

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN -2 2002

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SKYBIZ.COM, INC., *et al.*,

Defendants.

Case No. 01-CV-0396-EA (X)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER FOR PRELIMINARY INJUNCTION
REGARDING DEFENDANT SKYBIZ INTERNATIONAL LTD.

Now before the Court is Plaintiffs' Emergency Application for Relief Against SkyBiz International Ltd. (Dkt. # 239) and Defendant's Motion to Strike (Dkt. # 259-1). Plaintiff, the Federal Trade Commission (the "FTC"), seeks a ruling from the Court that the Preliminary Injunction of August 31, 2001 (Dkt. # 227) is enforceable against defendant SkyBiz International Ltd. ("SBI"), or in the alternative requests that the Court enter a preliminary injunction against SBI, pursuant to Section 13(b) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 53(b), and Rule 65(b) of the Federal Rules of Civil Procedure. SBI requests that the Court strike the plaintiff's emergency application pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

BACKGROUND

On May 30, 2001, the plaintiff filed suit against SkyBiz.com, Inc. ("SkyBiz.com"), World Service Corporation ("WSC"), WorldWide Service Corporation ("WWSC"), Nanci Corporation International ("NCI"), James S. Brown, Stephen D. McCullough, Elias F. Masso, Nanci Masso, Kier F. Masso, and Ronald E. Blanton alleging that the defendants (i) made false and misleading earnings

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claims to consumers, (ii) provided others with the means and instrumentalities to make the same deceptive claims, (iii) failed to disclose to consumers that SkyBiz.com's pyramid structure would not allow many of SkyBiz.com's participants to achieve the benefits promised by the defendants, and (iv) were operating a pyramid scheme, all in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

On June 6, 2001, the Court entered a Temporary Restraining Order (Dkt. #12) as to the defendants, and from June 26-28, 2001 held a preliminary injunction hearing. A day before the hearing, on June 25, 2001, the plaintiff filed its First Amended Complaint (Dkt. # 80), adding SBI, a corporation organized under the laws of the British Virgin Islands, as a defendant. On August 2, 2001, the Court issued its findings of fact and conclusions of law, and entered an Order for Preliminary Injunction (Dkt. # 157) as to defendants Nanci Masso and NCI. On August 31, 2001, the Court issued its findings of fact and conclusions of law, and entered an Order for Preliminary Injunction (Dkt. # 227, the "Preliminary Injunction") as to defendants SkyBiz.com, WSC, WWSC, James Brown, Stephen D. McCullough, Elias F. Masso, Kier F. Masso, and Ronald E. Blanton. In its Order, the Court declined to consider the role, if any, of SBI because the plaintiff did not request any relief against SBI at the preliminary injunction hearing or in subsequently filed proposed orders. See Dkt. # 227, p. 2, fn. 1.

On September 12, 2001, the plaintiff filed its emergency application seeking relief against SBI and on September 18, 2001, SBI filed its motion to strike from the record the plaintiff's emergency application. After the Court held a hearing on December 7, 2001, SBI advised the Court by pleading (Dkt. # 469) of its intention not to present the testimony of any live witnesses in connection with the Court's consideration of its response to the plaintiff's application. On December

10, 2001, the Court entered a Temporary Order (Dkt. #467) freezing the assets of SBI, pending a ruling on the plaintiff's application.

REVIEW

The plaintiff's application asserts three principal grounds for relief against SBI: (i) SBI is an "affiliate" of the other corporate defendants, and therefore is subject to the terms of the Preliminary Injunction, (ii) SBI acted "in concert" with the other defendants to effectuate the SkyBiz scheme, and therefore is subject to the terms of the Preliminary Injunction, and (iii) even if SBI is not subject to the terms of the Preliminary Injunction, SBI is part of the SkyBiz "common enterprise," and therefore the Court should enter a preliminary injunction against it. The Court addresses each of these grounds below in its Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. GENERAL FINDINGS

1. Defendant SkyBiz International Ltd. is a corporation organized under the laws of the British Virgin Islands. See Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, vol. II, Dkt. #148, pp. 8006-42.

2. SkyBiz International Ltd. has a subsidiary, SkyBiz International (Bermuda), Ltd. ("SBI Bermuda"), which was formed in order to facilitate merchant accounts with the Bank of Bermuda. See Appendix in Support of FTC's Preliminary Injunction Hearing, vol. 17, Dkt. #59, pp. 5614-17; Appendix in Support of Plaintiff's Response to Defendants' Response to First Supplement to Temporary Receiver's Report, Dkt. # 138, p. 7351.

B. AFFILIATE FINDINGS

1. With respect to ownership, defendant Kier Masso owns the vast majority of shares of SkyBiz.com, either directly, or by virtue of his status as the sole member of the SkyBiz Investment Company LLC. See Plaintiff's Appendix in Support of Plaintiff's Response to Defendants' Response to First Supplement to Temporary Receiver's Report, Dkt. # 138, pp. 7352, 7386-87.

2. Defendant Kier Masso is also one of four beneficiaries of the World Investment Trust¹ which is the sole owner of SBI. See Defendant's Legal Memorandum Accompanying Evidentiary Submission on FTC Emergency Motion for Relief Against SkyBiz International Ltd., Dkt # 491, p. 7.

3. Even defendant Kier Masso has recognized his status as an "owner" of SBI. For instance, he signed an application form for electronic banking and merchant services, which lists him, along with Elias Masso, as a beneficial owner of an SBI account. See Plaintiff's December 7, 2001 Hrg. Ex. 2, pp. F-0001640-41. Moreover, the accountant for SkyBiz.com and SBI opined, during deposition, that the entities were affiliates. See Plaintiff's Supplemental Memorandum Regarding Defendant SkyBiz International Ltd, Dkt. # 442, App. A, pp. 91-92.

4. Evidence submitted by the FTC shows that defendant Kier Masso, who held various positions as an officer and director of the other corporate defendants², also controlled SBI. Id. at App. C. For instance, defendant Kier Masso instructed Gordon L. Hill, a Bermuda attorney

¹ The Court finds it revealing that the other three beneficiaries of the World Investment Trust are Kier Masso's siblings. See Defendants' Combined Motion to Vacate "Order Authorizing Collection of Receivable," Response to "Receiver's Application for Approval to Collect Receivable," and Response to "Plaintiff's Emergency Application For Relief Against SkyBiz International Ltd," Dkt. # 291, Ex. 1, ¶ 3.

² See Preliminary Injunction, p. 5.

practicing in the field of tax and estate planning, to take various actions on behalf of SBI, including opening of bank accounts, executing property deeds, and transferring funds. Id. at App. C, D. In addition, a Bank of Bermuda account application for SBI lists defendant Kier Masso as the primary contact for SBI, and a signature card shows him as an authorized signatory to operate the account. See Plaintiff's December 7, 2001 Hrg. Ex. 2, pp. F-0001629-31, F-0001638. Moreover, various SBI corporate resolutions vest defendant Kier Masso with the authority to open and operate SBI bank accounts at CreditCorp, Bank Hapoalim, and Arvest State Bank. See Plaintiff's December 7, 2001 Hrg. Ex. 1, pp. 00093, 00114-15.

C. IN CONCERT FINDINGS

1. The Marketing Agreement between SkyBiz.com and SBI, contemplates, in its recitals, that SkyBiz.com and SBI were to jointly market the SkyBiz products. See Submission of Affidavit of Gordon Hill in Opposition to FTC Emergency Motion for Relief Against SkyBiz International, Ltd., Dkt. # 492, Ex. 1.

2. In Paragraph 5 of the agreement, SkyBiz.com grants to SBI a license to use its d/b/a name of "SkyBiz 2000," along with its logo and trademarks.³ Id.

3. In Paragraph 6.1 of the agreement, SkyBiz.com and SBI agree that each may receive the revenue properly belonging to the other and use the same credit card processor or bank to ensure "that sales transactions of each will be processed seamlessly and invisibly in so far as is apparent to the customers of each." Id.

³ "SkyBiz 2000" is listed as a d/b/a for SkyBiz.com, Inc. on the SkyBiz.com website. See Appendix in Support of FTC's *Ex Parte* Application for a Temporary Restraining Order, Vol. XI, Dkt. # 9, p. 3514.

4. SkyBiz.com and SBI together designated SBI Bermuda as a common agent in order to use the Bank of Bermuda as a credit card processor and bank for their receipt of revenue. See Plaintiff's December 7, 2001 Hrg. Ex. 1, pp. 00190-93.

D. COMMON ENTERPRISE FINDINGS

1. The Court finds, based upon the evidence set forth above in Section I(B)(4), that defendant Kier Masso, who served in various director and officer positions of the other corporate defendants, is in control of SBI.

2. The Court finds that SBI conducted operations in the offices of SkyBiz.com, at 6128 East 38th Street, Tulsa, OK. For instance, SBI bank statements listed the Tulsa address. See Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, vol. II, Dkt. # 148, pp. 7869-72, 7873-76, 7880, 8043-48. In addition, financial management operations for both SkyBiz.com and SBI were conducted out of this location. Id. at 8043-96. In addition, customer service and wire transfer records for both companies were kept there as well. See Appendix in Support of FTC's Preliminary Injunction Hearing, Vol. 19, Dkt. # 61, pp. 6408-66; Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, Vol. I, Dkt. # 147, pp. 7424-7833. Further, commission checks to associates, regardless of whether domestic or international, were issued from the Tulsa office from a common bank account. See Appendix in Support of FTC's *Ex Parte* Application for a Temporary Restraining Order, Vol. XI, Dkt. # 9, pp. 3518, 3533; Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, Vol. I, Dkt. # 147, pp. 7438-56.

3. The Court finds that SkyBiz.com and SBI communicated with associates all over the world through posting of daily "SkyMail" on the same web site. See Transcript of Proceedings had on June 28, 2001, p. 24.

4. Based upon the evidence set forth above and in the Court's findings in the preliminary injunctions of August 2, 2001 and August 31, 2001, the Court finds that the defendants transacted business through "a maze of interrelated companies" including SkyBiz.com, SBI, WSC, SBI, and NCI.

5. The Court finds that SBI and SkyBiz.com maintained joint accounting records. See Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, vol. II, Dkt. # 148, pp. 7881-87; Appendix in Support of Plaintiff's Response to Defendants' Response to First Supplement to Temporary Receiver's Report, Dkt. # 138, pp. 7346-49, 7354-55, 7366-67.

6. In addition, SkyBiz.com and SBI agreed that each would receive the revenue properly belonging to the other and use the same credit card processor or bank for both foreign and domestic customers. See Submission of Affidavit of Gordon Hill in Opposition to FTC Emergency Motion for Relief Against SkyBiz International, Ltd., Dkt. # 492, Ex. 1.

