

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

JUL 23 2009

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

OKLAHOMA DEPARTMENT OF )  
SECURITIES ex rel. IRVING L. FAUGHT, )  
ADMINISTRATOR, )

Plaintiff, )

vs. )

GLOBAL WEST FUNDING, LTD. CO., )  
an Oklahoma limited liability company, et al. )

Defendants. )

Case No. CJ-2009-2773

**OBJECTION AND MOTION TO QUASH SUBPOENA DUCES TECUM, OR IN THE  
ALTERNATIVE, MOTION TO STAY ORDER AND NOTICE OF HEARING**

COMES NOW the defendant, Brian McKye (hereinafter referred to as "Mr. McKye"), pursuant to 12 O.S. § 2004.1, Okla. Const. art. II § 21 and *U.S. Const. amend. V* and for his *Objection and Motion to Quash Subpoena Duces Tecum, or in the Alternative, Motion to Stay Order*, shows the Court that the *subpoena duces tecum* in question should be quashed, or in the alternative, this Court should stay its Order compelling production of certain documents based on the following:

PROPOSITION I.           INDIRECT CONTEMPT OF COURT REQUIRES CONSTITUTIONAL PROTECTIONS NORMALLY AFFORDED TO DEFENDANTS IN CRIMINAL PROCEEDINGS.

PROPOSITION II.        OKLA. STAT. TIT. 12, § 2004.1 PROTECTS PARTIES FROM DISCLOSING PRIVILEGED MATERIAL.

PROPOSITION III.      THE VIDEO SOUGHT IN THE SUBPOENA IS PRIVILEGED MATERIAL PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS; THEREFORE, THIS COURT MAY NOT ORDER MR. MCKYE TO PRODUCE THE VIDEO.<sup>1</sup>

<sup>1</sup> It is Mr. McKye's attorneys' understanding that the only document in Mr. McKye's possession that would be relevant to the *subpoena duces tecum* is a video tape. However, to the extent any other documents in existence and within Mr. McKye's control are subject to the *subpoena duces tecum*, Mr. McKye does not waive his privilege against self

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## FACTS

1. On July 13, 2009, this Court appointed Robert Ravitz, the Oklahoma County Public Defender, as counsel for Mr. McKye due to the allegations of contempt currently pending against Mr. McKye.

2. The allegations of contempt were brought by Plaintiff on June 5, 2009, and are contained in Plaintiff's *Application for Citation for Contempt Against Brian McKye* (hereinafter the "*Application for Contempt*"). The *Application for Contempt* alleges that Mr. McKye: 1) withdrew certain funds in violation of the *Temporary Restraining Order* issued on March 24, 2009; and 2) sent letters to former clients and conducted a meeting with former clients in violation of the *Agreed Order* entered into on April 1, 2009.

3. Relevant to this *Motion* are the allegations that the meeting with the former clients violated the *Agreed Order* because, apparently, conducting such a meeting interfered or hindered the Special Master in the conduct of his duties.

4. Prior to filing the *Application for Contempt*, on May 19, 2009, Plaintiff issued a *subpoena duces tecum* (hereinafter the "*Subpoena*") for certain documents allegedly in Mr. McKye's possession. Those documents included the following:

All documents, records, and materials relating to the meeting at the Hometown Buffet on May 15, 2009, including, but not limited to, the video taped record of the meeting.

*See Plaintiff's Motion to Compel Response to Plaintiff's Subpoena*, filed June 5, 2009 (hereinafter the "*Motion to Compel*"). Said documents were to be produced by May 28, 2009, but because Mr. McKye did not have possession of the documents they were not produced by that date.

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incrimination with regard to those documents and specifically invokes his right to not produce those documents in the same manner, and for the same reasons, that he is not producing the video tape.

5. Subsequent to Mr. McKye's involuntary failure to produce the documents by the date requested, Plaintiff filed its *Motion to Compel*. The *Motion to Compel* requested this Court enter an order requiring Mr. McKye to turn over the documents identified in the *Subpoena*.

6. The *Motion to Compel* was heard on July 13, 2009; and at that time, this Court entered an order requiring Mr. McKye to produce all of the documents requested in the *Subpoena*, including the videotape of the meeting.

7. In effect, the July 13, 2009, Order violates Mr. McKye's state and federal constitutional rights against self incrimination. The *Subpoena* specifically seeks the videotape made during the May 15, 2009, meeting. The videotape contains statements that may be used against Mr. McKye during his contempt trial; therefore, the *Subpoena* should be quashed.

#### **BRIEF IN SUPPORT**

#### **PROPOSITION I.      INDIRECT CONTEMPT OF COURT REQUIRES CONSTITUTIONAL PROTECTIONS NORMALLY AFFORDED TO DEFENDANTS IN CRIMINAL PROCEEDINGS.**

Mr. McKye is accused of indirect contempt of court. "The punishment for indirect contempt may be remedial to coerce the defendant's behavior, or it may be penal to punish the defendant for disobedient or disorderly behavior." *Henry v. Schmidt*, 2004 OK 34, ¶13, 91 P.3d 651, 654. The allegations against Mr. McKye concern the completed acts of allegedly removing money and interfering with the Special Master in violation of this Court's *Temporary Restraining Order*. Since the allegations concern completed acts, the threat of imprisonment is penal not coercive. *Id.* (citations omitted).

Because the allegations of contempt are penal, they are subject to federal and state constitutional protections. *Id.* at ¶18, 655. In *Henry*, the Oklahoma Supreme Court explicitly held that, "when a trial court imposes a penal sanction in an indirect contempt proceeding, **the**

**defendant is entitled to the constitutional protections afforded in criminal proceedings.**” *Id.* at ¶21, 656 (emphasis supplied). One of the constitutional protections afforded in criminal proceedings under both the state and federal constitutions is the right against self incrimination. *See Okla. Const. art. II § 21; U.S. Const. amend. V.*

**PROPOSITION II. OKLA. STAT. TIT. 12, § 2004.1 PROTECTS PARTIES FROM DISCLOSING PRIVILEGED MATERIAL.**

Pursuant to 12 O.S. § 2004.1 a party may object to the production of any privileged documents. “[A] privilege...shall not be waived solely for failure to timely object under this section.” Okla. Stat. tit. 12, § 2004.1(C)(2)(b). Therefore, in spite of the untimely nature of the objection, the privilege against self incrimination is not waived, and by filing this *Motion*, Mr. McKye is specifically invoking said privilege.

**PROPOSITION III. THE VIDEO SOUGHT IN THE SUBPOENA IS PRIVILEGED MATERIAL PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS; THEREFORE, THIS COURT MAY NOT ORDER MR. MCKYE TO PRODUCE THE VIDEO.**

The Oklahoma Supreme Court has outlined the exact procedure to determine whether a defendant may be compelled to turn over documents pursuant to a *subpoena duces tecum* when those documents are protected by the right against self incrimination. In *Rey v. Means, In and For Tulsa County*, 1978 OK 4, 575 P.2d 116 the Supreme Court stated the following:

On the production of documents, we find the present fifth amendment rationale to be...: “When the requested documents are in the hands of the claimant, **the elements of compulsion, incrimination and testimonial communication** must all be present to invoke the protection of the fifth amendment privilege.

*Rey*, at ¶11, 119.

“Compulsion exists in the forced production of documents by a motion to produce or a subpoena duces tecum issued to the person claiming the privilege.” *Id.* In this case, compulsion exists because the documents are being forcibly compelled through both a motion to produce and a subpoena duces tecum.

Upon a showing of compulsion, this Court will look to whether the Mr. McKye is being compelled to make an incriminating statement and testimonial communication. The communication may be “oral testimony, a written statement or a communicative or assertive act.” *Id.* (emphasis supplied). In the case at bar, the video depicts both communications and assertive acts.

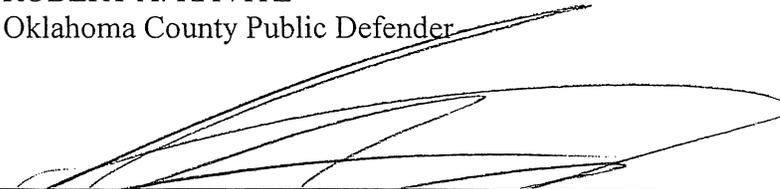
Moreover, even if this Court were to find that the communications or assertive acts were not “testimonial” in nature, the Court’s inquiry does not end. Rather, this Court must then “look beyond the contents to the compelled act of producing the papers. If the act of producing the documents is both incriminating and testimonial, then there is a valid fifth amendment claim.” *Id.* In the case at bar, if Mr. McKye were to produce the video, then that video would most assuredly be used in the penal contempt trial.

Therefore, because production of the video violates Mr. McKye’s right against self incrimination, the Subpoena seeking the same should be quashed; or in the alternative, this Court should stay its Order requiring Mr. McKye to produce the video due to the fact that the Order violates Mr. McKye’s right against self incrimination.

WHEREFORE, defendant, Brian McKye, prays that this Court quash the *Subpoena*, or in the alternative, stay its Order requiring Mr. Mckye to produce certain documents.

Respectfully submitted,

ROBERT A. RAVITZ  
Oklahoma County Public Defender

BY: 

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**NOTICE OF HEARING**

This matter is set for hearing on the 24<sup>th</sup> day of August, 2009 at 10:00 a.m., before  
the Honorable Noma Gurich.

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, hereby certify that on the 23<sup>rd</sup> day of July, 2009, I mailed a copy of the above and foregoing to the following persons via regular mail:

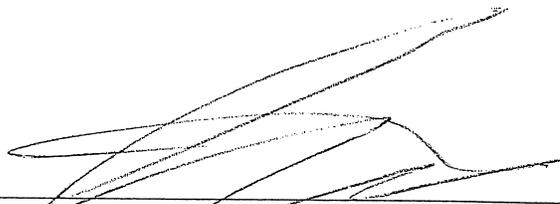
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