UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285 (RCL)
GALE A. NORTON, Secretary of the Interior, et al.,	)	(Special Master Alan L. Balaran)
Defendants.	)	

GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES, AND "BILLS OF PARTICULARS" FILED BY PLAINTIFFS IN SUPPORT OF SUCH MOTION

On March 20, 2002, plaintiffs filed Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, Should Not Be Held in Contempt for Destroying E-Mail ("March 20, 2002 motion"). The March 20, 2002 motion accused seven individuals in their personal and official capacities, and Department of the Interior Secretary Gale Norton and then-Assistant Secretary Neal McCaleb in their official capacities only, of violating various court "orders." The government filed its opposition to that motion on April 3, 2002. Plaintiffs later filed "bills of particulars" concerning the backup tape issue against Edward Cohen and Edith Blackwell – two of the individuals named in the March 20, 2002 motion – on July 22, 2002, and July 29, 2002, respectively. The government opposed these "bills of particulars."[1]

[1]Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt (filed Aug. 5, 2002) ("Govt. Opp. to Cohen

On September 17, 2002, the Court referred the March 20, 2002 motion to Special Master Alan L. Balaran. After holding a case management conference on October 30, 2002, the Special Master issued "Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause" (dated Nov. 4, 2002) (the "Revised Procedures Memorandum"). The Revised Procedures Memorandum required plaintiffs to file proper "Bills of Particulars" as to each of the Named Individuals (other than Mr. Cohen and Ms. Blackwell) and to conform those bills to specific procedural and civility requirements. The Revised Procedures Memorandum permitted the Named Individuals to file motions to dismiss plaintiffs "Bills of Particulars."

On behalf of all of the Named Individuals, in their official capacities, identified by plaintiffs in the March 20, 2002 motion, the government hereby moves for dismissal of plaintiffs' March 20, 2002 motion and the associated "Bills of Particulars." As explained in detail in the attached memorandum of points and authorities, plaintiffs' "Bills of Particulars" (1) fail to "articulate with specificity whether the conduct alleged against each of the[] Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court" (Revised Procedures Memorandum at 2); (2) fail, after multiple attempts, to provide a legal or factual basis for the extreme sanctions they seek against the Named Individuals, some of which are barred by sovereign immunity; and (3) fail to meet the clear civility requirements set forth in the Revised Procedures Memorandum at 4 & note 3.

Pursuant to the local rules of the District Court, counsel for the government has met and

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Bill"); Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes (filed Aug. 12, 2002) ("Govt. Opp. to Blackwell Bill").

conferred with counsel for plaintiffs, who state that they oppose this motion.

For the reasons set forth above and in the attached memorandum of points and authorities, the government requests that the Special Master recommend the dismissal of the March 20, 2002 motion and the associated "Bills of Particulars" as to each of the Named Individuals in their official capacities, and that the Court adopt such recommendation of dismissal. A proposed order is attached.

Respectfully submitted,

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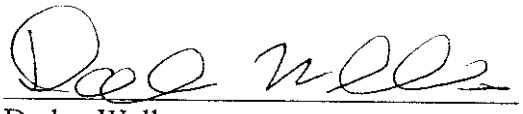

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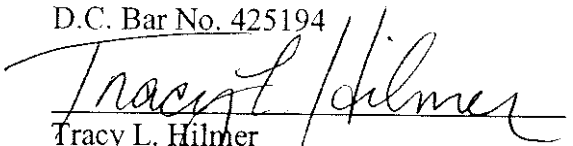

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DATED: January 6, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	(Special Master Alan L. Balaran)
GALE A. NORTON, et al.,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES, AND "BILLS OF PARTICULARS" FILED BY PLAINTIFFS IN SUPPORT OF SUCH MOTION

This brief is submitted on behalf of defendants Gale Norton and Neal McCaleb and the seven non-party respondents (collectively referred to as the "Named Individuals") in their official capacities in support of the government's motion to dismiss the "Bills of Particulars" ("Bills") filed by plaintiffs to hold the Named Individuals in civil and/or criminal contempt of court for failure by the Department of the Interior's Office of Solicitor to preserve certain backup e-mail tapes.

Plaintiffs filed Bills against Edward Cohen, a former employee of the Office of Solicitor, on July 22, 2002, and against Edith Blackwell, a current Office of Solicitor employee, on July 29, 2002.[1] On December 2, 2002, plaintiffs filed "Bills" as to: (1) defendants Norton and McCaleb,[2]

[1]The government filed its opposition to the Cohen Bill on August 5, 2002, and filed its opposition to the Blackwell Bill on August 12, 2002. *Government's Response to Plaintiffs' Bill*

(continued...)

(2) former Office of Solicitor employee Willa Perlmutter, (3) Department of Justice attorneys Phillip Brooks and Charles Findlay, and (4) former Department of Justice officials James Simon and Lois Schiffer.

The Bills and the requests that the Named Individuals be held in contempt should be dismissed for several reasons. First, despite their titles, plaintiffs' filings are not "bills of particulars" and do not state with specificity the conduct which allegedly constitutes the contempt charged. Consequently, as discussed in Part I, the Bills do not comply with the Special Master's directive that plaintiffs submit bills of particulars which "articulate with specificity whether the conduct alleged against each of the Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court." *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), *Memorandum of November 4, 2002 From Special Master Alan L. Balaran Regarding Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause* (the "Revised Procedures Memorandum") at 2. The Bills also fail to comply with the Court's directive at the March 15, 2002 hearing that the plaintiffs state "individual defendant by individual defendant" specific contempt charges and evidence supporting those charges. *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), Transcript of March 15, 2002 Status Hearing,

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[1](...continued)
of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt (filed Aug. 5, 2002) ("Govt. Opp. to Cohen Bill"); *Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes* (filed Aug. 12, 2002) ("Govt. Opp. to Blackwell Bill"). The arguments set forth in those oppositions are incorporated by reference here, since the Bill directed to defendants Norton and McCaleb alleges that they are derivatively liable in their official capacities for the alleged actions of Ms. Blackwell and Mr. Cohen. Further, the government's motion to dismiss extends to the Bills against all nine Named Individuals in their official capacity.

[2]Mr. McCaleb resigned his position, effective January 4, 2003.

at 21:10-14 ("3/15/02 Tr.") (Exhibit 1 hereto). Moreover, the Bills violate the civility provisions of the Revised Procedures Memorandum.

Second, despite their repeated attempts to do so, plaintiffs have not presented a *prima facie* case of contempt, let alone made the heightened showing necessary to establish criminal contempt or commission of fraud on the court. As discussed in Part II, the Bills against Named Individuals Brooks, Findlay, McCaleb, Norton, Perlmutter, Schiffer and Simon do not identify a court order that plaintiffs claim was violated, and thus the Bills fail to allege an essential element of civil contempt or of criminal contempt under 18 U.S.C. § 401(3).[3] To the extent that plaintiffs charge any of the Named Individuals with committing a fraud on the Court, plaintiffs have failed to address two essential elements: that the Named Individual intended to deceive or to defraud the Court, and that the conduct of the Named Individual prejudiced plaintiffs in presenting their case or affected a court ruling. Moreover, as discussed in Part III, plaintiffs have not presented evidentiary support for their charges that Named Individuals destroyed federal records or covered up the destruction of federal records, and as demonstrated in Part IV, plaintiffs have failed to support their claim of intentional misconduct on the part of any Named Individual.

Third, sovereign immunity precludes the imposition of civil penalties or criminal sanctions against the Named Individuals in their official capacity.

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[3]As discussed in the government's oppositions to the Bills directed to Named Individuals Blackwell and Cohen, the plaintiffs also failed to show that Ms. Blackwell or Mr. Cohen violated a court order.

I. The Bills of Particulars Do Not Comply with the Special Master's or the Court's Directives.

A. The Bills of Particulars Lack Specificity.

The Revised Procedures Memorandum directed plaintiffs to file Bills with respect to all individuals, except Edith Blackwell and Edward Cohen, named in plaintiffs' *Motion for Order to Show Cause Why Interior Defendants and their Counsel Should Not be Held in Contempt for Destroying E-mail* (filed March 20, 2002) (the "March 20, 2002 motion"), and directed that the Bills "articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court." Revised Procedures Memorandum at 3. The Court set forth the standards of specificity for Bills at the March 15, 2002 hearing, during which the Court directed plaintiffs to lay out "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." 3/15/02 Tr. at 21:10-14. The Court reiterated that plaintiffs should state the specific charges a respondent would have to defend against and also "lay out what the, in your view, the evidence that would be supporting" the specific charges. *Id.* at 21:21-23. Finally, the court concluded that "you need to specify by person so that each of them can respond to what the specifications would be and what the evidence would be so that each of them can have an opportunity to have due process." *Id.* at 23:7-10.

A Bill fulfilling the Court's and the Special Master's directives would state the specific charges against a Named Individual and the evidence supporting each of those specific charges. For example, if plaintiffs charge that a Named Individual committed contempt, a filing compliant with the directives would, at a minimum, identify the specific order he or she allegedly violated,

the conduct or action which allegedly violated the obligations imposed by the order, the evidence supporting the allegation that he or she violated the order, and, if plaintiffs are requesting a finding of criminal contempt, evidence supporting the allegation that violation of the order was willful. If plaintiffs charge that a Named Individual committed fraud on the court, a Bill would, at a minimum, identify the wrongful conduct, set forth the evidence showing that the conduct was intended to deceive or defraud the court, and show how the wrongful conduct prejudiced plaintiffs in presenting their case or affected a court order. Plaintiffs' Bills do not come close to meeting these requirements. Instead, the Bills presented on December 2, 2002 continue the almost studied imprecision and flood of misstatements which characterized the March 20, 2002 motion and the alleged Bills submitted in July 2002 directed to Edith Blackwell and Edward Cohen. The Bills hardly make a pretense of meeting the Special Master's or the Court's directives and should be dismissed for this reason alone.

B. Plaintiffs' Repetitive Filings and Shifting Theories Violate the Government's and the Named Individuals' Due Process Rights.

Plaintiffs are now on their **third** attempt to seek sanctions for the overwriting of some backup tapes of the Department of the Interior's Solicitor's Office, an event which was first disclosed in 1999. Despite the passage of time and plaintiffs' numerous attempts for sanctions in regard to the backup tapes, plaintiffs have never identified any harm suffered by the overwriting of the backup tapes. Plaintiffs initially sought sanctions based on the e-mail backup tape issue in their September 12, 2000 *Motion for Leave to File Surreply and Supporting Memorandum to Correct Facts Asserted in Defendants' Reply to Plaintiffs' Opposition and Request for Sanctions in Response to Defendants' Motion for a Protective Order.* Plaintiffs submitted with their motion a 72-paragraph "Factual Appendix " and 51 exhibits. Certain significant assertions in the "Factual Appendix" were not supported by plaintiffs' exhibits, which themselves were too often

misleading excerpts of larger documents. Plaintiffs did not, however, seek a recommendation for contempt as part of their request for sanctions in that motion. The Special Master issued an Opinion on July 27, 2001 (the "July 27, 2001 Opinion"), recommending that defendants' motion for a protective order be denied and that sanctions against defendants be limited to attorney's fees. Plaintiffs did not seek review of the recommendation limiting sanctions on the e-mail backup tape issue to attorney's fees.

On March 20, 2002, eight months after the Special Master's July 27, 2001 Opinion, the plaintiffs filed another request for sanctions in connection with the e-mail backup tape issue, this time seeking civil and criminal contempt sanctions as to the Named Individuals. Plaintiffs submitted with the March 20, 2002 motion the "Factual Appendix," now expanded to 104 paragraphs and 81 exhibits, apparently intended to account for events after the initial submission in September 2000. The March 20, 2002 motion alleged that the Named Individuals had violated one or more of six "orders" entered by the Court or by the Special Master. As demonstrated by the *Government's Opposition to Plaintiffs' March 20, 2002 Motion for Orders to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not be Held in Contempt* (filed April 3, 2002) (the "Government's Opposition") and the oppositions to the March 20, 2002 motion filed by the individual respondents, plaintiffs had made no effort to tie any individual respondent to the violation of any "clear and unambiguous" court order. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993), *quoted in Cobell v. Norton*, 226 F. Supp. 2d 1, 21 (D.D.C. 2002). Indeed, several of the respondents were no longer in Government service at the time some or all of the orders cited by plaintiffs as the basis for that motion had been issued, and some of the "orders" themselves did not even qualify as a possible basis for a contempt motion. *See* Government's Opposition at 9-12.

The Bills filed against Edward Cohen and Edith Blackwell alleged that Mr. Cohen participated in the overwriting of Solicitor's Office e-mail backup tapes and that Ms. Blackwell permitted the overwriting. Plaintiffs alleged that this conduct violated only an order entered November 9, 1998 regarding Plaintiffs' Third Formal Request for the Production of Documents ("Third Document Request"), thereby abandoning any claims that Mr. Cohen or Ms. Blackwell violated the five other "orders" discussed in the March 20, 2002 motion. As the government pointed out in its responses to the Blackwell and Cohen Bills, neither the November 9, 1998 Order nor the transcript of the November 6, 1998 hearing before the Court definitely and specifically required the government to retain newly created backup tapes, and therefore the conduct alleged by plaintiffs could not provide a basis for civil or criminal contempt.[4]

The Bills filed on December 2, 2002 abandon any allegation that the Named Individuals violated any specific order in this case. Instead the December 2, 2002 Bills allege that the Department of the Interior destroyed "federal records," and that the Named Individuals participated in the destruction of federal records or covered up the destruction of federal records. Therefore, plaintiffs have abandoned claims that any of the Named Individuals other than Edith Blackwell or Edward Cohen breached any court order. The Bills filed as to Edward Cohen and Edith Blackwell in July 2002 and against the remaining Named Individuals on December 2, 2002 were based on the same "Factual Appendix " and 81 exhibits plaintiffs used to support the March 20, 2002 motion on the e-mail backup tape issue.

Thus, for more than two years, plaintiffs have been engaged in a work-in-progress, attempting to articulate in successive filings why sanctions, in addition to the attorney's fees recommended in the Special Master's July 27, 2001 Opinion and approved by the Court on

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[4]Govt. Opp. to Blackwell Bill at 10-11; Govt. Opp. to Cohen Bill at 7.

March 29, 2002, should be imposed for the conduct alleged in the "Factual Appendix." When the government and Named Individuals demonstrate that plaintiffs' grounds are spurious, plaintiffs repackage the same facts and present a new motion under a different theory. Plaintiffs' serial accusations have violated the due process rights of each Named Individual to know precisely the nature of the charges against him or her. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967).

Plaintiffs' December 2, 2002 Bills further violate the due process rights of the Named Individuals because each Bill, in footnote one, purports to incorporate the March 20, 2002 motion, as well as the Bills filed in July 2002 against Edith Blackwell and Edward Cohen.[5] This will not do. At a minimum, each of the Named Individuals is entitled to a specific articulation of the order the person is alleged to have violated and the proof that he or she has violated it. *Wyatt By and Through Rawlins v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) ("Precedent dictates that a plaintiff seeking to obtain the defendant's compliance with the provisions of an injunctive order move the court to issue an order requiring the defendant to show cause . . . . In his motion, the plaintiff cites the provision(s) of the injunction he wishes to be enforced, alleges that the defendant has not complied with such provision(s) and asks the court, . . . to order the defendant to show cause.").

C. Plaintiffs Have Ignored the Special Master's Admonitions Regarding Civility, and the Master Should Disregard Their Filings.

In the Revised Procedures Memorandum, the Special Master repeated the admonition concerning civility that he had made at the October 30, 2002 case management conference.

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[5]If footnote one to the Bills is taken literally, Willa Perlmutter, whose involvement in the case ceased in 1997, is called to answer for the alleged actions of her successor, Edith Blackwell, who did not start to work on the case until Ms. Perlmutter had left government service.

10/30/02 Tr. at 48 (Exhibit 2 hereto). Specifically, at both the October 30, 2002 conference and in the Revised Procedures Memorandum, the Special Master required that the individuals against whom plaintiffs have made allegations of contempt be referred to either by proper name and title or as Named Individuals. *Id.* at 51-53; Revised Procedures Memorandum at 4. In the Revised Procedures Memorandum, the Master further stated that "Ad hominem attacks, spurious accusations and inappropriate tactics will not be tolerated." Revised Procedures Memorandum at 4. The Master was obliged to reinforce these admonitions in a letter to plaintiffs' counsel, Dennis Gingold, dated December 4, 2002, wherein the Master reminded Mr. Gingold that referring to the Named Individuals as "contemnors" violated the civility protocol. Exhibit 3.[6] Evidently, plaintiffs do not believe that the rules set down by the Master apply to them.

Plaintiffs have made no effort to conform their Bills to the civility requirements established by the Master. While plaintiffs' pleadings are devoid of any attempt to connect competent evidence of alleged wrongdoing to applicable legal principles, these pleadings are rife with *ad hominem* attacks and spurious accusations. One of the most egregious examples appears in the Brooks Bill at 2 n.2:

> Obviously if Gale Norton, Neal McCaleb, and the named individuals stopped deceiving this Court, stopped violating Court orders, and stopped destroying evidence, there would be no need for further contempt proceedings. Unfortunately, the Named Individuals and Other Contemnors have proven that they are "unscrupulous" and utterly incapable of rehabilitation.

Plaintiffs engage in similar name-calling at Brooks Bill at 6 n.13. These spurious, *ad hominem* attacks are incorporated by reference in each of the other Bills that plaintiffs filed on December 2, 2002. *See* Findlay Bill at 1 n.1; Simon Bill at 1 n.1; Schiffer Bill at 1 n.1; Perlmutter Bill at 1

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[6]Moreover, plaintiffs' website continues to refer to the Named Individuals as "contemnors" in describing plaintiffs' Bills.

n.1; Norton/McCaleb Bill at 1 n.1. The Bills fall far short of presenting the factual and legal justification for the extreme sanctions they seek against these people, and plaintiffs' failure to curtail their name-calling habit in the teeth of specific admonitions from the Special Master also warrants dismissal of these filings.

