

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 Federal Trade Commission,

Case No.: 2:20-cv-00840-JAD-NJK

4 Plaintiff

Filed Under Seal

5 v.

Order Granting in Part Ex Parte
Emergency Motion for Temporary
Restraining Order and Requiring
Defendants to Show Cause

6 Lead Express, Inc., et al.,

7 Defendants

[ECF No. 3]

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9 The Federal Trade Commission (FTC) sues a host of individuals and entities for a
10 permanent injunction and other equitable relief under 15 U.S.C. §§ 53(b), 57b, 6105(b), 1607(c),
11 and 1693o(c), alleging that they operate a massive payday-lending scheme that baits consumers
12 with telemarketed loans that have a fixed number of principal-plus-interest payments but
13 switches to unlimited finance-fee-only payments after the consumer agrees. The FTC moves on
14 an ex parte and emergency basis for an order temporarily restraining defendants from engaging
15 in the scheme, destroying records of the scheme's operations, or dissipating assets. It seeks
16 an order requiring the defendants to show cause why the temporary restraining order—if one is
17 entered—should not be converted into a preliminar

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1 Rule 65 does authorize a district court to “issue a temporary restraining order without
2 written or oral notice to the adverse party or attorney[.]” but only if two conditions are met.
3 First, specific facts that “clearly show that immediate and irreparable, loss, or damage will result
4 to the movant before the adverse party can be heard in opposition” must be established by
5 affidavit or verified complaint.⁷ Second, “the movant’s attorney” must certify “in writing any
6 efforts made to give notice and the reasons why it should not be required.”⁸

7 The FTC has not provided any authority how that it can cobble a hybrid standard from
8 § 53(b) and Rule 65(b) that allows the court to grant an ex parte restraining order without the
9 FTC showing that immediate and irreparable harm will result without that relief. So, the FTC
10 can either give notice to the defendants and proceed with its motion for a restraining order under
11 § 53(b) or it can meet Rule 65’s demanding burdens for a restraining order without notice.
12 Because the FTC seeks secrecy until it obtains a restraining order on the defendants
13 and has provided the court with thousands of pages of evidence, I construe its motion as seeking
14 the latter and proceed to determine if the FTC has met the standard for that relief.

15 1. Imminent irreparable harm

16 The Supreme Court has instructed that ex parte “temporary restraining orders are no
17 doubt necessary in certain circumstances, but under federal law they should be restricted to
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20 eliminating the requirement of a showing of irreparable harm in cases of statutory enforcement,
21 where an injunction is authorized by the applicable statute,” which “pre-dates the Supreme
22 Court’s” decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 76 (2008),
23 “remains intact.” *Consumer Defense, LLC*, 926 F.3d at 1213–14.

⁷ Fed. R. Civ. P. 65(b)(1).

⁸ *Id.* at 65(b)(1)(A).

⁹ *Id.* at 65(b)(1)(B).

¹⁰ See ECF No. 2 (motion to seal).

1 serving their underlying purpose of preserving the status quo and preventing irreparable harm
2 just so long as is necessary to hold a hearing, and no longer.”¹¹ In cases where notice could
3 have been given to the adverse party, courts have recognized ‘a very narrow band of cases in
4 which ex parte orders are proper because notice to the defendant would render fruitless the
5 further prosecution of the action.’¹² To meet this standard, the plaintiff “must show that
6 defendants would have disregarded a direct order and disposed of [evidence] within the time it
7 would take for a hearing” by providing evidence that the adverse party has “a history of
8 disposing of evidence or violating court orders or that persons similar to the adverse party have
9 such a history.”¹³

10 The FTC argues for the latter standard and relies on the declaration of Gregory Ashe to
11 support its position.¹⁴ Ashe is one of the attorneys representing the FTC in this case.¹⁵ Ashe
12 declares that it is the FTC’s experience that “defendants who have engaged in deceptive schemes
13 and who receive notice of the filing of an action by the FTC or of the FTC’s intent to file an
14 action alleging consumer deception, often attempt to undermine the FTC’s efforts by dissipating
15 or concealing assets . . .”¹⁶ Ashe backs up that statement by summarizing the details of 26
16 lawsuits ranging in file date from 1985 to 2016 which defendants, upon learning that the FTC
17 was acting against them or had already been granted a restraining order, proceeded to dissipate
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1 extension of credit to consumers, defendants have claimed that consumers will repay their loan
2 obligations with a specific amounting a fixed number of payments

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1 defendants take great care to mask the true location of their operations and even phone
2 numbers.²⁷ The evidence also shows that defendants comingle their funds “for no apparent
3 business reason”²⁸

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1 this is especially so if the defendants learn that the FTC is seeking monetary relief from them. I
2 find that counsel has adequately explained why notice should not be required in this case.

