

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	Case No.: 4:05-CV-472
	§	
vs.	§	
	§	
TRAVIS E. CORRELL, individually and doing	§	Joint Motion for an Order to
business as Horizon Establishment, et al.	§	Show Cause and an Order
	§	Holding Defendant Neulan D.
Defendants,	§	Midkiff in Civil Contempt
and	§	
	§	
BANNER SHIELD, LLC; et al.	§	
	§	
Defendants Solely for	§	
Purposes of Equitable Relief.	§	

I. Preliminary Statement

Plaintiff, Securities and Exchange Commission (“Commission”), and S. Gregory Hays, the court-appointed receiver (“Receiver”), jointly file this *Motion for Order to Show Cause and Order Holding Defendant Neulan D. Midkiff in Civil Contempt* (“*Motion*”) and request that the Court enter an order to show cause and, following a hearing, an order holding Defendant Neulan D. Midkiff (“Defendant” or “Midkiff”) in civil contempt of court and imposing sanctions for his intentional violations of the orders of this Court. The Commission and Receiver respectfully request that the Court: (i) schedule this matter on the Court's calendar by entering an order to show cause and, following a hearing, entering an order holding Defendant in civil contempt of this Court; (ii) incarcerate Defendant until such time as he complies with the Court’s orders by:

(a) turning over all receivership assets and records to the Receiver; (b) making an interim accounting, under oath, (c) withdrawing any actions or proceedings which involve the Receiver or which affect the receivership assets, which he has filed or prosecuted without the permission of the Court; and (d) acknowledging to the Court that he is bound by, and will fully comply with, all orders of the Court in the above-captioned matter; (iii) assess monetary sanctions against Defendant until such time as he complies with the Court's orders as specified in subparagraphs (ii)(a) through (d), above.; and (iv) impose such additional sanctions as the Court deems appropriate.

II. Procedural History

1. On December 7, 2005, the Commission filed a *Complaint* in the above-captioned matter alleging that Defendant had violated the antifraud provisions of the federal securities laws by offering investments in a non-existent bank deposit program that defrauded investors of approximately \$36 million.¹ In addition, on that date the Commission filed an *ex parte* motion for a temporary restraining order and other ancillary relief, including the appointment of a receiver. The Court granted the requested emergency relief and entered a *Temporary Restraining Order* and *Order Appointing Receiver*, appointing S. Gregory Hays as Receiver.

2. The *Temporary Restraining Order* provided in part that the Defendant was:

...restrained and enjoined from destroying, removing, mutilating, altering, concealing or disposing of, in any manner, any of their books and records or any documents relating in any manner to the matters set forth in the Commission's *Complaint*, or the books and records and documents of any entities under their control, until further order of this Court.

¹ Pursuant to the *Order Appointing Receiver*, on January 23, 2006 the Receiver filed his *First Interim Report*, which among other things noted that the fraudulent offering may have exceeded \$390 million, with as much as \$153 million currently owed to over 1,500 defrauded investors.

3. The Receivership order clearly spells out the Receiver's power and authority and directs the Defendant to cooperate with him in administering the Receiver Estate. In relevant part, the Receivership Order provides that: (i) "[A]ll assets of, or under the control of" Defendant Midkiff are frozen (§ 2); (ii) The Receiver is the receiver for Defendant Midkiff (§ 3); (iii) The Receiver has the authority "to take custody, control and possession of all records, assets, funds, property premises and other materials of any kind in the possession or under the direct or indirect control" of Defendant Midkiff (§ 5(a)); (iv) The Receiver has the authority to sell assets and to negotiate with creditors of Defendant Midkiff (§§ 5(e) and (f)); (v) Defendant Midkiff is required to cooperate with the Receiver and the professionals working with him and immediately deliver to the Receiver all assets of the Receiver Estate under his control (§ 9(a)); and, (vi) Defendant Midkiff is required to deliver to the Receiver all business records, insurance policies, computers and computer files, passwords and identifying information, and all other information related to the Receiver Estate in his control (§§ 9(b)-(g)).

4. On December 7, 2005, an agent for the Receiver met with Midkiff and personally served him with a copy of the *Order Appointing Receiver and Temporary Restraining Order and Other Equitable Relief* ("Temporary Restraining Order").

5. On December 12, 2005, the Court held a hearing on the Commission's motion for a preliminary injunction.² Midkiff failed to appear or respond to the Commission's motion, and after receiving evidence the Court entered an *Order of Preliminary Injunction and Other*

² Of note, at the hearing the Commission offered evidence of Midkiff's then early failure to comply with the Court's orders of December 7, 2005. During the hearing the Court inquired as to the Commission's intentions if Midkiff continued to defy the Court's mandates. Counsel for the Commission assured the Court that the Commission would seek to have Midkiff held in civil contempt if Defendant's contemptuous conduct continued.

Equitable Relief as to Defendants Neulan D. Midkiff and Joshua Tree Group LLC (“Order of Preliminary Injunction”) providing in part:

...that Defendants and their officers, agents, employees, servants, attorneys and all persons in active concert or participation with them, who receive actual notice of this *Order* by personal service or otherwise, are restrained and enjoined from, directly or indirectly, making any payment or expenditure of funds (including charges on any credit card or draws on any other credit arrangement), and from assigning, conveying, transferring, encumbering, disbursing, dissipating, selling, hypothecating or concealing any assets, monies, or other property owned by or in the actual or constructive possession of Defendants pending a showing to this Court that they have sufficient funds or assets to satisfy all claims arising from the violations alleged in the *Complaint*, pending the posting of a bond or surety sufficient to assure payment of any such claim, or until further order of this Court. Further, any bank, trust company, broker-dealer or other depository institution holding accounts for or on behalf of the Defendants shall make no transactions in securities (excepting liquidating transactions necessary as to wasting assets) and no disbursements of funds or securities (including extensions of credit, or advances on existing lines of credit), including the honor of any negotiable instrument (including specifically, any check, draft, or cashier’s check) purchased by or for Defendants pending further order of this Court;

...that Defendants their directors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, and each of them, be and hereby are preliminarily enjoined from destroying, removing, mutilating, altering, concealing and/or disposing of, in any manner, any books and records owned by or pertaining to the financial transactions and assets of Defendants;

... that Defendants are hereby required to make an interim accounting, under oath, within thirty (30) days of the issuance of this *Order*, (1) detailing all monies and other benefits which he received, directly and indirectly, as a result of the activities alleged in the *Complaint* (including the date on which the monies or other benefit was received and the name, address and telephone number of the person paying the money or providing the benefit), (2) listing all current assets wherever they may be located and by whomever they are being held (including the name and address of the holder and the amount or value of the holdings) and (3) listing all accounts with any financial or brokerage institution maintained in the name of, on behalf of or for the benefit of Defendant (including the

name and address of the account holder and the account number) and the amount held in each account at any point during the period from February 1, 2002, through the date of the accounting; and

... that the *Order Appointing Receiver* entered December 7, 2005, shall continue and that Defendants and their agents, servants, employees, attorneys and all persons in active concert or participation with them, who receive actual notice of this *Order* by personal service or otherwise, and each of them, are ordered to comply with the *Order Appointing Receiver*.

6. On December 15, 2005, an agent for the Receiver met with Midkiff and personally served him with a copy of the *Order of Preliminary Injunction*.

III. Statement of Facts-Midkiff's intentional violations of the Court's orders

A. Midkiff's failure to turn over receivership records

7. On or about December 12, 2005, after being served with the *Order Appointing Receiver* and *Temporary Restraining Order* and in violation thereof, Midkiff removed receivership records, in the form of documents and computers from an apartment in Forest Lake, Minnesota. On December 12, 2005, agents from the Federal Bureau of Investigation executed a search warrant at the apartment, which was leased in the name of Joshua Tree Group LLC and determined that Midkiff had removed the receivership records.

B. Midkiff's failure to turn over receivership assets

8. The Receiver has attempted to take control of and secure Midkiff's current residence, located at 7580 Hilo Lane, Forest Lake, Minnesota 55025, in Washington County, Minnesota (the "Hilo Lane House"). To date, Midkiff has refused to turn over the Hilo Lane House to the Receiver.

9. Midkiff has refused to identify and turn over to the Receiver additional receivership assets, including but not limited to a Lincoln Navigator SUV, a 1996 GMC Jimmy truck, real property located in Israel, an apartment located in the Ukraine, a boat, a golf cart and cash.³

10. On or about December 12, 2005, Midkiff sold and transferred ownership of a receivership asset, a 2000 Fleetwood Discovery motor home. [See Declaration of Marshall Gandy (“Gandy Dec.”) ¶ 2]

C. Midkiff misrepresentations to defrauded investors

11. On or about January 3, 2006, Midkiff sent a letter to the defrauded investors of Joshua Tree Group LLC, which contained false and misleading information regarding the Commission’s civil injunctive action. [See Gandy Dec. ¶ 3]

D. Midkiff has filed actions interfering with the receivership without prior permission of the Court

12. On or about February 2, 2006, Midkiff delivered to Marshall Gandy, lead counsel for the Commission, a document entitled “Acceptance of Legal Matters Fiduciary” naming Mr. Gandy as the fiduciary for the Neulan D. Midkiff Trust and documents that purported to be a financial instrument drawn on the United States Treasury in the amount of \$100 million with instructions to Mr. Gandy to use the funds to settle the Commission’s claims for monetary relief. [See Gandy Dec. ¶ 4]

³ The Defendant’s actions in regard to his failure to turn over receivership records and assets are detailed in the *Declaration of Mark C. King*, filed in support of the *Receiver’s Memorandum in Support of the Joint Motion for Order to Show Cause*.

13. On or about February 2, 2006, Midkiff delivered to James Clarkson, Director of Regional Operations for the Commission, documents that purported to be a financial instrument drawn on the United States Treasury in the amount of \$100 million with instructions to Mr. Clarkson to use the funds to settle the Commission's claims for monetary relief. [See Gandy Dec. ¶ 5]

14. On or about March 13, 2006, delivered to Ronda Blair, staff counsel for the Commission, documents that purported to be a financial instrument drawn on the United States Treasury in the amount of \$100 million with instructions to Ms. Blair to use the funds to settle the Commission's claims for monetary relief. [See Gandy Dec. ¶ 6]

E. Midkiff's failure to produce an accounting under oath

15. After being served with the *Order of Preliminary Injunction* Midkiff has failed to deliver to the Commission an interim accounting under oath. [See Gandy Dec. ¶ 7]

IV. Legal Analysis

A. This Court's authority enforce its orders

The authority to enforce its lawful orders and mandates is inherent in every court. *Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966); *SEC v. Bilzerian*, 112 F. Supp. 2d 12,16 (D.D.C. 2000); *SEC v. Pinez*, 52 F. Supp. 2d 205, 209 (D. Mass. 1999); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995); *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 534 (D.D.C. 1994); *SEC v. Current Financial Services*, 798 F. Supp. 802, 806 (D.D.C. 1992). Without this essential power, the judicial branch of government could not assert and enforce its authority by order or decree. *See, e.g., In re Williams*, 306 F. Supp. 617, 618 (D.D.C. 1969).

If a judgment directs a party . . . to perform any . . . specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.... The court may also in proper cases adjudge the party in contempt... FED. R. CIV. P. 70.

B. Civil Contempt is an appropriate sanction to coerce compliance

Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994).

Civil contempt is "wholly remedial" [as opposed to criminal contempt, which is punitive], and is intended to coerce compliance with an order of the court. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 93 L. Ed. 599 (1949); *Southern Railway Co. v. Lanham*, 403 F.2d 119,124 (5th Cir. 1968). *SEC v. Bankers Alliance Corp.*, 881 F. Supp. at 678.⁴

A sanction is considered "civil" and "remedial" if it either coerces the defendant into compliance with a court order or compensates the complainant for losses sustained. *International*

⁴ In determining whether a contempt proceeding is civil or criminal, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks v. Feiock*, 485 U.S. 624, 632-35 (U.S. Cal, Apr. 27, 1988). While both civil and criminal contempt are utilized to enforce a court's authority, "[i]f [a proceeding] is for civil contempt the punishment is remedial, and for the benefit of the complainant, but if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* at 485 U.S. at 631, citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). In *Hicks*, the Court explained that the conditional nature of the remedy rather than the penalty imposed, determined whether the proceeding was criminal or civil in nature, stating, "[a] conditional penalty... is civil because it is specifically designed to compel the doing of some act." *Hicks*, 485 U.S. at 633. Thus the critical trait of a civil contempt is whether by complying with the original order, the contemnor can avoid the sentence imposed, or purge himself of it. *Id.* at 635, n.7; see also, *Shillitani v. United States*, at 368-69.

Union, UMWA v. Bagwell, 512 U.S. at 829; *SEC v. Credit Bancorp, Ltd.*, 2000 U.S. Dist. LEXIS 9755, (S.D.N.Y. July 12, 2000); *FTC v. Think Achievement Corp.*, 144 F. Supp. 1029, 1033 (N.D. Ind. 2001) (civil contempt may be classified into two categories-coercive sanctions seeking to induce future behavior, and remedial sanctions which are backward looking and seek to compensate the aggrieved party for losses caused by contemnor's disobedience of court order).

When a party, with knowledge of the order, violates an order, which requires forbearance or the performance of a specific act, he commits contempt. *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988); *see also S.E.C. v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981). Intent or willfulness is irrelevant; the only issue is compliance with the order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Whitfield v. Pennington* at 913; *Jim Walter Resources, Inc. v. Int'l Union, United Mine Workers*, 609 F.2d 165, 168 (5th Cir. 1980). Civil contempt orders usually may be avoided, however, by complying with the conditional order. *Hicks v. Feiock*, at 632-35.

In seeking an order of civil contempt, the movant must establish the following by clear and convincing evidence: (1) issuance of a court order, (2) requiring specific conduct of the respondent, and (3) the respondent's failure to comply with the order. *Petroleos Mexicanos v. Crawford Enterprise, Inc.*, 826 F.2d 392, 401.

The *Order of Preliminary Injunction* requires Midkiff to comply with the *Order Appointing Receiver*. Clearly, Midkiff continues to not only ignore, but also to intentionally trample on this Court's previous orders. He has interfered with the receivership and with Mr. Hays' duties by initiating actions and communicating with the defrauded investors in violation of specific provisions of the preliminary injunction and the receivership orders. Midkiff has

demonstrated that he has no regard for this Court's mandates, viewing them as obstacles that he is free to avoid. It is difficult to imagine more contemptuous behavior.

C. Burden of Proof

In a civil contempt proceeding, the proof of contempt must be clear and convincing. *Vertex Distributing Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). *SEC v. Credit Bancorp, Ltd.*, 2000 U.S. Dist. LEXIS 9755; *SEC v. Pinez*, 52 F. Supp. 2d at 210; *SEC v. Current Financial Services, Inc.*, 798 F. Supp. at 806. The plaintiff must prove, by clear and convincing evidence, only that an outstanding court order was violated. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (moving party has burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1528 (11th Cir. 1992) (holding that the defendant could not reopen the issue of whether he received a particular amount in ill-gotten gains based on the argument that the CFTC had only proven the amount of disgorgement by a preponderance of the evidence); *SEC v. Homa*, 2000 U.S. Dist. LEXIS 16933, (N.D.III. November 13, 2000).

D. The Commission's Initial Burden is to make a *prima facie* case

To meet its initial burden, the Commission need only show that the defendant has failed to comply with the court's order [i.e., it must present a *prima facie* case]. *United States v. Rylander*, 460 U.S. 752, 755, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983); *FTC v. Affordable Media, LLC*, 179 F.3d at 1239; *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d at 1529; *Combs v. Ryan's Coal Co.*, 785 F.2d at 984; *SEC v. Bilzerian*, 112 F. Supp. 2d at 16.

Once the Commission has met its initial burden, burden is then on the defendant to come forward with evidence showing "categorically and in detail" why he is unable to comply. *United States v. Rylander*, 460 U.S. at 755; *FTC v. Affordable Media, LLC*, 179 F.3d at 1239; *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d at 1529; *SEC v. Princeton Economic International Ltd.*, 2001 U.S. Dist. LEXIS 9948, (S.D.N.Y. July 18, 2001) (burden is on defendant to prove impossibility of compliance); *SEC v. Bilzerian*, 112 F. Supp. at 16; *SEC v. Credit Bancorp, Ltd.*, 2000 U.S. Dist. LEXIS 9755, (contemnor bears burden of producing evidence of inability to comply); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. at 678 & 683; *SEC v. Current Financial Services, Inc.*, 798 F. Supp. at 808.

It is well settled that if a court finds that a defendant could at some time in the past have complied with a court order, the court should presume a present ability to comply. *SEC v. Princeton Economic International Ltd.*, 2001 U.S. Dist. LEXIS 9948.

The alleged contemnor may not, in defending against a contempt motion, seek reconsideration of the legal or factual basis for the order alleged to have been violated. *United States v. Rylander*, 460 U.S. at 756-57; *Huber v. Marine Midland Bank*, 51 F.3d 5, 8 (2d Cir. 1995); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d at 152829; *SEC v. Bilzerian*, 112 F. Supp. 2d at 17 n.6.

V. Argument

A. A sufficiently coercive sanction is necessary to ensure compliance

Courts have wide discretion in fashioning remedies to cure civil contempt. *Matter of Dickinson*, 763 F.2d 84, 87 (2d Cir. 1985). Incarceration is an appropriate remedy to compel compliance with a court's order. *Pierce v. Vision Investments, Inc.*, 779 F.2d 302, 307 (5th Cir.

1986); *In re Dinnan*, 625 F.2d 1146 (5th Cir. 1980); *see also United States v. United Mine Workers*, 330 U.S. 258, 305 (1947).

The distinguishing factor in civil, as opposed to criminal, contempt is that the defendant can "purge" himself or herself of the contempt at any time. *Shillitani v. United States*, 384 U.S. at 370-71; *Penfield Co. v. SEC*, 330 U.S. 585, 590, 67 S. Ct. 918, 91 L.Ed. 1117 (1947), rehearing denied, 331 U.S. 865; *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 981; *International Business Machines Corp. v. United States*, 493 F. 2d 112, 115 (2d Cir. 1973) *United States v. City Of Providence*, 492 F. Supp. 602, 610 (D.R.I. 1980).

It is apparent that Defendant does not intend to comply with this Court's orders. Indeed, the Defendant has essentially ignored this Court. It is also apparent that Congress and the Supreme Court have ensured that this Court can compel compliance with its orders so that the judicial system does not become a mere game of empty threats and endless promises of compliance.

B. Incarceration is an appropriate sanction

Coercion may be achieved by the incarceration of the contemnor until he or she purges himself or herself of contempt. *Shillitani v. United States*, 384 U.S. at 370; *Penfield Co. v. SEC*, 330 U.S. at 590; *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d at 981; *United States v. Professional Air Traffic Controllers Organization*, 678 F.2d 1, 4 (1st Cir. 1982); *In re Dinnan*, 625 F.2d 1146, 1149 (5th Cir. 1980); *In re Grand Jury Investigation*, 600 F.2d 420, 422 (3d Cir. 1979) *International Business Machines Corp. v. United States*, 493 F.2d at 115. Incarceration is an appropriate remedy. *SEC v. Bilzerian*, 131 F. Supp. at 18 (accounting); *SEC v. Credit Bancorp, Ltd.*, 2000 Dist. LEXIS 9755; *SEC v. Margolin*, 1996 U.S. Dist. LEXIS 11299 (failure to pay

disgorgement); *SEC v. Elmas Trading Corp.*, 824 F.2d at 733 (failure to produce documents or provide accounting). If incarcerated, Midkiff will in effect have the keys to the cell in his own pocket - capable of freeing himself at anytime by purging his contempt and complying with this Court's orders.

C. The Court should award the Commission and Receiver their costs

This proceeding would not be necessary but for the Defendant's recalcitrance and his failure to make to provide an accounting and turn over assets and records to the Commission and the Receiver. The Defendant should compensate the Commission and Receiver for their otherwise unnecessary efforts. *Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA Co.*, 112 F.3d 1296, 1307 (5th Cir. 1997); *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 962 (5th Cir. 1995).

VI. Conclusion

Based on the foregoing the Commission and Receiver respectfully request that the Court:

(i) enter an Order to Show Cause, ordering the Defendant to appear before the Court at a time and date set by the Court, to show cause, if there be any, why the Court should not enter an order holding him in civil contempt;

(ii) following a hearing, enter an Order holding Defendant in civil contempt and incarcerate Defendant until such time as he complies with the Court's orders by:

(a) turning over all receivership assets and records to the Receiver;

(b) making an interim accounting, under oath,

(c) withdrawing any actions or proceedings which involve the Receiver or which affect the receivership assets, which he has filed or prosecuted without the permission of the Court; and

(d) acknowledging to the Court that he is bound by, and will fully comply with, all orders of the Court in the above-captioned matter;

(iii) assess monetary sanctions against Defendant until such time as he complies with the Court's orders as specified in subparagraphs (ii)(a) through (d), above.; and

(iv) impose such additional sanctions as the Court deems appropriate.

Dated: March 20, 2006.

Respectfully submitted,

/s/ Marshall Gandy
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CERTIFICATE OF SERVICE

I affirm that on March 20, 2006, I electronically filed the foregoing *Joint Motion for Order to Show Cause* with the Clerk of the Court for the Eastern District of Texas, Sherman Division, by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants:

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CERTIFICATE OF CONFERENCE

On March 20, 2006, I have conferred with opposing counsel in a good faith attempt to resolve the matter without court intervention. Each opposing attorney contacted stated they opposed this *Joint Motion*. Therefore, the matter is submitted to the Court for resolution.

/s/ Marshall Gandy
MARSHALL GANDY