

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SECURITIES EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No.05-4057-SAC
)	
DAVID TANNER, et al.,)	
)	
Defendants.)	

**SEAFORTH MERIDIAN, LTD.’S OPPOSITION TO RECEIVER’S MOTION
FOR SHOW CAUSE ORDER**

Seaforth Meridian, Ltd. (“Seaforth”), by and through counsel, hereby responds to and opposes the Receiver’s Motion for Show Cause Order. The Receiver’s efforts to have Seaforth held in contempt are mistaken and contrary to law.

On November 23, 2005, the Receiver moved this court for a show cause order as to why they should not be held in contempt for allegedly violating this Court’s Stipulated Order entered on August 11, 2005. As a preliminary matter, Seaforth has moved this court for leave to intervene in order to seek to modify the Stipulated Order. This step is necessary since Seaforth is currently not a party to this litigation. The simple premise behind Seaforth’s efforts to modify the Stipulated Order is Seaforth’s inability to comply with that order for the reasons set forth in the Motion to Modify that order attached as Exhibit B to Seaforth’s Memorandum in Support of its Application for Leave to Intervene. Seaforth was preparing these papers when it became aware of the Receiver’s Motion for Show Cause Order.

Frankly, the Receiver is being unreasonable. The Receiver filed his Motion for Show

Cause in spite of his knowledge of the efforts that Seaforth has made to comply with the Stipulated Order. Indeed, the Receiver filed the motion to show cause, all the while knowing that:

RELEVANT FACTS

1. Seaforth and its managing members have done everything possible to comply with the Stipulated Order in a manner that would not have seriously adverse effects on Seaforth's investors other than the Receiver. Clyman Show Cause Affidavit, ¶4 (Exhibit A).

2. The Stipulated Order required that Seaforth pay the Receiver \$8,998,513.00 in two installments, the first on or before August 15, 2005 and the second on or before October 15, 2005. Clyman Show Cause Affidavit, ¶5.

3. Seaforth paid the Receiver \$4,110,185.00 in three installments, as follows: \$2,110,118.95 on August 12, 2005, \$1,500,000.00 on September 12, 2005, and \$500,000.00 on September 29, 2005. Seaforth was able to make these payments by liquidating all of its available cash balances and semi-liquid investments. As of September 29, 2005, Seaforth was left with three non-liquid investments. Clyman Show Cause Affidavit, ¶6.

4. The first investment, the "Hartsfield Investment, in the amount of \$1,050,000.00, is insolvent at this time. Although Seaforth is hopeful that it may be able to reconstitute this position at some unknown future point in time, the "Hartsfield Investment" is currently a total loss from an accounting perspective. Because Receiver has a 32% interest in Seaforth, Receiver's share of this loss is \$324,000. Clyman Show Cause Affidavit, ¶7.

5. The second investment, the "Meriton Investment", in the amount of \$7,750,000.00, is subject to a one year lock-up provision that will not expire until June 2006, at which time Seaforth may submit a written redemption request. Despite the lock-up, Seaforth

made a written redemption request to Meriton, which request was denied. Clyman Show Cause Affidavit, ¶8.

6. Seaforth also submitted a written redemption request with regard to the third investment, the “Quantum Investment”, which was in excess of \$6,000,000.00. The assets invested by Seaforth in Quantum were, in turn, reinvested by Quantum. Seaforth has been advised that these investments are illiquid and that a redemption of the size requested would be virtually impossible to accomplish without causing severe prejudice to the other Quantum investors. However, Quantum has been working diligently with two of Seaforth’s managing members to extract value from a 50 Million (USD) Certificate of Deposit to redeem Seaforth’s investment in Quantum to provide the necessary liquidity to meet the receiver’s demand. Clyman Show Cause Affidavit, ¶9.

7. From on and after August 11, 2005, two of Seaforth’s managing members have made trips to Europe in an attempt to expedite the redemption of the Quantum Investment. In fact, one managing member was in Europe prior to the Receiver’s Application working with Quantum to achieve this result. That managing member, Alain Assemi, is still there. Clyman Show Cause Affidavit, ¶10.

8. Seaforth has never opposed the return of property requested by the Receiver and has done everything in its power to comply with the Stipulated Order. Over \$4 million has already been paid. Once the Quantum Investment is liquidated, the remaining balance, less the Receiver’s share of the loss in the Hartsfield Investment, will be turned over. Clyman Show Cause Affidavit, ¶11.

9. Seaforth must also be mindful of the other Seaforth investors and is doing what it must to protect their interests. See Clyman Show Cause Affidavit, ¶12.

Seaforth also incorporates by this reference the Clyman Affidavit filed as Exhibit A to Seaforth's memorandum in support of its application for leave to intervene.

ARGUMENT

Civil contempt is a severe remedy which should be used only when necessary to sustain the authority of the court. *T.Y. v. Board of Cty Com'rs of Shawnee Cty*, 912 F. Supp. 1424, 1427 (D. Kan. 1996)(citing *NLRB v. Shurtenda Steaks, Inc.*, 424 F.2d 192, 194 (10th Cir. 1970)). The movant must establish that the alleged contemnor has not diligently attempted to comply in a reasonable manner with a court order. *T.Y.*, 912 F. Supp. at 1428 (citing *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)). Movant must do this by clear and convincing evidence. *Id.*

"[A] person who attempts with reasonable diligence to comply with a court order should not be held in contempt." *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984). "A contemnor is 'allowed to show either that he did not violate the court order or that he was excused from complying.'" *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998)(citation omitted). "A contemnor may be excused because of an 'inability' to comply with the terms of the order." *Id.* (citation omitted) . "To satisfy this burden, a contemnor must "offer proof beyond the mere assertion of an inability." *Id.* (citation omitted). Instead, a contemnor "demonstrate[s] an inability to comply only by showing that [he has] made 'in good faith all reasonable efforts to comply.'" (citing *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991)(quoting *United States v. Ryan*, 402 U.S. 530, 534 (1971)).

A contempt order should not issue if the court finds no willful disobedience but only incapacity to comply. *SEC v. Ormont Drug & Chemical Co., Inc.*, 739 F.2d 654, 656 (D.C. Cir. 1984). According the court in *Ormont*:

The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him "to do an impossibility."

....

It would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply. An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully....

Id. (citations omitted).

The court in *Ormont* held that a party "cannot be held in contempt if it lacked the financial ability to comply with the injunctive order." *Id.* at 657 (citations omitted); *see also* *SEC v. AMX, International, Inc.*, 7 F.3d 71, 73 (5th Cir. 1993)("[F]inancial inability is a defense for failure to comply with a court-ordered disgorgement." (citing *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984)). "If a party lacks the financial ability to comply with an order, the court cannot hold him in contempt for failing to obey." *Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986)(citing *Ormant*, 739 F.2d at 657).

As the Clyman Show Cause Affidavit makes abundantly clear, Seaforth is not willfully disobeying this court's order. To the contrary, Seaforth has in good faith engaged in all reasonable efforts to comply but is simply unable to do so. Moreover, further efforts to force Seaforth to comply with the Stipulated Order as presently constituted will harm Seaforth and its investors, perhaps significantly so. Seaforth continues to endeavor to comply with the Stipulated Order to the full extent of its ability and without harming its investors. These efforts notwithstanding, the Receiver has moved for a show cause order as to why Seaforth should not be held in contempt. Not only is this motion unnecessary and legally not supportable, it is patently unfair to Seaforth and its investors.

Because Seaforth is acting in good faith and has complied with the Stipulated Order as best it can so far, the Receiver's Motion for Show Cause Order should be denied forthwith.

Instead, these issues should be taken up and considered by the court when it hears and considers Seaforth's Motion to Modify the Stipulated Order Entered on August 11, 2005 (Docket No. 84) and Supporting Suggestions.

Respectfully submitted,

HELDER LAW FIRM

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2005, this document was electronically filed with the Court, which automatically notified the following electronic filing participants:

Timothy P. Davis, Counsel for Plaintiff SEC
Christopher M. Joseph, Counsel for Spencer Defendants
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Roger N. Walter, Counsel for Relief Defendant Vectra Resources, LLC
Christopher Bebel, Counsel for Relief Defendant Vectra Resources, LLC
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