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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Gary Kremen,

NO. C 98-20718 JW

Plaintiff,

**ORDER GRANTING DEFENDANT'S
APPLICATION FOR RELEASE FROM
CUSTODY**

v.

Stephen Michael Cohen, et al.,

Defendants.

I. INTRODUCTION

Defendant Stephen Michael Cohen ("Cohen") brings this Application for Release from Custody.¹ Cohen contends that he has satisfactorily purged himself of civil contempt. The Court conducted a hearing on December 4, 2006. Based on the papers submitted to date and the oral arguments of counsel, the Court GRANTS Cohen's Application for Release from Custody and ORDERS the United States Marshals to release Cohen.

II. BACKGROUND

The facts of the underlying dispute, now eight years old, are well-known to all involved. The Court briefly reviews only the pertinent background:

On November 27, 2000, the Court granted Plaintiff Gary Kremen's ("Kremen") Motion for Preliminary Injunction. At that time, the Court found that Cohen had (1) improperly thwarted

¹ Defendant originally filed this Application ex parte. Upon receipt of the Application, the Court set an expedited briefing schedule and invited opposition from Plaintiff. The Plaintiff timely filed their opposition.

1 Kremen's efforts to obtain discovery of financial information; (2) engaged in activities designed to
2 conceal money made from the operation of the sex.com website; and (3) transferred substantial
3 assets to entities for the purpose of avoiding ultimate financial responsibility at the conclusion of the
4 litigation. (Order Granting Motion for Preliminary Injunction at 2, hereafter, "PI Order," Docket
5 Item No. 440.) The Court ordered Cohen, *inter alia*, to: (1) return \$25 million, plus all revenue
6 generated from sex.com between November 27, 2000 and the entry of final judgment in the action,
7 to the United States to be held by the Court pending final judgment; (2) within three weeks, provide
8 a full accounting of the sex.com domain site operation; and (3) within seven days, to sign all waivers
9 to the release of tax returns, bank account records, and FOIA waivers for all defendants between
10 1995 and the present. (PI Order at 3-5.)

11 Following the issuance of the preliminary injunction, Kremen alerted the Court that
12 Defendants appeared to be violating the preliminary injunction in several respects, including (1)
13 transferring funds in excess of \$1 million; (2) failing to deposit the required money with the Court;
14 (3) failing to sign timely or complete waivers; and (4) failing to submit audits or submitting
15 incomplete audits. (Order Holding Defendants in Civil Contempt at 3, hereafter, "Contempt Order,"
16 Docket Item No. 541.) On February 7, 2001, the Court issued an Order to Show Cause why
17 Defendants should not be held in contempt of court. (See Docket Item No. 498.) On February 12,
18 2001, the Court ordered Defendants held in contempt, for a related failure to appear at Plaintiff's
19 counsel's office to sign various releases. (See Docket Item No. 512.). On February 28, 2001, no
20 Defendant appeared at the hearing on the Court's February 7 Order to Show Cause. (Contempt
21 Order at 3.) Defense counsel presented an unsubstantiated claim that Cohen was under legal
22 restraint in Mexico, which the Court disregarded due to improper authentication. Id.

23 On March 2, 2001, the Court ordered Defendants held in civil contempt and issued a warrant
24 for Cohen's arrest. (Contempt Order at 5-6.) As additional sanctions, the Court ordered that
25 Defendants were to be precluded from offering any evidence concerning the income and expenses
26 generated in connection with sex.com, and the alleged bona fide transfer of the domain name
27

1 sex.com from Cohen or any other defendant to any other entity. Moreover, the Court found
2 established for purposes of the action that Defendants Ynata, OFIL, Sandman, and "any other
3 Cohen-affiliated entity connected in any way with the domain name sex.com, are sham entities and
4 are, as a matter of fact and law, the alter-egos of Cohen and the alter-egos of one another." Id.
5 Subsequently, on April 3, 2001, judgment was entered for Kremen and against Defendants in the
6 amount of \$65 million. (See Docket Item No. 596.)

7 Cohen was arrested by the United States Marshal on October 27, 2005. He is currently
8 incarcerated in the Santa Clara County Main Jail. Between October 2005 and June 2006, the Court
9 held monthly status conferences regarding the status of Cohen's contempt. At issue during the last
10 status conference in June 2006 was whether Cohen had, in October 2005, directed the Nordea Bank
11 of Lithuania to transfer approximately \$4.1 million USD to the Deutsche Bank in the name of
12 Mexico Lending, an affiliated entity of Cohen's. Both sides have presented evidence on this
13 question.

14 Kremen has presented the following evidence:

15 On December 12, 2005, Kremen subpoenaed Google to request information relating to
16 Cohen and his known related or affiliated entities. Cohen signed a waiver to allow Kremen to
17 access his "gmail," (Google electronic mail) account. In August 2006, Google responsively
18 produced documents relating to the scohen15@gmail.com account. (Declaration of Nadya Y.
19 Spivack in Support of Plaintiff's Opposition to Defendant's Ex Parte Application for Release from
20 Custody or in the Alternative an Expedited Hearing Date ¶ 3, hereafter, "Decl. Spivack," Docket
21 Item No. 1235.) Two emailss were sent from scohen15@gmail.com to info@nordea.lt on October 4,
22 2005 and October 16, 2005. (Decl. Spivack ¶ 4.) The emails contained an attached memo, which
23 stated the following:

24 To: Nordea Bank Lithuania
25 From: Stephen M. Cohen
26 CODE: MAVERICK3452
27
28

1 Date: October 28, 2006²
2 To: Hans Dizengof
3 Re: WIRE TRANSFER

4 Dear Hans:
5 You are authorized to send a wire in the amount of \$3,476,000.00 Euros to the
6 "DEUTSCHE BANK TRUST COMPANY."
7 This information listed on my list as A10
8 Please list the sender as Mexico Lending
9 SEND ONLY through SWIFF and PLEASE do not send these funds through the
10 United States or through a correspondent bank in the United States.
11 I received the new credit cards via DHL and I thank you for your assistance. Please
12 deduct these credit card bills each month from this account.
13 I should be back in Europe in three weeks and look forward to talking to you again.
14 Thanks,
15 Stephen M. Cohen
16 +52 664 648-3633

17 (Decl. Spivack, Exs. 1, 2.) According to Google, both the October 4 and the October 16 emails were
18 sent from Internet Protocol ("IP") address number 209.205.192.8. (Declaration of Edmond Choi ¶¶
19 6-7, 10-11, hereafter, "Decl. Choi," Docket Item No. 1236.) An ARIN WHOIS Database Search for
20 that IP address lists Pacnet S.A. de C.V. as the owner. (Decl. Spivack ¶ 9.) During October 2005,
21 WLCOM controlled the IP netblock of 209.205.192.1 - 209.205.192.152, and identified
22 209.205.192.8 as an "in house" IP address used by employees and staff of WLCOM. (Decl. Spivack,
23 Ex. 6.) Cohen maintained an office at WLCOM's facility prior to his arrest, and typically worked
24 from late at night to early in the morning. (Decl. Spivack, Ex. 7, 25:25-26:3, Ex. 8, 31:16-21, 39:4-
25 20.) The two emails in question were sent at 2:54 AM and 5:59 PM, respectively. (Decl. Choi, Exs.
26 A, B.)

27 Cohen has presented the following evidence:

28 Cohen testified extensively on these matters at his September 29, 2006 deposition. With
respect to Nordea Bank in Lithuania and Deutsche Bank, he stated that he had never had an account
at either bank, knew no one at either bank, and had not received credit cards from either bank. (Ex
Parte Application for Release from Custody or in the Alternative An Expedited Hearing Date Ex. D

² The date of Cohen's memo does not match the date of the email because Cohen used an automatic date function, such that the document will adjust the date to whatever date the document is opened. (Decl. Spivack ¶ 7.)

1 at 465:21-466:10, hereafter, "Ex Parte Application," Docket Item No. 1226.) Cohen stated that the
2 "gmail" account scohen15@gmail.com was opened to receive and store large documents because it
3 provided a significant amount of free space. (Ex Parte Application, Ex. D at 598:25-599:8.) He
4 provided the password to WLCom employees, a "couple of [his] friends," and possibly his daughter,
5 Jhuliana Cohen. (Ex Parte Application Ex. D, 596:17-598:24.)

6 Cohen admitted to using the password "maverick" in the past, but stated that he had never
7 used "maverick3542." (Ex Parte Application Ex. D at 601:15-18.) He testified that he had never
8 received a DHL letter or a credit card from Nordea Bank. (Ex Parte Application, Ex. D at 603:11-
9 18.) Cohen has presented a certification from the Lithuanian Branch of the Nordea Bank which
10 states in pertinent part as translated into English:

11 We hereby inform that **Mr. Stephen Michael Cohen** and **Mexico Lending** does not
12 have and never had any bank account with Nordea Bank Finland Plc Lithuanian
13 Branch. A money transfer of EUR 3,746,000 from Nordea Bank Finland Plc
Lithuanian Branch to Deutsche Bank has not been made in October 2005.

14 (Ex Parte Application Ex. H.) Cohen further submitted evidence that no "Hans Dizengof" was
15 employed by Nordea Bank's Lithuania Branch. (Ex Parte Application Ex. I.)

16 **III. STANDARDS**

17 Whether contempt is civil or criminal is determined by the purpose of the contempt sanction.
18 A civil contempt sanction "is intended to coerce the contemnor to comply with the court's orders in
19 the future, and the sanction is conditioned upon continued noncompliance." In contrast, a criminal
20 contempt sanction "is intended to punish past conduct, and is imposed for a definite amount or
21 period without regard for the contemnor's future conduct." Richmark Corp. v. Timber Falling
22 Consultants, 959 F.2d 1468, 1481 (9th Cir. 1992).

23 The standard for finding a party in civil contempt is as follows: the moving party has the
24 initial burden to show by clear and convincing evidence that the contemnor violated a specific,
25 definite Court order. The burden then shifts to the contemnor to demonstrate why he or she was
26 unable to comply. Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir.

1 1999). A contempt proceeding does not "open to reconsideration the legal or factual basis of the
2 order alleged to have been disobeyed and thus become a retrial of the original controversy." United
3 States v. Rylander, 460 U.S. 752, 756-57 (1983). This is because "[t]he procedure to enforce a
4 court's order commanding or forbidding an act should not be so inconclusive as to foster
5 experimentation with disobedience." Id.

6 A defendant may assert a present inability to comply with the order in question; where
7 compliance is impossible, neither the moving party nor the court has any reason to proceed with a
8 civil contempt action. Id. (citing Maggio v. Zeitz, 333 U.S. 56, 75-76 (1948)). The defendant bears
9 the burden of production. Id. (internal citations omitted). A mere assertion of inability to comply is
10 insufficient; rather, the party asserting impossibility as a defense must show "categorically and in
11 detail" why he or she is unable to comply. Affordable Media, 179 F.3d at 1241.

12 IV. DISCUSSION

13 In its March 2, 2001 Order, the Court directed that Cohen be held in custody until he
14 performs the following four actions:

- 15 a) return[s] to the United States and deposit[s] with the Court \$25,000,000 or
such lesser sum as he shows is warranted by his economic circumstances;
- 16 b) return[s] to the United States all revenue generated from sex.com;
- 17 c) provide[s] a full accounting of the sex.com domain name operation;
- 18 d) effect[s] the turnover of \$1.1 million in bank funds to foreign accounts after
being ordered by the Court not to transfer any such funds.

19 (March 2, 2001 Order at 6.) The Court is now satisfied that Cohen has complied with these
20 conditions to the best of his ability. Cohen has repeatedly testified that he has no further funds to
21 pay and is not in a position to locate any further documents while in jail. (See, e.g., Ex Parte
22 Application, Ex. D at 585:7-14, 627:8-629:7.) The Court is satisfied that Cohen has provided an
23 accounting of assets to the extent that he is able from jail. (Ex Parte Application, Ex. F.) Lastly,
24 Cohen contends that he made a bona fide attempt to recover the more than one million dollars that
25 he wire transferred at the time of the Court's preliminary injunction of November 27, 2000, but that
26 his efforts were stymied by the Mexican authorities. (See, e.g., Ex Parte Application at 9.) Cohen

1 has not offered adequate evidence in this regard; however, the Court finds that holding Cohen in
2 prison at this point would do nothing to effect the turnover of these funds six years after they were
3 transferred.

4 Kremen has provided no evidence to rebut Cohen's contentions. Specifically, Kremen's
5 opposition is filled with unsupported conclusory statements and speculation. Aside from the two
6 emails described above, Kremen has provided no evidence that (1) Cohen actually had or has a bank
7 account with Nordea Bank in Lithuania; (2) Cohen actually had or has a bank account with Deutsche
8 Bank; (3) any bank actually received the emails purportedly sent by Cohen in October 2005; (4) any
9 transfer of funds, let alone a transfer of nearly \$3.5 million Euros, took place.³ Indeed, in the months
10 since Cohen has been incarcerated, Kremen has uncovered *no* significant evidence that Cohen has
11 outstanding funds in previously unknown bank accounts, or any other outstanding assets. Instead,
12 Kremen invites the Court to join him in speculating where Cohen's allegedly hidden assets,
13 accounts, and personal belongings might be:

14 The fact that Plaintiff is not able to confirm the account information at Nordea Bank
15 is due to the fact that the account is not under Cohen's own name. The releases
16 Cohen provided to Plaintiff do not release accounts held in the name of his wife,
17 daughters, other individuals or entities that Cohen likes to use. The purported
18 declaration from Nordea Bank that Cohen provides to this Court states that Cohen
19 does not maintain an account – but fails to provide a list of all of his other alter ego
20 and affiliated entities – several of which likely remain unknown to Plaintiff or anyone
21 other than Cohen himself.

22 . . .

23 Despite Cohen's claims of ignorance about his personal belongings, Plaintiff is
24 certain they reside with Cohen's wife, Rosa Cohen in Mexico, that Cohen knows
25 about his documents whereabouts and that he is behind his documents disappearance.
26 [sic] . . . The Court will also recall that at a hearing in this matter in March 2006,
27 Cohen's attorney was able to produce Cohen's cancelled passport delivered to him by
28 Rosa Cohen. It is no stretch of the imagination to believe she maintains his other
documents until he is released.

. . .

Kremen is informed and believe that Cohen uses and continues to use [named friends,
family members, and attorneys], among others, and enlists their assistance in

³ Under the circumstances, it is wholly unclear who sent the emails in question and who, if anyone, received it. These questions are unimportant, however, in the absence of any evidence that the 3.5 million Euros in question exist.

1 conferencing bankers and third parties in order to effectuate the transfer of assets in
2 violation of this Court's orders.

3 Kremen is informed and believed that Cohen actively harassed and threatened his
4 wife, Rosa Cohen, to prevent the completion of the settlement agreement [relating to
5 various properties in Mexico.] Kremen is further informed and believes that Cohen
6 actively worked with his Mexican attorney, Gustavo Cortez, to fraudulently file a lien
7 on the real properties and thwart any efforts at transferring the properties.

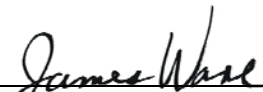
8 (Plaintiff's Opposition to Defendant's Ex Parte Application for Release From Custody or in the
9 Alternative an Expedited Hearing Date at 8, 10-13, Docket Item No. 1232.) The Court declines this
10 invitation. Cohen has been incarcerated for more than one year, during which time Kremen has
11 failed to locate evidence of hidden bank accounts or other assets. Under these circumstances, the
12 only purpose of Cohen's continued incarceration would be punitive—an impermissible purpose for
13 civil contempt sanctions. Accordingly, the Court finds it proper to order Cohen's release from
14 prison.

15 **V. CONCLUSION**

16 The Court GRANTS Cohen's Application for Release from Custody with the following
17 conditions:

- 18 1) Cohen shall appear on **February 26, 2007 at 9 AM** for an examination of
19 judgment/debtor satisfaction.
- 20 2) Service of papers upon Steve Teich, Cohen's current counsel, shall be deemed
21 effective service upon Cohen. If Cohen should wish to substitute attorney,
22 substitution must be approved by the Court. The motion for substitution of attorney
23 shall be noticed in accordance with the Civil Local Rules of the Court.

24 Dated: December 5, 2006

25 
26 _____
27 JAMES WARE
28 United States District Judge

1 **THIS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 Chad S. Hummel chummel@manatt.com
- 3 Christopher L. Wanger cwanger@manatt.com
- 4 David Henry Dolkas ddolkas@mwe.com
- 5 George G. Weickhardt gweickhardt@ropers.com
- 6 Glen H. Isaacs invalidaddress@invalidaddress.com
- 7 Jack S. Yeh jyeh@manatt.com
- 8 James M. Wagstaffe wagstaffe@kerrwagstaffe.com
- 9 John P. Kern jkern@manatt.com
- 10 Karl Stephen Kronenberger karl@kronenbergerlaw.com
- 11 Patricia De Fonte Patricia.DeFonte@idellseitel.com
- 12 Richard J. Idell richard.idell@idellseitel.com
- 13 Steve Emery Teich steve.teich@sbcglobal.net
- 14 Terri R Hanley law@terrihanley.com

9 **Dated: December 5, 2006**

Richard W. Wieking, Clerk

By: /s/ JW Chambers

Elizabeth Garcia
Courtroom Deputy

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