

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-81101-CIV  
United States District Judge Hurley  
Magistrate Judge Hopkins

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

FIDELITY ATM, INC., a Florida  
corporation also d/b/a Fidelity Bankcard;

STEINBERG GROUP, INC., a Florida  
corporation;

ADAM STEINBERG, individually and as an  
officer or director of Fidelity ATM, Inc.;

ALLISON STEINBERG, individually and as an  
officer or director of Fidelity ATM, Inc.;

ANDREW STEINBERG, individually and as  
an officer or director of Fidelity ATM, Inc. and  
Steinberg Group, Inc.; and

STEPHEN DUFFIE, individually and as  
an officer or director of Fidelity ATM, Inc.,

Defendants.

---

**DEFENDANTS, ANDREW STEINBERG AND ALLISON STEINBERG'S,  
MOTION TO MODIFY ASSET FREEZE TO PERMIT PAYMENT OF LIVING  
EXPENSES AND ATTORNEY'S FEES**

Defendants, ANDREW STEINBERG and ALLISON STEINBERG, by and  
through undersigned counsel, move for entry of an order modifying or partially  
dissolving the Stipulated Preliminary Injunction With Asset Freeze, Appointment Of  
Receiver And Other Equitable Relief dated January 6, 2007 in order to permit them to

pay necessary basic living expenses and reasonable attorney's fees from frozen assets on the following grounds:

**I. Procedural History And Factual Background**

1. This is a civil enforcement action seeking injunctive and other equitable relief, including disgorgement, based on defendants' allegedly deceptive or unfair trade practices in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 53(b) and 57b and the trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Franchise Rule"), 16 C.F.R. Part 436.

2. This case was commenced with the filing of the complaint, along with plaintiff's motion for an ex parte temporary restraining order and supporting papers on November 29, 2006. That same day, this Court entered an Ex Parte Temporary Restraining Order With Other Equitable Relief And Order To Show Cause (the "T.R.O.") that, *inter alia*, froze the defendants' assets.

3. On December 12, 2006, the plaintiff filed a First Amended Complaint that joined ALLISON STEINBERG as a party defendant.

4. On January 6, 2007, this Court entered a consent order titled Stipulated Preliminary Injunction With Asset Freeze, Appointment Of Receiver And Other Equitable Relief (the "Stipulated Preliminary Injunction") that, with certain modifications, continued the T.R.O's asset freeze.

5. The asset freeze, which is set forth in section II of the Stipulated Preliminary Injunction, prohibits the defendants from, *inter alia*, selling or encumbering any assets whatsoever and applies to "(1) all assets of any of the Corporate Defendants or Individual

Defendants as of November 29, 2006 and (2) assets obtained after that date if the assets are derived from the conduct alleged in the Commission's Complaint."

6. In paragraph 10 of the Stipulated Preliminary Injunction, the defendants expressly reserved "the right to apply to the Court for an Order modifying this preliminary injunction to permit them to pay reasonable, necessary and ordinary living expenses and/or attorney's fees and costs from frozen assets...."

7. On January 19, 2006, undersigned counsel asked plaintiff's counsel whether the plaintiff would agree to release six months of living expenses for defendants, ANDREW STEINBERG and ALLISON STEINBERG, from frozen funds and the plaintiff refused the same day.

8. On December 14, 2006, Carl F. Schoepl, Esq., the court-appointed equity receiver for the corporate defendants, served his First Report. The First Report, on page 9, lists six bank accounts in the names of the corporate defendants in the custody of the receiver with balances totaling \$594,097.65. In addition, the First Report discusses, at pages 5-6, personalty titled in the names of defendants, ANDREW STEINBERG and/or ALLISON STEINBERG, with an estimated value of \$467,457.00, including \$91,457.00 in cash in a brokerage account at Charles Schwab & Co., Inc. titled in the name of defendant, ANDREW STEINBERG.

9. Section VI of the Stipulated Preliminary Injunction required the defendants to submit to the plaintiff financial statements listing all of their assets and liabilities as well as ongoing living expenses under penalty of perjury. True and correct copies of the financial statements submitted by defendants, ANDREW STEINBERG and ALLISON STEINBERG, are being conventionally filed in paper or hard copy format as Composite

Exhibit A contemporaneously with this motion because attachments to the financial statements could not legibly be scanned into electronic format.

10. In the immediate aftermath of the asset freeze, defendants, ANDREW and ALLISON STEINBERG, have received some financial assistance from their family in order to pay living expenses as well as attorney's fees. However, they have come to a point where they cannot count on any further financial assistance from friends or family.

11. Defendant, ANDREW STEINBERG, began trying to start-up a new business in early January of this year, but this venture has generated little or no income to date. He is currently actively engaged in a search for full-time employment.

12. Defendant, ALLISON STEINBERG, is the stay-at-home mother of a 17-month old toddler named Aidan. Although she has a law degree, her re-entry into the workplace will require at least 3 months and possibly much more. In addition, in order to effectively search for full-time employment, she will need to pay for day-care for her son.

13. As reflected in Item 17 of their financial statements, ANDREW and ALLISON STEINBERG'S, average monthly living expenses for the six months leading up to the filing of this lawsuit totaled \$13,978.53, which includes, among other ordinary, necessary and reasonable living expenses, \$5,459.39 for the mortgage and insurance on their home.

14. Because of the asset freeze, defendants, ANDREW STEINBERG and ALLISON STEINBERG, cannot afford to pay their reasonable, ordinary and necessary living expenses or attorney's fees that will likely be incurred in the near future in defending this action. They have no source of funds from which to pay living expenses for the next 3-6 months other than frozen funds in the receiver's custody.

15. The following assets subject to the asset freeze and owned by defendants, ANDREW STEINBERG and/or ALLISON STEINBERG, were acquired with funds that were not directly or indirectly derived from or otherwise related to the deceptive or unfair trade practices that form the subject of this lawsuit:

- A. \$7,457.07 deposited on November 22, 2006, by defendant, ALLISON STEINBERG, into her account at Wachovia Bank, and derived from an escrow refund she received after the sale of her former home;
- B. \$30,000 paid by First Equity Group, Inc. to defendant, ANDREW STEINBERG, in November of 2005, representing a commission that he earned for participating as a real estate broker/salesperson in connection with the purchase of his current home.
- C. Defendant, ALLISON STEINBERG'S, earrings (purchased in April or May of 2004 for approximately \$3,000) and engagement ring (purchased in February of 2004 for \$10,000) were acquired before the corporate defendants ever existed (FIDELITY ATM, INC. was formed on 4/27/04 and STEINBERG GROUP, INC. was formed on 12/30/04).

16. Because the aforementioned assets, valued at approximately \$50,000, are in no way traceable to or derived from the unfair or deceptive trade practices alleged in the complaint, the Court should, in weighing the equities of this motion, exercise its sound discretion in favor of releasing, at minimum, at least these assets from the freeze to pay living expenses. Defendants, ANDREW and ALLISON STEINBERG, are essentially indigent at the present time in sense that they have no source of recurring income with which to pay for the necessities of life, including the mortgage and

insurance on their home as well as utilities, food, transportation and medical insurance expenses. Based upon their sworn financial affidavits, \$50,000 should defray approximately five months of ANDREW and ALLISON STEINBERG'S reasonable living expenses. Within such period of time, they will at least have an opportunity to obtain full-time employment without the additional burden of worrying whether they can keep a roof over their heads and those of their minor child.

## **II. Memorandum Of Law**

### **A. Legal Standard For Interpreting Consent Orders.**

17. "Consent orders are interpreted as contracts and are to be construed only by reference to the 'four corners' of the order itself. Reference to extrinsic evidence, such as the circumstances of formation, is permissible only if the order is ambiguous in some respect." *Robinson v. Vollert*, 602 F.2d 87, 92 (5<sup>th</sup> Cir. 1979). "[A] consent order is not to be construed by reference to the purposes of the parties because parties to a consent decree generally have opposing purposes." *Id.* citing *U.S. v. Armour & Co.*, 402 U.S. at 681-82, 91 S. Ct. 1752, 29 L. Ed. 2d at 263.