7. Moreover, the accountant for SBI and SkyBiz.com testified, at deposition, that there were routine intercompany transfers, and commingling of assets and expenses between SBI and SkyBiz.com, and a review of the evidence supports this testimony. See, e.g., Appendix in Support of FTC's Preliminary Injunction Hearing, vol. 21, Dkt. # 63, pp. 7328, 7330, 7332-33; Appendix in Support of FTC's *Ex Parte* Application for a Temporary Restraining Order, vol. V, Dkt. # 9, pp.

1518-22; Appendix in Support of Plaintiff FTC's Opposition to Defendant SkyBiz International Ltd.'s Motion to Dismiss and to Quash Service of Summons, Vol. II, Dkt. #148, pp. 7882-87.

II. CONCLUSIONS OF LAW

A. GENERAL CONCLUSIONS

1. This case was brought pursuant to Sections 5 and 13 of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b).
2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the FTC Act.
3. The principal place of business of Defendant SkyBiz International Ltd. is Tulsa, Oklahoma.
4. This Court has personal jurisdiction over the defendants.
5. Venue is appropriate in the Northern District of Oklahoma pursuant to 28 U.S.C. § 1391(b)(1).

B. AFFILIATE CONCLUSIONS

1. The plaintiff argues that SBI is subject to the terms of the Preliminary Injunction because SBI is an "affiliate" of the other corporate defendants, and the Preliminary Injunction defines the term "Defendants" to include the affiliates of the other named defendants.

2. Section III(B)(1) of the Preliminary Injunction defines the word "Defendants" as follows:

"Defendants" means SkyBiz.com, Inc., World Service Corporation, WorldWide Service Corporation and their officers and directors, James S. Brown, Stephen D. McCullough, Elias F. Masso, Kier E. Masso, and Ronald E. Blanton, and each of their successors, assigns, officers, agents, servants, employees, subsidiaries or affiliates, and those persons in active concert or participation with them who

receive actual notice of this Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, or other device unless specified otherwise.

Dkt. # 227, pp. 22-23 (emphasis added).

3. Black's Law Dictionary defines the word "affiliate" as "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, a parent, or sibling corporation." Black's Law Dictionary, 59 (7th ed. 1999). Adopting this definition, in order to determine whether SBI is an affiliate of any of the other corporate defendants, the Court must determine whether SBI is related to any of the other corporate defendants "by shareholdings or other means of control." Id.

4. After a review of the evidence submitted by the FTC and SBI, the Court concludes that SBI is sufficiently related to SkyBiz.com by ownership and control to fall within the definition of "affiliate."

5. In its response to the FTC's application, SBI argues that the lack of a direct ownership interest by SBI in any of the other defendants causes the "common ownership" prong of an affiliate analysis to fail. The Court does not find SBI's argument persuasive.

6. SBI and SkyBiz.com were also under the common control of defendant Kier Masso.

7. In response to the evidence produced by FTC, SBI argues that the relationship between it and the other corporate defendants was purely contractual and at arms-length, and in support submits copies of a Marketing Agreement with SkyBiz.com, and a Service Agreement with WSC. See Submission of Affidavit of Gordon Hill in Opposition to FTC Emergency Motion for Relief Against SkyBiz International, Ltd., Dkt. # 492, Ex. 1. The Court does not find SBI's

arguments persuasive. The agreements fail to mask the underlying control exercised by Kier Masso over SBI and the other corporate defendants.

8. Because sufficient evidence exists to conclude that SBI and SkyBiz.com are “affiliates,” the Court also concludes that SBI is included within the definition of the term “Defendants” set forth in the Preliminary Injunction, and therefore is subject to its terms.

C. IN CONCERT CONCLUSIONS

1. The FTC argues that SBI is “in active concert or participation” with the other defendants to effectuate the SkyBiz scheme, has actual knowledge of the Preliminary Injunction, and therefore is included in the definition of the term “Defendants” in the Preliminary Injunction, and subject to its terms. After a review of the evidence submitted by the FTC and SBI, the Court agrees.

2. In opposition to the evidence submitted by the FTC, SBI argues that actions taken pursuant to contractual arrangements between different corporations cannot constitute “acting in concert.” The Court disagrees, and after a review of the evidence, concludes that SBI is “in active concert or participation” with SkyBiz.com to effectuate the SkyBiz scheme, and is therefore subject to the terms of the Preliminary Injunction.

D. COMMON ENTERPRISE CONCLUSIONS

1. The plaintiff argues that even if SBI is not subject to the terms of the Preliminary Injunction, SBI is part of the SkyBiz common enterprise of marketing, promoting and recruiting associates into a pyramid scheme, and therefore the Court should enter a preliminary injunction regarding its activities.

2. Corporations are jointly and severally liable for injury caused by their violations of Section 5 of the FTC Act if they are deemed a common enterprise. FTC v. U.S. Oil & Gas Corp., 1987 U.S. Dist. LEXIS 16137, *57-64 (S.D. Fla. July 10, 1987).

3. Whether a common enterprise exists depends upon several factors, set forth in FTC v. Wolf, 1997-1 Trade Cas. (CCH) ¶ 71,713:

When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, Sunshine Art Studios, Inc. v. FTC, [1973-2 TRADE CASES ¶ 74,610], 481 F.2d 1171, 115 (1st Cir. 1973), Waltham Precision Instrument Co. v. FTC, [1964 TRADE CASES ¶ 70,992], 327 F.2d 427, 431 (7th Cir.), cert. denied, 377 U.S. 992 (1964); the sharing of office space and officers, Zale Corp. and Corrigan-Republic, Inc. v. FTC, 473 F.2d 1317, 1320 (5th Cir. 1973), Delaware Watch Co. v. FTC, [1964 TRADE CASES ¶ 71,106], 332 F.2d 745, 746 (2d Cir. 1964); whether business is transacted through “a maze of interrelated companies,” Delaware Watch, 332 F.2d at 746; the commingling of corporate funds and failure to maintain separation of companies, SEC v. Elliott, 953 F.2d 1560, 1565 n. 1 (11th Cir. 1992); unified advertising, Zale Corp., 473 F.2d at 1320; and evidence which “reveals that no real distinction existed between the Corporate Defendants,” Jordan Ashley, 1994-1 TRADE CASES (CCH) ¶ 70,570 at 72,035.

Id. at 79,080.

4. After a review of each of the factors articulated in FTC v. Wolf, the Court concludes that no real distinction exists between SkyBiz.com and SBI, that the two entities are a common enterprise.

5. Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a).

6. Section 13(b) of the FTC Act provides: “[u]pon a proper showing that, weighing the equities and considering the [FTC]’s likelihood of ultimate success, such action would be in the

public interest . . . a preliminary injunction may be granted" 15 U.S.C. § 53(b). See also FTC v. University Health, Inc., 938 F.2d 1206, 1217 (11th Cir. 1991).

7. Congress intended this standard to depart from what it regarded as the then-traditional equity standard. See FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001). The agency is not held to the high thresholds applicable where private parties seek interim restraining orders, in order that injunctive relief be broadly available to the FTC under a unique "public interest" standard. See id. Under this approach, it is not necessary for the FTC to demonstrate irreparable injury. See Miller v. Calif. Med. Ctr., 19 F.3d 449, 459 (9th Cir. 1994) ("the passage of the statute is itself an implied finding by Congress that violations will harm the public"). Rather, in determining whether to grant a preliminary injunction, a court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities. See FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988).

8. As irreparable harm is presumed in a statutory enforcement action, the district court need only find some chance of probable success on the merits. See FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir.), cert. denied sub nom. Windrush Partners, Ltd. v. Metro Fair Housing Svcs., 469 U.S. 882 (1984). This will be satisfied by a prima facie showing of illegality. See Commodity Futures v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978).

9. Balancing the equities tips in favor of the public interest in issuing such relief to federal agencies like the FTC. See World Wide Factors, 882 F.2d at 347 (9th Cir. 1989).

10. The standard for likelihood of success on the merits is met if the FTC "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair

ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” Heinz, 246 F.3d at 714-15. When a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight. See FTC v. Affordable Media, Inc., 179 F.3d 1228, 1236 (9th Cir. 1999). In the Findings of Fact listed above, when the Court states “there is sufficient evidence” regarding a certain proposition, reference is being made to the lenient standard under which the FTC may obtain injunctive relief.

11. Section 13(b) also empowers this Court to grant other equitable relief within the Court’s equitable powers. This may include appointment of a receiver, an asset freeze, or any measures that may be needed to make permanent relief possible. See F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1433-34 (11th Cir. 1984). Unless otherwise provided by statute, all the Court’s inherent equitable powers are available for the proper and complete exercise of that jurisdiction. See id. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. See Virginian R. Co. v. System Federation, 300 U.S. 515, 552 (1937). This Court thereby has power, in exercising this jurisdiction, “to do equity and to mould each decree to the necessities of the particular case.” Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

12. As demonstrated by the evidence, defendant SkyBiz International Ltd., as a common enterprise with SkyBiz.com, marketed its program to consumers throughout the nation, thereby affecting the passage of property or messages from one state to another. It also marketed its program to consumers throughout the world, thereby affecting the passage of property or messages

from the United States to foreign nations. Such transactions are “in or affecting commerce among the several states or with foreign nations,” as required by the FTC Act. See 15 U.S.C. § 44.

13. The misrepresentations made by those participants in the SkyBiz scheme led consumers to believe that if they took part in the SkyBiz program, they could earn substantial amounts of money. It is reasonable to expect that consumers could rely on the express claims of the representatives of the SkyBiz program. See Five-Star Auto Club, 97 F. Supp. 2d at 528. SkyBiz representatives are aware that consumers will rely on these representations and, it is hoped, become participants.

14. Illegal pyramid schemes "are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users." In re Koscot Interplanetary, Inc., 86 F.T.C. 1106 (1975). Several courts have adopted the Koscot test for pyramid schemes. See, e.g., U.S. v. Gold Unlimited, Inc., 177 F.3d 472, 480 (6th Cir. 1999); Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 781-82 (9th Cir. 1996).⁴

⁴ To date, the Tenth Circuit has not defined, nor has it adopted a definition for, a pyramid scheme. However, the Tenth Circuit defines a “Ponzi Scheme,” which is a different sort of fraudulent enterprise than the one at bar, as:

an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attract additional investors.

In re Hedged-Investments Associates, Inc., 48 F.3d 470, 471 n.2 (10th Cir. 1995).

15. A lawful multi-level marketing program is distinguishable from an illegal pyramid scheme in the sense that the “primary purpose” of the enterprise and its associated individuals is to sell or market an end-product with end-consumers, and not to reward associated individuals for the recruitment of more marketers or “associates.” See Gold Unlimited, 177 F.3d at 483-84 (suggesting that based on a statutory survey of state criminal laws against pyramid schemes, this is a difference). See also Ger-Ro-Mar, Inc. v. FTC, 518 F.2d 33, 36 (2d Cir. 1975) (explaining that the distributors profited by earning commissions from their own sales and those of their recruits); In re Amway Corp., 93 F.T.C. 618, 716 (1979) (sponsors do not make money from their recruits’ efforts until a newly recruited distributor begins to make wholesale purchases from his sponsor and sales to consumers).

16. Another distinction is that an unlawful pyramid scheme will saturate the market of potential participants to the point where it is unrealistic to expect that such a large number of individuals will become involved and the pyramid must therefore eventually collapse. A legitimate multi-level marketing program does not have such a propensity for saturation. See Five-Star Auto Club, 97 F. Supp. 2d at 518 (S.D.N.Y. 2000) (“[i]f . . . each Five Star participant recruited only three new members, Five Star would have 387,000,000 members . . . exceed[ing] the populations of the United States and Canada”); Gold Unlimited, 177 F.3d at 481; Ger-Ro-Mar, 518 F.2d at 36-38 (if even a small number of individuals are recruited each month by each member, after a year the number of members would exceed the population of the United States); Amway, 93 F.T.C. at 716-17.

17. There is good cause to believe that, under the more lenient standard, the FTC will ultimately prevail on the merits of this case and establish that defendant SkyBiz International Ltd.

has violated § 5(a) of the FTC Act. The Court is convinced that without the entry of preliminary relief, the defendant SkyBiz International Ltd. will continue to violate § 5(a) by making false or misleading representations about the SkyBiz program and its marketing plan which emphasizes potential for success for Associates who take part in the scheme.

18. Having found that the FTC will likely prevail on the merits, the Court must apply the second factor and weigh the equities. While the Court acknowledges that defendant SkyBiz International Ltd. will suffer a substantial burden when it is taken over by the Receiver and its operations virtually entirely shut down pending trial, the potential harm to the public outweighs any harm that the defendants may suffer. Moreover, in weighing the equities between the public interest in preventing further violations of law and defendant SkyBiz International Ltd.'s private interest in continuing to operate its business unabated, the public equities are accorded much heavier weight. See World Wide Factors, 882 F.2d at 347 (when balanc[ing] hardships of public interest against private interest, public interest should receive greater weight); World Travel, 861 F.2d at 1030-31.

19. There is good cause to appoint the Receiver over, and to freeze the assets of, SkyBiz International Ltd. As set forth in detail in the Findings of Fact, the plaintiff's evidence establishes a substantial likelihood that the Court will find defendant SkyBiz International Ltd.'s conduct deceptive and the consumer injury substantial. To allow SkyBiz International Ltd. to control its frozen assets and to operate its deceptive scheme would create an unreasonable risk that effective relief would be frustrated. See World Wide Factors, 882 F.2d at 348; FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989); SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963).

20. In addition, the Court hereby requires SkyBiz International Ltd. to repatriate all of its offshore assets (as set forth in more detail in the Order for Preliminary Injunction, below) and cease and desist from transferring any assets to extraterritorial entities.

21. To the extent any of these Conclusions of Law are more properly characterized as Findings of Fact, they should be so considered.

III. ORDER FOR PRELIMINARY INJUNCTION

A. Based on the above Findings:

1. There is good cause to believe that defendant SkyBiz International, Ltd. and its officers and directors have engaged and are likely to engage in acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and that the plaintiff is therefore likely to prevail on the merits of this action.

2. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary restitution will occur from the sale, transfer, or other disposition or concealment by the defendants of their assets or corporate records, or those assets and corporate records under their control, unless the defendants are immediately restrained and enjoined by Order of this Court. There is thus good cause for issuing this Order pursuant to Federal Rules of Civil Procedure 65(b).

3. There is good cause for the Court to appoint a receiver.

4. Weighing the equities and considering plaintiff's likelihood of ultimate success, a preliminary injunction with asset freeze, appointment of a receiver, and other equitable relief is in the public interest.

5. Fed. R. Civ. P. 65(c) does not require security of the United States or an officer or agency thereof.

B. Definitions – For the purpose of this preliminary injunction, the following definitions shall apply:

1. “**SBI**” means SkyBiz International Ltd. and its officers and directors, and each of their successors, assigns, officers, agents, servants, employees, subsidiaries or affiliates, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, or other device, unless specified otherwise.

2. “**Assets**” means any legal or equitable interest in, right to, or claim to, any real and personal property, including but not limited to “goods,” “instruments,” “equipment,” “fixtures,” “general intangibles,” “inventory,” “checks,” “notes” (as these terms are defined in the Uniform Commercial Code), and all chattel, leaseholds, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located.

3. “**Marketing Program**” includes, but is not limited to, any multi-level marketing program, sales program, business investment opportunity, pyramid marketing scheme, Ponzi scheme, or chain marketing scheme marketed by SBI.

4. “**Marketing Program Participant**” means anyone who makes a payment to SBI and who is granted the right to market a product or the right to recruit other people into the Marketing Program.

C. INJUNCTION AGAINST MISREPRESENTATIONS

IT IS ORDERED that in connection with the promotion of any Marketing Program, SBI is hereby preliminarily restrained and enjoined from making or assisting in the making of, expressly or by implication, orally or in writing, any statement or representation of material fact that is false or misleading, such as:

1. representations that persons who participate in such programs will or can receive compensation related to recruitment;
2. representations that persons who participate in such programs will receive substantial income; and
3. representations that consumers who participate in such programs will or can receive compensation related to the purchase or sale of goods or services, unless such compensation meets the requirements set forth in Paragraph E of this Order.

D. INJUNCTION AGAINST MATERIAL OMISSIONS

IT IS FURTHER ORDERED that in connection with the promotion of any Marketing Program, SBI is hereby preliminarily restrained and enjoined from failing to disclose, clearly and conspicuously, before any consumer becomes a Marketing Program Participant, all information material to a consumer's decision to participate in the Marketing Program, including but not limited to:

1. The number and percentage of current Marketing Program Participants who have made a profit through their participation in the Marketing Program, and the average amount of money made by each current Marketing Program Participant; and

2. That the structure of the Marketing Program prevents the vast majority of Marketing Program Participants from profiting from the Marketing Program by earning substantial income or receiving something else of value.

E. INJUNCTION AGAINST MAKING PAYMENTS RELATED TO RECRUITMENT

IT IS FURTHER ORDERED that SBI is hereby preliminarily restrained and enjoined from operating any Marketing Program that:

1. Pays any compensation related to recruitment based on false or misleading representations to consumers;
2. Pays any compensation related to the purchase or sale of goods or services based on false or misleading representations to consumers; or
3. Otherwise constitutes a pyramid marketing scheme, Ponzi scheme, or chain marketing scheme.

F. INJUNCTION AGAINST PROVIDING OTHERS WITH THE MEANS AND INSTRUMENTALITIES TO VIOLATE SECTION 5 OF THE FTC ACT

IT IS FURTHER ORDERED that in connection with the promotion of any Marketing Program, SBI is hereby preliminarily restrained and enjoined from providing to others the means and instrumentalities with which to make, expressly or by implication, orally or in writing, any false or misleading statement or representation of material fact, including, but not limited to representations that anyone who participates in any Marketing Program can receive substantial income.

G. INJUNCTION AGAINST PROVIDING CUSTOMER LISTS

IT IS FURTHER ORDERED that SBI is hereby preliminarily restrained and enjoined from (in the furtherance of a pyramid marketing scheme) selling, renting, leasing, transferring, or

otherwise disclosing the name, address, telephone number, social security number, or other identifying information of any person recruited to become a Marketing Program Participant. However, SBI may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

H. APPOINTMENT OF RECEIVER

IT IS FURTHER ORDERED that ROBB EVANS and ROBB EVANS & ASSOCIATES are appointed as Receiver with the full power of an equity receiver, for SBI and its affiliates and subsidiaries, and of all the funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by SBI with directions and authority to accomplish the following:

1. Oversee the operation of SBI by monitoring the actions of Defendants James S. Brown, Elias F. Masso, Kier Masso and any other officer, independent contractor, employee, or agent of SBI;
2. Identify and monitor all of the funds, property, premises, accounts, mail and other assets of, or in the possession or under the control of SBI, wherever situated, the income and profits therefrom, and all sums of money now or hereafter due or owing to SBI with power to, upon approval from the Court: collect, receive and take possession of all goods, chattels, rights, credits, monies, effects, lands, leases, books and records, work papers, records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of SBI and other individuals or corporations whose interests are now held by or under the direction, possession, custody or control of SBI;
3. Perform all acts necessary to conserve, hold, manage, and preserve the value of those assets in order to prevent any irreparable loss, damage and injury to consumers and business venture purchasers, and all acts incidental thereto, including, if necessary and with Court approval, the

suspension of operations. (Such acts shall not impede SBI from attempting to operate a viable legal sales business);

4. Perform all acts necessary to ensure that SBI is in compliance with the provisions of this Order, including ceasing all advertising, marketing, offering or providing or assisting others in doing the same which contains any false or misleading statements of material fact or which fail to disclose all information material to a consumer's decision to participate in the Marketing Program;

5. Notify SBI's Marketing Program Participants about this Order, by posting this Order on SBI's World Wide Web page, and providing information to Marketing Program Participants through SBI's meetings, conference calls, and seminars;

6. Enter into agreements in connection with administration of the receivership, including, but not limited to, the retention and employment of investigators, attorneys or accountants of the Receiver's choice, including, without limitation, members and employees of the Receiver's firm, to assist, advise, and represent the Receiver;

7. Institute, prosecute, compromise, adjust, intervene in or become party to such actions or proceedings in state, federal or foreign courts that the Receiver deems necessary and advisable to preserve the value of the properties of SBI or that the Receiver deems necessary and advisable to carry out the Receiver's mandate under this Order, and likewise to defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against the Receiver or SBI that the Receiver deems necessary and advisable to preserve the properties of SBI or that the Receiver deems necessary and advisable to carry out the Receiver's mandate under the terms of this Order.

8. The Receiver and all personnel hired by the Receiver as herein authorized, including counsel to the Receiver and accountants, are entitled to reasonable compensation for the performance

of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by or in the possession or control of, or which may be received by, SBI. The Receiver shall file with the Court and serve on the parties periodic requests for the payment of such reasonable compensation, with the first such request due prior to thirty days after the date of this Order. The Receiver shall not increase the Receiver's fee rate billed to the receivership estate without prior approval of the Court.

9. The bonds already on file with the Clerk of this Court in the sums of \$50,000 and \$200,000 shall be modified to condition that the Receiver will well and truly perform the duties of the office, including performance consistent herewith, abide by and perform all acts the Court directs, and be obligated to the United States of America, not the State of Oklahoma.

