

What Does a TRO Look Like to Preserve & Produce ESI?

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The Federal Trade Commission filed for a permanent injunction and temporary restraining order against the Defendants for violation of the Federal Trade Commission Act. The FTC sought the preservation of the Defendants' "...assets and an accounting of assets, preserving and producing business records and computers..." *FTC v. Real Wealth*, 2010 U.S. Dist. LEXIS 5884 (W.D. Mo. Jan. 26, 2010).

The Court granted the TRO and Ordered the Defendants comply with the following:

IT IS FURTHER ORDERED that, to the extent they have possession, custody, or control of Documents described above, Defendants shall produce the Documents as they are kept in the usual course of business. Defendants, to the extent they have possession, custody, or control of computer equipment or electronically-stored information described above, **shall provide Plaintiff with any necessary means of access to the computer equipment or electronically-stored information, including, but not limited to, computer access codes and passwords.**

IT IS FURTHER ORDERED that, Defendants shall, within forty-eight (48) hours of service of this Order, complete and serve on counsel for the FTC the "FTC's Electronically Stored Information Statement." Attachment D (Doc. No. 3-5)

Real Wealth, 15-16, emphases added.

The Defendants were ordered to preserve electronically stored information and enjoined from the following:

Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents or records that relate to the business practices, or business or personal finances, of Defendants, or other entity directly or indirectly under the control of Defendants, including but not limited to: any and all computer data and storage media (including, but not limited to, hard drives, DVDs, CD-ROMS, zip disks, floppy disks, punch cards, magnetic tape, backup tapes, and computer chips) and other documents or records of any kind that relate to the business practices or business or personal finances of the Corporate Defendants or Individual Defendants;

Real Wealth, 16.

Bow Tie Thoughts

The FTC and the Court were not messing around. Seeing the Court order the Defendants to provide direct access to computer systems and passwords sounds like the FTC was going in to do immediate forensic collection of hard drives, email servers or anything with an "On" button.

I'd like to see how detailed the FTC was in Attachment D, the "FTC's Electronically Stored Information Statement." I imagine they were very specific, including SmartPhones, removable media and work from home policies.

It will be standard practice for all parties to face electronic discovery issues as early as possible in litigation. While the FTC seeking a temporary restraining order might be extreme in civil litigation,

parties need to consider transitory ESI like RAM data, text messages or data that can be lost as soon as a computer is re-started, and whether a preservation order is needed.