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June 13, 2005

Commissioner James P. Madden
Santa Clara Superior Court
270 Grant Avenue, Dept 86
Palo Alto, CA 94306

Re: Kirsch v. Cunningham et al., June 16, 2005 at 1pm in D-86

Case number: 2-04-SC-001196

Dear Commissioner Madden:

I am writing in regards to the post-judgment motion hearing I requested on June 16, 2005.

I am writing you for five reasons:

1. to alert you to the tricks that the Defendants may use to (once again) delay their case so that you can be better prepared to deal with them at the hearing.
2. to alert you to the background of the requests I am making so that if you have any questions, you can ask them of me at the hearing
3. to save time at the hearing
4. to put "in the record" a description of what has been happening in the event another judge must deal with the Defendants or Mr. Herships
5. to advise you in advance of points and authorities which I may invoke at the hearing

My requested orders are well founded in the law, but they are unusual for small claims court because few people know of them and have a need to use them.

Unfortunately, I have to use them because the Defendants in TCPA cases that I bring, in general, are "semi-professionals" at avoiding judgments, these particular Defendants being a perfect example.

Background: Why this case has dragged on for almost 2 years

Because of abusive legal techniques used by the Defendants, this case (and 15 others 2-04-SC-001187 through 2-04-SC-001199, 2-04-SC-001214, 2-04-SC-001215, 2-04-SC-001718) has now dragged on for almost 2 years since I first filed in your court against the Defendants on September 24, 2003.

These techniques used in these cases include, but are not limited to:

- waiting almost 6 months after getting the statement of decision to file a motion to vacate claiming they were never served (the default judgment was mailed to their registered agent on 11/20/03 and they waited until 4/04 to file for a default)
- filing a CCP 170.6 peremptory challenge against Judge Hayden because of alleged bias—simply as a delaying tactic, yet admitting at the hearing that they knew nothing whatsoever about the judge!
- appearing in court almost 1 year after the lawsuit was originally served and 2 years after the FCC cited them for illegal faxing claiming that they were not ready yet to defend their case!
- providing an agent for service who cannot be served (since they gave an address at which the agent for service could never be found)
- using all sorts of techniques to duck service (such as lying)
- filing a 170.3(c)(1) challenge on Commissioner Madden but not citing a single violation of CCP 170.1 that justifies the filing (since there wasn't one)
- moving all their assets and business to a new "successor in interest" company to avoid paying judgments requiring me to waste my time and the court's time to amend all 16 judgments to the new company name
- refusing to comply with court order to return the statement of assets form (SC-133) which constitutes a contempt of court
- refusing to comply with a wage garnishment order--which constitutes a contempt of court
- filing 9 different actions in 6 different courts in an attempt to stay or overturn the judgment
- filing a false statement with the court claiming Herships is an employee and containing a signature that is fabricated

Defendants employ vexatious litigant Howard Herships to counsel them and file papers on their behalf to cause the case to drag on for at least 2 years

By way of background, the Defendants employ Howard Herships to write and file legal briefs on their behalf. Mr. Herships is not an attorney and appears to be practicing law without a license. He is also representing another TCPA defendant in court, Global QA. He is not a W-2 employee, Officer, or Director of the Defendants (or of Global QA).

Mr. Herships was declared to be a vexatious litigant in 2005 by the Court of Appeal (HERSHIPS v. NIEMIER, 2005 Cal. App. Unpub. LEXIS 2201). Herships has boasted to at least one friend of mine that he intends to "tie me up in court for 2 years."

That is how he operates not and he has not changed his modis operandi in more than 15 years! This article was published in June 27, 1990in the Orange County Register:

Bill aims to stop frivolous lawsuits
`Vexatious litigants' bother judges, state

Annoyance was imprinted on nearly every page of the 4th District Court of Appeal's decision.

The three-judge panel turned down Howard Herships' appeal -- the latest in what the judges called an "unflagging" series of lawsuits over the same loan default. And it had some choice words for the San Francisco man.

Herships' "antics have done little more than consume precious judicial resources," Associate Justice Thomas Crosby wrote. He chided Herships, who represented himself, **for dragging out the case for nearly eight years.**

The Santa Ana appellate court decided that in addition to losing the appeal, Herships should pay $2,500 to the defendants. "Perhaps an award of sanctions for a frivolous appeal will finally convince him to stop flogging this moribund steed," Crosby wrote.

Techniques they may use on June 16 to try to delay justice

Here are a few of the techniques they may try at the hearing on my motions so that you can be prepared to deal with them on the spot.

They may try to allow Herships to speak
Herships is a consultant hired to represent the Defendants in court and frustrate any attempts at collection. By law, such people are not permitted to represent the Defendants and you should not allow Mr. Herships to speak. Even if he proves he is a W-2 employee, the law forbids him to speak since he was hired solely to represent them in court per CCP 116.540(b) and (i).

For example, he has been disqualified from appearing for the defendants by Judge Cabrinha twice, by Commissioner Saldivar (who threatened him with sanctions if he ever tried it again), and by Commissioner Ryan.

