IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HORIZON UNLIMITED, INC.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
RICHARD SILVA & SNA, INC.	:	**NO. 97-7430**

MEMORANDUM and ORDER

Norma L. Shapiro, S.J. **June 7, 2000**

Plaintiff Horizon Unlimited, Inc. ("Horizon")[1], alleging, inter alia, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 et seq.,[2] filed an action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA").[3] Presently before the court is a motion for contempt and sanctions against Paul Array ("Array"), the president of plaintiff Horizon, and plaintiff's counsel. On April 27, 2000, the court held an evidentiary hearing on this motion. For the reasons set forth below, defendants' motion will be granted.

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[1] John Hare was originally a plaintiff as well, but his motion for voluntary dismissal was granted by Order of March 11, 1999.

[2] Plaintiffs' other claims for negligence/ negligent misrepresentation, fraud and deceit, and breach of warranty were dismissed by Memorandum and Order dated February 26, 1998; plaintiffs' motion for reconsideration was denied by Memorandum and Order dated March 27, 1999.

[3] By order of August 31, 1999, the action was dismissed with prejudice; limited attorney's fees and costs were later awarded to defendants.

BACKGROUND

Plaintiff Horizon, through Array, purchased a Seawind airplane kit manufactured by SNA, of which Silva is president. Plaintiff alleged its Seawind airplane did not “perform according to specifications and building times” printed in the promotional materials. Following a protracted and contentious discovery period, all plaintiff's claims other than its claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1, et seq. ("UTPCPL"), were dismissed by the court. The UTPCPL claim was voluntarily dismissed by plaintiff after it became apparent it was baseless. The court permitted dismissal only with prejudice.

During discovery, plaintiff requested flight test data defendants sought to withhold as confidential. This information was ultimately produced subject to a September 16, 1998 Confidentiality and Protective Order ("CPO") limiting all discovery materials marked "confidential" to use by certain people, including the attorneys in this action but not the parties themselves, unless otherwise approved by the court. On October 9, 1998, the court issued an order permitting plaintiff's expert, Richard Adler ("Adler"), to review the confidential flight test data subject to his agreement to be bound by the CPO.

Adler, having agreed to the CPO, was given a copy of the flight test data to prepare an expert report. On November 16,

1998, plaintiff's local counsel, Tracey Oandasan ("Oandasan"), filed plaintiff's pretrial memoranda, with Adler's report, in the clerk's office. This was done at the instruction of plaintiff's lead counsel, Martin Pedata ("Pedata"), who had been admitted pro hac vice. "Appendix A" of the expert report, the flight test data itself, was not filed but the pretrial memorandum and expert report were not filed under seal. Plaintiffs did not mark the report "Confidential."

On November 28, 1999, Array wrote Oandasan to request a copy of the flight test data, Adler's expert report, and other documents. Array erroneously believed the data was no longer confidential as a result of a memorandum and order issued by a different judge in another action involving the same parties. After consulting with Pedata, Oandasan informed Array on December 2, 1999 that the flight test data remained confidential, but she enclosed a copy of Adler's report (without Appendix A, the flight test data) as well as a copy of the CPO.

In December, 1999, defendants discovered images from Adler's report and commentary about the report on Array's web site. Defendants argue that filing Adler's report of record and transmitting the report to Array permitted Array's subsequent posting the report on his web site, in violation of the CPO. The flight test data was not filed or otherwise disseminated in its original form, but defendants argue that the body of the report

refers to the data in sufficient detail that its dissemination was a violation of the CPO.

DISCUSSION

"Coercive contempt sanctions 'look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order;'" "compensatory sanctions seek to 'compensate the complainant through the payment of money for damages caused by past acts of disobedience.'" United States v. Basil Investment Corp., 528 F. Supp. 1225, 1228 (E.D. Pa. 1981) (Shapiro, J.) (quoting Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1344 (3d Cir. 1976)), aff'd, 707 F.2d 1401 (3d Cir. 1983).

In civil contempt proceedings, the petitioner bears the burden of establishing the respondent's non-compliance. The petitioner must show by "clear and convincing evidence" that the respondent has disobeyed the court's order. See Quinter v. Volkswagen of Am., 676 F.2d 969, 974 (3d Cir. 1982); Schauffler v. Local 1291, 292 F.2d 182, 190 (3d Cir. 1961); Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938). If there is "ground to doubt the wrongfulness of [respondent's] conduct," the petitioner has not met his burden. Quinter, 676 F.2d at 974; see Fox, 96 F.2d at 686.

To establish contempt, the petitioner must prove: "1) that a valid order of the court existed; 2) that the defendants had

knowledge of the order; and 3) that the defendants disobeyed the order." Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995) (citation omitted). Defendants need not prove that plaintiffs' disobedience was wilful. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Harley-Davidson, Inc. v. William Morris d/b/a Bill's Custom Cycles, 19 F.3d 142, 148 (3d Cir. 1994); Waste Conversion, Inc. v. Rollins Environmental Services, Inc., 893 F.2d 605, 609 (3d Cir. 1990). The disobedient party's good faith does not bar a finding of contempt. See Harley-Davidson, 19 F.3d at 148.

In some circuits, "substantial compliance with a court order is a defense to an action for civil contempt . . . [i]f a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986); see United States Steel Corp. v. United Mine Workers, 598 F.2d 363, 368 (5th Cir. 1979); Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union, 531 F.2d 617, 621 (D.C. Cir. 1976). Whether substantial compliance is a defense to civil contempt is still undecided in the Third Circuit. See Robin Woods Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994) (stating that even if the court were to recognize substantial compliance as a defense to contempt, it would not apply in that case).

However, district courts have accepted substantial compliance as a defense. See Halderman v. Pennhurst State Sch. & Hosp., 154 F.R.D. 594, 608 (E.D. Pa. 1994); Merchant & Evans, Inc. v. Roosevelt Building Products Co., Inc., No. 90-7973, 1991 WL 261654, at *1 (E.D. Pa. Dec. 6, 1991).

"There is general support for the proposition that a [party] may not be held in contempt as long as it took all reasonable steps to comply." Harris v. City of Phila., 47 F.3d 1311, 1324 (3d Cir. 1995). The respondent must "show that it has made 'in good faith all reasonable efforts to comply.'" Id. (quoting Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991)).

There is no dispute in this action that a valid court order existed, and that the individual subjects of the contempt motion had knowledge of it. There is a dispute about whether the order was disobeyed, and whether, even if it were technically disobeyed, there was substantial compliance. In addressing this dispute, the court must consider two issues: 1) whether the filing of Adler's report of record without marking it confidential and subsequently transmitting that report to Array violated the CPO; and 2) if so, which individuals are responsible for the violation and whether they "substantially complied" with the order.

I. Filing and Transmitting of the Report

The testimony at the evidentiary hearing, and our own review of Adler's report and the flight test data, establishes that the information posted on Array's web site came only from Adler's report. There is no evidence that Array received the flight test data itself, but there are at least two instances in the report where Adler directly refers to information from the confidential flight test data pages. The court is convinced, from its own comparison between Adler's report and the confidential flight test data, that the former includes information from the latter. Plaintiff's counsel knew full well that Adler based his report on the confidential data he was given. The assumption that the report did not refer to this confidential data in any way was completely unjustified. The CPO was violated when Adler's report was filed of record, not under seal, when it was later provided to Paul Array, and when it was posted on Array's web site.

II. Responsibility

Defendants seek to hold three parties in contempt for violating the CPO: Array, Pedata, and Oandasan.

A. Paul Array

Array never had access to the confidential flight test data in its original form. But Adler's report, like the data itself, was subject to the CPO, so Array still violated the CPO when he posted portions of the report with commentary on his web site.

The evidence is clear and convincing that Array was aware

plaintiff's counsel had erroneously provided him with Adler's report. Array knew the flight test data itself was confidential since plaintiff's counsel had informed him of this when she rejected his request for that data. But she still provided him with Adler's report and a copy of the CPO; Array's comments on his web site suggest he knew the report contained confidential data he was not supposed to receive. The web page where the report and commentary are displayed has the heading "Flight Test Data." (Def.'s Mot. for Sanctions for Violation of Protective Order ("Def.'s Mot.") Ex. 2). Array writes on the site that although SNA attempted to withhold the flight test data as confidential, Horizon "finally got it," (Def.'s Mot. Ex. 2); he then analyzes it. Array also writes that Adler's report, published on the web site, "was prepared from the manufacturers flight test data supplied by (SNA) Seawind." (Def.'s Mot. Ex. 2.) Although his attorneys had refused to give him the data itself, Array obviously knew he had succeeded in getting portions of it through Adler's report.

Array was therefore aware of the CPO and disobeyed it by putting Adler's report, with his commentary, on his web site. There is no evidence that he "substantially complied" with the CPO in any way; all Array's efforts were directed towards circumventing it. Array will be prohibited from further communication of information concerning Adler's expert report in

any form. Array must also compensate defendant's counsel for a portion of the fees incurred in filing and arguing the contempt motion.

B. Martin Pedata

Pedata, lead counsel for plaintiff, testified he was responsible for all decisions pertaining to the filing and dissemination of Adler's report. He reviewed Adler's report, the CPO, and the confidential flight test data and concluded that Adler's report was not subject to the CPO. Pedata sought no guidance from the court or permission from defendant's counsel before making the decision to file the expert report of record not under seal.

The report does not fall under paragraph 15 of the CPO, permitting "dissemination of information legally obtained from sources other than the opposing party." The expert report itself was not obtained from the opposing party, but it revealed confidential information obtained from the opposing parties and subject to court-ordered confidentiality. A CPO agreed to by the parties and approved by the court as a condition of obtaining trade secrets cannot be evaded simply by publishing a report based on and discussing the restricted data.

Pedata erroneously claims that the data in Adler's report was already publicly available. The report clearly references the flight test data marked confidential by order of the court.

Any argument that this designation was incorrect should have been made before, rather than after, the material was disseminated.

There is clear and convincing evidence that Pedata violated the CPO by authorizing the filing of Adler's report and directing local counsel to send the report to Array. Pedata did not take "all reasonable steps" to comply with the court order; his violations were not merely "technical" or "inadvertent." General Signal Corp., 787 F.2d at 1379. It was unreasonable for him to conclude that an expert report based on confidential flight test data was not itself confidential. Pedata might have made a reasonable effort to comply had he had given defendants a chance to review the report or sought guidance from the court prior to its filing, but he did neither of these things. Pedata will also be responsible for a portion of defendant's counsel's fees in filing and arguing the contempt motion.[4]

C. Tracey Oandasan

Oandasan testified that as local counsel for plaintiff under Local Rule of Civil Procedure 83.5.2, her role was limited to following Pedata's instructions. Although Oandasan filed Adler's report herself, corresponded with Array about his request for the flight test data and Adler's report, and forwarded a copy of Adler's report to Array, she testified (and Pedata confirmed)

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[4] The court, in its order of May 2, 2000, has already ordered plaintiff to return the Adler report and all information falling under the CPO to defendant's counsel.

that Pedata made the final decision to do these things.

An attorney retained as local counsel is obliged to ensure that lead counsel comply with our local standards of practice. Oandasan's role in this action was not consistent with that obligation. She testified that as local counsel she acted as nothing more than a "file clerk." Oandasan improperly referred all issues of CPO compliance to Pedata and relied on his decisions on compliance with a court order; she did not take all reasonable steps necessary to comply with her obligation as local counsel and shares some responsibility for the contempt.

CONCLUSION

There is clear and convincing evidence that Paul Array and plaintiff's lead counsel, Martin Pedata, were aware of the valid September 16, 1998 CPO and failed to comply with it, substantially or otherwise. Tracey Oandasan, plaintiff's local counsel, failed to exercise that individual responsibility incumbent on her as an officer of this court. Compensatory damages will be limited to the fees and costs incurred by defendant's counsel in filing and arguing the contempt motion. Array and Pedata will be jointly liable for seventy-five percent of that amount and Oandasan will be liable for twenty-five percent of that amount. Array will be enjoined from communicating any information contained in Adler's report to any party.

An appropriate Order follows.

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ORDER

AND NOW, this 7th day of June, 2000, upon consideration of defendants' Motion for Contempt and Sanctions for Violation of Protective Order, all responses thereto, and following an April 27, 2000 evidentiary hearing, it is **ORDERED** that:

1. Defendant's Motion for Contempt and Sanctions for Violation of Protective Order is **GRANTED**.

   A. Defendants may file an itemized petition for fees and costs incurred in the filing and argument of this motion within twenty (20) days of the date of this order.

   B. After the court approves this petition, the court will order Paul Array and Martin Pedata, Esquire to jointly pay seventy-five percent of the approved amount, and Tracey Oandasan, Esquire will be ordered to pay twenty-five percent of the approved amount; payment to be made within twenty (20) days of said order.

2. No further information regarding the expert report of Richard Adler shall be communicated in any form by Paul Array; failure to comply with this order shall be a contempt of court punishable by a coercive fine of no less than $100,000.

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S.J.