

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HEEBE ET AL. * CIVIL ACTION
*
VERSUS * NO: 10-3452
*
UNITED STATES OF AMERICA * SECTION: "C" (5)
*

MOTION TO ENFORCE JUDGMENT

NOW INTO COURT through undersigned counsel come petitioners, Frederick R. Heebe, A.J. Ward, Shadowlake Management, L.L.C. ("Shadowlake Management"), Willow, Inc., Fred Heebe Investments, Live Oak Homes Corporation, Heebe & Heebe, P.L.C., and River Birch, Inc. ("River Birch"), who respectfully request the Court to enforce its December 21, 2010 Judgment against the United States of America.

On December 21, 2010, the Court entered a final Judgment ordering the Government to immediately return all seized property of tenants of 2000 Belle Chasse Highway other than River Birch, Inc., to provide copies of property shared between River Birch, Inc. and other tenants, and to return all privileged documents to the petitioners. Rec. Doc. No. 23.

As is set forth in detail in the attached memorandum, the Government has failed to comply with the Court's Judgment in several ways. First, the Government has failed to return

property that clearly belongs to tenants other than River Birch, Inc. Second, the Government has retained copies of all non-River Birch, Inc. property it has returned. Finally, the Government has retained clearly privileged documents without justification.

Accordingly, the plaintiffs respectfully request that the Court order the Government to comply with the Judgment without delay.

Respectfully submitted,

/s/ William P. Gibbens

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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/s/William P. Gibbens

WILLIAM P. GIBBENS

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MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION TO ENFORCE JUDGMENT

Plaintiffs, Frederick R. Heebe, A.J. Ward, Shadowlake Management, L.L.C. ("Shadowlake Management"), Willow, Inc. ("Willow"), Fred Heebe Investments, Live Oak Homes Corporation ("Live Oak"), Heebe & Heebe, P.L.C., and River Birch, Inc. ("River Birch"), respectfully submit the following memorandum in support of their Fed. R. Civ. P. 70 motion to enforce this Court's judgment set forth in its December 21, 2010 Order compelling the Government to return all the property it illegally seized during a search of 2000 Belle Chasse Highway in Gretna, Louisiana almost four months ago.

I. INTRODUCTION

The Judgment entered by the Court on December 21, 2010 clearly and unequivocally required the Government to: (A) return all seized property of tenants other than River Birch, (B) provide copies of all shared property it intended to retain; (C) and return all privileged

documents. Despite this clear and unequivocal Order, as well as an extension of time in which to comply, the Government has materially failed to comply with all three of those requirements. Accordingly, the Plaintiffs respectfully request that the Court order the Government hold the Government in contempt for failing to comply with the Court's order, order immediate compliance with the Court's Judgment, and award Plaintiffs' attorneys' fees and costs.

II. BACKGROUND

On September 23, 2010, the Government conducted a search of 2000 Belle Chasse Highway, Gretna, Louisiana. Though the search warrant indicated that only a single business was to be searched, the Government searched and seized 25 banker's boxes of paper documents, six computer servers, a laptop computer, and several hard drives from the seven tenants operating at that address, two of which were law firms. Plaintiffs subsequently filed a motion to return property, which this Court granted on December 21, 2010.

This Court's Order required the Government to:

immediately return all seized property of tenants other than River Birch, Inc. In the case of property shared between River Birch, Inc. and other tenants, the Government shall provide to petitioners copies of all documents it intends to retain by Monday, December 27, 2010. Likewise, the Government shall complete its "clean team" review and return all privileged documents to the petitioners by Monday, December 27, 2010.

Rec. Doc. No. 23. The Order was based on the Court's finding that the Government did not have the authority to enter or search Shadowlake Management, Willow, Fred Heebe Investments, Live Oak Homes, Heebe & Heebe, P.L.C., or the offices of Peter J. Butler, L.L.C. Accordingly, the Court ordered a return of those illegally seized materials. Rec. Doc. No. 23.

After receiving an extension of time in which to comply with the December 21 Order, on January 5, 2011, the Government returned only three of the twenty-five boxes of materials to the Plaintiffs. Rec. Doc. 32 at p. 5-7. According to the Government's Notice of Compliance, the

Government made copies of all non-privileged documents and hard drives belonging to non-River Birch entities, provided those copies to the Court, and returned the originals to Plaintiffs. *Id.* at 3. Notably, the Government's Notice of Compliance also indicated that the Government has kept mirror copies of all the servers it seized during the search of 2000 Belle Chasse Highway. *Id.*, at 3. The Notice of Compliance is somewhat unclear with regard to the Government's compliance with this Court's Order requiring it to return "all privileged documents." While the Notice of Compliance appears to indicate that privileged paper documents, and other documents designated by plaintiff's counsel have been returned, there is also a note that the "clean team" review of any document identified as potentially privileged "by a party" is ongoing. *Id.* at 3-4.

