

X990002

(3) D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

T.E.M.M. MARKETING, INC.,
a corporation, and
RODNEY L. TURNER, and
BRIAN A. EDWARDS, and
MICHAEL D. MERRYMAN,
individually and as officers
of said corporation,

Defendants.

CIVIL NO.

JUDGE

~~(Proposed)~~ **EX PARTE TEMPORARY RESTRAINING ORDER
WITH ASSET FREEZE AND ACCOUNTING,
AND
ORDER APPOINTING RECEIVER, PERMITTING IMMEDIATE ACCESS
TO DEFENDANTS' RECORDS, GRANTING EXPEDITED DISCOVERY,
AND
ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiff Federal Trade Commission ("Commission"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §53(b), filed its Complaint for a permanent injunction and other relief, including consumer redress, and moved *ex parte* for a temporary restraining order with asset freeze and accounting and an order to show cause why a preliminary injunction should not be granted pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, and for

the appointment of a temporary receiver with immediate access to defendants' records and expedited discovery. The Court has considered the pleadings, memoranda, declarations and other exhibits in support of the Commission's motion and finds that:

1. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe it will have jurisdiction over all the parties hereto;

2. There is good cause to believe that T.E.M.M. Marketing, Inc., Rodney L. Turner, Brian A. Edwards and Michael D. Merryman have violated Section 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(a), and that the Commission therefore is likely to prevail on the merits of this action;

3. 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 redress will occur from the transfer, disposition or concealment by defendants of their assets or business records unless defendants are immediately restrained and enjoined by Order of this Court, and that in accordance with Fed. R. Civ. P. 65(b), the interest of justice therefore requires that the Commission's Application be heard *ex parte* without prior notice to defendants;

4. Good cause exists for appointing a temporary receiver for the corporate defendant;

5. Weighing the equities and considering the Commission's likelihood of ultimate success, a temporary restraining order with an asset freeze and accounting, and an order appointing a temporary receiver, permitting immediate access to defendants' records and granting expedited discovery is in the public interest; and

6. That no security is required of any agency of the United States for issuance of a restraining order. Fed. R. Civ. P. 65(c).

PROHIBITED MISREPRESENTATIONS

I.

IT IS HEREBY ORDERED that T.E.M.M. Marketing, Inc., and Rodney L. Turner, Brian A. Edwards and Michael D. Merryman ("defendants") and defendants' agents, employees, officers, independent contractors, attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby restrained and enjoined from making or assisting others in making, expressly or by implication, any false or misleading oral or written statement or representation in connection with the distribution, marketing or sale of advertisements in or sponsorships of publications or programs, including—but not limited to:

- A. any misrepresentation concerning the distribution of any publication or program; ✓
- B. any misrepresentation concerning the printing or publishing of any publication;
- C. any misrepresentation concerning agreement to approve, authorize or pay for advertising or to support any publication or program;
- D. any misrepresentation concerning prior approval of advertising or sponsorship of a program by any person;
- E. any misrepresentation concerning the printing of any advertisement or listing in reliance on prior authorization to do so;
- F. any misrepresentation concerning any person's obligation to pay for any advertisement or to sponsor any program or publication;
- G. any misrepresentation concerning the costs incurred in printing, publishing or distributing any advertisement, publication or program;
- H. any misrepresentation concerning any payment constituting a donation;

I. any misrepresentation concerning any publication or program being in any way associated with any state, county, municipality, community, school(s) or group;

J. any misrepresentation concerning their identity(ies) and/or relationship with each other and/or to any publication, program, corporation or any other entity.

II.

IT IS FURTHER ORDERED that defendants and their successors, assigns, officers, agents, servants, employees, 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 corporation, subsidiary, division or other device are hereby temporarily restrained and enjoined from directly or indirectly transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, converting, withdrawing or otherwise disposing of any asset, wherever held, except for transfers to the temporary receiver appointed herein or as ordered by the Court upon a showing of good cause. The term "asset" as used herein includes, but is not limited to, information identifying defendants' customers or potential customers.

III.

IT IS FURTHER ORDERED that defendants and their successors, assigns, officers, agents, servants, employees, 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 corporation, subsidiary, division or other device shall, within three (3) business days following service of this Order, take such steps as are necessary to deliver to the territory of the United States of America all assets which are held by, or for the benefit of, any of the defendants, or are under their

direct or indirect control, jointly or singly, which were transferred outside of the territory of the United States of America subsequent to January 1, 1990, except as ordered by the Court.

IV.

IT IS FURTHER ORDERED that any financial or brokerage institution, business entity or person having possession, custody or control of any records of any defendant or of any account, safe deposit box or other asset titled in the name of any defendant, either individually or jointly, or held for the benefit of any defendant, or that has held, controlled or maintained custody of any such account, safe deposit box or other asset at any time since January 1, 1990, shall:

A. Hold and retain within its control and prohibit the transfer, encumbrance, pledge, assignment, removal, withdrawal, dissipation, sale or other disposal of any such account or other asset, except for transfers or withdrawals directed by the temporary receiver appointed herein or by further order of the Court;

B. Deny access to any safe deposit box titled individually or jointly in the name of any defendant or otherwise subject to access by any defendant;

C. Provide to counsel for the Commission and the temporary receiver appointed herein, within three (3) business days of notice of this Order, a sworn statement setting forth: (1) the identification number, date opened, and all authorized signatories for each such account or asset; (2) 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 asset was remitted; and (3) the identification of any safe deposit box subject to access by any defendant;

D. Allow representatives of the Commission immediate access to inspect and copy all records of any defendant and all documents relating to any account, safe deposit box or other asset of any defendant. Alternatively, any financial institution, other entity or person may arrange to deliver to the Commission copies of any records it seeks for a charge not to exceed fifteen cents per page copied; and

E. Cooperate with all reasonable requests of the temporary receiver relating to implementation of this Order, including transferring funds at the receiver's direction and producing records related to the defendants' accounts.

V.

IT IS FURTHER ORDERED that defendants and their successors, assigns, officers, agents, servants, employees, 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 corporation, subsidiary, division or other device are hereby temporarily restrained and enjoined from:

A. Failing to create and maintain books, records, accounts, and data which, in reasonable detail, accurately, fairly, and completely reflect their incomes, disbursements, transactions, and use of monies; and

B. 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 which relate to defendants' business practices or defendants' business or personal finances from January 1, 1990, to the present time.

VI.

IT IS FURTHER ORDERED that defendants and their successors, assigns, officers, agents, servants, employees, 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 corporation, subsidiary, division or other device and the temporary receiver appointed herein shall allow the Commission's representatives, agents, and assistants immediate access to the defendants' business premises, whether said premises are leased, rented or owned, including—but not limited to—228-D East Collins Road, Fort Wayne, Indiana. The purpose of this access shall be to inspect and copy any materials relevant to this action and to inventory the defendants' assets. The Commission may exclude defendants and their officers, directors, employees, and agents from the premises during this time, and identify—through photographs and driver's licenses, and obtain information from, all individuals at the premises. The Commission may remove materials from defendants' business premises so they may be inspected, inventoried, and copied. The Commission shall return materials so removed within five (5) business days of completing said copying. In no event shall the Commission retain the materials longer than ten (10) business days.

VII.

IT IS FURTHER ORDERED that the U.S. Marshal for the District of Indiana shall accompany the Commission's representatives, agents, and assistants on to defendants' business

premises within the District of Indiana to assure compliance with the terms of this Order by defendants and their officers, agents, employees and representatives.

VIII.

IT IS FURTHER ORDERED that each defendant shall immediately provide a copy of this Order to each of its divisions, subsidiaries, corporations, affiliates, successors, assigns, directors, officers, managing agents, employees, representatives, and independent contractors, and shall, within three (3) business days from the date of service of this Order, provide the Commission with a sworn statement that defendants have complied with this provision of the Order. The temporary receiver has no obligations under the provisions of this paragraph.

IX.

