UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, Plaintiff,	:	CIVIL ACTION NO. 3:04-cv-2075 (JCH)
v.	:	
GLOBAL NAPS, INC. et al, Defendants.	:	JULY 9, 2007

RULING RE: PLAINTIFF'S MOTION FOR CONTEMPT AND SANCTIONS (Doc. No. 303)

The plaintiff, Southern New England Telephone Company ("SNET"), brings this motion requesting that the court enter findings of civil and criminal contempt, as well as impose appropriate sanctions, against the defendant, Global NAPS, Inc. ("Global"). SNET's application is based on Global's alleged violation of this court's orders permitting SNET to attach certain items of Global equipment. (Doc. Nos. 129, 152, & 239). The court entered these orders to enable SNET to secure its $5,250,000 prejudgment remedy ("PJR") against Global. On May 1, 2007, the court held an evidentiary hearing on SNET's motion (Doc. No. 443)[1]. For the reasons that follow, SNET's Motion for Contempt and Sanctions is granted in part and denied in part.

[1]Global suggests that even though the court held a full eventiary hearing on the pending motion and gave it the opportunity to present evidence, the court must consider the "evidence" it offered with its Mootness Motion on April 23, 2007 (Doc. No. 425), as well as its Opposition to SNET's Motion for Contempt (Doc. No. 334). Defendants' Memorandum in Opposition at 5 n. 9. Global suggests further that, because SNET did not call Global's representatives, or rebut the "evidence" in Global's pleadings, "evidence is now taken as true as "Rule 56 permits(s)." Id. Global cites no cases in support of its position.

The court does not consider materials submitted as pleadings to be "evidence" when a hearing is noticed and all parties have opportunity to be heard. The court decides this motion on the hearing record before it. See Tran. (5/1/07) (Doc. No. 451) at 25-27 (court advised parties any evidence had to be offered at the hearing and defendants' attorney stated he did not intend to offer any prior affidavits).

I. FACTS[2]

On May 5, 2006, after finding probable cause to believe that Global had improperly failed to pay for certain services it ordered from SNET's federal tariff, this court ruled that SNET was entitled to a PJR in the amount of $5,250,000.[3] PJR Tr. at 16. That same day, the court also granted SNET's Motion to Disclose Property and Assets, which requested, inter alia, that Global disclose "any and all real or personal property in which Defendant has an interest, wherever located." (Doc. No. 64). Based on the representation by Global's counsel that, "I'm more than happy to cooperate in the disclosure of assets process, you Honor," PJR Tr. at 20, the court directed the parties to coordinate with each other to gather the information responsive to SNET's Motion to Disclose. Id. at 21. The court then stated that, while Global did not "have to produce each and every piece of paper," it did have to "produce quality information" that would enable SNET to attach Global's property if necessary.[4] Id.

In an email to counsel for SNET dated May 22, 2006, that Global claimed was in fulfillment of the court's May 5, 2006 decision, Global provided SNET with a generic listing of its Connecticut assets (Ex. A. to Doc. No. 142). After reviewing Global's disclosures in connection with SNET's Expedited Motion to Compel Compliance with

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[2]The court assumes the parties' familiarity with the procedural history of this case. The following section sets forth the court's findings, unless otherwise indicated.

[3]The court has since granted partial summary judgment for SNET, finding Global liable to SNET for a number of circuits that Global ordered from SNET's federal tariff. See Southern New England Telephone Co. v. Global Naps, Inc., _ F. Supp.2d _, 2007 WL 951663 *9 (D.Conn. Mar. 27, 2007).

[4]At this time, counsel for Global Naps was representing to the court that a bond would be obtained.

Court Order and for Sanctions (Doc. No. 142), the court opined during a May 26, 2006 telephone conference that, "[w]hat you disclosed doesn't come close to what I ordered and what I thought was accommodating to the parties . . . It doesn't even fall in the realm of inadequate. It is less than inadequate . . . ." Motion to Compel Tr. at 18 (Doc. No. 153). The court issued a written order on the same day compelling Global to provide SNET with documentation of the location, identity, and valuation of all Global's assets in Connecticut. See Order and Ruling Re: Motion to Compel and Motion for Protective Order (Doc. No. 149).

Subsequently, on May 31, 2006, the court issued a written order granting SNET's PJR, in which the court authorized SNET to secure its PJR through, among other things, "[a]ttachment of sufficient real or personal property of Defendant to secure such sum" and through "[a]ttachment or garnishment of any other real or personal property disclosed by the Defendant pursuant to the Plaintiff's Motion to Disclose Property and Assets dated December 23, 2005 [Doc. No. 64]." Order Granting Prejudgment Remedy (Doc. No. 64).[5] Id. On June 6, 2006, counsel for Global emailed counsel for SNET a more detailed list of what Global claimed to be Global's equipment in Connecticut. Ex. A to Doc. 305. For each piece of equipment, the list provided its

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[5]The court further ordered incorrectly that, in the event Global's Connecticut assets were insufficient to satisfy the PJR, Global was to "bring into the state of Connecticut assets sufficient to satisfy the prejudgment remedy. . . . " However, the court retracted this aspect of the Order on June 19, 2006 (Doc. No. 180). On October 3, 2006, the court issued a revised Order Granting Prejudgment Remedy (Doc. No. 239), which reflected the deletion of the transfer language.

This court has subsequently held that it may not order Global to bring assets into Connecticut unless SNET makes a showing of irreparable harm. See Ruling on Plaintiff's Application for Additional Prejudgment Remedy at 1-2 (Doc. No. 271) (citing Inter-Regional Financial Group, Inc. v. Hashemi, 562 F.2d 152, 154 (2d Cir. 1977) and Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 221 F.R.D. 300, 301 (D.Conn. 2002)).

type (e.g., chassis), general location, manufacturer, product number, and serial number. Id.

Following its June 6, 2006 disclosures, counsel for Global unequivocally represented to this court during an October 3, 2006 oral argument that, "the location, serial number, identity and description of all of the assets in Connecticut have been provided." Oral Argument Tr. at 29; see also id. at 44 (counsel for Global stating, "[w]e have identified locations, serial number, model number . . ." in response to statement from the court that "[y]ou indicated earlier that you had disclosed all of what could be disclosed . . . ."). Global's counsel went on to state that counsel for Global and SNET were "working on a procedure whereby SNET can go inspect the actual assets themselves at their physical location in Connecticut to confirm they are there." Id.

However, the court found that Global had still been overly vague as to the location of certain items on the June 6, 2006 list and that, because of Global's continued vagueness, SNET could not locate Global's equipment without Global's assistance. In particular, Global made numerous representations to SNET that a piece of equipment could be found on a particular "right of way," such as Global's Amtrak right of way. See Ex. A to Doc. 305. As the court observed,

> [SNET] asked you [Global] to tell them where [items of equipment] were. When you say right of way, Metro North owns a right of way from the Connecticut border to the Rhode Island border. I estimate that's 100 miles. If they told you their equipment was located on their right of way, that wouldn't be terribly compliant with the court's order to tell them the location

Oral Arg. Tr. at 46. To prevent further delay in SNET's ability to attach the items Global had repeatedly described as Global's assets in Connecticut, the court orally issued the following order:

> Today is Tuesday [October 3, 2006]. The court orders that no later than 5 p.m. on Thursday that the defendant through its employees or agents will physically accompany a representative of the plaintiff to each quote location quote as described in [the] answer of defense counsel in which there are property which has been disclosed by the defendant which it owns here in Connecticut. That includes specifically taking the plaintiff's representative to the precise location of the property and permitting the plaintiff to enter onto or proceed across any property rights which the defendant has . . . . In other words, it is the Court's intention by this or by Thursday at 5:00, the plaintiff will have an opportunity to physically put its eyes upon the property the defendant has identified as exists in Connecticut . . . to take whatever appropriate steps are necessary to effectuate an attachment thereof of the property under the laws of the State of Connecticut . . . . That should deal with the Connecticut property.

Id. at 47. Neither party objected to the court's Order. Id. Toward the end of the October 3 proceeding, the court issued a corrected Order Granting Prejudgment Remedy (Doc. No. 239), again ordering that, to secure the PJR, SNET could attach any assets that Global had identified pursuant to the court's granting of SNET's December 23, 2005 Motion to Disclose. On October 26, 2006, after further motion practice, this court ruled that SNET could take physical possession of the property it attached (Doc. No. 246).

On October 30, 2006, having not yet had access, counsel for SNET emailed Global to arrange dates on which SNET could visit Global's Connecticut sites and attach Global's property. Pl. Ex. 15 to Motion for Contempt at 2. Counsel for Global replied the next day that:

> I was waiting for confirmation from Global NAPs as to the availability of personnel to meet your client in order to hand over the equipment. Global has in fact gone a step further to facilitate your attachment. The company has removed the equipment to a central location in Mystic, Connecticut, where it can be consolidated and can easily be accessed.

