

Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COINLAB INC., a Delaware Corporation,

Plaintiff,

v.

MT. GOX KK, a Japanese corporation, and
TIBANNE KK, a Japanese corporation,

Defendant.

Case No. 2:13-cv-777-MJP

OPPOSITION TO MOTION FOR
TEMPORARY RESTRAINING ORDER

Defendant Tibanne KK (“Tibanne”), by and through its attorneys, respectfully submits this Opposition to Plaintiff CoinLab, Inc.’s (“CoinLab”) Motion for Temporary Restraining Order (the “Motion”).

I. INTRODUCTION

Tibanne apologizes again for not obtaining counsel within 30 days as required by the Court’s April 30, 2014 Minute Order (Docket No. 61). As explained in more detail below, after several months of litigating this matter, the exchange operated by Defendant Mt. Gox KK (“Mt. Gox”) was hacked, leading to the suspension of its operations and bankruptcy. Shortly thereafter, Tibanne’s counsel withdrew from this action. And, without the benefit of counsel,

1 Tibanne mistakenly believed that the Order staying the entire action (Docket No. 62) included a
2 stay of its obligation to obtain new counsel.

3 Tibanne began looking for counsel as soon as CoinLab filed its Motion for Relief From
4 Stay and Temporary Restraining Order, which was granted on July 22, 2014 (the “TRO”).
5 Despite its financial difficulties, Tibanne obtained new counsel in this action on Friday,
6 August 8, 2014, who filed an appearance on the following Monday, August 11, 2014.
7 Additionally, on August 19, 2014, Tibanne provided CoinLab’s counsel with the domain and
8 website list required by the TRO. Thus, since July 21, 2014, Tibanne has acted quickly to obtain
9 counsel and comply with the Court’s orders, and there are no continuing violations.

10 Despite the foregoing, CoinLab continues to request that the Court extend the TRO and
11 essentially freeze all of Tibanne’s assets. The sole justification for this is CoinLab’s
12 (unsupported) assertion that, without the asset freeze order, it may not be able to satisfy a
13 judgment if it prevails in this breach of contract action. Yet, the Ninth Circuit has specifically
14 held that a plaintiff in CoinLab’s position does not have a right to restrain a defendant’s use of its
15 property, much less impose on the Court to supervise its business activities. It is perhaps for this
16 reason that the Motion makes no effort to identify or satisfy the standard for granting a TRO.

17 Moreover, CoinLab’s true intent was revealed at the last hearing when its counsel said it
18 would like to see Tibanne driven into bankruptcy.¹ In other words, the requested TRO is nothing
19 more than a strong-arm tactic. If Tibanne is not able to sell domain names, an ordinary part of its
20 business, then it will not have the money needed to defend this action. And that is exactly what
21 CoinLab wants.

22 Based on the foregoing, as explained in detail below, the Motion should be denied in its
23 entirety. Alternatively, for the reasons shown below, Tibanne requests that the Court grant it
24 relief from the TRO, and from any extension thereof, to permit it to sell domain names in order

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26 ¹ This statement is based on counsel’s recollection of the hearing because the transcript was not available at the time of filing.

1 to generate funds to pay ongoing business expenses incurred by Tibanne, including, without
2 limitation, legal fees and expenses.

3 **II. FACTS AND PROCEDURAL BACKGROUND**

4 This is an action for breach of contract and related relief against Mt. Gox and Tibanne.
5 Tibanne is only a bit player in this drama, as CoinLab's own First Amended Complaint (the
6 "FAC") makes clear. Specifically, the FAC does not mention Tibanne in any substantive
7 capacity, instead referring to it only in identifying the parties and jurisdiction. (*See* Docket
8 No. 29.) Likewise, the contract at issue, Exhibit A to the FAC, identifies Mt. Gox and CoinLab
9 as the "Parties." (*Id.*, Ex. A, p. 1.) Thus, while Tibanne signed the contract, the real dispute here
10 is between Mt. Gox and CoinLab.

11 From August 2013 through early 2014, Mt. Gox and Tibanne, represented by the same
12 counsel, vigorously defended this action. Moreover, they both pursued counterclaims, including
13 specifically a request for a declaration that the contract at issue is illegal and, therefore, void.
14 However, in February 2014, the exchange operated by Mt. Gox was hacked, resulting in the
15 suspension of its operations. (*See* Declaration of Mark Karpeles (the "Karpeles Dec."), a copy of
16 which is attached hereto as Exhibit 1, at ¶ 2.) On February 28, 2014, Mt. Gox filed for
17 bankruptcy protection in Japan (the "Japanese Bankruptcy") and, shortly thereafter, sought
18 recognition of the same in the United States Bankruptcy Court for the Northern District of Texas
19 (the "Texas Bankruptcy"). (*Id.*) Later, the Court in the Texas Bankruptcy issued an Order
20 recognizing the Japanese Bankruptcy as a foreign main proceeding. (*See* Docket No. 70-1.)

21 On March 18, 2014, Mt. Gox filed a Notice of Bankruptcy Filing and Related Stay in this
22 action. (*See* Docket Nos. 36, 37.) Two days later, Mt. Gox filed a Motion to Stay Entire Action
23 (the "Motion to Stay"). (*See* Docket Nos. 41, 42.) The same day, Tibanne filed a Notice of
24 Joinder joining in the Motion to Stay. (*See* Docket No. 43.) Also on the same day, Tibanne and
25 Mt. Gox's counsel filed a Motion to Withdraw as Attorney for Tibanne. (*See* Docket Nos. 39,
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1 40.) The Court granted Tibanne’s counsel leave to withdraw on April 8, 2014. (*See* Docket
2 No. 57.) At that time, the Motion to Stay was still under consideration.

3 On April 30, 2014, the Court entered a Minute Order stating, among other things, that
4 “Defendant Tibanne must obtain an attorney admitted to practice in this District within 30 days
5 from the entry of this order or face sanctions.” (*See* Docket No. 61.) On the same date, the
6 Court granted Mt. Gox and Tibanne’s Motion to Stay and struck Plaintiff’s pending motion to
7 compel. (*See* Docket No. 62.) At the time these two Orders were entered, Tibanne was not
8 represented by counsel. (Ex. 1, ¶ 3.)

9 Without the guidance of counsel, Tibanne believed that the Order granting the stay of the
10 entire action (Docket No. 62) included a stay of the 30-day deadline for Tibanne to obtain new
11 counsel in the Minute Order (Docket No. 61). (Ex. 1, ¶ 4.) Consistent with this understanding,
12 nothing happened when the 30th day after the Minute Order came and went (May 1, 2014). And,
13 nothing continued to happen until July 21, 2014, when CoinLab moved to lift the stay in order to
14 enter the TRO and sought a default against Tibanne. (*See* Docket Nos. 64, 65, 66.)

15 In the meantime, between April 30, 2014 and July 21, 2014, Tibanne was struggling to
16 remain afloat. (Ex. 1, ¶ 5.) Since its founding in 2009, Tibanne specialized in web hosting,
17 application development and system management. (*Id.*, ¶ 7.) In general, Tibanne develops
18 automated systems to make processes that are more responsive to its customers’ needs. (*Id.*) In
19 this capacity, its largest customer was Mt. Gox, but it also had (and still has) several other
20 customers. (*Id.*) Tibanne also capitalized on its specialized knowledge to generate revenues by
21 purchasing and selling internet domain names. (*Id.*)

22 When Mt. Gox suspended operations, Tibanne’s income was substantially reduced. (*Id.*,
23 ¶ 5.) Mt. Gox was Tibanne’s largest customer and, without its monthly revenues, Tibanne was
24 unable to meet its monthly expenditures. (*Id.*) Accordingly, Tibanne looked for ways to
25 generate money to fund its ongoing business expenses – as well as legal expenses in connection
26 with actions pending in the United States and Canada, accusing Tibanne and others of

1 wrongdoing in connection with the hacking and suspension of the operations of Mt. Gox.² (*Id.*,
2 ¶¶ 5-6.)

3 As noted, part of Tibanne’s business has always been acquiring and selling domain
4 names. (*Id.*, ¶ 7.) One of the, if not the, most valuable domains held by Tibanne is bitcoins.com,
5 which Tibanne purchased in 2011. (*Id.*) In fact, also in 2011, Tibanne obtained the trademarks
6 on “Bitcoin” and several related terms in order to keep the use of the words free, and to prevent
7 anyone from trying to limit their use or make a profit off of others’ work. (*Id.*, ¶ 8.) Since
8 registering those trademarks, Tibanne has publicly announced that it would allow them to be
9 used freely throughout the world. (*Id.*) To this day, Tibanne has never sought to prevent the use
10 of, or obtain a royalty for the use of, “bitcoin” or related marks. (*Id.*)

11 On May 28, 2014, Tibanne announced that it would auction off “bitcoins.com.” (*Id.*,
12 ¶ 9.) This announcement garnered international media attention, including articles in the Wall
13 Street Journal, the Telegraph and on general news websites. (*Id.*, ¶ 9; *see also id.*, Exs. A-C.)
14 Indeed, in its motion seeking the TRO, CoinLab admitted that Tibanne “publicly announced” its
15 intent to sell bitcoins.com and that Tibanne announced it was doing so “to keep alive” Tibanne.
16 (*See* Docket No. 65, p. 3.)

17 In deciding to sell “bitcoins.com,” Tibanne worked with the trustee in the Japanese
18 Bankruptcy (the “Mt. Gox Trustee”). (Ex. 1, ¶ 10.) Moreover, Tibanne has continued to work
19 with the Mt. Gox Trustee for the benefit of Mt. Gox and its creditors. (*Id.*) In fact, Tibanne has
20 agreed to, and does, provide the Mt. Gox Trustee with monthly financial reporting of Tibanne’s
21 operations. (*Id.*)

22 The sale of bitcoins.com was scheduled to occur on July 24, 2014 – nearly two months
23 after the sale was originally announced. (*Id.*, ¶ 11.) Despite this, just three days before the
24 auction, on July 21, CoinLab filed a motion with this Court accusing Tibanne of a grand plan to
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26 ² Tibanne denies all such allegations. (*Id.*, ¶ 6.)

1 liquidate its assets and become judgment-proof. Based on these representations, the Court
2 entered the TRO on July 22. Based on the TRO, the auction house that was conducting the sale
3 of bitcoins.com refused to conduct the auction. (*Id.*) This, in turn, left Tibanne with essentially
4 no money. (*Id.*) And, on the same day as it moved to block the sale, it also moved to hold
5 Tibanne in default. Based on the foregoing, CoinLab strategically waited until the eve of the sale
6 to: (a) cripple Tibanne's ability to raise money; and (b) simultaneously put it under threat of
7 default if it did not hire new attorneys.

8 When CoinLab filed its motions, Tibanne believed that its deadline to obtain new counsel
9 in this District had been stayed. (Ex. 1, ¶¶ 4, 12.) Nevertheless, it immediately tried to obtain
10 counsel in this District to represent it in this action. (*Id.* ¶ 12.) These efforts were delayed by the
11 TRO itself. Specifically, Tibanne found itself without the money it needed to hire lawyers to
12 secure the relief from the TRO it needed to sell bitcoins.com to raise money. (*Id.*)

13 Then, on August 5, 2014, the Court ordered that Tibanne appear and show cause why it
14 should not be sanctioned for not hiring replacement counsel in this District. Finally, on
15 August 8, 2014, Tibanne was able to retain counsel. (*Id.*) And, at the show cause hearing, the
16 Court declined to enter sanctions.

17 At this point, however, Tibanne has essentially run out of money. (*Id.*, ¶ 13.) It does not
18 have sufficient cash to pay its ordinary operating expenses or to continue to employ legal counsel
19 to defend it in this and other pending actions. (*Id.*) But, if Tibanne is permitted to sell domains –
20 including bitcoins.com – it will be able to raise the money needed to keep the lights on, including
21 defending this action. (*Id.*, ¶ 14.)

22 III. ARGUMENT

23 This argument is divided into four sections. *First*, we address why the Court should deny
24 the Motion and allow the current TRO to expire. *Second*, and in the alternative, we discuss the
25 \$5,000 bond proposed suggested by CoinLab and show why it is manifestly insufficient to
26 protect Tibanne if the TRO is entered. *Third*, also in the alternative, we show that the Court

1 should permit Tibanne to sell domains to fund its business expenses despite any extension or
2 modification of the TRO. *Fourth*, we show that, in all events, the Court should deny CoinLab’s
3 request for attorney’s fees.

4 **A. THE MOTION SHOULD BE DENIED**

5 The Motion should be denied outright for at least three separate and independent reasons.
6 *First*, CoinLab is requesting something to which it simply has no right. Both the United States
7 Supreme Court and Ninth Circuit Court of Appeals have made this point unmistakably clear:

8 *In Grupo Mexicano [de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S.*
9 *308, 333 (1999)]*, the Supreme Court held that a district court does not have the
10 authority to issue a preliminary injunction preventing a party from disposing of
11 assets pending adjudication of a claim for money damages. The Court noted that
12 ‘before judgment (or its equivalent) an unsecured creditor has no rights at law or
in equity in the property of his debtor.’ The Court held that a creditor with no
rights to the property of a debtor could not seek to restrain the debtor’s use of its
property.

13 *Dateline Exports, Inc. v. Basic Const., Inc.*, 306 F.3d 912, 914 (9th Cir. 2002). Indeed, the Ninth
14 Circuit’s holding in *Dateline Exports* mirrored that of the United States Supreme Court in *Grupo*
15 *Mexicano*. The *Dateline Exports* court affirmed that the district court lacked the authority to
16 grant an injunction which, “if granted, would have permitted a creditor with no right to the
17 debtor’s assets to interfere with the debtor’s use of its own property.” *Id.*

18 This case is no different. CoinLab does not claim a right to any specific asset of Tibanne.
19 Rather, it claims that it needs the TRO “to prevent Tibanne from rendering itself judgment-
20 proof” in the event CoinLab prevails in this suit. (*See* Docket No. 88, p. 2.) Thus, *Dateline*
21 *Exports* is directly on point. CoinLab is nothing more than an alleged “creditor with no right to
22 the debtor’s assets” and, therefore, the Court should not allow CoinLab “to interfere with the
23 debtor’s use of its own property.” *Dateline Exports*, 306 F.3d at 914.

24 *Second*, the Motion makes no effort to satisfy any of the requirements for entry of a TRO.
25 It is well established that a TRO may be granted only “upon a clear showing” of each of the
26 following elements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable

1 harm in the absence of the TRO; (3) that the balance of equities tips in movant’s favor; and
2 (4) that granting injunctive relief is in the public interest. *Winter v. Nat’l Res. Def. Council, Inc.*,
3 555 U.S. 7, 24 (2008).

4 The Motion does not even acknowledge that this is the test for the entry of a TRO, much
5 less try to meet these elements. Instead, the Motion goes on about Tibanne’s failure to obtain
6 counsel and prior failure to provide the list of domain names required by the original TRO. Yet,
7 the failure to obtain counsel was explained above, and has been cured. Likewise, Tibanne has
8 now complied with the requirement of disclosing its domains to CoinLab’s counsel.³ Thus,
9 those alleged violations do not provide a substitute route for CoinLab to obtain a TRO. Rather,
10 even if CoinLab was otherwise possibly entitled to “interfere with [Tibanne’s] use of its own
11 property” (it is not, *Dateline Exports*, 306 F.3d at 914), it has nevertheless completely failed to
12 meet its burden to satisfy the elements required for the entry of a TRO.

13 *Third*, “[t]he purpose of a TRO is ‘preserving the status quo and preventing irreparable
14 harm just so long as is necessary to hold a hearing [on the preliminary injunction application],
15 and no longer.’” *Gambill v. U.S. Bankr. Court--Tacoma*, C12-5608BHS, 2012 WL 2881897,
16 at *1 (W.D. Wash. July 13, 2012) (brackets in original) (quoting *Granny Goose Foods, Inc. v.*
17 *Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423 (1974), and citing *Reno Air Racing Ass’n*
18 *v. McCord*, 452 F.3d 1126, 1130-31 (9th Cir. 2006)). Yet, here, CoinLab is not seeking a
19 preliminary injunction.⁴ Thus, its request for a TRO is fundamentally improper.

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24 ³ It should be noted that the list of domains is not relevant to the underlying issues in this case, but only to the TRO
25 itself. Because the TRO should not be extended, the requirement of providing a list is essentially moot, in addition
26 to being satisfied.

⁴ CoinLab’s claims that it plans to move to lift the stay and proceed with this litigation. But, the Court properly
stayed the action based on Mt. Gox’s bankruptcy and CoinLab has advanced no reason why the Court should reverse
its prior order.

1 Based on the foregoing, CoinLab is not entitled to the requested TRO. Accordingly, the
 2 Court should deny the Motion and allow the current TRO to expire of its own accord. If,
 3 however, the Court were to grant the Motion and extend the TRO, the Court should nevertheless
 4 enter an Order stating that Tibanne may sell domains, including, without limitation, bitcoins.com,
 5 in order to finance its ongoing business operations.

6 **B. ALTERNATIVELY, THE COURT SHOULD REQUIRE AT LEAST A \$1**
 7 **MILLION BOND**

8 Rule 65(c) provides that “[t]he court may issue a preliminary injunction or a temporary
 9 restraining order only if the movant gives security in an amount that the court considers proper to
 10 pay the costs and damages sustained by any party found to have been wrongfully enjoined or
 11 restrained.” Fed. R. Civ. P. 65(b). Here, CoinLab is seeking to restrain Tibanne from engaging
 12 in essentially any transactions with its assets. As noted, this will leave Tibanne with essentially
 13 no income and likely lead to bankruptcy – something CoinLab says it would welcome.

14 As security for this drastic measure, CoinLab proposes to provide only a nominal \$5,000
 15 bond. The Motion makes no effort to justify this amount – nor could it. This amount is clearly
 16 insufficient to stand as security for the destruction of Tibanne’s business. Indeed, the sale of
 17 bitcoins.com alone was expected to bring in approximately \$750,000, not to mention its other
 18 assets and ongoing business activities. Accordingly, Tibanne respectfully suggest that, if the
 19 TRO is allowed, then it not be entered until CoinLab post at least a \$1 million bond.

20 **C. ALSO ALTERNATIVELY, TIBANNE SHOULD BE GRANTED RELIEF FROM**
 21 **THE TRO**

22 The current TRO expressly permits Tibanne to sell assets in order to fund its ordinary
 23 operating expenses. (*See* Docket No. 69, ¶ 1.1.) The proposed new TRO maintains this
 24 provision, but would require Court approval of any sale (or essentially any other business
 25 activity). (*See* Docket No. 88-1, ¶¶ 1-2.) Regardless, the auction house that planned to conduct
 26 the auction of bitcoins.com has not agreed to proceed with the auction based on the TRO as

1 currently written. (Ex. 1, ¶ 11.) Thus, if the TRO is extended in its original or proposed
2 modified form, then Tibanne would require a Court order to proceed with the sale of domains.

3 As set forth above, Tibanne’s income is insufficient to pay its expenses. By selling
4 domains – particularly bitcoins.com – Tibanne can generate income to use to pay its bills.
5 Accordingly, Tibanne seeks relief from the TRO, and any extension thereof, in the form of an
6 Order stating that Tibanne may sell bitcoins.com, or any other domains, despite the TRO so long
7 as the funds are used for ordinary business purposes. Further, upon the sale of any domain
8 names, Tibanne will provide CoinLab with copies of the monthly accounting that it is currently
9 providing to the Mt. Gox Trustee, translated into English.

10 **D. IN ALL EVENTS, ATTORNEY’S FEES SHOULD BE DENIED**

11 Finally, CoinLab requests that the Court order Tibanne to pay all of CoinLab’s attorney’s
12 fees incurred in connection with their TRO and the extensions thereof. (*See* Docket 88, p. 6.)
13 CoinLab does not assert that it has any statutory or rule-based right to recover such fees. Instead,
14 it cites – without any explanation or analysis – two cases dealing with when a Court can invoke
15 its inherent authority to award attorney’s fees. (*Id.* citing *In re DeVille*, 361 F.3d 539, 544-45
16 (9th Cir. 2004); *Mark Indus., Ltd. v. Sea Captain’s Choice, Inc.*, 50 F.3d 730, 732-33 (9th Cir.
17 1995).)

18 CoinLab has not met the very high standard for awarding attorney’s fees under the
19 Court’s inherent authority. In fact, the Motion does not even try to meet the requisite “high
20 threshold” to show that Tibanne acted in “bad faith.” *Primus Auto. Fin. Servs., Inc. v. Batarse*,
21 115 F.3d 644, 648 (9th Cir. 1997). Mere “ignorance or negligence” is not enough to justify the
22 sanction of attorney’s fees under the Court’s inherent authority. *Barber v. Miller*, 146 F.3d 707,
23 711 (9th Cir. 1998). Yet, as demonstrated above, that is the most that Tibanne was guilty of
24 here: It misunderstood the Court’s orders when it did not have counsel and, once apprised of its
25 error, it acted promptly to come into compliance. Accordingly, the requested sanction of
26 attorney’s fees is not appropriate.

IV. CONCLUSION

For the reasons stated above, Tibanne respectfully requests that the Court enter an Order: (a) denying Plaintiff’s Motion for Temporary Restraining Order in its entirety; (b) or, in the alternative, requiring a bond of at least \$1 million for the TRO and specifically providing in the TRO that Tibanne may sell domains to fund its ordinary operating expenses; and (c) in all events, denying CoinLab’s request for attorney’s fees.

DATED this 19th day of August, 2014.

MILLER NASH LLP

/s/ Lance D. Reich

/s/ Kevin Regan

Lance Reich, WSB No. 41090
Kevin Regan, WSB No. 44565
MILLER NASH LLP
601 Union Street, Suite 4400
Seattle, WA 98101
Telephone: (206) 622-8484
Fax: (206) 622-7485
E-mail: lance.reich@millernash.com
E-mail: kevin.regan@millernash.com
Attorneys for Defendant Tibanne KK

Amanda Hinkley
Richard G. Douglass
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, IL 60606
Telephone: (312) 419-6900
Email: ahinkley@novackmacey.com
Email: rdouglass@novackmacey.com
Admitted Pro Hac Vice
Attorneys for Defendant Tibanne KK

Eric N. Macey
NOVACK AND MACEY LLP
303 W. Madison St., Suite 1500
Chicago, IL 60606-3308
Telephone: (312) 419-6900
Email: emacey@novackmacey.com
Admitted Pro Hac Vice
Attorneys for Defendant Tibanne KK

CERTIFICATE OF SERVICE

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I hereby certify that I served the foregoing OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER on the following parties via CM/ECF system transmission.

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 19th day of August, 2014.

/s/ Lance D. Reich
Lance D. Reich