

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF ILLINOIS

3 YTB TRAVEL NETWORK OF) Docket No. 09-CV-369
4 ILLINOIS, ET AL.,)
5)
6 Plaintiffs,) Benton, Illinois
7 vs.) June 3, 2009
8)
9 KENT MCLAUGHLIN, KIMBERLY)
McLAUGHLIN, WILLIAM HOFFMANN,)
JACQUES JOHNSON and LYNETTA)
JOHNSON,)
Defendants.)

10 Motion for Temporary Restraining Order
11 BEFORE THE HONORABLE J. PHIL GILBERT
12 UNITED STATES DISTRICT COURT JUDGE

13 APPEARANCES:

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15
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18
19
20
21
22
23
24
25

INDEX

WITNESSES FOR
THE PLAINTIFF:

DIRECT

CROSS

REDIRECT

RECROSS

Scott Tomer 23 53 65
Alan Horton 66 76
Jerome Hughes 79 81
Von Nickleberry 83 85

WITNESSES FOR
THE DEFENSE:

Scott Tomer 85
William Hoffmann 88 95 116 117
Kent McLaughlin 118 121
Jacques Johnson 125 127 136

EXHIBITS:

MARKED

RECEIVED

Plaintiff's 1 -- Hoffman Agreement 33
Plaintiff's 2 -- McLaughlin Agreement 33
Plaintiff's 3 -- JohnsonAgreement 33
Plaintiff's 4 -- Rep Agreement 7
Plaintiff's 6 -- Literature 42
Plaintiff's 7 -- Hoffman Resignation 44
Plaintiff's 9 -- TRO 45
Plaintiff's 10 --Email List 46
Plaintiff's 12 -- Email 49
Plaintiff's 13 -- Johnson Resignation 49
Plaintiff's 14 -- Email 49
Plaintiff's 15 -- Email 49
Plaintiff's 16 -- Email 49
Plaintiff's 17 -- Email 73
Plaintiff's 18 -- Solicitation 50
Plaintiff's 19 -- Solicitation 51
Plaintiff's 20 -- Solicitation 51
Plaintiff's 21 -- Email 51
Plaintiff's 22 -- List of Directors 61 65
Plaintiff's 23 -- List of Directors 61 65
Plaintiff's 24 -- Email 63 65
Plaintiff's 25 -- Email 61
Defendant's 1 -- 10-Q 53

1 THE CLERK: YTB Travel Network of Illinois versus
2 Kent McLaughlin and others, case number 9-369. This matter
3 is set for a TRO hearing. Are all the parties ready? Would
4 you please stand and acknowledge your name for the record.

5 MR. GOLDENBERG: Mark Goldenberg for the plaintiff.

6 MR. ROSENFELD: Tom Rosenfeld, Your Honor, for the
7 plaintiff, Scott Tomer.

8 THE COURT: Pardon?

9 MR. GOLDENBERG: Scott Tomer. He's the plaintiff.
10 He's YTB.

11 THE COURT: Okay.

12 MR. BRIGHAM: Chad Brigham for the plaintiff.

13 MR. McCARTHY: Edward McCarthy for the defendants,
14 Your Honor, and my associate, Steven Wohlford.

15 THE COURT: What's your last name?

16 MR. WOHLFORD: W-O-H-L-F-O-R-D, Your Honor.

17 THE COURT: Okay. Welcome. I understand,
18 Mr. McCarthy, that you wish a rule on witnesses; is that
19 correct?

20 MR. McCARTHY: Yes, Your Honor, I would ask that
21 the witnesses be excluded.

22 THE COURT: Except for the parties, of course.

23 MR. McCARTHY: Yes, sir.

24 THE COURT: If anybody is going to be a witness in
25 this case other than the parties, you will be asked to remain

1 outside the courtroom till called. Okay.

2 Before I ask the parties to give me a brief opening
3 statement as to the factual basis, I want to get one thing,
4 that issue that concerns me as to jurisdiction. And I'd
5 like, I guess, we can start with you, Mr. Goldenberg. I want
6 the parties to address whether this Court has jurisdiction
7 over this matter.

8 I will say, Mr. McCarthy, the pleadings, I don't
9 know whether you've amended the pleadings. You have not
10 alleged diversity properly, but I think I gave you till what,
11 the 11th?

12 MR. MCCARTHY: Yes, it was the 15 days whenever the
13 order was last week.

14 THE COURT: Yes. So there is a concern of this
15 Court whether it even has jurisdiction to hear this matter.
16 Mr. Rosenfeld.

17 MR. ROSENFELD: Thank you, Your Honor. We filed a
18 motion for remand.

19 THE COURT: I am aware of that.

20 MR. ROSENFELD: And the basis of the motion, it's
21 the defendant's responsibility and burden to prove diversity
22 in jurisdictional matters. In this case the plaintiff has
23 pled for equitable relief, injunctive relief, both temporary
24 preliminary, and permanent, and accounting of certain
25 activities and a trust on certain funds, should they be

1 found. The plaintiff has not sought any actual damages,
2 punitive damages, in this matter nor does the plaintiff seek
3 a legal recovery in this matter.

4 And the defendants simply relied on the complaint
5 and hasn't satisfied its burden under the Seventh Circuit.
6 And I believe we cite the law in our motion for remand to
7 satisfy the jurisdiction. So we are in a position of having,
8 perhaps, to litigate matters that we might have to
9 relitigate. That's the purpose of the motion.

10 THE COURT: Mr. McCarthy, it's your burden to show
11 that this Court has jurisdiction.

12 MR. MCCARTHY: Thank you, Your Honor, for that.
13 The defendants' position is that the question of \$75,000 of
14 value, whatever, in controversy is measured by the value of
15 the case to the plaintiff. And the actual show that the
16 plaintiffs have filed suit against individuals who had in
17 their, in the plaintiffs' pyramid scheme of activity, had
18 downline individuals of a large number, thousands, and that
19 the value to the plaintiffs of receiving an injunction are
20 the value of the business that they are trying to protect,
21 which is well in excess of \$75,000. We will document that.
22 We will not only have testimony today, but we will document
23 it with financial records of the plaintiff.

24 So as I understand it, summarizing again, the value
25 is based on what is the injunction worth to the plaintiff and

1 that they are requesting, and I don't think there's any doubt
2 that the plaintiff would consider this to be worth more than
3 \$75,000.

4 The other questions about -- we'll straighten out
5 the allegations about domicile and stuff like that.

6 THE COURT: Citizenship.

7 MR. McCARTHY: Yes, sir.

8 THE COURT: All right, Mr. Rosenfeld, is it your
9 position that you're seeking more than or less than 75,000?

10 MR. ROSENFELD: Less than 75,000, Your Honor.

11 THE COURT: How is that determined? How are you --

12 MR. ROSENFELD: When you --

13 THE COURT: Because, you know, the agreement talks
14 about liquidated damages of \$10,000 per person per
15 occurrence.

16 MR. ROSENFELD: Correct.

17 THE COURT: We have several defendants and how many
18 occurrences?

19 MR. ROSENFELD: Your Honor --

20 THE COURT: It could easily be over 75,000.

21 MR. ROSENFELD: The contract at issue, and I hope
22 we've put it clearly, the contract at issue, you've got two
23 separate agreements. You're got a director's agreement and
24 then an incorporated rep agreement. The contract is very,
25 very clear with respect to the mechanisms and the remedies

1 available. The plaintiff, under the documents, is not
2 entitled to seek monetary relief in court. It has to file an
3 arbitration.

4 There's a provision, 9.4, of the rep agreement,
5 Your Honor, and it's Exhibit 4 of the binder that I provided
6 you, that we provided you. And Exhibit 4, looking at Section
7 9.4 and 9.5 provide that mediation and arbitration are
8 required for any claims. There is a cashout exception at the
9 end of 9.5 that says nothing in the agreement shall prevent
10 the company from applying to and obtaining from any court
11 having jurisdiction a writ of attachment, a temporary
12 injunction, a preliminary injunction, permanent injunction or
13 other relief available to safeguard and protect a company's
14 interest prior to, during or following the filing of any
15 arbitration or other proceeding or pending the rendition of a
16 decision or award in connection with any arbitration or other
17 proceeding.

18 So in this lawsuit we, in fact, have drafted but
19 not filed an arbitration proceeding before the AAA. This
20 document requires in the first paragraph of 9.5 that the AAA
21 arbitrate any matters regarding the agreement and the breach
22 thereof. It says if mediation is unsuccessful, any
23 controversy or claim arising out of or relating to the breach
24 thereof shall be settled by arbitration administered by the
25 AAA under the commercial arbitration rules, and judgment on

1 the award rendered by the arbitrator may be entered.

2 So we're stuck with an arbitration provision.
3 We're not stuck with it. It's what we've agreed to. The
4 only carve out and exception, Your Honor, is a case for
5 injunctive relief pending the, during the pendency of the
6 arbitration or leading up to it.

7 THE COURT: You say you're not seeking any monetary
8 damages?

9 MR. ROSENFELD: Nor could we. That's what we filed
10 the action in Madison County for injunctive relief. It's
11 been removed. It hasn't evolved into something more than it
12 was at its -- at the outset, and that is a suit for
13 injunctive relief. So we are seeking less than 75,000. We
14 are not seeking any monetary recovery nor is our position
15 could we. If we were the appropriate motion would be to
16 compel arbitration. We are not asking for that. And that's
17 what the document provides, and that's the way, I believe,
18 we've laid that out in the lawsuit, Your Honor.

19 THE COURT: Mr. McCarthy, any response before we
20 proceed further?

21 MR. MCCARTHY: Yes. Thank you, Your Honor. Just
22 briefly, the -- we don't have arbitration until somebody
23 demands arbitration. It's feasible arbitration could be
24 waived and this Court could continue on with the case.

25 They also asked in their complaint for a

1 constructive trust, and it's our position that asking for a
2 constructive trust of funds that the plaintiff, or excuse me,
3 that the defendants may be receiving from another contractor,
4 that could well exceed \$75,000, but it's going to be monetary
5 damages. And I think when they put themselves out wanting a
6 constructive trust, that money has come into its case.

7 Now, the fact that they can recover monetary
8 damages at some stage, whether it's in arbitration or it's
9 here, strongly militates against having an injunction
10 proceeding. If they can be made whole by monetary relief,
11 then we're not supposed to be here talking about an
12 injunction. And, you know, from that standpoint, I think
13 that the door is open to argue that there's no cause or no
14 right to an injunction here at all.

15 THE COURT: Okay. Thank you.

16 MR. ROSENFELD: Your Honor, may I make one more
17 point?

18 THE COURT: Sure. We're playing ping-pong.

19 MR. ROSENFELD: The complaint that Mr. McCarthy
20 removed to this Court, paragraph 29, we actually set out in
21 the lawsuit itself with a heading, "The agreements dispute
22 resolution procedure." And we laid that out in paragraph 29,
23 citing the jurisdiction of the AAA on any monetary amounts
24 and indenting and highlighting the exception for injunctive
25 relief.

1 And so we did want to draw, we did draw the Court's
2 attention to that, both the state court and Your Honor, to
3 the point that we were simply seeking injunctive relief, and
4 we understood the arbitration provisions. I'm not sure
5 whether Mr. McCarthy is suggesting that they're waiving or
6 the defendants are willing to waive the arbitration
7 provision.

8 THE COURT: I think he was implying that maybe
9 you're waiving the arbitration provision.

10 MR. ROSENFELD: Well, Your Honor, we are not
11 setting in motion a claim for damages. If the defendants
12 believe we are setting in motion a claim for damages, then it
13 seems to me that if they truly believe that, that they are
14 faced with a choice of invoking the arbitration provision and
15 asking that the matter be, the monetary piece be segregated
16 and put in arbitration or they're waiving it, but we try to
17 be very meticulous and not ask for legal relief here.

18 THE COURT: All right. Of course, I'm going to be
19 reserving my ruling on the jurisdiction issue. I want to go
20 ahead and at least begin by hearing the brief opening
21 statements of counsel. And then I'm going to give each
22 counsel one hour to present their case.

23 MR. GOLDENBERG: Thank you, Your Honor. YTB is in
24 the travel industry. It's a multi-level marketing business.
25 It focuses its activity in the travel business. It was

1 formed in 2001 by Scott Tomer and his father, Lloyd Tomer,
2 and Kim Sorenson, who observed this major shift in travel,
3 purchasing from travel agencies around the corner of the
4 shopping center to the internet. At that point in time
5 Expedia was a \$5 billion entity in doing internet sales of
6 travel.

7 So YTB's concept has put a face to the internet,
8 and they did this by creating this multi-level marketing,
9 which is just a distribution system for replacing advertising
10 dollars with word of mouth. So you could buy your ticket
11 from your aunt or your neighbor and somebody at your church,
12 and they would get the commission, and they would get the
13 same price as Expedia would get. And it was dependent upon
14 the sales situation.

15 So they have two things. They have a travel sales
16 business, and then they have the RTA's or the registered
17 travel agents that are out there, and they market the sale of
18 the travel industry.

19 These gentlemen became reps and, eventually,
20 directors, which meant they were in the business of finding
21 the sales force for YTB, finding the reps, finding the RTA's,
22 the registered travel agents, finding the reps, which would
23 also find other RTA's.

24 These gentlemen, as a matter of fact, became so far
25 up, so successful with YTB, that they went up the line and

1 became directors, and there's tier levels of directors at
2 YTB. And the defendants progressed up the tier level of
3 being directors, which meant a couple of things. They got
4 extra benefits. They got the opportunity to earn extra money
5 from the reps. And the RTA's that the reps created and what
6 Mr. McCarthy said was this downline activity report, which is
7 an important concept because this downline activity report
8 was one of the higher and more important confidential and
9 proprietary pieces of information that belonged to YTB
10 because that was their sales force. That's what we are here
11 to protect, is the sales force.

12 You get access to this as directors, and this
13 provides directors with the names of the reps and the RTA's,
14 their addresses, their phone number, their email address,
15 every possible contact information you could have on the
16 multi-marketing sales force for YTB. Highly proprietary,
17 highly confidential. Acquired over many years at great
18 expense to YTB and from which these defendants benefitted
19 greatly.

20 They also, when they became directors, they assumed
21 by their own contract documents a fiduciary relationship of
22 the highest trust. They also obtained stock options and
23 health coverage, health benefits, and they agreed to comply
24 with all of the rep and all of the RTA policies and
25 procedures' terms and conditions.

1 These gentlemen made millions of dollars while they
2 were at YTB. In the last four months Mr. Hoffmann made at
3 least \$400,000. Mr. McLaughlin made in excess of \$200,000.
4 Mr. Johnson made over \$50,000. They made millions of dollars
5 not just off of their own efforts, but off of the efforts of
6 all of the people underneath them, all of the reps and RTA's
7 that they recruited and that the reps recruited and the RTA's
8 that the reps recruited.

9 Their motion calls this a scheme. Mr. McCarthy
10 didn't take a minute of his first speech to try and call us a
11 pyramid scheme. That's what they are trying to do. They
12 used this multi-level distribution system to benefit to the
13 tune of millions of dollars, and now they want to come in
14 here and say this is a pyramid scheme. They, in their
15 papers, want to throw up the complaint filed by the Illinois
16 Attorney General which was filed several weeks ago in
17 Champaign. They are, basically, trying to kill this company
18 with allegations, and that's the way they are going to attack
19 getting out of their contract obligations. They're going to
20 kill this company before we even get to these contract
21 documents that they signed.

22 The remedy at law is insufficient. You'll find out
23 that, Judge, through the testimony of Scott Tomer and others.
24 And they want to take this as every man for himself, and they
25 don't want to talk about the contract documents because they

1 signed these contract documents, which Mr. Rosenfeld pointed
2 out are very clear in what the benefits are, how these people
3 benefitted from it, and what they're trying to do.

4 Now, this is important because it allows -- it
5 tries to attack the sales force. So let's talk about what we
6 are really looking for, Judge, because --

7 THE COURT: Let me ask you this: If there is a
8 liquidated damages provision that you could get through
9 arbitration, wouldn't that be an adequate remedy at law?

10 MR. GOLDENBERG: No, I think, Judge, because once
11 you have this multi-level marketing mechanism as laid out for
12 you and you see how important it is, it's impossible to
13 really assess the domino affect of them violating their
14 obligations and taking away a rep that's in the YT market,
15 and then how many reps does that rep take away and how many
16 reps because it's downline.

17 You recruit a rep. You might recruit 20 reps
18 apiece. They might recruit RTA's. So it's all in this
19 multi-level marketing distribution system to sell these
20 travel packages to consumers. So it's impossible to assess
21 the fact that it may be a liquidated damage for one violation
22 of it and that may be one rep or two reps. And how do you
23 assess the 2 reps, the 10 reps or the 20 reps or the 50 reps
24 or 1,000 reps that come as a result of them starting this
25 process of taking away the distribution system of YTB.

1 THE COURT: So the damages could be in the hundreds
2 of thousands of dollars.

3 MR. GOLDENBERG: It depends how the Court
4 determines each violation, but each violation is a contact
5 of, inappropriate contact of 10 reps, but if those 10 reps
6 result in YTB losing a thousand members of its sales force,
7 then there's an insufficient remedy at law for that.

8 THE COURT: Okay. I understand the insufficient
9 remedy at law argument. But again, going back into this
10 jurisdiction issue, your co-counsel said you're not asking
11 for any money. You're not asking, you know, it doesn't rise
12 to 75,000, and now you're saying that the remedy's
13 insufficient because it could be thousands of dollars, I
14 guess.

15 MR. GOLDENBERG: No, I said it could be thousands
16 of reps that they could lose. So these -- they could
17 improperly contact 50 reps and those 50 reps could end up
18 causing YTB to lose 300 reps, 500 reps and more RTA's, and
19 you don't know how this progresses down.

20 I think Mr. Rosenfeld said we are not seeking
21 monetary damages in this court. We do have a complaint for
22 arbitration filed in the American Arbitration Association
23 where we will be seeking damages, but it's not in this court.

24 THE COURT: Okay. Go ahead.

25 MR. GOLDENBERG: So let's talk about the relief

1 we're seeking because I think the relief we're seeking,
2 Judge, is very reasonable.

3 We're saying while they were at YTB, none of the
4 defendants were at YTB, they couldn't recruit anybody from
5 YTB to another multi-level marketing firm. But after they
6 left YTB, what can they do? They can compete. They can go.
7 They can go out and work for anyplace they want.

8 Mr. Hoffmann has a history of working for
9 multi-level marketing firms. He could go work for other
10 multi-level marketing firms. He can take with him, solicit
11 any rep that he directly sponsored into YTB. So if he
12 directly sponsored Mark Goldenberg, he can contact me to say,
13 "You can leave on day one and come with me to my new
14 multi-level marketing company, Visalis, which sells drugs."
15 He's not restricted from doing that.

16 All we're saying is while you were a director, you
17 received all of this proprietary or confidential information
18 which is a list of all of our reps and all of the downline
19 activity reports from the whole sales distribution force,
20 most of whom you didn't sponsor, but you have access to their
21 names, their phone numbers, their emails address, which is
22 important because you will hear testimony about blitz emails
23 to these people that they could not have obtained the
24 information with if they hadn't used this confidential and
25 proprietary.

1 All we're saying leave that stuff alone. This is
2 information that belongs to YTB that you did not develop on
3 your own, that you would not have been entitled to this
4 confidential and proprietary information but for your
5 position of, a fiduciary position, a highest trust position
6 with YTB, this downline activity report that's password
7 protected that you don't have access to. You don't have a
8 right to do this.

9 And what we're saying so take your reps that you
10 directly sponsored and leave the rest of our reps alone for
11 180 days, Judge. Six months, we're saying, leave our people
12 alone.

