

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible : Case Nos. 18-mc-00175
Violations of 18 U.S.C. § 1956 and : 18-mc-00176
50 U.S.C. § 1705 :
: GJ. No. 18-2
: UNDER SEAL

OMNIBUS RESPONSE TO APRIL 5, 2019 MINUTE ORDER

The United States of America, by and through its attorney, the U.S. Attorney for the District of Columbia, responds to this Court's April 5, 2019 Minute Order directing the government to advise the Court which grand jury is conducting the investigation to which the subpoenas issued to [REDACTED] relate. Because the investigation is before Grand Jury 18-2, a sitting grand jury to which the banks could produce the records, this Court may impose contempt and related civil fines for the duration of that grand jury.

BACKGROUND

As part of the United States' grand jury investigation into possible violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705 by the Foreign Trade Bank (FTB), Grand Jury 16-2 issued subpoenas to [REDACTED] and the U.S. Attorney's Office issued a subpoena to [REDACTED] (collectively, the "Banks"). During roughly three months of subpoena-return extensions, the Banks tried to convince the government to forego the subpoenas in favor of utilizing the Mutual Legal Assistance Agreement (MLAA) between China and the United States, culminating in a March 22, 2018 letter from the Chinese Department of the Ministry of Justice directing [REDACTED] to not reply to the subpoena.

On May 3, 2018, this Court discharged Grand Jury 16-2 and empaneled Grand Jury 18-2. Shortly thereafter, the United States transferred the instant investigation to Grand Jury 18-2. On June 5 and September 6, 2018, FBI agents presented testimony before Grand Jury 18-2 regarding the subject offenses. Grand Jury 18-2 has issued over 100 subpoenas in this matter. The extant subpoenas seek one of the final batches of evidence that the United States is pursuing prior to requesting Grand Jury 18-2 to return an indictment.

In late-November 2018 the government filed motions to compel compliance with the extant subpoenas. After several rounds of briefing, this Court held a hearing on March 5, 2019, after which there was additional briefing. On March 18, 2019, this Court ordered [REDACTED] [REDACTED] [REDACTED] "to appear before the grand jury to provide testimony" or, if the parties agreed, "to promptly complete production of the subpoenaed records, in lieu of appearing before the grand jury," Order Mar. 18, 2019, ECF 32 at 1. The United States gave [REDACTED] [REDACTED] [REDACTED] until March 28, 2019, to appear before Grand Jury 18-2 or produce the records. Neither bank complied with the Order.

On March 29, 2019, the United States moved for entry of contempt. After the completion of briefing, this Court set a contempt hearing for April 10, 2019.

ARGUMENT

A Subpoena Issued by an Expired Grand Jury Remains Operative in the New Grand Jury

"It is well settled that the same matters may be considered by more than one grand jury." *In re Grand Jury Proceedings*, 658 F.2d 782, 783 (10th Cir. 1981) ("*Sutton*") (citing *United States v. Thompson*, 251 U.S. 407 (1920)). Thus, "a subpoena issued by a grand jury that has expired may be used to collect evidence for a successive grand jury that 'has indisputably carried the investigation forward,'" Minute Order Apr. 5, 2019 (quoting *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir 2000)). "That a different grand jury from the one which subpoenas the evidence is

presented with that evidence is of little import.” *Sutton*, 658 F.2d 782, 784 (10th Cir. 1981) (quoting *United States v. Kleen Laundry and Cleaners, Inc.*, 381 F. Supp. 519 (E.D.N.Y.1974)). “[L]ittle would be gained by requiring that a second subpoena be issued by the second grand jury,” but what would be lost is great—the “complete waste of judicial time,” *Sutton*, 658 F.2d at 783–84.¹

When addressing the identical scenario, the D.C. Circuit held that the “contempt grand jury” need not be the grand jury that issued the subpoena, *In re Sealed Case*, 223 F.3d at 778. No “prejudice aris[es] from enforcement of a subpoena where the originally issuing grand jury has expired and another has indisputably carried the investigation forward,” *id.* (citing *Kleen Laundry*, 381 F. Supp. at 521. Although Grand Jury 16-2 expired, Grand Jury 18-2 “has indisputably carried the investigation forward,” *In re Sealed Case*, 223 F.3d at 778. In fact, Grand Jury 18-2 is the only grand jury that has heard live testimony and has issued over one hundred subpoenas for this investigation. This Court compelled ██████████ ██████████ ██████████ to present testimony or documents to the grand jury. ██████████ ██████████ ██████████ failure to comply justifies Grand Jury 18-2’s transition into a “contempt grand jury,” *id.*

The D.C. Circuit’s analysis is consistent with the maxim “that civil contempt sanctions are necessarily limited to the period in which the contemnor can unlock the figurative prison door by

¹ Although “the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, 371 n. 8 (1963), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the policy of the Department of Justice generally not to resubpoena a contumacious witness before successive grand juries for the purpose of instituting further contempt proceedings.” Justice Manual § 9-11.160, available at <https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.160>. However, the Justice Manual further notes that resubpoenaing a contumacious witness “may be justified in certain circumstances.” *Id.* “Prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to resubpoena a witness before the successive grand jury as well as to seek civil contempt sanctions should the witness persist in his or her refusal to testify.” *Id.* The United States has not made such authorization request here because it is not seeking to resubpoena the Banks at this time.

purging himself of contempt,” *In re Grand Jury Proceedings*, 744 F.3d 211, 214 (1st Cir. 2014) (citing *Shillitani*, 384 U.S. at 371–72). “Where the grand jury has been finally discharged, a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt.” *Shillitani*, 384 U.S. at 371. The discharge of Grand Jury 16-2 has no impact on either banks’ ability to purge contempt. Contempt, should it be imposed, will begin during Grand Jury 18-2’s term.² Either bank may present a witness or records to Grand Jury 18-2, prior to its discharge, to purge contempt.

The D.C. Circuit’s decision recognizes that contempt is keyed to a contemnor’s disobedience to the court’s order to compel, not the subpoena itself. *Compare In re Sealed Case*, 223 F.3d at 778, with *In re Grand Jury Proceedings*, 744 F.3d at 216–18. The recalcitrant witness statute supports this interpretation, as it limits confinement of the contemnor “to the term of the grand jury, including extensions, before which such refusal to comply with *the court order* occurred” 18 U.S.C. § 1826(a)(2) (emphasis added). Here, the banks’ failure to comply with this Court’s order and appear before Grand Jury 18-2 is the basis for contempt, not its non-compliance with the subpoena from Grand Jury 16-2.

Expiration of the Grand Jury Does Not Moot the Subpoena

“There is, naturally, an exception to [the mootness] rule” that a party to whom the subpoena had been directed can be discharged from contempt because the grand jury “no longer existed,” *Almont Ambulatory Surgery Ctr., LLC v. United Health Grp., Inc.*, No. 2:14-cv-02139, 2017 WL 5201731, at *2 (C.D. Cal. Mar. 8, 2017). That is, expiration of the original grand jury

² Prior to the issuance of the Court’s Minute Order, the United States began the internal process of seeking approval to extend the term of Grand Jury 18-2, which is scheduled to be discharged in May 2019. Because Grand Jury 18-2 has heard all of the evidence relating to the planned indictment request, the United States believes extension of the grand jury is appropriate.

does not “moot” the case, *In re Sealed Case*, 877 F.2d 976, 981 n.6 (D.C. Cir. 1989) (“*Sealed Case II*”), because “the criminal investigation [can be] renewed or continued by a subsequent grand jury [meaning] the issue is capable of repetition. *Ambulatory Surgery*, 2017 WL 5201731, at *2. Thus, contempt “cases not covered by the ‘recalcitrant witness’ statute,” “fall within the ‘capable of repetition but evading review’ exception to the mootness doctrine.” *Id.* This exception permits courts to review contempt proceeding even after the original grand jury has expired. *See Sealed Case II*, 877 F.2d at 981 n.6; *Ambulatory Surgery*, 2017 WL 5201731, at *2 (“there appears to be nothing improper in the government filing a motion to compel compliance with the initial subpoena” even after the original grand jury expired).

CONCLUSION

The government requests that this Court enter contempt and impose a daily \$50,000 fine on the Banks during the pendency of Grand Jury 18-2.³

Respectfully submitted,

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/s/

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³ The United States’ request encompasses [REDACTED]. Even though [REDACTED] is not subject to a grand jury subpoena, the requested documents are for use before Grand Jury 18-2 and its investigation.

Certificate of Service

I certify that on the 9th day of April, 2019, service was made of a copy of the foregoing Omnibus Response 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; and
- 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.

/s/
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