

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 00-514-CIV-GOLD/SIMONTON

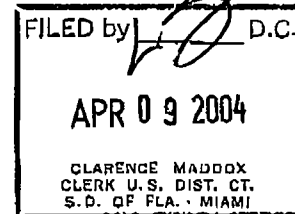
FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERITEL PAYPHONE DISTRIBUTORS,
INC., a Florida corporation and ROY B.
GOODMAN, individually and as an officer
of the corporation,

Defendant(s).

**ORDER IMPOSING FINAL CIVIL CONTEMPT REMEDIES**

This Cause is before the Court upon Plaintiff Federal Trade Commission's ("FTC" or "the Commission") request for a judgment against Respondents, jointly and severally, in the amount of \$6,412,035.13. (FTC's Reply to the Receiver's Report, DE #121, filed December 19, 2003). The Individual Respondents filed a Response (DE #134) on March 2, 2004). The Court held a hearing on the FTC's motion on March 5, 2004. Upon review of the parties' arguments, the record, applicable statutes, and case law, the FTC's motion is GRANTED, and Respondents are jointly and severally liable in the amount of \$6,412,035.13.

Background

The Court issued an Order (DE #104, filed October 15, 2003) holding Defendants Ameritel and Goodman, along with Public Telephone Corporation, Lenora Kaus, Nathan Matalon, Kimberly Matalon, American Payphone Distributors, LLC, and Jakina Consulting Corporation (collectively "Respondents") in contempt for violating a Stipulated Judgment

and Order for Permanent Injunction ("Permanent Injunction"), which was filed on February 1, 2001 (DE #62). The findings of fact in the Civil Contempt Order are incorporated herein.¹ Respondents violated the Permanent Injunction by making misrepresentations to consumers regarding likely profits of a payphone business venture, renaming themselves Public Telephone Corporation ("PTC") without informing the Federal Trade Commission of the change, and continuing to deceive customers under the new name. The Order appointed David R. Chase as Receiver to, among other things, file a report detailing the amount of income Respondents received or generated. The Order also granted the FTC's request for \$2.7 million in damages. The Receiver's report was to propose the manner in which this amount was to be distributed among defrauded consumers.

The Receiver submitted his Report (DE #120) on December 15, 2003, in which he stated that the gross sales for PTC exceeded \$6.4 million. According to the Report, the available redress at that time totaled \$1,190.31. The Receiver submitted another Report (DE #126, filed February 12, 2004) detailing the transfers from Corporate Respondents to Individual Respondents and seeking compensation for receivership services. Based on the records available to the Receiver at the Corporate Respondents' premises, he determined that these Corporations transferred \$938,872.62 to the Individual Respondents. Due to scrivener's errors in the February 12, 2004 Report, the Receiver

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Part of this Final Order enters disgorgement and restitution remedies. The Eleventh Circuit calls such contempt remedies "non-injunctive equitable sanctions." *McGregor v. Chierico*, 206 F.3d 1378, 1387 (2000). Other circuits refer to disgorgement as akin to an injunction, *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993), and might under these circumstances require the Civil Contempt Order findings of fact to be restated in the remedial order because Rule 65(b), Fed. R. Civ. P., requires that every injunction set forth the reasons for its issuance and "not by reference to the complaint or other document."

submitted a Supplemental Report (DE #136, filed March 10, 2004) which indicated that the Corporations actually transferred \$923,122.62 to the Individual Respondents.

Legal Standards

Proper civil contempt sanctions either coerce compliance with the order, or redress consumer injury. *In re: Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002); *McGregor v. Chierico*, 206 F.3d 1387 (11th Cir. 2000); *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 465 (S.D. Fla. 1998); see also *United States v. Tankersley*, 277 F. Supp.2d 908, 913-14 (N.D. Ind. 2003) ("injunctions, restitution, disgorgement—are equitable remedies, which, by all historical accounts, are civil, not criminal, sanctions."). Remedies for violations of the FTC Act are instructive in fashioning contempt remedies. See *McGregor*, 206 F.3d at 1387-88. Under the FTC Act, district courts retain their full equitable powers, *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984), including the power to order disgorgement to "deprive the wrongdoer of his ill-gotten gain." *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (citing, among other precedents, *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)); accord, *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) ("[W]e conclude that Section 13(b) [of the FTC Act] permits a district court to order a defendant to disgorge illegally obtained funds").

Further, the Court, in exercising its equitable power to order disgorgement, has the discretion to disregard claims for offset of business expenses. *Febre*, 128 F.3d at 536; *SEC v. United Monetary Services, Inc.*, No. 83-8540-CIV-PAINE, 1990 WL 91812 (S.D. Fla. 1990); *SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 fn.20 (E.D. Mich. 1991) ("it is clear that it is within the district courts' equitable discretion to disallow expenses

incurred in perpetration of the fraud”), *aff’d* 12 F.3d 214 (6th Cir. 1993). For example, courts have explicitly disallowed expenses for overhead and commissions, because the manner in which the defendants “chose to spend their misappropriation is irrelevant” as to disgorgement. *Great Lakes Equities*, 775 F. Supp. at 214; *see also United Monetary Services*, 1990 WL 91812 at *9 (disallowing offsets for sales commissions and printing costs); *SEC v. TLC Investments and Trade Co.*, 179 F. Supp. 2d. 1149, 1157 (C.D. Cal. 2001) (deductions for business expenses in carrying out a fraudulent scheme “are hardly appropriate or legitimate”); *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D. N.Y. 1987) (disallowing offsets for every alleged reason, including corporate salaries and charitable giving). Fixed “expenses would be incurred whether or not the fraud took place;” consequently, fraud proceeds used to pay fixed expenses constitute unjust enrichment that should be disgorged. *Great Lakes Equities*, at 215.

Findings of Fact and Conclusions of Law

Applying these well-established legal principles to the facts of this case leads the Court to hold Respondents jointly and severally liable for the amount specified in the Receiver's Reports. Because the Court found that the Respondents failed to rebut the evidence of violations of the Permanent Injunction offered by the Commission, the Court has the power to order the Respondents to compensate injuries in the amount of all money received by Ameritel and PTC after the date of the Permanent Injunction.

Respondents argued that portions of the amounts transferred to the Individual Respondents actually paid the business expenses of the Corporate Respondents and that the amount disgorged against each of them should be reduced by the amount they each

used to pay the business expenses of the Corporate Respondents. As explained above, however, the Court has the discretion to disregard claims for offset of business expenses. There is no evidence that the Respondents conducted any legitimate business that was not prohibited by the Permanent Injunction. Accordingly, the Court denies Respondents' request to offset the damages for business expenses, and Respondents are jointly and severally liable for the gross sales of Ameritel and PTC from March 28, 2001 (the date of the first proven misrepresentations in violation of the Permanent Injunction) to September 10, 2003, the date where Respondents were to show cause before the Court why they should not be held in civil contempt. *McGregor*, 206 F.3d at 1387-88; *FTC v. Gill*, 183 F. Supp.2d 1171, 1186 (C.D. Cal 2001).

Each Individual Respondent is responsible either for violating the Permanent Injunction or aiding and abetting violations of the Injunction. Roy Goodman violated the Permanent Injunction and was responsible for Ameritel's violations. Contempt Order., pp.10-15. PTC, Ameritel's successor which continued the violations of the Permanent Injunction, funneled money to Mr. Goodman, via American Payphone Distributors. *Id.*, pp.25-26. Based on the Receiver's Supplemental Report, which detailed transfers from the Corporate Respondents to the Individual Respondents, Roy B. Goodman is individually liable for \$231,877.88, and he shall disgorge and pay \$231,877.88 to the Receiver within 30 days after this Order.

Nathan Matalon aided and abetted the Respondents' violations of the Permanent Injunction. Contempt Order, pp.17-18. Mr. Matalon was also heavily involved with PTC, Ameritel's successor. *Id.*, p.21. Therefore, based on the Receiver's Supplemental Report,

Nathan Matalon is individually liable for \$424,229.37, and he shall disgorge and pay \$424,229.37 to the Receiver within 30 days after this Order.

