UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60907-CIV-MORENO

FEDERAL TRADE COMMISSION, et al.,

vs.

JEREMY LEE MARCUS, et al.,

Defendant.
_____/

DEFENDANT JEREMY MARCUS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION FOR ORDER TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CONTEMPT OF COURT

Defendant Jeremy Lee Marcus, through undersigned counsel, hereby files his response memorandum in opposition to the Receiver's motion for order to show cause why he should not be held in contempt of court (DE 330), and states as follows:

INTRODUCTION

This case is over. The FTC has won. Almost a year ago, Mr. Marcus stipulated to a final money judgment whereby he turned over millions of dollars in assets—everything he had. After consenting to the judgment, Mr. Marcus has nothing left. He lives with his elderly mother—he is sleeping on the couch in her residence and is supported by her financially. The FTC brought serious allegations, and Mr. Marcus did not fight them. There is nothing left to do here.

However, the Receiver now moves for a contempt order against Mr. Marcus because he allegedly failed to turn over certain personal property and other items in satisfaction of the stipulated judgment. The items at issue—which include wood drawers, a hand truck, and extension

ladders—have a purported value of $132,000, less than 1% of the value of the assets marshalled by the Receiver.

These items were left by Mr. Marcus at his prior residence when he vacated it and turned it over to the Receiver in March 2018—after which he has had no access to the residence. Indeed, the Receiver's own court filings confirm that the items were accounted for, and Mr. Marcus's prior counsel notified the Receiver that the items had been left in the residence. Yet, now, some eight months since Mr. Marcus vacated his residence, the Receiver moves for sanctions—and appears to seek incarceration—because it claims that these items have not been turned over.

The Court should deny the motion for several reasons. *First*, civil contempt is improper where—as here—it is used as means to collect on an unpaid money judgment. *Second*, there is no clear and convincing evidence that, as to the missing items, Mr. Marcus failed to turn them over. Moreover, where, as here, there is substantial compliance with an order, the Court should not enter contempt sanctions. *Third*, coercive civil contempt remedies are improper here because Mr. Marcus does not have the items and, thus, cannot be coerced to comply. Where an alleged contemnor cannot comply with the order at issue, civil contempt is unwarranted. *Finally*, if the Court does impose sanctions, they should be substantially less severe than incarceration, which is considered a drastic remedy only appropriate in extraordinary circumstances.

BACKGROUND

Relevant History

On May 8, 2018, the Federal Trade Commission filed a complaint against Mr. Marcus and some nineteen additional defendants alleging violations of the FTC Act. In April 2018, the parties, Mr. Marcus among them, notified the Court that they had reached a settlement pursuant to which Mr. Marcus would agree to a Stipulated Permanent Injunction and Monetary Judgment (the

"Judgment"). (DE 229, 231). Under the terms of the Judgment, Mr. Marcus—while not admitting any wrongdoing—agreed to entry of a money judgment against him, jointly and severally with all other Defendants, for more than $85 million. (DE 231 at 3, 8).

In partial satisfaction of that money judgment amount, Mr. Marcus agreed to relinquish to the Receiver *all* of his assets, in the form of real property, trusts, tax refunds, businesses, and personal property. (*Id.* at 9-17). Among the personal property Mr. Marcus agreed to turn over is the property the Receiver describes as the "Valuable Personal Property" and "Other Property," which has a combined market value of $132,755 (collectively, the "Property At-Issue"). *See* Mtn. at 4-5. The Judgment listed 29 separate items of "Valuable Personal Property"—the Receiver claims only a few of these are missing. (*Id*. at 16-17). And the "Other Property" in the Judgment included 83 different items, including night tables, shelves, rugs, arm chairs, extension ladders, and a wet-dry vac. (*Id*. at 17, App. A.). The Receiver claims 14 of these items are missing.

Mr. Marcus substantially complied with the Judgment, having turned over virtually everything of value he owns to the Receiver. As of July 2018, the Receiver had marshaled more than $35 million in assets, with another $10 million likely over the next six to nine months that followed his July 2018 report to the Court. (DE 274 at 4).

As of March 2, 2018, prior to the entry of the Judgment, all of the Property At-Issue was inside Mr. Marcus's residence when the Receiver conducted an inspection of the property and prepared an inventory of its contents. (DE 330-1 at 2). Shortly thereafter, Mr. Marcus turned over to the Receiver, and vacated, his residence located at 300 Royal Plaza Drive, Fort Lauderdale, Florida. (DE 212). The Property At-Issue remained inside Mr. Marcus's home when he surrendered the property to the Receiver. Later, the Receiver filed his Third Interim Report with the Court on July 19, 2018, stating that Property At-Issue was within the Receiver's custody and

control, and either located at Mr. Marcus's prior residence at 300 Royal Drive, or with Moecker & Associates, the entity the Receiver had retained to conduct private sales or auctions of Mr. Marcus's property.[1] (DE 274 at 18, DE 274-3).[2]

In addition, in the months preceding and post-dating the Judgment, there was constant communication between Mr. Marcus's prior counsel and Receiver's counsel regarding compliance with the Judgment. *See, e.g.*, Mtn., Ex. A, Ex. B (DE 330-1) (April 27, 2018 e-mail from Mr. Marcus's prior counsel: "I have left you a few messages about Jeremy's turnover obligations under the stipulated order."); Ex. C (DE 330-1) (May 15, 2018 e-mail from Mr. Marcus's prior counsel to Receiver's counsel: "I know you've been busy with other turnover issues, but I am still waiting to hear back from you on the turnover items we previously discussed and that I e-mailed you. . . . You mentioned last time we spoke that you understood that the ball was within your court and that you wouldn't hold it against Jeremy [Marcus] by running off to court. We just want to ensure that he fulfills his obligations under the order. . . ."). Among that constant back and forth, Mr. Marcus's prior counsel communicated to Receiver's counsel via e-mail that the Property At-Issue was left in the Residence, consistent with the Receiver's Third Interim Report. *See* Mtn., Ex. A, Ex. I (DE 330-1) (June 27, 2018 e-mail from Rachel Hirsch to Greg Garno).

ARGUMENT

A. LEGAL STANDARD

Civil contempt requires that the Court find the alleged contemnor "willfull[y] disregard[ed] the authority of the Court. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002).

[1] The Receiver states this report was a mistake. Mtn., Ex. A ¶ 12. To the extent, as the Receiver now insists, the Property At-Issue was not within his custody or control on July 19, 2018, the Receiver has offered no explanation as to why he thought otherwise at the time he filed his Third Interim Report, only a few months after the Judgment was entered.

A finding of civil contempt must be supported by clear and convincing evidence. *Id.* Civil contempt sanctions must serve one of two purposes: to coerce the contemnor into compliance or to compensate the complaining party for losses sustained as a result of the contempt. *FTC v. Slimamerica*, No. 97-civ-06072, 2011 WL 882109, at *3 (S.D. Fla. Mar. 9, 2011). When fashioning a sanction to secure a party's compliance, courts "should consider 'the character and magnitude of the harm threatened by continued contumacy and the probable effectiveness of any suggested sanction in bringing about the result desired." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991).

A coercive contempt sanction comes with some limitations; for instance, once a contemnor's contumacious conduct has ceased or the contempt has been purged, no further sanctions are permissible. *FTC v. Leshin*, 719 F.3d 1227, 1231 (11th Cir. 2013). Any sanction should not be any greater than necessary to ensure compliance. *FTC v. Slimamerica*, 2011 WL 882109, at *3. Otherwise, they lose their coercive effect and become punitive. *In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002). The court must make an individual determination in each case whether there is a realistic possibility that the contemnor will comply with the order. *Id.*

While incarceration is an available sanction for civil contempt, it is a drastic one that should be used sparingly, and only if the alleged contemnor has the ability to pay and would subject to release upon payment of the sanction or upon a showing that he is financially unable to pay. *In re Falck*, 513 B.R. 617, 619 (S.D. Fla. Bankr. 2014) (noting that "a person incarcerated as a result of civil contempt must have the key to his jail cell in his pocket"). Instead, courts should endeavor to apply the least possible sanction necessary to ensure compliance with an order, which, in this case, incarceration surely is not. *See, e.g.*, *SEC v. Faulkner*, No. 3:16-cv-1735, 2019 WL 277621, at *6 (N.D. Tex. Jan. 22, 2019); *Giuliano v. N.B. Marble Granite*, No. 11-MC-753, 2014 WL

2805100, at *7 (E.D.N.Y. Jun. 20, 2014); *In re Free*, 466 B.R. 48, 62 (W.D. Pa. 2012).

B. THE COURT SHOULD NOT HOLD MR. MARCUS IN CONTEMPT

For several reasons, the Court should not hold Mr. Marcus in contempt—and it especially should not order him to be incarcerated as a contempt sanction.

