UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	Civil No. 1:10CV01362 EGS
Plaintiff,	)	
v.	)	
DANIEL CHAPTER ONE,	)	
and	)	
JAMES FEIJO,	)	
Defendants,	)	
and	)	
PATRICIA FEIJO,	)	
Contempt Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF THE IMPOSITION OF CIVIL CONTEMPT SANCTIONS

The United States of America respectfully files this response to the Memorandum in Response to Order to Show Cause Re: Contempt [doc. #40]. As detailed below, the arguments raised by Daniel Chapter One, James Feijo, and Patricia Feijo should be rejected, and civil contempt sanctions imposed.

Background

On July 29, 2011, the United States filed a motion asking that the Court set a hearing for Daniel Chapter One, James Feijo, and Patricia Feijo ("Contemnors") to show cause, if any, why they should not be found in civil contempt of the Court's Order entered on June 22, 2011. The Contemnors failed to reply to this motion. The Court subsequently issued a Minute Order scheduling a hearing on September 28, 2011, "for defendants to show cause why they should not be found in civil contempt." Less than a week before the date of the hearing, Daniel Chapter One, James Feijo, and Patricia Feijo filed what they captioned as "Defendants' Show Cause Hearing Brief" [doc. 38]. After considering this filing, the Court issued a Minute Order which stated that:

> [u]pon consideration of [38] defendants' response to [34] government's motion for order to show cause, it appears that defendants to not oppose the government's motion for order to show cause. Accordingly, [34] the government's motion for order to show cause is GRANTED, it is FURTHER ORDERED that the hearing scheduled for September 28, 2011 at 2:00 p.m. is hereby VACATED. Defendants are hereby ORDERED TO SHOW CAUSE why Daniel Chapter One, James Feijo, and Patricia Feijo should not be held in civil contempt. . . .

The Court then ordered the Contemnors to show cause why they should not be held in contempt. Comtemnors' filing provides no justification for their contemptuous behavior.

Argument

In their filing, the Contemnors state that they should not be held in civil contempt because (1) the sanctions proposed by the government are criminal in nature and the Contemnors are entitled to constitutional protections, (2) the Order is unconstitutional, and violates the Religious Freedom Restoration Act, and (3) Patricia Feijo is not a party to the action, and cannot

be subject to civil contempt sanctions. As detailed below, these arguments have no merit, and civil contempt sanctions should be imposed against the Contemnors.

The Pending Motion Seeks Civil Contempt Sanctions and Criminal Procedures Should Not be Utilized

The Contemnors assert that the motion filed by the government is actually a motion for criminal contempt sanctions, and state that they are entitled to constitutional protections associated with criminal contempt proceedings. In determining whether a contempt proceeding is civil or criminal, courts look at the sanction:

> [t]raditionally, whether a contempt is civil or criminal has depended on the 'character and purpose' of the sanction. A sanction is considered civil if it is 'remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'

Evans v. Williams, 206 F.3d 1292, 1294-95 (D.C. Cir. 2000) (quoting Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911)). Analysis of the sanctions the government requests demonstrates that the pending motion is for civil contempt.

The government requests in its motion that the Court impose an escalating monetary civil contempt penalty that converts to imprisonment if the Contemnors do not comply. Specifically:

> Day 1: $1,000
> Day 2: $5,000
> Day 3: $10,000
> Day 4: $20,000
> Day 5 and beyond: imprisonment for James Feijo and Patricia Feijo
> Day 5 and beyond: $25,000 for Daniel Chapter One

Additionally, the United States requests that it be awarded its attorney's fees incurred in seeking civil contempt.

The escalating monetary penalty that converts to imprisonment if the Contemnors do not comply is a coercive remedy, which Contemnors can avoid completely. Contemnors can avoid the accumulation of any fine and can avoid imprisonment by simply complying with the Court's Order. This type of penalty is "designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 (1994).

