United States District Court
for the
Southern District of Florida

| | | |
|---|---|---|
| Federal Trade Commission, Plaintiff<br><br>v.<br><br>Acquinity Interactive, LLC, and others, Defendants | )<br>)<br>)<br>)<br>)<br>)<br>) | Civil Action No. 14-60166-Civ-Scola |

**Omnibus Order**

This matter is before the Court upon the FTC's motions for a preliminary injunction (ECF No. 138) and for an order to show cause why Robert Zangrillo, Brent Levison, and Elisha Rothman should not be held in contempt. (ECF No. 137.) The Court has reviewed the motions and the relevant legal authorities and **grants** the FTC's motion for a preliminary injunction (**ECF No. 138**) and **grants in part and denies in part** the FTC's motion for an order to show cause (**ECF No. 137**.) The Court also **grants** the FTC's request to set a briefing schedule on summary contempt proceedings. (**ECF No. 170**.)

Before beginning its analysis, the Court notes that the FTC's motion is styled as a motion for a temporary restraining order, but in its briefing, the FTC stated its belief that the Court may enter a preliminary injunction without an evidentiary hearing once the Contempt Defendants, as defined below in this order, have had an opportunity to fully respond to the FTC's motion, including by submitting any evidence or affidavits the Contempt Defendants seek to rely on in connection with responding to the FTC's motion. Contempt Defendants Katz, Levison, and Rothman do not contest the FTC's assertion, but merely state that they "do not concede that the FTC has proven that the websites were deceptive and specifically maintain the arguments made and evidence adduced at the preliminary-injunction hearing" in *FTC v. On Point Global*, 19-25046-Civ (S.D. Fla.) (the "*On Point Matter*"). (ECF No. 160, at 13 n.5.) Conversely, Robert Zangrillo and certain of the Entity Defendants, including Dragon Global LLC, Dragon Global Management LLC, and Dragon Global Holdings LLC argue that the Court "must hold a hearing prior" to granting a preliminary injunction because these respondents state that they "dispute nearly every factual assertion that the FTC makes." (ECF No. 163, at 32.) The Court previously held a two-day evidentiary hearing on the FTC's motion for a Preliminary Injunction in the *On Point Matter*, where the Court found a preliminary injunction was warranted based on the evidence presented to the Court, as further set forth in this order. Because Court has already found the FTC is likely to succeed on the merits in the *On Point Matter* with respect to all of the Contempt Defendants, the Court finds it

does not need additional evidence prior to entry of a preliminary injunction. Rather, the true questions at issue for the Court to decide are whether Katz's settlement with the FTC is enforceable, whether the Contempt Defendants had actual notice of the *Acquinity* order, and whether the FTC satisfies the standard for entry of a preliminary injunction based on contemptuous conduct in the *On Point Matter*. In light of these considerations, the parties' submissions in connection with the FTC's motion, and proceedings in the *On Point Matter*, the Court does not find an evidentiary hearing is necessary before for the Court can enter a preliminary injunction. As such, and because all parties have had an opportunity to respond and submit evidence and affidavits in this matter, the Court construes the FTC's motion as a motion for preliminary injunction.

**1. Background**

In 2014, the FTC settled a lawsuit against Burton Katz and others for his role in a "mobile-billing cramming scheme," which entailed using "unsolicited text messages to lure consumers to fraudulent 'free merchandise websites'" and then requiring those consumers to "provide personal information to qualify for free merchandise that did not exist or was unobtainable." (ECF No. 160, at 2.) The personal information provided by the consumers was also used by the Defendants to identify targets to receive unsolicited pre-recorded phone messages. As part of this scheme, Katz utilized a company "Polling Associates, Inc.," an SMS technology platform, which the Defendants utilized to place a $9.99 recurring charge on consumer's telephone bills. (*Id.* at 3.) The FTC and Katz reached a settlement in October 2014 and Katz agreed he was permanently enjoined from "billing, submitting for billing, or assisting or facilitating the billing or submitting for billing, charges to any telephone bill, including but not limited to a bill for any voice, text, or data service." (ECF No. 132, at 3.) Section II of Katz's settlement with the FTC also noted that he, and any "officers, agent, servants, and employees, and all other persons in active concert or participation . . . who receive actual notice of this Order, whether acting directly or indirectly" are enjoined from, "in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of any product or service . . . making, or assisting others in making, expressly or by implication, any false or misleading material representation, including representations concerning the cost, performance, efficacy, nature, characteristics, benefits, or safety of any product or service, or concerning any consumer's obligations to pay for charges for any product or service." (*Id.*) The Court entered a Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Burton Katz and others on October 16, 2014. (ECF No. 132.)

