

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HORIZON UNLIMITED, INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 RICHARD SILVA & SNA, INC. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

May 10, 2001

Plaintiff Horizon Unlimited, Inc. ("Horizon"),<sup>1</sup> alleging, inter alia, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 et seq.,<sup>2</sup> filed an action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA"). Presently before the court is defendants' motion for enforcement of contempt addressed to Paul Array ("Array") et al., and defendants' motion to strike plaintiff's post-hearing brief. The motion to strike will be granted and the motion for enforcement of contempt will be denied.

BACKGROUND

Plaintiff Horizon, through its president, Paul Array ("Array"), purchased a Seawind airplane kit manufactured by SNA, of which Silva is president. Plaintiff alleged its Seawind

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<sup>1</sup> John Hare was originally a plaintiff as well, but his motion for voluntary dismissal was granted by Order of March 11, 1999.

<sup>2</sup> Plaintiffs' other claims for negligence/negligent misrepresentation, fraud and deceit, and breach of warranty were dismissed by Memorandum and Order dated February 26, 1998; plaintiffs' motion for reconsideration was denied by Memorandum and Order dated March 27, 1999.

airplane did not "perform according to specifications and building times" stated in the promotional materials. Following a protracted and contentious discovery period, all plaintiff's claims other than its claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1, et seq. ("UTPCPL"), were dismissed by the court. The UTPCPL claim was voluntarily dismissed by plaintiff after it became apparent it was baseless. By Memorandum and Order dated August 31, 1999, the court permitted dismissal only with prejudice and the court ordered the case closed. See Horizon Unltd., Inc. v. Silva, Civ. No. A. 97-7430, 1999 WL 675469 (E.D. Pa. Aug. 31, 1999).

During discovery, plaintiff had requested flight test data defendants sought to withhold as confidential. This information was ultimately produced subject to a September 16, 1998 Confidentiality and Protective Order ("CPO") limiting all discovery materials marked "confidential" to use by certain people, including the attorneys in this action but not the parties themselves, unless otherwise approved by the court. On October 9, 1998, the court issued an order permitting plaintiff's expert, Richard Adler ("Adler"), to review the confidential flight test data subject to his agreement to be bound by the CPO.

Adler, having agreed to comply with the terms of the CPO, was given a copy of the flight test data to prepare an expert

report. On November 16, 1998, plaintiff's local counsel, Tracey Oandasan, Esq. ("Oandasan"), filed plaintiff's pretrial memorandum, with Adler's report, in the clerk's office. This was done at the instruction of plaintiff's lead counsel, Martin Pedata, Esq. ("Pedata"), who had been admitted pro hac vice. The pretrial memorandum and expert report were not filed under seal; plaintiff did not mark the report "Confidential," but "Appendix A" of the expert report, the flight test data itself, was not filed at all.

On November 28, 1999, after the action was dismissed with prejudice and the case closed, Array wrote Oandasan to request a copy of the flight test data, Adler's expert report, and other documents. Array erroneously believed the data was no longer confidential as a result of a Memorandum and Order issued by a different judge in another action involving the same parties. After consulting with Pedata, Oandasan informed Array on December 2, 1999, that the flight test data remained confidential, but she enclosed a copy of Adler's filed report (without "Appendix A," the flight test data) as well as a copy of the CPO.

In December, 1999, defendants discovered images from Adler's report and commentary about the report on Array's web site. Defendants argued that filing Adler's report of record and transmitting the report to Array permitted Array to post the report on his web site, in violation of the September 16, 1998

CPO. The flight test data was not filed or otherwise disseminated in its original form, but defendants argued that the body of the report referred to the data in sufficient detail that its dissemination violated the CPO.

Finding that Array, Pedata and Oandasan violated the CPO, this court granted defendants' motion for contempt and sanctions.<sup>3</sup> Upon the finding of contempt, the court ordered on June 7, 2000, that, "[n]o further information regarding the expert report of Richard Adler shall be communicated in any form by Paul Array; any failure to comply with this order shall be a contempt of court punishable by a coercive fine of no less than \$100,000." Horizon Unltd., Inc. v. Silva, No. Civ. A. 97-7430, 2000 WL 730340, at \*5 (E.D. Pa. June 7, 2000). On September 11, 2001, defendants filed this motion for contempt of the September 16, 1998 CPO and June 7, 2000 Order after references to Adler's report again appeared on the Horizon web site ("seawindbuilders.com").<sup>4</sup> At oral argument, the court granted both parties leave to present additional evidence; plaintiff submitted additional evidence and an accompanying brief.

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<sup>3</sup>The court subsequently denied Pedata's motion for reconsideration of the finding of contempt.

<sup>4</sup>Because there is some evidence that Array transferred ownership of the website to Janos Dosa ("Dosa"), he was also named as an alleged contemnor in petitioner's motion for contempt. Defendants have not pursued a finding of contempt against Dosa.

Defendants moved to strike plaintiff's post-hearing brief.

#### DISCUSSION

A. Defendants' Motion to Strike Plaintiff's Post-Argument Brief

By Order dated March 8, 2001, the court left the record open until March 15, 2001; both sides were permitted to "present additional evidence regarding defendants' motion" on or before that date. No leave was given to submit post-argument briefs. Defendants' motion to strike will be granted. The court will not consider plaintiff's post-argument brief.

B. Defendants' Motion for Enforcement of Contempt

"Coercive contempt sanctions 'look to the future and are designed to aid the [petitioner] by bringing the defiant party into compliance with a court order;'" "compensatory sanctions seek to 'compensate the complainant through the payment of money for damages caused by past acts of disobedience.'" United States v. Basil Investment Corp., 528 F. Supp. 1225, 1228 (E.D. Pa. 1981)(Shapiro, J.)(quoting Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1344 (3d Cir. 1976)), aff'd, 707 F.2d 1401 (3d Cir. 1983).

In civil contempt proceedings, the petitioner bears the burden of establishing the respondent's non-compliance. The

petitioner must show by "clear and convincing evidence" that the respondent has disobeyed the court's order. See Quinter v. Volkswagen of Am., 676 F.2d 969, 974 (3d Cir. 1982); Schauffler v. Local 1291, 292 F.2d 182, 190 (3d Cir. 1961); Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938). If there is "ground to doubt the wrongfulness of [respondent's] conduct," the petitioner has not met its burden. Quinter, 676 F.2d at 974; see Fox, 96 F.2d at 686.

To establish contempt, the petitioners must prove that : (1) a valid court order existed; 2) the respondent knew of the order; and (3) the respondent disobeyed the order. See Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). Petitioners need not prove that respondent's disobedience was willful. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Harley-Davidson, Inc. v. William Morris d/b/a Bill's Custom Cycles, 19 F.3d 142, 148 (3d Cir. 1994); Waste Conservation, Inc. v. Rollins Envir. Servs., Inc., 893 F.2d 605, 609 (3d Cir. 1990). The disobedient party's good faith does not bar a finding of contempt. See Harley-Davidson, 19 F.3d at 148.

"There is general support for the proposition that a [party] may not be held in contempt as long as it took all reasonable steps to comply." Harris v. City of Phila., 47 F.3d 1311, 1324 (3d Cir. 1995)(assuming arguendo that substantial compliance is a defense to civil contempt, the court found the accused party did

not meet its burden of showing that it made a good faith effort to take all reasonable steps to comply with the court's order); Robin Woods Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994)(stating that even if the court were to recognize substantial compliance as a defense to contempt, it would not apply in that case). See also General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986); United States Steel Corp. v. United Mine Workers, 598 F.2d 363, 368 (5th Cir. 1979); Washington Metro. Area Transit Auth. v. Amalgamated Transit Union, 531 F.2d 617, 621 (D.C. Cir. 1976); Halderman v. Pennhurst State Sch. & Hosp., 154 F.R.D. 594, 608 (E.D. Pa. 1994); Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., Inc., No. 90-7973, 1991 WL 261654, \*1 (E.D. Pa. Dec. 6, 1991). The respondent must "show that it has made 'in good faith all reasonable efforts to comply.'" Harris, 47 F.3d at 1324 (quoting Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991)).

There is no dispute in this action that valid court orders existed, and that Array and Horizon had knowledge of them. There is a dispute whether: (1) the orders were disobeyed; and (2) even if they were disobeyed, there was substantial compliance.

In support of their motion, defendants submitted a September 4, 2000, print-out from the "seawindbuilders.com" web site. This print-out was the same as the one submitted by defendants in

December, 1999, in support of their initial motion for contempt, except that there were blank spaces where the scanned copies of excerpts from Adler's report once were.

Array does not dispute that his comments were back on the web site on September 4, 2000. They were the same comments on which the court based its prior finding of Array's contempt of the CPO. See Horizon, 2000 WL 730340 at \*3("Array violated the CPO when he posted portions of the [Adler] report **with commentary** on his web site.")(emphasis added). The September 4, 2000, re-posting of Array's comments on the "seawindbuilders.com" web site was in violation of the September 16, 1998 CPO and the June 7, 2000 Order that Array not communicate any information concerning the Adler Report in any form in the future.

Array argues that even if a technical violation of the court's Orders occurred, he should not be held in contempt because he substantially complied. He contends he: (1) did not own the web site in September, 2000; and (2) destroyed all electronic copies of his comments.

Array testified that he sold the web site to Seawind Group International Ltd. ("SGI"). It is unclear whether and when the sale took place.<sup>5</sup>

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<sup>5</sup>Array did not offer any documents pertaining to the sale other than a March 31, 2000, letter from Dosa (part-owner of SGI) reflecting SGI's interest in purchasing the web site. His attorney, Joseph Mitchell, Esq., averred that Dosa did not make himself available for a deposition or produce any documents

On August 11, 2000, Array sent via fax a "Registrant Name Change Agreement" form to Network Solutions, indicating that SGI would be the new owner of the domain name (the web site).<sup>6</sup> Array admitted he never followed up with Network Solutions to ascertain whether the registration had been transferred.<sup>7</sup> As of March 8, 2001, Network Solutions listed Array as the administrative and billing contact for "seawindbuilders.com" and Dosa as the technical contact. See Defs.' Post-Argument Submissions, Ex. 5.

Based on his assertion that he transferred ownership of the site to SGI, Array argues he is not responsible for the re-posting of his comments on that web site in September, 2000. In April, 2000, Array deleted the electronic copy of Adler's report and his comments, but the comments remained on a back-up disk he gave SGI in connection with the alleged transfer. On September 7 or 8, 2000, after he was notified by his counsel that defendants

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because "as a competitor to [sic] SNA, he did not want to be subject to likely questioning by SNA's counsel intended to illicit [sic] competitively sensitive information." Mitchell Aff. at ¶2. This may be an explanation but it is hardly an excuse.

<sup>6</sup>Dane Hill, custodian of records for Verisign, Network Solutions' parent company, testified at deposition that Network Solutions received the fax on August 11, 2000 and also received the original form by mail on August 22, 2000. Hill Dep. at 8-9.

<sup>7</sup>On September 14, 2000, Network Solutions sent an email to Dosa, carbon copied to Array, informing them that Network Solutions could not process the transfer request. Hill Dep. at 10. Network Solutions received no response to that email. Hill Dep. at 10.

had found his comments on-line, Array contacted SGI. When SGI changed the server of the "seawindbuilders.com" web site, it used this back-up CD and inadvertently uploaded Array's comments.<sup>8</sup> SGI found the file containing the comments a few days later and deleted them on September 14, 2000.

Even though Array's lack of credibility has been quite evident during this protracted litigation, the court cannot now find an intent to violate court orders by clear and convincing evidence.

#### **CONCLUSION**

Defendants have not proved by clear and convincing evidence that Array disobeyed court orders. Array's comments did appear on-line but it may have been inadvertent.<sup>9</sup> Defendants' motion will be denied.

An appropriate Order follows.

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<sup>8</sup>There is a dispute whether the comments could be accessed through a link on the "seawindbuilders.com" web site or whether it was necessary to type in the exact address for the comments to access them; it is not disputed that they could be accessed for several days in September, 2000.

<sup>9</sup>Despite the contrary testimony of the technical manager/internet contact for SNA, Michael Pastelak, it is unclear whether the flight test data gathered in 1993-1995 is still proprietary, confidential information in need of protection. See Pasktelak Aff. at ¶2.

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ORDER

AND NOW, this 10th day of May, 2001, upon consideration of defendants' motion to strike plaintiff's post-hearing brief [Docket #179], defendants' motion for enforcement of contempt [Docket #158], and the responses thereto, it is **ORDERED** that:

1. Defendants' motion to strike plaintiff's post-argument brief is **GRANTED**.
2. Defendants' motion for enforcement of contempt is **DENIED**.

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S.J.

