IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. Centurion Financial Benefits LLC, *et al.*, Defendants.	Civil Action No. 05 C 5442 Judge Moran Magistrate Denlow

PLAINTIFF FEDERAL TRADE COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER TO SHOW CAUSE WHY FRANK BELLISSIMO AND IRA RUBIN SHOULD NOT BE HELD IN CONTEMPT

I. INTRODUCTION

As outlined in great detail in the exhibits supporting the Federal Trade Commission's motion, individual defendant Frank Bellissimo and non-party Ira N. Rubin repeatedly and brazenly violated multiple provisions of this Court's Preliminary Injunction Order ("PI"). Specifically, the FTC has established that Bellissimo and Rubin commenced operating a telemarketing scam that sold non-existent government grants to U.S. consumers and then transferred hundreds of thousands of dollars of proceeds from this scam mere months after being served with orders explicitly prohibiting such conduct. Bellissimo and Rubin have produced *no evidence whatsoever* rebutting their well-documented violations of the PI and neither denies any of the FTC's claims. Similarly, neither individual contests that they were subject to the PI, questions whether the provisions they are accused of violating were sufficiently clear, or

challenges whether it was possible for them to actually abide by these provisions.[1] Instead, Bellissimo and Rubin each improperly invoke their Fifth Amendment right against self-incrimination and assert an "impossibility" argument that is both baseless and irrelevant. Bellissimo also claims that the FTC has not met its burden, suggesting, in essence, that the FTC has him confused with another Canadian telemarketer (and associate of Ira Rubin) named Frank Bellissimo. None of these objections represent a valid defense to the FTC's allegations. The Court should therefore find Bellissimo and Rubin in contempt.[2]

II. THE FTC HAS SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT BELLISSIMO HAS VIOLATED THIS COURT'S ORDERS[3]

As the moving party in a civil contempt proceeding, the Commission bears "the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order." *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing,* 207 F.3d

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[1] Indeed, given Bellissimo and Rubin's longstanding involvement with scams of this nature and their unhesitating willingness to violate court orders, it is a virtual certainty that they are continuing to engage in the same fraudulent conduct underlying the FTC's motion.

[2] The Commission submits that its contempt motion should be decided on the written record. Just as courts decide summary judgment motions on the basis of written testimony, courts may also make contempt findings in the face of "overwhelming evidence" supporting contempt when the alleged contemnors do "not present any arguments which [create] any issue of material fact." *U.S. v. Ayres*, 166 F.3d 991, 994 (9th Cir. 1999) (district court did not violate due process by finding defendant in contempt on the basis of uncontroverted affidavits offered in support of contempt finding) (quoting *Commodity Futures Trading Commission v. Premex, Inc.*, 665 F.2d 779, 782 n.2 (7th Cir. 1981.)) This case is particularly suited for such a summary determination because neither Bellissimo nor Rubin have offered any evidence controverting the overwhelming evidence presented by the FTC in support of its motion.

[3] Unlike Bellissimo, Rubin does not challenge the sufficiency of the FTC's evidence, effectively conceding that the Commission has met its initial burden. The FTC therefore addresses its reply on this issue solely to Bellissimo.

500, 505 (8th. Cir. 2000); *see also CFTC v. Wellington Precious Metals, Inc.,* 950 F.2d 1525, 1529 (11th. Cir. 1992); *In re Kademoglou,* 199 B.R. 35, 36 (N.D. Ill. 1996). If a violation is shown, "[t]he defendant's intent regarding compliance with the order is irrelevant." *SEC v. Showalter,* 227 F. Supp. 2d 110, 120 (D.D.C. 2002); *see also SEC v. Yun,* 208 F. Supp. 2d 1279, 1285 (M.D. Fla. 2002); *SEC v. Bilzerian,* 112 F. Supp. 2d 12, 16 (D.D.C. 2000) ("Bilzerian's intent is irrelevant; the Court need not find that his failure to comply with the orders was willful or intentional.").

