UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-61940-CIV-LENARD/KLEIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

FLU FIGHTER CORP.,
FLU FIGHTER LABORATORIES ,INC.,
FLU FIGHTER LABORATORIES INC.,
FLU-FIGHTER LABORATORIES,
FLU FIGHTER LABORATORIES,
PHILLIP ROTH,
JODERUS SCHERPENSCHOUDER,
ARTHUR VANMOOR,
AMANDA MEDINA,
JOSEPHINE MEDINA, and
VERONICA MEDINA,

Defendants.
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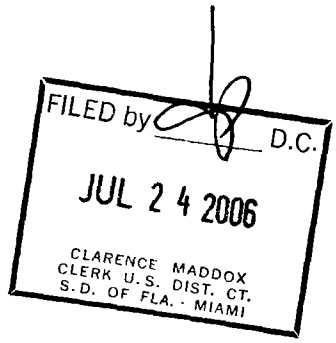

ORDER ADOPTING REPORT AND RECOMMENDATION THAT DEFENDANTS BE FOUND IN CONTEMPT (D.E. 43)

THIS CAUSE is before the Court upon Magistrate Judge Theodore Klein's Report and Recommendation that Defendants be Found in Contempt ("Report," D.E. 43), issued January 11, 2006, Corrected Report and Recommendation that Defendants be Found in Contempt ("Corrected Report," D.E. 45), issued January 13, 2006, and Report and Recommendation that Contempt Fines Against Defendants Be Discontinued as of January 13, 2006 ("Third Report," D.E. 48), issued January 18, 2006. On January 23, 2006, Defendant Arthur Vanmoor filed Objections to the Magistrate's Report of January 11, 2006.

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("Objections," D.E. 54.) On February 9, 2006, Defendant Arthur Vanmoor filed Amended Objections to the Magistrate's Report Entered January 11, 2006. ("Amended Objections," D.E. 64.) On February 10, 2006, Plaintiff United States filed a Response to Defendant Vanmoor's Amended Objections. ("Response," D.E. 61.) Having considered the Reports, the Objections, the Response, and the record, the Court finds as follows.

I. Background

On December 22, 2005, Plaintiff United States filed the instant Complaint for Emergency Temporary Restraining Order, Preliminary and Permanent Injunction. (D.E. 1.) Therein, Plaintiff requests injunctive relief on the basis of claims that Defendants, Flu Fighter Corp., Flu Fighter Laboratories ,Inc. [sic], Flu Fighter Laboratories Inc., Flu-Fighter Laboratories, Flu Fighter Laboratories (collectively, "FFL"), Arthur Vanmoor, Joderus Scherpenschouder, Phillip Roth, Amanda Medina, Veronica Medina and Josephine Medina (all collectively "Defendants"), have violated 18 U.S.C. § 371 by defrauding the United States and the Food and Drug Administration ("FDA"), and that the Defendants have introduced into interstate commerce "misbranded drugs," as that term is defined in federal Food, Drug, and Cosmetic Act ("FDCA"), at 21 U.S.C. 352, and have introduced into interstate commerce unapproved "new drugs," as that term is defined by the FDCA, at 21 U.S.C. § 355, in violation of 21 U.S.C. § 331(a) and (d). (D.E. 1 at 1-2.) Specifically, Plaintiff United States alleges that Defendants used the Internet to sell non-FDA-approved new drugs, including "Cancer Cure," "Flu Fighter," and "Migraine Miracle." (D.E. 1 at 7.)

On December 22, 2005, the Court entered a Temporary Restraining Order ("TRO") pursuant to 18 U.S.C. § 1345 and 21 U.S.C. § 332. (D.E. 26.) Therein, Defendants were ordered, inter alia to:

> (1) Immediately cease the production, shipment and/or sale of Cancer Control, Migraine Miracle, Flu Fighter, and any other unapproved new drugs or misbranded drugs in interstate commerce;
> (2) Immediately cease the promotion and advertisement related in any manner to Cancer Control, Migraine Miracle, Flu Fighter, and any other unapproved new drugs or misbranded drugs;
> (3) Immediately shut down the websites www.cancercure.org, www.migrainecure.com, and www.flufighter.net.

(Id. at 3.) On December 23, 2005, returns of service were filed as to the FFL Defendants and Arthur Vanmoor. (D.E. 19-24.) These returns of service reflected that a copy of the Summons, the Complaint, and the TRO were served on the authorized agent for Defendants' attorney of record, Sidney Fleishman, Esq. (Id.)

On January 3, 2006, Plaintiff United States filed an Emergency Motion to Compel Defendants to Comply with the Temporary Restraining Order and for Issuance of an Order to Show Cause Why Defendants Should Not Be Held in Contempt. (D.E. 30.) On January 4, 2006, the Court referred this matter to Magistrate Judge Theodore Klein (D.E. 33), who held an evidentiary hearing on January 6, 2006. (D.E. 34.)

II. Report of the Magistrate Judge

In his Report, issued January 11, 2006, Magistrate Judge Klein first recounts the

testimony heard during the January 6, 2006 evidentiary hearing from Plaintiff's witnesses Special Agent Kim Ward of the FDA, Office of Criminal Investigations ("FDA/OCI"), Special Agent Michael Niemiec, FDA/OCI, and Mr. Barton Bellamy. Agent Ward testified and presented exhibits demonstrating that several websites continued to offer Cancer Control, Migraine Miracle, and/or Flu Fighter for sale after the effective date of the TRO. (Report at 3.) During this testimony, Magistrate Judge Klein verified that www.cancercure.org, www.migrainecure.com, and www.flufighter.net were still active. (Id.) Agent Niemiec testified that he made an undercover purchase via telephone of two bottles of Cancer Control after the effective date of the TRO. (Id. at 4.) A recording of this conversation was played in open court and evidence of Agent Niemiec's receipt of the drug was entered into evidence. (Id.) Finally, Barton Bellamy, the owner of Ceba-Tek, a nutritional supplement manufacturer and bottler located in Melbourne, Florida, testified that his company had been manufacturing product for Defendant FFL since 2005, and that his point of contact since September 2005 had been Defendant Arthur Vanmoor. (Id.) Bellamy further testified and introduced evidence that on January 3, 2006, Vanmoor had contacted Bellamy to request the shipment of all remaining product, packaging and raw materials in Ceba-Tek's possession. (Id. at 4-5.)

Defendants, represented by Mr. Fleishman, presented no evidence. (Id. at 5.) At the close of evidence, Magistrate Judge Klein ordered Defendants to cease the operation of four phone numbers and five websites, in addition to those noted in the TRO. (Id.) The Magistrate further ordered Plaintiff to monitor such websites and phone numbers and

immediately inform the Court if the violation of Court Orders continued. (Id.)

On January 9, 2006, Plaintiff United States filed a Second Emergency Motion to Compel Defendants to Comply with the Temporary Restraining Order and for Issuance of an Order to Show Cause Why Defendants Should Not Be Further Held in Contempt (D.E. 38.) Magistrate Judge Klein held an evidentiary hearing on January 10, 2006, in which the government presented evidence that five websites and three phone numbers were active after the date of the first evidentiary hearing. (Report at 5-6.) Defendants did not contest the government's evidence or offer any evidence in rebuttal. (Id.)

Based on the foregoing, the Magistrate made the following findings of fact. First, the Magistrate found that the Defendants Vanmoor and FFL received actual or constructive notice of the TRO on December 23, 2005. (Id. at 6.) Second, he found that these Defendants intentionally violated the TRO's directive to immediately cease the shipment or sale of Cancer Control. (Id.) Finally, he found that the Defendants intentionally violated the TRO's directive to immediately shut down the telephone numbers and websites associated with the sale of unapproved drugs. (Id. at 6-7.) The Magistrate specifically found that Defendants had continued to advertise and promote Cancer Control, Migraine Miracle and/or Flu Fighter from December 23,2005 through at least January 10, 2006. (Id. at 7.)

Thus, the Magistrate recommended that Defendants Arthur Vanmoor, Flu Fighter Corp., Flu Fighter Laboratories ,Inc. [sic], Flu Fighter Laboratories Inc., Flu-Fighter Laboratories, and Flu Fighter Laboratories be held in civil contempt. (Id. at 7-8.) Magistrate

Judge Klein further recommended that the District Court impose a per day civil sanction against these defendants in the amount of $10,000.00 per day from December 23, 2005, the first effective date of the TRO, until January 6, 2006, when the Court first ordered Defendants to cease and desist their activities concerning unapproved drugs. (Id. at 8.) The Magistrate also recommended that Defendants be fined $25,000 per day from January 6, 2006 until they came into compliance with the TRO. (Id.) Finally, Magistrate Judge Klein ordered Defendants to shut down the violative telephone numbers and websites, and ordered any service providers to disconnect or shut down any such numbers or sites. (Id. at 8-9.)

On January 13, 2006, Magistrate Judge Klein issued his Corrected Report (D.E.45), wherein he noted that civil contempt sanctions could not be retroactive. (Id. at 1 (citing John T. v. Delaware County Intermediate Unit, 318 F.3d 545 (3d Cir. 2003).) Thus, the Magistrate recommended that sanctions be imposed from the day Judge Klein recommended that Defendants be held in contempt, or January 6, 2006, until Defendants complied with the Court's Orders to shut down all websites and telephone numbers associated with unapproved drugs, at a rate of $25,000 per day. (Id. at 1-2.)

On January 18, 2006, Magistrate Judge Klein issued his Third Report (D.E. 48), wherein he indicated that he had received notice that on January 12, 2006, the subject websites and telephone numbers had ceased operation as a result of service of the Court's Order and Report and Recommendation on various web servers and telephone companies. (Id. at 1.) Accordingly, the Magistrate recommended that fines against Defendants cease as

of January 13, 2006, and that fines be imposed should Defendants re-institute such phone lines or websites. (Id. at 2.)

III. Defendant's Objections

In his Objections, Defendant Vanmoor argues that the Court should dissolve the TRO and reject the Magistrate Judge's Report because there is no evidence connecting him with the marketing of the product and subsequent violation of the TRO. (Id. at 1.) Defendant Vanmoor argues that he was deported from the United States in October 2004, that the evidence only shows that someone was sending mail to Vanmoor at a U.S. address, that he sold the trademarks he owned for the subject drugs to Defendant Scherpenschouder, and that he was involved only to some limited extent in the production of the product at issue, not that promotion or advertisement of that product. (Id. at 1, 5-6.) Vanmoor further argues that the Magistrate's Report fails to find any evidentiary support for the link between Vanmoor and any violative acts. (Id. at 6.) Vanmoor maintains that there is nothing to connect him with the sale or shipment of any product after the effective date of the TRO, with the operation of the subject telephone numbers, or with the operation of the subject websites. (Id. at 7-9.) Finally, Defendant Vanmoor argues that, even assuming he was in contempt of the Court's Order, the proposed fine is excessive. (Id. at 9.)[1]

In its Response, Plaintiff United States argues that Defendant Vanmoor's objections

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[1] On January 17, 2006, Defendants Arthur Vanmoor and FFL filed a Notice of Consent to Entry of Preliminary Injunction Order. (D.E. 47.) On January 18, 2006, the Court entered the Preliminary Injunction. (D.E. 49.) Then, on February 9, 2006, Defendant Vanmoor filed his Amended Objections (D.E. 64), in which he removed virtually all references to his Motion to Dissolve the TRO, as well as any arguments that the evidence for the TRO failed to connect him with the restrained activities. The Court will construe these two latter filings as indicating Defendant's intent to withdraw his Motion to Dissolve.

