IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, CORY STREISINGER, State of Oregon Ex Rel, Director of the Department of Consumer and Business Services, in her official capacity,	)	
Plaintiffs,	)	Case No. 03-603-KI
vs.	)	OPINION
UNITED STATES OF AMERICA,	)	
Intervenor Plaintiff,	)	
vs.	)	
ORION INTERNATIONAL, INC., RUSSELL B. CLINE, APRIL DUFFY, BANGONE VORACHITH, NANCY HOYT,	)	
Defendants,	)	
vs.	)	

JULIE VACURA,)
)
Receiver.)
)

KING, Judge:

Plaintiffs the United States Commodity Futures Trading Commission ("CFTC") and the State of Oregon Department of Consumer and Business Services ("DCBS") bring this action against Orion International, Inc., its director, Russell Cline, and three other individual defendants. Plaintiffs allege that defendants set up a fraudulent scheme to solicit members of the public to trade illegal off-exchange futures contracts on foreign currencies and to misappropriate customer funds. Before the court are motions by the plaintiffs and the court-appointed Receiver for orders of contempt against defendant Cline.

PROCEDURAL BACKGROUND

On May 7, 2003, the CFTC and the DCBS filed a complaint against defendants seeking injunctive relief for alleged violations of the antifraud and contract market provisions of the Commodity Exchange Act, federal regulations, and the antifraud and registration provisions of the Oregon Securities Law.

On May 8, 2003, pursuant to the Commodity Exchange Act, 7 U.S.C. § 13a-1, this court entered a Statutory Ex Parte Restraining Order Freezing Assets, Preserving Books and Records, Allowing Access to Books and Records, and Appointing Temporary Receiver, and Order Granting Expedited Discovery, which froze defendants' assets to preserve them for potential restitution after resolution of the case.

Pursuant to the terms of the restraining order, defendants are prohibited from dissipating, converting, withdrawing, or otherwise disposing of other assets wherever located. The restraining order also directs defendants to provide the Receiver with an accounting of their assets, to give her control and possession of real and personal property, and cooperate with the Receiver in securing receivership assets.

By orders dated July 7 and August 12, 2003, this court entered consent preliminary injunctions against all defendants, with the stated purpose of preserving the status quo, preventing any further violations of federal and state laws as alleged in the complaint, and protecting the public from potential loss. These orders continued the terms of the restraining order.

On July 29, 2003, the court entered an order that provided that defendant Cline was to vacate his current residence on thirty days notice from the Receiver. As directed by the court, the Receiver twice asked Cline to vacate the house, but he refused to do so. After holding telephone conferences with the Receiver and former counsel for Cline on October 20, October 21, and October 24, 2003, the court declined to immediately order Cline to vacate his home, specifically stating that such an order was likely, but that the court would give Cline the opportunity to put together a request for relief from the restraining order to permit employment in order to earn income, including a means for making payments on the house in question. The court also deferred ruling in order to provide the Receiver an opportunity to determine if there were alternative receivership properties at which Cline could reside. The court received no motions by Cline to permit employment or to otherwise authorize relief from the restraining order.

The court held another hearing on November 25, 2003, regarding Cline's residency and failure to vacate the house at which he currently resided, located at 11851 SW Riverwood Drive. The court asked several questions of the Receiver in order to determine whether, as recommended by the Receiver, the sale of the Riverwood Drive property was in the best interest of the receivership. The court noted that there appeared to be no other receivership properties available for temporary residence for Cline. The court also recounted the history of this issue with Cline's then newly-appointed counsel, emphasizing that Cline has filed no motions or otherwise sought permission to receive income in order to make payments on the house or otherwise justify his continued residence there, despite similar requests for relief having been granted as to other defendants, and despite numerous suggestions by the court that Cline ought to reach a stipulation with plaintiffs or come to the court for relief. The court then ordered Cline to vacate the Riverwood Drive house by 5:00 pm on December 12, 2003, and directed Cline not to remove any of the furnishings from the house. Specifically, the court ordered as follows:

> The furnishings in the home are also property of the receivership, under the court's jurisdiction. Mr. Cline is not to remove anything from the home, except with the permission of the Receiver. Now, I'm not talking about his personal clothes or items that are clearly personal items, but no furniture, artwork, that type of thing. Anything you intend to remove from the home, furnish a list to [the Receiver] in advance of your leaving, and don't take it until she has either approved it; or if you disagree with her decision, you can submit that to the court.