In Bagwell, the Supreme Court specifically discussed "per diem fine[s] imposed for each day a contemnor fails to comply[,]" stating that they are acceptable civil contempt remedies as "such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite daily fines are purged." Id. at 829. Similarly, the imprisonment sought by the government is not a fixed term, as Contemnors "'carr[y] the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911) (quoting In re Nevitt, 117 F.448, 461 (8th Cir. 1902)). As a result, an escalating monetary penalty that converts to imprisonment is an appropriate civil contempt remedy because Contemnors can avoid all sanctions by complying with the Court's Order. This remedy does not change the pending motion into a request for criminal contempt sanctions.

Attorneys' fees are an appropriate civil contempt fine as they are necessary "to make the plaintiff whole[.]" Food Lion, Inc. v. United Food and Commercial Workers Intern. Union, 103 F.3d 1007, 1017 n14 (D.C. Cir. 1997). Parties, including the United States, are entitled to compensatory relief constituting attorney's fees incurred in prosecuting a contempt proceeding.

SEC v. Bilzerian, 613 F.Supp.2d 66, 77-78 (D.D.C. 2009); United States v. American Bar Ass'n, 2006 WL 1737775, at *1 (D.D.C. June 26, 2006). Similarly, this remedy is an appropriate civil contempt remedy, and requesting this remedy does not convert this proceeding into one for criminal contempt sanctions.

Contemnors assert that criminal procedure protections are necessary as a result of Bagwell, 512 U.S. 821 (1994). However, Bagwell recognized that "civil contempt sanctions, or those penalties designed to compel future compliance . . . are . . . coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." Id. at 827. Indeed, Bagwell characterized as a "paradigmatic coercive, civil contempt sanction" confining a contemnor indefinitely until he complies with a command. Id. at 828. Civil contempt involves the ability to obtain release from prison by obedience, so the contemnor "'carries the keys of his prison in his own pocket.'" Id. (quoting Gompers, 221 U.S. at 442 (1911); In re Nevitt, 117 F. at 451).

Contemnors nevertheless rely upon language in Bagwell stating that,

> [f]or a discrete category of indirect contempts [i.e., those taking place out of court], however, civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding . . . . [T]he risk of erroneous deprivation from the lack of a neutral factfinder may be substantial.

Id. at 833-34. However, Contemnors ignore that Bagwell precedes this discussion by reference to some traditional and unchallenged distinctions separating civil and criminal contempt, including the comments cited above as well as stating that a "close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order." Id. at 829. In the instant case, Contemnors refuse to send a letter

required by the court order, a contempt falling squarely within this acknowledged civil contempt example.

Contemnors' violations of this Court's order barring them from making unsubstantiated curative claims for their products are similarly civil contempts given the nature of the relief sought. Nothing in Bagwell converts those alleged violations into criminal contempt charges. As discussed above, the fines are prospective and easily avoided, falling within Bagwell's discussion of what characterizes civil contempt. Bagwell recognized that "indirect contempts involving discrete, readily ascertainable acts . . . properly may be adjudicated through civil proceedings . . . ." Id. at 833.

The facts involved in Bagwell as well as the order at issue were radically different than those here. Dealing with strike activity, the order in Bagwell "effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed." Id. at 837. After making a finding of civil contempt, the court in Bagwell announced a prospective fine schedule, stating that the union would be fined $100,000 for any future violent breach of the injunction and $20,000 for non-violent breaches. Id. at 823-24. Over the next seven months, the court held seven civil contempt hearings at which evidence was presented concerning more than 400 violations of the injunction, and ultimately the court ordered over $64 million in fines. Id. at 824. The Supreme Court held that these fines were not coercive and were "more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." Id. at 837. An escalating monetary penalty that converts to imprisonment if the Contemnors do not comply is quite different than what occurred in Bagwell. Contemnors can avoid paying any fine and can avoid imprisonment by (1) mailing the required

notice, and (2) making a showing to the Court sufficient to demonstrate their compliance with Part II of the FTC's Order. The instant case is comfortably within what Bagwell recognized as traditional civil contempt.

