

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

DAZZLE SOFTWARE II, LLC,
a Michigan limited liability company, and
L AND L GOLD ASSOCIATES, INC., a
Michigan corporation, d/b/a **AMERICAN
JEWELRY AND LOAN,**

Plaintiffs,

v.

JOHN KINNEY, an individual, and
**CENTRAL OHIO SCRAP METAL
CO.,** an Ohio corporation, d/b/a
LEV'S PAWN SHOP,

Defendants.

Case No.

Dist. Judge

Mag. Judge

**EX PARTE APPLICATION FOR SEIZURE OF
COMPUTER STORAGE DEVICES AND COMPUTERS
PURSUANT TO THE DEFEND TRADE SECRETS ACT OF 2016**

Plaintiffs Dazzle Software II, LLC (“Dazzle II”) and L and L Gold Associates, Inc., d/b/a American Jewelry and Loan (“AJL”), by their undersigned counsel, submit this *ex parte* application pursuant to the Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836 *et seq.*, seeking seizure of computer storage devices and computers in the possession, custody and control of Defendants John Kinney (“Kinney”) and Central Ohio Scrap Metal Co., d/b/a Lev’s Pawn Shop (“Lev’s Pawn Shop”). In support of this application, Plaintiffs state the following, as set forth in greater detail in Plaintiffs’ Verified Complaint and Jury Demand, the Declaration of Mark St. Peter and the accompanying brief:

1. This action involves a massive theft of Plaintiffs’ trade secrets and other intellectual property by Defendants and a pattern of deception and trickery regarding their wrongful conduct, which has been unequivocally established by forensic analysis of the computer from which Plaintiffs’ intellectual property was stolen.

2. As set forth in Plaintiffs’ Verified Complaint and Jury Demand (the “Verified Complaint”) filed in conjunction with this application, Plaintiff Dazzle II is the present owner of all assets of a business formerly operated by the late Derek Best, who, many years ago, developed software (the “Dazzle Software”) used in the pawn brokerage industry to assist pawn brokers in operating their businesses. The software permits pawn brokers, who are heavily regulated under federal and

state laws, to keep track of and manage information that is critical to their operations and to their compliance with applicable legal requirements, such as customer lists, inventory lists, outstanding loan balances, aggregate financial data and much more. *See* Verified Complaint, ¶¶ 8-21.

3. Until his death on February 17, 2016, Mr. Best operated his business by himself, singlehandedly providing software maintenance, distributing licenses necessary to access and operate the Dazzle software and providing other services to his pawn broker customers. Verified Complaint, ¶¶ 13-14. ALJ was one of Mr. Best's customers during his lifetime and has been using the Dazzle Software for many years. Verified Complaint, ¶¶ 11, 19.

4. Defendant Lev's Pawn Shop was also a customer of Mr. Best and a user of the Dazzle Software. Verified Complaint, ¶ 24.

5. Chaos ensued among Mr. Best's customers when he unexpectedly passed away because there was no one with the knowledge and/or inclination necessary to provide the services his customers had come to depend upon, including dispensing the licenses required to allow continued access and use of the Dazzle Software. Verified Complaint, ¶¶ 16-18.

6. State court litigation initiated after Mr. Best's death culminated in a transaction whereby Dazzle II purchased all of the assets formerly owned by Mr. Best and his entities, including, among other things, the Dazzle Software, second

generation software that was in development and was on the verge of being released at the time of Mr. Best's death and all of the computers and data Mr. Best used to operate the business. Verified Complaint, ¶ 20.

7. The state court litigation also resulted in the entry of an injunction that required Mr. Best's widow, LiPing Liufu Best ("Mrs. Best") to turn over to a third-party the computers Mr. Best used to operate the business, for the purpose of allowing continued maintenance of the Dazzle Software so that Mr. Best's customers could continue to use it, at least on a temporary basis, until a more permanent solution could be found. Verified Complaint, ¶ 21.

8. Mr. Best used three computers in the operation of his business. Mrs. Best, however, initially turned over only two of them and maintained possession of the third (referenced in the Verified Complaint as the "Third Computer"). Verified Complaint, ¶ 22.

