



time as the United States Court of Appeals for the Fifth Circuit can hear the appeal.

It is well settled that an order of incarceration for civil contempt may be enforced only if the alleged contemnor has the ability to comply with the Court's Order but fails and/or refuses to do so. As is set out below, B. David Gilliland has demonstrated that he is unable to personally comply with the Court's Agreed Order Modifying and Abating Orders of January 21, 1999, and March 11, 1999, Freezing Assets and Appointing Temporary Receiver, entered on March 26, 1999 (the "Agreed Modification Order"), because he does not have the financial ability to personally comply with the Court's Order. Gilliland testified that he is unable to cause Hammersmith, LLC to comply. Accordingly, the Court's Contempt Order and Incarceration Order are improper and should be stayed until appeal can be heard.

## II. BACKGROUND

On March 26, 1999, the Court entered an Agreed Order Modifying and Abating Orders of January 21, 1999, and March 11, 1999, Freezing Assets and Appointing Temporary Receiver (the "Agreed Modification Order"). On May 24, 1999, the Court entered an Order Finding B. David Gilliland in Contempt of Court (the "Contempt Order") for failure to comply with the Agreed Modification Order. Prior to being held in contempt, Gilliland presented uncontroverted evidence that he had a present inability

to comply with the Agreed Modification Order. The Court implicitly recognized that Gilliland was unable to comply with the Court's Agreed Modification Order and gave Gilliland forty-five days to comply with the Order.

On July 2, 1999, Gilliland filed an Emergency Motion to Vacate and an Emergency Motion to Stay. On July 2, 1999, the Court stayed the Contempt Order until a hearing could be held. On July 22, 1999, the Court denied the Motion to Vacate and Motion to Stay and ordered Mr. Gilliland to be taken into custody by waiting United States Marshals. On July 23, 1999, Gilliland filed his notice of appeal with the United States District Court.

### III. ARGUMENTS AND AUTHORITIES

#### A. The Relevant Standard.

Four factors must be considered in determining whether to stay a District Court's Order. Those factors are: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.<sup>1</sup> The Fifth Circuit has not applied the factors in a

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<sup>1</sup>United States v. Baylor Univ. Medical Ctr., 711 F.2d 38, 39 (5<sup>th</sup> Cir. 1983).

rigid manner, but has instead held that to obtain a stay pending appeal, a moving party need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.<sup>2</sup>

B. Gilliland is Entitled to a Stay.

Applying the test adopted in this Circuit, Gilliland is entitled to a stay of execution pending the Court of Appeals ruling on his appeal. Gilliland meets each of the four factors and the equities weigh heavily in favor of not incarcerating him prior to a determination of his appeal.

1. Gilliland has a likelihood of success on the merits.

The purpose of civil contempt proceedings is not punitive, but coercive and intended to compel someone to perform his lawful duty.<sup>3</sup> However, the jailing of a person who is simply unable to perform the commanded act, changes the character of the contempt proceeding into a punitive one.<sup>4</sup> Accordingly, the United States Supreme Court has repeatedly stated that punishment may not be imposed in a civil contempt proceeding when the contemnor is

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<sup>2</sup>Ruiz v. Estelle, 650 F.2d 555 (5<sup>th</sup> Cir. 1981).

<sup>3</sup>Maggio v. Zeitz, 333 U.S. 56, 72, 68 S.Ct. 401, 409 (1948) (citation omitted).

<sup>4</sup>Maggio, 333 U.S. at 72, 68 S.Ct. at 409 ("Of course, to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably.").

unable to comply with the terms of a court's contempt order.<sup>5</sup> The determination of ability to comply with a contempt order is a preliminary matter.<sup>6</sup> Furthermore, the ability to comply is addressed on an ongoing basis and not just at the time the contempt order is issued.<sup>7</sup>

The only evidence before the Court is that Gilliland is unable to comply with the Court's Order. Gilliland has sworn that he is without ability to comply with the Court's Agreed Modification Order. He has sworn that he does not have the

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<sup>5</sup>McPhaul v. United States, 364 U.S. 372, 378, 81 S.Ct. 138, 142 (1960) ("It is of course true that a court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability or is impeding justice by not explaining what happened to them.") (citations omitted); United States v. Rylander, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question. While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.") (citations omitted).

<sup>6</sup>SEC v. AMX International, Inc., 7 F. 3d 71, 73 (5<sup>th</sup> Cir. 1993) ("We note as a preliminary matter that financial inability is a defense for failure to comply with a court-ordered disgorgement") (citation omitted).

<sup>7</sup>Rylander, 460 U.S. at 757, 103 S.Ct. at 1552 ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply . . .") (emphasis added); Pierce v. Vision Investments, Inc., 779 F.2d 302, 310 (5<sup>th</sup> Cir. 1986) ("A contempt order is not proper if the contemnor is unable to comply with the order he or she failed to obey. In light of the amount of time that has elapsed since the appellants were held in contempt, we vacate the contempt judgment and remand to the district court for a hearing as to whether the Kirks are able to comply with the consent order.") (citations omitted).

personal assets to comply, and Gilliland is unable to cause Hammersmith to comply. Further, the Contempt Order does not find that Gilliland has a present ability to comply with the Agreed Modification Order. Rather, the Court implicitly found that Gilliland had no present ability to comply and granted him forty-five days to do so. Where, as here, a contemnor has a present inability to comply with the Court's Order, incarceration would act as a punishment rather than a coercive remedy. Accordingly, it would be error for the Court to incarcerate Gilliland for his inability to comply with the Agreed Modification Order.

2. Gilliland will suffer an irreparable harm.

If the Contempt Order is not stayed, Gilliland will face incarceration. The Fifth Circuit has implicitly recognized that incarceration constitutes an irreparable harm. Specifically, in Reading & Bates Petroleum Co. v. Musselwhite<sup>8</sup>, the Court granted a stay of a contempt order incarcerating a contemnor noting that his daily incarceration would cause irreparable harm if it was ultimately determined that the contempt order was not appropriate.<sup>9</sup> Here, if the Court of Appeals determines that the Contempt Order is inappropriate, Gilliland will suffer irreparable harm as the result of his improper incarceration.

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<sup>8</sup>14 F. 3d 271 (5<sup>th</sup> Cir. 1994).

<sup>9</sup>Id. at 272.

3. Granting the stay would not harm other parties.

As is set out above, Gilliland has sworn that he is presently without the ability to comply with the Court's Agreed Modification Order. Hence his incarceration would be merely punitive. The other parties to this case will not benefit from Gilliland's incarceration. Conversely, because he is unable to comply, failing to incarcerate Gilliland will not harm the other parties to this action.

4. Granting the stay would serve the public interest.

Granting a stay in this matter would insure that the contemnor not be incarcerated improperly. The public has an interest in preventing persons from being deprived of their liberty improperly.<sup>10</sup> If the stay is not granted and it is later determined by the Court of Appeals that Gilliland's incarceration is improper, the Court will have improperly deprived Gilliland of his liberty in contravention of the public interest.

IV. RELIEF REQUESTED

Wherefore, considering the premises, Equitable Defendant B. David Gilliland respectfully requests that the Court stay enforcement of the Contempt Order and the Incarceration Order until his appeal can be heard, and for such other and further relief as he may show himself to be entitled.

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<sup>10</sup>See e.g. Soroa-Gonzales v. Civiletti, 515 F. Supp 1049, 1062 (N.D. Ga. 1981).

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

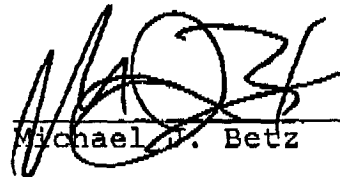
I certify that I have conferred with Robert Brunig, Attorney for the Securities and Exchange Commission and he indicated that the Commission was opposed to the relief sought herein. Mr. Quilling, receiver, could not be reached for the purposes of conferring on this Motion. Accordingly the Motion is presented to the Court for consideration.

  
Michael J. Betz



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served, via hand delivery, upon Paul B. Lackey, Bickel & Brewer, 4800 Bank One Centre, 1717 Main Street, Dallas, Texas 75201; Ronald D. Wells, Milner, Lobel, Goranson, Sorrels, Udashen & Wells, P.C., 2515 McKinney Avenue, Suite 1500, Dallas, Texas 75201; Michael J. Quilling, Quilling, Selander, Cumiskey, Clutts & Lownds, P.C., 2800 One Dallas Centre, 350 North St. Paul Street, Dallas, Texas 75201-4240; Robert A. Brunig, Securities & Exchange Commission, 801 Cherry Street, Suite 1900, Fort Worth, Texas 76102; Deborah Goodall, Goodall & Sooter, 12830 Hillcrest Road, Suite 111, Dallas, Texas 75230; Dan Ray Waller, Secore & Waller, L.L.C., 13355 Noel Road, Suite 2290, Dallas, Texas 75240; and S. Cass Weiland, Sheinfeld, Maley & Kay, P.C., 1700 Pacific Ave., Suite 4400, Dallas, Texas 75201-4618; Michael F. Pezzulli, Pezzulli & Loewinsohn, L.L.P., 18383 Preston Road, Suite 110, Dallas, Texas 75252-5476 and via certified mail, return receipt requested and facsimile, upon John A. Yanchunis, James, Hoyer, Newcomer, Forizs & Smiljanich, P.A., 4830 W. Kennedy Blvd., Suite 147, Tampa, Florida 33609, (813) 286-4174;; Wendall A. Odom, Jr., 440 Louisiana, Suite 800, Houston, Texas 77002, (713) 224-2815; and via certified mail, return receipt requested to Garra J. Graner, 38-11 Ditmars Blvd., Long Island City, New York 11105 on this 22 day of July, 1999.



Michael D. Betz