

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible

Case Nos. 18-mc-00175

18-mc-00176

18-mc-00177

Violations of 18 U.S.C. § 1956 and
50 U.S.C. § 1705

UNDER SEAL

**GOVERNMENT'S MOTION TO HOLD THE WITNESSES IN CIVIL CONTEMPT
FOR FAILURE TO COMPLY WITH THE COURT'S MARCH 18, 2019 ORDER**

The United States of America, by and through its attorney, the U.S. Attorney for the District of Columbia, respectfully moves this Court for an order holding [REDACTED] (collectively the "Banks") in civil contempt for failure to comply with the Court's March 18, 2019 Order (the "Order"). Because this motion concerns a grand jury proceeding, the government further requests that it be filed under seal. *See* Fed. R. Crim. P. 6(e); LCvR 6.1.

BACKGROUND

On March 18, 2019, this Court ordered [REDACTED] to appear before the grand jury to provide testimony at the earliest date available to the grand jury, or, in the alternative, if the parties agreed, to promptly complete production of the subpoenaed records, in lieu of appearing before the grand jury. The parties subsequently negotiated a deadline of March 28, 2019, to produce the witness or records. Prior to that date, [REDACTED] informed the government that they would not comply with the Order, and they have not.

On March 18, 2019, this Court also ordered [REDACTED] to complete production of the subpoenaed records by March 28, 2019. On March 22, 2019, [REDACTED] filed a motion to stay the Order with this Court and a notice of appeal

in the United States Court of Appeals for the D.C. Circuit.¹ [REDACTED]

has also failed to comply with the Court's production Order.

ARGUMENT

A witness who fails to comply with a grand jury subpoena, or a court order compelling compliance with that subpoena, may be held in contempt. Fed. R. Crim. 17(g); see *Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."). Contempt proceedings can result in either criminal or civil sanctions or both. See 28 U.S.C. 1826(a) (civil); 18 U.S.C. 401(3) (criminal). "Criminal contempt is a crime in the ordinary sense," and generally requires "the protections that the Constitution requires for such criminal proceedings." *Int'l Union v. Bagwell*, 512 U.S. 821, 826 (1994) (citations and quotation marks omitted); see *id.* at 829. "In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Id.* at 827; see *id.* at 828, 829. Courts ordinarily "first consider the feasibility of prompting [compliance] through the imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate." *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 801 (1987); see *NLRB v. Belvins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981) ("Civil contempt . . . is a remedial sanction used to obtain compliance with a court order[.]")

When, as here, an order of civil contempt is at issue, "[t]he procedures" governing the "proceedings are quite simple," Beale & Bryson, *Grand Jury Law & Practice* § 11:16 (2d ed.

¹ Contemporaneous with this motion, the United States is filing an Opposition to [REDACTED] stay motion.

2017). The witness is entitled to notice, time to prepare any factual or legal defenses, assistance of counsel, and the opportunity to present any such defenses to the court. *Id.* In deciding the nature of the notice required and the extent of any hearing held, a court may consider whether the witness “had an opportunity to present his defenses to the district court at some point in the court of the litigation, such as the point that he filed his motion to quash the subpoena.” *Id.*

Because the Banks have had “an adequate opportunity to raise [their] claims” by extensive briefing and argument, and have had such claims “determined by the court,” an entry of contempt is appropriate, *id.* Contempt should include imposition of a coercive daily-fine of \$50,000. *See In re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (affirming this Court’s entry of a \$50,000 daily fine against contemnor); *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 670 (2d Cir. 1983) (daily coercive fine of \$50,000 imposed on Swiss financial institution that refused to comply with grand jury subpoena to produce records stored overseas); *Gucci Am., Inc. v. Weixing Li*, 1:10-cv-4974, 2015 WL 7758872, at *1 (S.D.N.Y. Nov. 30, 2015) (imposing daily fine of \$50,000 on Chinese Bank for failing to produce bank records in China).

