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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HILDA L. SOLIS,

Plaintiff,

No. 2:11-cv-01706 JAM JFM (PS)

vs.

ORLAND SAND & GRAVEL CORP.,

Defendant.

ORDER TO SHOW CAUSE

_____/

Pending before the court is plaintiff’s Motion for Order to Show Cause Regarding Civil Contempt. ECF No. 51. The motion alleges that defendant Orland Sand & Gravel Corp. (“OSG”) and its owner, Dale Bogart (“Bogart”), have refused to comply with the Permanent Injunction entered by District Judge John A. Mendez (ECF No. 47), which requires them to permit inspection of their mine by representatives of the Department of Labor. Plaintiff seeks (1) an order directing OSG and Bogart to show cause why they should not be held in contempt; and (2) an order holding them in civil contempt and imposing appropriate sanctions.¹ Pursuant

¹ Plaintiff’s proposed sanctions include enjoining OSG’s mining operations for (12) months, issuing monetary sanctions of \$50,000, and incarcerating Bogart for not less than 30 days. Plaintiff proposes that these sanctions, with the exception of a portion of the monetary sanctions, be suspended so long as OSG complies with the Permanent Injunction and permits inspection of the mine by the Secretary.

1 28 U.S.C. § 636(b), the undersigned has the authority to certify the facts of the contempt to the
2 district court and to issue an order directing defendant to show cause before the district judge
3 why he should not be held in contempt. See Alcalde v. NAC Real Estate Investments &
4 Assignments, Inc., 580 F. Supp. 2d 969 (C.D. Cal. Aug. 4, 2008).

5 The hearing on plaintiff's motion for an order to show cause (ECF No. 51) was
6 held on June 19, 2013. Joseph Lake appeared on behalf of plaintiff. Defendant, who was
7 properly served with the motion (see ECF No. 54), made no appearance and filed no objection to
8 the motion.² Upon review of the documents in support of the motion, upon hearing the
9 arguments of plaintiff's counsel, and good cause appearing therefor, THE COURT FINDS AND
10 ORDERS AS FOLLOWS:

11 CERTIFIED FACTS

12 The following background facts were set forth by the assigned magistrate judge in
13 the January 8, 2013 findings and recommendations recommending granting plaintiff's motion for
14 default judgment:

15 Plaintiff, Hilda A. Solis, the Secretary of Labor, filed this complaint
16 against the defendant, Orland Sand & Gravel Corp. ("Orland"), on
17 June 24, 2011 seeking injunctive relief pursuant to the Federal Mine
18 Safety & Health Act ("the Act"). Plaintiff asserts that defendant
19 operates a sand and gravel crushing operation in Orland, California
20 and that the operation constitutes a mine as defined by the Act. The
21 complaint asserts that the Act gives the Secretary of Labor's
22 representatives the right to enter mine property to conduct safety and
23 health inspections. The complaint alleges that plaintiff's inspectors
24 have been prevented by defendant from conducting safety and health
25 inspections [at] defendant's operation site. Defendant was issued
26 citations by the plaintiff for its failure to comply but still refused to
allow plaintiff's inspectors to inspect the site.

27

28 On June 27, 2011, the district judge issued a temporary restraining

29 ² The court notes that Mr. Bogart attempted to file documents which were received on
30 June 14, 2013. However, these documents were returned pursuant to the court's July 23, 2012,
31 order indicating no further filings will be accepted from defendant "unless they are filed by a
32 licensed attorney." ECF No. 35.

1 order against defendant. Specifically, the court determined that: (1)
2 there is reasonable grounds to believe that the defendant has violated
3 and is continuing to violate the Act by denying entry to an authorized
4 representative of plaintiff to inspect the site; (2) the court has
5 jurisdiction and the power to restrain defendant from continuing to
6 violate the Act; and (3) the public interest will be irreparably harmed
7 unless the defendant is restrained from continuing to violate the Act.
(See Dkt. No. 5 at p. 2.) Accordingly, the court temporarily restrained
8 defendant from (1) denying representatives of plaintiff from entry to
9 permit inspection of defendant's site; (2) refusing to permit
10 inspection of the site; and (3) interfering with, hindering and delaying
11 plaintiff's representatives from carrying out the provisions of the Act.
(See id.)

8 On June 29, 2011, the court granted a preliminary injunction in favor
9 of plaintiff and against defendant which included the same injunctive
10 relief as the temporary restraining order described above. The court
11 further held that the "[p]reliminary injunction shall remain in full
12 force and effect until such time as the merits of Plaintiff's Complaint
13 have been resolved, or upon order of the court." (Id. at p. 2.)