9. As detailed in the Verified Complaint, Kinney traveled from Columbus, Ohio to Farmington Hills, Michigan, contacted Mrs. Best and got consent from her to access the Third Computer for the limited purpose of obtaining a temporary license that would allow Lev's Pawn Shop to continue using the Dazzle Software in its business operations, without interruption. Verified Complaint, ¶¶ 25-26.

10. Kinney, however, saw an opportunity to acquire much more. Instead of simply obtaining the temporary license authorized by Mrs. Best, Kinney copied the *entire contents of the Third Computer*. Verified Complaint, ¶ 27.

11. As further detailed in the Verified Complaint, by imaging the Third Computer in its entirety, Kinney obtained reams of copyrighted materials, trade secrets and other confidential and proprietary information, including the Dazzle Software programs, all of the components that comprise the second generation Dazzle Software that was due to go live right before Derek Best died, a processor for generating temporary licenses or access codes to allow for the continued use and operation of the Dazzle Software and AJL's entire database for its business operations, as well as the databases of other pawn broker businesses. Verified Complaint, ¶¶ 27-28, 38-39.

12. Dazzle II demanded the safeguard and return of its intellectual property, making it perfectly clear to Kinney that all IP earlier owned by Mr. Best had been transferred to Dazzle II. Verified Complaint, ¶ 30.

13. Instead of complying with the request for return of the property, Kinney lied about his actions and engaged in tomfoolery aimed at deceiving Plaintiffs and reinforcing Kinney's illegal acts and motives.

14. Regardless, as explained further below and in the Verified Complaint, Plaintiffs later gave Kinney yet another chance to return the property and avoid costly and protracted litigation, only to be deceived yet again.

15. Kinney's duplication of the contents of the Third Computer left an indisputable electronic trail. A forensic examination subsequently conducted by an expert engaged by Plaintiffs substantiated that Kinney had, in fact, copied all of the files and data contained on the Third Computer to two external storage devices. Verified Complaint, ¶ 30; Declaration of Mark St. Peter ("St. Peter Declaration"), ¶¶ 11-19. This examination also identified the exact brands and serial numbers of the devices Kinney used to duplicate the contents of the Third Computer. St. Peter Declaration, ¶¶ 11-12. Plaintiffs thus had (and have) concrete proof of the theft and could specifically identify the devices Kinney used to misappropriate Plaintiffs' intellectual property.

16. When confronted with the irrefutable evidence of his theft, Kinney confessed that he indeed intended to obtain a complete copy of the contents of the Third Computer, but claimed that his attempted duplication was interrupted, that he did not obtain a complete copy and that he left Michigan with only a temporary license that would allow him to continue to operate the Dazzle Software. Verified Complaint, ¶ 32. But, as noted, Kinney's representations were belied by the electronic trail he left behind.

17. Kinney's obfuscations continued when his counsel later delivered to Plaintiffs what were represented to be the exact external storage devices that Kinney had used in his purported "attempt" to copy the contents of the Third Computer. Verified Complaint, ¶ 35. It was further represented that these devices had been wiped clean two days after Kinney "attempted" the copying (or on Monday March 7, 2016), that they contained no intellectual property of either of the Plaintiffs and that Kinney had not used, or transferred to any other device or to any third-party, any of the contents of the devices. *Id.* Thus, according to Kinney, he had done absolutely nothing wrong and had obtained from the Third Computer only that which he had been authorized to take by Mrs. Best, *i.e.*, a temporary license to facilitate operation of the Dazzle Software.

18. Kinney's attempt to deceive Plaintiffs was, however, quickly exposed. Examination of the devices delivered to Plaintiffs revealed that they were, in fact, not the same devices that Kinney had used to copy the contents of the Third Computer. Verified Complaint, ¶ 36; St. Peter Declaration, ¶¶ 22-30.

19. The recently enacted Defend Trade Secrets Act of 2016 ("DTSA"), 18 U.S.C. § 1836, permits a party to file an *ex parte* application, supported by affidavit or verified complaint, for an "order requiring seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(2)(A)(i). Based on the facts stated in

this application and in the Verified Complaint, the St. Peter Declaration and the arguments set forth in the accompanying brief, entry of a seizure order against Defendants is warranted.

