FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INVESCO HIGH YIELD FUND; INVESCO V.I. HIGH YIELD FUND; MORGAN STANLEY GLOBAL FIXED INCOME OPPORTUNITIES FUND; and MORGAN STANLEY VARIABLE INSURANCE FUND, INC. CORE PLUS FIXED INCOME PORTFOLIO, *Plaintiffs-Appellees*, v. HANS JECKLIN, *Defendant-Appellant*, and SWISS LEISURE GROUP AG; JPC HOLDING AG; GEORGE HAEBERLING; JOHN TIPTON; CHRISTIANE JECKLIN, *Defendants.*	No. 21-15809 D.C. No. 2:05 cv-1364-RFB OPINION

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted July 7, 2021
San Francisco, California

Filed August 25, 2021

Before: A. Wallace Tashima and Susan P. Graber, Circuit Judges, and Kathryn H. Vratil,[*] District Judge.

Opinion by Judge Tashima

SUMMARY[**]

Recalcitrant Witness Statute

The panel affirmed the district court's order granting plaintiff's motion to compel and holding Hans Jecklin in contempt as a recalcitrant witness.

The panel held that the federal recalcitrant witness statute, 28 U.S.C. § 1826(a), applied to an individual who refused to comply with a court order compelling responses to post-judgment written discovery requests. The panel rejected

[*] The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Jecklin's contention that the statute applied only to a refusal to provide in person testimony, not to a refusal to answer interrogatories or produce documents. The panel also rejected Jecklin's contention that the statute applied to a refusal to produce prejudgment, but not post-judgment, discovery.

The panel affirmed the district court's issuance of the arrest warrant, and dissolved this court's stay of the arrest warrant.

The panel addressed the remaining issues in a concurrently filed memorandum.

COUNSEL

Tamara Beatty Peterson (argued) and Nikki L. Baker, Peterson Baker PLLC, Las Vegas, Nevada, for Defendant-Appellant.

John M. Conlon (argued), Jean-Marie L. Atamian, Jason I. Kirschner, and Christopher J. Mikesh, Mayer Brown LLP, New York, New York, for Plaintiffs-Appellees.

OPINION

TASHIMA, Circuit Judge:

Under the federal recalcitrant witness statute, when a witness refuses to testify or provide other information, including documentary evidence, the court "may summarily order his confinement . . . until such time as the witness is willing to give such testimony or provide such information." 28 U.S.C. § 1826(a). We address whether § 1826(a) applies to an individual who refuses to comply with a court order compelling responses to post-judgment written discovery requests. We hold that it does.[1]

I. BACKGROUND

In April 2019, the district court entered a judgment in favor of Plaintiffs and against Defendants Hans Jecklin, a Swiss citizen, and two business entities he controls, Swiss Leisure Group AG, and JPC Holding AG (collective, the "Jecklin Defendants"), in the amount of $38,489,055, plus post-judgment interest accrued since 2003, costs, and attorney's fees.

Two months later, Plaintiffs propounded post-judgment interrogatories and requests for the production of documents on the Jecklin Defendants pursuant to Federal Rules of Civil Procedure 69(A)(2), which authorizes a judgment creditor to obtain discovery from a judgment debtor to aid in the execution of a judgment. When the Jecklin Defendants failed to produce the requested discovery, Plaintiffs moved to

[1] In a concurrently filed memorandum, we address the remaining isues in this appeal.

compel discovery responses under Rule 37. *See* Fed. R. Civ. P. 37(a). In a May 28, 2020, order, the district court granted Plaintiffs' motion to compel.

The Jecklin Defendants did nothing to comply with the May 28 order. As Plaintiffs stated in a status report: "Despite the passage of over a month since entry of this Court's May 28, 2020 Order, and over one year since Plaintiffs' post-judgment discovery requests were served, Defendants have not made any meaningful effort to comply with the Court's Order, let alone acknowledged that they would comply with the Order compelling Defendants to respond to the discovery requests." At a status conference held two days later, the Jecklin Defendants advised the court, through counsel, that "they are not going to comply with the Court order compelling discovery because they do not accept jurisdiction of this Court and they consider Your Honor's decision not to be enforceable in Switzerland."

