

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,

Plaintiff,

v.

XAVIER BECERRA, Secretary of the
Dep't of Health and Human Services,
et al.,

Defendants.

Case No. 8:21-cv-839-SDM-AAS

**DEFENDANTS' OPPOSITION TO FLORIDA'S EMERGENCY MOTION TO
ENFORCE THE PRELIMINARY INJUNCTION**

INTRODUCTION

On July 23, 2023, the Eleventh Circuit lifted its stay of the preliminary injunction entered by this Court, which enjoined the Centers for Disease Control & Prevention (CDC) from “enforcing against a cruise ship arriving in, within, or departing from a port in Florida the conditional sailing order and the later measures (technical guidelines, manuals, and the like).” ECF 91 at 123. Accordingly, the CDC promptly notified cruise industry representatives by letter the same day that “the CSO and accompanying measures, such as technical instructions, are currently nonbinding recommendations for cruise ships arriving in, located within, or departing from a port in Florida.” Pl.’s Ex. A. The July 23 letter explained that “CDC will continue to operate the CSO as a voluntary program for such ships” and

asked cruise ship operators to inform the CDC by July 26 “of any ships operating out of Florida ports that will continue to follow all of the CSO’s provisions on a voluntary basis.” *Id.* In addition, the CDC reminded cruise ship operators that other regulations that this Court had not enjoined continue to apply, such as the requirement that ships “report individual cases of illness or death, including COVID-19 cases, to the CDC Quarantine Station per 42 CFR §§ 71.21, 71.35.” *Id.*

Florida’s assertion that the CDC’s letter to cruise ship operators warrants contempt sanctions is mystifying. This Court’s Order did not prohibit the cruise ship operators from adhering to the CSO and later guidance on a voluntary basis, through continuing collaboration with the CDC. Nor did this Court’s Order enjoin the CDC from enforcing the other, unchallenged regulations cited in the CDC’s letter, which are independent of the CSO and subsequent guidance, and apply to all cruise ship operators regardless of whether they choose to follow the CSO.

Under the injunction, the CDC cannot, and will not, bring enforcement actions for noncompliance with the CSO by ships covered by the injunction. Consistent with the injunction, the CDC has invited cruise ships to advise it whether they intend to comply voluntarily with the CSO, which is a nonbinding recommendation for those ships covered by the preliminary injunction. None of this even arguably constitutes “enforcement” of the CSO in violation of the Court’s Order, and Plaintiff has identified no basis for the severe sanction of contempt.

BACKGROUND

On October 30, 2020, the CDC issued the *Framework for Conditional Sailing and Initial Phase COVID–19 Testing Requirements for Protection of Crew*, 85 Fed. Reg. 70153-01 (Nov. 4, 2020). The CSO announced that “[a]fter expiration of CDC’s No Sail Order [“NSO”] on October 31, 2020, CDC will take a phased approach to resuming cruise ship passenger operations in U.S. waters.” *Id.*; *see also* 1st Declaration of Capt. A. Treffeletti ¶¶ 33-45, ECF No. 31-1 (“1st Treffeletti Decl.”). The CDC later issued implementing guidance for each phase of operations, which it has updated in coordination with the cruise industry and relevant public health authorities.¹

Many cruise ships operating under this guidance have successfully resumed passenger operations. 3d Treffeletti Decl. ¶¶ 15-23. Collaboration with the CDC has helped cruise ship operators to identify and correct potentially dangerous practices. *Id.* ¶¶ 24-38 (illustrating deficiencies that the CDC personnel identified and cruise ship operators corrected in early sailings). This collaboration provides important benefits to the cruise industry by enabling cruise ship operators to reassure passengers of the safety of their voyages, *see id.* at ¶ 23, at a time of increasing public health concerns, *see, e.g., Florida Leads U.S. in Covid-19 Cases as Hospitalizations Surge*, Wall St. J. (July 24, 2021), *available at* <https://www.wsj.com/articles/florida-leads-u-s-in->

¹ *See Cruise Ship Guidance*, <https://www.cdc.gov/quarantine/cruise/index.html> (last visited July 12, 2021) (including instructions for crew management, local agreements, simulated voyages and voyages under a conditional sailing certificate); *see also* 1st Treffeletti Decl. ¶ 74; Supplemental Declaration of Capt. A. Treffeletti ¶ 5, ECF No. 72-1 (“2d Treffeletti Decl.”); 3d Declaration of Capt. A. Treffeletti ¶¶ 22-23, ECF No. 96-1 (“3d Treffeletti Decl.”).

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On Florida’s motion, this Court enjoined the Defendants “from enforcing against a cruise ship arriving in, within, or departing from a port in Florida the conditional sailing order” and subsequent implementing guidance. ECF 91 at 123. The Court indicated that compliance with the CSO would thereafter be voluntary for cruise ships covered by the injunction: “the [CSO] and the measures promulgated under [CSO] will persist as only a non-binding ‘consideration,’ ‘recommendation’ or ‘guideline.’” *Id.*

Defendants appealed and, after the Court denied a motion to stay the injunction, ECF No. 98, Defendants filed a motion to stay the injunction in the Court of Appeals. *See Florida v. Becerra*, Case No. 21-12243 (11th Cir.). Norwegian Cruise Line Holdings Ltd., one of the largest cruise lines operating out of Florida ports, sought leave to file an amicus brief in support of the motion to stay, explaining its support for the CSO, and arguing that Florida has been the barrier to safe resumption of sailing. *See generally* Brief of Amici Curiae NCLH, *Florida v. Becerra*, Case No. 21-12243 (11th Cir.) (filed July 13, 2021) (stating that NCLH “supports the Conditional Sailing Order and is committed to comply fully with it”). After initially granting a stay pending appeal and indicating that opinions would be forthcoming, the motions panel later reversed itself and allowed the injunction to take effect immediately on July 23, 2021. *See Order, Florida v. Becerra*, Case No. 21-12243 (11th Cir. July 23, 2021).

Accordingly, the same day, the CDC sent a letter to cruise industry representatives, informing them that the injunction had taken effect and that “the CSO and accompanying measures, such as technical instructions, are currently nonbinding recommendations for cruise ships” covered by the Order. Pl.’s Ex. A. Consistent with this Court’s Order, CDC indicated that “CDC will continue to operate the CSO as a voluntary program” for ships in Florida, and asked ships to inform CDC if they intend to voluntarily comply by 5 pm on July 26, 2021. *Id.* at 1. The letter also identified several longstanding regulations and separate public health orders that apply to ships completely independently of the CSO—which were neither challenged by Florida nor enjoined by the Court. These regulations include reporting and inspection requirements, and regulations that permit the CDC to order sanitation and detention—requirements that long pre-existed the CSO and are not the subject of this litigation. *Id.* at 2.²

The July 23 letter also noted the applicability of the CDC’s separate Mask Order, which is also not challenged in this litigation. *Id.* at 2. After further review, however, the CDC advised cruise industry representatives on July 24 that the CDC will “continue to exercise enforcement discretion by not enforcing the requirements of CDC’s Mask Order for ships arriving in, within, or departing from a port in Florida, regardless of whether or not the ship has chosen to follow the [CSO] public

² Because the CSO color-coding of ships no longer applies to ships not voluntarily participating in the CSO, the CDC noted that such ships will be designated “Gray,” meaning only that “CDC cannot confirm that the cruise ship operator’s health and safety protocols align with CDC’s standards.” Pl.’s Ex. A. Plaintiff’s motion does not assert that this is a violation.

health measures on a voluntary basis.” Defs.’ Ex. A (July 24, 2021 Letter, attached hereto).

LEGAL STANDARDS

“[P]rinciples of ‘basic fairness require[] that those enjoined receive explicit notice’ of ‘what conduct is outlawed’ before being held in civil contempt.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam)). A civil contempt finding can be made “only upon a showing that the alleged contempt is clear and convincing.” *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007). Courts “construe any ambiguities or uncertainties in [a] court order in a light favorable to the person charged with contempt,” and the order “may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard.” *Id.*

Moreover, civil contempt is an objective standard. *Taggart*, 139 S. Ct. at 1802. As a result, “[c]ivil contempt may be appropriate if there is no objectively reasonable basis for concluding that the [party’s] conduct might be lawful.” *Id.* at 1799. But civil contempt “should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant’s conduct.” *Id.* at 1801.

DISCUSSION

Florida’s emergency motion “asks this Court for [1] an order clarifying that the CDC’s letter violates this Court’s injunction and [2] a show cause order asking

Defendants to explain why they should not be held in contempt.” ECF No. 108 at 3.
There is no basis for either.

I. CDC’s Letter Did Not Violate The Preliminary Injunction

Florida’s assertion that the CDC’s letter violated this Court’s injunction is baseless. This Court enjoined CDC from “enforcing against a cruise ship arriving in, within, or departing from a port in Florida the conditional sailing order and the later measures (technical guidance, manuals, and the like).” ECF 91 at 123. The CDC has fully complied with the preliminary injunction. Since the injunction became effective on July 23, CDC has not enforced the CSO or any such later measures against any such cruise ship. Florida does not and cannot contend otherwise.

The injunction did not prohibit cruise industry operators from continuing to follow the CSO and technical guidance voluntarily, in collaboration with the CDC. Ship operators may well conclude that there are business advantages to continuing that collaboration, which allows CDC personnel to assist cruise ship operators in preventing and containing outbreaks onboard. *See, e.g.*, 3d Treffiletti Decl. ¶¶ 24-27, ECF No. 96-1 (“3d Treffiletti Decl.”) (explaining that CDC personnel on a simulated voyage identified, for example, staff mistakes related to operating testing equipment and physically distancing passengers with positive test results from other passengers cleared for embarkation). Accordingly, the CDC asked cruise ship operators to inform it of any ships that choose to continue voluntarily under the CSO framework. That is not an “enforcement” of the CSO and is not a violation of the Court’s injunction, which explicitly contemplated voluntary compliance.

Nor did this Court enjoin enforcement of any of the other requirements cited in the CDC's July 23 letter, all of which are independent of the CSO. For example, the requirement that ships "report individual cases of illness or death" onboard "to the CDC Quarantine Station per 42 CFR §§ 71.21, 71.35," is longstanding. It was not challenged in the Complaint and not enjoined by this Court. Similarly, there is no dispute that "[s]hips remain subject to inspection under 42 CFR § 71.31(a) to prevent the introduction, transmission, or spread of communicable diseases; this includes, for example, inspections when the ship has on board individuals reportable under 42 CFR § 71.21." Indeed, "[b]efore 1969, every arriving ship and aircraft, including passengers and crew, was inspected." *Foreign Quarantine*, 50 Fed. Reg. 1516, 1518 (Jan. 11, 1985).³ Florida acknowledged the validity of these regulations in its preliminary injunction motion. *See* ECF No. 9 at 12-13 (stating that "these regulations make sense as an outflow of § 264"). The letter reminds ship operators of other regulations that continue to apply, regardless of whether the ship is operating under the CSO; it does not "threaten[] new government enforcement." Florida's contention that the CDC's reference to these longstanding requirements violates the Court's injunction is baseless.

³ As noted above, the CDC has also since clarified that it is not at this juncture enforcing the Mask Order (which is independent of the CSO) against cruise ship operators, regardless of whether they choose to remain under the framework of the CSO voluntarily. *See* Defs.' Ex. A.

II. There Is No Basis for a Show-Cause Order

Florida's motion states that it "does not seek an immediate order finding Defendants in contempt, but only a show cause order." ECF No. 108 at 5. There is no basis for even that step. For the reasons explained above, Florida has failed to establish, by any evidence—let alone clear and convincing evidence—that Defendants' actions "were based on an unreasonable interpretation of the clear and unambiguous directive of [this Court's] order." *Georgia Power Co.*, 484 F.3d at 1291. Rather, the Court specifically contemplated that ships might wish to voluntarily comply with the CSO, and did not even hint that it was enjoining other regulations cited here.

Florida also argues that the CDC cannot "evade liability for civil contempt" by not violating "the text" of the Order, citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). But the case cited does not stand for that remarkable proposition. There, the Supreme Court held that contempt could be a proper sanction for a specific violation of a more general order to comply with a statute, even if the order did not specify the particular conduct at issue; the particular conduct at issue clearly violated the statute and was understood in light of a history of continuing and persistent statutory violations. There are no similar allegations here. Rather, the Court preliminarily enjoined enforcement of the CSO; the July 23 Letter does not contemplate enforcement of the CSO.

Florida's motion must be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to enforce the preliminary injunction.

Dated: July 25, 2021

Respectfully submitted,

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