IT IS FURTHER ORDERED that at least seventy-two (72) hours prior to the scheduled date and time for the hearing on a preliminary injunction in this matter, but in no event later than two weeks after entry of this Order, each defendant shall provide this Court and counsel for the Commission with a completed financial statement, on the forms attached to this Order, for such defendant individually and for each corporation of which such defendant is an officer.

X.

IT IS FURTHER ORDERED that defendants Rodney L. Turner, Brian A. Edwards and Michael D. Merryman shall each notify counsel for the Commission at least seven (7) days prior to any discontinuance of his present business or employment and of his affiliation with any new or previously inactive business or employment, each such notice to include the defendant's new business

address, a statement of the nature of the business or employment in which the defendant is newly engaged, and a description of the defendant's duties and responsibilities in connection with that business or employment.

XI.

IT IS FURTHER ORDERED that the Commission is granted leave to conduct expedited discovery in this matter. The Commission may depose witnesses at any time after the date of this Order upon two (2) days notice. The Commission may require the response to interrogatories, requests for production of documents or requests for admissions within five (5) days after service of the request.

XII.

IT IS FURTHER ORDERED that defendants shall serve on the Commission their opposition to issuance of a preliminary injunction, including any declarations, exhibits, memoranda or other evidence on which they intend to rely not later than 4:30 p.m. (EST) of the third (3rd) business day prior to the preliminary injunction hearing in this matter.

XIII.

IT IS FURTHER ORDERED that, if any party to this action intends to present the testimony of any witness at the preliminary injunction hearing in this matter, that party shall, at least forty-eight (48) hours prior to the scheduled date and time of hearing, file with this Court and serve on all other parties, a witness list which shall include the name, address, and telephone number of any

such witness, and either a summary of the witness' expected testimony or the witness' affidavit revealing the substance of such witness' expected testimony.

XIV.

IT IS FURTHER ORDERED that all service and delivery to the Commission shall include service or delivery to Brinley H. Williams or Michael Milgrom, counsel for the Commission, at Eaton Center—Suite 200, 1111 Superior Avenue, Cleveland, Ohio 44114, unless either Mr. Williams or Mr. Milgrom consents to service at another location. Service shall be complete upon receipt.

XV.

IT IS FURTHER ORDERED that copies of this Order may be served by employees or agents of the Commission upon any financial institution or person or entity that may be in possession of any asset, record, property or property rights of defendants or that may be subject to any provision of this Order; and

IT IS FURTHER ORDERED that the initial process in this matter may be served on defendants by employees or agents of the Commission.

XVI.

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein expires ten (10) days after entry unless, within such time, the Order, for good cause shown, is extended for an additional period not to exceed ten (10) days, or unless it is extended with the consent of the parties.

XVII.

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

XVIII.

IT IS FURTHER ORDERED that Mark Winick is appointed as temporary receiver, with the full power of an equity receiver, for defendant T.E.M.M. Marketing, Inc., and its subsidiaries and affiliates (hereinafter referred to as "the receivership defendant"), and of all the funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by the receivership defendant. The temporary receiver is directed and has authority to:

A. Assume full control of the receivership defendant by removing defendants Rodney L. Turner, Brian A. Edwards and Michael D. Merryman, and any other officer, independent contractor, employee or agent of the receivership defendant, from control and management of the affairs of the receivership defendant;

B. Take custody, control and possession of all the funds, property, premises, mail and other assets of, or in the possession or under the control of, the receivership defendant, wherever situated. The temporary receiver has full power to sue for, collect, receive and take possession of all goods, chattels, rights, credits, monies, effects, lands, leases, books and records, work papers, and records of accounts, including computer-maintained information, and other papers and documents of the receivership defendant.

C. Preserve, hold, and manage all receivership assets, and perform all acts necessary to preserve the value of those assets;

D. Prevent the withdrawal or misapplication of funds entrusted to the receivership defendant and obtain an accounting thereof;

E. Manage and administer the business of the receivership defendant at his or her discretion until further order of this Court, by performing all acts necessary or incidental thereto. This includes hiring or dismissing all personnel or suspending operations as the receiver deems appropriate;

F. Disburse funds that the receiver deems necessary and advisable to preserve the properties of the receivership defendant or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order;

G. Collect any monies owed the receivership defendant;

H. Institute, 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 properties of the receivership defendant or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order;

I. Defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against the receivership defendant that the receiver deems necessary and advisable to preserve the properties of the receivership defendant or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Order.

