UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SISTEM MÜHENDISLIK INSAAT SANAYI VE TICARET, A.Ş.,

Plaintiff,

- against -

THE KYRGYZ REPUBLIC,

Defendant.

12-CV-4502 (ALC) (RWL)

REPORT & RECOMMENDATION TO HON. ANDREW L. CARTER: INCREASED SANCTIONS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Since November 14, 2016, Defendant, the Kyrgyz Republic, has failed to pay the more than eleven-million-dollar judgment (with interest) on which this action is based. Since March 2018, the Republic has failed to comply with discovery and several court orders. Since, May 7, 2020, the Republic has failed to pay the interim judgment for over two million dollars in sanctions imposed for that non-compliance. To this day, the Republic has failed to come into compliance despite coercive sanctions that have been accumulating at $5,000 per day. As a result, Plaintiff, Sistem Mühendislik Insaat Sanayi Ve Ticaret, A.Ş. ("Sistem"), has moved to increase the amount of sanctions to $15,000 per day. For the reasons set forth below, Sistem's motion should be granted.

Factual and Procedural Background

The facts underlying the judgment in this case, the initial sanctions imposed on the Republic, and the Republic's attempt to vacate sanctions have been set forth in previous orders and opinions of this Court. *See* Dkt. 175 (Order and Certification for Civil Contempt Pursuant to 28 U.S.C. § 636(e)(6)); Dkt. 205 (Report and Recommendation to deny the Republic's motion to vacate

sanctions and grant Sistem's cross-motion for entry of judgment on sanctions) (the "R&R"). Accordingly, the Court sets forth here only a brief summary, focusing on events since the Court's adoption of the R&R.

A. The Republic's Failure to Comply with Court Orders, Refusal to Pay Multiple Judgments, and Disregard for Sanctions

On September 9, 2009, Sistem obtained an international arbitration award against the Republic in the amount of $8.5 million plus costs and interest. The Republic refused to pay the award. Accordingly, on June 8, 2012, Sistem filed an action in this District to recognize and enforce the award. (Dkt. 1.) On November 14, 2016, the Court entered a judgment confirming the award in the amount of $11,603,319. (Dkt. 131.) The Second Circuit affirmed. (Dkt. 184.)

The Republic failed to pay the judgment. Sistem therefore pursued asset discovery. The Republic did not cooperate. On September 11, 2017, the Court granted Sistem's motion to compel and ordered the Republic to pay attorney's fees of $6,894.82. (Dkts. 152, 162 at 5.) The Republic moved for reconsideration. This Court denied that motion and ordered the Republic to pay another $9,477 in attorney's fees. (Dkt. 166.) The Republic has not paid either fee award. (Kry Decl. ¶ 57.[1])

Following the Republic's continued violations of discovery orders, on March 30, 2018, this Court issued a certification of facts recommending that the Republic be held in civil contempt. (Dkt. 175.) The certification explained that the Republic had violated at least five court orders that were clear and unambiguous, and concluded that "civil contempt sanctions of $5,000 per day of noncompliance are

[1] "Kry Decl." refers to the Declaration of Robert K. Kry executed on July 20, 2020 (Dkt. 229).

necessary to offset th[e] wrongful benefit to the Republic, to compensate Sistem for the Republic's ongoing contumacy, and to provide the necessary incentive for the Republic to comply." (Dkt. 175 at 6-7, 9.)

On October 31, 2018, the Honorable Andrew L. Carter, United States District Judge, adopted the certification and recommendation in its entirety. (Dkt. 185.) The contempt sanctions started accruing thirty days later. (Dkt. 185 at 6.) But despite the passage of nearly two years and daily accumulation of $5,000 in sanctions, the Republic still has not done anything to comply with the outstanding orders and discovery. (Kry Decl. ¶¶ 25-26, 29, 48-52.)

On May 7, 2020, the Court entered an interim judgment on the unpaid fee awards and accumulated contempt sanctions, which by then amounted to $2,281,371.82. (Dkt. 218.) The Republic has not paid any portion of that amount. (Kry Decl. ¶¶ 52, 57.)

B. The Republic's Implausible Motion to Vacate the Sanctions Award

On April 19, 2019, the Republic served a "notice of set-off and discharge" asserting that it no longer owed anything to Sistem because it had obtained, by assignment, an allegedly offsetting award issued by a Kyrgyz tribunal in 2011. (Kry Decl. ¶ 30.) On June 28, 2019, the Republic moved to vacate the sanctions on the basis of that award. (Kry Decl. ¶ 31.)

Sistem opposed and cross-moved to increase sanctions to $10,000 per day. (Kry Decl. ¶ 31.) On the eve of the due date for the Republic's reply, the Republic appeared through new counsel at Kellogg, Hansen, Todd, Figel & Frederick, PLLC ("Kellogg Hansen"). (Kry Decl. ¶ 32.) Sistem then withdrew its cross-motion to

increase sanctions without prejudice, explaining that, "[n]ow that the Republic has decided to engage new counsel, it is possible that its compliance with the Court's discovery orders may improve," and that the Court should "afford the Republic a further opportunity to comply before increasing the rate of sanctions." (Dkt. 204 at 1.)

On October 1, 2019, this Court recommended denying the Republic's motion to vacate, explaining that "[t]he Republic's latest effort to evade its obligations and compliance with court orders and judgments has no merit" and that the Republic's actions "appear to be a subterfuge to undermine a validly issued ICSID Award." (R&R at 6, 8 n.12, 19.) As to Sistem's withdrawal of its cross-motion to increase sanctions, the Court stated: "Although it was not required to do so, Sistem has chosen to wait to see if the Republic's retention of new counsel will result in the Republic's compliance with its obligations. Should that not occur, Sistem would be well within its rights to renew its request." (R&R at 6 n.9.)

On February 25, 2020, Judge Carter adopted that recommendation in its entirety, finding that "the Republic has not put forth even a facially plausible claim to set-off." (Dkt. 214 at 4 n.2, 8.) On March 6, 2020, Sistem sent the Republic a summary of the outstanding discovery and sought an update. (Kry Decl. ¶ 36 & Ex. C.) The Republic never responded. (Kry Decl. ¶ 37.)

C. The Republic's Further Delay by Failing to Cooperate with Its Own Counsel

Instead, on May 22, 2020, Kellogg Hansen moved to withdraw, citing, *inter alia*, Rule 1.16(c)(7) of the New York Rules of Professional Conduct (i.e., "the client fails to cooperate in the representation or otherwise renders the representation

unreasonably difficult for the lawyer to carry out employment effectively"). (Kry Decl. ¶ 38.) Kellogg Hansen submitted a declaration explaining that the Republic had paid the firm's invoice for the reply in support of the Republic's motion to vacate, but not two later invoices. (Dkt. 222 ¶¶ 3-4.) The declaration also stated that Kellogg Hansen had made multiple unsuccessful attempts to contact the Republic's client representatives since March 2020. (Dkt. 222 ¶¶ 11-14.)

On June 19, 2020, this Court granted Kellogg Hansen's motion to withdraw. (Dkt. 225.) The Court ordered Sistem to communicate with the Republic's original counsel, Grant McCrea, who remained counsel of record. (Dkt. 225.) Mr. McCrea stated that he attempted to contact his client but that his client failed to respond. (Kry Decl. ¶ 42 & Exs. D, E.)

D. Sistem's Renewed Motion to Increase Sanctions, and the Republic's Continued Vexatious Conduct

On July 20, 2020, Sistem renewed its motion to increase sanctions against the Republic. (Dkt. 227-29.) The Court ordered the Republic to file a response within forty-five days. (Dkt. 237.) The Republic did not file a response within that time. It did, however, belatedly send a letter by email to the Court styled as the Republic's objection to Sistem's renewed motion to increase civil contempt sanctions; the Court entered the Republic's letter on the docket on October 7, 2020. (Dkt. 240.)

The Republic's letter is both substantively and procedurally problematic and demonstrative of bad faith. Substantively, the Republic's letter opposes Sistem's motion – and additionally seeks vacatur of the sanctions already imposed and discontinuation of any further sanctions – on the basis of the Republic's alleged set-

off claim. As set forth above, however, the Court already has rejected that argument and found it not to be even facially plausible.

Procedurally, the Republic's submission suffers from two defects. First, the letter purports to be submitted by the Director of the Center for Court Representation of the Government of the Kyrgyz Republic. As a foreign sovereign, the Republic may not litigate this case pro se and, once again, is flouting the Court's orders. (*See* Dkt. 74 at 2-3 (ordering the Republic to appear by counsel admitted in the Southern District of New York).) Second, the letter contains a "cc" notation as follows: "cc: Counsel by electronic mail." Sistem's counsel, however, has no record of ever receiving the email. (Reply Declaration of Robert K. Kry (Dkt. 244) ¶¶ 3-4 & Ex. J.)

In short, the Republic continues to defy the Courts' orders and, far from indicating that it will comply, continues to resist and multiply Sistem's litigation costs.

The Court's Authority to Increase Contempt Sanctions

"A district court has wide discretion to impose sanctions, including severe sanctions, under Federal Rule of Civil Procedure 37 …." *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 294 (2d Cir. 2006). That broad discretion permits courts "to design a remedy that will bring about compliance" from a party that refuses to obey the court's orders. *Perfect Fit Industries, Inc. v. Acme Quilting Co. Inc.*, 673 F.2d 53, 57 (2d Cir. 1982). That discretion also permits a district court to "increase the amount of [a] daily fine" if "a higher coercive sanction is … warranted." *New York v. Shore Realty Corp.*, 763 F.2d 49, 54 (2d Cir. 1985).

Consistent with those principles, courts will increase the amount of a per diem fine when the existing fine has not secured compliance. *See, e.g.*, *United States v.*

Mongelli, 2 F.3d 29, 30 (2d Cir. 1993) (affirming order increasing fine from $4,000 to $10,000 per day); *United Fabrics International, Inc. v. Metro 22, Inc.*, No. 16-MC-253, 2017 WL 455552, at *1-2 (S.D.N.Y. Jan. 31, 2017) (doubling fine after "several months" of noncompliance); *Spectacular Venture, L.P. v. World Star International, Inc.*, 927 F. Supp. 683, 684, 686 (S.D.N.Y. 1996) (increasing fine from $1,000 to $2,500 per day after four months of noncompliance).

Indeed, courts sometimes prescribe escalating fines in the first place. *See, e.g.*, *1199 SEIU United Healthcare Workers East v. Alaris Health at Hamilton Park*, No. 18-CV-3336, 2019 WL 1448075, at *2 (S.D.N.Y. Mar. 11, 2019) (imposing fines for failure to comply with post-judgment asset discovery of $1,000 per day escalating to $5,000 after five days and $10,000 after twenty days); *CE International Resource. Holdings LLC v. S.A. Minerals Limited Partnership*, No. 12-CV-8087, 2013 WL 324061, at *3 (S.D.N.Y. Jan. 24, 2013) (imposing fine of $5,000 per day increasing to $20,000 per day after twenty business days); *Telenor Mobile Communications AS v. Storm LLC*, 587 F. Supp. 2d 594, 621 (S.D.N.Y. 2008) (imposing "initial contempt sanction of $100,000 per day, doubling to $200,000 per day thirty days thereafter, and to $400,000 per day thirty days after that, and continuing to double every thirty days until compliance is achieved"), *aff'd,* 351 F. App'x 467 (2d Cir. 2009).

Discussion

A. The Republic's Continued Defiance of the Court's Discovery Orders Justifies an Increase in Coercive Sanctions

The Republic's conduct has been and continues to be, in a word, contemptuous. Since Judge Carter imposed sanctions in October 2018, the

Republic has not produced a single document, answered a single interrogatory, or done anything else to comply with the Court's asset discovery orders. (Kry Decl. ¶¶ 25-26, 29, 48-52.) The existing sanctions have had no discernable impact on its compliance. An increase in sanctions is necessary to compel the Republic to comply and is justified for several reasons.

First, the duration of the Republic's noncompliance is staggering. Nearly two years have elapsed since the Court's initial imposition of sanctions, and the Republic still refuses to comply. A $5,000 per day sanction has had no effect on the Republic's litigation misconduct.

Second, the character of the Republic's noncompliance has worsened. In March 2018, this Court described the Republic's March 2018 production (of seventeen documents) as a mere "token production that did not represent a meaningful or good-faith effort to comply." (Dkt. 175 at 7.) But at least the Republic produced something. By contrast, the Republic has now produced nothing for over two years.

The Republic's total failure to move the ball forward for two years is particularly striking because the Republic's March 2018 discovery responses identified specific steps the Republic planned to take in the near future. For example, the Republic stated that it could not yet produce its loan documents and bank statements because they constituted "state secret[s]" and were "subject to [a] more stringent and lengthier disclosure authorisation process," which the Republic "hope[d] to complete … by April 2018." (Dkt. 174, Ex. A at 3.) So far as the record shows, the Republic has done nothing to move that process forward at all. (Kry

Decl. ¶ 25.) Similarly, in response to Sistem's demand for a copy of the Republic's state property inventory, the Republic stated in March 2018 that "this work has yet to be completed." (Dkt. 174, Ex. A at 2.) Two years later, the Republic is seemingly no closer to making progress on, let alone completing, that work. (Kry Decl. ¶ 26.)

The Republic's violations are all the more egregious given its continued disregard of its obligations even when reminded by counsel. After the Republic hired Kellogg Hansen to litigate its motion to vacate, and after the Court denied that motion, Sistem sent Kellogg Hansen a detailed summary of the outstanding discovery and asked for an update. (Kry Decl. ¶ 36 & Ex. C.) The Republic never responded. (Kry Decl. ¶ 37.) Instead, two months later, Kellogg Hansen moved to withdraw. (Kry Decl. ¶ 38.) Kellogg Hansen explained that the firm had alerted the Republic to Sistem's summary of the outstanding discovery obligations, but that the Republic had thereafter ceased responding to Kellogg Hansen's communications. (Dkt. 222 ¶ 10-14.)

Those facts justify a substantial increase in coercive sanctions. A $5,000 per day fine was warranted when the Republic made only a token effort to comply in 2018. Substantially larger sanctions are warranted now that the Republic has made absolutely no effort to comply for more than two years. The Court's existing sanctions simply have not been sufficient to compel the Republic's compliance.

B. The Republic's Recent Actions Further Confirm the Need for a Substantial Increase in Sanctions

The Republic's continued refusal to comply with this Court's discovery orders is a sufficient reason by itself to increase the amount of sanctions. But the Republic's other conduct over the past two years aggravates the situation even

further.

Instead of endeavoring in good faith to purge its contempt and pay the sanctions imposed on it, the Republic instead devoted its resources to attempting to circumvent the Court's orders through the assignment of an allegedly offsetting award from an arbitral tribunal in the Republic. (Kry Decl. ¶¶ 30-31.) As this Court previously concluded, "[t]he Republic's latest effort to evade its obligations and compliance with court orders and judgments has no merit" and "appear to be a subterfuge to undermine a validly issued ICSID Award." (R&R at 6, 8 n.12.) Judge Carter agreed, stating that "the Republic has not put forth even a facially plausible claim to set-off." (Dkt. 214 at 4 n.2.)

The Republic's choices about how to spend its money make clear that the Republic places a high priority on trying to evade this Court's authority and no priority whatsoever on complying with the Court's orders. The Republic's priorities became even clearer after the Court denied its motion to vacate. Promptly after this Court ruled, the Republic stopped paying its legal bills and stopped communicating with its lawyers. (Dkt. 222 ¶¶ 10-14; Kyr Decl. Exs. D, E.)

Even the Republic's actions in responding to the instant motion show disregard for the Court's authority and the applicable rules. The Republic improperly appeared pro se; failed to properly file its response and serve Sistem; and merely rehashed its set-off arguments that had already been found implausible.

In short, this is not merely a case of a judgment debtor that passively failed to comply with asset discovery and then failed some more. The Republic has clearly demonstrated its refusal to comply with the Court's orders, and its determination to

actively engage in vexatious litigation.

C. Increasing Sanctions to $15,000 per Day Is a Proportionate Next Step

Turning to the amount of an increased sanction, Sistem submits that a three-fold increase, to $15,000 per day, is proportionate to the Republic's egregious misconduct and the need to coerce compliance. This Court agrees.

A substantial increase in sanctions is necessary to coerce the Republic to comply. As the Court has previously acknowledged, "the Republic is deriving substantial benefits" from its refusal to pay because "the post-judgment interest rate on the judgment is less than the Republic's actual cost of borrowing." (Dkt. 175 at 9.) The Federal Reserve's aggressive rate-cutting in response to the coronavirus pandemic has now cut the benchmark interest rate to practically zero, providing even less incentive for the Republic to pay the judgments against it. (Kry Decl. ¶¶ 61-65 & Exs. G, H.) The existing $5,000 per day sanctions mitigate that effect to some extent but clearly have not been sufficient to induce the Republic to comply. Additional sanctions are necessary to coerce the Republic to pay the judgment or to comply with the asset discovery necessary to collect it involuntarily.

The Republic has never claimed it is unable to pay a larger sanction. The Republic receives billions of dollars a year in taxes and other revenues. (Kry Decl. ¶ 66.) The Republic apparently has ample resources to pay but simply chooses not to. In light of the circumstances of this case, increasing sanctions to $15,000 per day is a modest next step to coerce the Republic into complying with its discovery orders. *Cf. In re Marc Rich & Co., A.G.*, 707 F.2d 663, 670 (2d Cir. 1983) (affirming $50,000 per day sanction for foreign corporation's refusal to comply with grand jury

subpoena); *International Business Machines Corp. v. United States*, 493 F.2d 112, 115-16 (2d Cir. 1973) (dismissing appeal of $150,000 per day sanction for failure to comply with pretrial discovery order); *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (affirming $50,000 per day sanction against corporation owned by foreign government for failing to comply with grand jury subpoena).

Conclusion

For foregoing reasons, I certify pursuant to 28 U.S.C. § 636(e)(6) that a sufficient factual basis has been shown,[2] and also find that Sistem has established its right to relief by evidence satisfactory to the Court within the meaning of 28 U.S.C. § 1608(e) to the extent applicable,[3] for the entry of an order (1) increasing the existing civil contempt sanctions from $5,000 per day to $15,000 per day, (2) commencing thirty days after Judge Carter's entry of an order on this recommendation, and (3) terminating upon the Republic's satisfaction of the judgement or full compliance with all outstanding discovery demands arising from this Court's January 2018 discovery orders. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b), the parties shall have fourteen (14) days to file written objections to this

[2] 28 U.S.C. § 636(e)(6) authorizes Magistrate Judges to certify facts serving as the basis to order the alleged contemnor to show cause before a District Judge why the alleged contemnor should not be held in contempt. This Court previously issued the requisite certification leading to Judge Carter's order holding the Republic in contempt and imposing sanctions. (Dkt. 175.) To the extent new facts recounted herein require similar certification, this Court provides it above. Regardless, the Republic's failure to purge its contempt alone justifies increasing the amount of sanctions against it.

[3] 28 U.S.C. § 1608(e) provides that "[n]o judgment by default shall be entered … against a foreign state … unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This Report and Recommendation is not premised on judgment by default but instead based on failure to purge contempt. Accordingly, 28 U.S.C. § 1608(e) is not presently applicable. Out of an abundance of caution, however, Sistem has asked the Court to make the requisite finding under the statute. (Dkt. 239.) As stated above, the Court so finds.

recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the Chambers of the Honorable Andrew L. Carter, Jr., 40 Foley Square, New York, New York 10007, and to the Chambers of the undersigned, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York,
November 5, 2020

Copies transmitted to all counsel of record.