No. 20-55858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JASON CARDIFF and EUNJUNG CARDIFF, et al.,
Defendants-Appellants,

and

VPL MEDICAL, INC.,
Intervenor-Appellant.

Appeal from the United States District Court
for the Central District of California
No. 5:18-cv-02104-DMG-PLA

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO MOTION FOR SUMMARY REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Appellants Jason Cardiff and a company he owns and/or controls, VPL Medical, Inc., have appealed a district court order entering a Preliminary Injunction with an asset freeze and Receivership over VPL. Hoping to short circuit the ordinary appeal process, Cardiff now asks this Court to summarily reverse the district court's order. The Court should reject Cardiff's motion, which does not nearly meet the strict standards for such unusual relief.

BACKGROUND

1. The FTC's Complaint, the District Court's Original TRO and PI, and Subsequent Contempt Orders

In October 2018, the FTC sued Jason and Enjung Cardiff and others for violating the FTC Act, 15 U.S.C. §§ 45(a), 52, the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8404, the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c), and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105, through a wide-ranging scheme of fraud and deception.[1] ECF 1. The complaint alleges that the Cardiffs and their co-defendants made false and unsubstantiated claims that their products would help people quit smoking, lose weight, and improve their sexual performance. It also charged a related

[1] The other defendants are Danielle Cadiz, a/k/a Danielle Walker; Redwood Scientific Technologies, Inc. (California); Redwood Scientific Technologies, Inc. (Nevada); Redwood Scientific Technologies, Inc. (Delaware); Identify, LLC; Advanced Men's Institute Prolongz LLC; Run Away Products, LLC; and Carols Place Limited Partnership. ECF 1.

unlawful auto-ship continuity program that resulted in unauthorized shipments and charges, abusive telemarketing through robocalls, and unsubstantiated claims regarding a multi-level marketing scheme.

On October 10, 2018, the district court entered a temporary restraining order against Defendants, ECF 29, which it extended two weeks later, ECF 48. On November 7, 2018, the court entered a preliminary injunction against them. ECF 59. The TRO and PI froze Defendants' assets and appointed a Receiver who is directed and authorized to, among other things, "[c]onserve, hold, manage, and prevent the loss of all Receivership Property, and perform all acts necessary or advisable to preserve the value of those Assets … ." ECF 59 at 23-24, Section XVI.D. The PI grants the Receiver "full power to sue for, collect, and receive, all Receivership Property[.]" *Id*. As pertinent here, it defines "Receivership Property" as: "any Assets, wherever located, that are: (1) owned, controlled, or held by or for the benefit of … Jason Cardiff, … in whole or in part; (2) in the actual or constructive possess of … Jason Cardiff …; or (3) owned, controlled, or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by … Jason Cardiff … ." ECF 59 at 9, Definition. M.

The Asset Freeze is designed to preserve funds so that they remain available for consumer redress if a monetary judgment is entered at the conclusion of the

case. Paralleling the definition of Receivership Property, it covers all assets (1) owned or controlled, directly or indirectly, (2) held, in part or in whole, for the benefit of, or (3) in the actual or constructive possession of any Defendant. It also covers all assets (4) owned or controlled by, in the actual or constructive possession of, or otherwise held for the benefit of any corporation, partnership, asset protection trust, or other entity that is directly or indirectly owned, managed, or controlled by any Defendant. ECF 59 at 14-15, Section VII.A.

Importantly for this motion, the TRO and PI's Asset Freeze and Receivership cover *all* Cardiff assets, personal and business, whenever acquired, not simply assets held when the TRO was entered. ECF 59, Section VII.D. at 15. Other defendants did not face such a broad freeze. That differential treatment (including placing the Cardiffs' individual assets under receivership) was justified by evidence showing that the Cardiffs used elaborate asset protection vehicles designed to shield their assets from creditors and potential creditors. ECF 5 at 62.

Subsequent events have proven the prescience of such provisions. The FTC has documented the Cardiffs' violations of the TRO, such as Jason Cardiff's attempt to wire more than $200,000 to third parties, including parties outside the United States. ECF 206. Indeed, since entry of the PI, the district court has twice found the Cardiffs in contempt for failing to disclose assets, failing to turn assets over to the Receiver, and dissipating and wasting assets covered by the PI. ECF

238, 315. The first contempt involved an elaborate scheme, aided by their friend Jacques Poujade, to hide the Cardiffs' control of a Canadian company, while maintaining that Jason Cardiff was merely an unpaid consultant to the operation. Cardiff used the company to transfer $1.56 million (Canadian or CAD) from a company bank account (for which the Cardiffs were the only signatories) to a subsidiary account. At a contempt hearing, the district court rejected the Cardiffs' explantion for the transfer, stating:

> I would say of the 16 years I've been on the federal court, I've never presided over a matter where the fraud committed by the defendants was so clear, the deception so extreme. I'm astounded.

