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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ON DEMAND DIRECT RESPONSE, LLC,

Plaintiff,

v.

SHANA LEE MCCART-POLLAK,

Defendant.

Case No. 2:15-cv-01576-MMD-GWF

**ORDER AND REPORT AND
RECOMMENDATION**

BACKGROUND

On January 14, 2019, the Court issued an order granting Defendant McCart-Pollak (“McCart-Pollak”)’s motion to compel compliance with a subpoena to produce documents on non-party Spiral Toys and granted McCart-Pollak an award of sanctions in the amount of costs incurred in relation to her motion to compel. *See* ECF No. 408. In addition, on January 29, 2019, the Court issued an order granting McCart-Pollak’s motion to compel compliance with subpoena to produce documents on non-party Mark Meyers, Chief Executive Officer of Spiral Toys, and granted McCart-Pollak an award of sanctions in the amount of costs incurred in relation to her motion to compel. *See* ECF No. 411. Although the Court granted McCart-Pollak’s motions to compel, the Court denied her request to hold Spiral Toys and Mark Meyers in contempt. Rule 45 of the Rules of Civil Procedure authorizes sanctions against a non-party by holding it in contempt. *See* Fed. R. Civ. P. 45(g); *Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d 1218, 1224 (9th Cir. 2018) (“And the standard for a contempt finding differs from a Rule 37 sanction.”); *see also Genx Processors Mauritius Ltd. v. Jackson*, 2018 WL 5777485, at *9 (D. Nev. Nov. 2, 2018) (“Rule 37 applies to motions to compel production only from a “party” under Rule 34, which in turn provides that motions to compel production from nonparties are governed by Rule 45.”)

1 The award of costs to McCart-Pollak was, therefore, granted in error. The Court hereby
2 withdraws its grant of costs to McCart-Pollak for expenses incurred in relation to her motions to
3 compel compliance with a subpoena to produce documents on non-parties Spiral Toys and Mark
4 Meyers.

5 **DISCUSSION**

6 The subpoenas to produce documents to Spiral Toys and to Mark Meyers are governed by
7 Rule 45 of the Federal Rules of Civil Procedure. Pursuant to Rule 45(g), a court may “hold in
8 contempt a person who, having been served, fails without adequate excuse to obey the subpoena
9 or an order related to it.” *Poly-Med, Inc. v. Novus Sci. PTE Ltd.*, 2017 WL 2291942, at *2 (S.D.
10 Cal. May 25, 2017). The party moving for contempt has the burden to establish by clear and
11 convincing evidence that the contemnor has violated a clear and specific court order. *Forsythe v.*
12 *Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012), report and recommendation adopted, 2012 WL
13 1833393 (D. Nev. May 18, 2012). If the moving party establishes by clear and convincing
14 evidence that the contemnor violated a clear and specific court order, then the burden shifts to the
15 contemnor to show that he or she took every reasonable step to comply and to explain why
16 compliance was not possible. *Id.* To assess the extent to which the contemnor has taken “every
17 reasonable step” to comply with the court order, the court can consider “(1) a history of
18 noncompliance and (2) failure to comply despite the pendency of a contempt motion.” *Id.*

19 “Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to
20 compensate the party pursuing the contempt action for injuries resulting from the contemptuous
21 behavior, or both.” *Taddeo v. Am. Invsco Corp.*, 2015 WL 751072, at *2 (D. Nev. Feb. 20, 2015)
22 (quoting *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir.1986)). The civil
23 contempt power of a magistrate judge regarding failure to abide by a discovery order is governed
24 by 28 U.S.C. § 636(e), which provides as follows:

25 the magistrate shall forthwith certify the facts to a judge of the district court and
26 may serve or cause to be served upon any person whose behavior is brought into
27 question under this section an order requiring such person to appear before a judge
of that court upon a day certain to show cause why he should not be adjudged in
contempt by reason of the facts so certified.

28 *See* 28 U.S.C. 636(e)(6)(B)(iii)(2013).

1 **I. Certification of Facts as to Spiral Toys**

2 Pursuant to 28 U.S.C § 636(e), the undersigned certifies the following facts that appear to
3 provide grounds for a finding of civil contempt against non-party Spiral Toys:

4 1. That on October 24, 2018, McCart-Pollak served a subpoena for the production of
5 documents on the registered agent of non-party Spiral Toys. The subpoena required Spiral Toys
6 to produce documents on November 13, 2018.

7 2. That Spiral Toys failed to serve any objection to the subpoena and did not appear as
8 designated in the subpoena.

9 3. That Spiral Toys did not produce documents in response to the subpoena for the
10 production of documents.

11 4. That Spiral Toys failed to file an opposition to Plaintiff’s motion to compel (ECF No.
12 399) compliance with the subpoena.

13 Based on the foregoing and for good cause appearing, the undersigned Magistrate Judge
14 finds that non-party Spiral Toys should be held in civil contempt. It is recommended that the
15 district court enter an order regarding Spiral Toys as follows (1) finding Spiral Toys in civil
16 contempt for failing without adequate excuse to obey the subpoena served upon it by McCart-
17 Pollak on October 24, 2018; and (2) ordering Spiral Toys to pay McCart-Pollak’s reasonable costs
18 for bringing her motion to compel in the amount of \$18.81. *See McCart-Pollak’s Application for*
19 *Costs* (ECF No. 410).

20 **II. Mark Meyers**

21 On November 14, 2018, McCart-Pollak served a subpoena on Mark Meyers, CEO, of
22 Spiral Toys. *See Motion to Compel* (ECF No. 405), 3. McCart-Pollak argues that Mr. Meyers
23 failed to produce sales and royalty records for 2014, 2016, 2017, and 2018 and did not produce
24 email records from April 2012 to June 2013 because the emails were corrupt. *Id.* at Exhibits 2, 5.
25 McCart-Pollak requested that the Court compel Mr. Meyers to comply with the subpoena and to
26 hold Mr. Meyers in contempt. Mr. Meyers failed to respond to McCart-Pollak’s motion to compel
27 and on January 29, 2019, the Court granted McCart-Pollak’s motion to compel and granted her
28 costs legitimately incurred in relation to her motion to compel.

1 McCart-Pollak filed an application for costs (ECF No. 414) as instructed by the Court on February
2 6, 2019. On February 14, 2019, Mr. Meyers filed his Opposition (ECF No. 416) and request to
3 deny costs. Mr. Meyers states that he is no longer an employee of Spiral Toys and that he has
4 previously participated in document production and depositions as it relates to this matter. He
5 argues that McCart-Pollak's requests are duplicative and that he has produced all responsive
6 documents that he has in his possession. He further states that the address listed in the subpoena
7 served upon him "was not a place of business and due to Meyers experience with Ms. Pollak,
8 Meyers did not feel that it was appropriate to come to a residential address on Hollywood Blvd."
9 *See Opposition* (ECF No. 416), 4. As a result, he mailed and provided electronic versions of
10 responsive documents to McCart-Pollak.

11 "A nonparty's failure to timely make objections to a Rule 45 subpoena ... generally requires
12 the court to find that any objections have been waived." *Martinez v. City of Avondale*, 2013 WL
13 5705291, at *3 (D. Ariz. Oct. 18, 2013) (citing *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636
14 (C.D. Cal. 2005)). However, in unusual circumstances and for good cause, the failure to act timely
15 will not bar consideration of objections to a Rule 45 subpoena. *Moon*, 232 F.R.D. at 636. For
16 instance, in circumstances where the subpoena is overbroad on its face and exceeds the bounds of
17 fair discovery and if the subpoenaed witness is a non-party acting in good faith, courts have found
18 unusual circumstances. *Id.* *See also McCoy v. Sw. Airlines Co.*, 211 F.R.D. 381, 385 (C.D. Cal.
19 2002); *American Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Oh. 1999). In light
20 of the nature of the subpoena served on Mr. Meyers and his representations of good faith, the
21 undersigned recommends that the district court partially grant McCart-Pollak's request for
22 contempt and issue an order to show cause why contempt sanctions should not be entered against
23 Mr. Meyers. Accordingly.

24 **IT IS HEREBY ORDERED** that the Court hereby withdraws its grant of costs to McCart-
25 Pollak for expenses incurred in relation to her motions to compel compliance with a subpoena to
26 produce documents on non-parties Spiral Toys and Mark Meyers according to the provisions
27 herein.

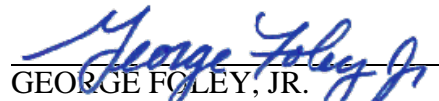
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IT IS HEREBY RECOMMENDED that the district court enter an order regarding Spiral Toys as follows (1) finding Spiral Toys in civil contempt for failing without adequate excuse to obey the subpoena served upon it by McCart-Pollak on October 24, 2018; and (2) ordering Spiral Toys to pay McCart-Pollak’s reasonable costs for bringing her motion to compel in the amount of \$18.81.

IT IS FURTHER RECOMMENDED that the district court partially grant McCart-Pollak’s request for contempt and issue an order to show cause why contempt sanctions should not be entered against Mark Meyers.

Dated this 25th day of March, 2019.



GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE