

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case No. 04-22431-CIV-MARTINEZ/BROWN**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN ENTERTAINMENT
DISTRIBUTORS, INC., et al.,

Defendants.

**OPPOSITION TO DEFENDANT MIRIAM SOFIA ANDREONI'S
MOTION TO WITHDRAW CONSENT TO ENTRY OF PROPOSED
STIPULATED FINAL ORDER AND PERMANENT INJUNCTION**

Defendant Miriam Sophia Andreoni, *a.k.a.* Masha Tango and Miriam Smolyansky, (“Miriam Andreoni”) has moved to withdraw her consent to a settlement agreement in which she signed a proposed final order that would resolve the Federal Trade Commission’s claims against her in this action. The courts have repeatedly recognized that, in light of federal policy favoring the enforcement of settlement agreements, a party may not withdraw from a valid agreement to settle. In accord with these precedents, this Court should deny Miriam Andreoni’s motion to withdraw her consent and enter the proposed final order and injunction.

In addition, the Court should enter two proposed consent decrees that would resolve the Federal Trade Commission’s claims against Defendants Mauricio Paz, Universal Cybercom Corporation, Automated Entertainment Dispensers, Inc., and Universal Technical Support, Inc. *See* DE 256. The Commission has requested the entry of these consent decrees through the same motion that requests the entry of Miriam Andreoni’s proposed final order and injunction. *See*

DE 288, Motion to Approve Consent Judgments at 1. Miriam Andreoni's motion to withdraw her consent to her settlement does not implicate these two settlement agreements regarding the Commission's claims against these four other defendants. Accordingly, this Court should also enter the two proposed orders concerning these defendants.

BACKGROUND

In September 2004, the Federal Trade Commission (the "FTC" or "Commission") filed this action, in which the Commission alleges that American Entertainment Distributors, Inc., ("AED") and its officers—including Miriam Andreoni, who served as AED's vice president—took more than \$19 million from consumers through a scheme that sold bogus business opportunities in violation of the prohibition on deceptive acts and practices in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the FTC's Franchise Rule, 16 C.F.R. Part 436 (2003). DE 3, Complaint. The FTC's complaint seeks restitution and damages to redress the injury to consumers and permanent injunctive relief to prevent the defendants from engaging in future violations of the FTC Act and the Franchise Rule. DE 3, Complaint at 16–17.

In January 2009, with trial of this matter set for February 2009, counsel for the Commission and Miriam Andreoni negotiated an agreement in principle to resolve the Commission's claims against her. DE 257, Unopposed Motion to Vacate Pretrial and Trial Deadlines at 2–3. In reliance on the parties' representation that a settlement was forthcoming, the Court vacated all pretrial and trial deadlines with respect to Miriam Andreoni. DE 262, Paperless Order Granting Motion to Vacate.

The parties worked to finalize all terms of the settlement in a proposed stipulated order to be submitted to the Court for approval and entry. After numerous drafts of the settlement

agreement were exchanged, Miriam Andreoni signed a proposed consent order in which she consents “to the entry of the following Stipulated Final Order and Permanent Injunction” as a settlement of the claims against her. DE 288-1, [Proposed] Stipulated Final Injunction and Order as to Defendant Miriam Sophia Andreoni at 1. Senior officials of the Commission’s Bureau of Consumer Protection reviewed the settlement and forwarded it to the Commission with their recommendation. The five Commissioners of the FTC approved the settlement and authorized the Commission’s attorneys to assent to the proposed consent order to resolve the pending claims against Miriam Andreoni.¹ Accordingly, on July 13, 2010, the proposed settlement, signed personally by Miriam Andreoni, and signed by counsel for the FTC and counsel for Miriam Andreoni, was filed with the Court. DE 288, Motion to Approve Consent Judgments.²

Approximately three weeks after the agreement was filed, and more than a year and a half after she agreed to a settlement in principle, Defendant Miriam Andreoni moved to withdraw her consent to the proposed final order that she had negotiated and signed. DE 291, Motion to Withdraw Consent. In the motion to withdraw her consent, Miriam Andreoni does not dispute that she agreed to the entry of the proposed order and all the terms that appear above her signature. Rather, the motion asserts that Miriam Andreoni “now unequivocally seeks to

¹ The FTC, an independent regulatory agency, has authority to litigate and settle actions brought under the statutory provisions at issue in this case, and the five Commissioners have not delegated settlement authority. *See* 15 U.S.C. § 56(a)(2).