### **B. No Waiver Of Right To Modify Preliminary Injunction.**

18. Defendants, ANDREW and ALLISON STEINBERG, clearly bargained for and expressly reserved, in paragraph 10 of the Stipulated Preliminary Injunction, "the right to apply to the Court for an Order modifying this preliminary injunction to permit them to pay reasonable, necessary and ordinary living expenses and/or attorney's fees and costs from frozen assets...." Accordingly, the plaintiff cannot now argue that they waived their right to modify the injunction in order to pay living expenses and attorney's fees.

**C. This Court Has Inherent Equitable Discretionary Authority To Modify Injunctions.**

19. The Fifth Circuit<sup>1</sup> discussed the legal standard governing the modification or dissolution of injunctions in *Collum v. Edwards*, 578 F.2d 110, 112-113 (5<sup>th</sup> Cir. 1978): “The judge’s broad and flexible equitable powers govern the granting and dissolution of permanent as well as temporary injunctions. [citations omitted] The right of continuance of a preliminary injunction is far from absolute. The dissolution of a preliminary injunction is a matter within the sound discretion of the Trial Court and can only be set aside for an abuse of discretion.”

20. It is settled law that a district court has broad authority to order an asset freeze during the pendency of a civil enforcement action seeking relief in equity. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11<sup>th</sup> Cir. 1984). “A request for equitable relief invokes the district court’s inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief.” *Levi Strauss & Co. v. Sunrise Intl. Trading, Inc.*, 51 F.3d 982, 987 (11<sup>th</sup> Cir. 1995); see also, *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367 (S.D.Fla. 2006) (“A district court may exercise its full range of equitable powers, including an asset freeze, to preserve sufficient funds for the payment of a disgorgement award. ... Freezing assets is a well accepted equitable remedy employed to ‘preserve the status quo’ and is proper in actions arising under the Securities Act.”).

**D. Legal Standard For Releasing Frozen Funds For Living Expenses.**

---

<sup>1</sup> Decisions of the Fifth Circuit decided prior to the close of business on September 30, 1981 are binding precedent in the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11<sup>th</sup> Cir. 1981).

21. The U.S. District Court for the Western District of Virginia summarized the legal standard applied in cases that have dealt with requests for living expenses in *SEC v. Dowdell*, 175 F. Supp. 2d 850, 854 (W.D.Va. 2001) as follows:

**Courts which have addressed requests for living expenses look for evidence of the defendant's overall assets or income. See *SEC v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 2001 WL 1346005 (S.D.N.Y. 2001). Where the courts have denied such requests, the defendants were found to have other sources of income or were requesting funds for luxuries, not necessities. See *id.* (finding that the defendant had voluntarily waived a \$15,000 per month salary and was seeking money for a nanny, housekeeper, handyman and nurse); see also *SEC v. Coates*, 1994 U.S. Dist. LEXIS 11787, 1994 WL 455558 (S.D.N.Y. 1994) (finding defendant failed to tell the court that the receiver was already paying monthly salaries to him and his family totaling almost \$12,000 and that budget included lawn and pool service).**

Since there was no evidence presented to indicate that the defendants had alternate sources of income or were seeking funds for luxuries, the court granted defendant Dowdell's motion to unfreeze assets in the amount of \$4,000 per month for living expenses. *Id.* at 855.

**E. Legal Standard For Releasing Frozen Funds For Attorney's Fees.**

22. Although it is clear that defendants, ANDREW and ALLISON STEINBERG, are not *entitled* to the payment of attorney's fees from frozen assets, it is well-settled that a district court, in the exercise of its broad equitable discretion, *may* allow the payment of reasonable attorney's fees from frozen assets and set limits upon their release prior to the entry of final judgment. See *SEC v. Dowdell*, 175 F. Supp. 2d 850, 855-56 (W.D.Va. 2001) citing *SEC v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427 (S.D.N.Y. 2001) and *SEC v. International Loan Network, Inc.*, 770 F. Supp. 678, 680 (D.D.C. 1991); see also *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7<sup>th</sup> Cir. 2002); *FTC v. Amy*

*Travel Service, Inc.*, 875 F.2d 564, 575-76 (7<sup>th</sup> Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1032 (7<sup>th</sup> Cir. 1988).

23. ANDREW and ALLISON STEINBERG have incurred \$29,080.00 in legal fees through January 31, 2007 in defending this civil enforcement action. Their parents have, to date, paid \$20,000 on their behalf towards the sum owed, leaving a balance owed of \$9,080.00 as of January 31, 2007. True and correct copies of the statements for legal services rendered by the law firm of Cove & Associates, P.A., will be filed under seal (or redacted) if the reasonableness of the fees incurred to date is disputed by the plaintiff in its response to this motion or upon the request of this Court.

24. It is anticipated that ANDREW and ALLISON STEINBERG will incur an additional \$15,000 (50 hours at \$300/hr.) in attorney's fees within the next three to six months in order to be able to continue paying experienced counsel to represent their interests in this complex legal matter, conduct limited discovery and engage in intensive negotiations with the goal of reaching a global settlement, thereby conserving scarce resources for all parties and this Court.

25. The need for competent legal representation in an action of this nature was succinctly stated by the district judge in *Dowdell*, 175 F. Supp. 2d 850, 854, 856

(W.D.Va. 2001):

**This is a complex legal matter, and lawyers are essential to the presentation of issues related to it. Therefore, the court is ordering the respective attorney's to file with the court, within the next ten days, reasonable estimates of the fees necessary to take them through the hearing on the preliminary injunction. If the estimates are reasonable, the court will approve them.**

**F. Because This Court Cannot Order Disgorgement Of Profits Obtained Without The Aid Of Any Wrongdoing, Any Assets Not Causally Related To Wrongdoing Should Be Made Available As A Potential Source From Which To Pay Reasonable Living Expenses And Attorney's Fees**

26. In *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11<sup>th</sup> Circuit 1999), the Eleventh Circuit held that “the district court may not disgorge profits obtained without the aid of any wrongdoing,” then went on to find that the district court had abused its discretion by ordering the disgorgement of profits for a period during which there was no record-evidence of fraudulent activity. Defendants, ANDREW and ALLISON STEINBERG, have denied any wrongdoing in their answer. However, even if this Court were to find them liable for the deceptive and unfair trade practices alleged in the amended complaint after a full trial on the merits, it cannot order them to disgorge profits unrelated to the unlawful trade practices (or, by logical extension, assets acquired prior to or not derived from) the unlawful trade practices, any such unrelated assets should be made available during the pendency of this action as a source for the payment of living expenses and attorney’s fees prior to entry of final judgment, upon proper application.

**G. Manifest Injustice Will Result Unless Mr. And Mrs. Steinberg Can Pay Their Short-Term Basic Living Expenses And Have A Meaningful Opportunity To Defend Themselves**

27. Besides this Court’s inherent equitable discretion, another legal basis on which to permit the payment of reasonable living expenses and attorney’s fees from frozen funds or assets is “manifest injustice” pursuant to Federal Rule Of Civil Procedure 60(b), which provides, in pertinent part, as follows:

**(b) MISTAKES; INADVERTENCE, EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a**

**prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment....**

In *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1371 (S.D.Fla. 2006), judge Marra of this Court denied defendant Lauer's motion to modify the asset freeze in part because by agreeing to the freeze without reservation, he waived any argument that the freeze was improper. Judge Marra, however, specifically left open the possibility that in an appropriate case, a defendant could challenge the scope of the freeze based in order to correct a manifest injustice.<sup>2</sup>

28. Manifest injustice will result if defendants, ANDREW and ALLISON STEINBERG, cannot adequately protect their interests in this lawsuit or pay for the basic necessities of life during the next three to six months. Simply put, if they do not pay their mortgage, it is a virtual certainty that within a matter of 2-3 months they will be facing a mortgage foreclosure action in addition to this lawsuit, potentially leaving them homeless and impecunious before they ever get a chance to tell their side of the story at trial.

### **III. Conclusion**

Defendants, ANDREW and ALLISON STEINBERG, are unemployed with a toddler to care for, have no sources of steady income at the present time and are not seeking funds for luxuries. Instead, they seek the release from the asset freeze of Fifty Thousand Dollars (\$50,000) (\$10,000 per month for 5 months) in order to pay necessities such as the mortgage and insurance on their home, utilities, food, transportation and other ordinary and reasonable expenses. In addition, they seek to release from the asset freeze \$24,080, comprised of \$9,080 to pay attorney's fees incurred through January 31, 2007

---

<sup>2</sup> "Lauer-has not shown an intervening change in controlling law, newly discovered evidence,-or a need to correct a clear error or manifest injustice.—*Fed.R.Civ.P. 60(b)*."

plus an additional \$15,000 to pay attorney's fees that will likely be incurred in defending this lawsuit within the next 3-4 months.

WHEREFORE defendants, ANDREW STEINBERG and ALLISON STEINBERG, request the entry of an order modifying the Stipulated Preliminary Injunction With Asset Freeze, Appointment Of Receiver And Other Equitable Relief dated January 6, 2007 so as to release from the asset freeze \$50,000 (\$10,000 per month for 5 months) for living expenses and \$24,080 for attorney's fees.

**Unsworn Declaration Under Penalty Of Perjury Pursuant To 28 U.S.C. § 1746**

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 5<sup>th</sup> day of February 2007.

s/Andrew Benjiman Steinberg

**Unsworn Declaration Under Penalty Of Perjury Pursuant To 28 U.S.C. § 1746**

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 5<sup>th</sup> day of February 2007.

s/Allison Beth Steinberg

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of February 2007 I filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

COVE & ASSOCIATES, P.A.  
Counsel for defendants, Fidelity  
ATM, Inc., Steinberg Group, Inc.,  
Adam Steinberg, Andrew Steinberg,  
Allison Steinberg and Stephen  
Duffie  
225 South 21<sup>st</sup> Avenue  
Hollywood, FL 33020  
Telephone: (954) 921-1121  
Facsimile: (954) 921-1621  
E-mail: hel@covelaw.com

By: s/Hector E. Lora, Esq.  
Fla. Bar No. 0755842

**Service List**

(via transmission of Notices of Electronic Filing generated by CM/ECF)  
Richard McKewen, Esq.  
J. Ronald Brooke, Jr., Esq.  
Deborah Matties, Esq.  
Counsel for plaintiff, Federal Trade Commission  
600 Pennsylvania Ave., N.W., H-286  
Washington, DC 20580  
Tel. no.: (202) 326-3071 (R. McKewen); (202) 326-3484 (J.R. Brooke); (202)  
326-2047 (D. Matties);  
Fax no.: (202) 326-3395  
E-mail address: rmckewen@ftc.gov; jbrooke@ftc.gov; dmatties@ftc.gov

(via transmission of Notices of Electronic Filing generated by CM/ECF)  
Carl F. Schoeppl, Esq.

Receiver for corporate defendants  
Fidelity ATM, Inc. and Steinberg Group, Inc.  
Schoeppl & Burke, P.A.  
4800 N. Federal Highway, Suite 207-D  
Boca Raton, FL 33431  
Tel. no.: (561) 394-8301  
Fax no.: (561) 394-3121  
E-mail address: [carl@schoeppleburke.com](mailto:carl@schoeppleburke.com)