

**IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
DAVIDSON COUNTY**

MARIE MURPHY, Special Deputy)	
Commissioner of the Tennessee)	
Department of Commerce and)	
Insurance,)	
)	
Petitioner,)	No. 10-507-III
)	
v.)	Petition for Contempt v.
)	Posey, Bachman, et al.
SMART DATA SOLUTIONS, LLC,)	
et al.,)	
)	
Respondents.)	

**POSEY AND BACHMAN MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO STAY PROCEEDINGS**

Respondents Bart S. Posey, Sr. and Richard H. Bachman join the Lawyers' Motion to Dismiss or, in the Alternative, to Stay Proceedings. The grounds asserted in that motion, and the arguments presented in the supporting legal memorandum, apply equally to Posey and Bachman.

First, the Court lacked subject matter jurisdiction to enter the seizure order with respect to American Trade Association, Inc. The order was entered under Tennessee Code Section 56-9-201, which authorizes proceedings only "with respect to a domestic insurer." Tenn. Code Ann. § 56-9-201(a). Because ATA is not a domestic insurer, the seizure order was unauthorized to the extent that it was with respect to ATA. And because the contempt petition concerns funds allegedly owed to ATA, the allegations do

not concern violations of a lawful order. *See Konvalinka v. Chattanooga-Hamilton Co. Hospital*, 249 S.W.3d 346, 354 (Tenn. 2008).

Second, the contempt petition does not definitely and specifically allege the conduct and actors at issue. Contempt proceedings are designed to be abbreviated, and the parties generally do not have access to the discovery process or other procedural protections. The rights of a respondent are protected not by elaborate procedures, but by the requirement that the petitioner definitely and specifically identify the charges and present the evidence supporting those charges. The respondent is then required only to respond to the charges and evidence in a show cause hearing. In this case a contempt proceeding is impossible because the State has failed to definitely and specifically identify the alleged violations and violators. The State admits the need to gather additional facts, and the Court has recognized the need to clarify the State's allegations. But these are steps that should be taken before a contempt petition is filed, not after. The petition should therefore be dismissed without prejudice.

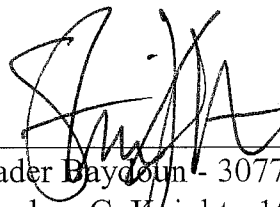
Third, the provisions of the seizure order relied on by the State are insufficiently precise to support a contempt finding. To justify a finding of civil contempt, an order must "expressly and precisely spell[] out the details of compliance in a way that will enable reasonable persons to know exactly what actions are forbidden." *Konvalinka*, 249 S.W.3d at 355. In this case, two presumably reasonable actors, CITM and Special Deputy Receiver Eggers, have expressed views that cast doubt on the applicability of the seizure

order provisions to the conduct at issue. Further, the State has been unable to connect specific instances of alleged misconduct with specific provisions of the seizure order.

Fourth, the record already demonstrates that the State cannot establish a “willful” violation. As is noted above, CITM has taken the position that the funds at issue did not belong to ATA, and Eggers has acknowledged that this position seems to be justified by CITM’s marketer agreement. (4/12/11 Statement, at Tab A, pp. 1-2). At most, the contempt petition involves an honest disagreement that should not be resolved by means of a contempt petition.

Respondents Posey and Bachman respectfully request that the Court dismiss the contempt petition. In the alternative, they respectfully request that the Court stay this proceeding until the pending appeal is resolved.

Respectfully submitted:



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Notice of Hearing: This motion is scheduled to be heard on June 10, 2011, at 11:00 a.m. Failure to timely file and serve a written response to this motion may result in the Court granting the motion without further hearing.

CERTIFICATE OF SERVICE

I hereby certify this 5th day of May, 2011, that the foregoing pleading was served by U.S. mail, postage prepaid, to the parties and interested entities listed below:

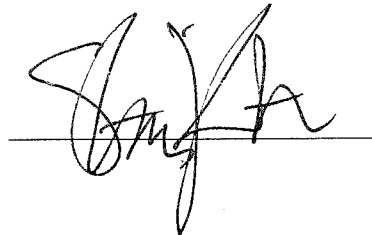
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A handwritten signature in black ink, appearing to read "Craig V. Gabbert, Jr.", is written over a horizontal line.