IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705	:	**Case No. 18-mc-00177-BAH**
	:	**UNDER SEAL**

OPPOSITION TO THE UNITED STATES' MOTION FOR CONTEMPT SANCTIONS

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ARGUMENT

The government has asked this Court to hold [redacted] ("[redacted] or the "Bank") in civil contempt and to impose a fine of $50,000 per day. At issue is the Bank's compliance with an administrative subpoena issued pursuant to 31 U.S.C. § 5318(k)(3). As shown below, a contempt citation is unwarranted here. At a minimum, this Court should stay the contempt sanctions pending the Bank's appeal. *See* Motion to Hold the Witnesses in Contempt ("Contempt Motion") 5 (consenting to such a stay).

I. A Contempt Citation Is Not Appropriate Because The Bank Has Shown Good Faith And Substantial Compliance With This Court's March 18 Order

"[A] party moving to hold another party in contempt must demonstrate by clear and convincing evidence that the alleged contemnor violated the court's prior order." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (emphasis omitted). But a finding of contempt is inappropriate if the party charged with contempt proves its "good faith substantial compliance" with the court's order. *Id.* at 1017; *see also Wash. Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617, 621 (D.C. Cir. 1976) ("Either substantial compliance or inability to comply is ... a defense in ... any ... civil contempt proceeding.").[1] "Substantial compliance" means that the party "took all reasonable steps within

[1] *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981), did not alter the availability of this defense. In *Blevins*, the D.C. Circuit held that a special master in a labor dispute erred by treating the plaintiff's motion for civil contempt as criminal and requiring plaintiff to prove defendant's "wilful and deliberate disregard of a court decree" "beyond a reasonable doubt." *Id.* at 1183. The court explained that "[i]n civil contempt proceedings the clear and convincing evidence standard applies and the failure to comply with the court decree need not be intentional." But the court did not address the availability of "substantial compliance" as a *defense* to a civil contempt charge or the relevance of defendant's good faith in mitigating damages. Accordingly, the D.C. Circuit assumed in *Food Lion* that the defense was still available post-*Blevins*, and noted that "several subsequent district court decisions support the defense's continuing availability." *Food Lion*, 103 F.3d at 1017 & n.16.

[its] power to comply with the court's order." *Food Lion*, 103 F.3d at 1017 (quoting *Glover v. Johnson*, 934 F.2d 703, 708 (6th Cir. 1991)). Though the party's "good faith alone is not sufficient to excuse contempt," good faith is relevant "in determining whether substantial compliance occurred, and may be considered in mitigation of damages." *Id.* at 1017-18.

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. This is the full extent of what is reasonably in the Bank's power at this time because Chinese law prohibits the Bank and its employees from taking additional action to produce the documents without permission from the Ministry of Justice. Op. at 32 ("The government concedes that complying with the respective subpoenas exposes each bank to legal penalties in China."); Tr. at 30, 42; Reply 20; Clarke Decl. ¶ 10(a) ("The Banks have adequately shown that compliance with the Subpoenas might violate certain Chinese regulations and might lead to administrative sanctions against the Banks and possibly their responsible personnel …."); *id.* ¶ 36. If the Bank turns the documents over to the government in direct contradiction to the instructions of Chinese officials, it risks significant fines—both administrative and criminal—and its officers risk their professional reputations and future employment prospects in the banking industry. *See* Surreply 16-19; Motion for Stay Pending Appeal ("Stay Motion") 6-7.

In addition, it is undisputed that the Bank is acting in good faith. Since the Bank first received the subpoena, it has done everything in its power to comply insofar as it can without violating Chinese law and risking significant sanctions. He Decl. Ex. 3 at 2; Tr. at 77-78. Neither the government nor this Court have ever questioned this. U.S. Reply 31; Tr. at 38:12 (Mr. Faruqui:

"No one is disputing good faith."); Op. at 45 ("Since receiving the subpoenas, the banks have acted in good faith and the sincerity of their willingness to comply is not questioned.").

Accordingly, the contempt motion should be denied. Alternatively, the contempt sanctions should be stayed pending the resolution of the Bank's appeal—an outcome the Government has already consented to in its contempt filing. Contempt Motion 10.

II. Ruling On The Government's Motion For Contempt Is Premature Until This Court Rules On The Bank's Motion For A Stay Pending Appeal

Civil contempt actions have two purposes: "to obtain compliance with a court order" and "to compensate for damage sustained as a result of noncompliance." *Blevins*, 659 F.2d at 1184. As to the first goal, the Bank's stay motion articulates why requiring the Bank to comply fully at this time—before its appeal is resolved—is unwarranted. Indeed, doing so would cause the Bank irreparable harm. Stay Motion 6-8. The government concedes that the Bank and its officers could face administrative sanctions, *see supra* 2, which include fines as well as career-threatening collateral consequences, Stay Motion 6-8. The Bank and its officers also risk criminal sanctions if they defy the instructions of the Chinese Ministry of Justice. Stay Motion 6-7. As to the second goal, the stay motion also explains that the government's own actions reveal that it has not suffered and will not suffer any harm if the Bank does not produce the documents before the D.C. Circuit resolves the appeal. *See* Stay Motion 8-9. The government waited more than a year before attempting to enforce the subpoena, and has disclaimed the need for urgency in these proceedings. Tr. at 20-22.

If the Court grants the Bank's stay motion, any contempt sanction would be unwarranted. And equity strongly counsels in favor of, at a minimum, resolving the stay motion before subjecting the Bank to a contempt citation. Civil contempt does not punish a party for its past failure to comply; it seeks to ensure compliance in the future. *Blevins*, 659 F.2d at 1184. Thus, if

the Court first holds the Bank in contempt but ultimately grants the stay motion, then any prospective contempt sanctions will be inappropriate. Yet the Bank will face serious obstacles to recovering any fines that have already been assessed. Neither purpose of civil contempt will have been served by assessing fines in the interim that the Bank may never be able to recover. There is no reason to coerce the Bank's compliance with an order that is stayed, nor to compensate the government for damages it never suffered.

III. The Bank's Notice of Appeal Was Proper

The government explains at length why the Bank's notice of appeal does not divest this Court of jurisdiction to enforce its judgement with an order of contempt. *See* Contempt Motion 3-4. While the Bank does not dispute this point, it is important to correct the government's accompanying assertion that the Bank's notice of appeal was premature. *See id.* at 3 n.2.

As the Bank has previously explained, the D.C. Circuit has jurisdiction to hear its appeal without the need for a contempt citation. *See* Stay Motion 10-11. "[I]t is settled that an order of a district court granting or denying an agency's petition for enforcement of a subpoena is final and appealable." *FTC v. Texaco, Inc.*, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977). Unlike a grand jury subpoena, a proceeding to enforce an administrative subpoena is "self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience." *Kemp v. Gay*, 947 F.2d 1493, 1496 (D.C. Cir. 1991) (quoting *Cobbledick v. United States*, 309 U.S. 323, 330 (1940)). The government itself has repeatedly referred to this subpoena as "administrative"—including some 20 times just in its motion to compel. *See generally* "United States' Motion to Compel Production of Documents Requested Via Administrative Subpoena Issued Pursuant to 31 U.S.C. § 5318(k)(3)." Thus, this Court's March 18 order is "a final order ripe for review." *Kemp*, 947 F.2d at 1497.

Indeed, in the only other known case where the propriety of a Patriot Act subpoena was litigated, the government *conceded* that the order granting (in part) a motion to compel was immediately appealable. U.S. Br., *United States v. Sedaghaty*, No. 10-30061, 2010 WL 3950036, at *2 (9th Cir. Apr. 21, 2010) ("The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 to review the district court's order granting in part the motion of the United States and holding that the Bank must comply with the subpoena, because that order is a final judgment."). It is unclear why the government has chosen to adopt a different posture in this case, especially in light of the clear circuit precedent that orders requiring compliance with administrative subpoenas are immediately appealable.

The government has taken the view that, because it intends to use information obtained through this administrative subpoena in a grand jury proceeding, the subpoena should be treated as if it were literally a grand jury subpoena rather than an administrative subpoena. Opposition to Stay Motion 4-5. This is misguided. The power to issue this subpoena comes, not from the unique role of the grand jury in our judicial system, but from statutory authority given to two federal agencies—the Department of Justice and the Department of the Treasury—to request certain documents from foreign banks that maintain U.S. correspondent accounts. *See* 31 U.S.C. § 5318(k)(3)(A)(i). There is no requirement that the information be used in a grand jury proceeding—or even that a related grand jury proceeding should exist at all. Indeed, the statute simply makes no mention of a grand jury.[2] And [redacted] as a foreign bank with no physical presence

[2] Grasping at straws, the government observes that the legislative history related to this Patriot Act provision mentions "investigations, prosecutions, and forfeitures." Opposition to Stay Motion 4. But virtually *every* administrative subpoena is connected to an investigation of some sort, and a great many lead to prosecutions or forfeitures. This does not turn them into grand jury subpoenas.

or employees in the United States, is not even subject to the jurisdiction of the grand jury (indeed, that is why the government did not issue a grand jury to subpoena to [redacted]).[3]

Furthermore, the government's argument proves far too much. It is *always* possible that information the government gleans through administrative subpoenas may eventually be presented to a grand jury. Federal agencies exercising their statutory oversight functions routinely provide information to the Department of Justice, and agency enforcement actions routinely run parallel with criminal proceedings. *See, e.g.*, Sec. & Exch. Comm'n, INVESTOR BULLETIN: SEC INVESTIGATIONS (Oct. 22, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_investigations.html ("[The SEC's Division of] Enforcement may refer potential criminal cases to criminal law enforcement authorities for investigation or coordinate SEC investigations with criminal investigations involving the same conduct."). If the government were correct, then no administrative subpoenas would be immediately appealable.

The government insists that this subpoena should be treated like a grand jury subpoena in light of the policy goal of not obstructing a grand jury's work. But as shown above, it is not practical to segregate some subset of administrative subpoenas as uniquely "grand jury-like" in nature. Accordingly, the government's proposed exception would swallow the D.C. Circuit's—and Supreme Court's—rule regarding administrative subpoenas.

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[3] It is not entirely clear whether the government means that *all* Patriot Act subpoenas should be treated as grand jury subpoenas, or only those that actually have something to do with grand juries. As noted above, the categorical approach makes no sense because there is nothing in the relevant Patriot Act provision that ties it to grand juries. But the case-by-case approach is even less defensible. For example, the government was under no obligation to tell [redacted] that a grand jury investigation was even taking place. Thus, under the case-by-case approach, the appealability of this Court's order would depend on a fact the appellant would have no way of knowing.

Unsurprisingly, the government has not identified a single case where an order compelling compliance with a subpoena issued by a federal agency under its statutory authority was nonetheless treated as "part of the related [grand jury] investigation," and thus held not to be a final judgment. Opposition to Stay Motion 4.[4] Each case the government cites where the order was held to be non-appealable involved what was clearly a grand jury subpoena—one issued under the grand jury's authority and compelling testimony or the production of documents to the grand jury. *See, e.g.*, *Cobbledick*, 309 U.S. at 324 ("The question is whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review...."); *In re Grand Jury Subpoena*, 912 F.3d 623, 625 (D.C. Cir. 2019) (addressing "litigation concerning a subpoena issued by a grand jury"). This is not surprising. The distinction between grand jury and administrative subpoenas is clear, as is that distinction's effect on the jurisdiction of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the Court deny the government's motion for civil contempt. If the Court decides to grant the government's motion, the Bank respectfully requests that the Court stay the contempt sanctions until the resolution of the Bank's appeal to the U.S. Court of Appeals for the District of Columbia Circuit—relief to which the government has already agreed.

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[4] Indeed, the government even had to add "[grand jury]" to this quote from the Court's opinion to make its point. This Court was describing the facts of *Sedaghaty*, and the opinion in that case makes no mention of the existence of a grand jury investigation. Moreover, by the government's logic, the order in *Sedaghaty* should not have been appealable. However, as noted above, the government *conceded* that the *Sedaghaty* order was appealable. While obviously the government is powerless to create jurisdiction where there is none, it would still be useful for it to offer some sort of explanation for its change of heart. *Cf.* Opposition to Stay Motion 4 n.4.

Dated: April 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 1, 2019, I caused to be served a copy of the foregoing document via electronic mail to Zia M. Faruqui, Assistant United States Attorney, zia.faruqui@usdoj.gov. Mr. Faruqui has agreed to receive electronic service in this matter.

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