

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE**

justify any sanction.

I. BUSINESS RECORDS PROVIDED TO PLAINTIFF WERE AUTHORIZED PURSUANT TO THE TRO

All documents and records produced to Plaintiff by the Receiver, were produced with Defendants' knowledge, without objection, pursuant to the Temporary Restraining Order ("TRO," Dkt. No. 6) and the Stipulated Preliminary Injunction Order ("PI," Dkt. No. 18). At the initiation of this case, Plaintiff requested this Court, as part of the TRO, to require Defendants to immediately produce documents and records that would enable Plaintiff "to quickly determine: (1) the full scope of Defendants' law violations, (2) the identities of injured consumers, (3) the total amount of consumer injury, and (4) the nature, extent, and location of the Defendants' assets." (Dkt. No. 6, page 26). Consequently, the TRO granted Plaintiff leave to:

Demand the production of documents from any person or entity, whether or not a party, relating to the nature, status, and extent of the assets of Defendants, and Defendants' affiliates and subsidiaries; the nature and location of documents reflecting the business transactions of Defendants, and Defendants' affiliates and subsidiaries; the location of any premises where Defendants, directly or through any third party, conduct business operations; the Defendants' whereabouts. (Dkt. No. 6, Paragraphs XIII.B.).

In compliance with these Orders, the Receiver, with Defendants' full knowledge and agreement, provided Plaintiff business records that included consumer complaints, customer lists, financial statements, promotional materials, and scripts, all of which were essential for immediately assessing the full scope of Defendants' law violations, identities of injured consumers, the total amount of consumer injury, and the nature, extent, and location of the Defendants' assets. Defendants were notified by letter and email transmitting the records.

III. DEFENDANTS HAVE WAIVED THEIR ABILITY TO OBJECT

At no time prior to Defendants' current motion did they object to the production of

(Dkt. No. 110, Motion at p. 10). This was purely the Defendants' choice. Plaintiff notified Defendants that the records were available. Defendants have not contacted the FTC's IT to access their imaged records, nor have Defendants ever mentioned to Plaintiff that they attempted or desired to access these records. Had the Defendants requested their imaged records the FTC's IT staff would have immediately turned those records over to them.

IV. DISMISSAL UNDER RULE 41(b) IS UNWARRANTED

The Defendants' request for dismissal under Rule 41(b) is unreasonable and unwarranted. Under Rule 41(b) a court may dismiss an action for, among other things, failure to comply with an order, to prevent undue delay in the disposition of pending cases, and to avoid congestion in the court's calendar. Fed. R. Civ. P. 41(b). However, the Eleventh Circuit "has clearly stated that because dismissal is considered a drastic sanction, a district court may only implement it as a last resort, when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." *World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F. 3d 1454, 1457 (11th Cir. 1995) (citing *Kilgo v. Ricks*, 983 F. 2d 189, 192); *see also Betty K. Agencies, Ltd. v. M/V Monada*, 432 F. 3d 1333, 1338 (11th Cir. 2005)(dismissal order vacated because there was no finding of willful or contumacious disregard for court rules, and without finding that lesser sanctions were somehow inadequate).

Defendants have not, and indeed cannot, demonstrate satisfaction of this two-pronged

Defendants' citation of *Tower Venture, Inc. v. City of Westfield*, 296 F. 3d 43 (1st Cir. 2002) for the proposition that violations of court orders warrant dismissal with prejudice is a misapplication of law. This case involves a party ignoring a case management order after that court extended the discovery deadline to accommodate that party's failure to meet the previous deadline. The situation here is not at all analogous.

completely devoid of any merit, and their defamatory statements far exceed the legal boundaries of advocacy. Plaintiff respectfully urges this Court to deny Defendants' Motion as it is nothing more than an attempt to mislead the Court and prejudice Plaintiff. However, in the alternative, Plaintiff urges this Court to take a lesser action than dismissal.

Dated: October 16, 2009

Respectfully submitted,

/s/Jessica D. Gray

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Thank you,
Jessica

10/8/2009

Attachment A, p 4 of 9

CERTIFICATE OF SERVICE

I, Jes.00007T0.7C