

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D.,)
)
 Plaintiff,)
)
 v.) Civil No. 1:03-CV-01793 (RBW)
)
 Attorney General Alberto GONZALES, *et al.*,)
)
 Defendants.)
)
 _____)

**MEMORANDUM IN SUPPORT OF PLAINTIFF STEVEN HATFILL’S MOTION THAT
JAMES STEWART BE HELD IN CIVIL CONTEMPT**

On August 13, 2007, the Court ordered Mr. Stewart (and four other reporters) “to comply with the subpoenas issued to them by Dr. Hatfill and to provide full and truthful responses to questions propounded to them by Dr. Hatfill’s attorneys.” Order, August 13, 2007. Mr. Stewart, however, refused to obey the Order. Because Mr. Stewart willfully disobeyed a clear and specific Order which was clearly known to and understood by him, civil contempt sanctions are warranted to compel obedience to the Court’s Order.

Federal courts have “have embraced an inherent contempt authority... as a power ‘necessary to the exercise of all others.’” *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994) (citations omitted). It is also expressly provided by 18 U.S.C. § 401(3), 28 U.S.C. § 1826, and the first sentence of Fed.R.Civ.P. 45: “(e) **Contempt.** Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.”

Civil contempt proceedings involve three stages:

(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying

with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

N.L.R.B. v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981). In this case, the Court issued the relevant Order on August 13, and Mr. Stewart has brought matters to this second stage by disobeying the Order. The Court should now find him in contempt and specify a penalty to coerce Mr. Stewart's compliance.

I. MR. STEWART IS IN CONTEMPT OF THE COURT'S AUGUST 13, 2007 ORDER

“The party seeking a finding of contempt has the burden of demonstrating, by clear and convincing evidence, that: (1) the Court's order was reasonably clear and specific; and (2) the alleged contemnor failed to comply with the Court's order.” *Lee v. Department of Justice*, 401 F. Supp. 2d 123, 131 (D.D.C. 2005) (citing *SEC v. Bankers Alliance Corp.*, 881 F.Supp. 673, 678 (D.D.C. 1995), and *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980)). *See also Food Lion v. United Food and Commercial Workers, et al.*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (rejecting argument that movant must demonstrate bad faith by contemnor). There is no doubt that the standard is met here.

The Order was perfectly clear and specific: “to comply with the subpoenas issued to them by Dr. Hatfill and to provide full and truthful responses to questions propounded to them by Dr. Hatfill's attorneys.” Order, August 13, 2007. Mr. Stewart testified that he was aware of the Order. Ex. A (Stewart Dep. Excerpts), 7:16-21. He also admitted that he understood the Order's requirements:

- Q. Okay. And are you aware that that order means that you have been ordered to provide me the names of FBI source 11, FBI source 12, FBI source 13 and FBI source 14?
- A. I am aware of the order.
- Q. I'm sorry, I didn't hear your answer.

A. I am aware of the order.

Q And you are aware that judge Walton has ruled that neither the First Amendment nor Common Law privilege permits you to withhold the names of those four sources, correct?

A. I have not read the order in its entirety, but my understanding is that that is what it says.

Id. at 7:22-8:9. There is, therefore, no ambiguity that the first half of the test for contempt is satisfied by clear and convincing evidence here.

The evidence of the second requirement – that the alleged contemnor failed to comply with the Court's order -- is equally clear and convincing. Mr. Stewart was asked “Will you identify to me FBI source 11?” *Id.* at 8:20. He answered flatly “No, I will not.” *Id.* at 21. He similarly refused to identify FBI sources 12, 13, and 14. *Id.* at 8:22-9:2.

It is beyond dispute that this Court’s Order was clear and specific and that he has failed to obey it. The only question is what sanction is required to compel respect for the Court’s Order and to compensate for the harm occasioned by his recalcitrance.

II. THE COURT SHOULD ORDER COERCIVE AND COMPENSATORY SANCTIONS

“Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.” *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947) (citation omitted). “[T]he award of costs and attorney’s fees” has been found “[a]n appropriate amount” to accomplish the compensatory purpose of such sanctions. *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70, 86 (D.D.C. 2003).

A. Coercive Sanction

A “per diem, coercive fine... is the epitome of a civil sanction” for contempt. *Pigford v. Veneman*, 307 F. Supp. 2d 51, 57 (D.D.C. 2004). The Supreme Court has described a “per diem fine imposed for each day a contemnor fails to comply with an affirmative court order” as “[a] close analogy to coercive imprisonment...” *Bagwell*, 512 U.S. at 829. “Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged.” *Id.*

Mr. Stewart fully understands that he is engaging in contempt of this Court’s Order, and his willful defiance will not end until he is compelled to end it:

Mr. Stewart, do you understand that if you refuse to identify those sources during the course of today's deposition you may suffer consequences for your refusal to identify those four sources?

A. Yes, I am aware of that.

Q. Okay. And do you understand that one of those consequences could be a finding that you are in contempt of this order?

A. I am aware of that, yes.

Ex. A., 8:11-19. Moreover, he committed himself to this course of action despite the admission that *he did not even know whether any of his former FBI sources still object* to his testifying truthfully as to their identity. *See id.* at 9:14-10:7 (admitting that he had not asked any of his former FBI sources for their permission to obey this Court’s Order and, to his knowledge, no one had asked them on his behalf) and 10:8-10:15 (admitting that he did not know whether any of them wanted him to uphold his concealment agreement rather than obey the Court’s Order).

