

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury)	Case No. 18-mc-00175-BAH
Investigation of Possible)	GJ No. 18-2
Violations of 18 U.S.C. § 1956)	
and 50 U.S.C. § 1705)	<u>UNDER SEAL</u>

**[REDACTED] Brief Opposing Motion for Contempt
and Request for Hearing**

The actions of [REDACTED] throughout this case have been undertaken with the utmost respect for the Court. Unfortunately, it now has no choice but to decline to produce the documents from China in order to appeal the Court's discovery order. Its decision in that regard is certainly not intended to flout the Court's authority.

[REDACTED] requests that the Court decline to enter a contempt sanction. In the alternative, if the Court does enter a finding of contempt, [REDACTED] urges imposition of a modest fine. Finally, any fine should be stayed pending appeal and not accrue during the pendency of such appeal, as the Government agrees, and should not exceed the term of the grand jury.

Pursuant to LCrR 47(f), [REDACTED] respectfully requests the Court hold an oral hearing on the Government's motion.

Applicable Standard

Civil contempt may be imposed only when a movant establishes his right to relief by clear and convincing evidence. *See Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980). Because civil contempt is an "extraordinary" remedy, courts impose it with caution. *Joshi v. Professional Health Services, Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987) (per curiam); *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996) (Lamberth, J.).

A district court enjoys “broad discretion” in deciding whether to hold a party in contempt, *see In re General Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995), and should not resort to such a severe sanction “if there are any grounds for doubt as to the wrongfulness of the defendant’s conduct.” *Life Partners, Inc.*, 912 F. Supp. at 11. Moreover, it is within the discretion of a district court to excuse the conduct and decline to issue a contempt citation. *See Southern Railway Co. v. Brotherhood of Locomotive Fireman and Enginemen*, 337 F.2d 127, 135 (D.C. Cir. 1964); *see also Cobell v. Norton*, 231 F. Supp. 2d 315, 320 (D.D.C. 2002) (“a court is not required to impose a contempt sanction every time a violation of a court order is proved”) (Lamberth, J.).

Argument

I. ██████ should not be held in contempt

The Restatement provides that “a court or agency should not ordinarily impose sanctions of contempt . . . on a party that has failed to comply with the order for production, *except in cases of deliberate concealment or removal of information or of failure to make a good faith effort*” to secure permission from the foreign government to disclose the information. Restatement (Third) of Foreign Relations Law § 442(2)(b) (emphasis added).

There has been no finding of deliberate concealment or removal of information in this case; to the contrary, as the government has conceded, and the Court has concluded, “[t]he documents at issue here originated in China. The government concedes that this factor counsels for respecting principles of international comity.” Opinion at 42.

Nor is this a case where ██████ acted in bad faith. To the contrary, the Court has already concluded that, “[s]ince receiving the subpoenas, the banks have acted in good faith and

the sincerity of their willingness to testify is not questioned.” *See* Opinion at 45; *see also id.* at 57 (“the government agrees that none of the banks has acted in bad faith”).

Finally, another bank previously approached the MOJ about whether it could comply with the Government’s subpoena, and was told that, if it “provides relevant client information to the U.S. DOJ directly, the banking regulatory authorities will impose administrative penalties and fines,” and may additionally impose “criminal liabilities.” Opinion at 7. Because [REDACTED] is in the same position as the other bank, the MOJ’s response applies to [REDACTED] as well.

Given this record, there should be no finding of contempt against [REDACTED]. *See* Restatement (Third) of Foreign Relations Law § 442, Reporters’ Notes No. 8 (holding that, where foreign parties made a showing of “(i) the applicability of the prohibition; (ii) a good faith effort to secure a waiver; and (iii) the continued refusal of the government concerned to permit disclosure, a motion to hold them in contempt was denied. *Federal Maritime Commission v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967)”). The *DeSmedt* court reasoned that, where a subpoena recipient shows that it is prohibited from producing the documents, as here; there was a good-faith effort to secure a waiver, as here; and that effort was rejected, as here; it would be improper to hold the entity in contempt, thereby forcing it to violate the law of the foreign sovereign:

I cannot, of course, direct and order anybody to violate the orders of his native land and I don’t intend to do so, and I don’t intend the United States Court to be so presumptuous as to attempt to intrude upon the sovereignty of any foreign nation, irrespective of the consent to transact business here that that foreign government has given to its nationals. If in the exercise of its own wisdom it feels that although authorizing the national to become a member of the Conference it can still deny this government access to documents within its own borders, that is for them to determine and not for this Court. It is a matter to be negotiated through diplomatic channels and not through the judicial process of this Court.

DeSmedt, 268 F. Supp. at 974-75.

For these reasons, the Court should deny the Government's motion for contempt.

II. Any fine should be nominal and any sanction should be stayed and not accrue until conclusion of appellate proceedings

In light of the serious issues in this case, if the Court finds ██████ in contempt, it should impose a nominal fine, which should not begin accruing until ██████ exhausts its appellate rights.

A. Any fine should be nominal

Where there is a substantial dispute as to whether the outcome is determined by Circuit precedent, and the issues at stake are significant and material, an entity should not be subjected to draconian sanctions in order to obtain appellate review. Thus in *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993), and *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), the courts entered *de minimis* fines of \$1.00 per day pending appeal in light of the seriousness of the questions involved.

Here, ██████ respectfully submits that a nominal fine is also appropriate in light of the serious questions at the center of this case and its good faith throughout these proceedings. As the Opinion recognized, a court is required to "consider, as a matter of international comity, whether to abstain from exercising its authority." Opinion at 32. This Court has already concluded that "[r]esolving the comity concerns is a murkier matter" and concluded there is no "precedent squarely on point." Opinion at 32, 37. Respectfully, ██████ is entitled to have the D.C. Circuit determine whether *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) "is on all fours with this case, and thus the comity analysis should begin and end there." Opinion at 33.

Subjecting ██████ to heavy penalties for asserting and defending, in good faith, its attempt to avoid potentially crippling sanctions for violating Chinese law by urging the

Government use the MLAA process makes little sense, especially since a contempt citation is the only procedural means for ██████ to appeal this Court's ruling and obtain a final judicial resolution of its comity arguments.

The Government urges the Court to impose a daily fine of \$50,000. Motion at 3. It provides no basis for this excessive amount, other than noting the same amount has been imposed by other courts, in other cases. *Id.* But each case is unique. The Government's proposed punitive sanction has no application here, in this case, where ██████ has acted in good faith, and is merely attempting to avoid penalties and sanctions. *See* Opinion at 32 ("The government concedes that complying with the respective subpoenas exposes each bank to legal penalties in China" (citation omitted)).¹

B. The Government agrees the Court should stay any sanction pending appeal

In its Motion, 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." Motion at 5. The Government also proposes that, if the D.C. Circuit affirms the March 18, 2019 Order, the fines should begin accruing seven business days after the Court of Appeals issues its mandate. *Id.* ██████ respectfully suggests the Court should adopt the Government's proposal, but with the modification that the fine should not begin accruing until ██████ has exhausted its appellate rights and should not extend past the grand jury's term.

The grounds for granting a stay pending appeal are well-established. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). In

¹ *See, e.g.,* Edward Gregory Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 N.E. Journal on Criminal and Civil Confinement 171, 203 (Summer 1990) ("Because of the drastic nature of sanctions for contempt, a court should avoid, where feasible, imposition of 'Draconian punishment' upon the civil contemnor").

deciding whether to issue a stay, a court considers: (1) whether the petitioner is likely to prevail on the merits of its appeal; (2) whether the petitioner will be irreparably injured without such relief; (3) whether the issuance of a stay would substantially harm other parties interested in the proceeding; and (4) wherein lies the public interest. *Id.* Where the last three factors weigh in favor of granting a stay, the petitioner need only show a “substantial case on the merits.” *Id.*

To grant a stay, the Court is “not required to find that ultimate success by the movant is a mathematical probability.” *Id.* Similarly, a stay may be appropriate where a “serious legal question” is raised, even if the movant has not shown that it is likely to prevail on the merits. *See McGregor Printing Corp. v. KEMP*, 811 F. Supp. 10, 12 (D.D.C. 1993).

Here, all four factors weigh in favor of staying the imposition of contempt sanctions against ██████ pending the outcome of its appeal, including the significant legal issues at stake and their impact on comity and on Chinese-US relations.

1. ██████ has serious and substantial legal issues on appeal

As reflected in the voluminous briefs submitted in this case, the extended oral argument, and the Court’s 59-page Opinion, ██████ has serious and substantial legal issues on appeal, including but not limited to whether *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987), controls the outcome; whether the Government’s concession that “complying with the respective subpoenas exposes each bank to legal penalties in China” (Opinion at 32) should be afforded more weight; whether, and to what extent, the MLAA remains a viable alternative that the Government should have used here; and important comity issues concerning whether, and when, a court should order someone to violate the law of a foreign sovereign.

██████ thus presents a “substantial case” on the merits that raises significant legal issues. Indeed, in many cases that present a less substantial case, courts have routinely stayed

the imposition of contempt sanctions pending appeal. *See, e.g., Tinsley v. Mitchell*, 804 F.2d 1254, 1255-56 (D.C. Cir. 1986) (court stayed civil contempt fine of \$50 per day after attorney refused to pay his share of attorneys' fees); *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 925 (D.C. Cir. 1982) (staying civil contempt order holding government meeting was improperly closed).

In fact, in the two most recent occasions in which this Court has confronted a similar question – a party maintaining it should not be required to comply with a grand jury subpoena – it stayed the imposition of sanctions pending appellate review. *See In re: Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (“The district court then held the Corporation in contempt, imposing a fine of \$50,000 per day until the Corporation complies with the subpoena, but stayed accrual and execution of the penalty pending appeal”); *In re: Grand Jury Investigation*, No. 18-3052, Government’s Brief filed Sept. 28, 2018 at 5-6 (explaining that the district court found appellant “in civil contempt, and stayed the contempt order pending appeal”). This case should not be treated differently.

2. [REDACTED] will suffer irreparable harm absent a stay

If the Court denies [REDACTED] motion to stay the imposition of contempt sanctions, [REDACTED] will be forced to either violate Chinese law, thereby mooting its claim of right to not have to do so, or incur substantial fines. [REDACTED] should not be forced to suffer such a Hobson’s choice to have its appeal heard.

3. The Government has not shown that it will suffer substantial harm if a stay is not granted

Any injury to the Government that results from a stay would be minimal. It waited over one year before moving to enforce its subpoena. While the Government explains that it used this time to complain to its Chinese counterparts through diplomatic channels about the MLAA

process, there is no indication that the government discussed this specific subpoena to ██████████ during those discussions. Opinion at 40. Instead, the Government asserts it was debating whether to move ahead with a motion to compel. *Id.* This record suggests the Government will not be substantially harmed by a brief stay. Moreover, the Government has consented to the stay.

4. Granting a stay serves the public interest

As ██████████ previously explained, whatever short-term benefit might accrue to the United States from obtaining the desired information could, over the long term, be far outweighed by harm caused by damage to the relationship between the United States and China. At present, the Chinese government does not—and would not—compel production of American documents by threatening to fine American companies with branches or affiliates in China. *See* MOJ letter, previously submitted as Exhibit 3 to ██████████ Opp. Br., at 4 (“Chinese authority has never asked American financial institutions or enterprises located in the territory of China to submit information stored in the United States directly to China”).

But ignoring the MLAA and requiring ██████████ to produce the documents via subpoena creates the risk that the Chinese government will reciprocate. Thus, in a mirroring situation, it may seek to obtain documents and records directly by threatening to impose punitive fines on American companies that happen to have branches or subsidiaries in China. The public interest supports allowing the D.C. Circuit to have an opportunity to consider this consequence to U.S. relationships generally, and the U.S.-Chinese relationship specifically, before fines begin accruing.

Conclusion

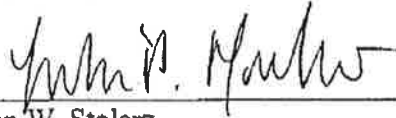
For all the foregoing reasons, ██████████ respectfully requests that the Court decline to enter a contempt sanction. In the alternative, if the Court does enter a finding of contempt,

██████ urges imposition of a modest fine that shall not accrue during the pendency of such appeal, and shall only begin accruing seven business days after ██████ exhausts its appellate rights. Finally, any civil contempt sanctions should not exceed the term of the grand jury.

██████ also respectfully requests the Court hold an oral hearing on the Government's Motion.

Dated: April 2, 2019

Respectfully Submitted,



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