

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

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p>Plaintiff,</p> <p>vs.</p> <p>TRAVIS E. CORRELL, individually and doing business as Horizon Establishment; GREGORY THOMPSON; DWIGHT J. JOHNSON; HARRY ROBINSON “ROBBIE” GOWDEY, individually and doing business as Atlas and Jericho Productions; GRANT CARDNO; NEULAN D. MIDKIFF; TRAVIS CORRELL & COMPANY, INC.; THE LIBERTY ESTABLISHMENT, INC.; SOVEREIGN CAPITAL INVESTMENTS, S.A.; TNT OFFICE SUPPLY, INC.; NET WORTH GROUP, INC.; and JOSHUA TREE GROUP LLC,</p> <p>Defendants,</p> <p>and</p> <p>BANNER SHIELD, LLC; HOSPITALITY MANAGEMENT GROUP, INC.; CREATIVE WEALTH VENTURES, LLC, and JTA ENTERPRISES,</p> <p>Defendants Solely for Purposes of Equitable Relief.</p>	<p>CIVIL ACTION NO. 4:05CV472</p>
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**RECEIVER’S MEMORANDUM IN SUPPORT OF THE
JOINT MOTION FOR ORDER TO SHOW CAUSE AND AN ORDER HOLDING
DEFENDANT NEULAN D. MIDKIFF IN CONTEMPT**

S. Gregory Hays (“Receiver”) files this Memorandum in Support of the Joint Motion for Order to Show Cause and an Order Holding Defendant Neulan D. Midkiff in Contempt. In support of the Joint Motion, the Receiver shows this Court as follows:

The Receiver was appointed as receiver for Defendant Midkiff and others on December 7, 2005, pursuant to this Court's Order Appointing Receiver ("the Receivership Order"). Despite numerous efforts by the Receiver and his staff to obtain information and take control of property under the control of Defendant Midkiff as directed in the Receivership Order, Defendant Midkiff has failed to comply with the terms of that Order. Moreover, the Receiver has determined that Defendant Midkiff has violated the terms of the asset freeze ordered by this Court.¹ Accordingly, the Receiver asks this Court to issue an order requiring Defendant Midkiff to show cause why he should not be held in contempt and, ultimately, to hold him in contempt and issue appropriate sanctions for his failure to comply with this Court's orders.

Background

On December 7, 2005, the Securities and Exchange Commission ("SEC") filed this action seeking temporary, preliminary and permanent injunctive relief, as well as disgorgement and other monetary sanctions related to a "high-yield investment program" or "prime bank investment" (the "Bank Deposit Program"). The SEC established a prima facie case that the Defendants, including Defendant Midkiff, promoted and sold the Bank Deposit Program in violation of various provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. Consequently, this Court entered the Receivership Order on December 7, 2005. On December 13, 2005, the Court entered an Order of Preliminary Injunction and Other Equitable Relief as to Midkiff and Defendant Joshua Tree Group LLC.

The Receivership order clearly spells out the Receiver's power and authority, and directs the Defendants to cooperate with him in administering the Receiver Estate. In relevant part, the Receivership Order provides that:

¹ The SEC has also filed a *Memorandum in Support of the Joint Motion for Order to Show Cause* addressing this and other conduct engaged in by Defendant Midkiff.

- “[A]ll assets of, or under the control of” Defendant Midkiff are frozen (¶ 2);
- The Receiver is the receiver for Defendant Midkiff (¶ 3);
- 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));
- The Receiver has the authority to sell assets and to negotiate with creditors of Defendant Midkiff (¶¶ 5(e) and (f));
- 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));
- 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)); and,
- Defendant Midkiff is enjoined from interfering with the Receiver’s operation of the Receivership. (¶ 4.)

