

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE,  
EASTERN DIVISION**

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**RANDY MARTIN,**

**Plaintiff,**

**vs.**

**No. 1:11-CV-1204-JDB**

**PERFORMANCE BOAT BROKERAGE.  
COM, LLC and MATTHEW EDWARD  
SMITH,**

**Defendants.**

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**REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE AS TO PLAINTIFF'S  
MOTION FOR CONTEMPT AND SANCTIONS AGAINST DEFENDANT MATTHEW  
SMITH**

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This matter came to be heard on the 13th day of October, 2011, at 10:00 am upon Plaintiff's Motion for Contempt and Sanctions filed on August 11, 2011, ("Contempt Motion"), [Doc. Entries 13 and 14]. As this Court has granted the Motion to Withdraw as counsel filed by the firm of Rainey, Kizer, Reviere, and Bell and has advised Defendant Performance Boat Brokerage.com, LLC that it has thirty (30) days to obtain counsel and report the same to this Court, the hearing of the instant Motion against Defendant Performance Boat Brokerage.com, LLC will not be held within this thirty day period.

The hearing did proceed against Defendant Matthew E. Smith, however. And, it appearing to the Court that based upon the pleadings, the statements of counsel, the testimony of witnesses, and the record as a whole, the Magistrate Judge reports as

follows:

1. On July 14, 2011 after notice and hearing, the Honorable James D. Todd issued a preliminary injunction in this action prohibiting Defendants, Matthew Smith and Performance Boat Brokerage.com, LLC from selling the business known as Performance Boat Brokerage.com, LLC and from selling any of the assets of Performance Boat Brokerage.com, LLC, except in the normal and ordinary course of business without permission of the court.
2. Having been informed that Defendants purportedly sold or transferred assets outside the ordinary course, Plaintiff filed his Motion for Contempt and Sanctions against Defendants on August 11, 2011.
3. On August 12, 2011, this Court referred this matter to the United States Magistrate Judge for a report and recommendation.
4. On August 17, 2011, Plaintiff filed a Motion for an Expedited Hearing and this Court granted Plaintiff's Motion and issued a Setting Letter setting the hearing for August 24, 2011 at 10:00 a.m.
5. On August 23, 2011, Defendants filed their first Motion for Continuance of the Expedited Hearing and requested a phone hearing regarding the same. This was heard on the same date by the Magistrate Judge, with counsel for Plaintiff and Defendants being present by phone. An Agreed Order was submitted by counsel for both parties to the Magistrate Judge on August 24, 2011. The Magistrate Judge issued a Report and Recommendation to the Court to execute the Agreed Order continuing the Contempt Motion to August 30, 2011 at 10:00 a.m.
6. In attendance at the hearings of August 30, 2011 were Brett Manire and Mark

Waddington, who were present in response to subpoenas issued pursuant to Rule 45 of the Federal Rules of Civil Procedure. Defendant Matthew Smith was not present and, after hearing argument from counsel for Plaintiff and Defendants as to the Continuance Motion, the Magistrate Judge indicated that the continuance would be denied.

7. After a request by the parties for a brief recess, the Magistrate Judge was informed by counsel for the parties that an agreement had been provisionally reached to continue and postpone the hearing on the Contempt Motion provided that Mark Waddington, a member of Performance, LLC, or Performance, LLC, a Missouri LLC, would agree to pay \$125,000.00 on or before October 1, 2011 into a Rainey, Kizer, Reviere & Bell trust account. This \$125,000.00 purportedly being a deferred portion of the purchase price owing to the Defendants for certain assets acquired from the Defendants by Performance, LLC.
8. On August 30, 2011, Waddington testified that:
  - a. Performance, LLC was a party, as “Buyer,” under a certain “Asset Purchase Agreement with Matthew Smith and Performance Boat Brokerage.com, LLC dated August, 2, 2011, (“Asset Purchase Agreement”).
  - b. Under the Asset Purchase Agreement, Performance, LLC is obligated to pay to Defendants, Matthew Smith and Performance Boat Brokerage.com, LLC, the sum of \$125,000.00 on or before October 1, 2011.
  - c. He, or Performance, LLC, as the case may be, is willing to pay the \$125,000.00 to the Rainey, Kizer, Reviere & Bell trust account on the condition that title to the assets acquired under the Asset Purchase

Agreement is not encumbered or impaired by the Preliminary Injunction.

9. With Waddington's testimony that \$125,000 would be paid into the Rainey-Kizer trust account, the parties agreed the hearing on the Contempt Motion should be continued until a time set by this Court.
10. On September 12, 2011, the Magistrate Judge issued his Report and Recommendation as to the continuation of the hearing on Contempt and Sanctions and as to the \$125,000.00 that was to be paid into the Rainey-Kizer trust account on October 1, 2011. [Doc. Entry 30]. Also on September 12, 2011 the Court adopted the Magistrate's Report and Recommendation and entered it as an Order of this Court. [Doc. Entry 31].
11. On September 29, 2011, Mark Waddington and Defendant Matthew Smith agreed to an Amendment to Asset Purchase Agreement effectively changing the date that the \$125,000 payment would be due to Defendant Smith from Waddington. Whereas the \$125,000 payment had been due 60 days after August 2, 2011, the Amendment changed the due date to 90 days after August 2, 2011. [Doc. Entry 38; Exhibit Admitted on October 13, 2011].
12. In addition to Plaintiff and Plaintiff's counsel, present by phone at the October 13<sup>th</sup> hearing were Brett Manire and Mark Waddington and counsel for Mark Waddington and Performance, LLC, Tom Whitmore.
13. In addition to previous testimony that Waddington had purchased the assets of Performance Boat Brokerage.com, LLC while the Injunction was in effect, Waddington and Manire testified as to Matthew Smith's defiance of this Court's Orders and his intentional avoidance of the hearing.

14. Plaintiff testified as to:

- a. His agreement to purchase a boat ("Boat") from Defendants based on Defendants' representation that Plaintiff would receive good title to the Boat;
- b. Plaintiff's wiring of funds to Defendants making the total Plaintiff paid to Defendants the sum of \$155,000.00;
- c. Defendants' continued promises of good title, numerous misrepresentations that money had been transferred back to Plaintiff's bank account, misrepresentations that the loan holder was assuring release of the lien on the title, misrepresentations that the former owner of the boat had been paid by Defendants for the Boat and refused to pay the lienholder, and misrepresentations that the business and/or its assets would not be sold until the debt to Plaintiff was paid.

15. In addition, although Defendant Matthew Smith, through his counsel, represented to this Court in a phone hearing on August 23, 2011 that he would pay the \$25,000.00 he had received as a down payment on the sale of the business/assets into the Rainey-Kizer trust account, and this Court so ordered, Defendants have defied this Order.

16. And, although the hearing on this matter has been scheduled and re-scheduled three times, Defendants have yet to appear before this Court and respond as to why this Court should not grant Plaintiff's Motion for Contempt and Sanctions.

It is, therefore, recommended:

A. That Plaintiff's Motion for Contempt and Sanctions be granted as to

Defendant Matthew Smith and that he shall be found to be in contempt of this Court;

- B. That Defendant Matthew Smith be ordered to pay Plaintiff's attorney fees, costs, and expenses related to the Preliminary Injunction and the violation of that Injunction and that these funds are to be attached pursuant to a writ of attachment;
- C. That the Preliminary Injunction dated July 14, 2011 remain in effect and that no further assets or funds owned by Defendants Matthew E. Smith and/or Performance Boat Brokerage.com, LLC on the date of this Order or on the date of the Order dated July 14, 2011 shall be transferred, removed, conveyed, or sold, except in the ordinary course and scope of business or as ordered by this Court;
- D. That any further sale of the assets of the business known as Performance Boat Brokerage.com, LLC or Matthew Smith be prohibited and any transfer of funds or assets associated with the sale be prohibited as well, except in the ordinary course and scope of business or as ordered by this Court;

RESPECTFULLY SUBMITTED, this the 25<sup>th</sup> day of October, 2011.

**s/Edward G. Bryant**  
EDWARD G. BRYANT  
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATIONS MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATIONS. 28 U.S.C. § 636(b)(1). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.