Herships has testified in Judge Cabrinha's court that he is not an officer, director, or W-2 employee of First Chartered, Chartered Financial, or Katrina Hartwell. Cabrinha also noted that Herships had filed the form in Jimmy Sutton’s cases specifying, under penalty of perjury, that he was a director of First Chartered. Herships' reply was, "I must have made a mistake."

Mr. Herships, it appears, seems to make a lot of mistakes.

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They may try to disqualify you
I believe they have previously filed a CCP 170.6 against you, and also filed a CCP 170.3(c)(1) statement against you because you refused Hartwell's request for yet another continuance when they showed up in court 1 year after the case had been filed (and more than 2 years after their FCC citation) claiming they still were not ready to defend the case!!!

First of all, they cannot file a 170.6 against you because you have already made an appearance in this action. You cannot disqualify a judge post-judgment. That is completely ridiculous. If that were tolerated, every losing defendant would do that.

Secondly, you are responsible for ruling on their 170.3(c)(1) motion against you. As you can see from their statement, they fail to state any qualifying legal grounds under CCP 170.1 on which to base their challenge. They can only challenge you for conflicts listed in the statute and they fail to point out a single one. They don't even allege a conflict that is listed in CCP 170.1!

They may make up a conflict that simply doesn't exist. You are allowed to recuse yourself if the challenge is proper. If it is improper, **then you should not tolerate this abuse of process** or they will just keep doing it over and over again.

As I recall, their motions were never granted. Instead, a different commissioner was substituted at the hearing to avoid the issue (I believe it was Commissioner Ryan).

I do not believe there is a basis for granting any of their disqualification motions and I hope that you will not let them get away with this abuse of process.

I urge you NOT to have a different judge on the date of the hearing. They will simply do a 170.6 on whatever judge appears, making the case drag on another 30 days.

They may try to ask for a continuance due to "a pending writ" in another court
They will undoubtedly claim they have a pending writ and that the current proceeding should be delayed until that writ is acted upon.

Herships is one of California's most famous vexatious litigants. He's not a lawyer. He doesn't have a bar card and as far as I can tell, he never had one.

Howard Herships will always have a pending writ in some court somewhere in the US.
He's filed 9 of them in 6 different courts including courts with absolutely no jurisdiction over this matter. That doesn't seem to bother him at all. He didn't even bother to show up at the hearing in the only hearing he got on his 9 filings. So after he gets denied, he simply changes the writ, re-files the writ, and asks again--over and over again.

Therefore, *this case will be delayed indefinitely if you accept this "we have a pending writ" argument.*

He's filed 9 cases in 6 different courts including the US Supreme Court, and the California Supreme Court (twice) to try to get your decisions overturned.

The good news is your judgments in these TCPA cases against Hartwell have survived review by 6 different courts in 9 different attacks.

The proper approach is to let the Defendants know that **if they ever get a stay**, then this court will have to consider it. But if there is no stay that has been issued by any court, there is no good reason for this case to be delayed.

They may try to avoid contempt by disqualifying the judge
If they don't follow your orders in the courtroom, and you assign it to a different courtroom to hold them in direct contempt, they'll do a CCP 170.6 on the judge. Therefore, if there are 2 judges available to hear this case at the end of their calendars, this will frustrate their abuse of that statute. Other options include issuing an OSC re: contempt on the spot for hearing at DTS, or having the deputy arrest the Defendant under Pen C 166(a)(1) per contempt as defined in CCP 1209(a)(5).

They may try to argue (once again) that the underlying judgments are invalid
The Defendants may bring this up to explain why they should not be compelled to comply with any post-judgment orders in these cases. Defendants should not be allowed to relitigate these cases—essentially attempting an illegal appeal—well beyond the time limits for such litigation and after the cases have been litigated to a final conclusion.

Should we be forced to discuss the issues in these fully-litigated cases, Herships' argument is that the *Lekse* case requires consolidation of separate causes of action. But that is not what the case says. What *Lekse* actually says is pretty simple:

- each missed rent payment is a separate causes of action
- for payments on running accounts and installment payments ONLY, the separate causes of action must be consolidated for amounts due at the time a case is filed due to an ancient legal principle.

This forced consolidation for recurring payments based on a contractual obligation does NOT exist for any other type of cause of action, such as repeated violation of a statutory tort. Forced consolidation is the EXCEPTION, and not the rule.

THAT IS WHY THEY DO NOT CITE ANY CASE LAW FOR ANYTHING OTHER THAN RENT. BECAUSE THERE ISN'T ANY BECAUSE FORCED CONSOLIDATION APPLIES ONLY TO RECURRING CONTRACTUAL PAYMENTS, not to repeated violations of statutory and common law torts.

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The fact is, as you well know since it's been brought up before at the fax.com hearing, the Small Claims Judges Benchbook says explicitly that a plaintiff is NOT required to join separate cases of action (see Section 3.5(d)). And the small claims court cannot force consolidation of these claims on it's own motion, even if it wanted to, since that consolidation would be in excess of its jurisdiction.

