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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

In Re Ryan Uehling

Case No. 1: 13-mc-00022-BAM

Kelly Nelson,

Plaintiff,

Millennium Laboratories, Inc., *et al.*,

Defendants.

**ORDER GRANTING MILLENNIUM
LABORATORIES, INC.’S MOTION FOR
AN ORDER TO SHOW CAUSE;**

**FINDINGS AND RECOMMENDATIONS
TO HOLD RYAN UEHLING IN
CONTEMPT OF COURT**

*Pending in the United States District Court
for the District of Arizona as Case No. 2:
12-cv-01301-SLG* /

I. INTRODUCTION

Currently before the Court is Millennium Laboratories, Inc.’s (“Millennium”) Motion to for an Order to Show Cause as to why Ryan Uehling (“Uehling”) should not be held in contempt of court for his refusal to answer three deposition questions pursuant to this Court’s June 27, 2013 Order compelling further deposition testimony. Doc. 72, 73. Uehling filed an opposition on May 23, 2014. Doc. 80. The Court deemed the matter suitable for decision without oral argument pursuant to Local Rule 230(g) and vacated the hearing set for May 30, 2014. (Doc. 84.)

Having carefully considered the parties’ briefs, as well as the entire record in this case, the Court GRANTS Millennium’s Motion for an Order to Show Cause, and issues the following findings and recommendations.

1 **II. BACKGROUND**

2 This dispute arises out of discovery in litigation currently pending in the United States District
3 Court for the District of Arizona, *Nelson v. Millennium Laboratories, Inc.*, No. 2:12-cv-01301-SLG
4 (D. Ariz. filed June 18, 2012). In that case, Plaintiff Kelly Nelson (“Nelson”), a former Millennium
5 employee, asserts various employment-related claims (age and sex discrimination, sexual harassment,
6 retaliation and various tort-based claims). Among these claims, Nelson alleges Millennium retaliated
7 against her for complaining about Millennium’s improper business practices.

8 Uehling is not a party to the Arizona case. Uehling, a former Millennium employee, previously
9 held the position of Regional Business Director in the West region and directly supervised Nelson
10 prior to his termination from Millennium. Nelson identified Uehling as a witness in support of her
11 claims against Millennium. Uehling resides in this District.

12 Uehling appeared for deposition on April 2-3, 2013, pursuant to notices and subpoenas served
13 by both Nelson and Millennium. During direct examination by Nelson’s counsel, Uehling testified,
14 *inter alia*, that Nelson had been a model employee while reporting to him at Millennium and that in
15 his view, there was no job-related basis for her termination. Uehling also testified that Nelson had
16 expressed concerns to him regarding certain business practices that she had been directed to participate
17 in as a Millennium employee.

18 Millennium’s counsel thereafter sought to explore Uehling’s potential bias. Uehling refused to
19 answer 135 questions on grounds of relevance and various privilege assertions. Millennium moved to
20 compel Uehling to respond, which this Court granted in its entirety. Doc. 22, at 13. In relevant part,
21 the Court ordered Uehling to answer the three outstanding questions (among other questions), holding
22 that “[t]he crime-fraud exception applies to communications by Uehling’s attorneys directing Uehling
23 to take certain actions with Millennium property.” *Id.* at 9-10. Uehling then moved for reconsideration
24 before Judge O’Neill, who denied Uehling’s motion in its entirety and held that the Court “ruled
25 properly to invoke the crime-fraud exception.” Doc. 28 at 6.

26 Uehling petitioned the Ninth Circuit for mandamus relief, and obtained a stay from the Ninth
27 Circuit with respect to five deposition questions (including the three questions still outstanding). On
28 February 21, 2014, the Ninth Circuit denied Uehling’s mandamus petition for three independent

1 reasons. Doc. 58. First, the Ninth Circuit held that “[t]he district court did not clearly err, as required
2 for mandamus to issue.” *Id.* at 2. Second, the Ninth Circuit held that mandamus was inappropriate
3 “because Uehling has adequate alternative means to obtain relief,” i.e., appealing a contempt citation.
4 *Id.* at 2-3. Finally, the Ninth Circuit held that mandamus was inappropriate because “the district
5 court’s order does not raise particularly new, injurious, or oft-repeated legal issues.” *Id.* at 3. Uehling
6 then filed a motion for rehearing en banc, which was denied on April 3, 2014. Doc. 65.