On February 12, 2020, the FTC filed a motion in this matter, seeking to show cause why Katz and the Entity Defendants[1] should not be held in contempt for violating the FTC's 2014 settlement. (ECF No. 135.) The FTC noted that Katz was named in another lawsuit, the *On Point Matter*, which alleged that Katz, in concert with the other *On Point Matter* defendants was operating "a sprawling online scheme that deceives consumers into providing money and their personal information . . . by promising a quick and easy government service" such as renewing a license, when in fact, the consumers would only receive "a PDF containing publicly available, general information about the service they sought." (ECF No. 135, at 1.) The Court granted the FTC's motion and stated it would hold a show cause hearing contemporaneously with trial in the *On Point Matter* at which time the Court would determine why Katz and the Entity Defendants should not be held in contempt for violating the settlement. (ECF No. 136.)

The FTC now claims, through discovery in the *On Point Matter*, that they learned certain individual defendants in the *On Point Matter*, Robert Zangrillo, Brent Levison, and Elisha Rothman, were aware of Katz's settlement with the FTC but despite their awareness of the settlement, acted in concert with Katz to violate its terms. Accordingly, the FTC asks the Court to hold a show cause hearing with respect to these individuals as well. The FTC also asks the Court to enter a preliminary injunction and freeze the assets of these individuals, Burton Katz, and the Entity Defendants pending conclusion of these contempt proceedings.

## 2. Legal Standards

### A. Contempt

The Court has authority to enforce its orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Contempt is established where there is clear and convincing evidence that the violated order 1) was valid and lawful; 2) was clear and unambiguous; 3) and where the alleged contemnor had the ability to comply. *FTC v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010). The Court may only enter "an order requiring the [d]efendant to show cause why the defendant should not be held in contempt" if "the court finds that the conduct as alleged would violate the order." *Mercer v. Mitchell*, 908 F.2d 763, 765 (11th Cir. 1990). Pursuant to Federal Rule 65(d)(2), the Court must also find that the individual in question had "actual notice" of the order in question. Fed. R. Civ. P. 65(d)(2).

[1] The Entity Defendants are: On Point Global LLC; On Point Employment LLC; On Point Guides LLC f/k/a Rogue Media Services LLC; Dragon Global Holdings 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.

**B. Preliminary Injunction**

"[I]n determining whether to grant a preliminary injunction . . . a district court must 1) determine the likelihood that the FTC will ultimately succeed on the merits and 2) balance the equities." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991). To obtain a preliminary injunction, the FTC need not show irreparable harm. *Id.* at 1218. The FTC is also freed "from its burden of" showing "a 'substantial' likelihood of success" as is required by private litigants. *FTC v. Sterling Precious Metals, LLC*, 894 F. Supp. 2d 1378, 1383 (S.D. Fla. 2012) (Marra, J.).

**3. Analysis**

**A. Contempt Proceedings**

The FTC states in its motion that at the time it moved for contempt against Katz, the FTC was not aware that Zangrillo, Levison, and Rothman each had notice of Katz's settlement, but through discovery in the *On Point Matter*, came to learn that each of these individuals had contemporaneous knowledge of the order and acted in concert with Katz to violate it while carrying out the deceptive practices that gave rise to the *On Point Matter*.

Zangrillo, Rothman, and Levison contend the Court should not require them to show cause why they should not be held in contempt because 1) Section II the FTC's settlement with Katz is not clear, definite, unambiguous, valid or enforceable; 2) the FTC has failed to show that these individuals had notice of the order; and 3) in any event, the FTC has failed to show non-compliance.

**a. The *Acquinity* Settlement**

In support of their arguments that they should not be made to show cause, Zangrillo, Levison, and Rothman state that the FTC's order was not clear and unambiguous and that it was not a valid and lawful settlement. Moreover, they state that the order does not describe in sufficient detail the conduct that was to be enjoined in violation of Federal Rule 65. Specifically, these individuals state that they believe the FTC's settlement with Katz is a "quintessential obey the law injunction" which provides little information to Katz or others what conduct is enjoined, instead simply telling them they must obey the law. (ECF No. 159, at 8.)

In response, the FTC acknowledges that an "obey the law" order may be too ambiguous to be enforced, but notes that the Eleventh Circuit has held there is nothing inherently wrong with an injunction instructing individuals to obey the law, and in any event, the FTC claims that the FTC's settlement with Katz required Katz and others affiliated with Katz from doing more than simply obeying the FTC Act. *See FTC v. Nat'l Urological Grp. Inc.*, 786 F. App'x 947, 956 n.3 (11th Cir. 2019) ("an injunction that simply tells a defendant to obey the law can be too

ambiguous. But aside from concerns about clarity, there is nothing inherently wrong with an injunction that instructs a party to comply with a specific law.").

The Court agrees with the FTC that Section II of the FTC's settlement with Katz is not so vague and ambiguous as to be an impermissible obey the law injunction. The FTC Act provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). The FTC's settlement with Katz, however, enjoined Katz and others from "in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of any product or service . . . making, or assisting others in making, expressly or by implication, any false or misleading material representation, including representations as to the cost, performance, efficacy, nature, characteristics, benefits, or safety of any product or service, or concerning any consumer's obligation to pay for charges for any product or service." (ECF No. 132, at 3.) The settlement, therefore, is more specific than the much broader provision of the FTC Act which makes deceptive acts or practices in commerce unlawful, generally speaking.

Moreover, as the FTC notes in its briefing, fencing-in relief has been approved by the Supreme Court, which allows the FTC to "prohibit[] respondents from engaging in similar practices with respect to 'any product' they advertise." *FTC v. Colgate-Palmolive, Co.*, 380 U.S. 374, 384 (1965). In *Palmolive*, the Supreme Court stated "the propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 394-95. Here, the conduct which led to the Katz settlement in *Acquinity* was not so different from the conduct which led the FTC to file its complaint in the *On Point Matter* and therefore has a reasonable relation to the unlawful practices previously found to exist. For instance, both the *Acquinity* action and the *On Point Matter* involved a scheme in which Katz and others fraudulently represented to consumers that products or services were available to them when in fact that was not the case. In the *Acquinity* action, the scheme involved luring consumers to "fraudulent 'free merchandise websites'" requiring the consumers to provide personal information for products that were not available. That information was then utilized to target victims of Katz's "mobile-billing cramming scheme." Similarly, in the *On Point Matter*, Katz and others developed "patently misleading" websites in order to trick consumers into thinking they could easily obtain government services through such websites, when no such government service was provided—all the consumers would receive was a guide that could have been obtained for free elsewhere on government sites. Thus, Section II of the Katz settlement, in addition to not being an "obey the law" injunction, appropriately ring-fences Katz and others from deceiving

DOCKET ALARM

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

**LAW FIRMS**
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

**FINANCIAL INSTITUTIONS**
Litigation and bankruptcy checks for companies and debtors.

**E-DISCOVERY AND LEGAL VENDORS**
Sync your system to PACER to automate legal marketing.