

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-3372-GHK (CWx)	Date	March 24, 2008
Title	Jackson v. Property I.D. Corp., et al.		

Presiding: The Honorable **GEORGE H. KING, U. S. DISTRICT JUDGE**

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers) Order Re: Defendants' Motions to Dismiss

This matter is before the Court on Defendants' numerous motions to dismiss (the "Motions"), filed by: 1) Realogy Corporation and NRT/Coldwell Banker Residential Brokerage Corporation (collectively, "Realogy"); 2) Property I.D. Corp., Property I.D. of East Bay LLC, Property I.D. Associates LLC and Property I.D. Golden State LLC (collectively, "Property ID"); 3) Mason-McDuffie Real Estate ("Mason McDuffie"); and 4) Pickford Realty Ltd. and Pickford Golden State Member LLC (collectively, "Pickford"). Plaintiff Alphonso Jackson ("Plaintiff"), Secretary of the United States Department of Housing and Urban Development ("HUD"), has filed a Complaint alleging violations of Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a) and (b). We have considered the papers filed in support of and in opposition to the Motions, and deem them appropriate for resolution without oral argument. L.R. 7-15. As the parties are familiar with the facts, we will not restate them except as necessary.

I. Introduction

The Complaint seeks relief in the form of a permanent injunction, an accounting, disgorgement, and costs. The Motions argue that HUD has failed to state a claim for an injunction, and is not entitled to an accounting and disgorgement under Section 8 of RESPA. In deciding a Rule 12(b)(6) motion to dismiss, we must accept the allegations of fact in the complaint as true and construe them in the light most favorable to Plaintiff. *See, e.g., Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

II. Injunctive Relief

Under RESPA, HUD "may bring an action to enjoin violations of [Section 8]." 12 U.S.C. § 2607(d)(4). However, Defendants argue that injunctive relief is impossible here, as all the conduct alleged to violate Section 8 has ceased. Section 8 prohibits the payment of kickbacks and unearned fees in connection with the referral of real estate settlement services. The Complaint alleges that Defendants have violated § 2607 through the creation and operation of several joint ventures between Property ID

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on one side and each of Realogy, Mason-McDuffie, and Pickford (the "Broker Defendants") on the other. These joint ventures allegedly allowed Property ID to make illicit payments to the Broker Defendants in exchange for business referrals. However, the Complaint alleges that in August 2005, "after Defendants were served with HUD's investigatory subpoenas . . . Property I.D. suspend[ed] the referral fee payments to the [Broker Defendants.]" (Compl. ¶ 35.) The Complaint further alleges that the joint venture between Property ID and Realogy "was formally terminated in August 2006." (*Id.*) Thus, Defendants argue, there is nothing for this Court to enjoin under the allegations of the Complaint.

Although injunctive relief is designed to prevent future harm, and thus is generally unavailable where the conduct to be enjoined has ceased, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). A suit for injunction may be moot "if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (quotation and citation omitted). However, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *Id.* Where the offensive conduct has ceased, a court must determine whether "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* In weighing this "cognizable danger," a court must consider "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* The Ninth Circuit has refined this test, requiring us to consider whether there is "a reasonable likelihood of future violations," by examining factors such as "(1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; (5) and the sincerity of his assurances against future violations." *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

Based on all the circumstances, we find that the Complaint makes sufficient allegations in support of injunctive relief. Plaintiff alleges that Property ID "is holding additional referral fee payments" for the Broker Defendants, and that, unless enjoined, the payments may resume. (Compl. ¶ 36.) Plaintiff further alleges that, "because Defendants remain settlement service providers in the position to give or accept unearned payments, they have the ability to resume operation of the joint ventures and the illegal fee-splitting scheme unless permanently enjoined." (Compl. ¶ 50.) Plaintiff also alleges that Defendants formed and operated the alleged "sham" joint ventures over the past ten years. (Compl. ¶ 26.) These allegations go directly to the factors we must consider in weighing the appropriateness of an injunction, and, if proven, would show that violations were recurrent and that Defendants are in the professional position to assure that they recur. Moreover, Defendants contest the wrongfulness of their actions, and although we intimate no opinion on the merits of this issue, it further weighs against dismissal, as there is no "recognition of the wrongful nature of [the] conduct." Further, on a motion to dismiss we cannot simply accept Defendants' assurances that the allegedly wrongful conduct will not continue. Therefore, as the allegations in the Complaint are sufficient to meet the

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Grant and *Fehn* factors, we decline to foreclose the possibility of an injunction at this time.¹

III. Disgorgement and Accounting

Even were we to reach a different conclusion on the availability of an injunction, we would not dismiss, as the Complaint adequately states a claim for disgorgement and accounting. As stated above, HUD “may bring an action to enjoin violations of [Section 8].” 12 U.S.C. § 2607(d)(4). We conclude that this language properly invokes the equity jurisdiction of this Court, including a range of possible equitable relief, among which are disgorgement and accounting.

Four sections in RESPA include remedial provisions: §§ 2605(f), 2607(d), 2608(b), and 2609(d). Two of these sections, 12 U.S.C. §§ 2605 & 2608, provide solely for private remedies. On the other hand, 12 U.S.C. § 2609 provides only for civil penalties to be assessed by HUD. The remedial provisions in § 2607 are broader in scope, providing for criminal penalties and both private and public civil actions, not only by HUD, but by the Attorney General or insurance commissioner of any state. The criminal penalties, 12 U.S.C. § 2607(d)(1), include up to a \$10,000 fine and one year of imprisonment. The private civil suit provisions provide for trebled damages as well as costs and attorneys’ fees. 12 U.S.C. §§ 2607(d)(2) & (d)(5). The public suit provision, already quoted in part, states in full that: “The Secretary [of HUD], the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.” 12 U.S.C. § 2607(d)(4).

The power to enjoin is equitable, and calls forth the full equitable jurisdiction of this Court. “Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Further, “since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” *Id.* The Court in *Porter* stated:

“Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.” *Id.* (quotations and citations omitted).

¹We find Realogy’s differing circumstances to be immaterial at this stage. The termination of Associates, LLC, Realogy’s joint venture with Property ID, in no way precludes Realogy from receiving illicit fees from Property ID by other means, including the formation of a new joint venture. Moreover, the suit between Realogy and Property ID to formally dissolve Associates, LLC is still pending. Under these circumstances, an injunction would not be moot.

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Porter, which construed the Emergency Price Control Act of 1942 (“EPCA”), might not be controlling here, as the language of the EPCA differs somewhat from the language in RESPA. For one, the Court in *Porter* relied in part on language in the EPCA that authorizes “other order(s)” by a district court to grant full relief. *Id.* at 399. However, the Court’s subsequent ruling in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) confirms the broad scope of our equitable jurisdiction under RESPA.

Mitchell affirmed the general applicability of *Porter* beyond the context of the EPCA and the “other order” language. *See Mitchell*, 361 U.S. at 290–92. Rather, when Congress invokes a Court’s equity jurisdiction, “it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes.” *Id.* at 291–92. In *Mitchell*, the Court construed an equitable provision of the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 217. At the time of the decision, that statute provided the district courts with jurisdiction, “for cause shown, to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.” Fair Labor Standards Act, ch. 676, § 17, 52 Stat. 1069 (1938), as amended, 71 Stat. 514 (1957) (current version at 29 U.S.C. § 217 (2008)). *Mitchell* construed this language as permitting a district court to exercise the full panoply of its equitable powers, including reimbursement for lost wages incident to wrongful discharge. *See Mitchell*, 361 U.S. at 290–96. The dissent focused on the “other order” language in the EPCA as distinguishing *Porter*, as Defendants argue we should do here. *See Mitchell*, 361 U.S. at 298 n.1 (Whittaker, J., dissenting). However, although such language was absent from the FLSA, the majority’s holding demonstrates that such language is not essential to the availability of broad equitable relief.

We conclude that there is no material difference between the use of the verb “restrain” in the section of the FLSA construed in *Mitchell*, and the use of “enjoin,” in § 2607 of RESPA. Indeed, Defendants do not argue any such difference. *Mitchell* showed, in keeping with *Porter*, that Congress intends to vest a court with full equitable authority absent specific language or an “inescapable inference,” of limits to that authority. Nothing in the language of § 2607, or RESPA generally, suggests such limits.

Defendants argue that the comprehensive remedial provisions of RESPA weigh against a conclusion that § 2607(d)(4) permits remedies beyond an injunction, and supports the inescapable inference that remedies such as disgorgement and accounting are prohibited. Although we agree that RESPA provides substantial remedies, none of the provisions in other sections of RESPA, nor in § 2607 itself, supports a negative inference about the availability of other equitable remedies in a suit brought by HUD. Rather, it appears clear from RESPA that violations of § 2607 are subject to the harshest punishments and expansive relief, as only that section provides for public suit in equity and criminal penalties. Moreover, other sections of RESPA do not provide for additional equitable remedies. Thus, we do not infer that Congress intended to exclude such remedies from § 2607 by failing to enumerate them. Rather, in limiting equitable remedies to § 2607, as well as to public suits—i.e., those invoking “the public interest”—we must conclude, as directed by *Porter* and *Mitchell*, that Congress intended to

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invoke the full range of equitable remedies in § 2607.

The Supreme Court's more recent holding in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), is distinguishable, and does not undermine our conclusion here. In that case, the Court found that past clean-up costs could not be awarded in a citizen suit brought under the Resource Conservation and Recovery Act of 1976 ("RCRA"). *Meghrig*, 516 U.S. at 482-83. RCRA, however, is dissimilar to RESPA and FLSA. The equitable enforcement provision at issue there, 42 U.S.C. § 6972, includes restrictions such as an "imminent and substantial endangerment" requirement that is lacking in either RESPA or FLSA. Also, unlike the situation here, RCRA has an analogous statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which provides for additional forms of relief which can be construed by comparison to be absent from RCRA. Also, RCRA "is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig*, 516 U.S. at 483. An award of past cleanup costs would have been contrary to the intent of that statute. By contrast, § 2607 of RESPA is designed to prohibit kickbacks and other illicit fees that raise the costs of settlement services. Interpreting § 2607(d)(4) to grant HUD the full panoply of equitable remedies is in accord with that purpose. That we deal with a public suit here, as opposed to the citizen suit at issue in *Meghrig*, only further confirms the distinction.

United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005), also cited by Defendants, does not demand a contrary result. In *Philip Morris*, the court construed the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and specifically the civil remedies provision of 18 U.S.C. § 1964, to determine the availability of disgorgement. As in *Meghrig*, but again unlike the situation here, RICO enumerates several equitable remedies, such as dissolution and divestment, and includes "*prevent and restrain*" (emphasis added) language that the D.C. Circuit interpreted as limiting the statute to forward-looking remedies. See *Philip Morris*, 396 F.3d at 1198-99. As there are no similar constraints in 12 U.S.C. § 2607, we follow the Supreme Court decisions in *Porter* and *Mitchell*, and conclude that disgorgement and accounting are available to HUD under § 2607(d)(4) in a suit brought to enjoin violations of § 2607(a) and (b).²

IV. Conclusion

In light of the findings and conclusions above, the Motions are **DENIED**. Defendants are ordered to answer the Complaint within fourteen (14) days hereof.

IT IS SO ORDERED.

²We note also that several other courts of appeal have similarly distinguished *Meghrig* and *Philip Morris*, given, among other things, the forward-looking limitations of RCRA and RICO. See *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219 (3rd Cir. 2005) (holding that restitution is available under the Food, Drug and Cosmetics Act ("FDCA")); *United States v. Rx Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006) (holding that disgorgement is available under the FDCA).

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