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9 IN THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) CASE NO. CR 08-494-SJO
11)
Plaintiff,) MOTION FOR ORDER TO SHOW CAUSE
12) RE: CRIMINAL CONTEMPT
13) [18 U.S.C. § 401(3);
JOSEPH R. FRANCIS,) Fed.R.Crim.P. 42(a)];
14) Declaration of Caryn Finley
(filed concurrently); Proposed
15) Order
Defendant.)

16 MOTION FOR ORDER TO SHOW CAUSE RE: CRIMINAL CONTEMPT

17 Plaintiff United States of America hereby moves the Court
18 for an order requiring defendant Joseph R. Francis ("Francis") to
19 show cause why he should not be held in criminal contempt of
20 court for violating the Modified Protective Order ("Protective
21 Order") entered on December 16, 2009. (Docket # 495.)

22 Specifically, the government alleges that Francis violated
23 Sections (1)(B) and (1)(C) of the Protective Order. These
24 sections bar him from providing or disclosing Discovery
25 Materials, including memoranda of interview, to non-litigants.
26 The Protective Order further orders that the Discovery Materials
27 may not be used for any other purpose or in any other proceeding,
28 except in connection with the defense of the criminal case or in

1 any civil administrative or civil judicial proceeding concerning
2 the tax liability covered by the plea agreement. The government
3 makes this motion pursuant to Title 18, United States Code,
4 Section 401(3) and Rule 42(a) of the Federal Rules of Criminal
5 Procedure.

6 **I. STATEMENT OF FACTS**

7 On December 16, 2009, the Court entered a Protective Order in
8 this matter. Francis has violated the Protective Order and should
9 be held in criminal contempt. Specifically, Francis violated the
10 Protective Order by disclosing portions of a memorandum of
11 interview to a non-litigant. Francis well knew that this
12 disclosure directly violated Sections (1)(B) and (C) of the
13 Protective Order and that a violation of this order may be punished
14 by contempt of court. The court ordered:

15 1. Pursuant to Rule 16(d)(1) of the Federal Rules of
16 Criminal Procedure and 28 USC § 1651, unauthorized
17 disclosure of discovery material and information
18 contained therein to non-litigants is prohibited under
the following provisions (when the term "defendant" is
used, said term encompasses an attorney for the
defendant):

19 B. Such Discovery Materials¹ provided by the United
20 States may be utilized by the defendant, the I.R.S.
and the Department of Justice ("D.O.J.") solely in
21 connection with the defense of this case and any
civil administrative or civil judicial proceeding
22 concerning any alleged additional tax liability,
including collection of any alleged additional tax
23 liability, covered by the plea agreement (Doc. 465,
¶18.) Such Discovery Materials may not be used for
24 any other purpose and in connection with any other
proceeding.

25 C. The Discovery Materials shall not be disclosed
26 either directly or indirectly to any person or
entity other than persons employed to assist in the

27
28 ¹ Discovery Materials is defined in Section (1)(A) to include
memoranda of interview.

1 defense or prosecution of this matter, including
2 persons employed by the defendant, the IRS and the
3 D.O.J. to assist in any civil administrative or
4 civil judicial proceeding concerning any alleged
5 additional tax liability, including collection of
6 any alleged additional tax liability, covered by
7 the plea agreement, or such other persons as to
8 whom the Court may expressly authorize disclosure
9 upon proper motion.

6 F. Before any such disclosure to the defendant,
7 defendant's counsel shall personally inform the
8 defendant of the provisions of this order and
9 direct him not to disclose any information in the
government's discovery in violation of this order,
and shall inform him that any unauthorized
disclosure may be punished as contempt of court.

10 (Docket #495 p. 1-4.)

11 On Friday, April 9, 2010, Francis e-mailed L.N., an employee
12 for a *Girls Gone Wild* creditor. Included in this e-mail were
13 excerpts from a Memorandum of Interview covered by the Protective
14 Order. See Exhibit A. On April 27, 2010, Exhibit A was provided
15 to the government by the creditor. See Caryn Finley's Declaration
16 ¶ 3.

17 On May 12, 2010, the government spoke directly with L.N. She
18 stated that the e-mail from Francis was sent by him as part of a
19 fee dispute he was having with her company, the creditor. *Id.* ¶ 4.
20 L.N. stated that Francis told L.N. that the information was from
21 sealed documents in the tax case and his attorney advised him not
22 to disclose the information. *Id.* ¶ 5. Francis stated that he
23 could send her the information now but that she could not share it.
24 L.N. told Francis not to send the information if he was not
25 supposed to share it because she would have to share the
26 information with her management. *Id.* L.N. questioned Francis as
27 to why he had not previously provided the information. Francis
28

1 responded that he could not previously provide it because of the
2 tax case, but that was settled now. *Id.* ¶ 6.

3 **II. STATEMENT OF LAW**

4 A. Jurisdiction

5 Title 18, United States Code, Section 401(3) provides that a
6 "court of the United States shall have power to punish by fine or
7 imprisonment, or both, at its discretion, such contempt of its
8 authority, and none other, as...[d]isobedience or resistance to its
9 lawful writ, process, order, rule, decree or command."
10 Accordingly, jurisdiction for a criminal contempt action for
11 violation of a protective order is appropriate only in the court
12 that issued the protective order. *Stiller v. Hardman*, 324 F.2d
13 626, 628 (2d Cir. 1963).

14 B. Initiation of Proceedings

15 The criminal contempt statute does not specify a maximum
16 penalty and the crime cannot be classified as either a misdemeanor
17 or a felony. 18 U.S.C. § 401. Accordingly, there is no right to
18 a grand jury indictment in the criminal contempt context. *Green v.*
19 *United States*, 356 U.S. 165, 187 (1958), overruled in part by *Bloom*
20 *v. Illinois*, 391 U.S. 194, 202 (1968); see also *United States v.*
21 *Powers*, 629 F.2d 619 (9th Cir. 1980). Criminal contempt actions
22 may be initiated by indictment, information, or notice pursuant to
23 Fed. R. Crim. P. 42. Therefore, an order to show cause is an
24 appropriate method for the initiation of criminal contempt
25 proceedings.

26 C. Burden of Proof and Rules of Evidence

27 The government has the burden of proving each element of
28 criminal contempt beyond a reasonable doubt. *United States v.*

1 NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993); In re Kirk, 641 F.2d
2 684, 687 (9th Cir. 1981); Powers, 629 F.2d at 627. Ordinary rules
3 of evidence apply to criminal contempt cases. Fed. R. Evid.
4 1101(b); In re Floersheim, 316 F.2d 423, 428 (9th Cir. 1963).

5 D. Jury Trial Right

6 The right to a jury trial for a criminal contempt charge
7 depends on the actual sentence imposed. Frank v. United States,
8 395 U.S. 147, 149 (1969). Defendants have a right to a jury trial
9 for serious charges of criminal contempt. Bloom, 391 U.S. at 201-
10 02. Serious contempt charges are those that could result in a
11 sentence of six months or more, whereas, petty contempt charges are
12 those that result in a sentence of less than six months of
13 incarceration. Petty contempt charges may be tried without a jury.
14 See Taylor v. Hayes, 418 U.S. 488, 494 (1974); Codispoti v.
15 Pennsylvania, 418 U.S. 506, 511 (1974).

16 In criminal contempt cases, a judge must determine whether a
17 defendant has a constitutional right to a jury trial before knowing
18 the actual sentence to be imposed. In this case, based on the
19 evidence obtained, the government seeks a sentence that includes
20 either incarceration or a monetary penalty, but recommends that any
21 resulting sentence of incarceration be less than six months. Thus,
22 trial on this charge should be conducted without a jury.

23 E. Elements of Criminal Contempt

24 To convict the defendant of criminal contempt, the government
25 must prove the following elements beyond a reasonable doubt:

- 26 1. A clear and definite order of the court;
- 27 2. The defendant knew of the order; and
- 28 3. The defendant willfully disobeyed the order.

1 United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997); Powers,
2 629 F.2d at 627.

3 **III. ARGUMENT**

4 The defendant willfully violated the terms of the protective
5 order entered on December 16, 2009.

6 A. The Protective Order is Clear and Definite

7 As recited above, the defendant was prohibited from disclosing
8 or using memoranda of interview "for any other purpose and in
9 connection with any other proceeding" other than the defense of the
10 criminal case and in any civil administrative or judicial
11 proceeding concerning any additional tax liability, including
12 collection of that tax liability, covered by the plea agreement.
13 See Protective Order ¶¶ 1(A)(B)(C). The language is clear and
14 specific to the materials it protects, when and how the defendant
15 is permitted to use such materials and the punishment should he
16 violate the protective order. See Id. at ¶ 1(F).

17 B. The Defendant Knew of the Injunction

18 It is undisputed that the defendant is aware of this Court's
19 Protective Order and its parameters. Two protective orders were
20 previously issued in this case: Protective Order Regarding
21 Discovery (Doc. #34) and Order Re: Defendant's Motion to Compel
22 Government Compliance with *Brady*, *Giglio*, and Rule 16(A)
23 Obligations (Doc. #214). These protective orders arose due to the
24 government's concern with the defendant's frequent inability to
25 respect the sensitive and confidential nature of the discovery
26 materials. (See Government's Motion for Protective Order Regarding
27 Discovery (Doc. #28).)

28 Furthermore, prior to the guilty plea, the defendant filed a
Motion for Modification of the Protective Order (Doc. #445), which

1 was opposed by the government. (Doc. #463.) This motion was
2 rendered moot by the guilty plea and the Court never ruled on it.
3 However, on November 6, 2009, at the sentencing hearing and in the
4 defendant's presence, defense counsel raised modification of the
5 existing protective order.

6 **MR. BRIAN:** One is, there's a protective order in the
7 case that was entered before we entered the case that
8 requires -- I don't have it in -- well, actually, I
9 might have it in front of me, but it requires the
10 return of certain discovery documents provided by the
11 Government, to the Government and I would ask that the
12 Court consider modifying it as follows. Mr. Francis
13 would be required to return all information that he has
14 received, all materials to Counsel and that Counsel for
15 the Defense would keep them in our possession. The
16 reason for that is, because there's a scope of release
17 of the Plea Agreement that talks about what can and
18 cannot be the subject of any future criminal
19 proceedings and it's tied to the Government's
20 investigation, including interview memos. So we just
21 want to retain a record of that. We will keep it in our
22 possession and Mr. Francis will be ordered to return
23 all of the memos of interviews and the like to us.²

24 **THE COURT:** Is that agreeable with the Government?

25 **MS. MARK:** Yes, your Honor. I just think that it just
26 needs to be reiterated that the discovery and evidence
27 in this matter is to be used for no other purpose at
28

² Accordingly, Francis should not have possessed the Memorandum of Interview on April 9, 2010.

1 all, other than for determining whether the Government
2 were to bring any charges against him and that includes
3 any other litigation Mr. Francis has ongoing.

4 **THE COURT:** Is that agreed?

5 **MR. BRIAN:** I understood the Court has ordered that.

6 **THE COURT:** Okay. Then that's agreed?

7 See Transcript of Sentencing, Doc. 488, p. 19-20. The government
8 raised again, in the defendant's presence, its concern about the
9 defendant's ability to comply with the court's Protective Order
10 and his understanding of the use he could and could not make of
11 the Discovery Materials.

12 After sentencing in this case, the government and defendant
13 entered into a Stipulation to Modify the Protective Order. (Doc.
14 494.) The Court granted the Stipulation and issued the Modified
15 Protective Order. (Doc. 495.) Furthermore, the defendant
16 demonstrated his knowledge of the Protective Order when he told
17 L.N. that he was advised by his attorneys that he could not
18 disclose the information. See Finley Declaration ¶ 5. The
19 defendant's numerous motions to modify the existing protective
20 orders, including his oral request in court and his statements to
21 L.N., indicate that he knew of the Protective Order and its
22 requirements but chose to disobey them.

23 C. The Defendant Willfully Violated the Protective Order

24 "Willfulness is defined as a volitional act done by one who
25 know or should reasonably be aware that his conduct is wrongful."
26 United States v. Baker, 641 F.2d 1311, 1317 (9th Cir. 1981)
27 (internal quotations removed). Francis willfully violated the
28 Protective Order by disclosing the memorandum of interview to a
non-litigant in a proceeding that was completely unrelated to his

1 tax liability. This conduct is clearly prohibited by the
2 Protective Order.

3 As defendant has demonstrated, he has an inability to comply
4 with the Court's Protective Order. Defendant's actions have
5 shown that he does not take his obligations to the Court
6 seriously and that his actions can only be regarded as willful
7 conduct.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the government respectfully
10 requests that the Court issue an order requiring the defendant to
11 show cause why he should not be held in criminal contempt of
12 court.

13 DATED: May 21, 2010

14
15 Respectfully submitted,
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21 /S/
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