UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 04 C 7403
	)	
WILLIAM J. BENSON, individually and d/b/a Constitutional Research Associates,	)	Judge Der-Yeghiayan
	)	
Defendant.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR ORDER TO SHOW CAUSE

William Benson's "declaration" of July 29, 2009 mocks this Court's authority. (Dkt. No. 186). On July 22, 2009, the Court ordered Benson to produce a list of his customers to the United States by August 5, and to certify his compliance with the Order in a sworn declaration. Instead of complying with the Order, Benson's attorney filed a declaration that does not bear Benson's signature and shows that Benson has made no effort whatsoever to satisfy the requirements this Court has imposed upon him. For the reasons set forth below, the Court should require Benson to appear and show cause why he should not be held in contempt of the Court's July 22 Order. If Benson refuses to purge himself of his contempt, the Court should impose coercive incarceration on Benson until he fully complies with the July 22 Order.

PROCEDURAL HISTORY

On November 16, 2004, the United States filed suit against Benson to enjoin his sale of documents he called the "Reliance Defense Package" and the "16th Amendment Reliance Defense Package." (Dkt. No. 1.) Benson falsely assured his customers that purchasing these packages would allow customers to avoid prosecution for federal tax crimes. (Id. at 2-3.) As part of its prayer for relief, the United States asked that the Court compel Benson to produce a list of all persons to whom he had sold one of these packages. (Id. at 7-8.)

On August 4, 2005, the United States moved for summary judgment against Benson. (Dkt. Nos. 37-39.) Again in its motion for summary judgment, the United States asked that the Court award the United States a list of customers to whom Benson sold one of his fraudulent reliance defense packages. (Dkt. No. 37 at 2; Dkt. No. 39 at 16.) The United States' motion identified seven customers known to have purchased one of Benson's products. (Dkt. No. 38 at 7-8.)

On June 15, 2007, while its motion for summary judgment was still pending, the United States sought to obtain a list of Benson's customers through civil discovery. The United States' discovery request prompted Benson to file a motion for a protective order on July 2, 2007. Significantly, Benson's motion for a protective order acknowledges that the United States had been seeking a copy of Benson's customer list since the inception of this case. (Dkt. No. 77 at 1-2.)

On December 17, 2007, the Court granted the United States' motion for summary judgment, (Dkt. No. 106), and later entered an Order of Permanent Injunction preventing Benson from continuing to distribute his fraudulent materials. (Dkt. No. 116 at 3-4.) The Court

concluded that the United States was not entitled to obtain a copy of Benson's customer list as it was not necessary to end Benson's harmful activities. (Dkt. No. 106 at 19.)

Benson appealed to the Court of Appeals for the Seventh Circuit the grant of summary judgment, the order of injunction, and the resolution of various motions to alter or amend the judgment. (Dkt. No. 139.) The United States appealed the Court's determination not to require Benson to disclose his customer list. (Dkt. No. 164.)

While Benson's appeal was pending (but before the United States noticed its appeal), the United States moved to hold Benson in contempt of Court. (Dkt. No. 156.) As part of the permanent injunction, the Court had ordered Benson to transmit a copy of the injunction order to every person to whom Benson had sold or transferred one of his fraudulent reliance defense packages. (Dkt. No. 116 at 4.) Instead of complying with this provision, on January 22, 2008, Benson filed an improperly signed declaration stating that he had mailed or emailed the injunction order only to those individuals identified as his customers in the United States' motion for summary judgment. (Dkt. No. 138.) The United States moved to hold Benson in contempt for willfully failing to comply with the injunction order. (Dkt. Nos. 154-156.) The Court gave Benson "one last opportunity to comply with the court's order" on February 27, 2008. (Dkt. No. 158.) Following an unsuccessful request to the Court of Appeals for a stay, (Dkt. Nos. 160, 168), Benson certified his compliance with the mailing provision of the injunction order in another improperly signed declaration on March 5, 2008. (Dkt. No. 162.)

On April 6, 2009, the Court of Appeals upheld the Court's grant of a permanent injunction, reversed with regard to the award of the customer list, and remanded for proceedings consistent with its opinion. (Dkt. No. 176.) This Court requested that the United States propose

an appropriate protective and immunity order to govern Benson's release of the customer list to the United States. (Dkt. No. 178.) The United States proposed such an order on June 16, 2009, and Benson promptly moved for a stay pending resolution of his request for rehearing en banc before the Court of Appeals. (Dkt. No. 179.) The Court of Appeals denied rehearing on July 21, 2009, and the next day, the Court entered an Order requiring Benson to produce a customer list to the United States. (Dkt. No. 185.) The Order allowed Benson until August 5 to produce a customer list to the United States. Instead of complying, Benson filed yet another improperly signed declaration on July 29, 2009 alleging that this information no longer exists and that Benson discarded the sole source of this information "two to three years ago." (Dkt. No. 186.)

ARGUMENT

The Court should find that Benson has failed to comply with the terms of this Court's Order of July 22, 2009, and should order Benson to show cause why he should not be held in contempt. If Benson does not purge his contempt before the show cause hearing, the Court should incarcerate him as a coercive measure until he provides a list of his customers and their addresses.

I. *THE COURT SHOULD ORDER BENSON TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CONTEMPT*

Benson's own declaration of July 29, 2009, (Dkt. No. 186), demonstrates that he is in contempt of this Court's July 22 Order. A party may be held in civil contempt when that party has violated an order or decree that "set[s] forth in specific detail an unequivocal command." Jones v. Lincoln Elec. Co., 188 F.3d 709, 738 (7th Cir. 1999); see United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001). To make a prima facie showing of contempt, a party must demonstrate four elements by clear and convincing evidence: (1) a court order setting forth an

unambiguous command; (2) the contemnor violated that command; (3) the contemnor's violation was significant, meaning the contemnor did not substantially comply with the order; and (4) the contemnor failed to take steps to reasonably and diligently comply with the order. Pirma Tek II, L.L.C. v. Klerk's Plastic Indus., B.V., 525 F.3d 533, 542 (7th Cir. 2008).

In this case, the Court's Order unambiguously compelled Benson to produce a list of his customers and their addresses to the United States within 14 days of July 22, 2009. (Dkt. No. 185.) Benson's declaration makes clear that he has not done so and does not plan to do so. (Dkt. No. 186.) Thus, the first three elements warrant no significant discussion. Regarding the fourth element, Benson's declaration is impossible to believe and reveals that he has not made any real effort to comply with the Order's requirement that he produce a list of his customers' names and addresses.

A. *Benson's story reads more like fiction than fact*

Benson's explanation is simply not credible. Without providing any details or dates, Benson would have the Court believe that the only source from which Benson could produce a customer list is a now-discarded computer that "crashed" sometime during 2006 or 2007. Benson has never come forward with this particular version of events in any of his previous sworn statements. To declare after five years of opposing production of the customer list that the only source of that list mysteriously disappeared mid-way through litigation smacks of fantasy. The Court should not believe it.

Benson's story is contradicted by other statements he has signed in this case. On January 22, 2008, Benson "signed" a "declaration" in which he attested to mailing or emailing the injunction order to the seven customers listed in the United States' motion for summary

judgment. (Dkt. No. 138.) Although Benson may have obtained the mailing addresses from the United States' motion, (Dkt. No. 38 at 7-8), he must have had at least one customer's email address recorded in some medium on or before January 22, 2008 because this was not part of the United States' motion. Less than three months later, on March 5, 2008, Benson "declared" that he had mailed or emailed a copy of the injunction order to each customer to whom he had sold or provided one of his reliance defense packages and for whom he had a mailing or email address. (Dkt. No. 162.) The March 2008 declaration does not in any way indicate that Benson was unable to comply with the injunction order's mailing requirement because the customer list had been discarded.

Benson's July 29, 2009 "declaration" is flatly at odds with the March 5, 2008 "declaration." In his most recent statement, Benson says that he has not possessed a list of customers or their addresses "since before this court issued its order of summary judgment" because his computer "crashed approximately two to three years ago." (Dkt. No 186 at 1-2.) If this is true, then Benson would not have had a mailing list in March 2008 when he attested to mailing a copy of the injunction to all customers and other persons to whom he provided one of his packages. Benson's March 2008 declaration establishes that Benson must have had some record of his customers' mailing or e-mail addresses as recently as March of last year, which was three months after the Court granted the United States summary judgment. (Dkt. No. 162.) If Benson's most recent statement is true, then his March 2008 declaration worked a fraud on the Court because Benson lacked the names, mailing addresses, or email addresses to comply with the injunction order's mailing requirement. (Id.) In sum, Benson either lied in March 2008, or he is lying now.

Benson has not even honored this fanciful explanation with his own signature. Instead of signing his "declaration," Benson's attorney filed a declaration bearing "/s/ William J. Benson" where Benson's signature ought to have appeared. See General Order 09-014 (April 30, 2009) (permitting the "/s/" convention only for the signature of the attorney whose login and password are used to access the electronic filing system). Without his signature, the Court has no assurance that Benson even read the declaration his attorney has submitted. Benson's own words (if they are in fact Benson's words), tell a story too fanciful and too inconsistent to believe.

B. *Benson has not used reasonable diligence in complying with the Court's Order*

In any event, even if Benson did discard his computer containing his customer list, that does not relieve him f the requirement to put together a customer list. More effort is required to comply with this Court's order. To avoid a finding of contempt, a party must be "reasonably diligent and energetic in attempting to accomplish what was ordered." Goluba v. School Dist. of Ripon, 45 F.3d 1035, 1037 (7th Cir. 1995). Although the United States must show that Benson has not used reasonable diligence to satisfy his obligations under the Court's order, Bailey v. Roob, 567 F.3d 930, 935 (7th Cir. 2009), Benson's own "declaration" reveals on its face that Benson has made *no effort whatsoever* to comply with the terms of the Court's July 22 Order. Even were the Court to credit Benson's preposterous story about his computer, Benson could have consulted his bank records and canceled checks, documents in his home, records provided to his attorney, emails sent and received after the alleged computer crash, and his own memory to provide the names of his customers to the United States. Benson has many sources of information available that may yield the information he is required to produce. But instead,

Benson has made no effort to comply and has chosen to flout the Court's authority and produce nothing to the United States.

The Court of Appeals has upheld a finding of contempt where parties have done *more* to comply with a court order than Benson has done here. In a case where a party was under court order to obtain fraudulently-transferred property from the transferee, it was contemptuous to do no more than write a demand letter to the transferee insisting on return of the property. Am. Fletcher Mort. Co., Inc. v. Bass, 688 F.2d 513, 517-18 (7th Cir. 1982).

In fact, one Court of Appeals has found that it was an abuse of discretion for a district court not to hold in contempt a party under an obligation to produce documents where that party only made "some effort" and not "all reasonable efforts" to produce those documents. United States v. Hayes, 722 F.2d 723, 725-26 (11th Cir. 1984) (per curiam). In that case, Hayes made two trips to Switzerland in an effort to persuade the individual in possession of the records to release them so that Hayes might comply with the court's order of production. Id. at 724. The court found that it was not sufficient for the contemnor to show that his efforts "were 'substantial,' 'diligent' or 'in good faith.'" Id. at 725-26. Only a showing that the party used "all reasonable efforts" could rebut a prima facie showing of contempt, and Hayes—despite his trips to Switzerland—could not make that showing because other methods of obtaining the information remained available, including lawsuits to compel disclosure from the person in possession. Id.

Finally, in United States v. Seetapun, the Court of Appeals for the Seventh Circuit found that a district court erred in finding that a party's cursory search for records and making a demand for return of records rose to the level of "reasonable efforts." 750 F.2d 601, 605. The

Court of Appeals found it was clearly erroneous for the district court not to hold in contempt the party under an obligation to produce the records given the minimal effort expended and the too-convenient excuse the party offered for non-production. Id. In this case, Benson's declaration shows on its face that he has not used "all reasonable efforts" or "reasonable diligence" to comply with this Court's July 22 Order. In fact, he has made no effort at compliance other than to have his attorney draft a declaration with a too-convenient excuse that is contradicted by Benson's own earlier statements. See Pearle Vision, Inc. v. Romm, 541 F.3d 751, 757-58 (7th Cir. 2008) (upholding finding of contempt where party obligated to produce records presented no evidence of compliance other than an affidavit that all records had been provided).

