IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK CRUMPACKER, Plaintiff, v. CAROLINE CIRAOLO-KLEPPER; MICHAEL MARTINEAU; MARK J. LANGER; COMM'R., INTERNAL REVENUE; UNITED STATES ATTORNEY GENERAL; and 2 UNKNOWN-NAMED IRS/DOJ ATTORNEYS, Defendants.	)	Case No. 1:16-cv-01053
UNITED STATES OF AMERICA Counterclaim Plaintiff, v. MARK CRUMPACKER, MICHAEL B. ELLIS, and ROBERT A. MCNEIL Counterclaim Defendants.	)	

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY COUNTERCLAIM DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

The United States of America moves the Court for an order directing counterclaim defendants Michael B. Ellis and Robert A. McNeil to show cause why they should not be held in contempt for violating the Court's April 19, 2017 Order of Permanent Injunction. (Dkt. No. 44).

The Court permanently enjoined McNeil and Ellis from filing certain lawsuits without first obtaining leave of court. The injunction reaches "any civil action in any United States District Court asserting, or purporting to assert a claim under the United States Constitution or the Administrative Procedure Act" challenging (i) actions by the Internal Revenue Service to prepare and assess income taxes, or (iii) actions taken by the Department of Justice to defend against such civil actions, or to collect taxes. Order at p.5. In order to request leave to file such a suit, McNeil and Ellis were required to file a document titled "Application Pursuant to Court Order Seeking Leave to File," certifying that the proposed action raised new claims and that the allegations of the complaint are true, and attaching the proposed complaint and a copy of the Court's injunction.

On August 28, 2017, McNeil and Ellis violated the Court's injunction. Along with eleven other plaintiffs, they filed a new lawsuit in this district against this Court and two other judicial officers for dismissing their prior legal challenges for lack of subject matter jurisdiction. They did not file an "Application Pursuant to Court Order Seeking Leave to File," and were not granted leave to file this new lawsuit. Accordingly, McNeil and Ellis should be held in contempt and the Court should impose coercive sanctions against them, including a daily fine and an award of attorney's fees, to ensure their compliance with the Order and to compensate the United States for its loss.

Background

Counterclaim Defendants Michael B. Ellis and Robert A. McNeil are serial filers of lawsuits challenging actions taken by the Internal Revenue Service and the Department of Justice to assess and collect taxes against them. See Order of Injunction ("Order") [Dkt. No. 44] at ¶¶ 1-

4. All of their individual lawsuits – as well as the lawsuits they assisted others in filing – raise the same claims and have been dismissed for the same reasons. *Id.* ¶ 5.

On February 28, 2017, the United States moved for entry of a permanent injunction against counterclaim defendants Ellis and McNeil barring them nationwide from bringing certain lawsuits without first seeking leave of court. (Dkt. No. 30). The Court entered the Order of Permanent Injunction ("Order") on April 19, 2017. The injunction bars McNeil and Ellis from

> Filing, or assisting in the filing of, any civil action in any United States District Court . . . asserting, or purporting to assert a claim under the United States Constitution or the Administrative Procedure Act challenging actions taken by the Internal Revenue Service in preparating to assess and assessing income tax liabilities pursuant to 26 U.S.C. § 6020 . . . [and/or] challenging actions taken by the Department of Justice to defend against [such] suits and/or suits to collect income tax liabilities.

Order at p. 5.

In order to bring such a suit, McNeil and Ellis were required to

> File with the court a document titled "Application Pursuant to Court Order Seeking Leave to File," that: (i) certifies that the claims presented are new claims never before raised and disposed of on the merits on or jurisdictional grounds by any court; (ii) describes the allegations of the complaint; and (iii) contains a certification under penalty of contempt that the allegations of the complaint are true; and (iv) attaches a copy of this injunction.

Order at p. 6. The injunction provides that McNeil and Ellis "shall not be permitted to file said action unless and until such application is granted." *Id.* McNeil and Ellis unsuccessfully moved pursuant to Rule 59 for relief from the order of injunction, and have appealed the denial of their Rule 59 motion, which is pending.

On August 24, 2017, McNeil and Ellis[1] filed another complaint in this district: *McNeil, et al. v. Harvey, et al.*, No. 17-1720 (D.D.C.). This new lawsuit names as defendants three judicial officers (including this Court) that dismissed the plaintiffs' prior legal challenges. The lawsuit challenges these dismissals and seeks a declaratory judgment that:

(i) Each plaintiff "complain[ed] as their core fact content that IRS never prepares substitute income tax returns" as to each of them;

(ii) Each court did not "adjudicate [their] core fact controvers[ies],"

(iii) Each court "falsif[ied] the record by attributing litigants relief they did NOT seek, then dismiss[ed] the cases on the basis of that fabrication,"

(iv) Each court's "uniform falsification . . . provides strong circumstantial evidence victims' cases, as filed, are meritorious,"

(v) Each court's "uniform falsification . . . violated each Plaintiffs' [*sic*] rights to adequate, effective and meaningful access to courts and due process of law, and constitute, as well, obstruction of the administration of justice,"

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[1] Joining McNeil and Ellis are eleven other plaintiffs, including the plaintiff in this underlying action (Mark Crumpacker); two individuals whose matters were consolidated with this case (William McGarvin, Gary Dwaileebe); two other plaintiffs who filed duplicative actions (Louis DePolo and Melba Ford); and the plaintiff in another action currently pending in this district (Harold Stanley). Crumpacker, McGarvin and Dwaileebe's actions were all dismissed for lack of subject matter jurisdiction by this Court on December 31, 2016. (Dkt. No. 25). The United States Court of Appeals for the D.C. Circuit granted the United States' motion for summary affirmance in the consolidated cases on September 13, 2017. DePolo and Ford's actions were also dismissed for lack of subject matter jurisdiction. *DePolo v. Ciraolo-Klepper*, 197 F. Supp. 3d 186, 192 (D.D.C. 2016); *Ford v. Ciraolo-Klepper*, No. 17-cv-00034, 2017 WL 2189577, at *6 (E.D. Cal. May 18, 2017). Stanley's action is currently pending. *Stanley, et al. v. Lynch*, No. 1:17-cv-00022 (D.D.C.).

(vi) Each court's "uniform falsification" renders their dismissal of no "precedential value or preclusive effect."

Exhibit A (*McNeil, et al. v. Harvey, et al.*, Complaint) at ¶¶ 49(a)-(f). The Complaint omits any mention of the fact that this Court has entered an injunction against McNeil and Ellis.

Argument

I. MCNEIL AND ELLIS HAVE VIOLATED THE PERMANENT INJUNCTION

Plaintiffs McNeil and Ellis have filed a new lawsuit seeking declaratory judgment that the dismissals of their prior actions and the actions of those they assisted violated the First and Fifth Amendments of the United States Constitution. By filing this new case – which revisits the merits of the previously-dismissed actions – McNeil and Ellis have plainly violated the injunction against them in this case. They should accordingly be held in contempt.

A party should be held in contempt for violating an injunction where the moving party has demonstrated "by clear and convincing evidence that (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by the Defendants; and (3) Defendants failed to comply with that order." *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 29-30 (D.D.C. 2014). Once the moving party has made that showing, the burden shifts to the defendant to justify the noncompliance by, for example, demonstrating . . . its good faith attempts to comply." *Id.* at 30. Contempt sanctions are "coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Ashford v. East Coast Exp. Eviction*, 774 F. Supp. 2d 329, 331 (D.D.C. 2011) (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994)).

All of these elements are satisfied here. The injunction clearly and unambiguously prohibits the defendants from "filing . . . any civil action in any United States District Court asserting, or purporting to assert a claim under the United States Constitution or the

Administrative Procedure Act challenging actions taken by the Internal Revenue Service in preparing to assess and assessing income tax liabilities pursuant to 26 U.S.C. § 6020," or actions taken by the Department of Justice to "defend against" such suits, without first obtaining leave of court. Order at p.5, ¶ 1(a). The injunction requires McNeil and Ellis follow certain steps in order to obtain leave. Specifically, the injunction requires them to file an "Application Pursuant to Court Order Seeking Leave to File, that (i) certifies that the claims presented are new claims never before raised and disposed of on the merits or on jurisdictional grounds by any court; (ii) describes the allegations of the complaint; and (iii) contains a certification under penalty of contempt that the allegations of the complaint are true; and (iv) attaches a copy of this injunction." *Id.* at p.5, ¶ 2.

Ellis and McNeil have violated the pre-filing leave requirements of the injunction. First, this new action on its face expressly challenges the holdings of the very cases that justified the entry of the injunction in this case because they were brought without any "good faith or legal basis" and "for the purpose of harassment." Order at p.3, ¶¶ 11-12. Thus there can be no doubt that, even though this action is brought against judicial officers rather than the United States, it is no less a challenge to "actions taken by the Internal Revenue Service in preparing to assess and assessing income tax liabilities pursuant to 26 U.S.C. § 6020."[2]

[2] McNeil and Ellis's assertion that they are not "challenging in this suit any actions taken by the Internal Revenue Service or by the DoJ to enforce the income tax" is nonsensical. They expressly seek a judgment that (i) judicial officers "falsified the record of each case," and that (iii) such falsification constituted "evidence that their cases are meritorious." Exh. A. at ¶ 8. This is just another way of saying that their underlying claims should not have been dismissed. It is therefore no different than any of their other lawsuits, or appeals of the dismissals thereof.

Second, this new action purports to assert "claim[s] under the United States Constitution;" namely the First and Fifth Amendments. Those claims merely recycle allegations that McNeil and Ellis have made in countless pleadings and motions in this case and others. *Compare* Exhibit A at ¶¶ 45-46 (alleging First Amendment Right of Access to Courts denied by "scheme to systematically fabricate and attribute to *pro per* litigants relief they never sought, thereby avoiding adjudication of ht ecases on their ACTUAL merits) *with* Dkt. No. 1 [Complaint in this action] at ¶ 33(accusing defendants of violating First Amendment by "fabricat[ing] allegations, falsely attributed [to] them."), Dkt. No. 46 at p. 8, (accusing courts of "attributing to victims allegations they never made and relief they never sought"), 15 (McNeil and Ellis seek to "compel judges to adjudicate the ACTUAL merits" of their cases). The First Amendment claim in particular has also been raised in a separate action against this Court and other judges on this court that is currently pending in this district: *Ellis v. Jackson, et al* , No. 1:16-cv-2313 (D.D.C.).[3]

Third, there is no evidence that McNeil or Ellis filed the required "Application Pursuant to Court Order Seeking Leave to File" before filing this new complaint, nor any evidence that any court granted them leave to file it. They have therefore violated paragraph 2 of the injunction.

II. THE COURT SHOULD IMPOSE MONETARY CONTEMPT SANCTIONS AGAINST MCNEIL AND ELLIS

Upon a finding of civil contempt, the court may impose coercive and compensatory sanctions. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947);

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[3] See Dkt. No. 1 [Complaint] at ¶90-98.

Evans v. Williams, 206 F.3d 1292, 1296 (D.C. Cir. 2000). The Court should impose both here – namely: (i) a per diem fine of $665 for every day that Ellis and McNeil do not withdraw their complaint and obey the required "leave" procedure of the court's injunction; and (ii) the United States' reasonable attorney's fees in bringing this motion.

Coercive sanctions should be crafted to bring a contemnor into compliance with a court order and to ensure his future compliance. *See Bagwell*, 512 U.S. at 826. Compensatory sanctions, on the other hand, ensure that the moving party receives the benefit of the order that has been violated. *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003). In fashioning contempt sanctions, courts have broad discretion and should 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 Mine Workers of America*, 330 U.S. at 304.

A. McNeil and Ellis Should be Fined $665 for Every Day that they Fail to Withdraw their Complaint

Courts have recognized that a per diem fine for each day a contemnor fails to comply with an affirmative court order is a valid and permissible coercive sanction. *See Bagwell*, 512 U.S. at 829; *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999).

A per diem fine is an appropriate sanction in this case. Simply, McNeil and Ellis's decision to file this new action without first seeking leave of court puts them squarely in violation of paragraph 2 of the injunction in this case. Every day that the new lawsuit is pending on the court's docket without an order permitting its filing restarts that violation. Accordingly, the only way that McNeil and Ellis can "purge" their contempt is to dismiss their complaint and – if they truly want to pursue this action – follow the proper procedures by filing the required application containing the appropriate certifications and attachments.

A fine of $665 is coercive without being punitive. According to the February 27, 2017 entry on McNeil's website, he received $665 of "donations" from third parties to assist him and Ellis in their ongoing, duplicative litigation. Exhibit E to Motion for Permanent Injunction [Dkt. No. 30-7] at p. 5 ("I applied $568.57 of the 2017 donations to the 2016 carryover deficit, completely eliminating it, which left $96.43 to be applied to the 2017 expenses incurred to date."). Accordingly, McNeil and Ellis should be fined this amount to ensure that they are personally financially coerced to comply with the injunction, and do not simply pass on the cost of compliance to third parties who donate money to their misguided and enjoined conduct.

B. The Court Should Award Attorney's Fees to the United States

In order to compensate the Government's loss from the defendant's disobedience of the injunction, the United States further requests that the court award attorney's fees incurred in preparing and litigating this contempt proceeding. *See United Mine Workers*, 330 U.S. at 303-304. As both McNeil and Ellis are in contempt of the Order, they should be jointly liable for the United States' attorney's fees. The United States requests that it be given fourteen (14) days after the entry of an Order of Contempt to submit a declaration in support of the fee amount.

Conclusion

McNeil and Ellis's new action is nothing more than a continuation of their campaign of litigation brought solely "for the purpose of harassment, and not for any legitimate purpose." For the foregoing reasons, the Court should issue an order to show cause why they should not be held in contempt. A proposed order to show cause is submitted herewith.

Dated: September 18, 2017

Respectfully submitted,

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