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	Miscellaneous Case Nos. 18-175, 18-176, and 18-177 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION AND ORDER

On March 18, 2019, the Court ordered, in response to the government's motions to compel, that three Chinese banks—Bank One, Bank Two, and Bank Three—comply with subpoenas issued in December 2017. *See* Compulsion Order (Mar. 18, 2019) ("Compulsion Order"), ECF No. 32 (No. 18-175), ECF No. 27 (No. 18-176), and ECF No. 26 (No. 18-177) (granting Gov't's Mot. to Compel Production of Documents Requested via *Bank of Nova Scotia* Subpoena—Bank One, ECF No. 1 (No. 18-175); Gov't's Mot. to Compel Production of Documents Requested via *Bank of Nova Scotia* Subpoena—Bank Two, ECF No. 1 (No. 18-176); and Gov't's Mot. to Compel Production of Documents Requested via Administrative Subpoena—Bank Three, ECF No. 1 (No. 18-177)).[1] Banks One and Two, each of which received a grand jury subpoena, were directed to either "appear before the grand jury to provide testimony at the earliest date available to the grand jury" or, if the parties agreed, to "promptly complete production of the subpoenaed records, in lieu of appearing before the grand jury." *Id.*

[1] Bank One is [REDACTED]; Bank Two is [REDACTED]; and Bank Three is [REDACTED].

at 1.[2] Bank One, Bank Two and the government "subsequently negotiated a deadline of March 28, 2019, to produce the witness or records." Gov't's Mot. Contempt, ECF No. 37 (No. 18-175), ECF No. 32 (No. 18-176), and ECF No. 34 (No. 18-177).[3] Bank Three, which received a subpoena under 31 U.S.C. § 5318(k)(3), was directed to complete production of the subpoenaed records by the same date of March 28, 2019. Compulsion Order at 1.

None of the three Chinese banks has complied with the Compulsion Order.

Instead, on March 22, 2019, Bank Three appealed the Compulsion Order, *see* Notice of Appeal, ECF No. 30 (No. 18-177), and moved for a stay of that order pending appeal, *see* Bank Three's Mot. Stay, ECF No. 31 (No. 18-177), which motion is opposed by the government, Gov't's Opp'n Mot. Stay ("Gov't's Opp'n Stay"), ECF No. 33 (No. 18-177).

Meanwhile, given the lack of compliance with the Compulsion Order, the government now seeks an order holding each bank in contempt and fining each bank $50,000 per day until full compliance is achieved. *See* Gov't's Mot. Contempt. In accordance with the Court's scheduling order, *see* Min. Order (Mar. 29, 2019), each bank filed its opposition on April 1, 2019, *see* Bank One's Opp'n Gov't's Mot. Contempt ("Bank One's Contempt Opp'n"), ECF No. 38 (No. 18-175); Bank Two's Opp'n Gov't's Mot. Contempt ("Bank Two's Contempt Opp'n"), ECF No. 33 (No. 18-176); Bank Three's Opp'n Gov't's Mot. Contempt ("Bank Three's Contempt Opp'n"), ECF No. 35 (No. 18-177). The government filed an omnibus reply on April

[2] Bank One and Bank Two each received a subpoena under the aegis of Grand Jury 16-2. *See* Gov't's Omnibus Response to April 5, 2019 Minute Order ("Gov't's Response") at 1, ECF No. 42 (No. 18-175) and ECF No. 36 (No. 18-176); *see also* Bank One's Opp'n Gov't's Mot. Compel, Ex. 1, Grand Jury Subpoena, ECF No. 6-1 (No. 18-175). Since the subpoenas were issued, that grand jury has been discharged and the ongoing criminal investigation has been transferred to Grand Jury 18-2. *See* Gov't's Response at 1. Courts may enforce grand jury subpoenas issued by a since-discharged grand jury so long as the shift of grand juries occurred before contempt proceedings. *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000); *but see In re Grand Jury Proceedings*, 744 F.3d 211, 217–18 (1st Cir. 2014) (ruling that subpoena issued by since-discharged grand jury could not be enforced despite subpoena having been transferred to a successor grand jury).

[3] The three motions are identical.

3, 2019. *See* Gov't's Contempt Reply, ECF No. 41 (No. 18-175), ECF No. 35 (No. 18-176), and ECF No. 37 (No. 18-177).

Initially, a hearing on the government's motion for contempt was set for April 4, 2019, but at Bank Three's request, and with the consent of the government and the other two banks, that hearing was rescheduled for, and held on, April 10, 2019. Both the government's motions to hold each bank in contempt and Bank Three's motion for a stay of the Compulsion Order are now ripe.

The cross motions present three issues addressed separately below: (1) Does the Court have jurisdiction to hold Bank Three in contempt despite that bank already having appealed the Compulsion Order? (2) Should any of the banks be held in contempt? (3) Should the Compulsion Order, at least for Bank Three, be stayed pending appeal and, relatedly, if any bank is held in contempt, should the attendant sanctions be stayed pending appeal? For the following reasons, the government's motions to hold the banks in contempt are granted and stayed pending appeal. Bank Three's motion to stay the Compulsion Order is denied.

I. JURISDICTION

Bank Three already has filed a notice of appeal of the Compulsion Order, s*ee* Notice of Appeal, raising the issue of whether this Court may exercise jurisdiction to hold this bank in contempt. Ordinarily, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). That divestiture lasts until the appellate court issues the mandate. *See, e.g.*, *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995); *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 645, 649 (11th Cir. 1990).

The government and Bank Three agree that this bank's appeal does not strip this Court of jurisdiction to enter a contempt order. *See* Gov't's Mot. Contempt at 3; Bank Three's Contempt Opp'n at 4. Still, the Court must independently be sure that any exercise of judicial authority is lawful.

The government and bank are correct: This Court has jurisdiction to hold Bank Three in contempt notwithstanding the filing of a notice of appeal. Under *Griggs*, a district court does not have jurisdiction over the appealed aspects of a case until the mandate returns. 459 U.S. at 58. Bank Three's appeal will challenge whether the subpoena it received exceeds the limits of 31 U.S.C. § 5318(k)(3). The pending motion raises a separate question: Has Bank Three complied with the Compulsion Order? If Bank Three prevails on appeal, there will have been no need to comply. That possibility, however, is present in every appeal and not one that affects a District Court's jurisdiction to enforce orders pending appeal. *See, e.g.*, *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988) (ruling that a district court did not lose jurisdiction once declaratory judgment was appealed because 28 U.S.C. § 2202's authorization of "further relief" "carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective" (quoting Edwin Borchard, DECLARATORY JUDGMENTS 441 (2d ed. 1941))); *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1201–02 (11th Cir. 2016) ("Absent entry of a stay on appeal—which Trident Atlanta failed to obtain here—the District Court retained jurisdiction to enforce its orders."); *In re White-Robinson*, 777 F.3d 792, 796 (5th Cir. 2015) (finding that, unless a bankruptcy court's ruling is stayed pending appeal, that court retains jurisdiction to enforce its own rulings "through any appropriate means, including a civil contempt order"); *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006) (upholding order

holding corporation in civil contempt and imposing sanctions since "district court retained jurisdiction to enforce its judgment notwithstanding C&A's appeal on the merits"). The principle holds when contempt follows from a failure to comply with an order to comply with a subpoena. *See, e.g.*, *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375–76 (8th Cir. 1996) (upholding district court's authority to require payment of contempt fines for failing to comply with subpoenas duces tecum after respondents had noticed their appeal and a stay of the imposition of contempt sanctions pending appeal had been denied); *Nat'l Labor Relations Bd. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (finding that, despite general rule that a notice of appeal divests the district court of its jurisdiction, the district court retains jurisdiction to "enforce its judgment so long as the judgment has not been stayed or superseded," and, consequently, district court was authorized to issue contempt citation to President of company that failed to comply with a subpoena to produce certain documents when president's appeal was pending (citing *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128–29 (D.C. Cir. 1978))).

Thus, the Court retains jurisdiction to enforce the Compulsion Order by holding Bank Three in contempt even after the filing of an appeal. Whether to hold Bank Three and the other two banks in contempt is the next question.

II. HOLDING BANKS IN CONTEMPT

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous, and the violation must be proved by clear and convincing evidence." *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006). Some judges in this district permit a party to "justify its failure to comply with a court order by establishing its inability to

comply or good faith substantial compliance." *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 40 (D.D.C. 2010); *see also Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 234 F. Supp. 3d 209, 211 (D.D.C. 2017) (refusing to hold party in contempt because putative contemnor had "by all appearances acted in good faith and in substantial compliance with the Court's order"); *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 17 (D.D.C. 2000) ("A party also may defend on the ground of good faith substantial compliance with the orders.").

The D.C. Circuit, however, has only assumed, but not decided, that good faith substantial compliance is a defense to contempt. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1017 (D.C. Cir. 1997). If that defense exists, the putative contemnor "must demonstrate that it took all reasonable steps within [its] power to comply with the court's order. 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." *Id* at 1017–18 (internal citations omitted); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(2) (advising that contempt sanctions ordinarily should not be imposed against a party for failing to comply with a court order to produce records located outside the United States if production is prohibited under the law of the country in which the information is located, "except in cases of deliberate concealment or removal of information or of failure to make a good faith effort" to obtain permission from foreign authorities to make the information available).

None of the banks produced a witness or records responsive to the subpoenas by March 28, 2019, as required under the unambiguous Compulsion Order. *See* Bank One's Contempt Opp'n at 1; Bank Two's Contempt Opp'n at 3; Bank Three's Contempt Opp'n at 2.

Nevertheless, each bank asks not to be held in contempt, each touting its good faith since receiving a subpoena. Bank One's Contempt Opp'n at 2–3; Bank Two's Contempt Opp'n at 3–4; Bank Three's Contempt Opp'n at 2–3. Indeed, while granting the government's motions to compel, the Court acknowledged that "[s]ince receiving the subpoena, the banks have acted in good faith and the sincerity of their willingness to comply is not questioned." Mem. Op. (Mar. 18, 2019) at 45, ECF No. 33 (No. 18-175), ECF No. 28 (No. 18-176), and ECF No. 27 (No. 18-177); *see also id.* at 57 ("[T]he government agrees that none of the banks has acted in bad faith."). More specifically, the banks were credited with good faith as to their willingness to comply should the United States government make a request for records through the Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Mutual Legal Assistance in Criminal Matters ("MLAA"), June 29, 2000. For reasons already addressed, the MLAA is not a viable option despite the banks' willingness to cooperate. *See* Mem. Op. (Mar. 18, 2019) at 42–47.[4] Consequently, each bank is now subject to, and flatly disregarding, an unambiguous court order. Although the banks' willingness to comply with an MLAA request may be genuine, that no longer matters.

[4] The futility of an MLAA request also explains why the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(2)(b), which Bank One cited, *see* Bank One's Contempt Opp'n at 2–3, and raised again at the April 10, 2019 hearing, is not helpful here. That Restatement section provides, in pertinent part, that contempt sanctions "should not ordinarily" be imposed unless the putative contemnor has failed to make a good-faith effort to obtain permission from authorities in the country where the records are located to make the requested information available. Bank One ignores the very next Restatement paragraph, however, advising that "a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(2)(c). Here, after examining thorough declarations submitted by the parties and several letters from China's Ministry of Justice, the Court determined that Bank One's best efforts to secure permission from foreign authorities will go nowhere. *See* Mem. Op. (Mar. 18, 2019) at 42–47. Thus, the Court issued the Compulsion Order, which Bank One, even by its own account, is openly violating. Bank One's Contempt Opp'n at 1.

More relevant to contempt, each bank purports to be disobeying the Compulsion Order in good faith because Chinese law does not permit compliance. Bank One's Contempt Opp'n at 3; Bank Two's Contempt Opp'n at 3; Bank Three's Contempt Opp'n at 2. Here, too, the Court has explained why the banks' representations about the risk that compliance poses under Chinese law is overstated. Mem. Op. (Mar. 18, 2019) at 51–57. Thus, the banks' defiance is not in good faith. Rather, the banks simply disagree with the Court's resolution of the banks' comity arguments.

In any event, good faith disobedience of a Court order is not a defense to contempt. *Food Lion*, 103 F.3d at 1017–18 ("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."). The defense the banks aim to invoke is good faith substantial compliance. *Id.* Bank Three alone contends that it has substantially complied, underscoring that it has "conduct[ed] document searches to ensure it has collected and preserved documents responsive to the subpoena and [sought] permission from Chinese authorities to permit it to produce the documents." Bank Three's Contempt Opp'n at 2. Yet, Bank Three's stashing documents somewhere in its facilities is not responsive to the subpoena. To the extent Bank Three argues that compliance is demonstrated by avoiding spoliation of the subpoenaed documents, that sets far too low a bar to constitute substantial compliance. Preserving the subpoenaed documents is expected. Accordingly, even assuming good faith substantial compliance is a defense to contempt, no bank meets that standard. Civil contempt is necessary to enforce the Compulsion Order.

As for the corresponding sanction, a civil contempt sanction should be "designed to compel future compliance with a court order." *Int'l Union, United Mine Workers of Am. v.*

Bagwell, 512 U.S. 821, 827 (1994). Thus, the contempt sanctions must be sufficiently hefty such that the contemnors are induced to comply and the Court "must then consider 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. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947). Here, the government suggests that "[c]ontempt should include imposition of a coercive daily-fine of $50,000." Gov't's Mot. Contempt at 3. Bank Three raises no objection to that specific amount, but Bank One and Bank Two do. Bank One suggests that only a nominal fine is appropriate, doubling down on its good faith and regarding contempt merely as a procedural vehicle for appellate review. Bank One's Contempt Opp'n at 4–5. Bank Two, citing its own good faith, also asks that any contempt sanction be less than a $50,000 daily fine. Bank Two's Contempt Opp'n at 4–5. In addition, Bank Two contends that a $50,000 daily fine is inappropriate given that the bank has only a "small number" of responsive documents. *Id.* at 5.

Without rehashing the prior discussion, the banks have not demonstrated good faith in a way relevant to contempt. Next, contrary to Bank Two's assertion, the volume of responsive records being withheld is unimportant. More important, the requested records are essential to an investigation into a matter of national security. Mem. Op. at 39–41. Therefore, "continued contumacy" threatens tremendous harm. Finally, while Bank One may view contempt merely as a means of obtaining appellate review, civil contempt "is essential to . . . the enforcement of judgments, orders, and writs of the courts." *Broderick*, 427 F.3d at 1234.

Daily imposition of a $50,000 fine is fitting for those purposes. The contemnors here are multi-billion-dollar banks disregarding an order to produce records or a witness essential to an investigation into a state-sponsor of terrorism's proliferation of nuclear weapons. Minor fines

would hardly be felt, let alone produce the coercive effect intended, and compliance is vital. Courts previously have approved the amount of $50,000 per day as an appropriate sanction for other well-resourced corporations and international banks. *See In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (affirming contempt sanction of $50,000 per day against a corporation owned by a foreign country that refused to comply with a grand jury subpoena); *Gucci Am., Inc. v. Li*, No. 10-cv-4974, 2015 WL 7758872, at *1 (S.D.N.Y. Nov. 30, 2015) (imposing daily $50,000 fine on Bank of China for failing to produce documents as required by a subpoena issued in civil litigation); *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 819–20 (11th Cir. 1984) (imposing, thirty years ago, a fine of $25,000 per day on Bank of Nova Scotia for bank's refusal to comply with a grand jury subpoena). For now, contempt sanctions will be set at $50,000 per day. If that does not induce compliance, sanctions may be increased.

III. STAY

What remains, then, is whether to stay accrual of the contempt sanctions. In principle, the government and each bank agree: Contempt sanctions should not accrue during the pendency of the banks' appeal to D.C. Circuit. Bank One and Bank Three, however, raise peripheral issues about the contours of the stay.

Bank One asks that the stay last not just during the pendency of an appeal to the D.C. Circuit, but until Bank One "has exhausted its appellate rights." Bank One's Contempt Opp'n at 5. In the next breath, Bank One asks that contempt not extend past the grand jury's term. *Id.*[5]

[5] In isolation, Bank One's position that sanctions should not run beyond the life of the grand jury term is unremarkable. Indeed, civil contempt must end no later than when the grand jury performing the investigation is discharged. *See* 28 U.S.C. § 1826(a)(2); *see also Shillitani v. United States*, 384 U.S. 364, 371 (1966) ("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."); *United States v. Harris*, 582 F.3d 512, 516 (3d Cir. 2009)

Those two requests, side-by-side, impress that Bank One's request to stay sanctions until all appellate rights have been exhausted is intended to give Bank One enough time to wait out the life of the grand jury without ever being subject to any sanctions. Such a stay would make the contempt order self-defeating. In any event, staying sanctions during an expedited appeal is enough to allow each bank to press its arguments to a court of review without introducing the possibility that the banks' appeal disrupts for too long the grand jury investigation.

Bank Three asks that, instead of holding the bank in contempt and staying accrual of contempt fines, the Court stay the Compulsion Order itself. *See generally* Bank Three's Mot. Stay; *see also* Bank Three's Contempt Opp'n at 3–4.[6] The bank's arguments, however, while

(describing proposition that civil contempt must end when grand jury's term expires as "universally acknowledged"); *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) (distinguishing, for purposes of compelling subpoena compliance when the issuing grand jury has since expired, instances in which "the shift in grand juries occurred during the contempt enforcement process" from cases in which the shift "occurred before [contempt] even started").

[6] The government and Bank Three dispute the D.C. Circuit's jurisdiction over Bank Three's appeal prior to Bank Three being held in contempt. Gov't's Contempt Mot. at 3 n.2; Gov't's Opp'n Stay at 2–5; Gov't's Contempt Reply at 3–7; Bank Three's Mot. Stay at 10–11; Bank Three's Contempt Opp'n at 4–7; Bank Three's Stay Reply at 1–7, ECF No. 38 (No. 18-177). Appellate jurisdiction is for the D.C. Circuit to decide but clarifying one point here is beneficial. All along, these parties have referred to Bank Three's subpoena as an "administrative" subpoena. *See generally* Gov't Motion to Compel Production of Documents Requested via Administrative Subpoena; Bank Three's Opp'n Gov't's Mot. Compel, ECF No. 4 (No. 18-177). Most commonly, an administrative subpoena refers to a subpoena issued in connection with internal agency proceedings. *See, e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 501–02 (1943) (treating a subpoena issued as part of the Secretary of Labor's investigation under the Walsh-Health Public Contracts Act as an administrative subpoena); *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539, 1541 (D.C. Cir. 1994) (treating "two subpoenas . . . issued . . . pursuant to the agency's investigation of two failed savings associations" as administrative subpoenas); *FTC v. Texaco*, 555 F.2d 862, 868 (D.C. Cir 1977) (treating subpoenas issued in conjunction with FTC's investigation into whether corporations were underreporting natural gas reserves as administrative subpoenas). Here, the Court adopted the parties' nomenclature and proceeded to consider whether the subpoena issued to Bank Three was consistent with the authorizing statute, a predicate for enforcement of a statutorily authorized subpoena, including typical administrative subpoenas. Mem. Op. (Mar. 18, 2019) at 9–10, 27–31. Concluding that the subpoena issued to Bank Three comported with 31 U.S.C. § 5318(k)(3), the Court issued the Compulsion Order. As for the immediate appealability of that decision, Bank Three notes that "[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.'" Bank Three's Mot. Stay at 10 (quoting *Cobbledick v. United States*, 309 U.S. 323, 330 (1940)); *see also Texaco, Inc.*, 555 F.2d at 873 n.21 ("[I]it 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."). The government disagrees, arguing that Bank Three's pre-contempt appeal is premature, since only orders enforcing subpoenas issued as part of an administrative proceeding are appealable prior to a contempt determination, and Bank Three's subpoena relates to an ongoing grand jury criminal investigation. Gov't's Opp'n Stay at 4–5 (citing *United States v. Const. Prods.*

