UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICBC (LONDON) PLC,

Plaintiff,

-against-

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant.

15 Civ. 0070 (LAK) (FM)

~~[PROPOSED]~~ ORDER OF CONTEMPT as with respect to Raheem Brennerman

THE BLACKSANDS PACIFIC GROUP, INC. and BLACKSANDS PACIFIC ALPHA BLUE, LLC,

Counter-Plaintiffs

-against-

ICBC (LONDON) PLC,

Counter-Defendant.

Plaintiff ICBC (London) plc's motion [ECF 125] seeking an Order holding Raheem Brennerman in civil contempt of court and imposing coercive sanctions against him is granted (except that) The Court reserves decision on the portion of ICBC's motion requesting an award of compensatory damages.

Having considered the papers submitted by ICBC, Mr. Brennerman having failed to file any papers in opposition, and the Court having heard oral argument, the Court finds that (1) its orders of August 22, 2016 and September 27, 2016 compelling Defendant The Blacksands Pacific Group, Inc. ("**Blacksands**") to fully comply with ICBC's post-judgment discovery requests (the "**Outstanding Discovery Orders**") are clear and unambiguous, (2) the proof of Blacksands' willful noncompliance with the Outstanding Discovery Orders is undisputed, clear

and convincing, (3) Blacksands has not diligently attempted to comply with those orders in a reasonable manner, and (4) Mr. Brennerman is properly charged with contempt because he has abetted and directed Blacksands' noncompliance with the Outstanding Discovery Orders and because he is legally identified with Blacksands. The Court therefore ORDERS that:

1. Mr. Brennerman shall pay a coercive fine of $1,500 per day, commencing December 13, 2016, for each day in which Blacksands continues to fail to comply with the Outstanding Discovery Orders. The amount of the coercive fine will double every seventh day until it reaches $100,000 per day, and it will thereafter continue at the rate of $100,000 per day, unless otherwise ordered by this Court.

2. If Mr. Brennerman and Blacksands comply fully with the Outstanding Discovery Orders, the judgment is satisfied, or at least $3 million cash is paid on account of the judgment, in each case by 5:00 p.m. New York time on December 20, 2016, the Court will abrogate the coercive fines imposed on Mr. Brennerman and incurred through that date; provided, that such production or payment shall not moot the contempt that has been committed.

3. Upon application by the Plaintiff, the Court will consider the imposition of further sanctions, if there is an adequate showing that those imposed by this Order do not achieve compliance. Without limiting the generality of the foregoing, ICBC is at liberty to commence by appropriate process further civil and/or criminal contempt proceedings against Mr. Brennerman and anyone else who is properly chargeable with contempt in this matter.

4. The substance of this order was issued orally on December 13, 2016.

12/15/16

SO ORDERED

LEWIS A. KAPLAN, USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICBC (LONDON) PLC,

Plaintiff,

-against-

THE BLACKSANDS PACIFIC GROUP, INC., 15 Civ. 0070 (LAK)

Defendant-Counterclaimant,

-and-

BLACKSANDS PACIFIC ALPHA BLUE, LLC,

Additional Counterclaimant.

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

On December 12, 2016, this Court denied an *ex parte* application by Raheem Brennerman for an extension of time within which to resist a motion to hold him in civil contempt and impose sanctions on him. This memorandum and order explains that decision.

The Background

ICBC (London) plc ("ICBC"), The Blacksands Pacific Group, Inc. ("Blacksands"), and counterclaimant Blacksands Pacific Alpha Blue, LLC ("Alpha Blue"), a Blacksands subsidiary, entered into a bridge loan agreement ("BLA") on November 25, 2013.[1] Under the BLA, ICBC provided a $20 million, 90-day loan to Alpha Blue, which Blacksands absolutely and unconditionally guaranteed.[2] Of the available $20 million, Alpha Blue withdrew $5 million.[3]

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1 DI 1, Ex. A Part 6, at 3 (Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. in Lieu of Compl. under CPLR 3213).

2 *Id.*; BLA § 9.1. The BLA was attached as an exhibit to the Clark Affidavit in ICBC's original filing, but when the case was removed and docketed electronically, the BLA was

Neither Alpha Blue, as primary obligor, nor Blacksands, as guarantor, repaid the amount owed when it matured in February 2014.[4] ICBC extended the deadline for repayment of principal on two occasions, first to March 31, 2014, and later to July 31, 2014, while still collecting interest payments.[5] After each of these deadlines was missed, however, ICBC sent a notice of default to Blacksands.[6]

On or about December 8, 2014, plaintiff ICBC commenced this action in the New York Supreme Court against defendant Blacksands to recover $5 million plus interest and attorneys' fees of nearly $400,000 on Blacksands' guarantee of the obligations of Alpha Blue under the BLA. Under New York procedure, ICBC moved for summary judgment in lieu of a complaint.[7] Blacksands promptly removed the case to this Court and, in due course, both Blacksands and Alpha Blue filed counterclaims against ICBC.[8]

By order dated September 29, 2015, this Court granted ICBC's motion for summary judgment on its claim on Blacksands' guarantee and granted in substantial part its motion to dismiss the counterclaims.[9] It also granted a Rule 54(b) certificate with respect to ICBC's claim against Blacksands. The Clerk then entered judgment in favor of ICBC and against Blacksands.

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split among four entries: DI 1, Ex. A Part 2 at 11-27; DI 1, Ex. A Part 3; DI 1, Ex. A Part 4; and DI 1, Ex. A Part 5 at 1-11. The Court will cite simply to the BLA for ease of reference. *See also* DI 13 ¶ 4 (Blacksands' Rule 56.1 Response to Plaintiff's Statement of Material Facts) (acknowledging formation of BLA).

3 DI 1, Ex. 6, at 5.

4 *Id.*; DI 13 ¶ 15.

5 DI 1, Ex. 6, at 4-5.

6 The first notice of default was sent on April 4, 2014 by fax, which Blacksands claims not to have received. *See* DI 1, Ex. A Part 5, at 17-21 (April 4, 2014 Notice of Default); DI 1, Ex. A Part 5, at 13 (January 30, 2014 letter from Blacksands providing fax number); DI 13 ¶ 19 (Blacksands disputing receipt of April fax). The second notice was sent by courier in August 2014, and Blacksands acknowledges receipt. DI 13 ¶¶ 23, 25 (Blacksands acknowledging receipt of August 2014 Notice of Default).

7 *See* N.Y. C.P.L.R. 3213.

8 DI 11.

9 *ICBC (London) plc v. Blacksands Pacific Grp., Inc.*, 2015 WL 5710947 (S.D.N.Y. Sept. 29, 2015).

Blacksands appealed. As no supersedeas bond or other security was posted, however, ICBC began post-judgment discovery in an effort to locate assets that might be used to satisfy the judgment, serving document requests and interrogatories on or about March 24, 2016.[10]

Blacksands initially stonewalled the discovery requests, interposing frivolous objections. ICBC then moved to compel responses. The Court granted the motion and, on August 22, 2016, directed Blacksands to respond in full within fourteen days after the date of the order.[11]

On September 6, 2016, the day Blacksands was obliged to comply with the August 22, 2016 order (the "First Order"), Blacksands' counsel wrote to the Court and claimed that Blacksands had "agree[d]" to pay the judgment "pending its appeal" and purportedly requested the Court's assistance in determining the amount due under the judgment.[12] In reliance on the apparent commitment to pay, ICBC did not immediately seek further relief with respect to compliance with the First Order. The Court, at Blacksands' request, then held two conferences with counsel in what was said by Blacksands to be an effort to determine the amount owing.[13] On September 27, 2016, however, at the conclusion of the second conference, the Court entered the following order (the "Second Order"):

> "On August 22, 2016, this Court directed defendant to comply fully with certain outstanding discovery requests within fourteen days. It has not complied with that order.
>
> "Unless the case is fully and definitively settled on or before October 3, 2016, defendant shall comply fully with those discovery requests no later than 4 p.m. on that date. Any failure to comply with this order may result in the imposition of sanctions, including those associated with contempt of court, as well as in the imposition of coercive sanctions and other relief for civil contempt."[14]

No settlement was reached. Accordingly, Blacksands became obligated under the Second Order to comply fully with ICBC's discovery requests by 4 p.m. on October 3, 2016. It

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10 DI 84 ¶ 3.