12 The summons and complaint were served on defendant by personal
13 service on November 16, 2011. (See Dkt. No. 17.) On December 9,
14 2011, the matter was referred back by the undersigned to the district
15 judge after it was noted that defendant is a corporation. Defendant
16 attempted to appear in this action through its president/owner Dale
17 Roy Bogart, which was improper as he was not counsel. (See Dkt.
18 No. 19.)

16 After defendant did not file an answer, plaintiff requested entry of
17 default. (See Dkt. No. 20.) The clerk entered default on January 18,
18 2012. (See Dkt. No. 21.) On March 7, 2012, defendant filed a motion
19 to vacate default and a motion to dismiss for lack of jurisdiction
20 through its company president, Bogart. (See Dkt. No. 24.) On April
21 5, 2012, plaintiff filed a motion for summary judgment. (See Dkt. No.
22 26.) The court struck defendant's motion to vacate the default as it
23 was not filed through an attorney as required by law. Furthermore,
24 the court struck plaintiff's motion for summary judgment as moot.
(See Dkt. No. 35.)

21 On September 13, 2012, plaintiff filed a motion for default judgment.
22 Defendant did not file a response to the motion for default judgment
23 nor did it appear at the hearing on the motion conducted on
24 December 20, 2012.

24 ECF No. 44 at 1-3. The court adopted the findings and recommendations on March 12, 2013,
25 granting default judgment to plaintiff. ECF No. 47. The court granted the following injunctive
26 relief to plaintiff:

1 a. Defendant Orland Sand & Gravel Corporation has violated
2 Sections 103 and 104(b) of the Act by denying entry to authorized
3 representatives of the Secretary of Labor to inspect Defendant's mine
and will continue to violate Sections 103 and 104(b) of the Act absent
action by the court;

4 b. Under Section 108(a) of the Act, 30 U.S.C. § 818(a), this court has
5 the jurisdiction and the power to enjoin the Defendant from
continuing to violate Sections 103 and 104(b) of the Act;

6 c. The public interest will be irreparably harmed unless Defendant
7 Orland Sand & Gravel Corporation is enjoined from continuing to
violate Sections 103 and 104(b) of the Act.

8 d. Defendant, its agents, servants, employees, and those persons in
9 active concert or participation with it, are permanently enjoined from
10 violating Section 103 of the Act by denying authorized
11 representatives of the Secretary entry to and to permit the inspection
12 of the Orland Sand and Gravel Corporation mine operated by the
Defendant; refusing to permit inspection of the mine and related
equipment; and interfering with, hindering and delaying the Secretary
of Labor or her authorized representatives from carrying out the
provisions of the Act;

13 e. Defendant, its agents, servants, employees, and those persons in
14 active concert or participation with it, are permanently enjoined from
15 violating Section 104(b) of the Act by refusing to comply with Order
of Withdrawal No. 8613142; and

16 f. This permanent injunction shall be served on the defendant or its
attorney.

17 ECF No. 47 at 2-3 ("permanent injunction"). Default judgment was entered against defendant.
18 ECF No. 48. The default judgment and order adopting findings and recommendations were
19 served by mail on defendant on March 12, 2013. On March 22, 2013, the envelope containing
20 the default judgment and order was returned with "rejected for fraud" written on it.³

21 On March 22, 2013, defendant filed a document styled as a "Verified Invoice and
22 Billing Statement" addressed to the court. ECF No. 49. This document was returned to
23 defendant pursuant to the court's prior order that no filings shall be accepted from defendant
24 unless they are filed by a licensed attorney. See ECF No. 35.

25 ³ The court notes there are eleven notations on the docket of mail being returned for
26 reasons such as "rejected for fraud," or "refused for fraud fictitious address 18:1341-142."

1 The following facts are certified on the basis of the sworn declarations of Jerry
2 Husley, Federal Mine Safety and Health Supervisor/Mine Inspector with the Mine Safety and
3 Health Administration (“MSHA”) of the Department of Labor (ECF No. 51-2, hereafter “Hulsey
4 Decl.”), and of Deputy U.S. Marshal Frank Newsom (ECF No. 52, hereafter “Newsom Decl.”).
5 Both declarations were filed in support of the motion. Because defendant did not appear and
6 contest the accuracy of the declarations, no live testimony from these witnesses was necessary.
7 See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1324 (9th Cir.) (where alleged contemnor
8 fails to controvert affidavits, evidentiary hearing unnecessary), cert. denied, 525 U.S. 983
9 (1998).