II. The Bills of Particulars Do Not Allege the Essential Elements of Civil Contempt, Criminal Contempt, or Fraud on the Court.

None of the Bills filed by plaintiffs sets forth a *prima facie* case that, if believed, would be sufficient to sustain a finding under the appropriate standard of proof that any Named Individual committed civil or criminal contempt or committed a fraud on the court. Consequently, the government's motion to dismiss should be granted.

A. Plaintiffs Have Failed to Demonstrate that Issuance of Show Cause Orders for Civil Contempt is Warranted.

1. Legal Standards

Standards for civil contempt have been set forth in the contempt hearings in this case, *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) ("*Cobell I*"), and *Cobell v. Norton*, 226 F. Supp.2d 1 (D.D.C. 2002) ("*Cobell II*"), and other cases in this circuit. As the Court stated in *Cobell II:*

> Two elements must be established before a party may be held in civil contempt for violating an order. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993). First, the Court must have issued an order that is clear and reasonably specific. *Id.* at 1289; *Project B.A.S.I.C. v. Kemp,* 947 F.2d 11, 16-17 (1st Cir. 1991) (noting that in order for a party to be held in civil contempt, the court must have issued "a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the intended fashion."). In determining whether an order is clear and reasonably specific, courts apply "an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order." *United States v. Young,* 107 F.3d 903, 907 (D.C. Cir. 1997). *See also Project B.A.S.I.C.,* 947 F.2d at 16-17 (finding that "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are

> forbidden [] or what acts are required."). Second, the putative contemnor must have violated the court's order. *Armstrong,* 1 F.3d at 1289 (recognizing that "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous.").

Cobell II, 226 F. Supp. 2d at 21. Thus, a party seeking a finding of contempt must initially show, by clear and convincing evidence, that (1) a court order was in effect, (2) the order clearly and unambiguously required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *Petties v. District of Columbia*, 897 F. Supp. 626, 629 (D.D.C. 1995). Once the movant has made a *prima facie* showing that the respondent did not comply with the court's orders, the burden shifts to the respondent to produce evidence justifying the noncompliance. *Bilzerian*, 112 F. Supp. 2d at 16.

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997), *quoting National Labor Relations Board v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The goal of a civil contempt order is not to punish, but to exert only so much of the court's authority as is required to assure compliance. *Petties*, 897 F. Supp. at 629.

2. Plaintiffs Have Not Shown that the Named Individuals Violated a Court Order.

The Bills directed to Named Individuals Brooks, Findlay, McCaleb, Norton, Perlmutter, Schiffer and Simon do not identify a court order that plaintiffs allege was violated. Violation of a court order is a prerequisite to civil contempt. *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 738 (7th Cir. 1999) ("irrespective of the nature of the civil contempt, whether it be coercive or remedial, any sanction imposed by the court must be predicated on a violation of an explicit court order."); *Russell v. Sullivan*, 887 F.2d 170, 171 (8th Cir. 1989) (*per curiam*) (District Court

lacked jurisdiction over motion for civil contempt order for failure to pay attorney's fee since there was no court order directing payment of fees). Since the Bills do not identify an order which these Named Individuals allegedly violated, the Bills must be dismissed for failure to allege a basic element of a claim for civil contempt.

The Bills issued in July 2002 against Edith Blackwell and Edward Cohen did allege violation of the Order entered November 9, 1998. However, as the government pointed out in its responses to the Blackwell and Cohen Bills, the November 9, 1998 Order did not clearly and unambiguously require the Solicitor's Office to maintain newly created backup tapes. Since "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden or what acts are required," *Cobell II*, 226 F. Supp. 2d at 21, *quoting Project B.A.S.I.C. v. Kemp,* 947 F.2d 11, 16-17 (1st Cir. 1991), plaintiffs have not articulated conduct by Ms. Blackwell or Mr. Cohen that violates a court order, and therefore the Bills against them must also be dismissed to the extent that plaintiffs are seeking orders to show cause for civil contempt.

3. Even If Plaintiffs Could Show a Violation of a "Clear and Unambiguous" Order, Imposing Coercive Civil Contempt Sanctions for Failure to Retain E-Mail Backup Tapes Would Be Inappropriate.

Civil contempt sanctions are used either to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance. *Food Lion*, 103 F.3d at 1016. Coercive contempt sanctions are intended to force the offending party to comply with the court's order. *Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993). Compensatory contempt sanctions compensate the plaintiff for damages that the offending party has caused by its contempt. *Id.* As discussed below, in Part II(B)(2), the doctrine of sovereign immunity precludes the imposition of compensatory sanctions for civil

contempt against the Named Individuals in their official capacities. Further, coercive sanctions are not appropriate against any of the Named Individuals here.

Plainly, coercive sanctions could not force the government or any of the Named Individuals to produce e-mail backup data that was overwritten more than three years ago. Accordingly, the remedial purpose of a contempt order cannot be served where, as here, the allegedly violative act cannot be corrected. *See In re Sealed Case*, 250 F.3d 764, 770 (D.C. Cir. 2001) ("Because the Government could not undo the July 18 disclosure [of grand jury material], holding the Government in civil contempt would serve no useful purpose. . . .").

Moreover, eight of the Named Individuals either no longer work for the government (Named Individuals McCaleb, Schiffer, Simon, Cohen[7] and Perlmutter) or have withdrawn from working on the case since last year (Named Individuals Brooks, Findlay and Blackwell). Accordingly, these individuals no longer have any ability to implement any corrective action in regard to this matter. Further, Secretary Norton, although named only in her official capacity, cannot properly be held in contempt for matters that occurred months and even years before she even assumed office, and which she therefore never had an opportunity to prevent **or** cure.

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[7]Plaintiffs did not claim civil contempt against Mr. Cohen in the Cohen Bill. Accordingly, any charge of civil contempt by plaintiffs against Mr. Cohen in his personal or official capacity must be deemed abandoned.

B. Plaintiffs Have Failed to Demonstrate that Issuance of Show Cause Orders for Criminal Contempt or Fraud on the Court Are Warranted.

1. Plaintiffs Have Not Alleged the Elements of Criminal Contempt.

Plaintiffs ask that the Named Individuals Blackwell, Brooks, Cohen, Findlay, Perlmutter, and Schiffer be referred for prosecution under 18 U.S.C. § 401(3),[8] which permits the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful . . . order." To convict a defendant of criminal contempt under § 401(3), the Court must find, beyond a reasonable doubt, that the Named Individuals willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach*, 108 F. 3d 1477, 1481 (D.C. Cir. 1997), *citing United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993), and *United States v. Turner,* 812 F.2d 1552, 1563 (11th Cir. 1987). For a violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *Roach*, 108 F.3d at 1481 *citing In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994), and *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974). Thus, in order to support a referral for criminal contempt, plaintiffs must initially show, by clear and convincing evidence, that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by a Named Individual, and (3) that the Named Individual willfully violated the court's order.

As discussed in Part II(B)(2), below, sovereign immunity bars the imposition of sanctions for criminal contempt or compensatory civil sanctions against the Named Individuals in their official capacities. Moreover, § 401(3), the statute upon which plaintiffs rely, requires

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[8]Blackwell Bill at 25; Brooks Bill at 11 n.29; Cohen Bill at 14; Findlay Bill at 9 n.23; Perlmutter Bill at 4 n.13; Schiffer Bill at 3 n.6.

disobedience or resistance to a "lawful writ, process, order, rule, decree or command." Plaintiffs have not identified a writ, process, order, rule, decree or command which they allege Named Individuals Brooks, Findlay, Perlmutter, or Schiffer disobeyed or resisted. Therefore, the Bills must be dismissed for failure to allege a basic element of a motion for an order to show cause for criminal contempt.

The Bills against Edith Blackwell and Edward Cohen did allege a violation of the order entered November 9, 1998. However, that order is an insufficient basis for criminal contempt for the same reason it is an insufficient basis for civil contempt – the four corners of the order did not clearly and specifically require the Solicitor's Office to maintain newly created backup tapes. Therefore, the Bills against them must also be dismissed to the extent that plaintiffs are seeking orders to show cause for criminal contempt.

Further, as demonstrated in Part IV(B) below and in the Government's Opposition at 16-17, the Government's Opposition to the Cohen Bill at 6-7, and the Government's Opposition to the Blackwell Bill at 10-11, despite having multiple opportunities over many months, plaintiffs have failed to provide any support for their claim that any Named Individual "willfully" violated any court order or misstated the status of the Solicitor's Office backup tapes or withheld information concerning the backup tapes. Thus, they have failed to support another essential element of their claims for criminal sanctions, and for this reason as well, plaintiffs' March 20, 2002 motion and the Bills filed against the Named Individuals must be dismissed.

2. Sovereign Immunity Precludes the Imposition of Criminal Penalties or Compensatory Sanctions for Civil Contempt Against the Named Individuals in Their Official Capacities.

Plaintiffs request civil penalties against the Named Individuals and criminal sanctions against Named Individuals Blackwell, Brooks, Cohen, Findlay, Perlmutter, and Schiffer.

Because of sovereign immunity, these forms of sanctions are not available against the government or against the Named Individuals in their official capacities.[9]

The doctrine of sovereign immunity bars the imposition of fines, penalties or monetary damages against the government, except to the extent that the United States has explicitly consented to such sanctions. "[T]he doctrine of sovereign immunity stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *Id.* at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

The United States has not waived sovereign immunity from citation for criminal contempt, nor for court-imposed fines for civil contempt. *Coleman v. Espy*, 986 F.2d 1184, 1191 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993); *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed Case*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) (*per curiam*) ("...it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt. . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[10] Similarly, the court in *In re Newlin*, 29 B.R.

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[9]"As long as the government entity receives notice and an opportunity to respond, a suit against a government employee in his official capacity is to be treated as a suit against the entity." *Coleman*, 986 F.2d at 1189, *citing Kentucky v. Graham,* 473 U.S. 159, 166 (1985). *See also Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein.

[10]As the Court acknowledged in *Cobell II*, whether a court can order the government to compensate a party for losses sustained as a result of the government's contempt has not been decided by the Court of Appeals in this Circuit. *Cobell II*, 226 F. Supp. 2d at 154 n.163. The District Court in *United States v. Waksberg*, 881 F. Supp. 36, 41 (D.D.C. 1995), *vacated and*

(continued...)

781, 785 (E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt.

To the extent that plaintiffs are seeking money damages other than attorney's fees and costs, their claims are barred because the United States has not waived its immunity to the imposition of compensatory monetary damages based on contempt. *Coleman*, 986 F.2d at 1191; *Horn*, 29 F.3d at 763; *McBride v. Coleman*, 955 F.2d 571, 577-78 (8th Cir.), *cert. denied sub nom. McBride v. Madigan*, 506 U.S. 819 (1992); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989).

The determinations in this case that sovereign immunity does not bar either plaintiffs' claim for prospective action or their claim for retrospective relief in the form of an accounting[11] have no bearing on the separate issue of whether the government has waived sovereign immunity for money damages for civil contempt. A waiver of sovereign immunity as to one available remedy does not, by implication, waive sovereign immunity as to other remedies. *See Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990) (waiver of sovereign immunity as to back pay awards for discriminatory denial of promotion did not waive sovereign immunity for

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[10](...continued)
remanded, 112 F.3d 1225 (D.C. Cir. 1997), held that sovereign immunity barred recovery of damages as compensation for the government's violation of an injunctive order. The Court of Appeals vacated and remanded with directions to withhold a ruling on the sovereign immunity issue pending a determination on whether Waksberg had incurred damages. 112 F.3d at 1228.

[11]*See Cobell v. Babbitt*, 30 F. Supp. 2d. 24, 31-33, 38-42 (D.D.C. 1998) (denying defendants' motion for judgment on the pleadings); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 21 (D.D.C. 1999) (denying defendants' motion for summary judgment); *see also Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001) (agreeing that plaintiffs' action was not barred by sovereign immunity).

prejudgment interest on such back pay awards), *cert. denied,* 502 U.S. 810 (1991). Moreover, the holdings that sovereign immunity did not bar plaintiffs' claims were based explicitly on the finding that plaintiffs were not seeking money damages. *See Cobell*, 52 F. Supp. 2d at 21 ("defendants' sovereign immunity in the context of this case is simply not an issue as long as plaintiffs do not seek money damages.").

3. Plaintiffs Have Not Shown That Any Named Individual Committed a Fraud on the Court.

The standards required for a finding of "fraud on the court" are more stringent than those for contempt based on violation of a court order. "Fraud on the court ... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Baltia Air Lines, Inc. v. Transaction Management, Inc.*, 98 F.3d 640, 642 (D.C. Cir. 1996), *quoting Bulloch v. United States,* 721 F.2d 713, 718 (10th Cir. 1983). Examples of the type of conduct which constitutes fraud on the court include the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony. *Id.* at 643. Moreover, "fraud on the court" requires a showing of intent to deceive or intent to defraud the court. *Cobell II*, 226 F. Supp. 2d at 26; *United States v. Buck*, 281 F.3d 1336, 1343 (10th Cir. 2002). Moreover, cases which have addressed the issue indicate that "fraud on the court" does not exist unless the alleged misconduct has prejudiced the opposing party in presenting its case or has affected a court ruling. *Baltia Air Lines*, 98 F.3d at 643 (Although there were suggestions in the record that witnesses committed perjury or that counsel misled the court, "[t]here is still no basis for a finding of fraud on the court as that concept has been defined. It is particularly noteworthy in this regard that any misrepresentations to the District Court were not relevant to the court's decision. . . ."); *De Saracho v. Custom Food*

Machinery, Inc., 206 F.3d. 874, 880 (9th Cir.), *cert. denied*, 531 U.S. 876 (2000); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir.), *cert. denied*, 531 U.S. 813 (2000); *Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Synanon Church v. United States*, 820 F.2d 421, 428 (D.C. Cir. 1987). In sum, in order to support a claim for fraud on the court, plaintiffs must initially show, by clear and convincing evidence, that (1) a Named Individual committed a wrongful act, (2) the Named Individual acted with intent to deceive or intent to defraud the court, and (3) the wrongful act prejudiced plaintiffs in presenting their case or affected a ruling by the court.

Although the matter is not free from doubt, plaintiffs appear to claim that Named Individuals Brooks, Findlay and Perlmutter committed fraud on the court. However, even if the misconduct alleged as to Brooks, Findlay and Perlmutter were true, and it is not, plaintiffs have not shown any of the three elements of fraud on the court. Consequently, the Bills must be dismissed to the extent they claim that any of the Named Individuals committed fraud on the court, aided or abetted fraud on the court, or negligently supervised a person who committed fraud on the court.

III. The Bills of Particulars Do Not Establish a Factual Basis for Further Sanctions.

A. The E-Mail Backup Tapes are Not Federal Records.

The Bills filed on December 2, 2002 charge that the Named Individuals destroyed federal records or covered up the destruction of such records. For example, the only substantive sentence in the Bill directed to defendants Gale Norton and Neal McCaleb asserts, "[P]laintiffs have named Assistant Secretary-Indian Affairs, Neal McCaleb and Secretary Gale Norton in their official capacity [sic] for the systematic destruction of federal records and the cover-up of such destruction that had been done by their counsel on their behalf in this litigation." Bill for Gale

Norton and Neal McCaleb at 1. Plaintiffs' factual record in support of the Bills consists of plaintiffs' Factual Appendix (to the limited extent the Factual Appendix states facts), and the supporting exhibits. While the Bills broadly claim that Named Individuals destroyed federal records, the Factual Appendix and exhibits relate almost entirely to the overwriting of some backup tapes maintained by the Solicitor's Office which potentially contained electronic versions of e-mails responsive to plaintiffs' Third Document Request. Factual Appendix ¶¶ 15-104. There is no question that some Solicitor's Office backup tapes that the Special Master ultimately determined should not have been overwritten because they might have contained materials responsive to plaintiffs' Third Document Request were in fact overwritten. However, the backup tapes were not "federal records." Consequently, the overwriting of the tapes did not, and could not, constitute improper destruction of federal records.[12]

The Federal Records Act, 44 U.S.C. §§ 2101-08, 2901-09, 3101-07, 3301-24, governs the obligations of federal agencies, such as the Department of the Interior, concerning maintenance and destruction of federal records. Regulations issued pursuant to the Act require agencies to maintain e-mails that constitute "records" in a recordkeeping system, 36 C.F.R. § 1234.24, and provide that agencies may fulfill this obligation by printing out "their electronic mail records and the related transmission and receipt data specified by the agency." 36 C.F.R. § 1234.24(d).[13]

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[12]In any event, plaintiffs have not articulated a theory for charging former Assistant Secretary McCaleb for any alleged failings of the Solicitor's Office. It is difficult to understand how plaintiffs could in good faith believe that Mr. McCaleb or his predecessors had any responsibility for actions of the Solicitor's Office. If plaintiffs' Bill directed to Secretary Norton and Assistant Secretary McCaleb is intended to allege more than destruction of certain Solicitor's Office backup tapes, it is difficult to understand how plaintiffs could in good faith believe that the Factual Appendix or supporting exhibits in any way substantiate such charges.

[13]The contents of an e-mail determine whether the e-mail is a "record" which must be

(continued...)

However, the regulations further provide that backup tapes should not be used for recordkeeping purposes for e-mails because, among other deficiencies, backup tapes do not permit easy and timely retrieval of individual records or groupings of related records. 36 C.F.R. § 1234.24(c).

The Archivist of the United States is authorized to issue schedules identifying types of records that he or she has determined should be destroyed, 44 U.S.C. § 3303a(d), and agencies are required to dispose of records whose disposition the Archivist has authorized. 44 U.S.C. § 3303a(b). On August 28, 1995, acting pursuant to the authority granted by § 3302a(d), the Archivist promulgated General Records Schedule 20, "Disposition of Electronic Records." 60 F.R. 44643 (August 28, 1995) (Exhibit 5 to this Memorandum). Item 14 to General Records Schedule 20 authorizes (that is, requires) deletion of e-mail records from the e-mail system after they have been copied into a paper or other recordkeeping system. 60 F.R. at 44649. The provisions of General Records Schedule 20 which permitted the Department of the Interior and other agencies to maintain e-mail records in paper form and authorized the agencies to delete electronic copies were upheld in *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999), in which the Court specifically upheld the Archivist's "ultimate determination that a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system." *Id.* at 910.

The Department of the Interior used a paper recordkeeping system for maintaining e-mails which were "federal records." IRM Bulletin No. 96-06, which was issued by the Department on July 25, 1996, stated that:

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[13](...continued)
preserved in a recordkeeping system. Exhibit 4 to this Memorandum contains a list of factors relevant to determining whether an e-mail is a "record."

> Currently, the Department's E-Mail systems do not meet [the National Archives and Records Administration's] requirements for an "electronic recordkeeping system." . . . . Until new records software is developed, piloted and installed, **all E-Mail messages or attachments that meet the definition of a Federal record must be added to the organization's files by printing them out (including the essential transmission data) and filing them with all related paper records.** This should be done as soon as possible after the message is sent or received. The message or attachment should then be deleted from the E-Mail system. Messages or attachments that are not records should be deleted as soon as they have served their purpose.

Id. at 1 (emphasis in original).[14] Therefore, under applicable statutes and regulations, as well as Department policy, e-mails that were "federal records" were to be printed out and maintained in paper form. Copies of the e-mails on backup tapes were not federal records. As authorized by General Records Schedule 20, Interior employees were to delete e-mails which were federal records after the e-mails were printed out, and were to delete e-mails which were not federal records as soon as the e-mails had served their purpose.

Clearly, documents that are not "federal records" may be subject to discovery. As plaintiffs' own exhibits demonstrate, on June 17, 1996, shortly after this case was filed, the Solicitor's Office directed Department of the Interior agencies to retain "all documents, including e-mails, related to the management of trust funds and IIM accounts," Plaintiffs' Exhibit 4 (attached hereto as Exhibit 7), and the Solicitor's Office reiterated this directive as the case developed. See Exhibits 8 (memorandum from Named Individual Cohen dated November 10, 1998) and 9 (memorandum from Named Individual Cohen dated September 15, 1999). The Special Master's determination that after plaintiffs served the Third Document Request in June 1998, the Solicitor's Office was required to maintain e-mail backup tapes and to review the tapes

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[14]A portion of IRM Bulletin No. 96-06 is Exhibit 6 to Plaintiffs' Factual Appendix. The complete bulletin is Exhibit 6 to this Memorandum.

for responsive documents, July 27, 2001 Opinion at 5, was not a determination that backup tapes were "federal records."

The Revised Procedures Memorandum directed plaintiffs to submit Bills articulating whether the conduct alleged in the March 20, 2002 motion constituted fraud on the court or warranted the imposition of civil or criminal sanctions. As discussed above, in order to articulate a claim for fraud on the court, plaintiffs' Bills must present a *prima facie* case that a Named Individual (1) committed a wrongful act (2) with intent to defraud or to deceive the court (3) that prejudiced plaintiffs in the presentation of their case or affected a court order. The Bills filed on December 2, 2002 allege that destruction of "federal records" and a coverup of the destruction of "federal records" are the wrongful acts or serious misconduct constituting a fraud on the court and warranting imposition of civil or criminal sanctions. Since the Solicitor's Office backup tapes were not federal records, materials in plaintiffs' Factual Appendix and the supporting exhibits concerning overwriting of the backup tapes do not substantiate plaintiffs' charges in the Bills that the Department of the Interior systematically destroyed federal records or that counsel for the Department of the Interior covered up destruction of federal records. Plaintiffs have not supplied any evidence that the Solicitor's Office systematically violated departmental policy that e-mails qualifying as federal records be printed out, or that the Solicitor's Office systematically destroyed paper copies of federal records. Therefore, plaintiffs have failed to present a *prima facie* case that any of the Named Individuals committed the wrongful acts alleged in the December 2, 2002 Bills.[15]

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[15]Since the backup tapes were not federal records, plaintiffs have also failed to show that Edith Blackwell or Edward Cohen destroyed federal records or covered up the destruction of federal records.

B. Further Sanctions are Not Appropriate for the Overwriting of Backup Tapes.

While the overwritten backup tapes are not federal records, the Special Master ruled that they should have been reviewed for materials responsive to the Third Document Request. Defendants do not want to trivialize what the Special Master has found is a failure to fully comply with defendants' discovery obligations in regards to the Third Document Request. However, the overwriting of some backup tapes did not violate any court order, and plaintiffs no longer contend otherwise. Therefore, findings of civil contempt or criminal contempt pursuant to § 401(3) cannot be based on the overwriting of the backup tapes.

The overwriting of the backup tapes does not fulfill any of the three elements necessary to show a fraud on the court. First, the overwriting, while an error, was not comparable to the type of misconduct, such as bribery of a judge, that constitutes a fraud on the court. Solicitor's Office backup tapes were created solely to allow the Office to recover from a catastrophic failure of the computer system. The backup tapes were not archival, and, in the normal course of operations, Solicitor's Office backup tapes were periodically overwritten. When plaintiffs received the Third Document Request, the Solicitor's Office was preserving certain backup tapes because an Independent Counsel had specifically requested backup tapes. *See* July 27, 2001 Opinion at 4.

Other judicial officers have reached differing conclusions about whether a party must search backup tapes for materials responsive to document production requests. For example, on August 1, 2001, Magistrate Judge Facciola, in ruling on a specific request that the Department of Justice review backup tapes for responsive materials, ordered the Department to conduct a limited "test run" by restoring the e-mails attributable to one employee during a one-year period, after which he would determine whether the costs and the results of the limited review would

justify any further search of backup tapes. *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001). Magistrate Judge Facciola noted the "unique problems" that a review of backup tapes poses:

> In a traditional "paper" case, the producing party searches where she thinks appropriate for the documents requested under Fed. R. Civ. P. 34. She is aided by the fact that files are traditionally organized by subject or chronology ("chron" files), such as all the files of a particular person, independent of subject. Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter.
>
> Unlike a labeled file cabinet or paper files organized under an index, the collection of data by the backup tapes in this case was random.

Id. at 32-33.[16] Magistrate Judge Facciola noted that "[T]here is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search, and the handful of cases are idiosyncratic and provide little guidance." *Id.* at 33. The court applied a "marginal utility" analysis, and ordered a test run to determine whether the costs and benefits justified further review of backup tapes.

Similarly, the magistrate judge in *Byers v. Illinois State Police*, No. 99-8105, 2002 WL 1264004 (N.D. Ill. 2002), discussed the significant differences between paper-based discovery and the discovery of e-mail files on backup tapes:

> Chief among these differences is the sheer volume of electronic information. E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails typically lack a coherent filing system. Moreover, dated archival systems commonly store information on magnetic tapes which have become obsolete.

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[16]The Department of Justice also maintained backup tapes solely so that the computer system could recover from a catastrophic crash. *McPeek*, 202 F.R.D. at 32, 33.

> Thus, parties incur additional costs in translating the data from the tapes into useable form.

Id. at *10. The magistrate judge in *Byers* determined that the plaintiffs were only entitled to production of the e-mails on backup tapes if they paid a portion of the cost of production. *Id.* at *12. While the Special Master reached a different conclusion about the obligation of defendants to review Solicitor's Office backup tapes, the split in authority demonstrates that the limited overwriting of some tapes is not conduct of the magnitude necessary to constitute a fraud on the court. Moreover, plaintiffs have not shown that the overwriting was done with the intent to deceive or with intent to defraud the court. *See* Part IV(B), below. Overwriting of the tapes was the normal and accepted practice within the Department of the Interior. The issue here is failure to prevent destruction of materials which are normally destroyed, not the destruction of materials which are normally preserved.

Finally, plaintiffs have not attempted to show the third element of fraud on the court: that the wrongful act prejudiced them in presenting their case or affected a court ruling. In their numerous filings on the backup e-mail tape issue, plaintiffs have not even identified the issue or issues to which documents responsive to the Third Document Request were relevant or how the absence of the e-mails on the overwritten tapes prejudiced their ability to present their case on any issue.

Plaintiffs' overheated rhetoric should not obscure the limited scope of the Third Document Request. Item one of the Third Document Request requested production of "[a]ll documents prepared or signed" by three attorneys in the Solicitor's Office, all of whom worked in the Washington, D.C. headquarters of the Solicitor's Office, "which express legal advice, conclusions, opinions, assessments, instructions or directions to the Secretary or any and all other

Department of Interior personnel not employed in the Office of the Solicitor, . . . pertaining to the administration of the Individual Indian Money (IIM) trust."[17] The Third Document Request also asked for "All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions or directions to Interior Personnel" regarding the transfer of trust assets to tribes (Item 2), the 1990 delegation of IIM trust fund disbursement authority to Interior area office and agency personnel (Item 3), proposed legislation referred to as the Tribal Trust Fund Settlement Act of 1998 (Item 4), or "interest overdrafts" described by the then-Special Trustee in a deposition (Item 5). *Id.* The Third Document Request incorporated by reference definitions set forth in Plaintiffs' First Set of Interrogatories, and those definitions defined "documents" as including e-mails and information contained on "tapes."

The Third Document Request did not specifically request production of "backup tapes." The Third Document Request did not request production of all Solicitor's Office e-mails. The Third Document Request did not even request production of all Solicitor's Office documents or e-mails pertaining to the administration of the IIM trust. Interpreted broadly, item one of the Third Document Request asked for documents prepared or signed by three identified employees which pertained to administration of the IIM trust, while items two through five were limited to documents prepared or signed by other Solicitor's Office attorneys which addressed one or more of four specific topics. Moreover, throughout the course of motion practice on the Third Document Request, defendants and the Named Individuals promptly notified the Court, the Special Master and plaintiffs of developments concerning the Solicitor's Office backup tapes.

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[17]The Third Document Request is Exhibit 10 to this Memorandum.

IV. The Bills of Particulars for the Named Individuals are Insufficient.

A. The Bill of Particulars Directed to Willa Perlmutter Must Be Dismissed.

Willa Perlmutter was employed as an attorney by the Solicitor's Office between April 1995 and July 1997. See Exhibit 11 (Transcript of contempt hearing, January 22, 1999) at Tr. 1255, 1272. Plaintiffs' Bill claims that she "destroyed massive and unquantifiable amounts of her own e-mail." Perlmutter Bill at 2. Plaintiffs also assert that "[E]qually damning is her absolute and complete failure to inform field and regional Solicitor's Office of the prohibition against the destruction of electronic and hard copy [sic] federal records, including e-mail and other trust records." *Id.* at 3. Moreover, plaintiffs charge that Ms. Perlmutter "cynically abused her position as primary agency counsel to ensure that **all** evidence of her misconduct in this litigation and as trust counsel had been destroyed." *Id.* at 3-4 (Emphasis in original). Plaintiffs claim that her conduct merits disbarment, as well as findings of civil and criminal contempt. *Id.* at 4.

What evidence have plaintiffs marshaled to support these serious charges against Ms. Perlmutter? As support for the claim that she destroyed massive and unquantifiable amounts of her own e-mail, plaintiffs cite a portion of one answer she gave to a question by plaintiffs' counsel as a witness in the first contempt trial:

> Q. Are there notes or other kinds of recorded information that you kept at one time that – that you no longer have?
>
> A. Well certainly when I left the government, I left my files with the government.
>
> Q. Was any e-mail ever destroyed?
>
> A. I never destroyed an e-mail other than deleting things that were no longer – <u>I mean I would delete e-mails in the course of my business, just to keep my hard drive</u>

clean. But I never destroyed anything to speak of.

Exhibit 11 at Tr. 1306:18-07:01 (underscoring added). Plaintiffs' entire case that Ms. Perlmutter destroyed "massive and unquantifiable amounts of her own e-mail" rests on the underlined sentence above. However, her answer is not evidence that she did anything wrong at all. As discussed above, in Part III(A), Ms. Perlmutter was required, pursuant to applicable regulations and Departmental policy, to print out paper copies of those e-mails that were "federal records," and then to delete them. She was to delete e-mails which were not federal records as soon as the e-mails had served their purpose. Her answer is entirely consistent with adherence to Departmental policy and the Archivist's recordkeeping regulations.

The Special Master determined that the Solicitor's Office should have maintained backup tapes of e-mails after plaintiffs served the Third Document Request. But Ms. Perlmutter left the Solicitor's Office the year before plaintiffs served the Third Document Request. Moreover, the Special Master determined that the office should have maintained system backup tapes, not that individual employees should have kept e-mails on their hard drives. Nothing required employees to leave all e-mails on their hard drives for ever and ever.[18]

Plaintiffs do not have any support for the charge that Ms. Perlmutter failed to inform field and regional Solicitor's Office employees of the prohibition against the destruction of federal records, including e-mails. In any event, plaintiffs have not explained why they believe Ms. Perlmutter individually had an obligation to inform field offices of document retention policies. As plaintiffs concede, Edward Cohen, Ms. Perlmutter's supervisor, had directed on June 17,

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[18]The preamble to General Records Schedule 20 noted that "Federal agencies must have the authority to delete the original version from the 'live' electronic information system to avoid system overload and to ensure effective records management." Exhibit 5, 60 F.R. at 44644.

1996, that all documents relating to management of trust funds and IIM accounts be retained. Perlmutter Bill at 2. Moreover, on August 7, 1996, IRM Bulletin 96-06, which set forth Departmental policies on retention of electronic mail documents, was circulated within the Solicitor's Office. See Exhibit 6. Thus, the Solicitor's Office had provided guidance both on general document retention policies and document retention obligations for this case.

What evidence do plaintiffs cite to support their claims that Ms. Perlmutter "cynically abused her position" to ensure that all evidence of her misconduct had been destroyed? They cite no evidence – none whatsoever – for the extremely serious charges that she engaged in misconduct and that she used her position to destroy evidence of her misconduct.[19]

In addition to the lack of evidence to support plaintiffs' claims against Ms. Perlmutter, the Bill is deficient as a matter of pleading. As discussed in Part II, violation of a court order is a prerequisite to civil contempt or to criminal contempt under 18 U.S.C. § 401(3). Plaintiffs' December 2, 2002 Bill does not assert that Ms. Perlmutter violated an order, and she left the Department of the Interior before any of the orders identified in the March 20, 2002 motion were entered. Therefore, plaintiffs have not alleged a basic element of contempt. If plaintiffs are attempting to assert that Ms. Perlmutter committed fraud on the court, this charge must also be dismissed, as plaintiffs have not attempted to show that anything she did prejudiced their ability to present their case or affected any court order, much less that she did anything with intent to deceive the court.

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[19]Moreover, plaintiffs' allegation that she destroyed evidence of her misconduct is circular and confusing. Plaintiffs apparently allege that Ms. Perlmutter's misconduct was the destruction of her e-mails. Thus, the charge that she covered up her misconduct amounts to a claim that she destroyed e-mails to cover up her destruction of her e-mails.

Although the pleading deficiencies in the Bill against Ms. Perlmutter require dismissal, the formal shortcomings in plaintiffs' submission should not obscure what plaintiffs have done. Plaintiffs have charged Ms. Perlmutter with committing intentional misconduct so serious that plaintiffs assert that she should be referred for criminal prosecution and be disbarred, and plaintiffs have made these charges without a shred of evidentiary support. The irresponsibility of plaintiffs' Bill against Ms. Perlmutter is breathtaking.

B. Plaintiffs' Bills Do Not Demonstrate That Any Named Individual Intended to Deceive the Court or the Special Master Regarding the Preservation of Solicitor's Office Backup E-mail Tapes.

As demonstrated in Part II(B)(3) above, in order to establish a fraud on the court, plaintiffs must show that a Named Individual had a specific intent to deceive the Court regarding the preservation of the Solicitor's Office backup email tapes. Plaintiffs offer no proof that any Named Individual had any such intent.

As stated in the Government's Opposition at 16-22, the record demonstrates – entirely contrary to plaintiffs' unfounded claims – that the Government disclosed the discontinuation of the backup tape retention practice established for the Independent Counsel promptly after counsel became aware of the matter, that the Government sought to keep the Master and the plaintiffs informed about the chronological and geographic scope of the Solicitor's Office backup tapes that had been preserved as counsel became aware of those issues, and that the Government informed the Master and plaintiffs when any mishaps occurred with Solicitor's Office backup tapes.

Having apparently abandoned their contention that any Named Individuals – other than Mr. Cohen and Ms. Blackwell – violated a court order, they now appear to argue that former Department of Justice trial counsel Phillip Brooks and Charles Findlay "knew or should have

known" that their representations to the Master and the Court were incorrect or incomplete; that these attorneys failed to timely notify the Master and the Court of the actual extent of "systematic email destruction"; and that they failed to conduct "due diligence" to prevent the "systematic email destruction." Plaintiffs contend that former Deputy Assistant Attorney General James Simon "aided and abetted" Mr. Brooks and Mr. Findlay in these alleged actions and inactions[20], and that former Assistant Attorney General Lois Schiffer negligently supervised Mr. Brooks and Mr. Findlay.[21] Plaintiffs cite defendants Norton and McCaleb in their official capacities for these supposed misdeeds.[22]

Plaintiffs' Bills are, as usual, long on invective and short on facts and law. Without citing a single authority to justify their position, plaintiffs baldly posit a "knew or should have known" standard for a finding of criminal contempt or fraud on the court. *See* Brooks Bill at 3-4; Findlay

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[20]Plaintiffs also accuse Mr. Simon of "deceiving" them by virtue of the letter exchange between him and plaintiffs' counsel Thaddeus Holt at the outset of the litigation. To this day, plaintiffs have failed to demonstrate any falsity in Mr. Simon's correspondence, much less articulated a legal basis upon which he could be cited for contempt of court or fraud on the court for anything. Plaintiffs' "aiding and abetting" charge pertains only to their civil contempt charge. Simon Bill at 3. They have abandoned any criminal contempt charge as to Mr. Simon.

[21]While plaintiffs accuse Ms. Schiffer of "directly and through her deputies" concealing the destruction of the backup tapes (which they again mislabel "federal records") and of "stonewall[ing] this Court and suppress[ing] the truth about the Solicitor's Office destruction of Federal Records," Schiffer Bill at 2-3, plaintiffs offer no evidence at all that Ms. Schiffer took any action directly regarding the backup tapes. Accordingly, plaintiffs are left with the claim that she is guilty, essentially, of negligent supervision. Of course, they cite no authority for the notion that "negligent supervision" can constitute a basis for finding criminal contempt or fraud on the court.

[22]Plaintiffs' attempt to "reserve" the right to supplement their Bills to add Secretary Norton and/or Assistant Secretary McCaleb in their individual capacities is improper. *See* Norton/McCaleb Bill at 2 n.2. The motion before the Master is plaintiffs' March 20, 2002 motion, which deals with the Solicitor's Office only, not the Secretary's or Assistant Secretary's Offices. If plaintiffs wish to proceed on different allegations, they are free to file a separate show cause motion if they can meet the standards of Fed. R. Civ. P. 11, but they should not be permitted to further draw out these proceedings.

Bill at 4. While the "knew or should have known" standard might apply to a negligence case, it is simply not the correct standard for the extraordinary sanctions of criminal contempt or fraud on the court. Likewise, lack of "due diligence" is not a sufficient basis for finding a criminal contempt or a fraud on the court, nor have plaintiffs supplied any basis for their accusations concerning lack of "due diligence." *See* Brooks Bill at 7. As shown above, the standard is far more exacting – requiring proof of "willfulness" for criminal contempt and proof of "intent to deceive" for fraud on the court. Plaintiffs have not demonstrated that any of the Named Individuals possessed the requisite *mens rea* to justify the imposition of the severe sanctions they seek.

In their zeal to advance their personal vendetta against their former opposing counsel, not only do plaintiffs ignore the applicable legal standards, but they also fail to cite a single fact that even suggests that Mr. Brooks or Mr. Findlay made any representations regarding the state of the Solicitor's Office backup tapes other than in good faith, much less that they actually knew any of their representations to be incorrect when made, or that either of them intended to deceive the Master or the Court in making them. *Buck*, 281 F.3d at 1343 ("[R]elief based on fraud upon the court must be founded on **intentional** misconduct.") (emphasis added). The record in fact contradicts plaintiffs' accusations. The record demonstrates that Mr. Brooks informed the Master that the Solicitor's Office had discontinued the backup tape retention practice established for the Independent Counsel, and that he made this disclosure first by telephone on May 17, 1999 and then in writing three days later. *Motion for Establishment of Time Frame for Production of Certain Electronic Records and Notice to the Court Regarding Retention of Such Records* (filed May 20, 1999) at 2-8. The pleadings and representations to which plaintiffs cite in making their accusations of contempt and fraud against Mr. Brooks (Brooks Bill at 6 n.15; 7 nn. 16 & 20; 10)

simply reflect an understanding that the backup tapes in question were those that had been accumulated and retained by Interior pursuant to the practice established at the request of the Independent Counsel, and that the ultimate error was that from approximately November 23, 1998 until approximately May 12, 1999, Interior discontinued that practice. That further investigation may have subsequently yielded additional information about the issue does not suggest, much less prove, that the initial representations Mr. Brooks made to the Master and the Court on the basis of the information he had at the time were intended in any way to deceive. Nor is it incumbent upon Mr. Brooks, or any of the other Named Individuals, to "proffer[] competent evidence . . . that he too had been, and continued to be, defrauded by certain Named Individuals and Other Contemnors," as plaintiffs claim. Brooks Bill at 4 n.5. The burden of proof is plaintiffs', and it remains theirs throughout the course of these proceedings consistent with the Named Individuals' due process rights.[23] It is fatal to their claims that – nearly nine months after filing their show cause motion – plaintiffs still cannot cite a shred of evidence that Mr. Brooks knew anything more about the backup tape overwriting at the time than what he disclosed then to the Master and the Court, nor that he knew any earlier than May 12, 1999, that overwriting had occurred.

Plaintiffs now contend, for the first time, that "Mr. Brooks, as an Officer of the Court, was required to verify Solicitor's Office compliance with preservation and production orders prior to certifying compliance to this Court." Brooks Bill at 4. Tellingly, however, plaintiffs fail

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[23]Plaintiffs' repeated attempts to evade their burden of proof by suggesting the Master draw adverse inferences against the Named Individuals (*see* Brooks Bill at 4 n.5; Findlay Bill at 8 n.21) not only are legally unfounded, but irresponsibly urge the Master to violate the Named Individuals' due process rights by relieving plaintiffs of their obligation to prove each element of their claims against each Named Individual. The Master should decline to follow such a perilous course.

to cite any "preservation and production orders" with which the Solicitor's Office's supposedly failed to comply. As demonstrated previously in the Government's Opposition, none of the "orders" cited in plaintiffs' March 20, 2002 motion required the Solicitor's Office to save backup tapes until the Master's October 27, 2000 oral directive. Government's Opposition at 10-12. Plaintiffs have therefore failed to provide an adequate factual basis for their claim that the Solicitor's Office did not comply with "preservation and production orders" as to the email backup tapes. Likewise, they have failed to show how the claimed lack of "due diligence" of which they accuse Mr. Brooks, without evidence, could meet the legal standards for the extraordinary sanctions they seek to impose upon the Named Individuals.

Plaintiffs' contentions against Mr. Brooks and Mr. Findlay concerning their conduct after the May 20, 1999 disclosure are equally unsupported by any citation to fact. The record demonstrates that Interior immediately ordered backup tapes preserved in Solicitor's Office locations that had potentially responsive e-mails, *see* July 27, 2001 Opinion at 15, citing July 24, 2000 Declaration of Glenn Schumaker at ¶ 9, and that the Department of Justice trial team informed the Special Master time and again when some mishap befell a Solicitor's Office backup tape. *See* March 20, 2002 motion, Exhibits 47, 50-54, 57, 73. While plaintiffs feebly attempt to mock these disclosures and liken them to the Watergate scandal (*see* Findlay Bill at 4 & note 6), plaintiffs offer no basis for concluding that the disclosures were inaccurate – *i.e.*, that tapes were **not** mistakenly overwritten, were **not** lost in the mail, or did **not** experience technical failure as stated in the Government's disclosures. Accordingly, plaintiffs' claims that Mr. Brooks and Mr. Findlay "improperly limited the nature and scope of [their] disclosure[s]" (Findlay Bill at 4) is utterly unsupported.

Plaintiffs fail to show any falsity in Mr. Findlay's representation that "Interior has informed the Special Master on several occasions that the Solicitor's Office has saved some, but not all, backup tapes in its regional and field offices." Findlay Bill at 5-6 & note 15. Likewise, it is impossible to discern any support for plaintiffs' claim of fraud in Mr. Findlay's statement at the October 27, 2000 hearing that "Obviously, the accumulation of tapes has continued, and the department is faced with resolving whether or not it can rely on its paper records or must delve into the backup [tapes]." *Id.* at 7. Plaintiffs apparently contend that the Named Individuals promised to keep all backup tapes for every Solicitor's Office within Interior. That is simply not the case. In fact, between May 20, 1999 and August 2, 2000, the government informed plaintiffs and the Special Master on numerous occasions about the scope of the backup tape retention and search. On May 28, 1999, Mr. Brooks wrote a letter to the Master identifying the specific individuals whose e-mail accounts would be searched on the original set of backup tapes preserved at the request of the Independent Counsel. Exhibit 12. In a November 19, 1999 letter responding to earlier correspondence from plaintiffs' counsel Keith Harper, government attorney Matthew C. Urie specifically stated:

> Of the eighteen Field and Regional Solicitor's offices, I am told that certain members of seven of those offices may have prepared e-mail messages potentially responsive to the Plaintiffs' Third Request for Production of Documents. These seven offices are, the Southwest Regional Solicitor's office in Albuquerque, New Mexico, the Tulsa Field office in Tulsa, Oklahoma, the Alaska Regional office in Anchorage, Alaska, the Phoenix Field office in Phoenix, Arizona, the Twin Cities Field office in Minneapolis, Minnesota, the Billings Field office in Billings, Montana, and the Pacific Northwest Regional office in Portland, Oregon.

Exhibit 13 at 2; March 20, 2002 motion Exhibit 48. This letter was also provided to the Special Master. *Id.* In its April 19, 2000, status report to the Special Master, signed by Mr. Findlay, the government explicitly stated: "The Solicitor's Office is preparing a report on back-up tapes for

the seven regional and field offices in which e-mails relevant to Indian trust matters and this litigation may be found." United States' Status Report to Special Master of April 19, 2000 (attached hereto as Exhibit 14) at 2. The certificate of service demonstrates that four of plaintiffs' attorneys also received a copy of this document. On June 27, 2000, Mr. Findlay provided a chart to the Special Master showing the estimated coverage of inventoried backup tapes only for the offices identified in the above passage of Mr. Urie's November 19, 1999 letter and the Washington, D.C. headquarters office. Exhibit 15. In the August 2, 2000 Motion for Protective Order, the Government provided a declaration from then-Solicitor's Office Management Information Systems Team Leader Glenn Schumaker clarifying that the original set of backup tapes (those saved at the request of the Independent Counsel) covered the headquarters and Twin Cities offices of the Solicitor's Office and again noting that backup tapes were being accumulated and preserved for those two components of the Solicitor's Office and the additional six regional and field offices identified in Mr. Urie's November 19, 1999 letter. Exhibit 16 at ¶¶ 4, 9 (July 24, 2000 Declaration of Glenn W. Schumaker). Consistent with these earlier statements, Mr. Findlay told the Master at the October 27, 2000 hearing:

> We have given instructions both to the headquarters, people who are in charge of saving backup tapes, and instructions have been given to the field and regional offices which are most likely to have documents related to trust reform or trust administration.

Exhibit 17 (10/27/00 Tr. at 44:18-22).[24] Thus, plaintiffs' accusation that Mr. Findlay "lied to the Special Master" about the scope of Interior's backup tape preservation instructions (Findlay Bill at 5) is completely untrue.

The fact that plaintiffs' pleadings fail to conform to the requirements set forth in the Master's Revised Procedures Memorandum and are liberally peppered with personal jibes[25] and extraneous material[26] makes it extremely difficult to discern their actual argument. To the extent that plaintiffs are claiming that the Named Individuals failed to inform the Master that backup tapes were only being saved in those regional and field offices of the Solicitor's Office that actually did IIM-related work, they are incorrect, as demonstrated above. To the extent that plaintiffs are claiming that it was improper for Interior not to preserve backup tapes even as to regional and field offices of the Solicitor's Office that performed no IIM-related work before the

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[24]By a memorandum dated September 15, 1999, Mr. Cohen directed all Interior personnel, including Solicitor's Office personnel, both to print and save hard copies of *Cobell*- and IIM trust-related e-mail, and to leave such e-mail on their computers overnight so the messages could be picked up on backup tapes. Exhibit 9.

[25]*E.g.*, plaintiffs claim that Mr. Findlay withdrew from this matter "in disgrace," but cite nothing to support their claim beyond an ordinary notice of withdrawal. Findlay Bill at 2 n.3. Plaintiffs blame Mr. Brooks for the incivility that has marked this case (Brooks Bill at 2 n.2), but cite no pleading or statement made by him that contains anything like the invectives they have repeatedly hurled at him and other government counsel and employees.

[26]Despite the Master's unambiguous directive that "[f]indings stemming from proceedings in which the Named Individuals have not been afforded the opportunity to participate and/or comment will not be considered during these proceedings," (Revised Procedures Memorandum at 4), plaintiffs have attempted to bootstrap onto their Bills concerning the backup tape issue certain findings made in proceedings in which the Named Individuals did not participate, *see, e.g.,* Findlay Bill at 2 n.4; *id.* at 8 n.21; Brooks Bill at 11 n.27; or which took place after these Named Individuals withdrew from the case, *see* Findlay Bill at 4 & n.6. Likewise, plaintiffs misleadingly imply that Named Individuals in the present show cause motion were found to have engaged in wrongdoing in the *Supplemental Recommendation and Report of the Special Master Regarding the Delayed Disclosure of the Destruction of Uncurrent Check Records Maintained by the Department of the Treasury* (Feb. 7, 2000). *See* Brooks Bill at 4 n.9; Findlay Bill at 8 n.20; Simon Bill at 3 n.5. They were not.

Master expressly required Interior to do so in November 2000, plaintiffs have failed to articulate any basis for their standing to make such a claim as to materials having nothing to do with their lawsuit and/or sought by none of their document requests.

Finally, plaintiffs accuse Mr. Findlay of "deceptively us[ing] the Motion for Protective Order for purposes of obtaining a ruling from the Master that would authorize retroactively the surreptitious spoliation that had occurred and extinguish prospectively the unconditional obligation to preserve these electronic records. . . ." Findlay Bill at 6-7. This, apparently, is plaintiffs' articulation of a fraud on the court theory. Like their other accusations, however, this one is merely overblown rhetoric undergirded by no factual support. There is, of course, no question that the Government sought relief from the substantial burden and expense of reloading and searching the thousands of backup tapes that had been retained by the time the August 2, 2000 motion was filed. The Government relied on the D.C. Circuit's then-recent ruling in *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000). That case confirmed both the propriety of Interior's reliance on a paper recordkeeping system and the reasonableness of the Government's reliance on that system as the proper source for discovery. Likewise, the *McPeek* opinion, 202 F.R.D. 31 (D.D.C. 2001), issued by Magistrate Judge Facciola just a few days after the Master's July 27, 2001 Opinion, recognized the cost of restoring and searching backup tapes and acknowledged that a party could use that cost to seek an improper advantage in litigation. These rulings confirm that in August 2000, the Government could make a good faith argument that searching backup tapes for documents responsive to the plaintiffs' Third Document Request was too costly and burdensome, given the existence of a paper recordkeeping system.

Plaintiffs have had years to come up with factual support for the bad faith they assert. Having failed to put any facts on the table, they must now suffer the dismissal of their unsupported accusations. Because plaintiffs have failed to offer any evidence showing that Mr. Brooks or Mr. Findlay acted with an intent to deceive the Court, their claims against Mr. Simon and Ms. Schiffer similarly fail.[27] These individuals cannot lawfully be sanctioned for "aiding and abetting" or "negligently supervising" acts that did not constitute misconduct and that plaintiffs have failed to show were undertaken with any improper intent.

CONCLUSION

The time has come to put an end to the spurious attacks and overblown claims plaintiffs have leveled in pleading after pleading against the government and the Named Individuals concerning the backup tape overwriting issue. Despite being afforded numerous opportunities to produce facts to back up their claims, plaintiffs have offered nothing but innuendo and conjecture. They have failed to meet the requirements established by the Court, the Master and the law itself for the extreme sanctions they seek against the Named Individuals in their personal and official capacities. Too much judicial and attorney resources have been expended already on plaintiffs' unfounded claims. These claims must firmly and finally be dismissed.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

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[27]To the extent plaintiffs base their claims against Mr. Findlay upon his "supervisory" capacity (*see* Findlay Bill at 2) rather than on acts he supposedly took or failed to take directly, these claims likewise must be dismissed because of plaintiffs' failure to provide competent evidence of any actions or omissions by persons under Mr. Findlay's supervision that could meet the exacting standards of criminal contempt or fraud on the court.

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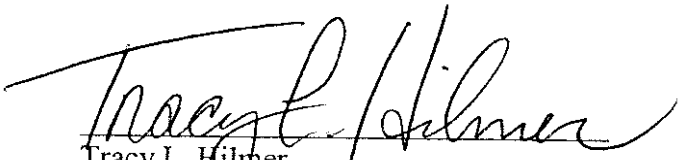

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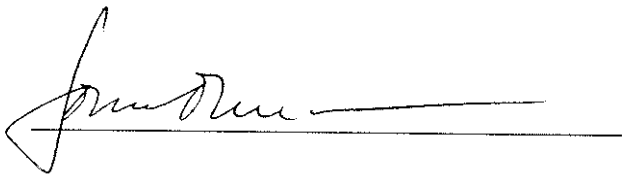
DATED: January 6, 2003

CERTIFICATE OF SERVICE

I certify that on January 6, 2003, I served the foregoing *GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES, AND "BILLS OF PARTICULARS" FILED BY PLAINTIFFS IN SUPPORT OF SUCH MOTION* and *MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES, AND "BILLS OF PARTICULARS" FILED BY PLAINTIFFS IN SUPPORT OF SUCH MOTION* in the manner stated upon the persons listed on the attached service list.



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-CV-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of the Government's Motion to Dismiss Plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and their Employees and Counsel Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes, and "Bills of Particulars" Filed by Plaintiffs in Support of Such Motion (filed Jan. 6, 2003), the Report and Recommendation of the Special Master, and the entire record in this case, it is this _____ day of _____, 2003,

ORDERED, that the government's motion be and hereby is GRANTED.

_____
Honorable Royce C. Lamberth
United States District Judge

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