WHEREFORE, Plaintiffs respectfully request that the Court grant this application and enter an order:

(1) Directing the U.S. Marshal to seize from Defendants, at Lev's Pawn Shop's business located at 3446 East Main Street, Columbus, Ohio 43123, and all such other address where the subject property may be found, and deliver to the Court the following computer storage devices:

- (a) Western Digital WD My Passport 0820 USB Device, bearing serial/identification number 575845314141335438383337;
- (b) ADATA USB Flash Drive ISB Device bearing serial/identification number 11a1713082120014;
- (c) UFD USB Flash Drive USB Device bearing serial/identification number aawcrfc21gqwena9 ((a), (b) and (c) are collectively referred to as the "Storage Devices");

(2) Directing the U.S. Marshal to seize from Defendants, at Lev's Pawn Shop's business located at 3446 East Main Street, Columbus, Ohio 43123, and all such other address where the subject property may be found, and deliver to the Court any computers or computer storage devices that may have been used by

Defendants to store, copy, review, disseminate or otherwise access any of the data copied by Defendants from the Third Computer to any or all of the Storage Devices;

(3) Enjoining Defendants from any further copying, reviewing, disseminating, reverse engineering, using or otherwise accessing any of the data copied by Defendants from the Third Computer to any or all of the Storage Devices.

(4) Granting such additional or other relief as the Court deems appropriate under the circumstances, laws and applicable statutes.

Respectfully submitted

JAFFE, RAITT, HEUER & WEISS, P.C

Dated: June 14, 2016

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**BRIEF IN SUPPORT OF EX PARTE APPLICATION FOR SEIZURE OF
COMPUTER STORAGE DEVICES AND COMPUTERS PURSUANT TO
THE DEFEND TRADE SECRETS ACT OF 2016**

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ISSUES PRESENTED

- I. Should an order be entered against Defendants requiring the seizure and impoundment of computer storage devices and association computers where Defendants engaged in widespread theft of Plaintiffs' trade secrets and other intellectual property and the requirements for issuance of such an order under the DTSA are satisfied?

Plaintiffs answer "yes."

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STATEMENT OF FACTS

For their Statement of Facts, Plaintiffs rely upon, and hereby incorporate by reference, the facts set forth in the Verified Complaint, the St. Peter Declaration and the application accompanying this brief.

ARGUMENT

I. Applicable Provisions of the Defend Trade Secrets Act of 2016

The Defend Trade Secrets Act of 2016 (“DTSA”), 18 U.S.C. § 1836, provides a basis under federal law for bringing a trade secret misappropriation claim with respect to a trade secret that is “related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). It mirrors the provisions of the Uniform Trade Secret Act in many respects, but it goes further and provides a mechanism that allows for ex parte seizures of property to prevent a misappropriator from propagating or disseminating a stolen trade secret:

Based on affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

18 U.S.C. § 1836(b)(2)(A)(i).

The requirements for issuing an ex parte seizure order under the DTSA are stated in subsection (b)(2)(A)(ii):

The court may not grant an application under clause (i) unless the court finds that it clearly appears from specific facts that—

(I) an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order;

(II) an immediate and irreparable injury will occur if such seizure is not ordered;

(III) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure;

(IV) the applicant is likely to succeed in showing that—

(aa) the information is a trade secret; and

(bb) the person against whom seizure would be ordered—

(AA) misappropriated the trade secret of the applicant by improper means; or

(BB) conspired to use improper means to misappropriate the trade secret of the applicant;

(V) the person against whom seizure would be ordered has actual possession of—

(aa) the trade secret; and

(bb) any property to be seized;

(VI) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized;

(VII) the person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person; and

(VIII) the applicant has not publicized the requested seizure.

18 U.S.C. § 1836(b)(2)(A)(ii)(I)-(VIII). In addition, subsection (b)(2)(B) sets forth the provisions that must be contained in a seizure order.

