UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION, Plaintiff, v. LANE LABS-USA, INC., CARTILAGE CONSULTANTS, INC., corporations, and I. WILLIAM LANE and ANDREW J. LANE, individuals, Defendants.	:	**Hon. Dennis M. Cavanaugh** **OPINION** Civil Action No. 00-cv-3174 (DMC)

substantially comply with the Final Order.

On October 26, 2010, the Third Circuit reversed and remanded for reconsideration. Lane Labs, 624 F.3d at 592. Specifically, the Third Circuit has directed this Court to reconsider whether Defendants' marketing claim that their calcium supplement "AdvaCal" is three to four times more absorbable than other calcium supplements violated Section III of the Final Order, and whether Defendants distorted research regarding AdvaCal in violation of Section IV of the Final Order. Id. at 586-89. Additionally, the Third Circuit has directed this Court to reconsider, in light of its formal adoption of the defense of "substantial compliance," whether Defendants substantially complied with the Final Order. Id. at 592.

On November 1, 2010, this Court asked the parties to submit proposed findings of fact addressing only (1) whether the claim that AdvaCal is three to four times more absorbable than other calcium supplements promised results unattainable for large segments of Defendants' audience, and whether AdvaCal was marketed to elderly women at risk of, or suffering from, achlorhydria; (2) whether Defendants distorted research regarding AdvaCal such that express or implied misrepresentations were made regarding "the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research" pertaining to "the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug;" and (3) the extent to which any violations of the Final Order were "technical" or "inadvertent," thereby justifying a defense of substantial compliance (Letter Order, ECF No. 127). On December 15, 2010, the parties submitted their respective Proposed Findings of Fact. (ECF No. 131, 132, 133). On December 28, 2010, Defendants filed a letter objecting to certain of the FTC's Proposed Findings of Fact. (ECF No. 134). On January 4, 2011, the FTC responded to Defendants' objections, and

noted their own objections to Defendants' Proposed Findings of Fact. (ECF No. 135). The matter is now, once again, before this Court.

II. STANDARD OF REVIEW

A. Civil Contempt

"The exercise of the power to find and to punish for contempt is . . . discretionary, and should be undertaken with the utmost sense of responsibility and circumspection." Thompson v. Johnson, 410 F. Supp. 633, 640 (E.D. Pa. 1976), aff'd 556 F.2d 568 (3d Cir. 1977). For a party to be held in civil contempt, a plaintiff must show that "(1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order." John T. ex rel. Paul T. v. Delaware County Intermediate Unit, 318 F.3d 545, 552 (3d Cir. 2003) (quoting Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995)). The burden then shifts to the alleged contemnors to show why they were unable to comply with the order. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999), cert. denied sub nom Lawson v. FTC, 534 U.S. 1042 (2001); In re Affairs with a Flair, 123 B.R. 724, 727 (Bankr. E.D. Pa. 1991).

To establish contempt, the movant bears the burden of proving by clear and convincing evidence that the respondent violated a court order. Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). This standard is not satisfied unless the evidence "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [R

the wrongfulness of the respondents' conduct, a court should not find contempt. John T., 318 F.3d at 552. Willfulness is not an element of contempt, nor does evidence of good faith bar a conclusion that a defendant acted in contempt. Robin Woods, Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994).

While good faith is not a defense to the elements of contempt, it is a factor in determining the availability of the affirmative defense of substantial compliance. Lane Labs, 624 F.3d at 591. "In order to avail oneself of the defense, a party must show that it (1) has taken all reasonable steps to comply with the valid court order, and (2) has violated the order in a manner that is merely 'technical' or 'inadvertent.'" Id.

III. DISCUSSION

The issues presented on remand are essentially the same as in this Court's initial consideration of the matter. The first two elements of civil contempt are uncontested. Therefore, the third element, whether the Defendants disobeyed Sections II or IV of the Final Order, and the defense of substantial compliance, are the dispositive issues in this case.

A. Section II

The Third Circuit questioned the "incongruity" between Defendants' assertion that AdvaCal was marketed to elderly women at risk of achlorhydria, and the actual language of the challenged representations which "do not, on their face, limit their claims to any particular target group." Id. at 585-86. The first task for this Court, therefore, is to determine "whether AdvaCal was, as a matter of fact, marketed to elderly females at risk of, or suffering from, achlorhydria." Id. at 586.

Defendants argue that the evidence and testimony presented at the hearing indicate that

AdvaCal was primarily marketed to post-menopausal women at risk of, or suffering from, achlorhydria.[2] (Defs. Andrew Lane and Lane Labs' Proposed Findings of Fact at 4- 6) ("Defs.' Proposed Findings") (ECF No. 132). Defendants further argue that the evidence demonstrates that AdvaCal is in fact three to four times more absorbable than other calcium supplements for post-menopausal women at risk of, or suffering from, achlorhydria. (Defs.' Proposed Findings at 9-10). Defendants therefore argue that they did not promise results that were unattainable for large segments of their audience. (Defs.' Proposed Findings at 10). For this reason, Defendants argue that they did not violate Section III of the Final Order, because they possessed competent and reliable scientific evidence that substantiates their claim that AdvaCal was three to four times more absorbable than other calcium supplements. (Defs. Proposed Findings at 10).

