

**IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF LOUISIANA
New Orleans Division**

**NATIONAL RIFLE ASSOCIATION OF
AMERICA, INC., *et al.*,**)

Plaintiffs)

v.)

C. RAY NAGIN, Mayor of New Orleans, and)

**WARREN RILEY,
Superintendent of Police, New Orleans**)

Defendants)

**CIVIL ACTION NO. 05-4234
Hon. Carl J. Barbier
Section "J"
Magistrate 2**

**MEMORANDUM IN SUPPORT OF MOTION
TO HOLD DEFENDANTS C. RAY NAGIN
AND WARREN RILEY IN CONTEMPT FOR
VIOLATION OF THE CONSENT ORDER**

The plaintiffs National Rifle Association of America, Inc., and Second Amendment Foundation, Inc., hereby set forth the following facts, reasons, and authorities in support of their motion to hold defendants C. Ray Nagin and Warren Riley in contempt for failure to comply with the Consent Order dated September 23, 2005, and to set a hearing date for a trial on whether said defendants should be held in contempt, to include their testimony in open court.

I. DEFENDANTS HAVE FAILED TO COMPLY WITH THE

CONSENT ORDER TO RETURN CONFISCATED FIREARMS

A. The September 23, 2005, Order that Defendants Return Confiscated Firearms to Their Lawful Owners

On September 22, 2005, plaintiffs filed a complaint and a motion for a temporary restraining order and for a preliminary injunction to enjoin unlawful confiscation of firearms in the wake of Hurricane Katrina and to require the return of confiscated firearms to their lawful owners. Defendants included Mayor Ray Nagin and Superintendent of Police Edwin Compass (now succeeded in office by Warren Riley¹), referred to below as the “New Orleans defendants,” and Sheriff Jack Strain and others, referred to below as the “St. Tammany defendants.” Counsel for all defendants received notice and the case was set for hearing the next day.

On September 23, 2005, the Honorable Jay C. Zaney signed a Consent Order which was agreed to and signed by counsel for all parties, including the plaintiffs, the New Orleans defendants, and the St. Tammany defendants. The Order decreed as follows:

[T]hat C. Ray Nagin, Mayor of New Orleans; P. Edwin Compass III, Superintendent of Police for New Orleans; and Jack Strain, Jr., Sheriff, St. Tammany Parish; and the officers, deputies, agents, servants, and employees of all such persons, and upon those persons in active concert or participation with them, are hereby enjoined and prohibited, until further order of this Court:

1. From confiscating lawfully-possessed firearms from citizens, including, but not limited to, Plaintiff Buell O. Teel and members of Plaintiffs National Rifle Association, Inc. and Second Amendment Foundation, Inc.
2. And they are further ordered to return any and all firearms which may have been confiscated from Plaintiffs Buell O. Teel, members of Plaintiffs National Rifle Association, Inc. and Second Amendment Foundation, Inc., and all other

¹F.R.Civ.P. 25(d).

persons who lawfully possessed them, upon presentation of identification and execution of a receipt therefor.

Id. at 3-4.

The text of the Consent Order was preceded by general denials by the defendants of the allegations of the Complaint, denials that it was their policy unlawfully to seize firearms from their lawful possessors, and denials that they had any such firearms in their possession. *Id.* at 2-3. Despite such denials, which defendants typically make for pleading purposes, it was incumbent on the defendants fully to apprise themselves of all relevant facts and to make all reasonable efforts, as the Order states, “to return any and all firearms which may have been confiscated from Plaintiffs . . . and all other persons who lawfully possessed them” *Id.* at 4, ¶ 2.

B. Compliance by St. Tammany Defendants with the Injunction Order

The St. Tammany Parish defendants took immediate steps to comply with the injunction order. Those defendants kept records of the seized firearms and their owners, including contact information, safely stored them, attempted to contact their owners, and made the firearms available for their owners to claim.

Accordingly, the plaintiffs and the St. Tammany defendants entered into a Consent Order Granting Permanent Injunction and Dismissal of Remaining Claims, which this Court signed on January 3, 2006. The Order decreed that the St. Tammany defendants “are hereby enjoined and ordered to cease and desist confiscating lawfully-possessed firearms from all citizens” It further ordered that these defendants “return any and all firearms which may have been confiscated

by Defendants, their officers, deputies, agents, servants, and employees of all such persons from Plaintiff, Buell O. Teel . . .; members of Plaintiff, National Rifle Association, Inc., who lawfully possess firearms; and all other persons who lawfully possess them, upon presentation of identification and execution of a receipt therefor.” Finally, the complaint was dismissed as to these defendants.

C. The New Orleans Defendants Have Failed to Comply with the Injunction Order

The New Orleans defendants, by contrast, have completely failed to comply with the injunction order that confiscated firearms be returned to their rightful owners. Plaintiffs have sought to cooperate with these defendants and to assist them in implementing measures to comply, but the defendants have refused to communicate with plaintiffs on the subject or to take any steps to comply with the order.

The only way for the New Orleans defendants to comply with the injunction order would be to gather comprehensive records on all known firearm confiscations and to inventory firearms being held, to make known and available to the public information on how to enquire whether their firearms are being held by the New Orleans police, to establish procedures to claim the return of firearms, and to provide a place or places where owners may physically retrieve their firearms.²

²By letter dated December 6, 2005 (copy attached herewith), plaintiffs’ counsel suggested the following measures to defendants’ counsel, who never answered the letter:

1. Announcement of a telephone number, website address, email address, postal address, and physical address where persons may make enquiries about seized firearms and retrieve them. The announcement should be prominently made in press releases, the New Orleans

Defendants have taken none of these steps. Instead, defendants simply deny that they ever authorized the confiscation of any firearms and deny that the New Orleans police ever confiscated firearms from their lawful owners or have possession of any such firearms.

The Complaint includes pertinent allegations which millions of Americans witnessed on television or read in the newspapers:

14. During and after Hurricane Katrina, beginning in August 2005 and continuing through the present, Defendants Mayor C. Ray Nagin and P. Edwin Compass III, the Superintendent of Police, have pursued a policy of seizing lawfully-possessed firearms from law-abiding residents. Superintendent Compass announced, on or about September 8, 2005, that anyone with a weapon, even one legally registered, will have it confiscated, adding: "No one will be able to be armed. Guns will be taken. Only law enforcement will be allowed to have guns." Some news accounts attribute these statements to New Orleans Deputy Police Chief Warren Riley, but they represent the policies of Defendants Nagin and Compass.

15. During the same period, Mayor Nagin ordered the New Orleans Police and other law enforcement entities under his authority to evict persons from their homes and to confiscate their lawfully-possessed firearms. Police went from house to house and confiscated numerous firearms from citizens at gunpoint.

Complaint at 4.

A videotape of the above Compass-Riley announcement is filed herewith. Newspaper articles on the same subject, together with other reports of firearms confiscations, are also being filed

website, newspapers, and by other media.

2. Establishing an inventory of seized firearms and a list of persons to whom they belong. Such persons are to be notified via any and all available contact information that their firearms are being held and may be retrieved. Firearms whose owners are unknown shall be listed and published by make, model, caliber, and serial number, and shall be made available so that the owners may claim them.

herewith.

By letter dated November 15, 2005, plaintiffs' counsel sent to counsel for the New Orleans defendants a summary of firearm confiscation incidents together with actual witness statements confirming the same. A copy of this letter with witness statements is attached. Counsel for New Orleans never responded to this letter, and failed to return scores of telephone messages left on voice mail from plaintiffs' counsel seeking to resolve this matter.

The above information includes incidents such as:

- NOPD officers stopped a vehicle in the French Quarter on September 21 and seized firearms from Jason Klemm and Joseph Lee Hooper, even though they exhibited firearm carry permits. Hooper asked at the 1st District Station for his firearm to be returned. Police on duty told him that they had no firearms and asked him to leave. Through the intervention of a family friend, he was taken to a detective who had his firearm and returned it.

- Robert Edward Zas and four friends evacuated from his home on September 9. New Orleans police stopped his vehicle at a checkpoint at the BellSouth building on Poydras and Barrone St. Upon questioning, he informed NOPD that they had a handgun and a rifle, both of which police seized. Included was a pistol in a suitcase belonging to Lisa Ann Zalewski.

- Ashton R. O'Dwyer, Jr., during the week prior to September 9, exited his vehicle at his house at Willow and Monticello Streets. As he lawfully carried a revolver from his vehicle toward his house, NOPD officers yelled at him to drop his weapon and put his hands in the air. He complied, was detained in handcuffs in the back of the patrol car, and later released. Police kept his

revolver and refused to give him a receipt.³

Moreover, plaintiffs' investigator interviewed witnesses who are willing to testify as follows:

- A NOPD officer confirmed that NOPD officers at his roll call were given a direct order to seize any guns in possession of a person who could not verify ownership. The officers at the roll call were told to call the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to pick up any seized weapons. However, this officer stated that the ATF took several hours to come to pick up any seized weapons. Therefore, he and other NOPD officers stopped calling the ATF. Regarding seized firearms, he stated: "I am not real proud of it, but if they were nice, most of the guys kept them, if they were crap, they tossed them in the river or in the canal." At least four (4) additional NOPD officers will verify that they were ordered at roll call to seize any guns in possession of persons who could not prove ownership.

- Two ATF agents stated that they told NOPD that the ATF could not take any firearms that had not been taken in the commission of a crime. When the NOPD insisted that the ATF take the firearms, the ATF again refused. However, because NOPD did not have the space to store the guns seized, the ATF rented, at ATF expense, a POD for the storage of guns seized by the NOPD.

As noted, plaintiffs' counsel provided full documentation of the above to defendants'

³National television broadcast several policemen assaulting and confiscating a firearm from Patricia Konie in her home, but they included a Louisiana State trooper and several California Highway patrolmen, and it is not known whether the latter were deputized by NOPD. This incident is the subject of *Patricia L. Konie v. State of Louisiana et al.*, Case 2:05-cv-06310-MLCF-DEK (E.D. La.).

counsel, but defendants have not taken steps to have the NOPD comply with the order to return confiscated firearms.

Given the devastation and the dispersal of many residents to other places, where they are struggling to rebuild their lives, there can be no doubt that there were numerous citizens who were victims of defendants' gun confiscation policies who have not been identified. Plaintiff NRA has over forty thousand members in Louisiana, and not less than 8,000 in the following Parishes: Orleans, St. Bernard, Plaquemines, Jefferson, St. Charles, and St. Tammany.⁴ Plaintiff SAF has thousands of members and supporters in Louisiana, over 200 of whom have contact addresses in the city of New Orleans.⁵ Needless to say, most NRA and SAF members are gun owners, and those in New Orleans were subject to defendants' confiscation policies.⁶ The Consent Order commands that confiscated firearms be returned to NRA and SAF members and to "all other persons who lawfully possessed them." Defendants have made no effort to do so.

II. THE STANDARDS TO FIND CIVIL CONTEMPT ARE MET HERE

⁴Affidavit of Wayne LaPierre, previously filed in this case in support of motion for TRO/Preliminary Injunction.

⁵Affidavit of Alan M. Gottlieb, previously filed in this case in support of motion for TRO/Preliminary Injunction.

⁶The NRA and SAF have standing to represent their members. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 398 n.7 (5th Cir. 1980) ("The Supreme Court has long recognized that a voluntary association has standing to bring suit on behalf of its members"). An association may have standing even though "it is not possible to state with certainty which of the members in the plaintiffs' associations will be harmed." *American Maritime Ass'n v. Blumenthal*, 458 F. Supp. 849, 855 (D. D.C. 1977), *aff'd* 590 F.2d 1156 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 943 (1979).

Defendants should be found in civil contempt because they have failed to comply with the Consent Decree, a type of injunction order. Since a finding of civil contempt is sought, defendants would need only to comply with the injunction order to purge themselves of contempt.

Southern Railway Company v. Lanham, 403 F.2d 119, 124-25 (5th Cir. 1969), which involved failure to comply with a discovery order, explained:

Civil contempt is 'wholly remedial' serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance. . . . Criminal contempt, on the other hand, is punitive, rather than remedial, serves to vindicate the authority of the court, and cannot be ended by any act of the contemnor.

While criminal contempt punishes a party for disobedience to the court, civil contempt awards relief to a private suitor, and permits the violator “to purge itself and remove the sanction by compliance with the court's . . . order.” *Id.* at 125.⁷ That is all plaintiffs seek here.

Moreover, a party must make every reasonable effort to comply with an injunction order, whereas here defendants have done nothing to comply. *Harris v. City of Philadelphia*, 47 F.3d 1333 (3rd Cir. 1995), upheld a contempt fine against the City for failure to comply with a consent decree regarding certain prison conditions. “The agreement memorializes the bargained for positions of the parties and should be strictly construed to preserve those . . . positions.” *Id.* at 1337 (citation omitted). Defendants have made no effort to comply here.

⁷See *Fireman's Fund Insurance Co. v. Myers*, 439 F.2d 834, 836-38 (3rd Cir. 1971) (upholding issuance of rule to show cause and finding of civil contempt where defendant could purge himself of contempt by depositing certain funds by a deadline).

The standard for whether it is possible to comply is high. “The City may escape contempt by showing that it *could not possibly comply* with the court's order *despite making all reasonable efforts to do so.*” *Id.* at 1340 (emphasis added), citing *United States v. Ryan*, 402 U.S. 530, 534 (1971). A finding of contempt is appropriate where the record is “‘devoid of any evidence’ that defendants exhausted all reasonable efforts” to comply. *Id.* at 1342 (citation omitted).

Nor have defendants sought further review of the injunction order. If a defendant believes the injunction order is incorrect, “the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.” *Maness v. Meyers*, 419 U.S. 449, 458 (1975).

O’Sullivan v. City of Chicago, 396 F.3d 843 (7th Cir. 2005), involved a suit to enforce a consent decree that required the City to make employment decisions without regard to political affiliation. The plaintiffs sought a rule to show cause why defendant should not be held in civil contempt for failure to comply with the decree, and an order to adhere to the decree in the future. *Id.* at 851.

Ruling in favor of plaintiffs, the court noted that “federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.” *Id.* at 867, quoting *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899, 905 (2004). “A party may not simply ignore the decree because it believes that factual or legal changes since the decree's entry renders continued enforcement illegal or inequitable.” *Id.* at 868.

Here, the injunction order is binding on the named defendants Mayor Ray Nagin and Superintendent of Police Warren Riley and the entire NOPD acting under their supervision. Fed.

R. Civ. P. 65(d) provides that an injunction order “is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Thus, “a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control.” *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Persons in "active concert or participation" include “nonparties who are successors in interest to parties named in the injunction” as well as persons who “aid or abet the named parties in a concerted attempt to subvert” the injunction. *Rockwell Graphic Systems, Inc. v. Dev Industries, Inc.*, 91 F.3d 914, 919 (7th Cir. 1996).

In *Rockwell Graphic Systems*, defendant was enjoined from disclosing certain trade secrets. Plaintiff moved for a rule to show cause why defendant’s successor and former president should not be held in civil contempt for violation of the injunction. The court held that both parties had a due process right to have the court resolve factual disputes:

There is no reason to suppose that this due process protection accrues only to the benefit of those alleged to be in contempt. A party who seeks enforcement of an injunction through the medium of civil contempt is likewise entitled to the resolution of genuine issues of material fact that bear upon the allegations by which it seeks to support a finding of contempt.⁸

91 F.3d at 920. Here too, the plaintiffs are entitled to be heard and to have the benefit of the court’s resolution of genuine issues.

⁸Accordingly, the district court’s order denying the motion for a rule to show cause why persons acting in concert should not be held in contempt was reversed. *Id.* at 921.

In sum, in the absence of evidence that defendants have exhausted all reasonable efforts to comply with the injunction order, the standards here are met for the defendants to be held in contempt.

III. PLAINTIFFS ARE ENTITLED TO A TRIAL AT WHICH DEFENDANTS NAGIN AND RILEY MAY BE CROSS EXAMINED TO DETERMINE WHETHER THEY SHOULD BE HELD IN CONTEMPT

Plaintiffs are entitled to a trial of the issue of whether defendants should be held in contempt, including testimony in open court by the defendants. F.R.Civ.P. 43(a) provides in part that “in every trial, the testimony of witnesses shall be taken in open court,” and the rule in the Fifth Circuit is that one is entitled to a trial on whether a consent order has been breached.

In *Sanders v. Monsanto Co.*, 574 F.2d 198, 199 (5th Cir. 1978), plaintiffs-appellants in a civil rights action filed a motion to hold defendants in contempt of a consent order. The Fifth Circuit held that they were entitled to have their motion heard on oral testimony, not just affidavits. The court explained:

Appellants argue, however, that because a civil contempt action is more in the nature of a trial on the merits of a breach of the consent "contract" Rule 43(a) should control. As provided by Rule 43(a), a trial requires a full hearing complete with oral testimony. We agree with appellants. *Id.*

The court reasoned that “a contempt proceeding from a court order is highly factual, approximating a trial on the merits.” *Id.* Moreover, “testimonial evidence has the highest reliability because the credibility of the witness can be evaluated, and the factual issues narrowed by cross-examination. Because the contempt proceedings depend so heavily on complex facts not

readily perceivable from the record, an oral hearing within the scope of Rule 43(a) is necessary.”
Id. at 200. Finally, the court held that “the court must make findings of fact and conclusions of law in its decision on a motion for civil contempt”

Accordingly, this Court should set a hearing date for a trial on whether defendants Nagin and Riley should be held in contempt, to include testimony in open court by said defendants.

CONCLUSION

This court should grant this motion to hold defendants Mayor Ray Nagin and Superintendent of Police Warren Riley in contempt for failure to comply with the Consent Order dated September 23, 2005, and to set a hearing date for a trial on whether said defendants should be held in contempt, to include their testimony in open court.

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