

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THRIVEST SPECIALTY FUNDING, LLC :
 :
 v. : Civil Action No. 2:18-CV-04764-AB
 :
 TOBY L. WRIGHT :

THRIVEST’S EMERGENCY MOTION FOR CONTEMPT

Thrivest Specialty Funding, LLC (“Thrivest”) respectfully moves this Court to hold Toby L. Wright in contempt of Court for failure to comply with the Court’s August 12, 2019 Order confirming the Emergency Arbitrator’s interim award of emergency relief by entering an Order in the form proposed. In support thereof, Thrivest relies upon and incorporates by reference the accompanying Memorandum of Law.

Respectfully submitted,

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Dated: August 15, 2019

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THRIVEST SPECIALTY FUNDING, LLC :
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 v. : Civil Action No. 2:18-CV-04764-AB
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**THRIVEST’S MEMORANDUM OF LAW IN SUPPORT OF ITS
EMERGENCY MOTION FOR CONTEMPT**

Thrivest Specialty Funding, LLC (“Thrivest”) submits this memorandum of law in support of its Emergency Motion for Contempt, which seeks to hold Toby L. Wright (“Wright”) in contempt of Court because Wright has failed to comply with the Court’s August 12, 2019 Order confirming the Emergency Arbitrator’s interim award of emergency relief (ECF No. 35) (the “August 12, 2019 Order”).

I. BACKGROUND AND RELEVANT FACTS

In October 2016, Thrivest provided Toby L. Wright (“Wright”) with a \$323,792.15 advance on his potential recovery in the NFL Concussion Litigation. See Agreement (ECF No. 11, Exhibit A). Wright has refused—and continues to refuse—to honor their Agreement. To date, despite having the use and enjoyment of Thrivest’s advance for more than two and a half years and receiving a \$1.9 million award in the NFL Concussion Litigation triggering his payment obligations, Wright has not paid Thrivest anything.

Thrivest commenced this action against Wright, seeking to compel Wright to participate in arbitration pursuant to the agreement to arbitrate at Section 6(z) of their Agreement. See Amended Complaint to Compel Arbitration (ECF No.11). Wright vigorously opposed arbitration, filing a Counterclaim challenging the validity of the Agreement as a whole and seeking a declaration that he could not be compelled to arbitrate. (ECF No.12). Later, Wright moved for summary judgment on his Counterclaim (ECF No.16) and sought an injunction (ECF

No. 17) and temporary restraining order (ECF No. 18) against the Arbitration. After an in-person oral argument during which Wright resisted arbitration, the Court granted Thrivest's request to compel arbitration on June 5, 2019, denying Wright's motions as moot while staying this action in favor of the Arbitration. (ECF No. 22).

The matter before the Court relates to an injunction issued by Emergency Arbitrator Hon. Mark I. Bernstein (Ret.) and confirmed in the Court's August 12, 2019 Order—namely, an injunction directing that Wright escrow funds pending resolution of the arbitration on the merits. On June 26, 2019, Judge Bernstein entered an Interim Award of Emergency Relief (the "Award") pursuant to AAA Rule 38, which authorizes the Emergency Arbitrator to award emergency relief in the case of "immediate and irreparable loss or damage." (ECF No. 25, at Exhibit B). Judge Bernstein rejected Wright's jurisdictional challenge, which he treated as a motion to dismiss. Id. Finding he had jurisdiction to adjudicate Thrivest's application, Judge Bernstein issued the Award, directing Wright to escrow \$800,000 "into the trust account of his attorney, Ronald Ellett, Esquire ... pending a final award, further order of the arbitrator, or written agreement signed by the parties." Id. An injunction directing the escrow of funds only, Judge Bernstein's Award makes clear that "[d]eposit of the Escrowed Funds as set forth herein shall not alter the parties' rights and obligations under the Agreement." Id.

Wright did not comply with the Award. Accordingly, on July 13, 2019, Thrivest filed an Emergency Motion to Confirm Arbitration Award, seeking to confirm the Award as well as to compel arbitration. (ECF No. 25). In response, Wright sought to vacate the Award. (ECF No. 30). On August 12, 2019, the Court confirmed the Award and denied Wright's application to vacate the Award. (ECF No. 35).

On August 12, 2019, Thrivest wrote to Ronald J. Ellett, Esquire, Wright's attorney, requesting compliance with the August 12, 2019 Order by no later than the close of business on

August 13, 2019. To date, Wright has not complied with the August 12, 2019 Order by escrowing \$800,000.00 in his attorney's trust account, nor has his attorney provided confirmation that Wright has so complied or that Wright will comply if afforded additional time.

II. ARGUMENT

The Court should hold Wright in civil contempt and issue appropriate sanctions because it is undisputed that (1) the August 12, 2019 Order exists and is valid, (2) Wright, through his counsel, had notice of the August 12, 2019 Order upon its issuance, and (3) Wright has failed to comply with the August 12, 2019 Order by escrowing the funds directed.

Courts enjoy “inherent power to enforce compliance with their lawful orders through civil contempt.” Spallone v. United States, 493 U.S. 265, 276 (1990). Civil contempt sanctions are penalties “designed to compel future compliance with a court order.” Int’l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 (1994). These sanctions serve two purposes: “one coercive and the other compensatory.” Harris v. City of Phila., 47 F.3d 1311, 1328 (3d Cir. 1995) (citing Bagwell, 512 U.S. 828–829). Coercive sanctions aim “to coerce the defendant into compliance with the court’s order and to compensate for losses sustained by the disobedience.” McDonald’s Corp. v. Victory Investments, 727 F.2d 82, 87 (3d Cir. 1984). This includes authority to imprison the contemnor “indefinitely until he complies with an affirmative command.” Chadwick v. Janecka, 312 F.3d 597, 608 (3d Cir. 2002) (imprisoning attorney for years for civil contempt of order to pay, citing Gompers v. Buck’s Stove & Range Co., 221 U.S. 418, 442 (1911)). Compensatory sanctions “make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed.” Century 21 Real Estate Corp. v. DiGennaro Real Estate, Inc., No. CIV.A.01-979, 2002 WL 126631, at *3 (E.D. Pa. Jan. 31, 2002).

To establish contempt, a movant must prove by clear and convincing evidence: “(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order.” Marshak v. Treadwell, 595 F.3d 478, 485 (3d Cir. 2009) (affirming order of contempt for violation of injunction). As detailed below, contempt is appropriate based upon Wright’s failure to comply with the August 12, 2019 Order. **First**, the August 12, 2019 Order is valid, codifying Judge Bernstein’s Award as an Order of the Court. **Second**, through his counsel, Wright had knowledge of the August 12, 2019 Order. **Third**, it is undisputed that Wright has failed to comply with the August 12, 2019 Order by escrowing the funds directed. The Court must hold Wright in contempt to compel compliance with the August 12, 2019 Order and to protect Thrivest from the risk of dissipation pending resolution of the arbitration on the merits.

A. The August 12, 2019 Order Is Valid.

The August 12, 2019 Order is a valid and binding Order that confirmed the Award by granting Thrivest’s Emergency Motion to Confirm.

An order confirming an arbitration award “shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.” 9 U.S.C.A. § 13; Domus, Inc. v. Davis-Giovinazzo Const. Co., No. CIV.A. 10-1654, 2011 WL 3666485, at *6 (E.D. Pa. Aug. 22, 2011) (holding that a judgment confirming an arbitration award “shall have the same force and effect” as a judgment entered by the Court); Trustees of New York City Dist. Council of Carpenters Pension Fund v. Galway Dev. Corp., No. 19 CIV. 278 (PAE), 2019 WL 1567713, at *4 (S.D.N.Y. Apr. 10, 2019) (holding that “[a]n order confirming an arbitration award is to be ‘docketed as if it was rendered in an action,’ and ‘have the same force and effect’” as a judgment rendered by the Court) (quoting 9 U.S.C. § 13).

“Courts traditionally have broad powers to enforce their own commands—if a court cannot enforce its own rules and orders, it is powerless.” Allen Organ Co. v. Galanti Organ Builders, Inc., No. CIV. A. 89-7636, 1991 WL 183432, at *2 (E.D. Pa. Sept. 12, 1991). Accordingly, after confirming an arbitration award in an order, a Court can enforce the order, and the underlying award, if one party fails to comply. See id.

Here, there can be no dispute that the August 12, 2019 Order is valid and that it codified the relief contained in Judge Bernstein’s Award as an Order of this Court. Wright had an opportunity to oppose Thrivest’s Emergency Motion to Confirm and did so. In fact, Wright sought to vacate the Award on grounds that this Court rejected in the August 12, 2019 Order. The August 12, 2019 Order is valid and Wright must comply with it. Absent compliance, he should be held in contempt.

B. Wright Had Knowledge Of The August 12, 2019 Order.

Wright has had knowledge of the August 12, 2019 Order since its issuance. The Court issued the August 12, 2019 Order through the Court’s Case Management/Electronic Case Files (CM/ECF) system. Attorney Ellett, Wright’s counsel, is a registered user of the CM/ECF system as evidenced by his electronic filings in this case. Therefore, upon the filing of any document in this action, including the August 12, 2019 Order, Attorney Ellett received immediate notification of the filing via e-mail. Notice to Attorney Ellett, as Wright’s agent, constitutes notice to Wright.

Here, the Court served the August 12, 2019 Order on Attorney Ellett through the CM/ECF system consistent with Rule 4(b)(1) of the Federal Rules of Civil Procedure, which provides that “[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.” Accordingly, Wright was served with, and had knowledge of, the August 12, 2019 Order when Attorney Ellett received the Order on

August 12, 2019. Lest there be any doubt, on August 12, 2019, Thrivest's counsel included a copy of the August 12, 2019 Order in his demand to Attorney Ellett for compliance. Despite clear notice of the August 12, 2019 Order, Wright has failed to comply and has given no indication that he will comply if afforded additional time. Contempt is the appropriate remedy under the circumstances.

C. Wright Has Failed to Comply With The August 12, 2019 Order.

As detailed above, Wright has failed to comply with the August 12, 2019 Order by depositing \$800,000.00 into escrow with his attorney pending resolution of the parties' dispute on the merits. Although Wright's compliance with the Award was long overdue at the time of the August 12, 2019 Order, Thrivest afforded him until August 13, 2019 to comply. It is now August 14, 2019 and Wright still has not complied, nor has he indicated an intention to comply with additional time.

D. Coercive Sanctions Are Appropriate.

Thrivest seeks to invoke the Court's contempt powers to prompt compliance with the August 12, 2019 Order. The Third Circuit has made clear that the Court has wide discretion in fashioning a civil contempt remedy. See Delaware Valley Citizens' Council for Clean Air v. Com. of Pa., 678 F.2d 470, 478 (3d Cir. 1982).

Judge Bernstein issued emergency relief in the underlying arbitration based on the likelihood that Wright would dissipate the funds in controversy before a decision on the merits. This Court confirmed the Award. Absent exercise of the Court's contempt powers, Wright will continue to ignore Judge Bernstein's Award and this Court's August 12, 2019 Order, exposing Thrivest to the very risk of dissipation that prompted the emergency relief in the first instance. Thrivest requests that the Court impose coercive sanctions to force compliance with the August

12, 2019 Order and then, if Wright continues his disobedience, imprison Wright until he complies.

First, Thrivest requests that the Court impose a fine of \$500.00 per day for each day of Wright's non-compliance. See Alla Paternack v. Bruce K. Klien, et al., Civil Action No. 14-2275, Schiller, J. (E.D. Pa. April 27, 2017) (imposing a fine of \$250.00 per day for each day of noncompliance with a settlement agreement). Second, Thrivest requests that the Court freeze Wright's accounts and restrict non-medical expenditures and/or transfers of more than \$500 absent court approval unless and until Wright complies with the August 12, 2019 Order. This sanction is well within the Court's discretion to fashion an appropriate contempt remedy and could prompt Wright to comply with the August 12, 2019 Order.

E. Compensatory Sanctions Are Appropriate.

Thrivest requests that the Court order Wright to pay Thrivest's attorneys fees and costs in connection with this motion as a compensatory sanction.

The Court has the power to enter relief to restore the parties to the position they would have held if Wright had obeyed the August 12, 2019 Order. See Cardionet, LLC v. Mednet Healthcare Techs., Inc., 146 F. Supp. 3d 671, 692 (E.D. Pa. 2015) (holding that compensatory sanctions are available in civil contempt proceedings when the award of attorneys' fees can restore the injured party to the position it would have occupied had the contemnor complied with the Court order in question). Here, Thrivest would have not have incurred the fees and costs relating to the Emergency Motion for Contempt but for Wright's failure to comply. Therefore, Thrivest requests that the Court order Wright to pay Thrivest's fees and costs as a compensatory sanction.

III. CONCLUSION

For the foregoing reasons, Thrivest respectfully requests that the Court grant its Emergency Motion for Contempt and enter an Order in the form proposed.

Respectfully submitted,

/s/ Peter C. Buckley, Esquire

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2019, I caused the Emergency Motion for Contempt to be filed with the Court and served on all counsel of record via the Court's electronic case filing system.

/s/ Peter C. Buckley, Esquire
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