Lenora Kaus aided and abetted the Respondents' violations of the Permanent Injunction. Contempt Order, pp.16-17. She was also heavily involved with PTC, Ameritel's successor. *Id.*, p.21. Thus, Lenora Kaus is individually liable for \$206,093.00, and she shall disgorge and pay \$206,093.00 to the Receiver within 30 days after this Order.

Finally, Kimberly Matalon aided and abetted the Respondents' violations of the Permanent Injunction. Contempt Order, p.17. She was also heavily involved with PTC, Ameritel's successor. *Id.*, p.21. Thus, the Court finds Kimberly Matalon individually liable for \$60,922.37, and she shall disgorge and pay \$60,922.37 to the Receiver within 30 days after this Order.

Individual respondents Roy B. Goodman, Nathan Matalon, Kimberly Matalon, and Lenora Kaus are hereby notified that each of them must make all reasonable efforts to pay to the Receiver the amounts ordered disgorged above. *See CFTC v. Wellington Precious Metals*, 950 F.2d 1525, 1529-30 (11th Cir. 1992); *In re: Lawrence*, 251 B.R. 630, 650-54 (S.D. Fla. 2000), *aff'd* 279 F.3d 1294 (11th Cir. 2002); *Piambino v. Bestline Products, Inc.*, 645 F. Supp. 1210, 1215 (S.D. Fla. 1986). A portion of this order is to remedy contempt via equitable disgorgement, not a money judgment. Accordingly, failure to comply with this order for disgorgement may be punished by contempt. *Wellington Precious Metals* (affirming incarceration as coercive remedy to secure compliance with disgorgement order); *In re: Lawrence*, 279 F.3d at 1300-1 (affirming incarceration for failure to comply with order to turn over assets to trustee); *Hodgson v. Hotard*, 436 F.2d 1110, 1113-14 (5th

Cir. 1971) (failure to pay pursuant to a Court order enforcing "public rights" is not merely enforceable by levy or execution, but rather civil contempt).

The Court has the power to order that amounts disgorged be used to compensate victims. *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998); *SEC v. R.J. Allen & Associates., Inc.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974). The Court orders the Receiver to accept the funds ordered disgorged by the Individuals and to preserve them to compensate purchasers of Ameritel's and PTC's business ventures sold in violation of the Permanent Injunction.

After subtracting the \$923,122.62 which is attributable to Individual Respondents, the Court concludes that Nathan Matalon, Kimberly Matalon, Roy B. Goodman, Lenora Kaus, Ameritel, PTC, Jakina Consulting Corp, and American Payphone Distributors are jointly and severally liable for the remaining \$5,433,871.44 in gross sales of Ameritel and PTC during the period of contempt. *See McGregor*, at 1389 (affirming contempt judgment in the amount of gross sales); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1088-89 (D.N.J. 1996) (subtracting individual liability amounts from overall joint and several liability), *aff'd* 124 F.3d 449 (3d. Cir. 1997); *SEC v. R.J. Allen*, 386 F. Supp. at 881 (corporations and individuals whose actions are inextricably interwoven are jointly and severally liable and required to restore to the Receiver the full amount received from the victims). Because Ameritel, PTC, Jakina Consulting Corp, and American Payphone Distributors are under the control of the Receiver, he may undertake all necessary efforts to bring assets, other than that owed by the Individual Respondents as disgorgement, into the Receivership Estate for purposes of satisfying the \$5,433,871.44 judgment.

Further, the court has the power in a contempt proceeding to appoint a permanent Receiver incident to the compensatory sanction for violations of the Permanent Injunction. Gill, 183 F. Supp.2d at 1186; see also *FTC v. Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1276-77 (S.D. Fla. 1999). The Court hereby appoints David R. Chase as permanent Receiver of the Corporate Respondents.

The Receiver has filed a request for compensation for the work performed thus far as a result of his appointment in this matter. A clear compensatory remedy for this portion of the contempt is for the Respondents to repay the Receiver for all amounts spent in performing his duties. See *United States v. Paccione*, 975 F.Supp. 537, 546 (S.D.N.Y. 1997) (compensatory fine payable to receiver for damages suffered as a result of violations of a TRO is proper civil contempt remedy). Given that these expenses would not have been incurred but for the contemptuous behavior of the Respondents, the Court hereby exercises its equitable discretion to disallow any offsets claimed by the Respondents' for business expenses. See *Febre*; *United Monetary Services*; and *Great Lakes Equities*, supra. The Receiver's compensation shall be paid from amounts collected, received and possessed by the Receiver or the Federal Trade Commission pursuant to this Order.