Finally, any suggestion that [REDACTED] notice of appeal deprives this Court of the authority to enter a contempt order would lack merit.² As outlined in our contemporaneously-filed opposition, [REDACTED] is not entitled to a stay pending appeal. And, courts in this District have long recognized that, “[w]here no stay pending appeal has been granted[,] the district court retains the power to enforce its judgment and

² The D.C. Circuit docketed [REDACTED] appeal on March 25. *See* March 26, 2019 Order, in Appeal No. 19-5068. Since that time, the United States has endeavored to secure [REDACTED] agreement to a stipulated contempt order and/or a voluntary dismissal of its appeal. Just yesterday, however, [REDACTED] declined to agree to either of these actions. Accordingly, the government expects to soon file in the D.C. Circuit a motion to dismiss the bank’s appeal because the subject of the appeal is not an appealable order. *Cobbledick v. United States*, 309 U.S. 323, 327-29 (1940)

to take steps in aid of execution,” including “enforcing its unstayed judgment [through] contempt.” *SEC v. Diversified Growth Corp.*, 595 F.Supp. 1159, 1170 (D.D.C. 1984); accord *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (“Where, as here, the district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes.”) (internal quotation marks and citation omitted). Accordingly, if—as the United States urges—this Court denies [REDACTED] stay request, a contempt citation for failure to comply with the Order may be entered because this Court will retain jurisdiction. See *United States v. Pescatore*, 637 F.3d 128, 144 (2d Cir. 2011) (“absent a stay [a party] must comply promptly with [an] order pending appeal”) (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975)); *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375–76 (8th Cir. 1996) (upholding district court’s authority to require payment of contempt fines for failing to comply with subpoenas duces tecum after respondents had noticed their appeal and a stay of the imposition of contempt sanctions pending appeal had been denied); *Nat’l Labor Relations Bd. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (finding that, despite general rule that a notice of appeal divests the district court of its jurisdiction, the district court retains jurisdiction to “enforce its judgment so long as the judgment has not been stayed or superseded.” and, consequently, the district court was authorized to issue contempt citation to President of company that failed to comply with a subpoena to produce certain documents when president’s appeal was pending (internal quotation marks omitted) (citing *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128–29 (D.C. Cir. 1978)).

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court issue an order holding the Banks in civil contempt and impose a \$50,000 daily fine. The government consents to the Banks' anticipated request that civil contempt sanctions be stayed pending appeal and not accrue during the pendency of such appeal. The government request that contempt fines begin accruing seven business days after the Court of Appeals' issuance of a mandate affirming this Court's order.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

/s/

Zia M. Faruqui, D.C. Bar 494990
Arvind K. Lal, D.C. Bar 389496
Assistant United States Attorneys
Christopher Kalstas, N.J. Bar 158592016
Special Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-7117 (Faruqui)
zia.faruqui@usdoj.gov

Certificate of Service

I certify that on the 29th day of March, 2019, service was made of a copy of the foregoing via electronic mail to

- Counsel for [REDACTED] (18-mc-175): Brian Stolarz, c/o LeClairRyan, 2318 Mill Road, Ste. 1100, Alexandria, VA 22314. Brian.Stolarz@leclairryan.com;
- Counsel for [REDACTED] (18-mc-176): Daniel Levin, c/o White & Case LLP, 701 Thirteenth Street, N.W., Washington, D.C. 20005-3807, daniel.levin@whitecase.com; and
- Counsel for [REDACTED] (18-mc-177): Hank Bond Walther, 51 Louisiana Ave., N.W., Washington, D.C. 20001, hwalther@jonesday.com; and Samidh Guha, 250 Vesey Street, New York, NY 10281, sguha@jonesday.com.

/s/
Zia M. Faruqui
Assistant United States Attorney

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Violations of 18 U.S.C. § 1956 and :
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[PROPOSED] ORDER

This matter came before the Court on the Government's motion to find the [REDACTED]
[REDACTED] in civil contempt for their failure to comply with the Court's March 18, 2019
Order. In consideration of the representations made in the Government's motion,
the Government's Motion is **HEREBY GRANTED**; it is further
ORDERED that the Bank is found to be in civil contempt of this Court's March 18, 2019
Order; it is further

ORDERED that the Bank is assessed a fine of \$50,000 per day, payable to the United
States, until such time as the Bank is willing to complete production of the subpoenaed records;
and it is further

ORDERED that the civil contempt sanctions against the Bank shall be stayed pending
appeal, shall not accrue during the pendency of the appeal, and shall only begin accruing seven
business days after the Court of Appeals' issuance of a mandate affirming this Court's order.

SO ORDERED.

Date

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CHIEF JUDGE,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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