Plaintiffs' Exhibit 19, Transcript of Proceedings, November 25, 2003, at 24:18-25 - 25:1-4.

The Receiver sought to take possession of the Riverwood Drive house with the aid of a locksmith on December 15, 2003. When she arrived, the Receiver found that virtually all of the furnishings had been removed from the house. On December 19, 2003, plaintiffs filed a motion for order of contempt.

On January 5, 2004, the court entered an order directing Cline to respond to questions from the Receiver regarding the receivership property that had been removed from the house. Cline, through counsel, provided a response to the plaintiffs' motion for order of contempt, which counsel apparently intended to serve as a response to the questions posed directly to Cline by the Receiver. Cline later supplemented his answers to the Receiver's questions, but the Receiver maintains that the information she received is woefully incomplete, as it does not account for hundreds of thousands of dollars worth of receivership property that had been identified by her on May 9, 2003, as being on the premises. The Receiver filed a motion for order of contempt on January 16, 2004.

DISCUSSION

I. Factual Findings

The court held hearings on January 20 and January 26, 2004, regarding the Receiver's and the plaintiffs' motions for orders of contempt. The Receiver and plaintiffs contend that there are items of substantial value missing from the Riverwood Drive house. During the contempt hearings, defendant appeared to be disputing the Receiver's allegations as to a number of missing items. At the court's request, on February 11, 2004, the Receiver submitted a list of items she believes are missing from the Riverwood Drive property. It appears that, with the exception of a few items,[1] defendant does not dispute the accuracy of the Receiver's list.

There are 72 items or groups of items on the list. From the limited information she has, the Receiver was only able to determine the price of 16 items, totaling $126,685. Although I

[1] Defendant contends that one $15,365 rug was returned to the store and therefore should not be considered "missing." He also contends that he took with him as personal items a chess set and five glass figurines.

decline to make findings on an item-by-item basis, I conclude that furnishings of significant value and previously in Cline's control are missing from the Riverwood Drive home.

Cline did not testify at either hearing, but he submits the following explanation regarding the missing furnishings from the Riverwood Drive house.

Cline submits that the furnishings were removed from the home on two different occasions. The first removal, according to Cline, occurred some time before December 5, 2003, when an acquaintance of Cline's, Lynn Lennon, removed a dining room table and chairs. She also allegedly took ornamental vases from the front entryway, a coffee table from the living room, and a plaid red velvet couch, loveseat and chair. Cline claims that Lennon removed the property because it belonged to her and that he did not participate in or approve of the removal of the property by Lennon.

During the hearing on January 26, 2004, Lennon testified that she took certain furniture from the house because it was hers. Subsequent to the hearing, she gave photographs to the Receiver, who then reported to the court that all items allegedly taken by Lennon with the exception of the plaid loveseat are in Lennon's possession as alleged by Cline. I make no findings as to the proper ownership of this furniture but for purposes of deciding the pending motions for contempt, I conclude that Lennon did take the furniture as alleged by Cline. Any discrepancies regarding the plaid loveseat are immaterial to the instant motions, given the length of the missing items list and the significant value of the remaining missing items.[2]

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[2] The Receiver's supplemental submission also states that Lennon has failed to produce proof of purchase of the items at issue, as requested by the Receiver. With respect to the ultimate determination of whether these items taken by Lennon should be considered a part of the receivership, I ask the Receiver to continue to attempt to work with Lennon regarding the ownership of the items.

