

**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 YOEUELL, )

Respondents. )

2011 MAR 23 PM 3:32  
CLERMONT MASTER  
DAVIDSON CO. CHANCERY CT.  
D.C.&M.

**FILED**

NO. 10-507-III

Petition for Contempt v.  
Posey, Bachman, et al.

**MEMORANDUM AND ORDER**

This lawsuit was filed by the Commissioner for the Tennessee Department of  
Commerce and Insurance to liquidate certain entities: Smart Data Solutions, LLC (“SDS”);  
American Trade Association, Inc. and American Trade Association, LLC (collectively

referred to as “ATA”); and Serve America Assurance (“SAA”). The Commissioner’s claim was that these entities were transacting insurance business in Tennessee in a manner that posed a significant hazard to the public and that the entities were insolvent. On these claims the Commissioner prevailed, and in May of 2010, this Court entered a Final Order of liquidation of SDS, ATA and SAA.

The phase the case is now in is that the Commissioner, as statutory liquidator/receiver, is processing and determining proofs of claim as well as marshaling the assets and claims of the liquidated entities.

The case is presently before the Court on the Commissioner’s Petition Seeking Damages for Civil Contempt and Other Appropriate Relief<sup>1</sup> against eight individuals and entities: Bart S. Posey, Sr.; Richard H. Bachman; William L. Hendricks, Jr.; Russell J. Hensley; Theodore T. Kitai; Evans Petree PC; Best Benefits Association, Inc.; and Quality Benefits Group, LLC (the “Alleged Contemnors”). The Contempt Petition alleges 6 instances of contempt:

1. On or about March 29, 2010, and consistent with instructions received from some combination of Bart Posey, Richard Bachman and William Hendricks, the amount of \$75,000.00 was wired to Plan Rx;
2. On or about April 29, 2010, and consistent with instructions received from some combination of Bart Posey, Richard Bachman and William

---

<sup>1</sup>Utilizing the procedure authorized in the February 4, 2011 Memorandum and Order for “a case within the case,” the Commissioner has provided in the caption above a subcaption of “Petition for Contempt v. Posey, Bachman, et al.” which, under the February 4, 2011 Order, triggers the Clerk and Master creating a separate folder for the contempt petition and filings related to that within the Court’s file.

Hendricks, the amount of \$374,616.79 was wired to Best Benefits Association, Inc. ("BBA"), a Mississippi non-profit corporation;

3. On or about April 29, 2010, and consistent with instructions received from some combination of Bart Posey, Richard Bachman and William Hendricks, the amount of \$75,000.00 was wired to Plan Rx;
4. On or about April 30, 2010, and consistent with instructions received from some combination of William Hendricks and Robert Garner, the amount of \$515,396.72 was wired to Robert Garner's trust account;
5. The actions of the Alleged Contemnors resulted in the receivership estate not receiving premium income for April and May 2010; and
6. 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.

These transactions, the Commissioner asserts, violated orders entered by this Court dated, respectively, March 23, 2010; April 14, 2010; and May 20, 2010. These orders granted the Commissioner possession and control of the property of ATA/SDS/SAA "in whatever form and wherever located"; enjoined waste or disposition of their assets; enjoined "the transaction of [their] business except with the written consent of the Commissioner"; and provided that "no person shall obstruct or interfere with the Commissioner in the conduct of this seizure[.]" The Contempt Petition claims that the instances of alleged contempt, listed above, violated the Court orders in that the Alleged Contemnors obstructed and interfered with the Commissioner's conduct of seizure, and/or diverted and wasted monies derived from ATA members that would have been paid into the SDS account for liquidation and payment

of claims. The Commissioner seeks for the Court to issue orders setting a date for a hearing for the Alleged Contemnors to show cause why they should not be held in contempt for violating the Court orders.

After thoroughly reviewing the Contempt Petition and the supporting affidavits and exhibits, the Court determines that the best way to proceed is for the Petitioner and the Alleged Contemnors to attend a scheduling conference to: (1) set the date for a hearing on the Contempt Petition and (2) determine how the proceedings shall be conducted. As to the latter, the Court instructs the parties to consider and be prepared to address the following.

(1) Procedure for Contempt Hearing

Civil contempt claims based upon alleged disobedience of a court order have four essential elements:

First, the order alleged to have been violated must be "lawful." Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person's violation of the order must be "willful."

*Konvalinka v. Chattanooga-Hamil. Cty Hosp.*, 249 S.W.3d 346, 354 (Tenn. 2008).

Customarily in Tennessee courts, the procedure used to process a claim of civil contempt is a show cause hearing. That is the process requested in the Contempt Petition.

The method of a show cause hearing is that the movant files a sworn statement or affidavit from which a court determines that there is probable cause to believe that there is civil contempt. 17 AM. JUR 2D *Contempt* § 182 (2d ed. 2010). The court's determination of probable cause "moves the burden to the opposing party to show why he or she should not be found in contempt of court." *Id.* "Before a person can be found guilty of indirect contempt not committed in the presence of the court, he or she must have due and reasonable notice of the proceeding. A court must issue a valid show cause order or equivalent legal process, based upon a sufficient initiatory accusation, apprising the contemnor of the accusation for a contempt judgment to be valid." *Id.* at § 129. The person accused of contempt "is entitled, among other things, to have the charges definitely and specifically set forth in the rule to show cause or other process. To be valid, an order to show cause must state facts which, if true, would constitute contempt." *Id.* See also, GIBSON'S SUITS IN CHANCERY § 25.04 (8th ed., William H. Inman (rev. ed.) 2004)).

Show cause hearings on contempt petitions are workable and appropriate where there are one or a few specific allegations of contempt, for example, failure to pay child support. In that kind of case, an act or acts of contempt can be definitely charged and specifically set forth in the contempt petition, and the petitioner can easily address the four essential elements for civil contempt, identified in *Konvalinka*, in their contempt petition thereby enabling the court to use the show cause procedure.

In more complicated cases, however, such as the Contempt Petition in issue, where there are multiple allegations of contempt based upon allegations of collaboration among numerous parties and proven by piecing together numerous exhibits and communications, using the customary show cause procedure is not workable. In this case if the Court were to proceed with the show cause procedure of the verified Contempt Petition providing probable cause to move the burden to the Alleged Contemnors, the contempt hearing would require the Alleged Contemnors, in the first instance, to put on proof to disprove and/or overcome as a matter of law the 54 allegations in the 24-page Contempt Petition. Such a procedure would be chaotic and not provide a meaningful process for the Court to ferret out the facts and conclusions of law necessary to determine the Contempt Petition.

Accordingly, the process the Court is considering using at the contempt hearing is to convene an evidentiary hearing in which the Commissioner will present the Court with proof to establish the four essential *Konvalinka* elements of civil contempt. The Alleged Contemnors will be provided an opportunity to cross examine the Commissioner's witnesses. At the conclusion of the Commissioner's proof, the Alleged Contemnors will be given the opportunity to make a motion to dismiss. At that point, the Court will determine if the Commissioner has made out a case of the four essential *Konvalinka* elements of civil contempt and, if so, shift the burden to the Alleged Contemnors to show cause why they should not be held in contempt. At which time the Alleged Contemnors would be provided an opportunity to present proof.

(2) Time Limits; Length of Hearing

In addition to discussing the procedure to be used at the contempt hearing, the Court further instructs the parties that the Court is considering imposing time limits on each party's proof. That, as well, needs to be considered by the parties, and they should be prepared to address time limits with the Court at the scheduling conference. Also, the Court will need an estimate from the parties of the length of the hearing (e.g. 3 days, a week).


(3) Definite, Clear List of Contempt Charges

*Supra* at 2-3, the Court stated succinctly the alleged instances of contempt the Court gleaned from the Contempt Petition. The Petitioner will be asked by the Court at the scheduling conference if this is an accurate and complete list, and, if it is not, at the conference such a list shall be prepared.

(4) Preliminary Motions

The Alleged Contemnors will be asked at the conference whether there are any defenses, purely as a matter of law, which they intend to make and if those should be heard prior to the evidentiary hearing on contempt.

It is therefore ORDERED that the Commissioner and the Alleged Contemnors shall attend a scheduling conference on Tuesday, April 19, 2011, at 1:30 p.m., to set a date for the contempt hearing and to address the matters detailed above.

  
\_\_\_\_\_  
ELLEN HOBBS LYLE  
CHANCELLOR

cc: Sarah Hiestand, Lyndsay Sanders, Robert Garfinkle  
Attorneys for the Petitioner

Nader Baydoun, Stephen Knight  
Attorneys for Bart S. Posey and Richard Bachman

E. Wood Weathersby  
Attorney for Evans Petree PC

William Hendricks, Jr.  
Theodore T. Kitai  
Russell Hensley  
Best Benefits Association, Inc.  
Quality Benefits Group, LLC