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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13
14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16 v.

17 NETWORK SERVICES DEPOT, INC.;
18 NETWORK MARKETING, LLC, dba
Network Services Marketing;
19 NET DEPOT, INC.;
20 NETWORK SERVICES DISTRIBUTION,
INC.;
21 SUNBELT MARKETING, INC.;
CHARLES V. CASTRO;
ELIZABETH L. CASTRO; and
GREGORY HIGH;

22 Defendants; and

23 PHYLLIS WATSON,

24 Relief Defendant.
25

CV-S-05-0440-LDG-LRL

**FEDERAL TRADE
COMMISSION'S REPLY IN
SUPPORT OF MOTION FOR AN
ORDER TO SHOW CAUSE WHY
JEFFREY S. BENICE AND
JEFFREY S. BENICE, A
PROFESSIONAL LAW
CORPORATION SHOULD NOT
BE HELD IN CIVIL CONTEMPT
AND MEMORANDUM IN
SUPPORT**

26 Jeffrey S. Benice (Benice) and Jeffrey S. Benice, a Professional Law Corporation
27 (Benice PLC) (collectively Contempt Defendants) admittedly have failed to abide by this
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1 Court's March 5, 2009 Final Judgment and Order for Permanent Injunction ("Final Order") by
2 failing to turn over \$238,300 to the FTC, and are thus in contempt. Contempt Defendants have
3 failed to meet their burden to put forth sufficient evidence to support their defense of
4 impossibility. Furthermore, Benice is bound by the Final Order and is personally liable for the
5 entire \$238,300.

6 **Contempt Defendants Have Not Produced Sufficient Evidence To Support**
7 **An Impossibility Defense**

8 Contempt Defendants' primary argument is that their insolvency makes it impossible for
9 them to comply with the Court's Final Order. However, they do not meet the legal standard, nor
10 do they offer sufficient factual proof of inability to pay more than \$2,500 per month they have
11 now offered to pay. Contempt Defendants must establish their inability to pay "clearly, plainly,
12 and unmistakably." *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995); *SEC v.*
13 *Musella*, 818 F. Supp. 600, 602 (S.D.N.Y. 1993) (citing *United States v. Rylander*, 460 U.S. 752,
14 757 (1983)). To satisfy this burden, Contempt Defendants must show "categorically and in
15 detail" why [they] cannot comply. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1241 (9th
16 Cir. 1999); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983). Conclusory statements do not
17 meet this burden. *Huber*, 51 F.3d at 10. To succeed on this defense, Contempt Defendants must
18 go beyond a bald assertion of inability to pay and satisfy their burden by introducing evidence in
19 support of their claim that they made "in good faith all reasonable efforts to comply." *United*
20 *States v. Hayes*, 722 F.2d 723, 725 (11th Cir.1984) (quoting *United States v. Ryan*, 402 U.S. 530,
21 534 (1971)).

22 Moreover, inability to pay is a defense only when it is impossible for the contemnor to
23 pay any portion of the order, "otherwise, the party must pay what he or she can." *SEC v. Zubkis*,
24 No. 97Civ.8086 (JGK), 2003 U.S. Dist. LEXIS 16152 at *10 (S.D.N.Y. Sept. 11, 2003) (citing
25 *SEC v. Musella*, 818 F. Supp. 600, 602 (S.D.N.Y. 1993)). The alleged contemnor must establish
26 that he has no assets of any kind out of which he can satisfy the order of the court, and he must
27 do so under penalty of perjury. *SEC v. Executive Sec. Corp.*, 433 F. Supp. 470, 473 (S.D.N.Y.
28 1977). A person subject to a court order must comply to the fullest extent possible, regardless of

1 whether such efforts result in compliance in whole or in part. *Piambino v. Bestline Products,*
2 *Inc.*, 645 F. Supp. 1210, 1214 (S.D. Fla. Sept. 30, 1986) (citing *Parker v. United States*, 129 F.2d
3 374 (1st Cir. 1942)). In *Piambino*, the inability to comply with the Court's order was of the
4 contemnor's own making. There, the attorneys claiming inability to pay had failed to pay back
5 certain attorneys' fees they had received and ultimately spent. The court, holding them in
6 contempt, found that they had not made all reasonable efforts to comply, and having examined
7 their assets and liabilities, determined that they could pay at least a portion of the monies owed.
8 *Piambino*, 645 F. Supp. at 1213-1217.

9 Here, Contempt Defendants have not met their burden. In response to the FTC's
10 demand, Contempt Defendants provided to the FTC a financial statement that lists monthly
11 expenses. This statement utterly fails to provide any verifiable documentation needed to
12 determine the accuracy of the numbers or the reasonableness of the expenses, or whether the
13 numbers are simply Benice's exaggerated estimate of expenditures. FTC staff have repeatedly
14 asked for further documentation but Contempt Defendants have not provided any such
15 documentation. Indeed, Benice testified at his deposition that he makes an average of \$400,000
16 per year from his practice and specifically asserted that he is "not insolvent." (Ex. 2 at 45).
17 Contempt Defendants have not shown that it is impossible to pay more than the \$2,500 they have
18 now offered to pay, and thus, their impossibility defense must fail.

19 Moreover, even if Contempt Defendants cannot afford to pay the entire amount in one
20 lump sum, they should have employed the utmost diligence in discharging their responsibilities
21 by at least making payments. See *Musella*, 818 F. Supp. at 602. In their response to the
22 Contempt Motion, Contempt Defendants proposed to pay \$2,500 per month to the FTC pending
23 the outcome of the appeal. However, Contempt Defendants have not provided any
24 documentation that clearly, plainly, and unmistakably demonstrates that they can only afford to
25 pay \$2,500 per month despite numerous demands. Indeed, the financial statement simply shows
26 that Benice is paying over \$6,000 per month in rent and over \$3,100 per month in car payments
27 on a BMW, a Porsche Turbo, a Jeep Wrangler, and a motorcycle. (*Id.* at 31-32, 40-44, Ex. JB 5).
28 Contempt Defendants have not explained why they have not put money aside every month to

1 restore the funds that the Court found rightfully belonged to consumers. Apparently, Benice did
2 not heed the Court's March 2006 warning that he should factor such a risk into his fee
3 calculations.

4 Contempt Defendants claim that the FTC has failed to fully disclose Benice's financial
5 status. On the contrary, the FTC provided to the Court, as attachments to the Contempt Motion,
6 everything that Benice provided to the FTC, including the conclusory financial statements
7 lacking verifiable supporting documentation. FTC Staff have questioned many of the monthly
8 expenses, including \$6,000 per month rent, over \$3,100 per month for several cars, and \$2,500
9 per month for food.¹ Benice describes his financial woes to the Court, but his lifestyle does not
10 appear to be that of someone who cannot afford to pay more of what he owes pursuant to the
11 Court's Final Order. Contempt Defendants' inadequate proposal would have them paying barely
12 one percent of what they owe each month and does not address the FTC's demand for interest.
13 Further, the proposal is only limited to the pendency of the appeal and does not address what
14 happens if the Court's decision is upheld. If Contempt Defendants were to pay only \$2,500 per
15 month, it would take them almost eight years to pay off just the principal amount – an
16 unreasonably long period of time for someone who makes \$400,000 per year. In short,
17 Contempt Defendants' bald assertion of inability to pay and lack of documentation does not
18 satisfy their burden of showing "categorically and in detail" why they are unable to comply. *See*
19 *Affordable Media*, 179 F.3d at 1241.

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23 ¹ Nowhere in Benice's financial statement or deposition did he assert that he was supporting
24 four children and an elderly parent. In fact, he lists only one Dependent in his financial
25 statement – his daughter. It was only in Contempt Defendants' response to the Contempt
26 Motion that Benice claimed to support four other people to justify his high rent and monthly
27 expenses. Significantly, for the first time, he claims to support his girlfriend's three children, but
28 he has not produced any evidence of a legal obligation to support them, nor has he explained
why his girlfriend is not supporting her three children or contributing to the support by paying
part of the monthly expenses such as food and rent. Benice' generosity, including the extra
support that he has voluntarily taken on, does not prevent him from downsizing his expenses in
order to cut costs to pay his Court-ordered debt.

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Respectfully Submitted,

WILLARD TOM
General Counsel

Dated: October 19, 2009

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Federal Trade Commission

CERTIFICATE OF SERVICE

This is to certify that on October 19, 2009 , I served a true and correct copy (ies) of the attached:

FEDERAL TRADE COMMISSION’S REPLY IN SUPPORT OF ITS MOTION FOR AN ORDER TO SHOW CAUSE WHY JEFFREY S. BENICE AND JEFFREY S. BENICE, A PROFESSIONAL LAW CORPORATION SHOULD NOT BE HELD IN CIVIL CONTEMPT AND MEMORANDUM IN SUPPORT

to:

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Attorney for Defendants Charles Castro; Elizabeth Castro; Gregory High; and Phyllis Watson; Network Services Depot, Inc.; Net Depot, Inc.; Network Marketing, LLC; Network Services Distribution, Inc.; and Sunbelt Marketing, Inc.

by filing the document electronically through the CM/ECF system on October 19, 2009.

I swear under penalty of perjury that the foregoing is true and correct. Executed this October 19, 2009, at Washington, D.C.

/s/ Laura Schneider
LAURA SCHNEIDER