

1 JOSE F. SANCHEZ, Cal. Bar No. 161362
CAROL LALLY, Cal. Bar No. 226392

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2 Attorneys for Plaintiff
3 Securities and Exchange Commission
4 Randall R. Lee, Regional Director
5 Sandra J. Harris, Associate Regional Director
6 5670 Wilshire Boulevard, 11th Floor
7 Los Angeles, California 90036-3648
8 Telephone: (323) 965-3998
9 Facsimile: (323) 965-3908

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

MX FACTORS, LLC; BBH
RESOURCES, LLC; JTL
FINANCIAL GROUP, LLC;
RICHARD M. HARKLESS; DANIEL
BERARDI; THOMAS
HAWKESWORTH; and RANDALL
W. HARDING

Defendants.

Case No. EDCV 04-223 VAP (SGLx)

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S *EX
PARTE* APPLICATION FOR ORDER
TO SHOW CAUSE RE: CIVIL
CONTEMPT AGAINST DEFENDANT
RICHARD M. HARKLESS**

By this *Ex Parte* Application, Plaintiff Securities and Exchange
Commission ("Commission") seeks an order to show cause why defendant
Richard M. Harkless ("Harkless" or "Defendant") should not be held in civil
contempt of this Court's Preliminary Injunction and Orders of March 8, 2004 (the
"Order"). Among other things, the Order requires Harkless to provide access to
and control over records and assets, provide accountings to the Commission, and
repatriate assets to the United States. The Order also prohibits dissipation of
assets and taking actions on behalf of Mx Factors, LLC ("Mx") without consent.
The Court ordered repatriation and accountings within ten days of entry of the

1 Order, or by March 18, 2004. Harkless *has not* provided access to and control
2 over records and assets, provided accountings to the Commission, or repatriated
3 assets and *has* dissipated assets and taken actions on behalf of Mx without
4 consent, in violation of this Court's Order.

5 Specifically, the Court restrained "Mx and Harkless, and their officers,
6 agents, servants, employees, attorneys, subsidiaries and affiliates, and those
7 persons in active concert or participation with them" from "transferring,
8 assigning, selling, hypothecating, changing, wasting, dissipating, converting,
9 concealing, encumbering, or otherwise disposing of" the assets of any of the
10 defendants, including Harkless and Mx. (Order at § V.) The Court also required
11 Harkless to provide the court-appointed receiver with "access to and control of"
12 all of the "assets, collateral, books, records, papers, notes, deeds of trust and other
13 interests in real property, or other property of, or managed by, Mx" (Order at
14 § VIII.) The Court prohibited "officer[s], agent[s], servant[s], employee[s], or
15 attorney[s] of Mx or Harkless, or their subsidiaries or affiliates" from taking or
16 purporting to take action in the name of Mx or any of its subsidiaries or affiliates
17 without the written consent of the receiver or order of this Court. (Order at § IX.)
18 The Court required Harkless to deliver accountings to the Commission "within ten
19 days of the issuance" of the Order, including "a detailed and complete schedule of
20 all assets of Mx and Harkless" and a "description of the source(s) of all such
21 assets." (Order at § XVI.) The Court also required Harkless to transfer to the
22 Clerk of this Court "all assets, funds, documents and other property held in foreign
23 locations in the name of defendant Harkless, or for the benefit or under the direct
24 or indirect control of Defendant Harkless or over which Defendant Harkless
25 exercises investment or other authority, including signatory authority." (Order at §
26 XVIII.) Likewise, the Court required Mx to repatriate "all assets, funds,
27 documents and other property held in foreign locations in the name of defendant
28 Mx, or for the benefit or under the direct or indirect control of Mx or over which

1 they exercise investment or other authority, including signatory authority” to the
2 receiver. (Order at § XVII.) As set forth in the accompanying Memorandum of
3 Points and Authorities and the Declaration of Carol Lally, Harkless has not
4 complied with any of these orders as of the date of the filing of this Application.

5 Accordingly, the Commission seeks an order for the Defendant to show
6 cause why he should not be held in civil contempt and coercively sanctioned until
7 he complies with the aforementioned orders. This application is being made *ex*
8 *parte* because an expeditious resolution of this matter will help to ensure that
9 assets are not dissipated further.

10 As stated in the accompanying Lally declaration and pursuant to Local Rule
11 7-3, the Commission has attempted unsuccessfully to resolve this matter through
12 conferring with Harkless’s counsel, Patrick Swan of Luce, Forward, Hamilton &
13 Scripps, LLP. Further, as required by Local Rule 7-19.1, the Commission sent a
14 letter to Mr. Swan advising of the time, date, and substance of the proposed *ex*
15 *parte* application, asking him to inform the Commission whether his client would
16 oppose the motion or wish to be heard. Mr. Swan indicated that his client would
17 like to be heard and would oppose the Application.

18 Counsel for the Commission have advised the defendants or their counsel of
19 the date, time and substance of the Commission’s *Ex Parte* Application. During
20 the Commission’s investigation, the temporary restraining order hearing, and the
21 preliminary injunction hearing, defendants were represented as follows:

22 ***Counsel to Mx Factors, LLC***
23 Frank Nemecek, Esq.
24 Nemecek & Cole
25 15260 Ventura Boulevard, Suite 920
26 Sherman Oaks, CA 91403
27 Telephone: (818) 788-9500

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1 **Counsel to Richard Harkless**
Edward Patrick Swan, Jr.
2 Clarice Estrada-Simpson
Luce, Forward, Hamilton & Scripps, LLP
3 600 West Broadway, Suite 2600
San Diego, CA 92101-3372
4 Telephone: (619) 236-1414
Facsimile: (619) 232-8311

5 **Counsel to JTL Financial Group, LLC and Randall W. Harding**
6 Roger J. Buffington, Esq.
Buffington & Bowling LLP
7 2151 Michelson Drive, Suite 232
Irvine, CA 92612
8 Telephone: (949) 221-9660

9 **Counsel to Thomas Hawkesworth**
Frank Peasley, Esq.
10 3877 12th Street
Riverside, CA 92501
11 Telephone: (909) 369-0818


12 **Counsel to Daniel Berardi**
Peter Scalisi, Esq.
13 3877 12th Street
Riverside, CA 92501
14 Telephone: (909) 686-9914

15 **Counsel to BBH Resources, LLC**
John W. Cotton, Esq.
16 Cotton & Gundzik, LLP
725 South Figueroa, 34th Floor
17 Los Angeles, CA 90017
18 Telephone: (213) 312-1336

19 It is the Commission's understanding that Nemecek & Cole no longer represent
20 Mx Factors, LLC and that Harding now is appearing *pro se*. The court-appointed
21 receiver and its counsel now are appearing for Mx Factors, LLC, BBH Resources,
22 LLC and JTL Financial Group, LLC.

23
24 DATED: June 24, 2004

Respectfully submitted,

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27 _____
JOSE F. SANCHEZ
CAROL LALLY
Attorneys for Plaintiff
28 Securities and Exchange Commission

1 JOSE F. SANCHEZ, Cal. Bar No. 161362
2 CAROL LALLY, Cal. Bar No. 226392

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MX FACTORS, LLC; BBH
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HARKLESS; DANIEL BERARDI;
THOMAS HAWKESWORTH; and
RANDALL W. HARDING,

Defendants.

Case No. EDCV 04-223 VAP (SGLx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION BY
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION FOR
ORDER TO SHOW CAUSE RE:
CIVIL CONTEMPT AGAINST
DEFENDANT RICHARD M.
HARKLESS**

Plaintiff Securities and Exchange Commission ("Commission") submits this memorandum of points and authorities in support of its *ex parte* application for an order to show cause why defendant Richard M. Harkless ("Harkless" or "Defendant") should not be held in civil contempt of this Court's Preliminary Injunction and Orders of March 8, 2004 (the "Order"). Among other things, the Order requires Harkless to provide access to and control over records and assets, provide accountings to the Commission, and repatriate assets to the United States. The Order also prohibits dissipation of assets and taking actions on behalf of Mx Factors, LLC ("Mx") without consent. The Court ordered repatriation and

1 accountings within ten days of entry of the Order, or by March 18, 2004. With
2 this Application, the Commission presents clear and convincing evidence that
3 Harkless *has not* provided access to and control over records and assets, provided
4 accountings to the Commission, or repatriated assets and *has* dissipated assets and
5 taken actions on behalf of Mx without consent.

