

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

IN THE MATTER OF THE )  
REHABILITATION OF INDEMNITY ) C.A. No. 8601-VCL  
INSURANCE CORPORATION, RRG. )

**MEMORANDUM OPINION**

Date Submitted: December 5, 2013

Date Decided: January 2, 2014

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**LASTER, Vice Chancellor.**

Indemnity Insurance Corporation, RRG (“Indemnity”) has filed a motion to hold Jeffrey B. Cohen in contempt of an order entered on November 1, 2013 (the “November 1 Order”) and to sanction him for his violations. The motion is granted.

## **I. FACTUAL BACKGROUND**

The facts for purposes of Indemnity’s motion were established at an evidentiary hearing held on December 5, 2013. During the hearing, the parties introduced documentary evidence and presented live witness testimony. In addition, the court has held three earlier evidentiary hearings in this matter on other motions. At two of the earlier hearings, the parties introduced documentary evidence and presented live witness testimony. At the third, which was held on an emergency basis, Indemnity submitted documentary evidence and provided witness testimony by affidavit, brought the affiant witnesses to the hearing, and was prepared to present their testimony live, but the court opted to dispense with live testimony because of the expedited nature of the hearing. In connection with each of these evidentiary hearings, the court has made factual findings.

### **A. The Seizure Petition**

On May 30, 2013, the Insurance Commissioner of the State of Delaware (the “Commissioner”) filed a Verified Petition for Entry of Confidential Seizure and Injunction Order (the “Seizure Petition”). The Commissioner has the power to file such a petition if the Commissioner believes (i) there exists “[a]ny ground that would justify a court order for a formal delinquency proceeding against an insurer” and (ii) “that the interests of policyholders, creditors or the public will be endangered by delay.” 18 *Del.*

C. § 5943(a). The governing statute authorizes this court to issue an order “forthwith, ex parte and without a hearing.” *Id.* The resulting order may authorize the Commissioner

to take possession and control of all or a part of the property, books, accounts, documents and other records of an insurer and of the premises occupied by it for the transaction of its business, and until further order of the Court enjoin the insurer and its officers, managers, agents and employees from disposition of its property and from transaction of its business except with the written consent of the Commissioner.

*Id.* The statute provides that an insurer subject to an ex parte order “may petition the Court at any time after the issuance of such order for a hearing and review of the order, and the Court shall grant such a hearing and review within 10 days of the filing of such petition.” *Id.* § 5943(d).

The Seizure Petition was supported by documentary evidence and averred that Indemnity was in a precarious financial position due to multiple acts of fraud by Cohen. After reviewing the Seizure Petition, the court entered an order granting the relief requested and authorizing the Commissioner to take control of the business and assets of Indemnity. Dkt. 4 (the “Seizure Order”).

On July 5, 2013, Indemnity petitioned for review of the Seizure Order. As required by statute, the court scheduled a hearing on the petition for July 15. The court also held a telephonic status conference with the parties on July 10. After that status conference, the parties reached an agreement to defer the July 15 hearing.

## **B. The Liquidation Petition**

Using the authority conferred by the Seizure Order, the Commissioner conducted a preliminary examination of Indemnity. On July 26, 2013, the Commissioner filed a

Verified Petition for Entry of Liquidation and Injunction Order (the “Liquidation Petition”), which was supported by extensive documentary evidence. The Liquidation Petition expanded on the allegations in the Seizure Petition and sought authority to liquidate Indemnity in light of (i) acts of fraud by Cohen and (ii) Indemnity’s unsound financial condition. Indemnity’s counsel subsequently represented that Indemnity does not have any basis to dispute the truth of the averments in the Liquidation Petition. Dkt. 73 at 10.

### **1. The Susquehanna Bank Fraud**

The Liquidation Petition described in detail an effort by Cohen to defraud the Commissioner using false documents purporting to be from Susquehanna Bank. As part of their investigation into Indemnity’s safety and soundness, the Commissioner’s investigators questioned Cohen about Indemnity’s assets. In response to these inquiries, Cohen represented that Indemnity held \$5.1 million in unencumbered cash in an account at Susquehanna Bank. Cohen further represented that he had provided that money to Indemnity as a capital contribution.

