

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL TRADE COMMISSION,)
)
Plaintiff,)
)
v.)
)
SKYBIZ.COM, INC., et al.)
)
Defendants.)

No: 01-CV-396-K(E)

FILED

AUG 02 2001

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER FOR PRELIMINARY INJUNCTION
REGARDING DEFENDANTS NANCI MASSO
AND NANCI CORPORATION INTERNATIONAL

This matter came on for hearing on June 26-28, 2001 on the motion of the plaintiff for preliminary injunction. Now, in accordance with Fed. R. Civ. P. 52(a) and 65, this Court enters its Order as to Defendants Nanci Masso and Nanci Corporation International (NCI).

On May 30, 2001, Plaintiff filed suit against SkyBiz.com, Inc., World Service Corporation, WorldWide Service Corporation, NCI, James S. Brown, Stephen D. McCullough, Elias F. Masso, Nanci Masso, Kier F. Masso, and Ronald E. Blanton (collectively "Defendants") alleging that Defendants: 1) made false and misleading earnings claims to consumers; 2) provided others with the means and instrumentalities to make the same deceptive claims; 3) failed to disclose to consumers that the structure of SkyBiz's compensation plan would not allow many of SkyBiz's participants to achieve the benefits promised by Defendants; and 4) were operating a pyramid scheme, all in violation of 15 U.S.C. §45(a), Section 5 of the FTC Act. (Complaint Counts I, II, III, & IV.)

After an ex parte hearing, the Court issued a Temporary Restraining Order Freezing Assets, Appointing a Temporary Receiver and Providing Additional Equitable Relief (the TRO)

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on June 6, 2001.

On June 8, 2001, certain defendants filed an application for a status conference before the Court, which was held on that same day. As a result of the status conference, the Court entered subsequent orders which gave some of the individual defendants access to personal bank and credit card accounts for day-to-day personal living expenses, and permitted NCI and its wholly-owned subsidiary, Nanci Realty Company to continue non-SkyBiz-related business, with Receiver oversight.

Plaintiff filed a First Amended Complaint on June 25, 2001, adding SkyBiz International, Ltd., a British Virgin Islands corporation, as a party defendant. The application for preliminary injunction seeks to continue all the provisions of the TRO pending adjudication on the merits.

I. FINDINGS OF FACT

1. Plaintiff, the Federal Trade Commission, is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 et seq. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

2. Defendant SkyBiz.com, Inc. (SkyBiz) is a corporation organized under the laws of the State of Nevada, with its principal place of business located in Tulsa, Oklahoma. SkyBiz is in the e-commerce business offering customers internet websites and related products and services..

3. Defendant World Service Corporation (WSC) is a corporation organized under the laws of the State of Nevada, with its principal place of business located in Tulsa, Oklahoma. WSC has been in business for over eight years, and currently provides management and

administrative services to SkyBiz.

4. WSC is owned by K.F.B.B. Ltd. Partnership. In the chart attached as Exhibit 1 to the Temporary Receivers' initial report, the Temporary Receiver lists K.F.B.B. Ltd. Partnership as owned 50% by Nanci and Elias Masso and 50% by Masso Ltd. Partnership. This was disputed in deposition testimony by accountant Ben Kemendo. (App. No. 7325, p.16:8-15). However, in the same passage, Kemendo also testified that K.F.B.B. Inc. is owned by NCI. It is unclear at this time if he was referring to the same entity as K.F.B.B. Ltd. Partnership. If he was, the FTC's corporate "inter-relatedness" argument becomes stronger.

5. Defendant WorldWide Service Corporation (WWSC) is a corporation organized under the laws of the State of Oklahoma with its principal place of business located in Tulsa, Oklahoma. WWSC was formed for the purposes of assuming the management and administrative functions of World Service Corporation. However, that event never occurred because this action was filed before the proposed transaction could be completed between the defendants.

6. Defendant Nanci Corporation International (NCI) is an Oklahoma corporation organized in 1986. NCI is owned by the Masso Ltd. Partnership, of which Elias Masso, Nanci Masso, and Kier Masso are general partners. Nanci Realty Corporation (Nanci Realty) is a wholly owned subsidiary of NCI and is engaged in the commercial real estate business. Nanci Masso is also president of Nanci Realty.

7. Defendant Nanci H. Masso is the founder and President of NCI. She resides in the Northern District of Oklahoma.

8. Until it was sold, Nanci Travel, a travel agency and a subsidiary of NCI, handled travel

arrangements for the SkyBiz sales presenters.

9. NCI's corporate offices are located at the Echelon Shopping Center, at 81st and Memorial, in Tulsa, Oklahoma. This office is at a location entirely separate from World Service Corporation and SkyBiz.com. (Tr. 6/27/01 at 122.11. 7-9) NCI does not share any office with either World Service Corporation or SkyBiz.com. The only NCI or Nancy Realty employee on site at the Skyline Complex is Kier Masso (Nanci Masso's stepson) who is the property manager for that property.

