

**IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

MARIE MURPHY, Special Deputy)
Commissioner of Commerce and Insurance)
for the State of Tennessee,)
))
Petitioner,)
))
v.)
))
SMART DATA SOLUTIONS, LLC,)
a Tennessee limited liability company,)
et al.,)
))
Respondents.)

No. 10-507-III

**Petition for Contempt v.
Posey, Bachman and others**

FILED
2011 APR 18 AM 11:22
 CLERMONT & ASSOCIATES, P.C.
 DAVIDSON COUNTY, TENNESSEE
 D.C. & M.

 PETITIONER'S STATEMENT FOR SCHEDULING CONFERENCE

Introduction

Petitioner, Marie Murphy, in her capacity as Special Deputy Commissioner of Commerce and Insurance for the State of Tennessee, and as Statutory Liquidator/Receiver of Smart Data Solutions, LLC (SDS), American Trade Association, Inc., and American Trade Association LLC (together, ATA) and Serve America Assurance (SAA), through counsel, submits this statement for the scheduling conference on the Verified Petition Seeking Damages for Civil Contempt.

The Petitioner agrees with this Court that the series of matters asserted in the Contempt Petition are not well-suited to the typical contempt proceeding in which a discrete event or instance of contempt is at issue, with a single defendant or contemnor. Thus, a framework proposed by the Court leading to the trial of the Contempt Petition is more efficient and manageable. The Scheduling Conference may tend to flesh out the outline by the Court about the conduct of the hearing, and any answers, briefing or preparation required before then.

The suggestion of the Evans Petree PC attorneys' counsel that a period of at least 90 days for discovery seems reasonable. Depending on whether there is written discovery in addition to required depositions and whether the parties are able to agree about the use of exhibits that the Petitioner has already tendered, the time needed for discovery would be affected. A period of 90 – 120 days would be appropriate. It is anticipated that some of these matters may be worked out at the scheduling conference, and that other discussions may begin thereafter.

Alleged Instances of Contempt

The Petitioner agrees that the six items listed by the Court are the main instances of contempt, and set out the main pecuniary damage items known and believed to arise from the series of contemptuous activities by all Alleged Contemnors. The last item identified by the Court, "Funds derived from the business previously conducted by SDS/ATA, or the members of ATA, were otherwise paid to, or through, or by the direction of any of the Alleged Contemnors to themselves or to other persons" is also appropriate, and not merely a sum of other items.

Item 6 is properly distinguished from the Court's item 5 (any other premium income not listed in items 1-4 for the months of April and May 2010), because other income streams from the SDS/ATA members may have been diverted by the Alleged Contemnors. Item 6 is meant to encompass those other items of loss or damage resulting from injunction violations by concealed conduct of business. Thus, there may be other activities that are part and parcel of the Alleged Contemnors' conduct. There may be other transactions in connection with the incipient establishment of an alternative business to that of SDS and ATA, whether or not fully implemented, that may have diverted additional funds belonging to the receivership entities or that should have at

been held by the receiver pending resolution of entitlement. Item 6 covers those contemptuous activities.

The Petitioner would also suggest that the instances of contempt violating the terms of the Seizure and Liquidation orders must include or reference that they include all unlawful means by which the diversion of receivership assets and harm to the receivership were achieved.

This could be an item 7: From and after the entry of the Seizure Order, the Alleged Contemnors each participated in and knowingly coordinated and conducted the business of ATA/SDS, whether under that name or transformed into different business names or conduits such as Best Benefits Association or Quality Benefits Group, so as to interfere with the receiver and the conduct of this proceeding, by carrying on the enjoined business without those acts having been controlled or authorized by the Commissioner, or sanctioned by the Court.

These acts included, but are not limited to, the Alleged Contemnors, including the attorneys:

-- orchestrating, encouraging and accepting the marketers' purported retroactive terminations written on or about April 15, 2010;

-- making misrepresentations during the period of Seizure about the approval of any plans or activities by the Commissioner, the State, or the Court;

-- arranging and causing PlanRx to use ATA/SDS's membership rolls and proprietary information for the supposed new business;

-- issuing the directions that allowed any money to be diverted rather than returned to the Commissioner;

-- communicating in any manner on behalf of SDS/ATA or as counsel to SDS/ATA or the Poseys to any outside persons or to each other in the conduct of this business plan.

These acts all violated the Seizure Order's bar against conduct of business and interference with the receiver and harmed the liquidation. These activities are reflected in the records and exhibits attached to the Contempt Petition, but are not believed to be fully known at this time.

The Case Should Proceed

Discovery should not wait for the conclusion of the appellate review of the liquidation order. The Court's July 14, 2010, order has already denied a motion for stay pending appeal for which Respondent Mr. Hendricks was an attorney for Respondent Mr. Posey.

Practical and legal considerations militate against waiting to resolve the alleged contempt. Practical considerations include a need for gathering additional facts to determine the extent of unknown violations. It took the Petitioner a considerable amount of time to gather the facts now known. Further delay could lead to further diversion or loss. Respondent Mr. Hendricks has already appeared in this Court on Petitioner's motion to turn over funds to the Petitioner. Respondent Mr. Kitai said he would turn over funds and failed to do so.

The Petitioner asserts from the record of this matter that the Alleged Contemnors unequivocally were prohibited from meddling with the business or diverting or affecting assets from the premiums of members. The April 1, 2010, Evans Petree account turnover motion, and the motion to amend the seizure order terms heard on April 16, 2010 accentuate that point. Even more so, where it is apparent that at least the lawyer respondents are going to argue there was no disobedience, and no willfulness, this matter must be resolved, in case there is a need to prevent any ongoing violations as well.

Legally, the appeal does not foreclose the determination of whether there is a contempt, nor imply under these circumstances that the Petitioner lacks entitlement to relief for violations of the

seizure and liquidation orders. The Liquidation Order has not been stayed pending appeal, precisely because it is an order of injunction and receivership, and in part because of the initial information the Petitioner had about the conduct at issue, which has continued to be investigated.

Konvalinka, 249 S.W.3d 346, 354 and following (Tenn. 2008) includes the requirement that the order being violated was lawful. The terms of the Seizure Order, even upon motion to amend it, were never weakened. The Liquidation Order amplified and made permanent the provisions to secure the assets and shut down the business. The Court's orders did not lack jurisdiction, and were not void.

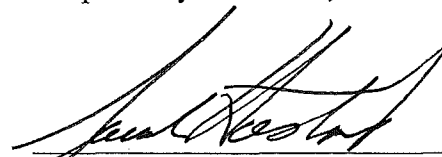
Conversion

The Petitioner has also alleged conversion. Contempt and conversion arise out of the same set of facts. Conversion is the appropriation of another's property to one's own use and benefit, by the intentional exercise of dominion over it, in exclusion or defiance of the true owner's rights. *Barger v. Webb*, 39 S.W. 2d 664 (Tenn. 1965); *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988). Contempt and conversion are not mutually exclusive and can be handled with judicial efficiency in the Petitioner's action.

Conclusion

For the above reasons, the Petitioner respectfully requests that this case proceed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Statement for Scheduling Conference is being served by U.S. mail, postage prepaid, addressed to the parties and interested entities listed below, or via email as indicated, this 18 day of April, 2011.

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