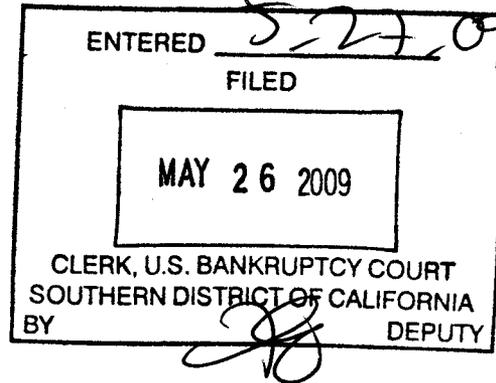


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 04-00769-PB11

12 NORTH PLAZA, LLC,)

13) ORDER ON TRUSTEE'S MOTION

14 Debtor.) FOR SANCTIONS AGAINST ANGELA

15) SABELLA AND DYNAMIC FINANCE

16) CORPORATION FOR FAILURE TO

17) COMPLY WITH DISCOVERY ORDERS

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Richard Kipperman, the chapter 11 trustee ("Trustee") of the estate of North Plaza, LLC ("Debtor"), has painstakingly sought information in this case. In furtherance of that goal, the Trustee sought and obtained authority to issue subpoenas to various entities and "additional persons possessing knowledge of [the Debtor]..." This authority was memorialized in the Amended Order on Ex Parte Application for Order Directing Examination and Production Pursuant to Rule 2004 which was entered on September 19, 2006 ("Rule 2004 Order"). Based thereon, the Trustee served subpoenas on Alcon Group Inc., ("Alcon"), Custodian of Records of Alcon Group, Inc., and Isaac Lei ("Lei") on February 16, 2007

1 ("Subpoenas"). Under the Subpoenas, Alcon and Lei were requested
2 to appear and produce documents. Before the appearance date
3 Alcon and Lei served the Trustee with objections to the Subpoenas
4 asserting several grounds including that Alcon and Lei's
5 communications with counsel for Dynamic Finance Corporation
6 ("Dynamic") and Angela Sabella ("Sabella") were protected by
7 Dynamic and Sabella's attorney-client privilege because Alcon and
8 Lei were serving as "client representatives" of Dynamic and
9 Sabella. The Trustee responded with a motion to compel directed
10 only to Alcon and Lei, seeking an order directing only Alcon and
11 Lei to produce the documents requested in the Subpoenas. Dynamic
12 and Sabella stepped in to assert their attorney-client privilege
13 and defend against the motion to compel (although the objection
14 was filed by Lei, counsel for Lei explained that Lei would not be
15 participating substantively in the matter - that it was "going to
16 be a Dynamic Sabella show...").

17 After substantial briefing and a lengthy evidentiary
18 hearing, the Court found that Alcon and Lei were not acting as
19 "client representatives" of Dynamic and Sabella, and were thus
20 not covered by their attorney-client privilege. Accordingly, the
21 Court granted the Trustee's Motion to Compel Alcon and Lei to
22 produce the documents sought in the Subpoenas. This ruling was
23 set out in the Order on Trustee's Motion to Compel Discovery from
24 Isaac Lei/The Alcon Group, entered on June 2, 2008 ("Discovery
25 Order").

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1 The Trustee now alleges that Alcon and Lei have violated the
2 Rule 2004 Order and the Discovery Order by failing to so produce,
3 an allegation the Court accepts for the purpose of this ruling.
4 The Trustee seeks sanctions, however, not against Alcon and Lei,
5 but against Dynamic and Sabella for the failure to comply
6 (Sanctions Motion).

7 The obvious problem with the Trustee's Sanctions Motion is
8 that neither the Rule 2004 Order (or more accurately the
9 Subpoenas authorized thereby), nor the Discovery Order are
10 directed to Dynamic and Sabella and they do not require Dynamic
11 and Sabella to do anything.

12 In an effort to overcome this difficulty, the Trustee cites
13 the Court to Federal Rule of Civil Procedure 71 (made applicable
14 to this bankruptcy matter by Federal Rules of Bankruptcy
15 Procedure 7071 and 9014) which provides:

16 When an order grants relief for a nonparty or may be
17 enforced against a nonparty, the procedure for
enforcing the order is the same as for a party.

18 On its face, Rule 71 merely provides a procedure for enforcement
19 of an order where a nonparty is subject thereto. It does not
20 provide that a nonparty is subject to any order granting relief.
21 For this proposition, the Trustee turns to case law, none of
22 which, however, apply Rule 71 to a subpoena or order compelling
23 production.

24 The present case is not the same as Peterson v. Highland
25 Music, Inc., 140 F.3d 1313, 1324 (9th Cir.), cert. denied, 525
26 U.S. 983, 119 S.Ct. 446, 142 L.Ed.2d 401 (1998). In that case,

1 defendants to a rescission action, GML and Gusto, violated a
2 judgment by continuing to license master recordings they were
3 ordered to return to plaintiffs. Third parties, Highland and
4 Hawkins, who were not named in the judgment, were nevertheless
5 held in contempt for their efforts in assisting defendants to
6 violate the judgment as their licensing agents:

7 Highland and Hawkins certainly had notice of the
8 contents of the judgment for rescission, a fact they do
9 not deny, and evidence concerning their licensing
10 activities amply supports a finding that they
11 flagrantly and deliberately aided and abetted GML and
12 Gusto in violating the express terms of the judgment,
13 granting licenses when they had previously stipulated
14 that GML would transfer no rights to Highland pending
15 the outcome of the dispute and continuing to do so
16 following the judgment, when, as Highland knew, GML and
17 Gusto no longer owned the rights to the Masters. This
18 evidence is sufficient to support a finding of contempt
19 against Highland and Hawkins, even though they were not
20 parties to the underlying action.

21 Id. at 1324. In the case at hand, the motion to compel and the
22 Discovery Order which resulted therefrom were directed to Alcon
23 and Lei. The Discovery Order instructed Alcon and Lei to produce
24 the documents demanded in the Subpoenas. There is no evidence
25 that Dynamic and Sabella somehow rendered Alcon and Lei unable to
26 complete this task. Alcon and Lei were quite capable of failing
to comply with the dictates of the Discovery Order on their own
by simply not producing the documents.

27 This case is also different from Quinter v. Volkswagen of
28 America, 676 F.2d 969 (3rd Cir. 1982). In that case, an expert
29 witness, who was not named in a protective order, was held in
30 contempt for disseminating information covered by the protective

1 order where he knew of the order and was "legally identified
2 with" the parties to the order. Id. at 972. In our case it was
3 not an affirmative action which violated the Discovery Order, but
4 rather the failure to act. The only entities who could violate
5 the Discovery Order by failing to act were the entities, Alcon
6 and Lei, who were required to act. The Discovery Order placed no
7 duty on Dynamic and Sabella. The Trustee goes to great lengths
8 establishing that Dynamic and Sabella were "legally identified"
9 with Alcon and Lei. However, legal identification is only part
10 of the equation - the party to be sanctioned must also have
11 violated the order. The Orders in this case directed Alcon and
12 Lei to produce. The Court is not going to sanction Dynamic and
13 Sabella for Alcon and Lei's nonperformance on the present record.
14 If the Trustee seeks to compel Dynamic and Sabella to assist
15 Alcon and Lei or to produce for them, he can bring a motion to
16 compel directed to Dynamic and Sabella. If, as the Trustee
17 asserts, Dynamic and Sabella are the ones with control over the
18 documents sought, this would seem the logical approach.

19 Dentsply Int'l, Inc. v. Kerr Mfg. Co., 42 F.Supp.2d 385, 419
20 (D.Del.1999), involved the violation of an injunction by a
21 nonparty that was nevertheless involved in underlying litigation.
22 The court based its decision to hold the nonparty liable on FRCP
23 65(d) and its common law origins which is specific to
24 injunctions. This Court finds a qualitative difference between
25 an injunction, which prohibits an action, and is thus naturally
26 applied to a related party who goes ahead and undertakes that

1 action, and an order which demands an action on the part of the
2 party.

3 Ultimately, the difference between this case and all of the
4 cases relied upon by the Trustee is that the Subpoenas issued
5 under the Rule 2004 Order and the Discovery Order directed Alcon
6 and Lei to act - to produce documents. The orders in the cases
7 relied upon by the Trustee directed the parties therein to
8 refrain from acting. In the case at hand, Alcon and Lei
9 allegedly violated the Orders by failing to act. They may have
10 been persuaded by Dynamic and Sabella, but ultimately it was
11 their failure to act which violated the Orders. In the cases
12 cited by the Trustee, on the other hand, the orders forbade
13 action and a nonparty, though related in some fashion to the
14 party, went ahead and acted, thereby violating the orders. Based
15 upon this distinction, the Court declines to impose sanctions on
16 Dynamic and Sabella for Alcon and Lei's failure to comply with
17 the Rule 2004 Order and/or the Discovery Order.

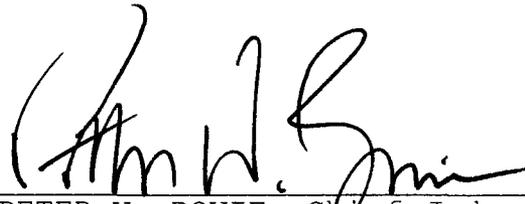
18 For the same reason, the Court declines to exercise its
19 inherent civil contempt power to impose sanctions against Dynamic
20 and Sabella based upon Orders which were not directed to them.
21 Dynamic and Sabella have indeed been active in this case and in
22 this discovery dispute. Dynamic and Sabella opposed the
23 production asserting their attorney-client privilege. The Court
24 held that their attorney-client privilege did not extend to Alcon
25 and Lei, and overruled the objection. However, to the extent
26 there was a privilege to assert, it was their privilege, and it

1 was appropriate for them to assert it, even if unsuccessfully.
2 If the Trustee thinks the objection was made in bad faith, the
3 Trustee has avenues to address this. Holding Dynamic and Sabella
4 in contempt for Alcon and Lei's failure to comply with the Orders
5 is not one of them.

6 The Trustee's Sanctions Motion is denied.

7 IT IS SO ORDERED.

8 DATE: MAY 26 2009

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11 PETER W. BOWIE, Chief Judge
12 United States Bankruptcy Court
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