

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN WILEY & SONS, INC., :

Plaintiff, :

-against- : 08 Civ. 7834 (GEL)

SUPAP KIRTSANG D/B/A : ECF Case

BLUECHRISTINE99 AND JOHN :

DOE NOS. 1-5, :

Defendants. :

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MEMORANDUM OF PLAINTIFF IN SUPPORT
OF PLAINTIFF'S MOTION TO ADJUDGE DEFENDANT
AND BANK OF AMERICA IN CONTEMPT OF THE
APRIL 27, 2009 TEMPORARY ORDER OF ATTACHMENT

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Plaintiff John Wiley & Sons, Inc. ("Wiley") respectfully submits this memorandum of law in support of its motion to adjudge defendant Supap Kirtsaeng ("Kirtsaeng"), and Bank of America in civil contempt of the Temporary Order of Attachment entered April 27, 2009.

Statement of Facts

Based upon the documentary evidence, the following facts are not subject to reasonable dispute.

On April 27, 2009, the Court entered the Temporary Order of Attachment that attached Kirtsaeng's accounts at Bank of America and enjoined Kirtsaeng, and all those in active concert with him who received actual notice of the order, from transferring or withdrawing any funds from his Bank of America account. (Dunnegan Dec. Ex. A)

On April 27, 2009, at 4:10 p.m., William Dunnegan, counsel for Wiley, served by hand a copy of the Temporary Order of Attachment on Bank of America at its branch at 350 Fifth Avenue, New York, New York, and received a receipt. (Dunnegan Dec. Ex. B)

On April 27, 2009, at 4:22 p.m., Laura Scileppi, counsel for Wiley, served a copy of the Temporary Order of Attachment on Mr. Sam Israel, counsel for Kirtsaeng, by e-mail. (Dunnegan Dec. Ex. C)

On April 28, 2009, Kirtsaeng withdrew \$6,400 in U.S. Currency from his Bank of America account. (Dunnegan Dec. Ex. D)

Despite this withdrawal, Bank of America represented to Wiley by letter dated April 29, 2009 that there was \$1.05 that was attached as a result of the Temporary Order of Attachment that it received on April 27, 2009. (Dunnegan Dec. Ex. E) Bank of America did not otherwise disclose that it allowed Kirtsaeng to withdraw \$6,400 in U.S. Currency after Bank of America had received the Temporary Order of Attachment. (Dunnegan Dec. ¶ 7)

Based upon this representation of the Bank of America that \$1.05 had been attached, Wiley withdrew its application for attachment of the account. (Dunnegan Dec. ¶. 8)

Wiley then served a subpoena on Bank of America concerning Kirtsaeng's account. (Dunnegan Dec. ¶ 9)

By letter dated June 12, 2009, after receiving the subpoenaed records from Bank of America, Wiley wrote to Mr. Israel and Bank of America, stating that it would initiate contempt proceedings if it did not receive a satisfactory response by the close of business on June 16, 2009. (Dunnegan Dec. ¶ 10) It has not received any response from either of them. (Dunnegan Dec. ¶ 10)

Argument

I.

THE COURT SHOULD ADJUDGE KIR TSAENG IN CONTEMPT
BASED UPON HIS WITHDRAWAL OF \$6,400 IN U.S.
CURRENCY FROM BANK OF AMERICA WITH KNOWLEDGE
OF THE TEMPORARY ORDER OF ATTACHMENT

There should be no reasonable dispute that Kirtsaeng is in contempt of the April 27, 2009 Temporary Order of Attachment based upon his withdrawal on April 28, 2009 of \$6,400 in U.S. Currency from his attached account at Bank of America. Wiley notified his attorney of that order the day before. (Dunnegan Dec. ¶ 5) Any suggestions that Kirtsaeng withdrew the \$6,400 without knowledge of that order would not be credible.

II.

THE COURT SHOULD ADJUDGE BANK OF AMERICA IN CONTEMPT
FOR ALLOWING, WITH KNOWLEDGE OF THE TEMPORARY ORDER
OF ATTACHMENT, KIR TSAENG TO WITHDRAW \$6,400

There should be no reasonable dispute that Bank of America is in contempt of the Temporary Order of Attachment. Bank of America acknowledged it received that order on April 27, 2009. (Dunnegan Dec. Exs. B and E) Bank of America nevertheless allowed Kirtsaeng to withdraw \$6,400 in currency on April 28, 2009, thereby violating the entire letter and purpose of this Court's Order.

A non-party to an order may be found liable for knowingly aiding and abetting a violation of that order. Alemite

Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.) ("We agree that a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law.")

In Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002), the Court of Appeals stated:

"Before a party can be found guilty of aiding and abetting civil contempt, the court must find: (1) that the party subject to the court's mandate committed contempt; and (2) that another party assisted the enjoined party. See Alemite, 42 F.2d at 833."

The assistance must be rendered with knowledge of the violation.

United States v. District Council of New York City, 2007 U.S.

Dist. LEXIS 69852 *72 (S.D.N.Y. September 17, 2007) (non-party adjudged in civil contempt as an aider and abetter.)

In Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 507 (8th Cir. 2000), after the district court declined to adjudge a sole shareholder in contempt of an order directing the corporation to make a payment on the ground that the shareholder was not a party, the Eighth Circuit reversed and remanded for a further development of the record, stating:

"We have no trouble concluding that, under Rule 65(d) and the cases cited above, the magistrate judge's payment orders were binding upon Gula as the sole shareholder, corporate officer and agent of the Appellees, even though the orders made no specific reference to him. There is no question that he had notice of the orders. And while the district court's June 25, 1997 order establishing a future payment schedule was not labeled an injunction, it looked like

one: it compelled the Appellees' affirmative, prospective obedience with it. See *Wintz Properties*, 155 F.3d at 873-74 ("The order instructs [the defendant] to do something - pay the Fund what the statute requires - which after all is the point of an injunction...."); *International Longshoremen's Ass'n*, 389 U.S. at 75, 88 S.Ct. 201. He was sufficiently 'legally identified' with the Appellees that he was in a position to carry out acts on their behalf. *Cooper*, 134 F.3d at 920. He therefore may subject to a contempt finding for their violation." (Emphasis added.)

The present case is even clearer because the Temporary Order of Attachment specifically named Bank of America.

III.

THE COURT SHOULD IMPOSE A FINE ON BOTH KIR TSAENG AND BANK OF AMERICA

A finding of civil contempt authorizes the court to impose an appropriate fine. *Hutto v. Finney*, 437 U.S. 678 ("Civil contempt may also be punished by a remedial fine, which compensate the party who won the injunction for the effects of his opponent's noncompliance."); *A.V. Versace, Inc. v. Gianni Versace S.p.A.*, 279 F. Supp. 2d 341, 354 (S.D.N.Y. 2003) ("[T]he sanction imposed on a civil contemnor should be calculated to advance either, or both, of two goals: to coerce future compliance with the Court's order, or to compensate the complainant for losses stemming from the contemnor's past noncompliance.")

The Court should impose an appropriate fine on Kirtsaeng and Bank of America. Kirtsaeng intentionally violated the Temporary Order of Attachment. Unless the Court imposes a fine,

there is no incentive for Kirtsaeng, or any other restrained party, to obey an order of this Court.

While we expect Bank of America to offer a plethora of excuses for its failure to obey the Temporary Order of Attachment, the April 29, 2009 letter of Bank of America reporting that only \$1.05 was frozen evidences an attempt to mislead Wiley and, indirectly, this Court. The Bank of America employee responsible for that letter would have (i) checked the balance of the account at the time Bank of America received the Temporary Order of Attachment on April 27, 2009, (ii) recognized that Bank of America had allowed the withdrawal of \$6,400 in cash on April 28, 2009, and (iii) reported that only \$1.05 had been frozen in an attempt to save Bank of America from being accountable for its failure to obey the Temporary Order of Attachment. Bank of America would have gotten away with that misrepresentation if Wiley had not taken the additional step of subpoenaing the Bank of America records for Kirtsaeng's accounts.


Conclusion

For the reasons set forth above, plaintiff respectfully requests that the Court adjudge Kirtsaeng and Bank of America in contempt of the April 27, 2009 Temporary Order of Attachment, order the turnover of the \$6,400 into escrow and impose an

appropriate compensatory fine.

Dated: New York, New York
June 18, 2009

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