

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case Number: 1:13-cv-21891-UU

CASINO ROYALE LLC, a Foreign Limited
Liability Company incorporated under the laws
of the Marshall Islands,

Plaintiff,

v.

FITTIPALDI INDUSTRIA NAUTICA LTDA, a
Foreign Limited Liability Company incorporated
under the laws of Brazil, and
WILSON FITTIPALDI JR, an individual,

Defendants.

**PLAINTIFF'S MOTION FOR
ADDITIONAL SANCTION FOR DEFENDANT'S CONTEMPT**

COMES NOW Plaintiff, by and through undersigned counsel, and pursuant to the Court's inherent authority, for entry of an order granting the additional sanction of incarceration against Defendant, Wilson Fittipaldi Jr. ("Fittipaldi"), for his continued contempt in failing to comply with this Court's Orders of March 31, 2016 [D.E. 74] and October 4, 2016 [D.E. 83] and states as follows:

FACTUAL BACKGROUND

1. On September 29, 2015, the Court entered a Final Default Judgment [D.E. 71] against Fittipaldi in the amount of Six Million Nine Hundred Seventy Two Thousand Six Hundred Eighty Two and 24/100 dollars (\$6,972,682.24).
2. On March 14, 2015, Plaintiff filed a Motion for Defendant to Complete Fact Information Sheet [D.E. 73].

3. On April 5, 2016, the Court entered an Order Granting Plaintiff's Motion for Defendant to Complete Fact Information Sheet in Aid of Execution, directing Fittipaldi to complete form 1.977 and provide the form with all supporting documentation to Plaintiff's counsel within 45 days (hereafter "Order to Compel") [D.E. 74].

4. Fittipaldi was properly notified of this requirement by service of the Court's Order to Compel at his address in Brazil by the Clerk of the Court.¹

5. On May 20, 2016, Plaintiff filed a Motion for Contempt [D.E. 75] on the grounds that Fittipaldi did not comply with the Order to Compel.

6. On June 9, 2016, Magistrate Judge Otazo-Reyes issued an Order Setting Show Cause Hearing on the Motion for Contempt (hereafter, "Order to Show Cause") [D.E. 78] and set a Show Cause Hearing for Wednesday, July 6, 2016 at 1:00 p.m.

7. The Order to Show Cause expressly directed Fittipaldi to "APPEAR before the undersigned Magistrate Judge at the United States District Court, 301 North Miami Ave., Miami, Florida . . . to show cause why he should not be held in contempt of court for failure to comply with the Order to Compel." *See* Order to Show Cause [D.E. 78 at 1-2]. The Order to Show Cause further directed Plaintiff's counsel to "serve a copy of this Order to Fittipaldi by process server when he next visits Florida" and to "file proof of such service with the Court by July 1, 2016." *See id.* at 2.

8. On July 1, 2016, Plaintiff filed a Status Report Concerning Service of Process on Wilson Fittipaldi, Jr. (hereinafter "Status Report") (D.E. 79) which described its efforts to serve Fittipaldi with the Court's Order to Show Cause as follows:

¹ On August 18, 2015 the Court entered an Order directing the Clerk of Court to send all future pleadings, motions, orders and any and all communications concerning this matter to Fittipaldi at his address in Brazil.

- a. Plaintiff attempted to serve Fittipaldi at his addresses in Key Biscayne, Florida where Fittipaldi was believed to reside when in Florida. *See* Status Report [D.E. 79, Ex. 2 at 2].
- b. Plaintiff delivered a copy of the Order to Show Cause to Fittipaldi's work address in Brazil. *See* Status Report [D.E. 79, Ex. 4 at 2].
- c. Plaintiff sent copy of the Order to Show Cause through Facebook messenger, which was confirmed as received. *See* Status Report [D.E. 79, Ex. 5 at 2]; Notice of Filing Supplemental Evidence in Support of Plaintiff's Status Report [D.E. 81, Ex. 1 at 1].

9. Fittipaldi did not challenge his receipt of notice of the Show Cause Hearing and did not otherwise respond to the Motion for Contempt.

10. Fittipaldi did not appear at the July 6, 2016 Show Cause Hearing. *See* Paperless Minute Entry [D.E. 80].

11. On September 16, 2016, Magistrate Judge Otazo-Reyes issued her Report and Recommendation and Certification of Facts Constituting Contempt [D.E. 82], finding clear and convincing evidence that Fittipaldi had notice of the Court's April 5, 2016 Order to Compel which ordered him to complete form 1.977 and provide the form with all supporting documentation to Plaintiff's counsel; that he failed to comply with said Order; that he had notice of the Magistrate's June 9, 2016 Order to Show Cause which required him to appear before the Magistrate on July 6, 2016 to show cause why he should not be held in contempt of Court; and that he failed to appear as required. [D.E. 82 pp. 3-4]

12. The Report and Recommendation further stated that “[u]nder the circumstances of this case, the undersigned finds that the only way to obtain compliance with this Court’s Order to Compel and Order to Show Cause is to find Fittipaldi in civil contempt and to impose upon him a fine of \$100 per day until he purges himself of the contempt that he failed to appear before the undersigned as required.” [D.E. 82 p. 4].

13. On October 4, 2016, the Court issued an Order Adopting Magistrate’s Report and Recommendation (herein after “Contempt Order”) [D.E. 83] holding Fittipaldi in contempt and imposing a fine of \$100 per day against Fittipaldi beginning from the date he was served with the Court’s Contempt Order until he purged himself of the contempt.

14. The Court further ordered the Plaintiff to serve the Contempt Order on Fittipaldi in accordance with the Federal Rules of Civil Procedure.

15. On October 10, 2016, Plaintiff filed its Notice of Compliance [D.E. 85], confirming it had served Fittipaldi Pursuant to Fed. R. Civ. Pro. Rule 5(b)(C), by mailing the Contempt Order to Fittipaldi’s last known home and business addresses. [D.E. 85 p. 2].

16. To date, despite a \$100 per day fine imposed by the Court, Fittipaldi has not appeared to purge himself of contempt. As such, the Plaintiff requests the Court enter a supplemental contempt order issuing a warrant for the arrest of Defendant, Wilson Fittipaldi, Jr., and ordering his imprisonment for civil contempt until he complies with this Court’s Orders [D.E.s 74 and 83].

LEGAL MEMORANDUM

A. The Court Has Inherent Authority to Issue Contempt Orders

This Court has the inherent authority to enforce its own orders by the exercise of contempt powers. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991) (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). Where a party continuously violates, disobeys, or otherwise ignores a valid court order, that party may be subject to being held in contempt of court and have fines, fees, and costs assessed against them. *See Brother v. BFP Investments, Ltd.*, 2010 WL 2978080 at *5-7 (S.D. Fla. July 26, 2010). “District courts have broad discretion in fashioning civil contempt sanctions.” *F.T.C. v. Slimamerica*, 2011 WL 882109, 3 (S.D. Fla. Mar. 9, 2011) (quoting *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1519 (11th Cir. 1990)).

B. The Court May Use Incarceration to Coerce Fittipaldi’s Compliance

The imposition of incarceration to sanction contempt is not limited to criminal contempt. *See Int’l Union v. Bagwell*, 512 U.S. at 827-829; *Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966). In *International Union v. Bagwell*, the United States Supreme Court made clear that an appropriately fashioned order of conditional incarceration for civil contempt is proper and will not implicate a contemnor's due process rights:

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket.

By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience, such that the contemnor cannot avoid or abbreviate the confinement through later compliance. . . . When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. The defendant is

furnished no key, and he cannot shorten the term by promising not to repeat the offense. . . .

512 U.S. 821, 840 (1994).

Civil contempt sanctions imposed to coerce compliance with a court order “‘cannot be any greater than necessary to ensure such compliance’ and may not be so excessive as to be punitive in nature.” *In re Jove Eng'g, Inc.*, 92 F.3d at 1558 (quoting *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991)). To mitigate the risk of becoming punitive, incarceration sanctions should be ordered only after less severe alternatives have failed or have been deemed doomed to fail. *See Combs v. Ryan's Coal Co.*, 785 F.2d at 981 (11th Cir. 1986). Further, the contemnor's incarceration must remain coercive: “[W]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights.” *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530 (11th Cir. 1992); *see Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442, 31 S. Ct. 492, 55 L. Ed. 797 (1911).

The Eleventh Circuit has upheld an order of indefinite incarceration pending the contemtor's compliance stating “although incarceration for civil contempt may continue indefinitely, it cannot last forever.” *In re Lawrence*, 279 F.3d at 1300 (quoting *United States v. O.C. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985)). A court ordering indefinite incarceration to enforce compliance must reconsider the incarceration at reasonable intervals to determine whether there remains a realistic possibility the contemnor will yield to the coercive effect of the sanction. *See In re Lawrence*, 279 F.3d at 1301 (“If the bankruptcy judge determines that, although Lawrence has the ability to turnover the Trust res, he will steadfastly refuse to do so,

the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion.")

Here, the Court attempted to coerce Fittipaldi to comply with its orders by imposing the lesser sanction of a \$100 per day fine. This sanction has failed and Plaintiff therefore requests the Court enter an order issuing a warrant to arrest Fittipaldi and for his incarceration until he purges himself of his contempt.

Dated: January 18, 2017

Respectfully Submitted,

MOORE & COMPANY, P.A.

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/s/ Clay M. Naughton

Clay M. Naughton, Esquire

Florida Bar No. 29302

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 18, 2017, this document was served by U.S. Mail on Fittipaldi Industria Nautica Ltda. and Wilson Fittipaldi, Jr. at the following address²:

Alameda Dálías, 224
Alphaville VI, Santana de Parnaíba
São Paulo, Brazil

And

Loja BraClean
No 79 Parque Laguna
Rua Sebastião de Souza Silva
Taboão da Serra, SP BR
06795

/s/ Clay M. Naughton

Clay M. Naughton, Esquire

² This document will also be sent via Facebook Messenger to Wilson Fittipaldi, Jr.'s account.