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 OPPOSITION TO PLAINTIFFS' BILLS OF PARTICULARS IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY **INTERIOR DEFENDANTS AND THEIR EMPLOYEES** AND **COUNSEL SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING COURT ORDERS AND FOR DEFRAUDING THIS COURT IN CONNECTION WITH TRIAL ONE (FILED OCTOBER 19,2001)**

The United States submits this brief in support of the non-party respondents (collectively referred to as the "Named Individuals") against whom plaintiffs have filed their motion of October 19, 2001 for orders to show cause (the "October 19,2001 motion"). The Court bifurcated plaintiffs' contempt motion, severing the two named individual defendants, Gale Norton and Neal McCaleb acting in their official capacities, from the 37 Named Individuals. The Court conducted a trial ("Contempt II") and found for the plaintiffs on the issue of whether defendants Norton and McCaleb, acting in their official capacities, had acted in contempt of court. *Cobell* ***v. Norton,*** 226 F. Supp.2d 1 (D.D.C. 2002) (the "Contempt II Order").[1] The remaining issue, whether the 37 Named Individuals should be held in contempt of court, has been referred to the Special Master.

[1] The Contempt II Order is on appeal. *Cobell v. Norton,* Case No. 02-5374 (D.C. Cir.) (argued Apr. 24,2003).

The Special Master required the plaintiffs to submit Bills of Particulars ("Bills") setting forth the facts and circumstances that support their allegations of contempt against these 37 Named Individuals. Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause, November 4,2002 at 3. Despite the Special Master's order, plaintiffs failed to submit Bills for 22 of the 37 Named Individuals.

The Court's Contempt II Order precludes any further contempt findings against the government or any of the Named Individuals acting in their official capacities. Moreover, the plaintiffs have failed to provide the Court with a basis for proceeding against any of the 37 Named Individuals. Accordingly, further proceedings with respect to any of the 37 Named Individuals are not warranted.

I. BACKGROUND

A. Prior Proceedings

On October 19,2001, plaintiffs filed a Motion for Orders to Show Cause Why Interior Defendants and their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court in Connection with Trial One. On November 28,2001, the Court entered an Order to Show Cause granting plaintiffs' motion "as to the Interior defendants in their official capacities." That order directed defendants Norton and McCaleb to "show cause why they should not be held in civil contempt of court in their official capacities" upon four specifications:

1. That defendants had failed to comply with the Court's Order of December 21, 1999 to initiate a Historical Accounting Project.

2. That defendants committed a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001.

3. That defendants committed a fiaud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21,1999.

4. That defendants committed a fraud on the Court by filing false and misleading quarterly reports starting in March 2000, regarding TAAMS and BIA Data Clean-Up.

Order to Show Cause, November 28, 2001 at 1-2. The order stated that the "Court defers ruling at this time on plaintiffs' motion to order non-party employees and counsel to show cause." *Id.* at 1. On December 6,2001, the Court entered a Supplemental Order to Show Cause, adding a **fifth** specification that defendants committed a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data. Plaintiffs' October 19,2001 motion did not address the IIM computer security issue which was the subject of the Supplemental Order to Show Cause, and plaintiffs did not amend their motion **to** include that specification.

The five issues identified in the Orders to Show Cause were tried in the Contempt II trial, and resolved **as** to defendants in their official capacities in the Contempt II Order. **As** part of the Contempt II Order, the Court "deferred ruling on the plaintiffs' motion filed on October 19,2001, as it related to 37 non-party employees and counsel." 226 F. Supp. 2d at 155. The Court explained this deferment: "Upon consideration of the memoranda filed in support of and in opposition to the plaintiffs' motion, the record in this case, and the applicable law, the Court finds that it is not appropriate to order these individuals to show cause at this time why they should not be held in contempt **of** court." *Id.* Instead, the Court referred the matter "to Special Master Balaran so that he may develop a complete record with respect to these 37 non-party individuals." *Id;* see *also id.* at 162 ("It is further ORDERED that the plaintiffs' motion for order to show cause, filed October 19,2001, shall be REFERRED to Special Master Balaran. Special Master Balaran

shall issue a report and recommendation with respect to each of the 37 non-party individuals named in the plaintiffs' motion.").

B. The Bills of Particulars

In a March 15,2002 hearing, the Court directed the 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.**" *Cobell v. **Norton,*** Civ. Action No. 96-1285(RCL), Transcript of March 15,2002 Status Hearing, at 21:10-14 ("3/15/02 Tr."). The Court reiterated that plaintiffs must 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. **As** of September 17,2002, the date of the Court's referral of the October 19,2001 motion to the Special Master, the plaintiffs had provided a bill of particulars for only a single individual.[2]

Following the Court's referral, the Special Master issued a memorandum dated November 4,2002 setting out the procedures and schedules goveming the Court's referral of the plaintiffs' October 19,2001 motion and another contempt motion referred to him. In the memorandum, the Special Master provided plaintiffs with six additional months to file Bills with respect to the conduct of the 37 non-party individuals named in the October 19,2001 motion. Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause, November 4,2002 at 3. The deadline for filing these Bills was set at May 1,2003. The Special

[2] Plaintiffs filed a Bill of Particulars against Edith Blackwell on August 21,2002.

Master subsequently denied both a letter request and a motion by plaintiffs to extend the May 1, 2003 deadline for filing Bills. Plaintiffs did not appeal the denials of their letter request and motion for extension of the May 1,2003 deadline.

On or about May 1, 2003, plaintiffs filed Bills against 15 of the 37 non-party individuals identified in the October 19,2001 motion. The Named Individuals against whom Bills have been filed are present or former officials or attorneys of the Department of the Interior (Bruce Babbitt, John Berry, Edith Blackwell, Michael Carr, Edward Cohen, Kevin Gover, Robert Lamb, Sabrina McCarthy, Anne Shields, and Stephen Swanson) and attorneys currently or formerly employed by the Department of Justice (Phillip Brooks, Charles Findlay, Sarah Himmelhoch, Lois Schiffer, and David Shuey).[3]

Plaintiffs did not file Bills against the remaining 22 non-party respondents, and the government accordingly does not address any allegations as to them. Indeed, since plaintiffs have failed to comply with the Court's March 15,2002 directive and the Special Master's November 4, 2002 schedule with respect to these 22 individuals, and for the other reasons stated in the Praecipe filed on May 8,2003 on behalf of these 22 individuals, the Special Master should promptly recommend the termination of the current proceedings as to them.

The Court's referral to the Special Master is limited to those matters encompassed by the plaintiffs' October 19,2001 motion. As noted above, the plaintiffs' contempt motions do not include the fifth specification identified by the Court in Contempt II (the IT Security specification).

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[3] One of these Bills pertained to Edith Blackwell, against whom plaintiffs had previously filed a bill of particulars on August 21,2002, as noted in footnote 2 above. The government filed its response to this Bill on September 4,2002. The government's response is incorporated by reference herein. Based upon correspondence exchanged with the Special Master, the government understands that plaintiffs are limited to the specifications with which they charged Ms. Blackwell in their August 21,2002 Bill and that the Bill they issued as to her on April 29,2003 will not be considered. Exhibit 3.

Eleven of the fifteen Bills filed by the plaintiffs purport to address the IT specification.[4] Because the IT Security specification is not before the Special Master, it is not addressed in the government's response to plaintiffs' Bills.

This brief addresses only the allegations made in the October 19, 2001 motion as particularized by the Bills filed against the 15 Named Individuals.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LEGAL BASIS FOR THE ISSUANCE OF SHOW CAUSE ORDERS AGAINST ANY NAMED INDIVIDUAL.

Plaintiffs urge the Court to impose sanctions upon the Named Individuals for civil contempt, criminal contempt and/or fraud on the court. Controlling case law demonstrates, however, that the allegations made by the plaintiffs – even construed most generously in their favor – cannot sustain the legal theories they propound.

A. Plaintiffs Have Failed to Establish a Legally Sufficient Basis for Civil Contempt Sanctions Against the Named Individuals.

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 the elements have been described by controlling authority in other cases in this circuit. The Court of Appeals held in *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993):

> "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Nevertheless, "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous," *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991), and the

[4] The Bills filed with respect to Bruce Babbitt, John Berry and Anne Shields do not reference the fifth or IT specification. Further, the Bill filed as to Edith Blackwell on August 21, 2002, does not include any IT security issues.

violation must be proved by "clear and convincing" evidence. *Washington-Baltimore News paper Guild, Local 35, v. Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980).

Thus, a party seeking a finding of civil 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 respondent, and (3) the respondent 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). Plaintiffs' October 19, 2001 motion and Bills do not satisfy their burden of establishing these elements and, in any event, articulate no remedy that they can possibly obtain from the Named Individuals that the Court has not already awarded them in its Contempt II Order.

1. There Is No Further Remedy Available to the Plaintiffs.

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, Inc. v. United Food & Commercial Workers Int'l Union,* 103 F.3d 1007, 1016 (D.C. Cir. 1997). 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,* 510 **U.S.** 913 (1993). Compensatory contempt sanctions compensate the plaintiff for damages that the offending party has caused by its contempt. *Id.* However, neither form of relief is available against the Named Individuals because they have no ability to "purge" past conduct, and the Court has already resolved the matter of plaintiffs' entitlement to relief in the Contempt II Order.

A fundamental concept of civil contempt is that the contemnor "carries the key of his prison in his own pocket." *Gompers v. Bucks Stove & Range Co.,* 221 **U.S.** 418, 442 (1911), *cited in International Union, United Mine Workers of America v. Bagwell,* 512 **U.S.** 821, 828 (1994). Thus, the individual found in civil contempt must be afforded the opportunity to purge the

contempt. *See Bagwell*, 512 U.S. 821, 829 (1994) ("Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge."). Purgation conditions are a necessary component of a civil contempt proceeding because civil contempt 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,* 103 F.3d at 1016, 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. "Civil contempt does not exist to punish the contemnor or to vindicate the court's integrity." *Morgan v. Barry,* 596 F. Supp. 897, 899 (D.D.C. 1984), citing *Blevins.*

In accordance with the Court of Appeals' holding in *Blevins,* a civil contempt order should be imposed, if at all, only at the conclusion of a three-stage proceeding involving "(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled." *Blevins Popcorn,* 659 F.2d at 1184-85 (citing *Oil, Chem. & Atomic Workers Int'l Union v. NLRB,* 547 F.2d 565, 581 (D.C. Cir. 1977)); *see also SEC v. Bilzerian,* 112 F. Supp. 2d 12, 16 (D.D.C. 2000) (penalty should be imposed only after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions). Although the Court held a trial against Interior Defendants on the very same allegations that plaintiffs now raise in their bills against the Named Individuals, the Court prescribed no purgation conditions for the Interior Defendants. Since the Court declined to prescribe purgation conditions for the party, it is difficult to imagine how the Named Individuals – none of whom currently has a role in the main litigation,

much less a decisionmaking role, and many of whom do not even work for the government any longer – could possibly fulfill any purgation conditions based on their past governmental activities.

Coercive sanctions are not appropriate against any of the Named Individuals in any event because there would be no point in attempting to undo the allegedly contemptuous acts with which they are charged. Plaintiffs accuse the attorney-Named Individuals (Blackwell, Brooks, Carr, Cohen, Findlay, Himmelhoch, McCarthy, Schiffer, Shuey and Swanson) of such things as attending various meetings and providing inappropriate legal advice and/or comments on various documents and proposed courses of action. Aside from the fact that plaintiffs fail to explain how any particular advice or comment from any of the attorney-Named Individuals violated a court order, there would be no point in requiring these attorneys to retract the advice and comments about which plaintiffs complain. Such a retraction would have no effect whatsoever upon the course of this litigation because the matters to which the challenged advice and comments applied are over and done with. Nor could these individuals somehow "undo" their attendance at meetings in the past. Likewise, there would be no point in requiring the retraction of a Federal Register Notice or of Interior Defendants' budget proposals submitted to Congress several years ago, to the extent such matters could conceivably be deemed contumacious in the first place. The Court never required Interior Defendants, as a condition of purging the civil contempt it found in Contempt II, to revise the various plans and reports upon which it based its findings. Accordingly, there is no reason – and in fact no opportunity – for the Named Individuals to alter those documents at this point in time. 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. . . .").

Further, plaintiffs have identified no basis for compensatory damages against the Named Individuals. As part of the relief granted the plaintiffs in the Contempt II ruling, the Court awarded plaintiffs their reasonable costs and attorneys' fees associated with that proceeding. The Court declined to designate its fee awards as "compensatory damages", but identified no other claim for monetary relief made by the plaintiffs in their October 19,2001 motion. Plaintiffs have not articulated any claim for compensatory monetary relief against the Named Individuals in their Bills. Since plaintiffs have already been awarded the full measure of compensatory relief they sought in their October 19,2001 motion, they are not entitled to any more. It would be perverse for the Court to permit these proceedings to continue for the sole purpose of allowing plaintiffs' counsel to run up additional fees when the plaintiffs themselves cannot possibly gain any further relief beyond that which the Court has already awarded. See *Bagwell*, 512 U.S. at 827 ("[A] contempt sanction is considered civil if it is 'remedial, and for the benefit of the complainant.'") (quoting *Gompers,* 221 U.S. at 441).

Because the availability of a remedy "for the benefit of the complainant" is an essential component of a civil contempt proceeding, and because in Contempt II the Court has already fully adjudicated plaintiffs' claims for relief on the very same allegations as those set out in the Bills, there is no legal basis for a civil contempt proceeding against the Named Individuals on those allegations. There is, in other words, nothing more the plaintiffs can get from the Named Individuals that they have not already been awarded against the government. For this reason alone, the proceedings should be terminated.

2. The Conduct Alleged by Plaintiffs Did Not Violate A "Clear and Unambiguous" Court Order.

Plaintiffs' Bills accuse the Named Individuals of various "frauds on the court." Despite this styling of their allegations, in order to establish civil contempt, plaintiffs must still identify a

"clear and unambiguous" order that applies to the person and specific conduct by the person that violates the order. Plaintiffs' failure to establish these elements is fatal to their contempt claims. As explained in ***Project B.A.S.I.C.***:

> A court order, then, must not only be specific about what is to be done or avoided, but can only compel action from those who have adequate notice that they are within the order's ambit. For a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion. "In determining specificity, the party enjoined must be able to ascertain from the four comers of the order precisely what acts are forbidden."

947 F.2d at 17 (internal citation omitted).

The "order" that plaintiffs claim the Named Individuals violated is the Court's December 21, 1999 ruling. However, the Court of Appeals for this circuit has held unequivocally that civil contempt will not lie for alleged noncompliance with a declaratory judgment:

> As the Supreme Court has observed: "[E]ven though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt.'"

Armstrong v. Executive Office of the President, 1F.3d 1274, 1289 (D.C. Cir. 1993) (citing *Steffel v. Thompson,* 415 U.S. 452,471 (1974) (further internal citations omitted)). Plaintiffs are precluded from basing a motion for contempt upon alleged non-compliance with the Court's declaratory judgment. Moreover, the general directives contained in the Court's December 21, 1999 ruling simply do not constitute a "clear and unambiguous" order upon which a contempt finding could be based.

In its briefs before the Court of Appeals appealing the Contempt II Order, the government has detailed its argument as to why the findings made by the Court in the Contempt II Order do not establish civil contempt or fraud on the court as to the official capacity defendants. The arguments

made by the government in its appellate briefs demonstrate with equal force why the allegations, as a matter of law, cannot establish that the Named Individuals committed civil contempt or fraud on the court. We incorporate those arguments here in their entirety and attach the briefs, but not the Joint Appendix. See Exhibit 1 at 40-52; Exhibit 2 at 16-35.

3. Plaintiffs Have Failed to Demonstrate That These Named Individuals Can Be Held in Civil Contempt, Given the Contempt II Trial and Order.

a The Named Individuals Acted In the Course and Scope of Their Official Duties and Therefore Are Not Liable in Their Personal Capacities for Civil Contempt.

As noted above, the only "order" identified by plaintiffs in their Bills is the Court's December 21, 1999 ruling. That ruling was directed to **defendants,** not *to* any of the Named Individuals. None of plaintiffs' Bills refers to any actions or conduct by a Named Individual except in his or her capacity as a government official or employee – that is, in his or her official capacity. Plaintiffs have made no allegations, nor supplied any evidence, that any Named Individual violated a court order directed to him or her personally or while acting in his or her personal capacity. While injunctive orders entered against the government are binding upon government employees acting as such, Fed. R. Civ. P. 65(d), an order against the government does not apply to government employees in their individual or personal capacities. *Hernandez v. O'Malley*, 98 F.3d 293,294 (7th Cir. 1996) ("Fed. R. Civ. P. 65(d), which makes an injunction effective against successors in office, does not create personal (as opposed to official) liability."). As explained in *Dobbs, Law of Remedies 2d* § 2.8(5), an agent who is acting in his own interest and not in the interest of his principal or employer would not be in violation of an injunction directed to his principal or liable for contempt. Thus, the Named Individuals, acting in their personal capacities, were not "within the order's ambit," *see Project B.A.S.I.* C., 947 F.2d at 17,

and they cannot be held liable in their personal capacities for violating the December 21, 1999 ruling.

Plaintiffs' counsel Dennis Gingold conceded as much during oral argument on April 25, 2003 on the e-mail backup tape contempt matter when he acknowledged that former officials or employees cannot be liable for civil contempt.[5] By this statement, Mr. Gingold acknowledged that the Court's rulings directed to Interior Defendants – including the December 21, 1999 ruling – bound the Named Individuals solely in their capacities as government employees, so that when a Named Individual left government employment he or she had no further obligations under those rulings. .

b. Plaintiffs Are Barred From Proceeding Against The Named Individuals In Their Official Capacities

As demonstrated above, plaintiffs' claims against the Named Individuals concern solely actions taken in their official capacities. Any claim in this proceeding against the Named Individuals in their official capacities is a claim against the government. As the Supreme Court has explained:

> Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept, of Social Services,* 436 U.S. 658,690, n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); *see also Wyoming v. United States,* 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein.

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[5] Oral Argument, April 25,2003, Tr. at 241. Exhibit 4. Named Individuals Babbitt, Carr, Cohen, Gover, Shields, Schiffer, Swanson and Berry are no longer employed by the government.

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. The 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 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[6] 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 prejudgment interest on such back pay awards), *cert. denied*, 502 U.S. 810 (1991).

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*, 510 U.S. 913 (1993); *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed*

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[6] *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).

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.").[7] Accordingly, to the extent any monetary remedies plaintiffs may claim against the Named Individuals have not already been awarded in the Contempt II Order, sovereign immunity precludes such an award.

The Contempt II trial against defendants Norton and McCaleb in their official capacities was a trial against the government. Plaintiffs' Bills present no factual or legal issue which was not litigated in the Contempt II trial. Indeed, the Bills quote liberally from the Contempt II record and the Contempt II Order. Consequently, the doctrine of *resjudicata* precludes further litigation by the plaintiffs against the Named Individuals in their official capacities on the issues litigated in Contempt II.[8] Nor can plaintiffs obtain additional attorneys' fees from the government. As noted above, the Court has already awarded attorneys' fees "incurred by plaintiffs as a result of having to litigate" the Contempt II trial. 226 F. Supp. 2d at 152. The award of attorneys' fees in Contempt

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[7] As the Court acknowledged in the Contempt II Order, 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. 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 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.

[8] The doctrine of *res judicata* bars a claim when there has been: (1) a final judgment on the merits; (2) involving the same parties or persons with whom they are in privity; (3) on the same cause of action. *Polsby v. Thompson*, 201 F. Supp. 2d 45, 49 (D.D.C. 2002). The Contempt II Order is a final judgment for purposes of *resjudicata*, even though the Contempt II Order is currently on appeal. *Wagner v. Taylor*, 836 F.2d 596, 598 (D.C. Cir. 1987); *Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C. Cir. 1983).

II is *resjudicata* as to the amount of compensation recoverable by plaintiffs from the government as a result of the matters resolved in that proceeding and is *resjudicata* as to the assessable monetary sanctions for the government's conduct. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 358-59 (3d Cir. 1999) (damage award in state court "reverse bifurcation" proceeding, in which damages were resolved before liability was adjudicated, precluded plaintiffs from seeking additional damages). Moreover, since plaintiffs may not seek further contempt remedies against the government, the government cannot be a losing party to whom fees may be shifted.[9]

B. Plaintiffs Have Failed to Demonstrate a Legally Sustainable Basis for the Issuance of Show Cause Orders for Criminal Contempt.

The Court's order of reference to the Master includes plaintiffs' request for both civil and criminal sanctions against the Named Individuals. As shown above, plaintiffs' allegations do not meet the legal requirements for civil contempt sanctions. They certainly do not satisfy the heightened showing required for criminal contempt sanctions. Further, to the extent that plaintiffs

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[9] Plaintiffs' allegations against Named Individuals Brooks, Findlay, Himmelhoch, Schiffer, Shuey, Blackwell, Carr, Cohen, McCarthy and Swanson concern, in whole or in part, their conduct as attorneys representing the government in this litigation. The doctrine of official immunity should preclude the award of compensatory damages to plaintiffs, including attorneys' fees, against these Named Individuals for conduct related to the advocacy function of representing the government in this litigation. *See Fry v. Melaragno*, 939 F.2d 832,836-837 (9th Cir. 1991) (government attorneys representing the United States, either as plaintiff or defendant, in civil trial, criminal prosecution or agency hearing, have absolute immunity from damage claims arising from their conduct of the litigation); *Christensen v. Ward*, 916 F.2d 1462, 1474 (10th Cir. 1990); *Bryan v. Murphy*, 246 F. Supp. 2d 1256,1261 (N.D. Ga. 2003) (holding government attorneys absolutely immune from claims for money damages, as well as injunctive or declaratory relief, for conduct of their official duties in litigation); *Moore v. Schlesinger*, 150 F. Supp. 1308, 1313-14 (M.D. Fla. 2001) (government attorneys had absolute immunity from damage claims arising from alleged "wicked scheme" of litigation misconduct: "[a]s Assistant United States Attorneys, the Defendants were charged with defending the public interest in Plaintiffs underlying civil suits and should not now fact the threat of liability for their choice of litigation strategies.").

seek punitive sanctions (including incarceration), the Named Individuals are entitled to the full measure of due process afforded in criminal proceedings, and the Special Master cannot preside.

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

Plaintiffs' Bills seek the imposition of criminal sanctions, including incarceration. However, plaintiffs' October 19, 2001 motion and Bills do not identify the particular statutory provision upon which they base their claims of criminal contempt, the elements of the supposed criminal infraction, or the conduct of the Named Individuals that they say constitutes a crime.[10] Accordingly, their claims for criminal contempt sanctions should be dismissed as legally insufficient.

To the extent Plaintiffs' Reply brief to their October 19, 2001 motion articulated any basis for criminal contempt, it referred to "violations of orders." *E.g.*, Plaintiffs' Reply at 4 ("Th[e] record directly implicates both criminal and civil contempt. There is no doubt that this Court has the inherent and statutorily-derived authority and a duty to protect and enforce its judgments and compel compliance with its orders, writs, processes, rules, decrees, and commands.").

To convict a defendant of criminal contempt for violation of court orders, the Court must find, beyond a reasonable doubt, that the person willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach,* 108 F. 3d 1477, 1481 (D.C. Cir. 1997)

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[10] Plaintiffs' October 19, 2001 Motion itself did not specifically seek criminal sanctions, nor was that claim apparent from the proposed order attached to the motion. Only in their Reply brief did plaintiffs state their request that the Court impose criminal sanctions against the Interior Defendants and the Named Individuals. *See Plaintiffs' Consolidated Reply to the Opposition of the Government and Individuals to Plaintiffs' Motions for Orders to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt* (filed Nov. 21, 2001) ("Plaintiffs' Reply"). Plaintiffs' Reply referred to 18 U.S.C. § 401 in a footnote, *id.* at 3-4 n.5, but made no effort to specify the part of the statute on which they relied, nor the elements of the supposed criminal act(s) that they claimed the Named Individuals had committed.

(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 accused 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 that evidence exists that, if believed, could establish beyond a reasonable doubt that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by a Named Individual, and (3) the Named Individual willfully violated the court's order. For the same reasons that their claims fail to establish a basis for civil contempt, plaintiffs' claims cannot meet the even more stringent criminal contempt standard. ***See*** Section II(A)(2), above.

2. Any Further Proceedings Before the Special Master on Plaintiffs' Motion and Bills Must Be Terminated.

So long as there are any possible criminal ramifications for the Named Individuals in these proceedings, they must be terminated consistent with the Named Individuals' due process rights. In ***Bagwell,*** the Supreme Court noted that when a court undertakes to address certain indirect contempts, "criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." ***Bagwell,*** 512 U.S. at 833-34. In determining whether those accused of violating the ***Bagwell*** injunction were entitled to the protection of criminal procedure, the Supreme Court observed that the fines set by the trial court were "not coercive day fines, or even suspended fines, but [were] more akin to criminal fines

which petitioners had no opportunity to purge once imposed." ***Id.*** at 837. Similarly, here, plaintiffs do not **ask** the Court to attach any purgation conditions to the fines they seek against the Named Individuals. Further, as noted in Section II(A)(1) above, the Named Individuals are not in a position to purge any of the alleged contempts in any event. Accordingly, the fines that plaintiffs urge the Court to impose upon the Named Individuals inescapably must be categorized as criminal in nature – i.e., punishment for past acts. ***See National Org. for Women v. Operation Rescue,*** 37 F.3d 646,658-62 (D.C. Cir. 1994); ***Evans v. Williams,*** 206 F.3d 1292, 1296 (D.C. Cir. 2000). Accordingly, the protections recognized as necessary by *Bagwell* must be afforded to the Named Individuals here.

Since plaintiffs cannot obtain any coercive or compensatory relief from this proceeding against the Named Individuals, and since the plaintiffs have identified no purgation conditions that these individuals could effect, the proceeding – if it continues – must be carried out in accordance with the Federal Rules of Criminal Procedure, and the Named Individuals must be afforded their full measure of due process rights. The Federal Rules of Criminal Procedure do not provide for a special master to conduct an investigation with potential criminal ramifications. Accordingly, beyond conducting the present review of the plaintiffs' October 19,2001 motion and Bills for legal sufficiency, there is no further role for the Special Master in this matter.

C. Plaintiffs Have Failed to Demonstrate a Legally Sustainable Basis for the Issuance of Show Cause Orders for Fraud on the Court.

Relying on the Court's ruling in Contempt 11, plaintiffs claim that the Named Individuals should be sanctioned for "fraud on the court." Plaintiffs apparently view fi-aud on the court as a catch-all for any type of behavior that, while not violating a "clear and unambiguous" court order, they believe should result in fines, imprisonment and other contempt sanctions.

It is far from clear that "fraud on the court" can serve as a basis for imposing a contempt sanction upon someone unless that person's conduct is also found to meet all the elements of civil or criminal contempt. It appears that plaintiffs allege a "fraud on the court" because they cannot identify a "clear and unambiguous order" that the Named Individuals have allegedly violated. In any event, if the sanctions plaintiffs seek are even partially criminal in nature (and here they clearly are, since no civil contempt purpose can be served by imposing them), the Named Individuals are entitled to "the protection of criminal procedure." *NOW v. Operation Rescue,* 37 F.3d at 661. This means, at a **minimum,** that the charge must "state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Fed. R. Crim. P. 7(c). Plaintiffs have not done this, nor have they even bothered to discuss the relationship of their allegations to the specific elements of "fraud on the court." These failures alone warrants the dismissal of their "fraud on the court" claims.

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. The facts alleged by plaintiffs cannot meet these stringent standards. In this Circuit, "[f]raud 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. ***Baltia Air Lines,*** 98 F.3d at 643. No such allegation is made here. As stated in ***Weese v. Schukman,*** 98 F.3d 542 (10th Cir. 1996),

> Generally speaking, only the most egregious misconduct such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. **Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it will not ordinarily rise to the level of a fraud on the court.**

Id. at 552-53 (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)) (emphasis added). All of plaintiffs' allegations against the Named Individuals, even if they could prove them, would fall into the category of conduct described in the above-highlighted excerpt of the *Weese* decision. At the outset, therefore, plaintiffs have not demonstrated a basis for "fiaud on the court." *See also* Ex. 1 at 41-52; **Ex.** 2 at 16-35.

Additionally, "fraud on the court" requires a showing of intent to deceive or intent to defi-aud the court. *United States v. Buck*, 281 F.3d 1336, 1343 (10th Cir. 2002). And controlling authority indicates that "fiaud 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. . . ."). Even assuming plaintiffs could establish the requisite *scienter* for any Named Individual (which they have not done), plaintiffs have identified no court ruling that the alleged conduct affected, nor have they demonstrated any interference with their presentation of their case. The plaintiffs prevailed in Trial 1, and the December 21, 1999 ruling gave them the relief the Court believed it constitutionally could award them. Thus, there is no clear and convincing evidence that the

conduct described in plaintiffs' allegations has impacted this litigation, and there is no basis for a finding of "fraud on the court."

CONCLUSION

For the reasons stated above, the government urges that the proceedings against the Named Individuals be terminated forthwith.

Respectfully submitted,
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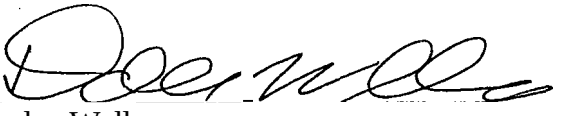

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DATED: June 2,2003

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 Memorandum of Points and Authorities in Opposition to Plaintiffs' Bills of Particulars in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One, Filed October 19, 2001, the Report and Recommendation of the Special Master, and the entire record in this case, it is this _____ day of _____, 2003,

ORDERED, that the plaintiffs' motion for order to show cause be and hereby is DENIED.

_____
Honorable Royce C. Lamberth
United States District Judge

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