6 With this Application, the Commission also presents evidence that Harkless
7 has traveled outside the United States during the pendency of this Court's Order
8 against him. Therefore, the Commission also seeks an order to show cause why
9 Harkless should not be required to surrender his passport(s) until he has provided
10 access to and control over records and assets, provided accountings to the
11 Commission, and repatriated assets as required by the Order.

12 **I.**

13 **STATEMENT OF FACTS**

14 On March 8, 2004, the Court entered the Order against Harkless and Mx.
15 The Commission hand-delivered a copy of the Order to Harkless's counsel that
16 same day, immediately following the conclusion of the hearing. (Lally Decl. at ¶
17 5.) The Commission also personally served Harkless with this Court's temporary
18 restraining order on February 26, 2004. (Lally Decl. at ¶ 4.) Both of these orders
19 required Harkless to, among other things, give the court-appointed receiver
20 ("Receiver") access to records and assets, provide accountings (including a
21 detailed asset schedule and records) to the Commission, and transfer foreign assets
22 to the United States. (See Order at §§ VIII, XVI, and XVIII.) Harkless has done
23 none of these things. Nor has Harkless provided the Receiver with any of Mx's
24 records that are in his possession or under his control, either in this country or
25 abroad, thus impeding the Receiver's ability to perform its court-ordered functions
26 on behalf of Mx and the investors. (Receiver Decl. at ¶ 15.) Further, after the
27 entry of the Order, funds were withdrawn from the foreign accounts of one of
28 Mx's affiliates or subsidiaries, which Harkless controls. (Lally Decl. at ¶¶ 11, 14;

1 Report of Temporary Receiver's Activities at 5.) Finally, the Commission has
2 evidence demonstrating that Harkless has traveled outside the country since the
3 entry of the Order. (Receiver Decl. at 13.)

4 II.

5 ARGUMENT

6 **A. Harkless Has Violated This Court's Specific and Definite Orders**

7 In a civil contempt proceeding, the "moving party has the burden of
8 showing by clear and convincing evidence that the contemnor[s] violated a
9 specific and definite order of the court." F.T.C. v. Affordable Media, 179 F.3d
10 1228, 1239 (9th Cir. 1999) (quoting Stone v. City and County of San Francisco,
11 968 F.2d 850, 856 n.9 (9th Cir. 1992)); see also In re Crystal Palace Gambling
12 Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987) ("If a person disobeys a specific
13 and definite court order, he may properly be adjudged in contempt.") (citing
14 Shuffler v. Heritage Bank, 720 F.2d 1141, 1146 (9th Cir. 1983)). The burden is
15 then on the contemnor to demonstrate why he has been unable to comply with the
16 Order. See Affordable Media, 179 F.3d at 1239 (citing Stone, 968 F.2d at 856
17 n.9). The Commission has shown, by clear and convincing evidence, that
18 Harkless violated not one but five specific and definite orders of the Court.

19 First, Harkless has violated the Court's Order prohibiting the dissipation of
20 assets. Section V of the Order specifically restrains "Mx and Harkless, and their
21 officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and
22 those persons in active concert or participation with them" from "transferring,
23 assigning, selling, hypothecating, changing, wasting, dissipating, converting,
24 concealing, encumbering, or otherwise disposing of" the assets of any of the
25 defendants, including Harkless and Mx. (Order at § V.) Over \$40,000 has been
26 disbursed from the Mx Factors, Ltd. account at Provident Bank & Trust of Belize
27 since the Court's entry of the Order. (Lally Decl. at ¶ 11.) Over \$220,000 has
28 been disbursed from the Mx Factors, Ltd. account at Atlantic International Bank of

1 Belize since the Court's entry of the Order. (Lally Decl. at ¶14.) Harkless's crab
2 fishing operation in Ensenada, Mexico received at least \$264,290 from these
3 Belize accounts after this Court's entry of the Order. (See Receiver's Decl. at ¶
4 14.) Harkless and his wife, Julie Harkless, are the signatories on these accounts
5 and are directors of the account holder, Mx Factors Ltd. (Lally Decl. at ¶¶ 10, 13;
6 Receiver Decl. at ¶ 3.) Further, these accounts were funded by Mx's accounts at
7 the Business Bank of Nevada, which the Order has frozen. (Lally Decl. at ¶¶ 10,
8 13; see also TRO Brief, Tercero Decl. at Ex. 17.) Thus, the Court's Order applies
9 to the Mx Factors, Ltd. accounts, and the disbursement of money from those
10 accounts violated a specific and definite order of the Court.

