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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRATERS & FREIGHTERS, a Colorado Corporation, and CRATERS & FREIGHTERS FRANCHISE COMPANY,

Plaintiff,

v.

DAISYCHAIN ENTERPRISES, a California Corporation, dba FREIGHT & CRATE; CATHY BENZ, an individual; and FRED BENZ, an individual,

Defendants.

No. C 09-4531 CW

ORDER DENYING CIVIL AND CRIMINAL CONTEMPT HOLDING

(Docket Nos. 228 and 240)

United States District Court  
For the Northern District of California

Plaintiff Craters & Freighters moves for an order to show cause as to why Defendants Cathy Benz and Fred Benz should not be held in criminal contempt. Plaintiff also moves for the appointment of a prosecutor to seek the imposition of criminal penalties for willful violations of the Court's orders. Docket No. 228. On November 30, 2015, the Court ordered that Defendants show cause in writing and at a hearing why they should not be held in civil or criminal contempt, or both. Subsequently, Defendant Fred Benz filed an Application for an Order to Show Cause Why [Plaintiff's attorney] John P. Schmitz Should Not Be Held in Contempt of Court and Prosecuted for False Filing, Misrepresentation, Trespass, Theft, Identity Theft and Money Laundering. Docket No. 240. Fred Benz and Cathy Benz each later

1 filed a financial affidavit.<sup>1</sup> The Court held a hearing on  
2 Tuesday, January 12, 2016. Having considered arguments at the  
3 hearing, the parties' filings and the record in this case, the  
4 Court DENIES Plaintiff's motion to appoint a prosecutor for the  
5 alleged criminal contempt, declines to sanction Defendants based  
6 on this motion and DENIES Defendants' application for an order to  
7 show cause.

8 "The standard for finding a party in civil contempt is well  
9 settled: 'The moving party has the burden of showing by clear and  
10 convincing evidence that the [non-moving party] violated a  
11 specific and definite order of the court. The burden then shifts  
12 to the [non-moving party] to demonstrate why they were unable to  
13 comply.'" FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th  
14 Cir. 1999) (quoting Stone v. City & Cty. of San Francisco, 968  
15 F.2d 850, 856 n.9 (9th Cir. 1992)).

16 Plaintiff asserts that Defendants have violated the Court's  
17 permanent injunction and prior orders by (1) failing to file  
18 financial affidavits; (2) failing to pay amounts due; (3) paying  
19 only eighteen of twenty-eight required weekly payments of ten  
20 dollars per week (as of December 10, 2015); (4) directing their  
21 sons to file, in August 2015, a Statement of Reservation of Name  
22 for "Craters & Freighters, a Colorado Corporation;" and  
23 (5) directing one of their sons to transfer a Statement of  
24 Reservation of Name for "Craters & Freighters, a Colorado

25 \_\_\_\_\_  
26 <sup>1</sup> One affidavit is signed "Kathy Benz," but other filings  
27 with the Court list "Cathy Benz." The Court uses the spelling  
28 that appears in Defendants' prior motion for leave to file a  
motion to reconsider. See Docket No. 227.

1 Corporation" to a "Steve Barnard," who then filed Articles of  
2 Incorporation for the entity—actions Plaintiff characterizes as a  
3 "straw man transaction to reincorporate Freighters & Craters, a  
4 Colorado Corporation." Docket No. 233 at 2.<sup>2</sup>

5 The Court declines to find Defendants in civil contempt for  
6 failure to file a financial affidavit, as ordered by this Court on  
7 May 22, 2015 and June 11, 2015. Fred Benz and Cathy Benz now have  
8 filed financial affidavits with the Court.

9 The Court denies Plaintiff's motion to appoint a prosecutor  
10 to initiate criminal contempt proceedings. The permanent  
11 injunction prohibits the use of "Freight & Crate" and the use of  
12 "the registered trademark 'Craters & Freighters' for any purpose  
13 whatsoever." Docket No. 104. Although Plaintiff submits filings  
14 with the Colorado Secretary of State that include the names Tyler  
15 Frederick Benz and Alexander Richard Benz, Plaintiff has not  
16 submitted evidence that Defendants Cathy Benz and Fred Benz are  
17 associated with those filings. Defendants have indicated that  
18 they are unable to pay amounts previously ordered, and Plaintiff  
19 has not produced evidence that Defendants are able to pay or that  
20 they are evading the execution of the judgment. As the Court  
21 indicated at the hearing, it will order a settlement conference  
22 regarding outstanding amounts due to Plaintiff, if the parties so  
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24  
25 <sup>2</sup> Plaintiff indicates that Defendants have obeyed the Court's  
26 orders to "dissolve 'Craters & Freighters, a Colorado Corporation'  
27 with the Secretary of State of Colorado," Docket No. 232 at 3 n.1,  
28 and to ask the United States Patent and Trademark Office to  
"remove Freight & Crate from the company line," id. at 3.

1 request. Plaintiff has not alleged that Defendants are using the  
2 infringing marks in advertising.

3 The Court reiterates that violations of the Court's orders,  
4 including the permanent injunction, may lead to contempt sanctions  
5 that may include incarceration until compliance is obtained. See  
6 Lasar v. Ford Motor Co., 399 F.3d 1101, 1110 (9th Cir. 2005). The  
7 Court does not condone Fred Benz's and Cathy Benz's delay in  
8 filing their financial affidavits, and notes that their affidavits  
9 lack detail. Plaintiff may continue to pursue its civil remedies  
10 to execute the judgment. The Court's primary concern is  
11 preventing Defendants' use of Plaintiff's trademarks in violation  
12 of the permanent injunction.

13 Separately, the Court denies Fred Benz's application for an  
14 order to show cause. The Court reiterates that it has rejected  
15 Defendants' subject matter jurisdiction arguments. See Docket  
16 Nos. 214, 222. Defendants present no evidence that Plaintiff's  
17 attorney has violated an order of this Court.

18 CONCLUSION

19 For the reasons stated above, the Court DENIES Plaintiff's  
20 request for the appointment of a prosecutor to seek the imposition  
21 of criminal penalties for willful violations of the Court's orders  
22 (Docket No. 228), declines to hold Defendants in civil contempt  
23 and DENIES Defendants' application for an order to show cause  
24 (Docket No. 240).

25 IT IS SO ORDERED.

26 Dated: February 2, 2016



27 CLAUDIA WILKEN  
28 United States District Judge