

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202</p> <hr/> <p>STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL,</p> <p>Plaintiff,</p> <p>v.</p> <p>BOOBIES ROCK!, INC, a/k/a , THE SE7VEN GROUP, a California corporation, SAY NO 2 CANCER, and ADAM COLE SHRYOCK, individually.</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY</p>
<p>Attorneys for Plaintiff: JOHN W. SUTHERS Attorney General ALISSA HECHT GARDENSWARTZ, 36126* Senior Assistant Attorney General alissa.gardenswartz@state.co.us JEFFREY LEAKE, 38338* Assistant Attorney General jeffrey.leake@state.co.us JAY B. SIMONSON, 24077* First Assistant Attorney General jay.simonson@state.co.us Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, CO 80203 (720) 508-6209 (720) 508-6204 (fax) *Counsel of Record</p>	<p>Case No.: 2013CV032857</p> <p>Division 269</p>
<p>PLAINTIFF'S EX PARTE MOTION FOR CONTEMPT AGAINST DEFENDANT ADAM COLE SHRYOCK</p>	

Plaintiff, the State of Colorado ex rel. John W. Suthers, Attorney General for the State of Colorado, ("Plaintiff"), by and through undersigned counsel, hereby moves, pursuant to C.R.C.P. 107, for an order requiring Defendant Adam

Cole Shryock (“Shryock”) to appear and show cause why he should not be held in contempt for his failure to comply with this Court’s Temporary Restraining Order and Asset Freeze, dated June 26, 2013, and its Stipulated Preliminary Injunction (“Preliminary Injunction”), dated July 8, 2013. **Plaintiff is filing this Motion as *ex parte*, as Defendant Shryock indicated in a recent telephone conversation with undersigned counsel that he is planning on permanently leaving the State within the next three to four weeks. Defendant Shryock has been informed that this Motion is being filed with the Court.**

In support of this Motion, Plaintiff states as follows:

PROCEDURAL BACKGROUND

2. On June 25, 2013, Plaintiff filed a civil Complaint against Defendants, including Adam Cole Shryock (“Shryock”), alleging that the Defendants misled thousands of consumers into believing that they were giving money to cancer-related charities, when, in fact, consumers were giving money to a for-profit business that provided very little money to charity. Along with the Complaint, Plaintiff filed a Motion for Temporary Restraining Order, Preliminary Injunction and Asset Freeze.
3. The Court issued a Temporary Restraining Order and Asset Freeze (“Temporary Restraining Order”) on Wednesday, June 26, 2013, at 2:00 P.M. See Exhibit A, *Temporary Restraining Order and Asset Freeze*.
4. Plaintiff served Defendants with a copy of the Temporary Restraining Order on Thursday, June 27, 2013, at 11:10 A.M. See Exhibit B, *Affidavit of Service*.
5. The Temporary Restraining Order set a hearing for a Preliminary Injunction for July 8, 2013. *Id.*
6. Prior to the scheduled hearing, on July 5, 2013, Defendants stipulated to a Preliminary Injunction that included all terms of the Temporary Restraining Order. See Exhibit C, *Signature, Adam Cole Shryock*
7. On July 8, 2013, Defendant Shryock appeared before the Court and affirmed his consent to the Stipulated Preliminary Injunction. The Court issued a Stipulated Preliminary Injunction (“Preliminary Injunction”) on the same day. See Exhibit D, *Preliminary Injunction*.

FACTUAL BACKGROUND

Shryock's violations of the Temporary Restraining Order.

8. Defendant Shryock became subject to the terms of the Temporary Restraining Order when he was served a copy of the Temporary Restraining Order on Thursday, June 27, 2013 at 11:10 A.M. See Exhibit B, *Affidavit of Service*.

9. The Temporary Restraining Order sets forth specific requirements for how Defendant Shryock was to suspend his business activities. Shryock was required to send an email informing employees about the Temporary Restraining Order within 48 hours of receiving the TRO; he was required to deactivate all internet sites that promoted SN2C within 48 hours; and he was required to send a written copy of the Temporary Restraining Order to all employees within 72 hours. Defendant Shryock was then required to inform the Court within 4 days of his progress towards compliance with the Temporary Restraining Order. Defendant Shryock did not comply with any of these requirements. See Exhibit A, *Temporary Restraining Order and Asset Freeze*; see Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶ 8-9.

10. Despite receiving the Temporary Restraining Order on June 27th, Shryock did not inform his employees and independent contractors of the Temporary Restraining Order by either email or U.S. mail for an additional six days, until Wednesday, July 3, 2013. As such, SN2C continued to sell merchandise and represent that it that it was raising money for cancer victims through an additional weekend and into the following week. See Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶ 2-11.

