

(10)

POSTED ON WEBSITE  
NOT FOR PUBLICATION

FILED  
MAY - 9 2011

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 09-29162-D-11  
SK FOODS, L.P., )  
Debtor. )

BRADLEY D. SHARP, Chapter 11 ) Adv. Pro. No. 09-2543-D  
Trustee, )  
Plaintiff, ) Docket Control No. BW-1  
v. )  
CSSS, LP, a California limited )  
partnership, ) DATE: April 27, 2011  
Defendant. ) TIME: 10:00 a.m.  
DEPT: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On January 20, 2010, Bradley D. Sharp, the plaintiff in this adversary proceeding and trustee in the underlying chapter 11<sup>1</sup> case of SK Foods, L.P. (the "trustee"), filed a motion for an order to show cause why the defendant CSSS, LP, dba Central Valley Shippers ("CVS"), Monterey Peninsula Farms LLC, Scott Salyer, Gerard Rose, and Larry Lichtenegger ("Lichtenegger")

1. Unless otherwise indicated, all Code, chapter, and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 should not be held in contempt for violation of a temporary  
2 restraining order and preliminary injunction issued earlier by  
3 this court (the "contempt motion"). On March 21, 2011,  
4 Lichtenegger filed a motion for summary judgment on the contempt  
5 motion, Docket Control No. BW-1 (the "Motion"). The Bank of  
6 Montreal ("BMO"), which has acquired the trustee's claims in this  
7 adversary proceeding by assignment, opposes the Motion. For the  
8 reasons set forth below, the court will deny the Motion.<sup>2</sup>

### 9 I. BACKGROUND

10 This adversary proceeding concerns certain items of  
11 equipment and machinery the parties refer to as a drum line and  
12 the events leading up to its being transported to New Zealand in  
13 August of 2009. On August 24, 2009, this court issued an order  
14 restraining and enjoining CVS, its officers, agents, servants,  
15 employees, and attorneys, and those in active concert or  
16 participation with them from moving the drum line to any location  
17 outside of California (the "TRO"). It is undisputed that on  
18 August 24, 2009, the day of the hearing, the drum line was in the  
19 Port of Oakland awaiting documentation that would allow it to be  
20 exported, and that it did not leave the Port of Oakland for New  
21 Zealand until a week later, August 31.

22 / / /

23 / / /

24  
25  
26 2. In a tentative ruling issued prior to the hearing, the  
27 court expressed its view that the Motion was covered by the stay  
28 of proceedings issued by the district court. Lichtenegger's  
counsel argued at the hearing, as in the papers, that the Motion  
is not covered by the stay. Upon further consideration, the  
court finds that it can resolve the Motion without testimony of  
Scott Salyer or his criminal defense attorney.

1 II. ANALYSIS

2 A. Lichtenegger's Version of Events

3 Lichtenegger contends he "knew nothing about the Drum Line  
4 before [the trustee] applied for the TRO"<sup>3</sup> and that he "had no  
5 involvement with any of [the] activities" by which the drum line  
6 was moved from the premises of CVS (in Selma, California),  
7 consigned to a carrier, and ultimately shipped to New Zealand.  
8 Memo, 1:14-2:2. The events of Friday, August 21, through Monday,  
9 August 24, 2009 are critical to the resolution of the Motion.  
10 Lichtenegger alleges this series of communications:

11 • The trustee's counsel called CVS's attorney, Gerard Rose,  
12 on Friday and told him he would be filing an application for a  
13 TRO and would be appearing on Monday, August 24, at 11:00 a.m. on  
14 the application.

15 • Rose was going to be on vacation on August 24 and asked  
16 Lichtenegger to make a special appearance on behalf of CVS to  
17 oppose the application. Lichtenegger said he would if he could  
18 resolve a scheduling conflict.

19 • Lichtenegger had a telephone conversation on Friday,  
20 August 21, with Rose and Malcolm Segal, criminal defense attorney  
21 for Scott Salyer, the principal of the debtor in this case, SK  
22 Foods, L.P., to discuss the TRO hearing, during which Segal  
23 informed Lichtenegger the drum line had already shipped -- on  
24 August 20.

25 / / /

26 / / /

27 \_\_\_\_\_

28 3. Memorandum in Support of Larry J. Lichtenegger's Motion  
for Summary Judgment, filed March 21, 2011 ("Memo"), 1:13-14.

1       • At Rose's request, Lichtenegger called the trustee's  
2 counsel and left the voicemail message quoted below.<sup>4</sup>

3       • Lichtenegger spoke later that afternoon with the trustee's  
4 counsel, who "was very aggressive and refused to discuss the  
5 situation with him," Memo, 6:10-11, and who immediately filed a  
6 declaration that included a transcript of Lichtenegger's earlier  
7 voicemail message.

8       • Lichtenegger decided by Monday morning, August 24, "not to  
9 get involved," cancelled the Court Call appearance he had earlier  
10 arranged, left a voicemail message for the trustee's counsel that  
11 he would not be appearing, and did not appear at the hearing.

12       • Lichtenegger "had no involvement with the Drum Line or the  
13 export process after the TRO issued."

14       In other words, according to Lichtenegger, his involvement  
15 with the drum line was limited to his being asked to make a  
16 single special appearance and ultimately declining to make that  
17 appearance. "When [Lichtenegger] did not appear [at the  
18 hearing], his engagement was at an end . . . . [BMO] produces no  
19 evidence that Lichtenegger was asked (until weeks later) to  
20 perform any other service for CVS."<sup>5</sup>

21       Lichtenegger purposefully refused to appear on  
22 behalf of CVS the morning of the TRO hearing. He took  
23 no further actions on behalf of CVS. [Note.] He chose  
24 to remove himself from that association before the  
injunction was even issued, and any facts linking him  
with CVS after August 21 are so attenuated that it will

---

25       4. No one has suggested a reason why Rose did not make this  
26 call himself if, as discussed below, Lichtenegger's role was to  
be limited to making a special appearance at the hearing.

27       5. Reply Memorandum in Support of Larry Lichtenegger's  
28 Motion for Summary Judgment, filed April 20, 2011 ("Reply"), 6:8-  
10.

1 be impossible for [BMO] to show by clear and convincing  
2 evidence that Lichtenegger acted on behalf of CVS in  
any capacity.

3 Reply, 6:11-15, emphasis in original.

4 **B. Lichtenegger's Greater Involvement**

5 The court finds that Lichtenegger's involvement with Salyer,  
6 CVS, and/or the drum line, both before and after the TRO was  
7 issued, was nowhere near as circumscribed as he contends. First,  
8 on Friday, August 21, before the TRO hearing the following  
9 Monday, he left a message for the trustee's counsel advising that  
10 he had been asked to make a special appearance. However, rather  
11 than leaving it at that, he added, "I wanted to inform you that  
12 I've investigated and confirmed that the drums [sic] shipped on  
13 Thursday -- they are already gone. That makes your application  
14 for a TRO moot. You may have other issues, but not a TRO."<sup>6</sup>

15 With those words, Lichtenegger went well beyond actions that  
16 might be expected from someone whose role is limited to  
17 considering whether to make a special appearance. Quite the  
18 contrary, they went directly to the substance of the application  
19 for the TRO. They were clearly designed to convince the  
20 trustee's counsel that his application for a TRO was too late.  
21 In fact, had the trustee's counsel relied on those words, as  
22 Lichtenegger almost certainly intended him to, he might have  
23 foregone the hearing altogether and lost any chance of preventing  
24 the shipment of the drum line.<sup>7</sup> Lichtenegger's present

---

25  
26 6. Larry J. Lichtenegger's Documentary Evidence in Support  
of Motion for Summary Judgment, filed March 21, 2011 ("LDE"), 70.

27 7. In fact, when the trustee's counsel returned his call  
28 later that day, Lichtenegger again said he understood the drum  
line had shipped the previous day and "requested that the hearing

1 contention -- that he did not represent any person or entity in  
2 connection with the drum line -- appears disingenuous in light of  
3 this language.

4       Next, it appears Lichtenegger did not have a firm basis on  
5 which to "confirm" to the trustee's counsel that the drum line  
6 had already shipped. He has testified he left the voicemail  
7 message at 3:16 p.m. on Friday. BMO Exhibits, 000713. At 3:29  
8 p.m. that day, he was copied with an e-mail from Segal to Salyer  
9 stating, "I just spoke to Larry [Lichtenegger] and Gerard [Rose].  
10 If the goods have already shipped, the TRO application is  
11 mooted." BMO Exhibits, 000276, emphasis added. At 3:31 p.m.  
12 that day, Lichtenegger e-mailed a single line to Salyer:  
13 "Confirm drums shipped on Thursday?" Id., 000277. On Sunday,  
14 August 23, Salyer e-mailed Lichtenegger, "Equipment does not ship  
15 out until Wednesday earliest." Id., 000278. And seven minutes  
16 later, "Departs Thursday." Id., 000280.<sup>8</sup>

17       Despite this new knowledge, which directly contradicted what  
18 he had "confirmed" to the trustee's counsel, Lichtenegger  
19 testified as follows on September 1, 2009, the day after the drum  
20 line actually shipped, concerning his decision not to appear at  
21 the August 24 hearing:

22       Over the weekend [August 22-23], I debated the  
23 usefulness of my appearance in light of my conflict  
24 with the deposition [the scheduling conflict referred

25 be continued as there was no longer an emergency." Exhibit  
26 Appendix in Support of Plaintiff's Opposition to the Motion of  
27 Larry Lichtenegger for Summary Judgment, filed April 13, 2011  
28 ("BMO Exhibits"), 000713.

