

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

DECKERS OUTDOOR CORPORATION,)	
)	
Plaintiff,)	
)	Case No. 20-cv-6718
v.)	
)	Judge Joan B. Gottschall
)	
THE PARTNERSHIPS AND)	
UNINCORPORATED ASSOCIATIONS)	
IDENTIFIED ON SCHEDULE "A",)	
)	
Defendants.)	

ORDER

This is a patent infringement suit brought by Decker’s Outdoor Corp., which owns several design patents related to UGG-branded footwear, against numerous operators of online stores that allegedly sell infringing counterfeit goods; plaintiff alleges that defendants have taken pains to conceal their true identities. *See* Compl. ¶¶ 1–22, ECF No. 1. On November 20, 2020, a sealed temporary restraining order, issued without notice to defendants, was entered. ECF No. 24. As required by Rule 65(b)(2) of the Federal Rules of Civil Procedure (“Rule”), the order expires after 14 days, and the court set a preliminary injunction hearing for December 4, 2020. *Id.* at 10.

Plaintiff moves ex parte to extend the temporary restraining order by 14 days. Rule 65 permits the court to extend a temporary restraining order for one 14-day period for “good cause.” Fed. R. Civ. P. 65(b)(2). Applying the good cause standard involves the exercise of discretion. *See Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 745 (7th Cir. 1976), *overruled in part on other grounds by Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir. 1989) (reviewing decision to extend a temporary restraining order for abuse of discretion).

Rule 65 states that, “If the [temporary restraining order] is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion.” Fed. R. Civ. P. 65(b)(3); *see Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70*, 415 U.S. 423, 443 (1974).

Plaintiff has made a very short written record in support of its motion. It represents that the temporary restraining order has not been “effectuate[d]” by unspecified third parties on which it was presumably served. Mem. Supp. Mot. Extend TRO 1, ECF No. 26. Plaintiff’s lawyer avers that it intends to pursue an asset freeze once defendants’ financial accounts have been identified. *Id.* Ex. A ¶ 2. Until that happens, plaintiff argues that failing to extend the temporary restraining order will result in the irreparable harm of defendants transferring their allegedly ill-gotten funds to offshore accounts outside this court’s jurisdiction. Mem. Supp. Motion. Extend TRO 2.

Proceedings on temporary restraining orders are marked by their informality and by the brevity of the record. *Geneva Assur. Syndicate, Inc. v. Med. Emergency Servs. Assocs. (MESA)* S.C., 964 F.2d 599, 600 (7th Cir. 1992). Even so, the record plaintiff has assembled does not contain enough specific information for the court to find good cause to extend the temporary restraining order here. *Cf. Squillacote*, 534 F.2d at 745 (discussing specific showings of need for discovery made at hearing on motion to extend a temporary restraining order). Any efforts to serve defendants and third parties are not described. Nor does the record contain anything about what, if any, steps plaintiff has taken to identify defendants’ financial accounts and why those efforts cannot be reasonably expected to bear fruit by the order’s expiration date of December 4,

2020. In the many similar cases over which this court has presided, these details have been provided in declarations submitted in support of a motion to extend a temporary restraining order, and plaintiff suggests no reason why they cannot be provided here. Since plaintiff requests an ex parte extension, waiting for the hearing date appears to be unnecessary, particularly because all hearings are being conducted by remote electronic means due to the COVID-19 pandemic. Based on motions filed in prior cases, plaintiff has the means and ability to create a paper record containing the necessary details. *See* Fed. R. Civ. P. 65(b)(2) (requiring reasons for an extension to be stated on the record).

The absence of an adequate record independently justifies denying the motion without prejudice. The court has two additional substantive concerns about extending the temporary restraining order on which plaintiff has not been heard, however.

First, as the Seventh Circuit has stated: “ex parte [temporary restraining] orders of very limited scope and brief duration may be justified in order to preserve evidence where the applicant shows that notice would result in destruction of evidence.” *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 323 (7th Cir. 1984). This is the form of harm that justified issuing the temporary restraining order ex parte here. Plaintiff showed, and the court found, that “in the absence of an [order issued without notice], Defendants could and likely would move any assets from accounts in financial institutions under this Court’s jurisdiction.” Sealed TRO 6, ECF No. 24. This would effectively render these proceedings against defendants who allegedly traffic in infringing merchandise “useless.” *Id.* The Seventh Circuit’s decision in *American Can* teaches, “Because an ex parte order is proper only when there is no reasonable alternative, [the court] must examine each of the operative terms of the restraining order to determine whether this asserted risk justified” taking action ex parte. *Am. Can.*, 742 F.2d at 322. In *American Can*, the

Seventh Circuit parsed each requirement of the ex parte temporary restraining order and pruned portions that should have been issued with notice to the defendant. *See id.* at 322–24. For instance, the court of appeals disapproved a portion of the temporary restraining order prohibiting the defendant from selling its products to customers previously served by the plaintiff, stating, “There is no plausible reason for issuing this portion of the order ex parte.” *Id.* at 322–23.