As indicated in the Receiver’s First Interim Report, this is a large case with many moving parts. While there have been varying degrees of cooperation by the other Defendants and Relief Defendants who are in this receivership, the Receiver has been able to make significant progress regarding taking control and disposing of various assets of all of the Defendants except for Defendant Midkiff. This has now reached the point that the Receiver requires assistance from the Court in enforcing the terms of the Receivership Order with Defendant Midkiff.

The Receiver's Dealings with Defendant Midkiff

Defendant Midkiff is a resident of Forest Lake, Minnesota, which is in suburban Minneapolis. From the moment of his appointment, the Receiver has attempted to obtain information from Defendant Midkiff regarding the nature and location of assets, computers and other relevant records. Beginning on December 7, 2005, and continuing through to the present, members of the Receiver's staff have traveled to Minnesota on several occasions in an effort to take control of various assets that are a part of the Receiver Estate. In particular, 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. With limited exceptions described below, Midkiff has failed to provide information to the Receiver and has refused to identify or turn over any assets to the Receiver.

Mark King, a member of the Receiver's staff, has been the person primarily responsible for dealing with Midkiff. With respect to the Hilo Lane House, his efforts have included the following:

- On **December 7, 2005**, King met with Midkiff and served a copy of the Order Appointing Receiver and Order of Preliminary Injunction and Other Equitable Relief as to Midkiff and Defendant Joshua Tree Group LLC.
- On **December 8, 2005**, King traveled to the Hilo Lane House, and attempted to gain possession of it. Midkiff did not answer the door, and refused to answer his phone.
- On **December 15, 2005**, Midkiff allowed King and a United States Marshal to enter the Hilo Lane House in order to take photographs and to inventory Midkiff's possessions. That same day, Midkiff met with King and a United States Marshal and

turned over records and a computer for Defendant Joshua Tree Group LLC. King also went to 1319 Bay Drive SE, Forest Lake, Minnesota, 55025 (the “SE Bay House”), which Midkiff is apparently providing to tenants rent-free.

- On **January 20, 2005**, Midkiff allowed appraisers retained by the Receiver to access the Hilo Lane and SE Bay Houses in order to have them appraised.
- On **February 16, 2006**, King left a voicemail with Midkiff to discuss Midkiff’s withdrawal from the Hilo Lane House. Midkiff did not return this voicemail.
- On **February 17, 2006**, King left a voicemail with Midkiff to discuss Midkiff’s withdrawal from the Hilo Lane House. In this voicemail, King requested that Midkiff both communicate and cooperate with the Receiver in the administration of the Receiver Estate. Midkiff did not return King’s call.
- On **February 20, 2006**: King left a voicemail with Midkiff requesting that he vacate the Hilo Lane House, but that he not remove any personal property from the premises. King further requested that Midkiff return his call so that they could set a reasonable deadline for Midkiff’s departure. In the voicemail, King informed Midkiff that, if he did not cooperate, the Receiver intended to pursue contempt of court proceedings. Midkiff did not return this voicemail.

(King Declaration, ¶ 8.) To date, Midkiff has not turned over the Hilo Lane House (or the SE Bay House) to the Receiver.

Midkiff's Other Assets

In addition to the houses and furnishings described above, the Receiver's investigation indicates that, at the time that this case was filed, Midkiff also owned or controlled: several automobiles, including a Lincoln Navigator and a 1996 GMC Jimmy; a motor home; real property located in Israel; an apartment located in the Ukraine; a boat; and a golf cart. (*Id.* ¶ 6.) On several occasions, King has tried to obtain information from Midkiff and to discuss these assets with him. (*Id.* ¶ 7.) He has left numerous messages with Midkiff on the voice recording system associated with Midkiff's mobile telephone. (*Id.*) However, Midkiff has returned very few of King's calls. (*Id.*)

Despite King's efforts, Midkiff has refused to provide the Receiver with an accounting of his assets or to turn over or account for the existence of many business records, insurance policies, computers and computer files, passwords, identifying information and other information related to the Receiver Estate. (*Id.* ¶ 9.) Moreover, it appears that Midkiff sold his motor home and, possibly, one other vehicle since being served with the Receivership Order on December 7, 2005. (*See id.* ¶ 10, and Exhibit A to King's Declaration.)

The Hilo Lane Property

Midkiff and his wife, Donna Midkiff, contracted with Frederick and Sandra Dewall ("the Dewalls") to purchase the Hilo Lane House pursuant to a "Contract for Deed."² The purchase price was \$1,300,000.00. Based upon information currently available to the Receiver, it appears that the "equity" in the property is approximately \$400,000.

² A Contract for Deed is an instrument of conveyance whereby the seller (the Dewalls, in this case) agrees to provide fee title to the purchasers (the Midkiffs) upon completion of the Contract for Deed's terms, namely payment of the purchase price over the period of time set forth in the contract. In this case, under the Contract for Deed's terms, the Dewalls had the right to cancel the Contract for Deed if the Midkiffs failed to perform in accordance with the contract's terms. In this event, the Dewalls also had the right to repossess the Hilo Lane Property, and to keep all previous payments made by the Midkiffs under the contract.

The outstanding principal balance owed on the Contract for Deed is believed to be approximately \$935,000. Not surprisingly, no payments have been made to the Dewalls since November 2005. The Dewalls have declared a default and have begun proceedings to foreclose on and repossess the Hilo Lane House. The Dewalls owe approximately \$862,000 on a mortgage that is secured by the Hilo Lane House and, apparently, are continuing to make the monthly mortgage payments.

Because it is evident that Midkiff purchased the Hilo Lane House using proceeds of the Bank Deposit Program offering, the Receiver has informally asserted claims to the “equity” in the property. Through counsel, the Receiver and the Dewalls are currently negotiating a settlement, which, if approved, would result in a substantial payment from the Dewalls to the Receiver. Obviously, this is conditioned upon the Dewalls being able to obtain clear title to and complete control over the Hilo Lane House. Midkiff’s refusal to cooperate with the Receiver in turning over control of this house (and its furnishings) is interfering with the Receiver’s ability to administer this asset and negotiate a settlement with the Dewalls as authorized by the Receivership Order.³

Argument and Citation of Authority

It is well established that this Court has the inherent power to enforce compliance with its orders by holding violators of those orders in contempt. The power to sanction violators is essential to the proper conduct of the judicial function and is the way that courts assert authority over those who are subject to their orders. *Young v. United States*, 481 U.S. 787, 795 (1987).

³ The Receiver Estate could find itself in a similar position with respect to the SE Bay House. However, despite numerous efforts to do so, Receiver’s counsel has not been able to engage the mortgage company for that property in a meaningful dialogue. If an appropriate accommodation can be made, the Receiver would be willing to forebear from selling the SE Bay House for some period of time so that the Midkiffs would have a place to live. However, this depends on cooperation from Midkiff and the mortgage company.

It is clear that Midkiff has not complied with this Court's Receivership Order: he has not turned over assets and documents; he has not provided the required information; he has not provided an accounting of his assets; he has not cooperated with the Receiver and the professionals working with him; he has violated the terms of the asset freeze; and, he is interfering with the Receiver's ability to effectively administer the Receiver Estate. This is a clear case of contempt, and Midkiff should be sanctioned accordingly.

A. Midkiff Should Be Held In Contempt For Violating The Receivership Order.

A party commits contempt when he knowingly violates a definite and specific court order requiring him to perform or refrain from performing a particular act. *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995). In order to establish civil contempt, the movant must demonstrate by clear and convincing evidence “(1) that a court order was in effect, (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order.” *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 581-582 (5th Cir. 2005). A movant need not demonstrate the respondent's willful intent to violate the court order before the Court can find the respondent in contempt; all that is necessary is the respondent's failure to comply. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Musslewhite v. O'Quinn*, 270 B.R. 72, 79 (S.D. Tex. 2000) (“The contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order.”).

In this case, there is clear and convincing evidence that all of the elements necessary for this Court to find Midkiff in contempt are satisfied: the Receivership Order was in effect and Midkiff had notice of it on December 7, 2005; the Receivership Order required specific conduct by Midkiff; and, as the facts above clearly demonstrate, Midkiff has failed to comply with the Receivership Order. Accordingly, this Court should hold Midkiff in contempt.

B. The Court Should Also Sanction Midkiff

Civil contempt can serve two purposes: (1) to enforce compliance with a court's order through coercion, or (2) to compensate a party who has suffered unnecessary injuries or costs because of contemptuous conduct. *Musslewhite*, 270 B.R. at 78. In all likelihood, monetary sanctions against Midkiff are of little moment here because the Receiver, theoretically, controls all of Midkiff's assets, including his money. It is, however, evident that, absent some meaningful sanction, Midkiff is not going to comply with the Receivership Order.

This Court may order that Midkiff be incarcerated until he complies with the Receivership Order. Another federal district court in Texas took this very step in a similar case. *SEC v. Resource Development International, LLC*, No. 3:02-CV-0605-R, 2002 U.S. Dist. LEXIS 27292 (N.D. Tex. Apr. 11, 2002) (Buchmeyer, J.). In *Resource Development*, also a receiver case, the court entered an order, very similar to the Receivership Order, directing all of the defendants to deliver to the receiver all receivership assets in their control. *Id.* at *3-*4. The receiver showed the order to Edward Harris, the president of one of the defendants, who then admitted that his company had offshore bank accounts containing money, and that he had the power to make deposits and withdrawals from those accounts. *Id.* at *4. Harris refused, however, to disclose the amount of money contained in the accounts, or to turn the offshore money over to the Receiver. *Id.* at *4-*5.

The court held Harris in civil contempt for refusing to comply with its receivership order. *Id.* at *5; *see also Harris v. Wendt*, No. 3:04-CV-0582-R, 2004 U.S. Dist. LEXIS 5964, at *1-*3 (N.D. Tex. Apr. 8, 2004) (Sanderson, M.J.) (noting, in a matter pertaining to Harris's petition for habeas corpus relief, that the *Resource Development* court had handed down civil contempt sanctions to compel compliance with the receivership order). The court further ordered that

Harris be jailed and remain incarcerated until he delivered “all Receivership Assets in his possession, custody or control to the Receiver.” *Resource Development*, 2002 U.S. Dist. LEXIS 27292, at *5.

The Court may fashion other sanctions. What is important here is that this Court impose sanctions sufficient to compel Midkiff to comply with the Receivership Order.

Respectfully submitted this ___ day of March 2006.

TROUTMAN SANDERS LLP

/s/ J. David Dantzler, Jr.

J. DAVID DANTZLER, JR.

Ga. State Bar No. 205125

Bank of America Plaza, Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000
(404) 962-6799 (facsimile)

QUILLING, SELANDER, CUMMISKY &
LOWNDES, P.C.

/s/ Clark B. Will

CLARK B. WILL, P.C.

Texas State Bar No. 21502500

Bryan Tower
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100
(214) 871-2111 (facsimile)

Attorneys for S. Gregory Hays, Receiver

CERTIFICATE OF SERVICE

I do hereby certify that, on March 20, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Todd Tefteller, Esq.
Law Offices of Todd Tefteller
403 West Tyler Street
Gilmer, TX 75644-2138

Additionally, I hereby certify that, on March 20, 2006, I served a true and correct copy of the foregoing on the following via facsimile:

Christopher J. Bebel, Esq.
Christopher Bebel, Esq., P.C.
440 Louisiana, Suite 900
Houston, TX 77002

/s/ Thomas E. Borton IV
Thomas E. Borton IV
Ga. State Bar No. 068733