UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 06-61851-CIV- UNGARO

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

RANDALL L. LESHIN, et. al.,

Defendants.

CORRECTED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON REQUEST TO MODIFY STIPULATED INJUNCTION AND EXTENDING THE MONITOR'S TENURE

THIS CAUSE is before the Court pursuant to the Plaintiff, the Federal Trade Commission's ("FTC" or "Commission"), Motion for Contempt as to Defendants Randall L. Leshin ("Leshin"), Randall Leshin, P.A. ("Leshin, P.A."), Express Consolidation, Inc. ("Express"), and Charles Ferdon ("Ferdon"), and non-party Debt Management Counseling Center, Inc. ("DMCCI")(collectively "Contempt Defendants") for violating the Stipulated Injunction and Order entered on May 5, 2008 ("Permanent Injunction" or "Order") (D.E. 366.) The Court conducted an evidentiary hearing on the matter on February 13 and 17, 2009. The Court's Findings of Fact and Conclusions of Law follow:

I. FINDINGS OF FACT

A. Underlying Action

1. The Commission commenced this action on December 12, 2006 by filing its Complaint for Injunction and Other Equitable Relief pursuant to Section 5, 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45, 53(b), and 57b. The Commission charged that these Defendants and others engaged in deceptive acts in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310, in connection with the sale of debt consolidation services.

2. Prior to the settlement in this action, Express, through its employees, secured and serviced or administered the services provided for in debt consolidation contracts that named Defendant Leshin, Leshin, P.A., or non-party corporation DMCCI, as the contracting party. (Leshin Test. 02/17/09).

3. DMCCI is wholly owned by RLL holding Company. Defendant Leshin is RLL's sole shareholder and director. Defendant Ferdon was president of DMCCI. (PCX 3 at 110). (Pl.'s Mot. Ex. 7 at 14-15). The only two directors of DMCCI, Matt Wiley and Michael Bradford (Pl.'s Mot. Ex. 6 at 00006), are Express employees. DMCCI has no employees. Leshin controls and supervises the actions of, the directors and officers of DMCCI. *Id.*; (*see also* Pl.'s Mot. Ex. 6. at 00001.)

B. The Stipulated Injunction

4. The underlying action was resolved by the Order entered on May 5, 2008. (D.E. 321.) Defendants Leshin, Ferdon and Express Consolidation, Inc. signed the Order before it was entered and acknowledged receipt of the Order after it was entered by the Court. In May 2008,

Leshin signed the acknowledgment of receiving the Order on behalf of the shareholders of DMCCI. (Pl's Mot. Ex. 7 at 10.)

5. In the Order, the Defendants agreed that they would not offer, enter into, or accept the transfer of contracts for debt consolidation services in any state where they are not in compliance with that state's legal requirements for a debt consolidation services business. (Permanent Injunction at ¶ VI.)

6. The Order appointed Gerald Wald as Temporary Monitor to oversee certain aspects of the Defendants' business and financial accounts, as well as implement a procedure to notify certain of Defendants' "existing clients" of their future options regarding their debt consolidation services. (Order at ¶¶VII - XI.)

7. The Order provided mechanisms for dealing with the debt consolidation contracts of the existing clients of Leshin, Leshin, P.A., and DMCCI. (Order ¶¶ IX, X and XII.)

8. The Order defined "existing clients" to mean "persons who (i) have signed an agreement for debt consolidation services with Randall L. Leshin, Randall L. Leshin, P.A. (including contracts under the name "Debt Management Counseling Center") or DMCCI; (ii) have not notified Defendants that they are cancelling such services; and (iii) have made a payment for such services to Randall L. Leshin, Randall L. Leshin, P.A., or DMCCI during the sixty days prior to the date this Order is entered." The rest of the Order treated those clients differently based on whose "existing clients" they were, as between DMCCI or Leshin or Leshin, P.A.

9. Existing clients of DMCCI were to have their contracts transferred to Express within ten (10) days after entry of the Order provided Express was, at the time of acceptance of a

transfer, in compliance with the legal requirements imposed by the states in which the consumer resided. (Order ¶¶ VI.D, XII(B)) This provision specifically stated that it did not alter the ability of these clients to cancel their contracts. *Id.*[2]

10. Existing clients of Leshin and Leshin, P.A. were to be notified of the Order and given an opportunity to express their preference for their future debt consolidation services. (Order ¶ IX.) An existing client's options differed depending on whether Express was timely qualified to provide debt management services in the state where the client resided, as set forth in more detail below.

11. The Monitor was tasked with sending the settlement notices to the existing clients of Leshin or Leshin P.A. 61 days after entry of the Order. (*See Id.* at ¶. IX.) The notices gave the clients different options depending on whether Express, which serviced these clients' contracts, was timely qualified to provide debt management services in the states where the clients resided. (Permanent Injunction ¶ IX.)[3]

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[2] There is nothing in paragraph XII exempting the transfers to Express from paragraph VI.D's prohibition on accepting transfers of contracts for debt consolidation services when the Defendants are not, at the time of the transfer, in compliance with legal requirements imposed by the state in which the person resides. Therefore, The Court reads paragraph VI.D to be a limitation on the obligation to transfer DMCCI's contracts to Express in paragraph XII.

[3] Express would have been timely "qualified to provide debt management services" in (1) a state that issues licenses for debt consolidation services, if it had the license within 60 days of the Order's entry, or an unambiguous statement from the state that it could conduct such business while its application was pending, or in (2) a state that does not issue licenses, if Express fulfilled that state's legal requirements, including registration, reporting, audit, insurance, or account requirements within 30 days. (Order, Definition S.)

12. In the states where Express was not timely qualified, the Monitor was to give an existing client a notice with two options: (1) cancel the contract, or (2) agree to a contract with a debt consolidation services provider identified by the FTC. (*See Id.*, at ¶ IX.C.,("C Notice").)

13. In states where Express was timely qualified, the Monitor was to give notice of three options to the client: (1) cancel the contract, (2) agree to a contract with a debt consolidation services provider identified by the FTC, or (3) agree to a new contract with Express. (*See Id.*, ¶ IX.D., at 31-32 ("D Notice").)

14. An existing client of Leshin and Leshin P.A. was to express his or her preference, including a preference to cancel, "by sending a form to the Monitor." (*See Id.*, ¶¶ IX.C., IX.D.)

15. On June 30, 2008, Defendants filed an emergency motion, requesting an extension of the deadlines for Express to qualify to provide debt management services in several states where the FTC alleged that Express was not qualified. (*See* Defs.' Emergency Motion for Relief from Final Judgment, D.E. 324 at 5.)

16. The Court held a two-day hearing on July 21 and 22, 2008 regarding the request for extension and regarding whether Express was qualified in the disputed states.

17. On the first day of this hearing, July 21, the Court ruled that there would be no extension of the number of days in Definition S of the Order for Express to qualify. (*See* Pl.'s Mot., Ex. 1, at 158.) On the second day, July 22, 2008, the Court made rulings concerning the states in which Express was qualified under Definition S. Relevant to this contempt proceeding, the Court ruled that:

a. Express was not qualified in California or Minnesota because it was undisputed that Express did not have the license required by California or the registration required by Minnesota within the timetable set by the Order; [4]

b. Express was not qualified in Nevada because it had obtained neither a license nor a registration under the Nevada statutes on debt adjusting and credit services. (*See* Pl. Mot. Ex. 2 at 311-317);

c. Express was not qualified in Texas because it lacked the accreditation required by state law. *Id.,* p.349; and

d. Express was not qualified in Florida, Georgia, Kentucky, Ohio, or Tennessee because each of these states requires that providers of debt management services have certain insurance coverage and the Court determined that the Travelers Insurance policy upon which Defendants relied to fulfill this requirement was facially insufficient to satisfy the insurance requirements in these states. *Id*., pp.283-286.[5]

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[4] Although Defendants initially contested California, by the July 22 hearing, California officials had denied Express's license application and ordered Defendants to cease conducting business there. (*See* Pl.'s Mot. Ex. 10B, "Desist and Refrain Order.") In light of these actions, at the July 22 hearing, Defendants conceded that existing clients in California should receive the C Notice. (*See* D.E. 366-3 at 354.)

With respect to Minnesota, Defendants did not contest that Express did not have the registration required by Minnesota law, but argued that Minnesota was among several states in which D Notices should be sent because the contracts with existing clients were executed in advance of passage of state laws. This Court rejected defendants' position for Minnesota and the other nine states with respect to which defendants made this argument. (*See* Omnibus Order, D.E. 339, at 7 ¶ 3.)

[5] Express produced an e-mail stating that Zurich Insurance had bound a new policy, with what Defendants alleged to be sufficient coverage, effective July 18, 2008. (Pl.'s Mot. Ex. 1, at 177-78; Ex. 2 at 272-275.) However, in order to be timely qualified, Express needed such insurance in place by June 4, 2008. (Order, Definition S(1).) Thus, the Court determined that after acquired policy was untimely. (Pl.'s Mot. Ex. 2 at 277.)

18. The Court ordered the Monitor to send C Notices to clients residing in twenty-five states, including the nine states listed above. (*See* Omnibus Order, D.E. 339, at 6-7 ¶¶ 1, 3, 4.)

19. On July 25, 2008, the Monitor sent the C Notices to clients in those twenty-five states where Express was not timely qualified, including the states identified above. (*See* Monitor's Initial Report to the Court, D.E. 342, at 18.)

20. Unknown to the FTC an the Court, Express, DMCCI and Leshin more or less concurrently sent their own notices, urging the recipients of C Notices to "cancel" their contracts by checking that option on the Monitor's form, and sign new contracts with DMCCI or Defendants, who would "continue" their existing debt management plans. (*See* Monitor's Initial Report, D.E. 342, at Ex. J.) (showing DMCCI solicitation to existing client in Ohio on July 25, 2008); (Pl.'s Mot. Ex. 8 at 5); (admitting Leshin authored letters and emails containing Defendants' own notices) [6]

21. On July 30, August 5 and 6, 2008, the Defendants sent these notice letters to existing clients in California, Texas, and Nevada who received the Monitor's July 25 C Notice. (*See* Hr'g Tr. 02/13/2007 at 81-83, 85-86.); (Pl.'s Mot. Ex. 8 at 11, 12, 17.) DMCCI sent nearly identical notices to existing clients in Florida, Georgia, Ohio, Kentucky and Tennessee. (Pl.'s Mot. Ex. 6); (Pl.'s Mot. Ex. 8 at 13.)

C. Defendants Continued Collection from Clients Who Cancelled.

22. The Order provides that the Monitor shall notify the Defendants whenever an existing client who had signed a contract with Leshin or Leshin, P.A. responds to the Monitor's

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[6] At the February 2009 contempt hearing, Defense counsel admitted that the Defendants and DMCCI had an idea during the July 21 and 22 hearing that they were going to send their own notices but did not seek the Court's approval for doing so.

notice by stating that he or she elects to cancel the contract and, within three days of receiving such notice from the Monitor, Defendants "shall discontinue all collections from that client." (Order, ¶. X.A.)

23. Defendants continued to collect from 971 clients who responded to the Monitor's C Notice by stating that they wished to cancel despite being notified by the Monitor that these clients had elected to cancel. After the July 22, 2008 hearing, Defendants and DMCCI solicited these clients to sign new contracts with Express, Leshin, P.A. or DMCCI and to continue to have their debt management plans serviced by Express in the same way that they were serviced prior to receiving the Monitor's C Notice. (Pl.'s Mot. Ex. 8 at 11-13.) These 971 clients were given new account numbers and Express and Leshin, in concert with DMCCI, continued collections from these clients. (*See* Monitor's Third Report, D.E. 356 at ¶ 7 & D.E. 356-4.); (*See also* D.E. 356-3, Ex. B at 2)(letter from Randall Leshin stating that existing customers who cancelled and then executed a new contract are being serviced by Express). [7]

24. Leshin drafted the letters to existing clients soliciting them to execute new contracts after the clients had notified the Monitor that they wished to cancel, and authored the telephone script for Express representatives to solicit such agreements. (Pl.'s Mot. Ex. 8 at 5-6).[8]

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[7] *See also* Monitor's Second Interim Report, (D.E. 49 at.7-8) ("Defendants' employees were repeatedly contacting clients in certain states that the Court had determined Defendants were not qualified in and were attempting to convince those clients to choose "cancel" on their return form and then continue with either Express or DMCCI.").

[8] The script states:

> Cancel your current contract by selecting option 2 on the notice, and then authorize DMCCI to continue your DMP. This will require very little effort on your part. Everything will stay the same and you will have to do nothing other than approve a new agreement. And the best part is that Express Consolidation will continue to service your DMP without any disruption.

(Pl.'s Mot. Ex. 8 at 14.); (Pl.'s Mot. Ex. 6 at 186.)

Michael Bradford, an employee of Express and President and Director of DMCCI, also authored and participated in the distribution of the letters. (*See Id.* at 5, 11, 12, 13; (Pl.'s Mot. Ex. 6 PCX 6, at 6.)(indicating Bradford is one of two directors of DMCCI); (*See also* Hr'g Tr., 2/13/09, at 71:8-11) (Bradford is the officer and president and director of DMCCI). At least 552 of the 971 clients from whom Defendants continued to collect after cancellation were signed to contracts with DMCCI. (*See* Pl.'s Mot. Ex. 12, containing Summary Exhibit, comparing Pl.'s Ex. 13, Monitor's Sept. 30, 2008 list of cancellations with DMCCI's client list and the amounts collected from them as of October 2, 2008.)

D. Defendants' Conduct Relating to Paragraph VI.D of the Order

25. Paragraph VI of the Order is titled "Prohibited Debt Consolidation Practices," and it provides in relevant part:

> IT IS FURTHER ORDERED that Defendants and their Representatives are hereby restrained and enjoined from:
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> D. Offering, entering into, or accepting the transfer of, a contract for debt consolidation services with a person when Defendants are not, at the time of the offer, transfer or execution of the contract, in compliance with legal requirements imposed by the state in which the person resides, including any requirements concerning licensing, registration, reporting, audit, insurance, escrow accounts or trust accounts imposed by the state's law regulating debt consolidation services, *provided that* this provision does not prohibit conduct permitted by other provisions of this Order where Express Consolidation, Inc. is, as defined in this Order is qualified to provide debt management services in a state.

(Order ¶VI.D.)

1. On May 15, Defendant Express Accepted Transfer of DMCCI's Contracts with Consumers In Florida, Georgia, Ohio, Kentucky, Minnesota and Tennessee.

26. On or about May 15, 2008, DMCCI transferred its existing clients who had signed contracts with DMCCI to Express by assigning the contracts to Express and sending a form letter notifying the relevant existing clients of the assignments. (*See* D.E. 382-4.)(letter advising clients of assignment to Express); (Hr'g Tr., 2/13/07 at 85:15-19); (Pl.'s Mot. Ex. 8 at 47-96.) The contracts that Express accepted by assignment from Express on May 15, 2008. included:

a. 169 contracts with Kentucky residents,

b. 721 contracts with Florida residents,

c. 701 contracts with Georgia residents,

d. 600 contracts with Ohio residents,

e. 287 contracts with Tennessee residents, and

f. 158 contracts with Minnesota residents

Id.[9]

27. On May 15, 2008, Express had not completed registration under the Kentucky Debt Adjuster Act and had not received confirmation that its registration pursuant to that act was complete. (Pl.'s Mot. Ex. 9 at 000009)(indicating Kentucky registration "not complete.") Indeed, at the time of the show cause hearing, February 17, 2009, Express still had not completed registration under the Kentucky Debt Adjuster Act. (Hr.'g Tr., 2/13/2009, at 68-69.)

28. On May 15, 2008, the only insurance that Express had to satisfy the insurance requirements for debt consolidation services under Kentucky, Florida, Georgia, Ohio, and

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[9] At the contempt hearing, Defendants disclosed for the first time that the contracts transferred from DMCCI to Express pursuant to Paragraph XII were transferred back to DMCCI after the Court's July 22 ruling. (Hr'g Tr., 02/13/09 at 73-74.)

Tennessee law was the Travelers Insurance policy that this Court found to be insufficient in its rulings on July 22, 2008. (Pl.'s Mot. Ex. 2. at 176-178.) Express did not acquire additional insurance in an effort to satisfy these requirements until July 18, 2008, two months after Express accepted transfer of contracts from DMCCI. *Id.*

29. On May 15, 2008, Express had not completed a registration to operate or provide services as a debt management services provider in Minnesota. (Pl.'s Mot. Ex. 9 at 000009.) (indicating "nothing" to show compliance with state requirements in Minnesota). Moreover, at the contempt hearing, Express offered no evidence that it had ever obtained or sought such a registration.

2. After Entry of the Order on May 5, 2008, Defendant Express and DMCCI Offered and Entered Into Contracts With Consumers In Florida, Georgia, Kentucky, Nevada, Ohio, Tennessee, and Texas.

30. On August 22, 2008, Defendants produced a report listing customers to whom Defendants sent letters in July 2008 soliciting them to execute contracts with Express. (Pl.'s Mot. Ex 8, at 000005, 000018-000046.) The report shows that Express offered contracts to hundreds of customers in Nevada and Texas on July 30, 2008. (*Id.* at 000027-41.)

31. On August 8, 2008, Express received an ISO Certificate of Registration from the State of Texas. (Pl.'s Mot. Ex. 8 at 000075.) Express relies on this August 8, 2008, ISO accreditation to satisfy Texas requirements that Express be independently accredited. (Pl. Mot. Ex. 9 at 00009.) [10]

[10] Leshin claims that Express obtained the accreditation on or before July 30, 2008 (DCX 10). However, the "Initial Assessment Visit Report" with which he attempted to support that proposition merely states that the assessor is "pleased to recommend Registration." (D.E. 375-12 at 3). The actual Certificate of Registration says Express Consolidation was "Originally Registered: 08/08/2008." (Pl.'s Mot., Ex. 9 at 000075.)

32. After entry of the Order, the Defendants also continued offering and executing new agreements in Florida, Georgia, Kentucky, Ohio, and Tennessee. On August 22, 2008, Defendants produced a report listing clients with whom Express, Leshin or Leshin, P.A., executed or entered into contracts for debt consolidation services after May 5, 2008. (Hr.'g Tr., 02/13/09, at 83-84); (Pl.'s Mot. Ex. 8 at 00003, 00005; Ex. 8 at 00099-126.) The report shows that

a. Between the entry of the Order on May 5, 2008 and the preparation of the report, Express executed post-order contracts for debt consolidation services with 37 Kentucky residents, (Pl.'s Mot. Ex. 8, at 109), and 51 Nevada residents. (Pl.'s Mot. Ex. 8, at 112-113.)

b. Between the entry of the Order on May 5, 2008 and July 18, 2008, (the effective date of the Zurich Insurance policy, see supra note 5, Pl.'s Mot. Ex. 9 at 000050.) Express executed post-order contracts with 117 Florida residents (Pl.'s Mot. Ex. 8, at 105-107); 112 Georgia residents (Pl.'s Mot. Ex. 8 at 107-108); and 88 Ohio residents (Pl's Mot. Ex. 8 at 113-114.)

c. Between May 5, 2009 and the date of its ISO accreditation, August 8, 2008 (Pl.'s Mot. Ex. 9 at 000075), Express executed contracts for debt consolidation services with 391 Texas residents. (Pl.'s Mot. Ex. 8 at 116-126.)

33. After the entry of the Order, Defendants also solicited and executed contracts that named DMCCI as the contracting party. Despite DMCCI's nominal status as the contracting party, Express actually services these contracts by among other activities providing credit

counseling services and disbursing funds from the Express Consolidation Disbursement Account to the clients' creditors. These post-order contracts with DMCCI include:

a. 126 contracts with Kentucky residents; and

b. 159 contracts with Tennessee residents.

(Pl.'s Mot. Ex. 6 at 146-175.) The contracts that named DMCCI as the contracting party include but are not limited to contracts that Defendants obtained by soliciting existing clients who had contracts with Leshin or Leshin, P.A. to cancel their contracts in response to the C Notice and execute contracts with DMCCI for continued service by Express.

3. After Entry of the Order on May 5, 2008, Defendant Leshin Continued to Execute Contracts with Consumers in California, and Express Offered or Serviced Such Contracts.

34. On July 30 and August 6, 2008, Express sent letters and emails that solicited California customers to execute a contract with Defendant Leshin. (Pl.'s Mot. Ex. 8 at 000005, 000011.) On August 22, 2008, Defendants produced a report identifying customers to whom these letters and emails were sent. The report shows that Express sent these offers to hundreds of customers in California. (Pl.'s Mot. Ex. 8 at 000027-41.)

35. Defendants' August 22, 2008, reports lists clients with whom Leshin executed or entered into contracts for debt consolidation services after May 5, 2008. The report identifies 404 California residents with whom Defendant Leshin executed contracts after the entry of the Order on May 5, 2008. (Pl.'s Mot. Ex. 8 at 000099-104.)

36. Express services the contracts between Defendant Leshin and California residents, and this servicing includes disbursing funds from the Express Consolidation Disbursement Account to the clients' creditors. (Hr'g Tr. 2/13/2009 at 114:11-115:23; 106:12-21.)

37. The post-order contracts that Express and Leshin, P.A. executed, as well as the contracts that Express accepted in transfer from DMCCI under Paragraph XII, are for "debt consolidation service" as defined in the Order.[11] (*See* Pl.'s Mot. Ex. 9 at 6-7, 37-38, 46-48, 53-54, 58-59, 67-68, 72-73, 154-155, 159-160.)

II. CONCLUSIONS OF LAW

A. Legal Standard for Civil Contempt.

38. United States District Courts have the inherent power to enforce their orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

39. The moving party must show civil contempt by clear and convincing evidence. *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988); *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998). This evidence must demonstrate that the alleged contemnors violated a valid order that was clear, definite and unambiguous, and that they had the ability to comply with the order. *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000).

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[11] The Order, Definition I., at p.6, defines "debt consolidation service" as:

> (1) receiving money from a consumer for the purpose of distributing one or more payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation;
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> (2) arranging or assisting a consumer to arrange for the distribution of one or more payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation;
>
> (3) exercising direct or indirect control, or arranging for the exercise of such control, over funds of a consumer for the purpose of distributing payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation; or
>
> (4) acting or offering to act as an intermediary between a consumer and one or more creditors of the consumer for the purpose of altering the terms of payment of the consumer's obligation.

40. Once this *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. *See Chairs*, 143 F.3d at 1436 (quoting *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991)).

41. A showing of substantial, diligent efforts does not rebut the prima facie showing of contempt. *Combs v. Ryan's Coal Company, Inc.*, 785 F.2d 970, 984 (11th Cir. 1986). At that point, "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990). As the Supreme Court long ago stated, "[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

42. Rule 65(d) dictates that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitware Co. v. NLRB*, 324 U.S. 9, 14 (1945). Indeed, Rule 65(d)(2)(C), Fed.R.Civ.P., provides liability for non-parties who have notice of an order and act in concert and participation with the restrained party.

B. Contempt Defendants Have Violated the Order.

43. The Court concludes that the FTC proved by clear and convincing evidence that the Contempt Defendants violated the Order when: (1) Defendants failed to discontinue all collections from clients who cancelled in response to the Monitor's notices, as required by paragraph X. A of the Permanent Injunction; (2) Express accepted transfers of debt consolidation

contracts from DMCCI for persons who resided in certain states where Express, at the time of the transfers, was not in compliance with the state's requirements; (3) Defendants and DMCCI offered and executed debt consolidation contracts in certain states where Defendants Express or Leshin should have been but were not in compliance with state law at the time that the offers were made or the contracts were executed.

1. Contempt Defendants Violated the Order When They Continued to Collect from Existing Clients Who Cancelled.

44. Defendants do not dispute that they have continued to collect from 971 clients who, as "existing clients" signed contracts with Leshin or Leshin, P.A., received the C notices sent by the Monitor in July and responded to the Monitor by stating that they elected to cancel. The Court rejects Defendants' argument that they are permitted to collect from these clients under the Order.

45. Paragraph X.A. of the Order prohibits further collection from these clients:

> If the Monitor receives a response to a notice in which an existing client states that he or she elects to cancel their contract for debt consolidation services, the Monitor shall promptly notify Defendants and, within three (3) days of receiving such notice, Defendants shall discontinue all collections from that client.

(Order ¶ X.A.)

The Defendants argued that, under the definition of "existing clients" in the Order, once the client cancelled (either in response to the Monitor's C Notice, or outside the Notice mechanism by notifying the Defendants of cancellation) then he was no longer an "existing client" and the Defendants, or DMCCI acting in conjunction with Defendants, were free to continue to collect from such clients pursuant to a new debt consolidation services agreement.

46. The scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *United States v. Armour*, 402 US 673 (1971).

47. *Frulla v. CRA Holdings*, 543 F.3d 1247, 1252 (11th Cir. 2008) recently set out the test for determining if an agreed order is ambiguous: "A contract is ambiguous where it is susceptible to two different interpretations, each of which is reasonably inferred from the terms of the contract." *Id.*; *United States v. American Soc. of Authors Composers and Publishers*, 309 F.Supp.2d 566, 573 (S.D.N.Y. 2004) (where the "meaning of an agreement among sophisticated parties is unambiguous on its face, the agreement does not become ambiguous simply because one of the parties later asserts that it intended a different interpretation.") As shown below, the Defendants' reading of "existing client" is not reasonable in light of the other provisions of the Order. *See Eaton v. Courtalds of North America, Inc.*, 578 F.2d 87, 90-91 (5th Cir. 1978) (interpretation of the agreed order is a matter of law, and the district court was correct to construe clauses in light of other portions of the order); *American Soc. of Authors Composers and Publishers*, 309 F.Supp.2d at 573 ("in determining whether an ambiguity exists, a contract should be read as a whole.")

48. Here, the Order is unambiguous and the reading offered by the Defendants and DMCCI is not reasonable under the terms of the Order. The language of the Order requires that Defendants cease collection from "that client." The term "that client" plainly refers to an existing client who received the Monitor's Notice and responded by selecting the option to cancel his or her contract. Defendants' reading is inconsistent with the text and would render this provision meaningless. Moreover, Defendants' construction is inconsistent with whole

passages of the Order, including part of paragraphs XII, and most of paragraphs IX, and X. For example, Paragraph IX.G then provides that in the states "where Express Consolidation, Inc. is qualified to provide debt management services" the Defendants may solicit existing clients of Leshin and Leshin, P.A. in those states. The absence of permission to solicit contracts where Express was not qualified makes it clear that the Defendants did not have permission to solicit those C Notice clients.

49. Because all those who received C Notices were "existing clients" at the time they received the notices, the Defendants' argument that the clients would no longer be "existing clients" at the moment that they notified the Monitor that they wished to cancel (Defendants' Opp'n. at p.5), also makes meaningless paragraphs X.A and subsequent provisions of the order concerned with implementing the responses to the Monitor's Notice. For example, Paragraph X.C. states the "Monitor shall create a list of the existing clients to whom the Monitor sent the notice described in Subparagraphs IX.C and IX.D that identifies the responses received from each existing client. If the Defendants were correct, then Paragraph X.C should not have used "existing client" because one of the responses the Monitor could have received, the cancellation, would take them out of the realm of "existing client" and the Monitor would not have been ordered to place them on the list.

50. To be consistent with the way the term is used in the order, the definition of "existing clients" should be construed as clarifying simply that if a client (who fits the other parameters of the definition) had notified the Defendants or DMCCI that he was cancelling prior to the entry of the Order, then he would not be an "existing client."

51. Consequently, the Order required that Defendants cease collections from the 971

clients who cancelled in response to the Monitor's notice. Defendants violated paragraph X.A by soliciting new contracts and continuing collections from these clients. Defendants' violation appears to be ongoing, as they offered no evidence that they had discontinued collections from such clients and rested solely on their claim that continued collection from these clients is not prohibited by paragraph X.A.

52. At least 552 of the 971 clients from whom Defendants continued to collect after cancellation were signed to contracts with DMCCI. Defendant Leshin directed DMCCI to solicit these contracts. Therefore, Defendant Leshin is responsible for the activities of DMCCI as its principal and DMCCI is responsible for violating Paragraph VI. D because it aided and abetted Leshin in continuing to collect from clients who cancelled their contracts pursuant to the C notice issued after notice of the Order.

2. Contempt Defendants Violated Paragraph VI.D of the Order When Express, Acting in Concert with the Other Contempt Defendants, Accepted Transfer of DMCCI Contracts With Clients in Florida, Georgia, Kentucky, Ohio, Tennessee and Minnesota.

53. Paragraph VI.D states: "Defendants *and their Representatives*" are restrained and enjoined from offering, entering contracts, or accepting transfer of them "*when Defendants are not*, at the time of the . . . transfer or execution of the contract, *in compliance with legal requirements imposed by the state*[.]" Defendants violated this provision when Express accepted transfer of DMCCI contracts with residents of Florida, Georgia, Kentucky, Ohio, Tennessee and Minnesota because Express was not, at the time of the transfer on May 15, 2008, in compliance with the legal requirements of these

states.[1]

Florida, Georgia, Kentucky, Ohio, and Tennessee

54. In May, 2008 Express accepted transfer from DMCCI of the following: 721 contracts with Florida residents, 701 contracts with Georgia residents, 600 contracts with Ohio residents, 287 contracts with Tennessee residents,169 contracts with Kentucky residents, within 10 days after entry of the Order. (Hr'g Tr. 02/13/09 at 85); (Pl.'s Mot. Ex. 8 at 000047-94.)

55. Florida, Georgia, Kentucky, Ohio, and Tennessee all require debt consolidation service providers to maintain insurance coverage for employee dishonesty, forgery and computer crime. *See* Fla. Stat. § 817.804(b), Ga. Code Ann. § 18-5-3.1(a)(2), Ky. Rev. Stat. Ann. § 380.040(7), Ohio Rev. Code Ann. § 4710.02(E), Tenn. Code Ann. § 47-18-104(b)(34)(A)(vii). In order to qualify to send C Notices in these states, Express needed such insurance in place by June 4, 2008. (Order Definition S(1).) At the July 22, 2008 hearing, the Court ruled that Express did not have the requisite insurance by June 4, 2008, because the Travelers policy upon which Express relied to satisfy these requirements was inadequate and a Zurich policy that Defendants reported that Express had just obtained on July 18, 2008 was untimely. (Pl.'s Mot. Ex. 2 at 277.)

56. These rulings foreclose Defendants' contention that Express had the requisite insurance when it accepted transfer of contracts with residents of these states on May 15, 2008. For the same reasons that Express failed to comply with the insurance requirements in these

[1] The undersigned notes that she is not persuaded that the Order required the transfer of DMCCI contracts to Express in states where Express was not in compliance with the legal requirements imposed by state in which "existing clients" were located on the date of the transfers.

states by June 4, 2008, it was not in compliance with the insurance requirements in these states "at the time of the . . . transfer" on May 15, 2008.

57. Defendants argue that the language in the Zurich policy provides retroactive coverage back to the date of the Order. However, the policy cannot circumvent or trump paragraph VI.D's requirement that the Defendants and their Representatives cannot offer, execute, or accept the transfer of contracts *when* the Defendants are not in compliance with state law on the dates of the offer, execution or acceptance of the transfer of debt consolidation contracts. An insurance policy obtained two months after the May 15 transfer does not satisfy paragraph VI.D's requirement that Express be in compliance at the time of the transfer.

58. Additionally, the Court concludes Express was not in compliance with Kentucky's registration requirements when it accepted the transfer of Kentucky contracts. Kentucky requires debt adjusters to file a complete and accurate registration. Ky. Rev. Stat. Ann. § 380.040(5). However, Defendants admitted that Express's "Registration is not complete." (Pl.'s Mot. Ex. 9 at 000009.) Accordingly, Express and the other Contempt Defendants violated Paragraph VI.D when, in May 2008, Express accepted transfer of 169 contracts between DMCCI and residents of Kentucky. (Pl.'s Mot. Ex. 8 at 000049-93, 000109.)

59. In addition to Express's failure to satisfy applicable insurance requirements, Express's acceptance of transfer of contracts with Tennessee residents violated paragraph VI.D because neither Express nor DMCCI had given consumers an informational statement required by Tennessee law before execution of these contracts. Tennessee law requires that a consumer sign an "information statement" on the impact of a debt management plan on his credit *prior* to the execution of a contract and that such statement be *printed in bold and capital letters*. Tenn.

Code Ann. § 47-18-104(b)(39)(A)(viii). In May 2008, neither Express nor DMCCI was providing such statements. Instead, language about the plan's impact on credit was inserted at the end of client contracts, in ordinary typeface. Thus, Defendants were not in compliance with Tennessee law when Express accepted the transfer of Tennessee contracts from DMCCI.

60. At the contempt hearing the Defendants proffered a letter dated February 3, 2009 from an individual in Express's legal department to an employee of the state of Tennessee purporting to show the state's agreement to allow Defendants and DMCCI to cure these deficiencies. There was no testimony from anyone from the State of Tennessee. The Court finds based on the clear and convincing evidence that Express had not complied with Tennessee law by the date of the contempt hearing and that all contract of Tennessee residents that were transferred by DMCCI to Express were transferred in violation of Tennessee law.

Minnesota

61. Express accepted transfer of 158 Minnesota contracts from DMCCI after entry of the Order. (Pl.'s Mot. Ex. 8 at 000047-95). Ferdon approved the transfers. (Pl.'s Mot. Ex. 8 at 000006.)

62. In their October 2008 compliance report to the FTC, Defendants admitted that they had no documents to support their compliance with Minnesota law. (*See* Pl.'s. Mot. Ex. 9 at 000009.) At the hearing, Ferdon admitted that Express was not registered under Minnesota law. (Hr'g Tr., 02/13/09 at 77.)

63. Minnesota law states,

> [o]n or after August 1, 2007, it is unlawful for any person, whether or not located in this state, to operate as a debt management service provider or provide debt management services including but not

> limited to offering, advertising, or executing or causing to be executed any debt management services or debt management services agreement, except as authorized by law without first becoming registered as provided in this chapter.

Minn Stat. § 332A.03. At the contempt hearing, Defendants took the position that the Minnesota registration requirement did not apply to the contracts that DMCCI transferred to Express because they fell within the following provision in the Minnesota law: "Debt proraters who were not required to be licensed as debt proraters before August 1, 2007, may continue to provide debt management services without complying with this chapter to those debtors who entered into a contract to participate in a debt management plan before August 1, 2007[.]" (Defendants' Response to Motion for Order to Show Cause, D.E. 375 at 11-12.) Defendants contended, and Defendant Leshin testified, that the clients residing in Minnesota are all being serviced under contracts executed prior to August 1, 2007. (Hr'g Tr. 02/13/09, at 135.)

64. Leshin's testimony that the Minnesota contracts that DMCCI transferred to Express were all dated prior to August 1, 2007 was not supported by any documentation and is contradicted by records in Defendants' own files. FTC Investigator Carol Jones testified that she extracted the identities of the Minnesota residents whose contracts were transferred from DMCCI to Express and placed them in a spreadsheet. (Hr'g Tr., 02/17/09 at 243-245.); Jones then ran those identities through the Apollo client database that the Defendants had produced in the underlying litigation, extracted the "Pend Date" for each such Minnesota client, and created spreadsheets showing those dates. (*Id*.); (*See* D.E. 382-15, & D.E. 382-16.)[2] The spreadsheet that Jones produced shows that Defendants' own client database identifies 121 contracts with

[2] Ferdon testified that "pend date" means "the date that the individual consumer would have signed a individual contract and sent it back to us." (Hr'g. Tr. 02/13/09 at 84.)

Minnesota clients executed on or after August 1, 2007. (*See* D.E. 382-16.) After this documentation was presented, counsel for Defendants acknowledged that Defendant Leshin's statements to the contrary were in error and stated that Defendants acknowledged that Express or DMCCI had executed 119 contracts with Minnesota residents that were dated on or after August 1, 2007. (Hr.'g Tr., 2/17/09 at 302.)

65. Because Express accepted transfer from DMCCI of at least 119 Minnesota contracts that were executed by debtors after August 1, 2007 and neither DMCCI nor Express prior were licensed prior to August 1, 2007 to act as a "debt prorater" as required by Minnesota law, Express entered into or accepted these contracts in violation of paragraph VI(D) of the Order.

66. As to the remaining 39 contracts, which presumably were executed by consumers prior to August 1, 2007, the Court is unable to conclude that Minn. Stat. § 332A.03 was violated because the FTC presented no evidence with respect to whether prior to August 1, 2007, DMCCI was or was not in compliance with Minnesota law prior to August 1, 2007.

67. At the contempt hearing, evidence was presented that the 119 contracts that DMCCI transferred to Express were re-transferred to DMCCI after the July, 2008 hearing. With respect to any Minnesota contracts that Express re-transferred to DMCCI that were originally executed after August 1, 2007, Minnesota law requires that Express, as DMCCI's servicing agent, be registered with the Commissioner of Commerce. The Court's conclusion in this regard is based Minn. Stat. § 332A.03 which requires any person providing "debt management services" or operating as a "debt services provider" to be registered with the Minnesota Commissioner of

Commerce and the definitions of "Debt management services" and "Debt management services provider" contained in Minn. Stat. § 332A.03 subdivs. 8 and 9.

68. Pursuant to Minn. Stat. §332A.02, subdiv. 9, "debt management services" include receiving funds for the purpose of distributing the funds among creditors in payment or in partial payment of obligations of the debtor. Defendant Leshin testified that while DMCCI is the contracting party, Express acts as DMCCI's servicing agent by, among other activities, disbursing the debtors' funds to the creditors. Therefore, under the statute, Express is providing "debt management services" in Minnesota and is subject to the registration requirements contained in Chapter 332A, Debt Management Services, notwithstanding that DMCCI is the nominal contracting party.

69. Additionally, Express, in its capacity as servicing agent for DMCCI, falls within the definition of "debt management services provider" contained in Minn. Stat. § 332A subdiv. 8 as follows: "Debt management services provider" means any person offering or providing debt management services to a debtor domiciled in this state, regardless of whether a fee is charged for the services. For the reasons stated in paragraph 67 *supra*, Express is offering "debt management services," even though the debtor pays his or her fees to DMCCI, and Express therefore, is subject to the registration requirements contained Chapter 332A, Debt Management Services.

3. Defendants Violated Paragraph VI.D By Offering and Entering Into Contracts in States Where They Were Not Qualified To Provide Debt Consolidation Services.

70. Paragraph VI.D of the Order also prohibits Defendants and their representatives from offering or entering into a contract for debt consolidation services "when Defendants are

not, at the time of the offer . . . or execution of the contract, in compliance with legal requirements imposed by the state in which the person resides[.]" "Representatives" is defined in the Order to mean "Defendants' successors, assignees, officers, agents, servants, employees and those persons in active concert or participating with Defendants who receive actual notice of this Order by personal service or otherwise." Defendants violated this provision by offering and entering into contracts with residents of states where Leshin or Express are not in compliance with the states' requirements for providing these services.

a. Leshin and Express Offered and Entered into Contracts with Customers in California Where They Are Not Qualified to Conduct a Debt Consolidation Business.

71. On February 29, 2008, Express filed an application to obtain a license to do business as a general prorater in the state of California. (Pl.'s Mot. Ex. 10A "Statement of Issues" at 3.) The applicable law is found at California Financial Code §§ 12000 to 12404. (Hr.'g Tr., 02/13/09 at 5.)

72. On July 15, 2008, the State of California denied Express's license application. (Pl.'s Mot. Ex. 10A "Notice of Intention to Deny Application.") The state cited that in exchange for a set up fee and monthly administrative fees, Express, Leshin and Leshin, P.A. had acted as proraters in the state, even though Express had no license or exemption and Leshin, P.A.'s contracts, on their face, showed that nether the law firm nor Leshin was entitled to the exemption from licensing for attorney at law, found in the California Prorater's law. (Pl.'s Mot. Ex. 10A "Statement of Issues" at 3-4.) The state found that the fees charged to at least 2,427 California residents by Leshin, Leshin, P.A., and Express were subject to the Prorater's Law, and exceeded the amounts that lawfully can be charged. (*See Id.* at 4-6.)

73. On July 15, 2008, the State of California ordered that Defendants Leshin, Leshin, P.A., and Express desist and refrain from offering debt prorating services in that state. (Pl.'s Mot. Ex. 10B "Desist and Refrain Order.") The Desist and Refrain Order stated that Leshin, Leshin, P.A., and Express had overcharged consumers in California "amounts that exceed the statutory limits found in California Financial Code sections 12104 and 12314 for nonprofit community service organizations and for profit entities operating as proraters, respectively." (*See Id.* at ¶ 13). The order concluded:

> Based on the forgoing findings, the California Corporations Commissioner is of the opinion that Express Consolidation, Inc., ECI, Randall L. Leshin, P.A., and Randall L. Leshin, acting in concert or in participation with others, have been engaging in the business of bill paying and prorating as defined in the Check Sellers, Bill Payers and Proraters Law without a license from the California Corporations Commissioner or meeting any exemption and in violation of that law including overcharging consumers in violation of Financial Code sections 12104 or 12314. (*Id.* at ¶ 19.)

74. The Desist and Refrain Order has never been stayed or set aside. (Hr'g Tr., 02/13/09 at 14.)

75. Leshin testified that, in response to the Desist and Refrain Order, some time in late July 2008 he sent new contracts that contained new language to California clients.[3] In his own opinion, this new language allowed him to operate under the exemption for attorneys at law found in California Financial Code 12100(c). (Hr'g. Tr., 02/13/09 at 111-113.) However, Leshin testified that the services performed did not change, and he admitted that there are still

[3] Yet, the contracts Leshin P.A. produced to the FTC in October 2008, in response to a request for documents that show compliance with California law, stated "It is clearly understood and agreed that RLL is not performing any legal services on CLIENT'S behalf. The only services RLL shall provide to CLIENT are debt management services pursuant to the Program." (Pl.'s Mot. Ex. 9 at 000006.)

30 or 40 clients in California from whom Leshin, P.A. has not received a signed contract with the new language. (Hr.'g Tr., 02/13/09 at 113). Neither Leshin nor anyone else on behalf of the Defendants ever sent the new contract language to officials of the State of California (Hr'g Tr., 02/13/09 at 18-19), even though they were subject to a Desist and Refrain Order there. Leshin also testified that the Defendants never refunded the fees overcharged to those consumers. (Hr'g Tr., 02/13/09 at 113-114.)

76. When the State of California receives information about an attorney acting as a prorater in the state, the state often undertakes an investigation in which it seeks to obtain from the attorney "their contracts, explanation of how they are doing business, and that it is qualified" under the attorney exemption. (Hr.'g Tr., 02/13/09 at 10.) Under the statute, "prorating should be incidental to his or her legal practice and not the entire practice." *Id.*

77. The exemption for attorneys states that the prorater law does not apply to "the services of a person licensed to practice law in this state, when the person renders services in the course of his or her practice as an attorney-at-law, and the fees and disbursements of the person, whether paid by the debtor or other person, are not charges or costs and expenses regulated by or subject to the limitations of this chapter. These fees and disbursements shall not be shared, directly, or indirectly, with the prorater or check seller." Cal. Fin. Code § § 12100(c).

78. Part of the attorney exemption provision requires that, "fees and disbursements shall not be shared, directly, or indirectly, with the prorater." Cal. Fin. Code § 12100(c). The Court concludes Defendants' business operation in California violates the forgoing statute. Leshin and Express share such fees and/or disbursements with regard to California clients.

(Hr'g Tr., 02/13/09 at 106) ("the payment from the customer, goes into. . . an RLL account if its an RLL contract . . . and then pursuant to the written agreements, funds are transferred . . . from . . . RLL . . .into an Express or ECI Disbursement Account from which the funds are transmitted to the creditors.")

79. Based on the Desist and Refrain Order, the Denial of the Application, the evidence that Leshin does not offer services to California residents that are otherwise incidental to his practice of law and the evidence that Defendants' contracts with California clients and fee arrangements are inconsistent with the exemption for attorneys in Cal. Fin. Code § 12100(c), Leshin and Leshin, P.A. are not in compliance with California law and were not in compliance when Defendants made the contract offers to each of the "existing clients." (*See* Pl.'s Mot. Ex. 9 at 000018-27.) For the same reasons, the Defendants also were not in compliance when Leshin executed contracts with new clients after July 25, 2008. (Pl.'s Mot. Ex. 11 at 99-104.)

b. Express and DMCCI Offered and Entered into Post-OrderContracts in States Where Defendants Did Not Satisfy State Requirements.

80. Defendants' reports listing the new contracts that they have executed since the Order was entered on May 5, 2008, show that Defendants and DMCCI also executed new contracts with residents of Kentucky, Tennessee, and Nevada in violation of the legal requirements of these states.

Tennessee

81. Express entered into post-order contracts with 61 Tennessee residents. (Pl.'s Mot. Ex. 8 at 000047-94; Ex. 8 at 000115-16.) Express's execution of these 61 post-order contracts

violated paragraph VI.D of the Order because Express was not in compliance with Tennessee law on the date it executed these contracts.

82. As discussed above, Express did not have the insurance coverage required by Tennessee law until July 18, 2008, at the earliest. In addition, Tennessee law requires that a consumer sign an "information statement" on the impact of a debt management plan on his credit *prior* to the execution of a contract and that such statement be *printed in bold and capital letters*. Tenn. Code Ann. § 47-18-104(b)(39)(A)(viii). Express instead inserted language about the plan's impact on credit at the end of its contract, in ordinary typeface. At the hearing, Defendants produced no evidence that they had cured this deficiency although they did produce the letter referred to in paragraph 60 *supra*. Notwithstanding this letter, the clear and convincing evidence supports the conclusion that Defendants were not in compliance with Tennessee law as of the conclusion of the contempt hearing.

83. Between May 5, 2008, and the preparation of its report on post-order contracts, DMCCI entered into 159 contracts with Tennessee residents. (Pl.'s Mot. Ex. 6 at 000146-175.) These contracts also violate paragraph VI.D of the Order because, although DMCCI is nominally the contracting party, Express services the contracts by among other things, disbursing funds to clients' creditors. Therefore, pursuant to Tenn. Code Ann. 47-18-104(39)(A), Express is "engaging in the business of debt adjusting" in respect of the DMCCI contracts with Tennessee residents and required to comply with Tennessee's insurance and disclosure requirements, but apparently has failed to do so. Thus, even if DMCCI's compliance (as opposed to Express's compliance) with Tennessee law had been the relevant issue with regard to DMCCI's post-order contracts, DMCCI's contracts suffer from the same

legal deficiencies under Tennessee law. Additionally, a subset of 63 of the 159 post-order contracts of DMCCI in Tennessee also violate paragraph X.A because the contracts resulted from solicitation of "existing clients" who cancelled in response to the Monitor's C Notice.

Kentucky

84. In Kentucky, Express entered into 37 post-order contracts. (Pl.'s Mot. Ex. 8 at 000049-93.)

85. Express's execution of the 37 post-order contracts violated paragraph VI.D of the Order because Express was not in compliance with Kentucky law on the date it entered into these contracts. Indeed, Express was not in compliance with Kentucky law when the contempt hearing was held.

86. Kentucky requires a debt adjuster to file a complete and accurate registration. Ky. Rev. Stat. Ann. § 380.040(5). However, Defendants admitted that Express's "Registration is not complete." (Pl.'s Mot. Ex. 9 at 000009.)

87. In addition, Defendants' report on DMCCI's post-order contracts shows that between the entry of the Order and the preparation of the Report, DMCCI entered into 126 contracts with Kentucky residents. (Pl.'s Mot. Ex. 6 at 000146-175.) These contracts also violate paragraph VI.D of the Order. Defendants acknowledge that Express, not DMCCI, provides debt adjusting services under the Kentucky contracts, and the Kentucky statute requires registration by any person "doing business in debt adjusting, budget counseling, debt management or debt pooling service." Ky. Rev. Stat. Ann. §§ 380.010(2), 380.040(5). As noted above, Express has never completed the registration required by the statute for persons that engage in such services.

Nevada

88. Express has never complied with Nevada's legal requirements for debt management service providers and violated paragraph VI.D by entering into post-order contracts with 51 Nevada residents. (Pl.'s Mot. Ex. 8 at 000112-113.) A business providing debt consolidation services in Nevada must secure either a Debt Adjuster's license pursuant to Nevada Revised Statute section 676, or a Credit Services Organization certificate of registration pursuant to Nevada Revised Statute § 598. (Hr.'g Tr., 02/13/09 at 47.) Not one of Leshin, Leshin, P.A., Express, Ferdon, or DMCCI has ever secured a Debt Adjuster's license pursuant to Nev. Rev. Stat. § 676, or a Credit Services Organization certificate of registration pursuant to Nev. Rev. Stat. § 598, one or the other of which is required to legally engage in the payment of debts on another's behalf. (Hr.'g Tr., 02/13/09 at 48.) They, thus, are not in compliance with Nevada law.

89. Defendants acknowledge that they offered and executed contracts with Nevada residents after May 5, 2008, and that they charged fees on at least some of these contracts in violation of Nevada law. However, Defendants argue that they should not be held in contempt for their failure to obtain either a license or registration under Nevada law because they refunded all fees paid by Nevada residents since May 5, 2008, and although they have retained the clients and presumably continue to perform whatever contractual obligations were undertaken in their debt management agreements, Defendants have ceased charging fees for such services. Yet, Defendants failed to produce documentary evidence in the contempt hearing supporting their claim that these alleged refunds occurred. Moreover, Defendants produced no evidence that they had notified Nevada clients that Defendants would no longer

collect any fees under the contracts, and were unable to say precisely when refunds were paid and fees were suspended. The only documentary evidence concerning fees charged to Nevada clients shows that Defendants have collected fees under contracts executed after May 5, 2008. In August 2008, when asked by the FTC for a compliance report showing the fees that they charged to consumers who contracted after the entry of the Order, Express produced a table showing that Express had charged 51 Nevada monthly consumers administrative fees monthly, totaling $1,589.51. (Pl.'s Mot. Ex. 8 at 000112-113.)

90. In any event, the Defendants' decision to solicit contracts from Nevada residents when they knew they lacked a license or registration was a willful and flagrant violation of the Order.

91. Nevada state investigator Fred Washington testified that, even if the refunds had been provided, the Defendants still violated Nev. Rev. Stat. §§ 598 and 676. (Hr.'g Tr., 02/13/09 at 47.) The services were provided in violation of state law, and thus the Defendants violated paragraph VI.D by executing contracts with Nevada residents.

c. Express Entered into Post-Order Contracts With Customers in Florida, Georgia, Ohio, and Texas Before It Satisfied The Requirements for Providing Debt Consolidation Services in Those States.

Florida, Georgia, and Ohio.

92. As discussed above, at the July 22, 2008 hearing, this Court ruled that the Travelers insurance policy failed to satisfy the insurance requirements for debt management service providers under Florida, Georgia, and Ohio law, and Express did not obtain additional insurance until July 18, 2008. Thus, even if Express's additional insurance satisfies the state

requirements, Express was not in compliance with the legal requirements of these states regarding insurance until July 18, 2008, at the earliest.

93. Express, under the direction of Defendants' Leshin and Ferdon, entered into over 300 contracts with residents of Florida, Georgia, and Ohio between May 5, 2008, when the Order was entered, and July 18, 2008. Specifically, Express entered into post-order contracts with 117 Florida residents before July 18, 2008. (Pl.'s Mot. Ex. 8 at 105-107); 112 post-order contracts with Georgia residents before July 18, 2008; (Pl.'s Mot. Ex. 8 at 107-108.); and 88 post-order contracts with Ohio residents before July 18, 2008. (Pl.'s Mot. Ex. 8 at 113-114.) Each of these contracts violated paragraph VI.D because, at the time that Express offered and entered into these contracts, Express was not in compliance with the legal requirements in these states.

Texas

94. As discussed above, at the July 22, 2008 hearing, this Court ruled that Express was not qualified to operate in Texas because it did not have the independent accreditation required by Tex. Admin. Code § 88.304(a). At the show cause hearing, Express presented an ISO accreditation that it subsequently obtained to address this defect. Although the accreditation certificate is dated August 8, 2008, Express argued that the accreditation was effective July 30, 2008. The Court finds that Express was not in compliance with Texas law until August 8, 2008, and that Defendants violated paragraph VI.D with respect to all post-order contracts with Texas residents executed before August 8, 2008.

d. **Re-transfers of Contracts from Express to DMCCI after the July 2008 Hearing**.

Georgia, Florida and Ohio

95. As noted *supra*, Ferdon testified that after the Order was executed DMCCI timely transferred all of its contracts to Express and then after the contempt hearing in July 2008, Express transferred those contracts back to DMCCI that were with debtors in Minnesota, Florida, Georgia and Ohio. The Court has addressed Minnesota in paragraphs, 60-70, *supra*.

96. The FTC seems to argue that the "re-transfers" to DMCCI were a subterfuge to avoid the restrictions on Express's ability to conduct debt adjusting services contained in the Order and the various state statutes. The Court is not inclined to agree because she construes paragraphs VI and XII of the Order to provide that DMCCI was not required to transfer any contracts to Express in the first instance unless Express was in compliance with state law. It appears, based on the testimony presented at the contempt hearing in July, 2008, that the contracts were re-transferred to DMCCI only after the Court resolved disputes between the parties regarding the specific states in which Express would be deemed to be in compliance with state law and therefore able to continue providing debt adjustment services.

97. Nonetheless, Express is the servicing agent for the contracts between debtors and DMCCI and, among other activities, is delegated the responsibility of disbursing debtors' funds to creditors. In most states, such as Minnesota, Express, in its capacity as the actual servicing agent, is required to satisfy regulatory requirements. *See*, paragraphs, 60-70, supra.

98. In Georgia, however, the Court declines to find with respect to the post-order DMCCI contracts that Express, as servicing agent, was required to maintain the insurance

required of persons engaged in "debt management services" because in Georgia the applicable statute regulates only "debt adjusting" for a fee. Ga. Code Ann. §18-5-1. In the case of the DMCCI contacts, the debtors pay their fees to DMCCI and no evidence was presented that DMCCI lacked the required insurance when these contracts were executed.[4] The Court also is unpersuaded at this time that the law would permit the conclusion that Express is the alter ego of DMCCI or that somehow Express's lack of insurance should be imputed to DMCCI based on the evidence presented at the hearing.

99. On the other the hand, the Court finds that Express is subject to and was in violation of the insurance requirements in Florida with respect to any contracts between debtors and DMCCI originally entered into before July 18, 2008 (the date of issuance of the Zurich policy) because although Express was not providing "debt management services" as defined in Fla. Stat. § 817.801 since it was not collecting fees directly from the debtors, it qualified as a "credit counseling agency" providing "credit counseling services;" Leshin has repeatedly testified that Express provides debt reduction and financial educational services. *See* Fla. Stat. §817.801(1) and (2). Pursuant to Fla. Stat. § 817.804 any person engaged in debt management services or credit counseling services is required to maintain at all times insurance coverage for employee dishonesty, depositor's forgery and computer fraud on the terms stated in Fla. Stat. §817.804(b). The FTC proved at the hearing that Express did not obtain the insurance required by Florida law until July 18, 2008.

100. With respect to Florida, the FTC also argued that the coverage obtained by

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[4] The Court does not understand from the testimony that DMCCI turns over the fees it collects directly to Express; rather the fees are deposited in a Leshin-controlled account from which he causes the administrative expenses and overhead of Express to be paid.

Express on July 18, 2008 failed to satisfy Florida law because it was not retroactive for all "occurrences" prior to July 18, 2008. Fla. Stat. §817.804 requires that the insurance coverage be maintained "at all times." The Court is satisfied that the Zurich policy, which covers "occurrences" "during the Policy Period shown in the Declarations, before such policy period or both" substantially complies with the requirements of Florida law.

100. In Ohio, persons engaged in "debt adjusting" are required to obtain and maintain insurance coverage on certain terms for employee dishonesty, depositer's forgery and computer fraud "at all times." Ohio Rev. Code Ann. § 4710.02(E). "Debt adjusting" includes doing business in debt adjusting, budget counseling, debt management or debt pooling service to effect the adjustment compromise or discharge of any consumer debt to receive from the debtor and disburse to the debtor's creditors any money. The Court finds that with respect to the "re-transferred" DMCCI contracts, it is Express that engages in debt adjusting, budget counseling and/or debt pooling service and that it is Express that effects the adjustment, compromise or discharge of consumer debt. Accordingly, Express was required to be in compliance with Ohio Rev. Code Ann. § 4710.02(E), but was not until July 18, 2008 for the same reasons as stated above.

C. Ferdon and Leshin are Individually Liable for Contempt

101. Leshin wrote the scripts that violated paragraph X.A. of the Order. Additionally, he controls Express and DMCCI and caused these entities to violate paragraph VI.D. Ferdon approved of the transfers that violate VI.D. In addition to Leshin's and Ferdon's liability for directly participating in the Order violations, Ferdon and Leshin are also individually liable for the contemptuous acts of Express, Leshin, P.A. and DMCCI through their positions as officers.

"A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs." *Wilson v. United States*, 221 U.S. 361, 376-77 (1911); *Connolly v. J.T. Ventures*, 851 F.2d 930, 93-35 (7th Cir. 1988) (corporate president and vice president liable for contempt). Both Leshin and Ferdon had notice of the Order at issue as well as the legal requirements in the states discussed above. Nonetheless, instead of consulting the Court as to their proposed course of action, they proceeded at their peril. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949); *Combs v. Ryan's Coal Company, Inc.*, 785 F.2d 970, 979 (11th Cir. 1986). "If a defendant acquiesces in a decree and undertakes to make his own determination of its meaning, having been alerted by it he acts at his own peril." *Wirtz v. Ocala Gas Company, Inc.*, 336 F.2d 236, 240 (5th Cir. 1964). Defendants neither sought to modify their ban from entering into or accepting transfer of contracts where they were not in compliance nor the prohibition on ceasing collections from those who cancelled. Nor did they seek clarification whether their proposed course of action in soliciting the C Notice clients complied with those provisions, even though they knew during the July 21 and 22 hearing that they were going to proceed in that manner. As officers of the three corporations that violated the Order, Ferdon and Leshin also liable.

D. Appropriate Remedies for Civil Contempt

102. Civil contempt remedies "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. U.S. 821, 827 (1994). The Contempt Defendants were placed on notice by the FTC's contempt motion (D.E. 366), as well as prior motions for extension of the Monitor's tenure in light of the Defendants' failure to properly cancel existing clients (*See* D.E. 355), and

they had their opportunity to be heard in briefs (D.E. 358, 359, 375), and the evidentiary hearing on February 13 and 17, 2009.

103. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb*, 336 U.S. at 193. In such proceedings, the court utilizes its inherent authority by providing the relief necessary to effect complete compensation to those aggrieved by the contempt. *See, e.g., Bagwell*, 512 U.S. at 829 (compensatory nature of the relief sought is a hallmark separating civil from criminal contempt) (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947)). In civil contempt, proper sanctions either coerce compliance with the order, *Lawrence v. Goldberg*, 279 F.3d 1294, 1300 (11th Cir. 2002); or redress consumer injury. *McGregor v. Chierico*, 206 F.3d 1378,1387 (11th Cir. 2000); *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 465 (S.D. Fla. 1998). The fact that the FTC is seeking redress, not for its own losses, but for the losses of consumers, does not remove this action from the auspices of civil contempt. *See e.g.*, *FTC v. Kuykendall*, 371 F.3d 745, 753 (10th Cir. 2004). Further, the Court may properly seek the assistance of the Court-Appointed Monitor in seeking accurate amounts to compensate proven contempt violations. *See FTC v. Neiswonger*, 494 F.Supp.2d 1067, 1082 fn.20 (E.D. Mo. 2007) ("the Court will await a final computation from the Receiver, at which time the Court will modify the contempt order to include a compensatory sanction to be levied against any or all defendants.")

1. Consumer Redress for Paragraph VI.D violations.

104. Disgorgement is a proper civil contempt remedy. *See In re: General Motors Corp.*, 110 F.3d 1013, 1018-19 (4th Cir. 1997). Contempt Defendants are ordered to disgorge all amounts collected from consumers since May 5, 2008 as follows:

California

105. All fees obtained from consumers who are parties to the 404 post-order consumer contracts in California as discussed in paragraph 35 *supra*.

Tennessee

106. All fees obtained from consumers who are parties to the 61 post-order consumer contracts with Express in Tennessee as discussed in paragraph 81 et. seq. *supra*.

107. All fees collected from consumers who are parties to contracts that DMCCI's transferred to Express referred to in paragraph 83 *supra*.

108. All fees obtained from consumers who are parties to the 159 post-order consumer contracts with DMCCI referred to in paragraph 83 *supra*.

Kentucky

109. All fees obtained from consumers who are parties to the 37 post-order consumer contracts with Express in Kentucky as discussed in paragraph 84 *supra*.

110. All fees collected by Express on account of DMCCI's transfer of 169 Kentucky consumer contracts to Express referred to in paragraph 60 *supra*.

111. All fees collected by DMCCI on account of the 126 post-order consumer contracts that it entered into with Kentucky residents referred to in paragraph 87 *supra*.

Nevada

112. All fees obtained from consumers who are parties to the 51 post-order consumer contracts in Nevada as discussed in paragraph 88 *supra*.

Minnesota

113. All fees collected by Express on account of DMCCI's transfer of 158 Minnesota consumer contracts to Express referred to in paragraph 61 *supra*.

Florida

114. All fees collected from consumers by Express for 117 post-order consumer contracts entered into prior to July 18, 2008 in Florida as discussed in paragraph 93 *supra*.

115. All fees collected by Express on account of DMCCI's transfer of 721 Florida consumer contracts to Express referred to in paragraph 54 *supra*.

Georgia

116. All fees collected from consumers who are parties to the 112 post-order consumer contracts with Express as discussed in paragraph 93 *supra*.

117. All fees collected from consumers by Express on account of DMCCI's transfer of 701 Georgia consumers contracts to Express referred to in paragraph 54 *supra.*

Ohio

118. All fees collected from consumers who are parties to the 88 post-order consumer contracts with Express as discussed in paragraph 93 *supra*.

119. All fees collected from consumer on account of DMCCI's transfer of 600 Ohio consumer contracts to Express referred to in paragraph 54 *supra.*

Texas

120. All fees obtained from 391 consumers who entered into post-order contracts with Express prior to August 8, 2008 discussed in paragraph 32 *supra*.

2. Consumer Redress for Paragraph X.A. violations.

121. With respect violations of paragraph X.A of the Order, Contempt Defendants are ordered to disgorge all amounts of fees that Defendants solicited and collected from "existing clients" in the states of California, Nevada, Tennessee, Kentucky, Florida, Georgia, and Ohio since May 5, 2008.

E. Disgorgement Order

122. Defendants Leshin, Leshin, P.A., Express Consolidation, and Ferdon, and non-party DMCCI, must make all reasonable efforts to pay the amounts ordered disgorged within the thirty (30) day time set out above. *See CFTC v. Wellington Precious Metals*, 950 F.2d 1525, 1529-30 (11th Cir. 1992); *In re: Lawrence*, 251 B.R. 630, 650-54 (S.D. Fla. 2000), *aff'd* 279 F.3d 1294 (11th Cir. 2002); *Piambino v. Bestline Products, Inc.*, 645 F. Supp. 1210, 1215 (S.D. Fla. 1986). This order is to remedy contempt via disgorgement, not a money judgment. Accordingly, failure to comply with this order for disgorgement may be punished by contempt. *Wellington Precious Metals* 950 F.2d 1525, 1529-30 (11th Cir. 1992) (affirming incarceration as coercive remedy to secure compliance with disgorgement order); *In re: Lawrence*, 279 F.3d at 1300-1 (affirming incarceration for failure to comply with order to turn over assets to trustee); *Hodgson v. Hotard*, 436 F.2d 1110, 1113-14 (5th Cir. 1971) (failure to pay pursuant to a Court order enforcing "public rights"is not merely enforceable by levy or execution, but rather civil contempt).

F. Modification of the Order

123. The Contempt Defendants' demonstrated failure to comply with the Final Order constitutes appropriate changed circumstances warranting a modification of that order pursuant to Rule 60(b), Fed. R. Civ. P. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968) (if it is shown that the decree has not achieved adequate relief in a statutory enforcement action, it is the duty of the court to modify the decree).

124. Courts have the power to modify a stipulated injunction following a finding of contempt. *See System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright,* 364 U.S. 642, 651 (1961); *FTC v. Neiswonger*, 494 F.Supp.2d at 1084.

125. Within 10 days hereof, the FTC shall submit a proposed Modified Stipulated Injunction and Order that includes the following provisions: (1) the Monitor to send new Notices to all consumers who executed contracts in violation of the Order, (a) for those clients who cancelled pursuant to the C notice and from whom the Contempt defendants continued to collect, the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants, (b) for those clients in states where the Defendants are not or were not in compliance with state law (as found above) when the contracts were executed the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants, (c) for those clients whose contracts were executed before Defendants' complied with the law of the state where the client resides, the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants; (2) a restriction on any transfers of clients or contracts by the Contempt Defendants amongst

themselves or to any debt consolidation services provider owned or controlled by Contempt Defendants; (3) a restriction on communicating with the recipients of the new Notices, set forth in (1) above. Finally, the notices in (1), above, will state, with specificity, the violations of the Order committed by the Defendants at the time the client was offered or executed the violative contract. The Court-Appointed Monitor will be compensated at the same rate and in the same manner as in the Order. These notices shall be drafted by the FTC for the Monitor's use and dissemination subject to the Court's approval. Therefore the FTC shall submit the forms of Notice to the Court for her approval within 10 days hereof.

126. For those clients in states where the Defendants are not or were not in compliance with state law (as found above) and who did not respond to the notices sent by the Monitor in July 2008, the Monitor shall send an additional Notice, at Defendants' expense, informing such clients that because Defendants were not qualified to do business in the client's state, the client's debt management plan has been transferred to a new provider. The Notice shall also inform each client that in order to continue his or her debt management plan, the client must sign a contract with a different debt consolidation services provider, either the alternative provider identified in the notice or a provider that the client has selected. The Notice shall also inform each client that if they fail to sign a contract with the alternative provider or another provider that is qualified under state law within 30 days, the client will no longer receive services under their debt management plan. The Notice shall include information about a toll-free number established by the Commission to explain the clients' options. These notices shall be drafted by the FTC for the Monitor's use and dissemination subject to the Court's approval. Therefore the FTC shall submit the forms of Notice to the

Court for her approval within 10 days hereof.

127. Defendants shall cease collecting fees from any clients who reside in states identified in this Court's Omnibus Order as states in which Defendants are not qualified to conduct debt management services (DE 339, Omnibus Order, Pages 6-7, ¶¶ 1, 3) and from whom Defendants have continued to collect payments under contracts executed prior to the Stipulation and Order.

128. Unless specifically Modified in the Modified Stipulated Injunction and Order, all provisions of the Order will remain.

G. Appointment of Monitor To Determine Amount To Be Disgorged

129. The Court is unable to compute the exact amounts to be disgorged from the exhibits. Therefore, the Monitor is hereby appointed to determine the amount to be disgorged for each of paragraphs 104 through 121 and to file a report within 30 days here of setting forth the amounts in categories by state.

H. Extension of the Monitor's Appointment

131. The Monitor's Appointment is hereby extended for a period of 240 days from entry of this Order or the completion of all duties, whichever occurs first.

DONE AND ORDERED in Chambers at Miami, Florida this 6th day of April 2009 *nunc pro tunc* for March 27th , 2009.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record