

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MEDICINE SHOPPE INTERNATIONAL,)
INC.)
)
Plaintiff,)
)
vs.)
)
S.B.S. PILL DR., INC. and SAVANNAH B.)
SWARTOUT)
)
Defendants)

Case No. 4:02CV01146CEJ

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR
CONTEMPT AND IN SUPPORT OF DEFENDANTS' MOTION TO REVERSE TRO**

In opposition to Plaintiff's Motion for Contempt, Defendants S.B.S. Pill Dr., Inc. ("Pill Dr.") and Savannah B. Swartout ("Ms. Swartout") say:

INTRODUCTION

Plaintiff's Motion for Contempt ("Plaintiff's Motion") and Memorandum of Law in Support of MSI's Motion for Contempt ("Plaintiff's Memorandum") oversimplify the legal and factual circumstances surrounding this Court's issuance of a Temporary Restraining Order on July 2, 2002 ("TRO"), and Defendants' alleged violation of that TRO. This Court will find ample support for a determination that Defendants were not in violation of the TRO or in contempt of this Court.

STATEMENT OF FACTS

In addition to the facts as set forth in Defendants' Response to Plaintiff's Motion for Contempt and Motion for Reversal of TRO, the following facts are noteworthy. The Court

issued its TRO against Cape Fear Apothecaries, Inc. (“Cape Fear”) on July 2, 2002 at 6:38 p.m. (“TRO”). (*See Ex. 1*) Prior to the entry of the TRO, Ms. Swartout had already done, inter alia, the following:

- A. Incorporated S.B.S. Pill Dr., Inc. (“Pill Dr.”); (*See Plaintiff’s Motion for Contempt Ex. 6*)
- B. Caused all Cape Fear Apothecaries, Inc. (“Cape Fear”) inventory to be boxed up and stored in a remote location in the pharmacy’s storeroom; (*See Ex. 2; see also Swartout Deposition at 72, 136*)
- C. Caused Pill Dr. to purchase new inventory for Pill Dr.’s use, valued in excess of \$80,000.00; (*See Ex. 3*)
- D. Caused Pill Dr. to purchase new furniture, fixtures and equipment for Pill Dr.’s use, and removed substantially all furniture fixtures and equipment belonging to Cape Fear; (*See Ex. 2; see also Swartout Deposition at 75-76*)
- E. Caused Pill Dr. to secure permission, from the appropriate regulatory agencies of the City of Hope Mills, North Carolina, to replace the existing sign;. (*See Ex.4; Ex. 5*)
- F. Caused Pill Dr. to place non-revocable orders for both temporary (*See Ex. 6*) and a permanent (*See Ex. 7*) “Hope Mills Drug” signs, putting cash deposits down on the same;
- G. Caused Pill Dr. to purchase other Hope Mills Drug advertising materials, including Letterhead, Labels, T-shirts for employees and logo rugs; (*See Ex. 8 at 1-4*)
- H. Secured authorization from numerous customers for Pill Dr. to fill their refill and other future prescriptions and notified them of the creation of Hope Mills Drug. (*See Exhibit 10 of Swartout Deposition*)
- I. Applied for and obtained a pharmacy permit for Pill Dr./Hope Mills Drug from the North Carolina Board of Pharmacy (“NCBP”). (*See Ex.9*) In order to accomplish this, the NCBP required an ownership registration change from Cape Fear to Pill Dr.; (*See Ex. 9*)
- J. Caused Pill Dr. to apply and pay for a new DEA Identification Number for Pill

Dr./Hope Mills Drug; (*See* Ex.10 ¶ 3; *see* also Swartout Deposition at 138)

- K. Caused Pill Dr. to attempt to establish new accounts with multiple vendors/suppliers for the provision of telephone, utilities, and other products and/or services. Although some of these suppliers/vendors were the same as those used by Cape Fear, Ms. Swartout's intent was to establish a completely new account with these organizations, and she explained this to each of these organizations. (*See* Ex. 10 ¶ 3)

Gary Homar, the MSI employee responsible for supervising Cape Fear's Medicine Shoppe® Pharmacy operation, admitted during his testimony that employees at the pharmacy were answering the telephone as "Hope Mills Drug" prior to the issuance of the TRO, and Plaintiff's Motion for Contempt alleges the same. (*See* ¶ 5 Plaintiff's Motion for Contempt) Plaintiff has presented no evidence proving that any actions taken to identify the pharmacy as Hope Mills Drug, or any other action taken for the purpose of starting the Hope Mills Drug pharmacy, were taken subsequent to this Court's issuance of the TRO. There is no evidence suggesting that Mr. Homar observed the pharmacy's identification as Hope Mills Drug any earlier than July 9, 2002. Mr. Homar admits that he did not visit the pharmacy between May 22, 2002 and July 9, 2002. (*See* Homar Deposition at 53) It is clear then, that Defendants had taken substantial actions and made great effort to start a new, completely separate pharmacy at 3127 North Main Street, Hope Mills, North Carolina, and to identify that pharmacy as Hope Mills Drug.

Thus was the status quo of the pharmacy operation at 3127 N. Main Street, Hope Mills, North Carolina on July 2, 2002.

Although Plaintiff had, prior to July 2, 2002, threatened Cape Fear and Ms. Swartout by

making statements of Plaintiff's intent to seek a TRO, counsel for Defendants first received notice of Plaintiff's actual TRO complaint, motion, and supporting papers on July 2, 2002. (*See* Ex. 11) Neither of Defendants were present at the TRO hearing ("TRO Hearing") which was held on July 2, 2002, the day of notice. (*See* Ex. 10 ¶ 2)

At the TRO Hearing, Defendants' counsel were not aware of many significant actions taken by Defendants' in order to begin the operation of a non-Medicine Shoppe pharmacy at 3127 North Main Street, Hope Mills, North Carolina ("Pharmacy"). (*See* Ex. 10 ¶ 3) Thus, these actions were not known to the Court before the issuance of the TRO.

Additionally, counsel for Defendants expressed concern about the meaning of certain terms contained in Plaintiff's proposed TRO and the TRO's applicability to Defendants, since neither of the Defendants were expressly named in the Plaintiff's proposed TRO. Defendants' counsel attempted to clarify the same with the Court at the TRO, but the Court appeared to characterized these questions as unripe and withheld clarification. (*See* Ex. 9 Plaintiff's Motion for Contempt)

The TRO expired by its own terms on July 15, 2002. (*See* Ex. 1 at 3)

The parties entered into an Interim Agreement, effective August 13, 2002, whereby Pill Dr. agreed, until this Court's ruling on Plaintiff's Motion for Preliminary Injunction, to take certain limited steps to re-identify, to the consuming public, as a Medicine Shoppe® Pharmacy. Pill Dr.'s level of compliance with regard to this Interim Agreement is not at issue for purposes of Plaintiff's Motion for Contempt.

ARGUMENT

The Defendants did not violate the terms of the TRO in this case, and thus cannot be held in contempt of this Court. Plaintiff has failed to meet the stringent burden imposed by the law of contempt. “The plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by ‘clear and convincing evidence,’ and where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.” *Quinter v. Volkswagen of America*, 676 F.2d 969, 33 Fed.R.Serv.2d 1619 (3rd Cir. 1982), *citing Fox v. Capitol Co.*, 96 F.2d at 686 (3d Cir. 1938).

In addition to conduct amounting to a violation of an order the clear terms of a court order, the party alleging contempt must prove the following elements by clear and convincing evidence: (1) That the alleged contemnor had actual notice of the order at the time of the alleged violation; (2) That the order violated was in effect at the time of the alleged violation; and (3) That the order violated was clear and unambiguous. *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996). Defendants did not violate the terms of the TRO. Additionally, the facts in this case do not support a finding that the first and second elements required by the *Reliance* case have been, or can be, met.

Neither of the Defendants is named expressly in the TRO. The TRO expressly applied only to Cape Fear. (*See Ex.1*) Thus, the TRO could only have applied to Defendants in their capacity as agents, servants, employees, or representatives of Cape Fear, in the event that Defendants acted “in concert” with Cape Fear, or if Defendants “aided or abetted” Cape Fear in violating the TRO.

I. **Defendants Did Not Act on Behalf of, or In Concert With, Cape Fear.**

As a practical matter, neither of the Defendants could have acted on behalf of Cape Fear after the issuance of the TRO. The actions taken by Defendants prior to the TRO had already at that point caused Cape Fear to be effectively abandoned, along with substantially all of its assets. (*See* Ex. 10 ¶ 13) Although Ms. Swartout took some actions on behalf of Cape Fear after the entry of the TRO, these actions were primarily for the purpose of ensuring that Cape Fear sales proceeds were deposited into Cape Fear's bank account, and that no Cape Fear assets were commingled with those of Pill Dr. (*See* Ex. 10 ¶ 15)

Indeed, Ms. Swartout's actions after the TRO were focused solely on operating Pill Dr.'s new, completely separate pharmacy business, a business isolated from Cape Fear. The only significant act Ms. Swartout performed on behalf of Cape Fear after the issuance of the TRO was to cause Cape Fear to file for bankruptcy protection. (*See* Ex. 10 ¶ 15)

Nor could Defendants have acted "in concert" with Cape Fear. Generally, a nonparty is considered to be acting "in concert" with a party when (1) there are circumstances "akin to alter ego, collusion or identity of interest between a party and a nonparty[,]" or (2) a nonparty "aids or abets a named party or his privy in violating the order." *Reliance Ins. Co.* at 377.

No alter ego or successor/identity in interest relationship existed or exists between Cape Fear, Pill Dr. and/or Ms. Swartout. Neither Pill Dr. nor Ms. Swartout are alter egos of Cape Fear. The alter ego issue has been briefed in Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, and is omitted in the interest of judicial economy.

Successor liability theories presuppose actual successor status, which generally requires a

transfer of all or substantially all of the assets of the transferor company. This requirement is not met here, and Pill Dr. is therefore not even the successor to Cape Fear.

The only assets and liabilities transferred to Pill Dr. from Cape Fear were either insignificant and transferred as a matter of administrative convenience, or were transferred inadvertently. (*See* Ex. 10 ¶ 10, 16). Cape Fear Apothecaries filed for Chapter 7 Bankruptcy protection leaving \$ 352,289.84 in assets and \$612,560.86 in liabilities. (*See* Ex. 12 at “Summary of Schedules”) Thus, equity in the amount of \$ 260,271.02 was left in Cape Fear, an amount which dwarfs the value of any asset actually transferred by Cape Fear to Pill Dr. It is clear, then, that the assets Cape Fear transferred to Pill Dr. were insignificant, and insufficient to support the conclusion that Pill Dr. is the successor to Cape Fear.

The prescriptions that were transferred to Pill Dr. from Cape Fear were transferred pursuant to individual patients’ requests, and were accommodated by Cape Fear and Pill Dr. only in order to ensure Cape Fear and Pill Dr.’s compliance with NCPB. (*See* Ex. 10 ¶ 3, 11) In any event, Cape Fear’s prescription files and customer lists are of little value, as evidenced by the low sale value of \$3,000.00 placed on them by the Trustee in Bankruptcy for Cape Fear. (*See* Ex. 13)

Pill Dr. continued to use the telephone phone number previously used by Cape Fear. However, neither Cape Fear nor Plaintiff had or have an enforceable property right to this phone number. Further, Pill Dr. continued to use the phone number in order to avoid any potential liability to the NCBP. (*See* Ex.10 ¶ 5) Changing phone numbers would have effectively cut off the continued patient care Ms. Swartout believed she and Pill Dr. were required to facilitate

under North Carolina law.

Additionally, it is clear from the undisputed identification of the pharmacy as “Hope Mills Drug” that Defendant did not continue to benefit from the Medicine Shoppe service marks or trade marks used by Cape Fear. Defendants thoroughly and completely de-identified the pharmacy. (See Plaintiff’s Motion for Contempt ¶ 10; Ex. 10 at ¶ 3) To the extent those marks are valuable assets, which Defendants specifically deny, Pill Dr. made no use of the same. Rather, Pill Dr. utilized its own, new and distinct identifying marks. Plaintiff argues that substantially all the assets of Cape Fear were transferred and used by Pill Dr. Yet, Plaintiff also argues that Pill Dr. was not sufficiently identified as a Medicine Shoppe, and that the intangible, goodwill assets with alleged value were not being used by Pill Dr. In fact, Medicine Shoppe considers these marks to be valuable enough to warrant preliminary injunctive relief, an extreme remedy, appropriate only where the likelihood of irreparable harm is shown. This is clearly an admission that one of the most valuable assets of Cape Fear, its licensing right to use the Medicine Shoppe marks, was not transferred to Pill Dr., and that the business of Pill Dr. was not a “continuation” of Cape Fear’s business.

Pill Dr. arranged for new furniture, fixtures and equipment to be purchased for its use, and separated the furniture, fixtures and equipment belonging to Cape Fear. (*See* Ex. 10 ¶ 3; Swartout Deposition at 75-77) The Cape Fear furniture remaining in the store after Pill Dr. began operations was limited to medicine shelving (Swartout Deposition at 75-77) of very little value, and effectively attached to the real property. (*See* Ex. 10 ¶ 10)

Cape Fear did not, and does not now, have any property interest in the store location,

other than a potential implied, informal, month-to-month, verbal lease of questionable enforceability. (*See* Ex. 10 ¶ 12) Thus, Pill Dr.'s use of the store location was not, and did not require, any transfer of any property interest, or asset, of any value. Without a transfer of a substantial amount of assets from Cape Fear to Pill Dr., therefore, no successor relationship exists, and no successor liability can be imposed on Pill Dr.

No collusion was at work here between Cape Fear, Pill Dr. and/or Ms. Swartout, either. Collusion requires cooperative acts designed to defraud another of his rights. *Black's Law Dictionary* 264 (6th ed. 1990). In order to prove fraud, one must prove intent. *Id.* at 660. Here, no proof of intent to deprive Plaintiff of its rights under the TRO exists or can be shown. In fact, the evidence presented to the Court thus far tends to show that no intent to defraud existed. Because Pill Dr.'s operation of a new, separate pharmacy began prior to the issuance of the TRO, and because no active steps to further identify the pharmacy as Hope Mills Drug were taken by either of Defendants after the TRO's issuance, it is clear that Defendants did not intend to do anything except maintain the status quo. (*See also infra* at p.13 regarding Defendants' lack of intent)

Defendants also did not aid or abet Cape Fear in violation of the TRO. The TRO applied to Cape Fear. Cape Fear, however, was effectively inoperable and had been practically abandoned at the time the TRO issued. Also, at that time Pill Dr. was already operating an independent pharmacy from real property in which neither Cape Fear nor Plaintiff had an enforceable property interest. Cape Fear was not, and could not have been, assisted by Defendants in violating the terms of the TRO. Again, it is clear that Defendants did not intend to

do anything except maintain the status quo, which consisted of the operation of a completely separate, independent, non-Medicine Shoppe pharmacy.

II. **The TRO's Terms Were Unfairly Vague and Indefinite, and Therefore in Violation of the Requirements of Fed.R.Civ.P. 65(d).**

The terms of the TRO issued by this Court were insufficient and indefinite. Ms. Swartout was unsure how the terms of the TRO might apply to her in her capacity as an individual and as agent for Pill Dr. (See Ex. 10 ¶ 6) Fed.R.Civ.P. 65(d) requires that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained." Fed.R.Civ.P. 65(d).

Additionally, the third element of the *Reliance* test, set forth *supra*, further clarifies Rule 65(d)'s specificity element in the contempt context by requiring that an allegedly violated order that is the subject of a contempt charge be "clear and unambiguous." *Reliance Ins. Co.* at 377; *See also* discussion *supra* at p. 5.

"Broad language in an injunction that essentially requires a party to obey the law in the future is not encouraged and may be struck from an order for injunctive relief, for it is basic to the intent of Rule 65(d) that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir.1987), citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 444, 94 S.Ct. 1113, 1116, 39 L.Ed.2d 435 (1974).

Equally important is the ". . . longstanding, salutary rule in contempt cases [] that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 544 (3d Cir. 1985)

quoting *United States v. Christie Industries, Inc.*, 465 F.2d 1002, 1006 (3d Cir.1972); *see also International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). Thus, even if Plaintiff's Motion is supported by one interpretation, however compelling, the existence of another reasonable interpretation would serve to invalidate the order as a basis for contempt in the event that the charged party acted in reliance on and in accordance with that interpretation. In this case, the TRO did not clearly or expressly apply to Defendants.

Defendants do not argue that Plaintiff's failure to expressly include them in the TRO's language, in itself, provides Defendants with a defense. In this case, however, the Plaintiff's omission caused sufficient vagueness to justify Defendants' actions and/or failures to act during the pendency of the TRO. It is undisputed that Ms. Swartout was, in general, an agent, employee and representative of Cape Fear, but it was not clear which, if any, of Ms. Swartout's actions, individually or on behalf of Pill Dr., would be prohibited under the terms of the TRO. Plaintiffs knew that Ms. Swartout was operating a non-Medicine Shoppe pharmacy at 3127 North Main Street, Hope Mills. If under the terms of the TRO Ms. Swartout specifically could not, under any circumstances during the effective period of the TRO, operate a pharmacy at that location, then the TRO could have and should have expressly so specified.

Defendants' counsel even attempted, during the TRO hearing, to clarify with the Court whether the proposed TRO would apply to Defendants. (*See* Ex. 9 Plaintiff's Motion for Contempt). While this Court's refusal to clarify this question during the TRO Hearing may have been judicially and/or procedurally appropriate, the fact that the vagueness was brought to the

Court's attention, and the fact that a clarification was not provided, indicate clearly that Defendants were not in contempt.

Plaintiff is now effectively arguing, in support of its Motion for Contempt, that under no circumstances during the effective period of the TRO, should Ms. Swartout, or any company owned and/or operated by her, have been allowed to operate a pharmacy at 3127 North Main Street, Hope Mills, North Carolina. If this were the intended effect of the TRO, Plaintiff could have, and should have, included specific language ensuring this construction by the Court and Defendants. Plaintiff's failure to include Ms. Swartout as a party and in the express language of its proposed TRO resulted in Ms. Swartout's omission from this Court's actual TRO. Defendants should not be penalized and held in Contempt of this Court based on Plaintiff's failure to include Ms. Swartout and clarify the scope of the TRO.

The TRO also lacked the requisite specificity due to the fact that the circumstances surrounding Ms. Swartout's incorporation and operation of Pill Dr./Hope Mills Drug were not fully known to the parties at the time of the TRO Hearing. Under the circumstances as they actually were, the terms of the TRO were difficult to interpret, justifying Defendants' actions and/or inactions. (See *infra* at III regarding changed conditions).

III. **Even if the TRO's Terms Were Violated, The TRO Was Issued Based on Erroneous Assumptions About the Status Quo.**

This Court should rule that the previous TRO was erroneously issued due to facts which arose after its issuance. A significant purpose of preliminary or temporary injunctive relief is to preserve the status quo. See *Hill v. Xyquad, Inc.*, 939 F.2d 627, 631 (8th Cir. 1991). “. . . [A]n injunction, unless issued after the final decree, when it becomes a judicial process, can only be

used for the purpose of prevention and protection, and not for the purpose of commanding the defendant to undo anything which he had previously done.” *Audenried v. Philadelphia & R.R. Co.*, 68 Pa. 370, 1871 WL 11065, 8 Am.Rep. 195, 18 P.F. Smith 370 (Pa. 1871). Thus, facts discovered after the issuance of a TRO may change the analysis of the propriety of such issuance, and may warrant a reversal of the TRO as erroneous. “[T]he right to . . . relief for violation of an injunction or temporary restraining order falls with an injunction or temporary restraining order ‘ which events prove was erroneously issued[.]’” *Reliance Ins. Co.*, 84 F.3d at 376. *Citing United States v. United Mine Workers of America*, 330 U.S. 258, 295 (1947).

In this case, counsel and the Court were unaware of the extent to which Defendants had acted, prior to the TRO Hearing, to open a completely new pharmacy identified as a non-Medicine Shoppe pharmacy. The substantial nature of those unknown actions warrants a ruling by this Court that the TRO was issued erroneously to the extent it applies to Defendants (such application being specifically denied). The issuance of the TRO based on the now-known circumstances of Defendants’ new pharmacy business would have more closely resembled mandatory preliminary injunctive relief, a type of relief strongly disfavored by courts. *Taylor v. Freeman*, 34 F.3d 266 (4th Cir. 1994). Courts should apply mandatory injunctions only in “the most extraordinary circumstances.” *Id.* at 270 n.2. Additionally, “[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party.” *Id.*, *citing Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir.1976).

Determining what the Court would have done had it been informed of all the facts

requires speculation; however, the facts and law strongly indicate that the issuance of a TRO under the actual circumstances would not have been justified. Thus, this Court should order the TRO to have been issued erroneously to the extent that the TRO applied to Defendants and refuse to Order Defendants in contempt.

The fact that Defendants took all affirmative actions to start operating a new, non-Medicine Shoppe pharmacy prior to the application for, and issuance of, the TRO, also technically places Defendants' conduct, to the extent such conduct violates the terms of the TRO at all, outside the scope of the TRO. Much, if not all, of the conduct prohibited by the TRO had already taken place when the TRO was issued. Therefore, no contempt could possibly have occurred, because no actions were taken after the TRO was issued.

IV. **Even if the TRO's Terms Were Violated, Defendants' Lack of Intent Excuses and/or Mitigates Defendants' Liability for Contempt.**

Defendants deny violating the terms of the TRO. In the event that this Court determines otherwise, Defendants' lack of intent to violate the TRO excuses and/or mitigates their liability for contempt. Problems with the TRO's specificity, and problems with changed conditions, caused genuine confusion regarding compliance. (See *supra* at III regarding changed conditions and II regarding specificity).

A party should not be cited for contempt for acting in good faith in obedience to ambiguous order. *State ex rel. Davis v. Achor*, 225 Ind. 319, 75 N.E.2d 154 (Ind. 1947). At a minimum, lack of contempt should serve to mitigate any contempt punishment issued by a court.

See Offut v. U.S., 232 F.2d 69, 98 U.S.App.D.C. 69 (D.C. Cir. 1956). In a similar vein, a failure to comply with a court order is excused where the alleged contempt was inadvertent. *Goldberg v. Ornstein*, 232 A.D. 84, 249 N.Y.S. 196 (N.Y. App. Div. 1931).

Even if Defendants had not been confused about the TRO's requirements, Defendants lacked intent, and acted in good faith at all times in attempting to comply with the TRO. Defendants had legitimate concerns about the potential for professional licensing problems should the pharmacy be re-identified as a Medicine Shoppe. Ms. Swartout was already on probation with the NC Board of Pharmacy ("NCBP") at the time the TRO was issued, and she had serious concerns about doing anything that might negatively affect the smooth operation of the pharmacy. (*See* Ex. 10 ¶ 5) Plaintiff contends that changing ownership registration with the NCBP is as simple as directing the NCBP in writing to do so. At the time the TRO was issued, though, it was Ms. Swartout's understanding from her experience with the NCBP that the process to change the name registered with the NCBP back to "Medicine Shoppe" or "The Medicine Shoppe" would require the same application process undertaken previously in order to start Hope Mills Drug. (*See* Ex.10 ¶ 8-9) This process is not at all as simple as writing a notification letter to the NCBP.

Further, "Certificate B" of the NCBP permit application, signed and certified by Ms. Swartout, states clearly to the NCBP that her intent is that her position as pharmacist-manager with Hope Mills Drug is to be a permanent position. (*See* Ex. 9). Ms. Swartout had legitimate concerns that changing the name of the pharmacy from Hope Mills Drug back to "Medicine Shoppe" with the NCBP so soon after the change from Cape Fear to Pill Dr. would jeopardize the

good standing of her pharmacy license.

Ms. Swartout's understanding of North Carolina pharmacy law also led her to believe that any action that could conceivably jeopardize continued patient care could also jeopardize her pharmacy license. Ms. Swartout had taken great pains to ensure her efforts to start a new, separate pharmacy would afford her patients a seamless transition, and a rapid Medicine Shoppe re-identification at that point was simply too risky. Of particular concern to Ms. Swartout was the effect of the removal of the "Hope Mills Drug" sign, which would have left the pharmacy completely unidentified. (*See* Ex.10 ¶ 5)

Further, Ms. Swartout had been instructed by the NCBP that she could not simultaneously operate two pharmacies from the same location, (*See* Ex. 10 ¶ 14) and was thus put in the position of having to choose to identify completely as either Hope Mills Drug, or Medicine Shoppe. Because of the actions already taken, and her concern about inconsistency in general as perceived by the NCBP, she chose, reasonably, to remain fully identified as Hope Mills Drug.

Additionally, the TRO expired by its own terms on July 15, 2002, roughly two weeks after its issuance, leaving little real time to undo all the substantial actions taken prior to the TRO to open a new, separate pharmacy.

Ms. Swartout was also legitimately concerned that the supplier and organizational relationships established by the new, separate pharmacy would be placed in jeopardy in the event that she rapidly re-identified. For example, Ms. Swartout had established a relationship with

NCPDP, an organization which provides a multitude of services to pharmacies in order to facilitate prescription services. Although NCPDP is not a regulatory authority, Ms. Swartout relied on the existence of this relationship in order to operate the pharmacy. NCPDP's services were critical to the operation of the Pharmacy, as these services facilitated transactions with insurance companies and other businesses integral to the operation of a pharmacy. Ms. Swartout reasonably believed that re-identifying the pharmacy as a Medicine Shoppe pharmacy so soon after setting up with NCPDP to do business as a non-Medicine Shoppe pharmacy would have jeopardized the services provided by NCPDP, spelling disaster for the continued care of her patients and for the financial viability of the business.

Certain of Ms. Swartout's conduct was inadvertent. For example, the "Hope Mills Drug" floor mat that Plaintiff alleges remained on the floor of the pharmacy was not left intentionally by Defendants, either during the short pendency of the TRO, or during the term of the Interim Agreement between Defendants and Plaintiff. (See Ex. 10 ¶ 19). This conduct, because it was inadvertent, should not be the basis for a contempt finding by this Court. *See Goldberg v. Ornstein*, 232 A.D. 84, 249 N.Y.S. 196 (N.Y. App. Div. 1931).

In short, Ms. Swartout was hit fast and hard with the TRO, and was greatly conflicted regarding what actions were appropriate. It is clear that Defendants did not intend to act in contempt of this Court. Most actions required to re-identify as a Medicine Shoppe Pharmacy could not be taken in a timely manner due to certain irreversible de-identification actions taken by Defendants prior to the TRO's issuance, and the expiration of the TRO by its own terms on July 15, 2002 obviated the necessity to do so after that point.

V. **Defendants' Affirmative Defenses are Applicable in Defense of Plaintiff's Contempt Claim.**

To the extent that Plaintiff is a private party bringing a contempt claim, the claim sounds in equity. Further, Plaintiff prays for specific performance, also an equitable remedy. Thus, Defendants' affirmative defenses of Unclean Hands and In Parei Delicto, contained in Defendants' Amended Answer and Counterclaims, serve to avoid the same to the extent Plaintiff itself seeks damages.

VI. **Even if Defendants Were in Contempt of This Court, the Damages for Which Plaintiff Prays Should Not be Awarded.**

Plaintiff prays for various relief in its Motion, including both compensatory and exemplary, or punitive, damages. There are, however, clear limitations to this Court's authority in awarding damages, whether compensatory or punitive in nature. This Court has broad discretion in determining the appropriate remedy for civil contempt livability, but any such remedy must be compensatory and non-punitive. *In re General Motors Corp.*, 61 F.3d 256 (4th Cir. 1995). Further, compensatory fines for contempt must bear a reasonable relationship to the actual losses of the allegedly injured party. *Nettis Environmental Ltd. v. IWI, Inc.*, 46 F. Supp. 2d 722 (N.D. Ohio 1999).

Even if this Court determines compensatory damages and/or fines to be appropriate in this case, which is specifically denied, Plaintiff has made no proof of its damages resulting from any alleged breach of the TRO, and no liquidated damages clause exists in the License Agreement. Further, any legal expenses incurred as a result of Plaintiff's pursuit of its contempt

claim would be minimal, since the bulk of the legal work related to the TRO was redundant as to Plaintiff's other claims and motions in this case. Additionally, the extent of any damages shown would be severely limited by the short duration of the TRO, which was issued on July 2, 2002, and which expired by its own terms on July 15, 2002.

Any damages claimed by Plaintiff should further be limited by the "Doctrine of Avoidable Consequences." Generally, a party cannot recover damages flowing from consequences which that party could reasonably have avoided. *Chesapeake & O. R. Co. v Kelly*, 241 US 485, 60 L.Ed. 1117, 36 S.Ct. 630 (1916). In this case, Plaintiff made no effort to assist Defendants with re-identification as a Medicine Shoppe Pharmacy. Plaintiff's likely had the ability to secure, on an expedited basis, Medicine Shoppe Pharmacy advertising materials of all kinds. Plaintiff, of course, could not have been expected to incur expenses in order to facilitate Defendants' compliance with the TRO, but to the extent that Plaintiff argues it was threatened with irreparable and immediate harm, Plaintiff's were in a position to, and should have made some effort to, assist with expedited re-identification. Plaintiff never made any such offer to Cape Fear or Defendants, (See Ex.10 ¶ 7) and any damages awarded to Plaintiff should be reduced accordingly.

Plaintiff's claims for punitive and exemplary damages are unconstitutional and the laws establishing the standard for granting and assessing punitive and exemplary damages are vague, ambiguous, and arbitrary, thereby violating Defendants' constitutional rights to due process and equal protection under the 14th Amendment of the Constitution of the United States, and the Constitutions of the States of Missouri and North Carolina.

Additionally, Plaintiff prays for specific performance for control and operation of the pharmacy to the extent that assets of the Pharmacy have been transferred to Defendants. Legitimate questions remain regarding the extent to which assets were transferred, and Defendants are entitled to litigate these issues fully on the merits of the case before such relief is considered. An interim specific performance remedy would be impractical and drastic, effectively depriving Defendants of the right to earn a living, and creating a massively confusing business operation scenario. Specific performance as a remedy simply should not be granted.

CONCLUSION

For the reasons stated herein, Plaintiff's Motion for Contempt should not be granted, and Plaintiff's requests for relief should be denied or modified in accordance with the principles herein stated.

This the _____ day of _____, 20 _____.

MURRAY, CRAVEN & INMAN, L.L.P.

_____/s/_____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
[Signature]
DEC 4 2002
U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

MEDICINE SHOPPE INTERNATIONAL,)
INC.,)
)
Plaintiff,)
)
v.)
)
S.B.S. PILL DR., INC.,)
)
and)
)
SAVANNAH B. SWARTOUT,)
)
Defendants.)

No. 4:02CV01146 (CEJ)

ORDER

On July 29, 2002, plaintiff filed a Motion for Contempt against defendants, which has been fully briefed.

After considering the parties' arguments, the Court concludes that a finding of contempt is inappropriate at this time.

Accordingly,

IT IS ORDERED that plaintiff's Motion for Contempt [#7] is **denied**.

Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 4th day of December, 2002.

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AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE
FOLLOWING INDIVIDUALS ON 12/05/02 by lwilderm
4:02cv1146 Medicine Shoppe Intl vs S.B.S. Pill Dr., Inc

28:1332 Diversity-Breach of Contract

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DEC - 5 2002
C. D. D.