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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. Art Intellect, Inc., a Utah corporation, d/b/a Mason Hill and VirtualMG, Patrick Merrill Brody, Laura A. Roser, and Gregory D. Wood Defendants.	**CIVIL NO: 2:11CV00357** **MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANT PATRICK M. BRODY AND LAURA A. ROSER SHOULD NOT BE HELD IN CIVIL CONTEMPT** **Judge Tena Campbell**

Plaintiff Securities and Exchange Commission ("Commission"), by and through its counsel of record, respectfully submits this Memorandum in Support of the Motion for Order to Show Cause Why Patrick M. Brody and Laura A. Roser Should Not Be Held in Contempt ("Motion"). As noted in the Motion, a Temporary Restraining Order, Accelerating Discovery and Order to Show Cause ("TRO Order") and an Order Appointing Receiver, Freezing Assets and Other Relief ("Asset Freeze Order") (collectively "Orders") were entered by this Court on April 18, 2011. (Docket #s 4 and 5). Notwithstanding having received notice and service of this Court's Orders, Brody and Roser (collectively "Defendants") are violating and continue to violate the federal securities laws in violation of the injunctive relief set forth in the Orders. In addition, they have failed to comply with expedited discovery as ordered, they have sold and/or are attempting to sell and hide assets in violation of the Asset Freeze Order, and they continue to provide use of a Cadillac CTS automobile, leased with fraudulently obtained investor funds, to Robert H. Copier, Brody's defense lawyer in the case of SEC v. Merrill Scott & Associates, Ltd., et al., Civil No. 2:02CV0039C (D. Utah) ("Merrill Scott" case).[1]

STATEMENT OF FACTS

A. Procedural Background

1. On April 18, 2011, the Court entered the Orders noted above, which, among other things, temporarily restrained the Defendants from violating federal securities laws, froze the assets of Brody, Roser, and Art Intellect, Inc. dba Mason Hill and VirtualMG ("Mason Hill"), appointed a receiver over the assets of Mason Hill, and ordered expedited discovery. (Docket #s 4 and 5).

[1] Brody has already been permanently enjoined from violating the federal securities laws in the Merrill Scott case. (Merrill Scott, Docket #1349). Currently pending in that action is the Commission's Motion for Order to Show Cause Why Defendant Patrick M. Brody Should Not Be Held in Civil Contempt for violating the permanent injunction by operating the fraudulent scheme that is the subject of the TRO Order in this action. (Merill Scott Docket #s 1388 and 1389).

2. Brody and Roser received actual notice of this action and the Orders on or about April 18, 2011, but they attempted to evade service for some time. (See Docket #s 11 and 12). The Court granted the Commission's Motion for Service by Publication and Alternative Means re Defendants Brody, Roser, and Art Intellect, Inc. dba Mason Hill and VirtualMG on April 25, 2011 and extended the TRO Order through May 17, 2011.[2] (See Docket #s 13 and 14).

3. On April 25, 2011, Defendants Brody and Roser were properly served with the Complaint, other pleadings, and the Orders. (Docket #s 15 and 16). Defendant Roser, the only registered agent for Defendant Mason Hill, continues to evade service on behalf of Mason Hill; thus the Commission has completed service through publication in the Salt Lake Tribune and Deseret News and by electronic mail, as allowed by this Court's order. (Docket # 13).

B. Defendants are Dissipating Assets in Violation of the Asset Freeze Order

4. Defendants Brody and Roser have a known personal residence at 6492 Canyon Crest Drive in Salt Lake County ("Canyon Crest home"). They reside there with Bryan Brody, the 18 year old son of Brody. See Declaration of Stacie Parker, Exhibit 1 at ¶ 3. Salt Lake County property records show the Canyon Crest home is owned by Defendant Roser. See Declaration of Scott R. Frost, Exhibit 2 at ¶ 8 and Ex. B, attached thereto.