to the Magistrate's Report are not well founded and should be rejected. (Response at 1.) Plaintiff maintains that the evidence it presented in this action meet its burden of proof in demonstrating that Defendant Vanmoor was a principal of the defendant companies, that he was actively involved with the operation of the companies before and after issuance of the TRO, that he received actual notice of the TRO, that Defendants continued to sell Cancer Control after service of the TRO, that Defendants continued to operate websites advertising and promoting the subject drugs, and that after Magistrate Judge Klein ordered Defendants to shut down their phone lines, they failed to do so. (Id. at 2-3.) Plaintiff further contends that the fact that Vanmoor may not have personally shipped Cancer Control to the FDA is irrelevant, as Vanmoor has a legal obligation as principal of defendant companies to ensure that violations of the Court's orders did not occur. (Id. at 3.) Moreover, Plaintiff avers that Defendant Vanmoor had a burden to come forward with evidence that he had no ability to ensure compliance with the Orders, but that he failed to even allege, let alone offer proof at the evidentiary hearings, that he was unable to comply. (Id.)

IV. Analysis

The Eleventh Circuit has held that district courts have an "inherent power to enforce compliance with their lawful orders through civil contempt." Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991) (citing Shillitani v. United States, 384 U.S. 364, 370 (1966)). A finding of civil contempt must be based on clear and convincing evidence that a court order was violated. Tom James Co. v. Morgan, 141 Fed. Appx. 894,

897 (11th Cir. 2005). This standard is more exacting that the "preponderance of the evidence" standard but, unlike criminal contempt, does not require proof beyond a reasonable doubt. Jove Engineering, Inc. v. I.R.S., 92 F.3d 1539, 1545 (11th Cir. 1996). Further, a party held in contempt may defend its failure to obey a court's order on the grounds that it was unable to comply; however, to succeed at this defense, such party must go beyond a mere assertion of its inability and introduce evidence in support of its claim to satisfy its burden of production on the point. Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1521 (11th Cir. 1986).

Here, it is undisputed that the Court issued a valid TRO on December 22, 2005 that mandated the cessation of all attempts by Defendants to promote, advertise or distribute unapproved drugs over the telephone or Internet. Furthermore, at the two evidentiary hearings held by Magistrate Judge Klein, Plaintiff United States presented clear and convincing evidence that such Order was violated in that numerous telephone numbers and websites remained operational long after the TRO was served upon Defendants, that Defendants' websites continued to promote and advertise unapproved drugs, and that such drugs were still being distributed. Despite Magistrate Klein's order on January 6, 2006 to cease and desist such activities, such websites and phone numbers remained operational through January 12, 2006.[2] Thus, Defendant's unapproved drugs continued to be available,

[2] Defendant Vanmoor argues that such websites were actually shut down on January 11. (D.E. 54 at 3 n.2.) However Vanmoor presents no evidence to support this claim. Moreover, it is apparent from the record that such websites were shut down, not by Vanmoor or his affiliates, but by the web server that hosted such sites, only upon being served with the Magistrate Judge's Cease and Desist Order. (D.E. 48 at 1.) Thus, the Court finds that Vanmoor did not exercise control over the date of the shut down, that his argument is unsupported by record evidence, and that such argument therefore lacks credibility. Accordingly, the

and thus create an endangerment, to the public.[3]

Defendant Vanmoor argues that there is no evidentiary support for the necessary "link" between the violative acts and Defendant Arthur Vanmoor. The Court first notes that such argument is entirely without merit. Record evidence indicates that Flu Fighter Corporation's registered address was actually a box at a mail service business that was being rented by Defendant Vanmoor, that Bellsouth telephone bills and other mail was being sent to that box addressed to Arthur Vanmoor d/b/a Flu Fighter Corp., that Vanmoor had adopted and used trademarks registered and/or pending with the United States Patent and Trademark Office for "MIGRAINE MIRACLE," "FLU FIGHTER," "CRAMPS COMFORTER," and "CANCER CONTROL," and that Vanmoor arranged for Ceba-Tek, Inc. to receive raw materials sent by him, blend these materials with some of its own, and then encapsulate, bottle and label the product with labels provided by Vanmoor. (D.E. 5 at 5-6, 18, 20-21.) In fact, the record further demonstrates that after Plaintiff had executed search warrants against Defendant Vanmoor, he contacted Barton Bellamy, owner of Ceba-Tek, and requested that Bellamy act as though he did not know Vanmoor or FFL if questioned by the media. (Id. at 22.) Moreover, as noted above, Bellamy testified at the first evidentiary hearing that his company had been manufacturing product for Defendant FFL since 2005, that his point of

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Court finds persuasive and hereby adopts the Magistrate's finding that the websites were shut down on January 12, 2006. (D.E. 48 at 1-2.)

[3] Record evidence shows that Defendants' websites, inter alia, encouraged patients suffering from cancer to cease their chemotherapy treatments because they were, "only going to slow down the curing of cancer [by Cancer Control]." (D.E. 5 at 9; D.E.35, Ex. 10.)

contact since September 2005 had been Defendant Arthur Vanmoor, and that on January 3, 2006, Vanmoor had contacted Bellamy to request the shipment of all remaining product, packaging and raw materials in Ceba-Tek's possession. (Report at 4-5.) The Court finds such evidence to be clear and convincing proof of Vanmoor's significant role in the manufacture, promotion and distribution of the subject unapproved drugs and subsequent violation of the Court's Orders.

Furthermore, in order for Vanmoor to demonstrate his inability to comply with the TRO or other Court Orders, he must go beyond mere assertions and introduce evidence in support of his claim to satisfy his burden of production on the point. Vanmoor may only demonstrate an inability to comply by showing he has made "in good faith all reasonable efforts to comply." Citronelle, 943 F.2d at 1301 (quoting United States v. Ryan, 402 U.S.530, 534 (1971)). Clearly, Vanmoor has failed to meet this burden, as he presented no evidence at either evidentiary hearing or in his Objections demonstrating that he attempted to comply in good faith with the Court's Orders but was unable to do so. Therefore, the Court finds Defendants FFL and Arthur Vanmoor in civil contempt for their violations from January 6, 2006 to January 12, 2006 of the TRO and Court Orders mandating the discontinuation of FFL's websites and phone numbers promoting, advertising and distributing unapproved drugs.

Finally, once this Court has found a party in contempt, it has "broad discretion in fashioning a contempt sanction." National Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia

Holding Corp., 140 Fed. Appx. 860, 864 (11th Cir. 2005) (quoting Sizzler Family Steak Houses v. W. Sizzlin Steak House, Inc., 793 F.2d 1529, 1536 n.8 (11th Cir. 1986)). Such sanctions can be imposed for both coercive and compensatory reasons, but sanctions designed to ensure compliance may not be any greater than necessary to ensure such compliance. Citronelle, 943 F.2d at 1304. "In establishing an amount to impose, the court must consider several factors, including the character and magnitude of the harm threatened by continued contumacy, the probable effectiveness of any suggested sanction in bringing about compliance, and the amount of the contemnor's financial resources and consequent seriousness of the burden to him." Matter of Trinity Industries, Inc., 876 F.2d 1485, 1494 (11th Cir. 1989).

In Matter of Trinity, the Eleventh Circuit considered defendant Trinity's argument that the district court abused its discretion when it imposed the allegedly excessive sanction of $10,000 per day for the manufacturing plant's refusal to honor an Occupational Safety and Health Act inspection warrant. 876 F.2d at 1493. The Trinity Court found that Trinity's repeated refusals to allow inspections evidenced the defendant's "willful, deliberate, and brazen contumacy and made obvious the need for the district court to resort to coercive tactics to secure compliance with its contempt orders." Id. at 1494. The Court further found that without the sanctions, Trinity's obstinance may have forestalled inspection even further. Id. Finally, the Court found the amount of $10,000 per day "entirely reasonable," given Trinity's net sales of $434,326,000 and net assets of $139,989,000. Id. Finding that, "the

court's task is to determine what amount is necessary to ensure compliance," the Court upheld the district court's civil contempt sanction. Id.

In the instant case, Defendants have failed to come forward with any financial information upon which the Court might determine how the proposed sanction would burden Defendants. As such information is entirely within Defendants' exclusive control, the Court must assume that the decision to withhold such information by Defendants was an intentional, tactical choice. The Court is thus unpersuaded by Defendant Vanmoor's bare argument that the proposed sanction is excessive, as Defendant simultaneously withholds any information that might confirm or disprove this assertion. As such, the Court is left only with Defendants' conduct as an indicator of the reasonableness of the proposed sanction. The Court considers relevant the facts that Defendants' contumacious conduct continued after the issuance of the TRO, persisted after the Magistrate Judge's issuance of a Cease and Desist Order on January 6, 2006, and, indeed, only ceased once such Order was served upon the web servers and telephone companies, who themselves shut down these services. This demonstrates that the Magistrate Judge's incrementally increasing threats of sanctions in the amounts of $10,000 per day, and later $25,000 per day, were not excessive, as they failed to induce Defendants to comply. If the telephone companies and web servers had not voluntarily shut down Defendants' services, such brazen obstinance may have continued indefinitely. With Defendants having presented no evidence of their financial resources or ability to pay upon which this Court may find the proposed sanction excessive, it must rely

on the foregoing episode to indicate that $25,000 was a reasonable, if not insufficient, coercive sanction.

Moreover, the Court finds that the character and magnitude of the harm caused or threatened by such conduct was potentially enormous. Defendants' continued promotion of its products preyed on the fears and hopes of sick or dying individuals, undermining such individuals' faith in their physicians and going so far as to encourage patients to cease their current medical treatments in favor of purchasing and consuming Defendants' unproven "cures." (See, e.g., D.E. 5 at 9.) Defendants thus recklessly endangered the lives of their customers in their efforts to turn a profit. Therefore, the Court finds that $25,000 per day is also a reasonable amount to impose upon Defendants from a compensatory standpoint, for the seven days from January 6, 2006 through January 12, 2006 in which Defendants continued to operate websites and telephone numbers promoting and distributing their unapproved drugs.

Accordingly, it is hereby,

ORDERED AND ADJUDGED that:

1. Magistrate Judge Theodore Klein's Report and Recommendation that Defendants be Found in Contempt (D.E. 43), issued January 11, 2006, Corrected Report and Recommendation that Defendants be Found in Contempt (D.E. 45), issued January 13, 2006, and Report and Recommendation that Contempt Fines Against Defendants Be Discontinued as of January 13, 2006

(D.E. 48), issued January 18, 2006, are **ADOPTED, consistent with this Order.**

2. Defendants Flu Fighter Corp., Flu Fighter Laboratories ,Inc. [sic], Flu Fighter Laboratories Inc., Flu-Fighter Laboratories, Flu Fighter Laboratories and Arthur Vanmoor are hereby **HELD IN CIVIL CONTEMPT**.

3. A fine of $25,000 per day for the seven days from January 6, 2006 through January 12, 2006, or $175,000, is hereby **LEVIED** against Defendants Flu Fighter Corp., Flu Fighter Laboratories ,Inc. [sic], Flu Fighter Laboratories Inc., Flu-Fighter Laboratories, Flu Fighter Laboratories and Arthur Vanmoor.

DONE AND ORDERED in Chambers at Miami, Florida this 24 day of July, 2006.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Theodore Klein
All Counsel of Record
Case No .05-61940-CIV-LENARD/KLEIN