UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 10-223 (RBW)
WILLIAM R. CLEMENS, Defendant.	)	

DEFENDANT'S MOTION AND MEMORANDUM OF LAW
TO AWARD FEES AND COSTS ASSOCIATED WITH MISTRIAL

Defendant William R. Clemens respectfully moves for an award of fees and costs that he incurred in preparation for and during his trial, which ended on July 14, 2011, when the Court declared a mistrial. On September 2, 2011, the Court ruled that the Government's conduct precipitating the mistrial did not bar re-prosecution under the Double Jeopardy Clause of the U.S. Constitution, but the Court did state that it would be "unfair" for Mr. Clemens to have to pay twice to defend himself in repeated portions of a retrial. The Court specifically invited this motion, explaining:

> I don't know what my authority would be to require that those expenses be reimbursed if there is a defense Motion in reference to that. . . . I think fundamental fairness obviously would require that he be reimbursed for those expenses, but sometimes fundamental fairness doesn't bear out when it comes to legal issues that a Court has to resolve.
>
> But if the defense feels that that's an appropriate remedy to address what occurred, I obviously would entertain that and make the best call I could based upon existing case law.

Tr. of Proceedings on Sept. 2, 2011 (excerpts attached hereto as Exhibit 1), at 59:7–19.

Existing case law empowers this Court to reimburse Mr. Clemens. Indeed, other federal district courts have awarded fees and costs in similar circumstances. The Court should therefore exercise its discretion to do "fundamental fairness" and grant Mr. Clemens relief.

BRIEF FACTUAL BACKGROUND

Roger Clemens was indicted on August 11, 2010, following a nearly three-year investigation involving over 100 law enforcement officers from multiple agencies, a private investigation headed by an international law firm, and an investigation by a Congressional committee. Vast resources were spent during these investigations. Mr. Clemens's initial trial began with a pretrial hearing on July 5, 2011, and jury selection from July 6 to July 12, 2011. Opening statements were delivered by counsel for the parties and the Government called its first witness the following day. On July 14, 2011, the sixth day of trial in this matter and the second day of testimony, the Government introduced an exhibit in violation of a pretrial order. The Court immediately addressed the admission and publication of this exhibit with counsel for the parties. Ultimately, the Court declared a mistrial after finding that the Government's admission and publication of that exhibit "put this case in a posture where Mr. Clemens cannot now get a fair trial before this jury." Tr. of Jury Trial Proceedings on July 14, 2011, at 50.

On September 2, 2011, the Court heard argument on Mr. Clemens's motion to dismiss the indictment and bar retrial pursuant to the Double Jeopardy Clause. During the hearing, defense counsel raised the question of whether fairness is served by making a criminal defendant "pay for something that's already happened to happen again" because of the Government's mistake. *See* Ex. 1 at 22:17 – 23:12. The Court posed a related question to counsel for the Government:

> Obviously it cost Mr. Clemens a lot of money to go through the four and a half days of jury selection and to have participated in the other parts of the trial, which if I were to conclude that there was no double jeopardy bar, all of those efforts and time would have to be repeated; and obviously that's not going to come cheap. Should he have to bear that expense or should the United States Government have to cough up the money to pay for that?

> Why should he—if the Government engaged in conduct that in my view clearly was in derogation of clear rulings I made and, as a result of that, put the defense in a position where it made the request . . . [—] should he have to bear that economic expense or should the United States have to bear it?

Id. at 36:16 – 37:5; *see also id.* at 37:9–12 & 37:16–20. The Court specifically pointed out that this question would be ripe "even if I don't decide that the heavy standard that [*Oregon v. Kennedy*, 456 U.S. 667 (1982)] has created has been satisfied." *Id.* at 37:2–3. The Court then found that it "doesn't seem fair" for Mr. Clemens to be in a posture to pay "a lot of money to go through that part of the trial which, if there is a retrial, . . . will have to be repeated [and] which he will have to pay for a second time." *Id.* at 37:12 & 59:2–4.

The Court's concerns already have been reflected in the weeks since the September 2 hearing. The Government is now playing catch-up with the extra time it earned through the mistrial, having recently demanded additional discovery information from the defense.

ARGUMENT

Federal courts have inherent power to sanction conduct that abuses the judicial process. This power is necessarily vested in courts to enable them to manage their own affairs and achieve the proper disposition of cases. *See Link v. Wabash R.R. Co.,* 370 U.S. 626, 630–631 (1962). The fact that the Government is the party who committed the wrongful act in this case does not reduce this power; the Court can sanction the United States to the same extent it can sanction private parties. *See, e.g.*, *Ramos Colon v. U.S. Atty. for Dist. of Puerto Rico*, 576 F.2d 1, 3 (D.P.R. 1978) (citing *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965)); *see also United States v. Ivory*, 29 F.3d 1307, 1311 (8th Cir. 1994) (explaining that a criminal defendant's request for the expenses of a retrial after a mistrial raising potential double jeopardy issues is "certainly" reviewable on appeal from any final judgment). "Indeed, the public interest demands

that prosecutors be held to the highest standard of conduct." *Colon*, 576 F.2d at 3 (citing *Smith*, 351 F.2d at 816; *Imbler v. Pachtman*, 424 U.S. 409, 420 (1975)).

When faced with sanctionable conduct, it is appropriate that the Court restore the prejudiced parties to the same position they would have been in absent the wrongful conduct. *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976). The D.C. Circuit has explained that, "despite the general American rule against fee-shifting," a district court has the authority to make a prejudiced party "whole" by compensating the party for his legal fees. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union,* 103 F.3d 1007, 1017 n. 14 (D.C. Cir. 1997); *see also Shepherd v. Am. Broad. Co.,* 62 F.3d 1469, 1475 (D.C. Cir. 1995) ("Other inherent power sanctions available to courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence."). The *Food Lion* court also noted that, unlike the prerequisites to bar a second trial under the Double Jeopardy Clause, bad faith is not required for an award of attorney's fees to remedy the violation of a court order. *Food Lion,* 103 F.3d at 1016 & 1017 n. 14. This rule is in line with well-settled law recognizing a trial court's discretion to impose sanctions in the form of attorney's fees up to the entire cost of the litigation as a sanction for willful disobedience of a court order. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 44–45 (1991) ("[A]n assessment of attorney's fees is undoubtedly within a court's inherent power . . . .").

Trial courts in this District have imposed this very sanction against governmental parties in both civil and criminal cases. *See, e.g., Landmark Legal Foundation v. E.P.A.*, 272 F. Supp.2d 70, 86 (D.D.C. 2003) ("It is well-established that courts may award attorneys' fees and expenses in conjunction with a civil contempt proceeding."); *United States v. Shelton*, 539 F. Supp.2d 259,

262 (D.D.C. 2008) (imposing fine against prosecuting agency). Indeed, at the September 2, 2011 hearing, the Government appeared to recognize that such an award is within this Court's discretion and authority. *See* Ex. 1 at 37:21–22 ("Your Honor, of course, it is this Court's prerogative to make determinations of that ilk.").

In this case, an award of fees and costs will at least partially restore Mr. Clemens to the same position he was in before the prosecutors engaged in conduct meriting a mistrial. Mr. Clemens proposes to submit a petition to the Court quantifying reasonable fees and expenses incurred between June 25, 2011 and July 14, 2011 if the Court grants this motion. As the Court correctly observed, "[A]ll of those efforts and time would have to be repeated; and obviously that's not going to come cheap." *Id.* at 36:19–21.

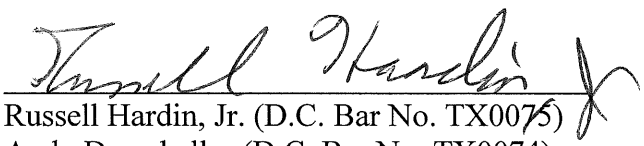
The case of *Estate of Wallace v. City of Los Angeles*, 229 F.R.D. 163 (C.D. Cal. 2005), is analogous and instructive. In that case, the representatives of the estate of rapper Christopher Wallace, a.k.a. "Biggie Smalls" or "The Notorious B.I.G.," brought suit against the City of Los Angeles and the Chief and officers in the Los Angeles Police Department for alleged involvement in Mr. Wallace's murder. Several days into trial, an individual affiliated with the Police Department informed the plaintiffs that the government parties may have withheld critical information to the case. Plaintiffs moved for entry of default against defendants, or, in the alternative, a mistrial and an award of attorneys' fees as a sanction for the defendants' actions. After invoking the "inherent power to sanction that abuses the judicial process," the Court granted the motion for mistrial and held that Plaintiffs were "entitled to an award of attorneys' fees and costs as a sanction," subject to a fee application. 229 F.R.D. at 164, 166. The same result is warranted here.

Perhaps most importantly, a reimbursement order is fair. The Government had its day in court. The conduct of its own attorneys resulted in irretrievably wasted time and the loss of an opportunity for a one-time, fair resolution of these charges for all involved. This is not fair to the accused—any accused—nor is it fair to the United States District Court and the taxpayers of this country. But of these constituencies, only Mr. Clemens directly paid out of his personal funds to prepare for trial, resources now wasted through no fault of his own. The Court can and should make the Government, the party responsible for the need for a second trial, pay for the waste and loss incurred in connection with the first one.

CONCLUSION

Accordingly, and for each of the reasons set forth above, this Court should order the Government to pay fees and costs to Mr. Clemens as a sanction for the prosecutorial misconduct resulting in a mistrial of the first trial.

Respectfully submitted,
RUSTY HARDIN & ASSOCIATES, P.C.



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