² The Commission has also requested by the same motion that the Court enter two proposed stipulated judgments filed on January 16, 2009, which would resolve the Commission’s claims against Defendants Mauricio Paz, Universal Cybercom Corporation, Automated Entertainment Dispensers, Inc., and Universal Technical Support, Inc. *See* DE 288, Motion to Approve Consent Judgments at 1. There is no challenge to the entry of these consent orders.

withdraw her consent to the Proposed Final Order and litigate the instant matter.” DE 291, at 1–2.

ARGUMENT

Settlement agreements are “highly favored in the law and will be upheld whenever possible” because they are a means of amicably and efficiently resolving uncertainties and preventing costly litigation. *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971); *see also Kent v. Baker*, 815 F.2d 1395, 1398 (11th Cir. 1987) (“Compromises of disputed claims are favored by the courts.”). Consequently, federal courts have frequently held that “a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced.” *Cia Anon Venezolana De Navegacion v. Harris*, 374 F.2d 33, 35 (5th Cir. 1967). The court will not set aside an otherwise valid settlement agreement simply because “a party has second thoughts about the results.” *Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 298 (4th Cir. 2000). To permit parties to withdraw from settlements after they have given their consent would cause unnecessary expense, require parties to repeat trial preparations that had been put off in light of settlement, and delay other matters on the public docket. *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526, 530 (5th Cir. 1986).

Accordingly, courts have held that a litigant may not withdraw from or otherwise avoid a valid settlement simply because a judgment or dismissal order contemplated by the settlement has not yet been entered. In *White Farm*, for example, the defendants negotiated a settlement agreement, but later claimed that they had withdrawn their consent before the judgment was entered. 792 F.2d at 530. The court rejected this argument as irrelevant, noting that where the parties have entered into a valid settlement, “a federal court may hold them to their word by incorporating the terms of their agreement into a final judgment.” *Id.* Similar results were

reached in other cases in which the parties announced settlements to the court and were granted a period of time to finalize their agreements, during which a party became unhappy with the bargain it had struck. *E.g.*, *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988) (affirming enforcement of settlement); *Spencer v. Cent. Carolina Bank & Trust Co.*, No. 95-785, 1996 U.S. Dist. LEXIS 20180 (M.D.N.C. Dec. 19, 1996) (denying motion to withdraw from settlement). Simply put, an agreement to settle is an enforceable contract, and the absence of a judgment or dismissal order does not permit a party to reconsider or back out of an agreement to settle.

Moreover, in enforcing valid settlement agreements, the courts do not distinguish between settlements that involve monetary or injunctive relief. In a variety of contexts, courts have rejected parties' efforts to avoid settlements involving injunctions that had not yet been entered. In *Allen v. Alabama State Board of Education*, for example, the defendant Board of Education notified the court that it had agreed to settle claims that standardized tests had an adverse impact on black students and schools, but the Board "changed its mind" before the court entered a consent decree. 816 F.2d 575, 576–77 (11th Cir. 1987). Because the Board had entered into a valid (although unsigned) agreement, the Court of Appeals concluded that the Board's change of heart did not allow it to avoid the injunctive relief to which it had agreed when it settled, and it directed the district court to enter a consent decree implementing the settlement. *Id.* at 577; *see also Moore v. Beaufort County Bd. of County Comm'rs*, 936 F.2d 159 (4th Cir. 1991) (enforcing settlement agreement imposing a new voting plan for county commissioner elections); *Old Nat'l Bank v. Goldberg & Assocs., LLC*, No. 08-80078, 2008 U.S. Dist. LEXIS 114408 (S.D. Fla. Sept. 4, 2008) (enforcing settlement that includes a permanent injunction).

Here, there is no question that Defendant Miriam Andreoni has entered into a valid

settlement agreement with the FTC. Indeed, the validity of her settlement is clearer than that of many of the agreements enforced in the above-cited cases, as her settlement was both reduced to writing and signed by the defendant. *See* DE 288-1, Proposed Stipulated Final Order and Permanent Injunction as to Defendant Miriam Andreoni. Miriam Andreoni does not even argue that the settlement agreement she has entered into with the FTC is invalid in any respect.

Instead, Miriam Andreoni's motion explicitly acknowledges that she is seeking to withdraw the consent that she previously gave to a valid settlement, and asserts that her new desire to be released from the settlement arises from "extensive deliberation and consideration." DE 291, Motion to Withdraw Consent at 2. A party's change of heart, however, is not a sufficient justification for setting aside a valid settlement. *See, e.g., White Farm*, 792 F.2d at 530; *Petty*, 849 F.2d at 133; *Spencer*, 1996 U.S. Dist. LEXIS 20180, at *10. In moving to withdraw her consent, defendant has provided no authority to the contrary.

Miriam Andreoni argues that the settlement at issue here is exceptional because the proposed order includes injunctive prohibitions. DE 291, Motion to Withdraw Consent at 2. However, there is nothing unusual about a settlement containing injunctive provisions, and courts have repeatedly enforced such settlements where a party belatedly sought to withdraw from an agreement with injunctive provisions. *See, e.g., Allen*, 816 F.2d at 576-77; *Moore*, 936 F.2d at 160-64; *Old Nat'l Bank*, 2008 U.S. Dist. LEXIS 114408, at *3-7. Again, Miriam Andreoni has cited no authority to the contrary.

CONCLUSION

Because Defendant Miriam Andreoni's change of heart is not a valid basis for allowing her to withdraw her consent to the entry of the proposed order negotiated to settle the claims against her in this action, her motion to withdraw consent should be denied, and the Court should

enter the Proposed Stipulated Final Order and Permanent Injunction as to Defendant Miriam Andreoni. In addition, the Court should enter the other pending consent judgments as to Mauricio Paz, Universal Cybercom Corporation, Automated Entertainment Dispensers, Inc., and Universal Technical Support, Inc, as no challenge has been raised to these settlements.

Respectfully Submitted,

/s Michael E. Tankersley

Michael E. Tankersley (Bar No. A5500895)

Daniel O. Hanks (Bar No. A5501278)

600 Pennsylvania Ave. NW

Washington, D.C. 20580

Telephone: (202) 326-2991, -2472

Fax: (202) 326-3395

mtankersley@ftc.gov

dhanks@ftc.gov

Counsel for Plaintiff Federal Trade Commission

August 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2010, I electronically filed the foregoing Opposition to Defendant Miriam Sofia Andreoni's Motion to Withdraw Consent to Entry of Proposed Stipulated Final Order and Permanent Injunction with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and the *pro se* party identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s Michael E. Tankersley

Michael E. Tankersley

SERVICE LIST

By Notice of Electronic Filing:

Jeffrey Cox
Sallah & Cox, LLC
2101 NW Corporate Boulevard
Suite 218
Boca Raton, Florida 33431

Patrick Jasperse
United States Department of Justice
1331 Pennsylvania Avenue, NW
Suite 950 N
Washington, DC 20004

Counsel for Miriam Smolyanski Andreoni

Counsel for United States

Jane Wollner Moscovitz
Moscovitz Moscovitz & Magolnick
1111 Brickell Avenue
Suite 2050
Miami, FL 33131

David Reich Chase
David R Chase PA
1700 E Las Olas Blvd.
Penthouse 2
Fort Lauderdale, FL 33301

Counsel for Defendant Anthony Rocco
Andreoni

Counsel for Defendant Anthony Rocco
Andreoni

William M. Pearson
GrayRobinson, PA
1221 Brickell Avenue
Suite 1650
Miami, FL 33131

Gerald Wald
Murai Wald Biondo Moreno & Brochin, PA
2 Alhambra Plaza
Penthouse 1B
Coral Gables, FL 33134

Counsel for Defendant James MacArthur

Receiver for Corporate Defendants American
Entertainment Distributors, Inc., Automated
Entertainment Dispensers, Inc., Automated
Entertainment Machines, Inc., Universal
Technical Support, Inc., and Universal
Cybercom Corp.; Monitor for DSG Holding
Company, Inc.

Barry E. Witlin, P.A.
1200 S. Pine Island Road
Suite 230
Fort Lauderdale, Florida 33324

Counsel for Defendants Mauricio Paz and
Universal Cybercom Corporation

Carlos E. Sardi
Genovese Joblove & Battista
100 SE 2nd Street, Suite 4400
Miami, FL 33131

Representing Third Party Plaintiff David
Shomers

By U.S. Mail:

Christopher Bruno
Bruno & Degenhardt
10615 Judicial Drive
Suite 703
Fairfax, VA 22030

Counsel for Defendant Anthony Rocco
Andreoni, Automated Entertainment
Dispensers, Inc., and Universal Technical
Support, Inc.

Louis J. Terminello
Chadroff Terminello & Terminello
2700 SW 37th Avenue
Miami, FL 33133-2728

Representing Third Party Plaintiff David
Shomers

Russell Graham MacArthur
Register No: 78742-004
FCI Butner Low
Federal Correctional Institution
Old NC Hwy 75
Butner, NC 27509