7 On April 21, 2014, Millennium deposed Uehling to obtain testimony regarding the five
8 questions Uehling previously refused to answer. *See*, Transcript of Deposition of Ryan Uehling, dated
9 April 21, 2014. Uehling refused to answer three of the outstanding questions. *Id.* at 504:10-505:2,
10 505:18-25, 506:1-22. The three outstanding questions are as follows:

11 (1) “Did you get an instruction from a law firm to copy Millennium files after you were
12 terminated, Mr. Uehling?”

13 (2) “Did an attorney instruct you not to return company property?” and

14 (3) “Did you do these things, deliver materials to Houston, the hard drive with the Millennium
15 files copied from your laptop and the hard copy documents that you had in your possession that
16 were Millennium documents, did you deliver those to the firm in Houston at somebody else’s
17 request?”¹

18 Millennium now moves this Court, pursuant to Federal Rules of Civil Procedure 37 and 45, to
19 order Uehling to appear before Judge O’Neill on a date certain to show cause as to why he should not
20 be adjudged in contempt for his refusal to answer the Subject Questions pursuant to this Court’s June
21 27, 2013 Order. Millennium requests that the Court recommend to Judge O’Neill that Uehling: (1) be
22 held in custody until he obeys the Court’s June 27, 2013 Order; (2) be sanctioned in the amount of
23 \$5,000 per day until he obeys the Court’s June 27, 2013 Order; and (3) be ordered to compensate
24 Millennium for its costs, expenses, and attorney’s fees associated with Millennium’s depositions of
25 Uehling, its motion to compel his testimony, and this motion.

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¹ These three unanswered questions are collectively referred to as the “Subject Questions.”

1 III. DISCUSSION

2 A. Legal Standard For Contempt Proceedings

3 Rule 37(b)(1) of the Federal Rules of Civil Procedure provides, “[i]f the court where the
4 discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to
5 obey, the failure may be treated as contempt of court.” *See also, Gen. Signal Corp. v. Donallco, Inc.*,
6 787 F.2d 1376, 1379 (9th Cir. 1986) (“Civil contempt occurs when a party fails to comply with a court
7 order”); *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (Civil contempt
8 consists of a party's disobedience to “a specific and definite court order by failure to take all
9 reasonable steps within the party's power to comply.”)

10 Civil contempt is characterized by the court's desire to compel obedience to a court order, or to
11 compensate the contemnor's adversary for the injuries which result from the noncompliance. *Flagstaff*
12 *Brewing Corp., v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (citing, *Shillitani v. United*
13 *States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535 (1966); *Gompers v. Bucks Stove & Range Co.*, 221
14 U.S. 418, 448–449, 31 S.Ct. 492, 500–501, 55 L.Ed. 797 (1911)). Thus, there are two forms of civil
15 contempt: compensatory and coercive. *United States v. Asay*, 614 F.2d 655, 659 (9th Cir. 1980). A
16 contempt adjudication is civil in nature when the sanction imposed is wholly remedial, serves only the
17 purposes of the complainant, and is not intended as a deterrent to offenses against the public. *McCrone*
18 *v. United States*, 307 U.S. 61, 64, 59 S.Ct. 685, 686, 83 L.Ed. 1108 (1939).

19 In fashioning civil contempt sanctions, the court has the discretion to award reasonable fees
20 and costs as a remedial measure, regardless of whether the party that is in contempt acted wilfully.
21 *Perry v. O'Donnell*, 759 F.2d 702, 704–705 (9th Cir.1985) “The choice among the various sanctions
22 rests within the discretion of the district court,” *United States v. Sumitomo Marine & Fire Ins. Co.*,
23 617 F.2d 1365, 1369(9th Cir. 1980), and the Ninth Circuit “defer[s] considerably to the judgment of
24 the district court in fashioning the appropriate sentence because of its proximity to the events out of
25 which the contempt springs.” *United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980)

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1 To demonstrate a finding of civil contempt is appropriate, the Millennium bears the initial
2 burden to show the following: “(1) that [Uehling] violated the court order, (2) beyond substantial
3 compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and
4 convincing evidence.” *U.S. v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010) (internal citations and
5 quotations omitted). Once the moving party does so, the contemnor must “demonstrate why [he] was
6 unable to comply.” *Id.*

7 **B. Order to Show Cause**

8 **1. Uehling is Ordered to Show Cause, Before the District Judge, as to Why He**
9 **Should Not be Held in Contempt of Court**

