

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO**

Civil Action No. 1:15-cv-01894-JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERARDO HERRERA, individually and d/b/a
El Lobo MultiServicios Profesionales, Inc.;
Lobo Multiservicios; and
Lobos Multiservicios LLC,

Defendant.

**AMENDMENT TO THE UNITED STATES' MOTION FOR AN ORDER TO
SHOW CAUSE AND REQUEST FOR EXPEDITED TREATMENT, AND
AMENDED DECLARATION OF JEAN A. WALKER**

Counsel for the United States hereby submits the Amended Declaration of Jean Walker, in support of the United States' earlier Motion for an Order to Show Cause and Request for Expedited Treatment. (Dkt. 18). The amendment corrects an error in the declaration that was repeated in the Motion it supported.

The amended declaration is attached as Exhibit A hereto. Ms. Walker revised a portion of paragraph 10 of the original declaration. (Dkt. 18-2). The original document read as follows:

10. I immediately recognized one of Mr. Herrera's workers, whom I had interviewed in person during my investigation. She appeared to be meeting with a client at one of the two desks when I saw her. The client had what looked like W-2 forms and other tax paperwork visible on the desk, and the worker was entering information into a computer. There was no one at the other desk, but I saw about five other customers waiting for service.

The amended declaration reads:

10. I immediately recognized one of Mr. Herrera's workers, whom I had interviewed in person during my investigation. She appeared to be meeting with a client at one of the two desks when I saw her. There was no one at the other desk, but I saw about five other customers waiting for service. I did not interview the clients, but I observed that they carried folders or packets of paper that appeared to be tax paperwork.

The error requires a correction to the paragraph now beginning at the top of page 6 of the Motion. A copy of the corrected Motion is attached as Exhibit B. The revised paragraph reads:

Revenue Agent Walker immediately recognized one of Mr. Herrera's workers, whom Agent Walker had interviewed during her earlier investigation of Mr. Herrera's business. (Walker Decl. ¶ 10.) The worker was sitting at one of the desks and appeared to be meeting a client when Agent Walker first saw her. Agent Walker saw approximately five other customers, who were waiting for service and holding folders or packets of paper that appeared to be tax paperwork. (*Id.*) Mr. Herrera did not appear to be in. (*Id.* ¶ 11.)

The amendment does not change the United States' request for relief, but counsel regrets the error.

DATED this 4th day of March, 2016.

Respectfully submitted,

CAROLINE D. CIRAULO
Acting Assistant Attorney General

s/E. Carmen Ramirez

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT FOR THE
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Lobos Multiservicios LLC,

Defendant.

DECLARATION OF JEAN A. WALKER

I, Jean A. Walker, pursuant to 28 U.S.C. § 1746, hereby declare that:

1. I am a duly commissioned Revenue Agent of the Internal Revenue Service, with a post of duty in the Grand Junction, Colorado area.
2. In 2014, I became involved in an investigation of Gerardo Herrera and his tax preparation business. I am familiar with IRS's investigative procedures and processes, and have access to and am readily familiar with IRS records, administrative files, and computerized information regarding the investigation.

3. In addition to investigating Mr. Herrera, I have been assigned to assist the government attorneys working on the above-captioned matter. I make this declaration based on my review of the investigative record, and on my personal knowledge.
4. On December 30, 2016, I signed an earlier declaration in this matter. That declaration was to support the United States' Motion for a Default Judgment and Permanent Injunction Against Gerardo Herrera.
5. As described in more detail in that earlier declaration, for several years Mr. Herrera has operated a business in Denver that offered a variety of services, including preparing tax returns, brokering real estate transactions, selling insurance, and translating documents for immigration proceedings. The business went by El Lobo Multiservicios Profesionales and similar names. Mr. Herrera has also offered tax preparation services at temporary locations in the Vail area. As my declaration described, Mr. Herrera and the business have repeatedly and systematically submitted false tax returns for their clients.
6. On January 7, 2016, the Court granted the United States' motion for an injunction, and permanently barred Mr. Herrera and his business from engaging in tax preparation or assisting others in doing so.

7. In early February 2016, I learned that the Department of Justice had received a tip from a Colorado resident who said Mr. Herrera had opened a new tax preparation office near Vail. The tipster reported that the new office was 57 Edwards Access Rd., Suite 11, in Edwards, Colorado. Shortly thereafter I learned that another tipster had contacted the IRS, and reported that Mr. Herrera was once again offering tax preparation services at his Denver office.
8. Based on this information, I made a visit to the Edwards office on February 11, 2016. John Vencato, an IRS Revenue Officer, went with me. The office was located in a small shopping complex near a highway. Before going to Mr. Herrera's office, Mr. Vencato and I stopped briefly at the office of the complex's property manager, whose office was on site, and confirmed that Mr. Herrera had rented the space.
9. When we arrived at Mr. Herrera's office, we saw a sign outside that said "Lobo Realty." The door was open, so Mr. Vencato and I entered. The entire office seemed to be one mid-sized room with two computer desks, a copy machine, and a small waiting area. The office appeared to be new. I saw almost no files, decorations, storage, or personal items that might suggest people had been working there for long. I looked for a copy of the injunction but did not see it posted anywhere. However, I saw a large sign of the sort that is typically hung in

windows and lit with neon leaning against a wall inside the office. The sign said “Taxes.”

10. I immediately recognized one of Mr. Herrera’s workers, whom I had interviewed in person during my investigation. She appeared to be meeting with a client at one of the two desks when I saw her. There was no one at the other desk, but I saw about five other customers waiting for service. I did not interview the clients, but I observed that they carried folders or packets of paper that appeared to be tax paperwork.
11. Mr. Vencato and I explained who we were and showed the worker our credentials, though she recognized me from our earlier interview. When questioned, the worker told me that she was once again working for Mr. Herrera, and that he had instructed her to set the office up for tax season. Mr. Herrera did not appear to be in the office. The worker told us she expected him later, sometime around noon.
12. I asked to see the software they were using to prepare returns, which was already open on the computer the worker had been using. The software showed that 66 returns had been submitted. I asked to see the signature area on the returns, because I wanted to determine if the business was using Mr. Herrera’s name and PTIN (an identification number that the IRS issues to individuals who prepare returns); my earlier investigation had showed that Mr. Herrera and his staff used

his PTIN on returns the business prepared. Now, however, the name in the preparer signature section of the software was Nathan Vanderhooven. I asked the worker who that person was, and about his connection to Mr. Herrera, but she had no explanation. The software also showed an EFIN (an identification number assigned to tax preparation businesses for purposes of e-filing returns) and an EIN (an employer identification number) that I later traced to Mr. Vanderhooven and a business named Faro Multiservicios LLC.

13. We explained to the worker that a Court had barred Mr. Herrera from engaging in the tax preparation business. Mr. Vencato put copies of the Court's order and judgment in an envelope with Mr. Herrera's name on it, and asked the worker to deliver it to him.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of March, 2016.

Jean A. Walker
Digitally signed by Jean A. Walker
DN: c=US, o=U.S. Government, ou=Department of the
Treasury, ou=Internal Revenue Service, ou=People,
serialNumber=392184, cn=Jean A. Walker
Date: 2016.03.03 09:13:09 -0700

JEAN A. WALKER
IRS Revenue Agent

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT FOR THE
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UNITED STATES OF AMERICA,

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v.

GERARDO HERRERA, individually and d/b/a
El Lobo MultiServicios Profesionales, Inc.;
Lobo Multiservicios; and
Lobos Multiservicios LLC,

Defendant.

**UNITED STATES' AMENDED¹ MOTION FOR AN ORDER TO SHOW CAUSE
AND REQUEST FOR EXPEDITED TREATMENT**

Defendant Gerardo Herrera runs a tax return preparation firm that repeatedly and systemically submitted fraudulent returns. By Order dated January 7, 2016, the Court permanently barred Mr. Herrera from engaging in the tax preparation business. (Dkt. 16, the "Injunction.") But Mr. Herrera has flouted the Injunction by continuing to operate a tax business, and refusing to comply with the Injunction's other terms. It is now the

¹ This document corrects and amends Docket 18.

midst of tax filing season. Unless Mr. Herrera is stopped soon, his conduct will cause the United States significant harm. The United States therefore moves the Court to enter an order directing Mr. Herrera to show cause as to why he should not be held in contempt. The United States respectfully requests a hearing as soon as possible; otherwise, Mr. Herrera may continue his wrongful conduct throughout tax season. The United States will also seek its costs in bringing and arguing this Motion.

I. BACKGROUND

A. Procedural History

The United States filed suit against Mr. Herrera on September 1, 2015. (Dkt. 1.) The Complaint alleged that since at least 2011, Mr. Herrera and his tax preparation business systematically and intentionally falsified their clients' tax returns. (*Id.* ¶ 11.) The IRS audited over 200 returns prepared under Mr. Herrera's PTIN (an identification number the IRS assigns to paid tax preparers), and discovered that over 99% of them required corrections. (*Id.*) While Mr. Herrera changed his tactics over time, most of the misrepresentations fell into two general categories: false claims for dependents, and inflated—or wholly fabricated—itemized deductions. (*Id.* ¶ 12.) The IRS had met with Mr. Herrera in 2014, and fined him over \$400,000 for his conduct. (*Id.* ¶ 22). But he and his firm continued to prepare fraudulent returns in 2015. (*Id.*)

Mr. Herrera was aware of the suit, but never made an appearance. He received personal service of the Complaint on September 29, 2015. (*See* Dkt. 6 (proof of

service).) The Clerk granted an entry of default on October 15, 2015. (Dkt. 8.)

However, as the United States discussed in a status report it filed on November 10, 2015 (Dkt. 10), shortly after the Clerk's default entry, Mr. Herrera called the undersigned counsel and said that was planning to meet with an attorney to discuss the matter. Counsel for the United States called the attorney and left messages, and later sent a certified letter regarding the suit to the attorney's office. (*See* Dkts. 15-2 and 15-3 (Declaration of E. Carmen Ramirez ("Ramirez Decl."), attached to this Motion, and Exhibit A thereto).) The Clerk of Court sent Mr. Herrera notice of two of the Court's scheduling Orders, and provided Mr. Herrera additional time to respond to the suit. (*See* Dkts. 12 and 14.) But neither Mr. Herrera nor the attorney ever appeared.

When it became clear Mr. Herrera did not intend to participate in the litigation, the United States moved for a permanent injunction and default judgment (Dkt. 15), which the Court granted on January 7, 2016. (Dkts. 16 and 17.) The Injunction barred Mr. Herrera from acting as a paid tax preparer, or instructing, advising, or assisting anyone else doing so. (Dkt. 16 at 3-4). It also directed Mr. Herrera to take affirmative steps to demonstrate compliance, including requiring him to post a copy of the injunction at his place of business, to provide the United States with certain information about the returns he had prepared, and to file a sworn statement documenting his compliance efforts within 45 days of the judgment. (Dkt. 16 at 5).

The United States then attempted to inform Mr. Herrera of the Injunction. On January 28, 2016, the United States called the attorney Mr. Herrera had said he was consulting, and informed him of the judgment. (*See* Ramirez Decl. ¶ 3.) The attorney informed counsel for the United States that he was not representing Mr. Herrera, so the United States sent Mr. Herrera a letter informing him of the Court's decision, and including copies of the Injunction and judgment. (Ramirez Decl. ¶ 3 and Ex. 1.) The letter informed Mr. Herrera that if he did not comply, the United States would take appropriate action, including moving for contempt.

The United States later learned that Mr. Herrera had rented a post office box. In an abundance of caution, the United States sent a similar letter to the post office box, with copies of the Injunction and judgment, on February 8, 2016. (Ramirez Decl. ¶ 4 and Ex. 2.) Further attempts to contact Mr. Herrera, described below, followed.

B. Mr. Gerardo's Violations of the Order

Forty-five days have passed. Mr. Herrera has not submitted the certificate of compliance the Injunction required. Indeed, he has not contacted the United States regarding any of the Injunction's requirements. Moreover, in early February, tipsters informed the United States that Mr. Herrera was still preparing taxes, both in Denver and in Edwards, Colorado, near Vail. Local news outlets had covered the injunction, and the United States believes that the callers learned about the injunction through the media. (*See, e.g.*, Vencato Del. ¶ 4).

On February 11, IRS Revenue Agent Jean Walker and Revenue Officer John Vencato visited the office address in Edwards that a tipster had provided. (Walker Decl. ¶ 7; Vencato Decl. ¶ 7.) The address was located in a small shopping center near a highway. (Vencato Decl. ¶ 8.) The IRS employees' first stop was to the complex's property management office, which was on-site. (*Id.*) The property manager confirmed that Mr. Herrera had recently rented the space on a short-term basis. (*Id.*) The manager also said that Mr. Herrera had paid for the first month, last month, and security deposit with a check. (*Id.*) The manager said he had initially misplaced the check, and asked Mr. Herrera to pay him again. However, the manager searched his office and found the missing check, a copy of which is submitted herewith. (*See id.* ¶ 9 and Ex. A.) The check had Mr. Herrera's name and signature.

After leaving the manager's office, the IRS employees went to Mr. Herrera's office, where they saw further evidence that the tax preparation business was up and running. A sign outside said "Lobo Realty", and listed Mr. Herrera's cell phone number. (Vencato Decl. ¶ 10.) Inside, the office was a single, mid-sized room with a small waiting area, and two desks with computers. (Walker Decl. ¶ 9.) The office appeared to be new: there were almost no files, storage items, or personal items that might suggest anyone had been working there for long. (*Id.*) The IRS employees looked for a copy of the injunction, but did not see it posted anywhere. (*Id.*) However, there was a large sign reading "Taxes" leaning against a wall. (*Id.*)

Revenue Agent Walker immediately recognized one of Mr. Herrera's workers, whom Agent Walker had interviewed during her earlier investigation of Mr. Herrera's business. (Walker Decl. ¶ 10.) The worker was sitting at one of the desks and appeared to be meeting a client when Agent Walker first saw her. Agent Walker saw approximately five other customers, who were waiting for service and holding folders or packets of paper that appeared to be tax paperwork. (*Id.*) Mr. Herrera did not appear to be in. (*Id.* ¶ 11.)

The worker showed the IRS employees the office's tax preparation software, which was already visible on the computer screen. (*Id.* ¶ 12.) The software showed that 66 returns had been filed. (*Id.*) In the past, Mr. Herrera and his staff had used his name and PTIN (an identification number the IRS assigns to preparers) on the returns they processed. (*Id.* ¶ 12.) But now, the software showed that the business had switched to a different name and PTIN to sign the returns, one that Revenue Agent Walker did not recognize. (*Id.* ¶ 12.)

Agent Walker and Officer Vencato explained to the worker that the Court had barred Mr. Herrera from the tax preparation business. (Walker ¶ 13; Vencato Decl. ¶ 12). Officer Vencato put copies of the injunction and final judgment in an envelope with Mr. Herrera's name, and asked the worker to deliver it to him. (Walker ¶ 13; Vencato Decl. ¶ 12).

The next day, February 12, 2016, Officer Vencato visited Mr. Herrera's Denver office. (Vencato Decl. ¶ 14). The office was locked, though Mr. Vencato saw a man who appeared to be Mr. Herrera leave the building, get into a vehicle, and drive away as Officer Vencato arrived. (*Id.* ¶ 15-16). The sign on the window advertised "TAXES" and other services. (*Id.* ¶16.) Officer Vencato looked in the window, and did not see a copy of the injunction inside or outside. (*Id.* ¶18.) He put copies of the injunction and judgment in an envelope with Mr. Herrera's name, and affixed it to the door. (*Id.* ¶19.)

C. The United States' Attempts to Contact Mr. Herrera

Mr. Herrera never contacted counsel regarding the letters of January 28 or February 8, 2016, or the copies of the Injunction and judgment Revenue Officer Vencato left at his two offices. Pursuant to Local Rule 7.1, the United States made several additional attempts to contact Mr. Herrera concerning this Motion:

- On February 19, counsel for the United States sent Mr. Herrera another letter, advising him that it planned to move for contempt once the 45 days in the Court's Order had elapsed. (Ramirez Decl. ¶ 5 and Ex. 3.) Counsel sent the letter to Mr. Herrera's Denver and Edwards offices. Federal Express records confirmed delivery on Saturday, February 20, and Monday, February 22, respectively. (Ramirez Decl. ¶ 5 and Ex. 4.)
- On February 22, counsel attempted to telephone Mr. Herrera on his cell phone number. Counsel tried again on February 23. On both occasions a

recorded message stated that the voice-mail box was full. (Ramirez Decl. ¶ 6.)

- On February 23, counsel sent an e-mail message with copies of the injunction and judgment, to an e-mail address Mr. Herrera listed on a sign advertising his business. (Ramirez Decl. ¶ 7 and Ex. 5).

As of the time of this filing Mr. Herrera has not responded to any of these attempts to reach him.

II. ARGUMENT

A. Mr. Herrera has knowingly violated the Court's Order.

Civil contempt is “a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). A district court has the inherent power to enforce its orders through civil contempt. *See, e.g., SEC v. Merrill Scott & Assocs., Ltd.*, 2011 U.S. Dist. LEXIS 134010, *29-30 (D. Utah Nov. 21, 2011).

As the moving party, the United States must show by clear and convincing evidence that Mr. Herrera had notice of the Court's Order, and that he disobeyed it. *See United States v. Ford*, 514 F.3d 1047, 1051 (10th Cir. 2008); *State ex rel. DOT v. United States*, 2012 U.S. Dist. LEXIS 164802, *14-15 (N.D. Okla. Nov. 19, 2012). The burden then shifts to Mr. Herrera to show either that he complied with the Order, or that it was impossible for him to do so. *See United States v. Ford*, 514 F.3d 1047, 1051 (10th Cir.

2008). The legal or factual bases for the Injunction are not at issue: the question is whether Mr. Herrera violated it, and whether he has the ability to comply. *See, e.g., State ex rel. DOT v. United States*, 2012 U.S. Dist. LEXIS 164802, *15 (N.D. Okla. Nov. 19, 2012).

The United States can easily meet its burden here. The Court's Injunction clearly laid out Mr. Herrera's obligations. The evidence shows that he has violated those obligations. Forty-five days have elapsed, and Mr. Herrera has not filed his certificate of compliance. He has not given the United States his customer list. He has not posted the injunction at his Edwards office or, most likely, his Denver office. Those facts alone would merit a finding of contempt. Here, Mr. Herrera is also violating the very heart of the Court's Order by continuing to engage or assist in the tax preparation business.

There can be little doubt that Mr. Herrera was on notice of the Injunction. The United States sent copies to his home, to a post office box, and to two business addresses. None of those letters have been returned. IRS employees left additional copies at his two offices, and spoke with one of his workers. The undersigned counsel e-mailed him at his business address, and tried to call him.² The fact that the business has acquired a new PTIN and is submitting returns under a different name is independent evidence that Mr.

² As an additional precaution, the United States mailed copies of the original Motion (Dkt. 18), together with copies of the injunction and final judgment, to Mr. Herrera's home, to his post office box, and to each of his office addresses.

Herrera is aware of the Injunction, and is trying to avoid detection. To find that Mr. Herrera did not know of the Injunction would be to reward him for ignoring it, and for refusing to participate in the litigation.

B. A Coercive Sanction is Appropriate Here.

There are two kinds of civil contempt sanctions: coercive and compensatory. *See State ex rel. DOT*, 2012 U.S. Dist. LEXIS 164802 at *21-22; *see also United States v. Wesson*, 2008 U.S. Dist. LEXIS 123158, *8-9 (D. Colo. Nov. 24, 2008). Compensatory sanctions are designed to compensate the complaining party for damages caused by the contemnor's refusal to comply with a court order. *Wesson*, 2008 U.S. Dist. LEXIS 123158, *8-9. Coercive sanctions, such as civil confinement, are designed to bring the defiant party into compliance going forward, and should therefore reflect the character and magnitude of harm if the desired result is not achieved. *Id.*

If Mr. Herrera does not quickly comply with the Injunction, he should be confined until he does. Courts have long had the power to impose conditional imprisonment to compel a party to obey a valid order. *Id.*, quoting *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) (“Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court’s directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.”).

Compensatory damages will not make the United States whole. The United States

cannot determine the losses it may have suffered if Mr. Herrera is continuing to understate his clients' liabilities until he identifies those returns (as the Injunction requires him to do) and the IRS examines them. Moreover, Mr. Herrera's past conduct, and his current violations, threatens the public's trust in the integrity of the tax system as a whole, a harm that cannot be easily quantified and compensated. Nor is a coercive fine likely to be effective. Mr. Herrera has already been assessed over \$400,000 in penalties. He has not paid the penalties, and their imposition has not caused him to desist. In short, allowing Mr. Herrera a brief window to comply and imposing confinement if he does not is the most appropriate sanction for his contempt.

III. CONCLUSION

Mr. Herrera is in clear violation of the Injunction. The United States therefore requests that the Court issue the attached Notice and Order to Show Cause directing him to explain why he should not be held in contempt. If he cannot do so, the Court should hold him in contempt, and, if he does not comply with five days, impose a coercive sanction of civil imprisonment until he does so.

The United States also requests that Mr. Herrera be required to reimburse the United States for its costs, including attorneys' fees, for bringing this Motion and attending any hearing in relation thereto. Because the United States is unable to calculate the total costs until after the Motion is heard, it will submit a declaration stating those costs at a later date.

DATED this 4th day of March, 2016.

Respectfully submitted,

CAROLINE D. CIRAULO
Acting Assistant Attorney General

s/E. Carmen Ramirez

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