III. LAW AND ARGUMENT

Rule 70 of the Federal Rules of Civil Procedure provides that if a judgment requires a party to perform a specific act and the party fails to comply within the time specified, "the court may order the act to be done – at the disobedient party's expense – by another person appointed by the court." Fed. R. Civ. P. 70(a). "The court may also hold the disobedient party in contempt." *Id.* at 70(e). A finding of contempt is appropriate when "when a person violates an order of a court requiring in specific and definite language that a person do or refrain from doing an act." *In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (internal quotation and citation omitted).

The Judgment entered by this Court on December 21, 2010 specifically required the Government to: (A) return all seized property of tenants other than River Birch, (B) provide copies of all shared property it intended to retain; (C) and return all privileged documents. Rec. Doc. No. 23. The reasoning behind the Order, and its three requirements, was that the Government did not have the authority to enter or search Shadowlake Management, Willow,

Inc., Fred Heebe Investments, Live Oak Homes Corporation, Heebe & Heebe, P.L.C., or the offices of Peter J. Butler, L.L.C. and therefore anything taken from them had to be immediately returned. But, despite the three clear and definite requirements set forth in the December 21 Judgment, the Government has materially failed to comply with those requirements. It has further violated the spirit of the Court's Order by persisting in its untenable, and unconstitutional, position that it is entitled to review all of the documents it took from 2000 Belle Chasse Highway, regardless of this Court's finding that it had conducted an illegal search and seizure.

Rather than return property based on the location and ownership of the materials seized, the Government reviewed everything that was taken and decided whether to return property based on the materials' contents. The Government explicitly stated this position in its previous pleadings:

It is the government's position that a determination of which items seized belongs solely to River Birch, is shared by River Birch and other entities, or is used only by companies other than River Birch, necessitates searching through all documents seized as well as all computer servers and hard drives imaged or taken during the execution of the search warrant.

Rec. Doc. No. 24 at 2 (emphasis added). Although the Government claims it has complied with the Court's judgment under protest¹, the Government has clearly persisted in its indefensible, unlawful position that it is able to retain property seized without authority.

A. The Government has failed to return all non-River Birch property.

Even though this Court's December 21 Order contained specific and definite language requiring the return of all non-River Birch property, the Government has clearly not returned all materials it illegally took from the non-River Birch businesses. The Government's own search receipts and pleadings indicate that, in addition to computers and server data, the Government

¹ The Government has not obtained a stay of the Judgment or appealed the Court's Judgment, and the Government has provided no authority for preserving any rights or arguments by complying with a Court order "under protest."

took over 25 banker's boxes of documents. Yet it has only returned four boxes. Furthermore, although it has been difficult for the plaintiffs to inventory everything that the Government seized, a number of documents known to have been seized are still missing. The Government failed to return a number of items taken from Shadowlake Management's offices, including a copy of a privileged memorandum from Ms. Bruchi to Peter Butler, Jr., a number of corporate minutes of Shadowlake Management and Live Oak Homes, several back up CDs containing Shadowlake data, several CDs containing Shadowlake's accounting software, a box of files on the maintenance of Parc Fontaine condominiums, a phone list, and checking account information.

There may be other similar violations for Shadowlake and the other businesses, but it has been difficult to determine what has not been returned because the Government's search warrant receipt of what was taken is vague and inaccurate. For example, neither Ms. Bruchi's memorandum to Mr. Butler nor the above-referenced corporate minutes are listed on the Government's search warrant receipt.

Moreover, the Government returned a number of documents that were not listed on the receipt of items taken:

- a personal file taken from Ms. Bruchi's office related to her son's administration of the estate of Hugh Overstreet,
- invoices from Shadowlake Management to River Birch for employee medical, dental, and life insurance, Rec. Doc. No. 32 at p. 5;
- real property tax bills, *id.* at p. 6;
- Shadowlake receipts for Polybutelene Replacement Schedule, *id.*; and
- correspondence from a local public relations company, *id.*

Accordingly, it is unclear precisely what the Government took, and plaintiffs have no way of ascertaining the full extent of the damage from the Government's illegal search. It was for this reason the plaintiffs asked the Court to order a return of all documents seized. Furthermore, it is unclear from the Government's Notice of Compliance whether the Government has returned everything it seized from the Law Offices of Peter J. Butler, L.L.C., or only privileged items taken from that office. Though the Court ruled that the Government did not have authority to enter that office, the Government's "clean team" apparently reviewed, and may still be reviewing, materials taken from that office. Rec. Doc. No. 33 at p. 3-4.

B. The Government has inappropriately retained copies of non-River Birch documents.

Second, contrary to the Court's ruling, the Government has retained copies of all non-River Birch documents that have been returned. For example, the Government returned copies of "NC General Contractors cancelled checks and bank statements 12/30/07 – 5/2010" and kept the originals. Rec. Doc. No. 32 at p. 6. These documents were taken from Shadowlake Management President Jacquelyn Bruchi's office. Similarly, the Government has kept copies of all the computers and hard drives it returned, even though these computers and hard drives belong to Shadowlake, Willow, and Heebe & Heebe. Rec. Doc. No. 32 at p. 3. The Government has also informed the plaintiffs that it has retained copies of Shadowlake and Willow's computer servers. The Government did not have authority to take anything from these businesses in the first place, and it does not have permission to keep copies of the unlawfully seized materials.

C. The Government has failed to return clearly privileged documents.

Despite this December 21 Judgment's unequivocal mandate that the Government return all privileged documents, the Government has failed to return a number of attorney-client privileged documents. As an initial matter, given the inadequacy of the Government's search

warrant receipts, it is near impossible for the Plaintiffs to ascertain what was taken much less validate with any precision what was returned. Nonetheless, a critical category of obviously privileged documents have not been returned—documents prepared in response to the Government’s investigation. As the plaintiffs explained in their Reply Memorandum, the Government removed three boxes labeled “Attorney – Client Privileged” from the office of Petitioner Heebe’s assistant, Lea Forbes. Rec. Doc. No. 17 at p. 11, Ex. “Reply – F, G.” These boxes contained documents that Mr. Heebe and his staff had been preparing for his attorneys in response to the investigation initiated by the Government. *Id.* One of these boxes contained red and yellow folders, which contained Mr. Heebe’s confidential communications to his attorneys about the events leading up to Jefferson Parish’s award of a 25-year disposal contract to River Birch, Inc. *Id.* Ex. “Reply – G, H.” The Government did not return those folders.

Moreover, as the Government’s Notice of Compliance makes plain, the Government persists in its flawed “clean team” review. The “clean team” only searched the offices of Peter J. Butler, L.L.C. Anything else reviewed by the “clean team” was given to the “clean team” by the general search team, so the general search team necessarily reviewed these documents first. Secondly, if the general search team has failed to designate an item as potentially privileged, such items will never make it to the “clean team” for review.

D. The plaintiffs respectfully request that the Court order the Government to comply with the Court’s Judgment.

In addition to failing to fully comply with all the requirements of this Court’s December 21 Judgment, the Government has ignored the spirit of the Court’s ruling by persisting in its untenable, and unconstitutional, position that it can review material it has illegally searched and seized. Indeed, the Government’s Notice of Compliance indicates that rather than return property based on the location and ownership of the materials seized, the Government reviewed,

and may still be reviewing, everything that was taken and decided whether to return property based on the materials' contents. Rec. Doc. 33 at 4. This practice is consistent with the Government's position explicitly stated in its previous pleadings:

It is the government's position that a determination of which items seized belongs solely to River Birch, is shared by River Birch and other entities, or is used only by companies other than River Birch, necessitates searching through all documents seized as well as all computer servers and hard drives imaged or taken during the execution of the search warrant.

Rec. Doc. No. 24 at 2 (emphasis added). Thus, although the Government claims it has complied with the Court's judgment, the Government has clearly persisted in its indefensible, unlawful position that it is able to retain and review property seized without authority thus violating not only the letter but also the spirit of this Court's Order. In light of this violation, and the violations explained above, Plaintiffs respectfully request that the Court order the Government to comply with the Court's judgment as expressed in its December 21 Order or be held in contempt pursuant to Rule 70 of the Federal Rules of Civil Procedure.

IV. CONCLUSION

For the reasons stated above, the plaintiffs respectfully request that the Court order the Government to comply with the Final Judgment in this matter without delay or hold the Government in contempt and award Plaintiffs' attorney's fees and costs.

Respectfully submitted,

/s/ William P. Gibbens

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/s/William P. Gibbens

WILLIAM P. GIBBENS

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NOTICE OF HEARING

PLEASE TAKE NOTICE that petitioners, Frederick R. Heebe, A.J. Ward, Shadowlake Management, L.L.C., Willow, Inc., Fred Heebe Investments, Live Oak Homes Corporation, Heebe & Heebe, P.L.C., and River Birch, Inc., will bring for hearing their Motion to Enforce Judgment before the Honorable Helen G. Berrigan in the United States District Court for the Eastern District of Louisiana on February 2, 2011 at 9:30 a.m. or as soon thereafter as

counsel may be heard.

Respectfully submitted,

/s/ William P. Gibbens

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