10 On April 2, 2013, mine inspector Hulsey and MSHA investigator Jason Jenó went
11 to the OSG facility near Orland, California to conduct a health and safety inspection. Hulsey
12 Decl. ¶ 2. Hulsey and Jenó showed their MSHA credentials and the permanent injunction to the
13 office secretary. Hulsey Decl. ¶ 3. When they asked to see Bogart, they were confronted by an
14 individual who gave his name as Rick. Rick stated that he represented OSG at the request of
15 Doc Bogart. Rick was not satisfied with Hulsey and Jenó’s credentials and demanded their
16 “Oath of Authority.” Hulsey Decl. ¶¶ 4-7. When Hulsey and Jenó attempted to give Rick a
17 copy of the injunction and explain their need to inspect the mine, Rick accused them of
18 trespassing. Rick became confrontational and approached Jenó very closely. Hurley verbally
19 cited OSG for denying entry to the mine, and left the premises. Hulsey Decl. ¶¶ 6-9. A copy of
20 the written citation was subsequently mailed to OSG via certified mail. Hulsey Decl. ¶ 10; see
21 also ECF No. 51-3 (Ex. A to Hulsey Decl.)

22 On the morning of April 15, 2013, Hulsey returned to OSG with Jenó and four
23 deputy U.S. marshals including Newsom. Hulsey Decl. ¶ 11. Upon their arrival, Bogart ran up
24 and confronted Newsom. Newsom advised Bogart that there was a court order requiring his
25 cooperation with the mine inspection. Hulsey Decl. ¶ 12; Newsom Decl. ¶ 3. Bogart stated that
26 he would not permit the inspection because the government did not have jurisdiction over him.

1 v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).⁴ Civil contempt sanctions are intended to coerce
2 compliance. Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827
3 (1994). To find civil contempt: “. . . the court need only (1) have entered a clear and
4 unambiguous order, (2) find it established by clear and convincing evidence that the order was
5 not complied with, and (3) find that the alleged contemnor has not clearly established his
6 inability to comply with the terms of the order.” Huber v. Marine Midland Bank, 51 F.3d 5, 10
7 (2d Cir. 1995). There need not be a willful violation of the order in order for the court to find
8 civil contempt. Asay, 614 F.2d 661. See also United States v. Laurins, 857 F.2d 529, 534 (9th
9 Cir. 1988).

10 As demonstrated by the facts certified above, it appears that defendant has
11 willfully violated the court’s order directing defendant to, *inter alia*, permit plaintiff to inspect its
12 mines. The court’s order was clear and unambiguous, and clear and convincing evidence
13 establishes that defendant’s representative Bogart wilfully failed to comply with the order.
14 Defendant was served by mail with the court’s permanent injunction, and plaintiff has produced
15 evidence that OSG representatives were further informed of the order on the occasion of both
16 attempted mine inspections. There is no indication that defendant was unable to comply with the
17 permanent injunction. Moreover, by failing to appear for this court’s hearing on plaintiff’s
18 motion, defendant and Mr. Bogart have declined to avail themselves of the opportunity to
19 dispute the facts presented by plaintiff or to demonstrate inability to comply with the permanent
20 injunction.

21 For these reasons, further contempt proceedings are warranted.

22 Accordingly, IT IS ORDERED that:

- 23 1. Plaintiff’s motion for an order to show cause (ECF No. 51) is granted;
24

25 ⁴ On the other hand, where contempt is imposed to vindicate the authority of the court
26 following a completed act of disobedience, and the contemnor has no opportunity to purge
himself of contempt, the contempt is criminal in nature. Bingman, 100 F.3d at 655-56.

1 2. Defendant and defendant's representative Bogart are hereby ordered to appear
2 and show cause why they should not be found in contempt based upon the facts this court has
3 certified;

4 3. A contempt hearing is set before the Honorable John A. Mendez, on August 7,
5 2013, at 11:00 a.m.;

6 4. The United States Marshal is directed to personally serve a copy of this order
7 on Dale "Doc" Bogart as owner and representative of defendant Orland Sand & Gravel Corp.,
8 and to expeditiously file a proof of service; and

9 5. Mr. Bogart is cautioned that failure to appear at the hearing before the District
10 Judge may result in issuance of a warrant for his arrest.

11 DATED: June 20, 2013

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14 ALLISON CLAIRE
15 UNITED STATES MAGISTRATE JUDGE

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