



Plaintiff, Federal Trade Commission (“FTC” or “Commission”), respectfully submits this consolidated Opposition to defendant Dennis Lee’s (“Lee”) *pro* Motion for Dismissal, Stay, or Summary Judgment (“Motion” or “Mot.”) (#99).

Defendant Lee’s motion largely reiterates the erroneous arguments raised in his recent Motion for Reconsideration (#98) and Objection or Appeal (#97) of the August 2, 2010 Order of U.S. Magistrate Judge Michael A. Shipp compelling the defendants to produce discovery (#96). Lee incorrectly maintains that the FTC obtained “unlawful” discovery from corporate defendants Dutchman Enterprises, LLC (“Dutchman”) and United Community Services of America, Inc. (“UCSA”) because documents and information of unrepresented corporations are somehow exempt from discovery. According to Lee, this conclusion mandates the dismissal of this action, the entry of summary judgment, or a stay for appeal.

However, the defendant *pro* fails to recognize that, under the Federal Rules of Civil Procedure, information and documents belonging to the corporate defendants, whom he owns and controls, are already lawfully discoverable through him, and in any event, unrepresented corporations are not immune from discovery. At bottom, the defendant’s motion is largely duplicative of his recent filings and just as fatally flawed. The Court should deny his motion for the reasons stated in the FTC’s September 7th Opposition to Lee’s recent filings (“Opp’n”) (#101).

While demanding the same improper “relief” proposed in his recent filings, Lee’s motion puts additional emphasis on two arguments addressed herein.

First, Lee now extensively argues that, in “compelling” him to represent corporate defendants, Judge Shipp caused him to violate his fiduciary duties to the

firms or commit other wrongdoing. Here, Lee disregards the reality that he was never compelled to represent the corporate defendants, and that the defendants are aligned in interest, so there was no “conflict” in his personal and fiduciary roles.

Second, Lee generally complains about the evidence that the FTC cited in its original TRO papers, and the FTC’s supposed motivation in bringing this case, in an apparent effort to re-litigate preliminary proceedings. The defendant ~~is~~’s arguments are irrelevant to, and provide no legal grounds for, a final determination on the merits. There are no proper grounds to dismiss or summarily adjudicate this case in favor of the defendant, or to stay the case for a protracted and unnecessary appeal. Lee’s current motion, like his recent filings, is completely devoid of merit.

BACKGROUND

Defendant Lee’s filing significantly misstates the nature of the evidence that the FTC had at its disposal and presented at the outset of this case, and other facts. The FTC will not burden the Court with a point-by-point rebuttal, which would consume many pages (and unnecessarily consume significant resources on the part of counsel). In the interest of brevity, FTC counsel respectfully refers the Court to the “background” section of its recent Opposition to defendant Lee’s Objection or Appeal and Motion for Reconsideration for an accurate summary of this case.

As Lee’s motion repeatedly refers to his record with state law enforcement authorities in vague terms, and further challenges the propriety of the injunctive and monetary relief sought by the FTC, this section briefly addresses Lee’s record of deceptive activities involving the promotion of purported energy-generating

devices, which supports the imposition of permanent, federal injunctive relief.

Defendant Lee is a convicted felon with a history of consumer fraud involving the promotion of purported energy-generating devices. At least nine states have charged Lee with violating consumer protection laws by promoting the sale of products and/or business opportunities with false or unsubstantiated claims, such as claims that his products generate “free electricity.”¹ These enforcement actions have resulted in felony convictions against Lee, PX07 at 3-6 (Cal.), ~~h~~ ~~1C15D~~, No. 90-56368, 1992 U.S. App. LEXIS 7361 (9th Cir. 1992), PX07D at 2-4 (Ky.),² jail time for Lee, PX07 at 3-6 (Cal.), court orders banning Lee from advertising or selling products in at least three states,³ court orders enjoining Lee from making unsubstantiated claims in advertisements,⁴ and at least one court order finding Lee in violation of an earlier order.⁵

¹ Pl.’s TRO Mot., PX07 at 3-6 (Cal.) (#4-11); PX07A (#4-12); PX07B at 2-8 (Alaska) (#4-13); PX07C at 2 (Idaho) (#4-14); PX07D at 10-14 (Ky.) (#4-15); PX07E at 2-8 (Maine) (#4-16); PX07F at 2-10 (N.M.) (#4-17); PX07G at 2-3 (Or.) (#4-18); PX07H at 2 (Vt.) (#4-19); PX07I at 2-8 (Wash.) (#4-20). Citations to “PX” exhibits herein refer to the exhibits filed with the FTC’s TRO motion.

² Notably, in an exhibit to his combined motion, defendant Lee falsely denies his criminal convictions in California. ~~8~~ Def.’s Ex. F at 22 (identifying Kentucky conviction as “LEE’S ONE ACTUAL CONVICTION SINCE 1977”) (emphasis in original) (#99-6).

³ PX07C at 3 (Idaho), PX07E at 28 (Maine), PX07H at 12-13 (Vt.).

⁴ PX07B at 10-11 (Alaska), PX07F at 11-12 (N.M.), PX07G at 8, 38 (Or.), PX07I at 10-11 (Wash.).

⁵ PX07I at 43-52 (Wash.); ~~6b~~ PX07G at 22-26, 28, 35 (Or.) (additional contempt order, vacated due to error in taping of hearing).

As detailed in the FTC's original moving papers, Lee promoted the HAFC kit on websites accessible throughout the United States, PX01 ¶ 23 (#4-5), PX12 (#25, 26), which violated other court orders banning him from advertising products in specific states. ¶ PX07C at 3 (Idaho); PX07E at 28 (Maine); PX07H at 12-13 (Vt.). His deceptive marketing of the HAFC kit violated several state court orders prohibiting him from making unsubstantiated advertising claims. ¶ PX07B at 10-11 (Alaska); PX07G at 8, 38 (Or.); PX07I at 10-11 (Wash.). As a whole, the record shows that defendant Lee has made a career out of deceptively promoting purported energy-generating or energy-conserving products such as the HAFC kit.

DISCUSSION

Defendant Lee, acting *ipso*, seeks a dismissal, summary judgment, and other relief on spurious grounds addressed below.

I. Lee Was Not “Compelled to Represent” the Corporate Defendants.

Defendant Lee's motion relies on the core fallacy that he was compelled to represent defendants Dutchman and UCSA, or reasonably had that impression. ¶ Mot. at 7. As noted in the FTC's recent Opposition, the Court could not, and did not, authorize Lee to serve as corporate counsel. Opp'n at 4 n.3. If Lee had any other impression, he was acting unreasonably. FTC counsel repeatedly advised Lee that he was a *pro* defendant and a corporate officer, not corporate counsel. ¶ at 6 n.8. This fact flatly contradicts Lee's assertion that “it was not made clear to Defendant . . . what his status with Corporate Defendants was.” Mot. at 11. At all relevant times, Lee reasonably should have known that he was not legally

representing the corporate defendants, or compelled to do so. *Id.* at 8.

II. Lee Did Not Have a “Fiduciary Duty” to Resist Discovery, and Did Not Face an Irreconcilable “Conflict” in Participating in Discovery.

Lee also argues that, in “compelling” him to represent corporate defendants and participate in discovery, Judge Shipp caused him to violate his fiduciary duties to the corporate defendants or commit other wrongdoing.⁶ Lee specifically claims that “[a]s a fiduciary, . . . [he] had no right to surrender anything to Plaintiff” from his unrepresented corporations. Mot. at 5. Lee asserts that “[i]f he acts in the best interest of the corporations, he is forced to defy the Magistrate’s order.” *Id.* at 11. In essence, Lee claims that his fiduciary duties require the act of contempt. His argument is defective for many reasons; the FTC will briefly address two.

First, the law already properly required Lee to disclose the requested information and documents. As the sole owner and controlling officer of the closely-held corporate defendants, Opp’n at 5, Lee has had custody and control of the relevant material, and the indisputable ability to obtain that material upon demand. In his personal capacity, Lee received the same discovery requests that were directed to the corporate defendants. Consequently, all information sought from the corporate defendants has been properly subject to discovery. *See* Opp’n at 8-10 (citations omitted). Lee was obligated to produce the requested discovery. His argument that a default or “[s]ummary judgment [would] have made it far more difficult to obtain the discovery Plaintiff has gotten from Corporate

⁶ Lee’s arguments pertaining to the unlicensed practice of law are not within the jurisdiction of the FTC and are irrelevant to this matter.

Defendants,” Mot. at 10, is simply incorrect as a matter of law.

Second, the defendants are clearly aligned in interest in this case. All three defendants are charged with the same violations of the FTC Act, 15 U.S.C. § 41 *e q*, in the deceptive promotion of the HAFC kit. As previously noted, Lee owns and has authority to control the corporate defendants; Lee denies any personal or corporate violations of law in connection with the promotion of the HAFC kit, so the corporate defendants’ interests are not materially different from his own. Lee does not face any irreconcilable conflict and is not, in any event, under any fiduciary duty to violate orders of the Court.

III. Defendant Lee’s Arguments About Preliminary Proceedings and the FTC’s Supposed Motivations are Irrelevant.

Next, Lee complains in general about the evidence that the FTC cited in its original TRO papers, and the FTC’s motivation in bringing this action. He alleges that “[t]he FTC had no case,” Mot. at 14, and that “allowing corporate defendants to continue unrepresented was an attempt to acquire information extraneous to this case.” *H* at 11. The defendant’s arguments are incorrect and irrelevant.

Second, Lee's argument also ignores the fact that all of the discovery from the defendants in this case was lawfully obtained through himself, as a defendant ~~is~~ and as the owner and controlling officer of the corporate defendants, who are not exempt from discovery. ~~See~~ p. 6-7; ~~see~~ Opp'n at 8-10. Contrary to Lee's suggestion, his companies did not have to be included as defendants in order for the FTC to obtain discovery relating to them. ~~See~~ *Cp v. Hl*, 136 F.R.D. 130, 133 (N.D. Ohio 1991) (stating that corporate officers may be compelled to produce discovery relating to non-party corporations).

Third, Lee has repeatedly failed to identify discovery requests that were "extraneous." He briefly contends that UCSA should not be a defendant to this case, but there is ample record evidence rebutting that contention. ~~See~~ Opp'n at 5 n.6.⁷ Lee has had a full opportunity to object to the FTC's discovery requests, and Judge Shipp has considered and dismissed most of his arguments. Order (#96).

IV. Defendant Lee's Remaining Arguments Are Without Merit.

Defendant Lee raises several other arguments that do not withstand scrutiny.

First, Lee's motion invites the Court to rule against the FTC without developing a factual record. His motion does not demonstrate that there are any

⁷ On a related note, Lee states that "Defendants requested UCSA be dropped from the Complaint, but Plaintiff refused. Defendants were going to file a motion, but Plaintiff talked Defendant Lee out of it. . . . Plaintiff has told [Lee] that he must confer with him on everything before going to the Judge." Mot. at 12. FTC counsel does not understand this reference. FTC counsel has conferred with defendant Lee on discovery disputes pursuant to Local Civil Rules. Any suggestion that FTC counsel have prevented Lee from filing motions is spurious.

factual or legal grounds for dismissal under Federal Rule 12, or that he is entitled

Lee's long history of similar consumer frauds in peddling energy-generating devices, amply justifies the requested injunctive (commonly termed "fencing in")

relief. It is well-established that "those engaged in violation of the FTC Act must be enjoined from some fencing in." *E v. McC*

, 352 U.S. 419, 431 (1957);

Cal. Ambiv. E, 400 F.2d 930, 935 (3d Cir. 1968)

(citation omitted).

Lee further contends that Judge Shipp "should have allowed [him] . . . to sell assets to engage legal counsel for the Corporate Defendants, appoint legal counsel for them, or issue a Summary Judgment against the Corporate Defendants." Mot. at 4. These arguments were addressed in the FTC's recent Opposition filing.

There is no just reason why the Court should lift the 9(un)5gleied isetsfraeeze, whyich]TJT*.00

⁸ As suggested in the defendant's Motion, the FTC retains the right to move for an entry of default against the corporate defendants.

FTC's recent Opposition to the defendant's Objection to answer these arguments.

CONCLUSION

For the above stated reasons, the FTC respectfully requests that the Court deny the defendant's ill-founded motion for a dismissal, a stay, or summary judgment.

Respectfully submitted,

Date: September 20, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document was served by operation of the Court's electronic case filing ("ECF") system upon the following:

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I further certify that on this date, the foregoing document was served by U.S. first class mail and email upon the following non-participants in the ECF system:

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