

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3 01CV521

SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
Plaintiff,)	
)	
Vs)	ORDER
)	
PATRICK L SWISHER and SWISHER)	
INTERNATIONAL, INC ,)	
)	
Defendant)	
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This matter is before the Court upon Defendant Patrick L Swisher’s Motion for Relief From Judgment Pursuant to Rule 60(b)(5) (Doc No 16) The SEC has filed a response objecting to Mr Swisher’s motion, and Mr Swisher has filed a Reply

Factual Background

Defendant Swisher seeks relief from certain provisions of a consent Final Judgment entered on September 19, 2001 (Doc No 6) The Judgment enjoined Mr Swisher from violating certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and rules promulgated thereunder, ordered him to disgorge certain profits and pay certain civil penalties, and disqualified him for a period of five years from acting as an officer or director of publicly traded companies Mr Swisher has complied with the terms of the Judgment but remains enjoined by the provisions requiring him to “obey-the-law”

Mr Swisher has now formed a franchise business and claims that the injunction requiring him to obey-the-law is hindering his ability to obtain approval to sell franchises in certain states that require pre-sale disclosures As part of the registration process in those states, Mr Swisher

must disclose that he is under the continuing obey-the-law injunction in this case. He alleges that the inability to sell franchises in those states would result in a grave economic impact. Mr. Swisher seeks a modification of the injunction to mitigate this potential economic loss.

Discussion

Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, “a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application. In exercise of that power, consent decrees may be modified in appropriate cases on the basis of material changes in operative law or facts.” The Fourth Circuit’s prevailing standard for modification of non-institutional consent decrees is set forth in *Tobin v Alma Mills*, 192 F.2d 133 (4th Cir. 1951). In *Tobin*, Alma Mills and other defendants entered into a consent decree permanently enjoining them from violating the provisions of the Fair Labor Standards Act. *Id.* at 135. Nine years later, Alma Mills applied to the court to dissolve the injunction on the grounds that the company had complied with its provisions for a long period of time and that there was no longer any need to keep it in force. *Id.* at 134. The owner of Alma Mills wished to sell the business and the fact that the company was subject to the injunction was interfering with the sale. The Fourth Circuit agreed with Alma Mills and affirmed the district court’s dissolution of the injunction. In so holding, the Fourth Circuit ruled that “an injunctive order may be modified or dissolved in the discretion of the court when conditions have so changed that it is no longer needed or as to render it inequitable.” *Id.* at 136. Particularly, with respect to an injunction against the violation of a statute (i.e., an “obey-the-law” injunction), such conditions are shown “where it appears that the one enjoined has observed the statute in good faith over a [long period of time] and there is no present reason to apprehend violation by him.” *Id.*

The SEC would have the Court apply the more rigorous standard for modification of a consent decree set forth in *Thompson v United States Department of Housing & Urban Development*, 220 F 3d 241, 247 (4th Cir 2000) In *Thompson*, the Fourth Circuit held that to justify the modification of a consent decree in cases involving institutional reform litigation, the party moving for modification must show that a significant change in circumstances warrants modification of the decree *Thompson*, 220 F 3d at 247 (citing *Rufo v Inmates of Suffolk Cnty*, 502 U S 367, 383 (1992)) In addition, the movant must show that the changed conditions make compliance with the consent decree (a) more onerous, (b) unworkable, or (c) detrimental to the public interest *Id*

The SEC argues that the Fourth Circuit has adopted the *Thompson* standard for all motions to vacate injunctions, not just cases involving institutional reform However, nothing in the *Thompson* case would suggest such a proposition The *Thompson* court specifically limited its holding to cases “involving *institutional reform* litigation,” and its analysis contemplated “the modification of an *institutional reform* consent decree ” *Id* at 246–47 (emphasis added) Thus, in cases involving non-institutional consent decrees, such as the one herein, the stringent standard adopted in *Thompson* simply does not apply

The Court finds that Mr Swisher has adequately demonstrated that he has complied with the provisions of the injunction in good faith for thirteen years He is no longer associated with the business at issue in this case and has not been for many years Moreover, his Affidavit details the economic impact of the obey-the-law injunction on his new business The Court, in its discretion, finds that conditions have changed such that it is no longer equitable to enjoin Mr Swisher to obey-the-law The obey-the-law injunction has been in effect long enough to accomplish the purpose for which it was granted, and there is no longer any reason to apprehend

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