13 So what we're asking for is reasonable. We're
14 saying, "Leave. Go compete. Go to another multi-level
15 marketing firm. Be successful. Take the reps you directly
16 sponsored if you want to, but the reps that you found out,
17 our reps that we have in our confidential and proprietary
18 information that you learned only through your position of
19 highest trust, your fiduciary position as a director of this
20 company, leave them alone for 180 days."

21 That's all we're asking. That's all this
22 injunction seeks is to tell them, to ask them, order them to
23 live by the contract terms and not solicit these other YTB
24 multi-level marketing sales force people that they learned
25 through the downline activity report and from their position

1 as a director for 180 days in accordance with the contract
2 documents they signed and from which they made millions of
3 dollars.

4 THE COURT: Okay. Thank you. Mr. McCarthy.

5 MR. McCARTHY: Thank you, Your Honor. If it please
6 the Court. When the defendants' relationship terminated, I
7 don't care whether you say it was terminated by the defendant
8 or by the plaintiff.

9 THE COURT: Does that really make a difference?

10 MR. McCARTHY: No.

11 THE COURT: I didn't think so.

12 MR. McCARTHY: As far as I can see. No. YTB threw
13 the switch. As a matter of fact, they threw the switch
14 before they were terminated. That is, they got no
15 information. Now it's disputed as to what kind of
16 information they received in these downline activity reports,
17 but it's my understanding it did not include such things as
18 email addresses for, I don't know, thousands of downline
19 people in this pyramid scheme.

20 Now, so we don't have -- we do not have that
21 information. And that is if the plaintiff claims it's
22 proprietary, fine. They have it. They can keep it. Because
23 what we're doing and what we're asking the Court to find that
24 we're doing is that the business that these gentlemen are in,
25 whatever it might be, they have websites.

1 Now, bear with me on this, this terminology,
2 because this is an old dog that's talking about something
3 that's a relatively new matter.

4 THE COURT: I'm kind of an old dog myself.

5 MR. McCARTHY: I know for me sometimes I stumble
6 around with these terms. So if I misstate something, I
7 apologize.

8 But the defendants have websites or newsletters, if
9 you want to call it that. People come to their website, sign
10 up for a newsletter and get a newsletter. Now, some of those
11 people may be YTB active individuals. And to the extent --
12 but there's no way for us to know that because we don't have
13 access to the proprietary information that Mr. Goldenberg was
14 talking about. We don't want that. We just want to be left
15 alone.

16 And they, when they, the people, have to actually
17 ask for the information to come from the defendants for their
18 activities or for the information. And -- and this is just
19 as crucial, I think. If a YTB person at one time was
20 receiving the emails and no longer wants to receive them,
21 they can just opt out. Push a button and say, "I don't want
22 this anymore." And they won't get the newsletter. Basic
23 spam rules or whatever they call it in the industry.

24 So what we're saying, we'll be happy to tell people
25 for 180 days when they call us directly, we'll say, "Now,

1 before we start talking, are you with YTB?" And the people
2 say, "Yes, I'm with YTB." And we'll say, "We can't talk to
3 you." That's all we can do on the phone.

4 On emails or newsletters, YTB people, even if the
5 plaintiff received an order from this Court that we couldn't
6 contact them on those addresses, YTB people, like a lot of
7 us, I suppose, can have multiple email addresses. They come
8 in and come to us without us knowing who they are on the
9 internet. When that occurs, that's, you know, there's no way
10 for us to know that we're contacting a YTB active person.
11 Now, and once again, they could opt out if they did not want
12 to be there.

13 So we've got a situation here that is almost
14 impossible to police. Mr. Goldenberg's claim is that they're
15 not asking for any damages, yet they've got a complaint for
16 arbitration, he says, ready to go. It doesn't matter to this
17 Court whether they have a right to damages here or a right to
18 damages in Madison County if the Court would decide to remand
19 or they have a right to damages in another jurisdiction or in
20 arbitration, if they have a right to damages and they do not
21 have a right to an injunction.

22 Anything that can be quantified if they have such a
23 reporting system that they can tell where people went or the
24 people have gone. And if they can track that, they can come
25 to us and say, "We think the defendants are responsible for

1 this." And then we'll have some trier of fact has to decide
2 that, but that could lead to monetary damages. And that is
3 one of the really, really weak parts of their requesting an
4 injunction.

5 And then the business they claim to be in, the
6 network marketing business, well, first of all, they say they
7 are in the travel business of the financials. And the entire
8 history of this organization would show that they're really a
9 network marketing organization. Now, if they're in the
10 travel business, there is nothing that any of these
11 defendants are doing at this time that involves the travel
12 business. Now we're asking the Court to consider the fact
13 that they can't come here and say that the network marketing
14 activity is the type of business that is designed for a
15 limited interaction of the court in the form of an
16 injunction.

17 It crosses across every aspect of industry and
18 finance, health, everything. And it is not just an industry.
19 It is not just an activity. Travel is and will -- we have no
20 problem with travel, but what the defendants, the name of the
21 organization the defendants have been associated with here,
22 Visalus, is a health products organization, not a drug
23 organization, but a health products organization, and it is
24 not related in any way to travel. So I think that that is a
25 big problem that the plaintiffs have in this case.

1 We'll show --

2 THE COURT: You're saying that your company and
3 their company are not direct competitors?

4 MR. McCARTHY: Yes. They are not competitors
5 whatsoever. Yes. That's part of the problem that they have.

6 THE COURT: Okay. Go ahead.

7 MR. McCARTHY: They are what, the way the plaintiff
8 looks at it is that what they are competing for are the
9 people to sell these positions downline. For example, they
10 have -- they just reorganized their company into kind of two
11 divisions that's effective like the first or second of this
12 month or just two days ago. And they have people who are
13 travel agents selling travel services and people who are
14 selling those websites. The money is made by the people who
15 are selling the websites. And to the extent we go into the
16 financials, that will be involved.

17 So that really what they're asking is for this
18 Court to say that the people can't go from one business to
19 another business, noncompetitive business. And that's
20 contrary to every case that I've read about preliminary
21 injunctions or injunctions or actions about the, you know,
22 contracts for restrictive covenants.

23 The Court has limited time. There are a few other
24 points that we'll make as the evidence is presented. Thank
25 you for your time, Judge.

1 THE COURT: All right. Thank you. Got one hour.

2 MR. ROSENFELD: Your Honor, call Scott Tomer.

3 THE COURT: That doesn't mean you talk fast,
4 though.

5 SCOTT TOMER,

6 having been duly sworn, testified as follows:

7 THE CLERK: Would you be seated, please. State
8 your full name for the record and spell your last name.

9 THE WITNESS: My name is James Scott Tomer.
10 T-O-M-E-R.

11 MR. ROSENFELD: Your Honor, as a point of
12 clarification, does Mr. McCarthy's cross apply to our time?

13 THE COURT: Maybe.

14 MR. ROSENFELD: Okay.

15 THE COURT: We'll see. I'll be flexible.

16 MR. ROSENFELD: Okay. I've got three very, very
17 short witnesses out there. Mr. Tomer is going to be the
18 longest of the bunch.

19 DIRECT EXAMINATION

20 BY MR. ROSENFELD:

21 Q. Would you state your name, please.

22 A. James Scott Tomer.

23 MR. ROSENFELD: You're the only one without an
24 exhibit book. May I approach, Your Honor?

25 THE COURT: Yes.

1 Q. (by Mr. Rosenfeld) Where do you reside, Mr. Tomer?

2 A. Edwardsville, Illinois.

3 Q. And you are the cofounder and director and CEO of YTB

4 International?

5 A. Yes.

6 Q. Briefly, tell us what the business of YTB is.

7 A. Basically, we've been two companies since we started.

8 One is a travel company. And according to *Travel Weekly*,

9 we're the 26th largest of travel in America. The other

10 company is a marketing company and that company, through a

11 sales force, finds our home-based travel agents, that is, the

12 network marketing side of our business.

13 Q. When did you form YTB?

14 A. In 2001. It was January or February.

15 Q. And where are your corporate offices?

16 A. In Wood River, Illinois.

17 Q. How many folks do you employ?

18 A. Approximately, 250.

19 Q. And how did you come -- your cofounder is your father?

20 A. Sam Sorensen.

21 Q. How did the three of you come to develop YTB?

22 A. We had been involved in a financial service company that

23 caught a market shift. You know, interest rates went up.

24 The financial services industry didn't change very fast, and

25 we had a good deal of success there, and we saw the same

1 dynamics, if you will, in travel in the late 90s and in 2000
2 where travel was shifting from being sold by travel agents,
3 you know, in the corner of the mall to going more to the
4 internet. And we thought if we could take that concept of
5 the internet, put a face with it, that we could get loyalty
6 from customers by buying their travel from people that they
7 knew.

8 Q. And this is a network marketing company, correct?

9 A. The way that we distribute the travel agencies is network
10 marketing. The travel itself is not.

11 Q. Tell us what network marketing is.

12 A. Network marketing, it's, basically, just a free-form
13 sales organization in that people come in. They recruit
14 other salespeople, and then based upon their performance,
15 they can qualify to earn compensation from the sales of other
16 people. It's kind of similar to an insurance agency where
17 you have the local broker who makes, you know, you've got the
18 salesperson who makes the commission, and then there's the
19 office manager who makes a little bit off of that and makes
20 higher commissions when they sell it themselves. Similar to
21 that.

22 Q. Is network marketing, essentially, the company that is
23 redirecting the money that would otherwise be a national
24 advertising and funneling it to the distributor themselves?

25 MR. McCARTHY: Your Honor, I object to the leading

1 form of the question.

2 THE COURT: Overruled.

3 Q. (by Mr. Rosenfeld) The money goes and rather than
4 dumping it into the advertising on TV and radio, you --

5 A. There's two ways to build a company. You can either buy
6 one. Barry Diller spent \$5 billion to purchase Expedia after
7 it had already been built. So whoever built Expedia spent a
8 lot of money, and Diller looked at that, Barry Diller looked
9 at it, and said with his company and said it's worth \$5
10 billion. And that's what he spent in 2003 for it.

11 Or you can say, "We are going to build it as we
12 go." And we chose to take that money instead of paying it
13 for an existing structure, an existing sales force or
14 existing company. And said, "We are going to pay our sales
15 people to help us expand our network of travel agents." And
16 so we pay our sales force to find those people who, in turn,
17 then become that face to the internet for their prospects.

18 Q. Is Amway a network marketer?

19 A. Yes.

20 Q. Visalus, which is presently where the defendants work,
21 are they a network marketer?

22 A. Yes.

23 Q. And YTB is a network marketer?

24 A. Yes.

25 Q. And YTB works through two subsidiaries?

1 A. Yes.

2 Q. YTB, the plaintiffs, YTB Travel Network of Illinois and
3 YTB Marketing, right?

4 A. Correct.

5 Q. Let's talk about the Travel Network piece. What do they
6 do?

7 A. We set people up with an internet site and on that site
8 people can purchase travel through.

9 Q. What do you call these people?

10 A. We call them our affiliates or RTA's, referring travel
11 agents.

12 Q. They are the travel agents?

13 A. That's right.

14 Q. Do they pay to be a travel agent?

15 A. Yes.

16 Q. What do they pay?

17 A. They pay a one-time fee of 449.95 and a monthly hosting
18 fee of 49.95.

19 Q. What do you do for them in return for the fee?

20 A. We process the travel. We aggregate the amount of travel
21 that is sold so the people who are RTA's get higher
22 commissions than they would if they just went directly to a
23 supplier like a Carnival. I think they start at like a 10
24 percent commission and with us they are at a 16 percent
25 because of our aggregated volume. So we act as a host agency

1 combining services for the travel agents.

2 Q. Do you provide a search engine?

3 A. Yes, we do.

4 Q. Do you provide accounting and handle the paperwork?

5 A. Yes.

6 Q. And how are the RTA's compensated? How do they make

7 money?

8 A. The commissions that we receive from the vendors, okay.

9 You book a cruise with Carnival and Carnival pays us a

10 commission, and then from that commission, we pay our

11 affiliates 60 percent. That's the entry point. And then 70

12 percent to RTA's, so whatever commissions we receive, that's

13 what we pass on.

14 Q. We've got the travel agency piece with the RTA's. You've

15 got another company, YTB Marketing. What does YTB Marketing

16 do?

17 A. YTB Marketing's job is to, through a sales organization

18 through a network marketing company, our people go and find

19 those referring travel agents, those RTA's.

20 Q. And those people are called reps?

21 A. Yes.

22 Q. So YTB Marketing consists of reps who sell RTA's and find

23 travel agents and sell them?

24 A. Yes.

25 Q. Does it cost anything to become a rep?

1 A. No.

2 Q. How do reps make money?

3 A. On that sale of the \$449, there's compensation paid
4 through a network marketing compensation plan, and then also
5 in the 49.95, there's a small piece of that that we call a
6 residual that's paid in through the sales force, as well.

7 Q. So if Mr. Hoffmann were to find somebody to be an RTA and
8 he brought them in and the company received the money,
9 Mr. Hoffmann, as a rep who sold that RTA, would receive a
10 commission?

11 A. That is correct.

12 Q. What if the rep, can Mr. Hoffmann also goes out and bring
13 in other reps?

14 A. Yes.

15 Q. Does he get compensated for bringing in a rep?

16 A. No.

17 Q. He gets compensated for bringing in the RTA, though,
18 right?

19 A. Only for the sale of the travel agency.

20 Q. Oftentimes, RTA's and reps can be the same person?

21 A. Often that happens.

22 Q. What happens if one of your reps or RTA's like
23 Mr. Johnson goes out and finds a rep and an RTA and then they
24 find another rep and RTA? Does Mr. Johnson receive any money
25 for that?

1 A. Very possibly. I mean there are some instances where
2 that does not happen especially in the early stages of a
3 person's sales career, but as they build an organization and
4 move into the higher ranks of our sales force, not only do
5 they make the income from the people that they personally
6 sponsor, but then that chain of sponsorship does flow back up
7 to them.

8 Q. The chain of sponsorship, is that what you refer to as
9 the downline?

10 A. Yes.

11 Q. Okay. So if I'm at the top of the chain and I've got
12 people downline, do I earn money off folks that I never met?

13 A. Yes.

14 Q. And never sponsored?

15 A. Yes.

16 Q. How did that happen?

17 A. Because it's from the efforts that you started. And so
18 if I recruited you and then you recruited Mark and Mark
19 recruited Chad, then what would happen is through this linked
20 sponsorship chain, when commissions are generated, if you are
21 qualified to receive compensation, you receive it. It's not
22 as much as if you did it yourself, but there is still a
23 comission that flows through that chain of sponsorship.

24 Q. And at some point can a rep become a director of YTB?

25 A. Yes, they can.

1 Q. And how does a rep become a director?

2 A. It's through, it's through, it's less through the
3 recruiting process even though the recruits are what
4 generates the sales. A person becomes a director in our
5 company under the terms that all of the defendants had, and
6 that was that there are a total of 500 of these travel sites
7 that have been sold by the sales force and no more than
8 one-third of those sites could have come from a personally
9 sponsored person.

10 In other words, they would have to have at least
11 three people that they personally sponsored that built an
12 organization that sold at least 167 of these travel sites.
13 Now they could also have ten people they personally sponsored
14 who each had 50, but that's how you become a director. And
15 as a director with our company, that's where they qualified
16 for additional compensation. They qualified for, depending
17 on when they became a director, either stock or stock options
18 in our company. And then, also, qualified for a company paid
19 health and life insurance and a group health and life
20 insurance.

21 Q. Do directors, do they provide documents to downline
22 activity reports or DAR's?

23 A. Everybody in our company has the downline activity
24 reports, and so that would list the number -- who is it
25 that's in your sales organization. Okay. And those are all

1 individual to the person.

2 So if you had nobody in your organization, it shows
3 nobody. But if you recruited three people who recruited ten
4 people and that grew to dozens or hundreds or thousands, then
5 all those names would definitely be listed.

6 Q. What else would be listed on the downline activity
7 report?

8 A. In what's called the power team, there's two ways that
9 the information is shown. In the typical downline activity
10 reports, you have all the people's names. For the people we
11 simply call the power team, that's kind of like the sales
12 manager of an organization. And those that you personally
13 sponsored, you have all of the contact information. You have
14 the phone number, the email in order to be able to
15 communicate with those people because you're looked at as the
16 first sales manager. Then the other people that are in those
17 organizations, you would see their names, but you would not
18 see the contact information.

19 Q. Are the DAR's password protected?

20 A. Yes, they are.

21 Q. Does the company consider them proprietary and
22 confidential?

23 A. Absolutely.

24 Q. Does the company -- well, let's just go to the director
25 agreements. Are the directors required to sign agreements?

1 A. Yes.

2 Q. Let's look at Exhibit 1, Mr. Tomer, if you would.

3 A. All right. Okay.

4 Q. This is a director agreement for William Hoffmann dated
5 October 10, 2008 --

6 A. Okay.

7 Q. About seven months ago. Okay? Mr. Hoffmann signed this.
8 I take that back. November 11, 2008.

9 A. Correct.

10 Q. And you accepted it on November 18. And looking, moving
11 quickly, Exhibits 2 and 3 are director's agreements for
12 Mr. McLaughlin and Mr. Johnson, correct?

13 A. Yes.

14 Q. Okay. Now, they're all three the same provisions,
15 correct?

16 A. Correct.

17 Q. Exhibits, 1, 2, and 3. Let's look at exhibit, paragraph
18 3 of Exhibits 1, 2, and 3 entitled the "Exclusivity to YTB."

19 A. Okay.

20 Q. It provides that now on the date written below I
21 acknowledge and agree that as a YTB director, I enjoy a
22 leadership role and in consideration for continuing this
23 position are the good and valuable consideration. I affirm
24 and agree as follows: I will devote my full network
25 marketing business energy, effort, and talent exclusively to

1 YTB. I am not working with, for, promoting, or representing
2 any other network marketing company regardless of its
3 products or services. Do you see that?
4 A. Yes.
5 Q. Now as a director, you require your directors to be
6 exclusively devoted to network marketing with YTB, correct?
7 A. That is correct.
8 Q. Now you don't require that -- we are going to get the rep
9 agreement. If someone is just a rep or an RTA, there's no
10 prohibition against them working for Visalus or anybody else,
11 right?
12 A. As many as they want.
13 Q. When they become a director, they've got to just work for
14 you, right?
15 A. Yes.
16 Q. Why is that?
17 A. There's additional compensation. There's benefits.
18 There are -- there is information that we are going to give
19 them that I'm not saying it's kept from anybody else, but
20 they're the first ones to receive it. Okay. And then they
21 also have the ability as directors to earn performance
22 bonuses.
23 Q. Do you make these reps become directors?
24 A. No.
25 Q. They have to sign the agreement to become a director --

1 A. That is correct.

2 Q. -- to get the life insurance, health insurance,
3 additional compensation?

4 A. Yes. They have to hit the numbers, and once they hit the
5 numbers, then the offer is extended for them to become a
6 director.

7 Q. Okay. And all three of these defendants signed
8 agreements that provided this exclusivity agreement while
9 they were at YTB; is that right?

10 A. Yes.

11 Q. Let's go to paragraph 5 entitled "Compliance."
12 Compliance provides that the director agrees with the
13 policies and procedures and terms of conditions relating to
14 rep and RTA agreements for YTB. Do you see that?

15 A. Yes, sir.

16 Q. Okay. And the rep agreement is Exhibit 4, the rep
17 agreement in effect in November, October, November of '08; is
18 that correct?

19 A. Yes.

20 Q. Okay. Exhibit 4, we will look at that in a second. But
21 that's the agreement that's incorporating the director
22 agreement; is that correct?

23 A. That is correct.

24 Q. That these folks all sign. Paragraph 6 of the directors
25 agreement, it says, "Materials and sales program." All sales

1 materials, presentations, training programs used by director
2 relating to YTB and its affiliates must be only those
3 developed and approved by corporate. Such information or
4 contact information regarding upline and downline individuals
5 and our contact info regarding the identity of reps or RTA's
6 is exclusive property of YTB and constitutes YTB trade
7 secrets. Do you see that?