10 Pursuant to 28 U.S.C. § 636(e), this court does not have the authority to issue contempt
11 sanctions. Rather, as the parties have not consented to the magistrate judge presiding over all
12 proceedings in this action, only the district judge has the authority to enter a finding of contempt. *See*
13 28 U.S.C. § 636(c) and (e)(4). Under § 636(e)(6)(B)(iii), if “the act constitutes civil contempt, the
14 magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be
15 served, upon any person whose behavior is brought into question ..., an order requiring such person to
16 appear before a district judge upon a day certain to show cause why that person would not be adjudged
17 in contempt by reason of the facts so certified.” 28 U.S.C. § 636(e)(6)(B)(iii). Upon such a
18 certification, the “district judge shall thereupon hear the evidence as to the act or conduct complained
19 of, and if it is such as to warrant punishment,” the district judge may punish such person. *Id.*

20 This Court finds that Uehling’s conduct “constitutes civil contempt.” 28 U.S.C. §
21 636(e)(6)(B)(iii). Millennium has shown, by clear and convincing evidence, that Uehling violated the
22 Court’s June 27, 2013 Order by refusing to answer the Subject Questions. While Uehling has
23 answered many of the questions previously compelled, he has not substantially complied with the June
24 27 Order because his refusal to answer the Subject Questions was not merely a technical or inadvertent
25 violation. *See, Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir.1986) (“[i]f a
26 violating party has taken all reasonable steps to comply with the court order, technical or inadvertent
27 violations of the order will not support a finding of civil contempt.”) (internal quotation marks and
28 citation omitted.) Additionally, Uehling’s refusal to answer the Subject Questions was not based on a

1 good faith or reasonable interpretation of the June 27, 2013 Order. Indeed, Uehling’s opposition
2 concedes he understood this Court’s order to answer the Subject Questions, but affirmatively chose
3 not to answer them. Uehling’s rationale for refusing to answer these questions is unmistakable:
4 Uehling invites these contempt proceedings because an order of contempt is the only way in which
5 Uehling may obtain appellate review of the June 27, 2013 order. *See*, Doc. 80, 4: 7-13; 5: 17-26; 6: 7-
6 13; 7: 22-27.

7 Accordingly, this Court certifies the following facts to the District Judge:

- 8 1. On June 27, 2013, this Court Ordered Uehling to answer the following questions:
 - 9 a. “Did you get an instruction from a law firm to copy Millennium files after you were
10 terminated, Mr. Uehling?”
 - 11 b. “Did an attorney instruct you not to return company property?” and
 - 12 c. “Did you do these things, deliver materials to Houston, the hard drive with the
13 Millennium files copied from your laptop and the hard copy documents that you
14 had in your possession that were Millennium documents, did you deliver those to
15 the firm in Houston at somebody else’s request?” Doc. 22.
- 16 2. Uehling sought reconsideration of the Court’s June 27, 2013 Order before Judge O’Neill.
17 Judge O’Neill denied Uehling’s motion for reconsideration. Doc. 28.
- 18 3. Uehling petitioned the Ninth Circuit for mandamus relief, and obtained a stay from the
19 Ninth Circuit with respect to five deposition questions (including the three questions still
20 outstanding). On February 21, 2014, the Ninth Circuit denied Uehling’s mandamus
21 petition. Uehling then filed a motion for rehearing en banc, which was denied on April 3,
22 2014. Doc. 65.
- 23 4. On April 21, 2014, Millennium deposed Uehling to obtain testimony regarding the five
24 questions Uehling previously refused to answer. *See*, Transcript of Deposition of Ryan
25 Uehling, dated April 21, 2014. Uehling refused to answer three of the outstanding
26 questions.

1 5. Uehling’s failure to comply with the June 27 Order was not the result of mistake or
2 confusion. Uehling deliberately violated the Court’s June 27 Order by refusing to answer
3 the Subject Questions.

4 Uehling is ORDERED to show cause in writing, no later than **June 13, 2014**, before United
5 States District Judge Lawrence J. O’Neill as to why he should not be held in contempt.

