IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

LESLIE NEWMAN, Commissioner of the Tennessee Department of Commerce and Insurance,	)	
Petitioner,	)	
VS.	)	**NO. 10-507-III**
SMART DATA SOLUTIONS, LLC, a Tennessee limited liability company, AMERICAN TRADE ASSOCIATION, INC., an Indiana nonprofit corporation with its principal place of business in Tennessee, AMERICAN TRADE ASSOCIATION, LLC, an Arkansas limited liability company, SERVE AMERICA ASSURANCE, a corporation with an unknown location, BART S. POSEY, SR., ANGIE POSEY, OBED W. KIRKPATRICK, SR., LINDA KIRKPATRICK, RICHARD H. BACHMAN, KRISTY WRIGHT, WILLIAM M. WORTHY, II, and COLIN YOUELL,	)	
Respondents.	)	

ORDER

This matter is before the Court on the Rule 59.04 motions of the respondents Smart Data Solutions, LLC ("SDS"); American Trade Association, Inc. and American Trade Association, LLC (referred to collectively as "ATA"); the Poseys; Richard Bachman; and William M. Worthy, II to alter or amend the May 20, 2010 Final Order in this case and to make additional findings of fact.

After considering the papers and oral arguments in support and in opposition, and after reviewing all of the orders of the case, the Court denies the motions. As follows, the Court concludes that the respondents' objections to the May 20, 2010 Final Order are without merit.

1. The Court did not find that Beema/Serve America, the entities whom SDS and ATA claim were insurors and underwriters for the insurance offered to ATA members, did not exist. Instead, the Court found at pages 3, 4, 5, 9, 10 and 12, of the April 14, 2010 Memorandum and Order[1], that:

- Serve America does not exist in the United States
- Serve America has never issued a policy to an entity in the United States
- Beema has denied ownership of Serve America
- Insurance coverage with Beema/Serve America is unauthorized and nonexistent coverage
- With Beema and Serve America there is no insurance underwriting company to fund and direct payment of claims

[1]The method of the orders pertinent to the motions in issue are that the May 20, 2010 Final Order is the "Liquidation Order." It enumerates the liquidation powers of the Commissioner. Incorporated into the May 20, 2010 Final Order are Findings of Fact and Conclusions of Law from an April 14, 2010 Memorandum and Order, drawn from affidavits, covering the issues that (1) SDS and ATA, having engaged in and transacted insurance business in Tennessee, are subject to the liquidation power of the Commissioner and (2) the entities pose a hazard to the public and require liquidation. Also incorporated into the May 20, 2010 Final Order are Findings of Fact and Conclusions of Law drawn from an April 26, 2010 evidentiary hearing finding that SDS and ATA are insolvent insurors which furnishes an additional statutory basis for liquidation.

- Beema and Serve America do not write insurance in the United States
- The Beema/Serve America insurance product is a sham and posed a significant risk of nonpayment of claims
- In the United States there is no Beema/Serve America insurance product in place

The statements by the Court at pages 5, 10, 11 and 15 of the April 14, 2010 Memorandum and Order that Beema and/or Serve America did not exist were not meant literally but were used as a short form reference to the findings catalogued above.

2. The respondents' argument, *see* proposed amended finding 9 at page 3 of Respondents' June 21, 2010 Motion to Alter or Amend and To Make Additional Findings of Fact ("Respondents' June 21 Motion"), and June 21, 2010 Motion To Alter or Amend of Respondent William M. Worthy, II, that SDS and ATA do not qualify as insurors subject to regulation and liquidation in Tennessee because these entities did not enter into insurance contracts or contracts of indemnify, and/or they were not licensed by Tennessee as insurors ignores the complete provisions of Tennessee Code Annotated sections 56-2-107 and 56-9-103(5). While those sections do list issuance of contracts of insurance and operating under an insurance license as actions which constitute doing insurance business in Tennessee, the list also disjunctively includes collection of premiums and membership fees, and transacting matters subsequent to the execution of and arising out of contracts of insurance. These latter activities of collecting premiums and membership fees, and

transacting matters subsequent to and arising out of insurance contracts, at pages 9-12 of the April 14, 2010 Memorandum and Order, were found by the Court to have been conducted by SDS and ATA, and to constitute transacting insurance business after SDS and ATA knew there was no insurance underwriting.

For these reasons the Court denies Mr. Worthy's motion and the proposed amended findings numbered 1-7 listed by respondents at page 2 of their June 21, 2010 Motion. In particular, the Court rejects proposed amended finding number 7, "Respondent William Worthy continued to offer assurances, into early 2010, that Beema/Serve America was prepared to fulfill its contractual obligations and that it expected SDS to do the same." The Court concludes that alleged assurances by Mr. Worthy, as a matter of law, are an insufficient basis for SDS and ATA to claim they did not know there was no underwriter or insurance product. As the Court found at pages 8-9 of the section "Notice That Serve America/Beema Provides No Coverage in the U.S." of the April 14, 2010 Memorandum and Order, the February 2009 North Carolina cease and desist order, even if not completely accurate, put SDS and ATA on notice that the insurance product had no underwriter. In the face of this fact, Mr. Worthy's subsequent assurances are insufficient defenses as a matter of law to the conclusion that SDS and ATA assumed the role of insurors.

3. The respondents' argument that SDS acted only in its capacity as a benefits administrator ignores conduct found by the Court at pages 10-12 of the April 14, 2010

Memorandum and Order. The Court found that SDS, individually, engaged in conduct that exceeded and altered its role from benefits administrator to insuror. The Court also found that this change in SDS' role was demonstrated through SDS' collaborative conduct with ATA.

As to SDS' individual actions, the Court found that SDS, after it knew or should have known that the Beema/Serve America insurance product was not underwriting or paying claims to ATA members, paid over $4 million in claims. The Court's findings were that there were no funds deposited into the claims account by any purported insuror; instead monies were transferred directly from the SDS accounts to the claims account and SDS paid the claims. This payment activity, the Court found, changed SDS from merely a benefits administrator to acting on its own and independently as an insuror by collecting premiums and remitting money to providers and policyholders.

Additional indicia of SDS' individual conduct as an insuror is the Court's finding that SDS continued to process insurance claims and pay them without the direction of an insurance underwriter. Further, accrediting paragraph 14 of the March 23, 2010 affidavit of Robert Heisse, fraud investigator for the petitioner, the Court found that SDS continued to prepare and distribute insurance cards and fulfillment packages to enrollees of ATA for a purported Serve America Health Insurance when SDS knew the latter was not paying claims or underwriting.

These foregoing actions of SDS, individually, constitute collecting premiums and membership fees, and transacting matters subsequent to the execution of insurance contracts and arising out of insurance contracts, listed in sections 56-2-107 and 56-9-103(5) as transacting business.

Further proof of SDS' insurance activities are as a collaborator with ATA. SDS and ATA pooled funds. There was no evidence that SDS or ATA segregated funds from individual employer groups to offset their individual plan liabilities. Additionally, Mr. Bart Posey is the common signatory on SDS Accounts 1, 2 and the claims account. These facts the Court derived from accrediting the March 31, 2010 affidavit of David White, the certified financial examiner for the petitioner.

The foregoing findings are the basis on which the Court (1) denies that aspect of the motions to alter or amend as to SDS' capacity as a benefits administrator, *see* proposed amended findings 1-8 at pages 2-3 of Respondents' June 21, 2010 Motion, and (2) denies the respondents' application for additional findings of fact related to expenditures by SDS that were made in its capacity as the benefits administrator, *see* pages 8-10 (listing 20 expenditure incidents) of the June 21, 2010 Motion. The latter expenditures listed by respondents for the Court to add as findings, while not disbelieved by the Court, are irrelevant. SDS did act as a benefits administrator consistent with the proposed additional findings, but, as the Court found beginning at page 9 of the April 14, 2010 Memorandum and Order, after February of

2009 SDS exceeded its role as benefits administrator and engaged in conduct that constitutes transacting insurance business in the State of Tennessee.

4. The respondents' claim that, in connection with the findings of fact of the April 14, 2010 Memorandum and Order, the Court applied a summary judgment standard is a misperception. At page 6 of the April 14, 2010 Memorandum and Order the Court referred to the summary judgment model as an analogy to illustrate why no evidentiary hearing was needed on the issues of ATA and SDS conducting insurance business in Tennessee and that the transaction of that business posed a significant hazard to the public. On those issues, this Court concluded that sufficient evidence could be adduced from the affidavits filed with the Court. On the insolvency of SDS and ATA, the Court concluded an evidentiary hearing was needed. The point imprecisely made by this Court in explaining at page 6 of the April 14, 2010 Memorandum and Order that affidavits were a sufficient evidentiary basis to determine the issues discussed therein is articulated by Justice Koch in a worker's compensation case:

> We will not dictate to a trial court the measure of evidence necessary to determine whether to initiate temporary benefits. Similarly, we will not mandate how that evidence must be adduced. Indeed, in some cases a full evidentiary hearing may be necessary for the trial judge to make this determination. In others, the trial court may find sufficient evidence in the record upon which to base its determination, thereby making a hearing unnecessary.

McCall v. National Health Corp., 100 S.W.3d 209, 214 (Tenn. 2003). This Court did not, in any way, consider or process the matters before it as a summary judgment.

It is therefore ORDERED that the respondents' motions to alter or amend and make additional findings are denied.

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