11. During this time period, Defendant Shryock attempted to conceal his activities by only accepting cash and checks over \$20.00 and requiring event proceeds to be sent to him via money orders. *Id* at ¶10.

Shryock's violations of the Preliminary Injunction.

12. The Temporary Restraining Order and subsequent Preliminary Injunction enjoined Defendant Shryock from continuing to sell merchandise, collect money, or promote events on behalf of Boobies Rock!, The Se7ven Group, or Say No 2 Cancer, or any other organization representing that it is raising money for charitable causes. See Exhibit A, *Temporary Restraining Order and Asset Freeze*; see Exhibit D, *Preliminary Injunction*.

13. Shryock continued to use cancer as a means to sell t-shirts until July 3, 2013, almost 6 days after he was served with the Temporary Restraining Order. Shryock agreed to the terms of the Stipulated Preliminary Injunction on July 5, 2013. On July 8, 2013, Shryock appeared in Court and affirmed that he agreed to the terms of the Stipulated Preliminary Injunction. On the same day, the Court issued an Order for the Preliminary Injunction. See Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶ 2-9; see Exhibit D, *Preliminary Injunction*.

14. In mid-August 2013, approximately one month after the Court issued the Preliminary Injunction, Shryock embarked on a new business scheme, which, like the other business schemes, represents that it is raising money for charitable causes. Shryock began recruiting models for this new business which he named “I Heart This Bar.” See Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶ 14-31.

15. I Heart This Bar uses the same business model, the same business manager and the same merchandise as SN2C. I Heart This Bar hires promotional models to sell merchandise at college football tailgate parties. The models walk around stadium parking lots telling customers that they are selling merchandise to raise money for a college scholarship fund. I Heart This Bar instructs the models to use the following script:

Hi, I'm Danielle and we are out today to raise \$65,000 for a scholarship fund sponsored by I Heart This Bar. Would you like to help us out and buy a t-shirt? Id.

16. The I Heart This Bar “scholarship fund” is nothing more than a cash bonus for the promotional managers. I Heart This Bar told its promotional managers that they would receive a \$7,500.00 cash bonus if they sold more merchandise than other promotional managers. *Id.* at ¶15.

17. The Attorney General’s Office became aware of I Heart This Bar’s activities on September 11, 2013. Exhibit F, *Affidavit of Kenneth King* at ¶7. Defendant Shryock was informed on September 20, 2013 that his actions were viewed as a violation of the Preliminary Injunction, that a contempt action was possible, and he was advised to retain counsel. On September 23, 2013, Defendant Shryock stated that he would voluntarily terminate all business activity related to I Heart This Bar. At the Attorney General’s request, Shryock provided the Attorney General with documents purporting to show that he ceased business activities in all fourteen states where I Heart This Bar was previously conducting business. *Id.* at ¶34.

Shryock's violations of the Asset Freeze.

17. Contemporaneous with its Temporary Restraining Order, the Court froze the Defendants' assets on Wednesday, June 26, 2013, at 2:00 P.M. See Exhibit A, *Temporary Restraining Order and Asset Freeze* and Exhibit D, *Preliminary Injunction*.

18. Pursuant to the Court's Asset Freeze, Defendants' were enjoined from several finance-related activities, including a) withdrawing, transferring or encumbering funds from any account; b) negotiating any checks or money orders received by Defendants; and c) spending, transferring, giving away or disposing of monies received by Defendants as a result of Defendants' business practices. *Id.*

19. Shryock continued to operate Say No 2 Cancer for an additional six days after the Temporary Restraining Order went into effect. During this time period, Shryock instructed his promotional managers to send money orders for monies received. To date, Shryock has not fully accounted for monies received from this six day time period. See Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶10-11; see Exhibit F, *Affidavit of Kenneth King* at ¶32.

20. On August 28, 2013, Shryock opened a new business bank account with U.S. Bank under the name SN2C, Inc. "SN2C" is a known abbreviation for Say No 2 Cancer. *Id.* at ¶33.

21. In mid-September 2013, Shryock wrote a check for \$36,000.00 to Lab Seven Design and Imprint, a t-shirt company. The check was written on a Wells Fargo account, under the name Boobies Rock. This account has been frozen pursuant to the Asset Freeze since June 27, 2013. *Id.* at ¶19.

RELEVANT LAW

22. The power to punish for contempt as a punitive measure or to coerce obedience is an inherent and indispensable power of the courts. *Austin v. City and County of Denver*, 397 P.2d 743 (Colo. 1964); see also *Kourlis v. Port*, 18 P.3d 770 (Colo. App. 2000). A finding of contempt is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Aleem*, 149 P.3d 765, 774 (Colo. 2007). Courts have broad remedial powers when faced with contempt of its orders, including injunctive orders. See, *Wilkinson v. Board of County Commissioners of Pitkin County*, 872 P.2d 1269 (Colo. App. 1994).

23. Rule 107 defines the actions constituting contempt to include “disobedience ... by any person to ... any lawful ... order of the court.” C.R.C.P. 107(a)(1). Thus, to find a party in contempt the fact finder must find that the contemnor did not comply with a lawful order of the court. The duty to comply arises because the contemnor was aware of the order. *See, e.g., People v. Allen*, 868 P.2d 379, 383 n. 10 (Colo.1994) (elements of contempt were established because defendant was aware of a permanent restraining order); *In re Marriage of Bernardoni*, 731 P.2d 146, 148 (Colo.App.1986) (father was made aware of his duty to permit mother to have visits with her children when the order was entered in open court). Rule 107 also distinguishes between direct and indirect contempt: direct contempt is witnessed by the court, while indirect contempt occurs outside of the court’s presence. *See* Colo. R. Civ. P. 107(a)(2) and (3).

24. In a finding contempt, a court may impose remedial sanctions, punitive sanctions, or both. Remedial sanctions are intended “to force compliance with a lawful order or to compel performance of an act within the person’s power or present ability to perform.” *See* Colo. R. Civ. P. 107(a)(5). If the contempt order is intended to be remedial in nature, the court must find that the contemnor: 1) did not comply with a lawful order of the court; 2) knew of the order; and 3) has the present ability to comply with the order. *In re Marriage of Cyr and Kay*, 186 P.3d 88, 92 (Colo. App. 2008). Proof of willfulness is not required before a court can impose remedial sanctions. *Id.* In contrast, a court seeking to impose punitive sanctions must find beyond a reasonable doubt: 1) the existence of a lawful order of the court; 2) the contemnor’s knowledge of the order; 3) the contemnor’s ability to comply with the order; and 4) that the contemnor is willfully refusing to comply with the court’s order. *Id.* That is, in order to support a contempt order imposed to punish, the court must find noncompliance with the court's order *and* that such conduct is offensive to the authority and dignity of the court. *People v. Razatos*, 699 P.2d 970 (Colo. 1985).

ARGUMENT

27. Defendant Shryock’s actions were unquestionably in contempt of the Court’s Temporary Restraining Order, the Preliminary Injunction and the Asset Freeze and present the Court with the option of imposing either remedial or punitive sanctions.

28. While remedial sanctions are available, it is questionable whether they are appropriate or adequate to address the level of disregard Defendant Shryock has displayed toward the Court’s Orders. Defendant Shryock has

flagrantly ignored the key provisions of the Court's Orders for a period of several months, while at the same time representing to the Court and to Plaintiff that he is attempting compliance in earnest. He has represented to Plaintiff that he is currently in compliance with the Stipulated Preliminary Injunction, but in light of his past conduct, Plaintiff has concerns that Defendant Shryock is not in compliance or does not intend to remain in compliance.

29. "In a contempt proceeding where remedial sanctions may be imposed...[t]he court shall enter an order ...describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed shall be described in the motion or citation." C.R.C.P. 107(d)(2).

30. Shryock's actions were already prohibited by the Court order(s), there is nothing that he can do, or be required to do, to remedy his actions or "purge" the contempt. He was not required to immediately pay restitution or fines, he was merely asked to comply with the law and cease his fraudulent business activities. As such, Shryock cannot be compelled to pay a fine as a remedial sanction. "Other than costs and reasonable attorney fees, a trial court is without authority to require, as a remedial sanction, monetary payments that do not force compliance with or performance of a court order." *Sec. Investor Prot. Corp. v. First Entm't Holding Corp.*, 36 P.3d 175 (Colo. App. 2001).

31. The facts support a finding that Shryock's contempt was "willful," making punitive sanctions a more appropriate and available sanction to vindicate the dignity of the Court. *Razatos*, 699 P.2d 970, *supra*, (willful conduct by contemnor required to establish basis for punitive sanctions).

32. "A person who 'willfully' violates an order of a court acts voluntarily, knowingly, and with conscious regard for the consequences of his conduct, refusing to comply with court orders when one has the ability to do so." *In re Marriage of Nussbeck*, 974 P.2d 493, 499 (Colo. 1999) *citing*, *Schnier v. District Court*, 696 P.2d 264, 268 (Colo. 1985) ("Disobedience or resistance of any lawful writ, process, order, rule, decree, or command" of a court constitutes contempt).

33. Shryock became aware of the Temporary Restraining Order when he was served a copy on June 27, 2013. Complying with the Temporary Restraining Order essentially required Shryock to do two things; 1) cease his companies' business activity and 2) communicate to his employees that business activity was ceased pursuant to court order.

34. The evidence clearly shows that these requirements were within Shryock's ability because Shryock did, in fact, communicate with his employees. Shryock communicated false information to his employees that SN2C had been the victim of fraud. Exhibit E, *Affidavit of Chase Pietrowski* at ¶¶10-11. Shryock then directed his employees to continue business activity and to continue to take in money from the sale of merchandise. Shryock sought to conceal the continued business activity by requiring his employees to send the proceeds to him by money order, rather than bank deposit. *Id.* at ¶10. These actions show that Shryock had the ability to communicate with his employees and to control their activities. Shryock could have easily used the same channels of communication to order his employees to cease all business activities, as he ultimately did several days later. Instead, Shryock willfully chose to send false information to his employees so that he could continue his business activity in violation of the Temporary Restraining Order.

35. On July 8, 2013, Shryock appeared before the Court and affirmed that he fully understood the Preliminary Injunction and stipulated to its terms. Immediately following his appearance, the Court issued the Preliminary Injunction. The most essential term of both the Temporary Restraining Order and the Preliminary Injunction was that Shryock would stop selling merchandise through organizations which represented that they were raising money for charitable causes.

36. Shryock completely disregarded the Court's order(s) despite clear awareness of the Preliminary Injunction's terms. Shryock merely changed the name of his scheme from "Say Not 2 Cancer" to "I Heart This Bar" and began using a "scholarship fund" as his charitable hook instead of "the fight against breast cancer."

37. I Heart This Bar uses promotional models to sell most of the same t-shirts as Shryock's Say No 2 Cancer enterprise. When the initial profits from I Heart This Bar didn't meet Shryock's expectations, he directed employees to increase the focus on the scholarship itself and raised the amount of the "scholarship fund" from \$7,500.00 to \$65,000.00. Accordingly, Shryock willfully created another fraudulent business that misrepresents it is raising money for charitable causes in direct violation of the Preliminary Injunction.

38. Both the Temporary Restraining Order and the Preliminary Injunction were accompanied by an Asset Freeze order. Ostensibly, it would appear difficult for Shryock to disregard the Order because his assets were frozen and assumedly beyond his control.

39. Shryock's immediate response, however, to the Asset Freeze was to direct his employees to continue Say No 2 Cancer's activities and to direct his employees to send money orders directly to him and to not deposit proceeds in his bank account. By directing his employees to send him money orders, Shryock willfully circumvented the Asset Freeze. Pursuant to term 1(B) of the Asset Freeze, Shryock was enjoined from negotiating any money orders he received as the result of his business practices. To date, Shryock has not accounted for all monies received from this six day time period.

40. Shryock demonstrated similar willful disregard for the Asset Freeze by writing a \$36,000.00 against the frozen Wells Fargo account to a t-shirt manufacturer to print and ship the t-shirts for his I Heart This Bar scheme. Shryock may have conveyed to the t-shirt manufacturer that his accounts were presently frozen; nonetheless, Shryock encumbered the account when he gave the check to the merchant in violation of term 1(A) of the Asset Freeze, and spent account funds in violation of term 1(C).

41. Defendant Shryock was fully capable of complying with the Temporary Restraining Order, the Preliminary Injunction, and the Asset Freeze.

42. Shryock has acted in contempt of the Court's orders and with a conscious disregard for the consequences of his actions. Shryock's actions merit punitive sanctions. Shryock has taken money from people for years who believed they were contributing to charitable causes. He has continued to do so, outside of the sight of Court, while subject to the Court's Order(s).

43. "The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court." C.R.C.P. 107(d)(1). Without question, Shryock actions merit punitive sanctions as the Courts deems commensurate with Defendants' willful violations of this Court's Orders.

WHEREFORE, the State respectfully requests that this Court

- a. grant this Motion in all respects;
- b. order the issuance of a contempt citation directed to Defendant Shryock requiring him to appear before this Court and show cause why he should not be held in contempt of the Court's Orders;

- c. direct that the citation inform him that punitive or remedial sanctions, in the form of fines and penalties, may be imposed upon him to vindicate the authority and dignity of the Court;
- d. direct that the citation also inform him that if he fails to appear as ordered, a bench warrant may be issued for his arrest without further notice; and
- e. award the State its costs and attorney's fees, together with all such further relief as the Court deems just .

Dated this 25th day of October, 2013.

JOHN W. SUTHERS
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