IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

BERINGER COMMERCE, INC., d/b/a BLUE ACORN, iCi., Plaintiff, vs. FIN CAP, INC., d/b/a "BLUEACORN.CO," BLUE ACORN PPP, LLC, BLUE OAK FOREST, LLC, MICHAEL S. COTA, JAMES FLORES, STEPHANIE HOCKRIDGE REIS, and NATHAN REIS, Defendants.	Civil Action No. 5:21-cv-251-BO

MOTION TO DISSOLVE
TEMPORARY RESTRAINING ORDER

Defendants Fin Cap, Inc., Blueacorn PPP, LLC and Blue Oak Forest, LLC (collectively, the "Blueacorn PPP Defendants"), through undersigned counsel, and pursuant to Rule 65(b)(4) of the Federal Rules of Civil Procedure, hereby move to dissolve the Temporary Restraining Order entered by the Court on June 11, 2021. (Dkt. 14). For the reasons set forth herein, and in the Declaration of Jeffrey Meyerson and the supporting memorandum of law filed contemporaneously herewith, the Temporary Restraining Order should be dissolved.

1. The Blueacorn PPP Defendants are a lender service provider that helps customers compile loan application paperwork for Paycheck Protection Plan ("PPP") loans. The Blueacorn PPP Defendants utilize technology and financial expertise to streamline the PPP application process for small businesses, independent contractors, and self-employed individuals. The Blueacorn PPP Defendants are not a bank or a lender, and have partnered with several banks to

apply for and secure PPP loans for customers. Since April 2020, the Blueacorn PPP Defendants have processed over 1.2 million PPP loan applications for customers and submitted over 750,000 of those applications to the Small Business Administration for processing. Declaration of Jeffrey Meyerson, ¶ 2 (hereinafter "Meyerson Dec.").

2. On or about May 19, 2021, counsel for the Blueacorn PPP Defendants was provided with a copy of a letter dated May 12, 2021 from counsel for BCI which enclosed a few mail items that had been forwarded to BCI by mistake. The May 12 letter simply asked the Blueacorn PPP Defendants to update their contact information so BCI did not receive these communications going forward. The May 12 letter did not mention any prior correspondence to the Blueacorn PPP Defendants. Prior to the receipt of the May 12 letter, no one at the Blueacorn PPP Defendants had any knowledge or awareness of BCI or its business and operations, or had any contact with BCI or any of its representatives. (Meyerson Dec. ¶ 4).

3. Thereafter, on or about May 27, 2021, the Blueacorn PPP Defendants received a letter dated May 26, 2021 from Beth A. Stanfield, counsel for Plaintiff Beringer Commerce, Inc. d/b/a Blue Acorn iCi ("BCI") (Dkt. 1, Ex. O). (Meyerson Dec. ¶ 5).

4. Upon receipt of the May 26 letter, outside counsel for the Blueacorn PPP Defendants sent an email to counsel for BCI stating:

> [I]n your letter you stated that we received an April 8, 2021 cease and desist and I cannot find that letter anywhere in our file. Can you please send me a copy of that letter at your convenience. I will discuss with my client and respond to you but I would ask for an extension on your current June 1 response date as it will likely take more time than 2 business days for my client to respond and/or complete the tasks that you are asking of them. I look forward to hearing from you.

(Meyerson Dec. ¶¶ 6-7).

5. Outside counsel for the Blueacorn PPP Defendants received the April 8 letter (Dkt. 1, Ex. I) from counsel for BCI on Friday, May 28, 2021. Upon reviewing the April 8 letter, it was

determined that another attorney on behalf of BCI had sent the April 8 letter by Federal Express to the address of the previous owners of the company and that no one currently associated with the Blueacorn PPP Defendants had ever actually received the April 8 letter. (Meyerson Dec. ¶ 8).

6. A simple search of the Arizona Corporation Commission would have revealed the registered address for "Blueacorn PPP, LLC" as c/o Radix Law, 15205 N. Kierland Blvd, Ste. 200, Scottsdale, AZ 85254. This was one of the addresses to which the May 12 and May 26 letters were sent. (Meyerson Dec. ¶ 9).

7. Counsel for the Blueacorn PPP Defendants also received an email dated May 28, 2021 from Ms. Stanfield in which she requested clarification of certain items, and stated, "Once we receive clarification on these items, we will discuss your request for some additional time to respond to our second Cease & Desist letter." (Meyerson Dec. ¶ 10).

8. In response to the May 26 letter, outside counsel for the Blueacorn PPP Defendants had a telephone conference with counsel for BCI. During that telephone conference, outside counsel for the Blueacorn PPP Defendants: (a) advised that no one currently associated with the Blueacorn PPP Defendants received the April 8 letter; (b) discussed the very high level of internet traffic that the Blueacorn PPP website receives (over 1 million hits daily), as well as the fact that over a half-million texts and emails are sent daily to and from customers of the Blueacorn PPP Defendants; (c) stated that the Blueacorn PPP Defendants had no intention of causing BCI any issues and that the Blueacorn PPP Defendants wanted to engage in a collaborative approach to determine the best course moving forward; and (d) expressed that changing the name of "Blueacorn PPP" immediately would actually create more issues for BCI rather than less because if the Blueacorn PPP Defendants were no longer using the name "Blueacorn," hundreds of thousands of customers would believe the Blueacorn PPP Defendants had disappeared, and BCI

would end up receiving an increase in the number of unwanted inquiries rather than a decrease. (Meyerson Dec. ¶¶ 11-12).

9. Counsel for the Blueacorn PPP Defendants suggested to counsel for BCI that the parties discuss these points and then reconvene to discuss possible solutions. Counsel for BCI expressed concern over the volume of communications being received by BCI, but stated she would discuss the issues with BCI. Following the call, and consistent with what Ms. Stanfield indicated in her May 28 email, counsel for the Blueacorn PPP Defendants was waiting to hear whether BCI will allow additional time for the Blueacorn PPP Defendants to respond to the cease and desist letter dated May 26, 2021 (Meyerson Dec. ¶ 13).

10. The Blueacorn PPP Defendants never stated they were unwilling to work to alleviate BCI's perceived issues being caused by the alleged infringing activity, and rather were willing to continue discussions to identify solutions that would achieve BCI's goal of reducing issues they were experiencing with unwanted calls or contacts. (Meyerson Dec. ¶ 14).

11. The Blueacorn PPP Defendants received no further communication from BCI or its counsel until an email dated June 11, 2021 transmitting a courtesy copy of BCI's Verified Complaint. Later that same afternoon, the Blueacorn PPP Defendants received a copy of the Temporary Restraining Order entered by the Court. (Meyerson Dec. ¶ 15).

12. The Blueacorn PPP Defendants received no prior notice of BCI's decision to file this lawsuit or its intent to seek a Temporary Restraining Order from the Court, despite the fact that BCI's counsel ***knew*** that the Blueacorn PPP Defendants had counsel that was engaged on this very issue. (Meyerson Dec. ¶ 16).

13. Rule 65 of the Federal Rules of Civil Procedure provides that a district court may issues a temporary restraining order without written or oral notice to the adverse party or its attorney ***only*** if:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. Proc. 65(b)(1) (emphasis added).

14. The entry of an *ex parte* temporary restraining order is an exceptional procedure. The certification by counsel for a moving party is a mandatory requirement under Rule 65(b)(1)(B) before a court may issue an *ex parte* temporary restraining order.

15. The record before the Court does not include the attorney certification required by Rule 65(b)(1)(B). Such certification is not included as any separate filing in the docket of this proceeding, and no such certification is included in BCI's Verified Complaint or Motion for Temporary Restraining Order. Further: (a) none of the three letters received by the Blueacorn PPP Defendants from counsel for BCI prior to the filing of this action make any mention of BCI seeking any injunctive relief; and (b) in communications with the Blueacorn PPP Defendants, counsel for BCI never mentioned seeking injunctive relief prior to sending a copy of the Verified Complaint with the Court's Temporary Restraining Order.

16. The Blueacorn PPP Defendants' right to notice and an opportunity to be heard have not been overcome by any showing by BCI as required under Rule 65(b)(1)(B).

17. Had the Blueacorn PPP Defendants been provided notice and an opportunity to be heard, the Blueacorn PPP Defendants would have immediately retained counsel in North Carolina who would have appeared at a hearing and apprised the Court of the nature of the parties' ongoing

discussions, and the Blueacorn PPP Defendants' willingness to continue discussions to identify solutions for the issues being raised on behalf of BCI, all as set forth in the Declaration of Jeffrey Meyerson filed contemporaneously herewith. In addition, the Blueacorn PPP Defendants would have presented arguments to this Court concerning why BCI was unlikely to succeed on the merits of its claims, as well as why the requested injunctive relief was overly broad, in that its terms were outweighed by the harm to the Blueacorn PPP Defendants and their customers, and not in the public's interest. (Meyerson Dec. ¶ 17).

18. Due to BCI's failure to comply with the requirements of Rule 65(b)(1)(B), the Blueacorn PPP Defendants submit that the Court's *ex parte* Temporary Restraining Order should be dissolved in its entirety.

19. Alternatively, the Blueacorn PPP Defendants submit that the Court should dissolve Paragraph 1 of the Court's *ex parte* Temporary Restraining Order requiring the Blueacorn PPP Defendants to cease, desist and refrain from all use of the words "acorn", "blue acorn" or "blueacorn" in any print or electronic platform including websites and social media platforms. This requirement of the Court's *ex parte* Temporary Restraining Order is impracticable, will impose an undue and unnecessary hardship on the Blueacorn PPP Defendants and their customers, and will not achieve the results desired by BCI.

20. As confirmed by the allegations of the Verified Complaint, BCI and the Blueacorn PPP Defendants are in completely different lines of business and are not in direct competition with each other. The damage BCI has allegedly incurred and which it seeks to stop through this litigation involves receiving unwanted contacts customers of the Blueacorn PPP Defendants that BCI is receiving in error. As the Blueacorn PPP Defendants made clear in communications with counsel for BCI prior to the filing of this lawsuit, removing the "Blueacorn" name from websites

and other platforms will only serve to sow further confusion among hundreds of thousands of customers of the Blueacorn PPP Defendants, who no longer will know how to contact the Blueacorn PPP Defendants with inquiries concerning their PPP loans and loan applications. Further, immediate removal of the "Blueacorn" name likely will result in a significant increase in the volume of unwanted communications received by BCI – ***the exact opposite of the result that BCI is seeking to achieve***. Further, in cases where reverse confusion is established, injunctive relief relating to disclaimers and corrective advertising would be the more appropriate remedy.

21. Because they were provided no prior notice of the Temporary Restraining Order or any opportunity to be heard, the Court is unaware: (a) that the Blueacorn PPP Defendants have been and remain willing to address the concerns raised by BCI; (b) of the practical reality that compliance with the *ex parte* Temporary Restraining Order is not in the public interest as it will impose significant burdens and hardships on the Blueacorn PPP Defendants and their thousands of customers; and (c) that the *ex parte* Temporary Restraining Order will not achieve the results being sought by BCI.

22. The Blueacorn PPP Defendants have complied with the remaining portions of the Court's *ex parte* Temporary Restraining Order, and submit that though such compliance, the volume of unwanted communications received by BCI should be reduced dramatically.

For the foregoing reasons, the Blueacorn PPP Defendants' Motion to Dissolve Temporary Restraining Order should be GRANTED, and the Court's *ex parte* Temporary Restraining Order dated June 11, 2021 should be dissolved in its entirety, or in the alternative, the Court should dissolve Paragraph 1 of the Court's *ex parte* Temporary Restraining Order.

This the 17th day of June, 2021.

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Counsel for Defendants Fin Cap, Inc., Blueacorn PPP, LLC and Blue Oak Forest, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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