IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. SMITH INTERNATIONAL, INC., and SCHLUMBERGER LTD., Respondents.	Supplemental to Civil Action No. 93-2621 -- SS/AK Judge Stanley Sporkin

UNITED STATES' POST-TRIAL BRIEF

December 3, 1999

ANGELA L. HUGHES
Member of The Florida Bar, #211052

ROBERT L. McGEORGE
MICHAEL D. BILLIEL
MATTHEW O. SCHAD
MAX R. HUFFMAN

BERNARD M. HOLLANDER
Senior Trial Attorney

325 7th Street, N.W., Suite 500
Washington, D.C. 20530
Telephone: 202/307-6410
Facsimile: 202/307-2784

Attorneys for the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Rules of Procedure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. SMITH INTERNATIONAL, INC., and SCHLUMBERGER LTD., Respondents.	Supplemental to Civil Action No. 93-2621 -- SS/AK Judge Stanley Sporkin

UNITED STATES' POST-TRIAL BRIEF

The evidence introduced during the trial of this matter shows that Respondents Smith International, Inc. ("Smith") and Schlumberger Ltd. ("Schlumberger") willfully violated a clear and unambiguous order entered by this Court in United States v. Baroid, et al. (Civil Action No. 93-2621). On July 14, 1999, Respondents combined the drilling fluid business of Smith subsidiary M-I L.L.C. (formerly M-I Drilling Fluids and hereinafter referred to as M-I) with most of the drilling fluid operations of Schlumberger in a joint venture.[1] This transaction violated the Final Judgment, which prohibits Smith from selling its drilling fluid business to Schlumberger or combining its that business with "the drilling fluid operations" of Schlumberger. Final Judgment ¶ IV.F, GX 1 at 11.

[1] For a detailed discussion of the factual background of the Baroid decree and the Smith/Schlumberger joint venture, see United States' Trial Brief at 2-7.

To restore the status quo ante, and thus remedy the civil contempt, the Court should order Respondents to rescind the transaction, restore the assets to their pre-transaction condition, and disgorge any profits earned from the joint venture from July 14 to the time the transaction is rescinded or the Respondents otherwise cease to be in contempt. Given the clarity of the plain language of the Final Judgment and the wholly twisted and unreasonable interpretation offered by Respondents, alleged reliance on advice of counsel cannot shield Smith and Schlumberger from responsibility for their willful violation of the decree. In addition to remedying the violation of the decree by ordering recission and disgorgement, the Court should find each of Respondents guilty of criminal contempt and impose a criminal fine of $1 million on each of them to punish their willful violation of the consent decree.

I. The Court Has the Power to Hold Smith and Schlumberger in Contempt

This Court has the power to hold Smith and Schlumberger in civil and criminal contempt. This power is based both on the Court's inherent power to enforce its orders and its authority under Paragraph XIV of the Final Judgment to punish violations of the decree.

Federal Rule of Civil Procedure 65(d) states that an injunction binds "the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." While Smith was not a party to the original action filed in 1993, it agreed to be bound when it purchased the divested drilling fluid business in 1994. GX 42, Admission 10. Moreover, in 1996, Smith went to the Court seeking modification of the decree to allow it to purchase Anchor. When the Court approved the modification, it made Smith a party to the modified decree -- the decree that was violated. GX 8. Thus, Smith should be treated as a party for purposes of Rule 65(d). Under Rule 65(d), Schlumberger,

because it had actual notice and acted in concert with Smith, may be held in contempt for violation of the decree.[2] Schlumberger is Smith's partner in the joint venture, and received notice that the Department of Justice regarded the transaction as a clear violation of the Judgment. GX 42, Admissions 35-37. Indeed, but for the active participation of Schlumberger in consummating the transaction leading to the formation of the joint venture, no violation of the decree would have occurred. See Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930). The Court also has the power under Rule 65 to hold Smith and Schlumberger in criminal contempt for wilfully violating the decree -- Smith for violating an order to which it is subject and Schlumberger for aiding and abetting Smith. Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 91 F.3d 914, 919 (7th Cir. 1996).

II. Legal Standards for Civil and Criminal Contempt

To prove civil contempt, Petitioner must show by clear and convincing evidence that there was a lawful Final Judgment, that Respondents had knowledge of the Final Judgment, and that they violated a "'clear and unambiguous' provision of the consent decree." United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); see Washington-Baltimore Newspaper Guild v. Washington Post Co., 626 F.2d 1029, 1031 (D.C. Cir. 1980); United States v. Greyhound Corp., 363 F. Supp. 525,

[2] The power to bind non-parties in circumstances such as this has a long and venerable history, see Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.) ("[A] person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal penalties for contempt. This is well settled law."), and is based on the common-sense recognition "that the objectives of an injunction may be thwarted by the conduct of parties not specifically named in its text." Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 91 F.3d 914, 920 (7th Cir. 1996); see also United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972) ("[I]n the circumstances of this case third parties such as Hall were in a position to upset the court's adjudication."). The instant case is even easier, because Schlumberger was specifically named in the Court's order.

570 (N.D. Ill. 1973), aff'd, 508 F.2d 529 (7th Cir. 1974). Evidence of intent or willfulness on the part of the Respondents is not required for a finding of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

Criminal contempt requires proof beyond a reasonable doubt of the above elements plus an additional element of intent, i.e., that Respondents' violation of the Final Judgment was willful. See United States v. Rapone, 131 F.3d 188, 192 (D.C. Cir. 1997). Willfulness may be shown by demonstrating that Smith and Schlumberger acted "with deliberate or reckless disregard of the obligations created" by this Court's order. Id. at 195 (citing United States v. Young, 107 F.3d 903, 909 (D.C. Cir. 1997), and In re Holloway, 995 F.2d 1080, 1082 (D.C. Cir. 1993)).

III. Respondents Violated a Clear and Unambiguous Provision of This Court's Final Judgment

A. The Plain Language of the Final Judgment Is Clear and Unambiguous

To make the determination of whether the actions in question violated the Final Judgment, this Court must construe the language of the Final Judgment. It is one of the most fundamental legal concepts that the starting point in interpreting the language of any document -- whether a consent decree, a contract[3] or a statute -- must be the document's plain language. See, e.g., Quadrangle Dev. Corp. v. Antonelli, 935 F.2d 1337, 1340 (D.C. Cir. 1991). Thus, the Court should look first to the "plain meaning of the Decree's language." United States v. Western Elec., 894 F.2d 1387, 1394

[3] A consent decree is read essentially as a contract. United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975); United States v. Western Elec. Co., 894 F.2d 1387, 1390 (D.C. Cir. 1990).

(D.C. Cir. 1990); see United States v. Armour & Co., 402 U.S. 673, 678 (1971). Where language is clear on its face, there is no need to reach out to external sources to aid in interpretation. See United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95-96 (1820) ("Where there is no ambiguity in the words, there is no room for construction.") (Marshall, C.J.).

Paragraph IV.F. of the Final Judgement, as amended, states:

> The defendants shall not sell the drilling fluid business to Baker Hughes, Inc., Schlumberger Ltd., or Anchor Drilling Fluids, or any of their affiliates or subsidiaries during the life of this decree. The purchaser of the divested drilling fluid business shall not sell the drilling fluid business to, or combine that business, with the drilling fluid operations of Dresser Industries, Inc., Baker Hughes, Inc., or Schlumberger Ltd., or any of their affiliates or subsidiaries during the life of this decree. The purchaser of the divested drilling fluid business shall not sell the drilling fluid business to, or combine that business, with the drilling fluid operations of Anchor Drilling Fluids, except in accordance with the terms of the Joint Motion to Modify Final Judgment and Stipulated Divestiture Agreement filed by the United States and Smith International, Inc. on June 4, 1996, which is hereby incorporated and made a part of the Final Judgment. (emphasis added)

There is no dispute that Respondent Smith is the "purchaser of the divested drilling fluid business" and that Respondent Schlumberger is the same Schlumberger Ltd. referred to in this provision. GX 42, Admissions 3-4. There is also no dispute that the terms "sell" and "combine" in this provision have their common, plain English meanings. See Tr., 11/22/99, at 7:19-8:8 (Boland). This provision, in simple and clear language, prohibits the joint venture transaction that Respondents consummated on July 14, 1999.

Prior to formation of the joint venture, Smith owned M-I. Tr., 11/22/99, at 155:15-156:4. In consummating the joint venture, Smith sold to Schlumberger, for $280 million plus contributed assets, a 40 percent interest in a joint venture that includes M-I, thereby selling a portion of the divested "drilling

fluid business" to Schlumberger. GX 32 at 10. Further, in consummating the joint venture, Smith combined M-I with Schlumberger's drilling fluid operations. Smith's action thus violated the Final Judgment's clear and unambiguous prohibitions both in selling the drilling fluid business to Schlumberger and in combining the divested "drilling fluid business" with the drilling fluid operations of Schlumberger.

It is difficult to imagine a provision that more unambiguously bars the Smith/Schlumberger joint venture. Respondents cannot escape liability for contempt by torturing the plain meaning of the decree to justify their actions.

B. Respondents' Attempt to Limit the Final Judgment to U.S. Operations or Assets is a "Twisted Interpretation"

Respondents have maintained that the Final Judgment does not apply to the Smith/Schlumberger transaction because Schlumberger claims to have exited the U.S. market and the joint venture was restructured to exclude certain U.S. assets of Schlumberger. This interpretation has no basis in the Final Judgment or anywhere else, and is in fact directly contradicted by other legal analyses done by their counsel (which Respondents ignored).

1. Respondents' Interpretation Ignores the Plain Language of the Final Judgment

Respondents' reading of the Final Judgment stands the ordinary rule of interpretation on its head, ignoring the plain language of the decree itself and roaming far and wide in an attempt to manufacture an ambiguity where none exists. As Neal Sutton, Smith's general counsel, conceded, the literal language of Paragraph IV.F. simply does not say what Respondents claim it does. Tr., 11/24/99,

at 86:8-86:18 (Sutton).[4]

To get to their desired result, Respondents attempt to use scattered statements in various other documents to read an exception for non-U.S. assets or operations into Paragraph IV.F. See Tr., 11/19/99, at 53:11-69:15 (Boland); Sutton Dep. at 83:13-84:5 (Tr., 11/18/99, at 91:14-92:5). Respondents' approach is best illustrated by the testimony of Smith's outside counsel Sean Boland, whose explanation of his analysis of the Final Judgment takes up about 30 pages of the trial transcript, discussing the Complaint, the Competitive Impact Statement, the 1996 modification proceeding, and other, unrelated consent decrees. Tr., 11/19/99, at 50:2-80:17 (Boland). Boland then claims that, based on these outside sources, the Final Judgment "in context" does not mean what it says. Tr., 11/19/99, at 70:7-71:2 (Boland). Similarly, Respondents' other witnesses, instead of focusing on the language of the decree, claim that it must be interpreted in reference to "the landscape" or "the ambiance" of the Final Judgment. Sutton Dep. at 83:13-84:5 (Tr., 11/18/99, at 91:14-92:5); Rock Dep. at 215:24-216:7 (Tr., 11/18/99, at 166:25-167:7).

Respondents maintained a studied ignorance of the language of the Final Judgment throughout the period leading up to the transaction, blithely accepting their counsel's convenient opinion that the decree did not mean what it said. Smith CEO Doug Rock testified that he "was told that just because it doesn't say United States doesn't mean it's not the United States." Tr., 11/22/99, at 188:20-189:8 (Rock). As discussed further below, Respondents remarkably failed to question this interpretation even after the Department of Justice notified them it would initiate proceedings in district court if they closed.

---

[4] Indeed, Smith's general counsel invented a new rule of construction in which one must look elsewhere to determine if plain language is really ambiguous. Tr., 11/24/99, at 69:9-69:24.

2. Respondents' Interpretation is Not Supported by The Complaint or Other Sources

Even if it were necessary or appropriate to consider external sources in interpreting the Final Judgment, the evidence offered by Respondents does not support their position that an exclusion for non-U.S. assets or operations should be read into Paragraph IV.F. It does not follow that because the Final Judgment was aimed at protecting U.S. competition it must be construed as barring only sales or combinations of U.S. assets. The remedy needed to protect competition in a particular geographic market often extends to assets and firms physically located outside the affected geographic market. See, e.g., United States v. Halliburton Co., et al., Civil Action No. 1:98CV02340 (D.D.C. April 1, 1998); United States v. Jos. Schlitz Brewing Co., 253 F. Supp 129, 145, 147-48 (N.D. Cal.), aff'd, 385 U.S. 37 (1966); United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215, 237 (S.D.N.Y. 1952).

The Final Judgment explicitly imposed a remedy that included international assets and operations, ordering Dresser to divest an ongoing, worldwide drilling fluid operation to protect competition in the United States, see GX 1 at 7, a point that Respondents studiously ignore when parsing the documents in search of reasons to limit the decree. The Final Judgment prohibited divestiture to a specified list of actual or potential competitors in the U.S. drilling fluid market and prevented circumvention of that prohibition by placing identical restrictions on the buyer of the divested drilling fluids business, which turned out to be Smith.

As Respondents acknowledge, Schlumberger had only a fledgling drilling fluid business in the United States at the time of the Final Judgment, and had not begun competing in the Gulf of Mexico.

Tr., 11/23/99, at 62:11-63:12 (Grijalva). Nevertheless, it was included on the "short list" of prohibited buyers because, as one of the largest oilfield service companies in the world, it was viewed as capable of expanding its business and becoming a significant independent competitor in the U.S. drilling fluids business. Schlumberger is today the second largest oil field service company in the world. Grijalva Dep. at 10:9-10:13 (Tr., 11/18/99, at 74:11-74:14).

If Respondents believed in retrospect that the scope of relief should be modified due to changed circumstances, e.g., because they believed that Schlumberger's experience in the U.S. shows that it is no longer a viable potential entrant, their only proper course was to seek a modification of the decree from the Court. They were not free to "construe" the decree in a manner they saw fit. Greyhound Corp., 363 F. Supp. at 534; cf. United States v. United Mine Workers, 330 U.S. 258, 293 (1947) ("The defendants, in making their private determination of the law, acted at their peril.").

3. Respondents' Interpretation is *Post Hoc* and Contradicted by Their Own Legal Analysis

Not only is there nothing in the Final Judgment or any related documents to support Respondents' interpretation of the decree, but the only documents produced by their counsel on the subject conclude that the language of the Final Judgment would bar a Smith/Schlumberger joint venture even if it included no U.S. operations of either party. GX 11 at 2; GX 13 at 20-21. Smith's outside counsel claims that he believed from the outset that the prohibitions of the Final Judgment were limited to U.S. transactions. Tr., 11/19/99, at 77:12-77:17, 135:4-135:7 (Boland). This analysis does not appear in any document from the time the decree was entered (when Smith purchased the divested drilling fluid business and became subject to the decree), or from the time of the 1996 Anchor

transaction (when Smith and the Justice Department jointly petitioned for modification). Smith's general counsel, Neal Sutton, now claims "in retrospect" that the Anchor transaction could have been done without modification if Anchor's U.S. business had been spun off first, Tr., 11/24/99, at 71:17-71:22 (Sutton), but there is no evidence that this possibility was considered at the time of the Anchor transaction.

The fact that no writing prepared during the period from the entry of the decree in 1994 to immediately before the transaction by Smith or its outside counsel supports their claim that they understood the decree to only cover transaction involving U.S. assets makes their recent, convenient analysis to that effect suspect. This is especially true given the statement by outside counsel to Smith's general counsel in April 1999 that the "order says that assets, international and domestic, are covered." GX 12; Sutton Dep. 112:20-112:21 (Tr., 11/18/99, at 119:19-119:20). Further, the Court should consider, in judging whether the views on the meaning of the decree expressed by counsel constitute a considered legal judgment or an attempt to construct a rationale for Respondents' violation, that despite the importance of the decree interpretation to the parties' ability to lawfully consummate the July 14th joint venture, neither Respondents nor outside counsel ever prepared a written legal analysis of their recent interpretation, even after the Department of Justice took the opposing view and threatened legal action. See Gunderson Dep. at 175:14-176:10 (Tr., 11/19/99, at 15:22-16:11).

