

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

LESLIE NEWMAN, Commissioner of the)
Tennessee Department of Commerce and)
Insurance, (Marie Murphy, Special Deputy)
Commissioner of Commerce and Insurance)
for the State of Tennessee))

Petitioner,)

VS.)

SMART DATA SOLUTIONS, LLC, a)
Tennessee limited liability company,)
AMERICAN TRADE ASSOCIATION, INC.,)
an Indiana nonprofit corporation with its)
principal place of business in Tennessee,)
AMERICAN TRADE ASSOCIATION, LLC,)
an Arkansas limited liability company, SERVE)
AMERICA ASSURANCE, a corporation)
with an unknown location, BART S. POSEY,)
SR., ANGIE POSEY, OBED W. KIRKPATRICK)
SR., LINDA KIRKPATRICK, RICHARD H.)
BACHMAN, KRISTY WRIGHT, WILLIAM M.)
WORTHY, II, and COLIN YUELL,)

Respondents.)

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DAVIDSON CO. CHANCERY C
D.C. &
NO. 10-507-III
Petition for Contempt v.
Posey, Bachman, et al.

MEMORANDUM AND ORDER

This matter is before the Court on the motion of respondents Evans, Petree P.C. and three members of that firm, attorneys Hendricks, Kitai and Hensley, and the motion of respondents Richard Bachman and Bart Posey to dismiss the Commissioner's Petition Seeking Damages for Civil Contempt and Other Appropriate Relief ("Contempt Petition").

After considering the papers, the Court denies the motions as follows.

1. The Court dismisses the respondents' defense to the Contempt Petition of lack of subject matter jurisdiction. This defense is based on the respondents' assertion that ATA is not a domestic insurer subject to Tennessee seizure law, and, therefore, this Court lacked subject matter jurisdiction to include ATA in the seizure order and lacks subject matter jurisdiction to proceed with contempt of that order.

The Court finds that ATA was a Tennessee corporation at the time of the seizure. The finding is based upon this list of facts of record gathered and cited by the petitioner in opposition to the motion to dismiss:

- 2/26/10 ATA filed a Tennessee Charter (Exhibit 5 to March 30, 2010 Supplemental Robert Heisse Affidavit)
- 3/1/10 Indiana Secretary of State issues certificate of dissolution of ATA as Indiana corporation (April 5, 2010 Bart Posey Affidavit)
- 3/19/10 Tennessee Secretary of State filed an acknowledgment of ATA as a Tennessee corporation with an ATA check attached from Springfield, Tennessee (Exhibit 5 to March 30, 2010 Supplemental Robert Heisse Affidavit)
- 3/30/10 ATA is reinstated as an Indiana corporation for the limited purpose of allowing the transfer and merger of ATA into American Trade Association, Inc., a Tennessee nonprofit corporation formed on or about March 19, 2010 (Paragraph 17 of April 5, 2010 Bart Posey Affidavit)

In addition to these facts which establish that ATA was a Tennessee corporation at the time of the seizure, another basis for subject matter jurisdiction is the determination by the Tennessee Court of Appeals at footnote 7 of its June 3, 2011 opinion affirming that SDS

and ATA “were collaborators and commingling funds such that the accounts and actions of SDS and ATA shall be considered together and in totality in analyzing the question of insolvency.” It is undisputed that SDS was incorporated in Tennessee on November 22, 2005, well in advance of the seizure order.

2. The Court denies the respondents’ claim that: (a) the Contempt Petition does not definitely and specifically allege the contemptuous actions at issue, alleged violations and violators and (b) provisions of the seizure order are insufficiently precise to support a contempt finding.

On the respondents’ side is that the Contempt Petition is not brief. The Petition consists of 54 allegations and is 24 pages. The Court initially questioned whether such a voluminous petition was a valid means to state contempt. After more consideration, however, the Court concludes that the Contempt Petition is valid, for two reasons.

First, this is an unusual case because the alleged contempt was performed by a number of individuals allegedly collaborating through numerous exhibits and communications with respect to a series of diversion of funds. Under these circumstances, it is not possible to state contempt charges in a short list. That method risks objections by the respondents that the charges are not sufficiently detailed.

Secondly, the focus in judging a contempt petition is notice to the alleged contemnors. That is, whether the contemnors are provided notice of the misconduct they are accused of

so as to be able to prepare a defense. Applying this standard to the papers filed herein, the Court concludes that the respondents have received good notice in this case. In particular, the petitioner has filed, as an appendix to its June 3, 2011 response in opposition to the motion to dismiss contempt, a chart correlating the allegations stated in the Contempt Petition with a list of the specific individuals allegedly involved and the provisions of the seizure order allegedly violated which provides the respondents sufficient notice to prepare a defense.

Similarly, the respondents' claim that the seizure order is not sufficiently specific is denied. The Court has judged the seizure order based upon the statement in *Konvalinka v. Chattanooga-Hamilton Co. Hospital*, 249 S.W.3d 346 (Tenn. 2008) that the context of the events going on at the time the order was issued and the knowledge of the persons involved inform whether the order allegedly violated was specific. The Court finds that the alleged contemnors, as revealed by their affidavits and papers filed with this Court at the time of the seizure order, knew or should have known that the conduct alleged in the contempt petition was forbidden by the seizure order. The Court finds, from correlating the events at the time as revealed in the affidavits filed by the respondents and papers filed by them with the provisions of the seizure order, that the respondents knew or should have known that they did not have the power, without further order, clarification or modification from the Court, to change the status quo or to direct income money to different payees or alter the

fundamental structure of the business and appropriate their assets elsewhere as alleged in the Contempt Petition.

3. The Court denies the respondents' claim that the Contempt Petition must be dismissed because of the statement of Special Deputy Eggers in an April 22, 2010 email allegedly acknowledging the merit of the view that the diversion of funds taking place was not the funds of ATA. The respondents characterize this statement as an admission and reason that if the funds did not belong to ATA, the funds were not governed by the seizure order and diversion of those funds is not susceptible to contempt charges.

As noted by the Court in its March 23, 2011 order, initiation of a civil contempt requires filing of a sworn statement demonstrating that there is "probable cause" to believe there is civil contempt. 17 AM. JUR. 2D *Contempt* § 182 (2d ed. 2010). Applying that standard to the respondents' contempt defense that the Eggers April 22, 2010 statement is an admission, the Court concludes that the Eggers statement is not dispositive at this juncture. At pages 25-28 of the June 3, 2010 opposition of the petitioner to the motion to dismiss the Contempt Petition, the petitioner argues that facts were withheld from Mr. Eggers at the time he made the statement, and, therefore, his uninformed statement can not constitute an admission. There exists, then, competing characterizations by the parties of the surrounding events that inform Mr. Eggers' statement. These competing characterizations preclude the Court from disposing of the Contempt Petition at this time. The contention that

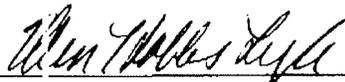
the Eggers' statement is an admission detrimental to the position taken by the petitioner will have to be determined by the Court in the context of an evidentiary hearing.

The same holds true with respect to the "willfulness" element of the alleged contempt. Willfulness is a question of fact and depends upon the surrounding events, circumstantial evidence and inferences. There are sufficient circumstances stated in the Contempt Petition to establish probable cause on the willfulness element and to proceed with an evidentiary hearing for the Court to determine the element in the context of all the proof.

It is therefore ORDERED that the motions to dismiss are denied, and the Contempt Petition shall proceed.

It is further ORDERED that to assist the Court in preparing this matter for hearing, the parties shall file, on or before July 8, 2011, legal authority for or against the proposition that the petitioner's claim for conversion can be tried alongside the contempt petition. The Court understands the point that both claims emanate from the same set of facts such that it would be more efficient and preclude inconsistent results to try the claims together. Nevertheless, before the Court proceeds to do that, it requires legal authority that to join the claims is not contrary to Tennessee law or an agreed order signed by the parties consenting to a trial of the conversion claim with the Contempt Petition.

Additionally due to a scheduling conflict, the Court must reschedule the October 24, 2011 evidentiary hearing to October 18-20. If by July 8, 2011, the Docket Clerk (862-5719) has received no objections to this rescheduling, the Court shall issue an order moving the hearing to October 18-20, 2011.



ELLEN HOBBS LYLE
CHANCELLOR

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Best Benefits Association, Inc.
Quality Benefits Group, LLC

COPIES TO ATTORNEYS AND PRO SE LITIGANTS
AT THE ABOVE ADDRESSES

DATE 6/27/11 CLERK CS