I. ACCESS TO BUSINESS RECORDS

IT IS FURTHER ORDERED that SBI shall allow the Receiver appointed herein and his/her representatives, agents, and assistants continued access to SBI's business premises and any other location where SBI's property or business records are located. Such locations specifically include, but are not limited to:

SkyBiz International Ltd.
6128 E. 38 St., Suite 400
Tulsa, OK 74135

If any business records or property relating to SBI are located in the personal residence of a defendant and request to enter such residence is denied, then such defendant shall immediately produce such items to the Receiver.

J. TURN OVER POSSESSION AND CUSTODY TO RECEIVER

IT IS FURTHER ORDERED that, immediately upon service of this Order upon them, all defendants, and any other person or entity served with a copy of this Order, shall forthwith, or within such time as permitted by the Receiver in writing, deliver over to the Receiver:

1. Location of all assets including, but not limited to, funds and property owned beneficially or otherwise, wherever situated, of SBI. The Receiver is granted the authority to monitor all financial transactions and to raise alleged violations to the Court;

2. Possession and custody of all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents, and other papers of SBI;

3. Possession and custody of all funds and other assets belonging to members of the public now held by SBI;

4. All keys, computer passwords, entry codes, combinations to locks required to open or gain access to any of the property or effects, and all monies in any bank deposited to the credit of SBI, wherever situated; and

5. Information identifying the accounts, employees, properties, or other assets or obligations of SBI.

K. STAY OF OTHER ACTIONS

IT IS FURTHER ORDERED that except by leave of this Court, during the pendency of the receivership ordered herein, SBI and all customers, principals, investors, creditors, stockholders, lessors, and other persons seeking to establish or enforce any claim, right or interest against or on

behalf of SBI, or any of its subsidiaries or affiliates, and all others acting for or on behalf of such persons, including attorneys, trustees, agents, sheriffs, constables, marshals, and other officers and their deputies, and their respective attorneys, servants, agents and employees be and are hereby stayed from:

1. Commencing, prosecuting, continuing or enforcing any suit or proceeding against SBI, or any of its subsidiaries or affiliates, except that such actions may be filed to toll any applicable statute of limitations;

2. Commencing, prosecuting, continuing or entering any suit or proceeding in the name or on behalf of SBI;

3. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of property of SBI, or any property claimed by SBI, or attempting to foreclose, forfeit, alter or terminate any of SBI's interests in property, including, without limitation, the establishment, granting, or perfection of any security interest, whether such acts are part of a judicial proceeding or otherwise;

4. Using self-help or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property, wheresoever located, owned by or in the possession of SBI, or any of its subsidiaries or affiliates, or the Receiver appointed pursuant to this Order or any agent appointed by said Receiver; and

5. Acting in any way whatsoever to harass or interfere with the Receiver's duties in overseeing the operation and management of the property subject to this receivership; or to interfere in any manner with the exclusive jurisdiction of this Court over the property and assets of SBI,

including the filing by any defendant of a petition for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, as to SBI.

6. However, nothing in this Paragraph shall prohibit any federal or state law enforcement or regulatory authority from commencing or prosecuting an action against SBI.

L. ASSET FREEZE

1. **IT IS FURTHER ORDERED** that SBI is hereby preliminarily restrained and enjoined from: Transferring, converting, encumbering, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, perfecting a security interest in, or otherwise disposing of any funds, property, accounts, contracts, shares of stock, lists of consumer names, or other assets, wherever located, including outside the United States, other than in the ordinary course of business. That is to say, the Court intends to permit SBI to sell “Web-Paks” as a product and otherwise conduct the activities necessary for it to attempt to remain viable as a business. However, such activities may not involve those elements constituting a pyramid scheme. The Receiver shall maintain his presence within the SBI facilities and perform a monitoring function to ensure that only transactions constituting legitimate business activities (in keeping with the Court’s intent described above) are carried out. The Court does not intend to arbitrate disputes over each transaction and anticipates cooperation and reasonableness between SBI and the Receiver in striking the appropriate balance.

2. Opening or causing to be opened any safe deposit boxes titled in the name of SBI, or subject to access by SBI; and

3. Incurring charges or cash advances on any credit card issued in the name, singly or jointly, of SBI.

4. The assets affected by this Paragraph shall include both existing assets and assets acquired after the effective date of this Order.

M. REPATRIATION OF ASSETS AND DOCUMENTS LOCATED IN FOREIGN COUNTRIES

IT IS FURTHER ORDERED that the all defendants, whether acting through any trust, corporation, subsidiary, division, or other device, shall:

1. Take such steps as are necessary to transfer to the territory of the United States of America all documents and assets that are located outside of such territory and are held by or for SBI or are under the SBI's direct or indirect control, jointly or severally; and

2. Provide the FTC and Receiver with a full accounting of all documents and assets that are located outside of the territory of the United States of America and are held by or for SBI or are under SBI's direct or indirect control, jointly or severally; and

3. Hold and retain all transferred documents and assets, and prevent any transfer, disposition, or dissipation whatsoever of any such assets or funds, except for transfers to the Receiver; and

4. Provide plaintiff access to SBI's records and documents held by financial institutions outside the territorial United States, by signing the Consent to Release of Financial Records, a copy of which is to be provided to SBI by the FTC.