The FTC draws a different conclusion from the evidence, arguing that Defendants marketed AdvaCal not only to elderly achlorhydric women, but to men and women of all ages as well. (FTC's Proposed Findings of Fact at 1) ("FTC's Proposed Findings") (ECF No. 133). Further, the FTC argues that Defendants' claim that "AdvaCal is three to four times more absorbable than other calcium supplements" is not obtainable in any population, young or old. (FTC's Proposed Findings at 13). For these reasons, the FTC contends that Defendants promised results that were not attainable in any population, which shows that Defendants did not possess competent and reliable scientific evidence for their claims, in violation of Section III of the Final Order. (FTC's Proposed Findings at 1).

In support of their contention that Defendants marketed AdvaCal to a broad population, the

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[2] Achlorhydric individuals cannot produce stomach acid and, as a result, absorb calcium at a rate significantly below average. FTC, 624 F.3d at 585.

FTC directs the Court's attention to Defendants' advertising material, including an infomercial, Lane Labs' catalogue, a letter to consumers, the Lane Labs website, direct mailings, a Health Sciences Institute newsletter, communications to retailers, telemarketing scripts, marketing plans, mailing lists, and outside publications. (FTC's Proposed Findings at 1-13). A thorough review of the most prominent of these materials indicates that Lane Labs marketed AdvaCal to men and women of all ages.

As part of their AdvaCal advertising campaign, Defendants produced an infomercial starring Dr. William Lane. (FTC.'s Ex. 537). Between March 2003 and February 2004, this infomercial was broadcast on television 177 times. (Stipulations of Fact ¶¶4(f), 9) (ECF No. 112). Defendants also distributed 10,000 CD Roms containing the infomercial. (Stipulations of Fact ¶8). This infomercial highlights the dangers of calcium deficiency, notes the importance of "taking action" at an early age, and features testimonials from men and women of all ages, including some in their twenties and thirties. Throughout the infomercial, various doctors, scientists, advocates and consumers proclaim the benefits of AdvaCal. Specifically, the infomercial touts AdvaCal's quality as "the most highly absorbable form of calcium," and states that AdvaCal "has been shown to be three times easier to absorb than ordinary chalky calcium." (FTC's Ex. 537 at 6). The participants, context, and language of the infomercial plainly indicate an effort by Lane Labs to market AdvaCal to men and women of all ages. Defendants argue that this infomercial was a failed test, and only generated $20,000 in sales before being quickly discontinued. (Defs.' Proposed Findings 7 n.2; Tr. 924, 1052). The relative success of the infomercial does not, however, alter the breadth of its dissemination. The relevant inquiry is whether Defendants marketed AdvaCal to men and women of all ages; whether or not those advertising efforts generated additional sales or revenue is inconsequential.

Lane Labs' "CompassioNet" catalogue of products also targeted women of all ages, and featured numerous advertisements for AdvaCal. (FTC's Ex. 141). Between 2003 and 2007, Defendants circulated over 7.2 million catalogues to former, existing, and prospective customers. (Stipulations of Fact ¶¶ 1-2; FTC's Ex. 392). Several advertisements throughout the catalogue describe the dangers of bone loss to women of all ages, including those in their twenties and thirties, and comments on the various advantages of AdvaCal, such as its bone building properties and high absorbability. These comments included a statement by Dr. William Lane that, "The sooner you start taking a highly absorbable calcium . . . the less likely you are to develop a problem." (FTC's Ex. 152 at 7). The wide distribution of the catalogue, and the advertisements appealing to women of all ages, indicate a marketing scheme directed at a large audience.

This scheme is also indicated by Lane Labs' website, which featured a "Dear Friend" letter touting AdvaCal's distinct bone building properties and high absorbability. (FTC's Ex. 68). Included in this Dear Friend letter is the statement, "where your system may absorb only about 20% of the calcium in a calcium carbonate supplement (or as little as 4% if your stomach acid level is low), it absorbs roughly 4 times as much of the specially processed calcium in AdvaCAL." (FTC's Ex. 68 at 2). Two paragraphs later, the Dear Friend letter states that osteoporosis is no longer just a "woman's problem," and that "men, too, suffer from this debilitating condition." (FTC's Ex. 68 at 2). In 2002, Defendants sent a near identical letter, with this same language included, to 45,000 women. (FTC's Exs. 475-478).

Defendants also extensively distributed a newsletter from the Health Sciences Institute titled "Members Alert" (the "HSI Newsletter"). (FTC's Ex. 444); Lane Labs 624 F.3d at 587. The HSI Newsletter also stresses that osteoporosis affects men and women of all ages, and discusses the

beneficial qualities of AdvaCal. (FTC's Ex. 444 at 1-3). The HSI Newsletter goes on to note that one of these beneficial qualities is AdvaCal's ability to be absorbed "*four times better* than typical calcium carbonate supplements." (FTC's Ex. 444 at 4) (emphasis in original).