Plaintiffs thereafter moved for sanctions. Invoking § 1826(a), Plaintiffs argued that "the Court should enter an order for the issuance of an arrest warrant as to Mr. Jecklin at such time as he may be found in the United States until such time as the Jecklin Defendants comply with the May 28 Order or Mr. Jecklin has been confined for 18 months, whichever is earlier." In a March 2021 order, the district court granted the motion for sanctions and held the Jecklin Defendants in civil contempt. In addition to imposing a daily fine, the court found that "the Jecklin Defendants' pattern of disregarding the Court's Order supports the coercive sanction of arrest." The court stated:

> The Court finds, based upon the record, that Hans Jecklin is in possession of information

> and documents that are the subject of this Court's May 28, 2020 Order related to post-judgment discovery. The Court further finds that Hans Jecklin has specifically remained outside of the territorial jurisdiction of the United States to avoid his legal obligations in the case before this Court. He has indeed confirmed this through his attorney by indicating he would no longer subject himself to this Court's jurisdiction. Therefore, an arrest warrant shall be issued for Hans Jecklin, and if he is in the United States, he shall be detained until he purges himself of his civil contempt. Upon such arrest, he shall be forthwith brought before this Court to address his contempt. This arrest is intended to be coercive and not punitive.

The court issued an arrest warrant on April 1, 2021. Jecklin timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

Post-judgment orders of contempt are within this court's jurisdiction under 28 U.S.C. § 1291. *Hilao v. Est. of Marcos*, 103 F.3d 762, 764 (9th Cir. 1996). "We review the court's finding of contempt under 28 U.S.C. § 1826 for abuse of discretion." *In re Grand Jury Proc.*, 801 F.2d 1164, 1167 (9th Cir. 1986) (per curiam). "Under this deferential standard, we must affirm the district court absent 'an error of law or clearly erroneous findings of fact.'" *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 975 F.3d 770, 775 (9th Cir. 2020) (quoting *Wilcox v. Arpaio*, 753 F.3d 872, 875 (9th Cir. 2014)). "Questions of statutory

interpretation are reviewed *de novo*." *United States v. Youssef*, 547 F.3d 1090, 1093 (9th Cir. 2008) (per curiam).

III. DISCUSSION

Jecklin contends that § 1826(a) does not apply here for two independent reasons. He argues that the statute applies only to a refusal to provide in-person testimony, not to a refusal to answer interrogatories or produce documents. He further asserts that the statute applies to a refusal to produce prejudgment, but not post-judgment, discovery. We reject both arguments.

A. Section 1826 Applies to a Refusal to Produce Written Discovery

We first address Jecklin's argument that § 1826(a) is limited to a refusal to provide "in-person testimony." "To answer this question we begin as we do for all questions of statutory interpretation, by turning to the text." *United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020). Section 1826 states:

> Whenever a *witness* in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to *testify* or *provide other information, including any book, paper, document, record, recording or other material*, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time

> as the witness is willing to give such *testimony* or *provide such information*.

28 U.S.C. § 1826(a) (emphases added).

Were we to consider only the third word of the statute, we might agree with Jecklin that § 1826(a) does not apply to written discovery responses. The statute refers to a "witness," and a "witness" is commonly understood to mean "[s]omeone who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit." *Witness*, Black's Law Dictionary (11th ed. 2019); *see Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 933 F.3d 1088, 1093 (9th Cir. 2019) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (quoting *FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011))). Jecklin does not fall within the dictionary definition of witness.

We do not, however, consider the third word of the statute in isolation. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Here, § 1826(a) as a whole makes clear that a "witness" includes not only someone who refuses to testify but also someone who refuses to "provide other information." 28 U.S.C. § 1826(a). Jecklin, therefore, was a witness under the statute.

Our case law supports this conclusion: we have consistently applied § 1826(a) to individuals who refused to provide information through means other than testimony. In *In re Grand Jury Proceedings*, 33 F.3d 1060, 1063 (9th Cir.

1994) (per curiam), for example, we applied § 1826(a) to an individual who failed to provide documents in response to a subpoena duces tucem issued by a grand jury. Similarly, in *In re Grand Jury Proceedings*, 873 F.2d 238, 239 (9th Cir. 1989) (per curiam), we applied § 1826(a) to an individual who refused to sign a consent form that would have given a grand jury access to information about his bank accounts. Neither of these cases involved a refusal to testify.

Jecklin's position is also at odds with the Third Circuit's decision, which specifically addressed the meaning of the word "witness" in § 1826(a). There, the appellant was confined for civil contempt under § 1826(a) after he failed to comply with a court order requiring him to produce several of his seized electronic devices in a fully unencrypted state. *United States v. Apple MacPro Comput.*, 949 F.3d 102, 104 (3d Cir. 2020). The Third Circuit held that the appellant was "a witness within the meaning of § 1826(a) both because he is being asked to provide testimonial information *and because the statute reaches even non-testimonial acts of production*." *Id.* at 107 (emphasis added). The appellant was "being asked to provide information in a proceeding and [was] therefore a witness under § 1826(a)." *Id.* at 108. Jecklin, too, is being asked to provide information in a proceeding. He therefore qualifies as a "witness" under the statute.

Finally, Jecklin's position is contrary to the purposes of the statute. As the Second Circuit has observed, "imprisonment under the recalcitrant witness statute is a coercive remedy, the sole purpose of which is to compel the production of information pursuant to court order." *United States v. Restrepo*, 936 F.2d 661, 669 (2d Cir. 1991). This purpose is achieved by compelling the production of

information through all authorized means, not solely through testimony.

For all of these reasons, we hold that § 1826(a) applies not only to a refusal to testify but also to a refusal to provide other information. This includes responding to interrogatories and requests for the production of documents.

B. Section 1826 Applies to a Refusal to Produce Post-judgment Discovery

Jecklin alternatively contends that § 1826(a) is limited to a refusal to produce prejudgment discovery and does not apply to a refusal to produce post-judgment discovery.

Jecklin's argument finds no support in the statutory text. Section 1826(a) refers to a refusal "to testify or provide other information" in "any proceeding before or ancillary to any court or grand jury of the United States." 28 U.S.C. § 1826(a). It makes no distinction between prejudgment and post-judgment proceedings, nor between prejudgment and post-judgment information.

Likewise, our case law and the case law of other circuits do not support Jecklin's argument. In *Danning v. Lavine*, 572 F.2d 1386 (9th Cir. 1978), the defendant was confined under § 1826(a) for refusing to answer prejudgment deposition questions. We held that the confinement could not continue after default judgment was entered against the defendant, because "[t]he depositions were taken to obtain a judgment and no further discovery for this purpose was necessary after entry of the judgment." *Id.* at 1389. In dictum, however, we assumed that § 1826(a) would apply to a refusal to produce post-judgment discovery:

> We acknowledge that if during the course of discovery in aid of execution on the judgment, Fed. R. Civ. P. 69(a), appellant had refused to disclose the identity of the person who received the proceeds, a contempt order compelling her to answer might be proper. That situation, however, is not presented by this appeal.

Id. at 1389–90.

Other circuits also have assumed that § 1826(a) applies to a refusal to produce post-judgment discovery. In *Martin-Trigona v. Gouletas*, 634 F.2d 354, 355–56 (7th Cir. 1980) (per curiam), a judgment debtor was found in contempt and confined after he refused to answer live questions in a post-judgment proceeding intended to discover his assets. The court upheld the confinement under § 1826(a). *Id.* at 362. The Fifth Circuit has also affirmed confinements under § 1826(a) based on a failure to produce post-judgment discovery. *See Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 99 F.3d 1134, at *1–2 (5th Cir. 1996) (per curiam) (unpublished); *James v. Frame*, 979 F.2d 1534, at *1, 5 (5th Cir. 1992) (per curiam) (unpublished). Although none of these decisions specifically addressed Jecklin's argument that § 1826(a) does not apply to post-judgment discovery, the court in each case plainly assumed that it did. Jecklin points to no case law to the contrary, and we are aware of none.

Finally, Jecklin once again fails to explain how the distinction he proposes comports with § 1826's purpose of compelling the production of information pursuant to court order. As the Supreme Court has observed, "[t]he rules governing discovery in postjudgment execution proceedings

are quite permissive." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 138 (2014). It would make no sense for Congress to have excluded these important proceedings from the reach of § 1826.

Given the statutory text, case law, and the statute's purpose, we hold that § 1826(a) applies to a refusal to produce post-judgment discovery.

IV. CONCLUSION

For the reasons stated herein and in our concurrently filed memorandum disposition, the district court's order granting the motion to compel, its civil contempt order, and its issuance of the arrest warrant are **AFFIRMED**. The stay of the arrest warrant entered by this court on May 25, 2021, is **DISSOLVED**.