

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PETER DENTON, *et al.*,

Plaintiffs,

v.

RUDOLF SUTER,

Defendant.

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Civil Action No. 3:11-CV-02559-N

ORDER OF CIVIL CONTEMPT AND COERCIVE INCARCERATION

This Order addresses Plaintiffs Peter Denton and Harvest Investors LP’s (collectively, the “Denton Plaintiffs”) Second Motion for Sanctions, Contempt, and to Compel [160]. The Court grants the motion.

I. ORIGINS OF THE DISPUTE

This Court has previously entered a Final Judgment in favor of the Denton Plaintiffs against Defendant Rudolf Suter, as well as an Order granting the Denton Plaintiffs’ motion for confirmation of a foreign arbitration award. *See* Order, December 21, 2012 [14]. Since the time the Court rendered the Final Judgment, the Denton Plaintiffs have sought postjudgment discovery from Suter. *See* Am. Findings, Conclusions, and Recommendation of the U.S. Magistrate Judge 2 [169] (“Amended Recommendation”). Suter’s responses to the Denton Plaintiffs’ discovery demands, as well as their attempts to execute on the Final Judgment, have resulted in numerous ongoing disputes between the parties in this matter. *See id.* Suter has not satisfied any amount of the Final Judgment. *See id.*

This dispute concerns Suter's failure to comply with U.S. Magistrate Judge David L. Horan's order granting the Denton Plaintiffs' motion to compel Suter to respond to the Denton Plaintiff's Interrogatory Nos. 10, 12, 14, 21, and 23 of Plaintiffs' First Set of Interrogatories and Interrogatory Nos. 34, 50, 51, 55, 68, 71, 72 and 78 of Plaintiffs' Second Set of Interrogatories. Order, November 4, 2013 5–21 [94]. In connection with the motion to compel, the Magistrate Judge awarded the Denton Plaintiffs \$27,605 for payment of reasonable and necessary fees under Federal Rule of Civil Procedure 37(a)(5)(A). Order, February 22, 2015 8 [141]. When Suter failed to either pay the \$27,605.00 or provide answers to the interrogatories, the Denton Plaintiffs filed their first motion for contempt. Amended Recommendation 5; Pls.' First Mot. for Sanctions, Contempt, and to Compel [149]. The Magistrate Judge held a hearing and oral argument on the Denton Plaintiffs' First Contempt Motion, and Suter personally appeared. Amended Recommendation 5–6. At the hearing, Suter did not contest that he had not fully answered or supplemented and verified his answers under oath as required by the motion to compel. *Id.* at 6. The Magistrate Judge granted the First Contempt Motion by ordering Suter to pay the \$27,605 within 10 business days of the date of the order. *Id.* Suter failed to comply; he neither fully answered the discovery requests nor paid the \$27,605. *Id.*

The Denton Plaintiffs filed a Second Motion for Sanctions, Contempt, and to Compel [160]. The Magistrate Judge held a hearing on the motion, but Suter did not appear for the hearing. *See* Amended Recommendation 12. Pursuant to 28 U.S.C. § 636(e), the Magistrate Judge certified facts to this Court showing that Suter's conduct constitutes a civil contempt

of the requirements of the Court's orders. *Id.* at 15. The Magistrate Judge also ordered Suter to pay \$3,919.50 for reasonable and necessary attorneys' fees, the loadstar amount, in connection with the Denton Plaintiffs' first and second motions for sanctions, contempt, and to compel. Mem. Op. and Order Awarding Att'ys' Fees on Mot. to Compel 11 [170]. This Court held a show cause hearing on March 9, 2016, to hear the evidence and determine whether Suter's conduct was sufficient to warrant punishment. *See* 28 U.S.C. § 636(e). Suter again failed to attend the hearing.

II. THE DENTON PLAINTIFFS' MOTION FOR SANCTIONS, CONTEMPT, AND TO COMPEL

A. The Legal Standard of Contempt

In a case where, as here, the matter is referred to a magistrate judge under 28 U.S.C. § 636(e)(6), when a party has committed any act of civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B)(iii). "A party may be held in contempt if he violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order." *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987). "A contempt order is civil in nature if the purpose of the order is (1) to coerce compliance with a court order or (2) to compensate a party for losses sustained as a result of

the contemnor's actions." *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 290–91 (5th Cir. 2002).

To show that civil contempt is warranted, a moving party must establish “(1) that a court order was in effect, (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court’s order.” *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992). The standard of proof for civil contempt is clear and convincing evidence, which is “that weight of proof which produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, of the truth of the precise facts of the case.” *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (internal quotation marks omitted). These elements make up the plaintiff’s *prima facie* case. See *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987). Where a case has been referred to a magistrate, and the magistrate certified facts to the district court indicating that a party’s conduct warrants a finding of contempt, some courts have found that the magistrate’s certificate of facts can be considered the statement of the *prima facie* case. See, e.g., *Proctor v. State Gov’t of N. C.*, 830 F.2d 514, 521 (4th Cir. 1987) (“This certificate of facts forwarded by the magistrate to the district court shall be considered the statement of a *prima facie* case. . . . [If the facts] will support a violation, then the district court may, if it deems the burden of persuasion to have been satisfied, find a party in contempt.”). But see *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 907 (3d Cir. 1992). “After the movant has shown a *prima facie* case, the respondent can defend against it by showing a present inability to comply with the subpoena or order.” *Petroleos*, 826 F.2d at 401. And,

“[e]ven if liability is established, the respondent may demonstrate mitigating circumstances that might persuade the Court to withhold the exercise of its contempt power.” *In re Brown*, 511 B.R. 843, 849 (S.D. Tex. 2014) (citing *Whitfield*, 832 F.2d at 914).

“Upon a finding of civil contempt, the Court has broad discretion to impose judicial sanctions that would coerce compliance with its orders and compensate the moving party for any losses sustained.” *Mary Kay Inc. v. Designs by Deanna, Inc.*, 2013 WL 6246484, at *4 (N.D. Tex. 2013) (citations omitted). For example, the “Court may impose a conditional fine, provided the amount is reasonably designed to force compliance without being punitive, and/or a fixed term of imprisonment, with the condition that the contemnor be released if he or she complies with the court order. The Court also may require that the contemnors pay reasonable attorney’s fees incurred by the moving party in obtaining the contempt finding.” *Id.*; *see also Collier*, 582 F. App’x at 422 (“Imprisonment is an appropriate remedy for either civil or criminal contempt, depending on how it is assessed. If the prison term is conditional and coercive, the character of the contempt is civil; if it is backward-looking and unconditional it is criminal.” (internal quotation marks and footnote omitted)).

B. Suter’s Conduct Warrants Holding Him in Contempt

The facts the Magistrate Judge certified to this Court establish the Denton Plaintiffs’ *prima facie* case. Specifically, the Magistrate Judge certified facts to this Court indicating, by clear and convincing evidence, (1) a court order was in effect, (2) the order required certain conduct by the respondent, and (3) the respondent failed to comply with the court’s order. *See Martin*, 959 F.2d at 47; Amended Recommendation 15–39. Suter did not appear

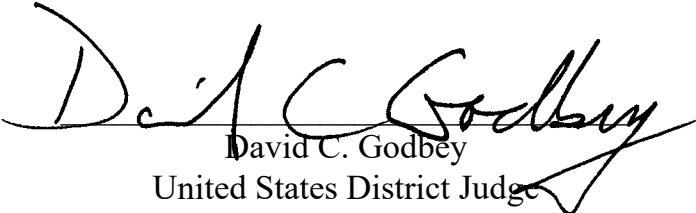
at the show cause hearing, and thus failed to rebut the *prima facie* case or present any mitigating evidence to the Court. The Court finds Suter's disregard of the Court's orders to be egregious. The Court notes that, in the past, Suter has complied with court orders only when threatened with incarceration. Amended Recommendation 10. Monetary fines seem to have no effect on his willingness to comply with court orders. *Id.* Accordingly, the Court finds by clear and convincing evidence that Suter is in civil contempt. The Court awards the Denton Plaintiffs \$8,086.50 for reasonable and necessary attorneys' fees in connection with the proceedings before this Court, to be paid within thirty (30) days of the date of this Order.

CONCLUSION

Based on the foregoing analysis, the Court hereby orders:

- (1) Defendant Rudolf Suter is in civil contempt of this Court.
- (2) Defendant Rudolf Suter shall be coercively incarcerated until he does the following: (a) fully and completely responds under oath to the Denton Plaintiffs' Interrogatory Nos. 10, 12, 14, 21, and 23 of Plaintiffs' First Set of Interrogatories and Interrogatory Nos. 34, 50, 51, 55, 68, 71, 72 and 78 of Plaintiffs' Second Set of Interrogatories; (b) pays the \$27,605 he owes to the Denton Plaintiffs; and (c) U.S. Magistrate Judge Horan determines that Defendant Rudolf Suter has complied with 2(a) and 2(b) above.
- (3) The clerk shall issue, and deliver to the United States Marshal, a warrant for the arrest of Defendant Rudolf Suter for confinement as directed by this Order.
- (4) Defendant Suter shall pay the Denton Plaintiffs \$8,086.50 in attorneys' fees within thirty (30) days of the date of this Order.

Signed March 10, 2016.


David C. Godbey
United States District Judge