

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) CR. NO.: 01-10068-EFH
)
EDMUND E. FLEMING,)
)
Defendant.)
_____)

MEMORANDUM AND ORDER

December 27, 2001

HARRINGTON, S.D.J.

This case was brought by the United States against Edmund E. Fleming on an indictment alleging fifteen counts of criminal contempt of court. Following a two-day trial, at which the defendant knowingly and voluntarily waived his right to a jury, this Court finds Mr. Fleming to be guilty on Counts Nine and Thirteen of the indictment and not guilty on all of the remaining counts.

I. FINDINGS OF FACT

A. The USIC Matter

The defendant in this case is a lawyer licensed to practice in the Commonwealth of Massachusetts. He is charged with repeatedly violating a court order restraining his assets, which was entered following his service as Receiver in a separate, but related, matter.

In April of 1981, the Commodity Futures Trading Commission (“CFTC”) – an independent agency of the United States that regulates commodities futures and option markets –

filed a lawsuit against an investment firm called U.S. Investment Company ("USIC"). *Commodity Futures Trading Comm'n v. U.S. Investment Co.*, No. 81-1070 (D. Mass. 1981) (Wolf, D.J.) (hereinafter "*USIC* matter"). In its complaint, the CFTC alleged that USIC had illegally solicited and invested approximately \$7 Million and had issued fraudulent account statements in order to cover up trading losses. No. 81-1070 (filed April 24, 1981). By a final order dated June 5, 1981, the United States District Court for the District of Massachusetts entered a judgment against USIC, permanently enjoining the company from engaging in activities relating to the sale of commodities futures. No. 81-1070 (June 5, 1981).

As part of its final order, the court authorized the appointment of Edmund E. Fleming as Receiver in the *USIC* matter. Specifically, the court authorized Mr. Fleming to "take into his immediate custody, control and possession all assets and property belonging to, or in the possession of, USIC." Additionally, the court directed Fleming to marshal the assets of USIC in an attempt to make restitution to the investors who USIC had defrauded. Mr. Fleming served as Receiver in the *USIC* matter for the next fifteen years.

On January 10, 1996, in response to complaints lodged by a USIC investor, the court issued an order relieving Mr. Fleming of his duties as Receiver in the *USIC* matter and appointing a Successor Receiver. No. 81-1070 (Jan. 10, 1996). Additionally, the court directed the Successor Receiver to review Mr. Fleming's conduct as Receiver and to submit a report with recommendations to the court. The Successor Receiver's Final Report and Recommendations (hereinafter "*Final Report*") was submitted to the court on December 3, 1996. It set forth the conclusion that Mr. Fleming had intentionally and willfully violated his fiduciary duty to the

Receivership and recommended that he restore \$912,592 to the Receivership. No. 81-1070 (Dec. 3, 1996) (adopted by the court on April 10, 2000).

B. The January 17 Order

After reviewing the Successor Receiver's Final Report, the court held a hearing on January 15, 1997, at which Mr. Fleming and his attorneys Jack Cinquegrana and Scott Tucker were present. At the hearing, Mr. Fleming's counsel agreed to an order restraining Mr. Fleming's assets while the court took time to consider the findings and conclusions set forth by the Successor Receiver in the Final Report. Two days later, the attorney for the Successor Receiver wrote a letter to the court containing an agreed upon proposed order restraining Mr. Fleming's assets. On January 17, 1997, the court entered that order (No. 81-1070 (Jan 17, 1997)), the relevant part of which stated:

After a hearing on January 15, 1997, IT IS ORDERED by the Court with the consent of the parties that:

1. Mr. Edmund E. Fleming shall, by April 18, 1997, file a response to the Successor Receiver's Report and Recommendations, dated December 3, 1996.
2. Mr. Fleming, directly or through his agents, servants, employees, attorneys, and any other persons acting in concert with him, is enjoined from selling, transferring, encumbering, or otherwise alienating his interest in any assets or property, whether individually or jointly held, except for ordinary day-to-day living expenditures in an amount less than \$1,000, and except as the Court may subsequently order with respect to payment of legal fees.
3. Mr. Fleming may disburse assets or property in excess of \$1,000 only with Court approval and upon 7 days notice to the Successor Receiver. However, Mr. Fleming may make the following two (2) disbursements without Court approval and without notice to the Successor Receiver: first, a quarterly health insurance payment of approximately \$1,370; and second, a quarterly life insurance policy payment of approximately \$1,250.

The January 17 Order was silent as to how long the restraint on Mr. Fleming's assets was to last. Subsequent court orders, however, make it clear that the January 17 Order was to remain in full effect until Mr. Fleming brought a successful action to have it vacated. For example, on March 3, 1997, the court issued a handwritten margin order stating that if Mr. Fleming wished to be relieved of the restraint upon his assets he should file a motion to vacate the January 17 Order and that the court would consider "the question of the perpetuation of the restraint on his assets . . . de novo." No. 81-1070 (Mar. 3, 1997) (emphasis in original). Later that month, Mr. Fleming filed a motion requesting that the court amend the January 17 Order to allow him to spend \$15,000 on attorneys' fees. However, the court denied the request, stating again that "Mr. Fleming may file a motion, affidavit, and supporting memorandum seeking to vacate the restraint on his assets if he believes he has a proper basis for asserting that [the] restraint is neither necessary nor appropriate." No. 81-1070 (April 3, 1997). Mr. Fleming never brought a motion to have the January 17 Order vacated.

Over the next three years, the court reminded Mr. Fleming that the order was still in effect on at least three separate occasions. The first occasion came at a hearing on January 19, 2000, where the court addressed Mr. Fleming personally with this issue:

THE COURT: I would note one other matter, and this has gone on perhaps longer than anticipated or that was agreed to, but my prior orders are in effect. That includes the order I entered with the agreement of the parties on January 17, 1997, with the restrictions, Mr. Fleming, on your assets and expenditures.

And, to my knowledge, and I mention this in the handwritten order that I issued on March 3, 1997, if you wanted that changed, you had to come back to me and ask me. To my knowledge I have not been asked. Right?

MR. FLEMING: That's correct.

THE COURT: And have you been adhering to those restrictions?

MR. FLEMING: Yes, I have, your Honor.

The court had a second occasion to remind Mr. Fleming that the January Order was still in effect after he made a filing with the court stating that he believed the order had expired and that he was no longer bound by its terms. No. 81-1070 (filed April 24, 2000). The court responded to this assertion by entering another order essentially repeating its earlier admonition that the January 17 Order was in full force and effect and would remain that way until Fleming brought a motion to have it vacated. No. 81-1070 (April 27, 2000). Finally, at a hearing on May 31, 2000, the court asked Mr. Fleming if he had been abiding by the terms of the January 17 Order. Mr. Fleming assured the court that he had been.

C. **The Alleged Violations of the January 17 Order**

On March 16, 2000, the court delivered an order in the *USIC* matter finding that Mr. Fleming had violated his fiduciary duty as Receiver in that matter and directing him to restore \$912,592 to the USIC estate by May 5, 2000. No. 81-1070 (entered April 10, 2000). By June of 2000, Mr. Fleming had made no efforts to comply with the restitution order. Consequently, the CFTC commenced discovery into Mr. Fleming's finances in an effort to secure payment of the \$912,592, subpoenaing his bank records and credit card statements. During this discovery, the USIC came across evidence indicating that Mr. Fleming had repeatedly violated the January 17 Order restraint on his assets.

On February 15, 2001, a Federal Grand Jury returned an indictment against Mr. Fleming, alleging that he was in contempt of court for violating the January 17 Order on fifteen separate

occasions by making expenditures in excess of \$1,000. Mr. Fleming does not dispute either the occurrence or the amount of the alleged expenditures. Each one of the alleged expenditures serves as a single numerical count of the indictment. They are:

1. On January 23, 1997, Mr. Fleming wrote a check on his account at Brookline Savings Bank to "Massachusetts General Hospital Inpatient" for \$1,935. This payment was associated with a knee surgery that Mr. Fleming had undergone at the hospital on April 4, 1996. Mr. Fleming was reimbursed for all but seventeen dollars of this amount by his health care insurance provider, Lester Burdick, Inc.
2. On January 30, 1997, Mr. Fleming withdrew \$7,903 from his account at Brookline Savings Bank in the form of a \$5,000 Treasurer's Check and \$2,803 cash. Five months later, the Treasurer's Check was redeposited in a newly established checking account in Mr. Fleming's name at Bay State Bank. Mr. Fleming did not specifically recall how he had spent the remaining \$2,803. However, he testified that he had most likely used the money to pay for ordinary day-to-day living expenses in an amount less than \$1,000 over the six-month period following the withdrawal.
3. On March 17, 1997, Mr. Fleming wrote a check for \$2,980 on his account at Brookline Savings Bank to "Bertram Zarins, M.D." This was payment for the surgeon who had performed Mr. Fleming's knee surgery on April 4, 1996. The majority of this charge was reimbursed by Fleming's insurance carrier, Lester Burdick, Inc.
4. On July 7, 1997, Mr. Fleming wrote a check on his account at Brookline Savings Bank to "International Bicycle" for \$1,158.81. The payment was for two bicycles that Mr. Fleming bought for his wife and for his daughter, respectively. Although Mr. Fleming paid for

the bicycles with a single check, at trial he was able to produce two separate receipts for the purchase demonstrating that he paid \$606.17 for one bicycle and \$552.64 for the other.

5. On July 19, 1997, Mr. Fleming charged \$4,301.99 on his MBNA Visa Card at the Coral Reef Hotel and Casino in St. John's, Antigua. The hotel kept \$86.03 as a transaction fee and handed over the remaining \$4,214.96 to Mr. Fleming in the form of Eastern Caribbean dollars. At the time, Mr. Fleming was in Antigua on a seven-day vacation. He testified that he withdrew the cash to spend on ordinary day-to-day living expenses in an amount less than \$1,000 over the course of his vacation.

6. On August 8, 1997, Mr. Fleming charged \$1,131 on his Discover Card to "Mac Warehouse." The charge was for a new personal computer.

7. On October 2, 1997, Mr. Fleming wrote a check for \$4,700 on his account at Bay State Federal Savings Bank to "James Thiel, DDS." The payment was for prosthetic dental work that Dr. Thiel had performed on Mr. Fleming's teeth.

8. On November 25, 1997, Mr. Fleming authorized a charge of \$1,551.10 on his Discover Card to "N.K. Foreign Auto Specialists." He testified that he had taken his wife's car into the shop for a simple tune-up but that the mechanics had discovered numerous problems in need of emergency repair.

9. On August 29, 1998, Mr. Fleming charged \$1,839.06 on his American Express Card at "Mac, PC and Photo Zone." The charge was for a new personal computer, which Mr. Fleming gave to his daughter to use at college.

10. On March 24, 1999, Mr. Fleming wrote a check for \$1,055.20 on his Brookline Savings Bank account to "Commonwealth Mutual." The payment was for his automobile insurance.

11. On July 9, 2000, Mr. Fleming wrote a check for \$2,835 on his E*Trade Securities account to "Triple M Contracting." The payment was for emergency repairs to the roof of Mr. Fleming's home in Brookline, Massachusetts.
12. On July 19, 1999, Mr. Fleming wrote a check for \$1,600 on his Brookline Savings Bank account to "Commonwealth Mutual." The payment was for the remainder of his annual automobile insurance.
13. On February 1, 2000, Mr. Fleming wrote a check for \$2,000 on his Brookline Savings Bank account to "Jon Fudeman." Mr. Fudeman is a Certified Public Accountant in Worcester, Massachusetts. The payment was for accounting services that he had performed for Mr. Fleming in association with Fleming's defense of his conduct as Receiver in the *USIC* matter.
14. On February 16, 2000, Mr. Fleming wrote a check for \$15,000 on his Bay State Federal Savings Bank account to himself for cash. Mr. Fleming testified that he did not spend this money at that time but that he merely transferred the funds to his house where he used the cash over the course of the following year to pay for ordinary day-to-day living expenses in an amount less than \$1,000.
15. On March 25, 2000, Mr. Fleming wrote a check for \$1,362 on his Brookline Savings Bank account to "Brown University." The payment was for miscellaneous expenses that Mr. Fleming's daughter had incurred over the course of a semester at college.

II. CONCLUSIONS OF LAW

In order to achieve a conviction on the charge of criminal contempt of court under 18 U.S.C. § 401(3), the United States must prove three elements beyond a reasonable doubt.¹ First, the United States must prove that there was a lawful court order of reasonable specificity. *United States v. Michaud*, 928 F.2d 13, 15 (1st Cir. 1991); accord *United States v. Marquardo*, 149 F.3d 36, 41–42 (1st Cir. 1998). Secondly, the United States must prove that the defendant violated that order. *Michaud*, 928 F.2d at 15. Thirdly, the United States must prove that the defendant's violation of the order was willful. *Id.* For purposes of clarity, this Court will consider the first element as a threshold matter and then consider the second and third elements together as they relate to one another.

With respect to the first element, this Court finds beyond a reasonable doubt that the January 17, 1997 Order entered by the United States District Court for the District of Massachusetts in conjunction with the *USIC* matter was a lawful court order of reasonable specificity. See No. 81–1070 (Jan. 17, 1997). The order was effective and in full force at the time period during which all of the transactions set out in the indictment occurred. Furthermore, at trial, Mr. Fleming did not dispute either the existence or the lawfulness of the January 17 Order.

With respect to the second and third elements, this Court finds that the United States has proven beyond a reasonable doubt that Mr. Fleming willfully violated the January 17 Order on two distinct occasions. The order prohibited Mr. Fleming from “selling, transferring,

¹The language of the statute reads: “A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.” 18 U.S.C. § 401(3).

encumbering, or otherwise alienating his interest in any assets or property . . . except for ordinary day-to-day living expenses in an amount less than \$1,000.” Thus, under the order, an expenditure is only valid if it was for an amount less than \$1,000 and it was for an ordinary day-to-day living expense. The only expenditures exempted from the order are a quarterly health insurance payment, a quarterly life insurance payment, and those expenditures for which Mr. Fleming had sought and obtained prior court approval.

In particular, this Court finds that Mr. Fleming willfully violated the January 17 Order with respect to Count Nine of the indictment. Count Nine alleges, and it is undisputed, that on August 29, 1998, Mr. Fleming purchased a personal computer for \$1,839.06. The amount of this expenditure was well in excess of the \$1,000 limit, and Mr. Fleming neither sought nor obtained prior court approval for the purchase. Thus, without having to consider whether a personal computer is a day-to-day living expense, it is clear that this transaction violated the January 17 Order because of its amount.

At trial, Mr. Fleming argued that the personal computer he purchased on August 29 did not violate the January 17 Order because it was not a single purchase in excess of \$1,000 but was a grouping of several concomitant purchases for less than \$1,000 each. In other words, Mr. Fleming argued that instead of buying a personal computer for \$1,839.06, he bought a computer, a monitor, a keyboard, a printer, memory, and a modem. Not one of these individual items, Mr. Fleming argued, was in excess of the order’s \$1,000 limit.

This Court does not find Mr. Fleming’s argument to be persuasive. Even if the purchase of a personal computer can be subdivided into the purchase of its various components, Mr. Fleming nevertheless made his purchase with one single expenditure for \$1,839.60. By its very

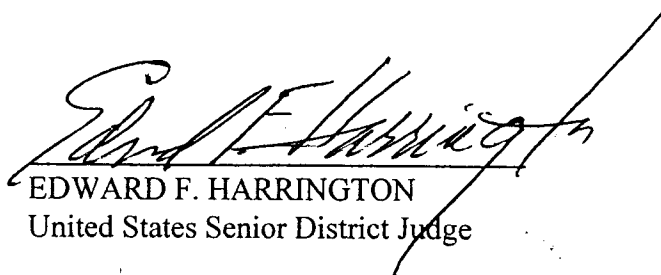
terms, the January 17 Order restricts the amount of Mr. Fleming's expenditures and not the value of the items he may purchase. Because Mr. Fleming willfully authorized a charge on his Discover account for \$1,839.60, without first obtaining court approval, he violated the January 17 Order.

In addition to Count Nine, this Court also finds that Mr. Fleming willfully violated the January 17 Order with respect to Count Thirteen of the indictment. Count Thirteen alleges, and it is undisputed, that on February 16, 2000, Mr. Fleming paid \$2,000 to his accountant, Jon Fudeman. The payment was for accounting services that Mr. Fudeman performed for Mr. Fleming in connection with Fleming's role as Superceded Receiver in the *USIC* matter. Mr. Fleming neither sought nor obtained prior court approval for this expenditure.

In his defense, Mr. Fleming argued that the \$2,000 payment to his accountant did not violate the January 17 Order because it was not a personal expense, but rather, was an expense incurred in association with Mr. Fleming's practice of law. The Court finds this argument unpersuasive for a number of reasons. First, the January 17 Order expressly applies to expenditures of "any assets or property, whether individually or jointly held." There is nothing in the order that would expressly or implicitly exempt business expenditures from its restrictions. Furthermore, the court in the *USIC* matter explicitly denied Mr. Fleming's request to expend \$15,000 on attorneys fees, notwithstanding the fact that the expense was incidental to his role as Receiver in that matter. Finally, it is worth pointing out that Mr. Fleming's argument on this point is significantly weakened by the fact that he made the payment with personal funds out of his personal checking account.

In conclusion, this Court finds that Mr. Fleming is guilty beyond a reasonable doubt of committing criminal contempt of court under 18 U.S.C. § 401(3) by willfully violating the January 17 Order as alleged in Counts Nine and Thirteen of the indictment. With respect to all remaining counts under the indictment, this Court finds that the United States has failed to prove beyond a reasonable doubt that Mr. Fleming willfully violated the January 17 Order.

SO ORDERED.



EDWARD F. HARRINGTON
United States Senior District Judge