IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BMADDOX ENTERPRISES LLC, Plaintiff, v. MILAD OSKOUIE, OSKO M LTD, and PLATINUM AVENUE HOLDINGS PTY, LTD, Defendants.	Case No. 17-cv-1889-RA-HBP
MILAD OSKOUIE and PLATINUM AVENUE HOLDINGS PTY, LTD, Counterclaim Plaintiffs, v. BMADDOX ENTERPRISES LLC and BRANDON MADDOX, Counterclaim Defendants.	

PLAINTIFF AND COUNTERCLAIM DEFENDANTS' SUPPLEMENTAL BRIEF AND SPECIFIC OBJECTIONS TO JUDGE PITMAN'S REPORT AND RECOMMENDATION

PRELIMINARY STATEMENT

The Report and Recommendation states "'[o]n [a] motion to dissolve a[n] [*ex parte*] temporary restraining order, [plaintiff], the party that obtained the order, bears the burden of justifying continued injunctive relief.'" *Gardner v. Weisman*, 2006 WL 2423376, *1 (S.D.N.Y. 2006) (quoting *SG Cowen Sec. Corp. v. Messih*, 2000 WL 633434, *1 (S.D.N.Y. 2000), *aff'd*, 224 F.3d 79 (2d Cir. 2000). In *Gardner*, there was no doubt that the petitioner could be made whole by a monetary award and that such and award would not be frustrated because the dispute involved real estate in New York. 2006 WL 2423376 at *1. Furthermore, the petitioner in *Gardner* failed to establish a likelihood of success on the merits. *Id.* In *SG Cowen*, the court again faced a situation where the party seeking to justify continued injunctive relief did not face a situation where a judgment would be rendered ineffectual if the injunction was not granted *and* where the court described the party's chances of success on the merits as "slim." *SG Cowen*, 2000 WL 633434 at *1-2. There remaining cases cited in the R&R for this standard also involve dramatically different fact patterns that did not involve an immediate threat of dissipation.

SPECIFIC OBJECTIONS

I. The Report and Recommendation to Dissolve the Court's TRO is Contrary to Law

In this case, Plaintiff has already established a significant likelihood of success on the merits of its copyright related claims and shown that Defendants and persons colluding with them would likely destroy, move, hide, or otherwise make assets relating thereto inaccessible to the Court in the absence of an *ex parte* temporary restraining order. (TRO 2, ECF No. 15.) While it is true that a party seeking to maintain a temporary restraining order bears the burden of justifying continued injunctive relief on a motion to dissolve a temporary restraining order, "[i]t is well established that the standard for an entry of a temporary restraining order is the same as for a preliminary injunction." *Taylor v. Taylor*, 2013 WL 1183290, *2 (N.D.N.Y. 2013) (citation

omitted). Here, the risks of dissipation applicable when Plaintiff sought an *ex parte* temporary restraining order are more of an issue for Plaintiff than they were before Defendants received notice of this lawsuit. Defendants have no assets but a hosted domain in the United States of which Plaintiff is aware. Moreover, Defendants have recently begun emailing Plaintiff's entire client list offering Defendants' infringing product at such a low price, $1.50 and $.99, they are almost literally giving away an inferior, infringing version of Plaintiff's product and causing significant consumer confusion. (ECF No. 56-2.) This is exactly the type of irreparable harm contemplated by the Second Circuit in *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). In *Salinger*, the Second Circuit held that "[h]arm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure, or that it is a loss that one should not be expected to suffer." *Id.* The harm to Plaintiff's business will be nearly impossible to measure in light of Defendants very recent actions, and the few assets that we know Defendants have should be preserved so as not to frustrate a judgment from the Court.

The R&R states that Plaintiff cannot show continuing irreparable harm, in party, because the Defendants have appeared and asserted counterclaims. (R&R 14 n5, ECF No. 58.) In support of this assertion, the R&R cites to a case involving a dispute over "identified real estate in the New York area" that it held would "not disappear . . . ." *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. and Trade Services, Inc.*, 295 F. Supp. 2d 366, 390 (S.D.N.Y. 2003). In this case, Defendants have no such ties to the United States and have stated at least twice that Defendant Oskouie may not be able to enter the United States for a settlement conference. In contrast to the cases cited in the R&R, it is unclear that Defendants' have *any* assets within New York and their continued behavior, such as emailing Plaintiff's clients with an offer to sell an infringing copy of Plaintiff's works for absurdly low prices indicates that

Defendants are *still* acting in a manner that indicates they will do what they can to frustrate a judgment. In 1985, considering a party who was physically present within the jurisdiction of the court during a time when it was much more difficult to transfer money and other assets, the Second Circuit found that freezing a defendant's assets was "essential to prevent a potential judgment from becoming ineffectual" in party because of defendant's "blatant disregard for . . . the obligation to testify truthfully under oath." *In re Feit & Drexler, Inc.*, 760 F.2d 406, 408 (2d Cir. 1985). In this case, Defendant has made numerous material misrepresentations before the Court. Furthermore, Plaintiff has not yet obtained any information relating to foreign bank accounts maintained by Defendants, and Defendants have not offered any evidence that they would be able to satisfy a judgment against them with anything other than the relatively small amount shown in one UK PayPal account.

Because there is a real threat of dissipation in this case that is not addressed by the R&R, which refers to opinions involving real property within the jurisdiction and other unrelated fact patterns, Plaintiff respectfully submits that the R&R is contrary to the law and should not be adopted by the Court.

II. The Report and Recommendation to Dissolve the Court's TRO is Based on Erroneous Findings of Fact

Plaintiff respectfully disagrees with several findings in the R&R as described below. (ECF No. 58). The R&R stated that "Plaintiff has failed to demonstrate imminent, irreparable harm if the Asset Restraining Order were dissolved." *Id.* at 12. In support of this finding, the R&R stated that "plaintiff has offered no evidence in support of its claim of irreparable injury." *Id.* at 13. The R&R states that Plaintiff only "offers . . . counsel's unsworn statements in briefs and correspondence." *Id.* Plaintiff respectfully submits that this finding is clearly erroneous, in part, because of information put on the record in Defendant Oskouie's several declarations.

In the Verified Answer with Counterclaims, Defendants asserted that, since 2012, the gross revenue from *TheUnitutor.com* alone was "between £300,000-400,000 annually." (Countercl. ¶ 21, ECF No. 32; Def. Oskouie's Second Decl. ¶ 9, ECF No. 34.) With respect to the infringing website, *ffltrust.com*, Defendant Oskouie reported enjoying gross sales of "nearly $19,000" during a single month in 2016. (Countercl. ¶ 37, ECF No. 32.) While Oskouie claims that sales generated by *ffltrust.com* have not returned to this level since March 2016, he has made no such claims with respect to the revenue generated by *TheUnitutor.com*. (Countercl. ¶ 38, ECF No. 32.) To the contrary, Oskouie claims that "[f]rom 2012 *to the present*, [his] business ventures earned total revenues of over $1 Million dollars . . . ." (Def. Oskouie's Second Decl. ¶ 13, ECF No. 34.) If Defendants did generate even £300,000 annually since 2012 from *TheUnitutor.com* alone, that single business venture would have earned total revenues approaching $2.5 million since 2012.

On October 16, 2017, Oskouie stated in a third declaration that his "personal bank accounts were locked, presumably by virtue of BME's use of the Asset Restraining Order." (Def. Oskouie's Third Decl. ¶ 29, ECF No. 48.) Despite Oskouie's inconsistently described but significant revenue for his e-commerce websites, he has submitted only a screenshot of one PayPal account showing £17,204.63 on hold. (ECF No. 51.) Plaintiff has submitted evidence obtained from third party financial service providers showing that Oskouie has a negative balance in his various Stripe accounts. (Pls. Reply to Mot. to Dissolve Ex. 4, ECF No. 50-4.) Oskouie has submitted evidence consistent with Plaintiff's assertion that his PayPal accounts in the United States are empty. (Def. Oskouie's Third Decl. Ex. A, ECF No. 48-1.) Oskouie further claims that his "monthly personal and business expenses" exclusive of legal fees total at least £9,500. *Id.* ¶ 27.

The evidence of record obtained from third parties shows that Oskouie "is or imminently will be insolvent," which, as noted by Judge Pitman, demonstrates irreparable harm to Plaintiff because it would frustrate a judgment in Plaintiff's favor. (R&R 8, ECF No. 58.) (citing *Shaoxing Bon Textiles Co. v. 4-U Performance Grp. LLC*, 2017 WL 737315 at *3 (S.D.N.Y. 2017) (citations omitted)). Only Oskouie's declarations assert, with no support, that he or his companies have any money with which to satisfy a judgment in Plaintiff's favor, and he has demonstrated his willingness to make misrepresentations before the Court. The evidence of record, from both Defendant Oskouie and third parties, shows that he will be insolvent in the near future. For this reason, the R&R's finding that "plaintiff has offered no evidence in support of its claim of irreparable injury" is clearly erroneous. Third party financial service providers abroad have thus far refused to cooperate with subpoenas. Defendant Oskouie could easily show that, contrary to the evidence of record, he is not in danger of imminent insolvency by providing financial records. He could also attempt to show what funds are directly linked to each of his websites, but he has not done that either.

If Oskouie's claimed annual revenue is accurate and he is *not* in danger of imminently becoming insolvent, then he is hiding money. This is supported by the several costly delays in litigation caused by Defendants' own actions. Oskouie has offered assurances to the Court that he will not attempt to frustrate any judgment against him, but he has offered nothing but his word. Because the record shows that Oskouie is hiding assets if he is not nearly insolvent, the R&R's finding that "plaintiff has offered no evidence in support of its claim of irreparable injury" is clearly erroneous.

The R&R also states that "plaintiff has offered only one piece of 'evidence' demonstrating" that defendants used aliases for their payment processing accounts. (R&R 15,

ECF No. 58.) Plaintiff respectfully objects to this characterization of the record. The record obtained from PayPal and submitted to the Court shows Defendants' use of the names Jerome Buddy, Jerome Kholberg, and email addresses containing two entirely different names in connection with a PayPal account listing *info@ffltrust.com* as contact information. (ECF No. 50-2.) Plaintiff disagrees with the R&R's assessment that "there is little reason to infer that defendants created the alias [Jerome Kholberg] to frustrate a judgment." (R&R 15, ECF No. 58.) Defendants have already used this alias to frustrate Plaintiff's attempts to resolve this matter using the DMCA instead of the Court. (Pl.'s Suppl. Mem. Ex-5, ECF No. 23-5.) The appearance of aliases on financial accounts attached to *ffltrust.com* strongly suggest that Defendants have used aliases to hide money in the past and will continue to do so in order to frustrate a judgment. For this reason, Plaintiff also submits that the R&R's finding that Oskouie's declaration that he had never heard of Jerome Kholberg or gone by that name does "not bear on plaintiff's ability to collect a judgment or suggest an intent to hide assets" is erroneous.

Plaintiff also respectfully objects to the claim that screenshots from *TheUnitutor.com* and *ffltrust.com*, both showing use of another alias used by Oskouie, Frank Delaney, in connection with both websites is weak evidence. (R&R 17, ECF No. 58.) The R&R recognizes that Plaintiff attached records obtained from Stripe, a financial service provider, demonstrating that Defendants used *trustffl@gmail.com* in connection with three accounts, including one for *TheUnitutor.com* and one for *ffltrust.com*. *Id.* Plaintiff objects to the finding that this evidence, in context, does not bear Defendants' willingness to frustrate a judgment from the Court. The R&R states that Plaintiff has not connected the relevant Stripe accounts to the same bank account. *Id.* 17-18. Plaintiff respectfully submits that the records produced by Stripe did not list

bank account information and the fact that Defendants used the email address *trustffl@gmail.com* for a Stripe account connected to *TheUnitutor.com* is significant.

CONCLUSION

Because Plaintiff has been unable to obtain detailed information regarding Defendants' foreign bank accounts thus far, Plaintiff could not have they "smoking gun" evidence that the R&R would require. Since only Defendants know whether they are solvent or wealthy, Oskouie has claimed to be well-off, and because the risks of dissipation are greater now than they were when Plaintiff applied for the current temporary restraining order, Plaintiff objects to the R&R as clearly erroneous and contrary to the law. Defendants have not offered to provide a bond of more than $100, and although they have offered to show financial documents eventually, it would be premature to allow Defendants to move what little money we know of before providing such financial documents. Plaintiff has drafted a proposed protective order, which will be delivered to Defendants' counsel for review on the day of this filing. If the Court does adopt the R&R, Plaintiff asks that Defendants be required to post a significant bond.