II. Entry of a Seizure Order Under the DTSA is Warranted

Kinney has established his willingness to engage in deception and subterfuge by (a) asking Mrs. Best for permission to access the Third Computer for the purported purpose of obtaining a temporary license to allow for continued use of the Dazzle Software and then vastly exceeding his permitted access by duplicating the entire contents of the Third Computer (Verified Complaint, ¶¶ 24-30; St. Peter Declaration, ¶¶ 11-19); (b) falsely representing that his copying of the contents of the Third Computer had been thwarted and that the only thing he obtained from the Third Computer was a temporary license, when, in fact, he had copied the entire contents of the Third Computer (Verified Complaint ¶¶ 31-32); and (c) delivering two external storage devices to Plaintiffs' counsel, falsely representing them to be the exact same devices that he had used in his "attempt" to copy the contents of the Third Computer when, in fact, they were two entirely different devices (Verified Complaint ¶¶ 33-36; St. Peter Declaration, ¶¶ 22-30).

As a result of Kinney's theft and subsequent obfuscations, Plaintiffs still do not know precisely what Kinney has done with their intellectual property or who he might have shared it with (Verified Complaint ¶ 37). At the very least, Kinney continues to use the Dazzle Software without Dazzle II's authorization, and it is believed that Kinney has distributed licenses for the Dazzle Software to others without Dazzle II's authorization (Verified Complaint ¶ 29). It is, therefore, apparent that Kinney has absolutely no regard for the intellectual property rights of others.

Given Kinney's demonstrated willingness to misappropriate valuable intellectual property; his demonstrated willingness to make misrepresentations and engage in deceptive activity to try to cover up his wrongdoing; and his continuing disregard for the intellectual property rights of Dazzle II and others, there is a significant risk that Kinney, in concert with or on behalf of Lev's Pawn Shop, "would evade, avoid, or otherwise not comply with" an order entered under Fed. R. Civ. P. 65 or an order granting other equitable relief. There is also a significant risk that if given notice, Kinney would destroy, further conceal or further disseminate the trade secrets at issue and/or the devices on which those trade secrets are stored. 18 U.S.C. § 1836(b)(2)(A)(ii)(I), (VI). Any one of those actions would result in immediate and irreparable harm to Dazzle II. 18 U.S.C. § 1836(b)(2)(A)(ii)(II). If Kinney were to destroy or further conceal the devices,

Dazzle II would be deprived of evidence essential to its trade secret and other claims against Defendants, and its ability to determine where its trade secrets (not to mention its other intellectual property) may have gone would be further compromised. Moreover, the further use or dissemination of the subject trade secrets could jeopardize their status as trade secrets or even eliminate it, resulting in the destruction of the economic value of the trade secrets. The denial of a seizure order could, therefore, have potentially dire consequences for Dazzle II.

For these same reasons, the harm to Plaintiffs by the denial of a seizure order would outweigh the harm to any “legitimate interests” of Defendants. 18 U.S.C. § 1836(b)(2)(A)(ii)(III). Plaintiffs have a right to the return of their trade secrets and to bar any use, reproduction or dissemination of those trade secrets by Defendants so as to maintain their trade secret status and their economic value. Conversely, Defendants have no legitimate interest whatsoever in maintaining possession of Plaintiffs’ trade secrets. Moreover, Plaintiffs are not indiscriminately seeking seizure of all of the computers Kinney or Lev’s Pawn Shop use in their business operations. *See* 18 U.S.C. § 1836(b)(2)(B)(ii)(stating that a seizure order, “to the extent possible, [should] not interrupt the legitimate business operations of the person accused of misappropriating the trade secret[.]”). Rather, the requested seizure is narrowly tailored to target the external hard drive and thumb drive and/or drives Kinney used to misappropriate Plaintiffs’ trade secrets and any computers

or devices that Defendants may have used to store, copy, review, disseminate or otherwise access any of the data contained on the hard drive and thumb drive. Further, the requested seizure would not result in any discernible harm to any third-party. 18 U.S.C. § 1836(b)(2)(A)(ii)(III). For these reasons, the balance of harms weighs in favor of Plaintiffs.

