

## Ex Parte TRO's: Courts Don't Like Them

Insights

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Every now and then, non-compete and trade secret plaintiffs conclude that the need for relief is so urgent that a temporary restraining order is not enough. Instead, they decide that relief must be granted by the court before notice and an opportunity to be heard is provided to the defendant. This practice, which is legally known as seeking relief *ex parte*, is permitted by courts, but subject to a specific showing of need that is discussed in greater detail below. A recent decision by the United States District Court for the Northern District of Texas illustrates that courts are loathe to grant *ex parte* injunctions.

To be clear, non-compete and trade secret cases are emergency driven. From a plaintiff's perspective, the defendant's wrongful conduct threatens irreparable harm. To prevent such harm, plaintiffs seek injunctive relief by way of (1) a temporary restraining order ("TRO"), and/or (2) a preliminary injunction. A TRO is simply an expedited, temporary form of preliminary injunctive relief. By seeking a TRO, a plaintiff is essentially telling the court that its need for relief is emergent. As the Florida Supreme Court once stated, "relief delayed is relief denied." *Capraro v. Lanier Business Products, Inc.*, 466 So.2d 212, 212 (Fla. 1985).

A case recently filed and decided illustrates that plaintiff must think carefully before seeking *ex parte* relief. In *Digital Generation, Inc. v. Steven Boring*, the plaintiff sought an *ex parte* TRO against its former employee, Steven Boring. According to Digital Generation, Mr. Boring had breached, or

was about to breach, a non-solicitation and confidentiality agreement. To support its claim, Digital Generation stated that Mr. Boring joined a competitor and visited a third party who provides a large volume of services to one of Digital Generation's clients. Digital Generation also stated that prior to leaving, Mr. Boring asked for permission to access a folder on his laptop computer to retrieve personal information, and it was subsequently discovered that the same folder contained alleged confidential information.

The court discussed the difference between a TRO and a preliminary injunction. A TRO is "simply a highly accelerated and temporary form of preliminary injunctive relief." The purpose of a TRO is to preserve the status quo and prevent irreparable harm "so long as is necessary to hold a hearing, and no longer." The court noted that a TRO may be granted on an *ex parte* basis, but only if the plaintiff alleges specific facts under oath that clearly show that immediate and irreparable harm will result before the defendant may be heard, or if the plaintiff certifies its efforts to provide notice and why notice should not be required.

Against this backdrop, the court proceeded to construe Digital Generation's allegations in a light favorable to the absent defendant. The court observed that 44 days had elapsed since Mr. Boring had accessed his laptop computer, and it concluded that the passage of time belied the plaintiff's assertion that *ex parte* relief was required. The court also explained that many of the plaintiff's allegations were "speculative" and not sufficient to establish its burden at this stage of the proceedings. After reaching these conclusions, the Court denied the motion without prejudice, and directed Mr. Boring to respond to the motion "within 14 days after the deadline to file an answer or otherwise respond." In other words, Mr. Boring was given a minimum of another 35 days after service of the complaint and summons to respond to the motion.

The takeaway from this case is that non-compete and trade secret plaintiff's should resist the temptation to seek *ex parte* relief. Although such relief is sometimes appropriate, courts are loathe to proceed in this fashion without a specific showing of why *ex parte* proceedings are warranted. A review of Digital Generation's motion suggests that its basis for *ex parte* relief was nothing more than its allegation that Mr. Boring engaged in wrongful conduct. Although it is impossible to know for sure, it seems likely that Digital Generation could have obtained a more expeditious consideration of its motion if it had simply made prompt service and asked the Court to scheduled an expedited hearing. Such a hearing may well have taken place within days. Instead, Digital Generation will now have to wait over a month unless it can find a good faith basis to renew its motion for a TRO.

A copy of Digital Generation's motion and the court's order are available below in pdf format.

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