

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

2003 DEC 1 10:33

In re

CASE NO. 6:03-bk-00299-ABB

ADVANCED TELECOMMUNICATION  
NETWORK, INC.,

Chapter 11

Debtor.

ADVANCED TELECOMMUNICATION  
NETWORK, INC., a New Jersey Corporation,

Adv. Pro. No. 03-122

Plaintiff,

vs.

DANIEL ALLEN, an individual and DAVID  
ALLEN, an individual,

Defendants.

**MEMORANDUM IN SUPPORT OF VERIFIED  
EMERGENCY, AND *EX PARTE* MOTION FOR: (I) TEMPORARY  
RESTRAINING ORDER; AND (II) MODIFIED PRELIMINARY INJUNCTION**

Plaintiff, ADVANCED TELECOMMUNICATION NETWORK, INC. (hereinafter "ATN"), hereby submits this Memorandum ("Memorandum") in Support of its Verified Emergency *Ex Parte* Motion For: (I) Temporary Restraining Order; and (II) Modified Preliminary Injunction (hereinafter, the "Motion"). In support of this Memorandum, ATN states the following:

**I. BACKGROUND**

**A. Procedural Background**

ATN filed this adversary complaint on April 28, 2003 (the "Complaint"). ATN sued Daniel W. Allen and David D. Allen (collectively, the "Defendants") seeking to recover the amount of \$9,576,495 (the "Assets") which was fraudulently transferred to Defendants.

Concurrently with the filing of the Complaint ATN filed its Verified Motion for Ex Parte Temporary Restraining Order and Preliminary Injunction (hereinafter, the "TRO Motion"). The Court denied ATN's initial request for a temporary restraining order, but instead set a date to

hear ATN's application for an initial preliminary injunction.

After granting several continuances at the behest of Defendants, the preliminary injunction hearing was held on October 1-2, 2003. The Court granted ATN's preliminary injunction application (hereinafter, the "Preliminary Injunction Order"), finding, among other things, that ATN had established a substantial likelihood that it would prevail on the merits of its claim that Defendants were the transferees of ATN's fraudulently transferred assets.

**B. Factual Background**

For purposes of brevity, ATN incorporates the allegations set forth in the Complaint and the TRO Motion, detailing the fraudulent transfer of ATN's assets to Defendants and their proclivity to shield assets. In the Preliminary Injunction Order and accompanying Memorandum Opinion dated October 15, 2003, the Court found that ATN transferred \$9,576,000 (hereinafter, the "Assets") to Defendants and their agents while ATN was insolvent and without reasonably equivalent value given to ATN in return.

At the preliminary injunction hearing, ATN alleged that a dissipation of the Assets would irreparably harm the bankrupt estate. The Court agreed that ATN established that it would suffer irreparable harm if the preliminary injunction was not granted, and that if the Assets were dissipated prior to a final adjudication in the adversary proceeding, the Court would be unable to fashion a final appropriate equitable remedy. See the Court's Memorandum Opinion dated October 15, 2003. Therefore, the Court ordered a freeze of the Assets pending final resolution of this matter.

Discovery in aid of execution of the Preliminary Injunction Order revealed that David Allen transferred approximately \$470,000 of the Assets into his Florida homestead after entry of the Preliminary Injunction. This action was a direct violation of the Preliminary Injunction Order which ordered Defendants not to "transfer, dispose, dissipate, conceal, encumber, assign or otherwise affect the Assets." See Preliminary Injunction Order dated October 15, 2003. Additionally, David Allen stated in his deposition that he had been advised by several of his attorneys to make the transfers of his share of the Assets during the time they had actual knowledge of the pendency of this action. See David Allen deposition dated November 10, 2003.

Similarly, Daniel Allen transferred his share of the Assets during the pendency of this action. Daniel Allen's deposition revealed that he had transferred the remaining portion of his share of the Assets, approximately over \$2,000,000, to an asset protection trust ("APT") that had been

established in the Cook Islands. See Daniel Allen deposition dated November 12, 2003. Daniel Allen further revealed that the APT had been established within thirty days of his having received the Assets in 1999, but had not been funded until some time after two continuances of the preliminary injunction hearing had been obtained by Defendants' counsel under the guise of requiring more preparation time.

