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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

FEDERAL TRADE COMMISSION,

Petitioner,

v.

DINAMICA FINANCIERA LLC,

Respondent.

2:08-CV-04649 MMM (PJWx)

~~PROPOSED~~ ORDER TO SHOW  
CAUSE WHY RESPONDENT  
SHOULD NOT BE HELD IN CIVIL  
CONTEMPT FOR ITS FAILURE  
TO COMPLY WITH THIS  
COURT’S JULY 31, 2008, ORDER  
AND NOTICE THAT DINAMICA  
FINANCIERA LLC AND ITS  
MEMBERS, JOSE MARIO  
ESQUER AND VALENTIN  
BENITEZ, MAY BE  
SANCTIONED, INCLUDING  
THROUGH COERCIVE  
INCARCERATION, FOR  
DINAMICA’S FAILURE TO  
COMPLY WITH THIS COURT’S  
ORDER

On September 22, 2008, this Court entered an Order finding that respondent, Dinamica Financiera LLC (Dinamica) was in civil contempt for its failure to comply with this Court’s July 31, 2008, Order (the “July 31 Order”) (DE 13) compelling Dinamica to produce complete responses to written interrogatories, all responsive documents, and a sworn certification of compliance for a Civil Investigative Demand (CID) issued by the Federal Trade Commission (Commission) on April 21, 2008, and then served on Dinamica. (September 22 Contempt Order) (DE 30). This contempt

1 order imposed a daily sanction of \$750.00, commencing on October 7, 2008, if  
2 Dinamica failed to purge itself of its contempt.

3 The Commission filed an Application asserting that Dinamica has failed to  
4 purge its contempt since the entry of the September 22 Contempt Order. The  
5 Commission's Application further states Dinamica has not paid any of the daily  
6 sanctions imposed by this Order. The Commission asserts that the monetary sanction  
7 imposed by the September 22 Contempt Order has not been effective and, therefore,  
8 requests that the Court impose additional sanctions for Dinamica's continuing civil  
9 contempt, including the coercive incarceration of one or both of Dinamica's  
10 members, Jose Mario Esquer and Valentin Benitez.

11 The Court has considered the Commission's Application and the papers filed  
12 in support thereof. Based on these materials it appears to the Court that the  
13 Commission has shown good cause for the entry of this Order.

14 It is, therefore, ORDERED that respondent Dinamica and its two members, Jose  
15 Mario Esquer and Valentin Benitez, appear at 10 a.m. on the 15th day of December,  
16 2008, in Courtroom No. 780, United States Courthouse, Los Angeles, California, and  
17 show cause, if any there be, why this Court should not find that Dinamica continues  
18 to be in contempt of this Court's July 31 Order and why the Court should not impose  
19 additional sanctions, including but not limited to coercively incarcerating Jose Mario  
20 Esquer, Valentin Benitez or both of them, as a result of Dinamica's continuing  
21 contempt and the apparent ineffectiveness of the monetary sanction imposed by this  
22 Court's September 22 Civil Contempt Order. Unless the Court determines otherwise,  
23 all issues raised by the Application and supporting papers, and any opposition to the  
24 Commission's Application, will be considered at the hearing on the Application.

25 IT IS FURTHER ORDERED that, if respondent Dinamica or either or both of  
26 its members, Jose Mario Esquer and Valentin Benitez, intend to file pleadings,  
27 affidavits, exhibits, motions or other papers in opposition to said Application or to  
28 the entry of the Order requested herein, such papers must be filed and delivered to

1 counsel for the Commission by 5 p.m. on December 5, 2008. Such filings, and  
2 Dinamica's appearance at the hearing on this Application, will serve as Dinamica's  
3 final opportunity to defend against the civil contempt sanction (e.g., by demonstrating  
4 an inability to pay the daily fine).<sup>1</sup> Any reply by the Commission shall be filed with  
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6       <sup>1</sup>The Supreme Court has held that a defendant may demonstrate a present  
7 inability to comply with an enforcement order in a civil contempt proceeding. *United*  
8 *States v. Rylander*, 460 U.S. 752, 757 (1983) (“In a civil contempt proceeding such  
9 as this, of course, a defendant may assert a *present* inability to comply with the order  
10 in question. While the court is bound by the enforcement order, it will not be blind  
11 to evidence that compliance is now factually impossible. Where compliance is  
12 impossible, neither the moving party nor the court has any reason to proceed with the  
13 civil contempt action. It is settled, however, that in raising this defense the defendant  
14 has a burden of production” (citations omitted)). In the Ninth Circuit, a defendant  
15 asserting an impossibility defense must show “categorically and in detail” why he is  
16 unable to comply with an enforcement order. *Federal Trade Commission v.*  
17 *Affordable Media*, 179 F.3d 1228, 1241 (9th Cir. 1999) (“[T]he party asserting the  
18 impossibility defense must show ‘categorically and in detail’ why he is unable to  
19 comply,” quoting *NLRB v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th  
20 Cir. 1973), and citing *Rylander*, 460 U.S. at 757); *Oliner v. Kontrabecki*, 305 B.R.  
21 510, 520 (N.D. Cal. 2004) (collecting cases and stating standard). This approach  
22 accords with that taken in other circuits. See, e.g., *Chicago Truck Drivers v.*  
23 *Brotherhood Labor Leasing*, 207 F.3d 500, 506 (8th Cir. 2000) (surveying precedent  
24 in First, Ninth, and Eleventh Circuits before holding that “alleged contemnors  
25 defending on the ground of inability must establish: (1) that they were unable to  
26 comply, explaining why ‘categorically and in detail’; (2) that their inability to comply  
27 was not ‘self-induced’; and (3) that they made ‘in good faith all reasonable efforts to  
28 comply’” (citations omitted)); *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir.  
1995) (“Accordingly, a party’s complete inability, due to poverty or insolvency, to  
comply with an order to pay court-imposed monetary sanctions is a defense to a  
charge of civil contempt. . . . [I]n order to hold the alleged contemnor in contempt,  
the court need only (1) have entered a clear and unambiguous order, (2) find it  
established by clear and convincing evidence that that order was not complied with,  
and (3) find that the alleged contemnor has not clearly established his inability to  
comply with the terms of the order. . . . [T]here is no requirement that the ability to  
pay be clearly established; what is required is that the *in*-ability to pay be clearly  
established by the alleged contemnor”); see also *Electrical Workers Pension Trust*

1 the Court and received by Dinamica and its members by 12 p.m. on December 12,  
2 2008.

3 IT IS FURTHER ORDERED that a copy of this Order and copies of said  
4 Application and the Memorandum of Points and Authorities in support thereof shall  
5 be served forthwith by the Commission upon counsel for Dinamica, and upon the two  
6 members of Dinamica, Jose Mario Esquer and Valentin Benitez. Service upon  
7 Dinamica's counsel shall be made by first-class mail, personal service, certified or  
8 registered mail return receipt requested, or by overnight express delivery service.  
9 Service upon Jose Mario Esquer and Valentin Benitez shall be made by personal  
10 service, or by certified or registered mail return receipt requested.

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12 **NOTICE of POTENTIAL FURTHER SANCTIONS for DINAMICA,**  
13 **JOSE MARIO ESQUER, and VALENTIN BENITEZ:**

14 Pursuant to this Order, Dinamica and its two members, Jose  
15 Mario Esquer and Valentin Benitez, are hereby placed on notice that  
16 they may be subject to further sanctions, beyond the monetary  
17 sanctions imposed by the Court's September 22 Civil Contempt  
18 Order, in the event the Court determines that Dinamica remains in  
19 contempt of the Court's July 31, 2008, Order. Since the monetary  
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22 *Fund of Local Union #58, IBEW v. Gary's Electric Service Co.*, 340 F.3d 373, 383  
23 (6th Cir. 2003) (adopting *Chicago Truck Drivers* standard for inability to comply  
24 defense); 17 AM. JUR. 2D CONTEMPT § 141 ("The inability of an alleged contemnor,  
25 without fault, to obey an order or decree of the court generally is recognized as  
26 absolving the contemnor from being held in contempt for violating the order or  
27 decree. Such a defense is effective only where, after using due diligence, the person  
28 is still not able to comply with the order. If one does all one can to comply with an  
order made by competent authority, one will not be punished for noncompliance  
because of the recalcitrance of others" (footnotes and citations omitted)).

1 **sanctions imposed by the September 22 Civil Contempt Order**  
2 **apparently have not coerced Dinamica to comply with the Court's**  
3 **July 31, 2008, Order, further sanctions may include, but are not**  
4 **limited to, the coercive incarceration of Jose Mario Esquer and**  
5 **Valentin Benitez. Such incarceration may continue until such time as**  
6 **Dinamica substantially complies with the terms of the Court's July 31,**  
7 **2008, Order.**

9  
10 DATED: December 1, 2008

  
MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE