IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible	**Case Nos.**	**18-mc-00175**
		18-mc-00176
Violations of 18 U.S.C. § 1956 and		**18-mc-00177**
50 U.S.C. § 1705		

UNDER SEAL

GOVERNMENT'S OMNIBUS REPLY

The United States of America, by and through its attorney, the U.S. Attorney for the District of Columbia, respectfully submits this omnibus reply to the contempt oppositions filed by [redacted] (collectively the "Banks"). The Banks have unequivocally refused to comply with the Court's March 18, 2019 Order (the "Order"). Neither their prior good faith nor the specter of future consequences in China can justify noncompliance. A daily fine of $50,000 is a conservative fine that is reasonably calculated to coerce compliance with the Order.

ARGUMENT

I. The Banks Violated The Order

The Banks incorrectly attempt to substitute good faith for the requirement of "substantial compliance" [redacted]. "Although a party's good faith may be a factor in determining whether substantial compliance occurred, and may be considered in mitigation of damages, good faith alone is not sufficient to excuse contempt." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1017 18 (D.C. Cir. 1997) (citations omitted). Further, to demonstrate that they acted in good faith, the Banks must show that they "took all reasonable steps within [their] power to comply with the court's order," *id.* at 1017. (internal citations omitted).

The Banks' good faith claim is that they sought permission from Chinese authorities to produce the document. *See e.g.*, [redacted] Br. 3 ("[redacted] is simply not in a position to defy the laws of its own government."); [redacted] Br. 2 ("Here, the Bank has taken all reasonable steps within its power to comply with the subpoena and the Court's March 18 order by conducting document searches to ensure it has collected and preserved documents responsive to the subpoena and seeking permission from Chinese authorities to permit it to produce the documents."). Relatedly, the Banks continue to claim that they cannot comply due to the fear of liability in China. Yet, this ignores that "the non-enforcement of the subpoenas would undermine the United States national security interests and not undermine any articulated Chinese interest," which "heavily favors enforcement of the subpoenas." Op. 51. Moreover, "the absence of any relevant past practice corroborates that each bank's connection to the Chinese government is strong reason to doubt that any is 'a credible object of *severe* government sanctions.'" *Id.* at 54 (quoting Gov't's Expert Decl. ¶ 105). In fact, the nominal penalties imposed against Chinese banks "in comparable cases," Op. 53, demonstrates that compliance is not "impossible," *United States v. Rylander*, 460 U.S. 752, 757 (1983).

II. A Daily $50,000 Fine Is Appropriate

"In determining what constitutes an effectively coercive sanction, the court 'consider[s] the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.'" *United States v. Two Gen. Elec. Aircraft Engines*, No. 14-cv-2213, 2016 WL 6495397, at *3 (D.D.C. Nov. 2, 2016) (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947)). Here, the magnitude of harm is great, as subpoena compliance here implicates "national security interests . . . related to an investigation into funding a state-sponsor of terrorism's nuclear weapons program, which poses catastrophic risks." Op. 35 (citing FBI Decl. ¶¶ 6a–f, 8–10). Such national security

interests mandate imposition of a coercive fine. *See Two Gen. Elec. Aircraft Engines*, 2016 WL 6495397, at *4 (daily $15,000 fine against shell company with no known assets was appropriate because civil forfeiture action alleged that airplane engine was destined for terrorist organization).

Courts also consider the contemnor's "financial resources and the consequent seriousness of the burden to that particular [contemnor]." *United Mine Workers*, 330 U.S. at 304. Here, the Banks, which are worth billions of dollars, cannot claim a financial burden from the imposition of the fine.[1] Ultimately, the Banks' vast resources must be considered when measuring what sort of sanction would coerce the Banks into complying with the Order. *See Oil, Chem., and Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1976). A sanction of $50,000 per day is sufficient, but not more than necessary, to ensure compliance, and is a fine amount regularly imposed by courts. *See* Govt. Mtn. to Compel at 3 (collecting cases). Imposition of such fine is appropriate as long as the Banks remain in contempt.[2]

III. Contempt Is Required To Appeal A Subpoena Involving A Grand Jury Proceeding

Although [redacted] is correct that an order to compel an administrative subpoena is normally immediately appealable, the government believes that this case raises a novel and complex issue

[1] [redacted] suggests that a "nominal fine" is appropriate, citing to cases that imposed fines of $1.00 per day in contempt cases, [redacted] Br. 4 (citing *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993), *United States v. Cuthertson*, 630 F.2d 139 (3d Cir. 1980)). Neither of these cases involved multibillion-dollar banks, but instead dealt with reporters, journalists, and television stations, and litigation that did not implicate national security concerns.

[2] [redacted] requests that any fine "not extend past the grand jury's term," [redacted] Br. 5; however, contempt may continue to run from an expired grand jury to a new one, as long as the district court ordered compliance before the transfer and the investigation had not ceased. *See In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) ("Appellant has identified no prejudice arising from enforcement of a subpoena where the originally issuing grand jury has expired and another has indisputably carried the investigation forward.").

because this administrative subpoena is part and parcel of a grand jury proceeding.[3] *Compare Office of Thrift Supervision Dep't of Treasury v. Dobbs*, 931 F.2d 956, 959 (D.C. Cir. 1991) (no reason not to apply the normal processes of litigation subpoenas (i.e., seeking contempt followed by appeal) to administrative subpoenas) *with In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) ("orders enforcing administrative subpoenas are considered final and appealable"). The Court's focus should be on the nature of the proceeding, not the type of subpoena at play. A grand jury proceeding can exist without a grand jury subpoena, but a grand jury subpoena cannot exist without such proceeding.

[redacted] distinction between the types of subpoenas ignores "the reality that grand jury subpoenas are issued as a matter of course by the Department of Justice, not by the grand jury," *United States v. Lazar*, No. 04-20017-DV, 2006 WL 3761803, at *15 (W.D. Tenn. Dec. 20, 2006) (quoting *United States v. Friedman*, 532 F.2d 928, 932 n.9 (3d Cir. 1976). "Basically the grand jury is a law enforcement agency." *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir. 1959); *see also In re Grand Jury Proceedings*, 486 F.2d at 90 (grand juries "are for all practical purposes an investigative and prosecutorial arm of the executive branch of government") (citing J. Moore, Federal Practice ¶ 6.02[1], [6] (2d ed. 1972)). "[G]rand jury subpoenas . . . are issued pro forma and in blank to anyone requesting them," without prior involvement from the court. *Id.* (citing Fed. R. Crim. P. 17(a)). "[A]lthough grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of

[3] In light of this Court's decision to expeditiously schedule the contempt hearing, the government plans on assessing the appropriateness of any D.C. Circuit dismissal motion only after this Court has first ruled on [redacted] stay motion. If this Court denies [redacted] stay motion and finds [redacted] in contempt [redacted] will plainly have the right to appeal at that juncture.

the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch." *Id.*

"That an administrative subpoena may be used for criminal investigations is not a novel proposition []." *United States v. Mountain States Tel. & Tel. Co.*, 516 F. Supp. 225, 230 (D. Wyo. 1981). Statutes, such as the USA PATRIOT Act, "empower[] the federal government's prosecutors, the Attorney General and her designees, local U.S. Attorneys, to gather evidence regarding suspected criminal activity," *In re Subpoenas Duces Tecum Nos. A99-0001 et al.*, 51 F. Supp. 2d 726, 730–31 (W.D. Va. 1999) (*In re Subpoena Duces Tecum I*), *aff'd sub nom. In re Subpoena Duces Tecum*, 228 F.3d 341 (4th Cir. 2000) (*In re Subpoena Duces Tecum II*). Nothing "requires the Attorney General to use a grand jury subpoena rather than an administrative subpoena" to obtain "evidence in a criminal investigation," *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1115–16 (9th Cir. 2012).

"While commentators have referred to [Department of Justice] subpoenas as 'administrative subpoenas,' . . . they do not qualify as administrative subpoenas in the traditional sense," *In re Subpoena Duces Tecum I*, 51 F. Supp. 2d at 730 (citation omitted). True "[a]dministrative subpoenas typically are issued by an agency which is seeking information from an individual or entity which the agency regulates to confirm compliance with its regulations." *Id.* (citation omitted). Subpoenas issued by the Attorney General are different because they allow the prosecutors "to obtain records for investigations relating to federal criminal [] offenses," *id.*

The scope and propriety of a subpoena is based on the proceeding with which it is associated, not the category of the subpoena. *Cf. In re Grand Jury Proceedings*, 486 F.2d at 92 ("a presumption of regularity attaches to the grand jury's proceedings, and hence to a grand jury subpoena"). Orders enforcing administrative subpoenas that are part of an administrative

proceeding "are considered 'final' for purposes of 28 U.S.C. § 1291 because there is no ongoing judicial proceeding that would be delayed by an appeal." *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 63 (3d Cir. 2003) (quoting *In re Subpoena Duces Tecum II*, 228 F.3d at 345-46. As to administrative proceedings, "judicial proceedings are appropriate only after the [administrative] investigation has led to enforcement, because '[j]udicial supervision of agency decisions to investigate might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process.'" *Id.* at 64 (quoting *SEC v. Wheeling–Pittsburgh Steel Corp.*, 648 F.2d 118, 127 n.12 (3d Cir.1981)). Grand jury proceedings are thus distinct from administrative proceedings because they involve ongoing judicial proceedings. "[I]n the case of a grand jury or trial," an immediate appeal from a motion to compel/quash halts the ongoing judicial inquiry, which courts refuse to allow. *Cobbledick v. United States*, 309 U.S. 323, 330 (1940).

Because the Attorney's General's USA PATRIOT Act subpoena seeks records for an ongoing judicial proceeding, *viz.* Grand Jury 18-2, we submit that the better view is that an appeal from an order compelling compliance is not ripe until [redacted] is placed into contempt. Contempt is the sole justification for halting this judicial proceeding. *Id.* This framework does not "segregate some subset of administrative subpoenas as uniquely 'grand jury-like' in nature" [redacted] Br. 6); rather the question is simply whether the administrative subpoena serves a function in the grand jury proceeding. [redacted] objects to such approach as unfair because it "would have no way of knowing" (at 6 n.3) whether a grand jury proceeding was ongoing. However, whether an

investigation is ongoing, even "in broad strokes," can be easily inferred by courts from what the "governments avers," *United States v. Apodaca*, 251 F. Supp. 3d 1, 11 (D.D.C. 2017).[4]

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.

Respectfully submitted,

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[4] That the government agreed there was jurisdiction in *Sedaghty* does not answer the question posed by the peculiar facts of this case. Of note, the Ninth Circuit never ruled on that appeal because the foreign bank produced the records shortly after the filing of briefs.

Certificate of Service

I certify that on the 3rd day of April, 2019, service was made of a copy of the foregoing motion counsels of record via email delivery.

/s/
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