I've attached a copy of the relevant part of Lekse showing the narrow limitation to contractual recurring payment cases.

Of course, Herships may claim that the courts are looking at this. And that would certainly be true since Herships keeps bringing it before a court time and time again. Herships will be bringing this issue before the courts until the cows come home. He cannot seem to grasp the simple concept that a recurring contractual payment is the only type of action where a plaintiff must consolidate separate causes of actions. Nor is it likely that he will he ever grasp the concept, no matter how often he is told.

My requests

Assignment Order
I'm requesting an Assignment Order be issued in this case. This is a very standard collection technique, but it is rarely used because few people know of this technique.

The best reference on assignment orders I'm aware of is in Rutter Group Calif Practice Guide: *Enforcing Judgments and Debts* [6:1422 ff].

Another excellent resource is *Debt Collection Practice in Calif* (2nd edition) from CEB. Richard Enkelis is the primary author of that book, and he's also the author of the section on assignment orders beginning on 11.21. He writes in the section "The assignment order may be the strongest tool in the judgment creditor's arsenal." This is indeed true. When enforced via contempt of court, an Assignment Order is an extremely powerful collection technique that is virtually impossible for any debtor (with incoming personal property) to dodge.

Also, unlike other collection techniques, which may require personal service, an Assignment Order doesn't require personal service of the motion or of the order (so long as the obligor has appeared in the action). Therefore, debtors who are adept at dodging personal service (such as for an OEX or OSC), can't avoid an assignment order.

I've been using Richard as a legal consultant for more than a year now and consulted with him about using assignment orders against any and all income that a corporation would receive. He concurred that such an order is legal since the statute only gives

examples of types of assignments, not an exhaustive list. I had Mr. Enkelis review and approve the proposed Assignment Order.

I've also enclosed a typical Memo of Points and Authorities for the issuance of an Assignment Order (from the Rutter Group book) as well as the proposed Order (again, drafted from the example in the Rutter Group book).

Vexatious litigant motion
Hartwell, under Herships' guidance, has filed 9 different actions in 6 different courts in an attempt to re-litigate a final determination against her. Therefore, she meets the definition of a vexatious litigant under CCP 391(b)(2). Note that according to the statute, there is no requirement that the actions filed be identical. As long as all 9 actions attempted to re-open the same final litigation, that meets the definition.

There is nothing to keep the small claims court from declaring Hartwell a vexatious litigant under CCP 391.7(a) since I made a noticed motion to that effect citing the 9 attempts.

It is also pretty clear that the small claims court has the power to enter such a determination since it is authorized by the statute that any court can make such a determination.

Indeed, when Judge Cabrinha examined the issue based on evidence I filed many months ago, he did NOT say that the small claims court lacked the jurisdiction to make such a determination. In fact, he went on to declare, **based on the evidence filed at that time (only 4 cases)**, that she was not. He wouldn't have made that statement if the small claims court didn't have jurisdiction to have made it.

I simply ask this court to re-evaluate the new evidence today, now that there are now a total **NINE** attempts to re-litigate a final determination against her.

Motion to compel completion of the SC-133 Statement of Assets form
I'd like the court to ask that the Defendants (Hartwell and Chartered Financial) submit to the court an honest and complete statement of assets form as required by court order and statute (CCP 116.830(b) and (d)).

If they don't comply on the spot, then IF SHE PROMISES TO APPEAR, it is reasonable for you to CONTINUE this case for one court day to comply with the order since she's known about the requirement for months and shouldn't need much time to fill out a form that is slightly over a page long.

If she returns a complete and honest form, I will ask you to issue a turnover order at that time. Such an order may be done on an ex parte basis, and I have informed the Defendants of my intent to ask the court for this via phone, email, and also this letter as well.

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If she returns empty handed, I'd ask that she be held in contempt and that an OSC re: contempt be issued on the spot or that the court allow substituted service for serving the OSC (this is allowed in this case; please see the attached memo of points and authorities).

If she does not appear after promising to appear, then I will request that the court issue a bench warrant for her arrest and that the bail to be set at the total outstanding judgments which is now over $34,000 and that the bail be applied to satisfaction of the judgments. This is within your authority as there is no restriction on the bail amount of a bench warrant.

I am sorry to have to ask you to do this, but as you know from this case, Ms. Hartwell has a great deal of difficulty responding to any government authority, e.g., when cited by the FCC for junk faxing, she just ignored them and continued junk faxing anyway.

She has also put our legal system through a lot of unnecessary hoops, filing a stack of documents 3 inches high with 6 different courts. I now have 3 large binders of post judgment legal documents for this case alone.

Not only is she not complying with valid court orders (such as wage garnishment and returning the statement of assets), but she is wasting the courts' valuable time and this type of behavior should not be tolerated and needs to be stopped.

Sincerely yours,

Steven T. Kirsch

Attachments:

- Lekse decision and other decisions related to causes of action
- Proposed Assignment Order
- Proposed Vexatious Litigant Order
- Proposed Turnover Order
- Memo of points and authorities relating to post-judment orders

Cc:
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