



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re

DANIEL SHERIDAN,

Debtor.

BYRON Z. MOLDO, CHAPTER 7
TRUSTEE,

Plaintiff,

vs.

STEPHEN MONTIETH ALBERS, et. al.,

Defendants.

CASE NO. SV 99-17689 KT

CHAPTER 7

ADV. NO. AP 02-01253 KT

**MEMORANDUM ON APPLICATION
FOR ORDER TO SHOW CAUSE RE
CONTEMPT FOR FAILURE TO
COMPLY WITH COURT ORDER TO
COMPEL PRODUCTION OF
DOCUMENTS AND ORDER SETTING
MATTER FOR HEARING**

DATE: December 14, 2006

TIME: 1:00 p.m.

PLACE: Courtroom 301
21041 Burbank Blvd.
Woodland Hills, CA

On March 15, 2005, Byron Z. Moldo, Chapter 7 Trustee (the "Trustee"), and the plaintiff in Adversary Proceeding No. 02-01253 filed an Application for Order to Show Cause re Contempt for Failure to Comply with Order to Compel Production of Documents (the "Application for OSC") seeking monetary and terminating sanctions against defendant Stephen Albers ("Albers"). Albers filed an opposition. To date, no hearing has been held on this matter

and no OSC has been issued by the court.

The Trustee seeks relief on five grounds: (1) failure to comply with court order to produce a log of documents of Sheridan Music Group, Inc. ("SMG"); (2) failure to produce approximately 2,240 SMG related documents; (3) failure to voluntarily turnover approximately 4000 documents held by SMG accountants; (4) a pattern of discovery abuse; and (5) injury to the estate caused by a pattern of discovery abuse. Albers' responses to these allegations are discussed below.

1. Document Log

On April 15, 2003, Judge Greenwald entered an order on a previous motion brought by the Trustee to compel Albers to produce documents. The order granted the Trustee's motion with regard to document request numbers 5, 6, 8, 9, 10, 26, 27, 35, 36, 37, 38, and 47. In addition, Albers was ordered "*to identify, as to each category of request, (a) how many documents exist; (b) the location of the documents; (c) the location where the documents will be produced; and (d) when the documents will be produced.*"

In his motion of March 2005, the Trustee states that Albers has not produced the document log identifying approximately 12,000 documents which the Trustee refers to as the "Tennessee" documents because they were in the custody of SMG's counsel in Tennessee. The Trustee attached six letters from his counsel to Albers' counsel dated from April 2003 to December 2004 requesting the same.

Albers responds that "an index of the pertinent SMG files," which the court presumes is Albers' response to the requirement for a document log as ordered by Judge Greenwald, was sent to the Trustee's special litigation counsel on April 3, 2003, the day after the hearing at which Judge Greenwald ordered production of the document log. Albers goes on to say that the Trustee "neither complained about the index nor did anything to make arrangements to obtain the documents."

A review of a letter dated April 3, 2003, from Albers' counsel to the Trustee's special litigation counsel discloses that the "index of the pertinent SMG files" was no more than a list of files and their dimensions, e.g., 1.5" and 4.0". There is no certification that anyone has actually looked in the files and verified the contents in order to insure that each document contained therein is actually responsive to the document request. There is no indication as to the category or categories to which the documents are responsive. It is not accurate to say that the Trustee did not complain about the "list" as the Trustee did just that in a letter to Ms. Rodriguez and her colleague, Mr. Novian, dated April 7, 2003.

Albers' reply to the Trustee's request for an OSC contains a "new" list (Exhibit CC). This list is more in line with what one might expect for reasonable compliance with the court's order of April 2003 in that it contains more informative detail about the content of the files. Nonetheless, there is no indication except what might be drawn by inference that anyone has

actually verified the contents and takes responsibility for the accuracy of the list.

The court notes that neither list claims any privileges as to the documents referenced thereon and, therefore, assumes that none will be made. However, at the hearing on this matter, the court will inquire whether the privilege log identified as Exhibit 10 to Albers' Motion for Issuance of Orders (Docket #132 in Adv. 02-01062; see also order entered on April 18, 2005) pertains to the documents at issue herein.

At the hearing on this matter, the court further will inquire whether the list remains incomplete and, if so, what information is not provided. Access to the documents in the possession of Albers or in SMG's possession in Nashville, Tennessee, will be addressed at the hearing. In any event, the court will require an express statement under penalty of perjury from Albers, for himself and for SMG, that he has produced all documents in his possession, custody, or control that are responsive to any document request by the Trustee, except those as to which a privilege has been claimed. Such statement must further reference any privilege log.

2. 2,240 SMG Related Documents

The Trustee asserts that Albers and his counsel have actively concealed over 2,240 documents in addition to the approximate 12,000 Tennessee documents. This accusation is based on a statement by Albers' counsel Susan Rodriguez in a declaration filed in support of Albers' motion to remove the Trustee from the case in which she declared that she had produced 4,760 out of over 7,000 pages received from her client, Albers, in early November 2004.

Ms. Rodriguez testifies in her declaration in response to the Trustee's request for an OSC that "[a]ll responsive documents in Albers' possession, custody and control were produced." She also states, in the argument portion of the response, that Albers so testified in a declaration submitted in support of a motion to dismiss filed and determined earlier in the case.

Presumably, Ms. Rodriguez is willing to testify to this "fact" based on her confidence in her client since it is unlikely that she has any personal knowledge. What Ms. Rodriguez can reliably say is that she examined each and every one of the "2,240 pages of unknown and unidentified documents" in question and determined that none are responsive to any document request served by the Trustee on Albers. If this is what Ms. Rodriguez means, she does not specifically so state. However, at a minimum, it is the court's view that she has made such a representation under penalty of perjury absent timely refutation or clarification otherwise.

The court has attempted to verify the content of the Albers' declaration to which counsel refers as containing Albers' statement that "all responsive documents in [Albers'] possession, custody and control have been produced." Document #132 on the docket for Adv. 02-01062 appears to be the one in question. Albers' declaration incorporated therein gives a lot of relevant detail but does not actually state that he has produced all documents in his possession, custody and control which are responsive to any document request served by the Trustee. The court is unwilling to draw such an inference, especially since Albers has not foreclosed the possibility

that other responsive documents might be kept at some location other than his rented home in Alabama.

The court notes that Albers' declaration further states: "At no time did I ever intend to waive the attorney-client privilege or work-product privilege." If Albers' counsel declined to produce any documents on the grounds of privilege, such counsel is required to produce a privilege log. If no privilege log has been given to the Trustee, then Albers' counsel has effectively represented that no documents responsive to the production request were found and omitted. If Albers' counsel disagrees, the court should be informed at the hearing on this matter.

3. 4,000 SMG Documents with Accountants

The Trustee states that he first learned, pursuant to an email from SMG lawyers on December 7, 2004, that SMG accountants in Mobile, Alabama, were in possession of 4000 SMG financial documents. The Trustee states that this revelation is inconsistent with previous assertions by Albers that Albers had produced all documents related to SMG.

The Trustee asserts that Albers' failure to disclose the documents with SMG's accountants was an attempt to impede the Trustee's discovery of essential information about SMG's financial condition and history from the time Albers took over the company. The Trustee further argues that Albers should have voluntarily turned over copies of the documents to the Trustee. As a result of Albers' failure to do so, the Trustee incurred considerable expense traveling to Alabama and copying the documents there. Counsel representing both SMG and SMG's accountants required the production to be done on site, thereby adding to the Trustee's expense.

The Trustee further asserts that SMG tax returns produced by Albers were incomplete and unsigned. The Trustee states that SMG's counsel agreed to produce complete copies, but none had been produced as of the date of the Trustee's motion, March 2005.

In response, Albers states that during a period in which discovery was stayed, he loaned SMG \$20,000 to have its tax returns prepared and then "forwarded all returns and amended returns to the Trustee...to facilitate settlement discussions."

The court proposes to order Albers to demand from SMG and to produce to the Trustee complete tax returns for SMG for the years 1999 through 2005 by a date to be determined at the hearing. If said returns bear no signatures, then Albers is ordered to produce a certification that such tax returns are accurate copies of returns filed with the taxing authorities.

4. Alleged Pattern of Discovery Abuse

The Trustee accuses Albers of a pattern of discovery abuse based not only on the specific instances set out above but also on (1) the necessity to obtain an order in March 2003 from the

Bankruptcy Court compelling Albers' attendance at a deposition in California; (2) the necessity to obtain an order in January 2005 in a related matter in Superior Court compelling Albers' attendance at a deposition in California; (3) Albers' baseless assertions of an inability to travel because of a back injury which were rejected in both the Bankruptcy Court and in the Superior Court; (4) Albers' failure to appear at a continued deposition; (5) redaction of all relevant information from SMG's attorneys' fee statements; and (6) production of numerous irrelevant documents, including cooking recipes and print outs of computer self-tests, which have needlessly multiplied the task of review. The Trustee states that it should not take years, multiple depositions, multiple subpoenas and motions to compel as well as countless meet and confer sessions to obtain relevant information about one small company controlled by one man, Albers.

Albers responds, among other things, that he has produced thousands of documents and appeared for his deposition on four occasions. Albers further responds with a renewal of his argument that the Trustee lacks standing to pursue any claims against Albers.

As to the first response, the court notes that this inquiry is not about whether Albers has produced documents or appeared at deposition. Instead, it is about compliance with his obligations with regard to discovery, including diligence, timeliness, completeness, and verification.

As to the second response, the court notes that a party's belief that the other side's position is without basis in law or fact does not relieve that person of his or her obligation to comply with rules and orders of the court.

The court will further consider the evidence on each side of the dispute raised by the Trustee's motion. More specifically, the court will focus on the requests of the Trustee made in compliance with the Federal Rules of Civil Procedure (the "FRCP"), the responses to such requests as evidenced by writings and declarations under penalty of perjury, and whether responses are specific and detailed enough to bind Albers to any assertions of compliance. The court will then look at the timeliness of compliance, taking into account the requirements under the FRCP, stipulations to extend time, stays on discovery, and grounds for excusable delay. The court anticipates requesting a chronological chart (as opposed to a narrative) to assist the court in this inquiry.

5. Settlement of Certain Actions and Legal Defenses

After the instant Application and Response were filed, the court approved a settlement between and among Albers, the Debtor, and SMG (to the extent that SMG may settle without the participation of the Trustee) of certain adversary proceedings to which the instant discovery pertained. This settlement provides for the dismissal of the following: Adv. 02-01062; Adv. 02-01063; Adv. 03-01348. The court will inquire about the impact of this settlement on the Trustee's claims.

Concurrent with the entry of this memorandum, a memorandum on Albers' motion to

CERTIFICATE OF MAILING

I hereby certify that copies of the **MEMORANDUM ON APPLICATION FOR ORDER TO SHOW CAUSE RE CONTEMPT FOR FAILURE TO COMPLY WITH COURT ORDER TO COMPEL PRODUCTION OF DOCUMENTS AND ORDER SETTING MATTER FOR HEARING** were mailed to the following parties in interest:

DATED: **NOV 13 2006**
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CLERK OF COURT

By: 
Deputy Clerk

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