Id. at p. 1. When SNET requested that Global allow a SNET representative to inspect Global's equipment sites, Pl. Ex. 16 at 5, Global responded that it had replaced the

equipment at these sites with equipment leased from a third party and that, consequently, the equipment was not subject to attachment. Id. SNET then pressed its right to inspect Global's equipment sites, at which point Global responded that it had "relocated all of the attachable personal property previously disclosed . . . to the Mystic location where that equipment has been removed and stored." Id. at 3. On November 2, 2006, SNET attached the equipment that Global made available at Mystic.

At least in part because it believed that none of the serial numbers on the equipment SNET attached at the Mystic site matched the June 6 list, SNET finally was given access by Global to inspect Global's five equipment sites in New Haven, Mystic, Devon, Hartford, and Stamford, Connecticut. On December 19, 2006, SNET visited Global's New Haven and Mystic sites. At both sites, SNET was able to match external serial numbers on a number of Sycamore-manufactured equipment. Global did not permit SNET to inspect the internal serial numbers embedded in the software of these Sycamore products or the Cisco/Cerent products. After SNET visited New Haven and Mystic, Global terminated the inspections without allowing SNET to visit Global's other three sites. The parties have stipulated that, at some point between December 20 and 21, 2006, two of Global's representatives traveled to each of Global's five Connecticut sites. Court Ex. 1, Stipulation No. 10. SNET brought the instant motion for contempt and sanctions on December 22, 2006 (Doc. No. 303).

On January 11 and 12, 2007, SNET inspected all five Connecticut sites and inventoried the internal and external serial numbers on Global's equipment. None of the internal serial numbers for the equipment at these sites matched the serial numbers on the June 2006 list. However, the external numbers on the previously-inspected

Sycamore equipment still matched the June 2006 list, although the internal serial numbers on that equipment matched neither the external serial numbers nor the June 6 list. The Sycamore equipment was the only equipment at Global's Connecticut sites with mismatching internal and external serial numbers. Further, the serial numbers on the equipment that SNET attached at Mystic had matching internal and external serial numbers.

From this evidence, SNET concludes "that Global NAPs cut short SNET's inspections on December 19, and hurriedly visited each site on December 20-21, in order to remove the June 2006 List equipment from the sites and replace it with different equipment, preserving only the external numbers that SNET had documented on December 19." Pl. Post-Hearing Brief at 10 (Doc. No. 454). The court agrees.

On March 13, 2007, three months after SNET's inspections of Global's equipment sites and over ten months after this court's May 2006 Order allowing SNET to attach those assets that Global had previously disclosed,[6] SNET was able to attach a significant proportion of the items identified on Global's June 2006 List. See State Marshall's Return of Attachment, Ex. A to Doc. No. 416; Pl. Post-Hearing Brief at 11; Def. Post-Hearing Brief at 8. Global had apparently been keeping that equipment at one of its locations in Massachusetts. Def. Post-Hearing Brief at 8. The record is silent

[6]The court references its May 2006 order (Doc. No. 152), rather than its amended October 2006 Order (Doc. No. 239) because the only significant changes in the October 2006 Order from the May 2006 Order were to clarify that SNET could only attach Global's disclosed assets to the extent necessary to secure the PJR and to delete any affirmative obligation of Global's to transfer assets into Connecticut if Global's Connecticut assets proved insufficient to satisfy the PJR. See Ruling, *supra*, n.3; compare Order Granting Prejudgment Remedy (Doc. No. 152) with Order Granting Prejudgment Remedy (Doc. No. 239). Thus, that the May 2006 Order required Global to allow SNET to attach those assets that the court ordered Global to disclose to SNET was clear and never altered or in dispute.

as to when exactly Global removed this equipment.[7] Further, the parties have stipulated that, "[t]he equipment Global NAPs made available for SNET to attach on November 2, 2006 [at Mystic], is not the same equipment disclosed on Global NAPs' June 6, 2006 spreadsheet." Court Ex. 1, Stipulation No. 1.

II. DISCUSSION

SNET essentially urges this court to hold Global in civil and criminal contempt for what it claims to be Global's willful violation of the written prejudgment attachment Order that this court entered in October 2006 (and in May, 2006). Global counters, *inter alia*, that any controversy between the parties has been mooted in light of the March 2007 attachment, that SNET has not shown that Global violated any of this court's Orders, and that there is no proof that Global acted with specific intent necessary for a finding of criminal contempt. The court addresses in turn SNET's submissions on civil and criminal contempt.

A. Civil Contempt

Courts possess inherent authority to sanction parties who disrupt the orderly administration of justice through abusive litigation tactics. See, generally, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Where a court considers awarding

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[7]Certainly, if one took Attorney Manishin's word, it would be clear the equipment had been moved by October 31, 2006, when he wrote saying as much. See supra at 5 ("The company has removed the equipment . . . .") (emphasis added). That to-be-attached equipment was the equipment on the disclosure list, which Global Naps represented to the court was the equipment it had in Connecticut.

Global presented quite an inconsistent position before the Circuit in an affidavit presented (by Global) the next day. In support of Global's Motion for a Stay of this court's Order of Attachment, Global, through Richard Gangi, Vice-President and Treasurer of Global, averred on November 1, 2006, that removing the equipment would cause it irreparable harm "likely forcing it to immediately terminate operations in Connecticut." See Plaintiff's Motion for Finding of Civil and Criminal Sanctions (Doc. No. 303) at 5 (emphasis added).

sanctions against a party that disobeys a court order, the court should only exercise this inherent authority when "the order the party allegedly failed to comply with is clear and unambiguous, the proof of noncompliance is clear and convincing, and the party has not diligently attempted in a reasonable manner to comply." Mahler v. United States, 195 F.Supp.2d 379, 383 (D.Conn. 2002) (citing New York State NOW v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989)); see also Perez v. Danbury, 347 F.3d 419, 423-24 (2d Cir. 2003).

Global contends that it did not violate a clear order of this court because: 1) the court only ordered Global to allow attachment of its Connecticut assets, not to allow attachment of the specific items it identified in June 2006; and 2) nothing in the court's Order prohibited Global from removing its equipment from Connecticut. Def. Post-Hearing Br. at 8. The court finds these arguments to be without merit.

An order is generally considered clear and unambiguous when it specifically demarcates what a party must and must not do to comply with the order at issue. See Perez v. Danbury, 347 F.3d at 424 (dealing with consent decrees); New York State NOW, 886 F.2d at 1351 (addressing injunctive orders). While Global is correct that the court's October order permitting prejudgment attachment broadly authorized SNET to attach any of Global's real or personal property (Doc. No. 239 at ¶ c), the May and October Orders both unmistakably allowed SNET to attach the real or personal property that Global disclosed pursuant to SNET's December 2005 Motion to Disclose Property and Assets (id. at ¶ e). Thus, when SNET sought to attach those items on Global's June 2006 list -- a list that this court specifically ordered Global to produce in satisfaction of the court's grant of SNET's December 2005 Motion to Disclose -- Global

was obligated to allow SNET to attach these items. The fact that SNET could have elected as well to attach items not on the June 2006 list is beside the point.

Similar reasoning also warrants the rejection of Global's suggestion that it did not violate an order of this court because nothing in the court's orders prohibited Global from removing its assets outside of Connecticut. Certainly, nothing in the court's Order expressly prohibited Global from taking its property across state lines. However, there is no ambiguity in the fact that, if Global's removal prevented SNET from attaching those items that the court specifically allowed SNET to attach and that SNET sought to attach, then Global would be in violation of this court's Order.

There is a more important point to be made in this regard. As discussed above, Global represented to this court at the October 3, 2006 oral argument that the June 2006 list provided the locations of Global's assets in Connecticut. Indeed, each and every location provided on the June 2006 list is a Connecticut location. Relying on the record before it and Global's submissions, this court ordered Global to appoint a representative to accompany a SNET representative to attach the equipment on Global's June 2006 list at each of Global's Connecticut sites. Global never objected to this Order. However, Global did not allow SNET to attach the specified items.[8] Instead, Global falsely informed SNET that it had taken the equipment on the June 2006 list to a

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[8]Technically, if Global removed its assets not on the list from Connecticut before SNET was able to attach them, SNET would have to make a showing of irreparable harm before this court could order Global to transfer the property back to Connecticut. See Ruling, supra at 3 n. 3. The question of what SNET would have to show to attach Global's out of state assets, however, is separate from the question of whether Global violated this court's Order by removing the assets on the list from Connecticut, making them no longer subject to attachment. There was never a challenge to the court's authority to order Global to allow SNET to attach the property on Global's June 2006 list.

location in Mystic when, in fact, equipment had at some point been taken to Massachusetts.

The court finds there to be clear and convincing proof that Global's conduct was a blatant violation of the court's clear and unambiguous May and October 2006 prejudgment remedy Orders. Considering Global's behavior since this court granted SNET's PJR application,[9] the court further finds there is clear and convincing evidence to conclude that Global's actions here were a naked attempt to thwart SNET's ability to secure its PJR. See Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (requiring a finding "that the challenged actions are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes . . ." before a court may find a party in contempt).

Having found that Global intentionally violated this court's clear Orders, the court now turns to whether Global diligently attempted to comply with these Orders when it finally allowed SNET to attach most the items on the June 6 list. See U.S. v. Paccione, 946 F.2d 1269, 1274 (2d Cir. 1992) (mooting a civil contempt finding where party purged himself within time frame set by the court). Global concedes that it has not yet permitted SNET to attach all of the property Global disclosed on the June 2006 list. See Def. Post-Hearing Br. at 6 (stating that Global had produced "substantially all" of

[9]The court notes that Global already has come perilously close to having this court find it in civil contempt for making "demonstrably false" statements concerning the maintenance of its financial records, thus violating a separate Order of this court intended to allow SNET to secure its PJR (Doc. No. 277 at 2). The court may consider such findings in deciding the current motion. See Litkey v. United States, 510 U.S. 540, 550-51 (1994); see also Mahler, 195 F. Supp.2d at 383 (considering the relevant context of the parties' interactions in ruling on a motion for contempt).

the items on the June 2006 list). According to a witness for SNET, SNET still has not been able to attach "three Sycamore cards, two Cisco/Cerent cards, and the faceplates for all of the Sycamore cards." Pl. Post-Hearing Br. at 11 (citing Hearing Tr. at 104, 106, and 111-12). To the extent that Global has prevented SNET from attaching these items from the June 2006 list, the court finds Global to be in civil contempt of the court's prejudgment Orders, entered first in May and reentered as modified in October.[10]

C. Civil Contempt Sanctions

The dual purposes of civil contempt sanctions are "to coerce future compliance and to remedy any harm past noncompliance caused the other party." Weitzman v. Stein, 98 F.3d 717, 719 (2d Cir. 1996). As such, the court hereby orders that Global shall allow SNET to attach every item on Global's June 6 list that SNET has not yet attached. Global must permit SNET to attach and take physical possession of these items within five (5) days of the issuance of this Ruling. These items certainly are the three Sycamore cards, two Cisco/Cerent cards, and the faceplates for all of the Sycamore cards that SNET has already identified. See Plaintiff's Post-Trial Memorandum at 11. If Global fails to comply within the five (5) days allotted, the court orders a penalty of $10,000/day, beginning on the sixth day and continuing each calendar day thereafter until Global complies.

Because the court finds that Global has acted willfully in violating this court's

[10]The court finds that SNET has not proven by clear and convincing evidence that Global owns the equipment that SNET inventoried at Global's five Connecticut equipment sites. Therefore, a finding of contempt on the grounds that Global has not permitted SNET to attach its Connecticut assets is unwarranted. If SNET has further evidence on the issue of Global's ownership of the property it was using in Connecticut in January 2007, it may present that to the court.

prejudgment Orders, the court further awards SNET the reasonable costs of prosecuting the instant motion for contempt and sanctions, including attorney's fees, expert fees, and other costs. Weitzman, 98 F.3d at 719. SNET should submit to Global its statement of hours claimed, and its billable hourly rates, together with other substantiating evidence, no later than July 20, 2007. If Global does not agree to the amount claimed by July 27, 2007, SNET should file its motion for attorneys' fees, together with back-up documentation, by August 6, 2007.

D. Criminal Contempt

Unlike the purposes of awarding sanctions for civil contempt, criminal sanctions are designed "to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief." New York State NOW, 886 F.2d at 1351 (citing United States v. United Mine Workers of America, 330 U.S. 258, 302-03 (1947)). The record in this case does not support a conclusion that Global's noncompliance rises to the level of a public offense. Moreover, having found Global in civil contempt and ordered sanctions that should adequately vindicate the authority of this court, and compensate SNET, the court finds it unnecessary to consider a finding of criminal contempt.

E. Rule 37 Sanctions

Global Naps argues that the court can not sanction it for violating its discovery Order of October 3, 2006, because it did not receive notice: Global Naps argues that SNET's Motion does not raise this as a ground for contempt or sanction.

While the issue of Global's failure to allow the court-order discovery in SNET's

Motion has been addressed by counsel, the court does not wish to risk violating Global's due process rights. Accordingly, the court orders Globals Naps to show cause why sanctions should not enter pursuant to F.R. Civ. P. 37 for its failure to comply with the court's October 3 Discovery Order. Global Naps must show cause no later than July 24, 2007. SNET may respond to Global Naps's filing, but no later than August 7, 2007.

III. CONCLUSION

For the foregoing reasons, the SNET's Motion for Contempt and Sanctions (Doc. No. 303) is GRANTED in part and DENIED in part. It is GRANTED with respect to SNET's request that the court sanction Global for civil contempt. It is DENIED with respect to SNET's request that the court hold Global in criminal contempt.

SO ORDERED.

Dated at Bridgeport, Connecticut this 9th day of July, 2007.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge