No. 21-15809

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MORGAN STANLEY HIGH YIELD SECURITIES, INC.; et al.,

Plaintiffs-Appellees,

v.

HANS JECKLIN;

Defendant-Appellant,

and

SWISS LEISURE GROUP AG*; et al.,*

Defendants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:05-cv-01364-RFB-PAL
Honorable Richard F. Boulware, II, United States District Judge

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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The United States Supreme Court has long recognized that a court's contempt power "is 'liable to abuse.'" *Int'l Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 831 (1994) (citations omitted). To that end, the U.S. Supreme Court has acknowledged that a contempt proceeding "often strikes at the most vulnerable and human qualities of a judge's temperament", which could cause an "offended judge" to abuse their contempt power:

> Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament," and its fusion of legislative, executive, and judicial powers "summons forth ... the prospect of the most tyrannical licentiousness."

Id. (citations omitted). Such is the case here.

The District Court abused its contempt power when it issued an arrest warrant to incarcerate Hans Jecklin—a 75-year-old citizen of Switzerland with a history of significant health issues—pursuant to the recalcitrant witness statute, 28 U.S.C. §1826(a), and without notice and an opportunity to be heard. Mr. Jecklin did not, however, refuse to

testify in a court proceeding or before the grand jury. Rather, the District Court issued the arrest warrant to punish Mr. Jecklin and vindicate its own authority after Mr. Jecklin openly challenged the District Court's jurisdiction over him and the enforceability of the District Court's decisions in Switzerland, and, to a lesser extent, to coerce Mr. Jecklin into providing post-judgment discovery responses concerning information located in Switzerland.

Mr. Jecklin's position was not anything new or intended to disrespect the District Court. In the appeal styled *Morgan Stanley High Yield Secu., et al., v. Hans Jecklin, et al.*, Case No. 19-15931[1] pending before the Court (the "First Appeal"), Mr. Jecklin and two Swiss entities (collectively, "the Jecklin Defendants") are pursuing their jurisdictional arguments and other assignments of error, which led the District Court to erroneously enter a judgment against the Jecklin Defendants for $38 million. Unfortunately, the Jecklin Defendants did not have, and still do not have, the funds to pay the astronomical judgment or to secure a supersedeas bond to stay Plaintiffs' collection efforts while they sought the Court's intervention.

[1] Oral argument in the First Appeal is set for June 11, 2021.

To give the appearance that they were not sitting idly by during the appeal, Plaintiffs propounded post-judgment discovery seeking documents and other information concerning Mr. Jecklin's assets, finances, accounts, or property that are located in Switzerland (or any other jurisdiction outside of the United States). Mr. Jecklin declined to produce any such documents because, among other reasons, Plaintiffs' judgment was not yet final and Plaintiffs had taken no steps to pursue their claims against Mr. Jecklin in Switzerland. Mr. Jecklin's failure to respond to Plaintiffs' post-judgment discovery did not prevent Plaintiffs from discovering assets upon which execution may be made.

Implicitly recognizing this reality, the District Court specifically stated it would defer a decision on Plaintiffs' post-judgment discovery requests regarding assets, finances, accounts, or property held in Switzerland. Subsequently, counsel reiterated, during a status conference, Mr. Jecklin's long-held position that the District Court lacked jurisdiction over him and that he will oppose recognition and enforcement of any judgment in Switzerland. Displeased with Mr. Jecklin "repeatedly express[ing]" his position, the District Court concluded sanctions were justified because it "long ago established that Defendants are subject to

this Court's jurisdiction". The District Court then issued an order holding Mr. Jecklin in contempt of court for allegedly violating an order on an issue the District Court had not yet decided and without providing Mr. Jecklin specific details on what he must do to purge the contempt.

The District Court ordered Mr. Jecklin to pay $1,000 per day until he "provided responses to the post-judgment discovery requests", and directed an arrest warrant be issued for Mr. Jecklin and, "[u]pon such arrest, he shall be forthwith brought before this Court to address his contempt." The former sanction is excessive. The latter sanction should shock the conscience of the Court.

In sum, the District Court decided to arrest and incarcerate a 75-year-old Swiss citizen without notice and an opportunity to be heard and based on an inapplicable statute. If left intact, the District Court's order could result in Mr. Jecklin being arrested, incarcerated, and brought, presumably, in handcuffs before the District Court "to address his contempt", despite that the Court may find that the District Court lacks jurisdiction over the Jecklin Defendants when it rules on the First Appeal in a few months from now. The arrest warrant simply cannot stand. To hold otherwise would invite "the most tyrannical licentiousness."

II. STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §1332(a)(3) because Plaintiffs and defendants are citizens of different states and citizens of foreign countries, and because the amount in controversy exceeded the statutory minimum of $75,000.00, exclusive of interest and costs.[2]

On March 31, 2021, the District Court entered its Order on Sanctions [1-ER-5-12]. On April 1, 2021, the District Court entered an Arrest Warrant commanding any authorized law enforcement officer to arrest Hans Jecklin [1-ER-3-4].

Additionally, on April 1, 2021, the District Court entered its Judgment for Attorney Fees in a Civil Case [1-ER-2] as against Defendant Hans Jecklin, Defendant Swiss Leisure Group AG ("SLG") and JPC Holdings AG ("JPC") and in favor of the Morgan Stanley Plaintiffs.

[2] As noted in the Introduction, the First Appeal is docketed as No. 19-15931, and challenges the District Court's findings of personal jurisdiction over Mr. Jecklin, a Swiss national, the substitution of parties without proof of acquisition of litigation rights, and findings regarding alter ego and fraudulent transfer. *See* Statement of Related Cases, *infra*.

Hans Jecklin timely filed a Notice of Appeal [2-ER-244-251] on April 29, 2021.[3]

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291 as the Order on Sanctions [1-ER-5-12] is a final order. *See Hilao v. Estate of Marcos*, 103 F.3d 762, 764 (9th Cir. 1996) ("post-judgment orders of contempt appealed here are within this court's jurisdiction under 28 U.S.C. §1291 as final and appealable orders").

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Arrest Warrant: Did the District Court err by applying 28 U.S.C. §1826(a), the recalcitrant witness statute, to issue an arrest warrant to imprison Mr. Jecklin for failing to respond to post-judgment discovery issued before a final judgment and without providing him with notice and an opportunity to be heard?

B. Definite and Specific Order: Did the District Court err by finding contempt, and imposing three (3) distinct sanctions as a result of its finding of contempt, when its Order granting Plaintiffs'

[3] SLG and JPC separately filed a Notice of Appeal as to the Order on Sanctions, and the related Judgment for Attorney Fees in a Civil Case on April 29, 2021. That appeal is docketed as No. 21-15808. *See* Statement of Related Cases, *infra*.

Motion to Compel was not definite and specific, and expressly reserved judgment on discovery requests related to information contained solely within a foreign jurisdiction?

C. Motion to Compel: Did the District Court err by granting Plaintiffs' Motion to Compel Hans Jecklin to respond to post-judgment discovery requests when: 1) no final judgment existed; 2) the parties were not designated correctly; 3) there was no money judgment; and 4) the motion was not in compliance with local rules?

IV. STATEMENT OF THE CASE

A. Following a Bench Trial, Mr. Jecklin Appeals the District Court's Findings of Fact and Conclusions of Law, and Judgment.

In the underlying action, Plaintiffs asserted claims for declaratory relief for alter ego and agency to pierce the corporate veil for recovery of a judgment issued by the District Court for the Southern District of New York and a claim for relief for fraudulent conveyance. The District Court's erroneous Order: Findings of Facts and Conclusions of Law filed on March 31, 2019 [2-ER-191-216] ("FFCL") and its Judgment in a Civil Case filed on April 2, 2019 [2-ER-190] ("Judgment") entered against the

Jecklin Defendants are the subject of the First Appeal. *See* No. 19-15931; Notice of Related Cases, *infra*.

B. Mr. Jecklin Objects to the Post-Judgment Discovery Requests Plaintiffs Serve Before the Judgment is Final.

On April 30, 2019, Plaintiffs filed their Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(3) and 60(a) ("Motion to Alter or Amend Judgment"). [2-ER-176]. In their Motion to Alter or Amend Judgment, Plaintiffs requested, among other things, that the District Court amend the Judgment to reflect a substitution of parties (the "Invesco Parties") and to enumerate the "current amount" of the judgment issued by the District Court for the Southern District of New York. [2-ER-177].

On June 7, 2019, and prior to any ruling by the District Court on Plaintiffs' Motion to Alter or Amend Judgment, the Invesco Parties served post-judgment written discovery requests on Mr. Jecklin, purportedly pursuant to Fed. R. Civ. P. 69(a)(2). [2-ER-40-48] (interrogatories); [2-ER-49-58] (requests for production of documents). Mr. Jecklin objected to the discovery requests for various reasons, including: 1) the discovery requests were premature; 2) the Judgment

was not a money judgment; and 3) there was no showing that the discovery sought would assist in collecting on the Judgment in Switzerland. [2-ER-59-73] [2-ER-74-97]. [2-ER-153-175 & 2-ER-134-152.]

C. The District Court Grants Plaintiffs' Motion to Compel, but Declines to Issue a Blanket Ruling on Discovery Requests for Information Contained in Foreign Jurisdictions.

On August 19, 2019, and while the Motion to Alter or Amend Judgment was still pending, Plaintiffs filed their Motion to Compel Jecklin Defendants to Respond to Plaintiffs' Post-Judgment Discovery Requests ("Motion to Compel"), seeking to compel responses to the written discovery requests propounded by the Invesco Parties, and seeking attorneys' fees. [2-ER-98-99 and 2-ER-110-111]. On May 28, 2020, the District Court entered its Order ("May 28 Order"), which granted in part and denied in part Plaintiffs' Motion to Alter or Amend Judgment, stated its intention to issue an amended judgment, granted the Motion to Compel, and denied without prejudice the related Motion for Attorneys' Fees. [2-ER-20-39].

In its May 28 Order granting the Motion to Compel, the District Court stated it was not making any ruling at that time regarding

discovery requests that involve information contained in foreign jurisdictions:

> The Court will address any issues regarding discovery requests that involve information solely contained in foreign jurisdictions as the issues specifically arise. The Court will not make a blanket ruling on all discovery requests at this time.

[2-ER-38]. The District Court further set a status conference by videoconference. [2-ER-39].

During the status conference, counsel for the Jecklin Defendants reiterated their long-standing contention that the District Court lacks jurisdiction over them and they do not believe the District Court's decisions are enforceable in Switzerland:

> I am in receipt of the Court's order of May 28th on the motion to compel responses to the discovery requests. I have explained the process and obligation of post-judgment discovery to my clients, to Mr. Jecklin, to JPG Holding AG, and to Swiss Leisure Group AG. My clients have stated to me that they are not going to comply with the Court order compelling discovery because they do not accept jurisdiction of this Court and they consider Your Honor's decision not to be enforceable in Switzerland.

[2-ER-15-16]. Plaintiffs then sought supplemental briefing on a request for sanctions, and the District Court set a briefing schedule. [2-ER-17].

The District Court then stated:

> What I will tell you also, Ms. Peterson, which you can communicate to your clients, which is they don't get to selectively participate. And what that means is that if they have substantive arguments in response to a motion for sanctions, **they don't get to make them**, but then not participate in discovery. . . .

[2-ER-18] (emphasis added). The following colloquy then occurred:

> THE COURT: . . . Do you understand, Ms. Peterson?
> MS. PETERSON: I think I understand, Your Honor. You're saying my client shouldn't selectively provide documents in response to the motion for sanctions if they're not going to participate in post-judgment discovery.
> THE COURT: Yes.
> MS. PETERSON: Essentially that's what you're saying.
> THE COURT: Yes, I mean, you can provide it if you think it's appropriate, but **I'm just telling you it's unlikely I would consider it** . . . .

[2-ER-18-19] (emphasis added).

D. The District Court Issues Contempt Sanctions Against Mr. Jecklin, Including an Arrest Warrant, to Punish and Coerce.

On March 31, 2021, the District Court issued its Order on Sanctions. [1-ER-5-12]. The District Court decreed that it had already determined it has jurisdiction over Mr. Jecklin and, thus, Mr. Jecklin's "repeated[ ] express[ions]" to the contrary warranted sanctions:

> The Court has long ago established that Defendants are subject to this Court's jurisdiction, yet Defendants repeatedly express to the Court, such as during the July 1, 2020 status conference and the Response to this instant Motion for Sanctions, that they reject the Court's jurisdiction over them and will not comply with the Court's Order. The Court finds that Defendants' conduct is in violation of Fed. R. Civ. P. 37.

[1-ER-9].[4]

Then, the District Court stated that "[t]his is not the first time the Court has warned Defendants about possible sanctions, albeit for other conduct." [1-ER-10]. In other words, as long as the District Court had warned about possible sanctions for other conduct, it did not believe it needed to warn (*i.e.*, give notice to) Mr. Jecklin about possible sanctions for failing to comply with the May 28 Order.

Next, the District Court concluded "that Hans Jecklin has specifically remained outside of the territorial jurisdiction of the United States to avoid his legal obligations in the case before this Court." [1-ER-12]. The District Court's conclusion that only malapropos motives could account for Mr. Jecklin's failure to travel to the United States recently—

[4] The District Court referenced Mr. Jecklin's refusal to acknowledge its jurisdiction and position that the orders are not enforceable in Switzerland no less than three times in the Order on Sanctions as a basis to arrest Mr. Jecklin. [1-ER-9:22-25; 1-ER-10:20-25; 1-ER-12:7-8].

notwithstanding the pandemic that has gripped the world for well over a year, the resulting international travel restrictions imposed by the United States and other countries, and Mr. Jecklin's age and health conditions—speaks volumes.

The District Court concluded by stating that Mr. Jecklin should be arrested first and would have the opportunity to be heard about "his contempt" later:

> He has indeed confirmed this through his attorney by indicating he would no longer subject himself to this Court's jurisdiction. Therefore, an arrest warrant shall be issued for Hans Jecklin, and if he is in the United States, he shall be detained until he purges himself of his civil contempt. Upon such arrest, he shall be forthwith brought before this Court to address his contempt.

[1-ER-12]. To prevent a casual observer from concluding that the arrest warrant was designed to punish Mr. Jecklin and vindicate its authority, the District Court added "[t]his arrest is intended to be coercive and not punitive." [*Id.*]

In its Order on Sanctions, the District Court also awarded Plaintiffs $29,962.00 in attorney's fees. [1-ER-12]. The District Court further assessed Mr. Jecklin the amount of $1,000 per day in fines until he

provided responses to the written discovery requests. *Id.* On April 1, 2021, the Arrest Warrant issued. [1-ER-3-4].

V. SUMMARY OF ARGUMENT

The District Court abused its discretion when it issued the Arrest Warrant for Hans Jecklin. The recalcitrant witness statute does not apply to post-judgment written discovery. Even if it were to apply, however, the District Court denied Mr. Jecklin notice and an opportunity to be heard before issuing the Arrest Warrant.

The District Court abused its discretion when it found Hans Jecklin in contempt. The District Court's finding of contempt was based upon alleged noncompliance with the May 28 Order; however, the May 28 Order expressly reserved decision as to the propriety of discovery seeking information solely contained within a foreign jurisdiction, and the District Court specifically stated that it "will not make a blanket ruling on all discovery requests at this time." The District Court erred in finding Mr. Jecklin in contempt for noncompliance with its May 28 Order, which was neither definite nor specific.

The District Court erred when it granted Plaintiff's Motion to Compel.

VI. ARGUMENT

A. The District Court Abused its Discretion in Issuing an Arrest Warrant for Mr. Jecklin.

The Court reviews a district court's entry of sanctions for an abuse of discretion. *Mendez v. County of San Bernardino*, 540 F.3 1109, 1130 (9th Cir. 2008). Factual findings made by the district court in finding contempt, however, are reviewed for clear error. *Irvin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004); *United States v. Bright*, 596 F.33d 683, 694 (9th Cir. 2010). Further, the Court reviews a district court's decision in setting punishment for an abuse of discretion. *United States v. Powers*, 629 F.2d 619, 624 (9th Cir. 1980).

1. The Recalcitrant Witness statute applies only to matters where the witness is actually testifying.

In its Order on Sanctions, the District Court issued an arrest warrant for Mr. Jecklin. [1-ER-12]. It relied upon 28 U.S.C. §1826(a) as the sole authority for this breathtaking sanction. *Id.* The recalcitrant witness statute does not apply.

This section of the United States Code, styled "Recalcitrant Witnesses", addresses a district court's power to hold in contempt a witness who refuses to testify in a court proceeding or before the grand

jury. 28 U.S.C. §1826. It is part of a chapter in the United States Code titled "Evidence – Witnesses" and whose sections address per diem and mileage to travel to court (28 U.S.C. §1821); the competency of a witness (28 U.S.C. §1822); mileage fees for witnesses and jurors (28 U.S.C. §1824); fees (28 U.S.C. §1825); court interpreters (28 U.S.C. §1827); and interpretation services (28 U.S.C. §1828). It has nothing to do with post-judgment discovery.

Indeed, courts that have applied this section of the United States Code have done so only in cases where the witness is actually testifying. *See*, *e.g.*, *U.S. v. Flores*, 628 F.2d 521 (9th Cir. 1980) (witness testified in court during a pretrial hearing); *In re Grand Jury Proceedings*, 13 F.3d 1293 (9th Cir. 1994) (witness who refuses without just cause to comply with order of court to testify in front of grand jury may be held pursuant to this statute); *In re Weiss*, 703 F.2d 653 (2d Cir. 1983) (witness who refuses to answer or gives evasive responses may be held pursuant to this statute). Underscoring the importance of actual in-court testimony, courts have denied the ability to hold a potential witness pursuant to this statute when the testimony has not yet occurred. *See*, *e.g.*, *United States v. Johnson*, 736 F.2d 358 (6th Cir. 1984) (even though potential witness

stated his intention not to testify in the future, court cannot hold potential witness in civil contempt under this section until the trial has started, the witness was called, and then refused to testify).

Here, Mr. Jecklin was not called as a witness and then refused to testify. Instead, he failed to respond to post-judgment discovery relating to assets and property he has in Switzerland, which lie beyond the reaches of the District Court. The recalcitrant witness statute does not apply. For that reason alone, the District Court's Order on Sanctions and Arrest Warrant can, and should, be reversed.

2. Even if Mr. Jecklin Were a Recalcitrant Witness, The District Court Failed to Provide Due Process Protections to Mr. Jecklin.

At Plaintiffs' urging, the District Court relied upon the Court's decision in *Danning v. Lavine*, 572 F.2d 1386 (9th Cir. 1978), *reh'g denied*, (June 6, 1978) to support its overreach in seeking to confine Mr. Jecklin. [2-ER-14]; [1-ER-12]. *Danning*, however, does not provide any foundation for the District Court's Arrest Warrant.

In *Danning*, a defendant failed to appear at several depositions, noticed by the trustee in bankruptcy. *Danning*, 572 F.2d at 1387. The district court then ordered that the defendant appear at her deposition,

and upon appearing, she refused to answer questions posed to her at the deposition. *Id.*, at 1387-1388. As a result of the refusal to testify at the deposition, the district court then entered a default judgment against the defendant, and also ordered the defendant to be held pursuant to the recalcitrant witness statute. *Id.* at 1388. This Court reversed, finding that the defendant could not be held as a recalcitrant witness under this statute after the judgment was entered. *Danning*, 572 F.2d at 1389.

The District Court, though, seized upon dicta in *Danning*:

> We acknowledge that if during the course of discovery in aid of execution on the judgment, Fed. R. Civ. P. 69(a), appellant had refused to disclose the identity of the person who received the proceeds, a contempt order compelling her to answer might be proper.

Danning, 572 F.2d at 1389-1390; *cf.* [1-ER-11-12]. But even if *Danning* were extended to apply to the failure to respond to premature post-judgment discovery, *see* Section VI(C) *infra*, the District Court failed to provide the basic opportunity to Mr. Jecklin to present available defenses.

The recalcitrant statute itself provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses **without just cause shown** to comply with an order of the court to testify or provide other information, including any

> book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--
> **(1)** the court proceeding, or
> **(2)** the term of the grand jury, including extensions
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. §1826(a) (emphasis added). This language of "just cause" includes, at a minimum, "affording the witness the opportunity of presenting all defenses properly available to him, and, as a corollary, a reasonable time to prepare." *In re Grand Jury Investigation*, 545 F.2d 285, 288-289 (3d Cir. 1976). "It seems axiomatic that before a district court may hold that a witness lacks just cause it must permit him to raise such defenses as he has to present." *In re Brummitt*, 608 F.2d 640, 643-44 (5th Cir. 1979). Indeed, this Court has also stated that the contemnor, under §1826, "is entitled to necessary due process protections" and the district court "must allow [the contemnor] the opportunity to present reasons for refusal to testify." *United States v. Powers*, 629 F.2d 619, 626 (9th Cir. 1980).

Here, the District Court did none of these things. While Mr. Jecklin had asserted that there was no showing that the requested discovery would assist in "collecting" on any judgment in Switzerland, [2-ER-64], the District Court did not permit Mr. Jecklin to provide information that his assets were insufficient and located in Switzerland. [2-ER-18] ("if they have substantive arguments in response to a motion for sanctions, they don't get to make them"). By failing to issue an order to show cause before finding contempt under the recalcitrant witness statute, the District Court rendered the phrase "without just cause shown", contained within the statute, meaningless. *See Boise Cascade Corp. v. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) (stating that "[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous") (citations omitted); *see also Parenteau v. Prescott Unified School District*, 2010 WL 729101 (D. Ariz. March 2, 2010) (defendant ordered to show cause why he should not be found in civil contempt until he complies with court-ordered post-judgment discovery). The District Court should be reversed.

3. The Order on Sanctions Contains Both Punitive and Coercive Elements.

The District Court was careful to invoke the talismanic words to suggest that its issuance of an Arrest Warrant was coercive, not punitive, and that Mr. Jecklin's actions constituted civil contempt, not criminal. (*See* Section IV(B), *supra*.) But, as the Court has noted, "[t]he Supreme Court has abandoned the idea that actions or proceedings must be wholly civil or wholly criminal and that the choice of one label inexorably sets the case on a single procedural or constitutional track" and has "repeatedly recognized that many kinds of cases are hybrids". *United States v. Alter*, 482 F.2d 1016, 1022 (9th Cir. 1973).

"If the primary purpose is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal." *F.D.I.C. v. LeGrand*, 43 F.3d 163, 168 (5th Cir. 1995). "If the primary purpose of the sanction is to coerce another party for the contemnor's violation, the order is considered purely civil." *Id.* "When a contempt order contains both a punitive and a coercive dimension, for purposes of appellate review it will be classified as a criminal contempt order." *Id.*; *see also Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (quoting *Penfield Co. of California v. S.E.C.*, 330 U.S. 585, 591 (1947)) ("Where,

however, a judgment of contempt contains an admixture of criminal and civil elements, 'the criminal aspect of the order fixes its character for purposes of procedure on review.'").

The Court has previously addressed the requirements of a proceeding under 28 U.S.C. §1826 in stating that "in a contempt proceeding, whether denominated civil or criminal, the alleged contemnor is entitled to the procedural safeguards of notice and a reasonable time to prepare a defense." *United States v. Powers*, 629 F.2d at 626 (9th Cir. 1980).

This concept is reflected by the consensus amongst the federal Courts of Appeals that the requirements of Fed. R. Crim. P. 42 apply to civil contempt proceedings. *See Brown v. Braddick*, 595 F.2d 961, 966 (5th Cir. 1979); *In re Grand Jury Investigation* 545 F.2d 385, 388 (3d Cir. 1976); *In re Grand Jury Investigation*, 542 F.2d 166, 168-69 (3d Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977); *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976) (dictum); *In re Grand Jury*, 524 F.2d 209, 218-19 (10th Cir. 1975); *In re Sadin*, 509 F.2d 1252 (2d Cir. 1975); *Alter*, 482 F.2d at 1020-24 (9th Cir. 1973); *Consolidation Coal Co. v. Local No. 1784*, 514 F.2d 763 (6th Cir. 1975) (civil contempt requires notice); *In re Grand Jury*

Proceedings, 559 F.2d 234, 237 (5th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

As there was no conduct on the part of Mr. Jecklin that occurred in the presence of the District Court, summary disposition is unavailable under Fed. R. Crim. P. 42(b). Thus, even were this Court to find that §1826 applies to the failure to respond to premature post-judgment written discovery, Fed. R. Crim. P. 42(a) still applies to the District Court's finding of contempt.

Although the District Court issued an Arrest Warrant, the District Court failed to satisfy any of the requirements for notice. No order provided a time or place of trial. Fed. R. Crim. P. 42(a)(1)(A). There was no reasonable time given to Mr. Jecklin to prepare a defense. Fed. R. Crim. P. 42(a)(1)(B). And no order stated the essential facts constituting contempt, nor did any order describe it. Fed. R. Crim. P. 42(a)(1)(C). The Court should reverse the District Court's Order on Sanctions and Arrest Warrant.

4. The District Court failed to impose the minimum sanction necessary to obtain compliance.

Even if the District Court had issued a definite and specific Order on Sanctions, *see* Section VI(B) *infra*, had found non-compliance with the

May 28 Order, and had respected all of the procedural due process rights of Mr. Jecklin, its imposition of sanctions was excessive, both quantitatively and qualitatively. This alone is sufficient to justify a reversal.

"Generally, the minimum sanction necessary to obtain compliance is to be imposed." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992) (citing *Spallone v. United States,* 493 U.S. 265, 280 (1990)). This maxim is supported by the long-standing concept in American jurisprudence "that a court must exercise '[t]he least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (citing *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L.Ed. 242 (1821); *In re Michael*, 326 U.S. 224, 227 (1945)).

Here, the District Court awarded Plaintiffs' attorneys fees, imposed fines of $1,000 per day, and issued the Arrest Warrant simultaneously and without any escalating steps or warning. The Third Circuit reviewed a similar situation and stated:

> It does not necessarily follow, however, that the range of penalties available to a court under §1826 are cumulative. We have not been cited to any case where a coercive monetary fine was levied in conjunction with imprisonment. These flexible sanctions, in our view, allow the district court to apply the degree of coercion minimally necessary to gain compliance

> with its orders, but do not vest the court with the power to visit Draconian punishment upon the civil contemnor. We therefore hold that a district court may use these civil sanctions interchangeably or successively, but not simultaneously in the absence of findings supported by the record showing the necessity for such severe action. The court should apply the least coercive sanction (e.g., a monetary penalty) reasonably calculated to win compliance with its orders. If compliance is not forthcoming, the initial penalty may be increased, or a new penalty appropriate under the circumstances may be selected. We do not believe that the simultaneous imposition of monetary and jail sanctions necessarily adds to the in terrorem effect of a properly devised solitary sanction.

Matter of Grand Jury Impaneled Jan. 21, 1975, 529 F.2d 543, 551 (3d Cir. 1976). The Court should reverse the District Court's issuance of the Arrest Warrant for Mr. Jecklin.

5. The Court Can, and Should, Issue a Stay of the Arrest Warrant as Soon as Possible and then it Can Dispose of the Appeal Later than 30 Days After the Filing of the Appeal.

In its Order filed May 7, 2021 [DktEntry: 2], the Court requested the parties address whether the requirement under 28 U.S.C. §1826(b) "that an appeal from an order of confinement under 28 U.S.C. §1826 shall be disposed of no later than thirty days after the filing of the appeal" applies to this appeal. Provided the Court issues a stay of the Arrest Warrant as soon as possible to prevent harm to Mr. Jecklin, the Court is

not obligated to dispose of the appeal within thirty days after the filing of the appeal.

28 U.S.C. §1826(b) states as follows:

> No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Mr. Jecklin is not currently confined under 28 U.S.C. §1826. He is the subject of an outstanding Arrest Warrant. [1-ER-3-4]. Mr. Jecklin is separately appealing the entry of the underlying judgment against him. Yet, he risks imminent confinement and detainment should he travel to the United States,[5] and the District Court has ordered that upon his arrest, "he shall be forthwith brought before this Court to address his contempt." [1-ER-5-12]. Therefore, the Court is not obligated under 28 U.S.C. §1826(b) to issue a decision on the appeal "not later than thirty days from the filing of such appeal", provided it stays the Arrest Warrant

[5] It is unclear whether the Arrest Warrant will impact Mr. Jecklin's ability to travel from Switzerland to other countries, besides the United States. The facts and the law, not to mention Mr. Jecklin's pending First Appeal, simply do not justify allowing the dark cloud of a potential arrest to hang over Mr. Jecklin's head.

pending a decision from the Court on the appeal. *See In re M.H.,* 648 F.3d 1067, 1071 (9th Cir. 2011) ("Where incarceration has been stayed pending appeal and no party is harmed by the delay, we may exceed the thirty-day time limit for deciding appeals that § 1826 would otherwise impose."); *In re Grand Jury Matter*, 906 F.2d 78, 82–83 (3d Cir. 1990) (citations omitted) ("We hold with other circuits that the thirty day rule has no application where the contemnor is not confined pursuant to the contempt order."). For these reasons, the Court should issue a stay of the Arrest Warrant as soon as practicable and then reverse the Arrest Warrant in due course. *See also* Circuit Rule 3-5.

B. The District Court's Order Granting Plaintiffs' Motion to Compel Was Not Specific and Definite and It Expressly Reserved Judgment on Discovery Requests of Information Contained Within a Foreign Jurisdiction.

Regardless of the statute cited by the District Court, the standard is the same for a finding of contempt. That is, the District Court must find, by clear and convincing evidence, that Mr. Jecklin "violated a specific and definite order of the court." *Parsons v. Ryan*, 949 F.3d 443, 454 (9th Cir. 2020), *cert. denied sub nom. Shinn v. Jensen*, 141 S. Ct. 1054 (2021); *Matter of Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (stating that

"[c]ontempt is committed 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.") (internal citations and quotations omitted); *United States v. Cutler*, 58 F.3d 825, 834 (2d Cir. 1995) ("[a] defendant cannot be held in contempt absent a definite and specific order of which he had notice."); *In re Lucre Management Group, LLC*, 365 F.3d 874, 875 (10th Cir. 2004) ("[t]o be held in contempt, a court must find the party violated a specific and definite court order").

Here, the District Court's May 28 Order was not specific and definite, and a finding of contempt based on it was improper. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). For that reason, an analysis of the "definite and specific" requirement for a holding of contempt "must construe any ambiguity in favor of the party charged with contempt." *Gascho v. Global Fitness Holdings, LLC*, 875 F.3d 795, 800 (6th Cir. 2017).

In its May 28 Order granting the Motion to Compel, the District Court expressly reserved judgment on issues relating to information

contained within foreign jurisdictions, stating "[t]he Court will address any issues regarding discovery requests that involve information solely contained in foreign jurisdictions as the issues specifically arise. The Court will not make a blanket ruling on all discovery requests at this time." (*See* Section IV(B), *supra*.) If there is anything specific and definite about that language, it is that there was the possibility of future discovery rulings by the District Court.

The discovery requests made by Plaintiffs were for documents relating to personal and real property, tax returns, trust accounts, investments, and expenditures on real property, to name a few. [2-ER-114-123 – 2-ER-124-133]. Because Mr. Jecklin lives in Switzerland, it is axiomatic that the documentation of his finances is contained within a foreign jurisdiction and production of it was not specifically nor definitely ruled upon in the District Court's May 28 Order.

Until such date that the District Court addressed the issues of discovery requesting information contained within a foreign jurisdiction, no specific and definite order existed. While Mr. Jecklin can glean from the Order on Sanctions that he must pay the $1,000 per day that has been accruing since the entry of the Order, the District Court provided

no specific details on what else he must do to "purge himself of his civil contempt." Must Mr. Jecklin produce documents and information in response to each and all of Plaintiffs' post-judgment discovery requests, notwithstanding his valid and unresolved objections to the same? And, how many documents and how much information would be sufficient for the District Court to conclude that Mr. Jecklin has "purge[d] himself of his civil contempt"? The District Court's failure to provide any specifics on what Mr. Jecklin must do to "purge himself of civil contempt" is yet another reason why the Court should reverse the District Court's Order on Sanctions and the Arrest Warrant.

C. The District Court Exceeded Its Authority by Granting Plaintiffs' Motion to Compel.

If more were required, the Motion to Compel that undergirds the May 28 Order and the Order on Sanctions was woefully deficient and should have been denied. Not only did the Motion fail to comply with Local Rule 26-7(b), but it also was futile for the reasons outlined in the Jecklin Defendants' objections to the Rule 69 discovery requests.

1. The Motion to Compel Failed to Comply with Local Rule 26-7(b).

Local Rule 26-7(b) states that "All motions to compel discovery or for a protective order **must** set forth in full the text of the discovery originally sought and any response to it." (emphasis added). This mandatory language is clear and unambiguous. Before a motion to compel can be considered by the Court, the motion "must set forth in full" the discovery originally sought. *Weathers v. Loumakis*, 2016 WL 6246762 at *2 (D. Nev. 2016) (quoting LR 26-7(b)). The failure to "set forth in full" the discovery originally sought is fatal to a motion to compel. *See id.*; *see also McGuire v. Stubbs*, 2011 WL 6937510 at *1 (D. Nev. 2011) (denying motion to compel under prior version of rule because discovery motion did not comply with requirement that it must "set forth in full the text of the discovery originally sought and the response thereto, if any"); *Bailey v. Suey*, 669 Fed. App'x. 472 (9th Cir. 2016) (unpublished) (finding that district court did not abuse discretion in denying motion to compel because motion did not set out the text of the requested discovery).

Here, Plaintiffs failed to "set forth in full" the text of the discovery sought against Mr. Jecklin. Rather, in their Motion to Compel, Plaintiffs dropped a footnote stating that the various discovery requests "were

substantially similar in form and substance." [2-ER-102, n. 2.] This allusive language does not satisfy the "set forth in full" requirement and the District Court could not meaningfully consider the discovery sought and the objections lodged. *See*, *e.g.*, *McGuire*, 2011 WL 6937510 at *1 (plaintiff's identification of twenty "points" which are the basis of the alleged deficient responses do not allow the court to determine precisely what deficiencies exist). Plaintiffs' noncompliance with the mandatory requirement of Local Rule 26-7(b), alone, is sufficient reason why the District Court should have denied the Motion to Compel.

2. Rule 69 Discovery Was Not Appropriate Because the Judgment Was Not a Money Judgment and Was Not Enforceable or Executable by the Invesco Parties.

Each of the Invesco Parties' requests for production were made pursuant to Fed. R. Civ. P. 69. The Rule states in part as follows:

> In aid of the judgment or execution, the judgment creditor or its successor in interest whose interest appears of record may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located.

Fed. R. Civ. P. 69(a)(2). As a threshold matter, it is axiomatic that only a judgment creditor or its successor may obtain discovery pursuant to Rule 69. A judgment creditor is defined as "a person having a legal right

to enforce execution of a judgment for a specific sum of money." *Black's Law Dictionary* 973 (10th ed. 2014); *see U.S. v. Gilbert Assocs., Inc.*, 345 U.S. 361, 365 (1953).

As Rule 69(a) addresses a "money judgment", courts uniformly have held that there is no right to discovery under this rule without a money judgment. *See Fox v. National Oilwell Varco*, 602 Fed. App'x 449, 451 (10th Cir. 2015) (unpublished) ("these provisions clearly contemplate the existence of a money judgment, without which there is no right to discovery") (citing *Sanderson v. Winner*, 507 F.2d 477, 480 (10th Cir. 1974) and *United States v. Varnado*, 447 Fed. Appx. 48, 50 (11th Cir. 2011) (*per curiam*) (unpublished)); *see also Ziino v. Baker*, 613 F.3d 1326, 1328 (2010) ("in terms of a judgment subject to execution, a 'money judgment' must exist"); *SEC v. Badger*, 2009 WL 816133 at *1 (D. Utah 2009) ("Rule 69(a)(2) of the Federal Rules of Civil Procedure allows discovery 'from any person' in aid of a money judgment"); *HCDL Holdings, LLC v. TKCT Milford, LLC*, 2018 WL 6620317 at *1 (M.D. Fl. 2018) (FRCP 69 provides for the enforcement of money judgments).

This Court has explained that a money judgment consists of "two elements: (1) an identification of the parties for and against whom

judgment is being entered, and (2) a definite and certain designation of the amount which plaintiff is owed by defendant." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1101 (9th Cir. 2011) (emphasis omitted). The District Court's Judgment [2-ER-190] in this case failed on both counts.

With respect to the first element, the Judgment [2-ER-190] did not identify the parties for and against whom judgment was entered. While the caption of the Judgment identified "Morgan Stanley High Yield Securities Inc., et al", nothing in the Judgment [2-ER-190] identified any of the Invesco Parties as being owed any amount of money from the Jecklin Defendants. Indeed, the Judgment was bereft of any information that provides "a definite and certain designation" of the amount which each plaintiff is owed by each defendant.

For example, there was no information that identified, among other things, how much, if any, JPC owed to Invesco High Yield Securities Fund; how much, if any, SLG owed to Invesco V.I. High Yield Securities Fund; or how much, if any, Mr. Jecklin owed to Morgan Stanley Global Fixed Income Opportunities Fund. As the Invesco Parties were not

judgment creditors identified in the Judgment, none of them had any right to post-judgment discovery pursuant to Rule 69.

As for the second element, the Judgment did not provide a definite and certain amount owed by the Jecklin Defendants. In fact, no sum of money was mentioned in the Judgment at all. Instead, the Judgment states:

> IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiffs against Defendants Hans Jecklin, SLG, and JPC in the full amount of the SDNY Judgment, plus post-judgment interest, costs, and attorneys fees.

(*See* Judgment [2-ER-190].) Simply put, there was no definite and certain money judgment in this case, and thus, no right to Rule 69 discovery.

The Judgment issued by the District Court was a declaratory judgment, not a monetary judgment. A declaratory judgment is normally a prelude to a request for other relief, whether injunctive or monetary. *See Berger v. Xerox Corp. Ret. Inc. Guar. Plan*, 338 F.3d 755, 763 (7th Cir. 2003). Nevada law[6] does recognize that declaratory relief is a prelude to other relief, which can be monetary. NRS 30.100 ("Further relief based

[6] The Jecklin Defendants have asserted, and continue to assert in their First Appeal, that Delaware law governed these claims.

on a declaratory judgment or decree may be granted whenever necessary or proper"). Presumably, that is why Plaintiffs sought to alter or amend the Judgment. (*See* Motion to Alter or Amend Judgment [2-ER-176-186].)

As the Judgment [2-ER-190] was not a definite and certain money judgment, the Motion to Compel should have been denied. *See Cubic Defense*, 665 F.3d at 1101; *Fox*, 602 Fed. App'x at 451; *Ziino*, 613 F.3d at 1328. At best, the discovery requests were premature and the District Court should have waited until resolution of the Motion to Alter or Amend Judgment before permitting any post-judgment discovery.[7]

[7] There are additional considerations that must be considered in the context of Rule 69. Specifically, as one court has noted, "[t]he scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment." *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012), aff'd sub nom, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014). The Jecklin Defendants, as Swiss citizens, have continued to contest personal jurisdiction and have expressly stated that they will oppose recognition and enforcement of any judgment in Switzerland. (*See* Answer [2-ER-217-243].) Any Rule 69 discovery would therefore need to be tailored to assist in collecting on a judgment where assets are located, such as Switzerland. Indeed, a void judgment is a nullity. *See Elliot v. Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828); *U.S. v. Berke*, 170 F.3d 882 (9th Cir. 1999) (final judgment is void if the court that considered it lacked jurisdiction).

VII. CONCLUSION

For the reasons set forth above and in the record, Mr. Jecklin respectfully requests that the Court find that the District Court abused its discretion when it held Mr. Jecklin in contempt for alleged noncompliance with an order that was neither definite nor specific and which was based on a Motion to Compel that never should have been granted. Mr. Jecklin respectfully request that, if the Court finds the May 28 Order to be definite and specific, it should still reverse the District Court's issuance of an arrest warrant for Hans Jecklin for its violation of his Due Process rights.

Dated this 12th day of May, 2021.

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FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number: 21-15809

I am the attorney or self-represented party.

This brief contains 7,652 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

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Signature: s/ Tamara Beatty Peterson Date: May 12, 2021
*(use "*s/[typed name]*" to sign electronically-filed documents)*

STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

I am aware of one or more related cases currently pending in this court. The case number and name of case related case and its relationship to this case are:

No. 19-15931 *Morgan Stanley High Yield Securities, Inc., et al., Plaintiffs-Appellees v. Hans Jecklin; Swiss Leisure Group, AG; JPC Holding AG, Defendants-Appellants, and George Haeberling; John Tipton*

This is the appeal as to the merits of the District Court's Findings of Fact and Conclusions of Law and the Judgment entered against Defendants Hans Jecklin, Swiss Leisure Group AG, and JPC Holding AG.

No. 21-15808 *Morgan Stanley High Yield Securities, Inc., et al., Plaintiffs-Appellees v. Swiss Leisure Group AG; JPC Holding AG, Defendants-Appellants, and Hans Jecklin; George Haeberling; John Tipton; Christiane Jecklin, Defendants.*

This is the appeal by Swiss Leisure Group AG and JPC Holding AG as to the Order on Sanctions [1-ER-5-12] and Judgment for Attorney Fees in a Civil Case [1-ER-2] that is the subject of this case.

Signature: s/ Tamara Beatty Peterson Date: May 12, 2021
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 12, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Erin Parcells
an employee of Peterson Baker, PLLC