



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES RIVEST,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 2019-0848-JTL
)	
HAUPPAUGE DIGITAL, INC.,)	
)	
Defendant.)	

ORDER TO SHOW CAUSE

1. The court issued a Final Order and Judgment dated November 21, 2022 (the “Final Order”). Dkt. 107.

2. The Final Order directed defendant Hauppauge Digital, Inc. (the “Company”) to produce to plaintiff James Rivest its quarterly and annual financial statements and reports for 2016 through 2022. *Id.* The Final Order also awarded Plaintiff costs of \$3,875, which the court directed the Company to pay on or before December 2, 2022. *Id.*

3. On December 2, 2022, the Company appealed the Final Order to the Delaware Supreme Court. Dkt. 108.

4. On December 8, 2022 the Company filed a motion to stay the Final Order pending appeal. Dkt. 110. During briefing on the motion to stay, the Company’s counsel represented that he “believes it incredible that the Company will abide by any future Order from this Court or our Supreme Court” and that the Company was actively seeking to escape the court’s jurisdiction and hide assets. *Id.* ¶ 12 & n.13.

5. The court issued an Order Granting Limited Stay Pending Appeal dated January 19, 2023 (the “Stay Order”). Dkt. 119. The Stay Order granted a stay of the Final Order as to the production of financial statements and reports from 2021 and 2022, conditioned upon the Company posting security in the amount of \$4,256.45 on or before January 30, 2023. The Company failed to post any security on or before January 30, 2023. Instead, the Company filed an unsecured undertaking to repay, which it misleadingly titled “Security Bond.”

6. The court issued an Order Regarding Deficient Security dated February 6, 2023 (the “Deficient Security Order”). Dkt. 122. The Deficient Security Order noted that the “unsecured undertaking” did not meet the requirements of the Stay Order. *Id.* ¶ 4. The court also noted that the Company seemed to have made a conscious choice to provide a noncompliant submission. *Id.*

7. On January 27, 2023, the Company moved the Delaware Supreme Court for a stay of the Final Order in its entirety.

8. On February 16, 2023, Kenneth Plotkin posted security in the amount of \$4,256.45. Dkt. 123. Kenneth Plotkin is the Company’s chief executive officer. He is a co-founder of the Company and serves as the sole member of its board of directors. Together with his wife, he owns approximately ten percent of the Company’s common stock, which is its only class of equity. *Rivest v. Hauppauge Digit., Inc.*, 2022 WL 3973101, at *3 (Del. Ch. Sept. 1, 2022), *appeal refused*, 285 A.3d 460 (Del. 2022).

9. In an order dated February 27, 2023, the Delaware Supreme Court denied the Company’s motion and ordered that the Stay Order remain in effect pending resolution of

the appeal. Order, *Hauppauge Digit. Inc. v. Rivest*, No. 442, Dkt. 16 (Del. Feb. 27, 2023).

A stay therefore continues to exist as to the production of financial statements and reports from 2021 and 2022, but no stay exists as to financial statements from 2016 through 2020.

10. In an email dated as of March 8, 2023, Plaintiff's counsel informed Company's counsel that the Company still had not produced its quarterly and annual financial statements for the years 2016 through 2020. *See* Dkt. 124 Ex. A ("Can you please advise as to when your client will be producing its quarterly and annual financial statements for the years 2016 through 2020? I have not received them yet.").

11. In an email dated as of March 9, 2023, Company counsel confirmed that he had advised the Company of its pending production obligations and had provided the Company a copy of the Delaware Supreme Court's order. Company counsel further advised that he had not heard from the Company and that his representation of the Company was now limited to appellate counsel.

12. The Company was obligated to produce its financial statements for the years 2016 through 2020 on or by December 9, 2022. *See* Dkt. 107 ¶ 5. The Company has not fulfilled that obligation.

13. Plaintiff has moved for an order pursuant to Rule 70(b) holding the Company and Plotkin in contempt of the court's Final Order.

14. Contempt comes in two varieties: civil and criminal. "In all civil cases, a contempt determination must be coercive or remedial rather than punitive and the court must use the least possible power adequate to the end proposed." *In re TransPerfect Glob., Inc.*, 2021 WL 1711797, at *18 (Del. Ch. Apr. 30, 2021) (cleaned up), *aff'd sub nom.*

TransPerfect Glob., Inc. v. Pincus, 278 A.3d 630 (Del. 2022), *reargument denied* (June 21, 2022), *cert. denied*, 143 S. Ct. 574 (2023); *see also Del. State Bar Ass'n v. Alexander*, 386 A.2d 652, 665 (Del. 1978).

15. To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it. *Arbitrium v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997). “For a party to be found in contempt for violation of the Court’s [o]rder that violation must not be a mere technical one, but must constitute a failure to obey the Court in a ‘meaningful way.’” *Dickerson v. Castle*, 1991 WL 208467, at *3 (Del. Ch. Oct. 15, 1991). “A party petitioning for a finding of contempt bears the burden to show contempt by clear and convincing evidence; the burden then shifts to the contemnors to show why they were unable to comply with the order.” *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *15 (Del. Ch. Dec. 9, 2009), *aff’d in relevant part*, 26 A.3d 180, 190–94 (Del. 2011). Notably, intent is not an element of an application to enforce an order by holding a party in contempt. “The moving party is not required to show that the violation was willful or intentional, but the intentional or willful nature of a contemnor’s acts may be considered in determining the appropriate sanction.” *Litterst v. Zenph Sound Innovations, Inc.*, 2013 WL 5651317, at *3 (Del. Ch. Oct. 17, 2013). The contemnor must know about the order, but that is all. It is not a defense for contemnor to claim that he did not intend to violate the order or that he did not understand what the order required. *See Mother Afr. Union First Colored Methodist Protestant Church v. Conf. of Afr. Union First Colored Methodist Protestant Church*, 1998 WL 892642, at *6 (Del. Ch. Dec. 11, 1998) (“Thus, if the respondents’ actions are violative of this Court’s Order, their state of mind is immaterial

for purposes of contempt adjudication, but the intentional or willful nature of their acts may be considered in determining the appropriate sanction.”).

16. “An order generally binds not only the named parties, but also those identified with them in interest, in privity with them, represented by them or subject to their control.” *Deutsch v. ZST Digit. Networks, Inc.*, 2018 WL 3005822, at *10 (Del. Ch. June 14, 2018) (cleaned up). This principle ensures that a party cannot nullify or evade an order “by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” *Id.* The Court of Chancery Rules recognize that in appropriate circumstances, an order can be enforced against nonparties. *See* Ct. Ch. R. 65(d) (recognizing that an order granting an injunction is binding not only upon the parties but also upon “their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise”); Ct. Ch. R. 71 (“[W]hen obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if that person were a party.”). Under these principles, an order that applies to an entity extends to directors, officers, and employees of the entity who are acting on behalf of the entity. *See, e.g., Fulk v. Wash. Serv. Assocs., Inc.*, 2002 WL 1402273, at *11 (Del. Ch. June 21, 2002) (holding that the “officers, employees or agents” of the contemnor “will all be bound by any injunction directed against the current parties”).

17. “A motion to show cause why the defendants should not be held in contempt is addressed to the discretion of this Court.” *Dickerson*, 1991 WL 208467, at *3. “This

Court must use the contempt power in a manner appropriate to the situation so as to best resolve the conflict at hand.” *Id.* at *3. Even where there has been a violation, the Court will consider good faith efforts to comply with the order or to remedy the consequences of noncompliance. *Id.* at *4.

18. The Final Order obligated the Company to produce its quarterly and annual financial statements and reports, including cash flow statements, balance sheets, and income statements, for the years 2016 through 2020. The Company has failed to comply with the central obligation imposed by the Final Order. A *prima facie* case exists for finding the Company is in contempt and to impose coercive and remedial sanctions. Good cause exists to consider imposing sanctions on Plotkin based on his involvement in the failure to comply with the Final Order.

19. The Plaintiff asks the court to exercise its broad discretion to impose “a coercive daily sanction of \$500 on both the Company and Kenneth Plotkin, the Company’s CEO and sole director, to be paid to the Register in Chancery, until the Company complies with the terms of the Final Order.” Dkt. 124 ¶ 17.

20. On or before April 5, 2023, the Company and Plotkin shall show cause why they should not be held in contempt. The Company and Plotkin must file formal submissions, signed in conformity with Rule 11. Plotkin can file in his individual capacity. The Company may only appear through counsel. *See Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990) (“A corporation, though a legally recognized entity, is regarded as an artificial or fictional entity, and not a natural person. . . . While a natural person may represent himself or herself in court even though he or she may not be an

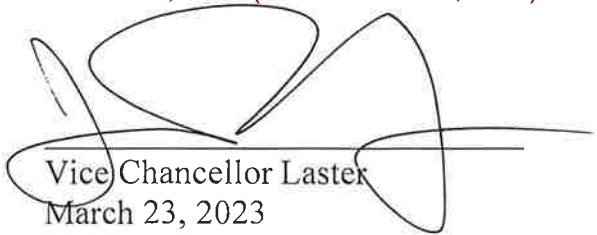
attorney licensed to practice, a corporation, being an artificial entity, can only act through its agents and, before a court only through an agent duly licensed to practice law.” (citation omitted)). To be persuasive, the submission will need to be supported by testimonial affidavits, executed under penalty of perjury. In addition, the submission may rely on documentary evidence submitted by transmittal affidavit or as exhibits to a testimonial affidavit.

21. On or before April 12, 2023, Plaintiff may respond to the Company’s submission and to Plotkin’s submission. Plaintiff will make a single submission. Plaintiff may submit evidence. Plaintiff has proposed a coercive sanction. For purposes of a remedial sanction, Plaintiff shall submit evidence of damages, including attorneys’ fees and costs, incurred as a result of the failure to comply with the Final Order. Plaintiff may include amounts incurred preparing their submission in response to this order.

22. In addition to serving the Company through its registered agent, Plaintiff’s counsel shall use best efforts to give actual notice to the Company and Plotkin. Plaintiff’s counsel will give notice to the Company’s counsel in the appeal from the Final Order in this matter, because even though he no longer represents the Company at the trial level, he remains the Company’s agent and therefore has an obligation to pass along information to his principal. Plaintiff’s counsel will file a certification attesting to his efforts.

23. On or before April 19, 2023, the Company and Plotkin may reply.

24. The court will determine whether an in-person, evidentiary hearing is necessary.



Vice Chancellor Laster
March 23, 2023