11 DI 87.

12 DI 88.

13 The point supposedly at issue was the interest calculation. *See* DI 88.

14 DI 92. For the background in this paragraph, see Hessler Decl. [DI 102] ¶¶ 5-6.

failed to respond.[15]

In the meantime, the Court of Appeals affirmed the judgment against Blacksands.[16]

The Contempt Adjudication as to Blacksands and the Contempt Application as to Brennerman

Blacksands

On October 13, 2016, ICBC moved to hold Blacksands in contempt. No opposition was filed. On October 20, 2016, the Court held Blacksands in civil contempt and imposed coercive sanctions on it. In addition, the written order entered on October 24, 2016 [DI 108] reiterated the Court's prior warning[17] that Blacksands' principal, Raheem Brennerman, would be at risk of contempt proceedings directed at him personally in the event full compliance was not forthcoming:

> "Upon application by the Plaintiff, the Court will consider the imposition of further sanctions, if there is an adequate showing that those imposed by this Order do not achieve compliance. Without limiting the generality of the foregoing, ICBC is at liberty to commence by appropriate process civil and/or criminal contempt proceedings against Raheem Brennerman and anyone else who is properly chargeable with contempt in this matter."

Brennerman

On December 7, 2016, ICBC—based on a reasonably documented assertion that Brennerman "controls every aspect of Blacksands' existence and operation," is "legally identified" with it, and "has directed its continuing contempt of Court"[18]—moved by order to show cause to

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15 DI 102 ¶ 7.

16 ___ F. App'x ___, No. 15-3387, 2016 WL 5386293 (2d Cir. Sept. 26, 2016).

17 Tr., Oct. 20, 2016 [DI 110] at 8.

18 Hessler Decl. [DI 123] ¶ 10.

The Court notes that the notice of appeal from the summary judgment against Blacksands was signed by Brennerman personally, on behalf of Blacksands and Alpha Blue, rather than by any attorney. DI 46. In addition, he personally wrote the Court to oppose, on behalf of Blacksands, a motion by its first lawyers in this case to withdraw. DI 37.

hold Brennerman in civil contempt of Court and to impose coercive sanctions.[19] The Court granted the order to show cause, made it returnable on December 13, 2016, and required the service and filing of any responsive and reply papers at or before 4 p.m. on December 11 and 12, 2016, respectively.[20] The order to show cause and supporting papers were served electronically[21] on Brennerman himself at 3:50 p.m. on December 7, 2016.[22] They were served also on Blacksands by personal service on Latham & Watkins ("Latham"), its counsel of record, contemporaneously.[23]

The Ex Parte *Application*

At 6:34 a.m. on Sunday, December 10, 2016, Brennerman sent an email to the Court's deputy clerk at his court email address.[24] The email is headed PRIVILEGED & CONFIDENTIAL CORRESPONDENCE. Although it indicates that copies were sent to lawyers at Latham, it bears no indication that copies were sent to ICBC's counsel despite the fact that Brennerman knows their email addresses.

Attached to the email was a letter purportedly by Brennerman to the undersigned.[25] The first two paragraphs requested more time to respond to the contempt motion, stated that Brennerman's choice of counsel to represent him in this matter was Paul Weiss which was unable to represent him on this matter, and stated that Brennerman was "in the process of engaging new personal counsel." Attached to the letter were copies of two emails with respect to his purported attempt to retain Paul Weiss and a very long settlement proposal with respect to the ICBC dispute. There was no indication that the letter and emails were sent to ICBC's counsel. At a December 13

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19 DI 122, at 19-23.

20 DI 121; DI 125.

21 Brennerman has refused to provide any information concerning the location of any of his residences or his personal whereabouts. Latham & Watkins, which came into the case on behalf of Blacksands and Alpha Blue and remains their counsel of record, claims not to know anything about his location or whereabouts. *See* Tent Decl. [DI 136]; Harris Aff. [DI 132].

22 Pollak Aff. [DI 126] & Ex. B.

23 DI 126 & Ex. A.

24 DI 127.

25 DI 128.

court proceeding, ICBC counsel confirmed that they had not received copies from Brennerman.

Discussion

The rules authorize extensions of time within which acts may be done on a showing of good cause where, as here, the extension is sought in advance of the deadline.[26] Extensions usually will be granted "unless the moving party has been negligent, lacked diligence, acted in bad faith, or abused the privilege of prior extensions."[27] And while the rules do not explicitly require that notice be given of such applications, "[t]he prudent course . . . is always to file a motion that complies with Rule 7(b) when requesting an extension of a time period,"[28] which among other things requires service on the opposing party. In any case, such applications lie within the broad discretion of the district court.[29] The Court here considers the relevant factors to be these:

1. This application was made *ex parte*. The fact that Brennerman wrote his letter *pro se* gives no excuse for his failure to give notice to ICBC's counsel, as he copied lawyers at Latham, which ostensibly does not represent Brennerman personally.

2. The history of this matter gives little comfort that this application—extraordinary in at least because of its *ex parte* letter and its explication of a purported settlement offer that evidently has not been communicated to the opposing party—is anything other than an attempt to delay matters. Among the indications are these:

- Brennerman was warned on October 20, 2016 that he faced the possibility of an attempt to hold him personally in contempt of court if Blacksands did not fully comply with the First and Second Orders.[30] Brennerman evidently controls Blacksands and therefore presumably knew that Blacksands would not comply. He therefore has known for almost two months that he was extremely likely to face a contempt proceeding. Circumstances do not lend a great deal of credibility to the notion that he first sought to obtain personal counsel in that regard on December 9.

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26 Fed. R. Civ. P. 6(b)(1)(A).

27 1 James Wm. Moore et al., *Moore's Federal Practice* § 6.06[2] (3d ed. 2016).

28 *Id.*

29 *E.g.*, *Saviano v. Town of Westport*, 337 F. App'x 68, 69 (2d Cir. 2009).

30 *See* Harris Aff. [DI 129]; Tent Decl. [DI 131].

- Brennerman has advanced no reason to think that Latham, which has been in this case since the fall of 2015 on behalf of Blacksands, could not represent him personally.

- This is the third and, depending on one's interpretation of the record, perhaps the fourth, instance in this case in which Brennerman has sought an unspecified delay, ostensibly to retain counsel.

  - Brennerman delayed retaining counsel to represent Blacksands in this case despite the fact that he had engaged in extended pre-suit correspondence with plaintiff in which plaintiff made clear that it would sue unless Blacksands paid its debt to ICBC. Counsel did not appear on Blacksands' behalf until January 7, 2015, nearly a month after the action commenced, and they immediately sought a 30-day extension of time on the ground that they were "only retained . . . last week."[31]

  - After Blacksands' first attorneys were granted leave to withdraw on September 18, 2015, new counsel—Latham—did not appear until November 20, 2015.[32] Latham then promptly sought an extension of time within which to cure a default on a motion by a belated filing.

  - Almost immediately after entry of the Second Order and on the day on which the first contempt motion was made, Latham sought to withdraw. The motion was made with Brennerman's consent and ostensibly on the basis that "the only remaining issues relat[e] to Blacksands' counterclaim and Plaintiff's enforcement of the judgment."[33] But the withdrawal, had it been permitted, would have left Blacksands unrepresented. Whatever may have been in Latham's mind, Brennerman's consent to its withdrawal would have been consistent with an intention on his part to leave an unrepresented

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31 DI 5.

32 Blacksands and Alphablue were unrepresented during the intervening two months. During that period, Brennerman purported to act on their behalves although he is not a member of the Bar. *See* DI 37, DI 46.

33 Harris Decl. [DI 97] ¶ 4.

The Court denied the motion without prejudice to renewal after complete disposition of the contempt motion, which had been filed by the time the order was entered. DI 100. The motion has not been renewed.

corporate entity to face the contempt proceeding that either had begun or obviously was imminent and with a further excuse for a delay to find new counsel.

3. ICBC asserts that events have been and are in train that have resulted, or may result, in assets being placed beyond its reach.[34] Moreover, Brennerman's email to a lawyer at Paul Weiss enclosed a proposal—not submitted to the Court—for a reorganization of "Blacksands Pacific Group + Personal Re-Organization."[35] The risk of prejudice to ICBC in consequence of further delay is palpable.

4. Finally, the entire purpose of these *civil* contempt proceedings has been to coerce compliance with the First and Second Order, which do no more than require full and complete responses to the document requests and interrogatories ICBC served in March 2016, approaching a year ago. It thus has been open to Brennerman for that entire period to eliminate the reason for civil contempt proceedings by producing the discovery. The fact that he has not caused Blacksands to do so despite court orders compelling that action has been in bad faith throughout and remains so.

The Disposition of the Contempt Motion Against Brennerman

No appearance was filed and neither Brennerman nor any attorney for Brennerman appeared at the December 13 hearing. The Court held Brennerman in civil contempt and imposed coercive fines on him for each day during which Blacksands continued in its failure fully to comply with the First and Second Orders. It reserved decision on ICBC's request for compensatory damages and attorneys fees.[36] Moreover, the Court made clear if Blacksands complied with the orders, paid the judgment, or paid at least $3 million on account of the judgment on or before December 20, 2016, the Court would abrogate any coercive fines against Brennerman that accrued from December 13, 2016 to and including the date of compliance or payment. It indicated also that if Brennerman on or before December 20, 2016 submitted any papers in opposition to the contempt motion directed at him, the Court would determine whether to consider them despite their lateness and reserved the right to reopen the contempt proceeding with respect to Brennerman.

Conclusion

It long has been said that a person jailed for civil contempt holds the keys to the jail

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34 *See* Hessler Decl. [DI 123] ¶¶ 13, 23, 50-57.

35 DI 128, at 3 of 8.

36 These rulings were embodied in a written order dated December 15, 2016.

in his or her pocket. All that needs to be done to gain release is to do what the Court has ordered. That is true here, albeit not in a strictly literal sense. Brennerman need only see to it that Blacksands complies with the orders to moot or reduce the civil contempt issue. His failure to do so, and hence his application for yet more time to avoid coercive personal sanctions, is bad faith conduct.

The Court concludes also that Brennerman's *ex parte* application was made without notice to ICBC in the hope that the Court would act favorably on his application without benefit of ICBC's input. ICBC was and remains at significant risk of being further prejudiced by delay as Brennerman proceeds, or may proceed, with various steps that may make collection of its judgment even more difficult. Brennerman has articulated no reason why Latham, which has long been in this case, could not represent him on the personal contempt application. And even if there were some issue, or if Brennerman simply would prefer other counsel, he has been on notice of the likelihood of this application since October 20, 2016 and thus has had ample time within which to arrange representation.

In all the circumstances, the Court declined to adjourn the contempt hearing scheduled for December 13, 2016. It declined also to extend the time within which Brennerman was obliged to submit any responsive papers. In the event he files responsive papers before the Court decides the motion, the Court will determine whether it will consider them despite the fact that they will have been filed out of time. Should Brennerman submit such untimely papers, he would be well advised to respond to all of the concerns articulated in this memorandum.

SO ORDERED.

Dated: December 15, 2016

Lewis A. Kaplan
United States District Judge