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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
MIDDLE ORLANDO, FLORIDA

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JED MARGOLIN,)	Case No. 6:12-mc-00047-JA-DAB
)	
Plaintiff,)	OBJECTION TO PROPOSED FINDINGS AND
)	RECOMMENDATIONS (#4)
vs.)	
)	
NATIONAL AERONAUTICS AND)	
SPACE ADMINISTRATION,)	
)	
Defendant.)	
_____)	

12
13
14 Comes now Plaintiff, Jed Margolin (“Margolin”), appearing *pro se*, and files his
15 Objection to Proposed Findings and Recommendations (#4) made by the Court’s Magistrate in
16 response to Margolin’s Motion for Writ of Execution against the National Aeronautics and Space
17 Administration (#2). The Court’s Magistrate recommended that the Court deny Margolin’s
18 Motion for Writ of Execution against the National Aeronautics and Space Administration
19 (“NASA”) asserting there is no statutory authority for such an action. Margolin respectfully
20 disagrees.¹

¹ The Court’s Magistrate also recommended denying Margolin’s Ex Parte Motion Requesting Permission to Register For and Use the Court’s CM/ECF System. The Magistrate made this recommendation without giving a reason. Indeed, the recommendation was made without any discussion of the motion at all.

Argument and Authorities

A. The United States has waived Sovereign Immunity in Freedom of Information Act actions brought under 5 U.S.C. §552(a)(4)(B) and, absent statutory exceptions, is subject to the civil process under the Federal Rules of Civil Procedure and the Court's Local Rules which includes the use of a Writ of Execution to satisfy a judgment as contained in Federal Rules of Civil Procedure Rule 69.

1. The United States has waived Sovereign Immunity in Freedom of Information Act actions brought under 5 U.S.C. §552(a)(4)(B):

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

Thus, the United States has consented to be a party in the current civil process.

2. Under 5 U.S.C. §552(a)(4)(F)(i) agency personnel found by the Court to have acted arbitrarily or capriciously in withholding documents are subject to disciplinary action.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against

1 the officer or employee who was primarily responsible for the withholding. The Special
2 Counsel, after investigation and consideration of the evidence submitted, shall submit his
3 findings and recommendations to the administrative authority of the agency concerned and
4 shall send copies of the findings and recommendations to the officer or employee or his
5 representative. The administrative authority shall take the corrective action that the Special
6 Counsel recommends.

7 .
8 .
9 .

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11
12 **3.** Under 5 U.S.C. §552(a)(4)(G) agency employees who fail to comply with orders of the Court
13 may be punished for contempt.

14 (G) In the event of noncompliance with the order of the court, the district court may punish
15 for contempt the responsible employee, and in the case of a uniformed service, the
16 responsible member.
17

18 **4.** Public Law 110-175, Sec. 4(b), Dec. 31, 2007, 121 Stat. 2525, further provides that:

19
20 Notwithstanding section 1304 of title 31, United States Code, no amounts may be obligated
21 or expended from the Claims and Judgment Fund of the United States Treasury to pay the
22 costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code.
23 Any such amounts shall be paid only from funds annually appropriated for any authorized
24 purpose for the Federal agency against which a claim or judgment has been rendered.
25

26 Thus:

27 **a.** Congress has waived sovereign immunity to actions brought under the Freedom of

28 Information Act;

29 **b.** Congress subjects agency employees to disciplinary action for arbitrarily or capriciously

30 withholding documents;

31 **c.** Congress subjects agency employees to punishment for failure to comply with an order of the

32 Court;

1 d. Congress requires that, where a plaintiff substantially prevails, the agency must pay costs
2 from its own annual appropriations.

3
4 It is reasonable to believe that Congress did these things in order to provide agencies and their
5 personnel with an incentive to comply with the Freedom of Information Act. It is therefore
6 reasonable to believe that Congress did not mean to replace the remedies available in a civil
7 process under the Federal Rules of Civil Procedure and a Court's Local Rules (which includes
8 the use of a Writ of Execution to satisfy a judgment) because the result would be to provide
9 agencies with an incentive to not comply with the Freedom of Information Act. If Congress had
10 meant to replace the remedies available in a civil process they would have explicitly done so.
11 Therefore, the above incentives provided by Congress do not replace the standard remedies in
12 the civil process, they augment them.

13
14 5. A writ of execution or attachment is a type of "civil process" for the collection of a judgment,
15 and hence is a type of suit. *See Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512,
16 518 (1984) ("Garnishment and attachment commonly are part and parcel of the [civil] process,
17 provided by statute, for the collection of debt.") (quoting *FHA v. Burr*, 309 U.S. 242, 245
18 (1940)).

19
20 Therefore, in actions brought against the United States under 5 U.S.C. §552(a)(4)(B) there is no
21 statutory bar to the use of a Writ of Execution to satisfy a judgment.

22

1 **B.** Margolin’s Motion for Writ of Execution against the National Aeronautics and Space
2 Administration (#2) was unopposed by Defendant NASA.

3
4 **1.** Margolin properly served NASA’s Counsel (Assistant U.S. Attorney for the District of
5 Nevada) with a copy of his motion.

6
7 **2.** In a subsequent filing in U.S. District Court for the District of Nevada Margolin reminded
8 NASA of his filing in the Middle District of Florida. (See Exhibit 3 at 32, line 9).

9
10 **3.** NASA’s Counsel failed to make an appearance in this Court (Middle District of Florida).

11
12 **4.** NASA’s failure to oppose Margolin’s motion raises an inference that they do not object to
13 the motion. *See, e.g., Freshwater v. Shiver*, Case No. 6:05-cv-756; 2005 WL 2077306, at *2
14 (M.D. Fla. Aug. 29, 2005). From *Freshwater*:

15 Although copies of this motion were mailed to Plaintiff’s counsel on June 7, 2005, Plaintiff
16 has not filed a brief in opposition as required under Local Rule 3.01(b). Failure to oppose
17 such a motion to dismiss raises an inference that there is no objection to such motion. See
18 Local Rule 3.01(b); (Doc. No. 14, filed on July 28, 2005, Sec. II-E) (“Where no
19 memorandum in opposition has been filed, the Court routinely grants the motion as
20 unopposed”).
21

22 Local Rule 3.01(b) states:

23 (b) Each party opposing a motion or application shall file within fourteen (14) days after
24 service of the motion or application a response that includes a memorandum of legal
25 authority in opposition to the request, all of which the respondent shall include in a
26 document not more than twenty (20) pages.
27

28 Therefore, Margolin’s motion for a writ of execution should be granted if only because NASA
29 has failed to oppose it.

1 **C.** This Court has failed to comply with Federal Rules of Civil Procedure Rule 70(d):

2 (d) OBTAINING A WRIT OF EXECUTION OR ASSISTANCE. On application by a party
3 who obtains a judgment or order for possession, the clerk must issue a writ of execution or
4 assistance.

5
6 Margolin made the proper application and paid the fee but the clerk has not issued the writ of
7 execution. Indeed, the Court's Magistrate has acted as an advocate for Defendant NASA who, as
8 noted above, has failed to appear and has not opposed Margolin's motion for a writ of execution.

9
10 **D.** Margolin wishes to inform the Court of several events that have taken place since April 26,
11 2012 when Margolin registered the cost judgment in this Court and filed a motion for writ of
12 execution against NASA. First, a short summary of the events that led to Margolin's actions in
13 this Court.

14
15 **1.** As a result of a Freedom of Information Act action, Case Number 3:09-cv-00421-LRH-
16 (VPC), heard in U.S. District Court For the District of Nevada Margolin obtained a cost
17 judgment against NASA. In an Order released November 4, 2011 the Nevada District Court
18 ordered NASA to pay Margolin costs of \$525.06 . (#2-1 at 8)

19
20 **2.** In that Order (*id.*) the Nevada District Court ruled that Margolin had substantially prevailed.

21
22 **3.** The "Openness Promotes Effectiveness in the National Government Act of 2007," also
23 referred to as the OPEN Government Act of 2007 (Public Law 110-175 – December 31, 2007),
24 amended several procedural aspects of the Freedom of Information Act. Section 4(b) requires
25 that when a complainant has substantially prevailed the Agency must pay assessed costs from

1 agency funds. The costs are not to be paid by the Claims and Judgment Fund of the United States
2 Treasury.

3
4 4. On January 6, 2012 Margolin sent an email to various NASA staff, including General
5 Counsel Michael C. Wholley and NASA Deputy Administrator Lori Garver. In part of that email
6 Margolin reminded NASA that they had not complied with the Court's Order to pay him the
7 \$525.06 judgment. (#2-1 at 11)

8
9 5. On February 6, 2012 Margolin filed two motions in U.S. District Court for the District of
10 Nevada: Motion to Compel NASA to Disclose Assets in the State of Nevada (USDC-Nevada
11 Document 74) and Motion Requesting NASA Be Held in Contempt (USDC-Nevada Document
12 75).

13
14 6. On February 22, 2012 NASA filed their Response to Motion to Compel NASA to Disclose
15 Assets in the State of Nevada (USDC-Nevada Document 76) and Response to Motion
16 Requesting NASA Be Held in Contempt (USDC-Nevada Document 77). In NASA's responses
17 they said they anticipated paying Margolin in March 2012. (Margolin filed replies to NASA's
18 responses expressing skepticism that they were going to pay him.)

19
20 7. NASA did not pay Margolin in March so on April 26 Margolin registered the cost judgment
21 in this Court and filed a Motion for writ of execution against NASA.

22

23 The following events have taken place in the Nevada Court since then.

1 **8.** On May 17, 2012 the Nevada Court ordered NASA to file a status report. (USDC-Nevada
2 Document 80, See Exhibit 1 at 13)

3
4 **9.** On May 29, 2012 NASA filed their status report. (USDC-Nevada Document 81, See Exhibit
5 2 at 15) NASA offered the following excuses for not paying Margolin:

6 **a.** Margolin had refused to give NASA his Social Security Number.

7 **b.** Courtney Graham (NASA) did not know until early January 2012 that the law requires
8 that the funds come from NASA agency appropriations, and not from the Judgment Fund.

9 NASA further stated their intention to pay Margolin “within 10 working days.”

10
11 **10.** On June 2, 2012 Margolin filed his reply to NASA’s status report. (USDC-Nevada
12 Document 82, See Exhibit 3 at 24; Exhibits in Document 82 omitted). In essence:

13 **a.** Margolin had received a telephone message asking for his Social Security Number. The
14 telephone message purported to come from the office of the U.S. Attorney for Nevada (not from
15 NASA) and said that Margolin’s Social Security number was needed by their Department. This
16 made it appear that the U.S. Attorney’s office was proposing to pay the Judgment. Since the law
17 requires that the Judgment be paid by NASA, not by DOJ, it was reasonable for Margolin to
18 assume that this message came from an individual using pretexting in an illegal attempt to obtain
19 his Social Security Number. The failure by NASA’s Counsel to respond to his subsequent email
20 on this matter provided further evidence that this was an attempt at pretexting.

21
22 **b.** Graham’s assertion that she did not know until early January that the judgment had to be paid
23 from NASA agency funds (instead of from the Judgment Fund) is probative, since she has
24 asserted in the past that she has special expertise in matters of the Freedom of Information Act.

1 Apparently, Ms. Graham's claim to special expertise was overstated. Unfortunately, the Nevada
2 Court relied on her claim to special expertise and gave her "special expertise" substantial
3 deference.

4
5 **c.** NASA's Counsel failed to explain why she ignored Margolin's March 2 email about the
6 telephone message.

7
8 **d.** In Margolin's Reply (*Id.*) he informed the Court (and NASA) that he had registered the
9 November 2011 Judgment in U.S. District Court for the Middle District of Florida and moved
10 for a Writ of Execution, and that he had incurred additional costs in the amount of \$107.99 in
11 doing so. Margolin also asked the Nevada Court whether the Nevada Court or the Florida Court
12 now had jurisdiction over the payment of the judgment. (See Exhibit 3 at 24)

13
14 **11.** Assuming that NASA's "10 working days" is the same as "10 business days" NASA
15 should have paid Margolin on or by June 13. NASA failed to pay Margolin by that day.

16
17 **12.** On June 25, 2012 the Nevada Court ordered (USDC-Nevada Document 84, See Exhibit 4
18 at 37.):

19 Before the court are Plaintiff Jed Margolin's Motion to Compel NASA to Disclose Assets in
20 the State of Nevada (#74) and Motion Requesting NASA Be Held in Contempt (#75), filed
21 on February 6, 2012. The motions involve Margolin's attempt to enforce this court's Order
22 (#73) of November 4, 2011, taxing costs in the amount of \$525.06. In response to the court's
23 Order (#80) of May 17, 2012, NASA filed a status report (#81) on May 29, 2012, indicating
24 that Margolin would be paid within 10 working days. Unless the court receives notification
25 by July 6, 2012 that satisfaction of the costs award has not occurred, the pending motions
26 shall be denied.

27
28 **13.** Since NASA hadn't paid Margolin he informed the Court that NASA hadn't paid him.

29 (USDC-Nevada Document 85, filed June 26, 2012; See Exhibit 5 at 39)

1
2 **14.** On June 27, 2012 NASA informed the Court that a check had been mailed to Margolin on
3 June 26 (the day after Margolin's response) in the amount of \$525.06. (USDC-Nevada
4 Document 86, See Exhibit 6 at 43). Subsequently, Margolin did receive the check for \$525.06.

5
6 **15.** On June 28, 2012 the Nevada Court ruled that since NASA had mailed Margolin the check,
7 Margolin's Motion For Sanctions and Motion to Compel were denied. (USDC-Nevada
8 Document 87; See Exhibit 7 at 50) The Nevada Court did not address the issue of the additional
9 costs Margolin has incurred or whether the present Court (Middle District of Florida) now has
10 jurisdiction over payment of the judgment. Presumably, the Nevada Court's only interest was in
11 disposing of Margolin's motions.

12
13 Since these additional costs were incurred in registering the judgment in the Middle District of
14 Florida, and NASA did not pay Margolin until long after he registered the judgment in the
15 Middle District of Florida, Margolin is entitled to these costs and the present Court has
16 jurisdiction over NASA's payment of this debt. NASA has refused to recognize their obligation
17 to pay Margolin these additional costs. Indeed, by failing to appear in this Court NASA has
18 shown its intention to ignore this Court's authority.

19

20

Conclusion

21 For the foregoing reasons Margolin respectfully requests:

22 **1.** This Court disregard the recommendation of the Court's Magistrate and grant Margolin's
23 Motion For Writ of Execution against the National Aeronautics and Space Administration so that

1 NASA's known assets at the Kennedy Space Center may be seized by U.S. Marshals and sold at
2 public auction in order to satisfy NASA's debt; and

3
4 2. This Court disregard the recommendation of the Court's Magistrate and grant Margolin's Ex
5 Parte Motion Requesting Permission to Register For and Use the Court's CM/ECF System
6 because the Magistrate has given no reason for recommending that Margolin's motion be denied.

7

8

Respectfully submitted,

9



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Dated: July 16, 2012

19

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Certificate of Mailing

21 I hereby certify that a copy of the foregoing OBJECTION TO PROPOSED FINDINGS AND
22 RECOMMENDATIONS (#4) has been sent by first-class mail to the following addressee on
23 July 16, 2012:

24

25

Charles F. Bolden, Administrator
National Aeronautics and Space Administration
300 E Street SW
Washington, DC 20024-3210

26

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32

33

Jed Margolin
July 16, 2012

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