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U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
ENTERED & SERVED  
MAR 31 2005  
CLERK, U.S. DISTRICT COURT  
DEPUTY

FILED  
MAR 1 2005  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,  
Plaintiff,  
v.  
INTEGRATED CAPITAL, INC. and  
ALAN WILSON,  
Defendants.

CV-N-03-0412-DWH (RAM)

ORDER

This matter comes before the court upon plaintiff's motions against defendants Integrated Capital Inc., and Alan Wilson. Plaintiff's first motion (#8) is to hold defendants in civil contempt of the stipulated final order ("SFO") entered in this case in August 2003. (#4). Plaintiff's second motion (#8) is to modify the SFO to permanently ban defendants from marketing any academic good or service. Defendants have opposed (#19) and plaintiff has replied (#21).

The parties were both represented and fully presented evidence to the court at a hearing on these motions on December 14 - 15, 2004 and January 18, 2005 as well as post trial briefs. For the reasons set forth below, plaintiff's motion for contempt (#8) is granted in part and denied in part and plaintiff's motion to modify the SFO is granted in part and denied in part.

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CPB

1 **Introduction**

2 Plaintiff Federal Trade Commission originally brought suit against defendants after receiving  
3 consumer complaints that defendants' business practices were deceptive and misleading. The parties  
4 settled and defendants agreed to a Stipulated Final Order in which defendants would pay a penalty  
5 and abide by a set of restrictions designed to curb concern over their sales methods. Plaintiff feels  
6 that defendants have not met the demands of the SFO and as such has moved for civil contempt and  
7 a modification of the SFO.

8 **I. Plaintiff's Exhibits 27 H - J**

9 As a preliminary matter, defendants have objected to plaintiff's exhibits 27 H - J and the court  
10 must decide whether they are admissible. Plaintiff argues that the exhibits are admissible as  
11 evidence of knowledge under Federal Rule of Evidence 404(b). To be admissible, the moving party  
12 must show that such purpose is a necessary element of proof, the prior act is based on sufficient  
13 evidence, and the prior act is not too remote in time. *See United States v. Ramirez-Robies*, 386 F.3d  
14 1234, 1242 (9th Cir. 2004). After review, the court finds it appropriate to admit plaintiff's exhibits  
15 27 H-J under Rule 404(b) to show knowledge, however in doing so the court notes they are in large  
16 part cumulative and not entirely on point and thus affords them little, if any, weight.

17 **II. Plaintiff's Motion for Contempt**

18 To establish a defendant's liability for civil contempt, the plaintiff must show by clear and  
19 convincing evidence that the defendant has violated a specific and definite order of the court. *FTC v.*  
20 *Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). "Clear and convincing evidence  
21 indicat[es] that the thing to be proved is highly probable or reasonably certain. This is a greater  
22 burden than preponderance of the evidence, . . . but less than evidence beyond a reasonable doubt."  
23 *U.S. v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001) (internal quotations omitted). It is without  
24 question that a court may impose fines to compensate for losses caused by violation in a civil  
25 contempt proceeding in an amount reflecting "complaintants' actual loss." *United States v. United*  
26 *Mine Workers of America*, 330 U.S. 258, 305-305 (1947). As such, in a contempt act for violations  
27 of an order in a fraud case under Section 13(b) or the FTC Act, a court has equitable authority to  
28 order payment of consumer redress for any injury caused by the violations. *FTC v. Kuykendall*, 371

1 F.3d 745, 764 (10th Cir. 2004); *McGregor v. Chierco*, 206 F.3d 1378, 1387 (11th Cir. 2000).

2 **A. Prohibited Business Activities in the SFO**

3 Section I of the Stipulated Final Order prohibits defendants from engaging in certain  
4 practices in the marketing and sale of academic goods and services. In particular, plaintiff charges  
5 that defendants have violated numerous SFO Section I subsections by “falsely representing” that  
6 customers: “were likely to get more aid than they could get on their own” (§ I(b)); “were likely to  
7 receive a specified amount of financial aid” (§ I(f)); “[would] get customized advice tailored to their  
8 specific financial needs” (§ I(g)); and that defendants misrepresented their expertise (§ I(h)). *See*  
9 #38, pp. 4 - 12.

10 For example, plaintiff points to defendant's solicitation letter, which references the school  
11 district of the target student near to defendant's return address; the letter itself declares that as a  
12 “[school district] area student you may benefit from [defendant's] services.” (#38, p. 4). The  
13 consumer witnesses at the evidentiary hearing before the court testified that those references gave  
14 them the impression that defendants were affiliated with their school district. The solicitation letter  
15 and defendant's oral presentations made numerous statements about “maximizing eligibility to  
16 receive financial aid” as well as touting defendants’ successes with previous clients.

17 Plaintiff further complains that while defendants offer consumers “customized financial aid  
18 strategies,” financial aid is calculated by means of a rigid structure, meaning that the vast majority of  
19 consumers receive the same strategy. In a similar vein, plaintiff points out that defendants input  
20 consumers’ financial data into computer programs to calculate their financial aid eligibility and  
21 opines that using a computer to “churn out a generic report” does not constitute a personalized  
22 strategy. Additionally, plaintiff cites repeated references during defendants’ presentations as to the  
23 professional and particular expertise of defendants in student loan applications and paints this as  
24 misrepresentation of their abilities.

25 These allegations seem to turn more on defendant’s apparent failure to make the Section II(a)  
26 affirmative disclosures rather than demonstrate an affirmative effort by defendant to portray greater  
27 success than consumers could achieve on their own. As to the defendants allegedly misrepresenting  
28 their expertise, while defendants’ presentation and scripts contain abundant chest-thumping, the

1 presentations seem more concerned with convincing consumers that the financial aid process can be  
2 difficult and contains many potential pitfalls, something which plaintiff does not contest.

3 While “[d]eception may result from the use of statements not technically false or which may  
4 literally be true,” *U.S. v. Ninety-Five Barrels*, 265 U.S. 438, 443 (1924), by drafting the term  
5 “falsely” into the prohibitions of Section I of the Stipulated Final Order, the court feels that plaintiff  
6 has set a higher bar to meet than simple misrepresentation. The difficulty this court has in finding  
7 the representations and acts cited by plaintiff to be false, is that the violations plaintiff makes them  
8 out to be are only indirect implications. While the SFO dictates that indirect false representations are  
9 forbidden, the implications here are tenuous at best. In considering whether defendants are in  
10 contempt of this section of the order, the court finds that while defendants “more likely than not”  
11 violated portions of SFO section I, plaintiff has failed to meet the stricter “clearly convincing”  
12 standard for civil contempt by showing the court that those violations were “highly probable.”

13 **B. Affirmative Disclosures Required by the SFO**

14 Section II(a) of the SFO requires that defendants make five certain affirmative disclosures  
15 about its business to consumers during “any oral sales presentation.” In this regard, defendant has  
16 failed miserably. The presentation scripts provided by defendant contain none of the disclosures.  
17 The court pointed this out to the parties during a conference on January 18, 2005 and defendant has  
18 offered nothing to convince the court that they have met this obligation.

19 The affirmative disclosures were included in the SFO because they related to the core areas  
20 of defendants’ business practices that attracted the eye of plaintiff FTC in the first place. Their  
21 conspicuous disclosure could mitigate much of the harm done by ‘misunderstandings’ as to the  
22 services provided by defendant. Defendants’ contentions that the placement of the affirmative  
23 disclosures at the conclusion of the individual ‘table talk’ meetings satisfies the SFO is without merit  
24 - the disclosures must be made during the sales presentation, not after consumers have already  
25 decided to purchase defendants’ services.

26 Plaintiff has presented evidence that clearly and convincingly demonstrates defendants’  
27

28 <sup>1</sup>Even were this court to find the evidence presented by plaintiff to meet the clear and convincing standard, it would not change the sanction this court chooses to impose upon defendant.

1 failure to comply with Section II(a) of the Stipulated Final Order. The court is distressed by  
2 defendants' failure, for the affirmative disclosures were surely the simplest requirement of the SFO  
3 to implement.

4 **III. Plaintiff's Motion to Modify the SFO to Ban Defendants from Selling Academic Goods**  
5 **or Services**

6 Defendants seeming inability to comply with the Section II(a) affirmative disclosure  
7 requirement of the SFO is disappointing, as is the defendants coming within a hairs-breadth of  
8 violating Section I. However, it does not warrant banning them from selling or marketing academic  
9 goods or services - at least not yet. Instead, the court orders as follows:

- 10
- 11 1. The Stipulated Final Order (#4) still applies in full, except as modified by this order;
- 12 2. Normally, the court would sanction defendants for their actions, given that defendants are in  
13 contempt of a prior order and because the college application process is hard enough on a  
14 vulnerable section of the public even without their needing to discern voluble salespersons.  
15 However, the court feels it would be more equitable to redress consumer harm than to fill its  
16 own coffers. Therefore, defendants shall contact all customers who purchased defendants'  
17 services between the entry of the Stipulated Final Order and July 17, 2004 and offer a full  
18 refund to those consumers dissatisfied with defendants' services; a copy of each  
19 communication and response shall be provided to plaintiff;
- 20 3. Defendants shall submit their solicitation letters, presentation and table talk scripts to plaintiff  
21 FTC for approval prior to use. Plaintiff FTC will respond in an efficient, timely and  
22 courteous manner so as to not prejudice defendants;
- 23 4. The parties will submit a status report to the court three months from the date of this order  
24 and then submit further status reports every six months thereafter (i.e. on the last day of each  
25 June and December). After receiving the June 2008 status report, the court will determine  
26 whether it is appropriate to continue this monitoring effort.

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**IV. Conclusion**

Accordingly, **IT IS ORDERED** that plaintiff Federal Trade Commission's motion for contempt (#8) is **GRANTED** in part and **DENIED** in part as set forth above. Plaintiff's motion to amend the Stipulated Final Order is **GRANTED** in part and **DENIED** in part as set forth above.

It is further **ORDERED** that due to this judge's imminent retirement, that the case be transferred to the Chief Judge for random reassignment.

DATED: This 30th day of March, 2005.

  
UNITED STATES DISTRICT JUDGE