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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GOVERNMENT'S MOTION FOR AN ORDER TO SHOW CAUSE**
AMMON BUNDY, et al.,	
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, through Ethan D. Knight, Geoffrey A. Barrow, Craig J. Gabriel, and Pamala R. Holsinger, Assistant United States Attorneys, hereby files this supplemental memorandum addressing the following issues:

1. The District of Oregon is the proper venue for this Court to enforce its own Protective Order against a third party;

2. Third-party Gary Hunt should be held in Civil Contempt of this Court's Orders after he has had an opportunity to appear and Show Cause why he should not be held in contempt;

3. There is a factual basis to conclude by clear and convincing evidence that third-party Gary Hunt is aiding and abetting a defendant (or defendants) in this case in violating the Court's original Protective Order (ECF No. 342), the new Order (ECF No. 1691), and the Supplement to the original Protective Order (ECF No. 1692); and

4. There are no prior restraint issues or "press" privilege issues.

I. The District of Oregon Is the Only Proper Venue for This Court to Enforce Its Own Orders

A. Proper Venue Under the Law

Third-party Gary Hunt resides in the Eastern District of California. Although his contemptuous conduct is likely occurring outside the District of Oregon, the only proper venue for this Motion to Show Cause is the District of Oregon. The Orders being violated by Gary Hunt were issued by this Court in the District of Oregon and they are properly enforced by this Court in the District of Oregon. *Myers v. United States*, 264 U.S. 95, 101 (1924). The Supreme Court in *Myers* held that venue is only proper where the court rendered the decree sought to be enforced. *Id*. "By disobeying the order, plaintiff in error defied an authority which that tribunal was required to vindicate." *Id*. at 104. The Court explained that contempt is technically neither civil nor criminal but "sui generis," as it falls within "the power inherent in all courts to enforce obedience, something they must possess in order to properly perform their functions." *Id*. at 103; *see also United States v. Twentieth Century Fox Film Corp*., 882 F.2d 656, 666 (2d Cir. 1989) (holding that district court in S.D.N.Y. properly exercised authority to impose contempt sanctions against employee who violated decree in Minnesota and Illinois);

Steers v. United States, 297 F. 116, 118 (8th Cir. 1924) (reversing district court that held contempt proceedings in a division different than the division that issued the injunction).

B. Proper Venue Based upon the Facts

The District of Oregon is the proper venue to enforce this Court's Orders because third-party Gary Hunt is aiding and abetting a defendant or defendants and their counsel in the violation of the original Protective Order (ECF No. 342). The protected discovery material in this case was only provided to charged defendants and their counsel or standby counsel pursuant to the Protective Order. Defendants or their counsel are the originating point of access and whoever provided the material did so in violation of the original Protective Order. Hunt has admitted the protected material is subject to this Court's Protective Order. As described in the Government's Supplemental Memorandum in Support of Motion to Enforce Protective Order (ECF No. 1689) and Special Agent Ronnie Walker's supporting Affidavit (ECF No. 1690), defendant Ehmer's Facebook post provides insight—when asked "Who is Gary Hunt?" the answer was "He is working with our lawyers."

This Court has jurisdiction to enjoin a non-party from disseminating confidential documents produced in reliance upon and subject to this Court's Protective Order. *See Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 194-95 (2d Cir. 2010) (affirming district court injunction against non-party who aided and abetted party's violation of court's protective order). Protective orders serve important functions and they cannot and should not be defeated either directly or indirectly by non-parties. *See, e.g.*, *In re Special Proceedings*, 291 F. Supp. 2d 44,

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50 (D.R.I. 2003) (holding protective order entered in criminal case was enforceable against a non-party post-trial).

This Court has authority to enjoin the actions of non-parties under the existing terms of the protective order when those non-parties aid and abet parties to violate the court's order. *See e.g.*, *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995) (noting that courts have authority and subject matter jurisdiction to punish contemptuous violations of its order, citing 18 U.S.C. § 401); *Inst. of Cetacean Research v. Sea Shepard Conservation Soc'y*, 774 F.3d 935, 948 (9th Cir. 2014) (organization that aid and abets a party's violation warrants contempt). This rule makes sense because it seeks to correct both direct and indirect or circuitous violations of this Court's orders.

Venue for the Motion to Show Cause is properly in the District of Oregon and not in the Eastern District of California. In addition, venue is proper in the District of Oregon because the government has made a prima facie showing that Hunt is aiding and abetting one or more of the defendants in violating this Court's original Protective Order (ECF No. 342). The Orders Hunt has failed to comply with were issued by this Court and the District of Oregon is the proper venue to enforce those Orders.

II. Third-Party Gary Hunt Should Be Held in Civil Contempt

Among the elements of inherent authority essential to "[t]he judicial Power," U.S. Const., Art. III, § 1, is a court's ability to enter orders protecting the integrity of its proceedings. This inherent authority necessarily includes the power to fine and/or imprison for contempt in order to enforce the observance of court orders. *United States v. Hudson*, 3 L. Ed. 259 (1812); *Ex parte*

Robinson, 86 U.S. 505, 510 (1874) ("The power to punish for contempts is inherent in all courts."). "This power reaches both conduct before the court and that beyond the court's confines, for '[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of a trial.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987)).

Contempt of court is an act of disobedience or disrespect towards the judicial branch of the government, or an interference with its orderly processes, and includes refusals by witnesses, without just cause, to obey a direct order of the court. *See United States v. Chandler*, 380 F.2d 993, 1000 (2d Cir. 1967); *United States v. Marshall*, 371 F.3d 42, 48 (2d Cir. 2004).

The essential difference between civil and criminal contempt is in the nature and purpose of the relief sought. *See, e.g.*, *Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988); *Gompers v. Buck Stove and Range Co.*, 221 U.S. 418 (1911); *In re Weiss*, 703 F.2d 653, 661 (2d Cir. 1983); *United States v. Powers*, 629 F.2d 619, 626-27 (9th Cir. 1980); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979); *see also Int'l Union, UMWA v. Bagwell*, 512 U.S. 821 (1994). A contempt proceeding is civil if the purpose is remedial and intended to coerce the person into doing what he or she is ordered to do. *Shillitani v. United States*, 384 U.S. 364, 368 (1966); *Evans v. Williams*, 206 F.3d 1292, 1294-95 (D.C. Cir. 2000) ("A sanction is considered civil if it is remedial . . . [b]ut if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."). The sanction for civil contempt is conditional and must be lifted

once the contemnor has complied with the court's order. *Id.*; *Newman v. Graddick*, 740 F.2d 1513, 1522 (11th Cir. 1984).

Civil contempt must be proved by clear and convincing evidence. *United States v. Conces*, 507 F.3d 1028, 1042 (6th Cir. 2007). At least one court has recognized that civil contempt, if possible, should be pursued first. *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983) ("Once it is determined that the civil contempt remedy is unavailing, the criminal contempt sanction is available.").

"The district court has inherent authority to fashion the remedy for contumacious conduct," and "incarceration is among the authorized remedies." *Conces*, 507 F.3d at 1043 (internal citations omitted). The Supreme Court has recognized that civil contempt designed to coerce compliance with a court order may involve custody or a fine; the character of the contempt proceeding remains civil so long as compliance will purge or reduce the sanction. *Bagwell*, 512 U.S. at 828-31. With civil contempt, the contemnor "carries the keys of his prison in his own pocket." *Conces*, 507 F.3d at 1043 (quoting *Bagwell*, 512 U.S. at 828). Selection of an appropriate sanction rests with the trial court's sound discretion. *See, e.g.*, *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983) (holding that civil contempt was unavailable because compliance with court's protective order was proven to be impossible; but affirming attorney fee award as sanction for protective order violations).