In contrast, two memoranda prepared by Respondents' counsel in April 1999, after they learned that the Department of Justice might oppose modification of the decree to permit the desired transaction and they began considering alternatives to a joint motion to modify, conclude that the Final

Judgment is not as limited as Respondents now claim.[5] An April 7, 1999, memo written by Bruce McDonald of Baker & Botts, Schlumberger's outside counsel, states that a joint venture involving only the non-U.S. operations of Smith and Schlumberger "would likely violate the consent decree" because the decree "is not limited to M-I or Schlumberger only in the U.S., but apparently applies to their assets worldwide." GX 11 at 2-3. Similarly, an April 16, 1999, memo from Collier, Shannon, Rill & Scott, Smith's outside counsel, examined a possible Section 7 challenge to a transaction involving only the non-U.S. operations of Smith and Schlumberger. The memo concluded that if a court found it had jurisdiction it would also find that "the joint venture is (or likely is) subject to the Baroid consent decree," and transfer the case to Judge Sporkin, who "could rule that order modification is required." GX 13 at 20. Moreover, notes of an April telephone conversation between Smith's general counsel and outside counsel state that the decree's prohibitions cover international and domestic assets. GX 12. The conclusion that the Final Judgment would bar a transaction, even if Schlumberger's U.S. assets were excluded, was reiterated by Baker & Botts in a June 21, 1999, e-mail to Gary Wilson, general counsel of Schlumberger's oil field services division, which Wilson admits that he read. GX 16; Tr., 11/24/99, at 22:14-24:13 (Wilson).

Both companies thus had memoranda from counsel that examined the Final Judgment and readily came to the straightforward conclusion that its prohibitions are not limited to U.S. transactions. Both memos suffered similar fates. The Baker & Botts memo was sent to Gary Wilson who testified

---

[5] Contemporaneous documents provide "cinematographic photographs" of a defendant's thoughts when written, and contradictory testimony only casts doubt on the witness's credibility. United States v. Corn Products Refining Co., 234 F. 964, 978 (S.D.N.Y. 1916) (Hand, J.); see also United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948).

that he scanned it quickly and put it in a drawer. Tr., 11/24/99, at 20:17-20:19 (Wilson). The Collier, Shannon memo, which was sent to Smith general counsel Neal Sutton, was likewise ignored. Tr., 11/24/99, at 74:18-75:10 (Sutton). Instead of this straightforward analysis of the decree, Respondents chose a twisted interpretation that would allow them to evade their obligations under this Court's order. This late-devised "interpretation" which purports to exclude this transaction from the Final Judgment was "advice fitted to accommodate" Respondents' business interests, but it offers no protection against contempt sanctions. See United States v. Cable News Network, 865 F. Supp. 1549, 1559 (S.D. Fla. 1994).

IV. Respondents Willfully Violated the Final Judgment

The evidence proves beyond a reasonable doubt that Smith and Schlumberger acted with reckless disregard for the Court's Final Judgment. Proof that Smith and Schlumberger knew of the Court's order, yet violated it, demonstrates willfulness. See Rapone, 131 F.3d at 195; United States v. Schafer, 600 F.2d 1251, 1253 (9th Cir. 1979) (party that knew "he was treading on dangerous ground" and proceeded to violate decree guilty of criminal contempt). The knowledge and conduct of Smith's and Schlumberger's general counsels must be imputed to the corporation, see New York Central & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909), following the general rule that a corporation is criminally liable "for the acts of its managerial agents 'done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform.'" United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981) (quoting jury

instruction given by district court).[6] Smith's decision makers were well aware of the Final Judgment even before purchasing Dresser's interest in M-I. Tr., 11/24/99, at 67:10-67:22 (Sutton). Smith agreed to be bound by the Final Judgment when purchasing Dresser's interest. GX 42, Admission 10. When purchasing Anchor, Smith negotiated a modification -- demonstrating not only its awareness of the Final Judgment, but also the proper method of seeking modification from the Court. GX 42, Admission 19. Likewise, Schlumberger was informed of the Final Judgment, and the fact that it named Schlumberger specifically, in 1994. GX 4; GX 42, Admission 18; Tr., 11/23/99, at 19:7-20:13 (Grijalva). In a case such as this, where the language of the Final Judgment is so clear, the Court should infer criminal intent from proof of knowledge and a violation.

A. Smith and Schlumberger Cannot Rely on Advice of Counsel as a Defense to Criminal Contempt

Smith and Schlumberger contend that their violation of the Court's Final Judgment was undertaken in reliance on the advice of counsel. To avail themselves of that defense, Respondents must show they acted in good faith in relying on counsel's advice. "'[N]o man can wilfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.'" Williamson v. United States, 207 U.S. 425, 453 (1908) (quoting jury

---

[6]That other officials of Smith and Schlumberger did not read the Final Judgment, or that their general counsels claim to have relied unquestioningly on the advice of outside counsel, cannot save Respondents from contempt sanctions. Indeed, maintaining a "studied ignorance" of the terms of the Final Judgment is the very definition of reckless disregard. See United States v. McMahon, 104 F.3d 638, 644-45 (8th Cir. 1997) ("If McMahon truly remained ignorant of the sequestration order, it was indeed a 'studied ignorance.'"). As the Second Circuit noted: "[A] party to an action is not permitted to maintain a studied ignorance of the terms of a decree in order to postpone compliance and preclude a finding of contempt." Perfect Fit Indus., Inc. v. Acme Quilting Co., 646 F.2d 800, 808 (2d Cir. 1981).

instructions). Further, "the reasonableness of a belief is a factor which bears upon whether the belief was in fact held in good faith." United States v. Benson, 67 F.3d 641, 649 (7th Cir. 1995) (Benson II). This reasonableness standard is heightened for sophisticated corporations. John Hopkins Univ. v. CellPro, 978 F. Supp. 184, 190, 194 (D. Del. 1997) (corporation with in-house counsel has a heightened obligation to investigate opinions from outside counsel).

B. Objective Indicia Demonstrate the Unreasonableness of Respondents' Defense

Measured against objective indicia of reasonableness, Smith's and Schlumberger's reliance on advice of counsel falls far short.

1. Reliance on a Twisted Interpretation is Unreasonable

The "advice of counsel" defense requires that Smith and Schlumberger sought the advice of outside counsel in good faith, see United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993), which in turn requires that some legitimate question exist as to whether this Court's order proscribed the joint venture. As discussed above, Respondents' interpretation of the Final Judgment completely ignores the plain language of the decree, and indeed, is not even supported by the other documents Respondents claim to have relied upon, which refer only to the geographic market and not to the scope of relief. Obviously deficient opinions by counsel do not permit reasonable reliance. Johns Hopkins Univ., 978 F. Supp. at 193.

Given the clarity of the decree language, Respondents' decision makers, including their general counsels and other in-house lawyers, knew or should have known that their outside counsel's "interpretation" of the Final Judgment flew in the face of a reasoned legal analysis.

This is particularly true in light of the clear warning Respondents received from the Department of Justice and other analyses received from their outside counsel stating that the decree would cover a Smith/Schlumberger joint venture regardless of whether U.S. assets were involved.

Instead, Respondents, especially their general counsels, have attempted to abdicate all responsibility for their actions and hide behind the implausible interpretations offered by their outside counsel. Schlumberger's general counsel, James Gunderson, could not recall whether he had even seen Paragraph IV.F. prior to looking at the pleadings in this case, and testified that he had never done any independent analysis of the decree. Gunderson Dep. at 90:11-92:12, 93:9-93:20 (Tr., 11/19/99, at 12:22-14:17). Neal Sutton, Smith's general counsel, testified that, "I wasn't exercising my independent judgment in any way" with respect to interpretation of the Final Judgment. Tr., 11/24/99, at 71:1-71:5 (Sutton). Sutton also testified that he had discussions with outside counsel about the fact that Smith could defend against contempt sanctions by arguing reliance on advice of counsel. Tr., 11/24/99, at 95:1-96:5 (Sutton). Such inattention to their obligations under the decree is the very definition of reckless disregard. In these circumstances, the Court should reject Respondents' attempts to escape responsibility by pointing to their counsels' oral interpretations, which are clearly at odds with the plain meaning of the order. See United States v. Greyhound, 508 F.2d 529, 533 (7th Cir. 1974).

2. Respondents Ignored a Clear Warning of Illegality

Ignoring a warning of the illegality of a proposed course of conduct is the kind of unreasonable conduct that will defeat the advice of counsel defense. United States v. Benson,

941 F.2d 598, 614 (7th Cir. 1991), amended in part, 957 F.2d 301 (7th Cir. 1992) (Benson I) ("If a person is told by his attorney that a contemplated course of action is legal but subsequently discovers the advice is wrong or discovers reason to doubt the advice, he cannot hide behind counsel's advice to escape the consequences of his violation."). Ignoring a warning likewise serves as independent evidence of criminal intent. Rapone, 131 F.3d at 195.

On July 12, Respondents gave notice to the Department of Justice that they intended to close the transaction on July 14. The next day, July 13, before the joint venture was consummated, Deputy Assistant Attorney General John Nannes sent a letter to Smith's counsel Sean Boland, with a copy to Schlumberger's counsel Rufus Oliver, stating that consummation of the joint venture "would clearly violate the Final Judgment entered by Judge Sporkin in United States v. Baroid Corporation, et al., Civil Action No. 93-2621," and that "if the parties go forward, the Department will take appropriate action in the District Court." GX 27. Both Smith and Schlumberger were aware of the Nannes letter prior to closing the transaction on July 14. GX 42, Admissions 34-38.

When confronted in this proceeding with the fact that they had received a clear warning from the Department of Justice that the joint venture would violate the Final Judgment, Respondents initially made the incredible claim that they were not sure what the letter meant. Respondents' witnesses testified that they thought the Department might respond to their violation by going to the Court to modify the decree, Tr., 11/19/99, at 166:11-167:9 (Boland), and, even more bizarre, that "appropriate action in the District Court" might mean no action, Sutton Dep. at 230:5-230:11 (Tr., 11/19/99, at 8:10-8:15). Neal Sutton, Smith's general

counsel, testified at trial that he thought there was a possibility the letter might be "a colossal bluff." Tr., 11/24/99, at 66:16-66:22 (Sutton). Perhaps sensing that their claims of confusion about the Nannes letter (which, like Paragraph IV.F., is very clear) lacked any credibility, Respondents' later witnesses testified that they understood the Department's warning and took it very seriously. Tr., 11/22/99, at 186:12-187:9 (Rock); Tr., 11/23/99, at 42:7-44:18 (Grijalva); Tr., 11/24/99, at 17:1-17:12 (Wilson).

Their actions following receipt of the Nannes letter, however, belie any professions of deep concern and instead show that Respondents merely factored the warning into their "cost-benefit" analysis of proceeding.[7] Respondents received the Nannes letter late on July 13. GX 42, Admissions 34-37. They acknowledge that they could have delayed the closing, but they chose not to do so, completing the transaction shortly before noon central time on July 14. Rock Dep. at 201:11-201:15 (Tr., 11/19/99, at 6:22-7:1); Grijalva Dep. at 219:13-221:5 (Tr., 11/19/99, at 11:7-12:9). Not only did the Department's warning not stop Respondents in their tracks, it did not even perceptively slow them down.

Boland sent the letter to Smith's general counsel, Neal Sutton, who showed it to Douglas Rock, the CEO, and faxed it to members of Smith's Board. Rock Dep. at 200:18-

[7] Gary Wilson of Schlumberger, in an e-mail sent even before the Nannes letter was received, evaluated Respondents' options and stated that if the parties closed the Department would "most likely" commence litigation, which could take several months. GX 20. Wilson noted that the Court might impose a civil fine or require unwinding the transaction. He stated that a criminal contempt proceeding was "highly unlikely." Id. Smith also evaluated the likely consequences if they closed, and concluded that they would at most be assessed a civil fine. Sutton Dep. at 201:12-201:23 (Tr., 11/18/99, at 169:24-170:8). Sutton also testified that a criminal contempt penalty might be less serious than a civil remedy because the fine might be less. Sutton Dep. at 187:3-187:15 (Tr., 11/18/99, at 169:9-169:19).

201:6 (Tr., 11/19/99, at 6:7-6:17); Sutton Dep. at 226:16-227:1 (Tr., 11/19/99, at 7:21-8:4). Rock testified that receipt of the Nannes letter may have been the first time that he had seen the language of the Final Judgment, Tr., 11/22/99, at 204:10-204:22 (Rock), but reading the letter and the plain language of the decree contained therein did not cause him to further review Paragraph IV.F. himself or to request Mr. Sutton to do so. Tr., 11/22/99, at 215:18-216:2 (Rock). Smith did not request a written opinion from its counsel, Tr., 11/22/99, at 216:12-216:13 (Rock), nor did it seek another opinion from another law firm, Tr., 11/22/99, at 217:18-218:1 (Rock). In addition, Smith did not seek a meeting with Mr. Nannes or others at the Department to discuss the letter.

Individuals at Schlumberger who received the Nannes letter prior to consummation include Victor Grijalva, James Gunderson, and Gary Wilson. GX 42, Admission 37. Only an hour after Schlumberger received a copy of the letter, Gunderson, the company's general counsel, sent an e-mail to the company chairman stating that Respondents would proceed with the transaction regardless of the Department's warning. GX 29. The company's executives and inside counsel did not undertake a review of the Final Judgment after receiving the Nannes letter. Tr., 11/23/99, 86:18-87:10 (Grijalva); Gunderson Dep. at 90:11-92:12, 93:9-93:20 (Tr., 11/19/99, at 12:22-14:17). Nor did they seek a written opinion from their counsel on the application of the Final Judgment to the joint venture. Tr., 11/23/99, at 89:12-90:10 (Grijalva); Gunderson Dep. at 175:14-176:10 (Tr., 11/19/99, at 15:22-16:11).

After receiving the Nannes letter, both Respondents knew that the Department of Justice would almost certainly seek contempt sanctions, which could result in serious penalties,

including possible recission of the transaction or jail sentences for the individual executives. Tr., 11/23/99, at 58:7-58:21 (Grijalva); Tr., 11/23/99, at 134:5-137:11 (Gunderson); Tr., 11/24/99, at 95:1-96:5 (Wilson). Indeed, Schlumberger's general counsel testified that he knew they were headed into "dangerous waters." Tr., 11/23/99, at 138:1-138:5 (Gunderson). Yet, rather than reevaluate their position in any meaningful way, Respondents sought and received perfunctory oral advice from counsel and then proceeded with the transaction, without taking any further steps. Most importantly, they did not come to the Court to seek clarification or modification.

3. Respondents Failed to Seek Clarification from the Court

Failure to seek clarification while relying on a questionable interpretation of an order also precludes a good-faith defense to criminal contempt. See In re Grand Jury Proceedings, 875 F.2d 927, 934 (1st Cir. 1989). "While a defendant is, of course, not required to seek a clarification, a failure to do so when combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree." Greyhound, 508 F.2d at 532.

Respondents both knew full well that they could come to the Court for clarification or modification of the order or for declaratory relief. Tr., Nov. 19, at 120:8-120:11 (Boland); GX 11 at 2; GX 12 at 2. The parties in fact told the Department of Justice in June of 1999 that if the Department did not make a decision they intended to go to the Court independently to seek modification. RX 54 at 3. Schlumberger discussed these options as late as the month before proceeding with the joint venture. GX 15 at 1; GX 16 at 1; Grijalva Dep. at 142:3-142:13

(Tr., 11/18/99, at 134:25-135:7).

In the end, however, the Respondents chose not to come to the Court before proceeding, even after they knew the Department of Justice would likely seek contempt sanctions. Respondents now claim that they did not come to the Court because they were so confident of their interpretation of the decree that they knew they would defeat a contempt petition. Tr., 11/24/99, at 84:2-84:14 (Sutton). It is clear, however, that business reasons rather than legal analysis drove their decision to proceed. See Tr., 11/24/99, at 85:7-85:15 (Sutton). Both Smith and Schlumberger had financial reasons to proceed quickly, Rock Dep. at 193:9-193:17 (Tr., 11/18/99, at 159:22-160:4); Grijalva Dep. at 136:2-138:22 (Tr., 11/18/99, at 144-15-146:14), and they did not want to take the risk that the Court might decline to modify the Final Judgment, which would kill their deal, Tr., 11/24/99, at 30:13-30:24 (Wilson). Having determined that it was "inconvenient" for business reasons to seek modification or clarification, Respondents cannot now excuse their failure to do so by reliance on the twisted interpretation offered by their counsel.

V. Recission of the Joint Venture and Disgorgement of Profits is Appropriate Relief for Civil Contempt and Imposition of a Fine is Warranted as Punishment for Criminal Contempt

A. Civil Contempt Remedies

Civil contempt "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." McComb, 336 U.S. at 191. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." Id. at 193. The equity power of the courts includes the

authority to order rescission where that remedy is appropriate. See J.I. Case Co. v. Borak, 377 U.S. 426, 433-34 (1964); United States v. Coca-Cola Bottling Co., 575 F.2d 222, 228-30 (9th Cir. 1978).

1. Recission

Respondents have violated the clear and unambiguous provisions of the Court's order and continue to profit from their violation every day that the joint venture continues. See ITT Continental Baking, 420 U.S. at 240 (violation of consent decree by making prohibited acquisition "continues until the assets obtained are disgorged"). Rescission of the transaction is the only remedy that would effectively restore the status quo ante and protect the integrity of the Court's order. Coca-Cola, 575 F.2d at 228. Respondents fully understood that recission was a possible remedy for contempt. Sutton Dep. at 201:24-202:8 (Tr., 11/18/99, at 170:9-170:17). Having ignored the Final Judgment to form the joint venture, Respondents cannot now avoid recission by arguing it would be burdensome or costly to undo the transaction. Any hardship resulting from recission is of Respondents' own making.

In addition to ordering recission, the Court may order a fine to coerce Respondents into compliance with the Court's order. See Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 349 n.9 (7th Cir. 1976). In determining the amount of the coercive fine, it is proper to take into account the contemnor's financial resources and ability to pay. See, e.g., United States v. International Bus. Mach. Corp., 60 F.R.D. 658, 667 (S.D.N.Y. 1973). If the Court determines that a daily coercive fine is appropriate in this case, it should take into account both the large size of Smith and Schlumberger and the profits they are reaping

from their illicit joint venture.

2. Disgorgement

In addition to ordering recission, the Court should order Respondents to disgorge all profits from the joint venture from July 14,1999, to the date that the transaction is rescinded or Respondents otherwise cease to be in contempt. See SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). The profits reaped from Smith and Schlumberger's illegal joint venture provides a surrogate measure of compensatory damages, because, in this case, no method exists to calculate the harm to antitrust enforcement from Respondent's violation of the Court's decree. In re General Motors Corp., 110 F.3d 1003, 1018 n.16 (4th Cir. 1997); Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 6 (2d Cir. 1989) ("Such profits are 'an equivalent or a substitute for legal damages . . . .'"); Connolly v. J.T. Ventures, 851 F.2d 930, 934 (7th Cir. 1988). "'[U]nder a theory of unjust enrichment, a contempt plaintiff is entitled to defendant's profits without submitting direct proof of injury, much less proof that any such injury 'approximated in amount the defendant's profits . . . .'" Manhattan Indus., 885 F.2d at 6 (quoting Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 395 (2d Cir. 1965)).

The evidence at trial demonstrated that Smith and Schlumberger were driven by their bottom lines, despite knowing of legal limitations on their conduct. No remedy but recission or disgorgement would prevent their conduct from being financially beneficial -- and therefore worth repeating. The amount to be disgorged should include the profits realized by the joint venture during the period of the contempt, and the United States is entitled to those profits as a

measure by which Respondents were "unjustly enriched." Id.; see also FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996) (the United States Treasury is the appropriate recipient of the disgorged funds).

Because this Court's broad equitable powers permit the disgorgement remedy and because, in the absence of recission, disgorgement is the only way to ensure that Smith and Schlumberger do not realize pecuniary benefit from their violation of the Court's order, the Court should order an accounting and disgorgement of all profits derived from the Smith/Schlumberger joint venture from its inception on July 14, 1999. In addition, the Court should order Respondents to pay the United States' costs in pursuing this contempt action.

B. Criminal Contempt Penalties

Substantial fines for criminal contempt should be imposed to punish Respondents' contumacious behavior in merging their drilling fluid businesses in the face of the clear language of the decree and the warning of the Department of Justice that their planned transaction violated this Court's order. See United States v. NYNEX, 814 F. Supp. 133, 142 (D.D.C.), rev'd on other gnds. 8 F.3d 52 (D.C. Cir. 1993). The fine imposed on conviction of criminal contempt "is essentially punitive and deterrent in purpose, rather than remedial." United States v. Kiuri-Perez, 187 F.3d 1, 6 n.2 (1st Cir. 1999). The penalty must bear a relationship to "the violation and the offender's income, capital, or both," in order to avoid being regarded as "mere license fees for illegal conduct." NYNEX, 814 F. Supp. at 142. The NYNEX court imposed a fine of one million dollars for criminal contempt. Id. In this case, the United States seeks a fine of one million dollars on each of the Respondents to punish their reckless disregard of this

Court's order.

CONCLUSION

In consummating the Smith/Schlumberger joint venture on July 14, 1999, Respondents willfully violated a clear and unambiguous prohibition of the Final Judgment. Respondents ignored both the plain language of the Final Judgment and a clear warning from the Department of Justice that their actions would violate the decree. In these circumstances, Respondents could not reasonably rely on advice of counsel to proceed with the transaction, and such advice cannot shield Respondents from liability. Accordingly, the Court should find Respondents in both civil and criminal contempt, order

recission of the joint venture and disgorgement of all of its profits, and impose an appropriate criminal fine to punish Smith and Schlumberger for their willful violation of the Final Judgment.

Dated: December 3, 1999

Respectfully submitted,

"/s/"

ANGELA L. HUGHES
Member of The Florida Bar,
#211052
ROBERT L. McGEORGE
MICHAEL D. BILLIEL
MATTHEW O. SCHAD
MAX R. HUFFMAN

BERNARD M. HOLLANDER
Senior Trial Attorney

325 7th Street, N.W., Suite 500
Washington, D.C. 20530
Telephone: 202/307-6410

-xxx-

Facsimile: 202/307-2784

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing UNITED STATES' POST-TRIAL BRIEF and UNITED STATES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW on the following counsel for Respondents by hand or overnight delivery on December 3, 1999:

Wm. Bradford Reynolds
Sean F. Boland
Thomas D. Fina
Mary Jean Fell
Collier, Shannon, Rill & Scott, PLLC
3050 K Street, N.W.
Washington, D.C. 20007

Counsel for Smith International

Rufus W. Oliver, III
J. Bruce McDonald
Baker & Botts, L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002

Harold D. Murry, Jr.
Mary C. Spearing
Baker & Botts, L.L.P.
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Schlumberger Ltd.

"/s/"
Angela L. Hughes

Appendix to United States' Trial Brief
United States v. Smith International et al.

INDIVIDUALS AND FIRMS MENTIONED AT TRIAL

I Smith International

C	Ben Bailer	Member, Board of Directors. GX 26.
C	Sean Boland	Partner, Collier, Shannon, Rill & Scott (outside counsel). GX 24; Tr. 11/19/99, 44:7 - 45:14, 51:16 - 52:14.
C	Clyde Buck	Member, Board of Directors. GX 26.
C	Loren Carroll	President, M-I; Member, Board of Directors. GX 26; Tr. 11/22/99, 181:8 - 181:15.
C	Richard Chandler	General Counsel, M-I; GX 13.
C	Thomas Fina	Partner, Collier, Shannon, Rill & Scott (outside counsel). GX 13.
C	Jim Gibbs	Member, Board of Directors. GX 26.
C	Markus Meier	Former Senior Associate, Collier, Shannon, Rill & Scott (outside counsel). GX 13; Tr. 11/19/99, 134:5 - 134:10.
C	Jerry Neely	Member, Board of Directors. GX 26.
C	Douglas Rock	Chairman and Chief Executive Officer; Member, Board of Directors. GX 26; Tr. 11/22/99, 135:21 - 137:11.
C	Moak Rollins	Member, Board of Directors. GX 26.
C	Neal Sutton	Sr. Vice President - Administration, General Counsel and Secretary. GX 13; Tr. 11/24/99

58:7 - 58:24.

II Schlumberger Limited

C	Euan Baird	Chairman of the Board. Tr. 11/19/99, 5:12 - 22.
C	David Browning	Former General Counsel. GX 4; Tr. 11/19/99, 120:20 - 121:4.
C	Chad Deaton	Executive Vice President - Oil Field Services Solutions (retired), now a consultant for Schlumberger. Tr.11/24/99, 13:20 - 13:23, 98:1 - 98:12.
C	Gibson, Dunn & Crutcher	Outside law firm that advised Schlumberger on some antitrust matters. GX 4; Tr. 11/17/99, 12:20 - 13:5. Tr. 11/18/99, 99:9 - 99:14.
C	Andrew Gould	Executive Vice-President of the Oilfield services Division. Tr. 11/19/99, 17:9 -17:13; Tr. 11/23/99, 108:8 - 108:9.
C	Victor Grijalva	Vice Chairman of the Board of Directors. Tr. 11/23/99, 5:7 - 6:17.
C	James Gunderson	Secretary and General Counsel. Tr. 11/23/99, 129:6 - 130:8; Tr. 11/24/99, 13:2 - 13:16.
C	John Kelly	Formerly, Drilling Fluids Marketing and Sales Manager; now employed by the Smith - Schlumberger Joint Venture. GX 45; Tr. 11/23/99, 107:4 - 107:22; Tr. 11/24/99, 49:7 - 49:16.
C	J. Bruce McDonald	Partner, Baker & Botts (outside counsel). GX 11; Tr. 11/17/99, 33:14 - 33:23; Tr. 11/24/99, 6:10 - 6:13.

C	John Oliver	Formerly Marketing Manager for Drilling Fluids; now employed by the Smith - Schlumberger Joint Venture. Tr. 11/24/99, 50:10 - 50:21
C	Rufus W. Oliver, III	Partner, Baker & Botts (outside counsel). GX 21; Tr. 11/19/99, 120:20 - 121:4.
C	Don Williamson	Formerly Gulf Coast Drilling Fluids Manager; now Bore Hole Fluids Manager for the Schlumberger Product Center in Houston. GX 14; Tr. 11/24/99, 56:14 - 57:15.
C	Gary Wilson	General Counsel of Schlumberger's Oilfield Operations. Tr. 11/24/99, 4:18 - 6:9.
C	John Yearwood	President of the Dowell Division. Tr. 11/18/99, 147:24 - 148:9.

III U.S. Department of Justice - Antitrust Division

C	Roger W. Fones	Chief, Transportation, Energy & Agriculture Section. GX 2; Tr. 11/19/99, 87:87:11 - 87:19.
C	Angela L. Hughes	Attorney, Transportation, Energy & Agriculture Section. GX 2; GX 31.
C	Joel I. Klein	Assistant Attorney General. Tr. 11/24/99, 110:12 - 110:14.
C	Donna N. Kooperstein	Ass't Chief, Transportation, Energy & Agriculture Section. Tr. 11/22/99, 88:20 - 89:2.
C	John M. Nannes	Deputy Assistant Attorney General. GX 27.

C	Constance K. Robinson	Director of Merger Enforcement. GX 2.