5. From April 27, 2011 to May 5, 2011, a series of classified advertisements were posted on the website www.ksl.com by a seller by the name of "Bryan" with the phone number 801-558-3073. See Exhibit 1 at ¶¶ 6, 8 and Ex. A, attached thereto; Exhibit 2 at ¶¶ 5-7 and Ex. A, attached thereto. One of these advertisements, dated April 28, 2011, lists for sale the "Entire Contents of a Home." The advertisement states, in part, "We are moving and need to sell everything is [sic] our home. Offer anything for anything." The advertisement contains several

[2] Defendant Gregory D. Wood consented to entry of a Final Judgment of Permanent Injunction against him. (Docket #7). The Judgment of Permanent Injunction in favor of Securities and Exchange Commission against Gregory D. Wood was entered on April 20, 2011, and the asset freeze as to Wood was lifted. (Docket #s 8 and 9).

photographs of the items offered for sale. The total asking price of the items in this advertisement is $51,000. See id. The photographs were taken in the Canyon Crest home and depict personal items belonging to the Defendants. See Exhibit 1 at ¶ 2-4, 6-8. The telephone number of the seller is Bryan Brody's cell phone number. See Exhibit 1 at ¶ 6.

6. Additional advertisements listed by the same seller, "Bryan" at 801-558-3073, were posted from April 27, 2011 through May 5, 2011 and depict a number of household and other items, including a motorcycle, Macintosh computers, a computer printer, an iPhone, an iPad, furniture, and appliances, for sale at various prices. The asking price for these items totaled $9,060. See Exhibit 2 at ¶¶ 5-7 and Ex. A, attached thereto. The advertisements contain photographs of each of the items. All of the items depicted in these advertisements are items belonging to the Defendants and were photographed in the Canyon Crest home. See Exhibit 1 at ¶¶ 2-4, 6, 8, and Ex. A, attached thereto.

7. Two other advertisements, posted May 1, 2011, from the same seller, "Bryan" at 801-558-3073 list a "$1,000,000 Home in Amazing Neighborhood." One of the advertisements shows an interior photograph of the Canyon Crest home belonging to the Defendants, and offers the top two floors of the house for rent of $3,000. The other advertisement shows an exterior view from the Canyon Crest home and offers the home for sale for $925,000. This advertisement states that seller financing is available with a $100,000 down-payment and no credit check required. See Exhibit 1 at ¶ 8 and Ex. A, attached thereto; Exhibit 2 at ¶¶ 5-7 and Ex. A, attached thereto. The home offered is the Canyon Crest home owned by Defendant Roser. See Exhibit 1 at ¶ 8; Exhibit 2, ¶ 3-4, 8.

8. On or around May 6, 2011, a Salt Lake resident named Levi Gephart responded to the advertisement offering the entire contents of a home for sale. Gephart called the telephone

number in the advertisement and spoke with a person named Bryan. Gephart drove to the home and was met by Bryan, a teenage boy who was selling the property. The address of the home was 6492 Canyon Crest Drive, which is the Canyon Crest home owned by Defendant Roser. Bryan told Gephart that Bryan's parents were moving out of the country and needed to sell everything. Gephart thought it was odd that a young man would have the responsibility of selling in excess of $50,000 worth of his family's furnishings. Gephart did not buy anything from Bryan. Gephart later did a property search on the Canyon Crest property and found that it belonged to Roser. After learning the property owner's name, Gephart informed the Commission staff of the advertisement and his encounter with Bryan. See Exhibit 2 at ¶¶ 3-4.

9. A majority or all of the assets being offered for sale in the KSL advertisements were likely acquired with fraudulently obtained funds from Mason Hill investors. See Exhibit 1 at ¶ 5; Exhibit 2 at ¶¶ 14-15.

10. Prior to the Orders of April 18, 2011, Mason Hill made payments on a leased 2008 Cadillac CTS in the amount of $740.97 per month. Mason Hill made these payments each month using funds from Mason Hill investors. The Cadillac is possessed and used by Robert H. Copier, Mr. Brody's personal defense attorney in the Merrill Scott case. See Exhibit 2 at ¶¶ 10-11 and Ex. D, attached thereto. Copier has actual notice and has received a copy of the Asset Freeze Order in this action. See Exhibit 2 at ¶ 11 and Ex. E, attached thereto at Page 1 of 5 ("Attached is an email from the SEC to this counsel [Robert H. Copier] with an order attached; the order; and, the responsive email from this counsel [Robert H. Copier]."), DN 1419-1, 1419-2, 1419-3. Copier has asserted that he does not represent Mason Hill and does not perform work for Mason Hill, thus he has no right to retain the Cadillac, which has been paid for with fraudulently obtained Mason Hill investor funds. See Exhibit 2 at ¶ 11 and Ex. E, attached

thereto at Page 5 of 5 ("This counsel has not been asked, and would not be willing to assist Mr. Brody in [this Mason Hill case]. It is beyond the scope of representation he has been assigned or undertaken and the areas that were most interesting as academic topics are somewhat dull in the real practice;" "If Mr. Brody wants securities law advice, he must find it elsewhere.") and at 1419-2 ("While I have been approached both by a named defendant and potential intervenors in this lawsuit to possibly represent them in this case, I do not at this time."). To date, the Court-appointed receiver, Wayne Klein, has not received the Cadillac from Copier. See Exhibit 2 at ¶ 11.

C. Defendants are Continuing to Violate the Federal Securities Laws in Violation of the TRO Order.

11. The TRO Order entered by this Court found that the Commission made a sufficient and proper showing in support of restraining Defendants Brody and Roser from engaging in ongoing violations of the federal securities laws "by evidence establishing a prima facie case of and a strong likelihood that the Commission will prevail at trial on the merits and that the Defendants, directly or indirectly, have engaged in and, unless restrained and enjoined by order of this Court, will continue to engage in acts, practices, and courses of business constituting violations of Sections 5(a), 5(c) and 17(a) [15 U.S.C. §§ 77e(a), 77e(c) and 77q(a)[and Sections 10(b) and 15(a) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78o(a)] and rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]." (Docket # 4).

12. The evidence presented by the Commission, on which the TRO Order was based, is outlined in the Commission's Ex Parte Motion for Temporary Restraining Order, Ex Parte Motion to Appoint Receiver, Ex Parte Motion Freezing Assets and Other Emergency Relief and the accompanying Memorandum in Support of the Ex Parte Motion for Temporary Restraining

Order, Ex Parte Motion to Appoint Receiver, Ex Parte Motion Freezing Assets and Other Emergency Relief. (Docket #s 2 and 3).

13. The evidence demonstrated that Defendants Brody and Roser, through Mason Hill, were selling unregistered securities in a fraudulent offering. The evidence showed that the Defendants were violating the federal securities laws by fraudulently offering unregistered investment contracts in the form of Reservation Agreements and Purchase Agreements coupled with Management Agreements, by purporting to offer investors the opportunity to invest in distressed real estate, with Mason Hill providing rehabilitation and property management services for the investors, with guaranteed rental profits. Mason Hill solicited investors through a network of "strategic partners" who were paid commissions based upon the number of investors they brought to Mason Hill. Rather than purchasing, rehabilitating, and managing the properties as represented, however, Mason Hill, through Defendants Brody and Roser, failed to provide properties, failed to rehabilitate properties, failed to properly manage the properties, and failed to use investor funds as represented. Investor funds were used to fund the Defendants' lavish personal lifestyle. Further, later investor funds were used to purchase properties and pay profits to earlier investors, the hallmark of a classic Ponzi scheme. (See Docket #s 2 and 3).

14. Pursuant to the April 18, 2011 Orders, the Court-appointed receiver, Wayne Klein, took over the assets and operations of Mason Hill. Brody and Roser no longer have access to Mason Hill's operations, including Mason Hill's website. (See Docket # 5).

15. After receiving actual notice and proper service of the Court's Orders, Brody and Roser continue to recruit sales people and solicit investor funds in a fraudulent scheme almost identical in nature to Mason Hill. Brody and Roser have used the entity names Jensen Blair and Residential Realty Advocates in order to carry out their fraudulent schemes. Brody has

represented himself to at least one potential salesperson as "Patrick Merrill," in an apparent attempt to continue his violation of federal securities laws and to deceptively hide his connection to Mason Hill. See Exhibit 1 at ¶ 9; Exhibit 2 at ¶ 9, 13; Declaration of Ryan Reilly, Exhibit 3 at ¶¶ 1-9.

D. Defendants Have Failed or Refused to Comply with Expedited Discovery as Ordered by the Court.

16. Defendants Brody and Roser failed to appear to provide deposition testimony pursuant to their properly served Notices of Deposition. (See Docket #s 20 and 21).

I. ARGUMENT

A. STANDARDS FOR CIVIL CONTEMPT

1. Court Authority and Procedure

"Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994). Congress codified the court's authority in the United States Code:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401. See also Fed. R. Civ. P. 70 (in proper cases, court may adjudge a party in civil contempt for failure to perform specific acts required by a judgment). Civil contempt is "wholly remedial" and is intended to coerce compliance with an order of the court. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

The distinguishing factor in civil, as opposed to criminal,[3] contempt is that the defendant can "purge" himself or herself of the contempt at any time. Shillantani v. U.S., 384 U.S. at 370-71 (1966). In this way, the civil contempt is "wholly remedial," not punitive, and it is intended to coerce compliance with an order of the court. See Comb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); cf. Bagwell, 512 U.S. at 829 (expanding remedial purposes to include losses sustained, not merely future compliance).

The Commission must prove Defendants Brody and Roser are in contempt by "clear and convincing evidence." Bagwell, 512 U.S. at 834. A party may be held in contempt if the moving party shows that "the order being enforced is clear and unambiguous, the proof of noncompliance is clear and convincing and the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered." See EEOC v. Local 638, 753 F.2d 1172, 1178 (2d Cir. 1985) (citation and internal quotation marks omitted). To meet this initial burden, the plaintiff need only present a prima facie case, U.S. v. Rylander, 460 U.S. 752, 755 (1983), and it is not necessary to show that the defendant's disobedience was willful. See SEC v. Universal Express, Inc., 546 F.Supp.2d 132, 134 (S.D.N.Y. 2008) (quoting EEOC v. Local 638, 753 F.2d at 1178). However, there is no right to a jury trial. Id.

2. Elements of Civil Contempt

In the Tenth Circuit, "[t]o prevail in a civil contempt proceeding, the plaintiff has the burden of proving, by clear and convincing evidence, that a valid court order existed, that the defendant had knowledge of the order, and that the defendant disobeyed the order." Reliance

[3] By contrast, a sanction is considered criminal contempt if it is imposed retrospectively for a "'completed act of disobedience' such that the contemnor cannot avoid or abbreviate the confinement [or fine] through later compliance." Bagwell, 512 U.S. at 828 (quoting Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 443 (1911); see also Hess v. N.J. Transit Rail Operations, Inc., 846 F.2d 114, 115 (2d Cir.1988) (criminal contempt sanction is one imposed "unconditionally and punitively . . . to vindicate the authority of the court and not to provide private benefits").

Ins. Co. v. Mast Constr. Co., et al., 159 F.3d 1311, 1315 (10th Cir. 1988) (citations omitted). "Civil contempt may be used 'to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance' with a court order. O'Connor v. Midwest Pipe Fabrications, Inc., 972 F.2d 1204, 1211 (10th Cir. 1992)." Reliance, 159 F.3d at 1318. Moreover, civil contempt does not depend on the state of mind or on the presence of good faith on the defendant's part, i.e., "intent" is not an element. In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987); see also Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th Cir. 1992) (holding that "good faith" is no defense). Finally, "[i]n a civil contempt proceeding, once a plaintiff has established the elements of contempt by clear and convincing evidence, it need only prove damages by a preponderance of the evidence." Reliance, 159 F.3d at 1318.

Once this initial burden is met, the burden then shifts to the defendant to come forward with evidence showing "categorically and in detail" why he is unable to comply with the court's order. Rylander, 460 U.S. at 755. To meet his burden, the defendant must establish "categorically and in detail" that he has made "in good faith all reasonable efforts" to meet the terms of the court order. FTC v. Affordable Media, LLC, 179 F.3d at 1228, 1239 (9th Cir. 1999); see also CFTC v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1529-30 (11th Cir. 1992) (holding that, where the defendant presented no evidence of good faith efforts to meet the terms of the court order, for this reason alone the defendant did not meet his burden.). Moreover, defendant's attempt to present incomplete records or conclusory statements does not satisfy the requirement to "make all reasonable efforts" to comply with the court order. Huber v. Marine Midland Bank, 51 F.3d 5, 9-10 (2d Cir. 1995); see also United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988) (evasive and incomplete testimony will not satisfy burden of production).[4]

[4] Nor will a court respect an elaborate transfer of assets designed to escape liability. Schmoll v. AcandS, Inc., 703 F. Supp. 868, 874 (D. Or. 1988), aff'd, 977 F.2d 499 (9th Cir. 1992). "There is no just reason to respect

More specifically, "the burden of proving plainly and unmistakably that compliance is impossible rests with the contemnor. In re Marc Rich & Co., 736 F.2d 864, 866 (2d Cir. 1984) (internal quotes omitted). In fact, a putative contemnor must show that "all reasonable avenues for raising funds have been explored and exhausted." SEC v. Bilzerian, 112 F.Supp. 2d 12, 26 (D.D.C. 2000) (citation omitted). The burden shifts back to the Commission only upon "clearly established" evidence presented by the alleged contemnor. Huber, 51 F.3d at 5, 10.

Once contempt has been established, a district court has "broad discretion to fashion an appropriate coercive remedy. . . based on the nature of the harm and the probable effect of alternative sanctions." See EEOC v. Local 28, 247 F.3d 333, 336 (2d Cir. 2001) (quoting N.A. Sales Co. v. Chapman Indus. Corp., 736 F.2d 854, 857 (2d Cir. 1984)). To fashion an appropriate remedy, a Court should consider: "(1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the burden of the sanction." SEC v. Bremont, 2003 WL 21398932 at *7 (S.D.N.Y. 2003)(quoting Dole Fresh Fruit Co. v. United Banana Co., 821 F.2d 106, 110 (2d Cir. 1987)). Remedies ranging from the use of an escrow requirement to incarceration are clearly within the Court's discretion. See, e.g., Local 28, 247 vF.3d at 336; SEC v. Margolin, 1996 WL 447996 at *5 (S.D.N.Y. 1996).

B. BRODYAND ROSER ARE IN CONTEMPT

1. Brody and Roser are Violating the Asset Freeze Order

This Court should find Brody and Roser in contempt of the Asset Freeze Order. Here, the three prongs of the EEOC test for civil contempt are clearly satisfied. First, there can be no

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the integrity of these [kind of] transactions." Id. Otherwise, "technical formalities of corporate form[ ] designed with the improper purpose of escaping liabilities . . . would unjustly elevate form over substance." Id.

doubt that the Asset Freeze Order was clear and unambiguous in its orders that the Court took "exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated of Art Intellect, Inc., d/b/a Mason Hill and VirtualMG, Patrick Merrill Brody [and] Laura A. Roser." The Asset Freeze Order clearly ordered that all assets of Brody, Roser, and Mason Hill "are frozen until further order of this Court," and that Brody and Roser "are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets." There is no question that Brody and Roser have received actual notice and proper service of the Asset Freeze Order.

Second, Brody and Roser, through Brody's son, Bryan Brody, have sold and/or are attempting to sell multiple assets, including a "$1,000,000 home," and the entire contents of their home, as well as various other items belonging to them, for tens of thousands of dollars. The evidence is clear and convincing that Bryan Brody has posted classified advertising on at least one website, and possibly others. Bryan Brody has offered to sell the Cove Canyon home belonging to Roser, its entire contents, and other items. Bryan Brody personally met with at least one individual and informed that person that Bryan Brody's parents were planning to leave the country and had to sell their home and everything in it. See Exhibit 2 at ¶¶ 3-4.

Third, the evidence is clear and convincing that Brody and Roser have not been "reasonably diligent and energetic in attempting to accomplish what was ordered." Rather, Brody and Roser have blatantly ignored this Court's Orders. They attempted to evade service and continue to evade service on behalf of Mason Hill. They are aware of the Orders and know that they are prohibited from selling or disposing of their assets in any way. They were properly

served with the Orders on April 25, 2011 and almost immediately thereafter, began advertising items and property for sale.

2. Brody and Roser Are Violating the TRO Order by Operating a New Fraudulent Scheme

Brody and Roser are also in contempt of the TRO Order enjoining them from violating Sections 5(a), 5(c) and 17(a) [15 U.S.C. §§ 77e(a), 77e(c) and 77q(a)[and Sections 10(b) and 15(a) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78o(a)] and rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]. These provisions prohibit acting as an unregistered broker, offering unregistered securities, or committing fraud in connection with the offer, sale or purchase of securities. Brody and Roser's actions outlined above demonstrate, by clear and convincing evidence, that they are continuing to fraudulently solicit securities from investors in violation of the TRO Order.

Again, the three prongs of the EEOC test for civil contempt are clearly satisfied. First, the TRO Order clearly states that the Commission presented ample evidence that the operations of Mason Hill violated the federal securities laws. The TRO Order clearly states that Brody and Roser "are temporarily restrained and enjoined from engaging in transactions, acts, practices, and courses of business described herein, and from engaging in conduct of similar purport and objection" in violation of Sections 5(a), 5(c), and 17(a) of the Securities Act, and Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5 thereunder. Clear and convincing evidence shows that before and after the Orders were served upon Defendants, they have been soliciting sales people and advertising on the Internet, offering the same investment and sales opportunities that were offered by Mason Hill and that were found to be in violation of the securities laws.

Second, clear and convincing evidence has shown that Brody and Roser have not halted their fraudulent conduct. Rather, they are continuing to operate the exact same scheme as Mason Hill, simply using different names. After Defendants received notice and proper service of the

Order, Brody testified that he and Roser had been planning to start a new business named Jensen Blair. Brody informed a number of people, including a prospective sales person and Brody's personal assistant, that he and Roser were planning to continue the business of Mason Hill, just using different names. There is evidence that both Brody and Roser had plans to leave the country in order to continue their fraudulent conduct and continue their fraudulent scheme under different names. This continued and ongoing conduct by both Brody and Roser is again in blatant disregard of the TRO Order. Third, the Defendants' conduct clearly shows that they are not being "reasonably diligent and energetic in attempting to accomplish what was ordered," but rather, they are again blatantly ignoring this Court's clear Orders.

3. Defendants Are Refusing to Comply with Expedited Discovery Pursuant to the TRO Order

Defendants have blatantly failed to comply with expedited discovery as outlined in the Commission's pending Motion to Compel Deposition Testimony of Laura A. Roser and Patrick Merrill Brody. (See Docket # 20 and 21).

C. BRODY AND ROSER'S CONTEMPT WARRANTS AN ORDER FROM THE COURT FINDING THE DEFENDANTS IN CIVIL CONTEMPT FOR FAILURE TO COMPLY WITH THIS COURT'S ORDERS.

In light of Brody and Roser's contempt, the Court should incarcerate Brody and Roser to coerce them to comply with the Orders of this Court. Enforcement of court orders through civil contempt may be either coercive, seeking to induce future behavior, or remedial, seeking to compensate the aggrieved party for losses caused by the contempt. See Bagwell, 512 U.S. at 829; FTC v. Think Achievement Corp., 144 F. Supp. 1029, 1033 (N.D. Ind. 2001). To force compliance, a court may find that incarceration is an appropriate remedy. SEC v. Bilzerian, 131 F. Supp. 2d, 10 (D.D.C. 2001); see also, SEC v. Credit Bancorp, Ltd., 2000 WL 968010 (S.D.N.Y. 2000) (failure to comply with asset freeze); Margolin, 1996 WL 447996 at 14-15

(failure to pay disgorgement); SEC v. Elmas Trading Corp., 824 F.2d 732, 733 (9th Cir. 1987) (failure to produce documents or provide accounting). The contemnor has the burden to prove that "no such realistic possibility exists" that the coercive sanction of incarceration might produce its intended result. Wellington Precious Metals, 950 F.2d at 1530. At a certain point any man will come to value freedom more than the amount of money the order requires him to pay and the humiliation of admitting he lied. Id. at 1531. Indeed, "many months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order." Id.

This type of resolution of contempt clearly falls within the Court's "broad discretion to fashion an appropriate coercive remedy. . ." Local 28, 247 F.3d at 336. Indeed, failing to take any action in light of Brody and Roser's contempt clearly threatens the Commission's recovery of sums the Court may order to be paid and threatens further loss of investor funds. As the Margolin court noted, "[d]efendant's failure to comply with the final judgment is a harm of substantial magnitude, undermining the deterrent effect of SEC enforcement actions and the enforceability of court orders." Margolin, 1996 WL 447996 at *5.

D. THE COURT SHOULD REQUIRE BRODY AND ROSER TO CEASE AND DESIST FROM DISSIPATING ASSETS IN VIOLATION OF THE ASSET FREEZE ORDER, IMMEDIATELY TRANSFER ANY FUNDS RECEIVED FROM THE IMPROPER DISSIPATION OF ASSETS TO THE COURT-APPOINTED RECEIVER, INCLUDING THE CADILLAC CTS, AND CEASE THEIR FRAUDULENT CONDUCT WITH REGARD TO OPERATING A SCHEME IDENTICAL TO MASON HILL

Brody and Roser's conduct with respect to their attempts to sell and hide assets requires the Court's sanction, as well as their continued conduct in operating a fraudulent scheme similar or identical in nature to Mason Hill. The Court should make a finding that Brody and Roser have violated the injunctive provisions of the Orders and order immediate compliance with those

provisions. In addition, the Court should order Brody to disgorge all monies he has received from the violations of the Asset Freeze Order Civil contempt may be used to compensate for injuries from noncompliance with a court order. Courts have held that disgorgement is an appropriate remedy for civil contempt. See, e.g., SEC v. Bilzerian, 131 F. Supp. 12, 18 (D.D.C. 2000); see also, SEC v. Credit Bancorp, Ltd., 2000 WL 968010 (S.D.N.Y. 2000) (failure to comply with asset freeze); Margolin, 1996 WL 447996 at 14-15 (failure to pay disgorgement); Elmas, 824 F.2d at 732, 733 (ordering disgorgement of defendant's profits as traditional trademark remedy); Abbot Laboratories v. Unlimited Beverages, Inc., 218 F.3d 1238, 1242 (11th Cir. 2000) ("[T]he court may disgorge the party in contempt of any profits it may have received."); McGregor v. Chierico, 206 F.3d 1378, 1387-88 (11th Cir. 2000); Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1521 (11th Cir. 1990); see also Leman v. Klentler-Arnold Hinge Last Co., 284 U.S. 448, 455-56 (1932). Such profits from selling of assets or other violations of this Court's Orders should be immediately transferred to the Court-appointed Receiver in this matter. These holdings are consistent with the general proposition that district courts enjoy wide discretion to fashion an equitable remedy for civil contempt. United States v. City of Miami, 195 F.3d 1292, 1298 (11th Cir. 1999). If Brody and Roser continue to violate this Court's Orders, additional equitable remedies may be required, including an order enjoining them from handling any funds of others or a prohibition on the purchase and sale of securities by Brody and Roser for anyone other than themselves through transactions effected through broker-dealers registered with the Commission.

E. THE COURT SHOULD AWARD ATTORNEYS FEES'

A party may recover attorneys' fees and expenses incurred in prosecuting a contempt. Premium Nutritional Products, Inc. v. Ducote, 571 F.Supp.2d 1216, 1220 (D.Kan. 2008). See

also Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224, 227 (10th Cir. 1980) (Court may award compensatory attorneys' fees in civil contempt proceeding). The court may award attorneys' fees and costs, regardless of whether the infringer acted willfully. John Zink Co. v. Zink, 241 F.3d 1256, 1261-62 (10th Cir. 2001).

The Commission is entitled to an award of the costs and fees incurred by it in bringing this contempt motion. In the event that the Court makes a finding that Brody and Roser are in contempt of the Orders, the Court should permit the Commission to submit a bill of the reasonable fees and costs incurred in bringing this motion.

CONCLUSION

For the reasons set forth above, the Commission respectfully urges this Court to grant its motion for an order to show cause and hold Brody and Roser in civil contempt for failure to abide by this Court's TRO Order and Asset Freeze Order, and for all other appropriate relief.

Respectfully submitted this 13th day of May 2011.

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