Entry of a seizure order under subsection (b)(2)(A) of the DTSA also requires a finding that,

- (aa) the information is a trade secret; and
- (bb) the person against whom seizure would be ordered—
 - (AA) misappropriated the trade secret of the applicant by improper means; or
 - (BB) conspired to use improper means to misappropriate the trade secret of the applicant[.]

18 U.S.C. § 1836(b)(2)(A)(ii)(IV). The facts set forth in the Verified Complaint and in the St. Peter Declaration establish the trade secret nature of the stolen information and Kinney's improper misappropriation of that information. Taking these elements in reverse order, as noted previously, Kinney was permitted to access the Third Computer by Mrs. Best, who, at that time, still possessed the authority to grant such access.¹ Verified Complaint, ¶¶ 25-26. However, the permission granted by Mrs. Best was limited to allowing Kinney to obtain a

¹ The transaction whereby Dazzle II purchased the Third Computer and the other assets of Mr. Best's business had not yet occurred.

temporary license or pass code that would allow him to continue to access and use the Dazzle Software on a temporary basis. *Id.* He was certainly not granted access to duplicate the entire contents of the Third Computer. Kinney's knowledge that he exceeded the scope of his permitted access is evidenced by in his subsequent misrepresentations and efforts to deceive Plaintiffs regarding the external storage devices he used to misappropriate the data contained on the Third Computer. Verified Complaint, ¶¶ 30-36; St. Peter Declaration, ¶¶ 22-30. There is, accordingly, substantial evidence that Kinney "misappropriated the trade secret of the applicant by improper means[.]" *Id.*²

There is also no question that Kinney obtained trade secret information when he duplicated the contents of the Third Computer. As alleged in the Verified Complaint, among the items Kinney misappropriated were the following

- All of the components, including the source code, algorithms, data dictionaries and programming elements, that comprise the "Dazzle II" software, which is a SQL-based replacement and upgrade to the Dazzle Pawn software. Dazzle II was near completion and was on the verge of going live when Mr. Best passed away;

² Even if, *arguendo*, Mrs. Best gave permission to Kinney to copy the entire content of the Third Computer, Kinney was clearly apprised that these assets did not belong to Mrs. Best, and he has failed to acknowledge that he possesses and controls the data and has refused to return the data to Plaintiffs.

- The management, registration and controller software used by Mr. Best to issue codes, manage client software registrations and track his clients. With this software, it is possible to generate codes that provide for continued access and use of the Dazzle Pawn software and to extend those codes for any period of time or number of user licenses. Defendants thus have the ability to extend their licenses for their 20-plus business locations indefinitely and to provide other users of the Dazzle Pawn software with codes for its continued use, without the authorization of Dazzle II;
- All of the components, including the source code, algorithms, data dictionaries and programming elements, that comprise the Dazzle Pawn software presently used by over 100 pawn brokers throughout the United States and the United Kingdom.

Verified Complaint, ¶ 39.

The items identified above were maintained solely, and in confidence, by Mr. Best up to the time of his death, and now by Dazzle II, and derive their value from being secret information that is not known in the industry. As such, they constitute trade secrets under the DTSA, which are broadly defined under 18 U.S.C § 1839 as,

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans,

compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public; and

Kinney also obtained by his misappropriation six copies of ALJ's entire database, which contained information critical to its business operations. Verified Complaint, ¶ 40. These contents of the databases also meet the definition of a trade secret under the DTSA. Based on the foregoing, the requirements of subsection (b)(2)(A)(ii)(IV) are satisfied.

Finally, regarding the remaining elements of a seizure order under the DTSA, Plaintiffs' application "describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized." 18 U.S.C. § 1836(b)(2)(A)(ii)(VI). Further, Plaintiffs "have not publicized the requested seizure." 18 U.S.C. § 1836(b)(2)(A)(ii)(VIII).

CONCLUSION

Based on the foregoing, Plaintiffs request that the Court grant their application, enter an order providing for the relief requested in the application and

grant such other relief as the Court deems proper under the circumstances, laws and applicable statutes.

Respectfully submitted

JAFFE, RAITT, HEUER & WEISS, P.C

Dated: June 14, 2016

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