No. 20-55397

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JASON CARDIFF and EUNJUNG CARDIFF, et al.,
Defendants-Appellants,

and

DANIELLE CADIZ, AKA Danielle Walker, et al.,
Defendants,

JACQUES POUJADE,
Objector.

Appeal from the United States District Court
for the Central District of California
No. 5:18-cv-02104-DMG-PLA

REPLY OF THE FEDERAL TRADE COMMISSION TO RESPONSE OF JASON AND EUNJUNG CARDIFF TO ORDER TO SHOW CAUSE

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Jason and Eunjung Cardiff appeal three interlocutory district court orders. The Court directed them to show why the appeals should not be dismissed for lack of appellate jurisdiction. Dkt. 3. In response to that order, the Cardiffs voluntarily dismissed with respect to one of the challenged orders, but assert appellate jurisdiction as to the remaining two: an order denying a motion to dissolve a preliminary injunction, and an order holding the Cardiffs in contempt for violating that injunction.

The Court does not have jurisdiction over either order. Orders denying a motion to dissolve an injunction are appealable only if the motion raised a "new matter," *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989), but the Cardiffs identify no such matter. Judicial decisions issued long before the injunction are not "new," and the concurring opinion of a recent panel member is not a change in the law. The Court lacks jurisdiction over the contempt order because it is a civil order subject to appeal only upon entry of a final judgment. *See Koninklijke Philips Elecs. N.V. v. KSD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008). The Court should dismiss the appeal.

BACKGROUND

1. The FTC's Complaint, the District Court's TRO and PI, and its First Contempt Order

In October 2018, the FTC sued the Cardiffs and others for violating the FTC Act, 15 U.S.C. §§ 45(a), 52, the Restore Online Shoppers' Confidence Act, 15

U.S.C. § 8404, the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c), and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105, through a wide-ranging scheme of fraud and deception.[1] ECF 1. The complaint alleges that the Cardiffs and their co-defendants made false and unsubstantiated claims that their products would help people quit smoking, lose weight, and improve their sexual performance. It also charged a related unlawful auto-ship continuity program that resulted in unauthorized shipments and charges, abusive telemarketing through robocalls, and unsubstantiated claims regarding a multi-level marketing scheme.

On October 10, 2018, the district court entered a temporary restraining order against Defendants, ECF 29, which it extended two weeks later, ECF 48. On November 7, 2018, the court entered a preliminary injunction (PI) against them. ECF 59. The TRO and PI froze the Cardiffs' assets; established a Receivership over their assets and businesses; required financial disclosures and accounting of all assets; required repatriation to the United States of foreign assets, documents, and records, including those in possession of third parties; prohibited the

[1] The other defendants are Danielle Cadiz, a/k/a Danielle Walker; Redwood Scientific Technologies, Inc. (California); Redwood Scientific Technologies, Inc. (Nevada); Redwood Scientific Technologies, Inc. (Delaware); Identify, LLC; Advanced Men's Institute Prolongz LLC; Run Away Products, LLC; and Carols Place Limited Partnership. ECF 1.

dissipation of domestic and foreign assets; required delivery of assets and information to the Receiver; and ordered expedited discovery. ECF 59 at 14-22, 30-31. The TRO/PI authorized the FTC and Receiver to conduct expedited discovery "for the purposes of discovering: (1) the nature, location, status, and extent of Defendants' Assets; or (2) compliance with this Order." ECF 59 at 35, § XXVI Expedited Discovery. The provisions of the TRO/PI apply not only to Defendants, but also to "their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly." *See, e.g.*, ECF 59 at 14, § VII Asset Freeze; *see also* Fed. R. Civ. P. 65(d)(2)(C).

Despite the restrictions imposed by the district court, the Cardiffs worked in concert with their friend and business partner, Jacques Poujade, to transfer frozen assets from an account for which the Cardiffs were the sole signatories, without informing the Receiver. Upon learning of the transfer, the FTC filed a motion to show cause why the Cardiffs and Poujade should not be held in contempt. ECF 134. The district court issued an Order to Show Cause on June 24, 2019, ECF 140, to which the Cardiffs responded. ECF 147, 166. The court then held a four-day hearing at which the Cardiffs testified. ECF 181, 182, 183, 249. At the conclusion of the testimony on July 31, the court found them in contempt, *see* ECF 238 at 2, and stated:

> I would say of the 16 years I've been on the federal court, I've never presided over a matter where the fraud committed by the defendants was so clear, the deception so extreme. I'm astounded.

ECF 188-1, Tr. 389:3-6. The court continued:

> I've heard carefully from the Cardiffs. Their stories are totally unbelievable. It's pretty clear to the Court that they've lied, that they worked in concert with each other and with others to avoid, violate the conditions of the orders of the Court.

ECF 188-1, Tr. 390:3-7.

On October 29, 2019, the district court issued its order holding the Cardiffs and Poujade in contempt and established conditions for purging the contempt. ECF 237, 238 (hereafter "First Contempt Order"). Among other requirements, the Cardiffs were ordered to produce a "full and detailed accounting, under oath, of all assets held by, for the benefit of, or otherwise controlled, directly or indirectly, by Eunjung Cardiff or Jason Cardiff (or both) for the period from July 31, 2018 to the date of [the Contempt] Order [October 29, 2019]." ECF 238 at 4-5. As part of the accounting, the Cardiffs were required to identify "the source of each deposit/credit" to all relevant accounts. The Court warned the Cardiffs that for each day they did not comply with the terms of the First Contempt Order, they would be incarcerated. ECF 238 at 7.

2. Second Contempt Order

The Cardiffs did not comply with the First Contempt Order. They: (1) failed to identify the source of the money that funded their luxurious lifestyle; (2)

dissipated assets subject to the asset freeze by spending freely on extravagant personal and unapproved living expenses, as well as attorneys' fees; and (3) allowed their residence (one of the Receivership Assets) to waste by refusing to pay the mortgage. Accordingly, on March 2, 2020, the FTC filed another motion to show cause why the Cardiffs should not be held in contempt of court and coercively incarcerated until they complied. ECF 300. The Cardiffs filed their opposition the next day. ECF 301.

On March 31, 2020, the district court again found the Cardiffs in contempt of the TRO and PI's provisions requiring that they disclose and account for their assets, turn all assets over to the Receiver, and prevent the dissipation of those assets. ECF 315 at 5. Rather than order coercive incarceration at that time, the district court ruled that the Cardiffs could purge their contempt if by April 30, 2020, they:

- Identify the source of each and every cash deposit into a cash-funded credit union (FCCU) account;
- To the extent Gerald Cardiff [Jason Cardiff's father] is the source of any cash deposit into the FCCU account, identify each and every source from which he deposited funds into that account;
- Turn over all Cardiff assets to the Receiver, including assets held abroad; and
- Replenish the Receivership Estate for any and all unpaid mortgage payments on the Cardiffs' residence, until the date of sale of that residence.

ECF 315 at 5.

The Cardiffs have not purged themselves of the Second Contempt Order. Instead, they filed a notice of appeal on April 7, 2020, ECF 317,[2] and filed a motion in the district court for a stay pending appeal on April 23, 2020, ECF 324. That motion remains pending.

3. The Cardiffs' Motion to Dissolve the PI

Meanwhile, on January 20, 2020, the Cardiffs moved to dissolve the PI, ECF 265, which the FTC opposed, ECF 277. On March 10, 2020, the district court denied the motion. ECF 305. Noting that "a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into instrument of wrong," ECF 305 at 3 (quoting *Salazar v. Buono*, 559 U.S. 700, 714-15 (2010) (cleaned up)), the court concluded that the Cardiffs had failed to show any changes in facts or law to justify dissolution of the PI.

First, the district court determined that the Cardiffs had not shown any changed factual circumstances that would justify dissolving the PI. Their claimed cessation of deceptive sales prior to the filing of the FTC's complaint did not warrant dissolution. ECF 305 at 4. The court concluded that the Cardiffs' claim

[2] The Cardiffs appealed three orders: ECF 305 (denying motion to dissolve PI), ECF 309 (approving marketing of house for sale), and ECF 315 (Second Contempt Order). They have voluntarily dismissed the appeal of ECF 309 (house sale). Dkt. 6.

was not credible or supported by the evidence, but that even if it were true, stopping sales would be relevant only to whether the PI should have issued in the first place, not whether it should be dissolved based on changed circumstances. *Id.* Further, the FTC had shown that the Cardiffs were likely to resume sales in the future. *Id.* at 5.

Second, the district court disagreed that the Cardiffs had proven a "significant change in the law" since the issuance of the PI to justify dissolution. ECF at 6. The court explained that both before and after issuance of the PI, the law in this Circuit is that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), permits the award of equitable monetary relief. The Supreme Court has not abrogated that law, and subsequent to issuance of the PI the Circuit confirmed its existing law. *Id.* at 6-7 (citing *FTC v. AMG Capital Mgmt.*, 910 F.3d 417 (9th Cir. 2018)). The court also rejected the Cardiffs' position that non-binding, out-of-circuit precedent could constitute a change of law sufficient to dissolve the PI. *Id.* at 7.

For similar reasons, the district court rejected the Cardiffs' argument that the FTC Act required the FTC to initiate an administrative proceeding 20 days after filing its complaint under Section 13(b) in federal court. Circuit precedent predating the PI had rejected that very position. *Id.* at 7 (citing *FTC v. Evans Products*, 775 F.2d 1084 (9th Cir. 1985)). Likewise, the district court rejected the Cardiffs' view that the decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), had cast

doubt on the FTC's authority to seek monetary remedies such as asset freezes and restitution. *Id.* at 7-8. Not only did the *Kokesh* decision not pertain to the FTC Act, the Ninth Circuit had previously confirmed that the FTC Act provides for equitable relief. *Id.* at 8.

ARGUMENT

I. THE DISTRICT COURT'S ORDER DECLINING TO DISSOLVE THE PRELIMINARY INJUNCTION IS NOT APPEALABLE

A district court's "denial of a motion to modify or dissolve an injunction" is appealable "only if the motion raises new matter not considered when the injunction first issued." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984). This jurisdictional limitation rests on the idea "that the moving party could have appealed the grant of injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief must rest on grounds that could not have been raised before." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013). The Cardiffs bear the "burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). The Cardiffs have failed to show that their motion to dissolve the PI raised new matter that they could not have raised at the time the PI was entered.

The Cardiffs fail to identify any specific "new matter" they raised in seeking to dissolve the PI. They claim only that "there were *significant* changes in the law

both before and after the Preliminary Injunction" that undermine the legal basis for the injunction. The argument is that the court relied on *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982), as support for its authority to order equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), but subsequent decisions have overruled *Singer*. Cardiffs at 5 (Dkt. 8). They point to *Owner Operator v. Independent Drivers Association, Inc. v. Swift Transportation Co.*, 632 F.3d 1111, 1121 (9th Cir. 2011), and *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). Cardiffs at 6. The decisions, however, *predate* the PI and therefore cannot be "new matter." This Court has recognized that "new matter" means "intervening decisions" issued *after* the district court's original decision. *See Babcock v. Tyler*, 884 F.2d 497, 501 n.4 (9th Cir. 1989); *see also Credit Suisse First Boston v. Grunwald*, 400 F.3d 1119, 1124-25 (9th Cir. 2005) (California Ethics Standard issued *after* entry of PI was "new matter"). As the district court correctly recognized, those decisions do not represent a "significant change[] in the law." ECF 305 at 5.[3]

[3] The Cardiffs have abandoned their argument that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), supported dissolution of the PI. The district court correctly rejected the claim (ECF 305 at 8) since *Kokesh* pre-dated the PI. The Cardiffs have also abandoned their claim that changed factual circumstances, namely, their alleged cessation of deceptive sales, supported dissolution of the PI. The district court correctly observed that the Cardiffs claimed the alleged cessation occurred *before* entry of the PI and concluded that the claim was not credible in any event. ECF 305 at 4.

The Cardiffs are even further afield with their contention that this Court's decision in *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018), represents "new matter." Cardiffs at 7. In fact, *AMG* did not change the law in any way. The panel expressly adhered to controlling precedent holding that Section 13(b) allows monetary remedies. *Id*. at 427 (citing *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)). *Commerce Planet* in turn relied on *H.N. Singer*, the case cited by the district court. *See* 815 F.3d at 598-99. That two judges called for the full Court to reverse its binding precedent is of no moment. *See* 910 F.3d at 429 (O'Scannlain, J., specially concurring). The Court denied rehearing *en banc*, without a single judge calling for a vote. *See id.*, *reh'g en banc denied*, No. 16-17197, 2019 U.S. App. LEXIS 18551 (9th Cir. Jun. 20, 2019), *petition for certiorari filed* Oct. 18, 2019, No. 19-508.[4]

Finally, the Cardiffs assert that the FTC can secure equitable remedies under Section 13(b) only if it also issues an administrative complaint. Cardiffs at 8. They identify no decision from any court that amounts to a "new matter" that could support this Court's jurisdiction. As the district court correctly determined, the

[4] The Seventh Circuit's decision in *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019), *petition for certiorari filed* Dec. 19, 2019, No. 19-825, is not a "new matter" because it is a non-binding, out-of-circuit decision. *See Babcock*, 884 F.2d at 501 n.4.

Cardiffs' position is contrary to this Court's decision in *Evans Products*, 775 F.2d 1084, which remains good law. ECF 305 at 7.

II. THE COURT LACKS JURISDICTION TO HEAR A PARTY'S APPEAL FROM A CIVIL CONTEMPT ORDER IN AN ONGOING PROCEEDING

The Cardiffs expressly concede that "an order of civil contempt entered against a party to ongoing litigation is generally not immediately appealable." Cardiffs at 9 (citing *Koninklijke Philips Elecs. N.V. v. KSD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008)). That should end the matter, as this case is ongoing. The Cardiffs nonetheless attempt to escape their concession by suggesting that the contempt sanction at issue here is criminal contempt and not civil contempt and is therefore immediately appealable. *See Bingman v. Ward*, 100 F.3d 653, 655 (9th Cir. 1996).

The Second Contempt Order is civil, not criminal. "Civil contempt seeks "only to coerce the defendant to do what a court had previously ordered him to do." *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (cleaned up). "[O]nce a civil contemnor complies with the underlying order, he is purged of the contempt and is free." *Id.* at 442 (cleaned up). He "carries the keys of his prison in his own pockets." *Hicks v. Freick*, 485 U.S. 624, 633 (1988) (cleaned up). On that standard, the finding of contempt for violation of the PI was plainly civil. As detailed above (pages 2-3), the PI required the Cardiffs to disclose their finances and to account for all their assets. It also required them to repatriate to the United States and

deliver to the Receiver foreign assets, documents, and records, including those in possession of third parties. It prohibited the dissipation of domestic and foreign assets. In addition, the PI authorized expedited discovery "for the purposes of discovering: (1) the nature, location, status, and extent of Defendants' Assets; or (2) compliance with this Order." ECF 59 at 35, § XXVI Expedited Discovery.

The district court's contempt order set forth purge conditions for the purpose of coercing them "to do what a court had previously ordered [them] to do." *Turner*, 564 U.S. at 441. Specifically, the Cardiffs can purge their contempt by identifying and accounting for their assets, repatriating those assets, turning over the assets to the Receiver, and ceasing the dissipation of those assets. ECF 315 at 5. The Second Contempt Order is thus civil and unappealable. It seeks to bring into the Receivership Estate assets that should have been transferred to the receiver in the first place, thus serving a coercive or compensatory purpose. *See Koninklijke Philips Elect.*, 539 F.3d at 1042. It also establishes conditions by which the Cardiffs may purge their contempt. *Id.*

The district court's warning that it may incarcerate the Cardiffs if they fail to comply does not change its character. The threat of incarceration aims to coerce compliance, not to punish. ECF 315 at 5. "The rule is settled in this Court that . . . a party to a suit may not review upon appeal an order fining or imprisoning him for

the commission of a civil contempt." *Koninklijke Philips Elecs.*, 539 F.3d at 1042 (quoting *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936)).

The Cardiffs also appear to argue that the merits of their claim, including an alleged lack of due process, makes the Second Contempt Order immediately appealable. Cardiffs at 9-15. They cite no authority for this proposition, which cannot be squared with the rule of *Koninklijke*.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Cardiffs' appeal for lack of jurisdiction.

Respectfully submitted,

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May 8, 2020

CERTIFICATE OF SERVICE

I certify that on the 8th day of May, 2020, an electronic copy of the foregoing Reply of the Federal Trade Commission was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

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