UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,	)	
Applicant,	)	
v.	)	**Misc. Action No. 16-621 (RMC)**
CARL FERRER,	)	
Respondent.	)	

ORDER

On September 16, 2016, this Court granted in part a Motion for Extension of Time by Carl Ferrer, Chief Executive Officer of Backpage.com, LCC to comply with requests 1, 2, and 3 of a subpoena *duces tecum* issued by the Senate Permanent Subcommittee on Investigations. *See* 9/16/16 Order [Dkt. 29].[1] There were two disputed issues in Mr. Ferrer's Motion for Extension of Time: "(1) whether Mr. Ferrer asserted any common law privileges (*i.e.*, attorney-client privilege and work-product) to withhold the production of responsive materials; and (2) whether an extension of time [was] justified to allow completion of document review and production." *Id.* at 3. The Court held that Mr. Ferrer waived the attorney-client and work product privileges with respect to the three subpoena requests and granted a two-week extension of time, until October 10, 2016, to complete production of responsive materials.

[1] For a more detailed summary of the facts and procedural history in this case, *see* Mem. Op. Enforcing Subpoena [Dkt. 17], *available at Senate Permanent Subcomm. v. Ferrer*, No. 16-MC-621 (RMC), 2016 WL 4179289, at *1-5 (D.D.C. Aug. 5, 2016), as well as the Court's Order Denying Mot. to Stay Enforcement [Dkt. 23].

With respect to the privilege issue, the Court noted that the October 1, 2015 subpoena required Mr. Ferrer to assert any claim of privilege or other right to withhold documents from the Subcommittee and provide a privilege log. *See id.* at 4 (citing *Ferrer*, , 2016 WL 4179289, at *3). It also noted that courts (either through judicial decisions or local rules) and the Federal Rules of Civil Procedure (*i.e.*, Fed. R. Civ. P. 26(b)(5)(A)(ii) & 45(e)(2)(A)) require the filing of a sufficiently detailed privilege log to avoid the arbitrary withholding of subpoenaed information. *See* 9/16/16 Order at 4-7; *see also, e.g.*, *Burlington North. & Santa Fe Ry. v. Dist. Ct., Mt*, 408 F.3d 1142, 1149 (9th Cir. 2005); *In re Grand Jury Subpoena*, 274 F.3d 563, 575-76 (1st Cir. 2001); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984); *Shelton v. United States*, 404 F.2d 1292, 1299-1300 (D.C. Cir. 1968); *Rynd v. Nationwide Mut. Fire Ins. Co.*, No. 8:09-CV-1556, 2010 WL 5161838, at *3 (M.D. Fla. Dec. 14, 2010); *Walker v. Ctr. for Food Safety*, 667 F. Supp. 2d 133, 138 (D.D.C. 2009); *Perry v. Schwarzenegger*, 264 F.R.D. 576, 580-81 (N.D. Cal. 2009); *Banks v. Office of Senate Sergeant-at-Arms*, 233 F.R.D. 1, 9 (D.D.C. 2005). In light of the circumstances of this particular case, where Mr. Ferrer did not produce a privilege log or provide any explanation for the withholding of *specific* documents, the Court found that he waived the claimed attorney-client and work product privileges.

On September 20, 2016, Mr. Ferrer filed a notice of appeal of the Court's ruling concerning the preservation of common law privileges. *See* Notice of Appeal [Dkt. 30]. On September 23, 2016, Mr. Ferrer filed a Motion for Partial Stay Pending Appeal of the Court's September 16 Order. *See* Mot. to Stay [Dkt. 32]. The Subcommittee filed a timely opposition, *see* Opp'n [Dkt. 33], to which Mr. Ferrer replied, *see* Reply, [Dkt. 34].

In determining whether to grant a motion to stay pending appeal, the moving party bears the burden of showing the balance of the following four factors favors the stay: "(1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest." D.C. Cir. R. 8(a); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Moreover, "granting a stay pending appeal is 'always an extraordinary remedy,' and . . . the moving party carries a heavy burden to demonstrate that the stay is warranted." *United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (internal citations omitted).

When Mr. Ferrer first indicated to this Court (and to the Subcommittee) that it needed more time to disclose non-privileged documents and to file a privilege log as part of its production efforts, the Subcommittee opposed the request and rejected his untimely attempt to invoke non-First Amendment privileges. In response to the Subcommittee's position, Mr. Ferrer *only* stated that: (1) he timely asserted the attorney-client and work-product privileges because he mentioned them in correspondence with the Subcommittee; and (2) "these privileges are not lightly waived." Reply in Supp. of Mot. for Extension of Time [Dkt. 28] at 5-6. Mr. Ferrer did not explain his failure to file a privilege log or his unwillingness to assert any kind of privilege or right to withhold specific documents. He now seeks to relitigate this issue by raising new arguments against the disclosure of privileged documents. Specifically, Mr. Ferrer argues that: (1) waiver of the privileges is inconsistent with the language of the Subpoena; (2) waiver imposes an untenable Hobson's choice of requiring Mr. Ferrer to waive his common law privileges in order to assert effectively his First Amendment rights, including the alleged right not to search for subpoenaed documents; (3) waiver is inconsistent with the fact that Mr. Ferrer

mentioned the privileges in correspondence with the Subcommittee; and (4) Mr. Ferrer's attorneys could still assert work product protection, even in the event of Mr. Ferrer's waiver.

