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1 IN THE CIRCUIT COURT
 2 OF THE 15TH JUDICIAL CIRCUIT
 3 IN AND FOR PALM BEACH COUNTY, FLORIDA
 4 GENERAL JURISDICTION DIVISION
 5 CASE NO. 50 2007 CA005887XXXXMB AJ
 6 ZAAZOOM SOLUTIONS, LLC,
 7 Plaintiff,
 8 v.
 9 RMCR, INC., a Delaware corporation,
 10 JEFFREY M. APPLEBAUM, individually
 11 and WENDY APPLEBAUM, individually,
 12 Defendants.
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 15 EXCERPT OF PROCEEDINGS
 16 COURT'S RULING
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 21 The above-entitled cause came on for hearing
 22 before the Honorable ROBIN L. ROSENBERG, judge of
 23 the above-styled case, at the Palm Beach County
 24 Courthouse, West Palm Beach, Florida, on Wednesday,
 25 June 13, 2007, commencing at 2:03 p.m.

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1 APPEARANCES
 2 DONALD HAYDEN, ESQ., of the law firm of
 3 BAKER & MCKENZIE, 1111 Brickell, 17th Floor,
 4 Miami, Florida, 33131, Co-counsel for
 5 Plaintiff.
 6
 7 GARY L. CRANDELL, ESQ., P.O. Box 24266,
 8 Denver, Colorado, by telephone, Co-counsel for
 9 Plaintiff.
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 11 WAYNE H. SCHWARTZ, ESQ., of the law firm of
 12 LEE & AMTZIS, 5550 Glades Road, #401, Boca
 13 Raton, Florida, 33431, on behalf of the
 14 Defendants.
 15 ALSO PRESENT: Gary Thomas Wojtesak
 16 Jeffrey Applebaum
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 2 THE COURT: The Court is prepared to
 3 issued its ruling at this time.
 4 Plaintiff ZaaZoom Solutions, LLC, filed its
 5 motion for temporary injunction and supplemental
 6 memorandum in support of its motion seeking the
 7 following as articulated in open court by
 8 counsel for plaintiff.
 9 Number one, that RMCR should be held to the
 10 terms of the contract, the exclusivity provision
 11 precludes RMCR's entering into affiliate
 12 marketing.
 13 The return of all ZaaZoom's proprietary
 14 information, number two.
 15 Number three, prohibit RMCR from using
 16 cloned Web sites to market or sell credit
 17 reporting or monitoring products.
 18 Number four, prohibits further contact or
 19 communication with Andrew Lermsider.
 20 Number five, no further business
 21 disparagement of ZaaZoom, its principals, or
 22 employees.
 23 Plaintiff relies upon Florida Rule of Civil
 24 Procedure 1.610 and Florida Statute Chapter 688.
 25 The case law sets forth in cases including

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1 but not limited to the John Juan Salon, Inc.
 2 versus Acosta 922 So.2d. 1081 Florida 4th DCA
 3 2006, that the temporary injunction must be
 4 based on the following four criteria:
 5 Number one, irreparable harm. Number two,
 6 a clear legal right. Number three, an
 7 inadequate remedy of law. Number four,
 8 considerations of public interest.
 9 Florida Statute 688.003 relating to
 10 injunctive relief and Subsection 1 relating to
 11 actual or threatened misappropriation may be
 12 enjoined. It says upon application to the
 13 Court, an injunction shall be terminated when
 14 the trade secret has ceased to exist, but the
 15 injunction may be continued for an additional
 16 reasonable period of time in order to eliminate
 17 commercial advantage that otherwise would be
 18 derived from the misappropriation.
 19 There is a definitional section in 688.002
 20 that defines improper means to include among
 21 other things a breach of duty to maintain
 22 secrecy. There's a definition of
 23 misappropriation which includes among other
 24 things acquisition in Subsection 2, A,
 25 acquisition of trade secret of another by a

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1 person who knows or has reason to know that the
 2 trade secret was acquired by improper means or;
 3 b, disclosure or use of a trade secret of
 4 another without expressed or implied consent by
 5 a person who in Subsection 2 at the time of
 6 disclosure or use knew or had reason to know
 7 that her or his knowledge of the trade secret
 8 was -- and it goes on in Subsection B, acquired
 9 circumstances giving rise to a duty to maintain
 10 its secrecy or limit its use; or Subsection C,
 11 derived from or through a person who owed a duty
 12 to the person seeking relief to maintain its
 13 secrecy or limit its use.

14 The statute also includes a definition of
 15 trade secret in Subsection 4 to mean
 16 information including formula, pattern,
 17 compilation, program, device, method, technique
 18 or process that Subsection A derives independent
 19 economic value actual or potential for not being
 20 generally known to and not being readily
 21 ascertainable by proper means by other persons
 22 who can obtain economic value from its
 23 disclosure or use, and Subsection B is the
 24 subject of efforts that are reasonable under the
 25 circumstances to maintain its secrecy.

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1 customers. Number three, billing platform.
 2 Number four, recurring revenue and retention
 3 formulas. Number five, ZaaZoom's unique Web
 4 design and graphics. Number six, affiliate
 5 performance data. Number seven, tracking system
 6 which was withdrawn as represented by counsel in
 7 open court. Number eight, bank deposits. And
 8 number nine, sales revenue data.

9 The Court finds that the information that
 10 plaintiff alleges to be trade secrets are in
 11 fact trade secrets. And to the extent that the
 12 information is in defendant's possessions and/or
 13 being used by defendant, the information has
 14 been misappropriated by defendant from
 15 plaintiff.

16 Defendant does not dispute that it is in
 17 possession of the customer lists, the credit
 18 card information, the billing platform, and the
 19 Web design and graphics.

20 The Court does not find that the plaintiff
 21 is limited to its answer in interrogatories
 22 specifically number five which was in
 23 Defendant's Exhibit 13, in which the plaintiff
 24 identified the customer list as the only trade
 25 secret at issue in this motion given that there

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1 Florida case law follows that definition in
 2 the case including but not limited to the Lee
 3 versus Cercoa, Inc. 433 So.2d. 1 Florida 4th
 4 DCA 1983. In considering what information
 5 constitutes a trade secret, the following
 6 factors were considered by the court.

7 Number one, the extent to which the
 8 information is known outside the owner's
 9 business. Number two, the extent to which it is
 10 known by employees and others involved in the
 11 owner's business. Number three, the extent of
 12 measures taken by the owner to guard the secrecy
 13 of the information. Number four, the value of
 14 the information to owner and its competitors.
 15 Number five, the amount of effort or money the
 16 owner spent developing the information. And
 17 number six, the ease or difficulty with which
 18 the information could be properly acquired by
 19 others.

20 The plaintiff alleges that the following
 21 are trade secrets and specifically on page four
 22 of the supplemental memorandum and in open court
 23 through counsel.

24 Number one, customer lists. Number two,
 25 credit card information relating to those

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1 have been many hours of testimony and argument
 2 that has allowed both sides to put forth what is
 3 and is not trade secrets and what arguments in
 4 support and opposition to that position.

5 The marketing agreement provides in
 6 paragraph 1-A that ZaaZoom will actively market
 7 and promote those certain products that RMCR
 8 listed on Schedule A through ZaaZoom's
 9 proprietary Web site, the
 10 www.yourfreecreditreportonline.com, and such
 11 other Web sites and/or domain directs, and
 12 ZaaZoom may from time to time determine in its
 13 sole business judgment.

14 The Web sites specifically designated in
 15 the agreement as proprietary and belonging to
 16 ZaaZoom. The agreement further provides that
 17 RMCR shall supply ZaaZoom with the products in
 18 Schedule A and shall use reasonable commercial
 19 efforts to timely fulfill product orders
 20 resulting from ZaaZoom's marketing efforts.

21 RMCR shall use commercially reasonable
 22 efforts to ensure that any personal information
 23 provided by consumers is maintained in a secure
 24 manner.

25 In addition, the agreement in paragraph ten

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1 sets forth explicit provisions governing the
 2 confidentiality of certain information and
 3 prohibits the disclosure of any confidential
 4 information to any third party and for use of
 5 any purpose other than for performance of the
 6 rights and obligations during the term of the
 7 marketing agreement and anytime thereafter in
 8 perpetuity.

9 The agreement further provides that the
 10 confidential information shall remain the sole
 11 property of the disclosing party and that upon
 12 request of the disclosing party, the receiving
 13 party will promptly return all confidential
 14 information furnished.

15 These provisions set out the basic
 16 relationship between the parties as to the
 17 respective rolls in the business venture covered
 18 by the marketing agreement.

19 The testimony and evidence presented over
 20 the course of the two-day hearing conducted on
 21 June 8th and 11th revealed the business
 22 structure as follows:

23 ZaaZoom utilized an affiliate marketing
 24 system which ZaaZoom had prior experience using
 25 and RMCR did not to market the RMCR products in

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1 collected from the customers. This arrangement
 2 set forth in an e-mail or at least was requested
 3 in an e-mail from Mr. Applebaum to Mr. Thomas at
 4 Exhibit 17.

5 Bill Cuevas, the technical manager for IT
 6 who performed work for ZaaZoom, testified that
 7 the customer information was sent to RMCR from
 8 ZaaZoom on a secure connection, and that ZaaZoom
 9 utilized encryption of the data to prevent
 10 anyone other than the receiving party from
 11 accessing the data.

12 Customer profiles such as that captured by
 13 ZaaZoom qualifies trade secrets under Florida
 14 Statute 688 as this information has economic
 15 value, is not generally or readily available by
 16 others, and is the subject of reasonable efforts
 17 by ZaaZoom to preserve its secrecy.

18 The fact that RMCR obtained additional
 19 information about the customer such as the
 20 Social Security number and assigned a customer
 21 password does not change the fact that ZaaZoom
 22 paid for the marketing efforts to obtain the
 23 customers as was its obligation under the
 24 agreement, that it maintained this information
 25 in a confidential manner, and posted the

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1 Schedule A to customers.

2 ZaaZoom paid the affiliates a commission in
 3 the amount of the \$25 bounty for a total of
 4 approximately \$250,000 in commissions to the
 5 affiliates, according to Mr. Thomas. ZaaZoom
 6 also paid Mr. Lermsider for services.

7 The customer came to ZaaZoom's proprietary
 8 site directly or from an affiliate site for the
 9 credit report offering and would provide on
 10 ZaaZoom's secure site their personal information
 11 including their name, contact information, and
 12 billing information including credit card
 13 information.

14 Once the credit card had been approved for
 15 the transaction, ZaaZoom credited the affiliate
 16 for the sale even if the customer was never
 17 authenticated by RMCR and sent the customer
 18 information to RMCR so that RMCR could provide
 19 the credit reporting services to the customers.

20 RMCR obtained Social Security number of the
 21 customer and provided for the customer to obtain
 22 a password. A customer ID was then assigned to
 23 the customer. ZaaZoom served as the guarantor
 24 or the obligated party on the merchant account
 25 that was used to deposit money that was

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1 information to RMCR in a secure manner and
 2 required under the agreement that RMCR maintain
 3 the information provided by customers in a
 4 secure manner.

5 Further, ZaaZoom verified the credit card
 6 information, billed the customer, paid the
 7 affiliate. And only after these steps were
 8 undertaken and there was a complete sale, did
 9 ZaaZoom post the information to RMCR's site.

10 These duties and obligations undertaken by
 11 ZaaZoom are consistent with the terms of the
 12 marketing agreement as set forth in paragraph
 13 1-D.

14 Mr. Cuevas testified that the information
 15 could not be sent back to ZaaZoom after RMCR
 16 assigned the customer ID because RMCR did not
 17 have the capability and/or time to create a
 18 system to do this.

19 Mr. Cuevas attempted to get this
 20 information back from RMCR as is reflected in
 21 Plaintiff's Exhibit 15.

22 Further, the Social Security number,
 23 password, and ID for each customers obtained
 24 through RMCR was encrypted and could not be
 25 unencrypted and sent back to ZaaZoom.

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1 ZaaZoom continued its involvement with the
 2 customer by performing all of the recurring
 3 billing by utilizing recurring revenue and
 4 retention report.
 5 Bill Cuevas testified that he created this
 6 system for ZaaZoom, and that no one was supplied
 7 with the formula with respect to this reporting
 8 system including RMCR. He also testified that
 9 the only person that had access to the retention
 10 reports were himself, Tim Michael, the affiliate
 11 manager, Gary Thomas, the CEO, Moe Tassoudji,
 12 the COO, and Michael Egan, an employee of
 13 ZaaZoom.
 14 Mr. Tassoudji also testified that ZaaZoom
 15 created the formulas for the revenue reports and
 16 that ZaaZoom took measures to secure the reports
 17 through fire walls, user names, and passwords
 18 for access to the information.
 19 Mr. Tassoudji testified that Mr. Michael wa
 20 given access to the formula. Mr. Michael,
 21 according to Mr. Thomas, was the highest paid
 22 ZaaZoom employee/consultant, who received about
 23 \$10,000 a month.
 24 RMCR's involvement was to service the
 25 customer relating to the product itself as this

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1 was RMCR's obligation under the agreement.
 2 This explains why RMCR's 800 number was on
 3 the Web site so customers could call RMCR to
 4 service the product, that it was responsible for
 5 providing under the agreement. The
 6 responsibility of customer service always was
 7 contemplated under the agreement as set forth in
 8 paragraph 1-D.
 9 With respect to the advertising associated
 10 with the promotion and marketing of ZaaZoom's
 11 Web site, yourfreecreditreportonline.com, Mr.
 12 Thomas testified that the ad that appears on the
 13 right side of the poster sized Exhibits 30-A
 14 through 30-E were created by ZaaZoom, that it
 15 represented ZaaZoom's brand, that it was created
 16 while Tim Michael was employed with ZaaZoom, and
 17 that RMCR was not authorized to use the Web
 18 design graphic.
 19 **The fact that Tim Michael was employed at**
 20 **the time that the graphic design was created is**
 21 **relevant in light of Exhibit 4, which reflects a**
 22 **series of instant messaging between Mr. Michael**
 23 **and Mr. Applebaum relating to, among other**
 24 **matters, certain proprietary information of**
 25 **ZaaZoom's.**

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1 Mr. Thomas testified that what appears on
 2 the left side of the poster sized Exhibits 30-A
 3 through 30-E are ads currently being used by
 4 RMCR through its affiliate called clickbooth
 5 advertises RMCR's site called
 6 runmyfreenationalcreditreport.com.
 7 Mr. Applebaum did not dispute that RMCR was
 8 using the graphic designs and Web sites at
 9 Exhibits 30-A through 30-E, but rather testified
 10 that he participated in the design of the Web
 11 sites, and that somehow entitled him to continue
 12 to use the designs in his new competitive
 13 business venture under the name of
 14 runmyfreecreditreport.com.
 15 Mr. Thomas testified that he paid Mr. Dan
 16 Nemmers approximately \$8,000 to \$12,000 a month
 17 or about \$18,000 total over a 90-day period for
 18 his graphic design work on behalf of ZaaZoom.
 19 There was no evidence that RMCR paid for any of
 20 the graphic design work.
 21 With the exception of the tracking system,
 22 which plaintiff has withdrawn as an alleged
 23 trade secret, and a bank deposit, which the
 24 Court finds inadequate or insufficient
 25 information to establish it as a trade secret,

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1 at this time, the Court finds each of the other
 2 trade secrets are in fact trade secrets. In
 3 that the persons to whom the information was
 4 provided was limited, ZaaZoom took measures to
 5 guard the secrecy of the information, and the
 6 information has value to ZaaZoom and to RMCR,
 7 and there was effort and money expended in
 8 developing the information.
 9 Based on the foregoing, the Court finds
 10 that the plaintiff has satisfied the requirement
 11 for a temporary injunction in that it has
 12 established a clear legal right to an injunction
 13 because it has shown that RMCR has
 14 misappropriated trade secrets that belonged to
 15 ZaaZoom in violation of Florida Statute 688.
 16 **The most direct evidence of the**
 17 **misappropriation of the trade secrets includes**
 18 **RMCR's use of the ads on the poster Exhibits**
 19 **30-A through 30-E which directly show that RMCR**
 20 **is using ZaaZoom's proprietary information to**
 21 **gain commercial advantage to compete with**
 22 **ZaaZoom for marketing, and providing the same**
 23 **services that are the subject matter of the**
 24 **marketing agreement between ZaaZoom and RMCR.**
 25 **The Court also find that portions of**

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1 Exhibit 4 which document various instant
 2 messaging exchanges between Mr. Applebaum and
 3 Mr. Michael reveal the transfer or anticipated
 4 transfer of proprietary information from ZaaZoom
 5 to RMCR.
 6 Specifically on pages 282 and 283 of
 7 Exhibit 4, Mr. Applebaum and Mr. Michael discuss
 8 the launching of RMCR's ads that replicate
 9 ZaaZoom's ad to the extent that Mr. Applebaum
 10 noted that other than certain color variations,
 11 quote, not much of a difference, end of quote.
 12 Mr. Michael was noted as reminding Mr.
 13 Applebaum on page 283, quote, not to forget to
 14 add the code thingy people have to type in to
 15 verify they are a person on your site, end of
 16 quote.
 17 The two proceed to discuss on page 283 the
 18 launching of RMCR's services with Azoogole, to
 19 which Mr. Michael says that he will explain to
 20 Mr. Applebaum the system which complements
 21 direct tracks that will be used.
 22 The Court also finds that Exhibit 10
 23 evidences direct communications from Mr.
 24 Michael to Mr. Applebaum on March 18, 2007, in
 25 which Mr. Michael is explaining to Mr. Applebaum

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1 the, quote, important items and deadlines that
 2 need to be completed prior to RMCR taking over
 3 affiliate marketing on April 15, end of quote.
 4 The list of items include precisely some of
 5 those items that ZaaZoom has alleged in this
 6 case are its trade secrets, such as recurring
 7 billing, recurring revenue and retention
 8 reports, its Web site, and credit card
 9 information.
 10 Mr. Applebaum testified that Mr. Michael
 11 did visit him on April 6, 2007, and Exhibit 11
 12 reflects the airline ticket confirmation for Mr.
 13 Michael's flight.
 14 The testimony was clear that Mr. Michael
 15 had access to ZaaZoom's proprietary information
 16 while he worked for ZaaZoom given his high level
 17 position and responsibilities at ZaaZoom.
 18 Through his access to this information at
 19 ZaaZoom, he was in a position to provide it to
 20 Mr. Applebaum who in turn misappropriated the
 21 information on behalf of RMCR to gain a
 22 commercial advantage over ZaaZoom.
 23 Similarly, ZaaZoom has satisfied the
 24 requirements for a temporary injunction because
 25 it has shown that it has suffered and continues

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1 to suffer irreparable harm. RMCR continues to
 2 market credit reporting products and services by
 3 utilizing trade secrets that it misappropriated
 4 from ZaaZoom including at a minimum the customer
 5 lists obtained from ZaaZoom.
 6 An injury is irreparable where the damage
 7 is estimatable only by conjecture and not by an
 8 accurate standard. That is the situation in
 9 this case as it relates to damage potentially
 10 caused to ZaaZoom from RMCR's use of ZaaZoom's
 11 proprietary information.
 12 Additionally, the existence of Florida
 13 Trade Secret Statute, Florida Statute 688,
 14 illustrates our state's interest in protecting
 15 business from theft of confidential information.
 16 Legal remedies will not necessarily suffice
 17 because of the time sensitive nature of the
 18 information and the possible advantage it could
 19 engender.
 20 Thus what is clear from the record based
 21 upon the above findings, and fact, and
 22 conclusions of law, the plaintiff's request for
 23 an injunction shall be granted as to, number
 24 one, requiring that RMCR return all of ZaaZoom's
 25 proprietary information within ten days from the

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1 date of this order.
 2 The proprietary information consists of
 3 customer lists, credit card information, billing
 4 platform, recurring revenue and retention
 5 formulas, ZaaZoom's Web design and graphics,
 6 affiliate performance data, and sales revenue
 7 data.
 8 And number two, the injunction is granted
 9 as to prohibiting RMCR from using the cloned Web
 10 sites to market or sell credit reporting or
 11 monitoring products.
 12 The Court does not find sufficient evidence
 13 in the record to support ZaaZoom's request for
 14 injunctive relief, and thus the request shall be
 15 denied as to number one prohibiting further
 16 contact or communication with Andrew Lermsider
 17 and prohibiting business disparagement of
 18 ZaaZoom, its principals or employees.
 19 The Court does take note that the agreement
 20 did not contain any nondisparagement provisions.
 21 The final issue relates to ZaaZoom's
 22 request that RMCR be held to the exclusivity
 23 provision in paragraph 3-A of the marketing
 24 agreement in which RMCR will be allowed products
 25 sold or marketed by any other third party

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1 affiliate network and shall not engage services
 2 of any other online marketing company and to
 3 promote or sell the products during the term of
 4 this agreement.
 5 Similarly in paragraph 3-B of the agreement
 6 ZaaZoom will not market or promote any products
 7 or services directly competitive with the
 8 products during the term of this agreement.
 9 Exhibit 22 reflects that RMCR attempted to
 10 terminate the agreement on April 5, 2007. There
 11 was subsequent correspondence between counsel
 12 relating to the appropriateness of the
 13 termination letter. While these letters were
 14 provided to the Court, they were not admitted
 15 into evidence.
 16 ZaaZoom argues that RMCR repudiated the
 17 contract by terminating it without providing the
 18 necessary 60 days' notice set forth in paragraph
 19 four of the agreement, and thus the contract was
 20 in effect for a period of one year or until
 21 October 13, 2006.
 22 Further, the plaintiff argues that the
 23 six-month trigger period had not expired under
 24 the addendum to the agreement.
 25 Plaintiff relies upon the legal principle

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1 as set out in Ordonez versus American Interstate
 2 Insurance Company at 950 So.2d. 427 Florida 4th
 3 DCA 2006, that sets forth the legal principle
 4 that when one party repudiates a contract, the
 5 nonbreaching party is relieved of all
 6 obligations to tender performance under the
 7 contract and has an immediate cause of action
 8 for breach.
 9 It is on this basis that plaintiff argues
 10 that it should not be obligated to abide by
 11 paragraph 3-B of the agreement, but that
 12 defendant should be held to its obligations
 13 under paragraph 3-A of the agreement.
 14 The Court agrees with the plaintiff that
 15 the language of the agreement clearly provides a
 16 60-day notice. Had the defendant not repudiated
 17 the contract, it would have been obligated to
 18 provide by the agreement including the
 19 exclusivity provision in the contract.
 20 As a practical matter, the Court believes
 21 that in order for the defendant to be able to
 22 comply with the Court's injunction, that it, by
 23 having to return all of the proprietary
 24 information to the plaintiff and from refraining
 25 from using the cloned Web sites to market or

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1 sell the credit reporting or monitoring
 2 products.
 3 RMCR will be precluded from allowing the
 4 product as defined in Schedule A of the
 5 agreement to be sold or marketed by any other
 6 third party affiliate network and from engaging
 7 services of any other online marketing company
 8 to promote or sell the products.
 9 In other words, the Court does not see how
 10 RMCR can market its products through the third
 11 party affiliate network and engage services of
 12 any other online marketing company to promote
 13 the sale of the product without inevitably
 14 having to use the proprietary information that
 15 has been misappropriated.
 16 Further, there is no evidence that RMCR has
 17 developed its own customer base or technology to
 18 carry out the marketing of the services provided
 19 in the agreement through this particularized
 20 means of marketing through the online system
 21 through the affiliate network.
 22 Thus, the Court will enjoin RMCR from
 23 violating paragraph 3-A of the marketing
 24 agreement until October 13, 2007.
 25 Are there any questions or need for

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1 clarification as to the Court's finding or
 2 ruling?
 3 MR. SCHWARTZ: Your Honor, under the
 4 Florida Rules of Procedure and case law that is
 5 cited, the Court is going to have to require an
 6 injunction bond which should be significant in
 7 order to protect the defendant from the
 8 potential damages that it may suffer based upon
 9 a possible erroneous issuance of an injunction
 10 which --
 11 MR. HAYDEN: Your Honor, if I may, I can
 12 address the bond issue, as well.
 13 THE COURT: Yes.
 14 MR. SCHWARTZ: I think I'd rather use
 15 between \$100,000 and \$200,000 a month and now
 16 you've apparently enjoined him from marketing
 17 through October, I think a bond of \$800,000
 18 should be posted by the plaintiff.
 19 THE COURT: Okay. What is plaintiff's
 20 response?
 21 MR. HAYDEN: Your Honor, if I may respond,
 22 those are gross revenue numbers. The average
 23 profits that would be obtained by the Internet
 24 marketing company that my client obtained would
 25 be ten percent of the amount of the monthly