

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Judge _____

ELECTRONIC PAYMENT TRANSFER, LLC)

)

Plaintiff,)

)

1:16-cv-_____

v.)

)

FEDERAL TRADE COMMISSION, and)

CITYWIDE BANKS, a Colorado corporation)

)

Defendants.)

**MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Plaintiff Electronic Payment Transfer, LLC, (“EPT”) by and through its counsel the KROB LAW OFFICE, LLC, pursuant to Rule 65, F.R.C.P. submits this motion requesting a Temporary Restraining Order and Issuance of a Preliminary Injunction against Defendant Citywide Banks from disclosing any financial information Defendant Citywide Banks may have regarding EPT to the Defendant Federal Trade Commission unless and until EPT is provided the *Subpoena Duces Tecum* and been given a reasonable opportunity to respond, object, or consent to the production of materials requested by Defendant FTC from Defendant Citywide Banks.

I. BACKGROUND

The FTC initiated an investigation into a third-party to this suit approximately five years ago. In the course of that investigation Defendant FTC has requested from EPT and its related companies documents, responses to interrogatories and depositions. In

response to these requests, EPT and its related companies have produced tens of thousands of pages of documents to Defendant FTC.

According to EPT's bank, Defendant Citywide Banks, and unbeknownst to EPT, Defendant FTC has now subpoenaed EPT's banking records entrusted to Defendant Citywide Banks. On Friday, June 24, 2016, Defendant Citywide Banks sent Plaintiff a letter to advise Plaintiff that Defendant FTC had served Defendant Citywide Banks with a *Subpoena Duces Tecum* for "records belonging to Electronic Payment Transfer LLC." See letter attached as Exhibit 1. Defendant Citywide further stated that "unless prevented from doing so" it would "deliver these records to the Federal Trade Commission by 10:00 a.m. on June 28, 2016," less than two business days from the time Defendant Citywide notified Plaintiff of the subpoena. The letter did not include a copy of the *Subpoena Duces Tecum*.

On Monday morning, June 27, 2016, EPT's attorneys contacted Defendant Citywide Banks' attorney by telephone and by e-mail requesting a copy of the *Subpoena Duces Tecum* so EPT could determine whether it was entitled to prevent disclosure of the records. After several discussions, Defendant Citywide Banks' attorney indicated that it would forward EPT a copy of the subpoena. Having not received it, EPT's attorneys again contacted Defendant Citywide Banks' attorney, who assured EPT's attorneys that they would receive the subpoena. Also on Monday, June 27, 2016, EPT's attorneys contacted Defendant FTC's attorney, requesting a copy of the subpoena it had served on

Defendant Citywide Banks related to EPT's records. Defendant FTC's attorney provided no response nor the subpoena.

Despite numerous inquiries, EPT has yet to receive a copy of the subpoena indicating (1) precisely what information is being requested; (2) the basis for such request; (3) the case or authority under which the subpoena was issued; or (4) any other information regarding the subpoena. Without a copy of the subpoena or information related to its issuance, specific requests or otherwise, Plaintiff is unable to determine whether the subpoena for its sensitive financial information is properly related to an investigation before the FTC and whether the FTC followed proper procedure in obtaining the information.

Furthermore, without procedural safeguards limiting the FTC's ability to disseminate EPT's financial information, if it is produced, EPT would be irreparably harmed. The industry EPT operates in is a highly competitive financial industry and if its financials were to become publicly available or available or accessible by its competitors it would cause irreparable harm to EPT's position in the industry. See Exhibit 2, Affidavit of Anthony S. Maley.

II. LEGAL STANDARD

A party seeking a preliminary injunction must show: (1) a substantial likelihood of prevailing on the merits; (2) it will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public

interest. *See Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 2003). Similarly a temporary restraining order may be issued where “specific facts in an affidavit... clearly show that immediate and irreparable injury, loss or, damage will result to the movant before the adverse party can be heard.” F.R.C.P. 65(b)(1)(A).

