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

MEMORANDUM IN SUPPORT OF 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 Local Rule 7.2, hereby file their Memorandum in Support of their Motion to Dissolve the Temporary Restraining Order entered by the Court on June 11, 2021. (Dkt. 14).

NATURE OF THE CASE

The Blueacorn PPP Defendants have hundreds of thousands of funded customers and applicants for pandemic related Paycheck Protection Program ("PPP") loans backed by the federal Small Business Administration. As a practical matter, enforcement of the Court's *ex parte* Temporary Restraining Order dated June 11, 2021 – requiring an immediate change to the name of the Blueacorn Defendants' business – will create massive confusion at a time when small business customers of the Blueacorn PPP Defendants are either in the process of applying for PPP loans, or beginning the process of asking for loan forgiveness for the amounts they received under the federal PPP program. As a legal matter, Plaintiff Beringer Commerce, Inc. d/b/a Blue Acorn iCi ("BCI") failed to give mandatory notice, as required by Rule 65(b), of its intent to seek temporary injunctive relief. Providing this mandatory notice would have permitted the Blueacorn PPP Defendants the ability and opportunity to present their substantive arguments to this Court prior to entry of the *ex parte* Temporary Restraining Order.

STATEMENT OF THE FACTS

The Blueacorn PPP Defendants are a lender service provider that helps customers compile loan application paperwork for 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. Principally during the "second round" of PPP funding which began only earlier this year, the Blueacorn PPP Defendants have successfully processed more than $14 billion in pandemic PPP loans for more than 860,000 businesses. Declaration of Jeffrey Meyerson, ¶ 2 (hereinafter "Meyerson Dec.").

The Blueacorn PPP Defendants first became aware of BCI's existence in May of this year when counsel for the Blueacorn PPP Defendants received a copy of correspondence from counsel for BCI dated May 12, 2021. (Meyerson Dec., ¶ 2). Following receipt of a letter dated May 27, 2021, counsel for the Blueacorn PPP Defendants scheduled a call with counsel for BCI which took place on June 1, 2021. During that call, 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., ¶¶ 5-12). 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).

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 had been stated in a prior email from counsel for BCI, counsel for the Blueacorn PPP Defendants was waiting to hear as to whether BCI would allow additional time for the Blueacorn PPP Defendants to respond to the cease and desist letter dated May 26, 2021. (Meyerson Dec. ¶ 13).

From the time of this conversation on June 1, 2021 between counsel for the parties, the Blueacorn PPP Defendants heard nothing further from BCI or its counsel until receipt of the Verified Complaint and the Court's Temporary Restraining Order on June 11, 2021. (Meyerson

Dec. ¶ 15). None of the correspondence sent on behalf of BCI prior to the filing of this lawsuit mentioned or referenced BCI's intent to seek temporary injunctive relief. (Meyerson Dec. ¶ 16).

ARGUMENT

A. The Court's Ex Parte Temporary Restraining Order Should Be Dissolved In Its Entirety.

"The requirements of Rule 65(b)(1) are not mere technical niceties that a court may disregard, but rather crucial safeguards of due process." *Nutrition & Fitness, Inc. v. Progressive Emu, Inc.*, No. 5:12-CV-192-F, 2012 WL 1478734 (E.D.N.C. Apr. 27, 2012) (citing *Tchienkou v. Net Trust Mortg.*, No. 3:10–CV–00023, 2010 WL 2375882, at * 1, (W.D.Va. June 09, 2010)). This Court has recognized that every requirement of Rule 65 must be satisfied for a TRO to be granted. *See, e.g.*, *Brady v. PNC Bank*, No. 4:15-CV-30-FL, 2015 WL 12600343 (E.D.N.C. Feb. 20, 2015) (reciting the necessary showings for a motion for a TRO to be successful). Among the most important of these requirements is that of notice. *See id.* (dismissing the motion for a TRO at the outset because the moving party "failed to provide a description of the efforts made to contact defendant, or why such efforts should not be required."). Specifically, the moving party must certify and document all effort(s) made to put the opposing party on notice ***of the intended motion for a TRO*** and, if applicable, why no notice is necessary. Fed. R. Civ. P. 65(b)(1)(B). This Court has routinely dismissed TRO motions in which the moving party failed to meet this threshold pleading requirement. *See, e.g.*, *Broughton v. Aldridge*, No. 5:10-CV-231-FL, 2010 WL 2332103 (E.D.N.C. June 9, 2010) (dismissing a TRO motion where Plaintiff failed to allege or certify what notice had been given or why it wasn't required); *Brady v. PNC Bank*, No. 4:15-CV-30-FL, 2015 WL 12600343 (E.D.N.C. Feb. 20, 2015) (same); *see also Nutrition & Fitness, Inc. v. Progressive Emu, Inc.*, No. 5:12-CV-192-F, 2012 WL 1478734 at *3 (E.D.N.C. Apr. 27, 2012) (stating that even if sufficient facts are pled to show that irreparable harm would be suffered by the moving party, there must still be a certification in writing of the efforts made to put the opposing party on notice of the impending TRO). Even if it were conceded that BCI has alleged sufficient facts to show the requisite level of harm, BCI never documented or certified any efforts to put the Blueacorn PPP Defendants on notice of BCI's request for a temporary injunctive relief prior to the granting of the Court's *ex parte* Temporary Restraining Order.

As many courts have recognized, even though Rule 65 does contemplate the potential for an *ex parte* temporary restraining order — one without notice to the opposing party — being granted, Fed. R. Civ. P. 65(b)(1), such a remedy is to be reserved for the most extreme situations. *See, e.g.*, *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423, 439 (1974) ("Ex parte temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."); *see also Turner v. Clelland*, No. 1:15CV947, 2016 WL 1069665 (M.D.N.C. Mar. 16, 2016), report and recommendation adopted, No. 1:15CV947, 2016 WL 3512216 (M.D.N.C. June 22, 2016) (stating that courts must not "lightly disregard Rule 65's technical requirements"). As the Fourth Circuit has rightly affirmed, granting a TRO without notice or compliance with the requirements of Rule 65 is a measure that should be subjected to the utmost judicial restraint. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999) ("The grant of interim relief is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.").

> The stringent restrictions imposed by . . . Rule 65 on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken

> before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.

Granny Goose, 415 U.S. 423, 438-39 (1974). In this case, when the Blueacorn PPP Defendants were represented by counsel known to BCI prior to filing the complaint, lack of notice by BCI of its intent to seek a temporary restraining order flouts that jurisprudence, denies the Blueacorn PPP Defendants their right to be heard, and creates grounds for dissolving the Temporary Restraining Order.

Despite its claims to the contrary, BCI's understanding of the notice required by Rule 65 is misplaced. (*See* Dkt. #1, Complaint, ¶ 122). This Court has observed that the notice contemplated by Rule 65 is that of notice of the impending filing of the TRO motion itself. *See Nutrition & Fitness, Inc. v. Progressive Emu, Inc.*, No. 5:12-CV-192-F, 2012 WL 1478734 at *3 (E.D.N.C. Apr. 27, 2012) (discussing how the moving party failed to document any efforts to put the opposing party on notice of the impending TRO motion). A mere awareness of potential grievances sent through a demand letter which made no reference to a TRO certainly does not meet this "stringent" requirement. (Dkt. #1, Compl., ¶¶ 122-23). This shocking failure to give notice is made even more evident when considered alongside the fact that both parties here were represented by counsel who were engaged in discussions, yet no mention of a motion for temporary injunctive relief was ever made, and the Blueacorn PPP Defendants' first awareness of BCI's intent to seek temporary injunctive relief was when they were served the Verified Complaint and the Court's *ex parte* Temporary Restraining Order. (See Dkt. #14).

Faced with the explicit requirements of Rule 65, BCI has failed to certify through its counsel that notice was not necessary, and as a result has denied the Blueacorn PPP Defendants the opportunity to oppose the injunctive relief. Had the required notice been provided, the Blueacorn PPP Defendants would have retained North Carolina counsel who would have appeared and presented meritorious arguments for why temporary injunctive relief should not have been granted, or should not have been granted in the scope ordered by the Court. (Meyerson Dec. ¶ 17). BCI's attempt to fit a generic cease and desist letter into the stringent notice requirements of an impending request for a TRO as required by Rule 65 and this Court is inadequate.

Rule 65 and due process demand that the Blueacorn PPP Defendants should have been given notice and an opportunity to respond to the claims made against them. Plaintiffs have afforded Blueacorn PPP Defendants no such opportunity. Accordingly, this TRO must be dissolved, *nunc pro tunc* to the date of its issuance, until the Court can hear from both parties at the preliminary injunction hearing.

B. Alternatively, The Court Should Dissolve The First Paragraph Of The *Ex Parte* Temporary Restraining Order.

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, will adversely impact hundreds of thousands of the Blueacorn PPP Defendants' customers who will suddenly be unable to locate or contact the Blueacorn PPP Defendants by name, and will not achieve the results desired by BCI.

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 from 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. *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co*., 561 F.2d 1365, 1374-76 (10th Cir. 1977) (acknowledging "reverse confusion" and approving a corrective advertising campaign reasonably equivalent to the infringing advertising campaign); 5 McCarthy on Trademarks at §30:6.

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.

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.

CONCLUSION

This Court should, consistent with Rule 65(b)(4), determine Blueacorn PPP Defendants' Motion to Dissolve as promptly as justice requires, and dissolve the Court's *ex parte* Temporary Restraining Order dated June 11, 2021 until all parties can be heard at the Court's June 25, 2021 hearing on preliminary injunctive relief.

This the 17th day of June, 2021.

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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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