ECF 188-1, Tr. 389:3-6. It continued:

> I've heard carefully from the Cardiffs. Their stories are totally unbelievable. It's pretty clear to the Court that they've lied, that they worked in concert with each other and with others to avoid, violate the conditions of the orders of the Court.

ECF 188-1, Tr. 390:3-7. The district court found the Cardiffs and Poujade in contempt of the asset freeze. ECF 238 at 2.

The second contempt involved the Cardiffs' refusal to pay their mortgage, thereby dissipating the value of their residence (also a frozen asset)—while at the same time spending freely on nonessential living expenses, such as multiple luxury car leases using money from an unknown source. ECF 300-1 at 6-9. The district court ordered the Cardiffs to reimburse the Receivership Estate for their unpaid

mortgage and truthfully and completely account for all of their assets (ECF 315 at 5), but they have not done so.[2]

2. VPL Medical, Inc.

VPL, the corporate appellant here, appears to be the Cardiffs' latest attempt to conceal their assets and income. On March 2, 2020, the Cardiffs' counsel reported (as required by the PI) Jason Cardiff's intent to create a "business entity that will manufacture and market disposable sanitary masks to be marketed and sold wholly to distributors and wholesalers of the mask. Jason will be the owner, principal, and agent of the business … ." ECF 374 at 2, ¶ 3. On April 27, Cardiff submitted to the FTC and the Receiver a report concerning his involvement in VPL. The report outlined a byzantine but not fully formed structure for multiple entities to carry out this mask business. As in the past, Cardiff downplayed his role, referring to himself as merely a "consultant," although he served as the CEO, co-founded the company, and called it "my biggest company to date." ECF 365 at 10. The Cardiffs' report provided no details about his role at VPL, which later secured millions of dollars in government contracts.

Although Cardiff told the court that no one associated with defendant Redwood was involved in the new company, in fact, Cardiff chose someone with

[2] The district court held Jason Cardiff in contempt a third time for obtaining a new Irish passport in violation of an order requiring him to surrender his passports to the Receiver. ECF 190-1 at 151-55.

long-term ties to Cardiff and Redwood, Bobby Bedi, as a front man for VPL. Bedi worked for Cardiff at Redwood, served on Redwood's Board and as its head of technology, wrote blog posts touting Redwood products, provided search-engine optimization services, helped launch a multi-level marketing scheme, and helped apply for merchant accounts. ECF 373 at 4, 8-101.

Third-party documents confirm Cardiff's control over VPL. In mid-April, 2020, the Veterans Administration (VA) and the Department of Health and Human Services (HHS) awarded VPL contracts for up to $6.3 million and $14.5 million, respectively, to supply those agencies with surgical masks. ECF 372 at 2 (¶ 3), 4-17. VPL received another protective equipment contract from the Federal Emergency Management Agency (FEMA) at the end of April. ECF 372 at 2 (¶ 5), 27-28. In correspondence between Stacey Barker, the head of VPL's enterprise sales, and the VA, Cardiff was the only person copied. ECF 370 at 10. Similarly, an email from Barker to FEMA stated that she was copying Cardiff, "my CEO." *Id.* VPL phone records show approximately 600 calls totaling nearly 2,000 minutes between Barker and Cardiff between March 25 and the end of May. *Id*.

Cardiff also served as the public face of VPL. A mid-March Twitter post directed to the U.S. President listed jc@vplmedical.com as VPL's contact person. ECF 370 at 10-11. Investigative reporting by ProPublica referred to Cardiff as VPL's representative. ECF 370 at 11.

3. *Ex Parte* TRO and Entry of PI

As described above, Cardiff's control over VPL makes its assets Receivership Assets subject to the Asset Freeze. Because of Cardiff's proven history of concealing his assets, on June 24, 2020, the FTC sought an *ex parte* TRO imposing an asset freeze and appointing a Receiver over VPL. ECF 370. The district court entered it the same day. ECF 352. The court found that the FTC would likely succeed in showing that Cardiff controls VPL and its assets, which therefore are Receivership Property. ECF 352 at 5. The court also found that, given Cardiff's past contemptuous conduct, he was likely to conceal or dissipate the VPL assets and destroy evidence of his ownership of VPL absent the *ex parte* TRO. ECF 352 at 6. That would irreparably harm the FTC's ability to obtain monetary relief for Cardiff's consumer victims. *Id*.

The district court also issued an order to show cause why it should not enter a PI. In response, Cardiff and Bedi maintained that Cardiff was only a consultant to VPL, and not its CEO. ECF 388 at 5. Yet documents found by the Receiver in VPL's office referred to Cardiff variously as a director (along with Bedi), founder, CEO, COO, and president of VPL. *Id*. The Receiver found emails in which Cardiff described VPL as "my biggest company to date" and expressing his desire to own "super-majority shares" and to have the ability to call all of Bedi's stock at any time and at minimal cost. *Id.*

Following a hearing, the district court entered the PI. It noted that the original asset freeze provisions had no temporal limitation and applied to any "[a]ssets owned or controlled, directly or indirectly," by Cardiff. *Id.* at 4, 6. It rejected Cardiff's claim that he was merely a consultant. "Given inconsistencies in how Bedi described Cardiff's position; [others'] belief that Cardiff acted as the CEO; Cardiff's history of dishonesty before this Court; and the undisputed facts that Cardiff helped to found VPL and wields final authority over many crucial business decisions, the Court concludes that the preponderance of the evidence supports the FTC's argument that Cardiff owns or controls VPL, whether directly or indirectly, even if he is not technically VPL's CEO." *Id.* at 6. It thus held that VPL belonged in the receivership and its assets frozen under the original PI. *Id.*

ARGUMENT

I. SUMMARY REVERSAL STANDARD

Cardiff's motion omits any mention of the strict standard for summary reversal. Such relief is appropriate only if the movant shows "clear error or an intervening court decision" that "requires … reversal" of the decision on review. *See* Ninth Circuit Rule 3-6(a)(1). The outcome of the case must be "beyond dispute." *United States v. Hooten*, 693 F.2d 857, 858 (9th Cir. 1982). For the reasons discussed below, Cardiff comes nowhere close to meeting that exacting standard.

II. THE SUPREME COURT'S *LIU* DECISION DOES NOT CLEARLY REQUIRE REVERSAL OF THE ASSET FREEZE

The asset freeze serves to preserve assets owned or controlled by Jason Cardiff that could be used to satisfy any monetary judgment that may ultimately be rendered in this case. Cardiff claims that the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), changed the law of monetary relief so substantially that the freeze on VPL's assets is now plainly unlawful. His contentions fall far short of proving the matter beyond dispute.

First, Cardiff asserts that under *Liu*, any ultimate monetary remedy must be limited to the net profits of his scheme, and since his scheme (he claims) has been unprofitable, no asset freeze can be justified "where … there were no unlawful net profits." Mot. at 8. That issue is not suitable for summary disposition. For one thing, this case involves a preliminary proceeding to preserve assets, not a final judgment and calculation of remedies that permanently forfeits assets. In that posture, protection of consumer interests requires ensuring that the maximum possible assets will be available to cover the ultimate judgment. *Liu*, which concerned only a final judgment, does not address the situation presented here.

Indeed, the record to date shows that the possible future judgment could dwarf the total amount of frozen assets, including the VPL assets. The Cardiffs' unjust gains from the Redwood scheme amounted to $18.2 million from January 1,

2015, through October 12, 2018. ECF 53 at 9; ECF 381 at 3. Cardiff has not refuted this calculation. ECF 368 at 5. The frozen assets total less than $5 million.[3]

Beyond that, whether and how *Liu* even applies to this case is a question plainly inappropriate for disposition without briefing and argument. Cardiff contends that *Liu* clearly overruled *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601-02 (9th Cir. 2016), *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982), and other precedents holding that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers courts to award restitution of unjust gains in FTC enforcement cases. Mot. at 7. But the cases interpreted different statutes. *Liu* interpreted a provision in the securities laws that allows a court to order "equitable relief." 15 U.S.C. § 78u(d)(5). The FTC Act, by contrast, authorizes a "permanent injunction." 15 U.S.C. § 53(b). As this Court has held, "equitable relief" serves as "a limitation on the relief available" from a court of equity, whereas "permanent injunction" conveys a broader power "to award complete relief," including legal remedies. *Commerce Planet*, 815 F.3d at 602. *Liu* did not address that matter, so the interpretation of the FTC Act set forth in *Commerce Planet* remains binding.

[3] Prior to the freeze of VPL assets, the FTC had frozen approximately $560,000 USD and $1.56 million CAD (equivalent to about $1.2 million USD). ECF 388 at 9. VPL assets may total nearly $3 million. ECF 365 at 7.

Cardiff is therefore wrong that the district court erred in declining to apply *Liu*. In keeping with *Commerce Planet*, the district court concluded that *Liu* involved the narrower understanding of equitable relief, not the broader one implicated by the phrase "permanent injunction." ECF 388 at 8-9.

Even if *Liu* applies here, how it does so can be determined only after factual findings that have yet to be rendered. As Cardiff acknowledges, Mot. at 15, *Liu* established that "when the entire profit of a business … results from the wrongdoing, a defendant may be denied inequitable deductions." 140 S. Ct. at 1950 (cleaned up). That determination in turn "requires ascertaining whether expenses are legitimate." *Id*. At this preliminary point in the case, it is not possible to determine which of Cardiff's claimed expenses will be deemed "legitimate" and which will not. This Court cannot resolve that question now.

At this point, however, Redwood's own records reveal millions of dollar spent on media and advertising to promote and broadcast false and unsubstantiated claims. ECF 381 at 17. The Cardiffs also spent hundreds of thousands of dollars on luxury vehicles, cruises, resorts, and private air charter travel. ECF 381 at 18. Expenditures for worthless, deceptive products and lavish personal expenses are classic "inequitable deductions." *Liu*, 140 S. Ct. at 1945.

Second, Cardiff appears to argue that the district court could not properly freeze the assets of VPL because VPL itself is not a party to this case and has not

been accused of wrongdoing. Mot. at 6-7. The district court, however, froze the VPL assets not because they were derived from the Redwood scheme but because they were "Assets owned or controlled, directly or indirectly, by Defendant Jason Cardiff or Defendant Eunjung Cardiff." ECF 388 at 4.[4] In other words, the VPL assets are equivalent to a bank account or a house or any other thing of value. And Cardiff does not challenge the district court's factual determination that Cardiff controlled VPL. ECF 388 at 6. Even if he had, such a factual dispute would be unfit for summary reversal.

In any event, the freeze is not inconsistent with *Liu*. There, the Supreme Court held that the *amount* of a final disgorgement judgment should reflect the defendant's wrongdoing. Nothing in *Liu*, however, requires that frozen assets be "only the actual property obtained by" unlawful means. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000). Cardiff asks in effect for a tracing requirement, but *Liu* did not address such a requirement, and this Court rejected it under the FTC Act. *Commerce Planet*, 815 F.3d at 601. The district court correctly rejected Cardiff's position as well. ECF 388 at 5 n.4.

[4] Cardiff stipulated to the original PI, ECF 58, so cannot challenge the provision now.

III. THE "PUBLIC INTEREST" DOES NOT SUPPORT SUMMARY REVERSAL

Finally, Cardiff suggests that the public interest in a U.S.-based supply of surgical masks during the Covid-19 pandemic outweighs the FTC's interest in freezing funds that may be needed to provide equitable monetary relief at the conclusion of the case. Mot. at 8-11. Such equitable balancing is plainly inappropriate for summary disposition, but even if it were, the record does not support Cardiff's claim.

Cardiff says that the PI prevented VPL from fulfilling an HHS order for 20,000,000 facemasks, thus frustrating the goal of having such masks produced in the United States. Mot. at 9. The Receiver, however, concluded that VPL was not in a position to fulfill the HHS contract; he characterized it as "doomed to fail." ECF 403 at 3. Rejecting Cardiff's motion to remove the Receiver, ECF 391, the district court declined to second-guess the Receiver's conclusion. ECF 403 at 3. Instead, the court found that removing the Receiver (which is what summary reversal here would do) "would cause the estate irreparable harm" due to the real risk of asset dissipation. ECF 403 at 4. In any event, the district court on August 29 approved a plan for ongoing VPL operations to which the Receiver and the Cardiffs agreed. ECF 470.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion for Summary Reversal.

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August 31, 2020

CERTIFICATE OF SERVICE

I certify that on the 31st day of August, 2020, an electronic copy of the foregoing Reply of the Federal Trade Commission was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

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