

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

CIVIL ACTION NO.
1:04-CV-2763

v.

MOBILE BILLBOARDS of AMERICA,
INC., INTERNATIONAL PAYPHONE
COMPANY, RESERVE GUARANTY
TRUST, MICHAEL A. LOMAS, and
MICHAEL L. YOUNG

Defendants.

**PLAINTIFF'S APPLICATION FOR AN ORDER TO SHOW CAUSE
WHY DEFENDANT MICHAEL A. LOMAS SHOULD NOT BE HELD
IN CIVIL CONTEMPT FOR FAILING TO COMPLY WITH
THE COURT'S ORDERS FREEZING ASSETS
AND SUPPORTING BRIEF**

Plaintiff Securities and Exchange Commission ("Commission") respectfully asks the Court to issue an order to show cause why Defendant Michael A. Lomas ("Lomas") should not be held in civil contempt for his violation of this Court's September 21, 2004 orders freezing assets, appointing a receiver and granting permanent injunctions. The factual basis and legal support for ordering Lomas to show cause why he should not be held in civil contempt are set forth below.

FACTS

On August 27, 2004, the Commission began investigating Mobile Billboards of America, Inc. (“Mobile Billboards”). Early in its investigation, the Commission’s staff told the attorneys representing Mobile Billboards and Lomas that the staff would soon recommend that the Commission authorize an emergency action against Mobile Billboards and related companies based upon evidence that Mobile Billboards had misrepresented certain facts in its offering documents. Specifically, the staff suggested at this early stage that Mobile Billboards had misrepresented the number of installed billboards and had insufficient advertising revenue to make lease payments to investors. Settlement discussions ensued as the investigation was completed. The Mobile Billboards scheme raised over \$60 million by selling and leasing back billboard frames that purportedly were mounted on the sides of trucks. Because the Mobile Billboard entities never generated significant advertising revenue from selling advertisements to place on the frames, the investment operated as a Ponzi scheme with money from new investors being used to make lease payments owed to earlier investors.

On September 21, 2004, the Commission filed a complaint against the defendants, Mobile Billboards, International Payphone Corporation (“International Payphone” or “Outdoor Media”), Reserve Guaranty Trust (“Reserve Guaranty”),

Lomas and Michael L. Young (“Young”), and sought permanent injunctions, the appointment of a receiver for Mobile Billboards, International Payphone, Outdoor Media and Reserve Guaranty Trust, and accountings and a freeze of the assets of the individual defendants, Lomas and Young. Simultaneously, the defendants consented, without admitting or denying the facts in the complaint, to the permanent injunctions and asset freezes, leaving only the amounts of disgorgement, prejudgment interest and civil penalties to be determined later. The order freezing the assets of defendant Lomas, entered on September 21, 2004, allowed Lomas to withdraw \$10,000 per month from his personal assets for living expenses and permitted certain entities that were purportedly operating businesses under Lomas’s ownership and control to continue operations in the ordinary course of their businesses in order to preserve the going concern value of their assets to pay any subsequent disgorgement ordered against him. Order Granting Permanent Injunctions, Freezing Assets And Ordering Other Ancillary Relief As To Defendant Michael A. Lomas, September 21, 2004, Paragraph IV, pp. 5-6 [hereinafter “Order”].

After Lomas’s assets were frozen, he began withdrawing money from accounts that he controlled in the names of the 10-26-84 Charitable Remainder

Unitrust and the 10-26-84 LLC in violation of the Order.¹ Lomas controlled the transfer of over \$382,800 out from these accounts from September 29 through October 18, 2004, well in excess of the \$10,000 per month living allowance stipulated in this Court's freeze order, to which Lomas consented.

The withdrawals from the 10-26-84 Charitable Remainder Unitrust and the 10-26-84 LLC were as follows:

| Date | Account Name | Ending In | Amount | Payee |
|-------------|---------------------|------------------|---------------|----------------------|
| Sep-29-04 | 10/26/84 LLC | 1722 | \$17,346.14 | Cash |
| Oct-7-04 | 10/26/84 LLC | 1722 | \$4,721.64 | Cash |
| Oct-8-04 | 10/26/84 CRU | 1227 | \$38,800.00 | Michael A. Lomas |
| Oct-12-04 | 10/26/84 LLC | 1722 | \$30,000.00 | Cash |
| Oct-12-04 | 10/26/84 CRU | 1227 | \$175,000.00 | Long Beach Dev. |
| Oct-12-04 | 10/26/84 CRU | 1227 | \$75,000.00 | Walker Retail, LLC |
| Oct-15-04 | 10/26/84 CRU | 1227 | \$5,000.00 | Grandview Foundation |
| Oct-15-04 | 10/26/84 CRU | 1227 | \$30,000.00 | Walker Retail, LLC |
| Oct-18-04 | 10/26/84 LLC | 1722 | \$7,000.00 | Cash |

See Hawks, pp. 66-68, 70-72, Ex. 431, Ex. 442, 445; Hays, pp. 3-4.

¹ These two accounts were opened in the names of an entity that Lomas created and controlled. The 10-26-84 Charitable Remainder Unitrust was purportedly under the control of two trustees of Lomas's choosing. In fact, Lomas directed the transfers of funds into and out of accounts purportedly under the control of the trustees. Deposition of Lesley Hawks, May 11, 2004, pp. 12-3, 48-51, 57 [hereinafter "Hawks, p.__"] (the cited pages and exhibits from the Hawks deposition are attached hereto as Exhibit A); Declaration of S. Gregory Hays, pp. 2-4 (the Hays declaration is attached hereto as Exhibit B)

Defendant Lomas further violated this Court's order by selling a 2001 Jaguar automobile in May 2005 and paying the proceeds from that sale, \$28,500, to his current attorney. Letter dated May 5, 2005 from Nina Marino to Alex Rue and J. David Dantzler (attached hereto as Exhibit C). As shown by her letter, this sale was authorized by Lomas's attorney in the mistaken belief that Lomas had not taken the \$10,000 per month living allowance authorized in the freeze order. Thus, by moving assets away from frozen accounts in amounts greater than \$10,000 per month, defendant Lomas has willfully violated and is in contempt of the Order.

ARGUMENT

I. This Court has the Authority to Hold Michael A. Lomas in Contempt

Courts have the inherent power to enforce compliance with their lawful orders by contempt. Young v. United States ex rel Vuitton Et Fils S.A., 481 U.S. 787, 795 (1987); Shillitani v. United States, 384 U.S. 364, 370 (1966). This power is essential to the proper conduct of the judicial function, and without it, courts would be unable to assert their authority by order or decree. Young, 481 U.S. at 796; In re Williams, 306 F. Supp. 617, 618 (D.D.C. 1969). Congress codified the courts' contempt powers in 18 U.S.C. § 401, which states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and no

other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 65(d) of the Federal Rules of Civil Procedure delineates the scope of a court's injunctive order as binding "*upon the parties to the action*, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d) (emphasis added). Thus, Rule 65(d) clearly binds defendant Lomas to the court ordered injunction as he was a party to the action and consented to the entry of the order against him.

II. Holding Lomas in Civil Contempt is Appropriate Based on His Violation of This Court's Orders Freezing Assets

A party commits contempt when he or she "violates a definite and specific order requiring him [or her] to perform or refrain from performing a particular act or acts with knowledge of that order." Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987), cert. denied sub nom, Pennington v. McLaughlin, 487 U.S. 1205 (1988); SEC v. First Financial Group of Texas, Inc., 659 F.2d 660, 669 (5th Cir. 1981). Furthermore, "[c]ivil contempt proceedings are brought to enforce a court order that requires a party to act in some defined manner." Doe, 1-13 ex rel. Doe Sr. 1-13 v. Bush, 261 F.3d 1037, 1047 (11th Cir. 2001), cert. denied, Kearney v. Does 1-13, 534 U.S. 1104 (2002)(quoting Chairs v. Burgess, 143 F.3d 1432, 1436

(11th Cir. 1998)); Taylor v. Teledyne Technologies, Inc., 338 F. Supp. 2d 1323, 1345 (N.D. Ga. 2004) (same).

The Commission has the burden to show by clear and convincing evidence:

(1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order.

Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1296 (11th Cir. 2002);

McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000); Taylor, *supra*

at 1345-46; See Piambino v. Bestline Products, Inc., 645 F. Supp. 1210,

1216 (S.D. Fla. 1986) (this burden easily met when offending party admitted

knowing of the order and failing to comply). A party's willful intent to

violate a court order need not be shown before a civil contempt sanction will

be imposed, as “the focus of the court’s inquiry in civil contempt

proceedings is not on the subjective beliefs or intent of the alleged

contemnors in complying with the order, but whether in fact their conduct

complied with the order at issue.” Bush, 261 F.3d at 1047 (11th Cir. 2001)

(quoting Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1516 (11th

Cir. 1990)).

The Commission's burden is easily met in this case. Lomas personally signed the Stipulation and Consent to entry of the Court’s Order and negotiated its

specific terms. There is no question that the Order was both valid and lawful. See 15 U.S.C. §§ 77v, 78u; SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104 (2d. Cir. 1972). Furthermore, the order is written in plain English and states: “It is further ordered that, pending entry of the Final Judgment in this matter, all assets of, or under the control of, Defendant Lomas, or any agent, are frozen, except as otherwise specified herein.” Order. ¶ IV, p. 5. Thus, the Order clearly and unambiguously prohibits Lomas from using any of the frozen funds over the \$10,000 per month living expense allotment.² Additionally, since this was a consent order, there is no doubt that Lomas knew and understood the terms of the Order, including the asset freeze, before he consented to it. Finally, defendant Lomas clearly had the ability to comply with the Order. However, his withdrawals of assets from the accounts for his personal benefit and in amounts greatly exceeding the Order’s provision for monthly living expenses allotment constitute clear violations of the Court’s Order.

² The Order was entered on September 21, 2004. Lomas could have permissibly withdrawn \$110,000 before August 21, 2005. Lomas’s withdrawals exceed that amount by at least \$300,500.

III. Lomas Should be Ordered to Replace the Funds Transferred in Violation of this Court's Order

Lomas should be made to replace the funds transferred in violation of the Court's Order in excess of the \$10,000 per month living allowance. This includes the funds that he directed be paid out of the 10-26-84 accounts and the proceeds from the sale of the Jaguar automobile. Such an order is clearly within the power of this court. Civil contempt, which the Commission seeks in this case, is remedial in nature and is employed to coerce compliance with the existing court order. Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 633 (1988); Whitfield, 832 F.2d at 913; S.E.C. v. Yun, 208 F. Supp. 2d 1279, 1288 (M.D. Fla. 2002); Taylor, 338 F. Supp. 2d at 1346. If the moved funds are not replaced, this Court has broad discretion in designing a coercive contempt remedy that will bring about compliance with its original order. Perfect Fit Industries, Inc. v. Acme Quilting Co. Inc., 673 F.2d 53, 57 (2d Cir. 1982) cert. denied 459 U.S. 832 (1982). This discretion may include imprisonment to coerce the defendant into compliance. Shillitani, 384 U.S. at 370-72; Penfield Co. of California v. SEC, 330 U.S. 585, 594 (1947); In re Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980); Yun, 208 F. Supp. 2d at 1287-88.

The sanctions imposed in civil contempt proceedings ordinarily are conditional, and the contemnor may avoid the sanctions by complying with the order. Hicks, 485 U.S. at 632-34; Shillitani, 384 U.S. at 368; Penfield Co. of California, 330 U.S. at 590 (1947).³

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court Order defendant Michael Lomas to show cause why he should not be held in civil contempt for his violation of this Court's orders freezing assets, order him to replace those assets, including those funds held by his attorney, and impose those sanctions the Court deems necessary should he fail to comply with the Court's order.

Dated: August 26, 2005

Respectfully submitted,

/S/ William P. Hicks
William P. Hicks
District Trial Counsel
Georgia Bar No. 351649

³ There are two classes of proceedings for contempt -- civil and criminal. Where an order of contempt imposes conditional incarceration for the purpose of compelling defendants to obey a court order, the defendants carry "the keys of their prison in their own pockets" and the sanction is viewed as a civil remedy. Shillitani, 384 U.S. at 368; Penfield Co. of California, 330 U.S. at 590.

/S/ Alex Rue

Alex Rue
Senior Trial Counsel
Georgia Bar No. 618950
Counsel for Plaintiff
Securities and Exchange Commission
3475 Lenox Road, N.E., Suite 1000
Atlanta, Georgia 30326-1232
Tel: (404) 842-7675 (Hicks)
Tel: (404) 842-7616 (Rue)
Fax: (404) 842-7679
E-mail: Hicksw@SEC.GOV;
Ruea@sec.gov

CERTIFICATE OF SERVICE⁴

This is to certify that on August 26, 2005, I electronically filed the foregoing application and memorandum with the Clerk of Court using CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

J. David Dantzler, Jr.
James Alexander Rue
William P. Hicks
Julie M. O'Daniel
Nina Marino

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

/S/ Alex Rue
Alex Rue
Georgia Bar No. 618950
Counsel for Plaintiff
U.S. Securities and Exchange
Commission
3475 Lenox Road, N.E. Suite 1000
Atlanta, Georgia 30326-1232
Telephone: (404) 842-7616

⁴ I also certify that this document is printed in Times New Roman font, size 14, and does not contain more than ten characters per inch.