This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies. Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Roy B. Goodman shall disgorge \$231,877.88 within 30 days after this Order. Roy B. Goodman shall pay the disgorged assets to the Receiver.

2. Nathan Matalon shall disgorge \$424,229.37 within 30 days after this Order. Nathan Matalon shall pay the disgorged assets to the Receiver.

3. Lenora Kaus shall disgorge \$206,093.00 within 30 days after this Order. Lenora Kaus shall pay the disgorged assets to the Receiver.

4. Kimberly Matalon shall disgorge \$60,922.37 within 30 days after this Order. Kimberly Matalon shall pay the disgorged assets to the Receiver.

5. Respondents are jointly and severally liable to the Commission, for the benefit of affected consumers, for the violations of paragraphs I and II of the Permanent Injunction as detailed in the Court's findings of fact in the Contempt Ordered filed October 15, 2003. Judgment is entered in favor of the Plaintiff, Federal Trade Commission against Roy. B. Goodman, Nathan Matalon, Kimberly Matalon, Lenora Kaus, Ameritel Payphone Distributors, Inc., Public Telephone Corporation, Jakina Consulting Corp., American Payphone Distributors, LLC, jointly and severally, in the sum of \$5,433,871.44.

6. David R. Chase is appointed as permanent Receiver, with the full power of an equity receiver, for the Corporate Respondents, their subsidiaries, successors and assigns, and of all the funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by the Corporate Respondents, with directions and authority to accomplish the following:

- a. Take full control of the Corporate Respondents, with the power to retain or remove, as the Receiver deems necessary or advisable, any officer, director, independent contractor, employee, or agent of these entities;
- b. Collect, marshal, and take custody, control and possession of all the funds, property, premises, accounts, rights of action, mail and other assets of, or in the possession or under the control of, or held for the benefit of, the Corporate Respondents, wherever situated, the income and profits therefrom, and all sums of money now or hereafter due or owing to the Corporate Respondents, with full power to collect, receive and take possession of all goods, chattels, rights, credits, monies, effects, lands, leases, books and records, limited partnership records, work papers, and records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of other individuals, partnerships or corporations whose interests are now held by or under the direction, possession, custody or control of the Corporate Respondents; *provided* that in his execution of the powers in this subparagraph, the Receiver shall credit the collection, receipt or possession of the assets of any Individual Respondent obtained within 30 days after this Order toward the payment of that Individual Respondent's disgorgement amount set forth above.
- c. Perform all acts necessary to conserve, hold, manage, and preserve the value of those assets, in order to prevent any irreparable loss, damage and

injury to consumers who purchased business ventures or franchises from the Corporate Respondents;

- d. Obtain, by service of this Order, documents immediately from any financial or brokerage institution, escrow agent, title company, commodity trading company, business entity, trust, or person concerning the nature, location, status, and extent of the Respondents' assets. Any such request by the Receiver seeking documents of the Corporate Respondents' subsidiaries, affiliates, divisions, successors, and assigns shall be accompanied by a letter signed by the Receiver, including the name of such subsidiary, affiliate, division, successor, or assign.
- e. Enter into such agreements in connection with administration of the receivership, including, but not limited to: (1) the retention and employment of investigators, attorneys and accountants of the Receiver's choice, including, without limitation, members and employees of the Receiver's firm, to assist, advise, and represent the receiver, and (2) the movement and storage of any equipment, furniture, documents, records, files or other physical property of the Corporate Respondents;
- f. Institute such actions and legal proceedings, for the benefit and on behalf of the Corporate Respondents' creditors, as the Receiver deems necessary against those individuals, corporations, partnerships, associations and or unincorporated organizations, which the Receiver may claim to have wrongfully, illegally or otherwise improperly misappropriated or transferred monies or other proceeds directly or indirectly traceable from consumers who

