UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	Case No. 02 C 1475
v.	)	Judge James F. Holderman
TLD NETWORK LTD., et al.,	)	Magistrate Judge Martin C. Ashman
Defendants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on November 1, 2002, Plaintiff Federal Trade Commission filed Plaintiff Federal Trade Commission's Response to Defendants' Rule 59 Motion to Amend or Alter Judgment with the United States District Court for the Northern District of Illinois, Eastern Division, a copy of which is attached hereto.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. TLD NETWORK LTD., et al., Defendants.	Case No. 02 CV 1475 Judge Holderman Magistrate Judge Ashman

PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE TO DEFENDANTS' RULE 59 MOTION TO AMEND OR ALTER JUDGMENT

Plaintiff Federal Trade Commission ("FTC"), by its counsel, submits this brief in response to Defendants' Rule 59 Motion to Amend or Alter Judgment. On October 15, 2002, the Court, after providing Defendants with an opportunity to argue otherwise, found that the FTC and Defendants had reached a settlement agreement and entered the parties' signed stipulated final judgment. Defendants now assert that there was no agreement to settle because the FTC previously rejected Defendants' settlement offer. Defendants' post-judgment attempt to raise this argument – which so clearly could have been raised before the Court entered judgment – is an improper application of Rule 59(e) and a blatant attempt to withdraw their settlement offer after it was accepted by the FTC. In any event, Defendants are wrong. The FTC never rejected Defendants' settlement offer, and Defendants should be bound by the parties' agreement.

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I. Defendants' Argument That The FTC Rejected Defendants' Settlement Offer Could Have, And Should Have, Been Raised Before the Judgment Issued.

On October 15, 2002, undersigned counsel for the FTC reported to the Court that the Commission had accepted Defendants' settlement offer in this matter. In response, Defendants argued extensively that there was no agreement to settle because third party banks had not signed assignments attached to the stipulated judgment. (Pl. Ex. 1 at 2-8, 13-16.) The Court rejected Defendants' argument, stating: "It seems to me that with regard to the parties who are before me that an agreement was, in fact, reached." (*Id.* at 17.) Now, in their Rule 59 motion, Defendants argue that there was no agreement to settle because the FTC previously rejected Defendants' settlement offer. Defendants' new argument, which is merely a thinly veiled attempt to withdraw their settlement offer after the FTC accepted it and the Court considered and entered it, is inappropriately raised at this juncture and should be disregarded.

Motions to alter or amend a judgment under Rule 59(e) must "clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Arifin v. Matuszewich*, No. 98 C 1591, 2000 WL 796146, at *1 (June 20, 2000) (Holderman, J.). Such motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Id.* Here, prior to entering judgment, the Court provided Defendants with an opportunity to raise any argument calling into question the parties' agreement to settle. It is hard to imagine a more fundamental argument that Defendants could have raised to the Court than the argument that the FTC had previously rejected the settlement offer. Defendants' failure to raise this argument, which

so clearly could, and should, have been made before the judgment issued, precludes them from raising it in a Rule 59(e) motion.[1] Their motion should therefore be denied.

II. There Was an Agreement To Settle.

In any event, as the Court found on October 15th, "an agreement was, in fact, reached" between the FTC and Defendants. (Pl. Ex. 1 at 17.) Terms were negotiated between FTC staff and Defendants. Defendants then offered to settle this matter by signing a stipulated final judgment, as well as three assignments attached to that judgment. Defendants knew that their signed settlement offer was being forwarded to the five member Commission for consideration. After tendering their signed settlement offer, Defendants never withdrew that offer before it was ultimately accepted by the Commission in a 5-0 vote on October 15, 2002. There was an agreement to settle, pure and simple.

Defendants' assertion that the FTC rejected Defendants' settlement offer is flat out wrong. The only entity with actual authority to accept or reject a settlement offer on behalf of the FTC is the five member Commission itself. *See* 16 C.F.R. §§ 2.32, 2.34, 3.25. The Commission never made a "counterproposal" to Defendants' settlement offer in an August 29, 2002 letter, as Defendants' allege. FTC staff, which negotiated with Defendants, proposed the edits contained in

[1] Defendants attempt to evade the requirements of Rule 59(e) by referencing a handwritten, undated facsimile communication sent directly to the Court on October 15, 2002, after the FTC approved the settlement. However, the Court has already found that "[t]his faxed communication, which is undated and was [sent] directly to me, not through counsel, is not appropriate or acceptable in connection with this case." (Pl. Ex. 1 at 17.) Even if Defendants properly raised this argument in the facsimile, Defendants' motion to amend or alter the judgment fails to assert any "manifest error of law or fact" with the Court's prior ruling, nor does it present "newly discovered evidence" on this issue. As such, there are simply no grounds to consider this argument pursuant to Rule 59(e).

the August 29, 2002 letter *before* the Commission received Defendants' offer.[2] These proposed edits to Defendants' settlement offer, which were largely typos and non-substantive wording changes, were suggested by FTC staff to increase the likelihood that the Commission would accept Defendants' offer. The suggested edits could not possibly bind the Commission as a counter-offer because FTC staff has no actual authority to bind the Commission through such action.[3]

Tellingly, once Defendants declined to make FTC staff's proposed edits, Defendants were well aware that their original settlement offer was being forwarded to the Commission, but they never withdrew their offer or suggested that they considered their settlement offer rejected until after the settlement was accepted by the Commission and presented to the Court. When Defendants' counsel informed the undersigned counsel by telephone on or about October 1, 2002 that Defendants would not agree to FTC staff's suggested edits to Defendants' settlement offer, undersigned counsel informed Defendants' counsel that Defendants' original offer would therefore be forwarded to the Commission without the edits. Indeed, Defendants' counsel acknowledged that Defendants' original settlement offer was still on the table and under consideration by the Commission in papers filed with the Court on October 10, 2002. (*See* Pl. Ex. 2 at 3: "Additional terms in the primary agreement requested by the office of the FTC were not acceptable to Mr. Goolnik. It is not clear whether the Commission itself will accept the

[2] As the August 29, 2002 letter to Defendants' counsel noted, these proposed edits were "from the Bureau of Consumer Protection and Bureau of Economics," not the five member Commission that accepts or rejects settlements. (*See* Def. Ex. 3.)

[3] It is well settled that staff of a government agency cannot bind the agency absent actual authority. *See United States v. Rand Motors*, 305 F.3d 770, 776 (7th Cir. 2002) (finding that a letter written by an AUSA could not amend a settlement agreement because "the AUSA did not have authority . . . without consent of her supervisors"); *Commodity Futures Trading Comm'n v. Field*, 249 F.3d 592, 594 (7th Cir. 2001) (holding that staff attorneys who engaged in settlement discussions on behalf of the CFTC "lacked actual authority to bind the government").

agreement as currently drafted[.]") It is nothing short of revisionist history for Defendants to now suggest – after the settlement agreement was accepted by the Commission and entered by the Court – that they understood that their original offer was rejected. In sum, Defendants' argument that the FTC rejected Defendants' settlement offer has no merit, and Defendants should be bound by the parties' agreement.[4]

III. Conclusion

For the foregoing reasons, the FTC respectfully requests that the Court deny Defendants' Rule 59 Motion to Amend or Alter Judgment.

Respectfully submitted,

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Dated: November 1, 2002

[4] Defendants' motion also appears to reassert the argument, extensively discussed and rejected by the Court on October 15, 2002, that third party agreement on the assignments was a condition of the settlement. (*See* Pl. Ex. 1 at 1-8, 13-18.) As the Court ruled on October 15, 2002, the bank agreements were not a condition of the settlement. (*See id.* at 17-18: "It seems to me that with regard to the parties who are before me that an agreement was, in fact, reached. The FTC accepted the terms proposed by Mr. Goolnik on behalf of his corporations, and this non-party agreement involving the banks is superfluous to the agreement that was made between the parties in front of me."). Again, Defendants have not asserted that there was any "manifest error of law or fact," nor have they presented "newly discovered evidence" on this issue. As such, there are simply no grounds to rehash this issue pursuant to Rule 59(e).

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff Federal Trade Commission's Response to Defendants' Rule 59 Motion to Amend or Alter Judgment was served by facsimile on November 1, 2002, before 4 p.m., upon the following counsel:

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SEE CASE FILE FOR EXHIBITS