

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PEARSON EDUCATION, INC., :
JOHN WILEY & SONS, INC., :
CENGAGE LEARNING INC. AND :
THE MCGRAW-HILL COMPANIES, INC., :

Plaintiffs,

-against-

07 Civ. 7890 (PKC)

MATTHEW STIRLING D/B/A :
THETEXTBOOKGUY.COM :
AND JOHN DOES NOS. 1-5, :

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO ENFORCE THE FINAL JUDGMENT
AND ADJUDGE DEFENDANT IN CONTEMPT

Plaintiffs Pearson Education, Inc., John Wiley & Sons, Inc., Cengage Learning Inc., and The McGraw-Hill Companies, Inc. respectfully submit this memorandum of law in support of their motion to (i) enforce the final judgment and permanent injunction by consent entered March 5, 2008 ("Final Judgment"), and (ii) adjudge defendant Matthew Stirling ("Stirling") in contempt for failing to make the \$15,000 payment due on April 1, 2008.

Statement of Facts

The Final Judgment required Stirling to pay plaintiffs \$15,000, by April 1, 2008. Stirling failed to make that payment by that date. On April 2, 2008, plaintiffs' counsel sent Stirling

and his attorney a letter demanding payment within 10 business days. Stirling again failed to make the payment within those 10 business days. On April 16, 2007, plaintiffs' counsel sent Stirling and his attorney a letter accelerating the amounts due and demanding payment of the remaining \$51,000 due under the Final Judgment.

I.

THE COURT SHOULD ENFORCE THE FINAL JUDGMENT

This Court has the authority to enforce the final judgment and permanent injunction entered March 5, 2008. In the final paragraph of the Final Judgment, the Court retained jurisdiction to do that.

In these circumstance, there can be no reasonable dispute that Stirling has failed to meet his obligations under the Final Judgment and the Court should compel him to pay the remaining \$51,000 due under it, plus interest and plaintiffs' additional attorneys' fees. The Spectacular Venture, L.P. v. World Star International, Inc., 927 F. Supp. 2d 693 (S.D.N.Y. 1996).

II.

THE COURT SHOULD ADJUDGE STIRLING IN CONTEMPT OF
THE FINAL JUDGMENT AND IMPOSE COERCIVE SANCTIONS

The Court also has the authority to adjudge Stirling in contempt and to impose coercive sanctions upon him. Eros Entertainment, Inc. v. Melody Spot, LLC, 2005 U.S. Dist. LEXIS 43227 (S.D.N.Y. October 11, 2005) ("There are three essential elements which must be established before a party can be held in civil contempt: 1) the order must be 'clear and unambiguous,' [citations omitted] 2) the proof of non-compliance must be 'clear and convincing,' [citations omitted] and 3) the contemnor has not 'been reasonably diligent and energetic in attempting to accomplish what was ordered.'")

After plaintiffs demonstrate non-compliance with the Final Judgment, Stirling bears the heavy burden of demonstrating that he lacks the ability to comply with it. Donovan v. Sovereign Security, Ltd., 726 F.2d 55 (1983) ("Inability to comply is, of course, a 'long-recognized defense to a civil contempt citation,' . . . , but the burden is on defendants to demonstrate their claimed inability 'plainly and unmistakably.'")

Even if Stirling can prove that he could not pay the entire \$15,000, it is inconceivable that Stirling lacked to ability to pay some portion of that amount. Yet, he failed to do so. Coercive sanctions are therefore appropriate.

Conclusion

For the reasons set forth above, plaintiffs respectfully request that the Court grant their motion.

Dated: New York, New York
April 17, 2008

DUNNEGAN LLC

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