To confirm the account balance the investigators asked Cohen for a contact at Susquehanna Bank. Cohen initially provided the investigators with an email address purportedly belonging to a Susquehanna Bank employee named Nicole Bliss. When the investigators pressed Cohen for a physical address, he asked them to use the email address on the grounds that Susquehanna Bank charged an exorbitant fee for providing confirmations via physical mail. When the investigators insisted on a physical address, Cohen finally gave them a P.O. Box that purportedly belonged to Susquehanna Bank.

The investigators sent a confirmation form to the P.O. Box that Cohen provided, and they received a fax confirming the account balance and its ownership. To follow up on the confirmation, the investigators tried to call Bliss at the phone number listed on the fax. That number, however, connected to a voicemail box for “James Berg of Susquehanna.” Confused, the investigators looked up Bliss’s phone number on the internet and contacted her there. Bliss denied having seen the form that the investigators had sent to the P.O. Box, and she asked them to resend the form by email. The investigators sent the form to the email address that Cohen had provided for Bliss.

The investigators did not receive a response to the email sent to Bliss at the address Cohen had provided. They eventually followed up with Bliss by phone, and she told them that she had not received the email. She provided the investigators with her correct email address, which differed from the address that Cohen had provided. The investigators sent a copy of the form to the correct email address, and Bliss confirmed that she had never seen the form and had certainly not completed it or faxed it to the investigators.

Further investigation revealed the following:

- The P.O. Box that Cohen claimed belonged to Susquehanna Bank was registered to Cohen.
- The fax number that transmitted the fax to the investigators did not belong to Susquehanna Bank.
- The signature on the fax was not Bliss’s, and she did not authorize anyone to sign her name.
- There is no “James Berg” at Susquehanna Bank.

- The phone number listed for Bliss on the fax that the investigators received is a VoIP number that does not belong to Susquehanna Bank and whose true owner is unknown.
- Susquehanna Bank does not charge a fee for account confirmations via physical mail.
- The domain name for the email address that Cohen provided does not belong to Susquehanna Bank. It was registered anonymously by Domains by Proxy, LLC, a company that Cohen is known to have used in the past.

Contrary to what Cohen had represented to the investigators, the cash in the Susquehanna Bank account was not unencumbered, and Cohen was not the source of the money. The cash actually originated from Susquehanna Bank itself, which loaned it to RB Entertainment Ventures, LLC (“RB Entertainment”), a company controlled by Cohen. As a condition of that loan, RB Entertainment had to provide the funds to Indemnity as a loan or capital contribution, and Indemnity had to deposit the money back in Susquehanna Bank as security for the loan to RB Entertainment. RB Entertainment and Indemnity thus paid loan origination fees and interest so that Indemnity could show an account balance of approximately \$5 million, even though Indemnity could not use the cash and had to keep it at Susquehanna Bank as security for the loan.

Although not yet fully developed in the record, the investigators uncovered evidence suggesting that Cohen previously had engaged in a similar act of fraud with respect to Indemnity’s account at RBC. On that prior occasion, Cohen also provided

investigators with a fake email address from a domain registered anonymously by Domains by Proxy, LLC.<sup>1</sup>

## **2. Solvency Issues**

The Commissioner's investigation revealed other solvency problems at Indemnity that went beyond the lack of economic substance to the \$5.1 million in cash that Indemnity claimed to hold at Susquehanna Bank. In its filings with the Commissioner, Indemnity claimed as assets over \$21 million in receivables from IDG Companies, LLC ("IDG"), another entity controlled by Cohen. Indemnity booked the receivables in lieu of actual payment of over \$23 million in premiums that IDG failed to remit to Indemnity. Delaware law requires unremitted premiums to be held in a fiduciary account, but IDG did not have a fiduciary account for the premiums. In fact, the Commissioner's investigation revealed that IDG did not appear to have the premiums at all. At the time of the investigation, IDG had only \$3.3 million in assets and had \$24.4 million in liabilities, including the \$21 million owed to Indemnity.