“[T]he primary goal of a preliminary injunction is to preserve the pre-trial status quo.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Therefore, “courts should be especially cautious when granting an injunction that requires the nonmoving party to take affirmative action.” *Id.*

III. ANALYSIS

A preliminary injunction and temporary restraining order is appropriate in the present case because Plaintiff will suffer irreparable injury unless such relief is granted.

Generally, in civil litigation a court may provide a protective order that may prohibit the disclosure of confidential commercial information or that such information be disclosed in a prescribed way. *F.R.C.P. 26(c)*. Similarly, the Right to Financial Privacy Act of 1978 (“RFPA”) protects customer’s financial records, maintained by financial institutions, from improper disclosure to officials or agencies of the federal government. *See 12 U.S.C. § 3401 et. seq.* In the present case, the FTC has subpoenaed confidential commercial information regarding EPT’s financial records, which under federal procedure and statute often require additional safeguards before they are discoverable or disclosed. While EPT is unable to discern what protections may be available to it due to Defendant FTS’s obscuration of the authority or specifics of its

subpoena it is likely that EPT is entitled to some protection of its highly confidential commercial financial information. Accordingly, Plaintiff is likely to prevail on the merits.

Furthermore, as discussed above and supported by the attached affidavit, Plaintiff will suffer irreparable harm if Defendant Citywide Banks produces information in response to a subpoena from Defendant FTC that is not either limited in scope or protected by certain measures.

The threatened injury to EPT if its personal and highly confidential financial information is disclosed and made public greatly outweighs the proposed damage the injunction would cause Defendants. Restraining Defendant Citywide Banks from disclosing the information would simply maintain the status quo and would not cause any affirmative action from or harm to Citywide Banks. Nor would the injunction cause significant harm to Defendant FTC. As discussed above, the FTC has been conducting its current investigation for over five years. Requiring the FTC to produce a *Subpoena Duces Tecum* concerning EPT and providing EPT time to review and respond to such would not take a significant amount of time, especially when compared to the already protracted investigation the FTC is conducting.

Finally, the public interest is served by issuance of the preliminary injunction and temporary restraining order requested in this action. Congress, through the Right to Financial Privacy Act of 1978 (“FRPA”) and the Gramm-Leach-Bliley Act (“GLBA”), have supported the right of customers of financial institutions to privacy in bank account

records. The public interest in upholding the rights of customers to privacy in their bank account records would be furthered by providing the requested injunction. Furthermore, any delay in the FTC's investigation would be minimal when compared to the entirety of the investigation; already over 5 years. Accordingly, a preliminary injunction and a temporary restraining order should be granted in this case.

IV. CONCLUSIONS

WHEREFORE, Plaintiff EPT respectfully requests a temporary restraining order be entered enjoining Citywide Banks from providing the Federal Trade Commission with any financial information related to Electronic Payment Transfer, LLC, unless and until EPT is provided the *Subpoena Duces Tecum* and given a reasonable opportunity to respond, object, or consent to the subpoena.

DATED this 28th day of June, 2016.

/s/Scotty P. Krob

Scotty P. Krob
Nathan L. Krob
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Greenwood Village CO 80111
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nathan@kroblaw.com
COUNSEL for
ELECTRONIC PAYMENT TRANSER, LLC

EXHIBIT 1



Dallas
Denver

June 24, 2016

Duncan E. Barber
720.488.5432
dbarber@sbbolaw.com

Via Email: jdorsey@eps-na.com
and Regular Mail

Electronic Payment Transfer LLC
ATTN: John Dorsey
6472 S. Quebec Street
Centennial, Colorado 80111-4628

Re: Subpoena Duces Tecum Issued to Citywide Banks

This law firm represents Citywide Banks ("**Citywide**"). The purpose of this letter is to advise you that the Federal Trade Commission has served Citywide with a Subpoena Duces Tecum for records belonging to Electronic Payment Transfer LLC. The date for disclosure is June 28, 2016. Unless prevented from doing so, as set forth below, Citywide will deliver these records to the Federal Trade Commission by 10:00 a.m. on June 28.

You may be entitled to prevent disclosure of these records. However, if you have not commenced legal proceedings to prevent Citywide from disclosing these records prior to the date set forth above and notified us of such proceedings, you will be deemed to have waived your rights to prevent such disclosure and Citywide will disclose the records described above to the Federal Trade Commission.

Citywide tries to protect the privacy of its customers, but is required to comply with valid legal demands for information made upon it. Because of the shortness of time, I am providing my cell phone number if you wish to contact me. That number is: 720-203-2852.

Very truly yours,

A handwritten signature in blue ink that reads "Duncan E. Barber".

Duncan E. Barber

cc: Citywide Banks
426715

EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Judge _____

ELECTRONIC PAYMENT TRANSFER, LLC)

)

Plaintiff,)

)

1:16-cv-_____

v.)

)

FEDERAL TRADE COMMISSION, and)

CITYWIDE BANKS, a Colorado corporation)

)

Defendants.)

AFFIDAVIT OF ANTHONY S. MALEY

ANTHONY S. MALEY, being first duly sworn, hereby states as follows:

1. I am the chief operating officer of Plaintiff Electronic Payment Transfer, LLC (“EPT”).

2. I have been affiliated with EPT and its related companies for more than 16 years in an executive position.

3. The Federal Trade Commission (“FTC”) initiated an investigation into a third-party to this suit approximately five years ago.

4. In the course of that investigation FTC has requested from EPT and its related companies documents, responses to interrogatories and depositions.

5. In response to these requests, EPT and its related companies have produced tens of thousands of pages of documents to the FTC.

6. Without prior notice, the FTC has now subpoenaed EPT's banking records entrusted to Citywide Banks.

7. On Friday, June 24, 2016, Citywide Banks sent EPT a letter to advise EPT that the Federal Trade Commission had served Citywide Banks with a Subpoena Duces Tecum for "records belonging to Electronic Payment Transfer, LLC."

8. Citywide Banks' letter further stated that "unless prevented from doing so" it would "deliver these records to the Federal Trade Commission by 10:00 a.m. on June 28, 2016," less than two business days from the time Citywide Banks notified EPT of the subpoena.

9. The letter did not include a copy of the Subpoena Duces Tecum.

10. EPT has yet to receive a copy of the subpoena indicating (1) precisely what information is being requested; (2) the basis for such request; (3) the case or authority under which the subpoena was issued; or (4) any other information regarding the subpoena. Without this basic information EPT cannot determine its legal rights to protect its personal financial information and to what extent the FTC may be entitled to EPT's personal financial information.

11. Disclosure of financial information related to EPT by Citywide Banks would likely irreparably harm EPT because EPT is in a highly competitive financial industry and its public dissemination and disclosure, without adequate protective measures, would irreparably damage EPT's position in the industry.

FURTHER AFFIANT SAYETH NOT.

DATED this 27th day of June, 2016.



Anthony S. Maley

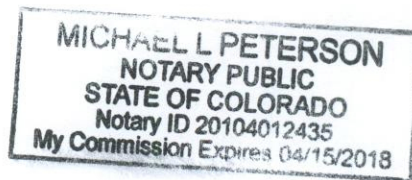
STATE OF COLORADO)
) SS
COUNTY OF ARAPAHOE)

The foregoing instrument was subscribed and sworn to before me this 27th day of June, 2016, by Anthony S. Maley. Witness my hand and official seal.



Notary Public

My Commission Expires: 04/15/2018



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Defendants.)

CERTIFICATE OF COUNSEL

The undersigned has conferred with counsel representing both Defendants in the present case. Plaintiff, to no avail, has requested the subpoena at issue from both Defendant Federal Trade Commission and Defendant Citywide Banks. Further, Plaintiff has provided counsel for both Defendants' a copy of the complaint, motion for temporary restraining order and preliminary injunction, and accompanying affidavit and proposed order. Due to the deadline set by the Defendant Citywide Banks of 10:00 a.m. today for the Plaintiff to initiate this matter, Plaintiff's counsel had not had the opportunity to confer with counsel for either Defendant as to whether they object to the injunctive relief being requested. Plaintiff's counsel will do so this morning and will advise the Court of those efforts.

DATED this 28th day of June, 2016.

/s/Scotty P. Krob

Scotty P. Krob

Nathan L. Krob

KROB LAW OFFICE, LLC

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COUNSEL for

ELECTRONIC PAYMENT TRANSER, LLC

**IN THE UNITED STATES DISTRICT COURT
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ELECTRONIC PAYMENT TRANSFER, LLC)

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CITYWIDE BANKS, a Colorado corporation)

)

Defendants.)

)

[PROPOSED] TEMPORARY RESTRAINING ORDER

This matter having come before the Court on Plaintiff Electronic Payment Transfer, LLC’s (“EPT”) Motion for Temporary Restraining Order and Preliminary Injunction, the Court having considered the pleadings, and otherwise being fully advised in the matter finds:

1. Defendant FTC has served a subpoena duces tecum or other process on Defendant Citywide Banks seeking disclosure of banking information related to Plaintiff EPS.

2. Both Defendant FTC and Defendant Citywide Banks have declined to provide a copy of the subpoena duces tecum or other process to Plaintiff EPT.

3. Without a copy of the subpoena duces tecum Plaintiff EPT cannot reasonably be expected to determine whether the subpoena was proper and whether protective measures should be sought.

4. Disclosure of EPT's commercial financial records to the FTC will injure EPT's commercial interests and inhibit its ability to compete against its competitors;

3. Such injury would be irreparable as the information would be permanently disclosed and unprotected from dissemination;

4. Neither Defendant will suffer any harm by the granting of the injunction.

3. This order was issued without notice as Defendants were responsible for the emergency nature in the action by failing to provide Plaintiff with a copy of the subpoena duces tecum and delaying in noticing the Plaintiff of such subpoena until two business days before the subpoena required compliance. Furthermore, Plaintiff's counsel attempted to confer with counsel for both Defendants' counsel.

Therefore, **IT IS HEREBY ORDERED THAT:**

Defendant Citywide Banks directly or through any agents is enjoined from providing, disclosing, transmitting or otherwise granting documents or information related to Electronic Payment Transfer, LLC to the Federal Trade Commission, unless and until EPT is provided the *Subpoena Duces Tecum* and, to the extent necessary, given 10 days to respond, object, or seek protective measures in connection with the subpoena.

DATED this _____ day of _____, 2016

BY THE COURT:

United States Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.:

ELECTRONIC PAYMENT TRANSFER, LLC

Plaintiff,

v.

FEDERAL TRADE COMMISSION, and
CITYWIDE BANKS, a Colorado corporation

Defendants.

INFORMATION FOR TEMPORARY RESTRAINING ORDER

Attorney for Plaintiff: KROB LAW OFFICE, LLC
Scotty P. Krob
Nathan L. Krob
Telephone number: (303) 694-0099

Attorney for Defendant Federal Trade Commission:
Michelle Chua
Telephone number: (202) 326-3248

Attorney for Defendant Citywide Banks:
Duncan E. Barber
Telephone number: (720) 488-5432

Concise statement as to type of claim: Injunction against disclosure of financial information

Jurisdiction (cite statute): 28 U.S.C. §§ 1331 and 1337(a)

Hearing: See D.C.COLO.LCivR.7.1A

Date Motion for Temporary Restraining Order filed: June 28, 2016

Estimated length of hearing: 1 hour

Request hearing be set for X today

Reason why immediate action is required: Defendant FTC's subpoena demands Defendant Citywide Banks produce Plaintiff's financial materials today, June 28, 2016

Notice:

Has opposing party and/or attorney been notified? No

If "no," state reason: due to time constraints in the subpoena.
Plaintiff is continuing to try to contact Defendants' counsel.

(Rev. 11/04)