The United States is asking this Court to issue an Order to Show Cause directing third-party Gary Hunt to appear in the District Court for the District of Oregon and show cause why he should not be held in civil contempt. After third-party Gary Hunt has had an opportunity to be

heard, the United States will be asking the Court to hold Gary Hunt in civil contempt and incarcerate him until he complies with this Court's January 11, 2017, Orders directing him to remove the protected material from his website and not further disseminate the protected material. Civil contempt sanctions can be imposed in court proceedings upon notice and an opportunity to be heard, and "[n]either a jury trial nor proof beyond a reasonable doubt is required." *Bagwell*, 512 U.S. at 827. The government is asking this Court to confine Hunt until such time he removes the material from his website and complies with the Court's three Orders.

Should third-party Gary Hunt continue to disregard this Court's lawful Orders after being held in civil contempt, the United States may pursue criminal contempt charges in violation of 18 U.S.C. § 401(3) before a lawfully empaneled federal grand jury in the District of Oregon. The government would be required to prove there was a violation of a clear and reasonably specific order and the defendant willfully violated that order. *United States v. NYNEX Corp*. 8 F.3d 52, 54 (D.C. Cir. 1993).

III. The Government Has Established by Clear and Convincing Evidence That Gary Hunt Is Violating This Court's Lawful and Direct Orders

The government became aware that from November 15, 2016, through December 28, 2016, a third party, Gary Hunt, began disclosing information verbatim from Federal Bureau of Investigation (FBI) FD-1023 reports that contained information from FBI Confidential Human Sources (CHSs). In addition to disclosing the details of the reports, Hunt identified the names of people he believed to be the CHSs working for the FBI. These reports were provided in discovery to the 26 defendants being prosecuted in *United States v. Bundy, et al*., Case No. 3:16-

CR-00051-BR. The reports were provided in discovery pursuant to a Protective Order (ECF No. 342), and each page of those reports was marked "Dissemination Limited by Court Order" in the lower left hand corners. The Protective Order prohibited dissemination beyond defendants and persons employed by the attorneys of record who are necessary to assist in preparation for trial.

On January 5, 2017, FBI Special Agent Matthew Catalano met with Hunt and provided him with a letter from the United States Attorney's Office advising Hunt that he was in possession of discovery material in violation of a Protective Order. The letter enclosed a copy of this Court's Protective Order. The letter requested Hunt cease and desist from publicly disseminating the material. The letter also directed Hunt to remove the protected material from his website. The letter also advised that should he not comply with the requests in the letter the government would seek a court order compelling his compliance. Hunt told SA Catalano that he did not intend to comply with the terms of the letter. Hunt stated he had two more articles outing CHSs; those articles were in their final review stage before he planned to upload them. Hunt stated it was necessary to out the CHSs so they could serve as defense witnesses in the next trial—currently set for February 14, 2017.

On January 6, 2017, the government filed a Motion to Enforce Protective Order. (*See* Motion with the attached Cease and Desist letter (ECF No. 1680), Affidavit of Special Agent Ronnie Walker (ECF No. 1681)). The Affidavit of Special Agent Walker set forth the background and details of Hunt's blog and disclosure of CHS identities.

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On January 9, 2017, this Court ordered the government to file a supplemental memorandum addressing three questions. (ECF No. 1685). On January 10, 2017, the government filed a Supplemental Memorandum (ECF No. 1689), along with a second Affidavit of SA Walker (ECF No. 1690). As part of that Memorandum, the government updated the Court with information that the violation of the Protective Order was ongoing. A Facebook account of charged defendant Duane Ehmer indicated that Gary Hunt was "working with our lawyers." (*See* ECF Nos. 1689 and 1690).

On January 11, 2017, this Court issued an Order Granting in Part Government's Motion to Enforce Protective Order. (ECF No. 1691). In that five-page written Order, this Court directed Hunt to remove all protected material from his website within 24 hours. This Court enjoined Hunt from further disseminating material covered by the Protective Order. The Order further directed the government to serve Hunt personally with the original Protective Order (ECF No. 342), the new Order (ECF No. 1691), and the Supplement to the original Protective Order (ECF No. 1692), and to certify to the Court the personal service. The Order states that in the event Hunt fails to comply with the Order after he is served, the government may initiate contempt or other enforcement proceedings.

On January 12, 2017, the government filed a Certification advising the Court Hunt had been personally served with all three Orders as directed. (ECF No. 1697).

On January 12, 2017, Hunt posted a lengthy article about the January 11, 2017, meeting with SA Catalano, in which he quoted extensively from each of the three Orders (ECF Nos. 342, 1690, and 1691) and acknowledged he received copies of the Orders.

As of January 30, 2017, Hunt has failed to comply with this Court's January 11, 2017, Order (ECF No. 1691) directing him to remove all material from his website Outpost of Freedom blog at http://outpost-of-freedom.com within 24 hours and enjoining Hunt from further disseminating material covered by the Protective Order. As described in the Affidavit of Special Agent Walker, Hunt has failed to remove the protected discovery material and disseminated additional discovery material in violation of the Court's January 11, 2017, Order and January 11, 2017, Supplement to Protective Order. (ECF No. 1789). There is clear and convincing evidence that Hunt is continuing to violate this Court's Order.

IV. There Is No Prior Restraint Issue or Qualified Press Privilege

A. There Is No Prior Restraint Issue Presented Here

This Court has the authority to issue protective orders protecting criminal discovery and, specifically, confidential source information. The substantial government interest in protecting confidential sources is long established. *See Roviaro v. United States*, 353 U.S. 53 (1957). This substantial government interest is unrelated to any suppression of expression and outweighs Hunt's First Amendment rights. No one has challenged the legitimacy of the Court's Protective Order, and to permit a party to end run the order by passing the information to a blogger threatens to undermine criminal discovery and the interests identified in *Roviaro*—i.e., if we cannot protect the confidentiality of our law enforcement informants, we cannot expect their cooperation in future investigations.

We are not asking this Court to restrain Hunt's ability generally to write about the case—or even the informants—we only want him to observe this Court's Order, which means that he

cannot publish the discovery material subject to the Court's Order. This discovery material was not in the public domain in any form. This Court should be able to enforce its Protective Order and prohibit wide dissemination of discovery which includes confidential FBI reports. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny). Besides *Seattle Times Co.* there are no cases that discuss the prior restraint issue in the context of sealed and protected discovery information in the context of a criminal trial. In *United States v. Noriega*, 917 F.2d 1543 (1990), the issue was the balance between a defendant's Sixth Amendment Right to a fair trial and the First Amendment interests asserted by CNN. The *Noriega* Court held that CNN should not be able to violate a court order and litigate at the same time. Hunt has waived any First Amendment defense by defying the Court's Orders.

B. No Qualified Press Privilege Is Implicated Here

Although the Ninth Circuit has recognized a qualified press privilege in *Shoen v Shoen*, 5 F.3d 1289 (9th Cir. 1993), the doctrine simply doesn't apply to the Motion before this Court. The government is not seeking the testimony of third-party Gary Hunt to identify the source or sources of the protected discovery information. The government intends to investigate that on its own. The government is merely seeking the removal of protected discovery material that this Court has ordered protected. Nothing about Gary Hunt's blogging activities is implicated by the Motion to Show Cause. Third-party Gary Hunt is continuing to disseminate protected discovery material in the face of three Court Orders. No privilege is implicated.

Finally, even if this case were subject to a balancing test, the government's interests far outweigh any First Amendment interest Hunt may assert. First, we need to protect our confidential sources for all of the valid reasons identified in *Roviaro.* Second, the Court has a significant interest in enforcing the terms of its own Protective Order. Without enforcement, Hunt's defiance threatens to undermine our ability to exchange discovery in future criminal cases.

V. Conclusion

Accordingly, the United States asks that this Court order third-party Gary Hunt to appear in the United States District Court for the District of Oregon and show cause as to why this Court should not hold him in contempt.

Dated this 7th day of February 2017.

Respectfully submitted,

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