

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE	)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	<u>MEMORANDUM OPINION</u>
v.	)	
	)	
TERRY L. DOWDELL, et al.,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

On September 23, 2002, the court held a hearing on an order to show cause why defendant Kenneth G. Mason should not be held in civil contempt for allegedly violating the November 19, 2001 *ex parte* temporary restraining order (TRO) as adopted by subsequent court orders.<sup>1</sup> Having thoroughly considered the parties' submissions, the oral arguments, the applicable law, and the entire documented record, the court shall find defendant Mason in civil contempt for (1) failing to identify, value and provide the location of all of his assets and funds having a value greater than \$5,000, in violation of section VII of the TRO, and (2) for dissipating at least \$27,000 of assets without the knowledge or permission of the court, in violation of provisions contained in section V of the TRO. Additionally, the court shall hold defendant Birgit Mechlenburg in civil contempt for transferring all of her assets abroad in violation of sections V and VIII of the TRO as extended by subsequent court orders.

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<sup>1</sup> Although the court did not hold a hearing to address the order to show cause why defendant Birgit Mechlenburg should not be held in civil contempt for allegedly violating the November 19, 2001 *ex parte* temporary restraining order (TRO), the alleged contempt will be addressed herein.

## I.

In brief, this is an Securities and Exchange Commission (SEC) enforcement action. The defendants in this case orchestrated and operated a Ponzi or pyramid scheme. According to the Permanent Injunction Order, which incorporated the Consent and Stipulation of defendant Terry Dowdell, under the “Vavasasseur program,” clients were promised high profits for their investments, while the defendants would simply use the money put in by the newest investors to pay earlier investors their promised “profits.” Defendants would then misappropriate the remaining funds, which amounted to approximately \$29,000,000.00.

On November 19, 2001, the court granted the motion of the plaintiff SEC for an *ex parte* temporary restraining order (TRO), which included provisions enjoining the defendants from committing federal securities violations, freezing the assets of certain of the defendants and setting various discovery deadlines. In granting the *ex parte* TRO on November 19, 2001, the court found that the SEC had met its burden of providing a proper showing, as required by 15 U.S.C. § 78u(d)(1) and 15 U.S.C. § 77t(b), that such relief was warranted. Namely, the SEC put forth what the court deemed sufficiently credible information presenting a case that a violation had occurred of the statutes involved, including, *inter alia*, 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), and 15 U.S.C. § 78o, and that such violations were occurring or would continue to occur. The TRO provided, among other things, for the freezing of assets of three individuals, Terry L. Dowdell, Birgit Mechlenburg and Kenneth G. Mason and two business entities, Dowdell Dutcher & Associates, Inc., and Vavasasseur Corporation. Then, on March 14, 2002, the court issued an Order of Preliminary Injunction, which incorporated the asset freeze order found in the TRO.

Since the entry of the Preliminary Injunction Order, the SEC has continued its investigation of the Vavasseur Program. That investigation has led to the allegations that defendants Mason and Mechlenburg separately violated various provisions of the TRO as adopted by subsequent court orders.

## **II. Mason's Alleged Contempt:**

### *A. The Allegations:*

The SEC contends that defendant Mason should be held in civil contempt for two separate violations of the TRO as adopted by subsequent court orders. First, the SEC contends that Mason should be held in civil contempt for failing to identify, value and provide the location of all of his assets and funds having a value greater than \$5,000, in violation of section VII of the TRO. The SEC's second contention is that Mason should be held in civil contempt for dissipating at least \$27,000 of assets without the knowledge or permission of the court, in violation of provisions contained in section V of the TRO.

In response to the SEC's first contention, Mason argues (1) that the TRO was not specific enough and (2) that all of his assets having values greater than \$5,000 that were not disclosed to the SEC were not tainted by ill-gotten gains. As for the SEC's second contention, Mason argues that, in short, the \$27,000 death benefit from the Lincoln Life Insurance policy was a legitimate asset not tainted by any allegation of ill-gotten gains and, therefore, was not covered by the asset freeze order. More specifically, Mason contends that the accounting orders in the TRO and the Preliminary Injunction are specifically limited to "all assets and funds received, directly or indirectly from individuals who invested monies" and to "any other defendant" and related

persons. The \$27,000 in Lincoln Life death benefits do not fall within either of such categories and, according to Mason, did not have to be disclosed to the SEC.

*B. Applicable Law:*

Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Civil contempt is an appropriate sanction if the court can point to a court order which “set[s] forth in specific detail an unequivocal command” that a party has violated. *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (quoting *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986) (citation and internal quotation marks omitted)).

The burden is on the complainant to prove civil contempt by clear and convincing evidence. *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995). In order to obtain civil contempt relief for violation of the asset freeze order, the SEC must establish by clear and convincing evidence:

- (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;
- (2) that the decree was in the movant’s favor;
- (3) that the alleged contemnor by his or her conduct violated the terms of the decree, and had at least constructive knowledge of such violations; and
- (4) that the movant suffered harm as a result.

*Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000). In order to prevail, therefore, the SEC must satisfy the preceding four-part test by clear and convincing evidence. The second element - that the decree was in the movant’s favor - and the fourth element - that the movant

suffered harm as a result - can be easily disposed of in favor of the SEC. The “action,” therefore, is in regards to civil contempt elements one and three.

(1) *Civil Contempt Element 1:*

First, there must exist a valid decree of which the alleged contemnor had actual or constructive knowledge. While there is no dispute that Mason, the alleged contemnor, had actual knowledge of the asset freeze order, Mason argues that the orders drafted by the SEC failed to “comply with FED. R. CIV. P. 65(d) as to specificity, reasonable detail, and the prohibition on reference to the complaint or other document.” Mason’s Response, page 4. In support of this argument, Mason lists a litany of problems that, according to Mason, arise “from the SEC’s interpretations of the Orders.” *Id.*

Defendant Mason’s most compelling argument under FED. R. CIV. P. 65(d) is that both accounting orders, which require the Vavasseur defendants to provide “an accounting of all assets and funds received, directly or indirectly, from individuals who invested monies in the entities described in the SEC’s Complaint,” violate Rule 65(d). *Id.* Rule 65(d) expressly provides that an order granting an injunction “shall describe in reasonable detail, and *not by reference to the complaint or other document*, the act or acts sought to be restrained.” FED. R. CIV. P. 65(d) (emphasis added). The accounting orders, therefore, do not comply with Rule 65(d).

The Fourth Circuit has strictly applied the terms of Rule 65 and has stated that the “terms are mandatory and must be observed in every instance.” *Alberti v. Cruise*, 383 F.2d 268, 271-72 (4th Cir. 1967). *See also Ciena Corp. v. Jarrard*, 203 F.3d 312 (citing *Alberti v. Cruise*). The Supreme Court has noted that the Rule 65(d) specificity requirements serve two essential

functions: (1) they prevent uncertainty and confusion on the part of those faced with injunctive orders, thereby avoiding the imposition of sanctions for violations of decrees too vague to be understood; and (2) they facilitate informed and intelligent appellate review. *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974). Despite Mason's contention to the contrary, the orders that Mason has allegedly failed to comply, although broad, are both specific and detailed enough so as to prevent uncertainty.

Even more, "where it gives fair warning of the acts that it forbids, an injunction may not be avoided on merely technical grounds." *U.S. v. Fuller*, 919 F.2d 139 (4th Cir. 1990) (unpublished table decision). If the court were to hold that defendant Mason was not in contempt of the TRO and other court orders because the accounting provisions reference the complaint, Mason would be avoiding compliance on merely technical grounds. Moreover, although there is a reference to the complaint, the two specificity requirements of Rule 65(d) have been met in all other respects. Notwithstanding the technical violation, therefore, the decrees at issue are valid. To that end, the SEC established the first of the four civil contempt elements.

*(2) Civil Contempt Element 3:*

The third element, that the alleged contemnor by his or her conduct violated the terms of the decree, and that he or she had at least constructive knowledge of such violations, is also at issue. Defendant Mason's principal argument is that the various orders neither require an accounting of non-Vavesseur funds and disbursements nor of assets not tainted by ill-gotten gains.

In section VII of the TRO, the court required each of the Vavesseur defendants, including

Mason, to “identify, value and state in writing the current whereabouts of all of their assets and funds having a value greater than \$5,000, including, but not limited to, all real and personal property.” TRO, section VII. Additionally, section V of the TRO froze all of the assets of each of the Vavesseur defendants regardless of the location of such assets.

Despite Mason’s reading to the contrary, these provisions are both clear and specific. The aforementioned language simply is not amenable to three or four different interpretations. Notwithstanding the apparent clarity of sections V and VII, Mason argues that, when considered in its entirety, the TRO indicates that assets not tainted by ill-gotten gains are neither subject to the accounting provision of section VII nor the freeze order of section V. Even more, Mason contends that the TRO would be equivalent to a “financial death sentence” if it is interpreted in any other way. Defendant Mason’s arguments are unavailing.

First, neither the phrase “ill-gotten gains” nor the phrase “tainted money” are ever used in the TRO, let alone in sections V or VII. In that regard, to hold that assets not tainted by ill-gotten gains are exempt from the scope of sections V and VII would be contrary to the plain meaning of the language contained in those sections. Second, even a cursory reading of the TRO is enough to discover that the order does not impose a “financial death sentence” on the Vavesseur defendants. Section V(B)(3) expressly provides that the Vavesseur defendants could not transfer “any funds or other assets ... for attorneys’ fees or living expenses, except after providing prior written notice to the SEC and after obtaining prior approval of the Court.” TRO section V(B)(3). Section V, therefore, expressly contemplates the payment of living expenses. To that end, the TRO did not impose a financial death sentence on Mason or any of the other

Vavesseur defendants.

It is evident, then, that by dissipating nearly \$27,000 in assets and by failing to provide an accounting of all assets worth in excess of \$5,000, Mason violated the TRO as adopted by subsequent court orders. In that regard, the SEC established the third element of civil contempt.

In consideration of the foregoing, defendant Mason is in civil contempt for (1) failing to identify, value and provide the location of all of his assets and funds have a value greater than \$5,000, in violation of section VII of the TRO, and (2) for dissipating at least \$27,000 of assets without the knowledge or permission of the court, in violation of provisions contained in section V of the TRO.

### **III. Mechlenburg's Contempt:<sup>2</sup>**

#### *A. The Allegations:*

The SEC contends that defendant Mechlenburg should be held in civil contempt for transferring personal property she owned from her residence in Massachusetts to a location outside of the territories of the United States in violation of the repatriation of assets provision (VIII) of the TRO. According to a witness statement, as well as to her former attorney, Mr. Charles Rose, defendant Mechlenburg transferred all of her personal belongings to Europe sometime after the preliminary injunction hearing conducted on March 5 and 6, 2002. In response, Mechlenburg contends that the SEC is employing a "hyper-technical interpretation" of

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<sup>2</sup> In open court on September 23, 2002, the court granted attorney Charles Rose's "Motion to Withdraw as Counsel for Birgit Mechlenburg," filed September 12, 2002. Defendant Mechlenburg, consequently, is no longer represented by counsel.

the asset freeze order and that the orders drafted by the SEC do not comply with FED. R. CIV. P. 65(d).

Mechlenburg's second contention, that the orders drafted by the SEC do not comply with FED. R. CIV. P. 65(d), is the same argument articulated by Mason. The same analysis applies here. In short, although the orders do not fully comply with Rule 65(d), such non-compliance is merely technical. The only new issue, therefore, is whether Mechlenburg's conduct violated the TRO or subsequent court orders as required under the third element of civil contempt.

*B. Civil Contempt Element 3:*

Section VIII of the TRO, as extended by subsequent orders, provides that Mechlenburg must "take such steps as are necessary to repatriate to the territory of the United States of America all assets and funds, which are held by [her] or which are under [her] direct or indirect control." Implicit in the preceding order is a prohibition on transferring assets outside of the territories of the United States. By transferring all of her assets abroad, therefore, Mechlenburg has violated section VIII of the TRO as extended by subsequent court orders. To that end, defendant Mechlenburg shall be held in civil contempt.

Additionally, section V of the TRO, as extended by subsequent court orders, sets forth a command prohibiting defendant Mechlenburg from "transferring, selling, assigning, pledging, dissipating ... any funds, assets or other property" under her "possession, custody or control..." Given the breadth of the asset freeze order, which extends to "all funds and other assets of ... Mechlenburg ...," defendant Mechlenburg also violated section V of the freeze order when she transferred her assets abroad. Consequently, Mechlenburg is also in civil contempt of section V

of the asset freeze order as extended by subsequent court orders.

**IV.**

In accordance with the forgoing, the court shall find both defendant Kenneth G. Mason and defendant Birgit Mechlenburg in civil contempt. An appropriate order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this memorandum opinion to all counsel of record and to defendant Birgit Mechlenburg.

ENTERED: \_\_\_\_\_  
Senior United States District Judge  
\_\_\_\_\_  
Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE	)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	<u>ORDER</u>
v.	)	
	)	
TERRY L. DOWDELL, et al.,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

**ADJUDGED, ORDERED AND DECREED**

as follows:

(1) defendant Kenneth G. Mason shall be, and he hereby is, found in civil contempt for (1) failing to identify, value and provide the location of all of his assets and funds having a value greater than \$5,000, in violation of Section VII of the TRO, and (2) for dissipating at least \$27,000 of assets without the knowledge or permission of the court, in violation of provisions contained in Section V of the TRO;

(2) defendant Birgit Mechlenburg shall be, and he hereby is, found in civil contempt for transferring all of her assets abroad in violation of Sections V and VIII of the TRO as extended by subsequent court orders;

(3) counsel for the SEC shall have ten (10) days from the receipt of this order to file with the court proposed sanctions aimed at remedying defendant Mason's civil contempt. Defense counsel shall then have ten (10) days from the filing of the SEC's proposed sanctions to file a response.

(4) counsel for the SEC shall have ten (10) days from the receipt of this order to file with the court proposed sanctions aimed at remedying defendant Mechlenburg's civil contempt.

The Clerk of the Court hereby is directed to send a certified copy of this order to all counsel of record and to defendant Mechlenburg.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date