The second removal of furnishings from the Riverwood Drive house, according to Cline, occurred on Saturday, December 6, 2003, without Cline's knowledge, participation or consent. On the morning of December 6, 2003, Cline allegedly left his house with Nancy Hoyt, who is also a defendant in this case. They claim to have left the house at approximately 10:30 or 11:00 am to visit Cline's children at his ex-wife's house in Silverton, Oregon. Cline contends that the house was locked when they left. Cline contends that they arrived at the home of his ex-wife, Annette Cline, at about 12:30 pm, where they picked up Cline's son Jeff. They went on to Silver Falls, arriving at approximately 2:00 and staying until approximately 4:00 pm. They then returned to Annette Cline's house, where they stayed until approximately 7:00 pm. On the way home, Hoyt allegedly received a telephone call from her son Jim who had arrived at the Riverwood Drive house to meet Hoyt. Hoyt allegedly learned from her son that the door to the house was unlocked and when he let himself in, he discovered the house in disarray. Cline claims that at some point between his and Hoyt's departure at 10:30 or 11:00 am, and Jim Hoyt's entry at 7:30 pm, unknown individuals came to the house and removed nearly all of the furnishings without his knowledge or permission.

Defendant presented several witnesses to corroborate his story about the events of December 6, 2003. First, defendant's ex-wife, Annette Cline, testified that Cline and Hoyt did come to visit her that day, took her son to Silver Falls during the afternoon, and then left her house between 6:30 and 7:00 pm.

I find the testimony of Cline's ex-wife credible and I conclude that Cline was visiting with his children on the day in question. I also credit Annette Cline's testimony that Cline had

come to visit his children only about 15-20 times during the last several years and that she did not know that Cline was planning to visit on December 6, 2003, until he arrived.

Cline also presented two witnesses who testified to seeing a white truck in front of Cline's house on or around the day in question. One witness, Glen Davis was a neighbor of Cline's, with the back of his house facing the front of the Riverwood Drive house at issue. Davis testified that mid-afternoon on the day in question, he saw a white truck pull into the driveway of the Cline house and back up to the front door. He observed people loading furniture into the truck and noted that the truck made at least two trips to the house that day. Davis also testified that the moving activity stopped for several hours and that, although he did not see Cline, he assumed that what he was observing was Cline moving out of the house. He did not believe any of the people he could see were acting as if they were trying to hide anything.

Deedre Marriott also testified regarding the events of December 6, 2003. She resides in a house two doors down from Cline's former residence. She testified to having observed a white truck parked out in front of Cline's house on or about the day in question. She saw a few men standing around the truck smoking cigarettes. She testified that the men looked as if they were waiting for someone because they were looking at their watches. She also believes that she saw the men do some lifting and moving, but she could not provide specifics.

I find the testimony of the two eyewitnesses, Davis and Marriott, credible but far from conclusive. Based on their testimony, it is clear that at least some items were removed from the Riverwood Drive house by unidentified persons via a white truck on December 6, 2003. However, I seriously question whether all of the furnishings at issue were removed that day. Based on the testimony of plaintiffs' witness, Stephen Gallup, a senior moving consultant for

Rose City Moving, it appears rather implausible that all of the furnishings in this house could have been moved by one truck in the time period at issue, especially given the relaxed manner in which the eye-witness testimony suggests the individuals were behaving.

More importantly, I do not believe Cline's allegations that he had no knowledge of the events that occurred at the Riverwood Drive house in his absence. A number of factors lead me to this conclusion. First, the timing of Cline's visit to see his children is suspect, given that he does not appear to regularly visit them and given that the visit was unannounced. Second, Cline's response to plaintiffs' motion for contempt suggests that he and/or Hoyt locked the doors of the Riverwood Drive house before leaving, and there is at least some evidence in the record about a working security system in the house. I would need to conclude that someone broke into the house in such a crafty manner as to leave no signs of break-in (and to the extent that an alarm was set, disabled the alarm), or I would need to conclude that the person was given a key to the house by someone other than Cline. Third, the eyewitness reports of the incident do not suggest that the individuals moving the furniture were stealing it--they came in the middle of the day, did not appear to be hiding, were standing around at various intervals, and appeared to be waiting for someone. Finally, if potentially hundreds of thousands of dollars worth of furnishings were stolen from Cline's house, one would expect him to file a police report of such activity. And faced with an order by the court not to remove any properties from the house and several reminders by the Receiver, one would also expect Cline to notify the Receiver upon returning to the house and finding it empty. Cline contacted neither the police nor the Receiver.

I conclude that Cline either arranged for or knew about the removal of the furnishings from the Riverwood Drive house.

II. Motions for Orders of Contempt

Plaintiffs and the Receiver ask the court to find Cline in contempt of several of the court's orders. They seek fines and incarceration.

Civil contempt is appropriate when a party fails to comply with a court order that is both specific and definite. Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984). Failure to comply consists of not taking all the reasonable steps within one's power to insure compliance with the order. Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466 (9th Cir. 1989). A court must find civil contempt based on clear and convincing evidence. Id. Substantial compliance with a court order is a defense to an action for civil contempt. Id. However, intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense. Stone v. City and County of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992). Punishment for civil contempt is intended to be either coercive or compensatory. Rylander, 714 F.2d at 1001.

I find by clear and convincing evidence that by removing or allowing for the removal of receivership property from the house located at 11851 SW Riverwood Drive, defendant Cline is in contempt of this court's May 8, 2003, restraining order, this court's August 12, 2003, preliminary injunction, and this court's November 25, 2003, order to vacate his residence without removing furnishings.[3] These orders were sufficiently specific and definite so as to make a

[3] Plaintiffs' motion also asks the court to find Cline in contempt for failing to provide an accounting as directed by the court's May 8, 2003, restraining order. I do not believe it is disputed that Cline has failed to fully comply with that order, but Cline for the first time in these proceedings asserts his Fifth Amendment rights and refuses to fully produce the accounting on the grounds that the production of the accounting might incriminate him. Although the issue has not been fully addressed by the parties, there appears to be support for his position. See United States v. Hubbell, 530 U.S. 27, 34-38 (2000) (discussing when the creation of documents and the act of producing documents is considered compelled testimony); See also SEC v. Rehtorik, 755 F. Supp. 1018, 1019 (S.D. Fla. 1990) (holding that order compelling accounting in civil case implicated defendant's right against self-incrimination); SEC v. College Bound, Inc., 849

finding of contempt appropriate for failure to comply. Cline has failed to establish the defense that he has substantially complied, and he has utterly failed to convince the court that he is or was unable to comply. Cline will be given one more opportunity to comply with the court's orders or defendant will be incarcerated.

CONCLUSION

Defendant Russell Cline has violated this court's orders and is found in contempt of court. Cline may purge this contempt by producing the missing property from the Riverwood Drive house or directing the court to where the property can be found. If Cline has not done so before March 15, 2004, he shall turn himself in to the United States Marshal's office on that day. Cline shall be taken into custody and remain incarcerated until he complies with the court's orders.

Plaintiffs' Motion for Order of Contempt, for Immediate Compliance with Court Order, Motion for Sanctions against Defendant Russell B. Cline (#167) and the Receiver's Motion for Order of Contempt (#185) are granted.

Dated this 25th day of February, 2004.

/s/ Garr M. King
Garr M. King
United States District Judge

F. Supp. 65, 67 (D.D.C. 1996) (same). At the contempt hearing on January 20, 2004, the CFTC conceded that Cline is entitled to assert his Fifth Amendment rights regarding the accounting. I will not find Cline in contempt for having failed to comply with this order.

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KING, Judge:

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IT IS SO ORDERED.

Dated this 25th day of February, 2004.

/s/ Garr M. King
Garr M. King
United States District Judge