The temporary restraining order here imposes several restrictions which on their face have an equally tenuous relationship to the justification for granting ex parte relief, including an injunction prohibiting defendants from selling counterfeit goods. *See, e.g.* Sealed TRO ¶¶ 1, 3. Thus, even if good cause to extend the temporary restraining order exists, under *American Can*, plaintiff must justify extending each provision of the temporary restraining order without giving notice to the defendants. The present record does not contain such a justification. *See Am. Can*, 724 F.2d at 323–24.

Second, the temporary restraining order contains several directives to third parties not named in the complaint. *E.g.*, ECF No. 24 ¶ 2. This court added a footnote to the temporary restraining order proposed by plaintiff: “Plaintiff set forth these third party names as examples of the third parties it believes may be providing services to defendants.” *Id.* at 7 n.2. This footnote was inserted because, as this court recently explained:

Supreme Court law as interpreted by the Seventh Circuit forbids pre-determining the question of whether an injunction binds a third party under Rule 65(d)(2) without first serving the third party and giving it an opportunity to be heard. *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Com'n.*, 511 F.3d 762, 766–67 (7th Cir. 2007); *United States v. Kirschenbaum*, 156 F.3d 784, 794–96 (7th Cir. 1998) (both applying *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110–11 (1969)). *Lake Shore Asset Management* illustrates the rule. The injunction there (which incidentally imposed an asset freeze) bound the single defendant and its “affiliates.” 511 F.3d at 766. The injunction swept too broadly, the Seventh Circuit held, because “the defendant must be the sole

addressee of the injunction.” *Id.* (citing *Zenith Radio*, 395 U.S. at 110-11). The court of appeals stated unambiguously that “whether a particular person or firm is among the parties' officers, agents, servants, employees, and attorneys; [or] other persons in active concert or participation with them is a decision that may be made only after the person in question is given notice and an opportunity to be heard.” *Id.* at 766–67 (brackets in original; internal quotation and citations omitted). That is so even where a court is “confident” that a third party is acting in concert with a party to the lawsuit, *id.* at 767, for “even a third-party aider and abettor must have her day in court.” *Kirschenbaum*, 156 F.3d at 794.

Pow! Entm't, LLC v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Unincorporated Assocs.

Identified On Schedule A Hereto, 2020 WL 5076715, at *2 (N.D. Ill. Aug. 26, 2020) (Gottschall, J.) (denying motion for entry of a default judgment awarding permanent injunctive relief).

Even with footnote two, the numerous directives in the temporary restraining order to third parties who have not been served creates the impression that this court has already decided that they are defendants' agents or that they are working in active concert or participation with the defendants. *See* Fed. R. Civ. P. 65(d)(2); Sealed TRO ¶ 2, 3–9; *see also Pow! Entm't*, 2020 WL 5076715, at *2 (holding that the assumption that “defendants have a contractual relationship with companies like PayPal, Amazon, and eBay” is insufficient by itself to enter an ex parte restraining order binding them without giving them “notice and an opportunity to be heard”). Furthermore, plaintiff has not shown that this court has personal jurisdiction over the third parties named in the complaint, as contrasted with the defendants. *See Am. Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 880–81 (E.D. Wis. 2005) (denying motion for temporary restraining order in part because it was “unclear” whether the court had personal jurisdiction over the defendants and “a restraining order or injunction is an in personam restraint issued against a party over whom the court has acquired in personam jurisdiction,” (quotation and citations omitted)). For these reasons, all references to third parties not named in the complaint as well as directives that can be performed only by third parties must be removed from the temporary

restraining order, unless plaintiff can demonstrate that including such language is compatible with the authority cited above.

Because the present record is inadequate to find good cause, plaintiff's motion to extend the temporary restraining order is denied without prejudice. Plaintiff may, if it wishes, refile its motion by no later than 4:00 P.M. on December 3, 2020. If plaintiff requires more time to respond to the two substantive matters described in this order, the court would be amenable to a brief extension of the temporary restraining order to allow plaintiff time to brief the issues raised in this order.

Dated: December 3, 2020

_____/s/
Joan B. Gottschall
United States District Judge