11 Second, Harkless has violated the Court's Order requiring him to provide
12 access to and control over assets and records of Mx. Section VIII of the Order
13 specifically requires Harkless to provide the Receiver with "access to and control
14 of" all of the "assets, collateral, books, records, papers, notes, deeds of trust and
15 other interests in real property, or other property of, or managed by, Mx"
16 (Order at § VIII.) Harkless has not provided the Receiver with any access
17 whatsoever to any of Mx's records that are still in his possession or under his
18 control, either in this country or abroad. For example, despite repeated requests,
19 Harkless has not provided the Receiver with access to the assets of or the records
20 pertaining to the Belize accounts or to Mx's files at Gordon & Rees, Mx's counsel
21 (Receiver Decl. at ¶¶ 2-12.)^{1/} Without that access, the Receiver is unable to
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23 ^{1/} Harkless has signed letters of instruction to the banks and his counsel
24 (Receiver Decl. at ¶¶ 4-6), but he refused to sign a letter of instruction to his
25 Belize agent, and his wife, Julie Harkless, the co-signatory on the accounts and co-
26 director of Mx Factors, Ltd., refused to sign letters of instruction to the bank.
27 (Receiver Decl. at ¶ 7.) Harkless's agent has not delivered the letters of
28 instruction to the Belize banks. (Receiver Decl. at ¶¶ 8, 9.)

(continued...)

1 identify, much less control, all of Mx's assets that may exist in the United States or
2 abroad. (Receiver Decl. at ¶ 15.) Thus, Harkless's failure to provide access to and
3 control of records and assets violates a specific and definite order of the Court.

4 Third, actions have been taken on Mx's behalf without the consent of the
5 Receiver or the Court. Section IX specifically prohibits "officer[s], agent[s],
6 servant[s], employee[s], or attorney[s] of Mx or Harkless, or their subsidiaries or
7 affiliates" from taking or purporting to take action in the name of Mx or any of its
8 subsidiaries or affiliates without the written consent of the Receiver or order of
9 this Court. (Order at § IX.) As discussed above, over \$250,000 has been
10 transferred from accounts that contained funds from Mx without the consent of the
11 Receiver or the Court. (Lally Decl. at ¶ 7.) Thus, the disbursement of Mx's funds
12 without authorization violated a specific and definite order of the Court

13 Fourth, Harkless has not provided accountings to the Commission. Section
14 XVI specifically requires Harkless to deliver accountings to the Commission
15 "within ten days of the issuance" of the Order, including "a detailed and complete
16 schedule of all assets of Mx and Harkless" and a "description of the source(s) of
17 all such assets." (Order at § XVI.) Since the entry of the Court's temporary
18 restraining^{2/} and preliminary injunction orders, the Commission has received no
19 accountings from Harkless, even though he was to have delivered them to the
20 Commission by March 18, 2004. (Lally Decl. at ¶ 7.) He also has not produced
21 the books and records underlying the accountings, as ordered to do by this Court.
22 (Lally Decl. at ¶ 6; see Order at § XVI.) The one-page, purported "schedule of
23

24 ^{1/} (...continued)

25 As of the date of this Application, Harkless has not provided the Receiver
26 with access to or control over the records and assets of those accounts. (Receiver
27 Decl. at ¶¶ 10-12.)

28 ^{2/} The temporary restraining order also required accountings of Harkless and
Mx.

