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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,)	CASE NO. CV 08-04649 MMM (PJWx)
)	
Petitioner,)	
)	
vs.)	ORDER GRANTING PETITIONER'S
)	MOTION TO HOLD RESPONDENT IN
DINAMICA FINANCIERA LLC,)	CIVIL CONTEMPT AND TO IMPOSE
)	SANCTIONS
Respondent.)	
)	
)	

On August 20, 2008, the Federal Trade Commission (“FTC”) filed an emergency petition that sought an order holding Dinamica Financiera LLC (“Dinamica”) in civil contempt and imposing sanctions for its failure to comply with the court’s July 31, 2008 order enforcing the FTC’s Civil Investigative Demand (“CID”).¹

¹A CID is “a type of administrative subpoena.” (See Emergency Petition of the Federal Trade Commission for an Order Enforcing a Civil Investigative Demand (“Emergency CID Petition”), Docket No. 1 (July 18, 2008) at 2.)

I. FACTUAL & PROCEDURAL BACKGROUND

The FTC is an administrative agency of the United States government organized pursuant to the FTC Act (“FTCA”), 15 U.S.C. § 41 et seq.² The FTC is authorized to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Dinamica is a California limited liability company formed on August 28, 2000.³ The company has two members, Jose Mario Esquer and Valentin Benitez.⁴ Dinamica is engaged in, and its business affects, “commerce” as that term is defined in 15 U.S.C. § 44.

The FTC is conducting a non-public investigation to determine whether Dinamica has violated Section 5(a) of the FTCA, 15 U.S.C. § 45(a), by engaging in a mortgage foreclosure rescue and credit repair scam.⁵ On April 22, 2008, the FTC served a CID on Dinamica pursuant to Section 20 of the FTCA, 15 U.S.C. § 57b-1.⁶ Dinamica was given twenty-one days to respond.⁷ On May

²*Id.* at 3.

³*Id.* at 4.

⁴*Id.* The FTC’s filings use two alternative spellings of Benitez: “Benetiz” and “Benitez.”

⁵*Id.* at 2. According to FTC attorney Stacy Procter, “Dinamica has disseminated radio ads throughout Southern California that target Spanish-speaking homeowners who have fallen behind or are about to fall behind on their mortgage payments. These advertisements promise, among other things, ‘options for each situation,’ ‘peace of mind,’ and to ‘speak your own language,’ and specifically represent that Dinamica can negotiate a one- to six-month delay of its clients’ mortgage payments. The ads imply that Dinamica’s services will allow its clients to protect their homes from foreclosure. Consumers who hear Dinamica’s radio ads are instructed to contact Dinamica via the toll-free telephone number advertised.” (Emergency CID Petition, Exhibit 1: Declaration of Stacy Procter (“Procter Declaration”), ¶ 5.) The FTC asserts that Dinamica “charges the equivalent of one monthly mortgage payment (often between \$1,700 and \$3,500) for these services.” (*Id.*, ¶ 6.)

Procter continues: “Based on the evidence gathered by the Commission’s staff to date, it does not appear that Dinamica is able to effect a suspension of its clients’ mortgage payments. Dinamica also does not appear to engage in negotiations that are reasonably calculated to lead to the results its sales staff promises consumers. Dinamica also advises its clients to ignore calls from their lenders and has refused to remit mortgage payments on its clients’ behalf. As a result of Dinamica’s actions, Dinamica’s clients not only lose the thousands of dollars they pay Dinamica, but are subjected to substantial mortgage fees and penalties, and are put at greater risk of losing their homes to foreclosure.” (*Id.*, ¶ 8.)

⁶15 U.S.C. § 57b-1 provides in relevant part:

“Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any

1 9, Dinamica’s attorney, Marcus Gomez, submitted partial responses to the CID interrogatories and
2 document requests, and asked for an extension of time to respond to June 11.⁸ On May 12, FTC
3 attorney Stacy Procter granted Dinamica two brief extensions: until May 19 to respond fully to the
4 CID interrogatories, and until May 27 to respond fully to the document production requests.⁹
5 Procter’s letter also “detailed numerous respects in which Dinamica’s May 9, 2008, partial response
6 to the CID was unclear.”¹⁰ On May 30, Procter sent another letter to Dinamica, requesting full
7 compliance with the CID.¹¹

8 On June 16, 2008, the FTC’s Office of General Counsel notified Dinamica that the matter
9 had been referred to it for judicial enforcement.¹² On June 25, the Office of General Counsel sent
10 Dinamica a letter stating that if it did not respond by July 2, the FTC would file a petition in federal
11 court to enforce the CID.¹³ On July 3, the FTC received a letter from Gomez, who said he had
12 informed his client that the FTC would seek a court order if Dinamica did not comply with the
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15 information, relevant to unfair or deceptive acts or practices in or affecting commerce
16 (within the meaning of section 45(a)(1) of this title), or to antitrust violations, the
17 Commission may, before the institution of any proceedings under this subchapter, issue
18 in writing, and cause to be served upon such person, a civil investigative demand
19 requiring such person to produce such documentary material for inspection and copying
20 or reproduction, to submit such tangible things, to file written reports or answers to
21 questions, to give oral testimony concerning documentary material or other information,
22 or to furnish any combination of such material, answers, or testimony.” 15 U.S.C. §
23 57b-1 (c)(1).

24 ⁷Emergency CID Petition at 3, 5.

25 ⁸*Id.* at 5-6. Dinamica did not file a petition to quash or limit the CID as mandated by
26 Commission Rule 2.7, 16 C.F.R. § 2.7. (*Id.* at 6; see also Procter Declaration, ¶¶ 11-13.)

27 ⁹Emergency CID Petition at 6.

28 ¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 6-7.

1 CID.¹⁴ Dinamica, however, failed to provide information and documents responsive to the CID's
2 interrogatories and document requests.¹⁵

3 On July 16, 2008, the FTC filed an emergency petition for an order enforcing the Dinamica
4 CID. On July 17, the court issued an order to show cause why Dinamica should not be compelled
5 to comply with the CID.¹⁶ The order required Dinamica to file any opposition to the FTC's petition
6 by July 24 and to appear on July 31.¹⁷ Dinamica did not respond. After the hearing on July 31, the
7 court entered an order compelling Dinamica to produce all documentary evidence and written
8 responses requested by the CID within five days of service of the order.¹⁸ Despite this order, the
9 FTC has as yet not received a complete response from Dinamica.¹⁹

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11 ¹⁴*Id.* at 7.

12 ¹⁵*Id.*

13 ¹⁶(Proposed) Order to Show Cause Why Respondent Should Not Comply with Federal Trade
14 Commission Civil Investigative Demand ("CID OSC"), Docket No. 5 (July 17, 2008).

15 ¹⁷*Id.* at 2.

16 ¹⁸Order Enforcing Civil Investigative Demand Issued by Federal Trade Commission, Docket No.
17 13 (July 31, 2008).

18 ¹⁹Emergency Petition of the Federal Trade Commission for a Civil Contempt Order ("Emergency
19 Civil Contempt Petition"), Docket No. 17 (Aug. 20, 2008), at 6.

20 On September 19, 2008, the FTC filed a supplemental status report, which stated that Dinamica
21 served some responses to the Commission's CID on September 18 ("September 18 response"), but that
22 the responses "remain substantially incomplete and in violation of this Court's July 31, 2008, Order that
23 required complete responses to the specifications of the CID." (Supplemental Status Report of the
24 Federal Trade Commission ("Supplemental Report"), Docket No. 29 (Sept. 19, 2008), ¶ 3.)

25 The FTC notes that Dinamica has represented that its document retention policy requires it to
26 maintain client files for ninety days prior to destruction. (*Id.*, ¶ 4) It emphasizes that the CID
27 "contained an express instruction directing Dinamica not to destroy any documents potentially
28 responsive to [the] CID [after it was served in April 2008]." (*Id.*) Consequently, the FTC concludes,
Dinamica should have client files dating back to at least January 23, 2008 (ninety days prior to the
service of the CID) in its possession. (*Id.*) The FTC represents that, despite this, there are a variety of
missing files. It contends, for example, that it has interviewed approximately twenty consumers in the
course of its Dinamica investigation, five of whom were Dinamica customers since January 23. (*Id.*,
¶ 5.) Dinamica has produced no files for any of these customers, however. (*Id.*) Based on information
presently available to it, the FTC estimates that Dinamica would "have had approximately 224 new
active customers for the eight month time period" running from late January to the present. (*Id.*, ¶ 6.)
Yet Dinamica's September 18 response included only 54 client files. (*Id.*, ¶ 3.) Additionally, the FTC

1 On August 20, 2008, the FTC filed a petition seeking an order holding Dinamica in civil
 2 contempt. The petition sought (1) an order directing Dinamica to show cause why it should not be
 3 held in civil contempt for its failure to comply with the court's July 31 order; and (2) the inclusion
 4 of express notice in the order that Dinamica and its two members, Esquer and Benitez, could be
 5 sanctioned for Dinamica's failure to comply with the court's July 31 order.²⁰ The court issued the
 6 order to show cause on August 21, directing Dinamica to submit any opposition to the FTC's civil
 7 contempt petition no later than August 28, and instructing Dinamica and both of its members to
 8 appear on September 22. Gomez belatedly filed a brief response on Dinamica's behalf on
 9 September 10.²¹

10 II. DISCUSSION

11 A. Propriety of Civil Contempt Order

12 Courts have inherent power to enforce their orders through civil contempt. See *Spallone v.*
 13 *United States*, 493 U.S. 265, 276 (1990) (citing *Shillitani v. United States*, 384 U.S. 364, 370
 14 (1966)). A district court has wide latitude in determining whether there has been a contemptuous
 15 defiance of one of its orders. *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), cert.

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 17 reports that its review of the 54 client files produced thus far indicates that most of files relate to
 18 consumers who are customers of Soluciones Dinamicas, not Dinamica. (*Id.*, ¶ 7.) Although Dinamica
 19 is "currently operating" as Soluciones Dinamicas, the latter was not formed until May 21, 2008. (*Id.*)
 20 Dinamica appears to have produced no files predating this time in violation of the CID. Based on these
 facts, the FTC "believes that Dinamica's production of client files is significantly incomplete." (*Id.*, ¶

21 8)
 22 The FTC also states that Dinamica has "failed to identify all persons currently or formerly
 23 employed by Dinamica as required by the CID." (*Id.*, ¶ 10.) Likewise, although the CID required that
 24 Dinamica produce financial information from January 1, 2006 through the present, it has "provided no
 25 financial information for 2008." (*Id.*, ¶ 11.) Other documents missing from the production include: (1)
 26 "all documents that refer or relate to complaints from customers received by Dinamica" (*id.*, ¶ 12); (2)
 27 bankruptcy paperwork "that customers report having completed" (*id.*, ¶ 13); and "copies of receipts that
 28 customers received from Dinamica" (*id.*). Given the many categories of documents that are not included
 in the production, the court concludes that Dinamica has failed to provide complete responses to the CID
 and has thus violated the court's July 31 order.

²⁰Emergency Civil Contempt Petition at 6.

²¹Respondents' Response to Order to Show Cause; Declaration ("Dinamica Response"), Docket
 No. 27 (Sept. 10, 2008).

1 denied, 506 U.S. 1081 (1993). The Ninth Circuit’s inquiry regarding contempt “has long been
2 whether defendants have performed ‘all reasonable steps within their power to insure compliance’
3 with the court’s orders.” *Stone*, 968 F.2d at 856 (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d
4 396, 404 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977)).

5 The FTCA gives the court authority to punish civil contempt. Section 57b-1 provides that
6 “[w]henever any person fails to comply with any civil investigative demand . . . the Commission .
7 . . . may file, in the district court of the United States . . . a petition for an order of such court for the
8 enforcement of this section.” 15 U.S.C. § 57b-1(e). Section 57b-1 further provides that “[a]ny
9 disobedience of any final order entered under this section by any court shall be punished as a
10 contempt of such court.” 15 U.S.C. § 57b-1(h).

11 The party moving for contempt bears the burden of establishing by clear and convincing
12 evidence that the contemnor has violated a specific and definite order of the court. See *Wolfard*
13 *Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997) (“For Wolfard to succeed in its
14 motion for civil contempt, it had to show by clear and convincing evidence that Zodiac violated the
15 consent judgment beyond substantial compliance, and that the violation was not based on a good
16 faith and reasonable interpretation of the judgment,” citing *In re Dual-Deck Video Cassette Antitrust*
17 *Litigation*, 10 F.3d 693, 695 (9th Cir. 1993)); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461,
18 466 (9th Cir. 1989) (“As we have previously stated, civil contempt is appropriate when a party fails
19 to comply with a specific and definite court order,” citing *Gifford v. Heckler*, 741 F.2d 263, 265 (9th
20 Cir. 1984)); *Vertex Distributing v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)
21 (“We apply well-settled law. In a civil contempt proceeding, the contempt must be proved by clear
22 and convincing evidence. *Battaglia v. United States*, 653 F.2d 419, 422 (9th Cir. 1981); *United*
23 *States v. Powers*, 629 F.2d 619, 626 n. 6 (9th Cir. 1980). This requires more than does the
24 preponderance of the evidence standard applicable to most civil cases. *Battaglia*, 653 F.2d at 422;
25 *Powers*, 629 F.2d at 626, n. 6. . .”).

26 Once the moving party shows by clear and convincing evidence that the contemnor has
27 violated a specific and definite order of court, the burden shifts to the contemnor to demonstrate that
28 he or she took every reasonable step to comply, and to articulate reasons why compliance was not

1 possible. See *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983) (“To satisfy this burden
 2 the individual appellants were required to show ‘categorically and in detail’ why they were unable
 3 to comply with the court’s previous order,” quoting *United States v. Rylander*, 656 F.2d 1313, 1318
 4 (9th Cir. 1981), rev’d on other grounds, 460 U.S. 752 (1983)), cert. denied, 464 U.S. 1040 (1984).
 5 In assessing whether an alleged contemnor has taken “every reasonable step” to comply with the
 6 terms of a court order, the district court can consider (1) a history of noncompliance and (2) a failure
 7 to comply despite the pendency of a contempt motion. See *Stone*, 968 F.2d at 857. The contempt
 8 need not be willful, *Perry v. O’Donnell*, 759 F.2d 702, 704-06 (9th Cir. 1985), and a party’s
 9 subjective intent is irrelevant. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949);
 10 *Donovan*, 716 F.2d at 1240. If, however, “a defendant’s action ‘appears to be based on a good faith
 11 and reasonable interpretation of (the court’s order),’ he should not be held in contempt.” *Vertex*
 12 *Distributing*, 689 F.2d at 889 (quoting *Rinehart v. Brewer*, 483 F.Supp. 165, 171 (S.D. Iowa 1980)).

13 **B. Dinamica Has Violated the Court’s July Order to Comply with the FTC’s Civil**
 14 **Investigative Demand**

15 The FTC has adduced clear and convincing evidence that Dinamica has not answered the
 16 CID’s interrogatories or produced documents responsive to the CID’s document requests.²² In
 17 addition, Dinamica has admitted, in response to the court’s August 21 order to show cause, that its
 18 responses to the CID remain incomplete.²³ Dinamica has not asserted that it has been unable to
 19 comply with the CID, and the court must conclude, based on the present record, that it has not taken
 20 all reasonable steps to comply with the terms of the court’s July order. Accordingly, the court
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22 ²²See, e.g., Emergency Civil Contempt Petition, FTC Exhibit 12: Second Declaration of Stacy
 23 Procter (“Second Procter Declaration”), ¶ 6; Supplemental Report, FTC Exhibit 18: Fourth Declaration
 24 of Stacy Procter (“Fourth Procter Declaration”).

25 ²³Dinamica Response, ¶¶ 4-5 (“In fact, Respondent did not produce further responses to the
 26 discovery requests [after seeking an extension in May 2008]. Petitioner’s Order to Show Cause request
 27 is accurate in that the discovery responses are not complete. Respondent’s counsel has prevailed upon
 28 Respondent to comply with the discovery requests and Respondent’s representatives have agreed to
 cooperate with Respondent counsel. Further responses are currently being prepared”). Although
 Dinamica has since produced additional documents to the FTC (see Supplemental Report), the FTC
 represents that the production nonetheless remains incomplete.

1 concludes that Dinamica is in contempt of the court's order, and that an order of contempt is
2 properly entered.

3 **C. The Appropriate Remedy**

4 Sanctions for civil contempt are imposed to coerce compliance with a court order, to
5 compensate the party pursuing contempt for injuries resulting from the contemptuous behavior, or
6 both. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947) ("Judicial
7 sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two
8 purposes[:] to coerce the defendant into compliance with the court's order, and to compensate the
9 complainant for losses sustained" (citations omitted)); *Perry*, 759 F.2d at 705 ("[T]he purpose of
10 civil contempt is remedial").

11 Whether contempt is civil or criminal turns "on the character and purpose of the sanction
12 involved." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). The character of the
13 relief is civil if the contemnor can avoid the sentence imposed, and purge himself of it, by complying
14 with the terms of the original order. It is criminal if he may not. See *Hicks on Behalf of Feiock v.*
15 *Feiock*, 485 U.S. 624, 632, 635 & n. 7 (1988). Where the purpose of the contempt order is to ensure
16 a party's compliance, the court must "consider the character and magnitude of the harm threatened
17 by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about
18 the result desired." *Mine Workers*, 330 U.S. at 304; see also *Whittaker Corp. v. Execuair Corp.* 953
19 F.2d 510, 516 (9th Cir. 1992) (quoting *Mine Workers* and citing *General Signal Corp. v. Donallco,*
20 *Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986), and *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th
21 Cir. 1983)).

22 **1. The Character and Magnitude of the Harm Threatened**

23 Dinamica's inaction constitutes a violation of both the letter and the spirit of the court's July
24 31 order. Given Dinamica's failure to comply with the FTC's CID even prior to entry of the court's
25 order, the court does not believe the failure is isolated or that there is no danger of repetition.
26 Indeed, Dinamica's continued noncompliance with the CID and the court's order are strong evidence
27 to the contrary. They suggest that Dinamica intends to continue its noncompliance, and to attempt
28 to impede the FTC's ability to determine whether Dinamica has violated Section 5(a) of the FTCA.

1 In light of the seriousness of the alleged violations that the FTC has under investigation, moreover,
2 such noncompliance may result in serious harm to consumers.

3 **2. Probable Effectiveness of the Proposed Sanction**

4 The FTC does not propose monetary sanctions in a particular amount, but instead requests
5 that Dinamica and its two members, Esquer and Benitez, be sanctioned. It requests that the
6 sanctions include coercive incarceration of one or both of Dinamica's members.²⁴ While
7 incarceration might well be effective in coercing Dinamica's members to comply with the CID, the
8 court concludes that monetary sanctions would be more appropriate at this stage of the proceedings.
9 The court therefore directs Dinamica to comply fully with the FTC's CID **within seven days of the**
10 **date of this order.**

11 If Dinamica does not do so, the court will impose a fine of **\$750 a day** beginning on the
12 eighth day following entry of this order and continuing each day thereafter until Dinamica provides
13 the requested information and documents to the FTC. Given the repeated problems the FTC has had
14 in obtaining information and documents from Dinamica, the court finds that such a coercive fine at
15 this stage is warranted.

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17 **III. CONCLUSION**

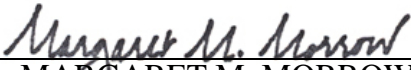
18 For the foregoing reasons, the court finds that Dinamica is in contempt of its July 31, 2008
19 order. The court directs Dinamica to comply with the FTC's CID and provide all information and
20 documents required by the CID by **October 6, 2008**. To ensure compliance, the court will impose
21 a **\$750 daily fine** on Dinamica, beginning on **October 7, 2008**, for every day that Dinamica fails
22 to provide the requested information and documents to the FTC. Should the coercive effect of this
23 sanction not cause Dinamica to comply as ordered, the FTC may initiate further contempt
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28 ²⁴Emergency Civil Contempt Petition at 6.

1 proceedings and request coercive incarceration of one or both of Dinamica's members, Esquer and
2 Benitez, as a sanction.²⁵

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4 DATED: September 22, 2008


MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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²⁵“The corporate cloak affords no protection to contempt proceedings, and a corporation may be punished for contempt in disobeying judgments, decrees, or orders of a court made in a case within its jurisdiction. . . . Since a corporation is capable of violating a court order only if its agents act or refrain from acting, it follows that an order directed at a corporation is binding on the agents authorized to act on its behalf, whether specifically named in the order or not. However, simply because a corporation has failed to comply with a court order, it does not necessarily follow that all corporate agents or officers are in contempt because of their agent status. There must be evidence in the record that the corporate agent charged with contempt was somehow personally connected with defying the authority of the court or disobeying its lawful decrees. When an agent of a corporation, having knowledge of an order directed at a corporation, participates in or encourages the violation of that order, that agent may be individually held in contempt of court.” AM. JUR. 2D, § 48.