

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NATIONAL UROLOGICAL GROUP,
INC., et al.,

Defendants.

CIVIL ACTION NO.

1:04-CV-3294-CAP

ORDER

This matter is before the court on the Federal Trade Commission's ("FTC") motion for the entry of contempt judgment and the imposition of sanctions against defendants Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith (collectively, the "defendants") [Doc. No. 829]. At this time, the FTC seeks the entry of a contempt judgment against the defendants only for their alleged violation of Section VI of the permanent injunction dated December 16, 2008 [Doc. No. 230].

I. Background

The court discusses only the background necessary to preface the instant motion; a more detailed recitation of the factual background and procedural posture of this case can be found in previous orders [Doc. Nos. 524, 650, 726].

On December 16, 2008, the court entered a permanent injunction that required the defendants to add a specific warning label on any “advertisement, promotional material, or product label for any covered product or program containing yohimbine that contains any representation about the efficacy, benefits, performance, safety, or side effects of such” [Doc. No. 230 at 16]. The injunction defined “advertising” to mean any “written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods, whether it appears in . . . packaging [or through other mediums].” [Doc. No. 230 at 4]. As for the specific language of the warning label, the injunction required the following disclosure to be made “clearly and prominently”: “**WARNING:** This product can raise blood pressure and interfere with other drugs you may be taking. Talk to your doctor about this product.” [Doc. No. 230 at 16].

In October 2012, in the wake of lengthy contempt proceedings which began after the court ordered the defendants to show cause why they should not be found in civil contempt for failing to comply with the above-mentioned injunction, the FTC moved for (summary) contempt judgment [Doc. No. 446]. Upon ruling on that motion, the court held, among other things, that there was no genuine dispute of material fact that certain advertisements for Fastin, Lipodrene, Benzedrine, and Stimerex-ES (products containing

yohimbine) made efficacy claims about those drugs and did not contain the disclosure required by the injunction [Doc. No. 524 at 23-24]. For violating this and other sections of the injunction, the court set a date for a contempt hearing to determine the nature and degree of appropriate sanctions [Doc. No. 524 at 37]. On May 14, 2014, the court imposed \$40 million in compensatory sanctions against the defendants and ordered a compulsory recall of all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels [Doc. No. 650 at 29]. The court's order did not expressly indicate which portion of the \$40 million sanction was attributable to the defendants' violation of Section VI of the injunction.

Lastly, in May 2015, the United States Court of Appeals for the Eleventh Circuit held that this court misapplied the doctrine of collateral estoppel when it refused to consider the defendants' evidence of substantiation during the contempt proceedings [Doc. No. 815]. Under the doctrine of collateral estoppel, this court had previously precluded the defendants from introducing evidence showing that they had possessed and relied upon "competent and reliable scientific evidence" in making representations about its weight-loss products [Doc. No. 422].¹ The Eleventh Circuit held "only that the district court misapplied collateral estoppel when

¹ This standard is not found in Section VI of the permanent injunction.

it barred [the defendants] from presenting evidence to prove their compliance with the injunction[].”*See id.* at 13.

II. Discussion

A. Legal Standards

“An injunction can be enforced, if necessary, through a contempt proceeding.” *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002).

A finding of civil contempt must be supported by clear and convincing evidence that the allegedly violated order was valid and lawful; . . . the order was clear and unambiguous; and the . . . alleged violator had the ability to comply with the order. *Riccard*, 307 F.3d at 1296. Once this prima facie showing of a violation is made, the burden then shifts to the alleged contemnor to produce evidence explaining his noncompliance at a show cause hearing. *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998).

FTC. v. Leshin, 618 F.3d 1221, 1232 (11th Cir. 2010).² Should the alleged contemnor meet his burden of production on his inability to comply, the burden then shifts back to the initiating party to show by clear and convincing evidence that the alleged contemnor was, in fact, able to comply

² Although *Leshin* refers to producing evidence of noncompliance at a “show cause” hearing, this court has held that due process does not require a hearing where there are no disputed issues of material fact [Doc. No. 390] (citing *Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp.*, 140 F. App’x 860, 864–65 (11th Cir. 2005)).

with the court's order. *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529.

Although the Eleventh Circuit has described civil contempt in passing as the “willful disregard of the authority of the court,” *Riccard*, 307 F.3d at 1296, “[t]he Supreme Court has made clear that the absence of willfulness is not a defense to a charge of civil contempt,” *Leshin*, 618 F.3d at 1232 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). Even “substantial, diligent, or good faith efforts are not enough; the only issue is compliance.” *Id.*; *McComb*, 336 U.S. at 191 (“An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.”); *see also TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 880 (Fed. Cir. 2011) (“Although a defendant’s diligence and good faith efforts are not a defense to contempt, these factors may be considered in assessing penalties, a matter as to which the district court has considerable discretion.”).

Additionally, the court will apply the summary judgment standard to the issue of the defendants’ contempt. Summary judgment is appropriate as to any claim or defense where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In determining whether the moving party has met its burden to show no dispute exists, a district court must view the evidence and all factual

inferences in the light most favorable to the party opposing the motion. *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). Once the moving party has adequately supported its motion, the nonmovant has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Ultimately, the court's function is not to resolve issues of material fact, but rather to determine whether there are any issues to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. *Id.* at 248. Applying the typical summary judgment standard in a contempt proceeding is acceptable because the court does not *weigh* the evidence, but instead determines whether there are any material factual disputes as to the alleged contemnors' compliance with the injunction.

B. Application

From January 1, 2009, through approximately December 2012, it is undisputed that the defendants packaged, labeled, and sold Fastin, Lipodrene, Benzedrine, and Stimerex-ES, all of which contain the chemical ingredient yohimbine [Doc. No. 837-2 at ¶ 74]. And the defendants concede that the labels and packaging for these products did not include the health-

risk warning required under Section VI of the injunction [Doc. No. 837-2 at ¶ 81]. However, the defendants do not concede that they are in civil contempt for violating Section VI of the injunction, nor do they admit that the product packaging and labels for the products at issue contain efficacy claims. Thus, the defendants have not conceded to all of the elements necessary to establish a contempt finding for Section VI. And because the Eleventh Circuit has vacated the court's order holding the defendants in contempt, the court believes that judicial economy requires ruling on all remaining contempt allegations at the same time. This approach also avoids the problem of piecemeal litigation. Therefore, the court will decide whether the defendants failed to comply with Section VI of the injunction at the same time it confronts the question of whether the defendants violated Sections II and VII of the injunction. The FTC may again move for the entry of a contempt judgment relating to the defendants' alleged non-compliance with Section VI, but this request should be incorporated in any dispositive motion filed within thirty days of the close of discovery on April 29, 2016 [Doc. No. 828].

III. Conclusion

In light of the procedural posture of this case, the court concludes that the FTC's motion for the entry of contempt judgment and the imposition of

sanctions is premature. For this reason and those discussed above, the FTC's motion [Doc. No. 829] is DENIED with leave to refile as set forth above.

SO ORDERED this 4th day of November, 2015.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge