

a Florida corporation, *et al.*,)
)
 Defendants.)
_____)

FTC’S MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANTS AND RESPONDENTS SHOULD NOT BE HELD IN CONTEMPT

Under the guise of a supposed mortgage foreclosure rescue operation, defendant Peter J. Porcelli, II, and his confederates have not only found a new lucrative method to scam financially troubled consumers, they have blatantly and systematically violated this Court’s permanent injunction orders entered in April 2004 and February 2005. Plaintiff, Federal Trade Commission, moves for an order to show cause why defendants Porcelli, Bonnie Harris, and Christopher Tomasulo, and respondents Thomas C. Little, Safe Harbour Foundation of Florida, Inc., Silverstone Lending, LLC, and Silverstone Financial LLC, should not be held in contempt.¹

Porcelli and his confederates have engaged in wholesale violations of the permanent injunctions entered by this Court: they saw an opportunity to take advantage of the growing

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number of distressed homeowners who are facing foreclosure.² But just like the illusory credit card scam in which consumers paid \$200 for nothing, resulting in this Court's order granting the FTC's motion for summary judgment on April 8, 2004,³ the new enterprise promised affordable loans to troubled homeowners and instead charged them exorbitant fees on extremely high interest rate loans, forcing most of the homeowners into even deeper debt. Even more outrageous is that this Court's prior orders permanently banned the principals from any involvement in an enterprise which extends credit to consumers. For this reason and to prevent further consumer injury and asset dissipation, we are asking that the Court take all necessary actions to coerce the defendants' and respondents' compliance with the Court's permanent injunctions, including requiring the contemnors to return all monies they received in connection with their mortgage operations, and enjoining them from foreclosing on or taking any further damaging actions with respect to their loans to homeowners.

I. PROCEDURAL HISTORY

In August 2002, the FTC filed its complaint against Porcelli, Bonnie A. Harris, Christopher Tomasulo and various corporate defendants based on their operation of an advance fee credit card scam in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair or deceptive acts or practices in or affecting trade or commerce," as well as the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310. The defendants misled tens of thousands of reasonable consumers into believing they would receive a credit card, although the

² More than 2.2 million foreclosures were filed in the U.S. in 2007, a 75% increase over 2006. *See* Statement of the Federal Trade Commission on Foreclosure Rescue Fraud before the U.S. Senate Special Committee on Aging (Feb. 13, 2008), available at <http://www.ftc.gov/os/testimony/P064814foreclosure.pdf>.

³ Docket No. 112 ("Summary Judgment Op.").

defendants never could, and never intended to, provide credit cards to anyone.⁴ The defendants also failed to disclose the additional fees they would charge consumers for a “pay-as-you-go ‘Mastercard’” – a form of debit card – and falsely promised consumers that purchasing this card would boost the consumers’ credit ratings, even though the use of such a card was never reported to credit bureaus.⁵ In all, defendants bilked consumers out of at least \$12.5 million.⁶

The FTC initially sought, and this Court entered, a temporary restraining order, including an asset freeze as to each defendant, and the appointment of a receiver over the corporate entities, in August 2002.⁷ After protracted litigation, including bankruptcy filings by various defendants and an attempted “removal” to federal district court in Florida, this court entered judgment against all defendants except for Tomasulo.⁸ On April 14, 2004, the Court entered an Order for Permanent Injunction with Monetary Judgment and Other Relief Against Bay Area Business Council, Inc., Bay Area Business Council Customer Service Corp., American Leisure Card Corp., Bay Memberships, Inc., Sr. Marketing Consultants, Inc., Special Technologies, Inc., Peter J. Porcelli, II, and Bonnie Harris (the “Porcelli/Harris Order”).⁹ In addition to ordering redress in the amount of the operation’s total net sales, the Porcelli/Harris Order provides for broad permanent injunctive relief, including banning the defendants from telemarketing and

⁴ *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (affirming this Court).

⁵ *Id.* at 636.

⁶ *See* Summary Judgment Op. at 25.

⁷ Docket No. 3.

⁸ Tomasulo was already engaged in settlement negotiations with the FTC prior to the FTC’s filing of its motion for summary judgment, so he was not included as a respondent.

⁹ Docket No. 114, PX 209.

marketing credit-related products.¹⁰ The Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief Against Defendant Christopher Tomasulo (the “Tomasulo Order”) was entered by the Court on February 2, 2005.¹¹ Although the wording of the key provisions are not identical in the two orders, all the defendants are banned from involvement in the marketing or sale of “Credit-Related Products” to consumers.

In a unanimous opinion, the Seventh Circuit Court of Appeals affirmed the Court’s summary judgment ruling in August 2005, including its ruling that Porcelli and Harris should be held jointly and severally liable for the redress award.¹² Porcelli was then criminally prosecuted for the same conduct, entering a guilty plea and receiving a sentence of 156 months incarceration in October 2007.¹³ Porcelli began serving his sentence in early 2008.

II. RESPONDENTS’ CONTEMPTUOUS CONDUCT

Within months of being banned from having any involvement in advertising, promoting, or selling Credit-Related Products, Porcelli began his new mortgage foreclosure operation. Porcelli continued to run this new scam until he entered federal prison and its operations

¹⁰ Defendants have made no efforts to comply with the monetary award in the Porcelli/Harris Order. Although the Court ordered redress of \$12,563,962.34, the FTC to date has received only \$110,000, and that sum did not come directly from the defendants. The bulk of that amount came from a distribution of monies paid by Porcelli to the Chapter 7 Trustee in the case *In re Peter J. Porcelli, II*, Case No. 03-04075 (M.D. Fla. Bankr.) to settle claims that he misrepresented his assets in his bankruptcy filing. The remaining amount paid to the FTC came from the Chapter 7 Trustee as a distribution in the case of one of the corporate defendants, *In re Bay Memberships, Inc.*, Case No. 02-21694 (M.D. Fla. Bankr.).

¹¹ Docket No. 124, PX 210.

¹² *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005).

¹³ *US v. Porcelli*, No. 3:07-cr-30037-WDS (S.D. Ill.), PX 212.

The flyer goes on to describe Safe Harbour as “having been established to give people a second chance when no one else will.”¹⁷ It warns consumers to “[b]e careful of other companies who look to profit from your misfortune.” Continuing the same theme, the bottom of the flyer warns homeowners to watch out for “Investment Sharks,” “Quick Money offers,” and to not “Keep Swimming,” i.e., “think . . . this will work itself out.” The flyer directs homeowners to call “Peter James” (a pseudonym Porcelli has used in the past) at a toll-free number.

Homeowners who call Safe Harbour usually reach either Bonnie Harris or Porcelli. Safe Harbour obtains payoff letters, foreclosure information, and other relevant information about the property itself, but it does nothing to determine whether the homeowners have the means to pay back a new loan; it does not perform any type of credit check or even determine the homeowners’ income before moving forward on the loans.¹⁸

The loans to consumers are made and secured by Silverstone Financial or Silverstone Lending, two companies also controlled by Porcelli, which have had the same address and are otherwise indistinguishable from Safe Harbour.¹⁹ Thomas Little, Porcelli’s lawyer in the later

¹⁷ See *Heise v. Porcelli, et al.*, No. 8:07-cv-1866-T-24 MAP (M.D. Fla.) (attachment to complaint), PX 213.

¹⁸ See PX 214 (McKenney Decl.) Atts. G(2), H(2), I(17), J(20-21), K(2), L(24), M(17), N(17), O(19), P(16), Q(13), R(16), S(2), T(2), U(23), V(17), X(15), Y(17), Z(15), AA(15), BB(16), CC(15), DD(15), EE(17), HH(2), II(16), JJ(16), KK(16), LL(15), MM(15), NN(15), OO(18), PP(15), QQ(2), RR(2), SS(15), UU(16), VV(15), WW(16), XX(15), YY(16), AAA(2), BBB(13), CCC(14), DDD(15), EEE(17) (intake forms).

¹⁹ See PX 214 (McKenney Decl.) Atts. I(7-12), J(8-12), L(8-12), M(8-12), N(8-12), O(8-12), P(8-12), Q(8-12), R(8-12), U(8-12), V(8-12), W(8-11, 20-24), X(8-11), Y(6-13), Z(8-11), AA(8-11), BB(8-11), CC(8-11), DD(8-11), EE(8-11), FF(8-11), GG(8-12), II(8-11), JJ(8-11), KK(8-11), LL(8-11), MM(8-11), NN(8-11), OO(8-11), PP(8-11), SS(8-11), TT(7-10), UU(8-12), VV(8-11), WW(8-11), XX(8-11), YY(8-11), ZZ(5-9), BBB(8-11), CCC(8-11), DDD(8-11), EEE(8-11) (notes and mortgages).

²⁰ PX 214 (McKenney Decl.) Atts. I(13), L(13), M(13), O(13), Q(2), R(13), U(13),

See PX 214 (McKe

defendants “from promoting, offering for sale, or selling, directly or indirectly, Credit-Related Products to any consumer.” Section I of the Tomasulo Order enjoins him from “engaging in, participating in, or assisting in the Telemarketing, advertising, promotion, offering for sale, or sale of Credit-Related Products to any consumer.” Both orders define “Credit-Related Product” as:

any product, program, or service which is advertised, offered for sale, or sold as a method by which persons may establish or obtain any extension of credit or credit device, including, but not limited to credit cards, loans, or financing, or as a method to consolidate or liquidate debts.

A. Standard for Contempt.

To prove contempt, the FTC must show by clear and convincing evidence that: (1) valid court orders e

or intentional.”). Moreover, unfamiliarity with the particulars of an order is not a defense to a charge of contempt. *Perfect Fit, Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir. 1981). A party may be held in civil contempt unless the defendant establishes that he or she has been “reasonably diligent and energetic in attempting to accomplish what was ordered.” *Goluba v. School District of Ripon*, 45 F.3d 1035, 1037 (7th Cir. 1995); *American Family*, 2008 U.S. Dist. LEXIS 3557, at *8; *FTC v. Trudeau*, 2007 U.S. Dist. LEXIS 85214, at *11.

B. Porcelli, Harris, and Tomasulo Should Be Found in Contempt.

The FTC clearly has satisfied its initial burden here. Porcelli, Harris and Tomasulo are all subject to valid court orders.²⁹ Similarly, all three have shown they know of their respective orders.³⁰ Finally, they all have violated the orders: the orders unambiguously enjoin the defendants from virtually any involvement in any enterprise which charges consumers among 3a9(6oFa)Tj16.3200

²⁹ See PX 209 (Porcelli/Harris Order), PX 210 (Tomasulo Order).

³⁰ See PX 214 (McKenney Decl.) Atts. A, B, C.

establishes extensive participation by each defendant. Porcelli was an owner, officer, or manager of each corporation.³¹ He signed loan documents on behalf of the corporations, corresponded and communicated with homeowners and third parties with respect to the loans, and managed their day-to-day operations.³² Harris also corresponded and communicated with homeowners, ordered appraisals on behalf of the corporations, and arranged for the loan closings.³³ Tomasulo communicated with consumers and third parties, and signed loan documents on behalf of the companies.³⁴

In short, each of the defendants engaged in a variety of tasks for an enterprise whose primary purpose was to violate this Court's orders.

C. Safe Harbour, Silverstone Lending, Silverstone Financial, and Thomas C. Little Should Be Held in Contempt.

Under Fed. R. Civ. P. 65, injunctions apply not only to the defendants, but also to those

³¹ See PX 214 (McKenney Decl.) Att. D.

³² See PX 214 (McKenney Decl.) Atts. I(5), J(5, 17, 19), L(5, 18, 20), M(5, 21), N(5, 19, 22, 23), O(5, 18, 20, 28), P(5, 17, 21), R(5, 23), U(5, 17, 19), V(5, 16, 23, 25, 26), W(5, 29, 31), X(5, 20), Y(11, 16, 20), Z(5, 21), AA(5, 17, 21), BB(5), CC(5, 20), DD(5, 19), EE(5, 23), FF(5, 18, 20), GG(5, 17, 22), II(5, 24, 27), JJ(5, 22, 24), KK(5, 20, 24), LL(5, 21), MM(5, 20, 24), NN(5, 16, 17, 23, 27), OO(5, 17, 20), PP(5, 20, 24), SS(5, 20), TT(4, 17), UU(5, 19-20), VV(5, 8), WW(5, 22, 26), XX(5), YY(5, 19), AAA(3), BBB(5, 18), CCC(5, 15, 17, 22, 25), DDD(5, 21), EEE(5, 23), GGG(2), III(2), JJJ(4,10).

³³ See PX 214 (McKenney Decl.) Atts. G(3-4), H(5), I(18-21), J(22-25), K(7-10, 12), L(25-26), M(18-19), O(18, 23-26), P(19-20), Q(14-16), R(15, 17-22), S(3-6), T(3-6), U(24-30), V(18-21), X(18-19), Y(18-19), Z(16-20), AA(16, 23-26), BB(18-21), CC(17-18), DD(16-19), EE(18-21), FF(17), GG(15-16), HH(9-10), II(15, 18-22), JJ(17-21), KK(17-19), LL(16-19), MM(16-19), NN(18-22), OO(16, 19-22), PP(16-19), QQ(4-5), RR(2-7), SS(16-19), TT(15-18), UU(17-18), VV(16-17), WW(18-21), XX(22-23), YY(18-19), ZZ(13), AAA(4-8), BBB(8, 14, 17), CCC(16-20), DDD(16-19), EEE(18-21).

³⁴ See PX 214 (McKenney Decl.) Atts. H(3-4), N(18), V(15-16, 26), X(16-17), BB(17), CC(16), DD(20), GG(22), HH(3-8), II(17), LL(20), QQ(3,6), TT(17), UU(19), WW(17), XX(16-21), DDD(20).

³⁵ Although this motion focuses on Little's conduct as part of the contemptuous operations, attorneys have been held in contempt even for incorrectly advising clients that certain conduct would not violate court orders. *See Chicago Truck Drivers*, 207 F.3d at 507 n. 7; *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Brotherhood Labor Leasing*, 230 F. Supp. 2d 963, 970-71 (E.D. Mo. 2002).

³⁶ *Supra* note 20.

³⁷ Little's participation, however, could not provide Porcelli or his cohorts with a defense to this motion: reliance on advice of counsel is not a defense to a charge of civil contempt. *See SEC v. McNamee*, 481 F.3d at 455-56 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949));de

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Court’s Order for Permanent Injunction with Monetary Judgment and Other Relief Against Bay Area Business Council, Inc., Bay Area Business Council Customer Service Corp., American Leisure Card Corp., Bay Memberships, Inc., Sr. Marketing Consultants, Inc., Special Technologies, Inc., Peter J. Porcelli, II, and Bonnie Harris, of April 14, 2004; and enter an order to show cause why defendant Christopher Tomasulo and respondents Thomas C. Little, Safe Harbour Foundation of Florida, Inc., Silverstone Lending, LLC, and Silverstone Financial, LLC, ~~shy8000 h4 (ing) j05 3404E069FESr LohE (080) 00800 0D00TTD0800j0.0800 0D00 aE) (Lsh) jDnot~~