United States District Court
for the
Southern District of Florida

Federal Trade Commission , Plaintiff v. Acquinity Interactive, LLC, and others , Defendant s	)	Civil Action No. 14-60166-Civ-Scola

Order on Motions for Summary Contempt

This matter is before the Court upon the FTC's motion for summary contempt ruling (ECF No. 181) and the Dragon Global Defendants' [1] motions for summary contempt ruling and reconsideration of the Court's preliminary injunction order (ECF Nos. 184, 186). The Corporate Defendants [2] the Dragon Global Defendar reconsideration (ECF No. 186

1. Background

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[1] The Dragon Global Defendants are Dragon Global LLC, Dragon Global Management LLC, and Dragon Global Holdings LLC. The Court will also refer to these entities collectively as "Dragon Global. "

[2] The Corporate Defendants are On Point Global LLC; On Point Employment LLC; On Point Guides LLC f/k/a Rogue Media Services LLC; Waltham Technologies LLC; Cambridge Media Series LLC f/k/a License America Media Series LLC; Issue Based Media LLC; DG DMV LLC; Direct Market LLC; and Bronco Family Holdings LP a/k/a Bronco Holdings Family LP.

[3] The Individual Defendants are Burton Katz, Brent Levison, and Elisha Rothman. References to the "Contempt Defendants" will include the Individual Defendants, Corporate Def endants, and Dragon Global Defendants.

in contempt makes plain that in law, as well as in boxing, one should watch for the follow-through, not just the first strike.

In October 2014, the Court entered a stipulated final judgment, in part, as to Burton Katz for his role in a deceptive practice that placed unauthorized charges on consumers' mobile phone bills. (ECF No. 132 at ¶ 2.) As part of this final judgment, the Court entered an injunction (the "Acquinity Order") against misrepresentations, through which Katz was enjoined, "in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of any product or service," from "making, or assisting others in making, expressly or by implication, any false or misleading material representation[.]" (Id. at 3.)

Almost six years later, in February 2020, the FTC filed a motion to show cause why Katz and certain corporate entities should not be held in contempt for violating the Acquinity Order. (ECF No. 135.) In particular, the FTC noted that Katz and the corporate entities were defendants in another lawsuit, FTC v. On Point Global LLC, 19-cv-25046 (S.D. Fla.) (the "On Point Matter"), in which the FTC alleged that the Katz and the defendants violated Section 5(a) of the FTC Act. (ECF No. 135.) Two months later, the FTC moved for another show cause order as to Robert Zangrillo, Brent Levison, and Elisha Rothman, who are also individual defendants in the On Point Matter. (ECF No. 137.) The Court granted the motions as to all Defendants except Robert Zangrillo. (ECF Nos. 136, 174.)

In August 2021, the Court granted the FTC's motion for a preliminary injunction, holding that the Acquinity Order was valid, lawful, and unambiguous and that there was good cause to believe that the Contempt Defendants had actual notice of the Acquinity Order. (ECF No. 177 at 2.) Moreover, the Court held that the FTC was likely to prevail on the merits of its contempt allegations. (Id. at 2–3.) The Court also ordered an asset freeze over certain of the Contempt Defendants' assets and imposed a receivership over certain of the Contempt Defendants. (Id. at 3–4.) Last, the Court set a briefing schedule for summary contempt proceedings (ECF No. 174 at 13), which the parties met and fully briefed.

2. Legal Standard

To establish civil contempt, the FTC must show, by clear and convincing evidence, that (1) the order at issue was valid and lawful, (2) the order was "clear and unambiguous," and (3) the alleged violator had the ability to comply with the order but did not do so. Peery v. City of Miami , 977 F.3d 1061, 1076–77 (11th Cir. 2020). A court may make a finding of civil contempt without an evidentiary hearing where there are no disputed material facts. See Mercer v. Mitchell, 908 F.2d 763, 769 n.11 (11th Cir. 1990) ("[W]hen there are no

disputed factual matters that require an evidentiary hearing, the court might properly dispense with the hearing prior to finding the defendant in contempt and sanctioning him."); see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp., 140 F. App'x 860, 865 (11th Cir. 2005).

3. Discussion

A. Valid, Lawful, and Unambiguous

As the Court previously held, the Acquinity Order is valid and lawful and not so vague and ambiguous as to be an impermissible obey-the-law injunction. (ECF No. 174 at 4–5.) Rather, the order is more specific and narrower than Section 5(a) of the FTC Act—the order provides that

> "in connection with the advertising, marketing, promotion,

deceptive practice under Section 5(a). But that finding alone does not resolve the question of whether the

under the "control" theory above. Under the "control" theory, the FTC must show by clear and convincing evidence that the defendant "had the management control or power to prevent the contempt." Kuykendall, 371 F.3d at 761.

The FTC has met its burden. Katz was the Chief Executive Officer of the On Point operation and functionally its largest shareholder. (ECF No. 182 at ¶¶ 96, 102; ECF No. 205 at ¶¶ 96, 102.) Katz played an active role at On Point, reviewing portfolios of new domains and reviewing documents pertaining to On Point's financial performance as well as On Point's chargeback and advertising account issues. (ECF No. 182 at ¶¶ 126, 133–137; ECF No. 205 at ¶¶ 126, 133–137.) This is sufficient to show that Katz had the "management control or power to prevent" the making of the false or misleading material representations. See Kuykendall, 371 F.3d at 761.

2. Brent Levison

Brent Levison was not a party to the Acquinity Order, and therefore the FTC must show by clear and convincing evidence that he had "actual notice" of the Acquinity Order and that he was in "active concert or participation" with Burton Katz. See Fed. R. Civ. P. 65(d)(2).

First, actual notice. All that is required in a contempt action is "knowledge of the mere existence of the injunction; not its precise terms." FTC v. Neiswonger, 494 F. Supp. 2d 1067, 1079 (E.D. Mo. 2007);

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held in civil contempt if, and to the extent that, he knowingly aids or abets an enjoined party in transgressing a court order[.]") (quoting Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 75 (1st Cir. 2002)). Therefore, to be bound by an injunction under Rule 65(d)(2)(C), the party need to have "played an essential role" in knowingly assisting the party to the injunction carry ovn inF knowinfT)).fvohy

The FTC's argument that Katz was an "agent" of Dragon Global also falls flat. To be an agent, one must be "employed or authorized to act for [the principal], or transact for [the principal], or entrusted with another's business." City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 557 n.9 (11th Cir. 1998). The only examples that the FTC gave of Katz purportedly acting as Dragon Global's agent were acts involving the solicitation of investment for On Point. (ECF No. 210 at 5–6 (citing ECF No. 182 at ¶¶ 139–141).) It appears that the FTC's theory is that (1) Global Dragon partnered with Katz and On Point by helping raise investments for On Point, and (2) Katz, as CEO of On Point but also as Dragon Global's agent, helped Dragon Global help On Point raise investments for On Point. (See ECF No. 201 at 2; ECF No. 210 at 5–6.) The undisputed evidence does not follow. Rather, Katz took those actions as On Point's CEO and day-to-day leader, and those actions were for the benefit of On Point. There is no evidence that Katz was a de facto leader or agent of Dragon Global such as to impute actual notice of the Acquinity Order.

The FTC in its reply points to new evidence, arguing that this evidence demonstrates that Dragon Global had actual notice of the Acquinity Order. (ECF No. 210 at 6.) Even assuming that this evidence provided Dragon Global with actual notice, the Court finds that Dragon Global was not in "active concert or participation" with Katz under Fed. R. Civ. P. 65(d)(2)(C).

Dragon Global is a venture capital, private equity, and real estate investment firm that oversees numerous portfolio companies in numerous industries. (ECF No. 190 at ¶¶ 1, 3; ECF No. 202 at ¶¶ 1, 3.) While it is undisputed that certain Dragon Global entities invested in On Point and solicited additional investment for On Point (ECF No. 182 at ¶ 82; ECF No. 205 at ¶ 82), the undisputed evidence shows that Dragon Global did not knowingly aid and abet Katz in the "making, or assisting others in making, expressly or by implication, any false or misleading material representation." ADT LLC, 853 F.3d at 1352; (ECF No. 132 at 3). At a certain level of abstraction, every entity that invested in On Point and every employee that received a paycheck from On Point could be said to have assisted Katz in violating the Acquinity Order. However, the "active concert or participation" prong of Rule 65(d)(2)(C) does not reach that far. Such participation must be knowing, and it needs to be directed at the actual prohibited conduct. See Goya Foods, 290 F.3d at 76. Here, there is no evidence that Dragon Global knowingly directed its investments or other investors to Katz's violative conduct. The most that the FTC points to is that Dragon Global provided funding in 2015 to purchase one domain, dmv.com; however, there is no allegation that dmv.com provided paid guides, contained

time. (ECF No. 182 at ¶¶ 80, 105; ECF No. 190 at ¶¶ 13–15; ECF No. 205 at ¶¶ 80, 105.)

In total, the undisputed evidence shows that Dragon Global, even if it did have actual notice of the Acquinity Order, was not in "active concert or participation" such as to be bound by the Acquinity Order. Therefore, Dragon Global's motion for summary contempt is granted. (ECF No. 184.)

5. Corporate Defendants

As to the Corporate Defendants, the Court finds that these entities had actual notice of the Acquinity Order, as such knowledge was imputed through Katz and Levison. See FTC v. Data Med. Cap., Inc., No. SA CV 99-1266 AHS (EEx), 2010 WL 1049977, at *19–20 (C.D. Cal. Jan. 15, 2010); see also Neiswonger, 494 F. Supp. 2d at 1080 n.18. Moreover, the Court finds that each acted in "active concert or participation" with Katz, as each entity had a specific role in assisting Katz carry out the deceptive scheme. (See ECF No. 182 at ¶¶ 72–81, 92–93, 102–113; ECF No. 205 at ¶¶ 72–81, 92–93, 102–113.) Therefore, the Court will hold the Corporate Defendants in contempt.

C. Reasonable Efforts to Comply

Alleged contemnors may argue that they were "excused from complying" with the injunction—meaning that the contemnor had an "inability to comply" with the order as it "made in good faith all reasonable efforts to comply." Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998) (cleaned up); see also Newman v. Graddick , 740 F.2d 1513, 1525 (11th Cir. 1984) ("[A] person who attempts with reasonable diligence to comply with a court order should not be held in contempt."). The Contempt Defendants argue that they made "all reasonable efforts" to comply with the Acquinity Order by (1) engaging law firms to review their websites and provide training regarding data privacy and security, (2) providing disclaimers on websites, and (3) creating a call center and money-back guarantee. (ECF No. 204 at 16; ECF No. 203 at 4–6.) However, the Court finds that these efforts do not excuse Contempt Defendants Katz, Levison, and the Corporate Defendants from being found in violation of the Acquinity Order. First, reliance on the advice of counsel is not a defense to contempt. See Cues, Inc. v. Polymer Indus., Inc., 680 F. Supp. 380, 387 (N.D. Ga. 1988) ("[I]t is not a defense to civil contempt that one received erroneous advice from counsel[.]"). Second, neither is a money-back guarantee. See FTC v. Trudeau, 579 F.3d 754, 773 n.14 (7th Cir. 2009) ("[A] money-back guarantee is not a general defense to a contempt action."). Third, disclaimers do not establish that alleged contemnors took "all reasonable efforts" to comply.

Indeed, the Acquinity Order required an end to false or misleading representations—there was no provision permitting such representations if a disclaimer was used. (ECF No. 132.) Moreover, as explained in the Court's contemporaneous order in the On Point Matter, even despite the use of disclaimers, the Contempt Defendants Katz, Levison, and the Corporate Defendants continued to perpetuate the deceptive scheme. Therefore, the Court holds that Contempt Defendants Katz, Levison, and the Corporate Defendants were able to comply with the Acquinity O rder.

D. Relief

Courts have "extremely broad and flexible powers" in contempt cases and have "wide discretion in fashioning an equitable remedy." FTC v. Leshin, 719 F.3d 1227, 1231 (11th Cir. 2013). Sanctions in a civil contempt case may serve to either "(1) coerce the contemnor to comply with a court order, or (2) compensate a party for losses suffered[.]" McGregor v. Chierico, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000); Leshin, 719 F3d at 1231. While coercive sanctions may come with some limitations, compensatory sanctions are "only limited by the requirement that they be compensatory." Leshin, 719 F.3d at 1231 (quoting Howard Johnson Co. v. Khimani , 892 F.2d 1512, 1521 (11th Cir. 1990)). Consumer loss is a "common measure for civil sanctions in contempt proceedings[.]" Trudeau, 579 F.3d at 771–72. Courts will often look to gross receipts as a baseline for determining consumer loss. See McGregor, 206 F.3d at 1388–89; see also FTC v. Figgie Intern., Inc., 994 F.2d 595, 606 (9th Cir. 1993) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each [product] that is not useful to them."); Kuykendall, 371 F.3d at 766 (holding that "using the defendant's gross receipts is a proper baseline in calculating the amount of sanctions necessary to compensate injured consumers.").

However, as the Tenth Circuit held in Kuykendall, a baseline is just a starting point. See Kuykendall, 371 F.3d at 766. Once this baseline is chosen, the liable Contempt Defendants must have the opportunity to present evidence regarding what, if any, amounts should "offset" the sanctions. See id. These offsets could be shown by, among other things, demonstrating that certain costs or expenses must be deducted or demonstrating that some consumers were "wholly satisfied with their purchases." See id. Moreover, the parties dispute the extent to which gross receipts from the freemium business appropriately measure consumer loss from those false and misleading

representations (ECF No. 204 at 21), as consumers did not pay money in reliance on those representations. [5]

Therefore, while the Court holds that gross receipts as to the paid-guide business is the appropriate baseline for civil contempt damages, the Court will defer ruling on the appropriate relief until after the show-cause hearing currently scheduled for the trial-period beginning on October 25, 2021. The parties may argue appropriate offsets or measures of calculating consumer loss as to the freemium business at that time.

E. Conclusion

As set forth above, the Court grants in part and denies in part the FTC's motion for summary contempt ruling (ECF No. 181). In particular, the Court grants the FTC's motion as to the Corporate Defendants, Burton Katz, and Brent Levison and holds those defendants in contempt. The Court denies the FTC's motion as to the Dragon Global Defendants and Elisha Rothman. The Court also grants the Dragon Global Defendants' motion for summary contempt ruling (ECF No. 184). As the Court grants the Dragon Global Defendants' motion for summary contempt ruling and holds that those entities will not be held in contempt, the Court denies as moot the Dragon Global Defendants' motion for reconsideration of the Court's preliminary injunction order (ECF No. 186) as well as the Dragon Global Defendants' motion to strike (ECF No. 221).

Done and ordered at Miami, Florida, on September 29, 2021.

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Robert N. Scola, Jr.
United States District Judge

[5] The Contempt Defendants also make several arguments related to the relief sought, such as that monetary contempt sanctions are impermissible and that joint and several liability is not available. (ECF No. 204 at 16–19.) However, the Court already addressed these arguments in an earlier order and need not readdress them here. (ECF No. 174); cf. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").