Benson's declaration attempts to suggest a defense of impossibility or an inability to comply, but Benson bears the burden of proving both defenses. United States v. Seetapun, 750 F.2d 601, 604-05 (7th Cir. 1984). Benson's most recent declaration suggests he will not be able to make this showing. Benson's March 5, 2008 declaration establishes that in March of last year, Benson had the information necessary to mail or email the injunction order to all customers and others to whom he provided a reliance defense package. (Dkt. No. 162.) Thus, as recently as March 2008, Benson could have complied with the requirement to produce the names and addresses of his customers. Where a party has demonstrated a past ability to comply with a court order, the law presumes a present ability to comply unless the alleged contemnor can produce evidence of a present inability. United States ex rel. Thom v. Jenkins, 760 F.2d 736, 739-40 (7th Cir. 1985). Self-serving and contradictory statements from the contemnor are insufficient to rebut this presumption. Id. Even if Benson's story about his computer were true, his declaration presents no evidence that he is presently unable to comply with the Court's July 22 Order

through other means. (Dkt. No. 186.) Similarly, even though the United States bears the burden of showing Benson's failure to use reasonable diligence—which is easily done here through Benson's own admissions—the burden of showing that compliance with the Court's July 22 Order is impossible rests squarely on Benson. United States v. Rylander, 460 U.S. 752, 757 (1983) (noting also that asserting a Fifth Amendment privilege in answering questions about present impossibility does not help the alleged contemnor carry his burden); Bailey v. Roob, 567 F.3d 930, 935 (7th Cir. 2009) (observing that the contemnor bears the burden of proving a present impossibility). Because Benson has not used reasonable diligence in complying with the Court's Order, Benson will not be able to show that obtaining a list of customers and their names is impossible.

C. *Coercive incarceration is the appropriate remedy for Benson's recalcitrance*

If Benson refuses to purge himself of his contempt before the show cause hearing, the Court should incarcerate Benson until he provides a full list of his customers and their addresses to the United States. See United States v. Dowell, 257 F.2d 694, 699 (7th Cir. 2001) ("Coercive sanctions seek to induce future behavior by attempting to coerce a recalcitrant party or witness to comply with an express court directive."). The Court granted Benson fourteen days to provide a customer list to the United States following the July 22 Order. Benson has had an additional two weeks to provide the United States a customer list prior to the filing of this motion. Benson will have still more time to comply with the Order before the Court holds a show cause hearing.

If Benson fails to purge himself of his contempt before the show cause hearing, coercive incarceration is the appropriate sanction to induce Benson's compliance with the Court's Order. Financial sanctions will be ineffective against Benson: He has made a career of not paying the

government the money it is owed and has encouraged others not to pay as well. The most appropriate sanction is to incarcerate Benson until he complies. See Shillitani v. United States, 384 U.S. 364, 368 (1966) (noting that in the civil coercive incarceration context, contemnors "carry 'the keys of their prison in their own pockets'") (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)). Benson can comply with the Court's Order, and obtain his release, by diligently reviewing his own records, bank records, records provided to his attorney, and his own memory to develop a list of names of people who purchased his reliance defense packages.

Benson's own statements make out a prima facie showing of contempt. Due to the glaring inconsistencies in Benson's representations to the Court, the too-convenient nature of his most recent excuse, and his failure to make a reasonably diligent effort at compliance, the Court should require Benson to show cause why he should not be held in contempt of the Court's July 22 Order. At the hearing, Benson should be required to show that his efforts amount to reasonable diligence, that he has a present inability to comply, or that compliance is impossible.

When Benson cannot make this showing, the Court should hold him in contempt and incarcerate him as a coercive measure until he complies.

Dated this 19th day of August, 2009.

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s/ Robert E. Fay

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