

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 17-60907-CIV-MORENO

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

**RECEIVER JONATHAN E. PERLMAN'S REPLY IN SUPPORT OF HIS MOTION FOR
ORDER TO SHOW CAUSE AS TO WHY DEFENDANT JEREMY MARCUS SHOULD
NOT BE HELD IN CONTEMPT OF COURT**

Jonathan E. Perlman, the Permanent Receiver (the “Receiver”) charged by this Court with taking exclusive control of all Receivership assets and with preserving the value of such assets for the benefit of consumers and creditors, submits this Reply in Support of his Motion for Order regarding the failure of Defendant Jeremy Marcus (“Marcus”) to comply with this Court’s prior orders to deliver assets to the Receiver (the “Motion”). [ECF No. 330].

I. INTRODUCTION

This case is not over. The Receiver continues to investigate and pursue assets for the benefit of the more than 38,000 consumers who suffered losses in excess of \$85,000,000 at the hands of Marcus. Marcus’ pattern of willful disregard of this Court’s orders continues to harm these consumers and interfere with the Receiver’s efforts to effectuate consumer redress.

Marcus has failed to cooperate and turn over the spoils of his deceptive conduct despite multiple court orders requiring him to do so. Marcus violated the Stipulated Order for Permanent Injunction and Monetary Judgment (the “Stipulated Order,” ECF No. 231) and Preliminary Injunction (“PI,” ECF No. 21) when he failed to turn over the valuable personal property and

other property worth approximately \$132,755 to the Receiver. In addition, Marcus violated the Asset Freeze imposed by this Court when, the day after he became aware of the Asset Freeze, he converted credit card points into \$18,200 in gift cards and failed to turn them over to the Receiver. To make matters worse, Marcus then submitted court ordered sworn financial disclosures that failed to disclose these assets. Marcus does not dispute these facts.

Marcus' response offers no evidence to rebut the Receiver's *prima facie* showing of Marcus' non-compliance with various court orders. Accordingly, Marcus has failed to meet his burden and the Motion should be granted. *FTC v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010) (Once a *prima-facie* showing is made, the burden then shifts to the alleged contemnor to produce evidence explaining non-compliance).

Marcus' focus is his argument that he should not be held in contempt for failing to perform what he agreed to in the Stipulated Order. Marcus offers no evidence or testimony to support his position. Instead, Marcus raises a host of hollow and misguided legal arguments to avoid his clear contempt.

First, Marcus argues that the Stipulated Order is not really an order subject to this Court's undisputed power to enforce through contempt. This argument ignores controlling law on this issue and the other orders Marcus violated.

Without offering any evidence, Marcus further argues that he turned over the valuable personal property at issue, has substantially complied with the Stipulated Order, and does not have the ability to comply with the order. All of these arguments lack the legally required evidence to support these defenses and should not be considered.

Finally, he pleads for this Court to adopt a sanction less severe than incarceration for his contempt of Court.

Plainly, the Receiver's Motion for contempt should be granted.

II. DISCUSSION

A. The Receiver Has Met His Burden with Clear and Convincing Evidence of Marcus' Contempt.

A civil contempt order must be supported by clear and convincing evidence that "the allegedly violated order was valid and lawful; ... the order was clear and unambiguous; and the ... alleged violator had the ability to comply with the order." *Leshin*, 618 F.3d at 1232 (citation omitted); *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000); *see also FTC v. Slimamerica*, No. 97-CIV-06072, 2011 WL 882109, at *3 (S.D. Fla. Mar. 9, 2011). Marcus does not argue that the subject orders are invalid or unlawful or that the orders were unclear or ambiguous.

Here, the record evidence reflects that Marcus possessed the valuable personal property in March 2018. *See* [ECF No. 330, Ex. A, ¶5]. The plain language of the Stipulated Order requires him to turn over that valuable personal property to the Receiver within 10 days. Instead, Marcus vacated his primary residence and took his possessions with him.¹ The Receiver made multiple demands on Marcus to turn over the valuable personal property and other property. *Id.* at ¶¶ 12, 15, and 16. During this time, the Receiver also made multiple demands for the combination of the large gun safe left at the residence in order to determine whether Marcus left the valuable personal property in the safe, but Marcus failed to provide that combination. *Id.* at ¶18. The Receiver was forced to pay a locksmith to break in the safe. *Id.* The valuable personal property was not there. *Id.* Nor was it anywhere else in Marcus' former residence. The Receiver

¹ Before vacating the premises, the Receiver, through counsel, requested that Marcus leave the property behind, but his counsel indicated that he was taking the property with him since he was under no obligation at the time to turn it over. Marcus did, however, leave some furniture and fixtures at his former residence.

has clearly and convincingly met his legal burden in establishing contempt.

B. Defendant Marcus Has Failed to Submit Any Evidence to Rebut the Evidence of His Contempt of Court.

“Once [a] prima-facie showing of a violation is made, the burden then shifts to the alleged contemnor to produce evidence explaining his noncompliance at a ‘show cause’ hearing.” *Leshin*, 618 F.3d at 1232 (quoting *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998)).

Despite his clear burden, Marcus offers no declaration, affidavit, or testimony in his response explaining his noncompliance.² Marcus relies upon certain disputed allegations to support his defense to a finding of contempt. Critically, he argues (without any evidence) the following:

- The luxury items he failed to turn over were left at his former residence;
- Marcus made a good-faith effort at compliance;
- Marcus cannot comply with the order; and
- Marcus’ financial inability to comply.

Each of these unsupported assertions acts as the foundation for his defense. Despite the criticalness of these assertions, Marcus offers no testimony, affidavit, declaration or any other evidence to support these claims. As a matter of law, this Court should disregard these assertions until Marcus offers competent evidence to support them.³ That is what the law requires.

² Instead, Marcus relies on a mistake in the Receiver’s Third Interim Report which was addressed in the Receiver’s Motion. *See* [ECF No. 330, Ex. A, ¶12.]

³ Marcus asserts that contempt is inappropriate because of substantial compliance. However, in making this argument, Marcus offers no competent evidence as to what he did in turning over the valuable personal property to the Receiver. As a matter of law, Marcus fails to meet his burden that the clear and convincing evidence of his noncompliance should be excused. *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984) (once a prima facie case for contempt is made, the

C. Marcus Does Not Address His Violations of the TRO and PI.

In his response, Marcus does not address how he violated this Court’s Asset Freeze in the Temporary Restraining Order (“TRO,” ECF No. 13) and the PI. On the evening of September 10, 2018, Receiver’s counsel discovered that the day after being served with the TRO, Marcus converted 3,640,000 American Express points from his personal American Express account to \$18,200 in American Express gift cards (19 cards), in violation of this Court’s Asset Freeze. The Receivership’s investigation revealed that the Receivership Entities paid for the purchases on this card. Marcus failed to disclose these assets in his Court-ordered sworn financial disclosures on May 23 and July 7, submitted under penalty of perjury. Despite the Receiver’s demands, Marcus has failed to turn over any of the gift cards, or their monetary value. Marcus disputes none of these factual allegations.

The PI is clear and unambiguous in providing that Marcus and the Receivership Defendants were subject to an asset freeze; they were required to disclose all assets in a sworn statement under oath; and were required to deliver or transfer to the Receiver all assets of the Receivership Defendants.⁴ The PI also required Marcus to cooperate with the Receiver and not interfere with the Receiver’s actions to recover assets. Marcus clearly violated the TRO and PI’s unambiguous terms by converting credit card points into \$18,200 worth of gift cards, by submitting false sworn financial disclosures that failed to disclose the \$18,200 in gift cards, and by failing to turn over the gift cards or their monetary value to the Receiver. In short, Marcus

alleged contemnor must then come forward with evidence). Moreover, it is Marcus’ burden to show, with evidence, that he made “all reasonable” efforts to comply, and a failure to do so does not rebut a prima facie showing of contempt. *Combs v. Ryan’s Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986) (citing *Hayes*, 722 F.2d at 725).

⁴ See [ECF No. 21]. Moreover, this Court’s TRO contained the same prohibitions and obligations. [ECF No. 13].

clearly violated valid, lawful, clear and unambiguous requirements of the TRO and PI. Marcus fails to address these violations and his false sworn representation to the Court.

D. The Stipulated Order Can Be Enforced Through Contempt.

Marcus argues that the Stipulated Order is a money judgment not subject to contempt relief.⁵ Courts have routinely rejected this argument.

Equitable orders to pay are enforceable using the Court's contempt power. *See, e.g., CFTC v. S. Trust Metals, Inc.*, No. 14-22739-Civ-KING/TORRES, 2017 WL 2875427 (S.D. Fla. May 15, 2017); *FTC v. BlueHippo Funding, LLC*, No. 09 Civ. 1819, 2017 WL 1162201, at *4 (S.D.N.Y. Mar. 28, 2017). Generally, this Court possesses expansive and flexible powers in ordering civil contempt sanctions. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). When a public interest is implicated, these powers become broader and more flexible. *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1316 (11th Cir. 2004). The power of contempt available to this Court is rooted in equitable principles including restitution. *S. Trust Metals*, No. 14-22739-Civ, 2017 WL 2875427. The power of contempt is "intensified" in cases like this where equitable restitution is necessary to further the public interest. *Id.* at *7. In other FTC cases, courts have enforced restitution remedies through the power of contempt. *BlueHippo Funding*, No. 09 Civ. 1819, 2017 WL 1162201, at *4.

⁵ Marcus does not address that his failure to cooperate and turn over his valuable personal property was a violation of the PI. The PI requires Marcus to "fully cooperate with and assist the Receiver." [ECF No. 21 at p. 21]. The PI also enjoins Marcus from "[t]ransferring, receiving, altering, selling, encumbering, pledging, assigning, liquidating, or otherwise disposing of any assets owned, controlled, or in the possession or custody of, or in which an interest is held or claimed by, the Receivership Defendants, or the Receiver." [Id. at p. 22]. It further prohibits Marcus from "[d]oing any act or refraining from any act whatsoever to interfere with the Receiver's taking custody, control, possession, or managing of the assets or documents subject to this receivership; to harass or interfere with the Receiver in any way; to interfere in any manner with the exclusive jurisdiction of this Court over the assets or documents of the Receivership Defendants; or to refuse to cooperate with the Receiver or the Receiver's duly authorized agents in the exercise of their duties or authority under any Order of this Court." [Id. at pp. 22-23].

Here, the FTC filed suit against Marcus under, in part, Section 13(b) of the Federal Trade Commission Act. The suit is one rooted in equity, and the Stipulated Order includes equitable monetary relief. As set forth herein, that equitable order is enforceable through contempt.

E. Marcus' Inability to Comply Argument Misses the Mark.

As set forth above, the Receiver has met his burden of a *prima facie* showing of a violation, and it is Marcus' burden to produce **detailed evidence** specifically explaining why he cannot comply. *See United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988) (emphasis added); *see also Consumer Elec. Ass'n v. Compras and Buys Magazine, Inc.*, No. 08-21085-CIV, 2009 WL 10667730, at *5 (S.D. Fla. June 10, 2009) (same). “This burden of production is not satisfied by ‘a mere assertion of inability.’” *Roberts*, 858 F.2d at 701 (quoting *Hayes*, 722 F.2d at 725). Rather, to succeed on the inability defense, the alleged contemnor must “establish that he has made ‘in good faith all reasonable efforts’ to meet the terms of the court order he is seeking to avoid.” *N.L.R.B. v. Triple A Fire Protection, Inc.*, No. 96-6944, 2002 WL 987269, at *10 (11th Cir. Feb. 5, 2002) (internal citation omitted). This requirement is construed strictly. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986). “Even if the efforts undertaken were ‘substantial,’ ‘diligent’ or ‘in good faith,’ unless there is evidence that ‘all reasonable efforts’ were made, the claimed inability to comply will not rebut a *prima-facie* showing of contempt.” *United States v. Coulton*, No. 07- CR-60172, 2013 WL 12086298, at *3 (S.D. Fla. Feb. 1, 2013) (citing *Hayes*, 722 F.2d at 725) (alterations in quotations).

Without any evidence, Marcus argues that contempt is improper since he purportedly is presently unable to comply with the Court orders. But Marcus’ “mere assertion of inability ...” is not enough. *See Combs*, 785 F.2d at 984.

Moreover, inability to perform is not a defense if the contemnor created the inability.

Southern Trust Metals, 2017 WL 2875427 (S.D. Fla. 2017) (citing *Hodgson v. Hotard*, 436 F.2d 1110, 1116 (5th Cir. 1971) and *Piambino v. Bestline Prods.*, 645 F. Supp. 1210, 1215 (S.D. Fla. 1986)); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 Fd.2d 1510, 1522 (11th Cir. 1986); see also *In Re Lawrence*, 251 B.R. 630, 652 (S.D. Fla. 2000) (“any impossibility claimed by the defendant was self-created, and therefore, was an invalid defense.”); *Solow*, 682 F. Supp. at 1327-1330. Here, the evidence presented shows that any inability to comply was of Marcus’ own doing.

F. Incarceration Is Proper Here.

The Court has “numerous options [to remedy contempt], among them: a coercive daily fine, a compensatory fine, attorney’s fees and expenses to the Receiver, and **coercive incarceration.**” *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991) (emphasis added).

In *International Union, United Mine Workers of America v. Bagwell*, the United States Supreme Court made clear that an appropriately fashioned order of conditional incarceration for civil contempt is proper and will not implicate a contemnor’s due process rights:

The paradigmatic coercive, civil contempt sanction ... involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, **or to surrender property ordered to be turned over to a receiver**, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket.

512 U.S. 821, 828 (1994) (internal citations omitted) (emphasis added).

Thus, incarceration is an appropriate sanction for civil contempt when it is remedial and intended to achieve full compliance with court orders, including when the alleged contemnor has refused to turn over assets. *See In re Lawrence*, 279 F.3d 1294, 1300-01 (11th Cir. 2002) (affirming incarceration of debtor who failed to comply with order to turn over assets to trustee); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530-31 (11th Cir. 1992) (affirming continued incarceration for contemnor who failed to comply with disgorgement order in investment fraud case); *Watkins*, 943 F.2d at 1304 (11th Cir. 1991) (coercive incarceration among “numerous options” available to court to ensure compliance with orders); *SEC v. Yun*, 208 F. Supp. 2d 1279, 1288 (M.D. Fla. 2002) (finding conditional incarceration appropriate for defendant who failed either to file supersedeas bond or pay judgment against her); *SEC v. Bankers Alliance Corp.*, No. 95-0428, 1995 WL 317586 (D.D.C. May 10, 1995) (incarceration of defendant appropriate to achieve full compliance with preliminary injunction).

Here, civil incarceration is appropriate, because Marcus’ willful disregard of this Court’s orders continues to damage consumers and interfere with the Receiver’s efforts to effectuate consumer redress. Thus, this Court should conditionally incarcerate Marcus until he turns over the valuable personal property and other property (identified in the Motion) and the nineteen additional American Express gift cards worth \$18,200, or their monetary value.

III. CONCLUSION

For the reasons set forth above and in Receiver's Motion, the Receiver respectfully requests this Court to enter an Order to show cause as to why Defendant Jeremy Marcus should not be held in contempt, and for such other and further relief as the Court deems appropriate.

Respectfully submitted this 22nd day of February, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via CM/ECF Notification and/or U.S. Mail to all parties on the attached service list on this 22nd day of February, 2019.

By: /s/ Gregory M. Garno, Esq.
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