Additional discussion in Bagwell distinguishes that case from the instant case. The Court stated that criminal procedures are needed where a contempt proceeding requires "elaborate and reliable factfinding[.]" Id. (citing Green v. United States, 356 U.S. 165, 217 n.33 (1958) (jury may be needed where "crucial facts are in close dispute")). Simply put, here there are no facts in dispute. Contemnors have not contested any of the evidence the government presented to the Court in the Motion for Civil Contempt. Further, Bagwell indicates the need for criminal procedures where the factfinder is not neutral. 512 U.S. at 833-34; see also FTC v. Trudeau, 579 F.3d 754, 776 (7th Cir. 2009). Here, the Contemnors have never complained that the court's neutrality is implicated, and criminal procedures are not necessary.

The Court's Order is straightforward, and the Contemnor's violations of the Order are clear and undisputed. The facts of this case do not support Contemnors' argument that criminal procedural safeguards are necessary.[1] The government seeks only coercive and compensatory

[1] Due to an ongoing criminal investigation in the District of Rhode Island, James Feijo and Daniel Chapter One have raised the Fifth Amendment in response to the allegations in Plaintiff's Complaint and in response to Plaintiff's Requests for Admission. The "prevailing rule" is "that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]" Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). The Fifth Amendment "does not preclude the inference where the privilege is claimed by a party to a Civil cause." Id. (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)). James Feijo and Daniel Chapter One "are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof." SEC v. Colello, 139 F.3d 674, 677 (9th Cir. 1998); SEC v. Whittemore, 691 F.Supp.2d 198, 206 (D.D.C. 2010).

relief, while Contemnors will hold the key to any prison in their own pocket. Contemnors' request for criminal contempt procedures should be denied.

Arguments Related to the Constitutionality of the Order and RFRA are Not Appropriately Raised in this Enforcement Proceeding

The Court of Appeals for the District of Columbia explicitly rejected Daniel Chapter One and James Feijo's claims related to the First Amendment, the Establishment Clause, and the Religious Freedom Restoration Act ("RFRA") when considering Defendants' appeal of the FTC's Order, stating that "DCO's arguments based on the Constitution and the Religious Freedom Restoration Act are wholly without merit." Daniel Chapter One v. Federal Trade Commission, 405 Fed. App'x 505, 506 (D.C. Cir. 2010). This issue has already been briefed in these proceedings [see doc. #7, 9, 23, and 24], and the availability of RFRA as a defense in this proceeding was implicitly rejected by the Court through the issuance of the preliminary injunction order. Nonetheless, Contemnors persist in arguing that the Federal Trade Commission's Order is unconstitutional, and that their actions are protected by RFRA.

The FTC Act entrusts the administration of the Act to the Commission, as "a body of experts[.]" FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948). Once a Commission order becomes final, the enforcement responsibility held by the courts "is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order." Id. "[I]t is well settled that a defendant cannot attack a final cease and desist order in a subsequent enforcement proceeding." United States v. H.M. Prince Textiles, Inc., 262 F.Supp. 383, 388 (S.D.N.Y. 1966) (citing Morton Salt Co., 334 U.S. at 54; Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437, 442 (2d Cir. 1944); United States v. Vitasafe Corp., 212 F. Supp. 397, 398 (S.D.N.Y. 1962)).

Indeed, as the Sixth Circuit noted, a RFRA defense is properly raised on direct appeal of agency decision, and not as the basis for an action seeking an injunctive order prohibiting the government from seeking civil or criminal sanctions. La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 318-319 (6th Cir. 2000) (citing Radio Luz v. FCC, 88 F.Supp. 2d 372, 376 (E.D. Pa. 1999)).

The review of the Order that occurred before the United States Court of Appeals for the District of Columbia Circuit was based upon an administrative review procedure that Congress established by statute. 15 U.S.C. § 45. Where "there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979); see also Defenders of Wildlife v. Adm'r, Envtl. Prot. Agency, 882 F.2d 1294, 1299 (8th Cir. 1989); Kreschollek v. Southern Stevedoring Co., 78 F.3d 868, 870-71 (3d Cir. 1996).

Contemnors' Constitutional claims and RFRA claim were properly considered and rejected by the circuit court, and cannot be raised in this enforcement proceeding. The Order is valid, and Contemnors' arguments are not appropriate at this juncture. These arguments should be denied outright.

Patricia Feijo is Subject to Civil Contempt Sanctions

As specified in the Federal Rules, a preliminary injunction binds:

> (A) the parties;
> (B) the parties' officers, agents, servants, employees, and attorneys; and
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)

as long as those individuals "receive actual notice of it by personal service or otherwise[.]" Fed. R. Civ. P. 65(d)(2). While Patricia Feijo is not a party to this suit, she is "in active concert or participation" with the parties to this suit. It is indisputable that Patricia Feijo received notice of the Order. In the recording submitted to the Court in support of the Motion for Civil Contempt, Patricia Feijo is co-hosting the radio show, and she tells a caller that:

> we do care about your daughter . . . **we just heard from our lawyer that a judge ruled in favor of the Trade Commission**, and so, you know, basically **we can be fined out of existence tonight or, or, put into prison**, and we want people to know the reality that we're sitting here, willing to risk even our lives, to serve the lord and to serve you, right, but the situation is such that I would say get the product while you can, even stock up while you can, and if one day you won't be able to get our products then just, you know, try to continue to follow pretty much what those products are, the herbs, the enzymes, because that is what we have seen work for many years.

(emphasis added). As detailed in the Motion for Civil Contempt, on that same radio show, Patricia Feijo told listeners that they didn't share their experiences with the products "until we had used it for a while and saw that it did indeed work, and then we began to share with people. Hey, this is what works for this and that!" Patricia Feijo also stated that the testimonies they had received from their customers and placed on their website and in their BioGuide were a sampling of their customer's experiences and that the results in the testimonials were "very typical of what people experience."

"[N]on-parties may be held in civil contempt where they are successors in interest to a party bound by an order or 'aiders and abettors' to a violation of the order by a party thereto." SEC v. Bilzerian, 613 F.Supp.2d 66, 70 (D.D.C. 2009); see also Whitcraft v. Brown, 570 F.3d 268 (5th Cir. 2009) (an "order binds not only the parties subject thereto, but also non-parties who act with the enjoined party."). The statements made by Patricia Feijo on the radio show

demonstrate that she was knowingly aiding and abetting and was acting in concert with James Feijo and Daniel Chapter One. Her actions were "knowing, deliberate, repetitive, and wilful" and demonstrate her "disrespect for the Court's authority and orders." Eppley v. Iacovelli, 2010 WL 724557, at *3 (S.D. Ind. Feb. 25, 2010). Fed. R. Civ. P. 65(d)(2) extends the reach of court orders beyond the parties to a suit.

> [The Rule] is derived from the commonlaw doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14 (1945). Patricia Feijo had notice of the preliminary injunction, and has acted in concert with James Feijo and Daniel Chapter One. As a result, she is bound by the preliminary injunction order, and is subject to civil contempt sanctions.

Conclusion

The United States presented the Court with evidence demonstrating that the Contemnors have violated this Court's Order (Doc. #31) by continuing to make prohibited representations about their products and failing to mail the required notice pursuant to the Modified Final Order the Federal Trade Commission entered. The Court's Order is clear and unambiguous. The Court should impose compensatory civil sanctions by ordering that Daniel Chapter One, James Feijo, and Patricia Feijo pay Plaintiff's attorney's fees and impose a coercive civil sanction of an escalating monetary penalty that converts to imprisonment until the Contemnors purge the contempt.

Respectfully submitted this 20th day of October, 2011.

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CERTIFICATE OF SERVICE

I certify that on October 20, 2011, I caused a true and correct copy of the above-entitled **PLAINTIFF'S REPLY IN SUPPORT OF THE IMPOSITION OF CIVIL CONTEMPT SANCTIONS**, to be served via the Court's Electronic Case Filing System to counsel for the Contemnors as follows:

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