The Commission clearly has satisfied its initial burden here. It has shown that the Preliminary Injunction entered by the Court: (1) froze Bellissimo's assets, prohibiting him or any third party from transferring, concealing, dissipating, disbursing, or otherwise disposing of such assets; (2) prohibited Bellissimo from operating a new business without first making certain disclosures to the Commission about the nature of the new business; (3) prohibited third parties from providing any payment processing services to Bellissimo; and (4) prohibited Bellissimo and anyone with actual notice of the order from making misrepresentations in connection with the sale of any product or service. (*See* FTC's Mot. for Order to Show Cause at ¶ 6.) The FTC has further shown that Bellissimo and Rubin systematically violated all of these provisions through their operation of a telemarketing scam, doing business as Easton Consulting Group and Potomac Fidelity Group, that sold non-existent government grants to U.S. consumers; through Rubin's provision of payment processing services to Bellissimo and transfer of over half a million dollars in scam proceeds to Canadian bank accounts controlled by Bellissimo; and through Bellissimo's failure make any of the required disclosures about his new business to the Commission. (*See id.* at ¶¶ 18 - 27.)

Having produced no evidence of his own, Bellissimo's challenge rests solely on his interpretation of the FTC's evidence. In particular, Bellissimo disputes whether the FTC's evidence clearly and convincingly shows that he controlled and benefitted financially from the Easton Consulting and Potomac Fidelity ventures. Among other things, this evidence shows:

- Email messages dated July 10 and July 13, 2006 from an individual with the initials "FB" at the address pfidelity@@gmail.com negotiating fees and other terms of a payment processing agreement for a telemarketing venture with Ira Rubin. FB asks Rubin to call him at 647-333-0251. (McKenney Dec. ¶ 5(c) Att C at pp.3-5.)
- Email messages with the subject heading "potomac" dated August 1, August 4, and August 7, 2006 from "FB" at pfidelity@gmail.com discussing the uploading and processing of "Potomac" deals as well as a $5,000 advance requested by FB to meet business operating expenses. (*Id.* at pp.8-10.)

- An email message with the subject heading "Easton" dated August 8, 2006 from pfidelity@gmail.com to Ira Rubin instructing Rubin where to wire a $5,000 advance requested by "FB" early that same day. (*Id.* at 11.) The wire information provided in the August 8 message to Rubin is the same Quebec bank and bank account number to which Rubin wired proceeds of the Easton and Potomac scams. (*See* Supplemental Dec. of Douglas McKenney ¶¶ 2-3 Att. A.)

- An email message dated August 14, 2006 from "FB" at pfidelity@gmail.com to Ira Rubin asking for an advance of $10,000 and requesting that Rubin call FB at 647-333-0251. (McKenney Dec. ¶ 5(c) Att. C at p.13.)

- An email message dated August 17, 2006 from "FB" at pfidelity@gmail.com to Ira Rubin asking for a $15,000 advance and promising "[l]ots of good business in the Easton account...." (*Id.* at p.14.)

- An email message dated August 25, 2006 from "FB" at fbellissimo1@telus.blackberry.net to Ira Rubin asking for an advance and requesting that Rubin call him at 647-333-0251. (*Id.* at p. 23.)

- An email message dated August 18, 2006 from Ira Rubin to "FB" at "fbellissimo1@telus.blackberry.net" notifying FB of wires that day for Easton and Potomac. (*Id.* at p. 24.)

- An email exchange dated August 31, 2006 between Ira Rubin and "FB" at fbellissimo1@telus.blackberry.net in which Rubin and FB discuss the importance

> keeping their stories straight regarding the manner in which FB's account with Rubin was set up. Rubin advises: "We are okay as long as your story to him is that wayne called up here directly and spoke with debra who set up the account." (*Id.* at p. 27.) Debra Kasputin served as Rubin's Director of ACH Operations. (*Id.* at ¶ p. 29.) Rubin allowed Bellissimo to set up the Potomac and Easton accounts using a third party named Wayne Delormier. (*Id.* at pp.29-35; *see also* FTC's Mot. for Order to Show Cause at ¶ 12 fn.11.)

To summarize, the FTC has demonstrated that an individual with Bellissimo's initials, "FB," using an email address with the prefix "fbellissimo1," requested tens of thousands of dollars in "advances" related to a telemarketing venture doing business as "Easton" and "Potomac" from Ira Rubin, a known associate of Bellissimo. The evidence further establishes that although Rubin sometimes received messages related to the Easton and Potomac entities from an email address with the prefix "pfidelity," these messages came from an individual who had the same phone number and same initials as the person using the "febellissimo1" account. Moreover, "FB" instructed Rubin to wire the requested advances into the same Canadian bank account that received over a half million dollars in proceeds from the Easton and Potomac ventures. In other words, Bellissimo has given the Court no credible reason to question whether the FTC's evidence clearly and convincingly establishes that he conceived of the Easton and Potomac telemarketing scams, procured payment processing services for the scams from Rubin, and received $556,189.39 in proceeds of the scams – all in violation of the PI.

III. BELLISSIMO AND RUBIN'S BASELESS IMPOSSIBILITY ARGUMENT IS NOT A DEFENSE TO THE COMMISSION'S ALLEGATIONS OF CONTEMPT

Once the Commission has made a prima facie showing that Bellissimo and Rubin violated the PI, the burden of production then shifts to the alleged contemnors, who may defend on the grounds that they were unable to comply. *See United States ex rel. Thom v. Jenkins,* 760

F.2d 736, 739 (7th. Cir. 1985). To establish a present inability to comply with the Court's order, Bellissimo and Rubin must show: "(1) that they were unable to comply, explaining why categorically and in detail; (2) that their inability to comply was not self-induced; and (3) that they made in good faith all reasonable efforts to comply." *Chicago Truck Drivers,* 207 F.3d at 506 (citing *FTC v. Affordable Media*, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) and *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1527-29 (11th Cir. 1992)).

Neither Bellissimo nor Rubin assert that they were unable to comply with the PI provisions they are accused of violating. Instead, for different reasons, each asserts that it would be impossible to comply with an order requiring them to return the $657,648 stolen from consumers as a result of their government grants scam. Bellissimo and Rubin are, of course, free to raise this argument if the Court finds them in contempt of the PI. That said, their purported inability to comply with one of the remedies sought by the FTC is not relevant to the central question of whether the alleged violations actually took place.

Even if Bellissimo and Rubin's present ability to repay the stolen funds constituted a valid defense to the FTC's charges of contempt, their impossibility assertions fall well short of the mark. Bellissimo's argument rests solely on a vague, unsigned, and unsupported statement made on his behalf by his attorney that the funds in question are no longer in Bellissimo's possession. (*See* Bellissimo's Opp. at pp.5-6.) Rubin's profession of impossibility is based on the existence of an asset freeze entered in a separate FTC action filed in the Middle District of Florida. Rubin claims that the Florida order prevents him from returning any proceeds from the government grants scam. (*See* Rubin's Opp. at pp.4-5.) Neither individual explains why

categorically and in detail they cannot repay the funds; why this purported inability is not self-induced; or how they have made all reasonable efforts to comply. For example, neither Bellissimo nor Rubin claim not to possess $657,648, much less that they are so impoverished that they are unable to pay even a portion of this amount. Similarly, Rubin does not indicate what steps, if any, he has taken to persuade the Florida court to relax the asset freeze in anticipation of satisfying a contempt judgment by this Court.[4]

Bellissimo and Rubin's assertions of impossibility do not constitute a valid defense to the FTC's contempt allegations. Even if they did bear some relevance to the central issue of whether Bellissimo and Rubin should be held in contempt for violating the PI, neither individual comes close to satisfying the heavy burden of establishing a legitimate impossibility defense.

IV. BELLISSIMO AND RUBIN'S ATTEMPTS TO INVOKE THE FIFTH AMENDMENT ARE INVALID

In an attempt to excuse their non-compliance with the PI, both Bellissimo and Rubin claim in their opposition that they fear any admission or denial of the FTC's allegations "either would directly incriminate [them] or furnish a link in the chain of evidence needed to prosecute [them] in violation of [their] privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States of America." (Rubin and Bellissimo's Opp. at 2.) They go on to assert that the facts giving rise to the FTC's "Contempt Motion can easily serve as the basis for a criminal prosecution of offenses including, but not limited to, the felonies of mail fraud, wire fraud, or conspiracy to commit the foregoing offenses." (*Id.*)

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[4] Indeed, counsel for the FTC has already represented to Rubin's attorney that the Commission would support temporarily relaxing the Florida asset freeze to permit repatriation of funds associated with the government grants ventures.

As of this date, neither Bellissimo nor Rubin have asserted *on their own behalf* a Fifth Amendment privilege against self-incrimination. Any Fifth Amendment privilege that may be applicable here belongs to Bellissimo and Rubin themselves, not to their counsel, and they therefore must personally assert the privilege. *See United States v. Schmidt*, 816 F.2d 1477, 1481 n.3 (10th Cir. 1987) (stating that Fifth Amendment privilege against self-incrimination is a personal privilege and that appellants, not their counsel, were the proper parties to claim the privilege); *State ex rel. Butterworth v. Southland Corp.*, 684 F. Supp. 292, 294-95 (S.D. Fla. 1988) (holding that where interrogating party insisted that witness personally invoke privilege against self-incrimination, witness was required to do so). Thus far, Bellissimo and Rubin have not personally asserted their Fifth Amendment privilege, and as a result, they each remain in contempt of the PI.

Furthermore, the blanket assertion of the Fifth Amendment privilege that Bellissimo and Rubin appear to be attempting here would effectively preclude both the Commission and the Court from assessing the applicability of the privilege. It is not enough for Bellissimo and Rubin to broadly state that information related to their alleged violations of the PI would incriminate them -- this is an issue for the Court to decide. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("[The witness'] say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."). Yet before the Court may do so, Bellissimo and Rubin must show how particular admissions or denials regarding the FTC's allegations would be incriminating. Thus far, Bellissimo and Rubin have only indicated (through their attorney) that they do not want *any* relevant information regarding their compliance with the PI shared with unnamed criminal authorities. This is not a legitimate invocation of the Fifth

Amendment. *See U.S. v. Butler*, 211 F.3d 826, 832 (4th Cir. 2000) (district court correctly prohibited defendant from asserting his "inability to comply with a court order while at the same time refusing to answer any further questions on the issue through the invocation of his Fifth Amendment privilege.")

Even if Bellissimo and Rubin had validly asserted their Fifth Amendment privilege, the Court would be entitled to, and should, draw adverse inferences against them for their invocation of this privilege. It is well-established that, in the context of a civil case, it is appropriate for courts to draw adverse inferences from a party's refusal to testify. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389-91 (7th Cir. 1995).

Thus, in light of the significant amount of evidence supporting the FTC's contempt allegations, the lack of any evidence refuting these allegations, and the adverse inference that the Court is entitled to draw from the FTC's evidence, there can be no question that the Commission has met its burden in establishing Bellissimo and Rubin are in contempt of the PI. *See U.S. v. Barnette*, 902 F. Supp. 1522, 1541 (M.D. Fla. 1995) (in civil contempt proceeding, court may draw adverse inference from alleged contemnor's invocation of Fifth Amendment privilege that his testimony would not have been favorable on issue) (citing *Baxter*); *Jolly v. Pittore*, 170 B.R. 793, 796 (S.D.N.Y. 1994) (same).

IV. CONCLUSION

WHEREFORE, Plaintiff Federal Trade Commission respectfully requests that the Court enter an order to show cause why Frank Bellissimo and Ira Rubin should not be held in contempt for violating the Preliminary Injunction.

Respectfully Submitted,

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DATED: April 26, 2007

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of **Plaintiff Federal Trade Commission's Reply in Support of its Motion for Order to Show Cause Why Frank Bellissimo and Ira Rubin Should Be Held in Contempt** and the **Supplemental Declaration of Douglas McKenney** were served electronically via the EC/EMF system on April 26, 2007, upon the following: Michael Sharif Baig, Daniel Steven Reinberg, and Hector E. Lora.

/s James H. Davis
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