

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023
 Title AK Futures LLC v. Smoke Tokes LLC, et al.

Present: The **James V. Selna, U.S. District Court Judge**
 Honorable

Elsa Vargas Not Present
 Deputy Clerk Court Reporter

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:
 Not Present Not Present

Proceedings: [IN CHAMBERS] Order Regarding Motion for Contempt Against AK Futures and The Frost Firm [70]

Plaintiff / Judgment Creditor AK Futures, LLC (“AK Futures”)’s Motion for Contempt against Defendant / Judgment Debtor Smoke Tokes LLC (“Smoke Tokes”), (Dkt. No. 70), comes before the Court following the January 23, 2023 hearing held on the Order to Show Cause. (See Dkt. No. 65.) The motion is fully briefed. (Pl.’s Opp’n, Dkt. No. 75; Def.’s Reply, Dkt. No. 79.) The Court posted its Tentative Order on March 30, 2023, vacating the April 3, 2023 hearing. (See Dkt. No. 85.) This Order reflects the final order on the instant motion.

After careful consideration of the parties’ briefings and evidence, for the following reasons, the Court **DENIES** the contempt motion.

I. BACKGROUND

On December 8, 2021, this Court issued a Judgment and Permanent Injunction against Smoke Tokes after granting AK Futures’s default motion. (Judgment, Dkt. No. 26.) On January 13, 2022, the Court awarded attorney’s fees. (Dkt. No. 30.) The Permanent Injunction enjoined Smoke Tokes and its representatives from reproducing and selling any products that infringed on AK Futures’s CAKE trademarks or copyrights. (Judgment ¶ E.) Smoke Tokes was also instructed to destroy any products that infringed on AK Futures’s intellectual property. (Id. ¶ F.)

In sum, the total judgment amount (“Judgment Amount”) totaled \$244,152.50, consisting of \$150,000 on AK Futures’ copyright claim, \$92,656.45 of attorney’s fees, and costs of \$1,495.95. (See Judgment; Attorneys’ Fees Order, Dkt. No. 30; Default

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

Judgment Order, Dkt. No. 20.)

Six months later, AK Futures requested the issuance of a writ of execution, which the Court issued on July 14, 2022. (Dkt. Nos, 31, 34.) The writ was for a judgment amount of \$244,152.40. (Dkt. No. 34.) Then, AK Futures requested *ex parte* relief to enforce the writ. (Dkt. No. 35.) On November 16, 2022, the Court granted the application and ordered the United States Marshals Service to enforce the writ against Smoke Tokes (“Enforcement Order”). (Enforcement Order, Dkt. No. 36.) As discussed previously in the Court’s Order to Show Cause, (Dkt. No. 65), the execution could not take place until December 9, 2022.

A. AK Futures Adds Post-judgment Fees and Costs

On December 7, 2022, AK Futures prepared and filed a “Memorandum of Costs After Judgment” (“Memorandum of Costs”). (Dkt. No. 40.) It appeared that the Frost Firm on behalf of AK Futures added post-judgment costs of \$390,171.00, consisting of unexplained “third party costs,” an estimate of levying officers costs to be incurred later, unpaid interests, and attorney’s fees for work performed after the Judgment. (*Id.*) Nothing was attached to the one-page memorandum to prove up any of the foregoing costs. (*Id.*) Using this Memorandum of Costs, the Frost Firm prepared a Notice of Levy showing an amount to be collected of over \$658,738.60.¹ (Notice of Levy, Dkt. No. 43-1.)

B. December 9, 2022 Enforcement Action

On December 9, 2022, AK Futures and the U.S. Marshals executed the Court’s Enforcement Order. (Dkt. No. 42.) Mr. Thomas Frost, counsel for AK Futures, presented the U.S. Marshals with the Notice of Levy and the Memorandum of Costs. (Declaration of Thomas Frost (“Frost Decl.”) ¶ 7, Dkt. No. 75-1.) Counsel for Smoke Tokes, Mr. William Kroger, was informed that all of Smoke Tokes’ inventory was to be seized by the end of the day. (Declaration of William S. Kroger (“Kroger Decl.”) ¶ 3, Dkt. No. 71.) By late afternoon, the U.S. Marshals collected enough Smoke Tokes

¹ This was \$414,585.60 more than the Judgment Amount.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

inventory to fill four large moving trucks.² (Id. ¶ 8.)

However, Mr. Kroger offered to exchange a cashier’s check in the amount of \$658,738 for an immediate cessation of the seizure, which Mr. Frost accepted. (Frost Decl. ¶ 13; Kroger Decl. ¶ 4.) But Mr. Kroger raised objections to the \$658,738 amount, arguing that the proper amount to be collected was \$244,152. (Frost Decl. ¶ 12; Kroger Decl. ¶5.) When Mr. Kroger asked Mr. Frost “how he arrived at this figure, he did not provide an explanation and merely told [him] to ‘Read the papers.’” (Kroger Decl. ¶ 5.) Mr. Frost was provided the cashiers check, (Frost Decl., Ex. B, Dkt. No. 75-3), and the moving trucks were unpacked, (Frost Decl. ¶ 15.).

C. AK Futures Attempts to Collect the Post-Judgment Costs

AK Futures did not attempt to justify how it believed it was able to collect the \$658,738 until it appeared before this Court on January 23, 2023. Before the hearing, AK Futures simply explained that \$658,738 amount was “required to satisfy the Judgment, including the Judgment Amount, accrued interest, and attorneys fees under CCP § 685.040.” (Pl.’s Response to OSC at 5, Dkt. No.43.) It provided no other explanation justifying its actions. It noted simply that the amount “matched amounts stated in the Notice of Levy served on the Judgment Debtor.” (Id. at 14.)

Then, through a series of unsuccessful attempts to collect the additional post-judgment amount, Mr. Frost filed numerous Affidavits and Requests for Issuance of Writ of Execution with the Court. (Dkt. No. 52 (filed on January 5, 2023); Dkt. No. 55-1 (filed on January 8, 2023).) Each time, the Clerk of the Court rejected requests because the documents were inadequately prepared. (Dkt. Nos. 54, 56, 59.)

But on January 12, 2023, the Clerk informed AK Futures that the amount requested did “not coincide with the amount(s) in the judgment/order. . . **For any post-judgment cost, it must be approved and determined by the Judge. . . . [The] Clerk is only allowed to enter the amounts that is on the judgment.**” (Dkt. No. 61 (emphasis added).)

² 38 pallets of Smoke Tokes’ assets were seized from Smoke Tokes’ Superstore. (Frost Decl. ¶ 6.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

On January 13, 2023, at 1:42 PM, the Court issued its Tentative Order,³ finding that AK Futures was not entitled to unilaterally add \$414,586.00 post-judgment costs without leave of Court. (See Order Dkt. No. 65 (adopting the tentative order).) It reasoned that AK Futures was required to show that the post-judgment attorney's fees were incurred reasonably. (Id. at 7– 8.) Finally, it noted that AK Futures' attempt to collect fees without any purported evidentiary basis was a gross overreach and could reasonably be seen as an attempt by the Frost Firm to enrich itself through a windfall opportunity.

Yet, approximately an hour and a half later at 3:06 PM, Mr. Frost again filed a new Affidavit and Request, requesting the Clerk to issue another Writ of Execution to include post-judgment amounts in \$380,171.00 of costs and \$670.58 accrued interest. (Dkt. No. 62.) At minimum, it appears that Mr. Frost disregarded the Clerk's January 12, 2023 notice that AK Futures could not seek a writ with post-judgment costs without a court order. And at most, Mr. Frost ignored the Court's Tentative Order, which explained in detail why AK Futures could not rely on California Civil Procedure 699.040 to obtain the post-judgment costs.

Then, four days later on January 17, 2023, a different clerk⁴ issued a Writ of Execution for \$634,993.98. (Dkt. No. 63.)

D. January 23, 2023 Hearing on Order to Show Cause

At the January 23, 2023 hearing on the Order to Show Cause, Mr. Frost continued to justify his actions in collecting the post-judgment amounts based on his understanding of California Civil Procedure 699.040 and argued that AK Futures was entitled to collect the entire amount of the cashier's check. He argued that because Smoke Tokes had not objected within ten days to AK Futures' filing of Memorandum of Costs, AK Futures was automatically entitled to the entire amount and the Court had no discretion to determine otherwise.

³ As part of its regular practice and as noted in its procedures, the Court posts all tentative orders on the Court's webpage.

⁴ The January 12, 2023 Notice of Deficiency issued by the Clerk's Office had been previously issued by a different clerk. (Compare Dkt. No. 61, with Dkt. No. 63.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

The Court determined that the Clerk did not have authority to award post-judgment attorneys' fees. Mr. Frost admitted that no attempt had been made before the Court to justify the post-judgment fee request.

The Court ordered that \$244,152.40 of the cashier's check be applied towards the satisfaction of the Judgment. (Dkt. No. 65.) It ordered AK Futures release \$414,586.00 back to Smoke Tokes and instructed AK Futures to submit an Attorney's Fee motion and permitted Smoke Tokes to submit a Contempt motion, both to be heard on the same day. (Id.)

II. DISCUSSION

A. *Legal Standard*

Federal courts have inherent authority to "punish disobedience to court orders," which is essential to the administration of justice. Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 795–96 (1987). Civil contempt sanctions are penalties designed to "compel future compliance with a court order" and "are considered to be coercive and avoidable through obedience." Int'l Union v. Bagwell, 512 U.S. 821, 827 (1994). They may also be remedial in nature, intended to compensate the party pursuing the contempt action. Id.; United States v. Mine Workers, 330 U.S. 258, 303–04 (1947). Thus, a court may order sanctions payable to the court or the wronged party, depending on its purpose. See Gen. Signal Corp. v. Donalco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986). An injured party's may also be awarded attorney's fees and costs. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 774 F.3d 935, 958 (9th Cir. 2014).

A civil contempt finding must be made upon "clear and convincing evidence." Ahearn ex rel. NLRB v. Int'l Longshore & Warehouse Union, Locs. 21 & 4, 721 F.3d 1122, 1129 (9th Cir. 2013). A district court has "wide latitude in determining whether there has been a contemptuous defiance of its order." Gifford v. Heckler, 741 F.2d 263, 266 (9th Cir. 1971). The "moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." F.T.C. v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999). Courts consider as

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

factors whether the contemnor substantially complied with the court’s order and whether the actions were “based on good faith and reasonable interpretation of the order.” In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993). But “[p]arties who act on the *unreasonable* advice of counsel risk being held in contempt if their actions violate a court’s order.” Inst. of Cetacean Research, 774 F.3d at 953 (italics supplied) (rejecting “self-serving interpretation” of a court’s order). Civil contempt “should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant’s conduct.” Taggart, 139 S. Ct. at 1801–02.

B. Analysis

The evidence does not clearly and convincingly prove that AK Futures and the Frost Firm, in bad faith, violated the Court’s Enforcement Order beyond substantial compliance. See In re Dual-Deck, 10 F.3d at 10 F.3d at 695.

The Court’s Enforcement Order was limited to enforcing the Writ of Execution, which clearly noted that the amount to be collected to satisfy the monetary judgment was \$244,152.40. (See Writ of Execution, Dkt. No. 34; Order Enforcing Judgment, Dkt. No. 36.) AK Futures had no basis to levy on more than it was entitled to. Yet, it sought to collect \$390,171.00 in unexplained “third-party costs” and “attorney’s fees,” which exceeded the entire Judgment Amount.⁵ Then, AK Futures double-downed on its astonishing position before this Court that the Court had no discretion but to award such costs through the Clerk’s actions—despite having presented absolutely no supporting documents, no accounting, or any evidentiary showing whatsoever.

Based on the evidence before the Court, it could reasonably be said that the Frost Firm, armed with a Judgment, Writ, and Enforcement Order in hand, saw a windfall opportunity to add whatever post-judgment attorney’s fees and third-party fees it desired, believing it would not need to prove up such amounts according to Cal. Civ. Proc. Code §

⁵ As discussed supra, AK Futures contends that these fees were incurred to enforce the permanent injunction, not the collection of the monetary judgment. Writs of execution pertain only to money judgments, not injunctions. It is not clear what basis AK Futures believed it had to enforce a writ of execution beyond the money judgment that was entered. AK Futures had a right to levy only the amount required needed to satisfy the money judgment.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

685.070.⁶ Then, it sought to legitimize its actions by “filing” the Memorandum, “serving” on Smoke Tokes the self-prepared Memorandum (although it was never determined when the Memorandum was served), and capitalizing on the threat of the U.S. Marshals’ office—who relied on AK Futures’s Notice of Levy (which incorporated the Memorandum (see Dkt. No. 43-3)). In doing so, it could be said that the Frost Firm believed it could circumvent federal court proceedings to collect nearly half a million dollars in attorney’s fees and third-party costs (ultimately, \$414,586.00) by relying on certain provisions of state procedural law. At the January 23, 2023 hearing, the Court admonished Mr. Frost for engaging in impermissible self-help. (See Dkt. No. 77, at 14–15.)

Notwithstanding, the Court ultimately declines to attribute bad faith to the Frost Firm’s conduct.⁷ The Court finds that the Frost Firm’s interpretation of the Court’s Enforcement Order and the relevant law was not “*objectively*” unreasonable. Taggart v. Lorenzen, 139 S. Ct. 1795, 1802 (2019) (emphasis in original); Vertex Distrib., 689 F.2d at 891. While “a party’s subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable,” subjective intent is not always irrelevant. Taggart, 139 S. Ct. at 1802 (noting evidence of bad faith, like continuing and persistent violations, is relevant). The question is whether AK Futures “had some—indeed, *any*—objectively reasonable basis” to justify its actions. In re Taggart (Taggart II), 980 F.3d 1340, 1348 (9th Cir. 2020) (emphasis in original).

Here, the record reflects that the Frost Firm relied upon a misguided interpretation of the scope of enforceability of California Civil Procedure § 685.070. (See Order 7–8, Dkt. No. 65.) While ultimately incorrect, the Frost Firm’s conduct is consistent with this interpretation. The Frost Firm consistently maintained its position that AK Futures was entitled to levy on more than the money judgment reflected in the writ pursuant to California procedural law. (See Opp’n 8, Dkt. No. 75-1.) It read California Code of Civil Procedure sections 685.040 and 685.070 together to allow it to add post-judgment

⁶ California law requires only that the person preparing the memorandum of costs to swear under oath that the person believes that the post-judgment costs are “reasonable and necessary.” Cal. Civ. Proc. Code § 685.070(b).

⁷ Applicable here is the common adage of Hanlon’s Razor.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:21-cv-01061-JVS(ADSx) Date April 20, 2023

Title AK Futures LLC v. Smoke Tokes LLC, et al.

attorney's fees to the Enforcement Order. The Court finds that such interpretation sufficiently relies on "some" objectively reasonable basis. Taggart II, 980 F.3d at 1348.

Smoke Tokes urges the Court to infer bad faith from AK Futures's January 13, 2023 filing of the affidavit and request for the issuance of writ. Smoke Tokes characterizes such action as improper "clerk shopping," *i.e.*, filing numerous affidavits and requests until it got a clerk to approve the request. (Opp'n 6, Dkt. No. 70.) While Mr. Frost does not explain why he chose to file the Affidavit and Request of a Writ on January 13, 2023—filed after the initial clerk explicitly denied the request and an hour and a half after the Court issued its Tentative Order—the Court declines to find bad faith motivating such filing. It is possible that the Frost Firm did not review the Court's Tentative Order before filing the Affidavit and Request and that the Frost Firm believed that Clerk who issued the rejection was not "familiar with the file." (Frost Decl. ¶ 25.) Mr. Frost explains that the Frost Firm "took [the subsequent January 17, 2023 Writ] at face value, reasoning that one clerk was more familiar with the file than the other." (*Id.*) On balance, the Court finds that the foregoing conduct does not rise to clear or convincing evidence of bad faith.

In conclusion, the Court finds that the evidence does not support a finding of civil contempt—a "severe remedy"—by clear and convincing evidence. Taggart, 139 S. Ct. at 1802.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion. The Court finds that oral argument would not be helpful in this matter. Fed R. Civ. P. 78; L.R. 7-15.

IT IS SO ORDERED.