But it is not clear that Mr. Stewart defers to the desires of the disclosing officials themselves any more than to the ruling of this court. Asked whether he would reveal the identity of FBI source 11 if that official agreed, Mr. Stewart at first said “no sir.” *Id.* at 10:16-19. Then, after interjection by counsel, Mr. Stewart allowed that “[i]t’s possible; it would depend on the

circumstances.” *Id.* at 11:23-24. The written waivers which over 100 FBI and DOJ officials have signed pursuant to this Court’s suggestion (*see* Hearing Trans., Oct. 7, 2004), however, do not meet Mr. Stewart’s personal standards.¹ *See id.* at 14:1-24 (testifying that he would not reveal any of his sources names even had they signed the written waivers). *But see id.* at 16:6-14 (testifying that his sources were not among those who signed the waivers in any case).

This entrenched defiance calls for coercion at this stage, but not punishment. *See Bagwell*, 512 U.S. 821 (1994) (analyzing punitive criminal contempt and coercive civil contempt). In order to maximize the likelihood of obtaining Mr. Stewart’s rapid compliance with this Court’s decision, and in keeping with past precedent, Dr. Hatfill asks that the Court first impose an escalating *per diem* fine. *See Pigford*, 307 F. Supp. 2d at 54 (adopting fine of \$1,000 per day for first month of contempt, increasing by \$1,000 for each subsequent month the contempt continued unpurged). In particular, Dr. Hatfill asks for a fine of \$1,000 per day for the first week of continued contempt, \$2,000 per day for the second week, escalating in \$1,000 increments for each subsequent week. There are several reasons to adopt an escalating *per diem* fine but with a more rapid escalation than in *Pigford*.

First, it is important that the recalcitrant witnesses’ defiance comes to a very rapid end. This case is now more than four years old, and the risk of further prejudicial loss of evidence is significant.

Second, purging the contempt is markedly easier here than was the case in *Pigford*. In *Pigford*, the contemnors were class counsel required to prepare and file certain petitions and

¹ Since the deposition, Mr. Stewart’s counsel has advised us that Mr. Stewart is now endeavoring to contact the FBI officials who made the disclosures and obtain, in a form satisfactory to Mr. Stewart, those officials’ consent to Mr. Stewart obeying this Court’s Order. Mr. Stewart subsequently advised us of the identity of one of his FBI sources but continues to defy the Court’s Order as to the other three.

notices of withdrawal. *Id.* at 54. Here, Mr. Stewart has merely to name the FBI officials who provided him disclosures about Dr. Hatfill.

Third, the law in this Court and this Circuit is clear. *See Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005). Thus there is no legal justification for Mr. Stewart to arrogate to himself a right to disobey the Court's order to obtain an appeal. *See Ex. A* at 4:8-18 (statement by counsel that Mr. Stewart "earnestly believes he is not obliged to answer" despite the Court's Order and justifying disobedience as "the only way that Mr. Stewart can secure appellate review").

Finally, the risk of industry support for Mr. Stewart's contempt calls for one additional measure: the Court should prohibit Mr. Stewart's solicitation or acceptance of any reimbursement for any contempt fines it should levy. *Cf. Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 914 F. Supp. 1172, 1179-80 (E.D.Pa. 1996) (prohibiting party assessed discovery sanctions from accepting any reimbursement from any other source), *In re HCMA (Carolina), Inc.*, 301 B.R. 764, 767 (Bankr. D. P.R. 2003) (prohibiting contemnor from seeking or accepting reimbursement for civil contempt sanctions). If the media industry is allowed to underwrite his defiance, fines in the range suggested here will have no coercive effect at all. (Alternatively, if the Court is disinclined to prohibit third-party reimbursement of the penalties, then the fines should begin at \$10,000 per day and the *per diem* amount should increase by \$5,000 for each week of continued defiance.)

Finally, in the event that coercive fines do not prove sufficient to enforce the Court's August 13 Order, Dr. Hatfill proposes that the Court set a status conference no later than 60 days after the imposition of the contempt Order. The Court can, at that time, assess whether additional sanctions are required to accomplish compliance.

B. Compensatory Sanction

At this stage, Dr. Hatfill seeks attorneys' fees and costs to compensate him for the harm suffered to date. "It is well-established that courts may award attorneys' fees and expenses in conjunction with a civil contempt proceeding." *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 70, 86 (D.D.C. 2003). If Mr. Stewart's contempt continues, then the resultant harm to Dr. Hatfill will obviously grow, possibly to the point of frustrating Dr. Hatfill's ability to complete the prosecution of his underlying claim. Dr. Hatfill therefore seeks an award of his costs and fees associated with Mr. Stewart's second deposition and this motion, without prejudice to his right to seek further compensatory contempt sanctions from Mr. Stewart later in this matter should his continued disobedience to this Court's Order cause him further damages. Dr. Hatfill's counsel will prepare a Bill of Costs for the contempt-related attorneys' fees and costs at the Court's instruction.

III. CONCLUSION

For the reasons state above, this Court should vindicate its authority by ordering Mr. Stewart to show cause why he should not be held in contempt. Should he not obey the Order before the hearing on the motion, he should be held in contempt on the hearing date, and he should be subject to contempt sanctions as described above and provided for in the attached proposed contempt Order.

Dated: September 25, 2007

Respectfully submitted,

/s/ Patrick O'Donnell

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