6 **2. The Contempt Proceedings Before Judge O’Neill Will Be Determined On the**
7 **Papers**

8 In general, proceedings for civil contempt “are instituted by the issuance of an Order to Show
9 Cause ... why a contempt citation should not issue and a notice of a date for the hearing.” *Alcalde v.*
10 *NAC Real Estate Invs. & Assign., Inc.*, 580 F.Supp.2d 969, 971 (C.D. Cal. 2008). Due process requires
11 that Uehling receive proper notice and an opportunity to respond and to be heard before civil contempt
12 sanctions are imposed. *United States v. Powers*, 629 F.2d 619, 626 (9th Cir. 1980).

13 Generally, a district court should not impose contempt sanctions solely on the basis of
14 affidavits. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983). A civil
15 contempt proceeding is a trial within the meaning of Fed. R. Civ. P. 43(a) rather than a hearing on a
16 motion.” *Id.* However, where the affidavits offered in support of a finding of contempt are
17 uncontroverted, a district court need not hold an evidentiary hearing. *Peterson v. Highland Music*, 140
18 F.3d 1313, 1324 (1998). “A trial court may in a contempt proceeding narrow the issues by requiring
19 that affidavits on file be controverted by counter-affidavits and may thereafter treat as true the facts set
20 forth in uncontroverted affidavits.” *Id.* The opportunity to fully brief the evidentiary issues satisfies
21 due process requirements. *Pacific Harbor Capital v. Carnival Airlines, Inc.*, 210 F.3d 1112, 1118 (9th
22 Cir. 2000).

23 Here, there is no reason to hold a hearing in this civil contempt proceeding. Uehling
24 acknowledges he has violated the Court’s June 27 Order for the purpose of being found in contempt;
25 thus, making the June 27 Order final and appealable. The only open question is the type of sanctions
26 that will accompany the contempt order.

27 Each party shall file a brief in response to this Order to Show Cause that explains their position
28 as to whether Uehling should be found in contempt of court. The briefs will be directed to United

1 States District Judge Lawrence J. O’Neill, supported by affidavits and relevant exhibits, and shall not
2 exceed ten (10) pages in length (exclusive of affidavits and exhibits). The parties’ briefs shall be due
3 on or before **June 13, 2014.**

4 **C. Findings and Recommendations For Contempt Proceedings**

5 Discussed above, civil contempt can be characterized by the court’s desire to compel
6 obedience *or* to compensate the contemnor’s adversary for the injuries which result from the
7 noncompliance. *Falstaff Brewing Corp.*, 702 F.2d at 778; *Shillitani*, 384 U.S. at 370, 86 S.Ct. at 1535.
8 This Court recommends light sanctions accompany an order of contempt: sanctions that have the
9 effect of compensating Millennium for Uehling’s noncompliance, rather than sanctions designed to
10 compel obedience with the Court’s order. The Court’s rationale for this recommendation is threefold.

11 First, Uehling’s conduct is not as egregious as Millennium suggests.² Uehling was put to a
12 difficult choice: Uehling adamantly disagrees with Court’s ruling concerning the crime-fraud
13 exception to the attorney-client privilege doctrine, but has no way to challenge this order except under
14 the most stringent standards of review. Uehling’s only option is to “double down” on his position,
15 face contempt sanctions, and risk substantial loss if he loses his appeal on the merits. This is precisely
16 what Uehling did. *See*, Doc. 80, 4: 7-13; 5: 17-26; 6: 7-13; 7: 22-27. Not wishing to moot his
17 objections to the discovery order, Uehling chose not to comply and risk contempt sanctions. Being
18 forced to disobey an order of the district court, and face contempt sanctions, in order to obtain review
19 of the court’s ruling seems a harsh choice. That choice is compelled by the case law, however, and it is
20 a choice Uehling was free to exercise.

21 Second, the only injury Millennium has sustained as a result of Uehling’s refusal to answer the
22 Subject Questions are the attorneys’ fees it incurred conducting the fourth day of Uehling’s deposition,
23 as well as the fees it incurred bringing the instant motion. Millennium does not identify, and this
24 Court does not perceive, any harm to Millennium resulting from Uehling’s refusal to answer the
25 Subject Questions.

27 ² Millennium argues that Uehling is “defy[ing] the rule of law,” “flagrantly disobeying the Court’s
28 Order,” and that “the most severe sanctions are warranted,” including imprisonment and tens –likely,
hundreds -- of thousands of dollars in monetary sanctions.

1 The Subject Questions call for information that is of minimal relevance to the *Nelson* action.
2 Millennium has consistently argued it requires information that may reveal Uehling's potential bias.
3 By obtaining testimony concerning Uehling's involvement in litigation against Millennium, and
4 whether Uehling has used, improperly or otherwise, Millennium property, Millennium has the
5 evidence it desires. However, whether an attorney instructed Uehling to take certain actions with
6 Millennium's property is relevant only in the most attenuated sense. Indeed, if an attorney instructed
7 Uehling to misappropriate Millennium property, it would seem to this Court that such a circumstance
8 bolsters Uehling's credibility when compared to a circumstance where Uehling misappropriated
9 Millennium's property on his own initiative. Thus, the Court is not persuaded by Millennium's
10 arguments that this information is needed for the rapidly approaching *Nelson* trial. Further, this Court
11 does not believe Millennium is damaged without this information.

12 Third, this Court is troubled by the circumstances surrounding Millennium's Motion. Uehling
13 is not a party to the *Nelson* litigation. Discussed above, the Subject Questions are of minimal relevance
14 to the *Nelson* action. The evidence shows that the primary attorneys – for both Ms. Nelson and
15 Millennium – in the *Nelson* action have largely abandoned any interest in Uehling's continued
16 deposition. Yet, Millennium – led not by its attorneys in the *Nelson* action, but by counsel who
17 specializes in False Claims Act litigation -- requests the harshest sanctions permitted under the law:
18 imprisonment and monetary sanctions amounting to tens, if not hundreds, of thousands of dollars.

19 These circumstances suggest that Millennium's continued interest in Uehling's testimony, as
20 well as the requested sanctions, have little to do with the *Nelson* litigation. It is the opinion of this
21 Court that Millennium is using the *Nelson* litigation to obtain as much information as possible in
22 anticipation of the need to defend against a qui tam action. Moreover, it appears to this Court that
23 Millennium has summoned its considerable resources to retaliate against, and borderline harass, a non-
24 party witness because that witness may be a relator in a qui tam action against Millennium.

25 For all the reasons discussed herein, this Court recommends only those contempt sanctions that
26 will compensate Millennium for its losses as a result of Uehling's refusal to comply with the June 27
27 Order. Those losses are limited to reasonable attorney's fees incurred attending Uehling's fourth
28 deposition, as well as reasonable attorneys' fees incurred litigating the instant motion.

1 **D. Uehling’s Opportunity to Purge A Contempt Sanction**

2 As a final matter, the Court notes that any contempt sanctions levied by the district judge are
3 considered to be avoidable through obedience to the Court's order. *Int'l Union*, 512 U.S. 821, 827, 114
4 S.Ct. 2552, 129 L.Ed.2d 642. The court must allow the contemnor to “purge” the sanction imposed by
5 complying with the discovery order. *Int'l Union*, 512 U.S. 821, 828, 114 S.Ct. 2552, 129 L.Ed.2d 642.

6 Should Uehling choose to fully comply with the Court’s June 27 Order, the contempt sanctions
7 levied against him will be vacated.

8 **IV. CONCLUSION**

9 Based on the foregoing, the Court ORDERS as follows:

- 10 1. Ryan Uehling is hereby ORDERED TO SHOW CAUSE as to why he should not be held in
11 contempt of court for disobeying the Court’s June 27, 2013 Order. Uehling is ORDERED
12 to show cause in writing, no later than **June 13, 2014**, before United States District Judge
13 Lawrence J. O’Neill, as to why he should not be held in contempt.
- 14 2. The parties shall file their briefs in response to this Order to Show Cause on or before **June**
15 **13, 2014**;

16 Further, the Court RECOMMENDS as follows:

- 17 1. Ryan Uehling be found in contempt of Court;
- 18 2. As civil contempt sanctions, Ryan Uehling be ordered to pay Millennium monetary
19 sanctions, in the form of reasonable attorneys’ fees Millennium incurred attending
20 Uehling’s fourth day of deposition, as well as reasonable fees incurred bringing the instant
21 motion;

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3. The amount of civil contempt sanctions should be assessed in light of the following findings: (1) Uehling is not a party to the *Nelson* litigation; (2) the testimony at issue is minimally relevant; (3) Uehling's failure to comply with the June 27, 2013 Order, while worthy of a contempt finding, was the only practicable means by which he could obtain appellate review of the June 27, 2013 Order; and (4) Millennium is pursuing further deposition testimony from Uehling, as well as contempt sanctions against Uehling, for reasons unrelated to the underlying *Nelson* action.

IT IS SO ORDERED.

Dated: May 29, 2014

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE