

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)
)
Plaintiff,)

v.)

Civil No. 07-01707 (HHK/JMF)

EXECUTIVE OFFICE OF THE)
PRESIDENT, et al.,)
)
Defendants.)

NATIONAL SECURITY ARCHIVE,)
)
Plaintiff,)

v.)

Civil No. 07-01577 (HHK)

EXECUTIVE OFFICE OF THE)
PRESIDENT, et al.,)
)
Defendants.)

**PLAINTIFF CREW’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF’S MOTION TO SHOW CAUSE WHY
DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT
AND FOR SANCTIONS**

STATEMENT

The stakes in this litigation are high for both the defendants and the American public. Defendants risk exposure of the facts behind the complete and utter dereliction of their record-keeping responsibilities, facts that raise serious and disturbing questions about why the White House has failed to take any action in the face of millions of email records that have gone missing. The American public, for its part, risks losing a significant body of the historical records of this presidency, records that will shed light on critical and highly controversial

decisions. To protect the public's interests, CREW has sought and secured a preservation order and has requested expedited discovery to ascertain whether broader preservation obligations should be imposed on the defendants.

It now appears that the intersection of these conflicting interests has led the defendants to knowingly submit false, misleading and incomplete answers to questions the Court posed to determine whether broader interim relief is necessary. Recently disclosed documents by the House of Representatives Committee on Government Oversight and Reform ("Oversight Committee") and the testimony before that committee of Theresa Payton, defendants' proffered declarant to answer the Court's questions, reveal several ways in which Ms. Payton's declaration and the White House's answers are false, misleading and incomplete.

First, Ms. Payton attested to a "lack of supporting documentation" for a chart identifying dates and components for which email is missing and noted "serious reservations about the reliability of the chart." Declaration of Theresa Payton ("Payton Decl.") at ¶¶ 10, 11 (attached as Exhibit 1). Both statements are misleading and the first is patently false. The White House is in possession of hundreds of pages of documentation supporting and explaining the multiple charts that the Office of Administration ("OA") prepared, documentation that was put together by a team of information technology experts. Moreover, the entire analysis was subjected to an independent verification and validation process.

Second, Ms. Payton attested that because her office has been retaining back-up tapes since October 2003, emails sent or received during the 2003 through 2005 time-period "should be contained on existing back-up tapes." *Id.* at ¶ 12c. Further, Ms. Payton attested on behalf of defendants that her office does not know if any emails "were not properly preserved in the

archiving process.” Payton Decl. at ¶ 12d. Documents released by the Oversight Committee demonstrate that each of these statements is false and that, contrary to OA’s representations here, the back-up tapes at a minimum do not contain all of the emails of the Office of the Vice President for a critical period in the fall of 2003.

Taken as a whole this evidence demonstrates defendants’ blatant disregard for the truth and the processes of this Court. The number and degree of contradictions between Ms. Payton’s declaration and the documentary evidence rise to the level of contempt and possibly fraud on this Court, and warrant sanctions against both Ms. Payton and the defendants on whose behalf her false, misleading and incomplete statements were made.

BACKGROUND

These consolidated lawsuits involve challenges by CREW and the National Security Archive to the knowing failure of the White House defendants to recover, restore and preserve millions of email records created and/or received within the White House as well as the failure of the archivist and head of OA to take enforcement action to ensure adequate preservation of all federal records. Complaint, ¶ 1.¹ Plaintiffs also seek an order compelling the defendants to implement an adequate electronic records management system in compliance with federal law. Id. at ¶ 2.

After defendants failed to respond to letters from each plaintiff requesting a meeting pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, plaintiffs filed requests for expedited discovery. Underlying both motions was the critical need to ensure the greatest possible preservation of the records of this presidency, preservation that is otherwise in grave

¹The references herein are to CREW’s complaint.

jeopardy given the past conduct of the defendants. The motions also pointed out how time is of the essence given the upcoming transition to a new administration.

After considering these motions, Magistrate Judge Facciola issued a Memorandum Order on January 8, 2008, explaining the Court's need for additional information to ascertain whether the requested relief is necessary. Specifically, the Court pointed out the possibility "that a small amount of information not currently in the record may have a large affect on the resolution of this Motion and the direction of this lawsuit." Memorandum Order at p. 3 ("Mem. Ord."). Accordingly, the Court ordered the defendants to provide answers, "by counsel in a sworn declaration"² to the following questions:

1. Are the back-ups catalogued, labeled or otherwise identified to indicate the period of time they cover?
2. Are the back-ups catalogued, labeled or otherwise identified to indicate the data contained therein?
3. Do the back-ups contain emails written and received between 2003-2005?
4. Do the back-ups contain the emails said to be missing that are the subject of this lawsuit?

Id. at 4 (footnotes omitted).

On January 25, 2008, defendants submitted the declaration of Theresa Payton, OA's chief information officer, "in accordance with the Court's instructions." Notice of Filing, January 15, 2008 (Document 48), p. 1. In addition to providing answers to the Court's four questions, Ms. Payton's declaration (Document 48-2) discusses the so-called "disaster recovery system" within the Executive Office of the President ("EOP") and the plaintiffs' claims. Payton Decl. at pp. 2-5.

² Id. at p. 4 n.4.

Ms. Payton also attested under penalty of perjury to the truth and correctness of her statements. Id. at p. 7.

One month later, on February 26, 2008, the Oversight Committee held a hearing on the topic “Electronic Records Preservation at the White House.” See Committee Hearings of the U.S. House of Representatives, Hearing on the Electronic Records Preservation at the White House, Preliminary Hearing Transcript, Feb. 26, 2008 (“Hearing Trans.”) (attached as Exhibit 2). The witnesses at the hearing included, *inter alia*, Ms. Payton and defendants Alan Swendiman and Allen Weinstein, all of whom testified under oath. Hearing Trans. at p. 25.

The Democratic committee staff also released a report summarizing their findings to date. Committee on Oversight and Government Reform, Memorandum to Members of the Committee, Supplemental Information for Full Committee Hearing on White House E-mails, February 26, 2008 (“Comm. Memo”) (attached as Exhibit 3). After the hearing the Oversight Committee released the sources of supplemental information (“Supp. Info.”)(attached as Exhibit 4),³ the written responses of former OA employee Steven McDevitt to the Committee’s questions (attached as Exhibit 5) and a spreadsheet showing missing email messages by day and EOP component.⁴ The documents released by the Committee, with the exception of Mr. McDevitt’s written responses, were provided to the Committee by either the EOP or NARA. See Comm.

³ For the Court’s convenience CREW has numbered the supplemental documents, which as released by the Oversight Committee did not have consecutive numbering, and will use its numbering herein.

⁴ Given the size of this document it is not included as an exhibit here, but it is available at <http://oversight.house.gov/documents/20080227155329.pdf> (last visited March 3, 2008). The Committee also released the opening statements of Chairman Henry Waxman and the three invited witnesses.

Memo at p. 1 (“the Committee received more than 20,000 pages of internal e-mails and other documents from the White House and the National Archives and Records Administration.”).

ARGUMENT

I. DEFENDANTS ARE IN CONTEMPT OF THIS COURT BY KNOWINGLY SUBMITTING FALSE, MISLEADING AND INCOMPLETE ANSWERS TO THE COURT’S QUESTIONS.

A. Standards For Contempt

For nearly two centuries the Supreme Court has recognized the “inherent powers of federal courts . . . which ‘are necessary to the exercise of all others.’” Roadway Express v. Piper, 447 U.S. 752, 764 (1980), *quoting* U.S. v. Hudson, 7 Cranch 32, 34 (1812). These powers include the “inherent power to enforce compliance with their [the courts’] lawful orders through civil contempt.” Shillitani v. U.S., 384 U.S. 364, 370 (1966). *See also* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (“[I]t is firmly established that ‘the power to punish for contempts is inherent in all courts.’” (*quoting* Ex Parte Robinson, 87 U.S. 505, 510 (1874))); Armstrong v. Executive Off. of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

A court has at its disposal a number of sanctions for litigation misconduct including civil and criminal contempt and fraud on the court. A “primary aspect” of a court’s discretion in this area “is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” Chambers, 501 U.S. at 45. As the Supreme Court has explained, “[t]hese powers are ‘governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” Id. at 43, *quoting* Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962).

Civil and criminal contempt each serve different purposes and require different showings.

Civil contempt is remedial in nature and is “used to obtain compliance with a court order.” Food Lion, Inc. v. United Food & Commercial Workers, Int’l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (citation omitted). A sanction such as civil contempt is also “for the benefit of the complainant.” Evans v. Williams, 206 F.3d 1292, 1294-5 (D.C. Cir. 2000). Criminal contempt, on the other hand, “is punitive, to vindicate the authority of the court.” Id. Moreover, state of mind and intent are relevant inquiries in determining whether a party should be held in criminal contempt for willfully violating a court order,⁵ while for civil contempt “the intent of the recalcitrant party is irrelevant.” Nat’l Labor Relations Bd. v. Blevins, 659 F.2d 1173, 1184 (D.C. Cir. 1981). See also Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

Civil contempt will lie only for violating a court order that is “clear and unambiguous.” Armstrong, 1 F.3d at 1289, *quoting* Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991). This is assessed under “an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order.” U.S. v. Young, 107 F.3d 903, 907 (D.C. Cir. 1997). Whether the putative contemnor has violated a clear and unambiguous order must be proven by “clear and convincing evidence.” Armstrong, 1 F.3d at 1289, *quoting* Washington-Baltimore Newspaper Build, Local 35 v. Washington Post Co., 626 F.2d 1029, 1031 (D.C. Cir. 1980). The moving party bears the initial burden of proof, Food Lion, 103 F.3d at 1016, after which the burden shifts to the putative contemnor to prove “good faith substantial compliance” with the court order. Id. at 1017.

B. Defendants’ Violation Of This Court’s Clear And Unambiguous Order

⁵ For these purposes willfulness has been defined as a “deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.” TWM Manufacturing Co. v. Dura Corp., 722 F.2d 1261, 1272 (6th Cir. 1983).

Rises To The Level Of Contempt Of Court

Applying these standards here leads inescapably to the conclusion that defendants have violated a clear and unambiguous court order. First, the order from this Court was clear and unambiguous. Defendants were directed to provide answers to four questions in the form of a “sworn declaration” that was “to be provided by counsel.” Mem. Ord. at p. 4.⁶ The four questions asked for very specific information as to whether the back-up copies indicated the period of time they cover, the data they contain, whether they contain emails written between 2003 and 2005 and whether they contain “the emails said to be missing that are the subject of this lawsuit.” Id. (footnote omitted).

That the Order was clear and unambiguous is also apparent from the defendants’ response, in which they voiced no concern or question over the meaning of the Court’s Order. Nor did the defendants raise any concerns or questions about the scope of their responsibilities in responding to the Court’s questions. Instead, through a three-sentence notice of filing, defendants submitted the declaration of Theresa Payton and noted it was “submitted in accordance with the Court’s instructions.” Notice of Filing at p. 1 (Document 48). By filing Ms. Payton’s declaration defendants signified they were able to respond fully to the Court’s questions.

Nevertheless, it is now apparent that defendants’ responses are in some material ways

⁶ To the extent the Court’s order placed the burden of responding directly on defendants’ counsel, consideration of whether plaintiff should be awarded its costs pursuant to 28 U.S.C. § 1927 may be warranted. Under that statute, “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

false, misleading, incomplete and accordingly violate the Court's order. First, the Court's Order made specific reference to the missing emails that are the subject of this lawsuit. Mem. Ord. at 4. In response, Ms. Payton claimed an "apparent lack of supporting documentation" of "whether there may be anomalies in Exchange email counts for any particular days resulting from the potential failure to properly archive emails for the 2003-2005 time period." Payton Decl. at ¶ 11. Ms. Payton described "a chart created by a former employee" that she "believe[s] is what Plaintiffs refer to as the 'detailed analysis.'" *Id.* at ¶ 10. The reference to "detailed analysis" comes from CREW's Complaint at ¶ 34 (and the Complaint of the National Security Archive at ¶ 32), *id.* at ¶ 9, which states as follows:

In October 2005, in response to government subpoenas, the OA discovered that many electronic communications of the White House had not been properly preserved. After discovering the problem, *the OA -- on its own initiative -- conducted a detailed analysis and concluded that commencing in March 2003, there were hundreds of days of missing White House e-mails created or received between March 2003 and October 2005.* The OA further estimated that as of that time, at least five million e-mails -- and most likely many millions more -- had been deleted from the servers and were recoverable only from back-up tapes.

(emphasis added).

Ms. Payton's description of the documentation that OA prepared is false and misleading, as evidenced in part by the written answers of Steven McDevitt, who served as an information technology specialist-project manager in OA's Office of the Chief Information Office ("OCIO") from September 2002 through July 2003, and thereafter as director of the architecture and engineering directorate of the OCIO from July 2003 to October 2006.⁷ Contrary to Ms. Payton's

⁷ As the hearing transcript makes clear, Mr. McDevitt did not testify under oath because of constraints placed upon him by the White House Counsel's Office. *See, e.g.*, Hearing Trans.

declaration claiming that a single chart was created by one employee, Mr. McDevitt explained that, in fact, a 15-person team within OA conducted an extensive multi-phase assessment of the missing email problem that resulted in a final analysis of “approximately 250 pages in length” that “included the complete background data and trend analysis” in addition to a separate analysis summary report. Responses from Steven McDevitt, question 20 (“McDevitt Resp.”).

Mr. McDevitt described some of the accompanying materials as follows:

There were numerous documents, PowerPoint presentations and other memoranda that described the analysis that was performed, the actions taken to correct the process and the recommendations to improve the processing of .pst files. The team documented the details of each action taken to clean up and correct the identified issues.

There must be thousands of email messages between the team members that describe the actions of the team, the completion of specific tasks, analysis of issues and to provide status to OCIO management, OA Counsel and OA management.

McDevitt Resp., question 23.

The misleading, if not outright false, nature of Ms. Payton’s statements is also demonstrated by Mr. McDevitt’s description of the verification that was performed of OA’s analysis. As he describes,

During this analysis process, a high level of formality and review was performed on every step of the process. The team performing the analysis met daily and in some cases multiple times per day. Each activity was documented either in meeting notes or in emails distributed to the entire team . . . an independent verification and validation was

at pp. 8,10, 21-22. If the Court deems it necessary, CREW would be happy to seek sworn testimony from Mr. McDevitt either through a deposition subpoena, a declaration, or at any hearing the Court should hold.

performed by a separate set of contractors who were not members of the team that was performing the analysis effort.

Id., question 25. Moreover, “[t]he results of this analysis, both in preliminary and final form were presented on various occasions to OA management and OA counsel . . . throughout the period of October 2005 through February 2006.” Id., question 26.

Some of these details were confirmed by John Straub, former director of OA during this period. In an interview with the Oversight Committee staff Mr. Straub stated that he oversaw this effort, was “consumed” by it and “worked closely with Mr. McDevitt to locate the missing e-mails.” Committee Memo at p. 19. Moreover, according to documents shown to the Committee, “the White House Counsel’s office was aware of these issues and met frequently with Mr. McDevitt’s team.” Id.

Ms. Payton’s statements are highly inconsistent and cannot be reconciled with both Mr. McDevitt’s written responses and Mr. Straub’s statements to the Oversight Committee. During her hearing testimony, when confronted with some of these inconsistencies, Ms. Payton did not deny a lack of knowledge regarding the work of this team. Instead, when pressed by Representative Eleanor Holmes Norton as to whether she was unaware of the 15-person team who worked on the missing email analysis in light of her statement “that a single member created . . . this chart perhaps indeed almost on his own,” Ms. Payton responded: “No,”⁸ and further that “all I know is that they [the team] put data together . . .” Hearing Trans. at p. 113.

Records NARA produced to the Oversight Committee also document Ms. Payton’s awareness of the “2005 report” months before she executed her declaration in this case. For

⁸ Hearing Trans. at p. 112.

example, a record of a meeting between EOP and NARA staff that took place on October 11, 2007, notes: “We asked if Theresa [Payton] had reviewed an electronic version of the 2005 report . . .” Supp. Info. at p. 23.

Second, and perhaps most serious of all, Ms. Payton’s statements in her declaration concerning the back-up copies and whether they contain any missing emails are false and appear designed to mislead the Court into believing that both discovery and any additional interim relief are unnecessary. Specifically, in response to the Court’s question of whether the back-up copies “contain emails written and received between 2003-2005,” Ms. Payton stated in relevant part:

In October 2003, this office [OA] began preserving and storing all back-up tapes and continues to do so. *For that reason, emails sent or received in the 2003-2005 time period should be contained on existing back-up tapes.*

Payton Decl. at ¶ 12c (emphasis added). Likewise, in response to the Court’s question about whether the back-up copies “contain the emails said to be missing that are the subject of this lawsuit,” Ms. Payton responded in pertinent part that “[a]t this stage, *this office does not know if any emails were not properly preserved in the archiving process.*” *Id.* at ¶ 12d (emphasis added). She also stated:

in view of this office’s practice in the 2003-2005 time period of regularly creating back-up tapes for the EOP Network, which includes servers containing emails, and in view of this office’s practice of preserving all such back-up tapes from October 2003 to the present, *the back-up tapes should contain substantially all the emails sent or received in the 2003-2005 time period.*

Id. (emphasis added).

Documentary evidence makes clear that at the time the EOP defendants submitted this declaration they knew that critical emails were missing from the Office of the Vice President in

the September 20, 2003 to October 6, 2003 time-period during which the Department of Justice was conducting an investigation into the disclosure by top White House officials of the identity of covert CIA operative Valerie Plame Wilson. An internal OA November 28, 2005 memorandum documents “the planned activities to recover Office of Vice President email from the target period of September 30, 2003 to October 6, 2003.”⁹ Supp. Info. at pp. 44-46. That memorandum also documents the fact that after restoring the server containing “the journal mailboxes for the target period” from a backup “performed on 10/21/03” OA found “no messages for the target period . . . present in the journal mailbox.” *Id.* at p. 46. (emphasis added). As a result, according to this memorandum, OA had to restore “[t]he Exchange server that contained the OVP mailboxes” from “a backup that was performed on 10/21/2003,” and from which email “was extracted from each of the 70 OVP mailboxes and copied to a .PST file.” *Id.*

In other words, despite Ms. Payton’s representation that emails sent or received in the 2003-2005 period should be contained on existing back-up tapes, for a critical period from September 30, 2003 to October 6, 2003, the .pst archives containing the journaled files that she represented were captured by back-up tapes¹⁰ were missing. Instead, OA could recover only those emails in the personal email accounts of officials in the vice president’s office that had not been deleted by the individual users by the time the back-up was created. See also Committee Memo at 3 (“The only e-mails that could be recovered and provided to the Special Counsel were

⁹ It appears that the White House provided this memorandum to the Oversight Committee.

¹⁰ See Payton Decl. at ¶ 7 (describing disaster recovery back-up process).

e-mails that the White House was able to restore from the personal e-mail accounts of officials in the Vice President's office"); Hearing Trans. at 89-90.¹¹

The Court posed these questions to ascertain the completeness of the existing set of back-up copies subject to the Court's current preservation order. Defendants' responses were made with full knowledge that at least one critical subset of email was missing, yet defendants failed to acknowledge that omission and instead represented that emails sent or received in the 2003-2005 time-period "should be contained on existing back-up tapes." Those statements are false and misleading.¹²

Defendants' false and misleading statements cannot be excused by any lack of personal knowledge on Ms. Payton's part. The Court ordered *the defendants* to respond to its questions and it was clearly incumbent on the defendants to adduce accurate and complete responses. That Ms. Payton purported to submit her declaration "on behalf of the Defendant OA," Payton Decl. at ¶ 2, does not excuse or explain the defendants' failure to respond completely, accurately and in a non-misleading manner to the Court's questions.¹³

¹¹ When confronted with these facts during her testimony before the Oversight Committee Ms. Payton admitted "that 70 mailboxes were restored . . ." Hearing Trans. at 90.

¹² There is also reason to question the sincerity of Ms. Payton's statement that the "independent assessment" her office has undertaken is expected "to be completed in the near term," Payton Decl. at ¶ 11. Just last week Ms. Payton told the Oversight Committee that OA has targeted completion of phases one and two of its three-phase assessment for some time this summer, Hearing Trans. at p. 135, while OA has been telling NARA since May 2007 that it was on the verge of completing its assessment. *See, e.g.*, Supp. Info. at p. 28 (email dated June 20, 2007, from Gary Stern, General Counsel of NARA, to Emmet Flood and Christopher Flood of the White House Counsel's Office, noting "we were informed that the OA CIO audit of the missing email situation should be completed in about 4 weeks.").

¹³ In this regard, it bears repeating that defendants' notice of filing, submitted with Ms. Payton's Declaration, notes that it was being "submitted in accordance with the Court's instructions," Notice of Filing at p. 1, which were directed to all the defendants, not only OA.

In this regard, defendants' obligations are analogous to the obligations that Rule 30(b)(6) of the Federal Rules of Civil Procedure imposes on a responding party. Those include a duty to designate a deponent (here a declarant) "knowledgeable on the topic." Banks v. Office of the Senate Sergeant-At-Arms, 241 F.R.D. 370, 373 (D.D.C. 2007), *citing* Alexander v. FBI, 186 F.R.D. 137, 141 (D.D.C. 1998). Moreover, parties responding to a Rule 30(b)(6) notice also have an obligation to "prepare the [declarant] so that . . . she can testify on matters both within . . . her personal knowledge as well as those 'reasonably known by the responding entity.'" Banks, 241 F.R.D. at 373, *quoting* Alexander v. FBI, 186 F.R.D. at 141. See also McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 79 (D.D.C. 1999) ("A designee of the receiving entity [under Rule 30(b)(6)] should not only testify about matters within his or her own personal knowledge, but also about matters which the receiving entity has reasonable knowledge and access."). In the Rule 30(b)(6) context, the purpose "is to 'curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of the facts that are clearly known to the organization and thereby to it.'" Banks, 241 F.R.D. at 372-73, *quoting* Fed. R. Civ. P. 30(b)(6) advisory committee notes.

That purpose applies with equal force here. The Court, having imposed a clear and unambiguous obligation on the defendants to respond to four discrete questions, should not have to countenance "bandying" and gamesmanship by which defendants proffer the declaration of an individual who is either wilfully uninformed or has offered patently untruthful and misleading responses.

In sum, the clear weight of the evidence establishes that defendants have violated this Court's order by offering incomplete, false and misleading responses to a direct Court order.

Accordingly, sanctions are warranted for conduct that is patently “disrespectful to the court and to deter similar misconduct in the future.” Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998), *cited in* Landmark Legal Found. v. Environmental Protection Agency, 272 F.Supp.2d 70, 85-86 (D.D.C. 2003).¹⁴ In addition, given the urgency behind plaintiffs’ requests for expedited discovery, the defendants’ responses to the Court’s order place “an intolerable burden” on the court, which will now be required “to modify its docket to accommodate the delay caused by the contumacious party.” Id. This misconduct more than justifies sanctions under prevailing Circuit precedent.

II. APPROPRIATE SANCTIONS FOR DEFENDANTS’ CONTUMACIOUS BEHAVIOR INCLUDE COSTS, ATTORNEYS’ FEES AND DISCOVERY.

This Court has varied and flexible sanctions available to “fashion an appropriate sanction for conduct which abuses the judicial process.” Chambers, 501 U.S. at 44-45. Although civil contempt is not punitive in nature, sanctions for civil contempt “can be imposed to compensate the complainant for losses sustained as a result of the contumacious conduct.” Landmark Legal Found., 272 F.Supp.2d at 86, *citing* U.S. v. United Mine Workers, 330 U.S. 258, 303 (1947).

¹⁴ Conduct that is especially egregious may rise to the level of fraud on the court that also “warrants a finding of civil contempt.” Cobell v. Norton, 226 F.Supp.2d 1, 121 (D.D.C. 2002), *vacated in part and remanded*, 334 F.3d 1128 (D.C. Cir. 2003). This flows from a court’s inherent powers, which include “[t]he authority to respond to and punish fraud on the court . . .” Id. at 24, *citing* Universal Oil Products v. Root Refining Co., 328 U.S. 575, 580 (1946); Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir. 1989). Behavior that is considered to be a fraud on the court includes “some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.” Aoude, 892 F.2d at 118. The Court should also consider whether criminal contempt sanctions are warranted, a matter within the Court’s purview. See Landmark Legal Found., 272 F.Supp.2d at 77 (“it is the court that makes the initial decision whether a criminal contempt proceeding should take place.”).

Toward that end, courts often award attorneys' fees and expenses necessitated by a civil contempt hearing. See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Food Lion, 103 F.3d 1017 n.14. Other sanctions recognized by courts to address a party's civil contempt include "drawing adverse evidentiary inferences or precluding the admission of evidence." Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1475 (D.C. Cir. 1995).

This Court should exercise its inherent authority here to fashion a remedy that includes both an award of attorneys' fees and costs as well as permitting the plaintiffs to take the deposition of Ms. Payton at the defendants' expense. Specifically, CREW should be awarded its costs and attorneys' fees associated with this motion and any subsequent hearing the Court may hold, as well those costs and attorneys' fees associated with its motion for expedited discovery.

As to discovery, defendants' contumacious behavior has delayed the resolution of plaintiffs' motions for expedited discovery and cast serious doubt on the true facts regarding the back-up copies that defendants have been directed to preserve. Accordingly, a deposition of Ms. Payton conducted under oath represents the most effective way to ascertain the facts necessary to answer fully and accurately the Court's questions. In addition, if Ms. Payton is not sufficiently knowledgeable, plaintiffs should be permitted to depose another EOP official or officials who can testify to what Ms. Payton cannot, at the defendants' expense. Only in this way will CREW be adequately compensated for defendants' contumacious conduct.

CONCLUSION

For the foregoing reasons, the Court should immediately issue a show cause order why defendants should not be held in contempt for their submission of false, incomplete and misleading answers in response to the Court's Memorandum Order of January 8, 2008.