10. The accounting system used by NCI and its subsidiary (Nanci Realty Corp.) is entirely separate from WSC and SkyBiz.com. (Tr. 6/27/01 at 68 11.16, 23-24; 123 11.15-17).

11. Throughout its fifteen year existence, NCI has been engaged in the sale of nutritional supplements and skin products. The Receiver presented no evidence that Nanci Masso or NCI sells or has been engaged in the business of promoting or selling "Web-Paks" or other computer/internet products or business opportunities. (Tr. 6/27/01 at 122 11.14-21).

8. The SkyBiz Program is a multi-level marketing venture which involves the sale of an Internet product called a Web Pak. The Web Pak is a personal computer-related package which consists of the tools to create a 35 megabyte internet website, various tutorials for beginner computer users, and an electronic mail account. It is this venture which the FTC alleges is a pyramid scheme.

9. SkyBiz holds a note receivable from NCI in the amount of \$713,034.31. This is the promissory note secured by a mortgage on the Skyline Complex office building. The loan refinanced the purchase loan from Valley National Bank.

10. NCI has a lease agreement with WSC (as a tenant) for the offices used by SkyBiz

and WSC at the Skyline Complex.

11. From time to time since the formation of WSC in 1993, Nanci Masso has been listed in corporate documents as an officer or director. (App.No.5517). She was President of WSC for 6 months in mid-1999. She was listed as a director as late as September 26, 2000. (App.No.5527). The Receiver sees no evidence of active involvement at this time. (Tr.6/27/01 at 122 ll.20-21).

12. Randy Jo Wilcox, WSC's Chief Operating Officer since January, 2001, has (1) never met Nanci Masso, (2) never taken direction from Nanci Masso with regard to WSC, and (3) never sought out or contacted Nanci Masso for advice with regard to WSC.. (Tr. 6/28/01 at 151-52).

13. Nanci Masso is not presently involved in the management or operation of either WSC or SkyBiz.

14. On February 20, 2001, Nanci Masso submitted and approved a check request for a check for \$50,000 to be drawn on a SkyBiz bank account to be made out to her and delivered to her. (App.No. 5255-56). The check was purportedly for a personal oil and gas investment.

15. By corporate resolution dated December 18, 2000, SkyBiz gave Nanci Masso authority to purchase three condominium time-share units in Scottsdale, Arizona on behalf of SkyBiz. (App.No. 5627).

16. On October 31, 1998, NCI opened a merchant account with MasterCard in the name NCI d/b/a Skybiz 2000. (App.No.4499). On August 18, 1998, NCI had entered into an agreement for Paymentech to process the \$125 SkyBiz program costs. (App.No. 5305-12). The agreement was executed by Paul C. Murphy, CFO of NCI. The processing contract with

Paymentech was used to process charges from the NCI*SKYBIZ 2000 merchant account, sales of the SkyBiz program to recruits.

17. A WSC memo from Edna Benavides to Valley National Bank, dated August 4, 1999, authorized Paymentech to debit the bank accounts of NCI, Freeway 100, World Quest International and SkyBiz 2000 (companies which WSC services). (App.No.5949). Nanci Masso's signature appears at the bottom of the memo.

18. There is no evidence that Nanci Masso or NCI has any role in the overseas accounts identified by the Receiver.

19. Nanci Masso occasionally received expense reimbursements from WSC for credit card charges made to her Citibank Visa by her husband Eli Masso.

20. There is sufficient evidence to conclude that "Nanci Masso used Nanci Corporation in order to facilitate collection of SkyBiz annual Associate fees charged to their credit cards" as alleged by the FTC.

21. There is no evidence that any account in the name of NCI continues to be open or available to service SkyBiz.com.

22. NRC is the registered agent for SkyBiz in Oklahoma. PX 172 (App. # 5542-43).

23. There is insufficient proof that Nanci Masso or NCI have been previously engaged in illegal multi-level marketing or pyramid schemes.

24. There is sufficient proof that "based on her level of participation with World Service and NCI and the sheer volume of consumer complaints and credit card charge back received by the companies, Nanci H. Masso knew of or recklessly disregarded knowledge of the deceptive acts of the corporate defendants," as alleged by the FTC.

25. There is sufficient proof that NCI and Nanci Masso may have “aided and abetted” to some extent the entities involved in the Web-Pak promotion and sales in the obtaining of merchant accounts and other financial transactions as described herein. The Court deems this sufficient to find the corporate entities a “common enterprise” in this sense.

26. There is sufficient evidence to conclude that the preliminary injunction (in modified form) should be granted against Nanci Masso or NCI, assuming arguendo that SkyBiz is conducting a pyramid scheme. The Court now enters a preliminary injunction under the terms discussed at the status conference in this case on June 8, 2001. Those terms are that NCI and Nancy Realty are free to operate their respective businesses (while severed from SkyBiz or WSC), but with monitoring by the Temporary Receiver to assure that payments and cash flows are in the normal course of business. The issue was raised again prior to commencement of the preliminary injunction hearing in this case. The position of counsel for NCI and Nanci Masso was to request complete removal of Temporary Receiver involvement in the Nanci entities. (6/26/01 Tr., 7-9). The Court declines to do so.

27. The FTC has presented sufficient evidence for the Court to conclude that Nanci Masso and NCI should remain as defendants in this lawsuit (under the legal standard articulated below) and should be placed under restrictions as to their activities.

To the extent any of these Findings of Fact are more properly characterized as Conclusions of Law, they should be so considered.

II. CONCLUSIONS OF LAW

1. This Order supersedes the June 6, 2001 *Ex Parte* Temporary Restraining Order (# 12).
2. This case was brought pursuant to Sections 5 and 13 of the Federal Trade Commission

Act, 15 U.S.C. §§ 45(a) and 53(b).

3. This Court has subject matter jurisdiction in this case pursuant to 28 U.S.C. §§1331 and the FTC Act.

4. This Court has personal jurisdiction over Defendants.

5. Venue is appropriate in the Northern District of Oklahoma pursuant to 28 U.S.C. §1391(b)(1).

6. Defendants contend that the FTC was required under Rule 9(b) F.R.Cv.P. to plead with particularity its factual allegations that NCI and Nanci Masso participated in deceptive trade practices against consumers. The Court disagrees. "A claim under section 5(a) of the FTC Act is not a claim of fraud or mistake, so Rule 9(b) does not apply." *FTC v. Communidyne*, 1993 WL 558754 (N.D.Ill.1993).

7. The Commission has alleged that Defendants violated Section 5 of the FTC Act by engaging in deceptive practices in marketing the SkyBiz scheme, and is seeking equitable relief.

8. The parties dispute the appropriate standard for injunctive relief. Defendants cite the traditional four-prong test quoted in *Kikumura v. Hurley*, 242 F.2d 950, 955 (10th Cir.2001). The Court finds this test inapposite. Section 13(b) of the FTC Act provides: "[u]pon a proper showing that, weighing the equities and considering the [FTC]'s likelihood of ultimate success, such action would be in the public interest . . . a preliminary injunction may be granted . . ." 15 U.S.C. § 53(b).

9. Congress intended this standard to depart from what it regarded as the then-traditional equity standard. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C.Cir.2001). The agency is not held to the high thresholds applicable where private parties seek interim restraining orders, in

order that injunctive relief be broadly available to the FTC under a unique "public interest" standard. *Id.* Under this approach, it is not necessary for the FTC to demonstrate irreparable injury. Rather, in determining whether to grant a preliminary injunction, a court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir.1988).

10. The standard for likelihood of success on the merits is met if the FTC "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15. When a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight. *FTC v. Affordable Media, Inc.*, 179 F.3d 1228, 1236 (9th Cir.1999). In the Findings of Fact listed above, when the Court states "there is sufficient evidence" regarding a certain proposition, reference is being made to the lenient standard under which the FTC may obtain injunctive relief.

12. The FTC seeks to impose the preliminary injunction against Nanci Masso individually. Individual defendants may be held liable for injunctive relief for the corporate defendants' violations of the FTC Act if the FTC demonstrates that the individual defendants participated directly in the wrongful acts or practices or had authority to control the corporations. *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.1997). Authority to sign documents on the corporation's behalf demonstrates requisite control. *Id.*

13. The FTC has not argued that Nanci Masso ever directly participated in selling Web-Paks to consumers. Rather, it contends Nanci Masso used NCI in order to facilitate collection of

SkyBiz annual Associate fees charged to credit cards. Thus, under this contention, Nanci Masso participated in various management and administrative functions necessary for the operation of the alleged SkyBiz pyramid.

14. The FTC seeks to impose the preliminary injunction upon NCI on the basis that all defendant companies form a "common enterprise". The factors set forth in *FTC v. Wolf*, 1996 WL 812940 (S.D.Fla.1996), (a decision upon which both sides rely) are (1) common control, (2) sharing of office space and officers, (3) business being conducted through "a maze of interrelated companies", (4) unified advertising or (5) no real distinction existing between the corporate defendants.

15. The Court's task has been made difficult by the occasionally quite imprecise language of the FTC. For example, in seeking to establish "common control", the FTC states in its post-hearing memorandum that "Mrs. Masso, Elias Masso and Kier Masso served as officers and directors of SkyBiz, WSC and NCI. These interlocking directorates and officer positions are further demonstrated by the company records." (FTC Memo at 4). In fact, the records indicate that Nanci Masso has never been listed as an officer or director of SkyBiz. (Attachment A to Temporary Receiver's Report). Since SkyBiz is the heart of this case, such imprecision is regrettable.

16. The FTC has not demonstrated sufficiently a sharing of office space and officers as regards NCI vis a vis the other corporate entities, or of unified advertising.

17. The FTC has presented sufficient evidence of a maze of interrelated companies. Nancy Realty was SkyBiz's registered service agent in Oklahoma. Paymentech wrote to Ron Blanton, president of WSC, by addressing Blanton at NCI. Merchant credit card accounts were

opened in the name of NCI and NCI*SkyBiz 2000 for use by SkyBiz and with the address of WSC. Accountant Ben Kemendo testified he believed there were intercompany advances between the two Nanci entities and the other corporate entities. (App.No. 7332, p. 43:21-25). Further, Nanci Masso using SkyBiz funds for her own personal oil and gas investment (in the year 2001) and Nanci Masso purchasing condominium properties on behalf of SkyBiz (in late 2000) lead the Court to conclude some restrictions must be imposed, both upon Nanci Masso individually and upon NCI.

18. The FTC argues that NCI must be placed under a preliminary injunction because "NCI and its subsidiaries have been, and without Receivership supervision will continue to be, used by the individual defendants to conceal assets and facilitate the scam." Defendants argue that NCI has not been shown to be part of a "common enterprise" with the other corporate entities in the narrowly focused sense of direct participation in the sale of Web-Paks. While this limited proposition might be true, it does not follow that an injunction is not appropriate against entities on the periphery of the pyramid scheme itself, if those entities have the potential (as demonstrated by past acts) of serving as conduits for improper cash flow. The FTC has sufficiently shown the entities were operated as a "common enterprise" in this broader sense. The parties have not addressed whether such a showing is sufficient to impose ultimate liability on a defendant, but the Court deems it sufficient under the precedent previously cited for imposition of the preliminary injunction.

19. Having found that the FTC has established a likelihood of success on the merits (under the lenient standard applicable to the FTC), the Court must proceed to the second part of the preliminary injunction standard and weight the equities. The Court finds that while Nanci

Masso and NCI will suffer some burden from their severance from the other named corporate entities and the sustained monitoring of the Temporary Receiver, such burden is outweighed by the public interest in preventing the possible disbursement of funds gained by an alleged pyramid scheme. Thus, the preliminary injunction as amended shall issue as to both NCI and Nanci Masso.

20. The FTC has failed to prove any necessity for keeping defendants Nanci Masso and NCI under Section I of the TRO (Injunction against misrepresentations) or Section II (Injunction against material omissions) as there is no evidence these defendants engaged in such activity. All other aspects of the TRO, not specifically addressed herein, shall remain in force as a preliminary injunction against Nanci Masso and NCI. Specifically, the Court directs Nanci Masso to sever all ties and refrain from any transactions with the defendant companies other than NCI and its subsidiaries. NCI shall also sever all ties and refrain from any transactions with the other defendants aside from Nanci Masso. Neither Nanci Masso nor NCI shall interfere in repatriation of assets and documents located in foreign countries. The Temporary Receiver shall continue to permit Nanci Masso and NCI and its subsidiaries to conduct their normal businesses. However, the Receiver shall continue to function in a monitoring capacity as to NCI and its subsidiaries. This does not mean that the Receiver is to be physically present at the business site on a day-to-day basis. Rather, the Receiver shall have access to a monthly report of all transactions conducted and checks written by the companies. The Receiver shall be presented with any proposed transaction (real estate or otherwise) involving amounts over \$50,000.00 before such transactions take place, for purposes of review and approval. Such approval shall be demonstrated by the Receiver or his representation countersigning the transaction. Aside from

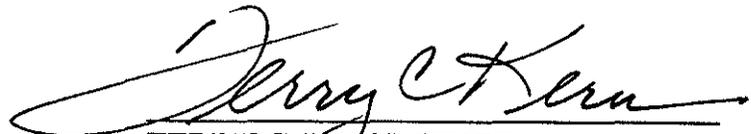
the monthly transaction and check report, the Receiver and the FTC shall be permitted access upon request to business records and the business premises of NCI or its subsidiaries, if in the Receiver's judgment such access is necessary on an expedited basis.

14. NCI is directed to advise the Court (and present documentation) within five days of the total amount of its assets at this time. The Court will then determine whether to unfreeze the companies assets.

To the extent any of these Conclusions of Law are more properly characterized as Findings of Fact, they should be so considered.

IT IS THEREFORE ORDERED that the application of the FTC for preliminary injunction against defendants Nanci Masso and Nanci Corporation International is hereby DENIED in part and GRANTED in part, as detailed in this Order.

ORDERED THIS 2 DAY OF AUGUST, 2001.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE