APPENDIX A

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KENNY G ENTERPRISES, LLC, Debtor, ---------- KENNETH GHARIB, Appellant, v. THOMAS H. CASEY, Chapter 7 Trustee, Appellee.	No. 16-55007 D.C. No. 8:15-cv-00551-GW Central District of California, Santa Ana ORDER

In re: KENNY G ENTERPRISES, LLC, Debtor, ---------- THOMAS H. CASEY, Chapter 7 Trustee, Appellant, v. KENNETH GHARIB, Appellee.	No. 16-55008 D.C. No. 8:15-cv-00551-GW

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,* District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judges Wardlaw and Callahan voted to deny the petition for rehearing en banc, and Judge Kendall so recommended. The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained. The motion for judicial notice is **DENIED**.

* The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX B

Case: 16-55007, 07/28/2017, ID: 10525476, DktEntry: 50-1, Page 1 of 6

FILED

JUL 28 2017

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KENNY G ENTERPRISES, LLC, Debtor, --- KENNETH GHARIB, Appellant, v. THOMAS H. CASEY, Chapter 7 Trustee, Appellee.	No. 16-55007 D.C. No. 8:15-cv-00551-GW MEMORANDUM*

In re: KENNY G ENTERPRISES, LLC, Debtor, --- THOMAS H. CASEY, Chapter 7 Trustee, Appellant, v.	No. 16-55008 D.C. No. 8:15-cv-00551-GW

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

KENNETH GHARIB,

Appellee.

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted April 3, 2017
Pasadena, California

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,[**] District Judge.

Kenneth Gharib ("Gharib") appeals the district court's decision affirming in part and vacating in part the bankruptcy court's order finding him in contempt of court in the bankruptcy proceedings of Kenny G Enterprises, LLC ("the Debtor"). The district court affirmed the portion of the bankruptcy court's contempt order fining Gharib $1,420,043.70, but vacated the portion of the order imposing $1,000 in daily sanctions. Thomas H. Casey cross-appeals. We have jurisdiction under 28 U.S.C. § 158(d). We affirm in part and reverse in part.

1. The district court properly affirmed the bankruptcy court's $1,420,043.70 sanction against Gharib. The bankruptcy court may hold Gharib in

[**] The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

civil contempt for failing to comply with his statutory turnover obligations. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). The record supports the bankruptcy court's decision to hold Gharib in contempt. The bankruptcy court found that on August 14, 2013, Dana Douglas, representing the Debtor, notified Gharib that the Debtor's bankruptcy case was converted from one under Chapter 11 to one under Chapter 7. The conversion triggered Gharib's obligations under 11 U.S.C. § 542(a) and Central District of California Local Bankruptcy Rule ("LBR") 3020-1(b)(5) to turn over to the trustee of the Debtor's estate all of the Debtor's assets that were in Gharib's possession, which amounted to $1,420,043.70. Gharib failed to do so. A year and a half later, after extensive briefing, discovery, and an evidentiary hearing to determine the precise scope of Gharib's turnover obligations and to discover where the assets had gone, the bankruptcy court concluded that "in all likelihood the alleged Iran transaction is entirely fiction and the Hillsborough proceeds [amounting to $1,420,043.70] (or what is left of them) are still here and under Gharib's control." Based on the record before us, we cannot conclude that the bankruptcy court's finding was clearly erroneous. *See Atlanta Corp. v. Allen* (*In re Allen*), 300 F.3d 1055, 1058 (9th Cir. 2002).

Because complying with the bankruptcy court's order will cure his contempt, Gharib's contempt is civil, not criminal. *See Shillitani v. United States*, 384 U.S. 364, 368 (1966) (holding that when an incarcerated contemnor "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted), his contempt is civil in nature). Accordingly, the bankruptcy court acted within its 11 U.S.C. § 105(a) civil contempt powers when it sanctioned Gharib in the amount of $1,420,043.70, and did so again when it ordered Gharib incarcerated for his continued failure to comply. *See Cal. Emp't Dev. Dep't v. Taxel* (*In re Del Mission Ltd.*), 98 F.3d 1147, 1151–52 (9th Cir. 1996) (where an entity failed to perform its § 542(a) obligations, § 105 authorized the bankruptcy court's coercive fines); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) ("The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." (internal quotation marks omitted)). Therefore, the district court did not err in affirming the bankruptcy court's $1,420,043.70 sanction against Gharib, and the bankruptcy court acted within its civil contempt authority in detaining Gharib for his continued failure to pay the sanction.

2. However, the district court erred by vacating the portion of the bankruptcy court's order imposing daily sanctions on Gharib for failure to pay the contempt fine. The district court reviewed the bankruptcy court's contempt order only with reference to the language of § 542, which mandates the turnover of "property or the value of such property." 11 U.S.C. § 542(a). From this, the district court erroneously concluded that the amount of the bankruptcy court's sanctions against Gharib had to be cabined to "the value of" the assets Gharib was required to turn over, or $1,420,043.70 only. But in the face of a § 542 violation the bankruptcy court may invoke its contempt power under § 105, which allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). *See In re Del Mission*, 98 F.3d at 1151–52 (9th Cir. 1996) (noting that § 105(a) provides the remedy for a § 542(a) violation). As long as the sanctions are coercive in nature and not punitive, § 105(a) articulates no specific monetary limit on the scope of contempt sanctions available to the court. To the contrary, the Supreme Court has noted that "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order . . . exert[s] a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged." *Int'l Union*, 512 U.S. at 829. Therefore, where per diem fines can be prospectively

purged "through full, timely compliance" with the court's order, then daily fines "operate[] as a coercive imposition upon the defendant . . . to compel [his] obedience." *Id.* at 830 (internal quotation mark omitted). Because this precisely describes the nature of the $1,000 daily sanctions the bankruptcy court imposed, the court acted within its § 105(a) civil contempt authority when it imposed them.

3. Because the monetary sanctions imposed and Gharib's ensuing incarceration for noncompliance with those sanctions are properly coercive, they are not punitive. However, we are mindful that Gharib has remained incarcerated for civil contempt since May 2015. At some point, due process considerations will require the bankruptcy court to conclude that Gharib's continued detention and the daily $1,000 sanctions have ceased to be coercive and instead have become punitive. When that occurs, Gharib must be released from custody.

4. In light of our disposition, we decline to reach Gharib's claim that he lacked notice of the bankruptcy court's August 14, 2013 oral temporary restraining order.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX C

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 15-551-GW	Date	November 30, 2015
Title	*In Re: Kenny G Enterprises, LLC,*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Raymond Aver	Thomas H. Casey Nicholas Bravo - Creditor

PROCEEDINGS: ARGUMENT ON BANKRUPTCY APPEAL

Appellant Kenneth Gharib is also present.

Court hears oral argument. The Tentative circulated is adopted as the Court's Final Ruling. The Court would AFFIRM in part and VACATE in part the Bankruptcy Court's Contempt Order, allowing that portion of it ordering Appellants to pay $1,420,043.70 to stand, while vacating that aspect which orders Appellants to pay sanctions in the daily amount of $1,000.

_____ : 20

Initials of Preparer JG

Gharib, et al. v. Casey (In re Kenny G Enters., LLC), District Court Case No. 8:15-cv-00551-GW; Bankruptcy Case No. 8:11-bk-24750-TA
Tentative Ruling on Bankruptcy Appeal

I. Background

Kenneth Gharib ("Gharib") and Freedom Investment Corporation ("Freedom" and, together with Gharib, "Appellants") appeal from the Order Finding Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi and Freedom Investment Corporation, a Nevada Corporation, in Contempt of this Court and Imposing Sanctions, entered by the United States Bankruptcy Court for the Central District of California ("Contempt Order") on March 23, 2015. *See* Appellants' Excerpts of Record ("ER") at 1203-17, Docket No. 9-9. Appellants identify eight issues presented for appeal, *see* Docket No. 9, at 2-3, whereas (though he has not filed a cross-appeal) appellee Thomas H. Casey, the Chapter 7 Trustee ("Appellee") for debtor Kenny G Enterprises, LLC ("Debtor"), identifies 31 issues for appeal, *see* Docket No. 10, at 2-6. The Bankruptcy Court entered this Order due to its conclusion that Appellants had violated the terms of the Order Denying Debtor's Motion for Final Decree and Order Converting the Case from a Chapter 11 Case to a Case Under Chapter 7 and Temporary Restraining Order ("Conversion Order/TRO"), entered August 13, 2013. *See* ER at 10-15, Docket No. 9-1.

At the heart of this case is a series of transfers of funds representing sales proceeds from the sale of property in Hillsborough, California, previously owned by Debtor. In short, though the Debtor's Chapter 11 Plan did not provide for the sale of the Hillsborough property, the Debtor sold it anyway, with Gharib acting on behalf of the Debtor in the transaction.[1] Gharib created Freedom and – purportedly in conformity with a Memorandum of Understanding between the Debtor and Mother and Baby Co. LTD

[1] A further recitation of certain of these facts is contained in the Bankruptcy Appellate Panel for the Ninth Circuit's decision on an appeal taken from that aspect of the Conversion Order/TRO that converted the case to Chapter 7 and the denial of a motion to reconsider that aspect of the Conversion Order/TRO. *See* ER at 430-35, Docket No. 9-2. Although Appellee argues that certain aspects of that decision are entitled to "law of the case" effect in this appeal, the Court has no need to consider that argument. To the extent that the Court did need to consider the argument, it would reject it because – or *at least* because – the Bankruptcy Appellate Panel did not actually consider or resolve any of the issues germane to the present appeal from the Contempt Order. *See* ER at 442, Docket No. 9-2; *id.* at 451, Docket No. 9-2 (addressing the Debtor's argument that the Bankruptcy Court lacked *the authority* to issue a TRO).

("MandB") designed to result in the purchase, for the Debtor, of property in Iran – transferred the net sale proceeds into an account held by Freedom. Within hours of the Bankruptcy Court's Conversion Order/TRO designed to prevent the further transfer of those funds to anyone other than the Debtor's Chapter 7 trustee, Gharib transferred approximately $1.4 million of the sales proceeds from Freedom to Excellent Money Management Corp ("EMM"), another entity for which Gharib was then the sole signatory. Two days later, Gharib transferred the proceeds from EMM to A&M Developers Corp. and Domnus Corp to complete – according to Appellants – the Debtor's acquisition of the Iranian property.[2]

In light of these transfers, and following the submission of both documentary and testimonial evidence (including live testimony by Gharib and the individual who the Bankruptcy Court concluded had given Gharib oral notice of the TRO), the Bankruptcy Court entered its Contempt Order. In the Contempt Order, the Bankruptcy Court ordered Gharib and Freedom "to pay sanctions in the sum of $1,420,043.70 forthwith to the Trustee. For every day from entry of this order that this sum remains unpaid, further sanctions in the sum of $1000 will be added to the sums due." ER at 1215, Docket No. 9-9; *see also* ER at 1217, Docket No. 9-9.[3]

II. Appellate Jurisdiction

Appellants assert that this Court has appellate jurisdiction over the Sanctions Order by way of 28 U.S.C. § 158(a)(1) because, at least in the context of this matter (a contempt/sanctions order against non-parties stemming from a contested matter concerning the disposition of certain assets of the Debtor's Chapter 7 estate), that order represents a final order. Appellee has not contested this assertion and the Court concludes that, given the context of the Bankruptcy Court's ruling here, it agrees. *See, e.g.*, *Stipp v. CML-NV One, LLC (In re Plise)*, 506 B.R. 870, 876 (B.A.P. 9th Cir. 2014)

[2] Appellants do not challenge, as clearly erroneous, any of the facts recited in this paragraph.

[3] As part of the Contempt Order, the Bankruptcy Court also scheduled a further hearing for May 12, 2015, to assess compliance and to consider the imposition of further sanctions, which the Bankruptcy Court warned could include incarceration of Gharib for ongoing contempt. *See* ER at 1215, 1217, Docket No. 9-9. Appellants filed their Notice of Appeal before that May 12, 2015, hearing went forward. It is this Court's understanding that Gharib is, in fact, currently incarcerated due to his continued noncompliance with the Contempt Order, and this Court has issued an order permitting Gharib to appear at the oral argument on this appeal notwithstanding that status. *See* Docket No. 17.

(concluding that appellate jurisdiction existed under § 158 where appeal was from bankruptcy court's sanctions order against non-party); *Rosales v. Wallace (In re Wallace)*, 490 B.R. 898, 904 (B.A.P. 9th Cir. 2013) ("Where the contempt proceeding is the sole proceeding before the court, an order of civil contempt finding a party in contempt of a prior final judgment and imposing sanctions is a final appealable order."); *Munson v. Gradient Resources, Inc.*, Case No. 3:13-cv-01988-MO, 2014 WL 2041819, *2 (D. Or. Apr. 29, 2014) (suggesting that contempt adjudication is final once sanctions have been imposed).

III. Standard of Review

This Court reviews the Bankruptcy Court's findings of fact for clear error and its conclusions of law *de novo*. *See Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015). The "clear error" standard asks whether the reviewing court is "left with the definite and firm conviction" that there was a mistake in findings. *See Stahl v. Simon (In re Adamson Apparel, Inc.)*, 785 F.3d 1285, 1291 (9th Cir. 2015); *Confederated tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 334, 343 (9th Cir. 1996); *see also Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("In applying this standard, we, like any reviewing court, will not reverse a lower court's finding of fact simply because we 'would have decided the case differently.'") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "Clear error review is deferential, and '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *United States v. Christensen*, 801 F.3d 970, 984 (9th Cir. 2015) (quoting *United States v. Working*, 224 F.3d 1093, 1102 (9th Cir. 2000) (*en banc*)). The clear error standard extends to a bankruptcy court's "'quintessentially factual determination[s]' of credibility." *Ashley v. Church (In re Ashley)*, 903 F.2d 599, 606 (9th Cir. 1990); *see also Deitz v. Ford (In re Deitz)*, 760 F.3d 1038, 1051 (9th Cir. 2014); *Miguel v. Walsh*, 447 F.2d 724, 726 (9th Cir. 1971) ("Even if we were in doubt, we are, as was the court below, required to accept the findings of the referee in bankruptcy, unless they are clearly erroneous. This is particularly true where the credibility of the witnesses is a factor.") (omitting internal citations). Hearing an appeal from a bankruptcy court decision, this Court may affirm on any basis supported by the record. *See Pham v. Golden (In re Pham)*, 536 B.R. 424, 433 (B.A.P. 9th Cir. 2015); *Mwangi v. Wells Fargo Bank, N.A. (In*

re Mwangi), 473 B.R. 802, 812 (D. Nev. 2012); *Street v. Harrow (In re Fruehauf Trailer Corp.)*, No. CV 11-09218 DDP, 2013 WL 816446, *6 (C.D. Cal. Mar. 5, 2013).

IV. Discussion

A. Assessing the Arguments

1. Contempt of an Oral Injunctive Order

Appellants argue that they had insufficient notice of the TRO, both because any notice they did have was too indefinite and because no written order had been entered before the time in which they made the transfer to EMM. With respect to a requirement that the order have been in writing in order to allow for a later contempt finding, Appellants appear to rely upon two cases: *Bethune Plaza v. Lumpkin*, 863 F.2d 525, 527 (7th Cir. 1988), and *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1021 (10th Cir. 1996). If Appellants are correct that the TRO could not form the basis for a contempt finding if they only had notice of an oral order, then all other issues on this appeal are irrelevant and this Court must reverse the Contempt Order. However, *Bethune Plaza* does not appear to support this argument. *McClendon* could be understood to support Appellants' view on this question, but it is not a panel decision – it is only the explanation offered by one Tenth Circuit judge for why that judge: 1) granted an application for an emergency stay pending an appeal and 2) referred a writ of prohibition to a Tenth Circuit panel. *See* 79 F.3d at 1017.

That part of *McClendon* that would support Appellants' argument concerns a discussion of the contents and meaning of Rule 65(d) of the Federal Rules of Civil Procedure as it existed at that time. The single Tenth Circuit judge in *McClendon* noted that the district court's ruling in the case had been oral, and offered the following discussion of the impact of that fact:

> It has been held that '[o]ral statements are not injunctions,' and that a defendant is under no judicial compulsion when an injunction is not recorded on a separate document in accordance with Rules 58 and 65(d). *Bates v. Johnson*, 901 F.2d 1424, 1427-28 (7th Cir. 1990). Absent a written order with sufficient specificity, *see B & C Truck Leasing, Inc. v. ICC*, 283 F.2d 163, 167-68 (10th Cir. 1960), there are serious questions concerning not only enforceability, but also appellate jurisdiction. *See Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993), *cert. denied*, 510 U.S. 1092, 114 S.Ct. 923, 127 L.Ed.2d 216 (1994); *Bates*, 901 F.2d at 1427-29.

Id. at 1021. Of the cases the Tenth Circuit judge relied on in this discussion, *B & C Truck* involved only the question of whether a *written* judgment was sufficiently specific, concluding that it was not, and *Burgess* simply involved a judgment that was not sufficiently specific to constitute – or include – injunctive relief (whereas the court did have appellate jurisdiction over, and could review, an earlier, remaining-in-force, preliminary injunction).

However, like *McClendon* itself, the Seventh Circuit's decision in *Bates* lends support to Appellants' position. In that case, the Seventh Circuit indeed noted that "[o]ral statements are not injunctions," but followed that up by stating that "[a] judge who proclaims 'I enjoin you' *and does not follow that up with an injunction* has done nothing." 901 F.2d at 1427 (emphasis added). Here, of course, the Bankruptcy Court *did* follow up its oral ruling with a written one, but by that time the transfer had already been made, and there does not appear to be any *evidence* that Appellants ever received notice of the *written* order (though the Bankruptcy Court presumed/speculated they must have). In addition to its teaching that "oral statements are not injunctions," *Bates* also intoned that "[w]hen a judge does not record an injunction or declaratory judgment on a separate document, the defendant is under no judicial compulsion," and remarked that "[a]s a matter of law, oral instructions are no instructions – at least, not legally *binding* if a party wishes to put up a fight…." *Id.* at 1428.

Appellee does not so much as cite, much less discuss, *McClendon* (which Appellants did cite) or *Bates* (which Appellants did not cite). Instead, Appellee responds that a bankruptcy court's oral order is effective, even before a written order is entered, so long as parties have notice of the oral order's "existence and content." He cites several cases as support for this proposition: *Noli v. Comm'r of Internal Revenue*, 860 F.2d 1521 (9th Cir. 1988); *In re Bradley*, 588 F.3d 254 (5th Cir. 2009); *In re Rodarte*, No. CC-12-1276-HKiD, 09-10411-TA, 2012 WL 6052046, *5 (9th Cir. BAP, Dec. 6, 2012); *America's Servicing Co. v. Schwartz-Tallard*, 438 B.R. 313, 318 (D. Nev. 2010); *Saffady v. Dunn*, 2009 WL 1868032, *1, 5 (D. E.D. Mich. June 26, 2009); *In re MarketXT Holding Corp.*, 336 B.R. 39, 54-55 (Bankr. S.D.N.Y. 2006); *Dynamic Changes Hypnosis Ctr., Inc. v. PCH Holding, LLC*, 306 B.R. 800, 807-08 (D. E.D. Va. 2005); and *In re Nail*, 195 B.R. 922, 930-31 (Bankr. N.D. Ala. 1996). The Court's review of these cases

finds several of them unhelpful in attempting to discern the Bankruptcy Court's power in the circumstances at hand.

Noli involved a bankruptcy court's oral grant of a request to lift the automatic stay to allow a Tax Court trial to proceed and the implications of Rule 58 of the Federal Rules of Civil Procedure (concerning entry of judgment), not an injunction or any contempt proceedings flowing therefrom. *See Noli*, 860 F.2d at 1524-25. *Rodarte* – an unpublished decision with no precedential value – similarly involved an oral ruling that, in part, granted relief from the automatic stay, and similarly did not involve injunctive relief or any contempt proceeding. *See Rodarte*, 2012 WL 6052046, *2-3, 5. *Dynamic Changes* involved only the issue of a bankruptcy court's failure to follow the "separate document" requirement of Bankruptcy Rule 9024, noting that the sole purpose of that requirement was to establish when the time for appeal begins to run. *See* 306 B.R. at 807. Like *Noli* and *Rodarte*, therefore, it clearly has nothing to do with the question of the effectiveness of an oral injunctive order and contempt proceedings brought pursuant thereto.

America's Servicing Co. did, in fact, involve an appeal from a sanctions order, following a lender's violation of the automatic stay that the Bankruptcy Court reinstated, orally, on the debtor's motion, but that the Bankruptcy Court did not enter as an order on the docket until *after* the lender had taken the action – the sale of real property – that gave rise to the sanctions order. *See* 438 B.R. at 315.[4] That being said, in that case the District Court handling the appeal indicated that "[a] bankruptcy judge has discretion…to determine whether her order reinstating a case, and hence an automatic stay, is effective when signed or when entered into the docket," meaning that "[p]resumably…a

[4] The exact same circumstance was at issue in *In re Nail*, 195 B.R. 922 (Bankr. N.D. Ala. 1996): an oral order granting the debtors' motion to reinstate the stay, and a foreclosure which occurred *after* the oral order but before entry of a written order. *See id.* at 923, 925. However, *Nail* is slightly less useful for present purposes because it did not involve a motion seeking sanctions for violation of that oral order, but instead was in the context of the lender's attempt to confirm its foreclosure. *See id.* Yet, the court also intoned that "[t]he effect of granting a motion to reinstate a bankruptcy case is identical to that of granting a temporary restraining order or preliminary injunction." *Id.* at 927. But in supporting that conclusion, it relied on a case that analyzed the purposes of Rule 58, not of Rule 65 (while still concluding that it would not prevent a civil contempt finding). *See id.* at 927-29 (discussing *Bethlehem Mines Corp. v. United Mine Workers of Am.*, 476 F.2d 860, 861-64 (3d Cir. 1973)). It also offered the following: "What is relevant is the significant difference in the impact of an order prohibiting certain actions and one allowing certain actions. The difference is actually one of timing. Certain orders must be enforced when issued. The importance of such orders lies strictly in the order's ability to produce immediate results. To delay the operative time of such orders eviscerates them." *Id.* at 931-32.

bankruptcy judge also has discretion to determine that her order is immediately effective when spoken." *Id.* at 318. Continuing on, the court explained as follows:

> If docketing is not the sine qua non of efficacy, a spoken order should be sufficient, because a signed, but yet undocketed order provides no more notice to any party than does an oral order. Whether oral or written, undocketed orders provide actual notice to parties attending a hearing on a motion and constructive notice to parties with notice of the motion who are expected to attend the hearing, but undocketed orders, written or spoken, do not provide constructive notice to the world at large.

Id. In addition, *America's Servicing* relied on *Noli* as "appear[ing] to permit a bankruptcy judge to make her oral orders immediately effective, so long as there is notice." *Id.*; *see also id.* at 319 ("Because the purpose of the order was to provide immediate relief and the Bankruptcy Court specifically noted in the written order that the oral order was intended to be effective when spoken, the Court finds that the order was immediately effective on May 13, 2009…."). However, while this scenario did lead to a sanctions order, it did not present the Rule 65 considerations that a TRO does, and therefore the *America's Servicing* court had no reason to consider the approaches to the issue reflected in *McClendon* and *Bates* (neither of which it cited or discussed). In addition, here Appellants were not present at the hearing leading to the Conversion Order/TRO and were not "parties with notice of the motion who [were] expected to attend the hearing."

Getting closer to the heart of the matter here, in discussing civil contempt, the *Saffady* decision quotes *In re Carrico*, 206 B.R. 447 (S.D. Ohio 1997), for the rule that a court's order must (in the absence of stay) be obeyed and "[t]he fact that an order is oral and/or not docketed is insignificant as long as there is evidence of knowledge of the order and the contempt proceedings are civil in nature." *Saffady*, 2009 WL 1868032, *4 (quoting *In re Carrico*, 206 B.R. at 454).[5] But in that case no party was being charged with contempt for violating that oral order; rather, the effect of the valid, oral, order was to *protect* certain parties from a charge of contempt. *See id.* at *5.

[5] Similarly, *In re MarketXT Holdings Corp.*, 336 B.R. 39 (Bankr. S.D.N.Y. 2006), stated that "[a] party may be held in civil contempt for violating an oral Court order." *Id.* at 54 (citing *United States v. Local 30, United Slate, Tile & Composition Roofers*, 1990 WL 6105, *3 (E.D. Pa. Jan. 25, 1990) and *In re Carrico*). But, like *America's Servicing*, the court offered no mention of either *McClendon* or *Bates*.

Ultimately *In re Bradley*, 588 F.3d 254 (5th Cir. 2009), is most on-point. There, the Fifth Circuit concluded that an individual could be held in civil contempt when he violated an "oral injunction" before it was later reduced to writing and entered. *See id.* at 265-66; *see also id.* at 264 (discussing how conduct could have supported *criminal* contempt). Presaging the Bankruptcy Court's concern here, the Fifth Circuit noted that "[b]ankruptcy proceedings are particularly vulnerable to efforts – which can be nearly instantaneous – to transfer funds out of the reach of parties entitled to claim them. Injunctions against moving assets are important to the management of bankruptcy cases, but have little effect if parties can irremediably defy them before they formally go into effect." *Id.* at 266; *see also id.* at 267 n.10 ("Our holding should not be read to encourage use of 'oral injunctions' in bankruptcy proceedings or otherwise.").

Bradley did not cite or discuss *McClendon*, but it did discuss *Bates*. It reasoned that *Bates* had interpreted "order" in Rule 65(d) to refer only to a written document, not to oral commands. *See id.* at 262 (citing *Bates*, 901 F.2d at 1427). It also ultimately distinguished *Bates* (and another Seventh Circuit decision) by explaining that the cases "discussed the inadequacy of oral decrees in determining whether there was a valid, appealable order, not in the context of contempt proceedings." *Id.* It also noted that, in the case before it, the bankruptcy court did follow up with an injunction materially identical to the oral command and upheld the bankruptcy court's factual finding that the contemnor in fact considered himself bound by the oral injunction and falsely claimed he consummated the transactions in question in ignorance of it. *See id.* at 262-63.

There appears to be no clear answer in the Ninth Circuit as to whether a litigant may be held in civil contempt upon notice of an oral injunction.[6] However, several cases support the conclusion that a litigant *may* be held in contempt in such a situation, including the Fifth Circuit's decision in *Bradley*. The Court agrees with the *Bradley* court's discussion of the policy reasons supporting a conclusion that contempt may be had of an oral injunctive order, as a rule that is particularly necessary in the bankruptcy

[6] The closest the Ninth Circuit appears to have come to addressing the issue is in *Mott v. Groves*, 428 F.2d 1208 (9th Cir. 1970), where the Ninth Circuit posited – in a situation where a bankruptcy court determined that the debtor was not entitled to an exemption for a deposit in a savings and loan association because the debtor had been orally ordered in a separate federal suit not to dispose of any of his property before a further hearing in that suit – that "[p]erhaps in a contempt or other enforcement proceeding instituted in action No. 42,710, Mott's attack upon the oral nature of the order would be a good defense." *Id.* at 1209.

context. As a result, the Court is unprepared to conclude, on *de novo* review, that the Bankruptcy Court erred, for this reason, in issuing the Contempt Order.

2. Notice of the TRO

Appellants also argue that they were not given sufficient notice of the TRO because if they were given *any* notice, the injunction/TRO as conveyed to them did not comply with Federal Rule of Civil Procedure 65(d)(1). *See Demos v. Brown (In re Graves)*, 279 B.R. 266, 272 (B.A.P. 9th Cir. 2002) (concluding that 11 U.S.C. § 105 does allow a bankruptcy court to impose a permanent injunction against a non-party even though "an adversary proceeding is ordinarily required," "provided that the [non-party] receives essentially the same procedural protections that would be afforded in an adversary proceeding"); Fed. R. Bankr. P. 7065 (indicating that Fed. R. Civ. P. 65 applies in adversary proceedings, except as to certain aspects not relevant here). "Generally, a party cannot be held in contempt for violating an injunction absent knowledge of that injunction." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003). To that end, Rule 65(d)(1) requires that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(A)-(C).[7] Because the TRO had not yet been issued in written form, Appellants argue that any notice they received did not provided them notice in conformity with the commands of Rule 65(d)(1). Apart from generally arguing that the Bankruptcy Court did not commit clear error in making the factual finding that Appellants received sufficient notice, Appellee does not direct any argument to this contention specifically. *See* Appellee's Brief at 22-26.

"[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Thus, "'[o]ne basic principle built into Rule 65 is that those against whom an injunction

[7] *See* 2 Collier on Bankruptcy (15th ed. rev.) ¶ 105.02[3][c], at 105-15 ("[T]he court issuing the injunction must comply with Rule 65…."); *Canter v. Canter (In re Canter)*, 299 F.3d 1150, 1155 (9th Cir. 2002).

is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.'" *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1047 (9th Cir. 2013) (quoting *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086-87 (9th Cir. 2004) and *Union Pac. R.R. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000)). In connection with the requirements of Rule 65(d(1), "'[t]he benchmark for clarity and fair notice is not lawyers and judges, who are schooled in the nuances of [the] law,' but instead the 'lay person, who is the target of the injunction.'" *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1150 (9th Cir. 2011) (quoting *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006)). "Generally speaking, 'an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.'" *Columbia Pictures*, 710 F.3d at 1047-48 (quoting 11A Charles A. Wright et al, Federal Practice & Procedure § 2955 (2d ed.)).

Here, the Bankruptcy Court determined that Appellants had been given notice of the TRO by way of a phone call from the Debtor's lawyer, Dana Douglas. Specifically, the Bankruptcy Court found the following:

- That at the August 14, 2013 hearing on the Debtor's motion for a final decree, the Bankruptcy Court "specifically enjoined [Appellants] from making any distributions of sale proceeds to anyone other than the Trustee." ER at 1205, Docket No. 9-9.
- That, at that same hearing, the Bankruptcy Court "went to some considerable length…to make clear to Ms. Douglas that: (1) the TRO against any transfer of the Hillsborough proceeds was to take effect immediately and (2) that the only withdrawal of any kind from the Freedom account was to be a single check payable to the Chapter 7 trustee, whose specific identi[t]y would become immediately known as soon as the U.S. Trustee made the appointment." *Id.*
- That, at that same hearing, the Bankruptcy Court "specifically requested that Ms. Douglas inform the principals of the debtor and Freedom of the TRO and of the conversion." *Id.*
- That the Court indicated at that hearing that it would sign a temporary restraining order that "says as follows: 'You are not to make any

distribution from this account that you've identified as held by Freedom Investments, Inc., a Nevada corporation, except one check. And that one check is to be to the identity of the trustee, who's [sic] name will be provided to you by Mr. Cadigan or his colleagues this afternoon.' That's it. No other transfers. Any other transfers will be not only a violation of what I think is already the law, but of my TRO as well…." ER at 1206, Docket No. 9-9.

- That Douglas spoke to Gharib by telephone at 12:48 p.m. on August 14, 2013, for about nine minutes. ER at 1208, Docket No. 9-9.
- That, during this conversation, "she fully informed Gharib that…a restraining order had been issued forbidding any transfer of the Hillsborough proceeds to anyone but the Trustee." *Id.*
- That Douglas was "an honest, credible witness and, at least in this instance, a faithful officer of the court," and that "not only did Ms. Douglas' demeanor as a witness on the stand support [the conclusion that she had given Gharib the aforementioned notice], but the court cannot fathom how any lawyer could have failed under these circumstances to make very clear to the client the court's directives, in starkest detail." *Id.*
- That differences between drafts of Douglas's declaration concerning, among other things, her telephone conversation with Gharib, and the fact that some of her notes were typed while others were handwritten, did not demonstrate perjury on her part. *Id.*
- That Douglas' "testimony from her own memory was detailed, clear and convincing." *Id.*
- That Gharib admitted having "a subsequent conversation with Ms. Douglas later that same day (8/14) before he completed the transfers of money to M&B (or A&M Developers) on 8/16," and that "by this time he surely had a written version of the TRO as well and/or certainly would have been well apprised of the Trustee's appointment and details of the TRO, even if one could accept (and the court does not) that the earlier conversation was lacking in detail." ER at 1209, Docket No. 9-9.

- That, for a host of reasons (including that he had twice been convicted of felonies and that an order had been entered recently in another forum for contempt involving perjury), Gharib was "not credible, not at all," that his "entire story" was "an elaborate fabrication," and that "[n]ot much about Gharib's story makes any sense at any level." ER at 1209-10, Docket No. 9-9.

Under the "clear error" standard, the only one of the factual findings listed above that the Court can find problematic is the supposition that by August 16, Gharib "surely had a written version of the TRO as well and/or certainly would have been well apprised of the Trustee's appointment and details of the TRO." ER at 1209, Docket No. 9-9; *see also* ER at 1214, Docket No. 9-9 ("The court finds that Gharib in his personal capacity and/or as manager of Freedom had notice through Ms. Douglas, *and likely otherwise as well*, of the TRO consistent with requirements of due process, sufficient to have turned over the Hillsborough proceeds, and therefore his disobedience to the TRO was contempt of this court punishable by sanctions.") (emphasis added). It appears to this Court that the Bankruptcy Court was simply engaged in speculation in making that finding, to the extent that it can even serve as a finding. The Bankruptcy Court cited no evidence in its record that supported the conclusion. *See, e.g.*, *United States v. Mays*, 549 F.2d 670, 679 (9th Cir. 1977) ("We find such conclusion is clearly erroneous, as we find no evidence which would support it."); *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997).

Still, however, that single erroneous factual finding does not impact the Bankruptcy Court's factual findings regarding the oral notice Douglas provided of the oral TRO. While that notice may not have been sufficient had Appellants been found in contempt for some other action, they were found in contempt for doing the exact thing that the TRO (and Douglas's oral notice of it) specifically indicated they could not do – transferring the Hillsborough sale proceeds to anyone but the Trustee.

Nevertheless, this Court still has one question about the Bankruptcy Court's determination that it had a sufficient basis to hold Appellants in contempt. In its Conclusions of Law, the Bankruptcy Court wrote that "[i]n order to find Gharib in contempt, the court must find that he violated a specific and definite order and that he had sufficient notice of its terms *and the fact that he would be sanctioned if he didn't*

comply." ER 1214, Docket No. 9-9 (emphasis added). The Bankruptcy Court cited to the Ninth Circuit's decision in *Hansbrough v. Birdsell (In re Hercules Enterprises, Inc.)*, 387 F.3d 1024, 1028 (9th Cir. 2004), for that proposition, and the *Hansbrough* case supports that statement.[8] But what the Bankruptcy Court relies upon for its conclusion that Gharib received sufficient notice of "the fact that he would be sanctioned if he didn't comply" is the transcript of the hearing on the TRO (where Appellants were *not* present), not any factual finding related to Douglas' notice to Gharib. *See* ER at 1214, Docket No. 9-9 ("As quoted above from the transcript of the 8/14/2013 hearing, the court could not have been clearer that it was expected there would be no transfers by Freedom, Gharib or otherwise of the Hillsborough proceeds except to the trustee, and that anything else would result in personal liability for sanctions as against Gharib or his brother, Steven Rashtabadi."). There is no dispute that Douglas was not Appellants' counsel, so *her* notice of the sanctions aspect of the order could not be considered notice to Appellants, or at least not until she conveyed such notice to them.

It would therefore seem that the Bankruptcy Court's contempt order must be reversed if *Hansbrough* accurately reflects the notice that Appellants must have received, as the Bankruptcy Court itself apparently felt was the case. For now, at least, this means that there are certain aspects of the Bankruptcy Court's decision that this Court need not

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[8] Appellants do not appear to rely on *Hansbrough* in their arguments on appeal, having not cited the case in either of their appellate briefs. The Court has substantial doubts about whether *Hansbrough* accurately reflects the law on this point, at least outside the Bankruptcy context. In *Hansbrough*, the Ninth Circuit stated that in order to find a party in contempt for violating a judicial order, the bankruptcy court had to make three findings as to the party: "[1] that he violated a specific and definite order and [2] that he had sufficient notice of its terms and [3] the fact that he would be sanctioned if he did not comply." 387 F.3d at 1028. For that proposition, it cited to *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190-91 (9th Cir. 2003). However, while *Knupfer* clearly refers to the first and second findings, it nowhere mentions any requirement – that the party must specifically be informed that he would be subject to sanctions if he did not comply with the court's order – as a *sine qua non* before any civil contempt order can be issued. Arguably, one could interpret the cited *Hansbrough* language as merely requiring that the party must have sufficient *notice* that he would be sanctioned if he did not comply with the court's order and not that he be specifically told by the court of the sanctions if he failed to comply. Nevertheless, there have been bankruptcy courts which have cited to *Hansbrough* for that latter proposition. *See e.g. Dhaliwal v. Singh (In re Singh)*, BAP No. NC-13-1285-DJuKi, 2014 Bankr. LEXIS 852 *22 (BAP 9th Cir., March 4, 2014) ("based on the record before us, we cannot affirm the bankruptcy court's imposition of sanctions against Dhaliwal under § 105(a). Dhaliwal did not violate a specific and definite order that also warned him that he would be subject to sanctions if he did not comply.").

However, considering that the Bankruptcy Court itself accurately cited to *Hansbrough* for this point, the Court is left to confront it.

reach.[9] However, there is at least one other aspect that would still require consideration – the Bankruptcy Court also determined that Appellants "refusal to turn over the Hillsborough proceeds to the Trustee was a violation of the turnover duties under § 542(a) and LBR 3020-1(b)(5) and is likewise punishable by sanctions." This Court must therefore consider whether at least the monetary sanctions aspect of the Contempt Order can stand under that reasoning.

3. Duties and Sanctions/Damages Under 11 U.S.C. § 542(a)

The Bankruptcy Court concluded that:

> "[a]s the manager of the debtor and of Freedom, Gharib had the affirmative duty to turn over the Hillsborough proceeds to the Trustee under 11 U.S.C. § 542(a) and this includes after conversion of the case from Chapter 11 to 7. LBR 3020-1(b)(5); *Resendez v. Lindquist*, 691 F.2d 397, 398 (8th Cir. 1982). Willful failure to turn over estate assets may be sanctioned. *Abrams v. Southwest Leasing Rental, Inc. (In re Abrams)*, 127 B.R. 239, 242-43 (B.A.P. 9th Cir. 1991); *In re Knaus*[], 889 F.2d 773, 775 (8th Cir. 1989).

ER at 1213, Docket No. 9-9. The Bankruptcy Court found that Gharib, "either in his own capacity or in his capacity as manager/officer of Freedom, willfully disobeyed the court's TRO and willfully defied his obligation as manager/officer of the debtor under § 542(a)." ER at 1214, Docket No. 9-9.[10]

The Bankruptcy Court had earlier found that Gharib was the sole managing member of Debtor, initially with a 100% ownership interest, *see* ER at 1204, Docket No. 9-9; that Gharib incorporated Freedom on March 5, 2013, and was the only signatory on a bank account opened for Freedom on March 8, 2013, *see* ER at 1204-05, Docket No. 9-9; that Gharib was personally involved in the Debtor's sale of the Hillsborough property, *see* ER at 1204, Docket No. 9-9; that the Debtor transferred $1,714,000 of the Hillsborough sale proceeds to Freedom on March 27, 2013, *see* ER at 1205, Docket No. 9-9; that Gharib thereafter personally withdrew $294,929.20 of the Hillsborough sale proceeds from the Freedom bank account and used business credit cards tied to the

[9] This includes Appellants' argument that they were deprived of due process in the way that the TRO was issued.

[10] The Court has no hesitation in concluding that the Bankruptcy Court did not clearly err in concluding that Gharib willfully failed to turn over the Debtor's assets in the form of the sales proceeds left in Freedom's account.

Freedom account for personal purchases, leaving the Freedom bank account with a balance of $1,420,000 as of July 31, 2013, *see id.*; and that the Debtor's lawyer regarded Gharib as the sole manager of the Debtor, *see id.* With the possible exception of the last of these findings, Appellants have not given the Court any reason to conclude that any of these findings are erroneous under the clear error standard.

Section 542(a) of Title 11 provides as follows:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a); *see also* 5 Collier on Bankruptcy (15th ed. rev.) ¶ 542.01, at 542-3 ("Any entity acquiring an asset (property of or debt owed to a debtor) that the trustee or debtor in possession may use, must turn it over to the trustee or debtor in possession and account for it."). Local Bankruptcy Rule 3020-1(b)(5) provides, in pertinent part, that "[u]nless otherwise provided in the plan, if the above-referenced case is converted to one under chapter 7, the property of the reorganized debtor shall be revested in the chapter 7 estate…."

To this Court, it seems that there are two key questions with respect to this issue. First, did the Bankruptcy Court err in determining that Gharib was a manager/officer of the Debtor under § 542(a) at the time the Debtor's case was converted to Chapter 7 and when he caused Freedom to transfer the Hillsborough sale proceeds to EMM? Second, if so, can monetary sanctions be issued against him?

Appellants argue that the Bankruptcy Court clearly erred in its manager/officer finding because Gharib presented evidence indicating that, on April 1, 2013, he resigned his position as managing member of the Debtor and transferred all of his interest in the Debtor to Steven Rushtabadi (Gharib's brother), pursuant to an April 1, 2013 Stock Purchase Agreement. In addition, he argues that Douglas, the Debtor's attorney, indicated to the Bankruptcy Court at the Final Decree Hearing that the management of Debtor had changed, calling into question the Bankruptcy Court's finding that Douglas regarded Gharib as the sole manager of the Debtor.

However, Appellants do not dispute that they "had the obligation under 11 U.S.C. § 542(a) to turn over to the Trustee any of the Debtor's property in their possession." Appellants' Opening Brief at 18. Moreover, they argue that the Debtor's transfer of $1,714,000 of the proceeds from the sale of the Hillsborough property to Freedom was pursuant to the Memorandum of Understanding that the Debtor had reached with MandB, *see id.* at 5, 18, that the proceeds remained assets of the Debtor upon the transfer to Freedom, *see id.* at 18, and that the sale proceeds were eventually used to purchase for the Debtor property in Iran from MandB, *see id.* at 2, 18. In addition, Appellants have not challenged the Bankruptcy Court's factual finding that in between the time of the transfer of the Hillsborough sale proceeds to Freedom and the transfer by Freedom of what remained of those proceeds to EMM – during which time Appellants admit that the sales proceeds remained assets of the Debtor – Gharib personally withdrew almost $300,000 of the sales proceeds from Freedom's account and used business credit cards tied to Freedom's account for personal purchases. Under these concessions and findings, which do not appear to be clearly erroneous, the Bankruptcy Court did not err in concluding that Gharib was a manager/officer of Debtor at the time of the Conversion Order/TRO, irrespective of what Douglas believed about Gharib's relationship with the Debtor at that point in time.

Having reached that conclusion itself, as noted above the Bankruptcy Court found a basis to impose sanctions for a willful failure to turn over estate assets in *Abrams* and *In re Knaus*. In *Abrams*, the Bankruptcy Court, invoking its discretionary powers under § 105, awarded damages for a creditor's refusal to promptly comply with § 542. *See Abrams*, 127 B.R. at 241. However, that aspect of the Bankruptcy Court's decision in that case was not an issue on appeal. *See id.*

Nevertheless, the Bankruptcy Appellate Panel of the Ninth Circuit, speaking in the context of an automatic stay violation, wrote that "the Code expresses no remedy for a violation of § 542, while [11 U.S.C.] § 362" – the automatic stay provision – "contains its own remedial provision." *Id.* at 243. It was "the case law and the legislative history of § 362 [that] indicate[d] that Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions, at least not without providing a means to recover damages sustained as a consequence thereof."

Id. Still, it is true that the Bankruptcy Appellate Panel also noted, without further comment, that the Bankruptcy Court had "invoked its equitable powers under § 105 in awarding the Abrams damages for appellees' § 542 violation." *See id.* at 243 n.8.

Insofar as § 542 is concerned, *In re Knaus* only observed that that provision required turnover of property taken both before and after the onset of the automatic stay. *See* 889 F.2d at 775. It offers no support for any damages remedy under § 542 itself. The only award of damages in that case – punitive damages there – came, again, under § 362. *See id.* at 775-76.

In short, neither *Abrams* nor *In re Knaus* appear to serve as appellate authority specifically authorizing an award of damages or other sanction under § 542 itself. Still, as noted, *Abrams* did recognize the Bankruptcy Court's decision in that case as relying on the "equitable powers" under § 105 as permitting an award of "damages." 127 B.R. at 243 n.8. This, however, is seemingly a contradiction in terms.

Obviously – and the parties agree on this – § 105 can be the source of *contempt* power in a bankruptcy court, *see, e.g.*, *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995), but the potential problem with that angle here has been discussed above. Neither the parties nor the Bankruptcy Court's Contempt Order have directed the Court to any authority permitting a bankruptcy court to award damages or otherwise issue monetary sanctions in connection with a § 542 violation *outside of the contempt power available under §105*. Without such authority, the Court seemingly would be required to conclude that the alternative award of damages/sanctions under § 542 cannot stand.

Into that void, however, steps the seemingly-applicable authority of *Newman v. Schwartzer (In re Newman)*, 487 B.R. 193 (9th Cir. BAP 2013). That case supports the view that either the property *or its value* must be turned over even if the individual or entity subject to the turnover order no longer has possession of the property. *See id.* at 200-02 ("If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate.") (omitting internal quotation marks); *see also Kotoshirodo v. Bachmen (In re Lull)*, Bankr. No. 06-00898, Adversary No. 09-90008, 2009 WL 2447831 (Bankr. D. Haw. 2009).

Here, too, however, this Court has no input from the parties on the potential role

Newman could play in the Court's analysis. The parties did not cite or discuss the case. In the absence of any analysis by the parties, however, it would seem to this Court that the damages/sanctions award here may be viewed as an order to turn over the value of the property. However, as it does not relate to the "value" of the Debtor's property, even *Newman* would not support that part of the Contempt Order that ordered Appellants to pay $1,000 per day.

4. Evidence of Damages

Appellants argue, in the context of an argument concerning the Bankruptcy Court's ability to *sanction* them for *civil contempt*, that the Bankruptcy Court had no evidentiary support of damages suffered by the Debtor's estate, and that such evidence was required. Even assuming that Appellants would make the same argument in the context not of a civil contempt sanction, but of damages/sanctions awarded under section 542(a), the Court would reject Appellants' argument. The Bankruptcy Court had plentiful evidence – and made factual findings in accord therewith – that through a series of transactions Appellants had transferred the Hillsborough sale proceeds through Freedom and other Gharib-controlled entities to MandB. It was the value of those proceeds that gave rise to the specific amount of sanctions/damages the Bankrupcy Court ordered Appellants to pay.

Although Appellants argue that the Debtor received property in Iran in exchange for those proceeds, that is both beside the point and contrary to the Bankruptcy Court's findings. First, it is beside the point because under § 542(a) Appellants had a duty to "deliver" the Hillsborough sale proceeds, not to exchange those proceeds for something else and then to deliver what they had received in exchange. Second, the Bankruptcy Court made factual findings – which this Court does not believe were clearly erroneous – that the evidence in support of a finding that the Iranian property even existed was less-than-trustworthy. In the absence of a finding that the Iranian property existed and actually did belong to the Debtor, the Hillsborough sale proceeds (or what was left of those proceeds) would constitute evidence of damages the Debtor suffered.

As such, the Court rejects Appellants' argument concerning evidence of the "damages" suffered by the Debtor's estate, to the extent that argument even still applies to an award under § 542(a) (as opposed to a civil contempt sanction).

B. Conclusion

Based on the foregoing, as it stands now, the Court would affirm in part and vacate in part the Bankruptcy Court's Contempt Order, allowing that portion of it ordering Appellants to pay $1,420,043.70 to stand, while vacating that aspect which orders Appellants to pay sanctions in the daily amount of $1,000.

APPENDIX D

FILED & ENTERED

MAR 23 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY deramus DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re: **KENNY G ENTERPRISES, LLC** **Debtor(s).**	Case No.: 8:11-bk-24750-TA CHAPTER 7 **ORDER FINDING KENNETH GHARIB aka KENNETH GARRETT aka KHOSROW GHARIB RASHTABADI AND FREEDOM INVESTMENT CORPORATION, A NEVADA CORPORATION, IN CONTEMPT OF THIS COURT AND IMPOSING SANCTIONS** **Hearing:** **Date:** March 12 and 19, 2015 **Time**: 2:00 p.m. **Courtroom**: 5B **New Hearing:** **Date**: May 12, 2015 **Time**: 2:00 p.m. **Courtroom**: 5B

For the reasons stated in the court's accompanying Memorandum of Decision **IT IS ORDERED:**

1. Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi ("Gharib") and Freedom Investment Corporation, a Nevada corporation ("Freedom"), are in contempt of this

court;

2. The contemnors, Gharib and Freedom, are ordered to pay sanctions to the Trustee in the sum of **$1,420,043.70** forthwith to the Trustee. For every day from entry of this order that this sum remains unpaid, **further sanctions in the sum of $1000** will be added to the sums due.

3. A further hearing is scheduled **May 12, 2015 at 2:00 p.m**. in courtroom 5B of this court to assess compliance and to consider imposition of further sanctions, which may include incarceration of Gharib for ongoing contempt of court. **Gharib is ordered to personally attend that hearing.**

###

Date: March 23, 2015

Theodor C. Albert
United States Bankruptcy Judge

APPENDIX E

FILED & ENTERED

MAR 23 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY deramus DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re: **Kenny G Enterprises, LLC** **Debtor.**	Case No.: 8:11-bk-24750-TA CHAPTER 7 **MEMORANDUM OF DECISION: (1) FINDING KENNETH GHARIB aka KENNETH GARRETT aka KHOSROW GHARIB RASHTABADI AND FREEDOM INVESTMENT CORPORATION, A NEVADA CORPORATION, IN CONTEMPT OF THIS COURT; (2) IMPOSING REMEDIAL SANCTIONS AND (3) CONTAINING SUPPORTING FINDINGS OF FACT AND CONCLUSIONS OF LAW** Date: March 12 and 19, 2015 Time: 2:00 p.m. Courtroom: 5B

This matter originally came on for hearing December 18, 2014 on the court's Nov. 10, 2014 "Order Granting the Chapter 7 Trustee's Motion For An Order Requiring Freedom Investment Corp and Kenneth Gharib to Appear and Show Cause as to Why (1) Freedom Should Not be Held in Contempt and Sanctioned… ("OSC")." Both Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi ("Gharib") and Freedom Investment Corporation, a

Nevada corporation ("Freedom") filed responses. At the December 18 hearing on the OSC, the court identified the main issues as ones of notice and whether a TRO announced orally, but actually entered in writing after certain acts were taken in violation, could nevertheless provide the basis for contempt. The court asked for further briefing on those issues and continued the matter for evidentiary hearing to March 12, 2015. Both sides provided briefing and extensive exhibits; all but one of the Exhibits (Exhibit "W") were received in evidence at the continued hearings. Live testimony was also given from Gharib and the debtor's former lawyer, Dana Douglas. The testimony did not conclude until the continued hearing March 19, 2015, at which time the court took the matter under submission. The court now renders its decision as follows:

I. Findings of Fact (Part One)

The following recitation of facts is little-changed from that announced in the tentative for the December 18 hearing. A few additional points are added. After considering the evidence and testimony, and evaluating credibility, the court finds the following facts (though page 5, line 6):

Debtor filed a voluntary chapter 11 petition on 10/24/11. Gharib was the sole managing member of Debtor, with initially a 100% ownership interest. Property of the estate included residential real estate located at 10 Horseshoe Court, Hillsborough, California. Debtor's chapter 11 plan was confirmed by order entered 1/9/13. The confirmed plan provided for the lease of the Hillsborough Property for five years. No authorization for selling the property is included in the plan. [Exhibit "3" to Trustee's Motion]. Less than two months after confirmation, Debtor entered into an all-cash sale of the Hillsborough Property for $3,150,000 to Douglas Rotenberg and Tuong-Vy Ton. Gharib admits to being personally involved in this sale. Escrow closed on 3/26/13 and sale proceeds were distributed to Debtor's DIP account in two separate transactions [Exhibits "6" and "7" to Trustee's Motion]. Freedom was incorporated on 3/5/13 by Gharib [Exhibit "7"][1]. Mr. Gharib was the only signatory on a bank account opened for Freedom on

[1] The numeration of Exhibits can be confusing. Exhibits received into evidence at the hearings are referred to hereinafter merely as "Exhibit__". Other exhibits were introduced in support of the Trustee's Motion and /or the respondents Opposition, and may thus be referred to as exhibits to those papers, although these same exhibits are also referenced as part of other exhibits received in the hearings.

3/8/13 [Exhibit "9" to Trustee's Motion]. On 3/27/13, Debtor transferred $1,714,000 of the sale proceeds to Freedom ("Hillsborough proceeds") [Exhibit "10" to Trustee's Motion]. From 4/13 to 7/13, Gharib personally withdrew $294,929.20 of the Hillsborough proceeds from the Freedom bank account [Exhibits "11" and "12" to Trustee's Motion]. From 5/13 to 7/13, Gharib used business credit cards tied to the Freedom account for personal purchases. As of 7/31/13, the Freedom bank account had a balance of $1,420,000 comprised primarily if not solely of the Hillsborough proceeds. Another of Gharib's corporations, Excellent Money Management Corp., was incorporated in Nevada on 3/5/13 by Gharib [Exhibit "18" to Trustee's Motion]. On 4/23/13 a bank account for Excellent Money Management was opened at Citibank [Exhibits "18" -"20" to Trustee's Motion] and its part in this drama is explained below.

On 8/14/13, at approximately 10:00 a.m., this court held a hearing on Debtor's motion for final decree. The sale of the Hillsborough property and the fact that the Hillsborough proceeds were being held by Freedom were brought to the court's attention. During the course of the hearing, which ended well before noon, the court converted the case to chapter 7 *sua sponte*. Mr. Gharib and Freedom were specifically enjoined by the court during the hearing from making any distributions of sale proceeds to anyone other than the Trustee. Although Mr. Gharib was not in attendance at the hearing, the debtor's lawyer, Dana Douglas, was present in court. It was clearly established in testimony that Ms. Douglas regarded Gharib as the sole manager of the debtor. Until that date no person had taken any steps on behalf of the debtor except Gharib[2]. The court went to some considerable length at the hearing to make clear to Ms. Douglas that: (1) the TRO against any transfer of the Hillsborough proceeds was to take effect immediately and (2) that the only withdrawal of any kind from the Freedom account was to be a single check payable to the Chapter 7 trustee, whose specific identify would become immediately known as soon as the U.S. Trustee made the appointment. The court also specifically requested that Ms. Douglas inform the principals of the debtor and Freedom of the TRO and of the conversion. She agreed

[2] There was a reference at the hearing to the debtor's brother, Steven Rashtabadi, as having recently come in to the debtor's affairs for purposes of signing its checks [Exhibit "13" to Trustee's motion at 274 and Exhibit "4" at 014608]. However, in later testimony Ms. Douglas made it clear she had never met or spoken with the brother before the August 14 hearing.

on the record to do so. The transcript of the proceedings reads in pertinent part as follows:

> THE COURT: 'Freedom Investments, Inc.' Do you know what that is…is that a California corporation?
>
> MR. RICHARDS: Do you know, Ms. Douglas, is that a California corporation or Nevada?
>
> MS. DOUGLAS: I would believe it's a Nevada corporation.
>
> THE COURT: Please tell Rasta Abadi [sic] and Gharib that unless they want to have a problem with me on a personal basis, they'd better see that that money goes to the Trustee. Would you do that for me, Ms. Douglas?
>
> MS. DOUGLAS: Yes, your honor, I could….
>
> MR. CADIGAN [for the U.S .Trustee]:…But it's apparent that her client has a difficulty in playing by the rules.
>
> So, I don't know if the Court feels comfortable in just basically restraining him from—or any other entity, from transferring these funds.
>
> THE COURT: Well, all right. If somebody wants to give me a TRO I'll do so. I sign [sic] such a—the temporary restraining order says as follows:
>
> 'You are not to make any distribution from this account that you've identified as held by Freedom Investments, Inc., a Nevada corporation, except one check. And that one check is to be to the identity of the trustee, who's [sic] name will be provided to you by Mr. Cadigan or his colleagues this afternoon.'
>
> That's it. No other transfers. Any other transfers will be not only a violation of what I think is already the law, but of my TRO as well….

[Exhibit 13 to Trustee's motion, pages 275-77 and Exhibit "4" at 014609-611]

The written order was entered at approximately 2:32 p.m. on 8/14/13 [Exhibit "14"]. The court's order was affirmed by the BAP on 8/20/14. The BAP's order was not appealed and is now final [Exhibit "28" to the Trustee's Motion]. But at virtually the same moment that the written TRO was being entered in the afternoon of 8/14/13 Gharib was busy violating the TRO.

On 8/14/13, at approximately 2:15 p.m., Gharib withdrew the money from the Freedom account via cashier's check payable to Excellent Money Management and closed that account. [Exhibits "16"-"18" to Trustee's Motion]. On 8/14/13, at approximately 3:09 p.m., Mr. Gharib deposited the funds into the Excellent Money Management bank account [Exhibit "21" to Trustee's Motion]. On 8/16/14, *two days after the hearing*, monies were disbursed from

Excellent Money Management via wire and check to (at least in part), A& M Developers Corporation [Exhibit "20" and "22" to Trustee's Motion] another of Gharib's corporations [Exhibit "8"].

II. Gharib's Story

The following is the explanation provided by Gharib both in his declaration and on the witness stand. Its repetition here is no implication that any of it is true. But it is useful in discerning the ruthlessness of Gharib in his ongoing defiance of this court and the rule of law. In his response to the OSC, and on the witness stand under oath, Gharib explains that on 3/1/13, Debtor engaged in extensive negotiations with a Mr. Mahdi Adib, the president and sole owner of something called Mother & Baby Co. LTD ("M&B") for the purchase of two pieces of real property in Iran for $2 million. On 3/3/13, M&B and Debtor entered into a written agreement for the purchase and sale of certain property in Iran ("MOU") [Exhibit "1" to opposition]. Freedom and Excellent Money Management were allegedly created in anticipation of this purchase. Under the MOU, Debtor was to perform first by opening the corporations and then second by wiring funds to Freedom for the purchase of the property. Once M&B performed third its obligations by transferring the Iranian property to Debtor, care of Gharib, and recording it in Iran, Mr. Gharib would in fourth step deliver a deed to "Buyer/debtor" and then, fifth, remove himself as signatory for Freedom and Excellent Money Management. Freedom and Excellent Money were formed on 3/5/13. The Hillsborough proceeds were transferred to Freedom pursuant to the terms of the MOU. On 4/1/13 (allegedly after these transactions were consummated), Mr. Gharib sold and transferred all of his interest in Debtor to Steven Rashtabadi, his brother. On 8/13/13, the day before the hearing, Mr. Gharib testifies he was informed that the transfer of the Iran property had been recorded and demand for transfer of the funds was made. No written evidence was presented showing any of this. The funds were transferred at approximately 2:15 p.m. on 8/14/13 [as described above], almost exactly at the time the court's injunction order was entered but more than two almost three hours later than the oral pronouncements of the court that the case had been converted and the TRO was issued, and about 90 minutes after his 9-minute

telephone call with Ms. Douglas. On 8/16/13, *two days after the hearing*, the recorded deed to the Iran property was allegedly delivered to Mr. Gharib and the funds from Excellent Money were transferred pursuant to the MOU, presumably to M&B via A&M Developers (in whole or in part). The middle step of A&M Developers' involvement was never explained. Indeed, the mechanics of the transfer of funds and where they reside now was never explained. All of the above was done in apparent complete indifference to the obligations of the Debtor under the confirmed plan or as a fiduciary to creditors, and in violation of the TRO.

III. Findings of Fact (Part Two)

After considering all of the exhibits and the testimony of the witnesses, and after carefully assessing their credibility, the court further finds, as follows:

1. The court finds that Ms. Dana Douglas is an honest, credible witness and, at least in this instance, a faithful officer of the court. She did speak to Gharib by telephone at 12:48 p.m. on 8/14/13 for about 9 minutes, as is verified by her telephone records [Exhibit "5" at 014557]. As she testified, she fully informed Gharib in this conversation that: (a) the case had been converted to Chapter 7 and (b) that a restraining order had been issued forbidding any transfer of the Hillsborough proceeds to anyone but the Trustee. Indeed, not only did Ms. Douglas' demeanor as a witness on the stand support this conclusion, but the court cannot fathom how any lawyer could have failed under these circumstances to make very clear to the client the court's directives, in starkest detail. Gharib and Freedom try to make an issue of the fact that earlier drafts of her declaration did not include the same amount of detail regarding the conversation. But these were prepared before she perhaps understood the full import of the hearing. That some of her notes were typed while others were handwritten also does not persuade the court of any perjury. The lesser detail put in notes is in any event not surprising. Her testimony from her own memory was detailed, clear and convincing. In some details her credibility is actually bolstered based on the drafts of the declaration. For example, in an early draft she declined to include Mr. Casey's name in the report of the conversation since at that point, some two hours before his appointment, his name could not have been known. Gharib and Freedom imply that she was

pressured into perjury by threats of malpractice suit from either the Trustee or a creditor's lawyer, Mr. Richards. But such a suggestion against an admitted lawyer is not only outrageous, it is not supported at all by the facts. In fact, the title company in the Hillsborough transaction had already seen the confirmed plan, so whether the petition was recorded was of small additional importance. Moreover, as Gharib admits, he had a subsequent conversation with Ms. Douglas later that same day (8/14) *before* he completed the transfers of money to M&B (or A&M Developers) on 8/16; by this time he surely had a written version of the TRO as well and/or certainly would have been well apprised of the Trustee's appointment and details of the TRO, even if one could accept (and the court does not) that the earlier conversation was lacking in detail.

2. In stark contrast, Gharib is not credible, not at all. The entire story as recited above strikes the court as an elaborate fabrication, manufactured to cover Gharib's behavior and to somehow explain around certain facts that the Trustee has well documented. Not much about Gharib's story makes any sense at any level, even allowing latitude for different cultures. First, the MOU [Gharib's Exhibit "1" to original opposition] is a very curious document. At bottom of the page the "Buyer" is labelled as "Freedom Investment Corp. Owned Wholly by Mother & Baby Co. Ltd." while "Seller" is described as the debtor. But of course this is wrong. It is reversed as the debtor is the buyer. Second, the date of the MOU is March 3, 2013 but Freedom was not even incorporated until 3/5/13 [Exhibit "7"]. Third, the first name of Mr. Adib (alleged principal of the seller) *right above his signature* is misspelled, at least as compared with the description given in Exhibit "7" at 014576. Is it "Mahdi" or "Mehadi"? Mistakes can happen, of course, but something this profound is more likely indicative of something manufactured after the fact and hurriedly signed, probably by parties uninterested in its effect. Fourth, no evidence whatsoever was proffered by Mr. Adib or from M&B about this alleged transaction. But Mr. Adib allegedly has an address in Encino, California, at least as of 9/28/2013 judging from Nevada state records [Exhibit "7"]. While this does not, of course, conclusively establish anything, it does cause one pause to further ask why he did not appear to testify about this alleged transaction. Fifth, Gharib testified that Freedom was created specifically for the M&B

transaction, that Mr. Adib was to be the controlling person of Freedom, but Gharib was to be the "only signer." How is this consistent with Gharib also spending hundreds of thousands of Freedom's monies from the Hillsborough transaction in the meantime well before August 14, 2013 (or is it August 16) when the transaction allegedly closed [Exhibits "11" and "12"]? Sixth, there is the alleged deed to the Iranian property [Exhibit "6" to original opposition at page 15]. This is not identical to the copy as produced to the Trustee at Gharib's Rule 2004 Examination [Exhibit "21"] at 015302. The date appears in handwriting above the seal only in the Rule 2004 version. How is it that Gharib has two versions of a document allegedly recorded in Iran in August 2013? Seventh, Gharib now testifies that he has no money with which he could possibly respond to a sanctions order. But if true this is a striking reversal of fortunes when compared to the 8/2014 application he apparently filed to rent a luxurious home in Newport Beach supported by exhibits showing $1,989, 278 on deposit in two bank accounts [Exhibit "11"]. One wonders if some or all of this represents the Hillsborough proceeds, and how could that be considering by this time the monies should allegedly have been sent to M&B?

Of course, there *might* be benign explanations of some or all of these anomalies, but none that appear in the record. But in aggregate, the story offered by Gharib is just very hard to believe. All of the timing is just so convenient; that transfers taking place within hours or even minutes of the TRO could possibly be just a coincidence defies imagination. And then there is the fact that Gharib has been convicted twice of felonies and an order was entered not long ago against him in another forum for contempt involving perjury [Exhibit "10"]. In sum, the court is convinced that Gharib has compounded his offenses by systematic and continuing perjury before this court in an ongoing effort to mask his contempt and so as to try to keep the Hillsborough proceeds. The court finds that in all likelihood the alleged Iran transaction is entirely fiction and the Hillsborough proceeds (or what is left of them) are still here and under Gharib's control. Rather, than travel down the proverbial rabbit hole with Mr. Gharib searching for a resolution in Iran, the court believes a more direct remedy is indicated.

IV. Conclusions of Law

Several legal points were raised by the respondents as to why the court cannot or should not issue an order of contempt. None of them are in the least persuasive.

First, respondents claim that a TRO is ineffective until it is actually entered on the docket. Respondents argue that the transfers from Freedom occurred some fifteen minutes before entry of the TRO and so Gharib's actions taken in that period cannot be contempt. But this is not the law. An oral order can be effective provided that the court intends that it be immediately effective and that this is timely communicated to the person affected. Orders do not need to be in writing to be effective provided there is notice. *Noli v. Comm'r of Internal Revenue*, 860 F. 2d 1521, 1525 (9th Cir 1988); *In re Rodarte*, 2012 WL 6052046 AT *5 (B.A.P. 9th Cir. Dec. 6, 2012); *America's Servicing Co. v. Schwartz-Tallard*, 438 B.R. 313, 318 (D. Nev. 2010); *Saffady v. Dunn*, 2009 WL 1868032 *5 (E.D. Mich. June 26, 2009); *In re Nail*, 195 B.R. 922, 932 (Bankr. N.D.Ala. 1996).

Respondents argue that none of these authorities are controlling because in each case the person restrained was actually in court to hear the oral pronouncement. Not so. In *America's Servicing*, the creditor was restrained when the bankruptcy court re-imposed the automatic stay, preventing a foreclosure. The creditor did not attend the hearing. But it was nevertheless charged with notice of the order because the debtor mailed notice of the ruling and it was deemed received even before the written order was entered. 438 B.R. at 319. An even stronger case is *In re Bradley,* 588 F. 3d 254 (5th Cir .2009). In *Bradley,* the bankruptcy court issued an oral injunction against the selling of assets from debtor's self-settled trust as part of a fraudulent scheme to shield assets from creditors. The party restrained, a trustee of the trust, did not attend the hearing. But the trust's attorney did attend and was asked to prepare the order, although actual entry of the order was delayed. The transfer occurred in the meantime anyway. The trust and trustee were held in contempt as the order was deemed effective when announced and notice was imputed to the parties restrained, as found by the court. *Id*. at 265-69. Recognizing a civil contempt power in bankruptcy courts emanating from 11 U.S. C. §105, the *Bradley* court observed:

> Bankruptcy proceedings are particularly vulnerable to efforts-which can be nearly instantaneous-to transfer funds out of the reach of parties entitled to claim them. Injunctions against moving assets are important to the management of bankruptcy cases, but have little effect if parties can irremediably defy them before they formally go into effect. *Id*. at 266

As in *Bradley* and the other authorities cited, a bankruptcy court's order to prevent further loss of assets through the kind of mischief presented here must be instantaneous and far-reaching. So long as due process notice is given, and the order is clear in its terms, parties should not be allowed to avoid its effect by artifice and professed ignorance. Under our facts, notice to Gharib was even more obvious than in some of the authorities cited in that Ms. Douglas gave him timely and detailed notice of the terms of the TRO, and that the case had been converted. She left no doubt whatsoever in her testimony that Gharib was fully and immediately advised of the TRO at least two hours before he took steps to defy it by transferring funds from Freedom. Gharib's testimony to the contrary was vague and not credible. Nor can anything be made of the fact that Ms. Douglas was the debtor's counsel, not Gharib's. Had she been his counsel then notice would have been conclusively imputed under principles of agency law. But since Gharib was the manager of the debtor and of Freedom, and he was the only manager of the debtor she knew of, she gave *him* the actual notice. Indeed, Gharib testified he had called her several times that day to learn of the results of the hearing. So, attempting to parse legalities about whether she was Gharib's counsel or whether he was technically still the officer of Freedom as of 12:48 p.m. 8/14/13, is all beside the point since imputed notice is not at issue; it was he, Gharib who had *actual* notice and it was he that took steps to defy the TRO.

Gharib argues that the TRO was improperly issued outside an adversary proceeding without proper notice. He seemingly concedes that the court has the inherent authority to issue injunctive relief *sua sponte* outside an adversary proceeding pursuant to 11 U.S.C. § 105(a), but asserts that he and Freedom were not afforded sufficient due process before the injunction issued. See *In re Obmann,* 2011 WL 7145760, *4-5 (B.A.P. 9th Cir. December 9, 2011); *Rinard v. Positive Invest., Inc. (In re Rinard)*, 451 B.R. 12, 22 (Bankr. C.D. Cal. 2011). As a result,

Gharib argues the injunction should be void. But as already stated above, in some circumstances the bankruptcy court cannot and should not wait for the filing of an adversary proceeding. To protect the estate, the court must act quickly to prevent dissipation of assets. This is one reason 11 U.S.C. §105 exists, to give the court power to act when needed as is established not only in the above authorities but in many others as well. *Bradley* 588 F. 3d at 265-66; *Rinard* 451 B.R. at 21-22. Moreover, even if there were some procedural flaw it is not material. The BAP addressed this issue in its Memorandum Decision dated 8/20/14. In the appeal, Debtor had argued that the injunctive relief could only be issued in an adversary proceeding. The BAP stated that the issuance of the TRO made no procedural difference in this case because LBR 3020-1(b)(5) provided that Debtor's property re-vested in the chapter 7 estate. The BAP said:

> No provision was made in the Plan for anything other than this default rule. Accordingly, KGE's [Debtor's] assets became property of the chapter 7 estate upon conversion of the case. Thus, a TRO was not necessary, as KGE and its insiders were already prohibited from transferring any of KGE's assets, including the sale proceeds. Even the bankruptcy court intimated at the August 14 hearing that this was "already the law." At best, any potential error here was harmless. [Motion for OSC, Exh. "28", p. 374]

So even assuming *arguendo* Mr. Gharib did not have notice of the TRO, as he asserts, *he had notice that the case had been converted* and was responsible for ascertaining what his obligations were as a result. [Decl. of Dana Douglas, Motion for OSC, p. 48 ¶ 4; Decl. of Kenneth Gharib, Opposition, p. 21 ¶17 (Mr. Gharib was not advised about the TRO. No mention about conversion)].

As the manager of the debtor and of Freedom, Gharib had the affirmative duty to turn over the Hillsborough proceeds to the Trustee under 11 U.S.C. §542(a) and this includes after conversion of the case from Chapter 11 to 7. LBR 3020-1(b)(5); *Resendez v. Lindquist*, 691 F. 2d 397, 398 (8th Cir.1982). Willful failure to turn over estate assets may be sanctioned. *Abrams v. Southwest Leasing Rental, Inc. (In re Abrams),* 127 B.R. 239, 242-43 (B.A.P. 9th Cir 1991); *In re Knaus)*, 889 F. 2d 773, 775 (8th Cir. 1989).

It is well established that a bankruptcy court is authorized to exercise civil contempt power. *Hansbrough v. Birdsell (In re Hercules Enterprises, Inc.)*, 387 F.3d 1024, 1027 (9th Cir.

2004). In order to find Gharib in contempt, the court must find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he didn't comply. *Id*. at 1028, citing *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178, 1190-91 (9th Cir. 2003). As quoted above from the transcript of the 8/14/2013 hearing, the court could not have been clearer that it was expected there would be no transfers by Freedom, Gharib or otherwise of the Hillsborough proceeds except to the trustee, and that anything else would result in personal liability for sanctions as against Gharib or his brother, Steven Rashtabadi [Exhibit "4" at 014609-611]. So the court finds that Gharib, either in his own capacity or in his capacity as manager/officer of Freedom, willfully disobeyed the court's TRO and willfully defied his obligation as manager/officer of the debtor under §542(a). The court finds that Gharib in his personal capacity and/or as manager of Freedom had notice through Ms. Douglas, and likely otherwise as well, of the TRO consistent with requirements of due process, sufficient to have turned over the Hillsborough proceeds, and therefore his disobedience to the TRO was contempt of this court punishable by sanctions. Alternatively (or additionally), the court finds that Gharib and Freedom's refusal to turn over the Hillsborough proceeds to the Trustee was a violation of the turnover duties under §542(a) and LBR 3020-1(b)(5) and is likewise punishable by sanctions.

V. Remedy

The contemnors, Gharib and Freedom, are ordered to pay sanctions in the sum of **$1,420,043.70** forthwith to the Trustee. For every day from entry of this order that this sum remains unpaid, further sanctions in the sum of **$1000** will be added to the sums due. Moreover, a further hearing is scheduled **May 12, 2015 at 2:00 p.m.** in courtroom 5B of this court to assess compliance and to consider imposition of further sanctions, which may include incarceration of Gharib for ongoing contempt of court. Gharib is instructed to personally attend that hearing. This memorandum shall serve as findings and the writing as required under FRCP 52(a)(1). A separate order to this same effect is entered herewith.

###

Date: March 23, 2015

Theodor C. Albert
United States Bankruptcy Judge

APPENDIX F

NOT FOR PUBLICATION

FILED

JUN 21 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KENNY G ENTERPRISES, LLC, Debtor. _____ KENNETH GHARIB, Appellant, v. THOMAS H. CASEY, Chapter 7 Trustee, Appellee.	No. 18-55027 D.C. Nos. 8:16-cv-01946-GW 8:17-cv-00389-GW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Kenneth Gharib appeals pro se from the district court's order affirming two continuing civil contempt orders entered by the bankruptcy court on October 4,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

2016 and February 16, 2017. We have jurisdiction under 28 U.S.C. § 158(d). We review de novo a district court's decision on appeal from a bankruptcy court, and apply the same standard of review the district court applied to the bankruptcy court's decision. *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990). We affirm.

The bankruptcy court did not clearly err by concluding that Gharib failed to satisfy his burden to show that he is unable to comply with the bankruptcy court's orders, and did not abuse its discretion by ordering continued sanctions for civil contempt, including incarceration. *See Kismet Acquisition, LLC v. Diaz–Barba (In re Icenhower)*, 755 F.3d 1130, 1138 (9th Cir. 2014) (standard of review); *see also Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 630 (9th Cir. 2016) (explaining that civil coercive contempt may change over time into criminal contempt depending on changing ability of the contemnor to comply with the contempt order); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) ("[T]he party asserting the impossibility defense must show categorically and in detail why he is unable to comply." (citations and internal quotation marks omitted)). Because Gharib's continued incarceration for noncompliance with the bankruptcy court's monetary sanctions remained coercive at the time of enforcement, we reject as without merit Gharib's contention that his due process rights were violated.

We reject as without merit and unsupported by the record Gharib's contentions regarding notice and an opportunity to be heard orally when the district court changed the hearing date on its own motion.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

APPENDIX G

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Kathleen J. McCarthy – Bar No. 132637
Steve Burnell – Bar No. 286557
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Attorneys for Thomas H. Casey
Chapter 7 Bankruptcy Trustee

FILED & ENTERED

OCT 04 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY steinber DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re

KENNY G ENTERPRISES, LLC,

Debtor.

Case No. 8:11-bk-24750-TA

Chapter 7

ORDER ON CONTINUING CONTEMPT AND BODY DETENTION AND THE CHAPTER 7 TRUSTEE'S MOTION FOR AN ORDER FINDING KENNETH GHARIB AND FREEDOM INVESTMENT CORP. IN CONTEMPT OF COURT, IMPOSING SANCTIONS, AND CONTINUED INCARCERATION OF KENNETH GHARIB

Status Conference Information:
Date: September 14, 2016
Time: 10:00 a.m.
Ctrm: 5B

Continued Status Conference:
Date: January 24, 2017
Time: 11:00 a.m.
Ctrm: 5B

On September 14, 2016, the Court held hearings on the Continued Status Conference Re: Kenneth Gharib's Continuing Contempt, Purging Contempt, And Defense Of Impossibility continued Status Conference re Kenneth Chapter 7 Trustee's Motion For An Order Finding

Kenneth Gharib And Freedom Investment Corp. In Contempt Of Court, Imposing Sanctions, And Continued Incarceration Of Kenneth Gharib (collectively, "Hearing"). Personal appearances were made by Mr. Kenneth Gharib, Steve Burnell of the Law Office of Thomas H. Casey, Inc. ("Trustee's Counsel"), and Thomas H. Casey, in his capacity as Chapter 7 Trustee of the estate of Kenny G Enterprises, LLC and Trustee's Counsel.

IT IS HEREBY ORDERED THAT Mr. Gharib's burden to prove the impossibility defense to civil contempt was not carried;

IT IS FURTHER ORDERED THAT the Hearing is continued to January 24, 2017 at 11:00 a.m. in Courtroom 5B at the United States Bankruptcy Court, 411 W. Fourth Street, Santa Ana, CA 92701. Mr. Gharib shall personally attend the continued Hearing;

IT IS FURTHER ORDERED THAT Mr. Gharib and any party in interest may file further documentation or pleadings no later than fourteen (14) days before the January 24, 2017 continued Hearing;

IT IS FURTHER ORDERED THAT Mr. Gharib is remanded back into the custody of the U.S. Marshal's Office until the January 24, 2017 continued Hearing; and

IT IS FURTHER ORDERED THAT at any time before the January 24, 2017 continued Hearing, Mr. Gharib may file an emergency motion for further hearing which the Court will accept with the expectation that it is supported by other and additional evidence.

###

Date: October 4, 2016

Theodor C. Albert
United States Bankruptcy Judge

APPENDIX H

Thomas H. Casey – Bar No. 138264
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Steve Burnell – Bar No. 286557
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Attorneys for Thomas H. Casey
Chapter 7 Bankruptcy Trustee

FILED & ENTERED

FEB 16 2017

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY firman DEPUTY CLERK

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re

KENNY G ENTERPRISES, LLC,

Debtor.

Case No. 8:11-bk-24750-TA

Chapter 7

ORDER ON: (1) CONTINUING CONTEMPT AND BODY DETENTION; (2) THE CHAPTER 7 TRUSTEE'S MOTION FOR AN ORDER FINDING KENNETH GHARIB AND FREEDOM INVESTMENT CORP. IN CONTEMPT OF COURT, IMPOSING SANCTIONS, AND CONTINUED INCARCERATION OF KENNETH GHARIB, AND (3) KENNETH GHARIB'S MOTION TO DISMISS THE SANCTIONS ORDER AND DENYING HIS "OBJECTION TO TENTATIVE RULING…WITHOUT A REQUEST FOR APPEARANCE"

Status Conference Information:
Date: January 24, 2017
Time: 11:00 a.m.
Ctrm: 5B

Continued Status Conference:
Date: June 27, 2017
Time: 11:00 a.m.
Ctrm: 5B

///

Exhibit A

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, January 24, 2017 **Hearing Room 5B**

11:00 AM
8:11-24750 Kenny G Enterprises, LLC **Chapter 7**

#15.00 Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi and Freedom Investment Corporation, a Nevada Corporation In Contempt Of This Court and Imposing Sanctions
(cont'd from 9-14-16)

Docket 0

Tentative Ruling:

Tentative for 1/24/17:

This is the oft-continued hearing for status conferences concerning Kenneth Gharib's ("contemnor"), ongoing contempt, as well as a hearing on his motion late-filed on January 12 as #17 on calendar, styled as: "Notice of Motion and Motion to Dismiss the Sanction Order; Defense of Impossibility to Comply as of January 2017." The court repeats verbatim below the tentative decision from its September 14, 2017 hearings because, regrettably, nothing or almost nothing has changed. For those earlier hearings and conferences the court wrote:

> "This is the continued status conference regarding Mr. Gharib's ongoing contempt, purging the contempt and/or regarding the defense of impossibility. At the last status conference June 16, 2016 the court continued the matter until August 24, 2016. In the meantime the Trustee filed a motion for continuance until September 14 and, in turn, Mr. Gharib on August 15 filed a "Motion to Dismiss Sanction Order Due to Impossibility to Comply..." which was not set for separate hearing, but is construed as part of the ongoing issue of the impossibility defense. Mr. Gharib has been in custody under this court's order since May of 2015.
>
> It is clear that the contemnor has the burden of proving impossibility. But Mr. Gharib has cited *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F. 2d 770 (9th Cir. 1983) for the proposition that impossibility is a complete defense, even if self-induced. Id. at 779-82 n. 7 quoting *United States v.*

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, January 24, 2017 **Hearing Room 5B**

11:00 AM
CONT... **Kenny G Enterprises, LLC** **Chapter 7**

Rylander, 656 F. 2d 1313, 1318 n. 4 (9th Cir. 1981). As the Trustee has argued, this authority is somewhat dubious since the discussion in *Falstaff* is in dicta and one of the authorities relied upon by the *Falstaff* court, *United States v. Rylander*, was later overturned in *United States v. Rylander*, 460 U.S. 752, 103 S. Ct. 1548 (1983). Further, on the very question before us, i.e. the question of self-induced impossibility, the Ninth Circuit has ruled subsequently to *Falstaff* in *Federal Trade Commission v. Affordable Media, LLC*, 179 F. 3d 1228 (9th Cir 1999) that self-induced impossibility, particularly in the asset protection trust context, is not a defense to civil contempt or at least that the contemnor's burden of proof on the point is very high. *Id.* at 1239-41. Instead, the contemnor must still prove "categorically and in detail" why he is unable to comply. *Id.* at 1241 citing *Rylander*, 460 U.S. at 757, 103 S. Ct. 1548. Moreover, on that point and in that context the court is justified in maintaining a healthy skepticism, as did the *Affordable Media* court. Id. at 1242. See also *In re Marciano*, 2013 WL 180057*5 (C.D. Cal. Jan. 17, 2013); *In re Lawrence* , 251 B.R. 630, 651-52 (S.D. Fla. 2000); *United States v. Bright*, 2009 WL 529153*4-5 (Feb. 27, 2009).

Here, with even a mild degree of skepticism it is sufficient to find that Mr. Gharib has not met his burden of proving "categorically and in detail" why he is unable to purge the contempt. While this is not exactly an asset protection trust context as in *Affordable Media*, we have a near cousin of this phenomenon, i.e. multiple transfers to apparent sham corporations. As near as the court can understand it, Mr. Gharib argues that he has had no access or control over any funds since losing all of the $11.9 million+ he claimed under penalty of perjury to own in November 2012 in filings made with this court. In previous briefs some of the subject proceeds from the Hillsborough sale were traced by the Trustee into two previously unidentified corporations, Office Corp and D Coffee Shop. In response to this evidence and in Mr. Gharib's own words:

"In March of 2015, foreigner [sic] investors decided to terminate their

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CONT... **Kenny G Enterprises, LLC** **Chapter 7**

contract and business with Gharib. Foreigner investors demanded and instructed Gharib to close all bank accounts of Best Entertainment Corp and Hayward Corporation in Bank of America and transfer the remaining balance to Office Corp. Gharib followed foreigner investors demand and instruction and he closed both bank accounts of Best Entertainment Corp in Bank of America. The remaining balance of approximately six hundred thousand dollars was transferred to Office Corp per foreigner investors' demand and instruction. Gharib never was the owner of funds or shareholder of Office Corporation. Gharib has no knowledge who owned stocks of Office Corp and foreigner investors never revealed to Gharib either. Shortly after, Gharib was detained in May 2015. While Gharib was in custody, trustee subpoenaed Office Corp bank account in Bank of America (see exhibit "26 and 27"). Office Corp's bank statements show the authorized signer was Mrs. Firouzabadi. Approximately three hundred thousand dollars of funds in that account was spent in a variety of items and the remaining funds were transferred to D Coffee Shop Corp (see exhibit "26"). Trustee also subpoenaed D Coffee Shop Corporation bank account in Bank of America (See exhibit "28" and "29"). D Coffee Shop Corp's bank statements show Mr. Rushtabadi was authorized signer and the remaining balance in D Coffee Shop Corp's account was spent in variety of items, and nothing left over in that account as of December 2015, 8 months ago. Gharib has no information why and for what purpose the funds were spent in both Office Corp and D Coffee Shop Corp. Gharib was incarcerated during that period (May to December 2015). Gharib has no information as to identity of stock holder of either Office Corp or D Coffee Shop Corp. Gharib was not part of any of the above Corporations in any way or shape... Gharib did not have any interest or ownership in any of the above corporations at all. It is undisputable that that all funds (whether proceed of sales of Hillsborough or Foreigner investors' money) in both corporations were spent and gone (definitely not by Gharib)...."

Gharib's "Motion to Dismiss..." filed August 15, 2016 at pp. 4-5

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Since the last hearing the Trustee has been unable to find or subpoena Mr. Rushtabadi, Gharib's brother. That a brother would be apparently so indifferent to Mr. Gharib's ongoing incarceration so as to offer his assistance or at least testimony is by itself rather noteworthy, particularly since Mr. Rushtabadi does know of the incarceration and makes telephone calls at Gharib's behest. But the Trustee was able to depose Ms. Firouzabadi August 26, 2016 [See Trustee's Exhibit "4"]. From her testimony it develops that she had a romantic relationship with Gharib allegedly ending in about 2014 and that, believing he was a successful businessman, she trusted him and allowed him to use her signature on various items and documents on things she apparently does not understand. [Transcript p. 57, line 16-19]. But, importantly, she testified she had absolutely no knowledge of either Office Corp or D Coffee Shop corporations or of any transfers therefrom [Transcript p. 75, line 6-7] and identified that her purported signature on several of said corporations' papers offered as exhibits by the Trustee were forgeries. [Transcript at p. 56, line 1-17] Interestingly, she also testified that Mr. Rushtabadi, the brother, requested by telephone just before the deposition that she leave the country. [Transcript pp. 22-23] Why she should leave her home on such short notice at Mr. Rushtabadi's request was not clarified but the implication is pretty clear, to avoid service just as Mr. Rushtabadi has reportedly done (at least so far).

In sum, the court is even less persuaded than before that Mr. Gharib does not have continuing access to funds and the ability to control funds, suing various shills, to purge the contempt either in part or in whole. His stories about what happened to the Hillsborough proceeds, about phantom investments in Iranian real estate, unnamed "foreigner investors" and the like, have absolutely no substance or corroboration and defy all credibility. The few details offered have proven to be either outright lies or very suspect, at best. In sum, Mr. Gharib's burden of proving impossibility has not been carried."

The only developments that could be construed as "new" do not help the

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contemnor's case. The Trustee now reports that his investigation reveals that the contemnor's brother, Steven Rushtabadi, has depleted all of the remaining money from the account maintained by D Coffee Shop Corporation's (a subsequent transferee from Office Corporation, itself a transferee from the debtor) at Bank of America in a series of over-the-counter withdrawals, presumably in cash. For a few weeks between January 11 through February 26, 2016 (See, Exhibits"2" and "3" to Trustee's Declaration) these withdrawals are supported by video evidence of Mr. Rushtabadi receiving the cash. But it appears that the incremental depletion of the account has actually gone on for months earlier in cash withdrawal amounts alternating between $4500 and $3500. Exhibit "1." But the court notes that all withdrawals appear to be below the regulatory threshold of $10,000. The contemnor argues that it is impossible now to comply with the court's order because he is indigent and has no control over either his brother's or Ms. Firouzabadi's activities (or funds). The contemnor correctly points out that many of these transfers occurred after he was confined. But the court is not so naïve as to believe that transfers to corporations ostensibly controlled by a one-time girlfriend and a brother necessarily means that the contemnor has no ongoing control. At the very least it is the contemnor's burden to prove this to be the case and that burden is manifestly not carried here. The simple fact that Mr. Rustabadi refuses to cooperate by giving testimony, either in response to the Trustee's subpoenas or, conspicuously, even in support of his own brother's testimony which might relieve contemnor's incarceration, renders this whole line of excuse very dubious. Equally dubious is the argument that because the contemnor has allegedly not formally communicated with either the girlfriend or the brother in several months according to the contemnor's declaration and the records of the Metropolitan Detention Center, this must mean he has no ongoing control But the court declines to take such an inference. Even less persuasive is the argument that the District Court has approved an *in forma pauperis* waiver of fees; all this means is that someone at the District Court believes what contemnor has said in an application, not that it is necessarily true. Rather, absent some more compelling and direct evidence to the contrary (such as declarations from Mr. Rustabadi or Ms. Firouzabadi), the court is more inclined to believe the more plausible scenario; i.e. the transfers from debtor to Office Corporation and then to corporations controlled by such close relatives or

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friends, were not mere coincidences, but were designed to camouflage the contemnor's ongoing control. Also disturbing is the Trustee's point made in page 5 of his Opposition: i.e. that several properties which contemnor claims were foreclosed upon as evidence of his indigence were actually transferred to a corporation, Las Vegas Investment, Inc., ostensibly controlled by the brother, Mr. Rushtabadi, using the name Steven Rush. If true this is yet further evidence that contemnor continues to control his investments using his brother as a shill. In sum, the court sees even less reason to find that impossibility has been proven.

Deny motion and confine for further status conference regarding ongoing contempt and/or defense of impossibility

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Tentative for 9/14/16:

This is the continued status conference regarding Mr. Gharib's ongoing contempt, purging the contempt and/or regarding the defense of impossibility. At the last status conference June 16, 2016 the court continued the matter until August 24, 2016. In the meantime the Trustee filed a motion for continuance until September 14 and ,in turn, Mr. Gharib on August 15 filed a "Motion to Dismiss Sanction Order Due to Impossibility to Comply..." which was not set for separate hearing, but is construed as part of the ongoing issue of the impossibility defense. Mr. Gharib has been in custody under this court's order since May of 2015.

It is clear that the contemnor has the burden of proving impossibility. But Mr. Gharib has cited *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F. 2d 770 (9th Cir. 1983) for the proposition that impossibility is a complete defense, *even if self-induced. Id.* at 779-82 n. 7 quoting *United States v. Rylander*, 656 F. 2d 1313, 1318 n. 4 (9th Cir. 1981). As the Trustee has argued, this authority is somewhat dubious since the discussion in *Falstaff* is in *dicta* and one of the authorities relied upon by the *Falstaff* court, *United States v. Rylander*, was later overturned in *United States v. Rylander*, 460 U.S. 752, 103 S. Ct. 1548 (1983). Further, on the very question before us, i.e. the question of self-induced impossibility, the Ninth Circuit has ruled subsequently to

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11:00 AM
CONT... Kenny G Enterprises, LLC **Chapter 7**

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CONT... Kenny G Enterprises, LLC **Chapter 7**

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Gharib's "Motion to Dismiss..." filed August 15, 2016 at pp. 4-5

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CONT... Kenny G Enterprises, LLC **Chapter 7**

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In sum, the court is even less persuaded than before that Mr. Gharib does not have continuing access to funds and the ability to control funds, using various shills, to purge the contempt either in part or in whole. His stories about what happened to the Hillsborough proceeds, about phantom investments in Iranian real estate, unnamed "foreigner investors" and the like, have absolutely no substance or corroboration and defy all credibility. The few details offered have proven to be either outright lies or very suspect, at best. In sum, Mr. Gharib's burden of proving impossibility has not been carried.

Deny motion to dismiss. Continue for further evaluation conference.

Party Information

Debtor(s):

Kenny G Enterprises, LLC	Represented By Robert P Goe Jeffrey S Souders Raymond H Aver

Trustee(s):

Thomas H Casey (TR)	Represented By Kathleen J McCarthy

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Santa Ana
Judge Theodor Albert, Presiding
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Tuesday, January 24, 2017 **Hearing Room 5B**

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CONT... Kenny G Enterprises, LLC **Chapter 7**

Thomas H Casey
Steve Burnell

United States Bankruptcy Court
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Santa Ana
Judge Theodor Albert, Presiding
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11:00 AM
8:11-24750 Kenny G Enterprises, LLC **Chapter 7**

#16.00 Chapter 7 Trustee's Motion for an Order Finding Kenneth Gharib and Freedom Investment Corp. in Contempt of Court, Imposing Sanctions, and Continued Incarceration of Kenneth Gharib
(cont'd from 9-14-16)

Docket 457

Tentative Ruling:

Tentative for 1/24/17:
See #15.

Tentative for 9/14/16:
See #6.

Party Information

Debtor(s):

Kenny G Enterprises, LLC — Represented By
Robert P Goe
Jeffrey S Souders

Trustee(s):

Thomas H Casey (TR) — Represented By
Kathleen J McCarthy
Thomas H Casey
Steve Burnell

United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, January 24, 2017 **Hearing Room 5B**

11:00 AM
8:11-24750 Kenny G Enterprises, LLC **Chapter 7**

#17.00 Motion To Dismiss The Sanction Order; Defense Of Impossibility To Comply As Of January 2017

Docket 601

Tentative Ruling:

Tentative for 1/24/17:
See #15.

Party Information

Debtor(s):

Kenny G Enterprises, LLC — Represented By
Robert P Goe
Jeffrey S Souders

Trustee(s):

Thomas H Casey (TR) — Represented By
Kathleen J McCarthy
Thomas H Casey
Steve Burnell

On January 24, 2017, the Court held hearings on: (1) Continued Status Conference Re: Kenneth Gharib's Continuing Contempt, Purging Contempt, And Defense Of Impossibility [Dkt. # 609], (2) Continued Status Conference Re: Chapter 7 Trustee's Motion For An Order Finding Kenneth Gharib And Freedom Investment Corp. In Contempt Of Court, Imposing Sanctions, And Continued Incarceration Of Kenneth Gharib [Dkt. # 611], and (3) Kenneth Gharib's Motion To Dismiss Sanctions Order, Defense Of Impossibility To Comply As Of January 2017 [Dkt. # 612] ("Motion To Dismiss").

Personal appearances were made by Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi ("Mr.Gharib") as pro se, Steve Burnell of the Law Office of Thomas H. Casey, Inc. ("Trustee's Counsel") on behalf of the Chapter 7 Trustee, Thomas H. Casey, in his capacity as Chapter 7 Trustee ("Trustee") of the estate of Kenny G Enterprises, LLC, and Ronald Richards of the Law Offices of Ronald Richards and Associates, APC, appeared on behalf of Creditor Mostafa Karimabadi ("Mr. Karimabadi").

This Court, having considered the record, including, pleadings filed by Mr. Gharib, the Trustee, and Mr. Karimabadi, and the arguments presented at the January 24, 2017 hearings,

IT IS HEREBY ORDERED that Mr. Gharib's Motion To Dismiss is denied.

IT IS FURTHER ORDERED that Mr. Gharib's burden to prove the impossibility defense to civil contempt was not carried today;

IT IS FURTHER ORDERED that the further status conference regarding ongoing contempt of Mr. Gharib and/or defense of impossibility is continued to June 27, 2017 at 11:00 a.m. in Courtroom 5B at the United States Bankruptcy Court, 411 W. Fourth Street, Santa Ana, CA 92701 ("Continued Status Conference").

IT IS FURTHER ORDERED that Mr. Gharib shall personally attend the Continued Status Conference and the U. S. Marshals are to return Mr. Gharib to this Courtroom on that date and time.

IT IS FURTHER ORDERED that Mr. Gharib is remanded back into the custody of the U.S. Marshal's Office until the Continued Status Conference.

IT IS FURTHER ORDERED that at any time before the Continued Status Conference, Mr. Gharib may request an earlier hearing and the Court will provide an emergency hearing within 48 hours with the expectation that Mr. Gharib has new evidence not previously presented to this Court. The Court has reviewed the "Objection to Tentative Ruling…and A Request For An Ex-Parte Application to Dismiss the Sanction Without a Request For Appearance…" filed by the contemnor, Mr. Gharib on Feb. 6, 2017. Although not entirely clear, it does not appear that such pleading creates any new issue or presents any new evidence and therefore, insofar as it can be read as a request for a hearing, it is denied;

IT IS FURTHER ORDERED that the Court's Tentative Rulings for the January 24, 2017 hearings shall become the findings of the Court, and are filed as an Exhibit [Dkt. # 613].

###

Date: February 16, 2017

Theodor C. Albert
United States Bankruptcy Judge

APPENDIX I

FILED & ENTERED

MAY 12 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY deramus DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re: Kenny G Enterprises, LLC Debtor(s).	Case No.: 8:11-bk-24750-TA CHAPTER 7 **ORDER OF CIVIL CONTEMPT AND FOR BODY DETENTION** Date: May 12, 2015 Time: 2:00 PM Courtroom: 5B

A hearing to assess compliance with this Court's "Order Finding Kenneth Gharib aka Kenneth Garrett aka Khosrow Gharib Rashtabadi ("Gharib") and Freedom Investment Corporation, a Nevada Corporation ("Freedom"), in Contempt of this Court and Imposing Sanctions" entered March 23, 2015 was held on May 12, 2015 at 2:00 p.m. Having considered the additional evidence presented at the hearing and all other papers filed in this proceeding, the Court finds that Gharib and Freedom are in continuing contempt of this Court for failing to pay the amount of sanctions to the Trustee as ordered in the original sum of $1,420,043.70, plus $1,000 per day from and after March 23, 2015.

It is further ordered that Gharib be taken into custody by the U.S. Marshals Service, to be detained in custody until he has purged the contempt by paying the sanctions, or is discharged according to law or by further order of this Court.

It is further ordered that the warrant shall issue upon a copy of this order.

###

Date: May 12, 2015

Theodor C. Albert
United States Bankruptcy Judge

APPENDIX J

Case: 18-55181, 06/21/2018, ID: 10916919, DktEntry: 16-1, Page 1 of 2

NOT FOR PUBLICATION

FILED

JUN 21 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KENNY G ENTERPRISES, LLC, Debtor. _____ KENNETH GHARIB, Appellant, v. THOMAS H. CASEY, Chapter 7 Trustee, Appellee.	No. 18-55181 D.C. No. 8:15-cv-00551-GW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

Kenneth Gharib appeals pro se from the district court's judgment dismissing his appeal of the bankruptcy court's initial contempt order. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 158(d). We affirm.

The district court properly dismissed Gharib's appeal of the bankruptcy court's initial contempt order after remand from this court. The district court addressed the bankruptcy court's enforcement of monetary sanctions and detention for Gharib's contempt in separate appeals from the bankruptcy court, and the record reflects that no issues remained that required further action from the district court.

We reject as without merit Gharib's contention that the district court should not have dismissed this appeal while his related appeals were still pending.

We do not consider documents not filed with the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

Gharib's motion to file a corrected opening brief (Docket Entry No. 14) is granted. The Clerk shall file the opening brief and exhibits submitted at Docket Entry No. 15, the answering brief and supplemental excerpts of record submitted at Docket Entry Nos. 9 and 10, and the reply brief and exhibits submitted at Docket Entry No. 13.

Gharib's request for clarification of the briefing schedule (Docket Entry No. 6) is denied as unnecessary.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 15-551-GW	Date	January 19, 2018
Title	*In Re Kenny G Enterprises*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: **IN CHAMBERS - FINAL RULING ON APPEALS FROM BANKRUPTCY COURT'S CONTEMPT ORDERS**

Attached hereto is the Court's Final Ruling on Appeals from Bankruptcy Court's Contempt Orders. The Court affirms the Bankruptcy Court's contempt orders issued in the 1946 Appeal and dismisses the 551 Appeal.

_____ : _____

Initials of Preparer JG

In re Kenny G Enter., LLC, Case Nos. SACV-16-1946-GW; SACV-15-0551-GW Final Ruling on Appeals from Bankruptcy Court's Contempt Orders

I. Background

The instant action is one of a series of appeals filed by Kenneth Gharib ("Appellant"), appearing in *pro per*, relating to various contempt orders entered by the United States Bankruptcy Court for the Central District of California.[1] *See generally In re Kenny G Enter., LLC*, CV-16-1946-GW (the "1946 Appeal"). Appellant previously appealed a contempt order entered by the Bankruptcy Court on March 23, 2015 (the "First Contempt Order"). *See generally In re Kenny Enter.*, 15-CV-0551-GW (the "551 Appeal"). The Bankruptcy Court entered this Order due to its conclusion that Appellant had violated the terms of the Order Denying Debtor's Motion for Final Decree and Order Converting the Case from a Chapter 11 Case to a Case under Chapter 7 and Temporary Restraining Order ("Conversion Order/TRO"), entered August 13, 2013. Appellant failed to comply with the First Contempt Order and, as a result, was ordered incarcerated by the Bankruptcy Court on May 12, 2015. On November 30, 2015, this Court affirmed in part and vacated in part the First Contempt Order. *See* 551 Appeal, Docket No. 18. Both Appellant and Trustee Thomas Casey ("Appellee") filed cross appeals to the Ninth Circuit Court of Appeals. *Id.*, Docket Nos. 19, 20.

The Ninth Circuit affirmed this Court's ruling in part, and overruled it part. *See Gharib v. Casey (In re Kenny G Enters. LLC)*, 692 Fed. Appx. 950, 952 (9th Cir. 2017). Specifically, the Ninth Circuit overruled this Court's decision insofar as this Court reversed the $1,000 per day sanctions ordered by the Bankruptcy Court as a proper form of coercive sanctions. *Id.* However, the Circuit (as did this Court) found "the bankruptcy court acted within its 11 U.S.C. § 105(a) civil contempt powers when it sanctioned Gharib in the amount of $1,420,043.70, and did so again when it ordered Gharib incarcerated for his continued failure to comply." *Id.*

Upon remand, this Court asked both parties to file simultaneous briefing on specific issues raised in the Ninth Circuit's ruling (*e.g.* at what point will the Bankruptcy Court's detention and $1,000 per day sanction order cease to be coercive and become punitive). *See* 551 Appeal, Docket No. 25. Both parties complied and the matter was taken under submission on

[1] The Bankruptcy Court held that Appellant had defied its orders through a series of shady asset transfers involving more than 1.4 million dollars to various shell companies owned or controlled by him. *See* 1946 Appeal, Docket No. 55 at 5 of 10.

October 5, 2017. *See* Response Filed By Appellee Thomas H. Casey to Reopening the Case ("Casey '551 Response"), *Id.*, Docket No. 26; Appellant's Brief in Response to Court' s Order For Clarification of Ninth Circuit's Ruling ("Gharib '551 Response"), *Id.*, Docket No. 27. As detailed below, the Court concludes that the Ninth Circuit's ruling does not require any further action by this Court, other than to dismiss the 551 Appeal consistent with the Circuit's decision. *See infra* at 9.

Appellant filed two more appeals to the contempt order and/or his incarceration, both of which were unsuccessful largely for procedural reasons. *See In re Kenny G. Enter.*, 16-CV-0319-GW (the "319 Appeal"); *In re Kenny G. Enter.*, CV 16-0848-GW (the "848 Appeal").[2] The Appellant has been in custody since May of 2015. The Bankruptcy Court also denied his latest challenges to his contempt and incarceration on September 14, 2016, and again on January 22, 2017. *See* Appellee's Excerpts of the Record ("AR"), Docket No. 49-1 at 5-10. In both instances, the Appellant argued that he was unable to comply with the contempt order and that the order should be removed. *Id.* The Bankruptcy Court denied both requests and included a written tentative decision adopted as its final ruling. *See* AR Ex. 3 ("Ruling"), Docket No. 49-1 at page 11. Appellant now appeals these decisions, which the Court has consolidated with the present action (the "1946 Appeal").

II. Appellate Jurisdiction

Appellant asserts that this Court has appellate jurisdiction over the Sanctions Order by way of 28 U.S.C. § 158(a)(1) because, at least in the context of this matter (a contempt/sanctions order against non-parties stemming from a contested matter concerning the disposition of certain assets of the Debtor's Chapter 7 estate), that order represents a final order. Appellee has not contested this assertion and the Court concludes that, given the context of the Bankruptcy Court's ruling here, it agrees. *See, e.g.*, *Stipp v. CML-NV One, LLC (In re Plise)*, 506 B.R. 870, 876 (B.A.P. 9th Cir. 2014) (concluding that appellate jurisdiction existed under § 158 where appeal was from bankruptcy court's sanctions order against non-party); *Rosales v. Wallace (In re Wallace)*, 490 B.R. 898, 904 (B.A.P. 9th Cir. 2013) ("Where the contempt proceeding is the sole proceeding before the court, an order of civil contempt finding a party in contempt of a prior final judgment and imposing sanctions is a final appealable order."); *Munson v. Gradient*

[2] The Ninth Circuit recently affirmed this Court's dismissal of the 848 Appeal. *See* 848 Appeal, Docket Nos. 40-41. The Ninth Circuit previously dismissed Appellant's Appeal of this Court's ruling on the 319 Appeal for procedural reasons. *See* 319 Appeal, Docket Nos. 54-55.

Resources, Inc., No. 3:13-cv-01988-MO, 2014 WL 2041819, *2 (D. Or. Apr. 29, 2014) (suggesting that contempt adjudication is final once sanctions have been imposed).

III. Standard of Review

A bankruptcy court's decision to hold someone in civil contempt and to impose sanctions is reviewed for abuse of discretion. *See Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower)*, 755 F.3d 1130, 1138 (9th Cir. 2014) ("We review for abuse of discretion the bankruptcy court's finding of civil contempt and imposition of sanctions."). However, findings of fact made in connection with a civil contempt order by a bankruptcy judge are reviewed for clear error. *Id.* The "clear error" standard asks whether the reviewing court is "left with the definite and firm conviction" that there was a mistake in the findings. *See Stahl v. Simon (In re Adamson Apparel, Inc.)*, 785 F.3d 1285, 1291 (9th Cir. 2015); *Confederated tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 334, 343 (9th Cir. 1996); *see also Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("In applying this standard, we, like any reviewing court, will not reverse a lower court's finding of fact simply because we 'would have decided the case differently.'") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "Clear error review is deferential, and '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *United States v. Christensen*, 801 F.3d 970, 984 (9th Cir. 2015) (quoting *United States v. Working*, 224 F.3d 1093, 1102 (9th Cir. 2000) (*en banc*)).

"A court's finding that compliance [with a court order] was not impossible is a factual finding that is reviewed for clear error." *In Re Marciano*, CV-12-1284-AHM, 2013 WL 180057, *2 (C.D. Cal. Jan. 17, 2013) (citing *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999)); *see also SEC v. Elmas Trading Corp.*, 824 F.2d 732 (9th Cir. 1987) ("[T]he court concludes that the district court did not clearly err in finding that appellant is able to comply with its orders of production."). The clear error standard also extends to a bankruptcy court's "'quintessentially factual determination[s]' of credibility." *Ashley v. Church (In re Ashley)*, 903 F.2d 599, 606 (9th Cir. 1990). Finally, this Court reviews any of the Bankruptcy Court's conclusions of law *de novo*. *See Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015).

IV. Analysis

A bankruptcy court has civil contempt power which it may enforce through sanctions.

See In re Hercules Enters., Inc., 387 F.3d 1024, 1027 (9th Cir. 2004); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284-85 (9th Cir. 1996).[3] Civil sanctions must be either "compensatory or designed to coerce compliance" and may include incarceration. *See In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003); *Gharib*, 692 Fed. Appx. at 952 (affirming Bankruptcy Court's incarceration of Appellant for failure to comply with contempt order); *see also FTC v. Kutzner*, CV 16-00999-BRO (AFMx), 2017 U.S. Dist. LEXIS 182569, *8-9 (C.D. Cal. June 12, 2017) ("Another civil contempt sanction option is imprisonment, which is 'not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do.'" (quoting *United States v. Yates*, 107 F.Supp. 412, 414 (S.D. Cal. 1952)); *In re Count Liberty, LLC*, 370 B.R. 259, 286 (C.D. Cal. Bankr. 2007). Incarceration is this context is not punitive but rather coercive in nature because the party "carries the keys of his prison in his own pocket." *Int'l Union v. Bagwell*, 512 U.S. 821, 828 (1994) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)). Generally, "a party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt." *Affordable Media, LLC*, 179 F.3d at 1239.

Here, the Bankruptcy Court previously determined that Appellant defied a court order through a series of shady asset transfers to various shell companies. *See* Memorandum Finding Kenneth Gharib In Contempt of Court ("Contempt Order"), Docket No. 49-1 at page 29. The Bankruptcy Court found him in contempt of court, and ordered him to pay over a million dollars, as well as an additional $1,000 a day until the initial sum was paid. *Id.* at 41. After he refused, the Bankruptcy Court incarcerated him on May 12, 2015. *See* Order of Civil Contempt and for Body Detention, Docket No. 49-1 at page 309. The Bankruptcy Court's actions were ultimately affirmed by the Ninth Circuit. *See Gharib*, 692 Fed. Appx. at 952. The Ninth Circuit found that:

> The record supports the bankruptcy court's decision to hold Gharib in contempt. The bankruptcy court found that on August 14, 2013, Dana Douglas, representing the Debtor, notified Gharib that the Debtor's bankruptcy case was converted from one under Chapter 11 to one under Chapter 7. The conversion triggered Gharib's obligations under 11 U.S.C. § 542(a) and Central District of

[3] Civil contempt "consists of a party's disobedience to a specific and definite court order." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). To establish a prima facie case for civil contempt, the moving party must show, by clear and convincing evidence that the nonmoving party disobeyed a specific and definite court order, and that such disobedience was: (1) beyond substantial compliance, and, (2) not based on a good faith and reasonable interpretation of the Court's order. *Id.* However, good faith is not enough in and of itself − it must reasonable. *Id.*

> California Local Bankruptcy Rule ("LBR") 3020-1(b)(5) to turn over to the trustee of the Debtor's estate all of the Debtor's assets that were in Gharib's possession, which amounted to $1,420,043.70. Gharib failed to do so. A year and a half later, after extensive briefing, discovery, and an evidentiary hearing to determine the precise scope of Gharib's turnover obligations and to discover where the assets had gone, the bankruptcy court concluded that "in all likelihood the alleged Iran transaction is entirely fiction and the Hillsborough proceeds [amounting to $1,420,043.70] (or what is left of them) are still here and under Gharib's control." Based on the record before us, we cannot conclude that the bankruptcy court's finding was clearly erroneous.

Id.

The Ninth Circuit also found that Appellant's contempt was civil in nature, and that both the fines, and incarceration were proper exercises of the Bankruptcy Court's civil contempt power. *Id.* The Ninth Circuit also noted, somewhat cryptically that "at some point, due process considerations will require the bankruptcy court to conclude that Gharib's continued detention and the daily $1,000 sanctions have ceased to be coercive and instead have become punitive. When that occurs, Gharib must be released from custody." *Id.* at 953.

In moving for the Bankruptcy Court to set aside his contempt order, Appellant did not attempt to rebut the initial contempt finding. *See generally* Motion to Dismiss Sanction Order, Docket No. 49-7 at page 370. Rather, he argued, unsuccessfully that he was unable to comply with the contempt order because he lacked any financial resources. *Id.* As detailed below, the Bankruptcy Court rejected that argument primarily because Appellant failed to present evidence of his poverty apart from his own uncorroborated testimony. Contempt Order, Docket 49-1 at page 21. The Bankruptcy Court found him lacking in credibility given his previous tendency to misrepresent the truth to the court, often under oath. *Id.*

Appellant presents three issues on appeal. First, he contends that the Bankruptcy Court abused its discretion in finding that he failed to demonstrate an inability to comply with the contempt order. *See* Appellant's Opening Brief ("Br."), Docket No. 21 at pages 8-9. Appellant further contends that the Bankruptcy Court errored as a matter of law by holding that inability to comply with a civil contempt order is not a defense if the inability to comply is self-induced. *Id.* Finally, Appellant argues that the Bankruptcy Court erred as a matter of law by failing to determine that Appellant's sanctions have ceased to be coercive because, among other things

"the underlying case" has been rendered "moot." The Court addresses each argument in turn.

A. The Bankruptcy Court's Finding as to an Inability to Pay

Generally, "a party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt." *Affordable Media,* 179 F.3d at 1239. "[O]nce an alleged contemnor's noncompliance with a court order is established, the burden shifts to the alleged contemnor to produce[] sufficient evidence of [its] inability to comply…." *In Re Icenhower*, 755 F.3d at 1139. "[T]he party asserting the impossibility defense must show 'categorically and in detail' why he is unable to comply." *Affordable Media*, 179 F.3d at 1241 (quoting *NLRB v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1971). This Court reviews the Bankruptcy Court's inability to pay finding for clear error. *See In Re Marciano*, 2013 WL 180057 at *2; *Affordable Media, LLC*, 179 F.3d at 1239; *see also Elmas*, 824 F.2d at 732.

Here, the Bankruptcy Court determined that Appellant failed to meet this burden. The Bankruptcy Court noted that Appellant's only evidentiary support for his claimed inability to comply was his own testimony that: (1) he had transferred his entire net worth to unknown foreign investors, (2) accounts that were previously under his control had been cleared out since he has been in custody, (3) he is not affiliated or in control of any of the shell corporations that his previous assets were transferred to, and (4) he has no assets, at all. *See* Ruling at 19-20. The court also noted that Appellant has to date been unable to subpoena or otherwise obtain corroborating testimony from anyone. *Id.* The court further noted that Appellant's "stories… have absolutely no substance or corroboration and defy all credibility." *Id.* The Bankruptcy Court concluded that Appellant failed to carry his burden to establish impossibility.

After reviewing the materials submitted, this Court would not find that the Bankruptcy Court's determination that Appellant failed to carry his burden to establish an inability to pay defense to his civil contempt was clearly erroneous.

B. Whether Bankruptcy Court Applied the Wrong Law on the Inability to Pay Defense

Appellant also contends the Bankruptcy Court erred when it concluded that the impossibility defense is unavailable to a civil contemnor who was the cause of his own inability to comply with the court order. *See* Br. at 25-26. This argument appears to be directed at the following portion of the Bankruptcy Court's Ruling:

> [O]n the very question before us, i.e. the question of self-induced impossibility, the Ninth Circuit has ruled…in [*Affordable Media*, 179 F.3d 1228] that self-induced impossibility, particularly in the

> asset protection trust context, is not a defense to civil contempt or at least that the contemnor's burden of proof on the point is very high.

See Contempt Order at 14.

The quoted language is admittedly unclear in one respect. While it is true that some forms of contempt such as criminal and civil compensatory contempt cannot be purged by self-induced impossibility, the same is not necessarily true for civil contempt that is coercive in nature. *Compare Affordable Media*, 179 F.3d at 1241 ("In the asset protection trust context, moreover, the burden on the party asserting an impossibility defense *will be particularly high* because of the likelihood that any attempted compliance with the court's orders will be merely a charade rather than a good faith effort to comply."), *with United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980) ("Self-induced inability is not a defense to a contempt proceeding."). However, the Bankruptcy Court did not reject Appellant's impossibility defense based on any "self-induced" exception to the impossibility defense. *See* Contempt Order at 14. Instead, it properly applied the standard set forth in *Affordable Media*, and found that Appellant failed to meet the requisite high burden.

As such, the Court would not overturn the Bankruptcy Court's ruling on this basis.

C. Whether Appellant's Contempt Is No Longer Coercive

Appellant's final argument on appeal addresses the nature of his contempt. As discussed earlier, the Ninth Circuit previously determined that Appellant's contempt was civil and coercive. *See Gharib*, 692 Fed. Appx. at 952. However, the panel noted that at some point his confinement and mounting fines will become punitive, and that at that point he must be released.[4] *Id.* Appellant appears to make two arguments as to why his contempt is no longer civil. First, he argues that he has now been confined for well over two years and that the term of confinement itself has become punitive. *See* Br. at 32-34. In support he references the fact that his incarceration now exceeds the mandatory minimum sentence for criminal obstruction of justice.[5] *Id.* Appellant also argues that the resolution of a related state case, Case No. 30-2012-00537915-CU-CB-CJC, renders the original contempt order moot. *See id.* at 30-31; *see also* Request for Judicial Notice, Docket No. 51.

[4] The Court addresses this issue below. *See infra* at 8-9.

[5] Appellant cites to the transcript from his Ninth Circuit hearing at which a member of the panel made a similar observation. *Id.* at 33.

This Court recognizes and shares the Ninth Circuit's concern that Appellant has spent a considerable amount of time incarcerated without the usual procedural due process rights afforded a criminal defendant. Unfortunately, the Court cannot locate any authority for the proposition that length of confinement, on its own, renders contempt punitive and criminal, as opposed to civil and coercive. *Cf. Shillitani v. United States*, 384 U.S. 364, 370 (1966) (upholding as civil "a determinate [2-year] sentence which includes a purge clause"). Rather than the length of confinement by itself, the proper determination as to whether Appellant's contempt is civil or criminal requires "an examination of the character of the relief itself." *Bagwell*, 512 U.S. at 828 (quoting *Hicks v. Feiock*, 485 U.S. 624, 636 (1988)). "The purpose of civil contempt is coercive or compensatory, whereas the purpose of criminal contempt is punitive." *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008) (quoting *United States v. Armstrong*, 781 F.2d 700, 703 (9th Cir. 1986)). "The civil contemnor is said to 'carr[y] the keys of his prison in his own pocket,' whereas the criminal contemnor 'is furnished no key, and he cannot shorten the term by promising not to repeat the offense.'" *Shell Offshore, Inc., v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016) (quoting *Bagwell*, 512 U.S. at 828-29). Though both the Ninth Circuit and the Supreme Court hold that the nature of contempt may change over time, such a change relates to the contemnor's ability to purge his or her contempt. *See Shell*, 815 F.3d at 630 ("[I]n order to categorize the contempt properly, a court must look to the purpose of the contempt at the time it is enforced, rather than at the time it is imposed. A court's power to impose coercive civil contempt depends upon the ability of the contemnor to comply with the court's coercive order, *something which may change over time*.") (emphasis added); *see also United States v. Rylander*, 460 U.S. 752, 757 (1983) (stating that the test for civil contempt on appeal is whether contemnor has the present ability to comply, not whether it could have complied in the past).

From the beginning, Appellant has had the ability to purge his contempt through compliance with the Bankruptcy Court's order. Nothing on the record suggests this has changed. Thus, Appellant remains in possession of the "keys to his own prison" and his contempt remains civil. *Bagwell*, 512 U.S. at 828; *see also Shell*, 815 F.3d at 629 ("[T]he ability to purge is perhaps the most definitive characteristic of coercive civil contempt."). In fact, the record suggests that Appellant's incarceration continues to exert a coercive influence even though it has

not yet proven wholly effective in obtaining compliance.[6] This appears to be the case given Appellant's apparent refusal to provide a consistent, corroborated, and credible explanation to the Bankruptcy Court as the various asset transfers that gave rise to the contempt order. Indeed, he continues to deny any connection to various shell companies and to claim that unnamed "foreign investors" and an absent brother are the ones controlling his assets.[7] The Court also notes that the Bankruptcy Court has, and continues to allow Appellant ample and expedient opportunities to challenge his contempt.

Further, Appellant's argument that his contempt has been rendered moot by subsequent case developments at the state level is entirely new and should be addressed directly to the Bankruptcy Court. According to the Appellee, Appellant raised this argument directly to the Bankruptcy Court on October 3, 2017, and it was rejected. Should Appellant wish to challenge *that* decision he must do so through the proper appellate procedures. At this point the record is insufficiently developed on this matter for this Court to consider it here and now.

In sum, the Court finds that the Bankruptcy Court did not error in failing to hold that Appellant's contempt has converted from civil to criminal in nature.

V. Outstanding 551 Appeal Issue

As detailed above, the Ninth Circuit affirmed in part, and reversed in part this Court's decision on Appellant's 551 Appeal. *See Gharib*, 692 Fed. Appx. at 953. After the Ninth Circuit handed down its ruling this Court ordered both parties to brief one aspect of that ruling: the Ninth Circuit's observation that at some point the Appellant's contempt will "[cease] to be coercive and instead…[become] punitive." *Id.* Both parties complied with the order and submitted written briefs and the Court took the matter under submission in October of 2017. *See* Casey '551 Response; Gharib '551 Response.

The Court has reviewed both submissions and the Ninth Circuit Order and finds that the relevant language does require additional action by this Court. As such, the Court would dismiss the Appellant's 551 Appeal consistent with the Ninth Circuit's ruling.

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[6] The amount of money involved is also a factor. Here, Appellant has been found to have taken and hidden over $1.42 million. If he is released at this point having spent about two years in custody, he would have profited in the sum of about $700,000 per year.

[7] Perhaps if Appellant were to "come clean" (*i.e.* more fully cooperate with the Trustee/Appellee in attempting to locate the assests), the nature of his contempt would change. As it is, his continued efforts to defy the Bankruptcy Court suggest that his confinement remains coercive.

VI. Conclusion

Based on the foregoing, the Court affirms the Bankruptcy Court's contempt orders issued in the 1946 Appeal and dismisses the 551 Appeal.