

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT, PART III

CHLORA A. LINDLEY-MYERS, Special)
 Deputy Commissioner of the Tennessee)
 Department of Commerce and Insurance,)
)
 Petitioner,)
)
 v.)
)
 SMART DATA SOLUTIONS, LLC, and others,)
)
 Respondents.)

No. 10-507-III

“Petition for Contempt
 Posey, Bachman and others”

CLEMA & PARTNER
 DAVIDSON CO. CHANCERY CT.
 D.C. & M.

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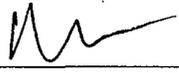
MOTION TO RECONSIDER
THE RULING REGARDING THE PLANRX WIRES

Evans Petree, P.C., William Hendricks, Russell Hensley, and Theodore Kitai respectfully move the Court, pursuant to Tennessee Rule of Civil Procedure 60, to reconsider that portion of the April 2, 2012 Memorandum & Order holding these respondents in contempt for two wires CITM made to PlanRx.¹ The movants have filed a memorandum in support of this motion, to which they have attached relevant portions of the trial record.

¹ This motion normally would be filed pursuant to Tennessee Rule of Civil Procedure 59.05 as a motion to alter or amend a judgment. The April 2, 2012 Order, however, is not a judgment due to the unresolved issue of the fees to be awarded to the Liquidator. Movants respectfully submit that there is no reason to delay raising the issue raised by this motion concerning the April 2, 2012 Order until after judgment is entered in this case.

Respectfully submitted by,

HARWELL HOWARD HYNE
GABBERT & MANNER, P.C.

By: 

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*Attorneys for Evans Petree, P.C.; William L. Hendricks, Jr.;
Russell Hensley; and Theodore Kitai*

NOTICE OF HEARING: MOVANTS ANTICIPATE ASKING THE COURT TO SET THIS MOTION FOR HEARING ON JUNE 14, 2012, AT 9:30 A.M., WHICH IS THE DATE AND TIME FOR WHICH THE COURT HAS SCHEDULED A HEARING ON THE LIQUIDATOR'S FEE APPLICATION IN THIS CASE. FAILURE TO FILE AND SERVE A TIMELY WRITTEN RESPONSE TO THE MOTION MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.

Certificate of Service

On May 31, 2012, I caused this document to be sent by email and by U.S. Mail to:

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Garfinkle, McLemore & Young, PLLC
2000 Richard Jones Road, Suite 250
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D. Alexander Fardon

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**MEMORANDUM SUPPORTING MOTION TO RECONSIDER
THE RULING REGARDING THE PLANRX WIRES**

Evans Petree, P.C., William Hendricks, Russell Hensley, and Theodore Kitai have moved the Court to reconsider that portion of the April 2, 2012 Memorandum & Order holding these respondents in contempt for two wires CITM made to PlanRx: \$75,000 on March 29, 2010 and another \$75,000 on April 29, 2010. The Court found that this \$150,000 either had been drafted from customers of the ATA program or was derived from a marketer and customer base proprietary to ATA (4/2/12 Order p. 17). The Court held all the respondents, including Evans Petree and the Lawyers, liable for contempt with respect to these wires to PlanRx (*id.* pp. 16-18, 24). Evans Petree and the Lawyers respectfully request that, with the benefit of the transcript, the Court consider whether the evidence supports this finding with respect to these respondents.

The Evidence Concerning the PlanRx Wires

Teresa Smith of CITM emailed Bill Hendricks on March 26, 2010, telling Hendricks that she needed to know “if I am paying PlanRx” (Smith Depo. pp. 63-64; Tr. Exs. 22, 29).¹

¹ All portions of the trial record cited in this memorandum are attached to it: Teresa Smith deposition transcript excerpts behind Tab A; trial transcript excerpts behind Tab B; trial exhibits (counsel’s copies from the trial) behind Tab C.

Hendricks emailed in response that Smith should wire all money CITM was holding for SDS to the SDS account he had created for that purpose (Smith Depo. pp. 64-65; Tr. Exs. 22, 29).

After Hendricks gave those instructions, Smith participated in a conference call with Rick Bachman of SDS and Terry Surrency of PlanRx (Smith Depo. pp. 65-66). Bachman and Surrency “came to agreement between each other” (*id.* p. 66). CITM as a result of that agreement wired \$75,000 to PlanRx on March 29 (*id.* pp. 66-67, 211). Smith testified:

Q. And was wiring \$75,000 directly to PlanRx consistent with the instructions Bill Hendricks had given you in this March 29th e-mail at 1:45 p.m.?

A. No, it’s not.

Q. Do you know if Bill Hendricks even knew about the phone call between Bachman and Surrency that resulted in the wire to PlanRx?

A. I don’t even know if he was involved in the call or not.

(*id.* p. 211).

Hendricks himself testified that he did not know of either CITM wire to PlanRx until he was served with the contempt petition in 2011 (Trial Tr. pp. 367-68). Rusty Hensley also testified that he did not know of any wire to PlanRx until he was served with the contempt petition (*id.* p. 514). Ted Kitai testified that he did not know about the CITM wires to PlanRx until this case was filed (*id.* p. 589). There was no evidence to the contrary.

The Memorandum & Order states that, when the Lawyers transferred to the Receivership on April 1, 2010 the \$851,128.98 that CITM had wired into the SDS account, Hendricks “knew of the \$75,000 being paid to PlanRx, and he did not provide this information to the Court” (4/2/12 Order p. 24). But the record does not support that statement. There was no evidence that Hendricks knew that CITM had wired \$75,000 – or any other amount – to PlanRx. If the Court based its finding to the contrary on an impression that CITM had told Hendricks that CITM was

holding more SDS money than the \$851,128.98 CITM then wired to the SDS account, that impression also would not be supported by the record. Hendricks testified:

Q. Your e-mail to Ms. Smith on March 29 [Tr. Exs. 22, 29] where you say, “All is to be wired into the escrow account, and any disbursements will be handled through our office. Thanks, Bill.” Did you know when you used the word “all” how much money CITM was holding for SDS?

A. I don’t believe I did. By the tone of this, it appears I didn’t. I would usually be a little more specific than that.

(Trial Tr. p. 369). Hendricks thus had no way of knowing that the \$851,128.98 CITM wired to the SDS account was not all the SDS funds CITM was holding at the time, let alone that CITM had held back \$75,000 and then sent that money to PlanRx contrary to Hendricks’s instructions.

The Memorandum & Order also states that the Lawyers’ “work in setting up BBA and Hendricks’ acceptance of termination letters enabled Bachman and Posey to misuse the Companies’ proprietary marketer and customer base to pay \$150,000 to maintain the business relationship” with PlanRx (4/2/12 Order p. 16). But CITM sent the first \$75,000 wire to PlanRx on March 29, before Hendricks received the termination emails on April 15 (Trial Exs. 42-45) and before BBA was formed on April 20 (Trial Ex. 6(B)). CITM, Bachman, and Posey thus did not need any lawyer to do anything to enable them to wire funds to PlanRx.

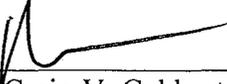
Conclusion

The Court has found that the \$150,000 CITM wired to PlanRx should have gone to the Receivership. Evans Petree and the Lawyers do not dispute that, given that finding, the evidence supports a finding of contempt against Bachman (and would have supported such a finding against CITM). But the same evidence shows that Evans Petree and the Lawyers did not participate in, condone, enable, or even know about those wires. To the extent the Court was under the impression that Hendricks knew from the amount CITM had wired to the SDS account

that CITM must have ignored his instructions not to send money to PlanRx, the trial record should dispel that impression. Evans Petree and the Lawyers therefore respectfully request that the Court reconsider its decision to hold them in contempt with respect to the PlanRx wires and that the Court reduce the damages awarded against Evans Petree and the Lawyers by \$150,000.

Respectfully submitted by,

HARWELL HOWARD HYNE
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By: 

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