UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. CYBERSPY SOFTWARE, LLC, and TRACER R. SPENCE, Defendants.	Case No. 6:08-cv-1872-ORL-31GJK

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In its preliminary injunction in this matter, this Court found:

> [T]here is a substantial likelihood that the Commission will ultimately succeed in establishing that Defendants have engaged in and are likely to continue to engage in acts and practices and provide the means and instrumentalities to engage in acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Preliminary Injunctive Order ("Order") at ¶ 7 (Nov. 25, 2008) (Docket No. 36).

By issuing the above injunction, this Court apparently rejected Defendants outlandish contention that the FTC lacks standing to enforce the FTC Act. Defendants base their

principle that when the United States (or, one of its agencies) brings a suit in federal court *without express statutory approval*, it must establish that it has an interest in the case. *See United States v. Maryland*, 488 F. Supp. 347, 360-64 (D. Md.) (United States held to have standing to bring action not expressly authorized by statute), *aff'd*, 636 F.2d 73 (4th Cir. 1980) (per curiam); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-79, 284-86 (1888) (discussing showing required for United States to bring action not expressly authorized by statute). In other words, the United States must "meet the usual Article III case or controversy requirements and *assert actual government interests*, rather than act as a puppet for private parties." *Federal Home Loan Bank Bd. v. Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985) (emphasis added) (citing *San Jacinto Tin*). *Accord*, *United States v. State Tax Comm'n of Miss.*, 505 F.2d 633, 637-38 (5th Cir. 1974) (United States can not lend its name to a suit for the benefit of private litigants, citing *San Jacinto Tin*).[3]

By contrast, Congress has granted express statutory authority for the Commission to seek an injunction in federal district court against parties whom it has reason to believe are violating, or are "about to violate" any provision of law enforced by Commission when to do so would "be in the interest of the public." 15 U.S.C. § 53(b). In Section 5 of the FTC Act, Congress declared unfair and deceptive acts or practices in or affecting commerce to be unlawful (15 U.S.C. § 45(a)(1)), and empowered and directed the

[3] Even without express statutory authority, the United States can bring an action for the benefit of the general public. *See, e.g.*, *United States v. American Bell Tel. Co.*, 128 U.S. 315, 367-68 (1888) (allowed suit to protect public from fraudulent patents, citing *San Jacinto Tin*).

Commission to prevent them (15 U.S.C. § 45(a)(2)). Congress expressly recognized that "unfair" acts and practices include those that cause and those that are "likely to cause" substantial injury. 15 U.S.C. § 45(n). In this case, the Commission clearly has an "interest" in enforcing the statute. The controversy at hand is whether Defendants' actual conduct – including conduct already documented in the FTC's filings with this Court – is conduct that Congress has prohibited by that statute because it causes or is likely to cause substantial injury. Article III requires no more.[4] In other words, Congress has protected, by statute, the public's right to be free of unfair and deceptive practices in commerce, and this Court may hear an action in which the FTC seeks to prevent the violation of that legally protected right. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 980-81 (11th Cir. 2005) (legally protected interest for injury in fact prong of standing analysis must consist of obtaining compensation for, or preventing, the violation of a right protected by statute or otherwise).[5]

B. Even If Applicable to the FTC's Actions to Enforce the FTC Act, Defendants' Standing Argument Fails As a Matter of Law

As discussed above, Defendants' standing argument is inapplicable in this matter.

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[4] *See also United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) ("A fundamental judicial rule requires that a complainant establish standing before a suit can be properly heard. Such a determination can be easily made with specific statutory authority.").

[5] In their Opposition to Plaintiff's Motion to Strike (Docket No. 44), at 5, Defendants assert that the FTC has shown merely that the FTC Act confers statutory standing, and that the FTC must demonstrate standing under Article III as well. Although the distinction between statutory and Constitutional standing may be valid in other contexts, it is a false dichotomy as applied in this case. The FTC Act not only authorizes the FTC to bring actions, it affirmatively defines the parameters of the "controversy" that this Court is to resolve.

However, even if it were applicable, the FTC has sufficiently shown the necessary elements of injury in fact, traceability, and redressability. Alternatively, as discussed in Section III, *infra*, if Defendants' standing analysis is applicable, the FTC is entitled to discovery to demonstrate each element of the standing triad.

1. There Is Sufficient "Injury in Fact"

First, the injuries alleged in this case constitute "injury in fact" for Article III standing purposes. "[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (internal quotation omitted). In enacting the FTC Act, Congress empowered the FTC to secure injunctive and other equitable relief against parties engaging in unfair and deceptive acts or practices in or affecting commerce, including actions that cause or are *likely to cause* substantial injury to consumers. If a substantial injury under the FTC Act is likely, it constitutes a present, actual injury, as opposed to an abstract injury, and is sufficient to meet the "injury in fact" prong of the standing analysis articulated in the cases that Defendants have cited. *See Aero-Motive Co. v. U.S. Aeromotive, Inc.*, 922 F. Supp. 29, 35-36 (W.D. Mich. 1996) (plaintiff alleged that at present the public is likely to be confused as to the origin of services and products offered by litigants due to defendant's use of plaintiff's trademark; despite lack of evidence of actual confusion to date, plaintiff claims circumstances create present likelihood of confusion to satisfy Art. III "injury in fact" requirement).

In this case, the Court has already found that:

> The sale and operation of RemoteSpy is likely to cause substantial harm to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or to competition. The likely harm includes financial harm (including identity theft) and endangering the health and safety of consumers. In limited circumstances, consumers include not only those who purchase products, but those whose privacy is unwittingly invaded by a product.

Order at ¶ 5. Defendants seem to pin their hopes on the myopic supposition that there

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is a likely cause of consumer injury. Order at ¶ 5. This Court has also found that:

> Defendants provide RemoteSpy customers with instructions for disguising the software as an innocuous file – complete with examples – in order to send the software to another computer and trick the owner or authorized user of the computer into installing the software. Defendants also recommend the use of a stealth email service to send the software to the remote computer, which would prevent the recipient from determining the identity of the person attempting to install the keylogger on the recipient's computer.

Id. at ¶ 4. Defendants also host the intercepted information and organize it for the their customers. These actions contribute to the alleged injuries and are a sufficient causal link for the FTC to meet the "fairly traceable" element. *See American Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 520 (4th Cir. 2003) (plaintiff must merely show that defendant discharges a pollutant that "causes or contributes" to the kinds of injuries alleged); *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 2003 U.S. Dist. LEXIS 26779, * 33 (D.N.J. 2003) (plaintiffs need only show "that there is a substantial likelihood that there exists a causal link between their injuries and defendant's conduct"). Particularly in light of the Court's preliminary injunction order, which prohibits much of Defendants' participation and conduct in contributing to the harm through promotional and instructional materials (*see generally* Order at Sections I and II), it is mystifying that Defendants continue to argue that any injury to the public is not "fairly traceable" to their conduct.

3. The Alleged Harm Will Be Redressed by a Favorable Decision

Finally, the injuries alleged in the FTC's Complaint are likely to be redressed by a favorable decision granting the judicial relief the FTC seeks. *Valley Forge*, 454 U.S. at

472; *Powell Duffreyn*

[6] *Accord Jones v. City of Columbus*, 120 F.3d 248 (1997) (per curiam) (reversing grant of summary judgment entered before plaintiffs had opportunity to complete

judgment is simply not appropriate or warranted." *Ramos v. Goodfellas Brooklyn's Finest Pizzeria, LLC*, 2008 U.S. Dist. LEXIS 87368, at *4-5 (S.D. Fla. 2008) (quoting *Snook*, 859 F.2d at 870).[7] This is especially true in cases in which the facts on which defendants rely in their summary judgment motion, or the proof supporting plaintiff's claims, is either likely in defendants' sole possession or largely within the control of the defendants. *See Cowan v. J.C. Penny, Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986) (per curiam) (defendant had exclusive possession of relevant facts); *Taylor v. Sanibel Dev., LLC*, 2007 U.S. Dist. LEXIS 33219, at *11 (S.D. Ala. 2007) (facts on which summary judgment motion based likely in defendant's sole possession); *see generally Alabama Farm Bureau*, 606 F.2d at 609 (factor of access to proof must be seriously considered in ruling on a defendant's motion for summary judgment, particularly in an action where plaintiff's proof must come mainly from sources largely within the control of the defendants and from the mouths of the alleged wrongdoers).

In this case, Defendants' Motion for Summary Judgment clearly has not set forth facts that meet its burden as to any, let alone all, counts in the FTC's Complaint, and the burden has not shifted to the FTC to demonstrate that there are material issues of fact that preclude summary judgment. Nevertheless, Defendants' legal arguments, if given credence, rest largely on factual assertions as to which discovery has only just begun and as to which there is certainly genuine dispute.

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[7] *Accord Morrow v. Israel Aircraft Indus., Ltd.*, 2007 U.S. Dist. LEXIS 70807, at *10-19 (M.D. Fla. 2007) (summary judgment denied in cases in which no discovery had occurred and plaintiffs had little, if any, opportunity to engage in discovery prior to filing responses to summary judgment motions).

Discovery will enable the FTC to explore, challenge, and rebut the factual assertions upon which Defendant's Motion for Summary Judgment is based. With respect to Defendants' standing argument, for example, Defendants contend that the FTC cannot demonstrate any "injury in fact" because the harms alleged are "speculative and vague" and that the FTC has shown "no real injury suffered by any real person." SJM at 6. Should the FTC be required to "identify a single victim that was injured" (SJM at 6) by Defendants' spyware, it would need to have a full opportunity to review the intercepted data of consumer victims and to obtain third-party discovery from RemoteSpy customers. Defendant Spence purports to know of no incidents in which Defendants' spyware was used to commit identity theft or stalk victims of domestic abuse. SJM at 7. The FTC is entitled to explore his personal knowledge and to examine relevant documents in his, and his company's, possession, custody, or control. Mr. Laykin contends in his declaration that Defendants' spyware is not likely to be used to perpetrate identity theft. SJM at 7. The FTC is entitled to explore his knowledge and expertise that form the basis of these assertions.

Defendants claim that they "have not committed any of the acts constituting the Alleged Harm" and blame any alleged injury on the actions of third parties. SJM at 8. The FTC is entitled to discover the full nature of Defendants' interactions with RemoteSpy customers before the Court rules on Defendants' Summary Judgment motion based on this claim. Defendants likewise make numerous factual assertions about the availability of allegedly comparable remote keylogger products being advertised in a similar manner and that would "fill the void" should the FTC's requested injunction be

granted. SJM at 9. Should the Court believe that the availability of such products would make the injuries alleged by the FTC not redressable, the FTC would potentially need to take discovery to assess the comparability and availability of those products.

At the hearing on the preliminary injunction, the Court noted that the FTC has "no way to answer my question [regarding the uses of RemoteSpy] without discovery; and . . . until . . . we engage is some discovery, they're not going to have any ability to find that out." Preliminary Injunction Hearing Transcript (Docket No. 41) at 21 ll.9-12. Despite all of the arguments raised by Defendants (including those at issue on this motion), the Court has allowed the parties until April 20, 2009 to conduct discovery (Docket No. 37). Accordingly, summary judgment at this time is plainly premature and should be denied.

IV. CONCLUSION

For the all foregoing reasons and those previously articulated, the FTC respectfully requests that Defendants' Motion for Summary Judgment be denied, and that the parties be permitted to proceed with discovery relevant to all of the claims and defenses at issue in this case.

Dated: December 31, 2008

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on **December 31, 2008**, I electronically filed the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court by using the CM/ECF system, which would then send notice of the electronic filing to Dawn I. Giebler-Millner, Esq., gieblerd@gtlaw.com, Michele L. Johnson, Esq., johnsonm@gtlaw.com, and Mary Ellen Pullum, Esq., pullumm@gtlaw.com.

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