1 assets” that Harkless produced on March 2, 2004 in response to the temporary
2 restraining order is neither detailed nor complete. The “schedule of assets” does
3 not disclose, for example, the homes in Belize and Vancouver, the English trust,
4 the Hollywood studio, or the \$30 million escrow trust identified in the preliminary
5 report of the Receiver filed on March 8, 2004. (Report of Temporary Receiver’s
6 Activities at 4, 6-9.) Harkless has made no attempt to describe the source of any
7 assets. Thus, Harkless’s failure to provide accountings to the Commission violates
8 a specific and definite order of the Court.

9 Fifth, Harkless has not repatriated foreign assets. Section XVIII specifically
10 requires Harkless to transfer to the United States “all assets, funds, documents and
11 other property held in foreign locations in the name of defendant Harkless, or for
12 the benefit or under the direct or indirect control of Defendant Harkless or over
13 which Defendant Harkless exercises investment or other authority, including
14 signatory authority.” (See Order at § XVIII.) Likewise, the Court required Mx to
15 repatriate “all assets, funds, documents and other property held in foreign
16 locations in the name of defendant Mx, or for the benefit or under the direct or
17 indirect control of Mx or over which they exercise investment or other authority,
18 including signatory authority” to the receiver. (Order at § XVII.) As discussed
19 above, the Commission has not received any notification that Harkless has
20 transferred any assets or other property held in foreign locations, even though he
21 was required to repatriate those assets 97 days ago. (Lally Decl. at ¶ 6.)

22 **B. Civil Contempt is the Proper Means of Enforcing Harkless’s**
23 **Compliance with This Court’s Lawful Orders**

24 This Court has inherent power to enforce compliance with its lawful orders
25 through civil contempt. Shillitani v. United States, 384 U.S. 364, 370, 86 S. Ct.
26 1531, 16 L. Ed. 2d 622 (1966). See also 18 U.S.C. § 401 (1982); Young v. United
27 States, 481 U.S. 787, 793, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987); In re Crystal
28 Palace, 817 F.2d at 1364; see also Fed. R. Civ. P. 70. Further, courts have found

1 defendants in civil contempt under circumstances such as those presented in
2 Harkless's case. Courts have, for example, held a defendant in a Commission
3 enforcement action in civil contempt for violating an order freezing funds and
4 assets. See e.g., SEC v. Moss, 644 F.2d 313, 315-16 (4th Cir. 1981), cert. denied,
5 455 U.S. 1023 (1982) (upholding determination by district court that defendant
6 was in contempt of freeze order when he sold a condominium apartment and some
7 shares of bank stock without the court's approval). Courts also have held a
8 defendant in a Commission action in civil contempt for failure to account for
9 funds and produce records. See, e.g., SEC v. Elmas Trading Corp., 824 F.2d 733,
10 732-33 (9th Cir. 1987); SEC v. Penfield, 157 F.2d 65, 66-67 (9th Cir. 1946).
11 Likewise, courts have held defendants in civil contempt for failing to repatriate
12 assets. See, e.g., Affordable Media, 179 F.3d at 1243. Thus, this Court has the
13 inherent authority to hold Harkless in civil contempt for his failure to obey its
14 Order.

15 **C. The Court Should Impose a Sanction Sufficiently Coercive to Compel**
16 **Harkless's Compliance**

17 The Court has broad equitable power to order appropriate relief in civil
18 contempt proceedings. SEC v. Hickey, 322 F.3d 1123, 1128 (9th Cir. 2003). Civil
19 contempt is "wholly remedial" and is intended to coerce compliance with an order
20 of the Court. Southern Railway Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).
21 See also McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S. Ct. 497, 93
22 L. Ed. 599 (1949). Whether acting on his own behalf or on behalf of Mx, Harkless
23 so far has shown no inclination to obey the specific and definite orders of this
24 Court. Moreover, when he used a third party and a post office box to attempt to
25 loot Mx's assets for his own benefit, he violated this Court's Order in a manner
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1 designed to avoid detection by the Court and the Commission.^{3/} (France Decl. at
2 ¶¶ 3-7.) Therefore, the Court should impose a sanction sufficiently coercive to
3 compel Harkless's compliance with its orders.

4 The sanctions sought by the Commission against Harkless are appropriate.
5 When the defendant in Elmas Trading Corporation refused to account for funds or
6 produce records relating to assets, for example, the district court ordered him
7 incarcerated. See Elmas Trading Corp., 824 F.2d at 733. As the Supreme Court
8 has held:

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10 "Imprisonment for civil contempt is ordered where the
11 defendant has refused to do an affirmative act required
12 by the provisions of an order which, either in form or in
13 substance, was mandatory in its character. Imprisonment
14 in such cases is not inflicted as a punishment, but is
15 intended to be remedial by coercing the defendant to do
16 what he had refused to do. The decree in such cases is
17 that the defendant stand committed unless and until he
18 performs the affirmative act required by the court's
19 order. . . . If imprisoned . . . 'he carries the keys of his
20 prison in his own pocket.' He can end the sentence and
21 discharge himself at any moment by doing what he had
22 previously refused to do."

23 Penfield Co., 157 F.2d at 66 (quoting Gompers v. Buck's Stove & Range Co., 221
24 U.S. 418, 442 (1911) (internal citations omitted). Imposition of a daily fine also is
25 appropriate. See Int'l Bus. Machs. Corp. v. U.S., 493 F.2d 112, 116 (2d Cir. 1973)
26 (fine may be imposed to coerce compliance). In this case, however, the imposition

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28 ^{3/} Even if Harkless were to argue that he attempted to appropriate Mx's assets
in good faith, his purported good faith would be no defense to contempt. See
Donovan v. Mazzola, 716 F.2d at 1240. In civil contempt proceedings, intent is
not an issue. Rather, the question is whether a party has complied with the Court's
order. Donovan, 716 F.2d at 1240; Jim Walter Resources, Inc. v. International
Union, UMW, 609 F.2d 165, 168 (5th Cir. 1980). The absence of wilfulness does
not relieve an individual from civil contempt since it is a sanction to enforce
compliance with an order of the Court and is not dependent on the state of mind of
the respondent. See In Re Crystal Palace, 817 F.2d at 1365; NLRB v. Ralph
Printing and Lithographing Co., 433 F.2d 1058, 1062 (8th Cir. 1970).

1 of a fine without more would be unlikely to coerce Harkless to obey the Order, as
2 he already has demonstrated a willingness to violate the Court's orders to
3 relinquish and repatriate assets. Incarceration would be more likely to coerce his
4 performance and is within the Court's discretion if the Court finds that
5 incarceration would serve that proper purpose of civil contempt. See Shillitani,
6 384 U.S. at 370-71; Penfield, 157 F.2d at 66.

7 Further, Harkless appears to have traveled outside the United States since
8 the entry of the Order. The Receiver has gathered evidence suggesting that
9 Harkless is living in Ensenada, Mexico and working at the fish camps in Baja
10 Tortugas, Mexico. (Receiver Decl. at ¶ 13.) The Commission already has
11 presented evidence that Harkless used Mx money to finance Olocun, S.A. de C.V.
12 ("Olocun"), a crab fishing operation in Ensenada, Mexico. (See, e.g., TRO Brief,
13 Bullard Decl. at ¶¶ 18(c), 19, 22(c) and Ex. 11; Tercero Decl. at Ex. 5, pp. 76-77,
14 Ex. 27, pp. 601-04, 686-88.) Much of the money improperly withdrawn from the
15 Mx Factors, Ltd. accounts after the entry of the Order was transferred to an
16 account at a Mexican bank. (Lally Decl. at ¶¶ 11, 14.) Thus, Harkless also should
17 demonstrate why he should not surrender his passport(s) until he complies with
18 the Order. SEC v. Showalter, 227 F. Supp.2d 110, 115 (D.D.C. 2002) (civil
19 contempt order requiring Commission defendant to surrender his passport).

20 III.

21 CONCLUSION

22 Because the Commission has shown by clear and convincing evidence that
23 Harkless has violated the specific and definite Order of this court, the burden now
24 is on him to demonstrate why he has been unable to comply with the Order.
25 Accordingly, the Commission respectfully requests that the Court issue an order to


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1 show cause why defendant Richard M. Harkless should not be held in civil
2 contempt of this Court's Preliminary Injunction and Orders of March 8, 2004.

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4 DATED: June 24, 2004



Jose F. Sanchez
Carol Lally
Attorneys for Plaintiff
Securities and Exchange Commission

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