

**IN THE UNITED STATES DISTRICT COURT FOR
OKLAHOMA-WESTERN DISTRICT**

**Commodity Futures Trading
Commission,**

Plaintiff,

vs.

**Mark S. Trimble, and
Phidippides Capital Management LLC,**

Defendants, and

Phidippides Capital LP,
Relief Defendant.

**Civil Action No: 09 CV
00154-D**

Judge Timothy D. DeGiusti

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RULE
TO SHOW CAUSE WHY MARK S. TRIMBLE SHOULD NOT BE HELD
IN CONTEMPT OF COURT FOR VIOLATING THE RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

FACTUAL SUMMARY

The Defendant Mark Trimble has violated the Restraining Order and the Preliminary Injunction in this case by concealing that he had transferred \$500,000 to his wife Nancy Trimble and his former wife, Denise McGinnis on January 16, 2009 and that he had subsequently had Mrs. McGinnis return \$225,000 to him in cash. He compounded this violation by failing to disclose these transfers and the whereabouts of these funds in the Accounting he filed with the Court on April 21, 2009. Finally, when the Plaintiff requested that he pay these funds to the Receiver, he returned only \$450,000 and refused to repay the rest. He has claimed that he

used the \$25,000 to pay his child support obligation in advance. In addition, in light of the CFTC's refusal to agree to additional monthly allotments of \$7,000 or more per month in living expenses, rather than ask the Court for living expenses he employed self-help and spend about \$15,000 and refuses to give the remaining \$10,000 to the Receiver.

ARGUMENT

The Defendant has consciously chosen to disregard the orders of the Court and has consistently acted in a manner disrespectful of the legal process and the rights of his victims. Mr. Trimble needs to get a job. He is unemployed, and he needs to adjust his lifestyle accordingly. Instead, he has chosen to maintain, at customer expense, his lavish lifestyle (which seems to include training and participating in bicycle races instead of gainful employment). The government acknowledges his need to support his children, but like other unemployed persons, unemployed Ponzi scheme operators, can go to court to have their child support obligations modified in light of their changed financial situations. The children of a Ponzi scheme operator do not have a right to live off of the victim's money. The victims' money needs to be returned to the rightful owners.

LEGAL ARGUMENT

This court has the inherent authority to enforce compliance with its own orders. *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966). This may be done through

civil contempt proceedings. *U.S. v. Professional Air Traffic Controllers*, 703 F.2d 443, 445 (10th Cir. 1983) *citing Shillitani v. United States*, 384 U.S. 364 (1966).

In order “to hold a person in civil contempt, the Court must find, by clear and convincing evidence, that: (1) a valid court order exists; (2) the contemtor had knowledge of the order; and (3) the contemtor has disobeyed the order.”

Federal Trade Comm. v. Kuykendall, 371 F.3d 745, 756-57 (10th Cir.2004); *CFTC v. Wellington Precious Metals Inc.*, 950 F.2d 1525 (11th Cir. 1992). “The Court must determine by considering the facts whether there is clear and convincing evidence that [the] recalcitrant party was aware of the terms of the order and proceeded to violate those terms.” *SEC v. Parkersburg Wireless Ltd.*, 156 F.R.D. 529 (D.D.C. 1994).

The *Kuykendall* factors are all met in this case. Mr. Trimble was represented by counsel throughout these proceedings and both the Restraining Order and the Preliminary Injunction were consented to by defense counsel on behalf of Trimble. Trimble was aware of the orders and the asset freeze provisions and acted intentionally to disobey them. The Restraining Order and the Preliminary Injunction clearly prohibited the defendant Trimble from concealing, transferring or dissipating any funds in his name or under his control. Moreover, the failure to disclose the transfers to Mrs. Trimble and Mrs. McGinnis may in themselves be sufficient to justify a finding of contempt. *SEC vs. Parkersburg Wireless*, 156

F.R.D. at 536. (Court noted that it was “possible contempt” if undisclosed assets were not brought within the asset freeze.) But, in this case he did more than that, he spent money in violation of the asset freeze, and he currently has at least \$10,000 in his possession which he refuses to give to the Receiver.

Once the plaintiff has carried its burden of proof, as Plaintiff has done here, the Court “has broad discretion in using its contempt power to require adherence to court orders. *O’Connor v. Midwest Pipe Fabricators, Inc.*, 972 F.2d 1204, 1209 (10th Cir. 1992) (holding defendants in contempt for failing to provide an accounting), *citing U.S. v Riewe*, 676 F.2d 418 (10th Cir. 1982). Judicial sanctions in civil contempt proceedings may be employed for either or both of two purposes: 1) to compensate the complainant for losses sustained; and 2) to coerce the defendant into compliance with the court’s order. *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947).

REMEDIES

In this case, Plaintiff’s objective is to collect and preserve assets necessary to make investors whole. Consequently, the plaintiff is requesting that the Court enter an order requiring that Mr. Trimble immediately return all funds his possession in violation of the asset freeze and to order such other measures as the Court deems necessary to coerce the Defendant to comply with the terms of the Preliminary Injunction.

The Plaintiff recognizes that the sanctions must be set at the lowest level necessary to compel compliance. *SEC vs. Novus Technologies LLC*, 2008 WL 623765 (D. Utah 2008). In *SEC vs. Parkersburg Wireless*, 156 F.R.D. at 537, the District Court imposed a “graduated system of penalties.” Initially, the Court gave the defendant approximately two weeks in which to purge herself of the contempt, after which the court imposed a fine of \$100 per day for the next 14 days to be deducted from the living expenses provided for in the preliminary injunction. If the defendant still had not complied with the Court orders, the court stated that at that time it would consider whether the defendant should be “incarcerated for such time as she remains in contempt of this Court.” *Id.* In *SEC v. Kenton Capital, Ltd.*, 983 F.Supp.13 (D.D.C. 1997) the Court found the defendant to be in contempt, ordered him to comply with the Court’s orders within 30 days and ordered that if he was not in compliance in 30 days that a warrant should issue for his arrest. *Id.* at 18. In *Novus Technologies*, after noting the need to determine that there was a factual basis for determining the reasonableness of the fine, the court ordered a compensatory fine of \$500 per day for 15 days and incarceration thereafter if he had not purged himself of the contempt. *SEC vs. Novus Technologies LLC*, 2008 WL 623765 at p.5.

The Plaintiff is requesting that this Court enter an Order finding the defendant, Mark Trimble, to be in contempt of this Court, requiring that he return

the \$50,000 he took in violation of the freeze order and imposing such other sanctions that the Court deems necessary under the circumstances.

Date: May 8, 2009

Respectfully submitted,

s/ Rosemary Hollinger

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