Given IDG's financial position, Indemnity had no reasonable expectation that the receivables would be fully repaid. Indeed, even without the money owed to Indemnity,

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<sup>1</sup> Cohen represented to the Commissioner's investigators that Susquehanna Bank was "Bank 4" on Indemnity's financial statements. Indemnity's third quarter 2012 financial statements claimed that it had deposits at "Bank 4" of \$5,100,000. Dkt. 21 Ex. 3. Its 2012 annual statement revised that amount to \$5,097,276. Dkt. 21 Ex. 8. The fraudulent bank confirmation from Susquehanna Bank stated that the account balance was exactly \$5,100,000. Dkt. 21 Ex. 9. According to Susquehanna Bank, the actual amount in the account at the end of 2012 was \$5,001,041.09. Dkt. 21 Ex. 15. Further investigation revealed that "Bank 4" actually referred to Royal Bank of Canada – Barbados ("RBC"), not Susquehanna Bank. These facts suggest that Cohen may have misled the investigators about the identity of "Bank 4" in an attempt to hide similar fraudulent conduct involving the RBC account.

IDG's net assets were effectively zero. Yet Indemnity was carrying the receivables from IDG at full face value on its financial statements.

The Commissioner's investigation revealed other material misstatements on Indemnity's financial statements, including overstated account balances and unsubstantiated reinsurance claims. Adjusted for these items, Indemnity's total policyholder surplus was negative \$9 million, an amount that contrasts sharply with the \$24.5 million that Indemnity had claimed on its financial statements.

Delaware law requires a captive risk retention group to hold a minimum of \$1 million in policyholder surplus. 18 *Del. C.* § 6905(a)(5). Because of the volume of Indemnity's business, the Commissioner would require Indemnity to maintain a substantially greater surplus. *See* 18 *Del. C.* § 6905(b) (giving Commissioner the authority to require additional surplus); Dkt. 20 ¶ 126 (statement by Commissioner that Indemnity's volume was sufficient to require a surplus "greatly in excess of \$1,000,000"). The effect of Cohen's fraud was to mask a shortfall in policyholder surplus of at least \$10 million.

### **C. The Court's Ruling On The Liquidation Petition**

Based on the averments in the Liquidation Petition and supporting documentary evidence, the court granted an order directing Indemnity to show cause why it (i) was not insolvent and in unsound condition and (ii) should not be liquidated. The parties agreed to a schedule leading up to a hearing on the order to show cause, and they agreed to extend the Seizure Order for another ninety days pending the outcome of the hearing.

During this period, the Commissioner continued its investigation and uncovered evidence of additional fraud by Cohen. Although Indemnity was not authorized to issue policies in excess of \$6 million, the Commissioner identified a \$35 million policy that Indemnity issued to Light Group, LLC. Attached to the policy was an endorsement purporting to provide a “cut through” to SCOR, a reinsurance company. The Commissioner’s investigation has revealed that (i) SCOR has no record of issuing the “cut through;” (ii) so significant a “cut through” would certainly have been documented; (iii) SCOR had never issued a “cut through” to Indemnity for any policy; (iv) the reference number on the endorsement was not issued by SCOR; and (v) Indemnity has never paid a reinsurance premium on the endorsement. When presented with this evidence, the board of directors of Indemnity (the “Board”) concluded that the endorsement was forged.

**D. Cohen Resigns.**

On August 5, 2013, Cohen resigned from his position as Chairman of the Board, and the Board removed him from all officer positions with Indemnity. As a result, after August 5, Cohen’s only connection to Indemnity was as the owner of RB Entertainment, an entity that purports to own 99% of Indemnity’s equity by virtue of having been issued a zero-dollar insurance policy by Indemnity. The remaining 1% of Indemnity’s equity is owned by the International Association of Entertainment Businesses, which is an association comprising all of Indemnity’s other policyholders. Those other policyholders have been issued and paid premiums for insurance policies that provide actual, positive-dollar coverage. The court has assumed during the course of the proceedings and

continues to assume for purposes of this decision that RB Entertainment owns 99% of Indemnity's equity.

On August 12, 2012, Cohen caused RB Entertainment to move to intervene in these proceedings and requested an expedited hearing. The parties briefed the motion, and the court heard argument on August 22. Based on the evidence in the record, the arguments made at the hearing, and pertinent authorities, the court denied the motion. The court held that as a stockholder of Indemnity, RB Entertainment had no grounds to intervene as of right and that permissive intervention was unwarranted at the time. The court noted that RB Entertainment could renew its petition to intervene if the Commissioner sought a remedy involving Indemnity that would inflict on RB Entertainment in its stockholder capacity a specific and unique injury not shared with other stockholders, such as a request to convert RB Entertainment's equity into non-voting stock or place it in a voting trust.

**E. The Emergency Application To Modify The Seizure Order**

On September 9, 2013, Indemnity sought an expedited modification of the Seizure Order on the grounds that Cohen was interfering actively with Indemnity and the efforts of the Commissioner. Due to the summary nature of an insurance liquidation and the exigent nature of the motion, the court heard the motion the following day. Counsel for both Indemnity and the Commissioner participated in the hearing, and they provided documentary evidence and presented testimony by affidavit. The affiants were present and available to testify, but the court dispensed with live testimony in the interest of time.

The evidence presented showed that Cohen had access to Indemnity's IT system and was monitoring the email accounts of Indemnity's Acting President and other Indemnity employees on an on-going basis. Cohen also had attempted to limit the Commissioner's ability to access Indemnity's IT systems by instructing Jorge Cuadra, an Indemnity employee, not to provide anyone with access to the servers that housed Indemnity's data. Cohen threatened Cuadra with personal liability if he did not comply with Cohen's instructions. Cohen used his access privileges to send a series of emails to all Indemnity employees in which he disparaged interim management, accused them of violating the law, and urged Indemnity employees to reach out to him personally.

Cohen also targeted Indemnity's business relationships. He sent an email to a large number of insurance brokers who did business with Indemnity claiming that he had been wrongfully forced out and that interim management had no experience operating an insurance company. In addition, someone improperly accessed the email account of Amy Ticer, an Indemnity employee, and sent an email to AM Best, a rating agency that covers Indemnity. The email attached a copy of the Maryland seizure order, which was confidential. The email was sent just before David Koehler, an Indemnity executive, was due to meet with AM Best. While the identity of the sender could not be conclusively established, the circumstantial evidence strongly suggested that it was Cohen.

After holding the emergency hearing and considering the evidence presented, the court amended the Seizure Order to clarify that Cohen was prohibited from accessing Indemnity's IT systems and from communicating with Indemnity's employees and business associates. Dkt. 85 (the "Amended Seizure Order"). The Amended Seizure

Order did not impose any additional restrictions on Cohen that were not already present under the Seizure Order. Paragraph 2 of the Seizure Order had granted the Commissioner title and control over all of Indemnity's assets, wherever located.

Paragraph 2 stated:

The Commissioner is hereby directed to immediately take exclusive possession and control of, and is hereby vested with all right, title and interest in, of or to, all of the property of [Indemnity] including, without limitation, all of [Indemnity's] assets, contracts, rights of action, books, records, bank accounts, certificates of deposits [sic], collateral and rights to collateral of [Indemnity], securities or other funds, and all real or personal property of any nature of [Indemnity] including, without limitation, all proceeds of or accessions to any of the foregoing, wherever located, in the possession, custody or control of [Indemnity] or any trustee, bailee, or any agent acting for or on behalf of [Indemnity] (collectively, the "Assets").

Seizure Order ¶ 2. The Seizure Order further provided that "[a]ll persons or entities that have notice of these proceedings or of this Seizure and Injunction Order, are hereby prohibited from interfering with the Commissioner and her authorized agents either in their possession and control of the Assets or in the discharge of their duties hereunder."

*Id.* ¶ 9.

Assuming it was not already clear, the Amended Seizure Order confirmed that the Assets covered by the Seizure Order included intangible assets like Indemnity's information systems and electronic records and that Cohen could not access those intangible assets. Amended Seizure Order ¶ 1. The Amended Seizure Order also confirmed that the Seizure Order prevented Cohen from communicating with Indemnity employees and third parties about the Seizure Order and Indemnity's business. *Id.* ¶ 2.

Although the evidence presented in connection with the motion indicated Cohen had violated the Seizure Order, the court did not impose any sanctions on Cohen at that time. Instead, the court entered an order requiring Cohen to show cause why he had not violated the Seizure Order.

**F. Cohen Continues To Interfere With The Commissioner And Indemnity.**

Less than an hour after the Amended Seizure Order was docketed, Cohen met with an Indemnity employee who provided him with a surreptitious recording of an all-hands meeting held that day. Cohen also sent a text to an Indemnity board member indicating that he had obtained the recording and would bring litigation.

On September 12, 2013, Indemnity moved for sanctions based on this additional misconduct. The next day, the court scheduled a hearing for September 24 at which Cohen would be able to present evidence and argument with respect to both the court's order to show cause and Indemnity's motion for sanctions. The court also established a briefing schedule so that Cohen would be able to respond in writing to the allegations against him.

Mere hours after the court scheduled that hearing, Cohen attempted to liquidate investments held in deferred compensation accounts for the benefit of certain Indemnity employees. Indemnity and the Commissioner prevented the accounts held for the benefit of Indemnity's then-current employees from being liquidated, but Cohen successfully liquidated the investments in an account held for a former Indemnity employee.

Cohen also tried to interfere with Indemnity's operations by shutting down Indemnity's utilities. He contacted Verizon and asked them to shut off Indemnity's

phone service, telling them that Indemnity had “moved.” Cohen asked that the shut-off be scheduled for a date after the September 24 hearing, but Verizon disconnected Indemnity’s phone service on September 19. Verizon informed Indemnity that it could not transfer the account into Indemnity’s name without Cohen’s consent, which he refused to provide. Cohen also tried to shut off Indemnity’s electricity, but Indemnity’s accounts payable department detected those efforts and was able to prevent Indemnity’s electrical service from being disrupted.

### **G. The September 24 Hearing**

On September 24, 2013, the court held an evidentiary hearing on the order to show cause and the motion for sanctions. In his written submission in advance of the hearing, Cohen defended his conduct on the grounds that many assets that appeared to belong to Indemnity in fact belonged to other companies that Cohen owned, such as IDG. Those assets, Cohen argued, were therefore not subject to the Seizure Order or the Amended Seizure Order. A key issue for the September 24 hearing, therefore, was the extent to which Indemnity owned particular assets and was operationally separate from Cohen’s other companies. As the founder and owner of the relevant entities, Cohen was uniquely situated to address these matters. Moreover, it was Cohen (not Indemnity, the Commissioner, or the court) who raised the other entities in an effort to justify his actions. Yet despite these facts, and even though he was facing civil contempt, Cohen chose not to appear in person at the September 24 hearing. Instead, he sent his Delaware counsel and a Maryland lawyer who had long served as Indemnity’s outside counsel. Neither proved able to answer questions about the relationship between Indemnity and

the other companies that Cohen controlled. Nor did they respond effectively to the evidence presented by Indemnity regarding interference with its operations and the efforts of the Commissioner.

Evidence at the hearing established that Cohen had violated multiple provisions of the Seizure Order and the Amended Seizure Order. The court made oral rulings at the close of the hearing, then formally implemented them by order dated September 25, 2013. *See* Dkt. 161 (the “September 25 Order”).

In an effort to establish a coercive civil sanction that would cause Cohen to comply with the court’s orders in the future, the court required Cohen to post security in the amount of \$100,000 with the Register in Chancery. *Id.* ¶ 4. If Cohen complied with the court’s orders going forward, he would receive his \$100,000 back in full at the end of the case. If he did not, he would forfeit it. In setting the amount of the security at \$100,000, the court took into account that Cohen had received an annual salary from Indemnity of more than \$1 million and that his total compensation was as much as twice that amount. In light of Cohen’s wealth, the court believed that a lesser amount would not provide a sufficient incentive for Cohen to comply with the court’s orders. At the hearing, Cohen’s counsel did not object to the size of the security or dispute its proportionality in light of Cohen’s wealth.

The court directed that Cohen comply with paragraph 2 of the Seizure Order by taking the necessary steps to place Indemnity’s utilities in its name. *Id.* ¶ 5. As a coercive sanction, the court directed that if Cohen had not made a good faith effort to do so by September 27, 2013, a fine of \$10,000 per day would be imposed on him starting

on September 30. *Id.* The court took into account Cohen’s wealth in setting the amount of this coercive sanction. The court also authorized discovery into Cohen’s net worth so that more refined sanctions could be imposed, if necessary, in the future. *Id.* ¶ 3.

The court directed that discovery proceed into the separateness of Indemnity from the other Cohen-controlled entities so that Indemnity’s assets could be identified and any separate assets of those entities made available to Cohen. *Id.* ¶ 2. Pending the outcome of that process, and because Cohen had repeatedly used IDG to interfere with the Commissioner and Indemnity, the court directed that Cohen “shall not, directly or indirectly, exercise any control over IDG.” *Id.* ¶ 7. In making this ruling, the court considered the absence of evidence indicating that IDG was anything other than a corporate shell.

The court directed that all communications between Cohen and Indemnity, its employees, and its officers and directors take place through counsel. *Id.* ¶ 6. The court imposed this restriction in an effort to avoid further allegations of interference and because of the volatile nature of the relationship between Cohen and Indemnity’s management.

#### **H. The Third Motion For Sanctions**

Cohen initially complied with the court’s directives. He posted the \$100,000 in security without difficulty, and he cooperated in the transfer of Indemnity’s utilities. His compliance, however, was short-lived.

On October 21, 2013, Indemnity filed a new motion for sanctions outlining additional misconduct by Cohen. First, Cohen had refused to return to Indemnity three

luxury vehicles (a 2011 Aston Martin, a 2012 Range Rover, and a 2013 Ford Mustang Shelby GT) that were titled in Indemnity's name. The vehicles were assets of Indemnity, and the Seizure Order required that they be returned to Indemnity. Nonetheless, Cohen refused to return them unless Indemnity paid him \$30 million that he claimed was due under his employment agreement.

Second, Cohen caused IDG and other companies he controlled to file suit against Indemnity and Indemnity employees. He also filed two lawsuits *pro se* against similar defendants. All three lawsuits were filed in the Maryland state courts. Each filing contravened the Seizure Order, which required that all legal issues related to the seizure be litigated in the Court of Chancery. Moreover, the complaints attached pages of sealed transcripts from these proceedings. The Maryland complaints were not properly filed under seal and, as a result, the transcripts were available to the public. Information in his complaints indicated that Cohen continued to have contact with Indemnity employees.

After reviewing the motion, the court scheduled a hearing for November 1, 2013, to enable Cohen to present evidence in his defense. That hearing lasted for over three hours. Unlike the earlier hearing, Cohen appeared personally with his counsel. Through counsel, Cohen presented evidence to explain why he should not be sanctioned. Cohen also took the stand and testified. He admitted that he had not returned the vehicles, even though they were titled in Indemnity's name. He admitted that he filed the Maryland actions despite knowing of the restrictions in the Seizure Order. He admitted that he had contact with Indemnity employees, even though he knew that he was forbidden from doing so. He pointed out that the court had required all communications between Cohen

and Indemnity to go through counsel, and he claimed that because he had filed his Maryland action *pro se*, he thereby became his own counsel and was therefore permitted to communicate directly with Indemnity and its employees.

During the hearing, Indemnity introduced additional evidence regarding Cohen's net worth. Indemnity presented documentation establishing that Cohen had received cash compensation in excess of \$1 million in each of the past four years. Indemnity also introduced a set of personal financial statements, prepared in June 2013 for the benefit of Indemnity's auditors, in which Cohen represented that he had net assets in excess of \$43 million. According to the financial statements, setting aside his interests in Indemnity and his other companies, Cohen had over \$19 million in net assets, including over \$13 million in cash. Cohen did not present any evidence to the contrary.

Based on the evidence presented at the hearing, the court found that Cohen had violated nine separate provisions of the Seizure Order and the Amended Seizure Order. The court made oral rulings at the close of the hearing, then formally implemented them through the November 1 Order.

The court directed that the \$100,000 Cohen had deposited as security be turned over to Indemnity. November 1 Order ¶ 5. The court ordered Cohen to arrange for the vehicles to be returned by Monday, November 4, 2013, and to dismiss the Maryland lawsuits by Friday, November 8. *Id.* ¶¶ 6-7. In an effort to avoid any altercations, the order specifically required Cohen to return the vehicles through an agent and not to return them personally. *Id.* ¶ 6. Finally, based on the evidence in the record concerning Cohen's considerable net worth and the fact that a deposit of \$100,000 had been shown

ineffective in convincing Cohen to conform his conduct to the court's orders, the court ordered Cohen to post security of \$500,000 with the Register in Chancery. *Id.* ¶ 10. The terms of the new security deposit were the same as before: If Cohen complied with the court's orders going forward, he would receive back the entire amount at the end of the case. If he did not, he would forfeit some or all of it. *Id.*

#### **I. The Rehabilitation Order**

On November 6, 2013, the Commissioner a filed Verified Petition for Entry of Rehabilitation and Injunction Order (the "Rehabilitation Petition"), which was supported by extensive documentary evidence. Dkt. 228. Indemnity consented to the entry of the relief sought in the Rehabilitation Petition. Dkt. 232. On November 7, the Court entered the requested Rehabilitation and Injunction Order. Dkt. 237.

#### **J. The Current Motion For Sanctions**

On November 7, 2013, Indemnity filed the motion for sanctions that gives rise to this decision. First, Indemnity explained that Cohen had not properly returned the vehicles in compliance with the court's November 1 Order. When Indemnity employees arrived at work on Monday, November 4, they found that the primary entrance to the Indemnity parking lot was blocked by the Aston Martin, which had been parked diagonally across the entrance. One of its tires appeared to have been intentionally deflated. In addition, the Mustang had been driven up onto the sidewalk and was parked so that it blocked the main entrance to Indemnity's offices. Indemnity had no way of moving the vehicles because the keys had not been returned. The Range Rover had not been returned at all.

Second, Indemnity alleged that its access logs indicated that key fobs assigned to Cohen were used to try to access Indemnity's offices three times on Sunday, November 3. Indemnity expressed concern that Cohen was attempting to tamper with or destroy documents and other evidence.

The court scheduled a hearing on December 5, 2013, so that Cohen could appear and respond to the allegations against him. To ensure that the evidence on critical issues was adequately developed, the court directed Cohen to respond in writing to a series of questions about his actions, then to sit for a deposition by Indemnity's counsel.

Cohen filed his opposition on November 15, 2013. He appeared on December 5 with counsel, presented evidence, and testified in his defense. Cohen admitted that he had personally returned the Aston Martin and the Mustang, rather than using an agent. He admitted that he intentionally had parked the vehicles in the manner that Indemnity had described. He admitted that he did not return the keys to the Aston Martin and the Mustang until Tuesday, November 5, and that he did not return the Range Rover until November 14, ten days after the ordered date of return. Cohen further admitted that he had attempted to access Indemnity's offices using his key fobs, but he testified that he only did so in an attempt to return the keys. Cohen denied deflating the Aston Martin's tire.

## **II. LEGAL ANALYSIS**

Indemnity's motion asks that Cohen be held in civil contempt. "To establish civil contempt, [the movant] must demonstrate that the [opponent] violated an order of this Court of which they had notice and by which they were bound." *Arbitrium (Cayman Is.)*

*Handels AG v. Johnston*, 1997 WL 589030, at \*3 (Del. Ch. Sept. 17, 1997). This court generally has required that the movant establish a violation of an order by clear and convincing evidence.<sup>2</sup> Whether a party should be held in contempt is ultimately a matter for the discretion of the court. *Dickerson*, 1991 WL 208467, at \*3. The violation “must not be a mere technical one, but must constitute a failure to obey the Court in a ‘meaningful way.’” *Id.* at \*4 (citation omitted). “Even where there has been a violation, the Court will consider good faith efforts to comply with the order or to remedy the consequences of non-compliance.” *Aveta, Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009).

Based on the evidence presented, the court finds that Cohen willfully returned the Aston Martin and the Mustang in a manner calculated to interfere with the operations of Indemnity and the Commissioner. The court directed Cohen to use an agent to return the cars because the court was concerned about Cohen’s interactions with Indemnity. Rather than using an agent, Cohen returned the cars himself. He parked the Aston Martin so as

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<sup>2</sup> See, e.g., *TR Investors, LLC v. Genger*, 2009 WL 4696062, at \*15 (Del. Ch. Dec. 9, 2009) (“A party petitioning for a finding of contempt bears the burden to show contempt by clear and convincing evidence . . . .”); *Dickerson v. Castle*, 1991 WL 208467, at \*4 (Del. Ch. Oct. 15, 1991) (stating that the court must find a violation “by clear and convincing evidence,” but noting that some older Delaware cases had applied a “preponderance of evidence” standard based on the civil nature of the proceeding). *But see Wilm. Fed’n of Teachers v. Howell*, 374 A.2d 832, 838 (Del. 1977) (finding that the movant “met its burden of establishing contemptuous conduct by a *preponderance of the evidence*” (emphasis added)). Because the evidence in this case meets both the higher “clear and convincing” standard as well as the lower “preponderance” standard, this decision has not attempted to reconcile the seemingly divergent evidentiary approaches. In the event of a direct conflict, the standard identified by the Delaware Supreme Court obviously would control. *In re MFW S’holders Litig.*, 67 A.3d 496, 520 (Del. Ch. 2013) (“There is no question that, if the Supreme Court has clearly spoken on a question of law necessary to deciding a case before it, this court must follow its answer.”).

to block the main entrance to Indemnity's parking lot, and he parked the Mustang so as to block Indemnity's main entrance. He failed to return the keys until November 5, even though he had the means to return them on November 4. As a result, the keys were not returned until after Indemnity was forced to have the vehicles towed.

Because of the manner in which Cohen returned the vehicles, Indemnity was forced to tow the vehicles to restore access through its front doors and the main entrance to its parking lot. Indemnity should not have to bear the cost of Cohen's malfeasance. Therefore, Cohen shall reimburse Indemnity for the costs of towing and any other expenses incurred in remedying the manner in which Cohen returned the vehicles.

The court previously entered an order providing that if Cohen did not timely return the three vehicles by Monday, November 4, he would pay a fine of \$10,000 per day for each day of non-compliance. This fine was a coercive sanction designed to encourage Cohen to return the three vehicles on time. He did not return any of the vehicles as directed. The Aston Martin and the Mustang were not properly returned until November 5, when Cohen provided the keys.

The Range Rover was delivered on November 14. Cohen attempted to justify this delay on the grounds that the Range Rover was in Florida and that it took him some time to arrange for it to be returned to Maryland. Had Cohen raised this issue with the court before the deadline, the court would have been sympathetic and provided Cohen with additional time to return the Range Rover. Cohen never raised the issue. Indeed, at the November 1 hearing, Cohen testified that he could return the vehicles "today" if the court ordered him to do so. Returning the Range Rover on time might have been inconvenient,

but it was far from impossible. Instead of arranging to return the Range Rover or requesting more time to comply with the court's order, Cohen simply disregarded the order and returned the Range Rover when it was convenient to him. In doing so, he consciously violated the court's order.

As a sanction, Cohen will pay Indemnity \$10,000 for the one-day delay in the return of all three vehicles, plus \$3,333/day for the seven additional business days of delay in the return of the Range Rover, for a total of \$33,331. This amount is in addition to reimbursing the costs of towing and any other expenses that Indemnity incurred due to the manner in which Cohen returned the Aston Martin and the Mustang.

The court declines to impose any additional sanction on Cohen for the flat tire on the Aston Martin. It is not clear from the evidence that Cohen placed the stick in the valve stem of the Aston Martin's tire, and because Cohen did not return the keys to the vehicle, Indemnity had to tow the car in any event.

The court declines to impose any sanction on Cohen for his attempts to enter Indemnity's offices. Cohen testified that he tried to access Indemnity's offices to return the keys and not for any improper purpose. Cohen was not able to enter the premises, and no harm was done.

In its reply, Indemnity raised as an additional issue the fact that Cohen did not timely dismiss the lawsuits that he filed *pro se* in Maryland. The evidence reflects that Cohen did not try to dismiss his lawsuits until November 8, 2013, the deadline set by the November 1 Order, when he sent a letter via regular mail from Florida to Maryland asking that the clerk dismiss them. As Cohen certainly knew, a letter mailed from

Florida to Maryland on November 8 would not arrive in time for the Maryland court to process it on November 8. Although Cohen violated the order by not making a good faith attempt at timely dismissal, the lawsuits have now been dismissed. In its discretion, the court will not impose additional sanctions for this failure.

During the hearing on December 5, 2013, Indemnity observed that Cohen has not yet posted the \$500,000 in security required by the November 1 Order. Cohen testified that he lacks the assets to post this amount, contrary to the evidence that Indemnity previously presented during the hearings on September 24 and November 1, which Cohen did not rebut. Cohen has moved separately to stay the obligation to post the \$500,000 pending an appeal under the collateral order doctrine. A hearing on the motion to stay is scheduled for January 10, 2014. The court will address the additional security requirement in the context of that motion.

### **III. CONCLUSION**

Cohen violated paragraph 6 of the November 1 Order. As a sanction, Cohen shall pay Indemnity the sum of \$33,331 and reimburse Indemnity for all towing costs and other expenses that Indemnity incurred due to the manner in which Cohen returned the Aston Martin and the Mustang. Cohen shall pay all attorney's fees and expenses of Indemnity and the Commissioner that relate to the November 7 sanctions motion and the December 5 evidentiary hearing. Indemnity and the Commissioner shall identify the amounts they have incurred through Rule 88 affidavits. Indemnity shall submit a proposed form of implementing order.