J. Permit defendants access to the corporate records and premises upon reasonable notice to, and under the supervision of, the receiver for the purpose of responding to expedited discovery.

XIX.

IT IS FURTHER ORDERED that, in light of the appointment of the temporary receiver herein, the receivership defendant is hereby prohibited from filing a petition for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, without prior permission from this Court.

XX.

IT IS FURTHER ORDERED that the temporary receiver shall be compensated for the services he renders to the receivership estate during the pendency of the case. Prior to paying any compensation, the receiver shall file a request with the Court, outlining the services rendered and the related fees and expenses. The receiver shall not be paid any compensation except upon order of the Court.

XXI.

IT IS FURTHER ORDERED that except by leave of this Court, during the pendency of the receivership ordered herein, the defendants 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, the receivership defendant or any of its subsidiaries or affiliates (excluding the plaintiff in this action), 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:

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

B. Commencing, prosecuting, continuing or entering any suit or proceeding in the name of, or on behalf of, the receivership defendant or any of its subsidiaries or affiliates;

C. 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, any property of the receivership defendant or any of its subsidiaries or affiliates, or any property claimed by any of them, or attempting to foreclose, forfeit, alter or terminate the receivership defendant's interests in property, whether such acts are part of a judicial proceeding or otherwise;

D. 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 the receivership defendant or any of its subsidiaries or affiliates, or the receiver appointed pursuant to this order or any agent appointed by said receiver; and

E. Doing any act or thing whatsoever to interfere with the receiver taking control, possession or management of the property subject to this receivership, or to in any way interfere with the receiver, or to harass or interfere with the duties of the receiver, or to interfere in any manner with the exclusive jurisdiction of this Court over the property and assets of the receivership defendant or its subsidiaries or affiliates.

XXII.

IT IS FURTHER ORDERED that, immediately upon service of this Order upon them, defendants shall transfer control of the following to the temporary receiver: (1) all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated, of the receivership

defendant; (2) 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), customer lists, title documents and other papers of the receivership defendant; and (3) all funds and other assets belonging to members of the public now held by the receivership defendant.

XXIII.

IT IS FURTHER ORDERED that the defendants shall fully cooperate with and assist the receiver appointed in this action. The defendants are hereby restrained and enjoined from, directly or indirectly, hindering or obstructing the receiver in any manner.

XXIV.

IT IS FURTHER ORDERED that the temporary receiver shall file with the Clerk of this Court a bond in the sum of 0 (\$ 0) with sureties to be approved by the Court, conditioned that the receiver will well and truly perform the duties of the office and abide by and perform all acts the Court directs.

XXV.

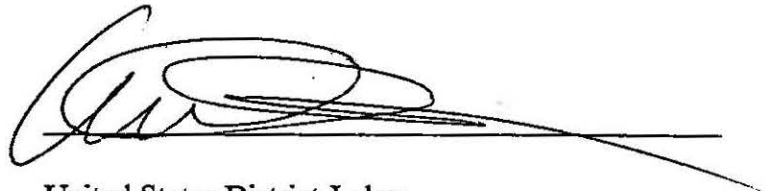
IT IS FURTHER ORDERED that each of the defendants shall appear before this Court on the 19TH day of OCTOBER, 1998, at 1:30 o'clock a.m./p.m., at the United States Courthouse, 1300 S. HARRISON ST., FORT WAYNE, INDIANA ^{COURT} Room 2ND FLOOR, to show cause, if any there be, why this Court should not enter a preliminary injunction, pending final ruling on the Complaint, against said defendants enjoining them from further

violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), continuing the freeze of their assets, appointing a permanent receiver, and imposing such additional relief as may be appropriate.

XXVI.

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for all purposes.

SO ORDERED, this 5TH day of OCTOBER 1978 at 9:45 A.M.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of horizontal strokes and a long, sweeping underline.

United States District Judge