3 B. The standard for a restraining order and preliminary injunction

4 The legal standard for issuing a temporary restraining order is “substantially identical” to
5 the standard for issuing a preliminary injunction.³² The Supreme Court clarified the standard for
6 these forms of equitable relief in *Winter v. Natural Resources Defense Council*,³³ instructing
7 that the plaintiff “must establish that [it] is likely to succeed on the merits, that [it] is likely to
8 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in
9 [its] favor, and that an injunction is in the public interest.”³³

10 Irreparable harm will be presumed for the purposes of the FTC’s request to convert the
11 restraining order into a preliminary injunction, which the court will hear oral argument on early
12 next month.³⁴ It is not presumed for the purposes of the FTC’s request for a temporary
13 restraining order without notice but, as I explained above, I find that the FTC has shown that it,
14 and the class of persons it seeks to protect, will suffer irreparable harm if the defendants are not
15 temporarily restrained from engaging in allegedly fraudulent behavior and their assets
16 frozen, so I will consider the three remaining *Winter* factors.

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21 ³² See *Stuhlberg Intern. Sales Co., Inc. v. John D. Brush and Co.*, 240 F.3d 832, 839 n.7
(9th Cir. 2001) (stating that the “analysis is substantially identical for the injunction and the
TRO”).

22 ³³ *Winter*, 555 U.S. at 20; accord *Herb Reed Enterprises, LLC v. Fla Entertainment Mgmt., Inc.*
736 F.3d 1239 (9th Cir. 2013)).

23 ³⁴ See 15 U.S.C. § 53(b). Provided that the FTC give defendants the requisite notice of its
motion and this order.

1 1. Likelihood of success on the merits

2 The FTC asserts the following claims:

3 x A claim under 15 U.S.C. § 45(a) of the Federal Trade Commission Act for
4 misrepresenting the repayment terms of the payday loans that defendants market and
5 offer to consumers.³⁵

6 x A claim under 16 C.F.R. § 310.3(a)(iii) of the FTC prescribed Telemarketing Sales
7 Rule (TSR) for misrepresenting the repayment terms of the payday loans that defendants
8 market and offer to consumers.³⁶

9 x A claim under 16 C.F.R. § 310.4(a)(9) of the RTS for using remotely created checks in
10 connection with the payday loans that defendants market and offer to consumers.³⁷

11 x A claim under 15 U.S.C. §§ 1631, 1638 of the Truth in Lending Act (TILA) and 12
12 C.F.R. §§ 1026.17 and 1026.18 of the TILA's Implementing Regulation Z for failing to
13 make required disclosures for the payday loans that defendants market and offer to
14 consumers.³⁸

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22 ³⁵ ECF No. 1 at ¶¶ 48–52 (Count 1).

23 ³⁶ Id. at ¶¶ 53–60 (Count 2).

³⁷ Id. at ¶¶ 53–58, 61–62 (Count 3).

³⁸ Id. at ¶¶ 63–73 (Count 4).



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1 promised loans; and feelings of anger, embarrassment, or distress when more money is
2 withdrawn from their bank accounts than what was agreed to. The harms to the United States
3 and the FTC include any distrust or anger that consumers feel toward the FTC or the United States
4 as a result of being defrauded in heavily regulated industries, i.e., lending and telemarketing.

5 The FTC also seeks to restrain the defendants from destroying, deleting, removing, or
6 transferring any and all business, financial, accounting, and other records concerning their
7 operations and the operations of any other entity that is owned or controlled in whole or in part

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1 distrust or anger those citizens toward the FTC or the United States as a result of being
2 defrauded in heavily regulated industries, i.e., lending and telemarketing.

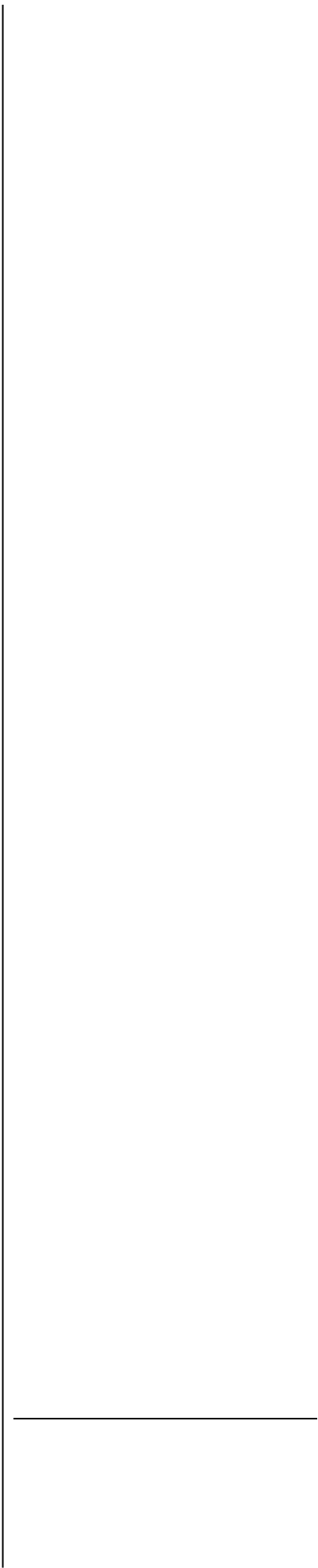
3 The only harms I foresee to the individual defendants if they are so enjoined is that they
4 might be unable to pay for ordinary living expenses like food, shelter, transportation, and
5 insurance premiums. But I have no evidence of what either Naito or Ikeda needs for legitimate
6 living expenses, and the harm is lessened by the FTC's suggestion that the asset freeze
7 not prohibit the individual defendants from incurring charges on any personal credit cards that
8 were established before this order was entered, up to the pre-existing limits. The harms that
9 could befall the corporate and tribal defendants if they are so enjoined is that they might be unable
10 to pay for ordinary operating expenses like rent, utilities, insurance premiums, and payroll.
11 These are not insignificant harms, but with an expedited hearing and briefing schedule for the
12 FTC's motion for a preliminary injunction—where defendants can present evidence of their
13 needs—the harms to the FTC and the public outweigh the harms to the defendants.

14 3. Public interest

15 The final Winter factor requires me to determine whether the requested temporary
16 restraining order would advance or impair the public's interest. The purpose of the requested
17 order is to prevent future harm to the public by denying the defendants' ability to use misleading
18 practices to aid in an allegedly fraudulent scheme. The public has a strong interest in protecting
19 the banking and telecommunication systems from being used by schemers and fraudsters. I find
20 that a narrowly tailored temporary restraining order would advance that public interest. So, I
21 conclude that this factor is also met.

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1 or participation with any of them, who receive actual notice of this order by personal service or
2 otherwise, are temporarily restrained from:

3 1. Engaging in the following prohibited business activities in connection with the
4 advertising, marketing, promotion, or offering of any loan or other extension of credit:

5 A. Misrepresenting or assisting others in misrepresenting, expressly or by
6 implication:

- 7 1. That any person will withdraw from consumers' bank accounts a
8 fixed number of payments to repay consumers' loans;
- 9 2. That any person will withdraw from consumers' bank accounts a
10 fixed total of payments to repay consumers' loans;
- 11 3. That any person will withdraw from consumers' bank accounts
12 payments that consist of both interest and principal repayment; and
- 13 4. Any other fact material to consumers concerning any loan or other
14 extension of credit, including, but not limited to: (a) closing costs or other
15 fees and how such costs or fees will be assessed, (b) the payment
16 schedule, monthly payment amount (any balloon payment, or other
17 payment terms, (c) the interest rate(s) or annual percentage rate(s), or
18 finance charge(s), and whether they are fixed or adjustable, (d) the loan
19 amount, credit amount, draw amount, or outstanding balance, (e) the loan
20 term, draw period, or maturity, (f) the amount of cash to be disbursed to
21 the borrower out of the proceeds, or the amount of cash to be disbursed on
22 behalf of the borrower to any third parties, (g) whether any specified
23 minimum payment amount covers both interest and principal, and whether

the credit has or can result in negative amortization, and (h) that the credit

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3. In the actual or constructive



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A. Hold, preserve, and retain within its control and prohibit the withdrawal, removal, alteration, assignment, transfer, pledge, encumbrance, disbursement, dissipation, relinquishment, reversion, sale, or other disposal of any such document or asset, as well as all documents or other property related to such assets, except by further order of this court, provided, however, that this provision does not prohibit the Defendant(s) from incurring