N. INTERFERENCE WITH REPATRIATION

IT IS FURTHER ORDERED that SBI and its officers, owners, directors, agents, servants, employees, salespersons, attorneys, corporations, subsidiaries, affiliates, successors, assigns, trusts and other entities or persons directly or indirectly under their control, and all persons or entities in

active concert or participation with them, who receive actual notice of this Order by personal service, facsimile or otherwise, are hereby preliminarily restrained and enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign assets, or in the hindrance of the repatriation required by Paragraph M of this Order, including but not limited to:

1. Sending any statement, letter, fax, e-mail or wire transmission, telephoning or engaging in any other act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a "duress" event has occurred under the terms of a foreign trust agreement until such time that all assets have been fully repatriated pursuant to Paragraph M of this Order; or

2. Notifying any trustee, protector or other agent of SBI of the existence of this Order, or of the fact that repatriation is required pursuant to a Court Order, until such time that all assets have been fully repatriated pursuant to Paragraph M of this Order.

O. CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), any consumer reporting agency may furnish a consumer report concerning SBI to the FTC.

P. PRESERVATION OF RECORDS

IT IS FURTHER ORDERED that the SBI is hereby preliminarily restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any contracts, accounting data, correspondence, advertisements, computer tapes, discs, or other computerized records, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local

business or personal income or property tax returns, and other documents or records of any kind that relate to the business practices or business or personal finances of SBI.

Q. MAINTENANCE OF CURRENT BUSINESS RECORDS

IT IS FURTHER ORDERED that SBI is hereby preliminarily restrained and enjoined from:

1. Failing to create and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect its income, disbursements, transactions, and use of money; and
2. Creating, operating, or exercising any control over any business entity, including any partnership, limited partnership, joint venture, sole proprietorship or corporation, without first providing the Court, the Receiver, and the FTC with a written statement disclosing: (a) the name of the business entity; (b) the address and telephone number of the business entity; (c) the names of the business entity's officers, directors, principals, managers and employees; and (d) a detailed description of the business entity's intended activities.

R. RETENTION OF ASSETS AND RECORDS

IT IS FURTHER ORDERED that any financial or brokerage institution, business entity, or person served with a copy of this Order that holds, controls or maintains custody of any account or asset of SBI, or has held, controlled or maintained custody of any such account or asset at any time since the date of entry of this Order shall:

1. Prohibit, pending notification of the Receiver or further Order of the Court, the withdrawal, removal, assignment, transfer, pledge, encumbrance, disbursement, dissipation, conversion, sale, or other disposal of any such asset;
2. Deny SBI access to any safe deposit box that is:
 - a. titled in the name of SBI; or

b. otherwise subject to access by SBI.

3. Provide the FTC's counsel and the Receiver appointed herein, within five (5) business days of receiving a copy of this Order, a sworn statement setting forth:

a. the identification number of each such account or asset titled in the name of SBI, or held on behalf of, or for the benefit of, SBI;

b. the balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted; and

c. the identification of any safe deposit box that is either titled in the name of SBI or is otherwise subject to access by SBI;

4. Upon the request by the FTC or the Receiver, promptly provide the Court, the Receiver, and the FTC with copies of all records or other documentation pertaining to such account or asset, including but not limited to originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs. Any such financial institution, account custodian, or other aforementioned entity may arrange for the FTC to obtain copies of any such records which the FTC seeks; and

5. Cooperate with all reasonable requests of the Receiver relating to implementation of this Order, including transferring funds at his direction.

S. DISTRIBUTION OF ORDER BY SBI

IT IS FURTHER ORDERED that SBI shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, agent, attorney, and representative of SBI.

T. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission, upon any financial institution or other entity or person that may have possession, custody, or control of any documents or assets of SBI, or that may be subject to any provision of this Order. Pursuant to Fed. R. Civ. P. 4(c)(2), this Order may be served upon SBI, upon the business premises of SBI, and upon any financial institution or other entity or person that may have possession, custody, or control of any documents or assets of SBI, or that may be subject to any provision of this Order, by employees of the FTC, by employees of any other law enforcement agency, by any agent of plaintiff or of the Receiver, or by any agent of any process service retained by plaintiff or the Receiver.

U. MONITORING

IT IS FURTHER ORDERED that agents or representatives of the FTC may contact SBI or its agents or representatives directly and anonymously for the purpose of monitoring compliance with Provisions C through G of this Order for Preliminary Injunction, and may tape-record any oral communications that occur in the course of such contacts.

V. IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

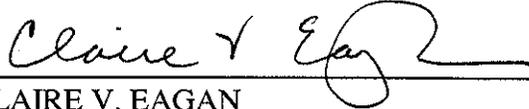
IV. DEFENDANT'S MOTION TO STRIKE

SBI requests that the Court strike the plaintiff's emergency application pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(f). Under Rule 12(f), a party may move to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Id. Because striking a portion of a pleading is a drastic remedy, Rule 12 motions to strike are infrequently granted and viewed with disfavor. See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, 677 F.2d 1045, 1057 (5th Cir. 1982); 5A Wright & Miller, Federal Practice and Procedure § 1380, at 647-50 (2d ed. 1990). As SBI has failed to show that the plaintiff's emergency application contains any matter that should be stricken pursuant to Rule 12, SBI's motion to strike should not be granted.

CONCLUSION

IT IS, THEREFORE, ORDERED that Plaintiffs' Emergency Application for Relief Against SkyBiz International Ltd. (Dkt. #239) should be and hereby is **GRANTED** and Defendant's Motion to Strike (Dkt. #259-1) should be and hereby is **DENIED**.

Dated this 2nd day of January, 2002.



CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE