

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 4:06CR00337 CEJ/MLM
)	
BETONSPORTS PLC, et al.,)	
)	
Defendant.)	

MOTION FOR ORDER TO SHOW CAUSE

By its undersigned attorneys, the United States of America moves that this Court issue an Order requiring officers, directors and/or counsel for corporate defendants in this case who have not yet appeared for arraignment to show cause why they should not be held in contempt or otherwise sanctioned for failure to appear at or arrange for arraignment for the absent corporate defendants. Additionally, the United States requests that the Court enter pleas of not guilty on behalf of the non-appearing corporations pursuant to Fed.R.Crim.P. 11(a)(4)¹, so that pre-trial preparation can proceed.

I. BACKGROUND

The Indictment in this case named four corporations as defendants, in addition to several natural persons. All corporate defendants were properly served and summonsed to appear in this Court; however, three corporate defendants have declined to appear: BETONSPORTS PLC, Direct Mail Expertise, Inc. and Mobile Promotions, Inc. (The latter two are referred to as “Lenis

¹Fed.R.Crim.P. 11(a)(4) states: “If a . . . defendant organization fails to appear, the court must enter a plea of not guilty.”

Companies,” since individual co-defendants, members of the Lenis family, established and controlled them. See paragraph 11, page four, of the Indictment in this case.)

A. The Lenis Companies

On July 31, 2006, this Court held arraignment hearings for the defendants in this case, including DME Global Marketing and Fulfillment, Inc.² Counsel for that Lenis Company stated that it was his understanding that the remaining Lenis Company defendants were inactive, and that they would therefore not appear. However, even if the Lenis Company defendants were inactive, that status would not shield them from federal criminal liability, nor excuse corporate disregard of this Court’s authority. Similarly, intentional non-appearance for proceedings in a Court having jurisdiction over a corporate defendant does not shield that corporation from federal criminal liability.

B. BETONSPORTS PLC

BETONSPORTS PLC’s counsel had been negotiating with the United States to settle its criminal as well as civil liability in this matter, and had agreed that his client would appear for arraignment, which this Court scheduled for the morning of January 5, 2007.³ Then, in the afternoon on January 4th, defense counsel announced that the corporation “would not participate in the criminal case” but would comply with this Court’s related Permanent Injunction.⁴

²DME Global Marketing and Fulfillment, Inc., Direct Marketing Expertise, Inc. and Mobile Promotions, Inc. are collectively referred to in the Indictment as “the Lenis Companies.” Only defendant DME Global Marketing and Fulfillment, Inc., appeared for arraignment.

³It is not known whether BETONSPORTS PLC had retained counsel at the time of the initial arraignment proceedings.

⁴The Permanent Injunction entered by the District Court on November 9, 2006, (No. 4:06-CV-1064 (CEJ), Doc. #30) required BETONSPORTS PLC to undertake a number of actions. To date, the defendant is not in compliance with the Court’s Order.

II. APPLICABLE LAW

A. A corporation's inactive status does not shield it from criminal prosecution

Whether or not the Lenis Companies are active or inactive, they were still obligated to appear for arraignment in the Eastern District of Missouri. “[T]o permit dissolution to insulate a corporation from criminal liability would enable corporate officers to engage the corporation in activities that violate federal criminal statutes, reap the profits from that unlawful activity, and then thwart federal enforcement efforts by the single expedient of voluntary termination of the business entity’s existence under that particular form or name.” Brickey, K., 1 Corporate Criminal Liability, Section 3:10, page 123. See also, United States v. BBF Liquidating, Inc., 450 F.2d 938 (9th Cir. 1971) (dissolved California corporation has same vitality for criminal prosecutions as it has for civil actions), cert. denied, 405 U.S. 1065 (1972); United States v. San Diego Grocers Ass'n, 177 F.Supp. 352, 355 (S.D. Cal. 1959) (same); United States v. Cigarette Merchandisers Ass'n, 136 F.Supp. 214, 217 (S.D.N.Y. 1955) (“[I]t would be contrary to sound policy to permit a defendant charged with criminal conduct to foreclose the vindication of public rights by its voluntary action.”); United States v. Md. & Va. Milk Producers, Inc., 145 F.Supp. 374 (D.D.C. 1956) (same).

Moreover, “a corporation should not be permitted to evade criminal liability when a voluntary corporate behavior -- such as failure to pay corporation taxes -- has led to involuntary forfeiture of the corporate charter.” Brickey, id. at 125, citing United States v. Consolidated Laundries Corp., 291 F.2d 563, 571 n. 11 (2nd Cir. 1961) (corporation whose charter has been forfeited is “not dead” but merely “in a state of coma.”). Cf., United States v. Glen Upton, Inc., 378 F.Supp. 1028 (W.D.Mo 1974). The Lenis Company defendants’ inactive status does not

provide excuse for non-appearance at arraignment and subsequent proceedings in this matter.

Even if the Lenis Companies were in fact dissolved, and not just inactive, Florida law provides that they would still be subject to criminal prosecution: F.S.A. §607.1405 states in pertinent part:

(2) Dissolution of a corporation does not:

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name; . . .

(f) abate or suspend a proceeding by or against the corporation on the effective date of the dissolution;

Therefore, the Lenis Company defendants, Direct Marketing Expertise, Inc. and Mobile Promotions, Inc. were and are subject to the jurisdiction of this Court, and are subject to sanction for failure to appear.

B. Foreign corporations present in the United States and properly served are subject to the Court's criminal jurisdiction

BETONSPORTS PLC's election to "not participate in the criminal case" in a Court already exercising jurisdiction over the corporation suggests that corporate management is neither in a coma nor dead but, instead, contemptuous and defiant. Voluntary absence waives a defendant's right to be present at known-to-the-defendant criminal proceedings, Fed. R. Crim P. 43(c). When counsel, at the direction of his corporate defendant client, declines to appear at arraignment, the defendant cannot rightly complain when criminal proceedings occur in absentia, and the corporation and its representatives are therefore subject to sanction. Fed. R. Crim. P. 43(b)(1).

III. CONCLUSION

Based on the foregoing, the United States moves this Court to issue its Order directing

that one or more officers, directors and/or counsel for each of the absent corporate defendants appear at a time and date certain and, at that appearance, show cause why the corporation(s), their officer(s), director(s) and/or counsel should not be held in contempt, fined, arrested or otherwise sanctioned for wilful disregard of this Court's processes and proceedings.

Additionally, the United States requests that the Court enter pleas of not guilty on behalf of Direct Mail Expertise, Inc., Mobile Promotions, Inc. and BETONSPORTS PLC, pursuant to Fed.R.Crim.P. 11(a)(4).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on January 9th, 2007, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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