A motion to stay a court order pending appeal is not a platform to relitigate an issue or to preserve arguments that were not properly raised. Notwithstanding, in the interest of clarity, the Court will address Mr. Ferrer's arguments.

Mr. Ferrer's likelihood of success on the merits is not very high. Mr. Ferrer (or his attorneys) failed to invoke the underlying attorney-client and work product privileges properly prior to the subpoena's production deadline (*i.e.*, October 23, 2015), the filing of this enforcement action, or the Court's enforcement ruling. Mr. Ferrer cannot now ask the Court to excuse his non-compliance and permit him to assert new privileges or objections that the Subcommittee was unable to consider and rule upon. To hold otherwise would raise serious separation of powers concerns and potentially undermine Congress's constitutional power of inquiry. Unlike normal civil discovery, the Court's jurisdiction in this context is narrowly circumscribed. In the context of congressional subpoenas, Congress "strip[ped] this Court of its customary authority to modify or quash a subpoena" and limited the "court's jurisdiction . . . to the matter Congress brings before it" for enforcement. *Ferrer*, 2016 WL 4179289, at *6 (citing 28 U.S.C. § 1365(a), (b)) (quoting S. Rep. No. 95-170, at 94 (1977)).

The "matter Congress brings before" the Court in this case includes the Subcommittee's October 1, 2015 subpoena, as well as the legal objections Mr. Ferrer raised to justify his noncompliance. *Id.* Congress made clear that a "resolution to direct the [Senate Legal] Counsel to bring a civil action" must "contain a statement of . . . any objections or privileges raised by the subpenaed party," thereby indicating that Congress contemplated that the Senate would have before it all asserted privileges and objections to the subpoena before the

Senate applied to a court for its enforcement. 2 U.S.C. § 288d. To go beyond those objections raised by Mr. Ferrer before the Subcommittee would undermine the very purpose of the statute conferring limited jurisdiction on this Court, namely "to avoid judicial interference with Congress's exercise of its constitutional powers." *Ferrer*, No. 16-MC-621 (RMC), 2016 WL 4179289, at *6 (citing S. Rep. No. 95-170 at 94).

Mr. Ferrer's argument that he did not have to comply with the subpoena until this Court ruled on his categorical First Amendment objection misses the point.[2] The Senate's resort to judicial assistance did not trigger Mr. Ferrer's legal obligation to search for documents and provide a privilege log. In fact, failure to comply with the subpoena by the return date, even without judicial intervention, may have triggered criminal contempt proceedings against Mr. Ferrer. *See* 2 U.S.C. §§ 192, 194; *see also Shelton*, 404 F.2d 1292. In *McPhaul v. United States*, the Supreme Court stated:

> [I]f petitioner had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that he state his reasons for noncompliance upon the return of the writ . . . . *To deny the Committee the opportunity to*

[2] As the Court previously stated in its September 16, 2016 Order,

> [A]lthough Mr. Ferrer raised multiple arguments to oppose partial enforcement of the Subcommittee's subpoena, none of Mr. Ferrer's briefs before this Court (or before the D.C. Circuit and the Supreme Court) asserted a common law privilege. *See Ferrer*, No. 16-MC-621 (RMC), 2016 WL 4179289, at *5 (arguing that: (1) this Court lacked subject matter jurisdiction; (2) the subpoena lacked a valid legislative purpose that falls within the scope of the Subcommittee's authority; (3) the subpoena violated his First Amendment rights, was overly broad, and punitive in nature; and (4) the subpoena violated his due process rights)."

9/16/16 Order at 4 n.1.

> *consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. His failure to make any such statement was a patent evasion of the duty of one summoned to produce papers before a congressional committee, and cannot be condoned.*

McPhaul v. United States, 364 U.S. 372, 379 (1960) (internal quotation marks, citations, and alterations omitted) (emphasis added). The reasoning applies with equal force in this case where nearly a year has passed since the subpoena's response date. Mr. Ferrer's actions precluded the Subcommittee from considering the applicability of his common law privileges to the congressional subpoena.[3] Because Mr. Ferrer willfully chose this path, it is highly questionable whether the Court has jurisdiction under the statute to acknowledge Mr. Ferrer's untimely assertion of privilege.

Mr. Ferrer argues that he asserted his attorney-client and work product privileges in a timely manner because he mentioned them in correspondence with the Subcommittee prior to the filing of this enforcement action. In support, Mr. Ferrer cites his counsel's November 13, 2015 letter to the Subcommittee, which stated that "[c]ertain documents have been withheld on the basis of attorney-client and/or work product privilege, and certain documents with the submission contain redactions on that same basis." *See* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 13, 2015 [Dkt. 1-12] at 1, 5. However, no privilege log was submitted identifying which materials (or portions of documents) were withheld and on what

[3] The Subcommittee notes that "Mr. Ferrer deprived the Subcommittee and the Senate of the opportunity to consider the important unresolved question of the applicability of such common-law privileges to congressional subpoenas" and that "respect due for the processes of a coordinate branch merits permitting the Senate to consider such an important unresolved legal issue prior to its submission to the courts for resolution for the first time." Opp'n at 14. The Court agrees.

basis. More importantly, the letter was submitted nearly three weeks after the October 23, 2015 response date and after the Subcommittee had considered and ruled on Mr. Ferrer's objections on November 3, 2015. This sole and dilatory instance is the only indication that Mr. Ferrer intended to assert a common law privilege until now. This only reference is "insufficient" and untimely to "constitute a valid assertion of a common law privilege." 9/16/16 Order at 4.[4]

Mr. Ferrer also argues that a finding of waiver of privilege is inconsistent with the language of the Subcommittee's Subpoena, which stated that "[a]ny document withheld on the basis of privilege shall be identified on a privilege log submitted with response to this subpoena." Mot. to Stay at 2 (quoting Letter and Subpoena to Carl Ferrer from Chairman and Ranking Member of PSI, Oct. 1, 2015 [Ex. 1-7] (Oct. 1, 2015 Subpoena) at 6). Mr. Ferrer, however, omits an important detail. The "response to this subpoena" was due on October 23, 2015. The Subpoena "directed Mr. Ferrer to 'assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege or other right to withhold documents' in a privilege log." *Ferrer*, 2016 WL 4179289, at *3 (quoting Oct. 1, 2015 Subpoena at 3). Compliance with the deadline was not a formality; rather, the purpose was to allow the Subcommittee to consider Mr. Ferrer's timely objections and rule on them, as it did. By failing to do so, Mr. Ferrer "den[ied] the [Subc]ommittee the opportunity to consider the objection" and

[4] Mr. Ferrer also argues that, while the Court found that he waived his right to assert work product privilege, his attorneys may still claim work product protections even if he cannot. While this may be true in certain circumstances, it is not true here, where neither Mr. Ferrer nor his attorneys properly invoked the privilege prior to the subpoena's response date or during the judicial enforcement proceedings. The Court's reasoning regarding its limited jurisdiction and waiver applies to both Mr. Ferrer and his attorneys.

undermined its constitutional authority. *McPhaul*, 364 U.S. at 379. The language of the Subpoena does not support the proposition that the privilege log could have been submitted at Mr. Ferrer's convenience or at a time of his choosing, let alone nearly one year after the response date.

Finally, neither the Subcommittee nor this Court forced Mr. Ferrer to waive his common law privileges in order to assert a categorical First Amendment objection. Mr. Ferrer did not have to choose between the privileges. He could, and should, have asserted both in his objections to the production and disclosure of documents. Nonetheless, Mr. Ferrer opted to pursue a categorical First Amendment objection at the expense of his common law privileges when he chose not to respond to the subpoena, not to identify the withholding of specific privileged documents, and not to file an itemized privilege log invoking both constitutional (First Amendment) and common law (attorney-client and work product) privileges. *See Perry v. Schwarzenegger*, 264 F.R.D. at 580-81. At a minimum, Mr. Ferrer could have timely objected to the search for documents on First Amendment grounds and communicated to the Subcommittee his intention to assert common law privileges in the event his constitutional objection was overruled. Mr. Ferrer failed to take even these precautions prior to the subpoena's response date (October 23, 2015) or prior to the Subcommittee's ruling on Mr. Ferrer's objections (November 3, 2015).

Mr. Ferrer's position that he did not have to file a privilege log until now because he had a First Amendment right not to search for responsive materials lacks merit on its face and falls flat when confronted with overwhelming First Amendment case law and the Court's limited jurisdiction under the civil enforcement statute. *See* 9/16/16 Order at 6 n.3. ("The crux of Mr. Ferrer's position is not based on an argument that the production or disclosure of information would

violate his First Amendment rights, but rather that the mere act of searching for documents would violate the Constitution. As the Court already noted, this argument is 'untenable and without legal support.'") (quoting *Ferrer*, 2016 WL 4179289, at *13); *see supra* at 4-5. To hold that Mr. Ferrer did not have to respond to a congressional subpoena until the Court ruled on his First Amendment objection would not only undermine Congress's constitutional power of inquiry, but also, would incentivize subpoena recipients to refuse to search for documents and raise objections in staggered batches, thereby treating a congressional subpoena "as an invitation to a game of hare and hounds" — a game that could delay congressional proceedings indefinitely. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *see also In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998) (addressing the obligations of subpoena recipients under Federal Rule of Civil Procedure 45). If a party who submits an insufficiently detailed privilege log may be found to waive the underlying privilege, *see Walker*, 667 F. Supp. 2d at 138, it cannot be that a party who refuses to search for documents and raises objections in staggered batches can preserve the same privileges. Indeed, the Subcommittee set the requirements of its own subpoena for its purposes. The subpoena directed the nature of the response required, including the filing of a privilege log. The Court cannot find that Mr. Ferrer has made an adequate showing on likelihood of success on appeal.[5]

With respect to the second factor of irreparable harm, the Court finds that it weighs in favor of denial of a stay primarily because any potential harm that could result from the disclosure of all responsive documents would be caused in large part, if not entirely, by Mr.

[5] In its Opposition, the Subcommittee also argues that "Mr. Ferrer's likelihood of success is further reduced by serious doubt about whether the [Court's September 16, 2016] Order is appealable." Opp'n at 15. The Court will not address this argument since the D.C. Circuit will assess its jurisdiction over Mr. Ferrer's appeal.

Ferrer's own actions. It is well-settled that a party requesting the extraordinary equitable relief of a stay pending appeal "does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012) (internal quotation marks and citation omitted) (addressing the factor of irreparable harm in the context of a preliminary injunction); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that a litigant cannot "be heard to complain about damage inflicted by its own hand"); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 36 (D.D.C. 2014), *appeal dismissed*, No. 14-5152, 2014 WL 5838221 (D.C. Cir. Nov. 7, 2014).

Mr. Ferrer's failure to assert any non-First Amendment privilege or produce a privilege log prior to this enforcement action is the real source of the alleged irreparable harm. Precisely because Mr. Ferrer could have avoided any harm that could result from the disclosure of responsive documents, the Court finds that Mr. Ferrer's own litigation choices do not warrant a stay of this Court's Order.[6]

Finally, with respect to the third and fourth factors, the Court adopts its earlier reasoning when it denied Mr. Ferrer's motion to stay this Court's August 5, 2016 Enforcement Order. This Court stated then:

> Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation. To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward

[6] In August 5, 2016, the Court ordered Mr. Ferrer to produce "all responsive documents" to the subpoena requests. *See* 8/5/16 Order [Dkt. 18]. When Mr. Ferrer asked this Court, the D.C. Circuit, and the Supreme Court to stay this Enforcement Order, Mr. Ferrer limited the irreparable harm argument to his categorical First Amendment objection. There was no suggestion that he would suffer any harm from the disclosure of documents supposedly covered by the attorney-client or work-product privilege. His failure to allege harm then undermines his claim now.

> Mr. Ferrer's dilatory conduct. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 & n.17 (1975) (recognizing that "protracted delay has frustrated a valid congressional inquiry"); *see also* [*United States v.*] *Judicial Watch, Inc.*, 241 F. Supp. 2d [17,] 18 [(D.D.C. 2003)]. In addition, given the seriousness of the inquiry's subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking. *McCammon* [*v. United States*], 588 F. Supp. 2d [43,] 49 [(D.D.C. 2008)] (stating that "the public interest in fact favors a prompt and final resolution of the instant lawsuit, which has delayed the Government's effort to carry out its duties to collect and lay taxes").

Order Denying Mot. to Stay Enforcement [Dkt. 23] at 6. The same reasons apply now. Contrary to Mr. Ferrer's characterization of this Court's Order as one degrading the protections of common law privileges "at a cost to the justice system and society at large," *see* Mot. to Stay at 23, the Court's holding stands for the unremarkable proposition that failure to assert a common privilege in a timely and detailed manner results in waiver of the underlying privilege. This result is particularly forceful and compelling in the context of congressional subpoenas, where the Court's authority and jurisdiction is limited by statute and by due respect for separation of powers.

In conclusion, the Court finds that the balance of the equities weighs against a stay of this Court's order. Mr. Ferrer has not met the "heavy burden" required to demonstrate that such an "extraordinary remedy" is warranted. *Phillip Morris USA*, 449 F. Supp. 2d at 990.

Accordingly, in its discretion, it is hereby

ORDERED that Mr. Ferrer's Motion for a Partial Stay of this Court's September 16, 2016, Dkt. 32, is **DENIED**.

Date: September 30, 2016

/s/
ROSEMARY M. COLLYER
United States District Judge