29       8. Lichtenegger did not submit these e-mails with the  
30 Motion and made no mention of them; they were submitted by BMO in  
31 its opposition. Lichtenegger does not deny receiving them.

1 to above], the non-schedule notification by Courtcall  
2 [a call Friday afternoon informing him the TRO hearing  
3 was not on calendar], and the fact that the drum line  
4 had already shipped and the hearing was a non-event. I  
5 decided that my appearance at the hearing, if in fact  
one would occur, was useless as there was nothing I  
could do to aid the court or any of the parties in this  
dispute.

6 BMO Exhibits, 000713-714.

7 The court need not determine at this time Lichtenegger's  
8 truthfulness in making that statement on September 1 in light of  
9 Salyer's two e-mails to him on August 23. The court also need  
10 not decide whether Lichtenegger's failure to correct his earlier  
11 misinformation to the trustee's counsel -- misinformation he knew  
12 the trustee's counsel had conveyed to the court in a declaration  
13 -- gives rise to liability. Indeed, Lichtenegger contends, and  
14 the court might later determine, that he was precluded by duties  
15 to a client (although he claims he had none) or by the attorney-  
16 client privilege from divulging the new information. For present  
17 purposes, the court finds that these e-mails raise serious  
18 questions about the credibility of Lichtenegger's present  
19 contentions that his role was limited to deciding whether to make  
20 a special appearance, and that as such, he could not have been  
21 covered by the TRO.<sup>9</sup>

22 But Lichtenegger did not stop there. He did not, as he  
23 contends, have "only one possible engagement -- to specially  
24

---

25 9. The Salyer e-mails of August 23 also raise questions  
26 about the credibility of Lichtenegger's present testimony that  
27 "[a]t all times relevant to this motion, my only understanding  
28 was that the drum line had been shipped from CVS's control and  
the shipment could no longer be stopped." Declaration of Larry  
J. Lichtenegger in Support of Motion for Summary Judgment, filed  
March 21, 2011, 2:13-14.

1 appear at the hearing." Reply, 9:11-12. A series of e-mails on  
2 August 24 and 25, 2009, among Salyer and various attorneys,  
3 including Lichtenegger, leads to the conclusion that, far from  
4 divorcing himself from the process and the players after the TRO  
5 hearing, Lichtenegger remained very much involved.

6 Beginning on Monday, August 24, Salyer and a group of  
7 attorneys, including Lichtenegger, exchanged a series of e-mails  
8 in which it was suggested that Lichtenegger contact the attorney  
9 for Olam, an entity that had by that time purchased the debtor's  
10 business operations from the estate, and threaten to sue Olam if  
11 it would not return certain property. Lichtenegger responded by  
12 asking for the name and phone number of Olam's attorney. He  
13 agreed with Putterman that they needed to think carefully about  
14 their approach "because of the possible effect on the subcon  
15 case" (presumably the trustee's substantive consolidation  
16 action), LDE 196, and stated that he "wanted to be sure of entity  
17 separation before [he] called [Olam's attorney]." Id.

18 Lichtenegger then expressed confusion about the drum line  
19 versus certain "color sorters," stating,

20 I thought the drum line was shipped out already and was  
21 the subject of the TRO on Monday. Could be just my  
22 confusion. Help. Left a message for Scott [Salyer],  
but he has not responded.<sup>10</sup>

23 Putterman's response was not to the point, and Lichtenegger  
24 replied, "I'll find out." LDE 195.

25 For purposes of this Motion, the court need not determine  
26 what person or entity Lichtenegger was representing in these  
27

---

28 10. LDE, 195-196.



1 exchanges, whether these or other discussions or e-mails  
2 concerned the drum line or something else, or whether  
3 Lichtenegger played any role in the transfer of the drum line  
4 after the TRO was issued. For present purposes, the court  
5 concludes from these e-mails that Lichtenegger continued to play  
6 some significant role with Salyer and/or his attorneys  
7 immediately after the TRO was issued and before the drum line  
8 actually left the Port of Oakland, a role he now attempts to  
9 repudiate.

### 10 III. CONCLUSION

11 For the reasons discussed above, the court cannot conclude  
12 that there are no genuine issues of material fact with respect to  
13 Lichtenegger's role in the events leading up to the drum line  
14 being shipped out of California. As a result, the court cannot  
15 conclude that Lichtenegger is entitled to judgment on the  
16 contempt motion as a matter of law. See Celotex v. Catrett, 477  
17 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986).

18 For the reasons set forth above, the Motion will be denied.  
19 The court will issue an appropriate order.

20 Dated: May 9, 2011

  
ROBERT S. BARDWIL

United States Bankruptcy Judge

Andrew Longman  
Deputy Clerk