

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JOHN DANIELS, et al.)	Case No. 03-CV-1550
)	
)	Hon. Matthew F. Kennelly
v.)	
)	
WAYNE BURSEY, et al.)	

**ADMINISTRATIVE AND BENISTAR DEFENDANTS’ MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR ORDER TO SHOW CAUSE WHY
ATTORNEY JOHN J. KORESKO SHOULD NOT BE HELD IN CONTEMPT**

Defendants Wayne Bursey, Daniel Carpenter, STEP Plan Services, Inc., Benistar Admin Services, Inc., Teplitzky & Company, P.C. (the “Administrative Defendants”) and Defendants Benistar Insurance Group, Inc., Benistar 419 Plan Services, Inc., Benistar 419 Plan, Benistar Employer Services Trust Corp., and Benistar, Ltd. (the “Benistar Defendants”) respectfully submit this memorandum of law in support of their motion for an order to show cause why John J. Koresko, V, Esq. should not be held in contempt of court and sanctioned for once again violating this Court’s minute order of September 29, 2004 and its oral directive issued in open court on November 15, 2004 prohibiting Attorney Koresko from disclosing the Confidential Settlement Agreement between Plaintiffs and Defendants or its contents to any person without first obtaining leave of this Court.

Despite these warnings, Attorney Koresko recently filed portions of the Confidential Settlement Agreement between Plaintiffs and Defendants as Exhibit E to his Motion for Sanctions dated September 20, 2005 in *STEP Plan Services, Inc. v. John J. Koresko, V*, No. 04-7718, Pennsylvania Court of Common Pleas, Philadelphia County. To avoid compounding Attorney Koresko’s violation of the Court’s orders, the Administrative and Benistar Defendants

are making a separate motion to file under seal a copy of Attorney Koresko's offending Exhibit E.

FACTS

The parties' private settlement agreement, now under seal as part of Docket No. 362, was never placed into the public record by the parties, nor did the parties have any dispute regarding the agreement which they asked the court to resolve.

As the Court will recall, during the course of discovery and before any decision on Plaintiffs' class certification motion was issued, the parties engaged in a series of settlement discussions under the auspices of Magistrate Judge Sidney Schenkier that ultimately resulted in the conclusion of the case through a settlement among the named Plaintiffs on an individual, non-class basis, and all the Defendants. (Docket Nos. 203, 211, 236, 268, 282, 288 and 326.) As the parties discussed settlement before the Magistrate, Attorney Koresko moved to withdraw as counsel based on his stated conflict of interest with the named Plaintiffs. (Docket No. 287.) The named Plaintiffs continued to be represented by their Chicago counsel, Krislov & Associates, experienced class action counsel. (Docket No. 342.) As the Magistrate conducted settlement conferences, Attorney Koresko, who had notice of the conferences but who did not participate, sought unsuccessfully several times to derail and stop the settlement process. (Docket Nos. 285, 325, and 330.) Attorney Koresko also continued to make filings without the consent of the named Plaintiffs, his former clients. (Docket No. 331.) Notwithstanding Attorney Koresko's efforts to undermine the process, the parties reached a settlement. (Docket No. 326.)

Upon reaching that settlement, the named Plaintiffs moved on October 1, 2004 to amend their complaint and withdraw all class allegations *without* prejudice. (Docket No. 339.) The parties did not submit their confidential settlement agreement to the Court in connection with

that motion or at any other time because it was not necessary to seek the Court's approval of the settlement agreement in light of the contemplated withdrawal of the class allegations. The Court allowed Attorney Koresko to oppose plaintiffs' motion on his own behalf and on behalf of unnamed "putative class plaintiffs," over the objections of the Defendants-Appellees on the grounds that he and such unnamed parties lacked standing to act in the case. (Docket Nos. 333, 334 and 338, Hearings of September 15 and 29, 2004.)

In connection with that opposition, Attorney Koresko sought and was granted, over various parties' objections, confidential discovery of the parties' memorandum of understanding of settlement and the confidential settlement agreement itself when it was executed. (Docket No. 338.) In its minute order, the Court stated:

[D]efendants are ordered to produce to attorney Koresko the executed memorandum of settlement, as well as any executed settlement agreements as they are concluded. **Mr. Koresko is ordered not to disclose these documents or their contents to any person without first obtaining leave of this Court on a showing of good cause.**

(Docket No. 338) (emphasis added).

The Administrative and Benistar Defendants produced the parties' memorandum of understanding to Attorney Koresko and, on or about October 19, 2004, the Confidential Settlement Agreement itself, upon its subsequent execution. (Docket No. 343.)

Three days later on October 22, 2004, without leave, Attorney Koresko entered an appearance for Robert Schmier and Schmier and Feurring Properties, Inc. ("Schmier and Feurring") "as objectors and potential plaintiffs in the above entitled matter." (Docket No. 355.) Attorney Koresko also filed a motion for leave to disclose the settlement terms and agreement on appeal. (Docket No. 353.)

The Administrative and Benistar Defendants filed a memorandum in opposition to Attorney Koresko's motion to disclose on November 2, 2004, arguing, among other things, that neither the memorandum of understanding nor the settlement agreement itself, to which Attorney Koresko, Mr. Schmier, and Schmier and Feurring were not parties, had ever been placed in the public record and neither document was at issue in the case. (Docket no. 361.) In their opposition, the Administrative and Benistar Defendants pointed out the significance, in view of the Seventh Circuit's decision in *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002), of the fact that the agreements had never been placed in the public record. (*Id.*)

A few days later, on November 9, 2004, Attorney Koresko filed a reply brief to which he attached the parties' Confidential Settlement Agreement -- the very subject of his motion for leave to disclose -- and which he had been enjoined by the Court from disclosing. (Docket no. 362.) A copy of the memorandum of understanding was attached as an exhibit to the Settlement Agreement.

At a status conference on November 15, 2004, the Court addressed Attorney Koresko's filing:

THE COURT: . . . The thing that I got has attached as Exhibit A the settlement agreement, and this was filed in the public record.

* * *

THE COURT: Why did you do that, Mr. Koresko? It was filed -- the thing that we're talking about, whether you can disclose it, you have now filed it in the public record without getting approval to do that.

MR. KORESKO: It was my understanding, your Honor, that I was not to disclose this to third parties.

THE COURT: And you don't think filing it in the public record constitutes disclosure?

* * *

MR. KORESKO: You Honor, I believe you made a statement at least two times ago that they know how to make motions to seal this record.

I supposed that if your Honor was not going to grant this motion, okay, that Mr. Webster would, as he has so well done up to date, ask your Honor to seal that particular document. But –

THE COURT: The reason my mouth is agape, Mr. Koresko, is that I am astonished at that argument, that a person who is an attorney, who's been practicing law, could think that when a document is has been disclosed to you under a court order that precludes you from disclosing it to anybody else, how you can think that filing it in the public record didn't constitute a disclosure. I mean, I am astonished at that argument. It's mind-boggling.

Tr. 11/15/04 Hearing at 7-8, a copy of which is attached as **Exhibit A**.

After determining that Attorney Koresko's reply brief with the Settlement Agreement attached had not yet been imaged onto the Court's Racer system, the Court denied the Administrative and Benistar Defendants' oral motion for sanctions against Attorney Koresko for his deliberate attempt to inject the parties' Confidential Settlement Agreement into the public record, but the Court ordered the clerk "to remove document 362 from the public record, place it under seal, and to remove the image of that document from the Racer system." (Docket No. 364.) The Court also denied Attorney Koresko's motion for leave to disclose the settlement terms and agreement on appeal, without prejudice to re-filing on appeal. *Id.*

Later, the Seventh Circuit *sua sponte* asked the parties to brief the issue of whether certain documents filed under seal in this Court should be unsealed. The Administrative and Benistar Defendants filed a brief requesting that the Seventh Circuit maintain under seal certain documents, including Attorney Koresko's reply brief with the Settlement Agreement attached as an exhibit. By Order dated February 23, 2005, a copy of which is attached as **Exhibit B**, the Seventh Circuit granted that request and has maintained those documents under seal.

Subsequently, on April 11, 2005, Attorney Koresko filed in the Seventh Circuit the Appellants' Motion to Unseal Certain Documents Due to Changed Circumstances, a copy of which is attached as **Exhibit C**. In that motion, Attorney Koresko argued that unsealing the Settlement Agreement "would have little or no impact on the issues before the Court of Appeals," Motion at 1, but that he needed the Settlement Agreement to be unsealed so that he could use it as evidence in *STEP Plan Services, Inc. v. John J. Koresko, V*, No. 04-7718, Pennsylvania Court of Common Pleas, Philadelphia County, and in *Sanchez & Daniels v. John J. Koresko*, No. 04-CV-5183, the fee dispute case pending before this Court. By Order dated April 28, 2005, a copy of which is attached as **Exhibit D**, the Seventh Circuit denied Attorney Koresko's motion to unseal the Settlement Agreement. After all this history on the confidentiality of the Settlement Agreement, Attorney Koresko has once again flouted this Court's orders and directives by taking matters into his own hands and filing pages 1, 2, 8, 10, 11, and 12 of the Settlement Agreement as Exhibit E to his Motion for Sanctions dated September 20, 2005 in *STEP Plan Services, Inc. v. John J. Koresko, V*, No. 04-7718, Pennsylvania Court of Common Pleas, Philadelphia County (the "Philadelphia Action"). A copy of that Motion for Sanctions, without exhibits, is attached as **Exhibit E**. In order to avoid compounding Attorney Koresko's violation of this Court's orders, the Administrative and Benistar Defendants are seeking in an accompanying motion to present the Court with Exhibit E to that Motion for Sanctions under seal. In ¶ 13 of the Motion for Sanctions, Attorney Koresko states:

Prior to that, U.S. Trust was trustee of the STEP Multiple Employer Plan and Trust, **per the admissions of plaintiff [STEP Plan Services] in a certain Settlement Agreement executed in case no. 03-cv-1550, N.D. Ill. See EXHIBIT E, redacted for information under seal.** Wayne Burse, Molly Carpenter and Daniel Carpenter all signed that settlement agreement, allegedly in the presence of the same notary public.

Emphasis added.

Not only did Attorney Koresko violate this Court's orders by filing any portion of the Settlement Agreement, but his purported reason for attaching a portion of the Settlement Agreement is clearly just a pretext for placing the Settlement Agreement in the public record. First, Attorney Koresko possesses many other documents, not under seal, that reflect U.S. Trust's former role as the STEP Plan's trustee, including the complaints in this case and the attachments to the complaints. Second, the Settlement Agreement does not mention U.S. Trust's role as trustee and, therefore, does not support the proposition for which Attorney Koresko purportedly was attaching it as evidence to the Motion for Sanctions. Thus, putting aside the fact that he filed the Settlement Agreement without first obtaining leave of this Court, he lacked good cause to file it and should have been denied leave even if he had complied with the Court's minute order of September 29, 2004 and sought leave.

Under these circumstances, Attorney Koresko has flagrantly violated this Court's orders and directives prohibiting him from disclosing the Settlement Agreement or its contents to any person without first obtaining leave of this Court on a showing of good cause.

ARGUMENT

I. THE COURT SHOULD HOLD ATTORNEY KORESKO IN CONTEMPT FOR THIS SECOND UNAUTHORIZED FILING OF THE PARTIES' CONFIDENTIAL SETTLEMENT AGREEMENT

This court has the authority to levy punishment for contempt of court, including “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.” 18

U.S.C. § 401(3). This court has held attorneys in contempt for disclosing confidential information and confidential settlement agreements. *Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427 (N.D. Ill. 1995).

The parallels between the actions of John Messina, plaintiff's attorney in the *Grove Fresh* case, and Attorney Koresko's actions here are remarkable. In *Grove Fresh*, Messina disclosed terms of a settlement agreement in violation of the court's order of confidentiality. *Id.* at 1435 n.6, 1446 & nn.29-30, 1448. The *Grove Fresh* court characterized as "[e]specially alarming . . . Messina's propensity to disregard court orders and include documents designated as confidential as attachments to his pleadings (which would then be put into the public record or forwarded to the press)." *Id.* at 1431 n.2; *see also id.* at 1438 n.11 (itemizing instances of Messina's attempts to file confidential documents in a public manner). Additionally, the court noted that "[b]ut for his status as plaintiff's attorney, Mr. Messina would never have had access to the confidential settlement agreement whose terms he disclosed." *Id.* at 1441. The court viewed Messina's "repeated attempts to circumvent my orders" as Messina's "intention to beat one of the defendants in this case 'over the head in public . . .'" *Id.* at 1438.

Attorney Koresko should be held in contempt both civilly and criminally as they were in *Grove Fresh*. "[T]he purpose of civil contempt is remedial, while criminal contempt is punitive." 3 Charles Alan Wright et al., Federal Practice and Procedure § 704 (3d ed. 2004). "A commitment or fine for civil contempt is to coerce the defendant. The sentence for a criminal contempt is not intended to coerce, but rather as a punishment to vindicate the Court's authority." *Tillotson v. Boughner*, 350 F.2d 663, 664 (7th Cir. 1965). "The nature of contempt may be civil, criminal, or both." *Grove Fresh*, 888 F. Supp. at 1435.

The standards for holding someone in contempt are:

To support a federal civil contempt conviction, it must be proved: “(1) that the court entered a lawful order of reasonable specificity; (2) the order was violated.” . . . Criminal contempt requires an extra element be shown: “(3) the violation was willful.” . . . A jury trial and a standard of reasonable doubt are required for criminal contempt charges. . . . The elements of civil contempt must be established by “clear and convincing evidence.”

Grove Fresh, 888 F. Supp. at 1436 (citations and footnotes omitted). “Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, do not require a jury trial – just notice and the opportunity to be heard” *Id.* at 1436 n.9.

Here, it is clear that the Court entered an order prohibiting Attorney Koresko from disclosing the Settlement Agreement without first obtaining leave of the Court. That order was lawful and was made with reasonable specificity. If there were any doubt about the specificity of that order and whether it prohibited Attorney Koresko from attaching the Settlement Agreement as an exhibit to a document filed in court, the Court made it expressly clear to Attorney Koresko in open court on November 15, 2004 that its order prohibited any such filing. It is also clear that Attorney Koresko recently violated that order again by making such a filing in the Philadelphia court. Thus, Attorney Koresko should be found in civil contempt of court.

As a result, Attorney Koresko should be ordered to compensate the Administrative and Benistar Defendants for losses caused by his noncompliance and contempt, including attorney’s fees and costs incurred in preparing this motion, attending any hearings, and prosecuting Attorney Koresko for contempt, to be awarded based on a submission of fees and costs after the granting of this motion. *See Grove Fresh*, 888 F. Supp. at 1445-46, 1447. The Administrative and Benistar Defendants are also entitled to protection from a significant risk of repetition of future disclosures through a requirement that Attorney Koresko post a bond to be forfeited upon future unauthorized disclosures. *See id.* at 1448, 1452 (requiring Messina to post a \$50,000

bond for five years to be forfeited upon a disclosure made by him without first consulting the court).

With respect to criminal contempt, Koresko's defiance of this Court's authority allows the Court to impose a fine or imprisonment in its discretion. 18 U.S.C. § 401; *see Grove Fresh*, 888 F. Supp. at 1452 (imposing four fines of \$1000 payable to the United States of America). The Court may impose a monetary fine of up to \$5,000 and imprisonment of up to six months without a trial by jury. 3 Wright et al., Federal Practice and Procedure § 712 (3d ed. 2004); *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970) (imprisonment); 18 U.S.C. §§ 19 and 3571(b)(6) and (7) (fine); *see also United States v. Kozel*, 908 F.2d 205 (7th Cir. 1990) (attorney sentenced to try five pro bono cases not entitled to a jury trial for criminal contempt).

CONCLUSION

For the foregoing reasons, the Court should issue an order to show cause why Attorney Koresko should not be held in contempt of court and, after he responds, should find him in civil contempt, order him to compensate the Administrative and Benistar Defendants for their resulting losses, and order him to post an appropriate bond to be forfeited upon future violations of the Court's orders. With respect to criminal contempt, the Administrative and Benistar Defendants are prepared to participate in whatever proceedings the Court may see fit to pursue.

Dated: October 19, 2005

Respectfully submitted,

**THE ADMINISTRATIVE AND BENISTAR
DEFENDANTS**

By: /s/ Daniel E. Tranen
One of Their Attorneys

Daniel J. McMahon, Esq.
Daniel Ephraim Tranen, Esq.
Benjamin M. Whipple, Esq.
WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER
120 North LaSalle Street
Suite 2600
Chicago, IL 60602
Telephone: (312) 704-0550
Fax: (312) 704-1522

Richard S. Order, Esq.
AXINN, VELTROP & HARKRIDER LLP
90 State House Square
Hartford, CT 06103
Telephone: (860) 275-8100
Fax: (860) 275-8101

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by first class mail on this 19th day of October, 2005, upon:

John J. Koresko, V, Esq.
Koresko & Associates
200 West Fourth Street
Bridgeport, PA 19405
(BY FAX ALSO – (610) 992-1091)

Attorneys for Plaintiffs,

Clinton A. Krislov, Esq.
Krislov & Associates Ltd.
20 North Wacker Drive
Suite 1350
Chicago, IL 60606

*Attorneys for Defendant,
Prudential Insurance Co. of America*

John Grossbart, Esq.
Sonnenschein, Nath & Rosenthal
Sears Tower, Suite 8000
233 S. Wacker Drive
Chicago, IL 60606

Reid Ashinoff, Esq.
Sonnenschein, Nath & Rosenthal
1221 Avenue of the Americas
New York, NY 10020-1089

*Attorneys for Defendant,
Thomas J. Murphy*

Kevin M. O'Hagan, Esq.
Daniel Meyer, Esq.
O'Hagan, Smith & Amundsen, LLC
150 N. Michigan Avenue, Suite 3300
Chicago, IL 60601

*Attorneys for Defendants,
New York Life Insurance Co., The National
Life Insurance Co., and Allmerica Financial
Benefit Insurance Co.*

Martin G. Durkin, Esq.
Holland & Knight
131 S. Dearborn Street, 30th Floor
Chicago, Illinois 60603

Michael L. Banks, Esq.
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103

*Attorneys for Defendant,
Metlife, Inc.*

Lynn H. Murray, Esq.
Grippio & Elden
111 South Wacker Drive
Chicago, IL 60606

*Attorneys for Defendant,
Hartford Life Insurance Co.*

Joel S. Feldman, Esq.
Bruce E. Braverman, Esq.
Sidley Austin Brown & Wood
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603

Barry A. Chasnoff, Esq.
John F. Gillard, Esq.
Akin, Gump, Strauss, et al.
300 Convent Street, #1500
San Antonio, TX 78205

*Attorneys for Defendant,
U.S. Trust Company of New York*

Michael L. Sullivan, Esq.
Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd.
55 East Monroe, Suite 3700
Chicago, IL 60603

*Attorneys for Defendant,
Mellon Trust of New York*

Lee T. Polk, Esq.
Barnes & Thornburg
One North Wacker Drive, Suite 4400
Chicago, IL 60606

/s/ Daniel E. Tranen
Daniel Ephraim Tranen, Esq.