While the FTC relies primarily on these marketing materia

Section III of the Final Order requires that Defendants possess competent and reliable scientific evidence that substantiates their claims. For the reasons stated, the Court finds that Defendants promised results that were unattainable for large portions of their

to testimony by Defense expert Dr. Fujita, who described the ten percent per year claim as "questionable," noting that increases of that magnitude were "quite unlikely." (FTC's Ex. 206 at 277). With respect to this specific claim, the FTC has not carried its burden of showing a violation of Section IV of the Final Order. In making the ten percent per year claim, Andrew Lane relied on the results of a study published in two peer reviewed journals by Dr. Fujita. (Tr. at 774). The study showed one patient, out of a group of twelve, that had a twenty eight percent c@ ÔFV`

Labs, produced a Product and Marketing Analysis for Calcium Supplements in which she discusses the dangers of combining data from different test sites. (FTC's Ex. 178 at LL 791). Ms. Reinagel states "it is important to compare 'apples to apples,'" and that the effect

Andrew Lane testified that he created these groups by combining the

acted in good faith, and took all reasonable steps to comply with the Final Order. Good faith alone, however, does not bar a conclusion that Defendants acted in contempt. Robin Woods, 28 F.3d at 399. The Court therefore requested that the parties submit proposed findings of fact on the issue of whether the violations by Defendants were "technical" or "inadvertent," so as to entitle Defendants to the affirmative defense of substantial compliance.

1. Relevant Case Law

To prevail on the defense of substantial compliance, an alleged contemnor must show that it "(1) has taken all reasonable steps to comply with the valid court order, and (2) has violated the order in a manner that is merely 'technical' or 'inadvertent.'" Lane Labs, 624 F.3d at 591. There is little authority within the Circuit addressing the defense of substantial compliance, and guidance on the meaning of the terms "technical" and "inadvertent" is particularly scarce. One case within the Third Circuit that did address the issue in the wake of Lane Labs is Port Drivers Fed'n 18, Inc. v. All Saints, 757 F. Supp. 2d 463 (D.N.J. 2011). There, the District Court had previously enjoined the defendants from violating the conditions and requirements of the Federal Truth in Leasing Regulations, and considered whether certain violations of that injunction were merely technical, so as to justify the defense. Id. at 465. The District Court found violations in two provisions of the leasing agreement. First, the leasing agreement did not contain the language "including insurance for the protection of the public," as required by the regulations. Id. at 466-67. Second, the agreement contained a list of items that could ultimately be deducted from the lessor's compensation. The list was followed by "etc.," which violated a provision of the regulations that required the lease

corrected, and that the defendants had been in communication with the plaintiffs regarding compliance. Id. at 473. The District Court ultimately determined, without elaborating, that the violations could both be characterized as "technical." Id.

Two cases decided in this Circuit before Lane Labs are also instructive, as they declined to even consider permitting the defense of substantial compliance because there were numerous violations, even despite substantial efforts by the defendant. In Pub. Interest Research Group v. Top Notch Metal Finishing Co., the District Court held the defendant in civil contempt for committing forty six violations of a court order prohibiting wastewater discharge in violation of pretreatment standards contained in its permit. 1988 WL 156725 at *5 (D.N.J. Dec. 23, 1988). Despite the defendant's substantial efforts to comply with that order, the violations were simply too "numerous and

insufficient to support a finding of substantial compliance.

The Court remains highly concerned with the FTC's delay in bringing this suit. Defendants

Final Order. Lane Labs, 624 F.3d at 587. The extensive distribution of a claim that directly violated the Final Order indicates that this violation was neither technical nor inadvertent.

The defense of substantial compliance similarly does not apply to the remaining violations in this case. The claim that AdvaCal was three to four times more absorbable than other calcium supplements directly violated Section III of the Final Order. This violation was not simply caused by a delay in response or a mistake in form. Nor was the Defendants' extensive distribution of the claim the result of a simple oversight. Rather, this was a consistent, substantive violation of Section III of the Final Order, and as such, was a violation unprotected by the defense of substantial compliance. For the same reason, the claim that "only AdvaCal can increase bone density," held to violate Section III of the Final Order by the Third Circuit, is not protected by the defense of substantial compliance. This claim was widely and commonly distributed, and violated the substance of Section III. Id. at 583-84.

Defendants are also not entitled to a defense of substantial compliance for their violations of Section IV of the Final Order. Both were violations that went to the core substance of Section IV. While the violations appear to be somewhat more minor than those of Section III, they were not the result of oversight or neglect. Defendants chose to make the claims at issue, and chose to widely distribute those claims. The Court cannot find a violation under those circumstances to be either "technical" or "inadvertent."

IV. CONCLUSION

For the foregoing reasons, the FTC's Motion for a finding of contempt is **granted**. An appropriate Order accompanies this Opinion.

S/ Dennis M. Cavanaugh

Dennis M. Cavanaugh, U.S.D.J.

Date: November 18, 2011
Orig.: Clerk
cc: All Counsel of Record
File