



Supreme Court
State of New York

Thomas J. McNamara
Acting Justice

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October 12, 2005

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Re: People of the State of New York v. National Collector's Mint, Inc.
Index No. 6355-04; RJI No.

Dear Counsel:

Enclosed is the decision and order with regard to the above matter. The original together with all papers submitted are being forwarded to Mr. Barbaro for filing. A copy of the decision and order is enclosed for counsel for respondents.

Very truly yours,

A handwritten signature in black ink, appearing to read 'TJM/ljb', written over a horizontal line.

Thomas J. McNamara
Acting Supreme Court Justice

TJM/ljb
Enc.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PEOPLE OF THE STATE OF NEW YORK, by
ELIOT SPITZER, Attorney General of the State
of New York,

Petitioners,

-against-

DECISION and ORDER
Index No.:6355-04

NATIONAL COLLECTOR'S MINT, INC.,

Respondent.

(Supreme Court, Albany County, Motion Term, June 27, 2005)
(RJI No.:01-04-079801)
(JUSTICE THOMAS J. MCNAMARA, Presiding)

APPEARANCES:

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MCNAMARA, J.:

Petitioners, the People of the State of New York, by Eliot Spitzer, Attorney General, commenced this proceeding pursuant to Executive Law §63(12) and General Business Law (“GBL”) Article 22-A, seeking permanent injunctive relief, restitution, civil penalties and costs stemming from the advertising and sale to the public by respondent, National Collector’s Mint, Inc. (“NCM”), of the “2004 Freedom Tower Silver Dollar” hereinafter referred to as the “subject coin”. By Decision dated November 4, 2005, and Order dated November 29, 2004, the Court found that the advertising complained of in the petition was fraudulent, deceptive and false within the meaning of Executive Law §63(12) and GBL §§ 349 and 350. The Court granted petitioners specific injunctive relief which included, among other relief, permanently enjoining NCM from engaging in such fraudulent and deceptive practices and which required NCM to make certain disclosures in all future advertisements concerning the sale of the subject coin. The Court also continued the Temporary Restraining Order, dated October 12, 2004, as modified by the Order Modifying Temporary Restraining Order, dated October 26, 2004, which enjoined the advertising and sale of the subject coin pending final determination of this proceeding. Lastly, the Court deferred petitioners’ request for restitution, civil penalties and costs pending further proceedings.

On January 24, 2005, the Court heard the parties concerning their respective proposals for the assessment and quantification of restitution, civil penalties and costs. By Order dated January 27, 2005, the Court directed NCM to pay full restitution of all refund claims that were submitted pursuant

to the restitution mechanism approved by the Court, which included a directive for NCM to provide an accounting. The Court also modified the Temporary Restraining Order, dated October 12, 2004, to permit NCM to process existing sales orders and accept payment for orders in accordance with the restitution mechanism. The Court then further deferred petitioners' request for civil penalties and discretionary costs pending NCM's compliance with the Court's restitution directives. NCM's compliance having occurred, petitioners now move for an order assessing civil penalties in the amount of \$2,000,000, and costs in the amount of \$3,015, against NCM. NCM opposes the motion.

In regards to civil penalties, it is clear that GBL Article 22-A, §350-d provides for the assessment of a civil penalty of up to \$500 for "each" violation of §349 and §350, which "shall accrue to the state of New York." See GBL §350-d. Specifically, this means here that a penalty of up to \$500 may be fixed for each improper advertisement and each improper consumer transaction. See *People by Vacco v. Lipsitz*, 174 Misc. 2d 571, 584 (Sup. Ct., N.Y. CO., 1997); See also *Meyers Bros. Parking Sys. v. Sherman*, 87 A.D.2d 562, aff'd 57 N.Y.2d 653 (1982). The purpose of such penalties is not to compensate consumer injuries, but rather to punish unlawful conduct and to deter future violations. See e.g. *State v. Wallkill*, 170 A.D.2d 8, 11-12 (3rd Dep't 1991); *Meyers Bros. Parking Sys. v. Sherman*, supra. However, the question of whether to impose a penalty in the first instance, as well as the amount thereof, is a matter which rests in the discretion of the Court. See e.g. *Tatta v. State*, 20 A.D.3d 825 (3rd Dep't 2005), *State v. Wallkill*, supra.

In determining a civil penalty here, the Court must first determine the number of actual violations. *People v. Allied Marketing Group, Inc.*, 220 A.D.2d 370 (1st Dep't 1995); *People by Vacco v. Lipsitz*, supra. In similar cases, where false advertising has been widely disseminated, petitioners have demonstrated that Courts have considered at least three different approaches to measuring the

number of violations: 1) by the number of individuals who received the false advertisement; 2) by the number of acts of publication that disseminated the advertisement; or 3) by the number of individuals who received the false advertisement and who acted on it. See e.g. *United States v. Readers Digest Association, Inc.*, 662 F.2d 955, 965-969 (3rd Cir. 1981)¹; *United States v. J.B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y. 1973), *aff'd in part and rev'd in part*, *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414 (2d Cir. 1974); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967 (Colo App 1993). Here, the proof the Court can utilize to determine the number of violations that occurred comes from the accounting and testimony of Peter Blumenthal, NCM's Chief Financial Officer. Mr. Blumenthal stated that as of October 13, 2004, one day after this proceeding was commenced, NCM had received approximately 184,755 orders for the subject coin.

It is also clear that in assessing a penalty, the Court may consider such factors as the injury to the public, the good or bad faith of the defendant, the defendant's ability to pay, whether the amount of the penalty would be a meaningful deterrent from engaging in such unlawful conduct in the future, and whether the penalty would eliminate the benefit derived by the violations or shock one's sense of fairness. See *United States v. Readers Digest Association, Inc.*, *supra*; *United States v. J.B. Williams Co., Inc.*, *supra* at 498 F.2d 438; *State v. Wallkill*, *supra*; *Meyers Bros. Parking Sys. v. Sherman*, *supra*.

Petitioners contend that if the Court imposes the maximum penalty of \$500 per violation, the

¹GBL §§349 and 350 are modeled on the federal Unfair And Deceptive Practices Act, 15 U.S.C. §45, which is enforced by the Federal Trade Commission. Thus, New York Courts have consistently looked to case law under the Unfair And Deceptive Practices Act to interpret GBL §§349 and 350 and to assist in fashioning remedies thereunder. See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995); *People by Vacco v. Lipsitz*, *supra* at 576.

result would be a penalty disproportionate to the harm suffered by consumers and the benefits retained by NCM. More particularly, Mr. Blumenthal testified that the 184,755 orders for the subject coin translated to over \$14,000,000 in sales earnings, more than half of which had been already collected by October 13, 2004. Petitioners contend that after more than \$2,000,000 in refunds or order cancellations occurred following the Court ordered restitution, NCM ultimately netted over approximately \$11,000,000 in sales earnings. However, petitioners contend that the imposition of a \$500 penalty for each sales order, for example, would result in an extreme penalty of \$92,377,500. Thus, petitioners contend that when the Court considers all relevant factors, a penalty of only \$2,000,000 is appropriate as it represents slightly more than \$10 for each consumer who responded to NCM's illegal advertising and a mere 17% of the more than \$11,000,000 netted by NCM. Petitioners therefore request that the Court assess this penalty amount against NCM.

In opposition, NCM contends that the penalty amount sought by petitioners is grossly excessive and wholly unjustified since it remedied any consumer injuries in the restitution process. In fact, NCM seeks credit for willingly engaging in Court ordered restitution which NCM contends should mean that there should be either no penalty or a substantially smaller penalty. If necessary, NCM suggests that a penalty of only \$2.22 should be imposed for each returned order. The record shows that there were 5,110 returned orders which would result in a penalty of approximately \$11,344. NCM contends that because fewer than five percent of the buyers of the subject coin sought and received refunds after getting corrective information, this means that not that many consumers were harmed by its advertising and sales campaign and therefore NCM should not be penalized in the excessive manner that petitioners now request. Lastly, NCM contends that once business costs and taxes are paid on its sales earnings, its net income from the sale of the subject coin is actually about

only \$1,000,000. NCM therefore contends that the Court should start its consideration of assessing a penalty, if there must be a penalty, based on that figure instead of the sales earnings figures used by the petitioners.

The Court notes first that restitution and civil penalties are two separate species with very different goals. The purpose of restitution was to put consumers status quo ante, restoring them to the position they occupied before the deception or fraud occurred. *Fischer v. Bright Bay Lincoln Mercury, Inc.*, 234 A.D.2d 586 (2nd Dep't 1996). The purpose of civil penalties, as noted above, is to punish unlawful conduct and deter similar unlawful conduct in the future. See e.g. *State v. Wallkill*, supra; *Meyers Bros. Parking Sys. v. Sherman*, supra. That being said, the Court's task here is to determine whether to impose a civility penalty against NCM for its unlawful conduct and if so, how much of a penalty. Based on the consideration of all relevant factors, the Court finds that the imposition of a civil penalty in this case in the amount of \$2 per sales order as of October 13, 2004, (\$2.00 x 184,755) or \$369,510 is warranted.

To begin, in looking at the injury to the public and the good or bad faith of NCM, the Court finds that NCM's assertion that in the end, only a small percentage of consumers were actually harmed by its unlawful actions purposefully misses the mark. In reality, harm occurred to approximately 184,755 consumers when they ordered their subject coins under false pretenses. As the Court of Appeals noted "[c]onsumers have the right to an honest market place where trust prevails between buyer and seller..." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995) citing to Mem of Governor Rockefeller, 1970 NY Legis Ann, at 472. Court ordered restitution, which armed consumers with correct information about the subject coin and facilitated refunds and order cancellations, may have remedied certain injuries that resulted from

NCM's breach of trust, however, restitution alone cannot completely remedy NCM's unlawful conduct here.

In the Court's view, NCM preyed upon and exploited public sentiments concerning the tragic events of September 11, 2001, and defrauded the public. The Court's Decision dated November 4, 2005, speaks for itself and will not be repeated here. The monetary injury to the public would have been far worse had it not been for this proceeding. The injury to the honesty and integrity of the marketplace, which affects all consumers subjected to NCM's fraudulent advertising, is immeasurable and can never really be cured. In any event, the Court will not allow NCM to play with the numbers here to make it appear that there was no substantial fraud or deception. In fact, the assertion that only about "five percent" of consumers sought refunds fails to take into account the fact that over twenty thousand consumers cancelled orders or the reality that many consumers may not have been able to seek refunds because, for example, they had given their subject coins away as gifts. Although the number of consumers who actually sought refunds or cancelled orders may not be as great as the number of consumers who consummated orders after receiving corrective information, the fact remains that this proceeding and restitution were necessary because of NCM's unlawful conduct and such conduct cannot go unchecked here. See *United States v. Readers Digest Association, Inc.*, supra. *People by Vacco v. Lipsitz*, supra. Moreover, while the orderly execution of the restitution process by NCM is commendable, it does not obviate the need to hold NCM accountable for its actions in the first instance.

In regards to NCM's ability to pay, the Court notes that NCM has failed to substantiate with any financial evidence Mr. Blumenthal's statement that NCM only netted about \$1,000,000 from the sales of the subject coins. On the other hand, NCM readily admits that it received \$10,200,000 in

gross earnings from the sales of the subject coins. If the Court begins with \$10,200,000, and subtracts NCM's stated 15 percent return on sales, NCM is left with a pre-tax profit of approximately \$1,500,000. Based on this figure, even once taxes in the stated amount of 10 percent are paid, NCM clearly has the ability to pay the Court's assessed penalty.

The Court finds further that the amount of the penalty assessed serves as a meaningful deterrent to NCM and others from engaging in such unlawful conduct in the future. A smaller penalty would not serve the legislative purpose of GBL §350-d of punishing those who violate GBL Article 22-A, since a smaller amount in relation to NCM's net profits could be seen simply as the cost of doing business. See *Meyers Bros. Parking Sys. v. Sherman*, supra. Moreover, there is simply no support for calculating a penalty under GBL §350-d based only on the number of returned orders. A larger amount, such as the \$2 million dollar figure requested by petitioners, would be excessive in relation to NCM's net profits. Further, the Court finds that a larger amount is not warranted in view of the undisputed fact that NCM has no prior history of violating GBL Article 22-A. Finally, the Court finds that the assessed penalty serves to eliminate some of the benefit derived by NCM's violations without shocking one's sense of fairness. *Id.* Hence, petitioners' motion for civil penalties is granted to the extent that the Court assesses a penalty against NCM in the amount of \$369,510.

In regards to costs and disbursements, NCM does not dispute petitioners' claim for statutory costs under CPLR 8201 for \$200, and under CPLR 8202 for \$100, or for disbursements under CPLR 8301 in the amount of \$715. However, NCM requests that the Court deny discretionary costs to petitioners in the amount of an additional \$2,000 under CPLR 8303(a)(6), contending that such costs are not warranted here. Petitioners, on the other hand, contend that they should be awarded discretionary costs.

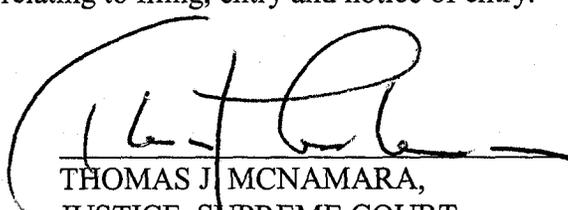
Inasmuch as there is no dispute concerning statutory costs and disbursements under CPLR 8201, 8202, and 8301, the Court grants petitioners' motion in this respect and awards such costs and disbursements to petitioners. The Court also finds that the circumstances of this case warrant an additional award of \$2,000 to petitioners and grants petitioners' motion in this respect as well. See *State v. Daro Chartours, Inc.*, 72 A.D.2d 872 (3rd Dep't 1979); *People by Vacco v. Lipsitz*, supra; *State v. Midland Equities of New York, Inc.*, 117 Misc. 2d 203 (Sup. Ct., M.Y. Co., 1982).

Accordingly, petitioners' motion is granted as stated above. NCM is directed to pay to the State of New York civil penalties pursuant to GBL §350-d in the amount of \$369,510, and costs and disbursements in the amount of \$3015, pursuant to CPLR 8201, 8202, 8301, and 8303(a)(6), within thirty (30) days of service of this Decision and Order with notice of entry.

This memorandum shall constitute both the decision and the order of the Court. All papers, including this decision and order, are being returned to the Attorney General. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

IT IS SO ORDERED!

Dated: October 12, 2005.
Albany, New York



THOMAS J. MCNAMARA,
JUSTICE, SUPREME COURT

The Court considered the following papers:

By Petitioners:

Notice of Motion dated May 27, 2005;
Affirmation in Support of Matthew J. Barbaro, Esq., dated May 25, 2005, with Exhibits A-H;
Memorandum of Law dated May 27, 2005;
Reply Memorandum of Law dated June 20, 2005;

By Respondent:

Affirmation of Jonathon S. Sack, Esq., dated June 13, 2005, with Exhibits A-D;

Affidavit of Peter Blumenthal sworn to June 13, 2005;

Memorandum of Law dated June 13, 2005;

Letter of Jonathon S. Sack, Esq., dated June 29, 2005.

Other:

Temporary Restraining Order issued by the Hon. Joseph R. Cannizzaro, JSC, on October 12, 2004,

Order Modifying Temporary Restraining Order issued by the Hon. Joseph R. Cannizzaro, JSC, on October 26, 2004;

Decision of the Hon. Joseph R. Cannizzaro, JSC, dated November 4, 2004;

Order of the Hon. Joseph R. Cannizzaro, JSC, dated November 29, 2004;

Order of the Hon. Joseph R. Cannizzaro, JSC, dated January 27, 2005.