

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: March 16, 2012

Date Decided: March 19, 2012

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Re: *Israel Discount Bank of New York v. First State Depository Company LLC*
Civil Action No. 7237-VCP

Dear Counsel:

This action is before me on a motion for contempt filed by Plaintiff, Israel Discount Bank of New York (“IDB”), against Defendants, First State Depository Company, LLC (“First State”) and Certified Assets Management, Inc. (“CAMI”), for failure to comply with the Stipulation and Preliminary Injunction Order (“PI Order”) entered by this Court on February 29, 2012. Having considered the parties’ submissions and arguments, I conclude that First State and CAMI have acted in contempt of the PI Order and appropriate sanctions should be entered against them.

I. FACTUAL BACKGROUND

On February 13, 2012, IDB filed a Verified Complaint (the “Complaint”) and a Motion for Issuance of a Temporary Restraining Order related to First State’s custodianship of \$17 million in certified numismatic coins, as well as 12,956 rare coins held as collateral for loan obligations between IDB and Republic National Business Credit LLC (“Republic”). In the Complaint, IDB claims that First State has transferred collateral out of its depository and that the alleged transfer and sale is a breach of its contractual obligations under the bailment agreements between IDB and First State. Further, IDB alleges that First State’s removing and marketing of the coins amounts to conversion. On February 21, 2012, after this Court entered a Temporary Restraining Order, IDB also moved for a preliminary injunction. On February 28, First State, CAMI, and IDB stipulated to the PI Order entered on February 29.¹

In its Motion for Contempt (the “Motion”), IDB alleges that First State and CAMI acted in contempt by failing to comply with paragraphs 3, 4, and 5 of the PI Order. As sanctions, IDB requests that the Court order First State and CAMI to return to First State all property related to the following accounts: (i) CAMI Collateral One, Acct. No. COLC000900, (ii) CAMI Collateral Two, Acct. No. COLC000901, (iii) Don Ketterling Collateral, Acct. No. COLI000902, and (iv) Vicky Lott, Acct. No. COLI000919 (the

¹ PI Order, Docket Item (“D.I.”) No. 34 (Feb. 29, 2012).

“Property”).² Further, IDB requests that if the Property is not returned into First State’s depository (the “Depository”) within two days, that the Court fine Defendants \$10,000 daily until the Property is returned. IDB further requests that the Court authorize it to remove the Property once it is restored. Finally, IDB requests its attorneys’ fees and costs from the inception of this action.

First State and CAMI urge the Court to deny the Motion because First State lacks control over the Property and because CAMI is concerned that the collateral will be dissipated unlawfully by IDB if it is returned. Defendants allege that representatives from IDB visited First State on March 5, 2012, and removed collateral from the COLC000926 Account (the “926 Account”), thereby providing IDB with adequate security for its loans. As further justification for their failure to comply with the PI Order, First State and CAMI explain that the Property has been released to CAMI.

In the alternative, First State and CAMI request that if the Court finds Defendants in contempt, that they be given a period greater than two business days to restore the Property and that the fine for any failure to restore the Property by the date specified be reduced. Defendants also request that any attorneys’ fees and costs be limited to those incurred in connection with this Motion.

² Pl’s Op. Br. 7. This definition of “Property” comports with the definition provided in the PI Order.

II. ANALYSIS

A. Are First State and CAMI Liable for Contempt?

Under Rule 70(b), the Court may find a party in contempt of court if it fails to obey or to perform an order of which it has knowledge.³ To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it.⁴ Undoubtedly, First State and CAMI were bound by and had knowledge of the PI Order, having negotiated its terms and stipulated to the entry of the PI Order on February 29, 2012. At issue between the parties is whether Defendants violated the PI Order. For the reasons stated below, I conclude that First State and IDB violated paragraphs 3 and 5 of the PI Order and, therefore, are in contempt of that Order.

IDB alleges that Defendants violated paragraphs 3, 4, and 5 of the PI Order. First, IDB argues that Defendants did not generate a depository report listing the Property on or before March 1, 2012, as required by paragraph 3. Defendants do not deny that such a report was not generated; instead, they assert that the Property in question was not under First State's control because it had been transferred to CAMI. Lack of control by First

³ Ct. Ch. R. 70(b)

⁴ *Aveta Inc. v Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing *Arbitrium (Cayman Islands) Handels AG v. Johnson*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997)).

State does not excuse Defendants from generating a report that the stipulated PI Order required them to produce. Thus, Defendants are in contempt of paragraph 3.

With respect to paragraph 4, IDB contends that Defendants represented that the Property at issue is located at the Depository. Defendants respond that, as signed, there was no representation in the stipulated PI Order that any particular collateral was in the Depository. The specific language of paragraph 4 of the PI Order does not support IDB's position. In that paragraph, Defendants represented that the Property was unencumbered, has not been pledged to any third party, and has a market value of at least \$12.5 million, but they did not represent that the Property was at the Depository. IDB further argues that the language on the first page of the PI Order following the fourth "whereas" clause implies that the Property was at the Depository on February 28, 2012. That language, however, simply states that proceedings before this Court were initiated with a Request for Entry Upon Land to inspect any books located at the Depository. Accordingly, IDB has not proven that aspect of its motion for contempt.

Finally, I find that Defendants are in contempt of paragraph 5 of the PI Order, which required Defendants to permit IDB and its representative to inspect and appraise all of the Property on March 2, 2012. CAMI concedes that it failed to comply with the PI Order, but offers, as justification for the failure, a fear that IDB unlawfully would dissipate the Property and that representatives from Heritage Auctions, who would be

joining IDB during the inspection, would use “information relating to the dispute between IDB and CAMI to harm CAMI.”⁵ CAMI offers no evidence that there was any real threat that the Property would be illegally removed or that IDB would misappropriate information related to the dispute to CAMI’s detriment. In fact, the PI Order provided that IDB would be permitted to enter the Depository and verify the value of the Property a couple more times after March 2, 2012. The plain implication of those provisions is that IDB did not intend to remove the Property. Beyond that, CAMI relies on unsubstantiated excuses for its blatant disregard of the terms of the PI Order. Therefore, I also find CAMI in contempt of paragraph 5 of the PI Order.

Like CAMI, First State does not deny that it has not complied with the terms of the PI Order. Rather, First State answers that inspection would be futile because it does not have control over the Property and because IDB received adequate security when IDB removed the collateral contained in the 926 Account on March 2, 2012. Again, First State’s alleged lack of control of the Property does not absolve it of contempt of the PI Order. With only days between the entry of the PI Order and the date scheduled for IDB’s first inspection, Defendants’ non-compliance with the terms of the PI Order is inexcusable. Moreover, First State’s reliance on the 926 Account amounts to a red herring because the 926 Account is not part of the Property to which the PI Order

⁵ Defs’ Ans. Br. 5.

pertains. Thus, I conclude that First State, like CAMI, is in contempt of paragraph 5 of the PI Order.

B. What Are the Appropriate Sanctions for Contempt?

Because First State and CAMI failed to comply with paragraphs 3 and 5 of the PI Order, IDB is entitled to an order holding First State and CAMI in contempt and imposing an appropriate sanction. This Court has broad discretion in formulating a remedy for violations of its orders.⁶ As part of its broad remedial powers, the Court may impose a fine,⁷ for example, to coerce a non-complying party to cease improper conduct.⁸

To remedy the contempt, IDB first requests that the Property be returned to the Depository within two business days. First State and CAMI respond that the two business day are insufficient for Defendants to comply with the PI Order and that such a requirement would be punitive rather than remedial in nature. That argument has no

⁶ See, e.g., *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 176 (Del. 2002) (“[T]he Court of Chancery’s ‘powers are complete to fashion any form of equitable and monetary relief as may be appropriate.’”) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983)); *Weinberger*, 457 A.2d at 715 (noting “the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate”).

⁷ *Magness v. Krewson*, 2004 WL 87734, at *3 (Del. Ch. Apr. 15, 2004).

⁸ *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1992 WL 83518, at *6 (Del. Ch. Apr. 22, 1992) (citing *Del. State Bar Ass'n v. Alexander*, 386 A.2d 652, 665 (Del. 1978)).

merit. In the PI Order, Defendants stipulated to a two-business-day period for restoring the Property to the Depository. Consequently, Defendants cannot object to a similar length of time to cure their contempt. The PI Order requires that IDB promptly have access to inspect the Property and receive reporting on its status; that requirement logically presumes that the Property promptly will be returned to the Depository. Since February 29, 2012, when this Court entered the PI Order, Defendants have had ample time to restore the Property to the Depository in accordance with the PI Order.

Next, IDB asks this Court to impose a \$10,000 daily fine on First State and CAMI if the Property is not restored to the Depository within two business days. Defendants contend that they are small companies and the \$10,000 requested by IDB is more than what is required to compel compliance. Defendants may be correct that \$10,000 per day is more than is necessary to compel compliance. Nevertheless, it is important that the Property be restored to the Depository promptly. Therefore, I order that Defendants be fined \$5,000 a day for each day they fail to comply with the Order entered in conjunction with this Letter Opinion. I consider the \$5,000 daily fine sufficient to motivate First State and CAMI promptly to cure any future failure to comply with this Court's orders.

IDB further requests that CAMI and First State be held jointly and severally liable for contempt. First State and CAMI respond that they are separate entities with different contractual relationships with IDB and, therefore, should not be held jointly and severally

liable for any contempt. Undermining their arguments is Defendants' statement in their answering brief that the Property IDB intended to be with First State is currently in CAMI's possession. Further, Defendants admit in their Answer that Robert Higgins owns a controlling interest in both CAMI and First State, and that Eric Higgins is the Head of Customer Service for First State. Thus, the record suggests that First State and CAMI are closely interrelated and likely to be acting in concert. Based on these circumstances, I find both companies responsible for their non-compliance with the PI Order. Therefore, I hold CAMI and First State jointly and severally liable.

Additionally, IDB requests the authority to remove the Property from the Depository after it has been returned. Because the right to transfer the Property to a different depository was not provided for in the PI Order and because the existence of such a right to transfer is disputed in the underlying breach of contract and conversion of property litigation, I deny IDB's request to transfer the Property after it has been returned to the Depository. Instead, I reaffirm the binding nature of paragraphs 1-11 of the PI Order entered on February 29, 2012, and extend slightly the schedule for compliance with certain of those provisions for which the original schedule has expired.

With respect to attorneys' fees and costs, the general or American Rule is that a litigant must defray her own attorneys' fees and costs associated with litigation.⁹ In exercising its discretion, the Court may award fees and costs for the totality of an action if the party against whom fees are sought has acted in "bad faith and vexatiously."¹⁰ In addition, Delaware courts have awarded attorneys' fees and costs where conduct was so egregious that it caused unreasonable delay or other prejudices to the opposing party.¹¹

IDB asks this Court to go beyond awarding attorneys' fees and costs associated with the Motion and to award attorneys' fees associated with this action as a whole. Defendants counter that any attorneys' fees and costs should be limited to those incurred by IDB solely in connection with this Motion. The facts brought to light in connection with the Motion for contempt raise questions about the *bona fides* of Defendants' conduct from the outset of this litigation. It also appears, however, that at least some of the relevant facts in that regard will be disputed, or at least, have not been fully developed yet. Therefore, I deny without prejudice IDB's request for fees and costs from the outset of this litigation.

⁹ *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

¹⁰ *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 138715, at *27 (Del. Ch. May 18, 2009) (citing *Fox v. Paine*, 2009 WL 147813, at *6 (Del. Ch. Jan. 22, 2009)).

¹¹ *Triton Constr.*, 2009 WL 138715, at *27.

I do find, however, that there is good reason to question Defendants' good faith in drafting and negotiating the PI Order and necessitating the present Motion. Because just a few days passed between the entry of the *stipulated* PI Order and Defendant's non-compliance with essential terms of that Order, I conclude that Defendants acted in bad faith and vexatiously in negotiating and stipulating to the PI Order. Indeed, Defendants apparently were never committed to complying with the PI Order. Therefore, I grant IDB attorneys' fees and costs associated with this Motion and the drafting and negotiating of the PI Order.

III. CONCLUSION

For the reasons stated herein, I grant Plaintiff's Motion in part and deny it in part. A separate Order consistent with this Letter Opinion has been entered.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp