

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FEDERAL TRADE COMMISSION,)
)
Plaintiff,)
)
vs.)
)
RICHARD C. NEISWONGER, ET. AL.,)
)
Defendants.)

Case No. 4:96CV2225SNL

MEMORANDUM OPINION

Plaintiff Federal Trade Commission (FTC) has filed this civil contempt action against defendant Richard C. Neiswonger, contempt defendant William S. Reed, and contempt defendant Asset Protection Group, Inc. (APGI) contending that the defendants have violated a 1997 Permanent Injunction by marketing and selling a training and business program with misrepresentations and by failing to disclose material facts to a large number of consumers. The FTC further alleges that defendant Neiswonger, individually, violated the 1997 Permanent Injunction by failing to provide a current performance bond to the FTC and to notify the FTC of his affiliation with defendant APGI. A hearing was conducted on October 25 and 26, 2006 to address the two primary issues present in this civil contempt action: 1) the FTC's desire to modify the 1997 Permanent Injunction as to defendant Neiswonger; and 2) the FTC's desire to have the Court find defendant Neiswonger, contempt defendant Reed, and contempt defendant APGI in civil contempt for violating the 1997 Permanent Injunction.¹ At the conclusion of the

¹Motions pending raising these issues are as follows: Contempt defendant Reed's motion to dismiss (#57), filed September 29, 2006; FTC's motion for an order modifying the Permanent Injunction as to defendant Neiswonger (#72), filed October 20, 2006; and Receiver's Application for Order as to why defendant Reed should not be held in contempt (#98), filed January 26, 2007.

hearing, all interested parties were permitted to file post hearing briefs. Furthermore, following the hearing on the civil contempt matter as to the 1997 Permanent Injunction, the Receiver filed a motion requesting that the Court make a separate ruling finding contempt defendant Reed in contempt for violating the provisions of a temporary restraining order (TRO) that this Court entered on July 17, 2006. *See*, Court Order #29. Contempt defendant Reed has filed a response to this additional motion for contempt as it relates to the alleged violation of the July 17, 2006 TRO. All substantive matters relating to this civil contempt action have been fully briefed, and the matter is now ripe for disposition.

After careful consideration of all objections to exhibits and testimony taken with the case, all said objections are hereby overruled, and all exhibits offered into evidence at the hearing are received into evidence.² All testimony will be considered by the Court and given its due weight. This Court, having now considered the pleadings, the testimony of witnesses, documents in evidence, and any other evidentiary materials submitted for the Court's consideration, and being fully advised in the premises, enters its findings and final disposition of this matter.

Background³

²In connection with this ruling, the Court expressly grants the FTC's motion *in limine* to admit testimony and exhibits from the deposition of contempt defendant Reed (#75), filed October 24, 2006.

³The Court's recitation of background material, including any specific findings of fact, it considers relevant to the issues before the Court are derived from the hearing transcript(s) of the TRO/Permanent Injunction hearing held on October 25-26, 2006 (#87 and #88, filed November 28, 2006); the parties' pleadings; the hearing exhibits, including deposition testimony; and post-hearing briefs. Where necessary, the Court will cite to specific evidence and/or testimony. Where more than one copy of the same exhibit has been filed by different parties, the Court will cite to only one exhibit; however, the reference should not be considered any indication of bias on the part of the Court. Referring to only one of duplicative exhibits is simply a matter of judicial efficiency.

Plaintiff, the FTC, is a federal law enforcement agency created by Congress, 15 U.S.C. §§41 *et. seq.*, charged with enforcing Section 5(a) of the FTC Act, 15 U.S.C. §45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

In 1996, defendant Neiswonger was involved, along with others, in a business venture known as Medical Recovery Systems, Inc. The FTC filed a complaint against Neiswonger, charging him and others with marketing training and business programs with false and misleading income claims, among other deceptive practices, in violation of Section 5(a) of the FTC Act.⁴ Specifically, the FTC alleged that Neiswonger was deceptively marketing business training programs for upwards of \$10,000.00 that purportedly equipped members of the general public to become well-paid business consultants in the areas of finance and expense reduction, among other things. Some of the alleged deceptive practices were Neiswonger's claims that consumers who purchased these programs were likely to earn six-figure incomes from fees generated using the programs, when in actuality, such incomes were rarely (if ever) achieved. Neiswonger also allegedly urged potential clients to speak with named "references" before purchasing the program(s), without disclosing that said "references" were paid to provide a positive (if not profitable) picture of the success of the program(s).

After filing the complaint, Neiswonger and his co-defendants stipulated to the entry of a Permanent Injunction (hereinafter referred to as the 1997 Permanent Injunction), which is the subject of this current litigation.

After Neiswonger signed the 1997 Permanent Injunction and paid \$425,000.00 in redress to the FTC, the United States Department of Justice charged him with financial crimes relating to

⁴**FTC v. Neiswonger, et. al.**, 4:96CV2225SNL, filed November 13, 1996.

the program(s) which were the subject of the FTC's 1996 civil lawsuit.⁵ In September 1998, Neiswonger pled guilty to one (1) count of wire fraud and two (2) counts of money laundering. United States District Court Judge Rodney W. Sippel sentenced Neiswonger to eighteen (18) months in a federal penitentiary and further ordered restitution in the amount of \$2,750,000.00 to the consumer victims.

As he was preparing to enter federal prison to serve his term of imprisonment, on or about October 23, 1998, Neiswonger joined contempt defendant Reed in constituting the first Board of Directors of contempt defendant APGI.

Defendant Neiswonger subsequently entered federal prison to serve his term of incarceration. Thereafter, the Justice Department initiated civil forfeiture action(s) against him, charging that he failed to disclose approximately \$1,300,000.00 in illicit proceeds to the authorities during plea negotiations in his criminal case. Neiswonger ultimately forfeited \$750,000.00 in settlement of the government's forfeiture proceedings.

Contempt defendant William Reed and defendant Neiswonger have been business partners for many years prior to the present action. Reed is a former Colorado attorney whose license to practice was suspended by the Supreme Court of the State of Colorado in 1997 for "engag[ing] in misrepresentations and dishonesty".⁶ In addition to joint business ventures with defendant Neiswonger, contempt defendant Reed has written a book entitled "Bulletproof Asset Protection (2004)" which advises the reader of methods by which to "hide" their assets from potential creditors, government agencies, receivers, and the courts.

⁵**United States of America v. Neiswonger**, 4:98CR364RWS.

⁶**Colorado v. Reed**, 942 P.2d. 1204, 1205 (Colo. 1997). As of today's date, Reed's law license has not been reinstated.

Contempt defendant APGI is a Nevada corporation created in late 1998 by defendant Neiswonger and contempt defendant Reed. From 1999 to mid-2006, APGI offered and sold a training and business opportunity program (the “APGI Program”) to consumers nationwide. The APGI Program was marketed and sold as an “assets protection” program wherein consumers who purchased the program became APGI “asset protection consultants”. They, in turn, would presumably sell APGI “asset protection services” to clients wishing to conceal assets from potential litigants and creditors, government agencies, and the courts. APGI “asset protection consultants” presumably would receive a portion of the fees paid by clients who purchased APGI’s services.

APGI’s “asset protection services” involved the sale and use of Nevada corporations that employed APGI’s services as a resident agent. APGI also sold services related to the formation and maintenance of offshore international business companies (“IBCs”). APGI “asset protection consultants” not only received a portion of the fees paid by clients who purchased APGI’s services, including the Nevada corporations and IBCs sold; but also, presumably received payments for the annual renewal of these corporations by said clients.

Defendant Neiswonger and APGI

Defendant Neiswonger actively participated in marketing and promoting the APGI Program. He personally promoted the program to potential “asset protection consultants” in person and by telephone. Neiswonger’s name, statements attributed to him, and signature all appear in APG promotional materials for the APG Program. . Neiswonger served as a Director of APG in 1998 and 1999.⁷ He then served as APGI’s Marketing Director. From 1998 to 2006, he additionally served as an agent of APGI.

⁷From all accounts it appears that he served in this capacity during his incarceration.

For a time, Neiswonger used an entity called APGI Marketing, Inc. to assist in the marketing of the APGI Program. According to the Receiver's Report (FTC's Exhibit 112), APGI Marketing, Inc. was a fictitious division of contempt defendant APGI. APGI internal documents do not distinguish between the two business entities. *See*, FTC's Exhibits 51, 105.

Contempt Defendant Reed and APGI

Contempt defendant Reed served as APGI's Director and President from late 1999 until mid-July 2006. Reed actively participated in promoting and marketing the APGI program along with Neiswonger. Reed's name, picture, statements attributed to him, and his signature all appear in APGI promotional materials. He also promoted the APGI Program via phone and other means. Reed reviewed and approved the development and final versions of most promotional materials for APGI. *See*, Neiswonger Deposition, pgs. 94, 179, 207.

Contempt Defendant APGI's Operation

Contempt defendant APGI was marketed throughout the United States via printed advertisements in various publications, mailed promotional letters, and interstate phone calls between APGI agents and prospective consumer purchasers. Via print ads, APGI solicited potential purchasers of the APGI Program with the promise of a substantial income in a "lucrative business". FTC Exhibit 13 and 14. Such persons were then invited to call a number to get more information. Consumers who called the advertised phone number got a recording requesting that they leave their mailing address for receipt of an "introductory package". This "introductory package" included a video describing the advantages of Nevada and offshore business corporations in general, as well as a "Special Free Report" signed by Neiswonger and containing statements from Neiswonger and Reed describing the APGI Program. FTC Exhibit 6; FTC Exhibit 15. The highlights of the "Special Free Report" include (but are not limited to)

Neiswonger's exaltation of the "overwhelming" demand for APG's services, Reed's account of how he gave up his law practice to develop APGI's "unique business system" which could easily provide anyone working the program part-time with an income of "more than \$90,000", and touting the benefits of Nevada and offshore business corporations. Potential buyers are again invited to call APGI for additional information.

When consumers called for additional information, APGI personnel would again reiterate the claims made in the introductory materials. They would provide consumers with the names of "references"; i.e., purportedly active APGI consultants who would corroborate these claims. The references were paid to recommend APGI but this fact was not normally disclosed to the consumer nor the amount paid to the reference for the positive spin put on APGI to the inquiring consumer. *See*, FTC Exhibits 33, 36, 37, 38, 40, 41, 42 (consumers' declarations); *see also*, FTC Exhibits 7, 9, 11, 14, 16-20, 23-24 (transcripts of recorded phone calls between FTC investigators posing as consumers and APGI personnel verbal sales pitches).

These contacts often next lead to a direct solicitation from defendant Neiswonger extolling the virtues of the APGI Program and additional promotional letters from Neiswonger and Reed. Ultimately, if a consumer elected to purchase the APGI Program for approximately \$9800.00; s/he received training materials, access to a one-day "training session" and a business affiliation with APGI as an "asset protection consultant". FTC Exhibit 6.

(Mis)representations re APGI

Consistently throughout APGI's written promotional materials are statements attributed to Reed and Neiswonger, including but not limited to:

- 1) that prospective purchasers of the APGI Program did not need prior experience in sales, management, or professional businesses to be successful APGI consultants (FTC Exhibits 6, 15);

2) that a “6-figure income potential” was obtainable on a part-time schedule (FTC Exhibits 6, 42C, 42D);

3) acquiring 6-8 clients in a single month was a “**VERY reasonable, very achievable goal**” (FTC Exhibit 10, 38; *see also*, FTC Exhibits 15, 64 speaking to the ease of obtaining clients);

4) that APGI was a business opportunity that could “generate a substantial income”; “a true **\$250,000+++ yearly income**” (FTC Exhibit 63);

5) promising prospective purchasers that “**\$350,000+** First year potential income. Part or full time. Unique products with no competition.” (FTC Exhibit 65);

The vast number of written representations throughout the marketing and promotional materials regarding the APGI Program as a “lucrative business” and likely incomes as “substantial” or “six-figure” were convincing to a significant number of consumers and relied upon by these same consumers to purchase the program.

In the promotional materials, Reed and Neiswonger attempted to “disclaim” their representations regarding income potential and ease of obtaining clients by placing such statements infrequently in the materials, using small print-type, and then “disclaiming” the disclaimers. For example, near the end of the “Special Free Report”, Neiswonger states that APGI “do[es] not guarantee any specific or certain income, nor should you consider any of the examples used . . . as projections of your income. Individual results may vary.” FTC Exhibit 6. He then goes on to state that “your income will depend on your initiative, time and effort invested . . . and other factors over which we have no control.” FTC Exhibit 6. However, he immediately negates the impact of this disclaimer by stating “You can certainly see, however, at a profit of \$1,700 to \$6,400 per client served, it takes only a small number of clients each year to create a very substantial income.” FTC Exhibit 6. Another example is Reed states in another

APGI promotional sales letter that a first year consultant, working part-time, can earn \$114,000 selling a certain ratio of Nevada and Bahamas corporations to clients. FTC Exhibit 36B. He follows this assertion by disclaiming this six-figure income claim “as a mathematical example only”. FTC Exhibit 36B. However, he too immediately negates this disclaimer by stating that “Our current experience is that the ratio is actually much more favorable than our example.” FTC Exhibit 36B.

A particularly effective representation by the defendants consisted of an advertisement featuring an APGI consultant named Barbara Black who purportedly had “absolutely no sales background” and made a “six-figure” income in her first year as an APGI consultant. FTC Exhibit 64. The defendants failed to inform prospective purchasers that 1) Ms. Black had been supplied with numerous names of prospective clients prepared to buy corporations (*see*, FTC Exhibit 105; Neiswonger Deposition, pgs. 124); 2) that Ms. Black was the only person out of nearly 2000 APGI consultants to have obtained a “six-figure” income at any time from the APGI Program; and 3) Ms. Black obtained this level of income for only two (2) years. *See*, FTC Exhibit 64, 105.

Numerous verbal representations were made to prospective purchasers regarding the likelihood of earning a “substantial income” or “six-figure” income from fees generated by using the APGI Program. Neiswonger repeatedly referred to a “six-figure” income when speaking directly to potential purchasers. The APGI “references” verbally corroborated written statements regarding the earning potential for “six-figure” incomes. Consumer declarations verify that the defendants repeatedly told consumers that they were likely to earn a “substantial income” or “six-figure” income from working as APGI consultants.

Factual Findings based on Receiver’s Report and APGI Records

Nearly two thousand (2000) consumers bought the APGI Program and became APGI consultants. FTC Exhibit 112. However, according to APGI's business records, only three (3) consultants, in a period of over six (6) years, succeeded in selling more than fifty (50) corporations in total. FTC Exhibit 119. A majority of APGI consultants failed to sell any corporations. FTC Exhibits 112, 113, 119.

The Receiver, upon review and analysis of APGI's records, found that the vast majority of APGI consultants actually lost money. The Receiver estimated that approximately 94% of the consultants failed to earn back their initial purchase fee for the program. Several of these consultants testified at the hearing as to their monetary losses and/or inability to earn an income that anywhere near the "six-figure" income represented multiple times to them by the defendants. The Receiver's findings corroborated the testimony of the consultant witnesses regarding little or no sales. Using APGI's own database, the Receiver ranked the listed APGI consultants by the number of corporations they sold, and concluded that the median number of corporations sold was zero (0). *See*, FTC Exhibit 113; Receiver's Hearing Testimony.

Neither defendant Neiswonger nor contempt defendant Reed disputed the Receiver's findings at the hearing. Neither party presented any evidence of consumer satisfaction or documentary evidence of actual income of APGI consultants.

Contempt defendant Reed put the number of APGI consultants, during the relevant timeperiod, at approximately 400. FTC Exhibit 18. However, State of Nevada corporate records show that APGI has provided resident agent services for nearly 3200 Nevada corporations since 1998; thus, at best, each of the 400 consultants only sold eight (8) corporations during his/her relationship with APGI. FTC Exhibit 26. Furthermore, as of the time of the initiation of this lawsuit, nearly 50% of the 3200 corporations listing APGI as their resident agent are defunct; i.e.,

failed to renew their corporate status. Thus, APGI consultants not only failed to earn “substantial income” based upon fees generated by the initial corporation, such income was nearly impossible for the majority based upon lack of renewals.

Material Facts Not Disclosed to Consumers

As stated before, the material fact that fees were not paid to “references” supplied by the defendants was not disclosed to consumers. APGI paid references \$50.00 for each initial phone call they accepted from a prospective purchaser of the APGI Program. FTC Exhibits 101, 105, 112; *see also*, FTC Exhibits 6, 8, 10, 20, 22, 23, 25, 26, 36. Some references by accepting several phone calls monthly earned anywhere from \$1000 to \$3000. FTC Exhibit 105; Neiswonger Testimony (October 26, 2006).

Representations were made to consumers that APGI’s “proprietary strategic alliance” with a telemarketing firm, would provide consumers with appointments with carefully-screened “qualified prospective clients”. FTC Exhibit 6. However, in actuality, APGI consultants paid thousands of dollars for these “appointments” to a succession of telemarketing firms recommended by APGI, only to find that their “appointments” were no more than “cold-calls” with persons who either had simply wanted general information or had no idea what APGI was or why the telephone call, or in some cases, a personal visit. FTC Exhibits 34, 37, 39, 40, 42.

Neiswonger’s prior criminal convictions in connection with the marketing of two (2) prior business opportunity programs were not disclosed to prospective buyers of the APGI Program. Contempt Defendant Reed’s law license suspension was not disclosed to prospective buyers of the APGI Program. *See*, FTC Exhibits 6, 20, 21, 23, 36, 40.

Miscellaneous Violations of the 1997 Permanent Injunction

Defendant Neiswonger failed to provide the FTC with proof of a current performance bond while marketing and selling the APGI Program.⁸ Although he apparently secured a performance bond in 1997 for another business enterprise⁹, however, there is no evidence that he ever notified the FTC about that bond or any bond secured in connection with the marketing and selling of the APGI Program. FTC Exhibit 116.

Neiswonger and Reed formed APGI's first Board of Directors in late 1998. Neiswonger did not report to the FTC, in writing, his new business affiliation.¹⁰ FTC Exhibits 1, 2, 27.

APGI's Profits

The Receiver found records at APGI's place of business evidencing the defendants' gross sales of the APGI Program and the income and expenses attributed to that program. FTC Exhibit 112; Miller Testimony (Receiver's Representative)(October 26, 2006 Hearing). These records were kept in electronic format by Neiswonger using Quicken, a well-recognized computer software for financial record-keeping. Said records were located on Neiswonger's office computer and preserved by the Receiver's staff. The records generated a written report of income and expenses on July 20, 2006. FTC Exhibit 118; Miller Testimony. The report accurately represented APGI's financial status as of July 19, 2006.

The Receiver also found financial records evidencing the defendants' income attributed to the sale of the APGI Program on the office computer of APGI Vice-President Kimberly Toy.

⁸Paragraph V of the 1997 Permanent Injunction required Neiswonger to procure and provide proof of a \$100,000.00 performance bond to the FTC prior to marketing or selling any program.

⁹The evidence indicates that the surety on this bond cancelled same in 2004.

¹⁰Paragraph XI of the 1997 Permanent Injunction required Neiswonger to inform the FTC, in writing, of any new business affiliation with any program, for a period of three (3) years, commencing in 1997.

These records also were made in the Quicken format, on a regular basis, near or at the time of the transactions. Again, once retrieved, they were preserved by the Receiver's staff. Based upon these records, as well as the records retrieved from Neiswonger's computer, the Receiver's staff was able to generate a current computation of the defendants' income from the sale of the APG Program.

APG's records indicate that, between January 2000 and July 2006, the defendants generated income of approximately \$19,854,937.64 from the sale of the APGI Program. These records indicate gross sales began in 2000 and for a period of five (5) years, from 2001 to 2005, the recorded gross sales for the APGI Program were in excess of \$3,000,000.00 per year. FTC Exhibit 118; Miller Testimony.

Neiswonger took the income of APGI to pay his personal expenses for a period of six (6) years; logging these expenses as "personal" in corporate accounting records. FTC Exhibits 114, 118. Although Neiswonger recorded \$2,802,371.19 in personal expenses in his expense records; the Receiver found the total payments made to, or on behalf of, Neiswonger from the proceeds of the sales of the APGI Program to be in excess of \$3,000,000.00 dollars.¹¹ FTC Exhibit 114; Miller Testimony. These payments included, but were not limited to, personal credit card payments, as well as payments on Mercedes-Benz and Lexus automobiles. FTC Exhibit 114.

The Receiver's investigation revealed that contempt defendant Reed also derived a substantial income from the sales of the APGI Program. Using the records obtained from Neiswonger and Toy's office computers, the Receiver was able to ascertain that Reed made \$1,223,195.78 in cash withdrawals, and that payments to other business entities controlled by Reed for "training" totaled \$3,688,861.13. The Receiver concluded that with the cash

¹¹\$3,089,031.10

withdrawals, the payments for “training”, and other miscellaneous payments to himself or for his benefit, Reed received approximately \$5,000,000.00 from the sales of the APGI Program. FTC Exhibit 114; Miller Testimony.¹²

Contempt Defendant Reed’s Notice of the 1997 Permanent Injunction

Defendant Neiswonger testified that he communicated to Reed several times both the requirements of the 1997 Permanent Injunction and the need to comply with it. FTC Exhibit 105 - Neiswonger Deposition, pgs 49-50, 253. Reed himself acknowledged the existence of the 1997 Permanent Injunction via conversations with Neiswonger. FTC Exhibit 104 - Reed Deposition, pgs. 15-16. He was aware that the injunction existed and that Neiswonger had to abide by several provisions if he were to enter into a new business affiliation. *Id.* In 2004, an APGI consultant complained to Reed about Neiswonger’s background and showed Reed a copy of the FTC’s original complaint in this case. Pianga Testimony (October 25, 2006 Hearing). Reed also received other complaints regarding Neiswonger’s background and this FTC litigation in 2005. FTC Exhibits 84,110. Reed personally responded to the complainants referencing Neiswonger’s “problems with the FTC” and court orders. FTC Exhibit 111; Hammond Testimony (October 25, 2006 Hearing).

Relevant Provisions of the 1997 Permanent Injunction¹³

¹²There was additional testimony of the Receiver’s representative that these figures may still actually understate the income for the defendants because (at the time of the hearing) APGI’s bank accounts had not been fully reconstructed. As of late October 2006, only approximately \$1.2 million in receivership defendant accounts had been frozen. Finally, recently, the Receiver has reported to the Court his belief that contempt defendant Reed has engaged in numerous financial transactions in violation of the TRO entered by this Court on July 17, 2006. These allegations are the subject of a motion by the Receiver as to why contempt defendant Reed should not be held in contempt for violation of the TRO (#98).

¹³FTC Exhibit 1; Court Order #12, filed February 28, 1997.

The FTC has alleged that defendant Neiswonger and contempt defendants Reed and APGI violated Paragraphs I, I.A., II, and II.A. of the 1997 Permanent Injunction; and furthermore, defendant Neiswonger has violated Paragraphs V and XI of said Injunction.

Paragraph I of the Injunction prohibits defendant Neiswonger, and all others in active concert or participation with him who receive actual notice of the Order, from misrepresenting any material fact in connection with advertising, promoting, marketing, selling, or otherwise inducing participation in any program. Prohibited misrepresentations include, but are not limited to, claims that consumers will earn a six-figure income, or words of similar import, from client fees generated from any program. The 1997 Permanent Injunction prohibits any misrepresentation of material facts in connection with advertising, promoting, marketing, selling or otherwise inducing participation in any program, regardless of whether such misrepresentations are made directly or by implication.

Paragraphs II and II.A. require Neiswonger, and all others in active concert or participation with him who receive actual notice of the Order, to affirmatively disclose all material facts to prospective purchasers of any program. Material facts include, but are not expressly limited to, “the amount of remuneration or any other benefit received by each reference whose name is provided to the prospective purchaser”. The Injunction requires the advance disclosure of all material facts to prospective purchasers in connection with advertising, promoting, selling or otherwise inducing participation in any program.

Paragraph V of the 1997 Permanent Injunction prohibits defendant Neiswonger from marketing or selling any program without first providing the FTC with written proof of a current performance bond before commencing marketing activities.

Paragraph XI of the 1997 Permanent Injunction requires defendant Neiswonger to report to the FTC, in writing, any new business affiliation with any program for a period of three (3) years, commencing in 1997.

Application and Modification of 1997 Permanent Injunction as to Defendants

This Court has jurisdiction over this matter for all purposes, as reserved and stipulated to, in Paragraph XIII of the 1997 Permanent Injunction. Moreover, pursuant to Rule 65(d) Federal Rules of Civil Procedure, injunctions are binding on all parties to the action, as well as “those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”

As a party to the original litigation in this matter, and a signatory to the 1997 Permanent Injunction, there is no dispute that said Injunction applies to defendant Neiswonger.

Normally, the Court would address any factual or legal issues before reaching a decision regarding the applicability of the subject injunction to Neiswonger; however, it appears that he has conceded its applicability. Although he presented a limited defense at the hearing; mostly consisting of disputing semantics, he chose not to file a post-hearing legal brief of “findings of fact and conclusions of law”. Instead, he filed a “Proposed Permanent Injunction” which concedes certain violations of the 1997 Permanent Injunction and seeks to modify the FTC’s

proposed amended 1997 Permanent Injunction¹⁴. Thus, this Court finds that there is no dispute that defendant Neiswonger has violated the provisions of the 1997 Permanent Injunction.¹⁵

As to contempt defendants Reed and APGI, Inc., it is their contention that this Court lacks jurisdiction over them because they were not signatories to the 1997 Permanent Injunction nor does credible evidence exist that they had “actual notice” of the subject injunction and its applicability to Neiswonger. Upon careful consideration of the matter, the Court finds that the contempt defendants Reed and APGI, Inc. did have actual notice of the 1997 Permanent Injunction and its applicability to Neiswonger; thus, pursuant to Rule 65(d) Fed.R.Civ.P., this Court has jurisdiction over them in the matter presently pending before the Court.

In their motion to dismiss¹⁶, the contempt defendants Reed and APGI, Inc. (referred periodically as APGI) argue that the FTC has failed to allege sufficient facts showing that either

¹⁴ The FTC has filed a “(proposed) Second Permanent Injunction Modifying Permanent Injunction as to Defendant Neiswonger” (#72), filed October 20, 2006. Defendant Neiswonger has filed his “(proposed) Second Permanent Injunction Modifying Permanent Injunction as to Defendant Neiswonger” (#83-3), filed November 8, 2006. Defendant Neiswonger’s version is a modification of FTC Document #72.

¹⁵ Even if Neiswonger had not filed his own proposed version of a second permanent injunction, this Court would have still found that the overwhelming evidence presented at the hearing establishes one or more violations of the 1997 Permanent Injunction by defendant Neiswonger. He clearly failed to notify the FTC of his affiliation with APGI, Inc., a business marketing and selling an “asset protection program”. He clearly failed to provide the FTC, in writing, a performance bond in the minimum amount of \$100,000.00 prior to the start-up of APGI, Inc. He consistently failed to inform potential customers of material facts relating to his criminal background regarding fraud in a similar business, and the suspension of contempt defendant Reed’s law license. He continued to entice potential buyers with advertisements and statements touting “substantial” incomes and/or “six-figure incomes” despite the preclusion of same by the 1997 Permanent Injunction. He failed to inform potential buyers that the “references” were actually paid to provide a good report on APGI; again in direct violation of the 1997 Permanent Injunction. It is this Court’s considered opinion that defendant Neiswonger clearly engaged in activities in direct violation of the 1997 Permanent Injunction in order to promote a business scheme similar to the one which gave rise to the 1997 Permanent Injunction and to the criminal charges levied against him in 1998.

¹⁶ Document Nos. #57 and #58, filed September 29, 2006.

contempt defendant had actual knowledge of the 1997 Permanent Injunction and its applicability to Neiswonger or that either contempt defendant was in active concert with Neiswonger (in violating the terms of the 1997 Permanent Injunction).

Rule 65(d) Fed.R.Civ.P. provides:

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice, of the order by personal service or otherwise.

Firstly, contempt defendant Reed contends that the FTC has failed to allege that he had **specific** knowledge regarding the terms of the subject injunction and/or failed to allege that he had actual knowledge of the specific terms of the subject injunction. He argues that the FTC has not met its burden because its evidence on this issue is circumstantial; i.e. generalities based upon his business relationship with defendant Neiswonger. The Court finds defendant Reed's argument meritless.

After careful consideration of the evidence before the Court, the Court finds that defendant Reed received actual notice of the subject injunction as required by Rule 65(d).

Personal service is not required under Rule 65(d). All that is required is knowledge of the mere existence of the injunction; not its precise terms. *See, Hill v. United States*, 33 F.2d. 489, 491 (8th Cir.1929). Furthermore, direct evidence is not required to sustain the FTC's burden of showing actual notice. "[F]or the reason that knowledge, like any other fact, may be established by circumstantial evidence . . .". *Hill*, at 491. Circumstantial evidence establishing "actual knowledge" may be derived from the parties' relationship, concert of action in maintenance of the unlawful business, and "the obvious interest of the defendants in evading any interference

with their unlawful business as long as possible”. Hill, at 491. In the present case, Neiswonger testified he told Reed of the requirements of the Permanent Injunction and the need to comply with same; that he discussed the “order” with Reed several times; and Reed’s own testimony of his understanding that Neiswonger had to abide by certain restrictions regarding future business practices.¹⁷ Furthermore, on more than one (1) occasion APGI consultants brought to Reed’s attention the initial FTC action, even providing him with the case number and a copy of the original complaint. Reed is a former attorney knowledgeable of civil remedies, including injunctive relief. The fact that he may never had seen Document #12 is immaterial. He was aware of an “order” restricting Neiswonger’s participation in any future selling of financial programs, and he was aware of the FTC’s action against Neiswonger. He and Neiswonger had been business partners for many years, and even remained in contact while Neiswonger was in prison. He had access to any and all documentation regarding this FTC litigation. Consequently, given Reed’s business relationship with Neiswonger, the fact he was an attorney, the fact that Neiswonger communicated to him several times regarding the Court’s enjoinder of Neiswonger’s further business practices, the Court concludes that it was “highly improbable” that Reed was unaware of the existence of the subject injunction. *See, Hill*, at 491 (“These and other circumstances indicated to the trial judge, and indicate to us, that it was so highly improbable that these defendants did not know of this injunction as to make a finding that they did know proper.”). It is this Court’s considered opinion that defendant Neiswonger and contempt

¹⁷Reed asserts that he was aware of an “order” but not of a “permanent injunction”. His limited deposition testimony was that he was aware that Neiswonger could continue “to sell his products, but there were three restrictions that he had to be careful of . . . Number one, he said he had to keep a bond . . . Number two, he said he was prohibited or couldn’t make income claims; and number three, he said that he had to disclose to any prospects that references were paid.” FTC Exhibit 104. He claimed that he had no “knowledge” of any injunction because he had never actually seen a document evidencing an injunction.

defendant Reed, given all the circumstances, had not overlooked the 1997 Permanent Injunction, “but that the purpose and intent of all the defendants was to disregard it.” Hill, at 491.¹⁸

Secondly, the Court finds that contempt defendants Reed and APGI, Inc. acted in concert or participation with defendant Neiswonger. The evidence sufficiently established that Reed directly reviewed and approved promotional materials for the APGI Program. His name, photograph, personal statements, and signature were widely used in promotional and sales materials for the APGI Program. He personally spoke with prospective consumers about the APGI Program. He and Neiswonger were members of the Board of Directors for APGI, Inc. Reed was President and Director of APGI from 1998 through 2006; Neiswonger was APGI’s agent and Marketing Director from 1998 to 2006. The Court finds that the evidence adduced shows that Reed and Neiswonger, together, ran APGI, Inc.

APGI acted in concert or participation with defendant Neiswonger in advertising, marketing, promoting, and selling the APGI Program. Although at one time, Neiswonger created a fictitious division of APGI, Inc. known as “APGI Marketing”, this entity and APGI, Inc. were indistinguishable in promoting and selling the APGI Program.

The evidence sufficiently shows that contempt defendants Reed and APGI, Inc.’s interests closely identify with the interests of defendant Neiswonger, and that they all stood in privity with one another in marketing, advertising, promoting, and/or selling the APGI Program. *See, Thompson v. Freeman*, 648 F.2d. 1144, 1147 (8th Cir. 1981).

¹⁸As for contempt defendant APGI, Inc., since Reed and Neiswonger both had actual knowledge of the 1997 Permanent Injunction, and they were officers of APGI, Inc., the Court finds that such knowledge may be imputed to their corporate business entity.

