

1 ATTACHMENT TO JUNE 10, 2009 ORDER TO SHOW CAUSE

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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11

12 Federal Trade Commission,

13 Plaintiff,

14 v.

15 Pricewert LLC also d/b/a 3FN.net, Triple Fiber

16 Network, APS Telecom, APX Telecom, APS

17 Communications, and APS Communication,

18 Defendant.

No. C-09-2407 RMW

[PROPOSED] ORDER APPOINTING  
TEMPORARY RECEIVER

19 I. INTRODUCTION

20 On June 2, 2009, the court issues a temporary restraining order based on the ex parte

21 application of plaintiff Federal Trade Commission ("FTC") that, among other things, ordered data

22 centers and upstream service providers to disconnect defendant's computer resources from the

23 internet and suspend Internet Protocol addresses assigned to defendant. The court then received

24 communications from third parties who were using defendant's hosting services for the third parties'

25 websites which raised a significant concern that one or more innocent third parties may be suffering

26 harm as a result of the TRO. In response to the court's June 5 order directing plaintiff FTC to file a

27 proposal for expeditiously addressing concerns raised by third parties and minimizing, if reasonably

28 feasible, any undue harm to innocent third parties, the FTC proposed the appointment of a temporary

1 receiver to be commissioned to resolve the third parties' requests for access to their content hosted  
2 on defendant's servers or computers.

## 3 II. STANDARD FOR APPOINTMENT OF RECEIVER

4 The district court has broad discretion in appointing a receiver and may consider a host of  
5 relevant factors, no single one of which is dispositive. *Canada Life Assurance Co. v. LaPeter*, 563  
6 F.3d 837, 845 (9th Cir. 2009). Among other things, the court may consider whether there is an  
7 imminent danger of loss of property, the inadequacy of legal remedies, and whether harm to be  
8 caused by denying the appointment would outweigh harm to the party opposing the appointment of a  
9 receiver, if one is appointed. *Id.*; *Solis v. Matheson*, 563 F.3d 425, 438 (9th Cir. 2009).

10 In this case, the temporary restraining order appears to be causing some harm to one or more  
11 innocent third parties whose websites were hosted by defendant and whose websites have now been  
12 disabled as a result of disconnecting defendant's servers from the internet. One such third party is  
13 Suren Ter-Saakov, who along with his company, Tsuren LLC, has sought to intervene for the  
14 purpose of obtaining a modification of the temporary restraining order to permit intervenors access  
15 to their content residing on defendant's servers. Intervenors contend that their legitimate businesses  
16 have been shut down by the disconnection of defendant's servers from the internet and that they are  
17 losing thousands of dollars each day as a result.

18 The harm to intervenors and any other similarly situated third parties is immediate and  
19 ongoing – their legitimate websites and business activities have been disrupted – and they may need  
20 obtain a copy of their content, from defendant's servers, in order to continue their website-based  
21 business activities. There is an ongoing and imminent danger that these innocent third parties will  
22 lose property if a temporary receiver is not appointed to assist them in obtaining a copy of their  
23 content stored on Defendant Data Centers. By contrast, appointing a temporary receiver for limited  
24 purposes of assisting innocent third parties obtain copies of their third party content would not  
25 impose any harm upon defendant. Moreover, the court is unaware of any other legal recourse the  
26 third parties would have to minimize the harm they are experiencing.

27 Appointing a temporary receiver, on the terms set forth herein, is reasonable and appropriate.  
28

1 **III. Appointment of Temporary Receiver**

2 Having reviewed the FTC’s proposal, this court finds that good cause exists to appoint a  
3 temporary receiver who can evaluate, subject to review by the court, the claims of third parties  
4 whose data is stored on Defendant Data Servers and coordinate the release of copies of such data to  
5 third parties whose data does not appear to relate to the conduct prohibited by the Temporary  
6 Restraining Order. The Court further finds that the costs associated with providing third parties with  
7 copies of their data should initially be borne by the Defendant, subject to later re-allocation, if  
8 appropriate.

9 **DEFINITIONS**

10 For the purpose of this order, the following definitions shall apply:

- 11 1. “**Assets**” means any legal or equitable interest in, right to, or claim to, any real, personal, or  
12 intellectual property of Defendant or held for the benefit of Defendant wherever located,  
13 including, but not limited to, chattel, goods, instruments, equipment, fixtures, general  
14 intangibles, effects, leaseholds, contracts, mail or other deliveries, shares of stock, inventory,  
15 checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform  
16 Commercial Code), cash, and trusts, including but not limited to any other trust held for the  
17 benefit of Defendant.
- 18 2. “**Botnet**” means a network of computers that have been compromised by malicious code and  
19 surreptitiously programmed to follow instructions issued by a Botnet Command and Control  
20 Server.
- 21 3. “**Botnet Command and Control Server**” means a computer or computers used to issue  
22 instructions to, or otherwise control, a Botnet.
- 23 4. The term “**Child Pornography**” shall have the same meaning as provided in 18 U.S.C. §  
24 2256.
- 25 5. “**Data Center**” means any person or entity that contracts with third parties to house  
26 computer servers and associated equipment, and provides the infrastructure to support such  
27 equipment, such as power or environmental controls.
- 28

- 1 6. “**Day**” shall have the meaning prescribed by and time periods in this Order shall be  
2 calculated pursuant to Fed. R. Civ. P. 6(a).
- 3 7. “**Defendant**” means Pricewert LLC also d/b/a 3FN.net, Triple Fiber Network, APS Telecom,  
4 APX Telecom, APS Communications, APS Communication, and any other names under  
5 which it does business, and any subsidiaries, corporations, partnerships, or other entities  
6 directly or indirectly owned, managed, or controlled by Pricewert LLC.
- 7 8. “**Defendant Data Servers**” means computer servers and associated equipment owned,  
8 leased, or controlled by the Defendant stored in a Data Center subject to the Temporary  
9 Restraining Order, and any data stored on such computer servers or associated equipment.
- 10 9. “**Document**” is synonymous in meaning and equal in scope to the usage of the term in the  
11 Federal Rules of Civil Procedure 34(a), and includes writing, drawings, graphs, charts,  
12 Internet sites, Web pages, Web sites, electronic correspondence, including e-mail and instant  
13 messages, photographs, audio and video recordings, contracts, accounting data,  
14 advertisements (including, but not limited to, advertisements placed on the World Wide  
15 Web), FTP Logs, Server Access Logs, USENET Newsgroup postings, World Wide Web  
16 pages, books, written or printed records, handwritten notes, telephone logs, telephone scripts,  
17 receipt books, ledgers, personal and business canceled checks and check registers, bank  
18 statements, appointment books, computer records, and other data compilations from which  
19 information can be obtained and translated. A draft or non-identical copy is a separate  
20 document within the meaning of the term.
- 21 10. “**Harmful Data**” means Child Pornography, botnet command and control servers or  
22 software, spyware, viruses, trojan horses, phishing-related data or software, or similar  
23 electronic code or content that inflicts harm upon consumers.
- 24 11. “**Phishing**” means the use of email, Internet web sites, or other means to mimic or copy the  
25 appearance of a trustworthy entity for the purpose of duping consumers into disclosing  
26 personal information, such as account numbers and passwords.
- 27 12. “**Receiver**” means the temporary receiver appointed in this Order and any deputy receivers  
28 that may be named by the temporary receiver;





1           **IT IS FURTHER ORDERED** that, notwithstanding the requirements of the Temporary  
2 Restraining Order that prohibit Defendant’s and third parties’ access to computer resources leased,  
3 owned, or operated by Defendant or other enumerated persons, the Receiver is authorized and  
4 directed to accomplish, and affected Data Centers are directed to take all reasonable steps to  
5 facilitate, the following:

6           A.     Take exclusive custody, control, and possession of the Defendant Data Servers. Any  
7 Data Center that has secured Defendant Data Servers pursuant to the Temporary Restraining Order  
8 shall provide the Receiver and/or his agents with full and immediate access to the Defendant Data  
9 Servers and any related data sufficient to enable the Receiver to accomplish his duties under this  
10 Order.

11           B.     Receive and review requests from third parties who claim they have suffered harm  
12 because they own data on Defendant Data Servers rendered inaccessible as a result of the Temporary  
13 Restraining Order. Any third party seeking the release of data pursuant to this Order shall provide  
14 the Receiver with:

- 15                   1.     If applicable, the Domain Name(s) and IP Address(es) used to aggregate the  
16                             data, and any passwords or similar information necessary to enable the  
17                             Receiver to access the requested data;
- 18                   2.     Contact information for the third party including a name, address, telephone  
19                             number, email address, business title, business name, and administrative  
20                             contact for the domain name in question;
- 21                   3.     Certification that the third party is the lawful owner of data sought from the  
22                             Defendant Data Server, or similar certification that the third party may  
23                             lawfully access such data;
- 24                   4.     Certification that the third party has no accessible back-up copy or alternative  
25                             access to the requested data absent the intervention of the Receiver;
- 26                   5.     Certification that the third party has no knowledge, direct or indirect, that the  
27                             requested data contains Harmful Data;

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6. Certification that the third party agrees to bear the reasonable costs of copying and transmitting the requested data, and any associated costs; and

7. Any other information deemed necessary by the Receiver to comply with applicable laws governing disclosure of the requested data to the third party, or to determine: (I) the identity of the third party; (ii) that the third party is lawfully entitled to the possession of the requested data; or (iii) that the data requested by the third party does not contain Harmful Data.

C. Determine whether third party requests for data comply with the requirements of Section “B,” above.

D. Evaluate the requested third party data to make a reasonable, good faith determination that it does not contain Harmful Data. In making his evaluation, the Receiver shall consider the third party certifications and any other documents or information supplied by the third party and, where appropriate, the documents filed by the Federal Trade Commission in this matter, relevant information that may be readily available from third party sources, and information uncovered through the Receiver’s independent investigation. The third party shall have the burden to produce evidence to the Receiver sufficient for the Receiver to make a reasonable, good faith determination that the requested data does not include Harmful Data.

E. If the Receiver makes a reasonable, good faith determination that a third party request for data complies with Sections B through D, above, the Receiver shall, while at all times complying with the document preservation and other applicable obligations set out in the Temporary Restraining Order, act expeditiously to obtain a copy of the requested data and provide it to the third party.

1. The Receiver shall take reasonable steps to minimize disruption and costs to any Data Centers in possession of Defendant Server Data;

2. The Receiver is authorized to enter into contracts with technicians, independent contractors, or other parties necessary to obtain copies of third party data pursuant to this Order, or to otherwise deliver requested data to third parties; and





1 the extraction, storage, and shipment of such data to the third party. The Receiver may seek to  
2 obtain such funds from the third party or the Defendant.

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4 **COMPENSATION OF RECEIVER**

5 **XI.**

6 **IT IS FURTHER ORDERED** that the Receiver and all personnel hired by the Receiver as  
7 herein authorized are entitled to reasonable compensation for the performance of duties pursuant to  
8 this Order and for the cost of actual out-of-pocket expenses incurred by them, subject to court  
9 approval. To the extent the \$25,000 transferred pursuant to Paragraph II of this Order and payments  
10 by third parties pursuant to Paragraph X of this Order are insufficient to cover the Receiver's fees  
11 and costs, the Defendant shall be responsible for reimbursing the Receiver for reasonable costs and  
12 fees approved by this Court, subject to later re-allocation, if appropriate. The Receiver shall file  
13 with the Court and serve on the parties periodic requests for the payment of such reasonable  
14 compensation, with the first such request filed no more than fifteen (15) days after balance in  
15 receivership accounts falls below \$5,000. The Receiver shall not increase the hourly rates used as  
16 the bases for such fee applications without prior approval of the Court.

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18 **RECEIVER'S BOND**

19 **XII.**

20 **IT IS FURTHER ORDERED** that the Receiver shall file with the Clerk of this Court a  
21 bond in the sum of \$20,000 with sureties to be approved by the Court, conditioned that the Receiver  
22 will well and truly perform the duties of the office and abide by and perform all acts the Court  
23 directs. 28 U.S.C. § 754.

24  
25 **CONSTRUCTION OF ORDER**

26 **XIII.**

27 **IT IS FURTHER ORDERED** that this Order shall not be construed to allow the release of  
28 Harmful Data, other than to appropriate law enforcement authorities, to any person, including any

1 third party who requests a copy of data on Defendant Data Servers, or to the Defendant and its  
2 Representatives, to provide any person with remote access to Defendant Data Servers, or to provide  
3 copies of any data on Defendant Data Servers to the Defendant and its Representatives. To facilitate  
4 the provision of copies of data to third parties consistent with this Order and to facilitate the  
5 Defendant's cooperation as required by this Order, the Receiver may provide Defendant and its  
6 Representatives, to the extent reasonably necessary, the ability to view locally and under the  
7 Receiver's supervision information about the organization of Defendant Data Servers and the  
8 organization of the data stored thereon.

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**SO ORDERED**, this \_\_\_\_ day of \_\_\_\_\_, 2009.

DATED: \_\_\_\_\_

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RONALD M. WHYTE  
United States District Judge

1 **Notice of this document has been electronically sent to:**

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11 Counsel are responsible for distributing copies of this document to co-counsel that have not  
12 registered for e-filing under the court's CM/ECF program.

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16 **Dated:** \_\_\_\_\_

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**Chambers of Judge Whyte**

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