1. Civil Contempt is Not Appropriate Against a Judgment Debtor for Failure to Satisfy a Money Judgment

As an initial legal matter, it is improper to hold Mr. Marcus in contempt for his failure to satisfy the money judgment. "It is . . . clear that when a party fails to satisfy a court-imposed money judgment the appropriate remedy is a writ of execution, not a finding of contempt." *Combs v. Ryan's Coal Co*., 785 F.2d 970, 980 (11th Cir. 1986). Yet, that is precisely what the Receiver is doing. Under the Judgment—described as a "monetary judgment" in its title—Mr. Marcus consented to the turnover of numerous assets "in partial satisfaction of the judgment." (DE 231 at 16). In addition to turning over all of his real estate and other material assets, Mr. Marcus turned over nearly 100 separate items comprising the so-called "Valuable Personal Property" and "Other Property." The Receiver claims that certain items are missing and have not been turned over, and appears to seek a contempt sanction of incarceration on that basis. But it cannot obtain a contempt remedy in pursuit of satisfaction of a money judgment. *See, e.g., Forry v. Federated Fin. Servs., Inc*., 2010 WL 11590869, at *2 (S.D. Fla. Jan. 25, 2010), R&R adopted, No. 01-7089-CIV, 2010 WL 680836 (S.D. Fla. Feb. 25, 2010) ("Because the issue now involves purely a monetary payment, a finding of contempt is an inappropriate remedy*"); In re Smith*, Bankr. No. 04-01851, 2007 WL 2429450, at *1 (Bankr. D.C. Aug. 23, 2007) ("A court's contempt powers are not ordinarily used in the enforcement of a monetary judgment.")

The Receiver may argue that the Judgment is not a pure money judgment, but instead was "equitable monetary relief," as described in the order, and thus can be enforced by contempt. (DE

330 at 8). But that is not correct. The $83 million Judgment amount was premised on the FTC's calculations of Mr. Marcus's ill-gotten gains—*i.e.*, a disgorgement amount. *See* Amended Complaint (DE 127) ¶ 95. In *Kokesh*, a relatively recent decision, the Supreme Court found that SEC disgorgement—which is akin to FTC disgorgement—is a penalty. *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1642 (2017) ("[w]e hold that SEC disgorgement constitutes a penalty.").

The Supreme Court has repeatedly noted that penalties are not equitable remedies. *Marshall v. City of Vicksburg*, 82 U.S. 146, 149 (U.S. 1872) ("Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."); *Mertens v. Hewitt Associates*, 508 U.S. 248, 270 (1993) (Ginsburg., J. dissenting) ("As this Court has long recognized, courts of equity would not—absent some express statutory authorization—enforce penalties or award punitive damages.") (collecting cases). And classic treatises on equity jurisprudence likewise note that equitable remedies do not include penalties. *See, e.g.*, 2 Story's Equity, § 1319 ("It is a universal rule in equity never to enforce either a penalty or a forfeiture.") (collecting cases at n.6;) and 4 J. Pomeroy, Equity Jurisprudence § 79, p. 98 (5th ed. 1941) ("Equity from the earliest period of its growth adopted the policy of relieving against penalties and forfeitures . . .").

Additionally, if the Receiver argues the monetary judgment was not a disgorgement award but constituted an equitable restitution order, that argument also fails. If the monetary judgment here comprised restitution, it was legal restitution—not equitable restitution. That is because legal restitution seeks money damages in the amount that the defendant obtained from wrongdoing, whereas equitable restitution seeks the specific property obtained from the wrongdoing. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). Here, the Judgment at issue imposed an award of monetary relief based on the Mr. Marcus's ill-gotten gains. And Mr. Marcus

was ordered to turn over the Property At-Issue in partial satisfaction of that award. This therefore was not an equitable restitution order imposing a constructive trust or equitable lien. *Id.* [3]

2. <u>There is No Clear and Convincing Evidence of Contempt</u>

The Court should not find that Mr. Marcus is in contempt.

<u>First</u>, there is not clear and convincing evidence that Mr. Marcus violated the Judgment. As noted, Mr. Marcus left the Property At-Issue in his residence when he vacated it before the Judgment was entered. The Receiver even filed a report with the Court reflecting that. Now, eight months after the Judgment was entered, and after there was substantial confusion between the parties regarding which items were left in the residence, the Receiver has filed a motion seeking the items at issue. In the span of those eight months, Mr. Marcus did not have access to the residence. In these circumstances, the Receiver cannot meet its heightened burden for contempt.

<u>Second</u>, a finding of contempt should not be entered where, as here, there has been substantial compliance. "Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance." *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

Mr. Marcus has substantially complied with the turnover provision of the Judgment. He consented to turnover of virtually all of his assets, and provided the Receiver with almost 100 separate items in the lengthy list of Valuable Personal Property and Other Property in the Judgment. The Property At-Issue comprises a fraction of the assets Mr. Marcus has already turned over—approximately three-tenths of one percent of the assets collected by the Receiver as of April 2018. Due to his compliance, Mr. Marcus is essentially homeless—he lives with his mother and

[3] We note that Magistrate Judge Torres addressed related—but we submit distinguishable—issues in *CFTC v. Southern Trust Metal*, 2017 WL 2875427 (S. D. Fla. 2017).

has no means to support himself except for financial assistance from his mother. He has paid his penance. In these circumstances, the Court should not find Mr. Marcus to be in contempt.

3. Civil Contempt is Improper Because Mr. Marcus Does Not Have the Property At-Issue and, Thus, Cannot Be Coerced Through Sanctions

The Receiver appears to seek *coercive* contempt sanctions against Mr. Marcus. But a coercive contempt sanction—especially the sanction of incarceration—is not appropriate where the alleged contemnor cannot comply with the order at issue.

"Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *Organizacion Miss Am. Latina, Inc. v. Ramirez Urquidi*, 2018 WL 4778452, at *4 (S.D. Fla. Aug. 27, 2018), *report and recommendation adopted in part*, 2018 WL 4777167 (S.D. Fla. Sept. 27, 2018). Thus, "[t]he inability to comply is a complete defense to a contempt citation. *In re Shore*, 193 B.R. 598, 603 (S.D. Fla. 1996). "Courts are not permitted to ignore evidence that 'compliance is now factually impossible.'" *Barash v. Kates*, 2010 WL 1417816, at *6 (S.D. Fla. Mar. 15, 2010) (cites, quotes omitted).

Here, Mr. Marcus does not possess the Property At-Issue. It was left at his residence. Thus, he neither can comply with the Judgment as to those items, nor can he be coerced into compliance. The Receiver asks this Court to impose the most severe sanction possible—even though he has not established or explained why his status report was "incorrect[]" in stating that the Property At-Issue was in Mr. Marcus's prior residence *after* he had vacated it and had no further access to it.

In the end, Mr. Marcus cannot turn over to the Receiver property that he does not have, and cannot make the Receiver whole in a single payment when he has no assets to draw from. No contempt sanction will change that.

4. The Court Should Not Impose a Sanction of Incarceration—the Most Severe Sanction Possible—in these Circumstances

As noted, a civil contempt sanction of incarceration is considered an extraordinary remedy. *See supra* at 5; *see also Teledyne Techs., Inc. v. Shekar*, 2015 WL 3799559, at *13 (N.D. Ill. June 17, 2015) ("[I]ncarceration should be a last resort. Imprisonment for civil contempt is a drastic remedy."). For this reason, "incarceration sanctions should be ordered only after less severe alternatives have failed or have been deemed doomed to fail." *In re Tate*, 2014 WL 1330567, at *11 (Bankr. S.D. Ga. Mar. 28, 2014). Moreover, as noted, the Court cannot incarcerate a contemnor unless it is established that he or she will be able to purge contempt—and thus is in possession of the "key to his cell." *See In re Falk*, 513 B.R. at 619.

Incarceration is completely improper here. First, the sanction of incarceration is incongruent with the alleged violation or contempt. The Receiver appears to seek incarceration due to Mr. Marcus's failure to turn over items worth approximately $132,000—including rugs and wood drawers—even though Mr. Marcus substantially complied with the Judgment and turned over tens of millions of dollars in assets to the Receiver. As noted, the alleged contempt—of which there is no clear evidence—pertains to less than 1% of the Receivership assets. This is not a purported violation that should be met with a sanction depriving Mr. Marcus of his freedom.

Second, there are clearly less drastic remedies available that the Court should employ before imposing incarceration. This is the first motion for contempt brought by the Receiver regarding the Property At-Issue. Thus, at a minimum, the Court must order lesser, alternative sanctions before imposing the draconian sanction of incarceration.

Indeed, we submit that if the Court elects to enter a sanction, the appropriate remedy here is to convert the value of the Property At-Issue into an additional money judgment. *FTC v. Leshin*, 719 F.3d 1227, 1229 (11th Cir. 2013) ("the FTC may apply to the Court to convert any unpaid

balance of this civil contempt remedy to a money judgment"). In connection with this, the Court could order Mr. Marcus to comply with a payment plan to satisfy that money judgment.

CONCLUSION

For the foregoing reasons, Mr. Marcus respectfully requests that the Court deny the Receiver's motion for an order to show cause why he should not be held in contempt of court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record on the Service List.

/s/ Michael A. Pineiro
MICHAEL A. PINEIRO