

LINKS: 42, 43, 46

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 08-2661-GAF (FFMx)	Date	June 15, 2012
Title	Nuscience Corporation v. Robert Henkel, et al.		

**Present: The
Honorable**

GARY ALLEN FEES

Renee Fisher

None

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: (In Chambers)

**ORDER RE: DEFENDANT ROBERT HENKEL'S MOTION TO VACATE DEFAULT
AND TO DISMISS FOR LACK OF PERSONAL JURISDICTION; CONTEMPT
SANCTIONS AGAINST DEFENDANTS AND STEPHEN ABRAHAMS**

I.

INTRODUCTION & BACKGROUND

Plaintiff NuScience Corporation (“NuScience”) possesses a trade secret in a proprietary water-splitting technology and formula that it uses to produce a product called “CELLFOOD,” the world’s top-selling oxygen and nutrient supplement. (Docket No. 32 [4/14/09 Order] at 3; Docket No. 36-1 [First Negrete Decl.] ¶ 3.) The formula was developed by Everett Storey while he was an officer for Deutrel Laboratories, Inc. Upon Storey’s death, the laboratory and its business was willed to Lois Ramm; in 1991, she sold the laboratory and all trade secret assets to Jerald Rhoten, who later formed NuScience. Since 1997, when Rhoten sold the laboratory and assigned the formula to NuScience, CELLFOOD has become the heart of NuScience’s business, which enjoys \$350 million in annual sales. In 2004, Ramm’s will was probated. At that time, her brother, John Henkel, allegedly discovered documents that detailed the trade secret formula; he subsequently threatened Rhoten and NuScience that he would sell or reveal the formula, but was permanently enjoined from doing so by an Iowa state court. (See 4/14/09 Order at 3–5; Docket No. 7 [First Amended Compl. (“FAC”)] ¶¶ 14–20; First Negrete Decl. ¶¶ 3–4.)

Defendants Robert and Michael Henkel are the sons of John Henkel. They claim to be in possession of Storey’s original formula, having lived with Ramm and Storey for a period of time in the late 1980s. They market and sell a product, Deutrocell, through their business entity of the

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same name, that they represent is equivalent to CELLFOOD, in that it also is made using the same water-splitting technology; contains 78 minerals, 34 enzymes, 17 amino acids; and is “cellular nutrition that provides 129 nutrients plus oxygen and hydrogen at the cellular level.” (4/14/09 Order at 5; FAC ¶¶ 21–28.) In 2008, the Henkels began to directly solicit NuScience’s customers; make sales of Deutrocell through their web site; offer to sell the trade secret formula; and use Plaintiff’s registered trademarks in promoting their product. (4/14/09 Order at 5–8; FAC ¶¶ 33, 35–49, 52–53, 65.) On August 13, 2008, NuScience filed a First Amended Complaint in this Court against the Henkel brothers and Deutrocell, asserting claims for federal trademark infringement and false advertising under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); misappropriation of trade secrets in violation of Cal. Civ. Code section 3426; unfair competition in violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code sections 17200 *et seq.*; and intentional interference with business relationships.

Defendants failed to appear in this action, and, on April 14, 2009, this Court entered default judgment against them as to Plaintiff’s FAC. (See 4/14/09 Order; Docket No. 31 [4/14/09 Judgment].) The Court’s 4/14/09 Judgment awarded \$400,000 in compensatory and punitive damages against Defendants. (4/14/09 Judgment ¶ 9.) The Court also permanently enjoined Defendants and their attorneys from, *inter alia*, (1) possessing, using, selling, or transferring NuScience’s trade secrets, including the formula or its ingredients; (2) claiming to third parties that they have knowledge of the trade secret formula; (3) recording in any way the trade secret formula; (4) using Plaintiff’s trademarks or variations of them in connection with the sale of any mineral supplements for human consumption; and (5) engaging in unfair competition or interference with Plaintiff’s business relationships by contacting Plaintiff’s customers. (*Id.* ¶ 4(a)–(g).) The Court ordered Defendants to immediately transfer to Plaintiff all documents and records relating to the trade secret formula, including originals and duplicates, and to deliver up for destruction all products, including Deutrocell, bearing Plaintiff’s trademarks. (*Id.* ¶¶ 5, 7.)

On April 19, 2012, Plaintiff sought an order from this Court requiring Defendants to show cause why they should not be held in contempt for failure to comply with the Court’s 4/14/09 Order and Judgment. (Docket No. 36 [App. for OSC Re: Contempt].) Defendants’ various acts of noncompliance are detailed *infra*. On May 7, 2012, the Court issued the requested order to show cause, giving Defendants until May 21 to respond. (Docket No. 42 [5/7/12 Order] at 6.) On May 9, Defendant Robert Henkel filed a motion to vacate default judgment and a motion to dismiss for lack of personal jurisdiction. (Docket No. 43.) Defendants did not otherwise respond to the 5/7/12 Order. For the reasons set forth below, the Court **DENIES** the motion to vacate and dismiss, and **ORDERS** contempt sanctions against Defendants. Plaintiff now requests that the Court issue an order to show cause re: contempt against Robert Henkel’s attorney, Stephen Abraham, for filing documents in connection with Robert Henkel’s motion

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that purport to reveal Plaintiff's trade secrets. (Docket No. 46 [Second App. for OSC Re: Contempt].) As set forth below, the Court **ORDERS** contempt sanctions against Abrahams. Plaintiff may file an appropriate motion for compensation from Defendants and Abraham.

**II.
DISCUSSION**

A. DEFENDANT ROBERT HENKEL'S MOTION TO VACATE AND DISMISS

Defendant Robert Henkel asks the Court to vacate the default judgment entered against him, and to dismiss Plaintiff's complaint for lack of personal jurisdiction. A defendant against whom default judgment is entered may later attack the judgment as void on the basis that the court lacked personal jurisdiction over him. See Fed. R. Civ. P. 60(b)(4); In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999). However, because Defendant previously failed to appear in this action and chose to allow the case to proceed to default judgment, he must now shoulder the burden of proof in contesting jurisdiction. See Philos Tech., v. Philos & D, Inc., 645 F.3d 851, 857 (7th Cir. 2011); accord SEC v. Internet Solutions for Bus., Inc., 509 F.3d 1161, 1163 (9th Cir. 2007).

1. PERSONAL JURISDICTION LEGAL STANDARD

Because this Court sits in California and no federal law governs personal jurisdiction over this case, the Court must apply California's long-arm statute. Fed. R. Civ. P. 4(k)(1)(A); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998). "California's long-arm statute is co-extensive with federal standards, so a federal court may exercise personal jurisdiction if doing so comports with federal constitutional due process." Boschetto v. Hansing, 539 F.3d 1011, 1015 (9th Cir. 2008); see also Cal. Civ. Proc. Code § 410.10. Under federal due process standards, to exercise personal jurisdiction over a non-resident defendant, "that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801 (9th Cir. 2004) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The extent and type of contacts a defendant may have with the forum state can give rise to two types of jurisdiction: general or specific. Data Disc, Inc. v. Sys. Tech. Assocs., 557 F.2d 1280, 1285 (9th Cir. 1977).

"If the nonresident defendant's activities within a state are 'substantial' or 'continuous and systematic,' there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities." Id. at 1287 (citation omitted). "The standard for establishing general jurisdiction is 'fairly high,' and

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requires that the defendant’s contacts be of the sort that approximate physical presence.” Bancroft & Masters, Inc. v. Augusta National Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citations omitted). Specific jurisdiction may be established where the plaintiff’s claims derive from the defendant’s contacts with the forum state. Id. The Ninth Circuit employs a three-prong test for specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802 (internal quotation marks and citation omitted).

To establish specific jurisdiction, it must be shown that Defendant “either purposefully availed [himself] of the privilege of conducting activities in California, or purposefully directed [his] activities toward California.” Schwarzenegger, 374 F.3d at 802. A purposeful direction analysis is most often used in suits, such as this trademark infringement and trade secret action, that sound in tort. Id.; see also Panavision Int’l, 141 F.3d at 1321 (stating that a trademark infringement action is “akin to a tort case”). To determine whether jurisdiction is proper under the “purposeful direction” prong, the Ninth Circuit employs the Calder v. Jones, 465 U.S. 783 (1984) “effects test” which requires proof of three elements: “the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (citing Schwarzenegger, 374 F.3d at 803).

2. APPLICATION

Robert Henkel argues that jurisdiction over him is improper because he is has not resided in California since 1989 and currently has no business office or connections in California. Moreover, he did not “expressly aim” tortious conduct at California. Deutrocell operates a generally-accessible web site that is in no way targeted to California, through which it has made

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just over \$200 in sales in the United States, Australia, and South Africa, with only a single sale—in the amount of \$12.95, for one ounce of the Deutrocell product—made to a California resident, who in fact was a NuScience employee directed to make the purchase. (Docket No. 43 [Mem. Vacate/Dismiss] at 1, 3–5, 7–14; Docket No. 43-1 [First R. Henkel Decl.] ¶¶ 3–5, 7–9, Ex. A; Docket No. 43-2 [Johnson Decl.] ¶ 4, Ex. A, Att. B; Docket No. 43-3 [First McKinney Decl.] ¶ 3; Docket No. 51-2 [Second McKinney Decl.] ¶ 4.)¹

It is undisputed that NuScience is a California corporation with its principal place of business in this State, and that this information is available on the company’s web site. (FAC ¶ 3; Docket No. 50-3 [Second Negrete Decl.] ¶ 2.) It is also undisputed that, prior to the initiation of this lawsuit, Deutrocell had contacted numerous of NuScience’s customers—also listed on Plaintiff’s web site—to solicit their business. (FAC ¶¶ 26, 65; First R. Henkel Decl. ¶ 8; Johnson Decl. ¶ 4, Ex. A, Att. A; Second Negrete Decl. ¶¶ 3–10, Exs. 1–4; Docket No. 50-4 [Rubin Decl.] ¶¶ 2–3, Ex. 1.) Most of these contacts were made via a short e-mail message, stating only “Go to evstorey.com or deutrocell.com[.] VERY INTERESTING”; another version of the solicitation e-mail asked, “Would you be interested in distributing EV STOREY[’]S ‘ORIGINAL KITCHEN FORMULA (DEUTROCELL)?” (Second Negrete Decl. ¶¶ 7–10, Exs. 1–4; Rubin Decl. ¶ 3, Ex. 1.) NuScience encouraged its largest and only U.S. distributor, Lumina Health Products, to develop a relationship with Deutrocell, during the course of which it sent sample products to Lumina, suggested that Lumina “could become bigger than Deutrel/Nu Science,” and disparaged NuScience’s product as being made from an incorrect formula. (First McKinney Decl. ¶ 4; Rubin Decl. ¶¶ 4–9, Exs. 2–6; Docket No. 51-1 [Second R. Henkel Decl.] ¶ 3.) Robert Henkel states that, although he “felt pressured” by Lumina owner Mark Rubin to consider selling Deutrocell’s products in the United States, Henkel told Rubin that he was “only interested in developing an overseas market.” (Second R. Henkel Decl. ¶ 4; see also Rubin Decl. ¶ 7, Ex. 5 (e-mail from Henkel to Rubin stating that “we are not much concerned about the [A]merican market as of now . . . [w]hat we are offering you is the rest of the world!”) At the time that this lawsuit was filed, the Deutrocell web site also listed all product ingredients, including that it is 6.3 percent deuterium sulphate, which is “one of the major, trade secret components of the [trade secret] [f]ormula,” and was previously unknown to the public (First Negrete Decl. ¶ 13); and advertised that Deutorcell was made using Storey’s original formula, that “this secret formula is for sale,” and that Deutrocell is “in no way affiliated with Nu Science, manufacturers of ‘Cellfood.’” (See Docket No. 50-2 [Byers Decl. ¶¶ 2, 5–7, Exs. 3–5].)

¹The Parties make various objections to the evidence offered by the other, primarily on the basis of relevance, personal knowledge, and hearsay. (See Docket Nos. 52–54, 57.) For the purposes of this order, these objections are **OVERRULED**; the Parties’ evidentiary arguments do not, in any event, affect the Court’s determination of the present motions.

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In Opposition, Plaintiff argues that Henkel waived his personal jurisdiction defense by attempting to file a handwritten motion challenging jurisdiction on December 8, 2008. This Court rejected the filing for document discrepancies, and the motion was never re-filed. (See Docket No. 50 [NuScience Opp.] at 4–5; Docket No. 50-1 [Second Salz Decl.] ¶¶ 2–3, Exs. 1, 2; Docket No. 15.) However, the Court declines to reach this argument, in light of the conclusion, detailed below, that personal jurisdiction is plainly present in this case.

Henkel is correct that the Court may not exercise general personal jurisdiction over him, because it has not been shown that his contacts with California are “substantial” or “continuous and systematic.” However, Henkel’s contacts with California support this Court’s exercise of specific personal jurisdiction over him. “[T]he ‘express aiming’ requirement . . . is satisfied when ‘the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.’” CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1077 (9th Cir. 2011) (quoting Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002)). The Ninth Circuit has held that a defendant targets a known forum resident when he, for example, uses the resident’s intellectual property to compete with the forum resident or to disrupt its business activities. However, express aiming will not be found where the defendant’s intentions are purely local or otherwise not directed at the plaintiff. Compare id. (misappropriation of course catalogues of plaintiff California corporation that assisted college students with transfer process for the purpose of competing with the plaintiff in California and elsewhere constituted “express aiming”); Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1129–30 (9th Cir. 2010) (express aiming satisfied where defendant law firm made commercial use on its web site of plaintiff law firm’s copyrighted material for the purpose of competing with the plaintiff for clients); Panavision Int’l, 141 F.3d at 1318–19 (express aiming met where cybersquatter registered the plaintiff’s trademark as part of a domain name in order to obtain money from the plaintiff in exchange for the rights to the domain name), with Pebble Beach v. Caddy, 453 F.3d 1151, 1153–54, 1156–58 (9th Cir. 2006) (express aiming not met where the plaintiff was a resident of the California forum and the defendant used the plaintiff’s trademarked name for his three-room bed and breakfast located in southern England); Schwarzenegger, 374 F.3d at 806–07 (express aiming not met where Ohio car dealership used movie star’s likeness in local advertisement); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997) (no purposeful availment or direction where the defendant’s only forum contact was use of the forum plaintiff’s trademark on a passive web page advertisement, without knowledge that the plaintiff was a forum resident).

Here, at the time that the default judgment was entered against Defendant, he had used Plaintiff’s trade secrets and copyrights in an attempt to compete with Plaintiff, a known California resident, on a global scale. Defendant argues that he did not direct his sales efforts

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toward the California market and made no sales to California, save for fulfilling the one order placed by Plaintiff. But Defendant made his product available in California via the Deutrocell web site, and it is apparent from the evidence that Defendant’s aim was not expressly local or in any way geographically limited. Rather, Defendant’s global ambition—including U.S. markets—was clear. At the time that the lawsuit was instituted in April of 2008, in addition to the one California sale, Defendant had already made sales in New Jersey, Australia, and South Africa and had directly solicited all of Plaintiff’s customers, who are responsible for distributing Plaintiff’s product throughout the world. Although Defendant suggested to Plaintiff’s U.S.-based distributor, Lumina, that they begin a partnership for overseas distribution, Defendant reserved the option of competing in the United States in the future. Moreover, by directly soliciting Plaintiff’s customers and disparaging Plaintiff’s product to them, revealing various aspects of the trade secret and offering the formula for sale on their web site, and claiming that their product was made using Storey’s original formula and identifying NuScience by name, Defendant’s actions went beyond mere competition to the “individualized targeting” identified in Pebble Beach and present in Panavision. See Pebble Beach, 453 F.3d at 1157. Accordingly, the Court concludes that Defendant’s conduct was expressly aimed at California.²

The remaining requirements for personal jurisdiction are easily met. Any economic loss experienced by Plaintiff, a California resident, was suffered in California. See CollegeSource, Inc., 653 F.3d at 1079 (“a corporation incurs economic loss, for jurisdictional purposes, in forum

²Plaintiff’s current President, Kevin Negrete, also states that, before and after the initiation of this lawsuit, Robert Henkel contacted NuScience in California offering to sell Storey’s original formula. (See Second Negrete Decl. ¶ 11.) Former NuScience Vice President of Sales and Marketing David McKinney denies this fact, on Henkel’s behalf. (See First McKinney Decl. ¶ 2; Second McKinney Decl. ¶ 6.) However, Henkel himself does not deny having contacted NuScience, and, in 2008, Defendants’ lawyer listed NuScience as among the companies that they had contacted “to see if there was an interest in the product being offered.” (See Johnson Decl. ¶ 4, Ex. A at 2, Att. A.) In any event, the Court need not resolve this particular factual dispute because Henkel’s contacts with California are otherwise sufficient to support the exercise of personal jurisdiction.

In addition, Defendant argues repeatedly that Plaintiff has committed a “fraud upon this Court” by making the jurisdictional allegation in its FAC, and repeating the allegation in the proposed judgment filed with the Court, that Deutrocell had made “substantial sales” in California, when it knew at that point that Deutrocell had made only a single sale in California. (See Mem. Vacate/Dismiss at 4–5, 8, 13 (citing FAC ¶ 25; Docket No. 31 [4/14/09 Judgment] at 3); Docket No. 51 [Reply Vacate/Dismiss] at 1–3, 10.) The Parties have filed conflicting affidavits as to whether McKinney told Plaintiff’s attorney, at the time of the preparation of the FAC, that Defendant had made multiple sales in California. (See Byers Decl. ¶ 9; Second McKinney Decl. ¶¶ 3–5.) According to Henkel, the false allegation of substantial sales in California served as the only basis on which this Court exercised personal jurisdiction over Defendants in entering default judgment. Defendant is incorrect. The Court’s 4/14/09 Order contains no such indication, and recites the jurisdictional facts relied upon in the present order. (See 4/14/09 Order at 5–8.)

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of its principal place of business”). It is now Defendant’s burden to show that Plaintiff did not suffer economic loss as a result of its conduct—a burden that it has failed to carry. Plaintiff’s claims arose out of the very activities that Defendant has purposefully directed toward California: the use of a California resident’s intellectual property to compete with the resident in California and elsewhere. See id.

Defendant argues that the exercise of jurisdiction over him was not reasonable. In assessing reasonableness, the Court balances “seven factors: (1) the extent of a defendant’s purposeful interjection [into the forum]; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum.” Panavision Int’l, 141 F.3d at 1323 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985)). Defendant argues that he has lived in Iowa since 2007, and “has nothing to do with this state”; that his resources pale in comparison to Plaintiff’s; and that the issues to be litigated in this case—having to do with rights in the trade secret formula—are more properly resolved in Iowa, where Lois Ramm’s will was probated and where judgment was entered against John Henkel. (Mem. Vacate/Dismiss at 12–13.) These arguments entirely miss the mark. Moreover, Defendant engaged in conduct that was intended to harm a California Plaintiff. It is hardly unreasonable or unjust to allow the victim to seek recompense at the site of the injury. At the time that the lawsuit was initiated, any interest that Iowa had in adjudicating the dispute was no greater than California’s, where the trademark and trade secret holder resides. Iowa’s interest in adjudicating the merits is, in any event, now irrelevant, as default judgment has been entered. As detailed above, Defendant’s purposeful interjection into California prior to the initiation of the lawsuit was hardly negligible. Finally, Defendant has presented no evidence that defending the lawsuit in California in 2008 and 2009—or today—would have been or is “so gravely difficult and inconvenient” as to place him at a “severe disadvantage in comparison to” Plaintiff. Amini Innovation Corp. v. Cosmos Furniture, Ltd., No. CV 08-7855, 2009 WL 806603, at *4 (C.D. Cal. Mar. 16, 2009) (quoting Burger King, 471 U.S. at 480.)). Thus, the Court concludes that its exercise of specific personal jurisdiction over Defendant Robert Henkel was reasonable.

Accordingly, the Court **DENIES** Defendant Robert Henkel’s motion to vacate the default judgment and to dismiss for lack of personal jurisdiction.

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B. CONTEMPT SANCTIONS

1. LEGAL STANDARD

Civil contempt “consists of a party’s disobedience to a specific and definite court order by failure to take all reasonable steps within the party’s power to comply.” In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993). Coercive sanctions take into account the “character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction.” Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1985) (quoting United States v. United Mine Workers, 330 U.S. 258, 304 (1947)). If a court finds coercive sanctions appropriate, it may order the contemnor to pay sanctions to the court or order the contemnor incarcerated until he has substantially complied with the court’s order. See, e.g., id.; SEC v. Elmas Trading Corp., 824 F.2d 732, 732–33 (9th Cir. 1987). To succeed on a motion for contempt, a plaintiff must show by clear and convincing evidence that (1) the defendants violated a court order; (2) the violation demonstrably fell short of substantial compliance with the court order; and (3) the violation was not based on a good faith and reasonable interpretation of the order. Wolfard Glassblowing Company v. Vanbragt, 118 F.3d 1320, 1322 (9th Cir. 1997) (citation omitted).

“[A] plaintiff seeking to obtain the defendant’s compliance with the provisions of an injunctive order move[s] the court to issue an order requiring the defendant to show cause why he should not be held in contempt and sanctioned for his noncompliance.” In re Grand Jury Proceedings, 142 F.3d 1416, 1424 (11th Cir. 1998) (internal quotation marks and citation omitted). “In his motion, the plaintiff cites the provision(s) of the injunction he wishes to be enforced, alleges that the defendant has not complied with such provision(s), and asks the court, on the basis of his representation, to order the defendant to show cause why he should not be adjudged in contempt and sanctioned.” Id. (same). “The defendant, following receipt of the order, usually files a response, either confessing his noncompliance or presenting an excuse, or ‘cause,’ therefor.” Id. (same). “The dispute is thereafter resolved at a show cause hearing At the hearing, if the plaintiff establishes the defendant’s noncompliance with the court’s injunctive order and the defendant presents no lawful excuse for his noncompliance, the court usually adjudges the defendant in civil contempt and imposes a sanction that is likely to prompt the defendant’s compliance with the injunction.” Id. (same).

2. CONTEMPT SANCTIONS AGAINST DEFENDANTS

Plaintiff served Defendants with a copy of this Court’s default judgment in March of 2011, along with a copy of a March 2011 default judgment obtained in Los Angeles County

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Superior Court against Robert Henkel for conspiracy to violate this Court’s judgment. (Docket No. 36-2 [First Salz Decl.] ¶¶ 3–5, Ex. 20.) Shortly thereafter, both Robert Henkel and Michael Henkel began to make threats, via telephone conversations with Plaintiff’s counsel and postings made on Defendants’ web sites, to publish the trade secret formula and the technical know-how for CELLFOOD on the Internet if Plaintiff did not “back off” and stop sending “legal papers.” (Id. ¶¶ 6–8, Exs. 21–22; First Negrete Decl. ¶ 11, Ex. 6.) One such internet posting, entitled “open letter to: Kevin Negrete” and others, refers to the “fraudulent judg[.]ments” obtained, and states that “if you do not stop harassing me and my brother bob, we are fully prepared to give the formula for cellfood to the world for free!!! . . . You are fully aware that we possess the formula in Ev’s handwriting!” (First Salz Decl. ¶ 8, Ex. 22.) Another of Defendants’ web sites have recently used Plaintiff’s trademarks; alluded to Robert Henkel’s “dispute with . . . NuScience . . . corporate harassment, corporate lies, corporate deception, theft, extortion, false and misleading advertising for ‘CELLFOOD’”; and claimed that Robert Henkel possesses Storey’s original formula, which it is “time to publish.” (First Negrete Decl. ¶ 14, Ex. 9.) Plaintiff’s distributors have found these sites and expressed concern to NuScience. (Id. ¶ 12, Ex. 7.)

Plaintiff’s counsel, Michael Salz, contacted the FBI, which investigated the Henkels’ conduct. Salz states that, on July 19, 2011, Robert Henkel told him, in a telephone conversation recorded by the FBI, that he would disclose NuScience’s trade secret formula to the world if NuScience did not agree to dismiss the state court action and forgo enforcement of the federal judgment. NuScience then requested dismissal of the state court action, which was entered on July 25, 2011. (First Salz Decl. ¶¶ 9–11.) However, on September 13, 2011, Robert Henkel stated to Salz in a recorded telephone conversation that he would sell the formula if NuScience did not pay him “tens of millions of dollars.” (Id. ¶ 12.) Robert Henkel also stated that he was selling “loads” of a product using the trade secret formula through his company, Revive Organics LLC. (Id.) The U.S. Attorney ultimately declined to prosecute. (Id. ¶ 13.)

In addition, in the past year and increasing in the past few months, NuScience and its customers have received e-mails from Defendants disparaging NuScience’s business practices and products and Negrete personally; offering to sell the same basic product as CELLFOOD, made by Defendants; threatening to contact CELLFOOD retailers directly to inform them that the product is not made from Storey’s original formula, but, rather, from a formula for “drain cleaner”; and demanding payment from NuScience of \$300 million. (First Negrete Decl. ¶¶ 6–9, 23, Exs. 1–3, 11–17.) In 2010, Robert Henkel sent product samples for a deuterium-based mineral formula to and discussed a possible business collaboration with McKinney, NuScience’s former Vice President. (Id. ¶ 16, Ex. 10.)

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In recent months, Defendants’ web sites have continued to list the trade secret ingredients for CELLFOOD, including all 78 minerals, 34 enzymes, and 17 amino acids, and have advised that the product is 6.3 percent deuterium sulfate. (*Id.* ¶ 10, Ex. 5.) Defendants’ alternative product is now apparently called Choice 02. The Revive Organics site states that Choice 02 has “tested the same as CELLFOOD at a leading university for PH values . . . [and] for osmolarity (substance concentration) 2890.” (*Id.* ¶ 10, Ex. 5.) To date, Defendants have not transferred to NuScience any documents pertaining to the trade secret formula and have not delivered up any products for destruction. (*Id.* ¶¶ 19–20.)

This Court ordered Defendants to show cause no later than 5:00 p.m. on Monday, May 21, 2012, why the Court should not adjudge them to be in contempt of the 4/14/09 Order and Judgment and why contempt sanctions should not issue. (5/7/12 Order at 5–6.) Other than Robert Henkel’s attempt to contest this Court’s personal jurisdiction over him, Defendants did not respond to the 5/7/12 Order by presenting evidence of their compliance with the judgment or an excuse for noncompliance. Since the 5/7/12 Order was issued, Defendants have continued to contact NuScience and its customers via e-mail, stating that they “will not be silenced”; disparaging CELLFOOD; and directing obscenities and threats to Negrete. Defendants have also posted pages on their web sites referring to Negrete and NuScience as “liars” that they will “expose[]” and referring to CELLFOOD as “drain opener you can drink,” and have registered new sites, including <http://nuscience.org> and <http://kevin-negrete.com>, in response to NuScience’s prosecution of a Uniform Domain-Name Dispute Resolution Policy (“UDRP”) complaint against their existing sites. (*See* Docket No. 56 [Third Negrete Decl.] ¶ 3, Exs. 1–8.)

On the basis of this clear, convincing, and undisputed evidence, the Court finds that Defendants are in **CONTEMPT OF THE COURT**. Specifically, Defendants have failed to comply with, or presented a lawful excuse for their noncompliance with, paragraphs 4(a)–(b), (d)–(g), 5, and 7 of the 4/14/09 and Judgment, because they have (1) continued to possess, use, offer to sell, communicate, reveal, publish, and advertise NuScience’s trade secrets and trade secret assets; represent to third persons that they have knowledge of the trade secrets; use the NuScience trademarks and other prohibited terms in connection with the sale of mineral supplements for human consumption; engage in unfair competition and intentionally interfering with NuScience’s prospective business advantage by contacting NuScience’s customers; (2) failed to immediately transfer to NuScience all documented information, in all media, about NuScience’s trade secret and Storey’s original formula and all products made according thereto; and (3) failed to deliver up for destruction all products bearing Plaintiff’s trademarks and all means of reproducing the trademarks. (*See* 4/14/09 Judgment ¶¶ 4(a)–(g), 5, 7.)

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Defendants are hereby **ORDERED** to:

1. Take down all web sites that fail to comply with the 4/14/09 Order and Judgment, including but not limited to: <http://d2so4online.com>, <http://uncle-evs.com>, <http://evstorey.com>, <http://nuscience.org>, and <http://kevin-negrete.com>.
2. Cease all contact, directly or indirectly, with any of NuScience's distributors or other business relations.
3. Cease publishing, directly or indirectly, any representations that they possess the trade secret formula or Storey's original formula.
4. Cease publishing, directly or indirectly, any representations that they will publish or release the formula.
5. Turn over to NuScience all trade secret related documents and things as required by the 4/14/09 Judgment.

Plaintiff has also requested that the Court order that Defendants compensate it for its "substantial losses . . . including, without limitation, substantial fines, an award of attorney fees and costs." (App. for OSC Re: Contempt at 12.) However, Plaintiff has not yet requested a specific, documented amount. Plaintiff is may file an appropriate motion for compensation **no later than the close of business on Monday, June 25, 2012.**

Finally, Plaintiff requests that the Court jail Defendants until they demonstrate compliance. (*Id.*) The Court declines to so order at this time; however, the Court warns Defendants that it reserves this sanction should they further disobey this order and the 4/14/09 Order and Judgment, and, particularly, if they persist in representing that they possess the trade secret formula or Storey's original formula; offering for sale products made based on the formula; or representing that they will publish the formula.

3. ORDER TO SHOW CAUSE RE: CONTEMPT AGAINST ABRAHAM

Plaintiff now requests that the Court issue an Order to Show Cause Re: Contempt against Robert Henkel's attorney, Stephen Abraham. Abraham filed with Robert Henkel's motions the Declaration of Glenn Johnson, who represented the Henkels in 2008. (*See* Johnson Decl. ¶ 3.) Attached to the declaration were documents Johnson sent to Plaintiff's attorney at the time, Stephen Byers, during the course of this litigation, in response to Byers' request for

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“documentation regarding formulation for Deutrocell, CellFood, Open-All and other formula created or distributed by Everett Storey.” (*Id.*, Ex. A, Att. C.) These documents contain handwritten notes that purport to detail the trade secret formula and preparation directions. Robert Henkel relies on these documents nowhere in his motions, and Abraham caused the documents to be filed on the Court’s public docket. Plaintiff twice sought to meet and confer with Abraham regarding the sealing of the documents; Abraham’s responses did not include any reference to sealing the documents, but instead took issue with the substantive claims asserted in this lawsuit. (See Docket No. 46-1 [Third Salz Decl.] ¶ 3, Ex. 2.) Thereafter, Plaintiff moved the Court to seal the documents (Docket No. 55), and they were sealed fifteen days after filing.

Abraham opposes Plaintiff’s application, arguing that Johnson did not represent, and the documents themselves do not indicate, that they contain the trade secret formula. Moreover, according to Abraham, the formula detailed cannot be Plaintiff’s protected formula, because it contains yeast, which Plaintiff has disclaimed as an ingredients in its own product; five percent sulfuric acid, which is not fit for human consumption; and “Open-All,” which itself has a trade secret formula that Plaintiff purports to own. Moreover, the formula does not reference use of a water-splitting technology. (Docket No. 47 [Opp. to Second App. for OSC Re: Contempt] at 4–5; Docket No. 47-1 [Abraham Decl.] ¶ 3, Ex. 1.) Abraham argues that, if the documents do in fact reveal Plaintiff’s trade secret, Plaintiff is “perpetrating a fraud of staggering proportions and exposing the public to serious health risk[s],” because sulfuric acid is a “caustic and known carcinogen.” (Opp. to Second App. for OSC Re: Contempt at 6.)

The Court finds Abraham’s arguments disingenuous. Johnson’s letter to Byers specifically states that the documents are responsive to Byers’ request for documentation regarding the trade secret formula. (See Johnson Decl. ¶ 4, Ex. A at 3.) Abraham’s act of publicly filing documents purporting to reveal the trade secret plainly violated paragraph 4(a) of the 4/14/09 Judgement, which states: “That Defendants and their . . . attorneys . . . [are] permanently enjoined and restrained from . . . publishing . . . in any manner any of NuScience’s trade secrets or trade secret assets, including all or any part of the ingredients (except water), formula, Everett Storey’s original formula . . . or any deuterium based mineral formulas” (4/14/09 Judgment ¶ 4(a).) The Court can discern no rational necessity for filing the documents at all, let alone on the public docket, or for evading Plaintiff’s subsequent requests to seal the documents. Because Abrahams has already been afforded an opportunity to respond to Plaintiff’s accusations and has failed to offer any evidence of compliance with the 4/14/09 Judgment or any lawful excuse for noncompliance, the Court finds Abraham to be in **CONTEMPT OF THE COURT**. Abraham is **ORDERED** to immediately cease and desist from making any further public disclosures prohibited by the 4/14/09 Judgment, including anything purporting to be NuScience’s trade secret formula or Storey’s original formula.

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Plaintiff may file an appropriate motion for compensation **no later than the close of business on Monday, June 25, 2012.**

**III.
CONCLUSION**

Based on the foregoing discussion, the Court **DENIES** Defendant Robert Henkel's motion to vacate default judgment and to dismiss for lack of personal jurisdiction. Defendants Robert Henkel, Michael Henkel, and Deutrocell, and their attorney Stephen Abrahams, are found in **CONTEMPT OF THE COURT** and are ordered to comply with the permanent injunction provisions of the 4/14/09 Judgment. Plaintiff may file an appropriate motion for compensation by Defendants and Abraham **no later than the close of business on Monday, June 25, 2012.** The hearing presently scheduled for **Monday, June 18, 2012**, is hereby **VACATED**.

IT IS SO ORDERED.