

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80438-CIV-HURLEY/HOPKINS

NYSE EURONEXT,
Plaintiff,

v.

NICOLAS ATWOOD,
BITE BACK, INC.,
ANIMAL LIBERATION FRONT,
an unincorporated association;
JANE DOES 1-100 names being unknown and fictitious,
JOHN DOES 1-100 names being unknown and fictitious,
Defendants.

ORDER DENYING MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the court upon plaintiff NYSE Euronext's *ex parte* motion for a temporary restraining order which enjoins the named and unnamed defendants from (1) causing the website broadcasting of any personal identifying data regarding plaintiff's employees or their family members, or regarding the employees or family members of any company with which plaintiff has an existing or prospective business relationship; and (2) sending any unsolicited email or making unsolicited telephone calls of a "threatening or harassing" nature to any person or account holder which enjoys an existing or prospective business relationship with plaintiff NYSE Euronext.

Upon consideration of the motion and supporting memorandum, the Court has determined that the plaintiff has not demonstrated a basis for *ex parte* relief consistent with the requirements of Fed. R. Civ. P. 65(b). Accordingly, for reasons that follow, plaintiff's motion for entry of an *ex parte* temporary restraining order shall be denied.

Preface

Plaintiff NYSE Euronext (“NYSE”) ¹ contends that it and certain other companies listed on its exchange which have business or economic relations with a company known as “Life Science Research” (“LSR”), or its subsidiary Huntingdon Life Sciences (“HLS”), are being harassed by the defendants and similar “extremist” animal rights protection groups which have targeted LSR and HLS in protest of their animal research practices.

According to plaintiff, the harassment stepped up shortly after LSR first listed its stock on the NYSE Arca on December 22, 2006. First, it alleges that in January 2007, another, nonparty animal rights activist group, Stop Huntingdon Animal Cruelty (“SHAC”), announced the beginning of “Operation Helter Skelter” on its website, www.shac.net, where it described NYSE Euronext as a “category one” target and published the location of its European business address. Shortly after, on January 13 and 17, 2007, public demonstrations took place at Euronext’s Cannon Bridge office in the United Kingdom.

Also in early 2007, the Animal Defense League allegedly published a website announcement at www.animaldefense.info urging its readers to protest the inclusion of HLS in the newly formed NYSE Arca exchange, stating:

On Dec. 22nd, Wall Street snuck the puppy killers at Huntingdon Life Sciences (HLS) onto the newly formed NYSE Arca exchange.

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As described by plaintiff, the New York Stock Exchange Group, Inc. operates and regulates two securities exchanges - the New York Stock Exchange, the worlds’ largest and most liquid cash equities exchange, and NYSE Arca, Inc., the first open all electronic stock exchange in the United States. On April 4, 2007, NYSE Group Inc. and Euronext N. V – a European exchange-merged to form “NYSE Euronext,” – the first cross border exchange organization which provides services for regulated cash and derivatives markets in Belgium, France, the United Kingdom, the Netherlands and Portugal. [Complaint ¶1].

However, there was one thing NYSE Arca forgot when supporting Huntingdon Life Sciences: who controls Wall Street.

On April 20th, remind Wall Street who really calls the shots.
Tell NYSE Arca to drop Huntingdon Life Sciences.

Friday April 20th
Meet Up: 11:30 a.m.
Starbucks at
55 Broad Street.

On March 7, 2007, plaintiff maintains that certain unnamed defendants vandalized the cars of two of its Netherlands employees with acid and painted the word “murderer” on the home of one. Plaintiff claims that a Palm Beach County based animal rights group, defendant Bite Back, Inc., later published laudatory references to these events on its website--“www.directaction.com” – where it attributed the Netherlands vandalism to acts of the “A.L.F.,” presumably a reference to the Animal Liberation Front. The redacted versions of the alleged postings which plaintiff submits in support of its motion bear URL banners suggesting that the first reference was posted on the Bite Back website on March 21, 2007, and the second on April 7, 2007.

The March 21, 2007 posting recites under “News From the Frontlines” --

“anonymous communique”:

The A.L.F. spray painted your houses and vandalized your cars in the Netherlands. Some of you are known in the neighbourhood as PEDOPHILES, as we spray painted this message on your houses. PAYBACK TIME FOR THE ANIMALS SUFFERING IN HUNTINGDON LIFE SCIENCES.

The April 7, 2007 posting recites under “News From the Frontlines” --

reported anonymously:

[REDACTED] is a SCUMBAG employed by Euronext. The ALF paintstripped his cars and redecorated his fancy house.

Zero tolerance toward those who profit from the animals dying on the cage floors

of Huntingdon Life Sciences.

Stop trading the shares of Huntingdon Life Sciences.

According to the NYSE, these postings on Bite Back's website also included the names, home addresses, telephone numbers and email addresses of the two Netherlands employees who were targeted, as well as those of two other persons affiliated with NYSE Euronext – a member of the Board of Directors of a pension fund for NYSE Euronext and a former head of compliance affairs-- as well as two members of the supervisory board of Van Der Moolen, a Netherlands based financial services firm whose principal U.S. subsidiary is a NYSE member organization. These addresses and numbers were allegedly supplied with an exhortation for the readers to "CALL ME DAY AND NIGHT," or "SPAMM ME."

Finally, plaintiff broadly charges that the named and unnamed defendants in this case either "work in concert with, or are part of, other animal rights extremist groups, including the Animal Liberation Front (ALF), Animal Defense League, Win Animal Rights ("WAR"), Stop Huntingdon Animal Cruelty ("SHAC") and Hugs for Puppies, all of which are engaged in a concerted effort to force the closure of LSR and HLS," and which "routinely use websites to disseminate personal and private information about 'targets' in order to "encourage, incite and direct others, including the unnamed defendants, to focus their extremist and illegal activities on these 'target' individuals."

On these premises, plaintiff brings suit for compensatory and punitive against the named and unnamed "John and Jane Doe" defendants to this cause, seeking compensatory and punitive damages for tortious interference with advantageous business relationships (Count 1)² and the

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The relationships allegedly injured by the defendants' conduct include plaintiff's relationship with its listed companies, such as LSR, as well as its contractual relationship with its own

entry of a permanent injunction against future website postings of personal identifying data relating to employees of NYSE Euronext or of any other entity with which it has existing or prospective economic or business relations. (Count 2)

In support of its motion for entry of an *ex parte* temporary restraining order, plaintiff submits the affidavit of Brian L. Gimlett, Senior Vice President of Security for the NYSE Group, Inc., a wholly owned subsidiary of NYSE Euronext. This affidavit repeats the essential historical allegations of the complaint, and sets forth Gimlett's various conjectures and opinions pertaining to the operation of Bite Back, Inc. and the various unnamed John and Jane Does. Gimlett opines, for example, based on his "lengthy experience as a law enforcement professional," that the domain name "directaction.info" effectively refers to "a violent form of activism that seeks an immediate remedy for perceived societal harms...involv[ing] activities such as sabotage, intimidation, demonstrations, vandalism, graffiti, assault, threats and protests." (Gimlett, Affidavit, ¶ 10). He also postulates that the primary objective of the named and unnamed defendants in this case -- like the various other animal rights "extremists" with whom they share a common agenda -- is to force the closure of LSR and HLS.

Standard

"An *ex parte* restraining order is an extreme remedy only to be used with the utmost caution." *Levine v Comoca, Ltd.*, 70 F.3d 1191, 1194 (11th Cir. 1995). In order to prevail on a motion for an *ex parte* temporary restraining order, plaintiff must show that:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the

employees, and its relationship with other parties with whom it is associated in the operation of its markets, including market makers and other providers of liquidity.

applicant before the adverse party or that party's attorney can be heard in opposition, and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required..

Fed. R. Civ P. 65(b).

Once the moving party meets these threshold requirements for *ex parte* relief under Rule 65(b), plaintiff must demonstrate (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest in order to obtain injunctive relief. *Four Seasons Hotels and Resorts, B.V. v Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003).

Discussion

In this case, plaintiff NYSE Euronext maintains that it should be relieved of the requirement of notifying defendants of the pendency of its motion for temporary restraining order, first, because the personal safety of its 'targeted' NYSE Euronext employees has become an issue following the Netherlands episode, and more harm is likely to occur if defendants are given notice, and second, because advance notice would give the defendants an opportunity to move the identifying data in question to other websites, or to simply begin disseminating the data through email or other means before this court has opportunity rule on the motion.

There are a number of difficulties with these theories. First, plaintiff adduces no evidence suggesting that the named defendants in this case have ever incited, threatened or committed a crime of violence against any person, nor does it present any evidence reasonably susceptible of

interpretation that an act of violence against one of its employees is imminent. After weeding through the complaint, it appears that the only allegation of harassment linked to the named defendants in this case is Bite Back's alleged after-the-fact website reporting of the Netherlands incident and its simultaneous identification of the names and addresses of involved and affiliated NYSE Euronext employees accompanied by an exhortation for its readers to email, spam and call them "day and night" to protest their relationship with HLS and LSR. These allegations do not remotely rise to the level of a threat or incitement to violence against the personal safety of anyone.

Second, the immediacy contemplated by Fed. R. Civ. P. 65(b) is lacking here. The Netherlands incident occurred on March 7, 2007. The URL on the Bite Back website page reporting this incident suggests that the publication of the employees names and address in question occurred on March 21, 2007 and April 7, 2007. Defendants have nearly had over two months to further disseminate the employee data in question, and Plaintiff does not proffer any explanation as to why it has waited this long to seek a temporary restraining order against future publications, nor does it give any indication as to whether the publication of this data is ongoing on the Bite Back website. Under these circumstances, the immediacy requirement for entry of an *ex parte* TRO is lacking. See e.g. *Best Deals on TV, Inc. v Naveed*, 2007 WL 902564 (N.D. Cal. 2007); *Comcast of Illinois X, LLC v Till*, 293 F. Supp. 2d 936 (E.D. Wis. 2003).

In addition, plaintiff makes no showing that the named defendants have acted in defiance of judicial authority in the past, or that they are otherwise likely to attempt to deliberately preempt the efficacy of any injunctive relief anticipated from this court by surreptitiously moving or broadcasting the data in question through another forum if noticed.

Finally, the court has carefully reviewed the remaining allegations involving the thicket of civil and criminal litigation embroiling other non-party animal rights activist organizations

referenced in the plaintiff's complaint; however, the *ex parte* injunctive relief sought against the named defendants in this case cannot rest on the strength of the opinion affidavit of Security Vice President Brian Gimlett, or the various allegations pinned to the unnamed defendants and other non-party "extremist" groups allegedly involved in an ongoing campaign of harassment and "terror" against HLS and LSR. See e.g. *Daniels v Southfort*, 6 F.3d 482 (7th Cir. 1993).


Conclusion

As it does not clearly appear from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result to the plaintiff before the defendant or defendants' attorneys may be heard in opposition, it is

ORDERED and ADJUDGED:

1. Plaintiff's motion for entry of an *ex parte* temporary restraining order [DE #2] is **DENIED** without prejudice for plaintiff to proceed with a request for entry of a temporary restraining order with notice.
2. Plaintiff is directed to hand serve a copy of its complaint, the present motion with all supporting attachments, and this order upon the named defendants by Monday, June 4, 2007.
3. The defendants may file any opposition to the requested temporary restraining order by June 14, 2007, and the plaintiff may file its reply by June 20, 2007.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 25th day of May, 2007.


Daniel T. K. Hurley
United States District Judge

Copies furnished to: all counsel