explaining its interest in delaying accrual of contempt fines during any appeal to the D.C. Circuit, fail to answer why staying the Compulsion Order is preferable to holding Bank Three in contempt and staying that contempt order. For example, Bank Three contends that the Compulsion Order should be stayed because the appeal raises at least a serious legal question. Bank Three's Stay Mot. at 2. Even if the appeal raises a serious legal question that might be resolved in Bank Three's favor, staying any contempt order would allow Bank Three to pursue that appeal without accruing fines.[7]

Next, Bank Three argues that the Compulsion Order should be stayed because compliance with that order would force Bank Three to violate Chinese law, thus visiting irreparable harm upon the bank and its employees. Bank Three's Stay Mot. at 6–8. At the same time, absent coercive sanctions, Bank Three will not comply with the Compulsion Order. Bank Three's Contempt Opp'n at 2. So, whether the Compulsion Order is stayed or Bank Three is held in contempt and fines are stayed, Bank Three is in the same position vis-à-vis Chinese law

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Research, Inc., 73 F.3d 464, 468–69 (2d Cir. 1996)). Whether Bank Three's pre-contempt appeal is proper depends on whether a subpoena under 31 U.S.C. § 5318(k)(3), no matter the label, more resembles a subpoena issued as part of an administrative proceeding or a grand jury subpoena. The Congressional Findings for Title III of the USA Patriot Act suggest that the purpose of the then newly-authorized subpoena was to aid criminal investigations into money laundering, *see* Mem. Op. (Mar. 18, 2019) at 30 n.12 (citing the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. 107-56, § 302(a)(6), (a)(8), (b)(4), 115 Stat. 272, 296–97), suggesting that the anti-money laundering ("AML") subpoena authorized under 31 U.S.C. § 5318(k)(3) hews more closely to a grand jury subpoena than administrative subpoena. Either way, Bank Three is being held in contempt today so appellate jurisdiction is secure. Additionally, referring to the AML subpoena as an administrative subpoena did not alter the Compulsion Order as, labels notwithstanding, an AML subpoena, like an administrative subpoena, is enforceable only if consistent with the authorizing statute. *See* Mem. Op. (Mar. 18, 2019) at 9–10, 27–31.

[7] Additionally, Bank Three's motion for a stay is unconvincing as to the strength of its appellate arguments. The motion to stay suggests that Bank Three will argue that the subpoena requesting all [REDACTED] records from Bank Three is broader than 31 U.S.C. § 5318(k)(3) allows because that subpoena is not confined to records attached to [REDACTED] use of a United States correspondent bank account. Bank Three's Stay Mot. 2–6. In asserting this argument, Bank Three uses just two sentences to breeze past the rationale for the Court's ruling: [REDACTED] is a front for North Korea's [REDACTED] and [REDACTED] sole purpose was laundering money through United States correspondent accounts. Mem. Op. (Mar. 18, 2019) at 29–30. On the facts of this case, no space separates [REDACTED] records from [REDACTED] records related to a United States correspondent account. If [REDACTED] were a front company serving some other purpose, Bank Three might have a point. Bank Three's motion for a stay, however, overlooks the nature of [REDACTED] illicit services.

and any irreparable harm. Likewise, Bank Three's arguments that the government will not suffer any harm if the Compulsion Order is stayed, Bank Three's Stay Mot. at 8–9, and that staying the Compulsion Order serves the public's interest in international comity, *id.* at 10–11, are as true of staying any contempt order.

Bank Three makes two arguments specific to staying the Compulsion Order rather than any contempt order. Neither is persuasive. First, according to Bank Three, "even if contempt sanctions are stayed . . . the mere fact of being held in contempt would cause irreparable harm to the Bank. 'Injury to reputation or goodwill'—such as the Bank would suffer from being held in contempt—'is not easily measurable in monetary terms.'" Bank Three's Stay Reply at 10, ECF No. 38 (No. 18-177) (quoting 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. 2014)). These proceedings, however, are under seal. Knowledge of Bank Three's contempt and the resulting reputational injury are consequently non-existent. In the same vein, Bank Three raised, at the April 10, 2019 hearing, the possibility that any contempt finding might need to be reported to regulators in a third country, in which Bank Three operates. Yet, even by Bank Three's counsel's representations, this possibility was entirely speculative.

Second, Bank Three argues that staying the Compulsion Order would serve the public's interest by conserving judicial resources. Bank's Stay Mot. at 10–11. Not so: Conservation of judicial resources counsels for holding Bank Three in contempt now and staying that contempt order. Bank Three's contempt is fully briefed. A hearing has been held. Delaying resolution of Bank Three's contempt while the bank appeals makes little sense as a matter of judicial resources, since, if that appeal results in affirmance of the Compulsion Order, the Court would then have to entertain repetitive briefs and possibly hold another hearing, when an alternative that realizes the bank's interests is available now. Moreover, enforcing the Compulsion Order by

holding Bank Three in contempt and staying that order rather than the Compulsion Order eliminates the possibility that Bank Three's pre-contempt appeal is dismissed for want to appellate jurisdiction, which would needlessly delay a final resolution and require that contempt proceedings, as to Bank Three, begin anew.

Accordingly, as with Bank One and Bank Two, Bank Three will be held in contempt until that bank complies with the Order. Contempt sanctions will not accrue, however, until Bank Three's appeal to the D.C. Circuit has been resolved.

IV. CONTEMPT ORDER

For the foregoing reasons, it is hereby

ORDERED that Bank Three's Motion for Stay Pending Appeal, ECF No. 31 (No. 18-177) is DENIED; and it is further

ORDERED that the Government's Motions to Hold the Witnesses in Civil Contempt for Failure to Comply with the Court's March 18, 2019 Order, ECF No. 37 (No. 18-175), No. 32 (No. 18-176), and No. 34 (No. 18-177), are GRANTED; and it is further

ORDERED that Bank One, Bank Two, and Bank Three are found in civil contempt of the Court's March 18, 2019 Order; and it is further

ORDERED that Bank One, Bank Two, and Bank Three are assessed a fine of $50,000 per day, payable to the United States, until such time as those banks are willing to complete production of the subpoenaed records or produce a witness to testify before the grand jury, provided that such daily fines shall not exceed the life of the term of the Grand Jury 18-2, including extensions; and it is further

ORDERED that the civil contempt sanctions against the banks shall be STAYED pending appeal, shall not accrue during the pendency of the appeal, and shall only begin accruing

seven business days after the Court of Appeals affirms this Court's order, provided the following:

1. That Bank One and Bank Two file a notice of appeal by April 12, 2019;
2. That Bank One, Bank Two, and Bank Three agree to file a joint motion in the Court of Appeals for an expedited briefing schedule, as agreed to and described at the April 10, 2019 hearing; and
3. That Bank One, Bank Two, and Bank Three preserve all information called for by the subpoena in this matter during the pendency of any appeal.

It is further **ORDERED** that the parties shall submit, by May 10, 2019, a joint report advising whether any portions of this Memorandum Opinion and Order may be unsealed and, if so, proposing any redactions.

SO ORDERED.

DATE: April 10, 2018

Beryl A. Howell
Chief Judge