

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible Violations  
of 18 U.S.C. § 1956 and 50 U.S.C. § 1705

Case No. 18-MC-00176 (BAH)

UNDER SEAL

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

Through no fault of its own, [REDACTED] finds itself in the position it most wished to avoid: where it cannot comply with both this Court's order and the Chinese law to which it is subject. While recognizing that this Court has rejected [REDACTED] comity argument, [REDACTED] respectfully asks the Court to withhold a contempt finding in favor of the U.S. government (the "Government") making a request under the Mutual Legal Assistance Agreement ("MLAA") in these circumstances where: (i) as the Court noted at the hearing, this is not a case where time is of the essence, as made clear by the Government's actions, so there is sufficient time to make an MLAA request; (ii) there is no question that compliance with the subpoena would violate Chinese law; (iii) the request is for documents that have always been in China; (iv) [REDACTED] is located in China and subject to the Chinese government's authority; (v) [REDACTED] has already collected the documents in China and is ready to produce them; (vi) as the Government acknowledged, the Chinese government is aware of the Government's investigation and the nature of the information

requested so there is no need for the kind of secrecy vis-à-vis the Chinese government which might make an MLAA request inappropriate; (vii) the Chinese Ministry of Justice has committed to doing its part to promptly process an MLAA request; and (viii) the Government could immediately return to court if an MLAA request were not promptly complied with in full.

█ further respectfully submits that it should not be held in civil contempt for non-compliance with the Court's March 18, 2019 Order (the "Order") because █ non-compliance with the Government's grand jury subpoena is justified, given the bank's inability to defy the demands of its own government by violating Chinese law. █ further submits that even if the Court does find █ to be in civil contempt of court, it should not issue the \$50,000 per-day sanction proposed by the Government in light of █ good faith efforts to cooperate with the Government at every stage of these proceedings—efforts which are continuing. █ further requests a stay of sanctions pending appeal if the Court finds █ in civil contempt and issues sanctions—a request to which the Government has already consented (and which █ gratefully acknowledges).

## ARGUMENT

### I. █ Should Not Be Held in Civil Contempt of Court

"Civil contempt is an extraordinary sanction that should be imposed with caution." *Al-Qahtani v. Obama*, 604 F. Supp. 2d 101, 103-104 (D.D.C. 2009) (citations omitted). To succeed on a motion for contempt, the Government must show, "by clear and convincing evidence, that (1) there was a court order in place; (2) the order required certain conduct by the defendant; and (3) the defendant failed to comply with that order." *12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Bd.*, 316 F. Supp. 3d 22, 25 (D.D.C. 2018) (internal quotation marks and citation omitted). Once this showing has been made, "the burden shifts to the non-moving

party to provide adequate detailed proof justifying noncompliance.” *Id.* “Demonstrating the inability to comply or good faith substantial compliance can justify noncompliance with a court order and enable a party to avoid a civil contempt finding.” *United States v. Latney’s Funeral Home, Inc.*, 41 F. Supp. 3d 24, 33 (D.D.C. 2014) (internal quotation marks and citation omitted).

██████ does not dispute that the Order requires ██████ to “appear before the grand jury to provide testimony at the earliest date available to the grand jury, or, in the alternative . . . promptly complete the production of subpoenaed records, in lieu of appearing before the grand jury.” Order, Mar. 18, 2019, ECF No. 27. ██████ also does not dispute that the Government imposed a deadline of March 28, 2019 for ██████ to produce documents in compliance with the grand jury subpoena, and that ██████ did not produce documents in compliance with this deadline. However, ██████ respectfully submits that it is unable to comply with the Order because, under Chinese law, it cannot disclose the requested materials without approval from the Chinese government. ██████ is simply not in a position to defy the laws of its own government.

██████ has made it clear from the beginning that it will produce the documents requested in the subpoena as soon as the Chinese government authorizes their transmission. ██████ has done everything in its power to ensure that the Government will obtain the documents as soon as an MLAA request is made. Accordingly, ██████ has “promptly contacted the Government to try to resolve this issue, steadfastly stated its intent to produce the documents quickly in China in response to an MLAA request, collected the documents and made them ready for production, and has communicated with the Chinese authorities to facilitate the response to the MLAA request if and when it is made. It has also secured all responsive materials in China and has long since closed the accounts in question . . . ██████ has [also] given its assurances that it will produce the requested documents within days of a request through the MLAA.” ██████ Opp’n to Mot. to Compel

Produc. of Docs. 16, 21-22, Jan. 7, 2019. Both this Court and the Government have recognized that [REDACTED] has acted in good faith in this regard. Mem. Op., Mar. 18, 2019, ECF No. 28 (“Since receiving the subpoenas, the banks have acted in good faith and the sincerity of their willingness to comply is not questioned.”); Mar. 5, 2019 Hr’g Tr. 38:12-15 (Government: “No one is disputing good faith. I think, as the Court referenced, the parties have in fact gotten along very well, and that’s because there hasn’t been any sort of implication of bad good [sic] faith.”).

[REDACTED] efforts with the Chinese government have been continuing, but to date have not resulted in permission to produce the documents. In light of such circumstances, given [REDACTED] good faith efforts to comply but its inability to do so absent Chinese governmental approval, and the fact that a finding of civil contempt against a regulated Chinese financial institution is an “extraordinary sanction” that should not be issued lightly, the Court should decline to hold [REDACTED] in contempt of Court.

II. If This Court Determines That [REDACTED] Is in Civil Contempt of Court, It Should Not Issue a \$50,000 Per Day Penalty

The Government has requested the Court impose a daily sanction of \$50,000 per day of non-compliance with the Order if it finds [REDACTED] in civil contempt. Gov’t’s Mot. for Contempt 3, Mar. 29, 2019. [REDACTED] respectfully submits that if the Court finds the bank in civil contempt, the sanction should be much lower, given the undisputed fact that [REDACTED] has operated in good faith to comply with the Government’s document requests throughout these proceedings. Even where an alleged contemnor “cannot demonstrate that [it] is unable to comply with the court’s order, the court is required to consider [its] good faith efforts to comply with [the] order in mitigation of any penalty the court might impose.” *United States v. Two Gen. Elec. Aircraft Engines*, No. 14-2213, 2016 U.S. Dist. LEXIS 151704, at \*4 (D.D.C. Nov. 2, 2016) (internal quotation marks and citation omitted). “To show good faith, the [alleged contemnor’s] duty includes the obligation to be

reasonably diligent and energetic in attempting to comply with [the] court's order . . . ." *Id.* (internal quotation marks and citation omitted). As noted above, ██████ good faith attempts to resolve the Government's request are clearly evident here. *See supra* at Section I. On this basis, the Court should award a lesser sanction.

██████ good faith stands in contrast to findings regarding other contemnors who have been subject to a \$50,000 per day sanction. For example, in *Gucci America, Inc. v. Weixing Li*, the Southern District of New York imposed a "large fine" of \$50,000 per day, in part, because the subpoenaed bank had "continued to flout the Court's Orders since 2011 and . . . pursued delay tactics designed to avoid ever having to comply with the subpoena requests." *Gucci Am., Inc. v. Weixing Li*, No. 10-cv-4974, 2015 U.S. Dist. LEXIS 160842, at \*10 (S.D.N.Y. Nov. 30, 2015). Notably, that court had initially issued contempt sanctions to Bank of China of \$10,000 per day in an earlier contempt finding for non-compliance with a civil subpoena, but explained that the "significant increase" to \$50,000 per day was "necessary to ensure swift compliance" after years of delay. *Id.* at \*12.<sup>1</sup> Those same circumstances are not present here.

Furthermore, a sanction of \$50,000 per day of non-compliance would be disproportionately burdensome given that ██████ has already disclosed that it is withholding only a small number of documents. In response to the grand jury subpoena, the bank has searched its records and collected and preserved fewer than 50 documents relating to a bank account that has long since been closed. *See* Mar. 5, 2019 Hr'g Tr. 66:2-4. While a sanction of that amount might make sense if the non-complying party were sitting on a large trove of documents and information responsive to the grand jury's investigation, that is not the case here. The Court should take that into consideration

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<sup>1</sup> The Second Circuit vacated that initial civil contempt finding for lack of personal jurisdiction, but the district court subsequently held Bank of China in contempt again once it had established that the bank was subject to specific jurisdiction and the bank continued to defy the court's order directing compliance with the subpoena. *See Gucci Am. v. Bank of China*, 768 F.3d 122 (2d Cir. 2014).

when exercising its “wide discretion” to determine an appropriate sanction. *See SEC v. Levine*, 671 F. Supp. 2d 14, 36 (D.D.C. 2009) (“Courts have wide discretion in fashioning remedial sanctions for civil contempt.” (citations omitted)); *Latney’s Funeral Home, Inc.*, 41 F. Supp. 3d at 36 (same).

III. As the Government Has Agreed, the Court Should Stay Sanctions Pending Appeal

In the event that the Court decides to issue sanctions for civil contempt, the Government has agreed to the anticipated request from [REDACTED] that the Court stay the accrual of sanctions pending appeal, such that any sanctions would not begin to accrue until seven business days after the Court of Appeals issues a mandate affirming the Court’s order. Gov’t’s Mot. for Contempt 5. [REDACTED] appreciates this agreement and respectfully requests that the Court issue such a stay. The issuance of a stay pending appeal—which [REDACTED] intends to pursue in the event that this Court finds it in civil contempt of the Court’s order—would be consistent with prior decisions within this Circuit granting stays in similar circumstances. *See In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (noting that the district court imposed a civil contempt fine on a foreign corporation for

failing to comply with a grand jury subpoena, but stayed accrual and execution of the penalty pending appeal); *In re Sealed Case*, 825 F.2d 494, 496 (D.C. Cir. 1987) (same).

Respectfully Submitted,

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