8 A. Yes.

9 Q. Okay. So -- and it says, I will protect the
10 confidentiality of trade secrets during the term that I am a
11 director and two years thereafter?

12 A. Yes.

13 Q. That's what they sign?

14 A. Yes.

15 Q. That's the downline and the upline contact information,
16 right? Okay. Let's go to Exhibit 4. And this is the rep
17 agreement. Exhibit 4, Section 3-21, which is --

18 A. Okay.

19 Q. -- looked like 14 to 37. It's entitled "Conflicts Of
20 Interest." See that?

21 A. Yes.

22 Q. Now this says the company's reps are free to participate
23 in other MLM's or network marketing business ventures.

24 That's the first sentence, right?

25 A. Yes.

1 Q. If you're a rep you are free to go to multiple MLM's,
2 right?

3 A. Correct.

4 Q. Director we saw you got to be exclusive, right?

5 A. That is correct.

6 Q. Okay. The next sentence goes on to say, However, during
7 the term of this agreement, reps may not directly or
8 indirectly attempt to enroll company's other reps, RTA's
9 consumers to any other --

10 THE REPORTER: Could you slow down a little bit.

11 MR. ROSENFELD: Okay. I'm sorry.

12 THE COURT: There's a stun gun underneath there.
13 That's your first warning.

14 Q. (by Mr. Rosenfeld) Okay. It says -- I think the third
15 full sentence, Mr. Tomer, reads, Following the cancellation
16 of a rep's agreement and for a period of six calendar months
17 thereafter with the exception of a rep who was personally
18 sponsored by the former rep, a former rep may not recruit any
19 of the company's reps, RTA's or customers for another MLM,
20 right?

21 A. Right.

22 Q. Or network marketing company?

23 A. That is correct.

24 Q. So if a rep leaves, they can take anybody with them who
25 they personally sponsored, right?

1 A. That is correct.

2 Q. On day one?

3 A. Yes.

4 Q. They can go compete. We heard in opening statements
5 about no competition. They can go to another network
6 marketing company, right?

7 A. Right.

8 Q. You've got no prohibition against Mr. Johnson,
9 Mr. Hoffmann or Mr. McLaughlin working for Visalus?

10 A. Right.

11 Q. You don't care. And you don't care if they want to
12 solicit the folks they brought to YTB, that's okay, too?

13 A. Right.

14 Q. Okay. But you're just saying for six months, for 180
15 days, they agree that they weren't going to touch the folks
16 downline who they didn't sponsor, right?

17 A. That is correct.

18 Q. You used the analogy of you're getting me and I get Mark
19 and Mark gets Chad. And what you're saying, if I leave, I
20 can ask Mark to go with me, but I can't ask Chad?

21 A. Correct.

22 Q. Okay. Because that's going to hurt Mark and his
23 income --

24 A. Yes.

25 Q. -- and his family?

1 A. That is correct.

2 Q. Okay. And that's one of the provisions you are trying to
3 enforce here today?

4 A. Yes.

5 Q. You don't want Mr. Johnson, Mr. Hoffmann, and
6 Mr. McLaughlin soliciting and recruiting anybody who they
7 didn't personally sponsor at YTB?

8 A. That's all we're asking.

9 Q. And they can do it in 180 months, but they just can't do
10 it now, right?

11 A. Yes.

12 Q. Okay. Now, this is for reps. Why is it even more
13 important to with respect to directors? Do directors have
14 more information about downline folks?

15 A. Yes.

16 Q. Are they in a better position to cannibalize somebody
17 else's work?

18 A. Well, they've been elevated by us in front of the entire
19 sales force. And so when someone has been elevated to a
20 position of prominence and now they make, they start going to
21 people they didn't personally sponsor, well, those folks know
22 them because of their prominence in our company. They've
23 been featured in magazines; they've been featured at
24 conventions, you know, and won numerous awards with us as
25 directors.

1 And then what we also do with our directors because
2 we considered them to be business partners is we gave them
3 additional information not given to other people in the
4 organization. There have been times that we sent them
5 communications that had the contact information including
6 some of these with home address, with emails, contact
7 information for people that were not available in their
8 direct activity reports in the back office.

9 Q. Let's go to Section 332, which is "Confidentiality." And
10 this paragraph deals with confidential information. And it
11 states there in the second paragraph, second sentence. 332
12 is on 17 of 37 on this document. Confidential information
13 includes, without limitation, rep customer lists and data,
14 information relating to genealogical or downline reports,
15 pricing, technical information, research, on and on.
16 Correct?

17 A. Yes.

18 Q. Okay. And we say here B1 to Section B1 on the next page,
19 under A, that same page, it says, Lists and data are for the
20 limited use of the rep to facilitate training support and
21 further the rep's business only; is that right?

22 A. That is correct.

23 Q. Okay. B1 deals with lists stating information relating
24 to the reps and RTA's, and the customers remain at all times
25 exclusive property of the company and must be returned to the

1 company upon request. A rep receiving such a list agrees to
2 limit the use to the intended scope of the list and
3 exclusively advance the rep's business and to hold
4 confidential and not disclose any third person the list.

5 A. Correct.

6 Q. And it says here that under B2, it says, Any use,
7 disclosure of lists outside of those authorized constitutes
8 misuse, misappropriation, a violation of the agreement and
9 will cause irreparable harm to the company.

10 Why would dissemination of your confidential, your
11 rep and RTA lists, constitute irreparable harm?

12 A. Well, especially in light when it pertains to the rep
13 side of our business, those are the salespeople who are
14 expanding our base of RTAs through which we sell our travel.
15 Okay. And those names would not have been available to the
16 upline had it not been for somebody else's efforts.

17 In other words, these weren't people that were
18 known by them. These were not people that in many cases that
19 they ever had personal interaction with. And for a person to
20 be able to take that individual's efforts, not their own, and
21 to cannibalize those people's contacts to take them to a
22 competing company, and I do look at Visalus as a direct
23 competitor of ours.

24 Q. Why is that?

25 A. Because they are a sales organization. It's the

1 salespeople that they're taking. They -- I'm sure some
2 people at Visalus buy travel. I'm sure some people in YTB
3 take vitamins. But the sales people is what is the value to
4 us.

5 Q. What's happening, what we're here for, you are
6 attempting, you're asking the Court to preserve this sales
7 division of YTB?

8 A. Yes, we are just asking that they live up to the contract
9 that they signed that said they would not talk to people for
10 six months after they leave unless they personally sponsored
11 the person. They brought them. They should be able to talk
12 to them, but if they didn't it's not their person to talk to.

13 Q. You mention Visalus. Could you turn to the last page of
14 Exhibit 6. We are getting ahead, but, you know, the last
15 page of Exhibit 6 is entitled "Visalus sciences career path."

16 A. Okay.

17 Q. Do you see that?

18 A. Yes.

19 Q. Is this something that you pulled off the internet?

20 A. Yes.

21 Q. This doesn't say anything. This talks about you can be
22 at Visalus, where the defendants are now an associate, a
23 director, a regional director, a national director,
24 presidential director, ambassador. Talks about how much
25 money you can make and how much you are going to be provided

1 for. It says under director, You personally enroll three
2 active associates, three active legs, right?

3 A. Yes.

4 Q. Talking about selling vitamins there or what is it? How
5 are these folks being compensated on this sheet?

6 A. I'm assuming, not knowing what their compensation plan
7 is, but I see the bottom where it says 2,000 GQB. In all, to
8 my knowledge, in all network marketing companies, there is no
9 payment for recruiting people. You recruit people. The
10 people make sales, whatever the product that's being sold,
11 and from that sale of product is derived compensation.

12 And so I'm assuming that that's the same thing
13 that's true here. You have three people. Those three people
14 have to sell something before a comission occurs.

15 Q. But in here, in here it's the number of people that
16 they're being compensated on, right, the number of producers
17 that they bring into Visalus?

18 A. Again, not, I'd hate to speak as an expert about their
19 comission plan. I would think that that is just a trigger.
20 In other words, you have to have three people who do so much
21 before you earn this title called director.

22 Q. Okay. And so -- and your concern here today, is it that
23 rather than developing their own marketing organization,
24 you're asking the Court to protect your marketing
25 organization from cannibalization of the defendant?

1 A. We're just asking that the emails that have been
2 continually bombarding our people since early April to folks
3 that are not their personally sponsored people -- that's all
4 we're asking for -- just have them stop communicating with
5 people they didn't sponsor.

6 Q. All right. I want to -- let's go to Mr. Hoffmann. Talk
7 about him for a second. Did there come a time when you
8 learned that Bill Hoffmann, while still a director with you,
9 was recruiting folks from your organization whom he did not
10 sponsor to go to Visalus?

11 A. Yes.

12 Q. When was that?

13 A. March 31st.

14 Q. Okay. And Mr. -- that was Mr. Hoffmann resigned, Exhibit
15 7 -- Mr. Hoffman resigned on April 6. Correct?

16 A. That sounds about right.

17 Q. And you're aware then on April 1st, five days before
18 that, Mr. Hoffmann asked Jerome Hughes, one of your directors
19 and reps, to come with him to Visalus?

20 A. I know that there was a phone conversation with Jerome to
21 that effect.

22 Q. And as well as a text message from Mr. Hoffmann to
23 Jerome?

24 A. Yes.

25 Q. On April 1st. Are you aware on April 1st Mr. Hoffmann

1 texted Nick Pagano in Detroit, Michigan --

2 A. Yes.

3 Q. -- he should go to California. Who's in California?

4 A. Visalus.

5 Q. Where does Mr. Hoffmann live?

6 A. Ohio.

7 Q. And Pagano is in Michigan, right?

8 A. Correct.

9 Q. Did Mr. Hoffmann sponsor Pagano?

10 A. No.

11 Q. Did Mr. Hoffmann sponsor Hughes?

12 A. No.

13 Q. And then we filed an action for, this action, and we got
14 a temporary restraining order from Madison County Circuit
15 Court, and that's identified as Exhibit A. We actually put
16 the TRO in here?

17 A. Yes.

18 Q. And Mr. Hoffmann was served with that TRO at 8:12 on the
19 morning of May 12th. That's Exhibit 9.

20 MR. MCCARTHY: Your Honor, I object to the line of
21 questioning as to the Madison County TRO and anything that
22 came out of the Madison County TRO.

23 THE COURT: What's the relevance of that?

24 MR. ROSENFELD: Your Honor, we are asking for
25 extraordinary relief from the Court. Mr. Hoffmann, after

1 receiving notice of the TRO, on May 12th, you'll see in
2 Exhibit 10, send out a phone book's worth of emails to people
3 at YTB recruiting them to Visalus, not only in violation of
4 our agreement, but also in violation of something he was just
5 served with. So --

6 THE COURT: I'm not concerned whether he violated
7 the Madison County restraining order. Why don't you move on
8 to something else.

9 MR. ROSENFELD: Very good. Let's go to Exhibit 10.

10 Q. (by Mr. Rosenfeld) What is Exhibit 10?

11 A. This appears to be a list by our compliance department of
12 people that were solicited by Mr. Hoffmann.

13 Q. And the date of the solicitation is May 12, 2009?

14 A. Yes.

15 Q. And just zipping down the list real quick, Alan Horton,
16 he's here today. Was Alan Horton sponsored by Bill Hoffmann?

17 A. No, he was not.

18 Q. Under your agreement in your view, he didn't have any
19 right to be soliciting Alan Horton?

20 A. Right.

21 Q. Was Debbie and John McCurdy, were they sponsored by Bill
22 Hoffmann?

23 A. I do not believe so. I don't think anybody on this list
24 was personally sponsored.

25 Q. None of them?

1 A. I don't think so.

2 Q. Okay. And behind it is Mr. -- the third page of Exhibit
3 10 is Mr. Hoffmann's email. Here's an email. The first page
4 it's to Reinerts Travel at the bottom?

5 A. Right.

6 Q. Bill Hoffmann breaks Visalus ambassador record in 17
7 days. And the next page says, Do you know anyone who would
8 want to have fun, get healthy, make more money, and drive a
9 new BMW? If your answer is yes, then become part of the 21st
10 Century online business model that enables you to harness
11 explosive trends in wellness, entrepreneurship, technology.
12 Simply fill out the information below, and I'll be in touch.
13 And it gives you this stuff, and at the bottom, it
14 says, Sign up now. Initial cap on the end. Exclamation
15 point. I'm ready to get my keys to my new BMW; is that
16 right?

17 A. Right.

18 Q. That's May 12th, 2009. And Reinerts' Travel, it looks
19 like that's -- do you know if the Reinerts were sponsored by
20 Bill Hoffmann?

21 A. No, not to my knowledge.

22 Q. Okay. Charles and Denise?

23 A. Not to my knowledge.

24 Q. They're in Mr. Hughes' organization?

25 A. Then definitely not.

1 Q. And after that then going on, we've got the same message,
2 11:43 a.m., Mr. Hoffmann to Harmon Travel. And it just goes
3 on and on and on with Mr. Hoffmann's solicitations, correct?
4 A. Correct.

5 Q. Do you view this as a solicitation?
6 A. It's definitely a solicitation, and the only way it would
7 have had, the only way that this could have been presented to
8 people was from a list of that was generated from the efforts
9 of YTB.

10 Q. Briefly, let's talk about Mr. McLaughlin. When did you
11 learn -- did there come a time when you learned that
12 Mr. McLaughlin was recruiting reps and RTA's to join another
13 company while Mr. McLaughlin was still a director with YTB?
14 A. Yes.

15 Q. When was that?
16 A. It was after we discovered the information about
17 Mr. Hoffmann.

18 Q. And do you recall who Mr. McLaughlin was recruiting?
19 A. It's a test.

20 Q. Mr. Horton?
21 A. I'm not good in tests.

22 Q. We've got Mr. Horton here to testify. Mr. Horton,
23 Mr. K. Ross?
24 A. I know there was, as I recall, there were several
25 including K. Ross, Johnson, Alan Horton, Andy Lakey.

1 Q. Okay. Let's talk about Mr. Johnson. Mr. Johnson -- look
2 at Exhibit 12. Exhibit 12 is an April 3rd, 2009, email of
3 from Jacques and Lynetta Johnson to Phil and Golden Kennedy,
4 subject: Visalus due diligence. On April 3rd, 2009, was
5 Mr. Johnson still a director?

6 A. I believe at that time he still was.

7 Q. Let's look on page, Exhibit 13, quickly. Is his
8 resignation, is it not, dated April 7th?

9 A. Yes, it is.

10 Q. So on April 3rd when he sent in this to Phil and Golden
11 Kennedy -- by the way, do you know whether Mr. Johnson
12 sponsored Phil and Golden Kennedy?

13 A. I do not.

14 MR. JOHNSON: I did.

15 Q. (by Mr. Rosenfeld) He says, Many of you in your team
16 have asked for an updated due diligence email. Here you go.
17 We'll post the Vianet (phonetic). See that?

18 A. Yes.

19 Q. Okay. Now, after Mr. Johnson sent this email out while
20 he was a director, he sent out exhibits -- let's look at
21 Exhibits 14, 15, 16. Okay. Thanks, sir. Exhibit 14 is an
22 email sent out by Mr. Johnson on May 17th, 2009, right?

23 A. That is correct.

24 Q. And it was sent to John and Debbie McCurdy?

25 A. That is correct.

1 Q. Do you know whether Mr. Johnson is their sponsor?

2 A. No, he's not.

3 Q. Okay. Exhibit 15 is another one from Kena Palmer. It's
4 dated -- darn. It looks like we copied that over. Oh, May
5 19th. Mr. Johnson sent one out on May 19th, just a couple
6 weeks ago. And then we've got exhibit -- let's go to --
7 let's go to Exhibit 18. This is a solicitation. It's May
8 27th, 2009, 8:50 p.m., correct?

9 Now, the Court entered -- this Court entered its
10 TRO that day in this case, I believe the record reflects.
11 8:50 p.m. Mr. Johnson sent this solicitation to
12 *PJ-10@prodigy.net*. Do you know who that is?

13 A. Peter Jensen.

14 Q. Did Mr. Johnson sponsor Peter Jensen?

15 A. No.

16 Q. Peter Jensen is one of the top, top folks at YTB, isn't
17 he?

18 A. That is correct.

19 Q. He filed an affidavit with the original lawsuit, didn't
20 he?

21 A. That is correct.

22 Q. So Mr. Johnson was soliciting Mr. Jensen who he did not
23 sponsor after this Court issued its TRO, correct?

24 A. Yes.

25 Q. And then we go to Exhibit 19. He did it, again, on the

1 28th; is that right?

2 A. Yes.

3 Q. And on Exhibit 20 he did it, again, on the 29th, to PJ,

4 right?

5 A. That one is PJ?

6 Q. Exhibit 20, if you look at the bottom, Team Supreme

7 International. Team Supreme International is Mr. Johnson,

8 isn't it?

9 A. To my understanding, that is correct.

10 Q. And at the top of the second page of Exhibit 20, it says

11 May 29th, 2009?

12 A. Correct.

13 Q. Got it?

14 A. Uh hum.

15 Q. And Exhibit 21 is just May 31?

16 A. Correct.

17 Q. It's another one. This one went to John and Debbie

18 McCurdy, again, right?

19 A. Correct.

20 Q. Not the people he sponsored. You're asking the Court to

21 apply injunctive relief to stop the defendants from

22 recruiting, for 180 days recruiting folks that they did not

23 personally sponsor, correct?

24 A. That is correct.

25 Q. And you're asking the Court to enter a preliminary

1 injunction requiring the defendants to identify, to return
2 all confidential information they have in their possession,
3 correct?

4 A. Correct.

5 Q. And to identify anyone to whom they may have disseminated
6 that information so you can undertake the means to recover it
7 yourself?

8 A. That is also correct.

9 Q. In the absence of that relief, what are the prospects for
10 YTB?

11 A. Well, since the campaign began, to go after our sales
12 force from what had been a fairly stable first quarter of
13 January, February, and March. We have seen in the April-May
14 timeframe where they have been actively pursuing people that
15 they did not sponsor. We've seen our sales cut by 50
16 percent.

17 Q. How much money did Mr. Hoffmann make in commissions from
18 the date he executed the director's agreement in November of
19 '08 till the day he resigned?

20 MR. McCARTHY: Objection to relevancy.

21 THE COURT: Sustained.

22 MR. ROSENFELD: Your Honor, one second. I don't
23 believe I have anything further. Your Honor, no further
24 questions.

25 THE COURT: Mr. McCarthy.

1 MR. MCCARTHY: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. MCCARTHY:

4 Q. Mr. Tomer, you just told the Court that you had a stable
5 first quarter?

6 A. In sales. Our sales in the first quarter were fairly
7 consistent in the first three months.

8 Q. What about your sales force?

9 A. Oh, no, we've been decimated.

10 Q. Through the first quarter?

11 A. Not as much as it has been in the second, but with
12 everything that's happening in the economy, yes, we've been
13 affected.

14 Q. I'm going show you what's been marked as Defendant's
15 Exhibit No. 1 and ask if this, can you identify what this
16 document is?

17 A. Based on what the cover says, it is our 10-Q.

18 Q. Okay. And that's your 10-Q for the quarter of March 31,
19 2009, right?

20 A. Yes.

21 Q. Okay. If you can go back to tab 12 --

22 A. Okay.

23 Q. -- which is page 28. Now, the 10-Q, this is a formal
24 document that you provide to the Securities & Exchange
25 Commission?

1 A. That is correct.

2 Q. And you personally swear that this is true?

3 A. I absolutely do.

4 Q. Okay. Now let's look --

5 A. I did here and I did with the SEC.

6 Q. Okay. Page or on tab 12, page 28, it describes how fewer

7 TSO's you had at the end of the quarter. You had, let's see,

8 73,801 and the year before you had 138,525. Is that

9 accurate?

10 A. That appears to be, yes.

11 Q. And you went from 92,000 -- you lost 19,000 or so of

12 them, 18,500 or something like that, in just three months?

13 A. Correct.

14 Q. And isn't it just as possible or as likely that whatever

15 problem you're facing these last couple months is merely a

16 continuation of that trend from those quarters?

17 A. Well, you're talking about two separate things. You're

18 talking about the total of RTA's or TSOs as they are called in

19 this document, which is travel site owners.

20 Q. Right.

21 A. RTA's are that same designation, if you will. Okay. And

22 the longer people are with us, there is an attrition rate

23 that happens, and we know what that attrition rate -- we

24 typically know that somewhere the average lifespan is about a

25 year. What is not reflected in this is that the number of

1 sales that are made on a monthly basis in January, February,
2 and March, were very, very consistent, and that's 74,027. We
3 were around the 23 to 2,500 per month in sales. And that was
4 consistent in January, February, and March.

5 Q. Okay. Well, if there was consistent -- will you look at
6 tab 11? It's entitled, that document is entitled "Convince
7 consolidated statement of operations"?

8 A. Yes.

9 Q. And it compares March 31, the quarter ending March 31 of
10 2009, with that of 2008, and it shows a net loss if I
11 translate this in thousands of dollars of almost \$2,000,000
12 in the quarter. Is that accurate?

13 MR. ROSENFELD: Your Honor, we argue on the grounds
14 of relevancy, Your Honor. The sanctity of the agreements in
15 this case are not dependent upon the health or well-being
16 necessarily of the company and the filings and securities.

17 THE COURT: Mr. McCarthy.

18 MR. McCARTHY: I think the health and well-being of
19 the company is very crucial, Your Honor, to determine if this
20 Court decides to grant an injunction, what kind of bond is
21 going to have to be put up by this company to protect my
22 clients.

23 THE COURT: I will give you five minutes on this
24 issue and then move onto the agreements here.

25 MR. McCARTHY: Yes, sir. Well, very well. Maybe

1 it would be more efficient if I do it during my time with
2 this as an adverse witness, Your Honor. We'll just talk
3 about the agreements.

4 Q. (by Mr. McCarthy) Let's see now. You said something to
5 me that was quite curious in that I understand to be the
6 point of the whole thing, and that is you want to retain --
7 your assets are salespeople. Is that a fair thing to say?

8 A. It is one of our assets.

9 Q. And is any organization that has sales people a
10 competitor of yours?

11 A. I don't know that it's any organization, but definitely I
12 would consider anyone that was in this area of this type of
13 distribution to be a competitor.

14 Q. You don't distribute anything, do you? You don't
15 distribute pens?

16 A. We don't do pens.

17 Q. You don't distribute, in Visalus' case, you don't
18 distribute health products?

19 A. No, we don't.

20 Q. What you do is that you sell offices or websites for
21 people to be travel agents out of their home. Fair to say?

22 A. I, yeah, I guess that's a summary that you could use.

23 Q. And it's from the sales of websites that your people are
24 compensated?

25 A. That is correct.

1 Q. And so you're not selling. All right. You're not
2 selling anything or any objects.

3 MR. ROSENFELD: I object. I think he's testified
4 it's a travel --

5 THE COURT: I understand.

6 Q. (by Mr. McCarthy) Now, you've talked about in a contract
7 agreement that the directors have a fiduciary relationship
8 with YTB. Is there any fiduciary relationship coming back to
9 the directors from YTB?

10 A. By fiduciary what do you mean?

11 Q. What do you mean by fiduciary? You're the guys who wrote
12 the contract.

13 A. That they have a fiduciary responsibility to us to
14 protect the names, to protect the list, to, in essence,
15 protect the company.

16 Q. What list does a director get? You testified that he
17 gets his power team information, that is, people that is in
18 his first line, right?

19 A. No.

20 Q. Right?

21 A. No. That's wrong.

22 Q. What does he get?

23 A. He gets the list of people in the power team. In the
24 cases of these gentlemen, it could be hundreds of people.

25 Q. And -- but those do not include any -- or power team is

1 in their direct line, right?

2 A. I -- they're not personally sponsored if that's what
3 you're asking.

4 Q. Not personally sponsored, but they're in their direct
5 line?

6 A. Everybody in the organization is in their direct line.

7 Q. Everybody in the organization?

8 A. You have to be in the lineage to be included. So I guess
9 I don't understand the question.

10 Q. The people, the power team, are the individuals who were
11 sponsored, directly sponsored by these gentlemen?

12 A. Incorrect.

13 Q. What is the power team?

14 A. The power team is a group of people that could have
15 started with one person and grown to dozens and hundreds, and
16 the only person that was personally sponsored was the first
17 person in what we are calling the power team. The power team
18 is mostly made up of people who they did not personally
19 sponsor.

20 Q. So at no time -- you said that they get the names of
21 people, but they do not get their email information?

22 A. Not in that report.

23 Q. Okay. What report do you think or do you claim the
24 defendants received email addresses?

25 A. Reports that we sent on specifically to directors.

1 Q. What reports are those?

2 A. They're individually pulled and sent to them.

3 Q. What are they?

4 A. They are a list of people not in their power team, not in
5 the organization of another director, and we provide that
6 access to them for a multitude of reasons, to get them out to
7 conventions, to be able to communicate with them. We send
8 reports to the directors of people that have canceled who are
9 not in their power teams, and in those reports that we sent,
10 it includes a phone number, email for sure, phone number
11 often.

12 Q. How many people are in these -- how many email addresses
13 are in these mailings?

14 A. As few as a dozen, as many as multiple hundreds.

15 Q. Do you have a record of how many of these email addresses
16 were sent to each one of these gentlemen?

17 A. I had people pull up some information this morning.

18 Q. Okay. And you haven't testified to it. Is it accurate
19 information?

20 A. Yes, it is.

21 Q. All right. How many names are on it?

22 A. Fifteen hundred in one to Mr. Johnson. Maybe 50 in one
23 to Mr. Hoffmann. These are just examples. These are not all
24 the emails.

25 MR. McCARTHY: Are you going to put it into

1 evidence?

2 MR. ROSENFELD: Sure.

3 MR. McCARTHY: I want to know are you going put it
4 into evidence?

5 MR. ROSENFELD: Sure.

6 MR. McCARTHY: Your Honor, if that's new evidence
7 from their side, I would ask to halt my cross examination now
8 and give them an opportunity to put that evidence on so that
9 I can examine him on those lists that he's claiming now that
10 he produced this morning from his company to try to say that
11 my clients have email addresses because we have no email
12 addresses.

13 THE COURT: We'll take a ten-minute recess. The
14 court reporter needs a break, and then we'll resume in ten
15 minutes. Thank you.

16 (The court recessed.)

17 (The court resumed.)

18 THE COURT: Mr. McCarthy, you may continue.

19 MR. McCARTHY: I thought they were going to be
20 entering more exhibits.

21 THE COURT: Okay. Are you tendering these,
22 offering these as evidence?

23 MR. ROSENFELD: Yes, Your Honor.

24 THE COURT: Any objection?

25 MR. McCARTHY: Subject to cross examination, Your

1 Honor.

2 THE COURT: All right. Subject to cross
3 examination. You may.

4 MR. ROSENFELD: Did Mr. McCarthy --

5 THE COURT: I don't know whether -- are you going
6 to cross examine on these now?

7 MR. McCARTHY: No, I thought they should be
8 offered.

9 THE COURT: He's offered them.

10 MR. McCARTHY: And tendered.

11 THE COURT: He's tendered them.

12 Q. (by Mr. McCarthy) Sir, you have exhibits, Plaintiff's
13 Exhibits 22, 23, and 25 in front of you?

14 A. Yes.

15 Q. What are these documents?

16 A. Communications that went to the defendants from our home
17 office.

18 Q. And what was the occasion of these?

19 A. On Exhibit 22, the response back, here's a list of the
20 directors you called Julie for. And so this is the complete
21 list of directors or email addresses home and cell phone
22 numbers.

23 Q. Okay.

24 A. There is -- that one was July 29th of last year.

25 November 14th of last year there was a similar list of

1 directors that went out. On November 14th these were a list
2 of everyone who's canceled since October 1st because of
3 nonpayments. And so those would be RTA's that, for whatever
4 reason, either their credit card didn't go through, they
5 canceled, whatever the case might be, that were sent, in this
6 case, to Mr. Hoffmann. And that has --

7 Q. Actually, it shows that its directors, not just RTA's?

8 A. I'm sorry. I'm looking at the third. Yeah, the first
9 two reports are directors only. There is a third report
10 dated November 14th.

11 THE COURT: What exhibit is that?

12 THE WITNESS: It's still Exhibit 22, the seventh
13 page in. In the bottom half of the page, the subject line is
14 inactive. And so these were from October 1st through Friday,
15 November 14th.

16 I don't know what the last date was that was
17 pulled, but those are all people who became inactive as RTA's
18 with their contact information both, you know, who sponsored
19 them, who was the power team leader, what the phone number
20 was and the email address.

21 Q. (by Mr. McCarthy) What is Exhibit 23?

22 A. Exhibit 23, this one is to, I believe, Mr. McLaughlin.
23 And, again, this is an inactive on November 14th. And this
24 was, again, I'm assuming, it is the same group. That is
25 something that was pulled this morning because of the call I

1 had last night after business hours with our counsel, if
2 there was other information that was available to directors
3 that was not available in the back office or downline
4 activity report. So these would have been, again, these as
5 far as their contact information, emails, and that would have
6 gone to Mr. McLaughlin.

7 Q. What is Exhibit 24?

8 A. That is an email and I believe on this one this was --
9 okay. If you look at the top of page 2, this is from
10 February of 2009. And this was a list that was sent to
11 Mr. Johnson, and this list is the way that it came down in
12 formatting. It doesn't have the columns, but again, it has
13 the information about the individual and their email address
14 and phone numbers and who were their personal sponsors and
15 power team leaders.

16 Q. And once again, these were the people who dropped?

17 A. You know, leaving out this morning, I'm assuming that is
18 the case, but I would like to have the ability to further
19 find that out just to make sure. I believe that is the case
20 in these, as well.

21 Q. It looks like, if I can direct your attention to page 2
22 where the text of Lisa Kerigan's message, it seems to say
23 whatever it is you choose to do or not to be or to create.
24 Go ahead and begin. Take some initial action and that action
25 will go quickly to feed to other actions.

1 A. I think that's just something she has at the bottom of
2 her email.

3 Q. Okay. Now, if these are, these lists of inactive people,
4 are you claiming to the Court that the list of people who
5 quit is something that you need protection about?

6 A. Oh, absolutely. Those people stop paying as RTA's. They
7 are still reps in our business. In other words, when a
8 person discontinues their payment for whatever reason, they
9 still remain a rep in our company. And so they are, in fact,
10 active reps regardless of their status as an RTA.

11 Q. It says, if I can direct your attention to the third
12 group on our third, the third email on Exhibit 22 to
13 Mr. Hoffmann.

14 A. Okay. Hang on just a second. Okay.

15 Q. Doesn't it say in the narrative at the bottom, this is a
16 list of everyone that has canceled on your team?

17 A. Due to nonpayment. In other words --

18 Q. Canceled. Doesn't it say canceled?

19 A. Yes. Their websites were canceled because of nonpayment.
20 There's no payment requirement to be a rep, so this is
21 specifically stating about the RTA.

22 Q. Now, did you have the occasion to crosscheck with any of
23 these individuals to see if they received any information or
24 emails, telephone calls or anything like that from any of
25 these defendants?

1 A. Okay. Please. Who are we talking about here?

2 Q. Any of these listed individuals on Exhibits 22 and 23 or
3 24. Did you have the occasion to check with them to see if
4 they received any communication from any of these defendants?

5 A. No.

6 MR. McCARTHY: Your Honor, I object to the
7 relevancy of this document.

8 THE COURT: It will be admitted and the Court will
9 weigh the relevancy and whether the Court will admit the
10 documents. You may proceed. Anything further?

11 MR. McCARTHY: No, sir.

12 THE COURT: Any redirect?

13 MR. ROSENFELD: Very briefly.

14 MR. McCARTHY: Your Honor, there are some people
15 designated as witnesses. I know that the plaintiffs are
16 about out of time.

17 THE COURT: Forget the time. Let's get going.

18 REDIRECT EXAMINATION

19 BY MR. ROSENFELD:

20 Q. Very, very briefly, Scott. Exhibits 22, 23, and 24 are
21 examples of lists that you routinely disseminate to your
22 directors?

23 A. That is correct.

24 Q. Not comprehensive?

25 A. No.

1 Q. Okay. Sometimes you just, because someone has been
2 canceled as an RTA, doesn't mean they are still a rep, right?

3 A. That is correct.

4 MR. ROSENFELD: That's it. Thank you.

5 THE COURT: You may step down. Next witness.

6 MR. ROSENFELD: Alan Horton.

7 ALAN HORTON,

8 having been duly sworn, testified as follows:

9 THE CLERK: Would you be seated, please. State
10 your full name for the record and spell your last name.

11 THE WITNESS: Alan Horton, H-O-R-T-O-N.

12 DIRECT EXAMINATION

13 BY MR. ROSENFELD:

14 Q. Mr. Horton, where do you reside?

15 A. Denver, Colorado.

16 Q. You are an RTA and a rep with, an RTA with YTB Travel
17 Network?

18 A. I am.

19 Q. And you are a rep with YTB?

20 A. I am.

21 Q. And you are a director, correct?

22 A. That's correct.

23 Q. When did you join YTB?

24 A. End of May, early June of 2004.

25 Q. As a rep and an RTA?

1 A. Yes.

2 Q. When did you become a director?

3 A. Officially titled in August of 2007 and fully qualified
4 in November of 2007.

5 Q. When you came from YTB in '04, who sponsored you?

6 A. Edward Terrazas.

7 Q. Mr. Johnson, Mr. Hoffmann, Mr. McLaughlin did not sponsor
8 you, correct?

9 A. No.

10 Q. As an RTA you sell travel packages, correct?

11 A. As an RTA I sell travel and, yeah, travel packages.

12 Q. Airline tickets as well as cars?

13 A. Correct.

14 Q. You receive commissions on those sales?

15 A. Yes.

16 Q. As a rep you sell RTA's?

17 A. Travel agencies, yes.

18 Q. And you are paid a commission from YTB on those sales?

19 A. That's correct.

20 Q. Okay. And as the director you receive income generated
21 by downline sales, by both your RTA's and reps?

22 A. On the rep side I do, yes.

23 Q. And that occurs whether or not you personally sponsor the
24 rep downline; is that correct?

25 A. That's correct.

1 Q. You, as a director, you signed a director's agreement,
2 correct?

3 A. I did.

4 Q. Look at Exhibit 1 briefly, sir. Did you sign an
5 agreement that looks like that?

6 A. I did.

7 Q. And you understood there was a rep agreement that went
8 with the director's agreement; is that correct?

9 A. Correct.

10 Q. That's Exhibit 4.

11 A. Yes, sir.

12 Q. Do you understand from your review of the documents, your
13 execution of documents, that when you left, what was your
14 understanding of what, who you could solicit when you leave
15 YTB?

16 MR. McCARTHY: Objection, Your Honor. It's
17 irrelevant his understanding.

18 THE COURT: Sustained.

19 MR. ROSENFELD: Move on.

20 Q. (by Mr. Rosenfeld) Did there come a time when
21 Mr. McLaughlin attempted to recruit you to leave YTB?

22 A. Yes, sir.

23 Q. When did that occur?

24 A. Right around on the 4th I would say the stage was being
25 set.

1 Q. 4th of what?

2 A. May. No, April.

3 Q. What year?

4 A. April 4th, 2009.

5 Q. Okay. And what did Mr. McLaughlin say to you?

6 A. He curried me on how things were going with me
7 financially, how things were going with some of the different
8 team members. I talked about how finances were hard. We're
9 kind of going through a storm with our company, and the
10 income and the sales have gone down. And he explained that
11 that was going on across the board. That he was also
12 experiencing significant decreases in his income.

13 He talked to me about how we're a team, and the
14 team is what's the most important. And that when you're
15 going forward as a team, you make moves as a team.

16 He alluded to the fact that at some point in time
17 we may need to change our strategy or make a move, and that
18 there was nothing that, he was saying, that we needed to do
19 at this point, but he would talk to me later if he felt we
20 needed to because he was concerned about what was going on in
21 the company.

22 Q. And the travel business has been down in the economy as
23 well as the company?

24 A. The travel business.

25 Q. Industry?

1 A. It's flattened out. Certainly decreased a little bit.

2 Yes, sir.

3 Q. You had another conversation with McLaughlin on April 6,
4 2009?

5 A. I did.

6 Q. Tell us about that.

7 A. He asked me if I could go out to California on the
8 following Tuesday, and he wanted me to go take a look at a
9 company, and that was at the point I believe it was Visalus.
10 I believe on that phone call I understood that.

11 Q. Did Mr. McLaughlin say anything about YTB in that
12 conversation on April 6?

13 A. Yes, I believe that there was -- there were conversations
14 about YTB in each of the conversations.

15 Q. Positive or negative?

16 A. Negative. I shouldn't say that. There were some
17 positive things, but the nature of the conversation was
18 overall that YTB is in a very challenging situation. It was
19 clear in his mind YTB wasn't going to make it through some of
20 the things we were going through.

21 Q. Did Mr. McLaughlin tell you any about your team, that you
22 were going to lose your team if you didn't go?

23 MR. McCARTHY: Objection, Your Honor. That's
24 leading.

25 THE COURT: Overruled.

1 THE WITNESS: He had shared with me that he had
2 been feeling out my team. Was unclear. It was vague at that
3 time point in time who he had been talking to, but he had
4 been talking to people.

5 Q. (by Mr. Rosenfeld) Who was your team?

6 A. The people that are in my business. So those below the
7 person I personally sponsored.

8 Q. He's talking about people you personally sponsored?

9 A. Yes.

10 Q. He didn't sponsor you?

11 A. No.

12 Q. Or he didn't sponsor them?

13 A. No.

14 Q. What did he say about your team?

15 A. Actually, on the 4th he was in Denver. We were at a
16 training, and that's when he pulled me aside, and that's
17 where the conversations began. He said he had been feeling
18 out the people on my team, and he realized a lot of those
19 people were feeling very pressured and challenged with
20 directions their incomes were going and the business they
21 were making. And he shared with me when we make this move,
22 75 -- he said three-quarters of the people will be moving
23 with me, and that I need to understand that if I decide that
24 I want to stay that's fine, but they're going to be moving
25 over.

1 Q. He told you if you stayed, your team, 75 percent of your
2 team was going with him?

3 A. Yes.

4 Q. Did he tell you -- did he promise you any money if you
5 went with him to Visalus?

6 A. Yes.

7 Q. What did he promise you?

8 A. The first statement to me was 3,500. The second one was
9 five, and then on the final conversation, which I believe was
10 on the morning of the 11th, he said potentially we could even
11 see ten.

12 Q. Ten what?

13 A. Thousand monthly.

14 Q. He was promising you if you went to Visalus, you would
15 get \$10,000 a month?

16 A. He said I could look forward to a monthly income for my
17 family.

18 Q. Did he ever tell you your choice was to come with him or
19 stay with YTB and start all over?

20 A. That's what he was telling me. He said I could stay, but
21 the team is going because they were unhappy.

22 Q. Let's turn to Exhibit 14. This is an email from Debbie
23 McCurdy from you to Aaron Disler (phonetic) at YTB and
24 earlier from Debbie McCurdy and -- Debra and John McCurdy to
25 you on April 19, 2009, right?

1 A. Correct.

2 Q. And it's forwarding on an email of Sunday, the 17th of
3 May, from Mr. Johnson's group, Mr. Johnson to Ms. McCurdy,
4 right?

5 A. That's correct.

6 Q. And this is a solicitation dated May 19th, 2009, correct?

7 A. That's correct.

8 MR. McCARTHY: Excuse me. I lost track. Which
9 exhibit is that?

10 MR. ROSENFELD: 14.

11 MR. McCARTHY: 14. Excuse me, Your Honor.

12 Q. (by Mr. Rosenfeld) Ms. McCurdy, who sponsored her?

13 A. My mother, Susan Horton.

14 Q. If not for your mother, Susan Horton, would Mr. -- did
15 Mr. Johnson know Ms. McCurdy independent, to your knowledge?

16 A. Not to my knowledge. I didn't even know her.

17 Q. Let's go to Exhibit 15. Let's go to 16, rather.
18 The May 20th email at the bottom of the first page of Exhibit
19 16 is from Mr. Johnson, again, to McCurdy on the 20th,
20 McCurdy onto you, you onto Disler, another recruitment; is
21 that correct?

22 A. That's correct.

23 Q. We got another one for Exhibit 17 on the 21st; is that
24 right?

25 A. That's correct.

1 Q. This is what came to you and you passed onto YTB?

2 A. Uh hum.

3 Q. Let's go back to 16. Debbie never requested this Visalus
4 information. Thanks. Alan.

5 A. Uh hum.

6 Q. Correct? Were you aware of any instance when Ms. McCurdy
7 made any effort whatsoever to contact Mr. Johnson about
8 Visalus?

9 A. No, sir.

10 MR. McCARTHY: Objection. That calls for a hearsay
11 answer.

12 THE COURT: Sustained.

13 Q. (by Mr. Rosenfeld) Okay. Let's go to Exhibit 21, last
14 one of the bunch. This is dated May 31. Email, the bottom
15 of the page. Email to Johnson to McCurdy onto you. And the
16 email says, the email says -- could you read that there right
17 in the middle where Debra writes to you?

18 A. Hi there. One for Mr. Snake in the grass. Good luck
19 tomorrow. Have a great day. John and Deb.

20 Q. That was two days ago, correct?

21 A. That's correct.

22 Q. Okay. And then the last exhibit, Exhibit 10, Exhibit 10
23 is a catalog of emails from Mr. Hoffmann dated 5-12, May
24 12th, to you and your mother. Your mother's Susan Horton?

25 A. That's correct.

1 Q. And you and your mother are identified on the first page
2 as having received an email from Mr. Hoffmann on 5-12-2009?
3 A. That's correct.
4 Q. Okay. And looking at the solicitations which were behind
5 it, do you recall receiving these emails? There's numerous
6 emails here. Do you recall receiving something like this
7 from Bill Hoffmann breaks Visalus ambassador record?
8 A. Yes.
9 Q. Did you ever request that Mr. Hoffmann provide you with
10 that?
11 A. With the Visalus emails?
12 Q. Yes.
13 A. No, sir.
14 Q. You are a director of YTB?
15 A. Yes, sir.
16 Q. As a director did you repeatedly get lists with contact
17 information regarding your downline?
18 A. I have access to it at my office.
19 Q. And that's not limited just to folks that you brought
20 into the company, right?
21 A. No, sir.
22 Q. Okay. That list includes contact information, emails,
23 addresses?
24 A. It depends where they are on my team, but yes, sir.
25 MR. ROSENFELD: Thank you, sir.

1 THE COURT: Cross examination?

2 MR. McCARTHY: Thank you, Your Honor.

3 CROSS EXAMINATION

4 BY MR. MCCARTHY:

5 Q. Mr. Horton, let's go to this training meeting in early
6 April of 2009. Do you remember that in Denver?

7 A. Yes.

8 Q. You just testified to that?

9 A. Yes, sir.

10 Q. Do you remember approaching Mr. McLaughlin to talk to him
11 about your financial problem?

12 A. No, sir.

13 Q. You were having financial problems at the time. You just
14 testified to that?

15 A. Yes, sir.

16 Q. Did you come to Mr. McLaughlin and say that things are
17 really, really tough for us because revenue is down for us
18 with the -- with YTB?

19 A. I did not initiate that conversation, sir.

20 Q. Did you ask him for assistance in helping to find a way
21 out of these financial problems?

22 A. Well, no, not -- I don't recall that. If I had it would
23 have been under the confines of YTB.

24 Q. Did you at that time, you had actually had to move your
25 residence, hadn't you?

1 A. Move my residence?

2 Q. Because of your financial problems.

3 A. No.

4 MR. ROSENFELD: I object as to relevancy.

5 THE COURT: Sustained.

6 Q. (by Mr. McCarthy) Now, let's go -- you talked about
7 Exhibits 14, Ms. McCurdy forwarding these on to you, 15, 16,
8 and 21. Do you remember testifying as to those?

9 A. Just now? Yes, sir.

10 Q. Do those emails give -- well, if we address just -- let's
11 just take the first one, number 14. Go to the very last
12 page, 8 of 8 of that Exhibit 14, where it says it's powered
13 by I contact and manager's subscription. Last page there.

14 A. Yes, sir.

15 Q. Do you see that? Did -- obviously, Ms. McCurdy did not
16 cancel what she was receiving when she could have canceled
17 it, correct?

18 A. She could have canceled it, sure.

19 Q. So she, rather than canceling it, she kept receiving it
20 and giving it to you?

21 A. Yes, she wanted to see how many of those were going to
22 her team.

23 Q. Her team.

24 A. That's what we were all doing because if they go to one,
25 they go to a lot. We were trying to see what the frequency

1 of this Visalus exposure was to team members. It's damaging
2 to our team.

3 Q. All right. And the point is anybody who doesn't want to
4 receive a newsletter like this can simply opt out of it?

5 A. Yes, sir.

6 Q. Is that not true, also, that in order to receive a
7 newsletter of this nature, you have to request it?

8 A. Repeat the question.

9 Q. Isn't it also true that as you can opt out, that it's
10 also necessary to request to get into a newsletter situation?

11 A. In some cases. I guess it would depend on how that news
12 distribution is set up. I would think it would be a
13 case-by-case scenario.

14 MR. McCARTHY: That's all I have, Judge.

15 THE COURT: Anything further?

16 MR. ROSENFELD: No, Your Honor.

17 THE COURT: You may step down. Next witness.

18 MR. ROSENFELD: Jerome Hughes, sir.

19 JEROME HUGHES,

20 having been duly sworn, testified as follows:

21 THE CLERK: Would you be seated, please. State
22 your full name for the record and spell your last name.

23 THE WITNESS: Jerome Hughes, H-U-G-H-E-S.

24

25

DIRECT EXAMINATION

1

2 BY MR. ROSENFELD:

3 Q. Where are you from, Mr. Hughes?

4 A. Macon, Georgia.

5 Q. Are you an RTA and a rep with YTB?

6 A. Yes, I am.

7 Q. When did you join YTB?

8 A. August of 2004.

9 Q. Who sponsored you with YTB?

10 A. Juliette St. John.

11 Q. Did you become a director in 2005?

12 A. Yes.

13 Q. You executed a director agreement?

14 A. Absolutely.

15 Q. Did there come a time -- did there come a time in early

16 April when you received a message from, text message from

17 Bill Hoffmann about leaving YTB?

18 A. The text message, actually, stated that we needed to

19 talk.

20 Q. What was the date of that?

21 A. That was April 1st.

22 Q. Is it still in your phone?

23 A. Yes, it is.

24 Q. Okay. Now, when we filed this lawsuit so we're clear

25 with His Honor, you filed an affidavit with this lawsuit; is

1 that correct?

2 A. That's correct.

3 Q. And in that affidavit it was Exhibit -- may I approach,
4 Your Honor, since I don't have a copy?

5 THE COURT: Yes.

6 Q. (by Mr. Rosenfeld) Exhibit J was this affidavit that you
7 signed, correct, and in this affidavit you stated that this
8 text message occurred on April 9th; is that correct?

9 A. Yes.

10 Q. And you're certain it's on April 1st?

11 A. Yes, after going back through the phone and looking at
12 the text messages and the dates, the date indicates that the
13 text message was sent and it was April 1st.

14 Q. And that evening did you receive a phone call from
15 Mr. Hoffmann?

16 A. That's correct.

17 Q. And on the phone call what did Mr. Hoffmann say?

18 A. He was, basically, just talking about the company,
19 Visalus, and that it was a billion dollar company, and I owed
20 it to myself and my family to come out and take a look at the
21 company and a little bit about the comission plan. Just,
22 really, he was pretty excited about the company.

23 Q. Did you respond to Mr. Hoffmann?

24 A. No.

25 MR. ROSENFELD: I have nothing further, Your Honor.

1 THE COURT: Cross examination?

2 CROSS EXAMINATION

3 BY MR. MCCARTHY:

4 Q. Now, sir, that affidavit that you gave of April the 9th,
5 2009, as being the date of the conversation, the text message
6 from Bill Hoffmann?

7 A. Right. Here's what happened. When they, actually, when
8 I was talking to YTB about it, I didn't know the exact date,
9 so I said somewhere around the 9th. And then after that, you
10 know, I went in my phone and actually just looked at the
11 date, again. The text message is still in the phone. It
12 still shows the date and the time that he texted, and that
13 same night we had the conversation.

14 Q. Now, you signed this affidavit that states on its face
15 that it was April the 9th and it was notarized, apparently,
16 on May the 1st, 2009. You didn't check your phone prior to
17 signing it?

18 A. No, I did not.

19 Q. When did you check your phone?

20 A. Actually, the last hearing that we were at.

21 Q. The last hearing. You're talking about the one in
22 Madison County?

23 A. That's correct.

24 Q. On the 14th or 15th of May?

25 A. Right.

1 Q. You've known about that. When did you tell the opposing
2 lawyers you were wrong about this or the lawyers for YTB that
3 this was the wrong date?

4 A. That same day.

5 Q. And what were you told was going to have to be done about
6 it, if anything?

7 A. Nothing.

8 Q. A new affidavit wasn't sent to you to sign before it was
9 given to this Court or anything?

10 A. No.

11 Q. Nothing. Okay. Did you -- you're still a director of
12 YTB?

13 A. Yes.

14 MR. McCARTHY: That's all I have.

15 THE COURT: Anything further?

16 MR. ROSENFELD: No questions.

17 THE COURT: You may step down.

18 MR. ROSENFELD: Last witness. Von Nickleberry.

19 VON NICKLEBERRY,

20 having been duly sworn, testified as follows:

21 THE CLERK: Would you be seated, please. State
22 your full name for the record and spell your last name.

23 THE WITNESS: My name is Von V, as in Victor,
24 V-O-N. Middle name is Archer, A-R-C-H-E-R. Last name is
25 N-I-C-K-L-E-B-E-R-R-Y. And that is junior, Jr.

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DIRECT EXAMINATION

BY MR. ROSENFELD:

Q. Mr. Nickleberry, where are you from?

A. Born and raised in Sangamon, Michigan.

Q. And you are an RTA and a rep with YTB?

A. Yes.

Q. And you joined YTB in 2004?

A. I sure did. March 31st.

Q. Who were you sponsored by?

A. Bill Hoffmann.

Q. And you became a director in 2006, correct?

A. Correct.

Q. You've known Mr. Hoffmann for years?

A. I've known him for some years, but we became extremely close in 2004.

Q. In April of 2009 did you know Nick Pagano?

A. Nick was my mentor for 12 years.

Q. Is Nick someone you sponsor at YTB?

A. Yes.

Q. Did you come to learn in early April that Mr. Hoffmann had communicated with Mr. Pagano?

A. You know, I didn't learn that.

MR. McCARTHY: Objection, Your Honor. That would be a hearsay answer.

THE COURT: Sustained.

1 Q. (by Mr. Rosenfeld) Did you have a discussion with
2 Mr. Hoffmann in early April about Jerome Hughes?
3 A. I think it was more like mid-April.
4 Q. Mr. Hoffmann was trying to recruit Mr. Hughes to Visalus?
5 A. No. I don't think Mr. Hoffmann had tried to recruit
6 Mr. Hughes to Visalus at the time, no.
7 Q. Did you tell Mr. Hoffmann, "You are not going to get
8 Jerome"?
9 A. I sure did.
10 Q. Did Mr. Hoffmann respond, "I will get Jerome and Jerome
11 will have to come"?
12 A. Yes, to the best of my knowledge.
13 Q. Okay. On April 18 of 2009, did you receive a phone call
14 from Mr. Hoffmann?
15 A. I sure did. I was on the highway, driving from Red
16 Carpet to pick up Terry Perez from the airport.
17 Q. Did Mr. Hoffmann describe YTB as a sinking ship?
18 A. He sure did.
19 Q. Did he tell you he had a position for you at Visalus?
20 A. He sure did.
21 Q. Did he tell you, "You've got 90 days before I start
22 taking people from your downline"?
23 A. Correct.
24 MR. ROSENFELD: I have nothing further, Your Honor.
25 Thank you, Mr. Nickleberry.

1 THE COURT: Cross examination.

2 CROSS EXAMINATION

3 BY MR. MCCARTHY:

4 Q. Sir, as I understand these conversations that occurred,
5 they were in -- the earliest one that you described was the
6 middle of April?

7 A. Yes.

8 MR. MCCARTHY: That's all I have, Judge.

9 THE COURT: You may step down. Any other
10 witnesses?

11 MR. ROSENFELD: No, Your Honor.

12 THE COURT: Mr. McCarthy.

13 MR. MCCARTHY: For the record we will move for a
14 judgment in favor of the defendants.

15 THE COURT: That will be denied.

16 MR. MCCARTHY: I will call back to the stand as an
17 adverse witness, Mr. Tomer.

18 THE CLERK: I would admonish you you are still
19 under oath. Would you take the stand and state your name for
20 the record, please, and spell your last name.

21 THE WITNESS: Yes, ma'am. Scott Tomer, T-O-M-E-R.

22 DIRECT EXAMINATION

23 BY MR. MCCARTHY:

24 Q. Can you identify that document?

25 A. The 10-K.

1 Q. And the 10-K is the report that you made for your company
2 to the Security & Exchange Commission concerning the
3 financial status of your company for the calendar year 2008,
4 correct?

5 A. That is correct.

6 Q. And once again, this is a document that, official
7 document that you filed and you verified as being true?

8 A. Correct.

9 Q. Okay. If I ask you to pick up on tab number 9 in this
10 official report concerning the financial condition of your
11 firm, your accountant or certified public accountant doing
12 the report felt compelled to report that this, that your
13 company was in threat of not continuing as a going concern.
14 Do you remember that?

15 A. Yes. It's our audit firm, actually.

16 Q. As a result of that, you had to do some immediate damage
17 control, did you not?

18 A. What would you classify as damage control?

19 Q. A letter to all your directors.

20 A. I put a letter to the shareholders.

21 Q. Okay. And that was also filed with the Security &
22 Exchange Commission?

23 A. It was in, I believe, in an 8-K.

24 Q. And the financial, exact financial statements for, if we
25 look at tab number 8, it shows that you had -- it tracks the

1 income for 2006, 2007, and 2008, and it shows a net loss in
2 2008 of \$4.475 million; is that right?

3 A. Yes.

4 Q. Also, in here if I can come across it, if we look at tab
5 number 5, sir, it shows the history of your RTA's. Now once
6 again, what are the RTA's?

7 A. Those are the people who are paying us a monthly posting
8 fee.

9 Q. Those are the people who pay the freight. They pay
10 everybody else's commissions up the line, correct?

11 A. We are talking about in the network marketing company.
12 Based on their purchases this is where commissions are
13 generated.

14 Q. It shows the ending balance went, in 2008, went to 92,000
15 of these people. In 2007 it was as high as 131,000. Do you
16 see that?

17 A. Yes. And the year before was 59. That's the column you
18 are talking out, right?

19 Q. Yes, sir.

20 A. Yes, sir.

21 MR. McCARTHY: All right. That's all I have with
22 this witness, Judge.

23 THE COURT: You may step down. Next witness.

24 MR. McCARTHY: Bill Hoffmann.

25

1 information. Most of those people that are active, and I
2 didn't look at it to see which ones aren't, are probably
3 still on my cell phone.

4 Q. Okay. Do you know when you glance at that, do you know
5 if any of those directors have left since that time?

6 A. I would say I see some, but I don't -- yeah, I see some.
7 Yeah. Quite a few, but that happens. Yes.

8 Q. Okay. Did they go to Visalus?

9 A. I do see one name that's went to Visalus, but they went a
10 long time ago, Ron and Phyllis Bush.

11 Q. They went before you?

12 A. Oh, yeah, months before. I didn't even know about
13 Visalus at the time.

14 Q. What, other than this list, do you have access to any of
15 the YTB downline activity information?

16 A. No.

17 Q. When were you cut off from them?

18 A. You mean my site shut down?

19 Q. Yes.

20 A. April 2nd.

21 Q. Okay. Now, what do you mean by site shut down? What was
22 the significance of your site being shut down?

23 A. Well, it's when they -- they would just shut down your
24 sites so you couldn't market or sell travel. And that's when
25 I'd have to look at the exact, how it coincides with the pay

1 period, but we were paid on a cash card, so they didn't pay
2 the commissions from the previous week on April 2nd or the
3 9th.

4 Q. So you have -- you consider that you have funds coming
5 due from them?

6 A. Well, they were commissions that would be due prior to me
7 deciding to join Visalus. Whether or not they open it to me
8 after I joined Visalus is probably what the next judge will
9 decide or wherever we end up.

10 Q. What is the -- what was the date that you joined Visalus?

11 A. I joined on the 8th or the 9th. The 9th of April.

12 Q. Let's take a look at these. I'm going to show you
13 Exhibit 10 and the information about your --

14 A. Uh hum.

15 Q. -- about you in this.

16 A. Correct.

17 Q. What is that document?

18 A. That's an email that Justin Johnson and Steve Bishop sent
19 out to people that had enrolled to the Bill Hoffmann
20 newsletter.

21 Q. All right. So this was sent to people who had
22 voluntarily enrolled in your newsletter?

23 A. Absolutely.

24 Q. Yeah. And as you turn the page there, is there
25 affirmative action that has to be taken to actually enter

1 into the site?

2 A. Correct, they would have to fill it out, put the correct
3 email, meaning a real email. Couldn't just like put "test"
4 in there. It would have to be like a -- and when the next
5 page popped up, they had to do the exact same thing, so they
6 would have to repeat the exact same information so that you
7 get away from people who really don't want to do it.

8 Q. Is it feasible for somebody to have filled out that
9 information about name and email address incorrectly or
10 inaccurately so that even though it was sent to an email
11 address that they opted in with, that they got another copy
12 coming to them?

13 A. Well, if they did do that, nothing was ever done with the
14 people that did this. This went out without my knowledge.
15 And we have not -- 2,100 people asked for more information.
16 And I believe that was on the 12th because that's what the
17 date says here, and we have not -- they just -- they're
18 just -- no one's responded to it, period. So if they put
19 another email address in there, then they would be putting a
20 different email address that they wanted the information to
21 come to.

22 Q. Okay. You don't have any control over that, do you, what
23 email address they put in there?

24 A. No. I don't even know who's really getting it. It's
25 just going into a data sever that they operate into, and two

1 and a half years later they are receiving a newsletter from
2 me.

3 Q. Has any information from Visalus been used to build your
4 email data base for *billhoffmann.com*?

5 A. Anybody from Visalus?

6 Q. Right. I'm sorry.

7 A. From YTB.

8 Q. Thank you. From YTB. Excuse me.

9 A. Well, if YTBers, people that are involved in YTB, signed
10 up for it, then they would be getting my newsletter, also.

11 Q. All right. But they would have to sign up. You didn't
12 take any information given to you by YTB and insert it into
13 your website?

14 A. No, there's anti-spamming rules. You can't take a list
15 that hasn't been asked for and send them information --

16 Q. Okay.

17 A. -- unless they asked for it.

18 Q. Through your -- in your personal newsletter you had that
19 while you were with YTB, right?

20 A. Uh hum. Yes.

21 Q. Okay. Did YTB permit you to have YTB business on your
22 own personal newsletter?

23 A. I don't know whether they permitted it. I mean when
24 you're involved in a business like this, we talk about YTB at
25 church. We talk about it at school. What I'm saying it

1 permeated. Network marketing is an industry. We talked
2 about it all. Every company we've talked about in the last
3 five and a half years, both Mr. Tomer and myself, in lots of
4 different companies. What I'm saying it's just talked about.

5 I don't think I ever asked permission. They never
6 gave me permission nor did I ask permission nor did they tell
7 me I couldn't send out information that was either mentoring
8 or meeting schedules or where I went on vacation last or what
9 way to get -- my whole thing was financial freedom made easy.

10 Q. Did YTB control how the information was disseminated
11 about their meetings and their business?

12 A. Not through my site, no.

13 Q. That's just the point. How did they do it?

14 A. Oh, through their own, through their own site. If I was
15 going to be doing a big meeting in Denver, which I was there
16 three weeks before the date I heard Mr. Horton talking about,
17 I would send the information in. They would say I'm coming,
18 and it would show up in everybody's back office. That's how
19 we communicated to the entire organization. The only people
20 I communicated with on my site were people that asked for my
21 monthly newsletter.

22 Q. So the YTB communication, YTB business communication,
23 took place on YTB's site only?

24 A. Yeah, and you had the same option you do with mine. You
25 could say opt out or unsubscribe.

1 Q. Now, what is your current mode of operation if somebody
2 calls you requesting information about Visalus?

3 A. I hate to say this, but I have to ask everybody, "Are you
4 with YTB?"

5 Q. And that's because of the insistence of YTB in this
6 lawsuit?

7 A. Yes. And I said, "If you are active with YTB, I cannot
8 talk to you."

9 Q. How many calls, if you know, how many calls like that do
10 you get on a day, average day?

11 A. There will be a dozen on my voicemail probably right now
12 asking what I'm doing. It won't be always just -- it's not
13 YTBers. I mean, if you make a little bit of money in this
14 industry, I mean I've got -- I get just as many phone calls
15 from people in other companies. That's the nature of what
16 this business is.

17 Q. Now, what does Visalus, as one of the companies that you
18 work with now, what does Visalus sell? What are its
19 products?

20 A. It's health and wellness. They sell anti-aging vitamins.
21 They sell an energy drink, and they have a weight loss.

22 Q. Is -- do they sell any travel?

23 A. No.

24 Q. Do you work for or are you a member of any organization
25 that has travel as its, you know, sales objective or travel

1 services as a sales objective?

2 A. No.

3 MR. McCARTHY: That's all I have of this witness,
4 Judge.

5 THE COURT: Cross examination.

6 MR. ROSENFELD: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. ROSENFELD:

9 Q. Mr. Hoffmann, you became a director with YTB what year?

10 A. I don't remember.

11 Q. Let's look at Exhibit 1.

12 A. Okay. Exhibit 1.

13 Q. It's the one here, right. We are going to work out of
14 that binder. Do you recognize your signature on this YTB
15 director agreement on the third page, I believe, November
16 11th, '08?

17 A. 11-08.

18 Q. That wasn't the first time you were a director?

19 A. No, this about the fourth agreement.

20 MR. McCARTHY: I object. This is outside the
21 scope.

22 THE COURT: Overruled.

23 Q. (by Mr. Rosenfeld) And in this agreement that you signed
24 in November, you agreed that while you were under 3A1, while
25 with YTB you were going to devote your full network marketing

1 business energy, effort, and talent exclusively to YTB,
2 right?

3 A. Yes.

4 Q. And you agreed that with respect to paragraph 5, that you
5 would comply with the policies and procedures of the rep
6 agreements, correct?

7 A. Correct.

8 Q. Okay. And you agreed in paragraph 6 that all sales
9 materials, presentations, training programs used by the
10 director relating to YTB and its affiliates must be only
11 those developed and approved by the corporate, right?

12 A. Correct.

13 Q. And it says such information, all contact information
14 regarding upline would remain the exclusive property of YTB
15 and constitutes YTB trade secrets. You agreed with that,
16 correct, paragraph 6?

17 A. Is that stuff that they've given me? That would be stuff
18 that they gave me, YTB gave me? You are talking about
19 materials? Well, you're the attorney, sir.

20 Q. I'm asking you what you agreed to.

21 A. Did I agree to any materials they gave me that I would
22 only use for YTB? Yes.

23 Q. You agree that all sales materials, presentations,
24 training programs used by the director relating to YTB and
25 all contact information regarding upline and downline

1 individuals and/or contact information regarding the identity
2 of reps and RTA's is the exclusive property of YTB and
3 constitutes YTB trade secrets?

4 I'm not limiting it to anything someone gave you.
5 I'm looking at the language. Do you agree to that provision?

6 A. Well, I guess I signed it, but I don't agree, not if
7 you're implying that information, if I get a business card
8 from somebody that belongs to YTB because I talked to them
9 about YTB.

10 Q. Well --

11 A. I'm not saying you're wrong. I'm just saying I would not
12 have known that. And the 11th was payday. Of course, I
13 signed it. I signed it. Sign it or you don't get paid.

14 Q. Okay. That's why you signed it. That's why you signed
15 it?

16 A. Absolutely. I got the phone call because it was supposed
17 to come in the month before. I was traveling. It came in.
18 They said, "You're not going to get your commissions on the
19 11th if you don't sign. So I stopped at the hotel, printed
20 it, signed it, sent it in and away we go.

21 Q. Okay.

22 A. You're right. Correct, though. But I didn't know that
23 that meant every information I ever gathered on my own, on my
24 own that I paid for, belonged to YTB. I did not know that.
25 That would be ignorance on my part, but I did not know that.

1 Q. Okay. Then we go to Exhibit 4, which is the --

2 A. With all the pictures that we did on vacations. YTB's
3 property, too? I'm just curious on that. Oh, I don't ask
4 questions.

5 THE COURT: You don't ask questions. You just
6 respond.

7 THE WITNESS: My brain was thinking. I apologize.

8 THE COURT: Next question.

9 Q. (by Mr. Rosenfeld) Do you know what downline contact
10 information is?

11 A. The information that we would gather from YTB going into
12 our back office and being able to pull up our power team or I
13 imagine even this director sheet. Contact information would
14 be there.

15 Q. Contact information regarding upline and downline
16 individuals. Do you know what that means?

17 A. Yeah, be contact information. Information they gave me.

18 Q. Okay. What if someone downline gave it to you, would
19 that be downline?

20 A. I never took their business cards. I would never do
21 that. I just never did it.

22 Q. Let's look at Exhibit 4, sir.

23 A. Okay.

24 Q. Rep policies and procedures.

25 A. Okay.

1 Q. And Section 3-21. Now, you agreed in the director
2 agreement under Section 5 that these rep policies and
3 procedures were part of your --

4 A. I never saw -- we did it electronically. And what I sent
5 up was 2003.

6 MR. McCARTHY: Your Honor, could I show a
7 continuing objection to the line of questioning is outside
8 the scope?

9 THE COURT: Yes, you can show it. Show anything
10 you want to. Denied.

11 MR. McCARTHY: Yes, sir.

12 THE COURT: The Court will note the continuing
13 objection.

14 MR. McCARTHY: Thank you, sir.

15 THE COURT: My interest is to hearing all the
16 facts. I'm not going to be limited by technicalities of
17 rules of evidence here. All right? I want to hear the
18 facts. Go ahead.

19 MR. ROSENFELD: Thank you, sir.

20 Q. (by Mr. Rosenfeld) Section 321 entitled "Conflicts of
21 Interest." It's on Exhibit 4 and it might be easy to find.
22 It's page 14 of 39.

23 A. Got it.

24 Q. Got it? Okay. And it says in the second sentence,
25 However, during the term of this agreement, reps may not

1 directly or indirectly attempt to enroll company's reps,
2 RTA's, or customers for any other network marketing business.
3 Do you see that?
4 A. I do.
5 Q. And you have the exclusivity provision we looked at,
6 Section 3, in the director agreement, as well?
7 A. Uh hum.
8 Q. On April 1 you were still a director with YTB?
9 A. I was.
10 Q. Did you email -- did you text message Jerome Hughes as he
11 testified today?
12 A. I did, for him to call me.
13 Q. Okay. And did you have a phone call with Jerome Hughes?
14 A. He called me.
15 Q. Excuse me, sir. I mean no disrespect.
16 A. I'm sorry.
17 Q. I appreciate you coming in today. Just answer my
18 question. And we certainly have to respect the job the court
19 reporter has. Did you follow up that text message on April 1
20 with a phone call to Mr. Hughes that evening?
21 A. No, he called me.
22 Q. Okay. And did Mr. Hughes testify accurately here today?
23 A. No. I disagree with his testimony.
24 Q. Okay. He didn't, you didn't talk to him about Visalus?
25 A. Oh, we talked about Visalus. We talked about Monade

1 (phonetic). His name was being thrown around about different
2 companies. And there was a gentleman by the name of Jason
3 Camaroto (phonetic) who was saying that he was getting ready
4 to go to another company.

5 THE COURT: You can't testify as to what someone
6 else told you.

7 THE WITNESS: Got you. So we talked about four
8 different companies that evening.

9 Q. (by Mr. Rosenfeld) Okay. And you texted Pagano on April
10 1, as well?

11 A. I don't know that it was April 1st. I believe you. If
12 you say it's April 1st, I'm not denying it.

13 Q. My testimony is not meaningful. This is an affidavit
14 from Mr. Pagano filed with the lawsuit, Exhibit J -- excuse
15 me -- Exhibit I of the original complaint.

16 MR. McCARTHY: Object, Your Honor. That's hearsay,
17 affidavit or not.

18 MR. ROSENFELD: I am going to ask whether he sent
19 it.

20 THE COURT: Overruled. You may show it to him.

21 Q. (by Mr. Rosenfeld) This is, Mr. Pagano filed this with
22 his affidavit. "Nick, could you fly to California on Sunday
23 or Monday?"

24 A. I did send that.

25 Q. Okay. And going back to 3-21, the agreement says

1 Following cancellation of a rep's agreement and for a period
2 of six calendar months thereafter with the exception of a rep
3 who was personally sponsored by a former rep, a former rep
4 may not recruit any of the company's reps, RTA's or customers
5 for another network marketing business.

6 A. I see that.

7 Q. What do you understand?

8 A. I see that. I would say I agree with that.

9 Q. You agree. That when you leave YTB, you can take with
10 you or try to take with you the folks you sponsored, but the
11 folks you didn't sponsor you can't recruit or solicit. Do
12 you agree with that?

13 A. I agree with that.

14 Q. At least for six months?

15 A. As long as they pay you. I thought that was the way it
16 worked, as long as they were paying you. That's what -- I'll
17 shut up.

18 THE COURT: As long as who's paying you?

19 THE WITNESS: YTB.

20 THE COURT: Okay.

21 Q. (by Mr. Rosenfeld) Okay. So you understood that was the
22 deal. That when you left you couldn't solicit anybody other
23 than your own folks for six months?

24 A. Correct.

25 Q. Okay. Did you tell Von Nickleberry that we'll take

1 Jerome's genitals and Jerome will have to come?

2 A. No. Am I allowed to expound on that?

3 Q. Go ahead.

4 A. He had called me about Jerome because there was rumor,
5 just rumors just like it was with me a rumor at that time
6 until they stopped paying me. But the rumor was that he was
7 going with another company. And he says, "Well, he'll never
8 go with Visalus." I said -- well, because he had sponsored
9 the Bushes who were in Visalus. And I said, "Well, I'm sure
10 they're going after him, but if he goes with Monade, some of
11 his generals will end up dispersing and going all the
12 different places." Because from their conversations with me,
13 Monade wasn't where they wanted to go.

14 Q. So you had texted Hughes on April 1 while you were still
15 a director.

16 A. Yes.

17 Q. You had a conversation with Hughes while you were still a
18 director?

19 A. We had discussed almost weekly. We talked about a lot of
20 different companies. One time we would talk about a lot --
21 all the time.

22 Q. In your conversation with Hughes on 4-1-09 did you
23 suggest it might be a good idea to go to Visalus?

24 A. No, I suggested to him to not make the mistake of going
25 to a company like Monade no matter how much money they are to

1 pay you and to take into consideration don't judge any
2 company by your downline. Phyllis and Ron.

3 Q. What's your history? How long have you been in network
4 marketing?

5 A. Five and a half years there and prior to that, I was with
6 a company called Excel Telecom from 1992 to 1997.

7 Q. So you've been in network marketing for 17 years?

8 A. No, I wasn't in between the time. I didn't do that, but
9 I mean wasn't involved from '97 then till 2003.

10 Q. Okay.

11 A. There was a direct sales company called National Health
12 Insurance. That's right. That was a network marketing.

13 Q. Did you attempt to enroll Peter Jensen or recruit Peter
14 Jensen from Visalus?

15 A. No, never.

16 Q. Never did?

17 A. We had a lot of discussions about it. In fact he
18 suggested I go to World Ventures and buy my business so we
19 could protect the check, and I said I wouldn't do that.

20 Q. Did you look at the affidavit Mr. Jensen filed with this
21 lawsuit?

22 A. Yes.

23 Q. It is false?

24 A. It was false. We had lots of discussions. He's my
25 mentor. He's the guy that taught me network marketing.

1 Peter Jensen.

2 Q. He sponsored you?

3 A. He sure did.

4 Q. You said two and a half years ago you set up the --

5 A. *billhoffmann.com*.

6 Q. -- *billhoffmann.com*. And as I understand it, you were at

7 YTB at that point?

8 A. Yes, I was.

9 Q. Were you doing any network marketing at that point?

10 A. No.

11 Q. Okay. And how many people enrolled in *billhoffmann.com*?

12 A. I don't know. I would have to ask my computer person.

13 I'm not very technical.

14 Q. Thousands?

15 A. Thousands.

16 Q. Five thousand, 10 thousand?

17 A. Probably over 5 thousand.

18 Q. And was the subject of -- we look at Exhibit 10 here, and

19 we can see the subject of *billhoffmann.com* is all about

20 Visalus. When you get a new Beemer. I've got the keys to my

21 Beemer, right?

22 A. Right. That's the ad they came up with.

23 Q. Was it the same subject? Was YTB the focus of the

24 attention for the two and a half years you had that website,

25 *billhoffmann.com*, prior to your going with Visalus?

1 A. YTB was on the site, yes.

2 Q. Okay. And how do folks enroll in -- how did these
3 thousands of people enroll in *billhoffmann.com* two and a half
4 years ago, over the two and a half years ago?

5 A. I had it on Google and things like that, and people would
6 go to it and enroll in it.

7 Q. You had access as a director for two and a half years to
8 all the contact information in your downline if you wanted
9 it, didn't you?

10 A. No, the power team.

11 Q. The power team?

12 A. The power team, which was 82 people in my organization.

13 Q. You didn't have access to anymore than that?

14 A. I might have had more than 82 at one time, but they went
15 away.

16 Q. I just want to refer you to Exhibit 23.

17 A. All my directors.

18 Q. 24. We are going to look at Mr. Johnson's Exhibit 24,
19 sir.

20 A. I wouldn't have had that.

21 Q. You wouldn't have had that to that extent?

22 A. I'm not a computer guy. I wouldn't have known what to do
23 with it.

24 Q. How would someone enroll in *billhoffmann.com*?

25 A. They'd go to *billhoffmann.com* that says get your monthly

1 newsletter all about motivation, mentoring, and sales
2 training.

3 Q. Okay. How many folks from YTB enrolled in
4 *billhoffmann.com*?

5 A. It wasn't a requirement that they had to tell they were
6 in YTB.

7 Q. How many YTB folks were enrolled?

8 A. I don't have any idea.

9 Q. How many folks did you sponsor?

10 A. In YTB?

11 Q. Yes. Personally.

12 A. I don't know that either as a placement sponsor. So I
13 don't know. They could probably tell me. I don't know.

14 Q. You don't know that?

15 A. No.

16 Q. Okay.

17 A. You worked with everybody in your group.

18 Q. A couple dozen, a couple hundred?

19 A. Probably a couple dozen.

20 Q. So if you only wanted to communicate when you leave YTB,
21 you are starting over with Visalus and you only want to
22 communicate with the YTB folks that you personally sponsored,
23 you could shut this site down and start a new one, couldn't
24 you, just like you did two and a half years ago?

25 A. But it's my site. Why would I want to shut it down?

1 Q. I'm asking could you do that?

2 A. I couldn't call it *billhoffmann.com*. I would have to

3 call it something else.

4 Q. And you could give the address, the new address to those

5 80, 200 or how many folks you personally sponsored. You

6 could give them that address?

7 A. Correct.

8 Q. All right. And as I understand the questioning from your

9 counsel, it's your position that it's up to those folks to

10 get off your site?

11 A. Well, when I get stuff from Kohls and I don't want it, I

12 just hit the unsubscribe, and I no longer get the newsletters

13 every week or month or however they send it out.

14 Q. Is that your understanding the way the agreement worked

15 with respect to solicitations, it was going to be up to the

16 person who got the knock on the door to not open the door?

17 Is that your understanding of the word "solicitation"?

18 A. Correct.

19 Q. Okay. You're entitled to keep knocking?

20 A. No.

21 Q. It's up to the person not to open the door. You're

22 entitled to keep knocking?

23 A. Well, there has to be some responsibility on the person

24 if they don't want it.

25 Q. Okay. What's your responsibility to make sure you are

1 not contacting somebody else like Jerome Hughes' downline or
2 Alan and Mrs. Horton, Susan, his mother's, downline? Do you
3 have any responsibility to undertake any effort to not do
4 that?

5 A. I believe that if I openly knew it was going to them, I
6 suppose I would have some responsibility to do that.

7 Q. You know that now, don't you?

8 A. That's why we stopped. As soon as I got that thing,
9 there was never another newsletter to go out. In fact we'd
10 stopped everything. We put it (witness indicating).

11 Q. Do you know Mike Capaletto?

12 A. Do I know Mike Capaletto? Yes, I met him.

13 Q. When did you meet him?

14 A. Oh, gosh. About mid April or something.

15 Q. Mid April?

16 A. No. No. He called. I didn't know it was that guy. He
17 called me and Von. We are doing a meeting in Ann Arbor one
18 time. He called. I didn't know it was Mike Capaletto. He
19 called Von and Von put the phone on me and let me talk to
20 this guy. And later when I met him in April, he said, "I'm
21 the one who called you and Von and tried to recruit you." I
22 didn't know he was trying to recruit us.

23 Q. Have you provided Mike Capaletto with any contact
24 information for anybody at YTB?

25 A. No.

1 Q. Email them anything? Didn't call them on the phone?
2 Didn't give them any prior information?

3 A. No, sir. I don't know him that well to be honest with
4 you. I mean I've only met him a few times.

5 Q. You understand that YTB is not asking the Court to keep
6 you from working with Visalus. Do you understand that?

7 A. I understand that.

8 Q. Do you understand that YTB is not asking that you not be
9 permitted to contact the folks you brought to YTB. Do you
10 understand that?

11 A. Uh hum.

12 Q. Do you understand. Are those --

13 A. Yes.

14 Q. Are those in your view, based on your experience in
15 network marketing, that's pretty reasonable, isn't it?

16 A. I would say that's reasonable. Yes, I would say that's
17 reasonable.

18 Q. Is it reasonable, based on your experience in network
19 marketing, that YTB would expect that you would not solicit
20 any YTB reps or RTA's for six months, 180 days, other than
21 the folks you brought to YTB?

22 A. As long as there was some clarification. I mean, can I
23 just elaborate just a little bit? I'm doing a meeting and
24 let's say this is the something something hotel, and there's
25 25 people out there and ten of them happen to be in YTB, and

1 I didn't invite one of them. What I'm saying is I would
2 totally understand me contacting them myself going after them
3 or giving information to somebody to contact them or
4 something like that. I totally, one hundred percent, agree.
5 But when people call me and don't identify themselves, I
6 don't know that that's fair.

7 Q. And if it's YTB's request that you return to YTB whatever
8 information you have in your computer or cell phone or
9 wherever in writing regarding downline contact or upline
10 contact information for YTB folks other than the ones you
11 sponsored, is that a reasonable request?

12 A. If that's the agreement that you, the Judge, decides,
13 then, yes. I don't have any information YTB gave me.

14 Q. I understand. So that wouldn't really bother you, would
15 it?

16 A. No.

17 Q. You don't have any?

18 A. Right. I don't have any.

19 Q. But if you had anything, you would think that would be a
20 reasonable thing for us to ask, that you return any
21 information you got about, other contact information you got
22 about folks other than you personally sponsored?

23 A. It will not create a hardship for me at all.

24 Q. And asking you to tell us anyone who you may have shared
25 any downline information regarding folks you didn't

1 personally sponsor, would that create a hardship for you?

2 A. I've never done that.

3 Q. So it wouldn't create a hardship?

4 A. It wouldn't create a hardship.

5 Q. How many folks have you recruited who were former YTB

6 folks who are now with Visalus?

7 A. I have no idea. Very small number, I imagine, if there

8 is. I mean, I don't know.

9 Q. When you say small are you guys talking about thousands?

10 Is it a dozen, two dozen, three dozen, 400?

11 A. I would say Jacques Johnson and Ian Olito.

12 Q. Now you're close with Jacques?

13 A. Uh hum.

14 Q. You talk all the time?

15 A. Probably sometimes daily, sometimes every three days,

16 whatever, just depending.

17 Q. Look at Exhibit 18 if you would.

18 A. Exhibit 18. That's the second folder.

19 Q. The big fat binder there.

20 A. Okay.

21 Q. Did you receive these solicitations?

22 A. Oh, yeah.

23 Q. You did?

24 A. Yeah.

25 Q. Are you aware that Mr. Johnson has been sending -- this

1 one went to Peter Jensen.

2 A. Well, Peter must have signed up for his newsletter.

3 Q. Have you spoken with -- have you spoken with Mr. Johnson
4 about whether he ought to be sending these kinds of
5 solicitations to folks?

6 A. Well, Peter Jensen's a big -- I'm sorry.

7 Q. Have you had any conversations?

8 A. About him sending these or not sending them?

9 Q. Excuse me. Have you had any conversations with respect,
10 with Mr. Johnson about his disseminating these solicitations
11 to all these folks?

12 MR. McCARTHY: Objection to the characterization of
13 solicitation.

14 THE COURT: I didn't understand your question
15 either.

16 MR. ROSENFELD: Fair enough. Thank you, Judge.

17 Q. (by Mr. Rosenfeld) Have you -- you received these
18 solicitations evidenced by Exhibits 17 through -- 14 through
19 21, correct?

20 A. Yes.

21 Q. Have you had any discussions with Mr. Johnson about these
22 solicitations?

23 A. They're too long.

24 Q. Have you ever expressed to Mr. Johnson whether you
25 thought it was appropriate or inappropriate that he was

1 sending these to YTB reps and RTA's who he did not personally
2 sponsor?

3 A. I don't know -- I don't know who they are going to other
4 than this exhibit came out and said people who had been
5 receiving them for months and maybe even years had decided
6 they don't want them anymore or didn't want them because they
7 now have Visalus information on it instead of YTB
8 information.

9 Q. And is it your view with respect to Ms. McCurdy or her
10 husband John or Mr. Jensen or any of the people who are
11 receiving this that it's their responsibility to opt out?

12 A. Absolutely.

13 Q. Excuse me. It's their responsibility to opt out. But
14 Mr. Johnson has no responsibility not to attempt to
15 communicate with them. Is that your position?

16 A. My position would be all they have to do is opt out,
17 yes.

18 Q. So in your view Mr. Johnson has no responsibility to make
19 any effort to cleanse his distribution list of YTB reps and
20 RTA's who he did not sponsor?

21 A. Correct. That's how you do it is opting out.

22 MR. ROSENFELD: I have nothing else, Your Honor.

23 Oh.

24 THE COURT: One more question.

25 Q. (by Mr. Rosenfeld) Exhibit 10, first one says Bill

1 Hoffmann breaks Visalus ambassador record in 17 days. See
2 that?

3 A. Yes.

4 Q. The only person you can identify as having recruited from
5 YTB is Mr. Johnson?

6 A. From this?

7 Q. Yeah.

8 A. I didn't recruit anybody from this.

9 Q. But the only YTB person you've told us you've recruited
10 to Visalus is Jacques Johnson, right?

11 A. That I would openly know as a YTB person before?

12 Q. Yeah.

13 A. Ian Olito.

14 Q. And Mr. Johnson has been the one who is sending these out
15 nonstop to that, to a distribution list, correct?

16 A. He did not send this out. This one --

17 Q. He's sending out his stuff that we looked at, Exhibits 14
18 through 21, right?

19 A. I would say that he's been doing that for the last two
20 years.

21 Q. And he's certainly been doing it for the last two months,
22 right?

23 A. Probably.

24 THE COURT: We've --

25 MR. ROSENFELD: One more question.

1 THE COURT: You said that before. No more
2 questions. Any redirect?

3 MR. MCCARTHY: Briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. MCCARTHY:

6 Q. You -- did you agree to leave YTB?

7 A. Did I agree to it?

8 Q. Yeah.

9 A. No.

10 Q. How is it -- they just stopped paying you, right?

11 A. Right.

12 Q. April 1st or whenever it was?

13 A. I was looking at another company. I actually looked at
14 several companies, but --

15 Q. Okay. And did you have any kind of an agreement with
16 YTB, "Okay. It's time for us to split our ways." or did they
17 just unilaterally on their own stop paying you?

18 A. Correct.

19 Q. They stopped paying you?

20 A. On April 2nd.

21 Q. April 2nd. That is, that was the payment that was due
22 that didn't arrive, right?

23 A. Well, true. It was from seven days prior to that. Or,
24 no, 14 prior to that.

25 Q. So, in essence, YTB may be -- we don't know otherwise --

1 is in violation of the agreement with you, and they're trying
2 to enforce these terms against you because they haven't paid
3 you?

4 A. They did not pay me.

5 MR. McCARTHY: That's all, Judge.

6 THE COURT: You may step down. Did you want to --

7 MR. ROSENFELD: I do.

8 RE CROSS EXAMINATION

9 BY MR. ROSENFELD:

10 Q. YTB suspended payment of you pending an investigation;
11 isn't that true?

12 A. It didn't show up on my cash card, the commissions.

13 Q. They suspended you. Isn't that true?

14 A. I guess so. They didn't pay me on April 2nd.

15 Q. Okay. And you, on Exhibit 7 on April 6th rescinded your
16 directorship?

17 A. Correct. I did do that.

18 Q. That's Exhibit 7. And as a network marketing person, do
19 you receive income presently?

20 MR. McCARTHY: Objection, Your Honor. This is
21 outside the scope.

22 THE COURT: Sustained.

23 MR. ROSENFELD: Thank you, Your Honor.

24 THE COURT: Sustained.

25 MR. ROSENFELD: That's all.

1 THE COURT: You may step down. Next witness.

2 KENT ALAN McLAUGHLIN,

3 having been duly sworn, testified as follows:

4 THE CLERK: Would you be seated, please. State
5 your full name for the record and spell your last name.

6 THE WITNESS: It's Kent Alan, A-L-A-N, McLaughlin,
7 M-C-L-A-U-G-H-L-I-N.

8 DIRECT EXAMINATION

9 BY MR. McCARTHY:

10 Q. Mr. McLaughlin, you heard the testimony of Alan Horton
11 as he testified here today?

12 A. Yes.

13 Q. Was that testimony accurate about your conversation with
14 him?

15 A. Absolutely, not.

16 Q. What about the date? Was the date about right?

17 A. It was sometime in March.

18 Q. March, April?

19 A. It was -- he said in April, but it was sometime in March.
20 I gave a YTB training and Alan approached me on how he wasn't
21 making any money, and he pulled me aside and said, "I don't
22 want anyone to know, but I've had to move in with my mom.
23 And we are very distraught, and me and my mom want to talk to
24 you about things."

25 Q. Later when you talked to him about options, what did you

1 talk to him -- what was the next conversation you had with
2 him?

3 A. The next conversation I said, "A lot of other people have
4 been calling me with the same thing." Within that week I had
5 to loan money to, and directors were calling me for the same
6 thing as he was. That's what the conversation was about.
7 And that the directors were going broke. They weren't making
8 any money. And I'd had just with him there, a director
9 called when I was with him and said, "Kent, can I borrow
10 money?"

11 I said, "The conversation everyone wants to know is
12 there a plan B? Is there something else? Is there anything
13 else out there?" And at the time I didn't know, but
14 everybody, all the directors, were pushing to look. "Is
15 there anything out there? Is there anything we can do
16 because we are going broke or we have to leave." There was
17 no conversation on what I told him I was -- anyone is going
18 to take his downline. These were my friends; these were my
19 buddies that were broke, starving.

20 Q. Okay. So you did not -- let's go back a little bit
21 step-by-step on this. You did not threaten that you were
22 going to take his downline?

23 A. Absolutely, not.

24 Q. Or that 75 percent were -- of the RTA's were going to go
25 with you and leave him?

1 A. At that time nobody knew what anyone was going to do.
2 You know, people were looking for a plan B to see what they
3 wanted to do because they were going broke. They did not
4 have any money. And YTB had changed -- stopped paying us,
5 stopped paying some of the director money that they
6 guaranteed us. And so all the directors were complaining
7 about that, that we weren't getting paid our guaranteed money
8 anymore.

9 Q. What was the change of payment from what was guaranteed
10 to you to what you were actually paid?

11 A. Well, there was a guarantee of at level one, you got 2
12 thousand.

13 Q. Two thousand how often?

14 A. Once a month.

15 Q. Okay. Thank you. Go ahead.

16 A. And at level two you got 4 thousand total. If you was at
17 level three, you got 8 thousand; and at level four, you got
18 12 thousand a month; and at level five, you were going to get
19 24 thousand.

20 And then all of a sudden they said, "Well, in all
21 literature it says guaranteed." And in the front of the room
22 they said guaranteed. And then they changed it to, "Well, we
23 are just going to have a pool. We are going to give you a
24 share of the pool." That pool was going down to a thousand
25 dollars a month for some.

1 So some people that were making, say, at level 4,
2 they was making 12 thousand, now they're getting a little
3 over 3 thousand a month. You know, I had them come to me and
4 say, "Can't -- I took my buyout from Sprint to be here."
5 That's why we were having the conversations with Alan Horton.

6 Q. But it was conversation that he initiated, and you did
7 not try or suggest to move, him to move from YTB to any other
8 firm?

9 A. Absolutely, not. Alan kept coming to me and saying, "Is
10 there a plan B?"

11 MR. McCARTHY: Okay. That's all I have of this
12 witness, Judge.

13 THE COURT: Cross examination.

14 CROSS EXAMINATION

15 BY MR. ROSENFELD:

16 Q. Mr. McLaughlin, in addition -- have you read the lawsuit
17 that was filed in this case?

18 A. Yes.

19 Q. Did you see the affidavit of K. Ross Johnson?

20 A. Yes.

21 Q. And Mr. Johnson, is he wrong?

22 A. Absolutely.

23 Q. Okay. You never promised him?

24 A. Didn't promise anybody anything.

25 Q. You didn't promise him \$5,000 a month?

1 A. No.

2 Q. Okay. Did you disparage YTB in your conversation with
3 Mr. Horton?

4 A. Not that I disparaged YTB. They would ask me and
5 everybody was wondering what was going on, and everybody had
6 their views.

7 Q. Did you promise Andy Lakey in March of 2000 or April of
8 2000 base compensation of 15 a month?

9 A. No.

10 MR. MCCARTHY: Your Honor, excuse me. This is
11 outside the scope.

12 THE COURT: Overruled.

13 Q. (by Mr. Rosenfeld) Did you make \$200,000 during the
14 four-month period after you signed your director's
15 agreement, the time you signed your director's agreement to
16 the time you left?

17 A. I don't know what the exact amount is, but--

18 Q. Approximately?

19 A. Approximately.

20 Q. \$200,000 in commissions from YTB?

21 A. Yes.

22 Q. And we've been through the director's agreements, and I
23 don't want to take everybody through it again. But you
24 understood the exclusivity provision, and yours was Exhibit 2
25 of the document. Exhibit 2 is your director agreement?

1 A. Uh hum.

2 Q. And you signed yours on -- you and your wife Kimberly
3 signed on -- no, you signed on 11-11-08, right?

4 A. Yeah, because I was called and said I wasn't going to get
5 paid unless I signed it.

6 Q. Okay. And you signed it and you understood that while
7 you were at YTB, you could only work at YTB?

8 A. Correct.

9 Q. And you understood that the contact information for
10 downline and upline belonged to YTB?

11 A. Correct.

12 Q. And then with respect to reps and the rep agreements, you
13 understood that when you left, you couldn't solicit for six
14 months anybody who you didn't personally sponsor at YTB,
15 right?

16 A. Correct, as long as I was getting paid and I held by the
17 agreement.

18 Q. Did you think those provisions were reasonable?

19 A. Yes.

20 Q. Okay. And do you think those provisions, enforcement of
21 those provisions, create any hardship for you?

22 A. No, as long as I'm getting paid, but we're not getting
23 paid.

24 Q. The provisions of you not soliciting anyone other than
25 the folks you personally sponsored, did that create a

1 hardship for you right now?

2 A. Does -- no, it does not.

3 Q. Okay. And in terms of you returning any downline or
4 upline contact information for any of those folks that you
5 didn't sponsor, those YTB folks, would that create a hardship
6 for you?

7 A. Would you repeat it?

8 Q. Would it create a hardship for you to retrieve or return
9 to YTB any contact information regarding upline or downline
10 reps or RTA's?

11 A. I don't have a lot of contact information. I'm the worst
12 on the computer in the world, so I ain't got them.

13 Q. So that wouldn't be a hardship if you were ordered to do
14 that?

15 A. I don't have one. As long as I am getting paid,
16 everything's fine, but I'm not getting paid.

17 Q. Well, you got -- you were talking to Alan in early April,
18 right?

19 A. Yes.

20 Q. You were talking to Lakey and K. Ross about other
21 opportunities in early April?

22 A. Everybody talked to everybody about other opportunities,
23 but no one solicited anyone. Every day I took probably 50
24 phone calls of these people complaining about YTB every day
25 because they were not making money.

1 MR. ROSENFELD: I have nothing further. Thank you.

2 THE COURT: Anything further, Mr. McCarthy? You
3 may step down.

4 MR. MCCARTHY: Briefly, Your Honor, I'll ask
5 Jacques Johnson.

6 JACQUES JOHNSON,
7 having been duly sworn, testified as follows:

8 THE CLERK: Would you be seated, please. State
9 your full name for the record and spell your last name.

10 THE WITNESS: Full name is Jacques Johnson,
11 J-O-H-N-S-O-N.

12 DIRECT EXAMINATION

13 BY MR. MCCARTHY:

14 Q. Mr. Johnson, you're one of the defendants in this case,
15 are you not, you and your wife?

16 A. That's correct.

17 Q. Lynetta, right?

18 A. Correct.

19 Q. Okay. Just for expediency here, let's just talk about
20 your Team Supreme International Newsletter. Okay? That's
21 throughout a lot of exhibits here, and people apparently
22 sending it into YTB saying that they're receiving from you.

23 Has anybody contacted you or let's put it this way.
24 How would someone who did not want to receive your newsletter
25 stop it?

1 A. Simply as you mentioned earlier, Mr. McCarthy, they would
2 go to I contact, and there's a button at the bottom of the
3 newsletter that says unsubscribe. Prior to that, upon
4 resigning from YTB, we sent out in the newsletter that if you
5 do not want to receive a newsletter, please unsubscribe.

6 So now that we assume that someone unsubscribed,
7 but we also proactively ask people to say if you still choose
8 to be with YTB because we are leaving YTB, please
9 unsubscribe. So it's both assumed and we asked people to
10 unsubscribe.

11 Q. Okay. And then, also, did you -- how do you handle phone
12 calls of people that you've never talked to before as far as
13 inquiries about what you're doing or what organizations you
14 might be working with?

15 A. Well, because I have a mindset that someone's trying to
16 get information from me in regard to where our whereabouts
17 are since we have left YTB because we were considered high
18 profile in YTB. Between Lynetta and I who is not here --
19 she's in a California -- and myself, we both discussed among
20 ourselves that we properly screen the person to ask them, you
21 know, "Is this call in response of you currently in YTB?"
22 "Who are you?" "Who is your director?" "Who is your power
23 team leader?" what have you. Because we clearly understand
24 from our standpoint because we were the top producers of YTB
25 since the convention of last year, so we recruit a lot of

1 people personally, hundreds of people.

2 So there was really no need for us to go after
3 someone, per se, because we had already acquired people, that
4 I probably sponsor over 400 people myself after being in YTB,
5 so that's why we were deemed an award. So that's why we were
6 properly screening of people, find out if they have some
7 affiliation of YTB, if they are actively involved with YTB or
8 not.

9 Q. Okay. And then if they are actively involved with YTB,
10 what's your course of action?

11 A. Our course of action at this particular time, "I choose
12 not to speak with you in regard to my whereabouts or any, you
13 know, issues concerning YTB." And I -- you will have to --
14 "We will have to call this conversation over and done." And
15 I've had that conversation several times.

16 MR. McCARTHY: That's all, Judge.

17 THE COURT: Cross examination.

18 CROSS EXAMINATION

19 BY MR. ROSENFELD:

20 Q. Good afternoon.

21 A. Good afternoon. Good evening, almost.

22 Q. Mr. Johnson, your agreement was Exhibit 3 if you want to
23 look at that. This is your director agreement, I believe.

24 A. Correct.

25 Q. And you signed it on October 30, '08, right?

1 A. Correct.

2 Q. And is that Lynetta, your wife's, signature underneath
3 yours?

4 A. Yes, it is.

5 Q. Okay. And you're familiar with the terms of the
6 agreement?

7 A. Yes, sir.

8 Q. Do you understand that when you were at YTB, you
9 couldn't, as a director -- as director you couldn't recruit
10 folks to another network marketing company, right?

11 A. Define recruit.

12 Q. Well, what is your understanding of the word "solicit" or
13 "recruit"?

14 A. Just so that you know, recruit or sponsorship are two
15 different things. I can recruit someone, which means that I
16 have an intent for you to look at an opportunity. Sponsor is
17 when I literally have you -- I'm sorry. What's your name,
18 sir? Who am I speaking with?

19 Q. Tom Rosenfeld.

20 A. Tom. Sponsor is when I actually bring you into a
21 business. When you say recruit that means I can take you out
22 to Starbucks and talk about, in this case, Visalus.

23 Q. What do you understand the term "solicit" to mean?

24 A. Solicit means that I'm actively trying to pursue you to
25 look at an opportunity or if you ask the question of

1 someone's knocking on your door, I'm soliciting you for
2 whatever. If I'm trying to sell you knives or something like
3 that, that's my definition of solicit.

4 Q. Someone who knocks on the door is a solicitor?

5 A. Correct.

6 Q. Someone, in an attempt to we've got recruits, solicits,
7 attempts to enroll?

8 A. Correct.

9 Q. Same thing?

10 A. Correct.

11 Q. Okay. And your understanding you couldn't do any of
12 those things while you were at YTB with respect to another
13 network marketing company?

14 A. Correct.

15 Q. And you resigned from YTB --

16 A. I believe it was April the 8th.

17 Q. April 8th. And you understood in the agreement, in your
18 agreement, director's agreement, that the rep, under
19 paragraph 5, "Compliance," that the rep policies and
20 procedures would also govern your conduct? Let's look at
21 paragraph 5 of Exhibit 3, sir. I don't mean to move too
22 quickly. You haven't been up here yet.

23 A. Can you repeat the question?

24 Q. Yes, sir. Exhibit 3, paragraph 5, is entitled
25 "Compliance." May I, Your Honor?

1 THE COURT: Yes.

2 Q. (by Mr. Rosenfeld) And we've looked at the rep policies
3 and procedures, and that's Exhibit 4. And they've got this
4 nonsolicitation we've been looking at about don't touch him.
5 Let's go to it. It's Exhibit 3-21 of Exhibit 4, Section 3-21
6 of Exhibit 4. See that?

7 A. Yes, I do.

8 Q. And 3-21 of Exhibit 4 says in the third sentence or so
9 that following cancellation of a rep's agreement, for a
10 period of six calendar months thereafter with the exception
11 of a rep who was personally sponsored by a former rep, a
12 former rep may not recruit any of this company's reps for
13 another network company. Right?

14 A. Correct.

15 Q. Now, recruit, solicit, attempt to enroll is all the same
16 thing, correct?

17 A. Correct.

18 Q. A knock on a door, right?

19 A. Correct.

20 Q. How about the email? It says, Jump in the water. The
21 water's great. Jump in the pool. Is that a recruit?

22 A. That I would disagree with you, once again, based on what
23 we shared with you earlier in terms of an email. When it
24 specifically allows a person, once they're told to
25 unsubscribe and they don't and they have the option through I

1 contact to unsubscribe.

2 Q. Let's go to Exhibit 14, as an example.

3 A. Your Honor, if I can clearly state that this was signed,
4 and we were told that we would get a copy of this, which I've
5 never got a copy of this.

6 THE COURT: What are you talking about?

7 THE WITNESS: This whole agreement here.

8 THE COURT: What exhibit?

9 MR. ROSENFELD: He's looking at Exhibit 14. I'm
10 sorry. Exhibit 14. Exhibit 14, 1-4.

11 THE WITNESS: Are you asking about 4, Exhibit 4?

12 MR. ROSENFELD: 14.

13 THE COURT: What exhibit are you asking a question
14 about?

15 THE WITNESS: I'm speaking of the whole content of
16 what he's speaking of.

17 THE COURT: You can't ask questions.

18 THE WITNESS: I'm not asking a question. I'm just
19 stating that --

20 THE COURT: Well, you have to respond to questions.
21 If your attorney, on redirect examination, wants you to
22 expound, you can. Go ahead, counsel.

23 MR. ROSENFELD: Okay. Thank you, Your Honor.

24 Q. (by Mr. Rosenfeld) Exhibit 14, please. Mr. Johnson --

25 A. Your question is?

1 Q. Page 3, it says, Join the pool. The water's great.
2 Visalus weekly leadership enrollers, the pool's waiting for
3 you to jump on in and the water's good. This simply means if
4 you can get three people on our executive success system,
5 which is anyone who joins at 500, a thousand or 2 thousand,
6 get them on the monthly autoship with the buy pack or the TSS
7 replenishing kit, and you are on your way.

8 Is that a recruitment, a solicitation or an attempt
9 to enroll the person on the receiving end of that email?

10 A. Neither, because it's only directly toward Visalus
11 associates.

12 Q. Well, this went to Debbie McCurdy. Is she a Visalus
13 associate?

14 A. I'm not sure.

15 Q. Okay. You don't know that she is?

16 A. Correct.

17 Q. And you never sponsored her at YTB?

18 A. Correct.

19 Q. Who sponsored her?

20 A. I have my idea who this person is.

21 Q. Now as to Debbie McCurdy, is this document, this email, a
22 solicitation, a recruitment or an attempt to enroll her in
23 Visalus?

24 A. That's an excellent question. If she is in Visalus or if
25 she is not in Visalus?

1 Q. Let's assume she's not.

2 A. Then, yes, it would be. Let's say that she's in Amway.

3 Q. Very good. In all of these exhibits, 15, 16, all the way
4 through 21, they're all recruitments or solicitations or
5 attempt to enroll the folks who they are addressed to,
6 assuming those folks are not with Visalus, aren't they?

7 A. Correct.

8 Q. Okay. And none of the folks identified on Exhibit 14
9 through 21 are folks that you personally sponsored at YTB,
10 correct?

11 A. Can you rename those folks?

12 Q. Yeah. Ms. McCurdy, did you sponsor her?

13 A. No.

14 Q. PJ?

15 A. No.

16 Q. That's Peter Jensen, right?

17 A. Correct.

18 Q. There's someone named Kena, Kiera?

19 A. No, I haven't sponsored that person either.

20 Q. So you didn't sponsor any of those folks?

21 A. Phil and Golden Kennedy, I did. You did mention earlier,
22 and I think I blurted it out earlier that I did.

23 Q. Now look at Exhibit 6. We are talking about network
24 marketing. Exhibit 6, this is the Visalus Sciences Career
25 Path. Does the network marketing at Visalus in terms of

1 commission works similar to the way which it works at YTB?

2 MR. McCARTHY: Your Honor, if I can object. This
3 is a hearsay document. Visalus is not a party.

4 THE COURT: Counsel.

5 Q. (by Mr. Rosenfeld) Are you familiar with this document?

6 THE COURT: Okay. Are you trying to lay a
7 foundation?

8 MR. ROSENFELD: Yes, sir.

9 Q. (by Mr. Rosenfeld) Have you ever seen this document, the
10 Visalus Sciences Career Path?

11 A. Yes.

12 Q. Have you seen it?

13 A. Yes.

14 Q. And what does this -- it says Visalus scientist rank in
15 bonus criteria. What does that tell us? What's the purpose
16 of that?

17 A. Well, if you, Tom, wanted to become a member of our
18 organization, then as a leader, I would try to share with you
19 what you need to do in order to become, let's say, a
20 director. You need three associates. If you want to be a
21 regional director, you need six associates that are active.

22 So what I'm trying to do is paint a picture as a
23 leader what it takes to become successful in our system.

24 Q. And you get paid based on how many folks you recruit and
25 how many folks those people you recruit, also, right?

1 A. No, because our company is a product-based company so
2 it's not about recruits. Where YTB was more heavily focused
3 on recruiting, ours is product based.

4 Q. Let me shortcut this. You recruit me for Visalus?

5 A. Yes.

6 Q. I recruit Mr. Goldenberg for Visalus?

7 A. Correct.

8 Q. Mr. Goldenberg goes out and sells pills, sells a whole
9 bunch pills?

10 A. Yes.

11 Q. He also recruits Mr. Tomer?

12 A. Um hum.

13 Q. And they're also selling pills. You were the trunk of
14 the tree. Are you going to make any money, any money on the
15 work these folks are doing at Visalus?

16 A. Yes, I will.

17 Q. How? How does that work?

18 A. Well --

19 THE COURT: I don't care how it works.

20 MR. ROSENFELD: Your Honor --

21 THE COURT: I don't. Okay?

22 MR. ROSENFELD: The only reason -- may I explain?

23 I'm done with the questions.

24 THE COURT: Okay.

25 MR. ROSENFELD: Here's my explanation.

1 Q. (by Mr. Rosenfeld) You were recruited by Mr. Hoffman,
2 correct, at Visalus?

3 A. Correct.

4 Q. And so if these folks you're recruiting under Exhibits 14
5 through 21 sign up and sell pills, you're making money and
6 he's making money; isn't that right?

7 A. If my intent is to recruit them, correct.

8 Q. I don't care what your intent is. If you signed folks
9 up, everybody you sign up, if they sell pills, you are going
10 to make some dough, right?

11 A. If I sign you up, yes, I will make money.

12 Q. And all those people you are soliciting, 14 through 21,
13 and Mr. Hoffmann has been receiving these emails for weeks,
14 he's going to make money, too, if those people sell, correct?

15 A. Yes.

16 MR. ROSENFELD: I don't have anything further.

17 THE COURT: Any redirect?

18 MR. McCARTHY: Just briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. McCARTHY:

21 Q. On these emails, these newsletters, did you use any list
22 of people given to you by YTB to generate the list of the
23 newsletter, that the newsletters are sent to?

24 A. No, I didn't.

25 Q. If YTB people come to you and sign up to receive your

1 newsletter, is there anyway for you to know that they're YTB
2 people?

3 A. No. There's no, nothing that will indicate that they are
4 YTB people.

5 Q. So you are not -- you are soliciting in general whoever
6 comes to you and is willing to be solicited, but you are not
7 going knocking down each door down the block soliciting to
8 sell knives, are you?

9 A. That's correct. Now on that same note to answer your
10 question, if I had access to all the emails, I could
11 literally blast everyone that I had with one email to say,
12 "Hey, hey, everybody, I'm with Visalus. Come join me." I've
13 never done that.

14 Q. Okay. You even testified that when you left Visalus, you
15 said on your newsletter you've now left Visalus --

16 A. Left YTB.

17 MR. McCARTHY: I'm sorry. Excuse me. I'm wrapped
18 around here. Okay. That's all I have, Judge.

19 THE COURT: Okay. Anything further?

20 MR. ROSENFELD: Nothing, Your Honor.

21 THE COURT: You may step down.

22 Any argument, Mr. Rosenfeld or Mr. Goldenberg? I
23 assume you don't have any other witnesses; is that correct?
24 Do you have anymore witnesses, Mr. McCarthy?

25 MR. McCARTHY: No, sir, we've established -- we

1 have a witness about how the newsletters work, but I think
2 that that's been established.

3 THE COURT: Okay.

4 MR. ROSENFELD: Your Honor, we're before you
5 seeking injunctive relief to try to protect the company's
6 sales force. It's very clear, and the Court has already
7 articulated in its order regarding the TRO with what the test
8 is and the balance and benefits and the showing of
9 irreparable harm.

10 This afternoon we've seen from the defendants' own
11 mouths that what we are asking for is entirely reasonable.
12 It doesn't threaten them any harm. It's found within the
13 four corners of the document. You know, we've heard some
14 explanations for this, "I didn't get paid." or those things,
15 but in terms of the actual instruments themselves, they are
16 very clear, and under the law they're very reasonable.

17 These folks were allowed to fully compete and feed
18 their family. They were allowed to take everybody with them
19 that they brought. They're not allowed to cannibalize those
20 people's, the work and the effort and the expense incurred by
21 people underneath them. Those are families, too, hundreds of
22 thousand of families.

23 The non entitled user status as directorship is to
24 utilize their information. Whether it's Bill Hoffmann doing
25 it directly or letting Jacques Johnson do it under him, it

1 doesn't matter how it happens. The notion, the convoluted
2 notion that the recipient is responsible to call time out,
3 that's not found in the document. These folks, they weren't
4 just RTA's; they weren't just reps. They were directors.

5 They had access to all this information. And the
6 information was outlined for them to be precious and
7 confidential and protectable.

8 If the injunction is not issued as some of the
9 evidence offered by counsel indicates, the company and the
10 industry is in a situation where monetary damages six months,
11 a year down the road may not be quantifiable, are not
12 quantifiable to replace the people that are gone. And it's
13 highly likely that a business which is completely focused on
14 its sales structure, as Mr. Hoffmann has explained himself.
15 The whole network marketing thing is based upon it's a
16 distribution. It's people driven, not advertising driven.
17 It's not like Anheuser-Busch. It's like Amway and it depends
18 on its people.

19 If they are allowed to flout the agreement and go
20 after these people, they are going to take the sales force,
21 the company's to die and no claim for monetary relief is
22 going to be, the damage will be irreparable. It's a one-way
23 street. Your Honor, I think that's been clear.

24 So when you balance the benefits from our
25 standpoint, we are asking that they cease communicating with

1 any, for six months from this day forward any, not
2 communicating. That's not fair. They cease soliciting or
3 recruiting or attempting to enroll any rep or RTA of YTB whom
4 they did not personally sponsor.

5 That they account for this Court for any
6 confidential information they had or that they have
7 disseminated. And, Your Honor, and that they return all the
8 confidential information that they obtained.

9 It's a pretty simple enterprise in terms of
10 injunctive relief. And, Your Honor, we feel it's mandatory
11 not only for this company, but it's mandatory for Jerome
12 Hughes, for Alan Horton, for Susan Horton, for the folks who
13 are out there who are still working who are being
14 cannibalized by the very people that they helped fund and
15 generate income for years. Thank you, Your Honor.

16 THE COURT: Mr. McCarthy.

17 MR. McCARTHY: Thank you, Your Honor. There's no
18 hesitation on the part of these defendants to provide any
19 information that they had before or that they still have from
20 YTB. I am going to get it right this time, from YTB. Of
21 course, they will give it back. That's their obligation.

22 I will go so far as to say this: If we can get
23 reliable information as to who these email addresses are, we
24 will purge them out of the email or the newsletters.

25 But how can we, how can we know who they are? They

1 keep -- you know, if they want to have a reason to complain
2 against us, they keep receiving the emails, sending them to
3 YTB, and they do nothing. If they don't want them, have them
4 stop it. If YTB wants -- if there's some way for an
5 intermediary or somehow for YTB to feel safe in having the
6 email addresses provided to another third party for us so
7 that nobody knows what they are and that they're secured, we
8 will take them off of our email programs and mail programs.
9 But as it is there's no way for us to know.

10 And, you know, you can call it solicitation. You
11 can call it what you want. It is entirely different than a
12 door-to-door salesman hitting every door that he comes down.
13 These people signed up for this stuff, initially. Those are
14 the spam rules, and they have to sign up first. And now if
15 they don't want it anymore, but instead of leaving it,
16 they're sending it to YTB complaining.

17 You know, I don't know if I were YTB, I don't know
18 how I would handle it either, but I don't know how we can
19 handle it under those circumstances. The reason I went into
20 the financials is not only to point out that there's reasons
21 for people to leave, but we're concerned that if we have to
22 take some kind of really drastic action about who we contact,
23 that YTB should put up a bond with significant surety to
24 protect us in case as the litigation goes on it turns out
25 that in a more complete hearing all we can do in something

1 like this is, all the Court can do is, like you say, grab as
2 many facts as you can and do the best you can.

3 So if it turns out that some injunction is wrong,
4 then we need protection for my people, and that's why, one of
5 the reasons why I presented the poor financial condition of
6 this plaintiff.

7 And, finally, I don't think that, and we covered
8 this in all of the documents we filed with the Court. This
9 is not a proper instance to have an injunction. These,
10 particularly a preliminary injunction, because this is not a
11 recognized industry such as -- you know, the whole, they're
12 talking about the whole business of being in sales.

13 Well, if you're selling travel products like they
14 are, we're not. We're not selling any travel products.
15 There's no reason, no basis under those circumstances to
16 grant an injunction. And thank you for your time.

17 THE COURT: Thank you, counsel. The Court's heard
18 the evidence and is prepared to make the following findings:
19 First of all based upon the face of the complaint and the
20 plaintiff's testimony, the Court takes YTB as a citizen of
21 Illinois. The Court's going to find that it does have
22 jurisdiction. So the Court's going to be denying the motion
23 to remand.

24 The Court is going to deny the motion to dismiss.
25 You know, this is an interesting issue that our, probably,

1 founding fathers couldn't even envision internet sales and
2 people that obtain financial or financial freedom made easy
3 from the armchair of their desk at home. But times have
4 changed.

5 We now have E filing in court where when
6 Mr. McCarthy and Mr. Goldenberg and I started practicing law,
7 we had to go to the courthouse and hand it to the clerk and
8 they filed it. You know, now you send it by email. And to
9 be honest with you, the laws sometimes have been lacking in
10 changing to keep up with the technology advancement that we
11 have made and that lawyers, besides lawyers, but I mean the
12 society as a whole is living under.

13 After hearing the evidence and applying the
14 well-established law regarding preliminary injunctions, the
15 Court is going to grant a preliminary injunction, making the
16 finding that the plaintiffs' position has some likelihood of
17 success on the merits. That the plaintiffs will suffer
18 irreparable harm if an injunction is not granted. Even
19 though there is a remedy at law contained in the contract,
20 the Court's not sure it's an adequate remedy of law. And
21 when the Court balances the harms to both parties using the
22 sliding scales, finds that there will be little harm to the
23 defendant. In fact the defendants take the position that
24 they're not even violating the agreements at all.

25 There is some conflict in testimony regarding who

1 was soliciting who when. But there appears to be, and, in
2 fact, none of the defendants say they have any proprietary
3 information. But the bottom line is this case is over some
4 proprietary information.

5 And maybe Mr. McCarthy's suggestion on resolving
6 this is an appropriate one. You get a third party that maybe
7 the defendants don't know who the downline reps are. And
8 they, and they don't know, you know, who they're soliciting,
9 whether they're downline reps of YTB through another
10 individual that works for YTB or not. And maybe that's the
11 way to resolve this.

12 I will say this and I'm going to address this to
13 the parties, to you, Mr. McLaughlin and Mr. Hoffmann and
14 Mr. Johnson, and also to you, Mr. Tomer. Unless you folks
15 are planning on putting Mr. McCarthy's and Mr. Goldenberg's
16 grandchildren through college, law school, and medical
17 school, I highly suggest you people resolve this without
18 additional litigation because it's just going to drain
19 everybody. Look how much money you have spent already. And
20 we're just at the preliminary stage here, but that's up to
21 you.

22 This case will go on a track. It will be assigned
23 to a magistrate judge. Whether or not there's arbitration or
24 not, it might well be resolved quickly with a settlement
25 conference before Judge Frazier before everybody engages in

1 any additional expense. But it seems to me that this is
2 something that ought to be resolved.

3 I believe that the evidence is established that the
4 plaintiff, at least, has some likelihood of success on the
5 merits. That there's likely been some solicitation by the
6 defendants of downline people of the plaintiffs'. Whether
7 they had knowledge of that or not may be an issue, will be an
8 issue for the permanent injunction hearing, but we will get
9 this thing tracked, get it on a discovery schedule and get a
10 magistrate judge assigned. Has one been assigned?

11 THE CLERK: Judge Proud, I see, is on it.

12 THE COURT: Judge Proud. That may be more
13 convenient for the attorneys.

14 THE CLERK: I don't see that it was tracked yet.

15 THE COURT: We don't see that it was tracked, but I
16 will issue an order regarding the issuance of a preliminary
17 injunction. The Court is going to require a \$30,000 surety
18 bond to be filed by the plaintiffs within ten days. Anything
19 else?

20 MR. GOLDENBERG: I agree with you. This is in the
21 parties' best interest to try and settle. Just so I
22 understand, with regard to the pending motion for rule to
23 show cause, if we believe that the Madison County Circuit
24 Court's order, temporary restraining order, was violated and
25 we want to pursue that motion, rule to show cause on

1 contempt, that would be heard by this Court, correct?

2 THE COURT: It's not mine, no. It would be heard
3 in the Madison County court.

4 MR. GOLDENBERG: So to the extent between the time
5 that the TRO was issued by the Madison County court, and it
6 was removed, if we want to file a motion for show cause or
7 contempt on that, that's Madison.

8 THE COURT: Yes.

9 MR. GOLDENBERG: Thank you for that clarification.

10 THE COURT: Anything else? That will be all.

11 (End of hearing.)

12

13 REPORTER'S CERTIFICATE

14

15 I, Jane McCorkle, Official Court Reporter for the
16 United States District Court for the Southern District of
17 Illinois, do hereby certify that the above and foregoing is a
18 true and correct transcript of the proceedings of TRO had in
19 this cause as same appears from my stenotype notes made
20 personally during the progress of said proceedings.

21

22

23 DATE: 7/27/09 s/s Jane McCorkle

24

JANE McCORKLE

25