## **II. REPATRIATION OF THE ASSETS IS MANDATED BY DEFENDANTS' FRAUDULENT CONDUCT**

Defendants have engaged in a systematic fraudulent scheme to deprive this Court of its jurisdiction over the *res* of the fraudulent transfers. The maxim that equity abhors fraud and should redress it where found is a central tenet of the American jurisprudence. See State ex rel. Burk v. Oklahoma City, 522 P.2d 612 (Okla. 1974). Even though Defendants had constructive and actual knowledge of this adversary proceeding for weeks, if not more than a month, prior to the initially scheduled preliminary injunction hearing, they waited until the day before the hearing to hire local counsel to represent them in this action. By doing so, they were virtually assured of a continuance. Having obtained two continuances, Defendants had sufficient time to begin the mechanism of shielding the Assets and attempting to put them beyond the jurisdiction of this Court.

As disclosed at the preliminary injunction hearing, Daniel Allen previously had sought to "asset protect" himself by transferring his interest in his homestead to his wife while he was being sued in the New Jersey shareholder litigation that is the basis from which the transfer of the Assets to the Allens emanated.

Additionally, Daniel Allen took the Assets in the face of pending litigation and while ATN was insolvent and facing numerous lawsuits and creditor claims. Upon receiving the Assets, Daniel Allen almost immediately established the APT in the Cook Islands, a jurisdiction that is notorious for being an asset haven for individuals seeking to thwart the claims of creditors and the United States judicial process.

Plaintiff submits that Defendants have engaged in a pattern of fraud as evidenced most recently by their blatant attempt to shield the Assets from the Court's jurisdiction when they were ordered not to do so by the Preliminary Injunction Order. While it is well within the purview of this Court to sanction such behavior, at a minimum an immediate order for repatriation of the Assets should be granted to maintain the dignity of this Court. See Chambers v. NASCO, Inc., 501 U.S. 32

(1991) (holding that a district court did not abuse its discretion in resorting to its inherent power to sanction bad faith conduct when litigant attempted to deprive court of jurisdiction by acts of fraud).

### III. LEGAL STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

Rule 65 of the Federal Rules of Civil Procedure, regarding the issuance of injunctions, is made applicable to adversary proceedings by Bankruptcy Rule 7065. Section 65(b) provides for the issuance of *ex parte*, without notice, issuance of temporary restraining orders when the applicant can demonstrate that immediate and irreparable injury will result prior to the adverse party being heard.

The elements for issuing a temporary restraining order are essentially the same as a finding for the issuance of a preliminary injunction under § 65. Under both, the movant must demonstrate that:

1. there is a substantial likelihood of success on the merits;
2. the temporary restraining order or preliminary injunction is necessary to prevent irreparable injury;
3. the threatened injury outweighs the harm that the temporary restraining order or preliminary injunction would cause to the non-movant; and
4. the temporary restraining order or preliminary injunction would not be averse to the public interest.

Univ. of Texas v. Camenisch, 451 U.S. 390, 392 (1981); Parker v. State Bd. of Pardon and Paroles, 275 F. 3d 1032, 1035 (11th Cir. 2001). The Court has already found that ATN has satisfied the elements for granting the initial preliminary injunction, and the Motion simply seeks to enforce the spirit of the Preliminary Injunction Order.

Unlike a preliminary injunction, a temporary restraining order may be issued *ex parte* and without notice pursuant to § 65(b). See United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972). The “*ex parte* request must be supported by a sworn documentary showing of ‘immediate and irreparable injury,’ as well as an explanation of why notice is impracticable or should not be required.” Marshall v. Reinhold Constr., Inc., 441 F. Supp. 685, 692 (M.D.Fla. 1977) (citation omitted). In the instant case, as more fully discussed below, Plaintiff will suffer immediate and irreparable injury if the Assets are not repatriated in that its ability to reorganize will be severely impaired.

An *ex parte* temporary restraining order “is indispensable to the commencement of an action when it is the sole method of preserving a state of affairs in which the court can provide effective

final relief.” Matter of Vuitton et Fils S.A., 606 F.2d 1, 4 (2d Cir. 1979), citing Developments in the Law of Injunctions, 78 Harv.L.Rev. 994, 1060 (1965). Defendants’ direct violation of the Preliminary Injunction Order and misrepresentations to the Court have hampered the Court’s ability to order any meaningful equitable remedies in this matter. An *ex parte* repatriation temporary restraining order must be entered in order to maintain the *status quo* as had been previously ordered by the Court.

#### **IV. THIS COURT HAS INHERENT POWER TO ORDER REPATRIATION**

##### **A. Provisional Remedies Preserving Status Quo in Equitable Actions are Appropriate**

This Court has implicitly acknowledged its power to issue a prohibitory injunction in this action seeking equitable relief by granting the Preliminary Injunction Order. Likewise, this Court has the same power to issue a mandatory injunction compelling Defendants to repatriate the Assets.

In an action grounded on equitable relief, it is appropriate to “preserve the *status quo* pending final hearing” and such power is “within the sound discretion of the trial court.” Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940), citing Prendergast v. N.Y. Telephone Co., 262 U.S. 43, 50-51(1923). The Court has already found that the issuance of the Preliminary Injunction Order was to preserve the *status quo* until final trial of this matter. See Memorandum Opinion dated October 15, 2003. If Defendants are allowed to eviscerate the Court’s power to preserve the *status quo* then the Court’s authority and dignity will be subject to the whims and fraudulent conduct of Defendants. A preliminary injunction is appropriate and mandated when it would be impossible for a court to make meaningful decisions on the merits without it. See Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5<sup>th</sup> Cir. 1980).

Moreover, a “preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” De Beers Consol. Mines v. US, 325 U.S. 212, 220 (1945). Since this Court can order repatriation of the Assets through a turnover order if it finds for Plaintiff on the merits of its case, then it is equally appropriate and within the power of the Court to order a repatriation of the Assets at this juncture.

##### **B. Inherent Power of Bankruptcy Court**

Section 105 of the Bankruptcy Code vests bankruptcy courts with the power to take any

actions necessary or appropriate to enforce or implement court orders, or to prevent an “abuse of process.” 11 U.S.C. § 105. In the instant case, a repatriation order would ensure that the Court’s authority to issue the Preliminary Injunction Order is not thwarted by Defendants actions, and the Preliminary Injunction Order is given its full and proper effect.

Moreover, as described above, Defendants have abused the Court’s procedural process in order to further their scheme of fraud. It can be inferred from Defendants’ conduct that they used the procedural mechanisms of the Court in obtaining the continuances in order to gain time to “asset protect” themselves. Section 105 specifically states that bankruptcy courts have the power to take necessary actions to prevent the abuse of process. Accordingly, this Court should ensure that Defendants are not allowed to subvert the intent of the Preliminary Injunction Order through their fraud and artifice.

Lastly, bankruptcy courts are at liberty to issue injunctions and have broad authority to employ their equitable powers to assure the orderly reorganization of the debtor. *See* 11 U.S.C. § 105; *In re Neuman*, 71 B.R. 567 (Bankr.S.D.N.Y. 1987). This Court has already found that the Assets are “likely to become part of ATN’s bankruptcy estate and critical to its reorganization.” Memorandum Opinion § 24. If Defendants are allowed to continue to flout the power of the Court such actions might impede the possibility of ATN’s successful reorganization. Clearly, Defendants should not be allowed to interfere with the orderly process of bankruptcy reorganization and the power of this Court to enter meaningful orders.

**V. ELEVENTH CIRCUIT HAS FOUND REPATRIATION OF ASSETS TO BE APPROPRIATE FOR ASSETS TRANSFERRED TO OFFSHORE TRUSTS**

Lawrence v. Goldberg (In re Lawrence), 279 F.3d 1294 (11<sup>th</sup> Cir. 2002), presented a situation where the defendant transferred his assets to a trust in the Jersey Channel Islands approximately two months before a large arbitration judgment was issued against him. Plaintiff subsequently filed for bankruptcy, and the trustee sought to compel turnover of the offshore trust’s assets. Defendant claimed that it was impossible to comply with the turnover order because he had relinquished control of the trust to an offshore trustee. The Eleventh Circuit Court of Appeals affirmed the bankruptcy court’s and district court’s findings that the defendant’s compliance with the repatriation order was not impossible, and that even if it were, the impossibility defense was invalid because the asserted impossibility was self-created. In re Lawrence, 279 F.3d at 1300.

Similarly, in the case *sub judice*, it can be inferred that Defendants transferred the Assets to an offshore trust in anticipation of losing on the merits. Lawrence firmly establishes the propriety of ordering a repatriation of assets when a defendant attempts to shield assets from its creditors and the court by transferring those assets to an offshore trust during the pendency of a legal action.

#### **VI. REPATRIATION ORDERS ARE APPROPRIATE AT PRELIMINARY STAGE OF TRIAL**

In a similar case to Lawrence, the Ninth Circuit Court of Appeals held that a district court properly entered a temporary restraining order ordering, among other things, a repatriation of assets that had been transferred to a Cook Islands trust. Federal Trade Commission v. Affordable Media, LLC, 179 F.3d 1228 (9<sup>th</sup> Cir. 1999). In Affordable Media the defendants had created a telemarketing Ponzi scheme whereby they collected millions of dollars from unsuspecting consumers. Upon the *ex parte* application for a temporary restraining order by the FTC, the district court entered the temporary restraining order pursuant to the Federal Trade Commission Act (the "Act"). The Ninth Circuit held that section 13(b) of the Act allowed the FTC to obtain a preliminary injunction where "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *Id.* at 1233, citing 15 U.S.C. § 53(b).

As discussed in section VIII(B) below, the FTC's statutory basis for obtaining preliminary injunctions can be likened to the requirements of Bankruptcy Rule 7065. Both require a court to find that the plaintiff establish a likelihood of success on the merits and to balance the equities. While the burden placed on the FTC in proving the necessity for a preliminary injunction is lighter than that of a private litigant, in the instant case, Plaintiff has already satisfied its burden according to the four prong Camenisch standard outlined above, and as such, it is appropriate for this Court to enter an *ex parte* temporary restraining order mandating repatriation of the Assets.

Lawrence referred to Affordable Media wherein the Court expressed great skepticism about a person sending millions of dollars overseas and not retaining any control over those assets. *In re Lawrence*, 279 F.3d at 1298. The Ninth Circuit held that the purpose for establishing and funding the offshore trusts was to frustrate the power of the court to enforce judgments. Federal Trade Commission v. Affordable Media, LLC, 179 F.3d at 1241. Similarly, it can be inferred that Defendants' motive for transferring the Assets to the Cook Islands was to

frustrate the power of the Court to render any meaningful decisions. Thus, due to Defendants' actions it is proper for the Court to enter a repatriation order at this juncture without necessitating a final disposition of this case. It should also be noted that both the Lawrence and Affordable Media Courts found that the defendants did not have an impossibility defense to the repatriation orders given that the impossibility of control of the trusts, if indeed they had no control, was self-created, and therefore, defendants in both cases were held in contempt of the respective repatriation orders. *See Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d 1294 *supra*, and *Federal Trade Commission v. Affordable Media, LLC*, 179 F.3d 1228 *supra*.

#### **VII. LAW OF FLORIDA AND OTHER JURISDICTIONS INVALIDATES SELF-SETTLED SPENDTHRIFT TRUSTS**

While Florida law recognizes the validity of spendthrift trusts it does not recognize the validity of self-settled spendthrift trusts. *See Menotte v. Brown (In re Brown)*, 303 F.3d 1261 (11<sup>th</sup> Cir. 2002). Daniel Allen testified in his deposition that he established the Cook Islands trust and that he was a beneficiary under the trust. *See Daniel Allen Deposition dated November 12, 2003*. It is manifestly evident that the APT was funded with the sole purpose to shield the Assets from ATN and this Court's jurisdiction. As the Lawrence Court stated in reference to self-settled spendthrift trusts, "the validation of such a provision would contravene public policy proscribing a debtor from shielding money placed in a Trust for his or her own benefit and to the prejudice of legitimate creditors." *Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d at 1299. The invalidity of Daniel Allen's APT further supports the appropriateness of ordering a repatriation of the Assets.

Likewise, the Restatement of Trusts states that self-settled spendthrift trusts are invalid. Restatement 2d Trusts § 156. This follows the generally accepted common law rule invalidating self-settled spendthrift trusts. *See Menotte v. Brown (In re Brown)*, 303 F.3d at 1266, fn 6 (wherein the Court lists several other state jurisdictions that follow this rule). This rule has been applied several times to debtors seeking to exclude certain assets from their bankruptcy estate by transferring these assets to offshore trusts. *See In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); and *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998).

In Portnoy, the debtor created a trust on the Isle of Jersey a few years after receiving a \$1 million loan from a bank and subsequently defaulted on that loan. The bank sought to collect its



judgment from this trust and the debtor then filed bankruptcy. The bankruptcy court held that New York's public policy against self-settled spendthrift trusts would be greatly offended if it allowed the debtor to shield his assets from his creditors while still retaining significant control over them. *In re Portnoy*, 201 B.R. at 700. The court further determined that the trust was created solely for debtor's benefit. *Id.* at 701.

Similarly, in the *Brooks* case, the debtor fraudulently transferred stock certificates to his wife, who subsequently placed them in a self-settled spendthrift trusts in the Jersey Channel Islands. The trustee then sought a turnover of these assets. Using reasoning similar to the analysis in *Portnoy*, the court concluded that it could not enforce a self-settled spendthrift trust without disrupting the principles of state and federal law. *In re Brooks*, 217 B.R. at 103. The trust was thus unenforceable under Connecticut law and its assets were included in the debtor's bankruptcy estate. Defendants in this action, similarly to the defendants in *Portnoy* and *Brooks*, have attempted to shield the Assets in contravention of the law and public policy, and therefore, must be ordered to repatriate the Assets.

#### **VIII. REPATRIATION ORDERS ARE ROUTINELY GRANTED THROUGH STATUTORY REMEDIES SIMILAR TO REMEDIES ALLOWED UNDER THE UNIFORM FRAUDULENT TRANSFER ACT.**

##### **A. Preliminary Injunctions Pursuant to UFTA are Specifically Authorized**

New Jersey's enactment of the Uniform Fraudulent Transfer Act specifically empowers a court to issue injunctions against further disposition by the transferee of the assets transferred. N.J.S. § 25:2-29(3)(a). In an action brought pursuant to Connecticut's enactment of UFTA, a district court held that a preliminary injunction was warranted to prevent the transfer of assets to an irrevocable spendthrift trust established by the defendant in Jersey, Channel Islands. *See Nastro v. D'Onofrio*, 263 F.Supp.2d 446 (D. Conn 2003). This Court similarly has the power to grant an injunction pursuant to UFTA and to order repatriation of the Assets. It should be noted that in *Nastro* the plaintiff was seeking an injunction to maintain the *status quo* pending a trial on the merits. *Id.* at 459. It cannot be gainsaid that an order for the repatriation of the Assets is imperative for maintaining the *status quo* in this action.

##### **B. Regulatory Agencies and Repatriation Orders**

Governmental regulatory agencies regularly obtain repatriation orders pursuant to statutory

provisions similar to UFTA. The Federal Trade Commission routinely seeks and is granted repatriation of asset orders both at the intermediate and final stages of trials. *See e.g. Federal Trade Commission v. Affordable Media, LLC*, 179 F.3d 1228 *supra*; *Federal Trade Commission v. Skybiz.com, Inc.*, 57 Fed.Appx. 374 (10<sup>th</sup> Cir. 2003); and *Federal Trade Commission v. Car Checkers of America, Inc.*, 1993 WL 56815 (D.N.J. 1993). Injunctions mandating repatriation of assets are sought by the FTC pursuant to several federal statutory provisions that do not specifically provide for repatriation orders but allow for injunctions that are in the public interest. *See e.g.* 15 U.S.C. § 53 and 15 U.S.C. § 45.

The Securities and Exchange Commission also regularly obtains repatriation orders based on the preserving the public interest. *See e.g. Securities and Exchange Commission v. Marino*, 29 Fed.Appx. 538 (10<sup>th</sup> Cir. 2002); *Securities and Exchange Commission v. Aremissoft Corp.*, 202 WL 1905952 (S.D.N.Y. 2002); and *Securities and Exchange Commission v. Bilzerian*, 131 F.Supp.2d 10 (D.D.C. 2001). Similarly to the FTC, injunctions mandating repatriation of assets are sought by the SEC pursuant to several federal statutory provisions that do not specifically provide for repatriation orders but do allow for injunctions that are in the public interest. *See e.g.* 15 U.S.C.A. § 77t and 15 U.S.C.A. § 78u.

The public interest is also served by the bankruptcy aim of promoting a successful reorganization effort and thereby assuring the orderly payment of creditors. *See N.L.R.B. v. Bildisco and Bildisco*, 456 U.S. 513 (1984) (successful reorganization serves the public interest); *O'Donnell v. Royal Business Group, Inc. (In re Oxford Homes, Inc.)*, 180 B.R. 1 (Bankr. D. Me. 1995) (recognizing the public interest in bankruptcy laws aimed at recovering fraudulently transferred assets and distributing them among creditors). As discussed above, preserving the fraudulently transferred Assets is crucial for ATN's reorganization efforts. As such, repatriating the Assets serves the public interest and should be mandated by the Court.

### CONCLUSION

As described above, ATN has conclusively satisfied the four requirements for temporary and preliminary injunctive relief. ATN is entitled to the equitable relief of an order mandating the repatriation of the Assets. Defendants have demonstrated their proclivity to take actions to impair the jurisdiction of the Court over this matter and to illegally shield assets. For these reasons, the Court must immediately issue temporary restraints and a modified preliminary injunction to preserve the *status quo*.

Dated this 1<sup>st</sup> day of December 2003.

Respectfully submitted,



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