IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

OAKTREE CAPITAL MANAGEMENT, LLC; DDJ CAPITAL MANAGEMENT, LLC; FMA, LLC; CONSECO CAPITAL MANAGEMENT, INC.; FRANKLIN ADVISORS, INC.; TUDOR INVESTMENT CORPORATION; LB SERIES FUND, INC.; LUTHERAN BROTHERHOOD HIGH YIELD FUND; CAPITAL RESEARCH AND MANAGEMENT COMPANY; ING CAPITAL LLC; AIM CAPITAL MANAGEMENT; FIDELITY MANAGEMENT AND RESEARCH CO.,

Plaintiffs,

v.

Civil Action No. 02-548 JJF

SPECTRASITE HOLDINGS, INC.; SPECTRASITE INTERMEDIATE HOLDINGS, LLC; STEPHEN H. CLARK; CALVIN J. PAYNE; TIMOTHY M. DONAHUE; MICHAEL J. PRICE; MICHAEL R. STONE; EDGAR L. REYNOLDS; STEVEN M. SHINDLER; LAWRENCE B. SORREL; JAMES R. MATTHEWS; THOMAS E. McINERNEY; WELSH, CARSON, ANDERSON & STOWE VIII, L.P.; WCAS VIII ASSOCIATES, LLC; WCAS CAPITAL PARTNERS III, L.P.; WCAS CP III ASSOCIATES, LLC; WCAS INFORMATION PARTNERS, L.P.; PATRICK J. WELSH; RUSSELL L. CARSON; BRUCE K. ANDERSON; ANDREW M. PAUL; LARA VanBUREN; ROBERT A. MINICUCCI; ANTHONY J. de NICHOLAS, PAUL B. QUEALLY; PRISCILLA A. NEWMAN; D. SCOTT MACKESY; JONATHAN M. RATHER; WELSH, CARSON, ANDERSON & STOWE IX, L.P.; WCAS IX ASSOCIATES,LLC.,

Defendants.

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MEMORANDUM OPINION

June 25, 2002
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is a Motion For Temporary Restraining Order And Order To Show Cause Re Preliminary Injunction (D.I. 6) filed by Plaintiffs. The parties briefed their respective positions and a hearing on the Motion was held on June 24, 2002. For the reasons discussed in this Memorandum Opinion, the motion will be denied.

BACKGROUND

I. The Parties

Defendant SpectraSite Holdings, Inc. (hereinafter "Holdings") is a Delaware corporation with its principal place of business in Cary, North Carolina. (D.I. 15 at 7). Holdings is the sole owner of SpectraSite Communications, Inc. (hereinafter "Communications"), an operating company engaged in the business of telecommunications infrastructure. (D.I. 15 at 7). Communications comprises substantially all of Holdings' assets. (D.I. 7 at 2). Defendant SpectraSite Intermediate Holdings, LLC (hereinafter "Holdco") is a newly formed limited liability company, incorporated in Delaware, wholly owned by Holdings. (D.I. 15 at 7). Holdco is the sole owner of a newly formed Delaware corporation, SCI Merger Vehicle, Inc. (hereinafter "Mergerco"). (D.I. 15 at 7). Defendants Welsh, Carson, Andersen & Stowe VIII, L.P., ("Welsh Carson") along with certain affiliates, are the controlling shareholders of Holdings, owning approximately 23% of Holdings' common stock. (D.I. 7 at 4).[1]

Plaintiffs, and the funds advised or managed by Plaintiffs, are the beneficial holders of approximately $1 billion of the aggregate principal amount of notes ("Notes") issued pursuant to five Indentures by Holdings. (D.I. 7 at 2). Plaintiffs have brought this motion to temporarily restrain Holdings from implementing the Tender Offer Transactions, as outlined below. (D.I. 7 at 2). Specifically Plaintiffs seek to enjoin the transfer or conveyance of substantially all of Holdings' assets to any other entity. (D.I. 7 at 2).

II. Holdings' Outstanding Financing

Previously, Holdings financed its business in part through the issuance of senior notes, five of which are subject to this action:

a. On June 26, 1998, and supplemented in March 1999 and June 2000, Holdings issued Senior Discount Notes in the face amount of $225,238,000 due in 2008 at a 12.0% interest rate.

b. On April 20, 1999, Holdings issued Senior Discount Notes in the face amount of $586,800,000 due in 2009 at a 11.25% interest rate.

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[1] The Court will also to refer to the parties collectively as "Defendants."

c. On March 15, 2000, Holdings issued Senior Discount Notes in the face amount of $559,800,000 due in 2010 at a 12.875% interest rate.

d. On March 15, 2000, Holdings also issued Senior Notes in the face amount of $200,000,000 due in 2010 at a 10.75% interest rate.

e. On December 20, 2000, Holdings issued Senior Notes in the face amount of $200,000,000 due in 2010 at a 12.5% interest rate.

(D.I. 7 at 2-3). It is undisputed that each of the Notes limits the right of Holdings to merge with another company unless the surviving company continues to be obligated for the Notes. (D.I. 15 at 9). Each Note restricts the right of Holdings to sell assets, and outlines the proper uses of proceeds from any such sale. (D.I. 15 at 9). Further, each Indenture limits the amount of existing and new financing that Holdings and its "Restricted Subsidiaries" may incur by placing a cap on the amount of any such financing. (D.I. 15 at 9).

The debt incurrence restrictions outlined in the Indentures are described as "caps" or "baskets." (D.I. 15 at 9). The "equity basket" permits Holdings and its Restricted Subsidiaries to incur debt senior to the notes based on the proceeds from issuance of equity securities. (D.I. 15 at 9). The "credit facility basket" enables Holdings' Restricted Subsidiaries to incur debt senior to the Notes based on a formula tied to the number of telecommunications towers that Communications owns or operates at any given time. (D.I. 15 at 9). The definition of "credit facility basket" is defined in each Indenture and discussed below.

III. The Tender Offer Transactions

Following months of deliberations by a Special Committee of Holdings' Board of Directors, on May 16, 2002, Holdings publicly announced its intention to enter into a series of interrelated "refinancing" transactions. (D.I. 15 at 10-11).

1. The Merger

In connection with the "refinancing transactions," Mergerco will be merged with and into Communications, with Communications being the surviving corporation. (D.I. 15 at 7). As an end result, Holdco will become the sole owner of Communications, with Holdings as the sole owner of Holdco. (D.I. 7 at 5).

2. New Term Notes

On May 15, 2002, Holdings and Holdco entered into an agreement with Welsh Carson such that Welsh Carson agreed to purchase new notes ("New Term Notes") to be issued by both Holdings and Holdco, having an aggregate principal amount of $350 million. (D.I. 7 at 5). Additionally, the New Term Notes will restrict the ability of

Holdco and its subsidiaries to make distributions to Holdings. (D.I. 7 at 5).

3. Tender Offer

Holdings intends to use up to $340 million of the proceeds of the New Term Notes to purchase some of the existing Notes through a Tender Offer to its existing Noteholders. (D.I. 7 at 5).

4. Exchange Notes

Additionally, in conjunction with the Tender Offer Transactions, Holdings and Holdco will co-issue Exchange Notes in the principal amount of as much as $75 million. (D.I. 7 at 6).

STANDARD OF REVIEW

An injunction is "an extraordinary remedy, which should be granted only in limited circumstances." Novartis Consumer Health, Inc. V. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578, ___ (2002) (citations omitted). Four factors must be considered when ruling on a motion for temporary injunctive relief. Those factors are: 1) the likelihood that the applicant will prevail on the merits; 2) the extent of irreparable injury to the applicant as a result of the conduct complained of; 3) the extent of irreparable harm to the defendant if temporary injunctive relief is granted; and 4) the public interest. Id.; see also Playboy Entertainment Group, Inc. v. United States, 918 F.Supp 813, 820 (D. Del. 1996). In order to grant an application for a temporary restraining order, the Court must conclude that each of the four factors weighs in favor of granting temporary injunctive relief. Id.

DISCUSSION

I. Likelihood Plaintiffs Will Prevail On The Merits

Plaintiffs allege that the Tender Offer Transactions violate numerous provisions of the Indentures governing their Notes. The Court will address each provision in turn.

A. Section 5.1

In relevant part, section 5.1 states that:

> The Issuer will not ... convey, transfer or lease, in one transaction or a series of transactions, all or substantially all its assets to, any Person, unless:
>
> (1) the resulting, surviving or transferee Person (the "Successor") will ... expressly assume, by supplemental indenture, executed and delivered to the Trustee, in form satisfactory to the Trustee, all the obligations of the Issuer under the Notes and this Indenture.

(D.I. 17, Ex. B at 41). The parties agree that the Tender Offer Transactions do not conform to this provision; the parties dispute whether the pending transaction constitutes a "transfer" under this provision.

Plaintiffs contend that the Tender Offer Transactions, taken together, implement a transfer of Communications, which constitutes substantially all of Holdings' assets, in violation of § 5.1. (D.I. 7 at 9-10). Plaintiffs contend that the substantive economic effect of the Tender Offer Transactions is a transfer, even though a transfer document is not executed by Holdings. (D.I. 7 at 11).

In reply, Defendants contend that the Tender Offer Transactions cannot affect an impermissible transfer because Holdings is not transferring its assets. (D.I. 15 at 18). Defendants contend that Communications, its only asset, is merely being converted by merger into additional interests in a limited liability company wholly owned by Holdings. (D.I. 15 at 18). Defendants further contend that such an intra-corporate conversion of ownership interests by merger of direct subsidiaries is not a transfer. (D.I. 15 at 18).

In the limited time allowed, the Court has considered the plain language of § 5.1 as well as the economic substance of the Tender Offer Transactions. Generally, under Delaware law, a merger is not a transfer of assets. <u>Star Cellular Telephone Co., Inc. v. Capitol Cellular, Inc.</u>, 1993 Del. Ch. LEXIS 158 <u>aff'd</u> 647 A.2d 382 (Del. 1994); <u>see</u> <u>also</u> <u>Shields v. Shields</u>, 498 A.2d 161, 167 (Del. Ch. 1985). However, the Court cannot conclude that the substance of the transaction, as opposed to the form of the transaction, did not have the economic effect of a transfer. <u>See</u> <u>In re Buckhead America Corp.</u>, 178 B.R. 956, 970 (D. Del. 1994). The Court can conceive of Plaintiffs succeeding on the merits of this claim.

B. Section 316(b) of the Trust Indenture Act and Section 6.7

Section 316(b) of the Trust Indenture Act provides in relevant part:

> Notwithstanding any other provision of the Indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of an interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder

15 U.S.C. § 77ppp(b). Section 316(b) is incorporated into the Indentures under § 6.7, which similarly prohibits any impairment or affect on the right to receive payment of principal and interest or to enforce that right.

Plaintiffs contend that the Tender Offer Transactions impair and affect Plaintiffs' right to receive payments and their ability to enforce those rights. (D.I. 7 at 12). Specifically, Plaintiffs contend that if the Tender Offer Transactions are implemented and substantially all of Holdings' assets are transferred, any distribution of value from Communications will first be applied to pay the New Term Notes and the Exchange Notes, thus Holdco's ability to make distributions to Holdings will be restricted. (D.I. 7 at 13).

In reply, Defendants contend that the indentures have not been impaired because the Tender Offer Transactions do not irrevocably impede Holdings ability to pay Plaintiffs in full. (D.I. 15 at 21-

23). Defendants contend that the pending transaction will strengthen the long-term prospects of the organization, ensuring that it will be able to pay the notes in full when they mature in the future. (D.I. 15 at 21-23). Further, Defendants contend that Plaintiffs' rights are not impaired under the Trust Indenture Act merely because, consistent with the terms of the Indenture, Defendants will incur debt superior in rights to the previously issued notes under the Indentures. (D.I. 15 at 22).

Because the Court will not address the issue of Defendants' solvency at this juncture, the Court cannot conclude that Plaintiffs have an unreasonable probability of success on the merits. Should Defendants file a bankruptcy action, a court may find that the Tender Offer Transactions, entered into at a time near the bankruptcy, impaired the rights of the Indentures by incurring significant senior debt.

C. Limits On Indebtedness of Holdings - Sections 4.3, 4.4, 4.6, and 4.11

Section 4.3 limits the rights of Holdings to incur new indebtedness, providing that such new debt may be incurred if either (a) after the incurrence of the Indebtedness, the ratio of Holdings's Adjusted EBITDA to Indebtedness ("Adjusted EBITDA Indebtedness") is equal to or less than 7.00:1 or (b) the Indebtedness otherwise falls within one of the exceptions to the applicable limitations. (D.I. 17, Ex. B at 27-29). Similarly, §

4.4 restricts the ability of Holdings' "restricted" subsidiaries to incur Indebtedness, limiting the right of Holdings to incur new indebtedness, providing for new debt only if (a) after the incurrence of the Indebtedness, Adjusted EBITDA Ratio is equal to or less than 7.00:1 or (b) the Indebtedness otherwise falls within one of the exceptions to the applicable limitations. (D.I. 17, Ex. B at 29-31). Section 4.6 prohibits Holdings from restricting or encumbering the ability of its Subsidiaries to issue dividends or otherwise distribute or transfer property or assets to Holdings. (D.I. 17, Ex. B at 32). Under § 4.11 Holdings may only (1) incur or permit to exist liens against its assets that qualify as permitted Liens, or (2) incur or permit to exist other liens only if it secures the Notes under the Indentures with equal or ratable liens. (D.I. 17, Ex. B at 38).

Plaintiffs contend that the Tender Offer Transactions violate §§ 4.3 and 4.4 because (1) the Adjusted EBITDA Ratio will exceed 7.00:1 and (2) the new indebtedness is not permitted by any of the exceptions. (D.I. 7 at 16-17). Plaintiffs also contend that the Tender Offer Transactions violate § 4.6 because Holdco's ability to make distributions to Holdings will be restricted by the New Term Notes. (D.I. 7 at 17). Plaintiffs contend that the insertion of Holdco as the owner of Communications does not change the substance of the transaction, that a subsidiary of Holdings is restricted from making distributions to Holdings. (D.I. 7 at 17). Further, Plaintiffs contend that the Tender Offer Transactions violate § 4.11 because Holdings proposes to grant the holders of the New Term Notes a security interest in Holdings' membership interest in Holdco, which is not a Permitted Lien under the Indentures, nor has Holdings granted an equal and ratable liens to Plaintiffs. (D.I. 7 at 18).

In opposition, Defendants contend that the New Term Notes qualify as a "credit facility" under the Indentures, and the use of that credit facility basket is an exception to every debt incurrence provision Plaintiffs cite. (D.I. 15 at 24). Specifically, Defendants contend that the definition of "credit facility" varies only slightly among the indentures and encompasses the New Term Notes as a refinancing in part of the existing secured debt of Communications. (D.I. 15 at 24). Defendants further contend that the New Term Notes are being incurred within the limits of the equity basket. (D.I. 15 at 24). At argument, Defendants contended that the new debt is within each Indentures definition of "credit facility" as any debt used in refinancing. (June 24, 2002 Hearing Transcript at 33).

In reply, Plaintiffs challenge Defendants' characterization of the "credit facility" definition in the five Indentures. (D.I. 28 at 8). Plaintiffs contend that Defendants mischaracterize the definition of “credit facility” in the April 20, 1999, March 15, 2000 (10 3/4%), and December 20, 2000 Indentures by failing to recognizes that new debt is limited to “non-convertible debt securities.” (D.I. 28 at 8). Plaintiffs do not dispute Defendants characterization of the “credit facility” definition with respect to the remaining Indentures. (D.I. 28 st 8). Plaintiffs contend that the New Term Notes issued by Holdco are convertible into shares of Holdings’ common stock and therefore cannot qualify as a “credit facility” because they are convertible, not non-convertible debt securities. (D.I. 28 at 8).

After considering the plain language of the Indentures, the Court concludes that convertible debt, as proposed by the New Term Notes, is not within the definition of “credit facility.” The definition of “credit facility” includes non-convertible debt securities, not convertible debt securities. Thus, to the extent the Tender Offer Transactions seek to issue new convertible debt, Plaintiffs have a reasonable likelihood of success of establishing a violation of the April 20, 1999, March 15, 2000 (10 3/4%), and December 20, 2000 Indentures with respect to all provisions cited by Plaintiffs.

D. Section 9.7

Section 9.7 of the Indentures states in relevant part:

> Neither the Issuer nor any affiliate of the Issuer shall, directly or indirectly, pay or cause to be paid any

> consideration, whether by way of interest, fee or otherwise, to any Holder for, or as an inducement to any consent, waiver, or amendment of any of the terms or provisions of this Indenture or the Notes unless such consideration is offered to be paid to all Holders that so consent, waive or agree to amend in the time frame set forth in solicitation documents relating to such consent, waiver or agreement.

(D.I. 17, Ex. B at 57).

Plaintiffs contend that the Tender Offer Transactions violate this provision because Holdings has not offered to pay consideration to all consenting holders who accept the Tender Offer and agree to waive existing defaults before the deadline. (D.I. 7 at 19). Plaintiffs contend that the plain language of § 9.7 requires that Holding pay the consideration offered to all holders who accept the Tender Offer and prohibits the selective acceptance of tendered notes. (D.I. 7 at 18-19)

In reply, Defendants contend that it has complied with the requirements of § 9.7 by offering the same consideration to all Noteholders who tender their Notes in accordance with the Tender Offer. (D.I. 15 at 25-26).

The Court is inclined to agree with Plaintiffs' interpretation of § 9.7 of the Indentures. The Court's reading of § 9.7 requires that Holdings accept all Notes tendered in connection with a tender offer. Because under the Tender Offer Defendants are not required to accept every Note tendered, the Court concludes that Plaintiffs have a reasonable likelihood of success with regard to this claim.[2]

II. Irreparable Injury To Plaintiffs

Plaintiffs contend that if a temporary restraining order is not granted, they will suffer irreparable injury when the Tender Offer Transactions are completed. (D.I. 7 at 26). Specifically, Plaintiffs contend that the transactions will transfer and convey Holdings' only substantial asset and impair the ability of Noteholders to recover on their Notes. (D.I. 7 at 26). Further, Plaintiffs contend that Holdings is insolvent or in the vicinity of insolvency and following the Tender Offer Transactions, Holdings will likely be unable to respond in damages to compensate Plaintiffs for the loss in value of their Notes. (D.I. 7 at 27). Plaintiffs also contend that money damages will be "extremely difficult" to calculate. (D.I. 7 at 28).

In reply, Defendants contend that Plaintiffs have not suffered irreparable harm because any damage resulting from the Tender Offer Transactions can be fully remedied by monetary damages after a full

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[2]The Court finds Plaintiffs' claim that the Tender and Exchange Offer violate federal securities law, breach of fiduciary duty, and tortious interference with contractual rights by Welsh Carson to be tangential to its decision to deny Plaintiffs' Motion. The Court's finding is confirmed by the parties lack of attention to these claims at the Hearing on the Plaintiffs' Motion. Accordingly, the Court will not address Plaintiffs likelihood of success on the merits of these claims.

trial on the merits. (D.I. 15 at 31). Defendants contend that Holdings is neither insolvent nor threatened by insolvency. (D.I. 15 at 31). Further, Defendants contend that money damages may be calculated by comparing the pre-Tender Offers and post-Tender Offers market prices for the Notes, thus reducing the calculation difficulty argued by Plaintiffs. (D.I. 15 at 33).

The Court finds that the harm Plaintiffs allege is not irreparable because Plaintiffs may be adequately compensated in money damages. The Court concludes that any money damages sought by Plaintiffs may be calculated by comparing the pre-Tender Offer market value of the Notes with the post-Tender Offer market value of the Notes. Further, the Court cannot conclude, at this stage of the proceedings, that Plaintiffs have suffered irreparable harm by being subordinated to senior debt, as the Indentures specifically provided for such a possibility through a credit facility basket. Further, the Court notes that Plaintiffs invested with full knowledge of this possibility. Finally, it is not appropriate for the Court to speculate about the solvency or insolvency of Holdings at this stage of the litigation and in view of the adequate remedy at law available to Plaintiffs.

III. Irreparable Harm To Defendants

Plaintiffs contend that granting a temporary restraining order will not impose any harm on Defendants because the Tender Offer permits Defendants to extend the deadline for the Tender Offer for numerous reasons. (D.I. 7 at 29). Plaintiffs further contend that because the financing is being provided by Welsh Carson, an interested party, there is little possibility that the offer will be withdrawn. (D.I. 7 at 30).

In reply, Defendants contend that enjoining the Tender Offers would deprive Holdings of a necessary cash infusion. (D.I. 15 at 35). Defendants further contend that if an injunction is issued the transaction might not go forward, depriving Note holders of an attractive opportunity and perhaps the only such opportunity. (D.I. 15 at 34).

The Court finds that Defendants will suffer irreparable harm if the pending transaction is enjoined. Without determining solvency or insolvency, it is clear that Defendants need the financing that will be provided for in the Tender Offer Transactions. Further, it is doubtful that Defendants can obtain similar financing from another source. In contrast, the harm to Plaintiffs is not irreparable and may be fully compensated by money damages that can be quantified. In sum, the Court concludes that Defendants would suffer irreparable harm if the pending transaction is enjoined, whereas any harm to Plaintiffs is compensable.

IV. Public Interest

Plaintiffs contend that no public policy would be violated by the issuance of a temporary restraining order. (D.I. 7 at 31). Plaintiffs contend that a temporary restraining order is necessary to preserve the status quo and prevent a transaction that violates the Indentures and unjustly enriches the shareholders of an insolvent company. (D.I. 7 at 31). Further, Plaintiffs contend that the denial of a temporary restraining order will encourage similarly abusive and strategic behavior. (D.I. 7 at 31).

In reply, Defendants contend that the public interest would not be served by granting the temporary restraining order. (D.I. 15 at 35). Defendants contend that such relief would significantly upset the expectations of the investing public and impair the efficient working of the capital markets. (D.I. 15 at 35).

Although, public policy dictates that valid contracts must be enforced, the Court must also be cognizant of the stage of this litigation. Injunctive relief is an extraordinary measure which must be granted only in exceptional circumstances, and the Court is unable to conclude that this is an exceptional case. The Court agrees with Defendants that the market will evaluate the Tender Offer and appropriately value the offer. For the Court to interfere with that process now would not be appropriate. See Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 60 (1985) (stating that injunctive relief "must be used with great care, lest the forces of the free market place . . . are nullified.) Accordingly, the Court finds that public policy does not favor granting Plaintiffs' Motion.[3]

CONCLUSION

After considering the four factors that must be met for a temporary restraining order to issue, the Court finds that the balance of potential harm to Plaintiffs and hardships that may be suffered by Defendants requires that Plaintiffs' motion be denied. In these circumstances, the Court is unwilling to interfere with the market when Plaintiffs knowingly subjected themselves to the possibility of senior debt as a risk of investing. For the reasons discussed, Plaintiffs' motion will be denied.

An appropriate Order will be entered.

[3]Because the Court will deny Plaintiffs' Motion after weighing the four factors, the Court will not address Defendants' laches argument.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

OAKTREE CAPITAL MANAGEMENT, LLC; DDJ CAPITAL MANAGEMENT, LLC; FMA, LLC; CONSECO CAPITAL MANAGEMENT, INC.; FRANKLIN ADVISORS, INC.; TUDOR INVESTMENT CORPORATION; LB SERIES FUND, INC.; LUTHERAN BROTHERHOOD HIGH YIELD FUND; CAPITAL RESEARCH AND MANAGEMENT COMPANY; ING CAPITAL LLC; AIM CAPITAL MANAGEMENT; FIDELITY MANAGEMENT AND RESEARCH CO.,	:	
Plaintiffs,	:	
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Defendants.	:	

O R D E R

At Wilmington this 25th day of June 2002, for the reasons set forth in the Memorandum Opinion issued with this Order, IT IS

HEREBY ORDERED THAT Plaintiffs' Motion For Temporary Restraining Order And Order To Show Cause Re Preliminary Injunction (D.I. 6) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE