IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**UNITED STATES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

December 3, 1999

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

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

BERNARD M. HOLLANDER
Senior Trial Attorney

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

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

**UNITED STATES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On July 27, 1999, the United States filed Petitions with this Court asking that Smith International, Inc. and Schlumberger Ltd. be found in civil and criminal contempt of violating the Final Judgment entered by this Court in United States v. Baroid Corporation, et al. in April of 1994 and modified in September of 1996. The petitions were tried jointly on November 17-19 and 22-24, 1999, with the Honorable Stanley Sporkin presiding. Pursuant to the Court's directions, the United

States hereby submits its proposed findings of fact and conclusions of law.[1]

I. Jurisdiction and Venue

1. This Court has jurisdiction over the civil contempt petition because of its inherent power to enforce compliance with its orders. McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949); United States v. United Mine Workers, 330 U.S. 258, 303-04, 330-31 (1947); Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 454-55 (1932); see 28 U.S.C. § 1651.

2. This Court has jurisdiction over the criminal contempt petition based on 18 U.S.C. § 401(3), which provides in relevant part:

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> . . .
>
> (3) Disobedience or resistence to its lawful writ, process, order, rule, decree or command.

See also McComb v. Jacksonville Paper Co., 336 U.S. at 193.

3. This Court also has jurisdiction over the civil and criminal contempt petitions based on Paragraph XIV of the Final Judgment, which provides:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any provision hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

---

[1] The trial transcript will be cited in this memorandum as "Tr." followed by the date, page and line numbers, and name of the witness. Government exhibits will be cited as "GX" followed by the exhibit number and, where appropriate, a page designation, or in the case of GX 42, an admission number. The Respondents' exhibits similarly will be cited as "RX" followed by an exhibit number. Depositions taken by Department of Justice attorneys will be cited as "Dep." preceded by the last name of the witness and followed by page and line numbers and the trial transcript reference.

4. Respondents have admitted that this Court has jurisdiction to enforce the Final Judgment and jurisdiction to determine whether the joint venture consummated on July 14, 1999 violates the Final Judgment. GX 42, Admissions 44 and 45.

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

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

7. Under Rule 65(d), Schlumberger, because it had actual notice and acted in concert with Smith, may be held in contempt for violation of the decree. The power to bind non-parties in circumstances such as this has a long and venerable history, see Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.) ("[A] person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal penalties for contempt. This is well settled law."), and is based on the common-sense recognition "that the objectives of an injunction may be thwarted by the conduct of parties not specifically named in its text." Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 91 F.3d 914, 920 (7th Cir. 1996); see also United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972) ("[I]n the circumstances of this case third parties such as Hall were in a position to upset the court's adjudication.").

8. The instant case is even easier, because Schlumberger was specifically named in the Court's order. Schlumberger is Smith's partner in the joint venture, and received notice that the

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

II. The Respondents

1. Smith is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 16740 Hardy St., Houston, Texas 77205. GX 42, Admission 1.

2. Smith is a worldwide supplier of products and services to the oil and gas exploration and production industry, the petrochemical industry and other industrial markets. As of 1998, the company employed approximately 8,000 people and had annual revenues of approximately $2.1 billion. GX 38 at SIIX 00029-30. Smith's 1998 revenues from its worldwide drilling fluid operations exceeded $850 million. Id. at SIIX 00047.

3. Smith pleaded guilty in the United States District Court for the Southern District of Texas in 1993 to fixing the price of drill bits in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. It was fined approximately $700,000 and settled private damage suits for approximately $19 million. Tr., 11/22/99, at 194:9-195:23 (Rock).

4. Smith produces and sells drilling fluids through M-I L.L.C. (formerly M-I Drilling Fluids and hereinafter referred to as M-I). M-I accounts for approximately 29% of U.S. and worldwide drilling fluid sales. GX 36, Exhibit A; GX 37 at SI-MCKD-02351.

5. Smith acquired a 64 percent interest in M-I from Dresser Industries, Inc. in 1994 pursuant to the Final Judgment entered that year by this Court in United States v. Baroid Corporation, et al. Smith acquired the remaining 36 percent interest in M-I in August of 1998 from Halliburton Company. GX 42, Admission 9; Tr., 11/22/99, at 139:13 (Rock).

6. Smith has inhouse counsel. Its General Counsel is Neal Sutton, who is also Senior Vice President of Administration. Mr. Sutton has been in the oilfield service industry as General Counsel since 1977. Tr., 11/24/99, at 58:11-58:24 (Sutton).

7. Schlumberger is a corporation organized and existing under the laws of Netherlands Antilles with its principal place of business in the United States at 277 Park Avenue, New York City, New York 10172. GX 42, Admission 2. Respondent Schlumberger is the same company as the Schlumberger Ltd. referred to in Paragraph IV.F. of the Final Judgment. GX 42, Admission 4.

8. Schlumberger is a worldwide supplier of oil field services and products through numerous subsidiaries. Grijalva Dep. at 9:9-10:13 (Tr., 11/18/99 at 73:18-74:14). Schlumberger's total revenues for 1998 were approximately $11.8 billion, of which Schlumberger's oil field services constituted nearly $8.9 billion. GX 39 at SL(MI) 100280 & 100287. Schlumberger operates in about 100 countries and has more than 50,000 employees. GX 34 at 1.

9. Schlumberger entered the drilling fluid business outside of the United States when it acquired IDF in September of 1993. Tr, 11/23/99, at 6:18-22, 8:16-9:2 (Grijalva). Although it generated marginal revenues in the United States from drilling fluid sales to onshore drilling projects in 1993, Schlumberger began to compete in the United States drilling fluids business for offshore drilling projects in 1994. RX 9 at SL (MI) 000749. Schlumberger's drilling fluids business was conducted by its Dowell division. Tr., 11/23/99, at 61:24-62:5 (Grijalva)

10. Schlumberger has inhouse counsel. Since January of 1999 , its General Counsel has been James Gunderson, who had been Schlumberger's Deputy General Counsel for four years prior to January of 1999 and had been part of Schlumberger's inhouse counsel group for 16 years in all. Prior to January of 1999, Schlumberger's General Counsel for 23 years was David Browning. Even though he was no longer Schlumberger's General Counsel, Mr. Browning served an advisory role to Schlumberger in its decision to proceed with the transaction on July 14, 1999. As General Counsel, Mr. Gunderson supervises a staff of approximately 130 lawyers around the world. Mr. Gunderson is also Schlumberger's Secretary. Tr., 11/23/99, at 129:12-24, 151:8-153:8 (Gunderson). Part of

Schlumberger's inhouse counsel group is Gary Wilson, who is General Counsel of Schlumberger's Oilfield Services operations. He has been with Schlumberger for 15 years. Tr., 11/24/99, at 4:25-5:21 (Wilson).

III. The Court's Decree

11. The provision of this Court's Final Judgment most pertinent to this proceeding is Paragraph IV.F. GX 1 at 11. That paragraph, as modified by this Court in 1996, reads as follows:

> The defendants shall not sell the drilling fluid business to Baker Hughes, Inc., Schlumberger Ltd., or Anchor Drilling Fluids, or any of their affiliates or subsidiaries during the life of this decree. The purchaser of the divested drilling fluid business shall not sell the drilling fluid business to, or combine that business, with the drilling fluid operations of Dresser Industries, Inc., Baker Hughes, Inc., or Schlumberger Ltd., or any of their affiliates or subsidiaries during the life of this decree. The purchaser of the divested drilling fluid business shall not sell the drilling fluid business to, or combine that business, with the drilling fluid operations of Anchor Drilling Fluids, except in accordance with the terms of the Joint Motion to Modify Final Judgment and Stipulated Divestiture Agreement filed by the United States and Smith International, Inc. on June 4, 1996, which is hereby incorporated and made a part of the Final Judgment.
>
> GX 1 at 11; GX 8 at 1-2.

12. The Final Judgment settled a civil antitrust complaint under Section 7 of the Clayton Act filed on December 23, 1993 by the United States to block the merger of Dresser Industries, Inc. ("Dresser") and Baroid Corporation ("Baroid"). GX 2 at 2; GX 42, Admission 12. The Complaint alleged that the transaction would substantially lessen competition in the diamond drill bit and drilling fluid markets. Id.

13. Drilling fluids are a mixture of natural and synthetic compounds used at oil and gas drilling sites to cool and lubricate the drill bit, clean the hole bottom, carry cuttings to the surface, seal porous well formations, control downhole pressure, and improve the function of the drill string and tools in the hole. GX 42, Admission 16.

14. At the time the Complaint was filed, Dresser competed in the drilling fluid business through its 64 percent interest in M-I Drilling Fluids; Baroid competed through its subsidiary Baroid

Drilling Fluids. GX 2 at 3-4; GX 42, Admission 13. The Complaint alleged that the U.S. drilling fluid market was dominated by three firms -- M-I, Baroid, and Baker Hughes, Inc. ("Baker Hughes"), which together accounted for at least two-thirds of domestic drilling fluid revenues. GX 2 at 6.

15. The United States filed the proposed Final Judgment on December 23, 1993, the same date that the Complaint was filed. GX 42, Admission 14; GX 1. Paragraph IV.A. of the Final Judgment ordered Dresser to divest the "drilling fluid business," which was defined as either Dresser's 64 percent interest in M-I or "all assets of Baroid Drilling and any other assets that Baroid owns or has an interest in that are used to research, develop, test, produce, manufacture, service, or market domestically or internationally drilling fluids." GX 1 at 7 & 9; GX 42, Admission 15. Both M-I and Baroid Drilling were international drilling fluid companies. GX 3 at 5.

16. The Final Judgment barred Dresser and Baroid from divesting the drilling fluid business to Baker Hughes, Schlumberger, or Anchor Drilling Fluids ("Anchor"). GX 1 at 11. The Final Judgment also barred the purchaser of the divested drilling fluid business from selling that business to, or combining that business with the drilling fluid operations of Dresser, Baker Hughes, Schlumberger, or Anchor. GX 1 at 11.

17. The public was given an opportunity to file comments on the Final Judgment prior to entry, pursuant to the Tunney Act. GX 42, Admission 5. Schlumberger had actual notice that it was named in the consent decree before the comment period expired. GX 4 at 1; GX 42, Admission 18.

18. The Court entered the Final Judgment on April 12, 1994. GX 42, Admission 6. The Final Judgment had a term of ten years. GX 1 at 32; GX 42, Admission 7.

19. Dresser satisfied the divestiture requirement of Paragraph IV.A. of the Final Judgment by divesting its 64 percent interest in M-I to Smith in 1994. GX 42, Admission 7.

20. Paragraph III.B. of the Final Judgment required the defendants, Dresser and Baroid, to require the acquiring party to agree to be bound by the Final Judgment. GX 1 at 8. Respondent Smith is the "purchaser" of the divested drilling fluid business referred to in Paragraph IV.F. of the Final Judgment. GX 42, Admission 3. Pursuant to Paragraph III.B., Smith, as the purchaser of the divested

drilling fluid business, agreed to be bound by the provisions of the Final Judgment. GX 1 at 8; GX 5 at 3; GX 9 at 2; GX 42, Admission 3; GX 42, Admission 10.

21. In 1996, Smith asked the Department of Justice to consent to modification of Paragraph IV.F. of the Final Judgment to permit it to acquire Anchor Drilling Fluids, a Norwegian drilling fluids company with a U.S. subsidiary. After an investigation, the Department agreed to the modification, provided that Smith divested the United States drilling fluid assets of Anchor, along with a five year supply contract for crude barite ore, a key ingredient in drilling fluids, which the purchaser of the Anchor assets could extend five additional years, and the right to technical support equivalent to the Technical Service Agreement between Anchor Drilling Fluids USA and Anchor Drilling Fluids AS (of Norway). GX 6 at 5-6; GX 42, Admission 19. The modification did not change the prohibition on transactions with Schlumberger. GX1 at 11; GX 8.

22. This Court entered an Order on September 19, 1996 approving the modification. GX 8 at 1; GX 42, Admission 20. The Order also extended the period during which Smith would be prohibited from selling to or combining with Schlumberger until the tenth anniversary of the modification order -- September 19, 2006. GX 8 at 2; GX 42, Admission 21. As a result of the 1996 modification, Smith became a party to the Final Judgment. See GX 8; GX 5 (first line of the Memorandum).

23. There are no documents contemporary with the Anchor modification, whether they are pleadings filed with this Court or internal Smith documents, stating that Paragraph IV.F. only prohibited a transaction between Smith and Anchor that included Anchor's U.S. assets. GX 5, 6, 7, 8 & 9.

24. Both Smith and Schlumberger had notice of this Court's September 19, 1996 modification prior to July 14, 1999. GX 42, Admission 22.

IV. The Smith/Schlumberger Joint Venture

25. In February of 1998, Victor Grijalva, Vice-Chairman of Schlumberger, contacted Douglas Rock, CEO and Chairman of Smith, and proposed combining Schlumberger's and Smith's drilling fluid businesses. RX 27 at 2. Following some preliminary discussions, Smith and Schlumberger

began negotiating a joint venture of their drilling fluids businesses in mid-August of 1998. RX 27 at 4. In September, they informed the Justice Department of the negotiations and asked that the Department consent to a modification of Paragraph IV.F. of the Final Judgment to permit the transaction to proceed. Id. at 5; GX 42, Admission 24. The Department of Justice opened an investigation. GX 42, Admission 26.

26. On October 21, 1999, Respondents entered into a Memorandum of Understanding outlining a proposed joint venture that would combine M-I with Schlumberger's drilling fluid operations; on February 5, 1999 they executed a formal joint venture agreement (hereinafter referred to as the Initial Joint Venture). RX 17; GX 42, Admission 25.

27. Smith and Schlumberger knew they could not lawfully consummate the Initial Joint Venture without modification of the Final Judgment. GX 10 at 72 (Paragraph 8.5).

28. In March of 1999, Sean Boland, of Collier, Shannon, Rill & Scott and outside counsel for Smith, and Rufus Oliver of Baker and Botts and outside counsel for Schlumberger, learned that the Department of Justice staff was "leaning towards" recommending against modification of the Final Judgment to allow the proposed joint venture between Smith and Schlumberger to proceed. GX 11 at page 1 of the attached memorandum; RX 35 at 1; Tr., 11/19/99, 105:10-105:23 (Boland). Both Neal Sutton, General Counsel for Smith, and Gary Wilson, General Counsel for Schlumberger's Oilfield Services operations, asked their respective outside counsels to outline the options available to the companies if the staff's final recommendation was against modification. Tr., 11/22/99, at 205:1-206:3 (Rock); Tr., 11/24/99, at 6:25-8:3 (Wilson). Mr. Wilson received a memorandum from Baker & Botts setting forth options; Mr. Sutton was provided information about options by Smith's outside counsel, Sean Boland, in a telephone conversation. GX 11, 12.

29. During the April time period, Rufus Oliver, outside counsel for Schlumberger, kept Sean Boland, outside counsel for Smith, informed about the financial condition of Schlumberger. Tr., 11/22/99, 49:11-23, 62:13-65:12 (Boland).

30. On April 7, 1999, Bruce McDonald, a partner at Baker & Botts, sent a memorandum

to Gary Wilson, General Counsel of Schlumberger's oilfield services division. GX 11.

a. The memorandum related to "Strategic options following an unfavorable DOJ recommendation." It was prepared because the Department of Justice staff lawyer who was investigating the proposed joint venture had stated that she was "leaning towards" recommending to her superiors that the Department not join Smith in requesting a modification of the consent decree. The staff attorney had said she was "not convinced that Schlumberger could not, with more effort, become a significant player in U.S. Gulf of Mexico drilling fluids services. GX 11 at page 1 of the attached memorandum.

b. The memorandum described five options: (1) "Appeal to DOJ Superiors," (2) "Offer compromises to DOJ," (3) "Independently request consent decree modification," (4) "Complete the transaction outside the U.S.", and (5) "Abandon the transaction." GX 11 at pages 1-4 of the attached memorandum.

c. As to the fourth option of combining the companies' worldwide drilling fluid operations, the Baker & Botts memorandum concluded that the transaction "would likely violate the consent decree . . . ." GX 11 at page 2 of the attached memorandum. The memorandum explained that "[t]he decree prohibits the combination of Smith's original 64% M-I interest with the drilling fluids operations of Schlumberger. It is not limited to M-I or Schlumberger only in the U.S., but apparently applies to their assets worldwide." GX 11 at 3.

d. The memorandum then noted under the subheading "Extraterritorial jurisdiction" that while "[w]e [Smith and Schlumberger] have a very good argument that this outside-the-U.S. DFS [drilling fluid services] combination would not affect any U.S. market," the "DOJ has a good argument that a consent decree gives a court jurisdiction to impose prohibitions that it could not have imposed otherwise, and therefore that the court may enforce the decree to stop even an

outside-the-U.S. transaction." Id.

e. The Baker & Botts memorandum then discussed possible penalties from a contempt action, including "a one-time fine, daily fines (imposed until the transaction is undone), an injunction to stop the transaction, and (very rarely imposed) jail time. Acting 'in concert' with Smith, Schlumberger could be subject to these penalties." Id. The memorandum concluded that with respect to consummating a revised joint venture that excluded both M-I's and Schlumberger's U.S. assets, "[f]or at least one reason, the option of closing outside the U.S. is superior to independently seeking modification. Seeking modification begins a court proceeding in which DOJ might feel obliged to participate. Closing makes DOJ decide whether to initiate a contempt proceeding (or declare victory because its refusal to modify forced the parties to abandon the U.S. portion of the transaction). Exercising its prosecutorial discretion, DOJ could decide not to challenge the closing." Id. at page 4 of the attached memorandum.

f. Schlumberger's outside counsel did not share this memorandum with Sean Boland, outside counsel for Smith. Tr., 11/22/99, at 49:8-50:2 (Boland).

31. In April 1999, Neal Sutton, General Counsel of Smith, spoke with Sean Boland, Smith's outside counsel, about the options available to Smith if the staff recommended against modification and took notes of their conversation. Sutton Dep. at 110:10-111:15; 115:17-115:21 (Tr., 11/18/99, at 116:1-117:1, 121:2-121:6); GX 12 at 1.

a. Smith's CEO, Douglas Rock, had asked Mr. Sutton to consult with Mr. Boland about options available to the company in light of the indication that the DOJ staff might recommend against modification. Tr., 11/22/99, at 205:9-206:3 (Rock). Mr. Sutton's notes of that conversation outlined five options: (1) "Proceed up line for meetings"; (2) "Combo of option one + fix"; (3) "Order says that assets . . . int'l and domestic are

covered. We could argue that if Slb [Schlumberger] shut down U.S. there are no assets affecting U.S. any more, she has jurisdiction problem. If vice versa (close, then shut) then arguably juris exists and decision is a joint one. Could wind down business, not just shut down. If Slb . . . does what they said they'd do in US (shut down business) unilaterally, we might be able to do deal. But there is a litigation risk."; (4) "Go ahead and litigate"; and (5) "License #2." GX 12.

b. With respect to the fourth option, the notes state that Smith and Schlumberger would "[r]un [the] risk of both Jordan and [DOJ] coming in." Id. at 2 (read by author at Sutton Dep. at 113:7-113:9 (Tr., 11/18/99, at 120:5-120:6)). The notes then go on to state "Don't risk getting judge to hold there is jurisdiction in a non-U.S. merger. Might block option 3 strategy." Id. at 2 (read by author at Sutton Dep. at 113:9-113:13 (Tr., 11/18/99, at 120:7-120:10).

c. The Option 3 strategy was proceeding with the transaction after Schlumberger shut down its U.S. drilling fluid business.

d. "Jordan" refers to Jordan Drilling Fluids, which was the purchaser of Anchor USA, the assets divested by Smith pursuant to the 1996 modification of the Final Judgment. Sutton Dep. at 130:19-132:6 (Tr., 11/18/99, at 122:4-123:13).

32. Smith's CEO, Douglas Rock, knew at least as early as April 1999 that Smith could seek modification of the Final Judgment from the Court without the support of the Department of Justice. Tr., 11/22/99, at 205:1-8 (Rock).

33. Also in April 1999, Collier, Shannon, Rill & Scott sent Neal Sutton, General Counsel for Smith, a "draft" memorandum written by Markus Meier, a senior associate at the firm, with an extensive background in antitrust law. GX 13 at 1-2; Tr., 11/19/99, 135:5-135:10 (Boland).

a. Sean Boland of the firm gave Mr. Meier an assignment of evaluating jurisdiction issues if the Department of Justice filed a suit to stop the Smith/Schlumberger joint venture under Section 7 of the Clayton Act. Tr., 11/19/99, 134:5-134:16 (Boland).

b. The memorandum included references to the consent decree. On page five of the memorandum, Mr. Meier assumed that "Schlumberger will not contribute the U.S. Dowell assets to the proposed joint venture. Instead, Schlumberger has expressed an intention to either sell the U.S. Dowell assets or cease drilling fluids operations in the U.S. due to its poor financial performance over the past six years." Id. at 6; Tr., 11/19/99, 105:10-105:23. On page 20 of that memorandum, Mr. Meier noted that "should a court decide that it has subject matter jurisdiction, we should anticipate that the court also would find that the joint venture is (or likely is) subject to the Baroid consent decree. At this point then, the matter in all probability would be transferred to District Judge Sporkin, if it were not already before him." Id. at 21. The next paragraph continued, "As consent decrees are 'construed for enforcement purposes basically as a contract,' and the Baroid consent decree states that Smith 'shall not . . . combine [M-I] with the drilling fluid operations of . . . Schlumberger, Ltd.,' Judge Sporkin could rule that modification is required." Id. (citations omitted).

c. Sean Boland told Schlumberger's outside counsel, Rufus Oliver, that Mr. Boland was conducting legal research under an assumption that Schlumberger would shut down its U.S. drilling fluids operations. Tr., 11/22/99, at 51:20-52:3 (Boland). Mr. Boland did not send the Collier, Shannon memorandum to Mr. Oliver. Tr., 11/22/99, at 71:19-72:4 (Boland).

34. Until late June 1999, Smith and Schlumberger continued seeking the consent of the Department of Justice to modify the Judgment so that the Initial Joint Venture could proceed.

35. Smith had hoped to consummate the Initial Joint Venture by March 31, 1999. Smith had planned to use the $280 million Schlumberger had agreed to pay for an interest in the joint venture that would include M-I to pay off a note that was due at the end of April. When the Initial Joint Venture was not consummated, Smith arranged for a bridge loan. The interest payments on this loan were approximately $5 million. Smith's Chairman and CEO was concerned that if prices on the stock

market were to decline, Smith's stock price might fall disproportionately because Smith was carrying extra finance charges. Tr., 11/22/99, at 208:8-209:16 (Rock).

36. On June 3, 1999, Gary Wilson, General Counsel of Schlumberger's Oilfield Services operations, sent an e-mail to James Gunderson, Schlumberger's General Counsel, relating to the "DOJ action plan." GX 15 at 1; see also Grijalva Dep. at 141:24-142:13 (Tr., 11/18/99, at 134:23-135:7). A number of Schlumberger employees were copied on the e-mail, including Victor Grijalva, Schlumberger's Vice-Chairman.

a. Under the action plan, Schlumberger's outside counsel would call the Department of Justice and explain the deterioration of Schlumberger's drilling fluids business. On that same day or the next day, Smith's outside counsel would call the Department of Justice and advise that Smith intended to file a motion to modify within seven days if the Department had not informed the parties that it supported such a motion or scheduled a high level meeting between Department officials and representatives of Smith and/or Schlumberger. And if no response was received, Smith would file a motion to modify with Judge Sporkin one week later.

b. The e-mail discussed Schlumberger's contingency plans for various scenarios resulting from the action plan: if the companies filed a motion to modify and the Department of Justice agreed or did not oppose; if the companies filed a motion to modify and the Department of Justice opposed; if the Department opposed a motion to modify, the companies closed the transaction outside the United States, and the Department of Justice did nothing; if the Department opposed a motion to modify, the companies closed the transaction outside the United States, and the Department of Justice instituted contempt proceedings.

c. Counsel for Smith was to inform the Department of Justice that Smith intended to file a Motion to Amend the consent decree if, within seven days, the Justice Department had not either informed Smith and Schlumberger that it supported the Motion or scheduled

a high level meeting between Justice Department officials and management representatives of Smith and/or Schlumberger.

d. Mr. Wilson informed Mr. Gunderson that if the Justice Department opposed Smith's Motion, one option was to withdraw the Motion and close the transaction outside the United States. If the Justice Department then commenced contempt proceedings against Smith and Schlumberger, the e-mail noted that "[t]he parties would defend these on the basis that (i) the Consent Decree exceeds U.S. antitrust jurisdiction and is unenforceable with respect to the non U.S. business, (ii) that the non U.S. transaction has no impact on U.S. commerce and (iii) that all other national regulatory approvals and clearances have been granted by relevant competition authorities." GX 15 at 1-2; see also Wilson Dep. at 62:9-62:11; 64:19-65:18 (Tr., 11/18/99, at 133:12-134:11).

e. The e-mail did not say or suggest that Smith and Schlumberger would defend a contempt action based upon a claim that the transaction was not barred by the Judgment.

37. On June 16, 1999, several Smith and Schlumberger executives and the companies' outside counsel met with representatives of the Department of Justice, including Deputy Assistant Attorney General John Nannes and Constance Robinson, Director of Merger Enforcement. Tr., 11/19/99, at 120:20-121:8 (Boland).

38. On June 21, 1999, Bruce McDonald of Baker & Botts, author of the April 7 memorandum and outside counsel for Schlumberger, sent to Gary Wilson, General Counsel for Schlumberger's oilfield services division, an e-mail again discussing options available to Schlumberger if Smith filed a request for modification with the Court and the Department of Justice opposed the request. GX 16 at 1. Mr. Wilson received and read this e-mail. Tr., 11/24/99, at 22:16-22:21, 23:5-23:6, 23:20-23:23 (Wilson).

a. In the June 21 e-mail, Mr. McDonald restated the advice he had previously given Mr. Wilson in his April 7 memorandum on the application of the Final Judgment to U.S. and

non-U.S. drilling fluid assets. (Proposed Finding of Fact 30). In the second paragraph of the e-mail, Mr. McDonald wrote:

> The consent decree prohibits Smith from combining M-I with the drilling fluids business of SL, and the decree does not distinguish between the U.S. and the non-U.S. businesses of M-I and SL. However, the parties have argued that the decree should not be enforced to prohibit the combination of their non-U.S. businesses. A non-U.S. combination would not have any effect on U.S. commerce and therefore is outside the jurisdiction of the U.S. antitrust laws and U.S. courts. (DOJ did not respond to this argument at the June 16 meeting.) (On the other hand, DOJ's counter-argument is that, in the consent decree, Smith agreed to the non-U.S. prohibition and that the decree itself gives the Court jurisdiction, even if the Court would not otherwise have had jurisdiction.)

b. The e-mail then listed five options for the parties: abandon the transaction; close the transaction as originally contemplated after filing a Motion to Modify the Final Judgment; split off the U.S. drilling fluids businesses of Smith and Schlumberger and close the joint venture outside the United States, combining only the non-U.S. businesses of Smith and Schlumberger; close the joint venture outside the United States after Schlumberger unilaterally closed its U.S. drilling fluids business; close the joint venture worldwide after Schlumberger unilaterally closed its U.S. drilling fluids business. GX 16 at 1-2. The last option describes the actions that the companies in fact took in late June and July. GX 31.

c. The e-mail noted that the fourth option -- closing the joint venture outside the United States -- was "a bad business choice" for Schlumberger. GX 16 at 2. The e-mail further noted that DOJ would likely argue that all the variations of joint ventures would violate the consent decree. GX 16 at 1-2.

39. On June 22 and 23 of 1999, Gary Wilson, General Counsel of Schlumberger's oilfield services division, and James Gunderson, General Counsel of Schlumberger, exchanged a series of e-

mails. GX 17 at 1-3.

a. The first e-mail once again set out Smith and Schlumberger's five options if the Justice Department opposed a Motion to Modify the Final Judgment. GX 17 at 2-3. The first four options were abandon the transaction, file a Motion to Modify with the Court without the support of the Justice Department, close outside the United States, and shut down Schlumberger's U.S. drilling fluids business while still closing outside the United States. Id. at 2. And again, the fifth option was "SLB [Schlumberger] unilaterally closes its US DFS [drilling fluids services] business and Smith and SLB then close the transaction on a worldwide basis." Id.

b. In this e-mail, Mr. Wilson forwarded the advice provided by Mr. McDonald in his April 7 memorandum (Proposed Finding of Fact 30) and his e-mail of June 21 (Proposed Finding of Fact 38): "DOJ could oppose this [the fifth option] and argue that it violates the Consent Decree which purports to apply to US and non US." Id. at 3. Mr. Wilson then wrote that under each of the final three options, "Smith and SLB would defend their position and action based upon the argument that (i) the Consent Decree exceeds US antitrust jurisdiction and is unenforceable with respect to the non US business and the facts that (ii) the the [sic] non US transaction has no impact on US commerce and (iii) all other national regulatory approvals and clearances have been granted by relevant competition authorities." Id. at 3.

c. The e-mail contains no suggestion that Schlumberger's counsel believed that the "shut down" option allowed it to close the transaction without modifying Paragraph IV.F. of the Final Judgment.

40. On June 28, 1999, Schlumberger informed the Justice Department that it had decided to discontinue its U.S. drilling fluids business. Tr., 11/23/99, at 79:24-80:1 (Grijalva); GX 21 at 1. This was the same month in which Schlumberger's Gulf Coast Drilling Fluids Manager, Don Williamson, prepared a memorandum analyzing how the company could restructure its Gulf Coast

drilling fluids business and continue to compete. GX 14. Mr. Williamson stated that Schlumberger was "presently in the best position in recent history to move the DF [drilling fluids] group into profitability. There are several new products with which we have been quite successful, several command high margins allowing us to significantly reduce our product cost from historical levels." GX 14 at SL (MI) 100393. Mr. Williamson is still employed by Schlumberger in its Houston offices. Schlumberger hopes to have him "play a coordination and communication role between Schlumberger's Product Centers and M-I because he is about the only person in [Schlumberger] who knows what drilling fluids are about." Tr., 11/24/99, at 56:14-57:15 (Wilson).

41. On June 29, 1999, Bruce McDonald of Baker and Botts sent another e-mail to Gary Wilson, General Counsel of Schlumberger's Oilfield Services operations discussing once again Smith's and Schlumberger's options. GX 19.

a. Like Mr. McDonald's e-mail of June 21 [GX 16] and Mr. Wilson's e-mail of June 22 [GX 17], Mr. McDonald's e-mail of June 29 reviewed Smith's Schlumberger's options if the Justice Department did not inform Schlumberger whether it would support modification of the consent decree. The first two options were again the same: abandon the transaction and file a Motion to Modify the Final Judgment without the support of the Justice Department. GX 19 at 1.

b. The third option was to proceed with the transaction either only outside the United States or on a worldwide basis. Id. In regard to this third option, the e-mail is consistent with the April 7 McDonald memorandum (Proposed Finding of Fact 30), the June 21 McDonald e-mail (Proposed Finding of Fact 38), and the June 22 and 23 Wilson e-mails (Proposed Finding of Fact 39), when it states that "DOJ could oppose this and claim that this violates the consent decree, which arguably prohibits Smith from combining M-I with both U.S. and non-U.S. DFS operations of SL." Id. Smith and Schlumberger would then argue that (1) the consent decree should not be interpreted to forbid Schlumberger's purchase of the Dresser interest in M-I or to forbid the

combination of Schlumberger's non-U.S. drilling fluids operations with M-I; (2) the consent decree exceeds U.S. antitrust jurisdiction and is unenforceable with respect to the non-U.S. operations of Schlumberger; and (3) the non-U.S. transaction has no effect on U.S. commerce and all other national regulatory approvals and clearances had been granted. Id. The document provides no explanation for interpreting the decree not to forbid the transaction.

c. The e-mail noted that if the companies closed the transaction outside the U.S. or worldwide without seeking modification, there were risks. Those risks were that the Justice Department could commence civil and criminal contempt proceedings against Smith and Schlumberger. Id. If civil contempt proceedings were commenced, the e-mail noted that the court could impose a civil fine and, at most, enter an injunction that required unwinding the transaction. Id. If criminal contempt proceedings were commenced, the e-mail noted that the Justice Department could ask the Court "to impose a criminal fine and/or jail sentences against the offending individuals." Id.

d. Following the discussion of the risks associated with consummating the transaction without first requesting modification, the e-mail noted that "[o]n the other side of the balance, SL [Schlumberger] must consider the business costs of further delay, such as erosion of its European DFS business." Id.

42. On June 30, 1999, Gary Wilson sent an e-mail to his superior Jim Gunderson, Schlumberger General Counsel and Secretary, once again reviewing the options available to Smith and Schlumberger. A number of individuals were copied on the e-mail, including Schlumberger's Vice-Chairman, Victor Grijalva. GX 20.

a. Smith's and Schlumberger's options were 1) to "sit it out" and wait for a decision from the Justice Department, 2) to file a motion to modify the Final Judgment without the support of the Justice Department, 3) to close the transaction either outside the United States or on a worldwide basis, and 4) to abandon the transaction. Id. The

information set forth by Mr. Wilson in this e-mail simply repackaged the information that Baker and Botts had provided to Mr. Wilson. Tr., 11/24/99, at 31:16-32:8 (Wilson).

b. Mr. Wilson characterized options one and four as "more cautious" than option three. Tr., 11/24/99, at 29:20-30:12 (Wilson). With regard to the second option set out in the June 30 e-mail, Schlumberger knew that if it applied for modification and the Court denied its request, "the deal was dead." Tr, 11/24/99, at 30:13-31:3 (Wilson).

c. In an e-mail from Rufus Oliver to David Browning sent five days before, Mr. Oliver characterized Smith and Schlumberger "closing everywhere after unilaterally shutting down our U.S. drilling fluids business" as an "'aggressive' action." GX 18 at 1.

d. Mr. Wilson noted in his e-mail that the Department of Justice likely would oppose a motion to modify the Final Judgment, which would result in lengthy litigation.

e. Mr. Wilson then went on to state that if Smith and Schlumberger closed the transaction either outside the United States or on a worldwide basis, the Department of Justice could oppose and claim that the transaction violated the Judgment. Mr. Wilson explained the Department's options:

> In this event, the DOJ
>
> (i) would (most probably) commence civil litigation against the parties for violation of the consent decree. As stated, this could take some months to resolve but could be settled with a compromise. If the court determined that Smith and Schlumberger had violated the consent decree, the court could impose a civil fine and, at most, enter an injunction that required unwinding the transaction.
>
> (ii) could commence criminal litigation for contempt, asking the court to impose a criminal fine and/or jail sentences against offending individuals. This is highly unlikely. Criminal contempt is an extremely harsh sanction for violation of a consent decree and it may be imposed only if its proved beyond a reasonable doubt that the contemnor willfully violated the specific and definite terms of a court order. In this case, it would not be at all obvious that the terms of the

consent decree had been violated as even in Nannes' own words "there are arguments that can go both ways". Further, Schlumberger is not a signatory to the decree.

f. Mr. Wilson concluded his e-mail by saying, "This should give everyone involved in the decision making process a clear picture of all the possible options that are or could be available if DOJ continues to say and do nothing." The Nannes referred to in Mr. Wilson's e-mail is Deputy Assistant Attorney General John Nannes, who sent a warning letter to the companies two weeks after this e-mail was written.

43. On July 1, 1999, Rufus Oliver, outside counsel for Schlumberger, sent Deputy Assistant Attorney General John Nannes a letter outlining the reasons why Smith and Schlumberger believed that the Final Judgment would not apply to a joint venture between Smith and Schlumberger when Schlumberger had announced that it was shutting down its U.S. drilling fluids operations and excluded Schlumberger's U.S. drilling fluids assets from the joint venture. GX 21.

a. The letter quotes language from the Final Judgment relating to Schlumberger, but Mr. Oliver tacked on to the quoted language a phrase supplied by him -- in the U.S. His placement of that phrase outside the quotation marks shows that he recognized his phrase was not contained in the language of the decree (and is in fact inconsistent with the plain language of the decree).

b. Mr. Oliver's letter stated that "[w]e believe that the decree would not be enforceable against transactions outside the U.S. that have no effect on a U.S. market." The letter then noted that, in any event, there was no "textual basis for thinking that the portion of

the decree that governs Smith was intended to apply outside the U.S." Mr. Oliver's letter provided no textual basis for explaining why a U.S. limitation should be read into Paragraph IV.F. of the Final Judgment.

44. In approximately late June or early July, Schlumberger lost a major drilling fluids contract with Statoil in the North Sea to M-I. GX 22. In a July 3, 1999 e-mail relaying this news to Jim Gunderson, Schlumberger's General Counsel, and Gary Wilson, General Counsel of Schlumberger Oilfield Services operations, Andrew Gould, an Executive Vice-President in Schlumberger's Oilfield Services operations, reported that "[t]he M-I people in Norway have been telling Statoil that the deal will go through. We have several other bidding situations where we cannot exclude the possibility that Dowell will continue to lose market share. I think we need to tell M-I that we cannot continue with this process if they do not tell their people to act as if the outcome of the deal is unknown." Id.

45. On July 4, 1999, John Yearwood sent an e-mail to Andrew Gould and Chad Deaton, both Executive Vice Presidents in Schlumberger's Oilfield Services operations, saying that Schlumberger's drilling fluids business was deteriorating rapidly. GX 23.

a. Contributing to this deterioration was clients' perception that "the JV will happen (also fueled by M-I) and Dowell fluids will be incorporated into M-I (which is what we have told them). This means that any long term contract will more than likely be given to M-I because they will be around in the future while Dowell will "disappear."

a. In his July 4, 1999 e-mail, Mr. Yearwood communicated that he felt strongly Schlumberger needed to make a decision that week. GX 23. "If we can not [sic]

make the decision to form the JV this week then I would walk away from the JV, with the understanding that the DF [Drilling Fluids] Segment can be managed as a new business in Schlumberger." Mr. Yearwood also recommended against consummating the joint venture only outside the United States because "just outside the US will not bring us the benefit of the [Gulf of Mexico] and will be financially/managerially too complex." Id.

46. Subject to approval of its Board of Directors, Smith had decided by July 8, 1999, to proceed with the revised joint venture with or without the support of the Justice Department. Tr., 11/24/99, at 76:1-76:15 (Sutton); Rock Dep. at 184:18-185:2 (Tr., 11/18/99, at 157:8-157:15); Sutton Dep. at 167:12-167:15 (Tr., 11/18/99, at 162:17-162:20). Smith knew that it had the option of coming to the Court and that doing so would eliminate any risk of being found in violation of the Final Judgment. Tr., 11/24/99, at 76:1-76:15 (Sutton); Sutton Dep. at 168:19-169:3, 171:8-172:3 (Tr., 11/18/99, at 162:22-163:25); Tr., 11/24/99, at 82:5-85:2 (Sutton).

47. On July 8, 1999, Sean Boland, outside counsel for Smith, wrote Deputy Assistant Attorney General Nannes that Smith and Schlumberger had decided to consummate a joint venture that excluded Schlumberger's U.S. drilling fluids assets (hereinafter referred to as the Revised Joint Venture) and had targeted July 14 as the consummation date. He agreed to provide the Department with 48 hours notice before the companies proceeded. GX 24.

48. On July 12, 1999, Sean Boland provided the 48 hours notice and wrote to Deputy Assistant Attorney General Nannes that the parties intended to complete the transaction on

Wednesday, July 14. GX 12; GX 42, Admission 29.

49. On July 13, 1999, the Smith Board of Directors convened at 2:00 p.m. central time for a special telephonic meeting to vote on whether to give approval to Smith proceeding with the Revised Joint Venture. GX 26 at 1.

a. The Smith Board of Directors meeting lasted 37 minutes. GX 26 at 5.

b. Attending the Smith Board of Directors meeting were inside directors Loren Carroll and Doug Rock, both in person at Smith's Houston headquarters, and outside directors Ben Bailer, Clyde Buck, Jerry Neely, and Waly Wilson, all present via conference call. Also present at Smith headquarters for the meeting were Neal Sutton and Margaret Dorman, Vice President, Controller, and Assistant Treasurer . Id. at 1. Finally, Sean Boland, Smith's outside counsel, was patched in to the meeting via conference call. Id.

c. During the Board Meeting, Mr. Boland discussed the consequences that could result if Smith and Schlumberger consummated the Revised Joint Venture. Tr., 11/24/99, at 59:3-61:15 (Sutton). For the purposes of their consideration of whether to approve the Revised Joint Venture, Mr. Boland told the Smith Board that it should assume that the Justice Department would conclude that the transaction was barred by the Final Judgment. Tr., 11/24/99, at 59:3-60:17 (Sutton). Mr. Boland then told the Smith Board that if they proceeded with the joint venture, the Justice Department might do nothing, seek a temporary restraining order before they closed, or file civil and criminal contempt actions. Tr., 11/24/99, at 60:17-61:15 (Sutton). Mr. Boland also told the

Smith Board that the Court could order a civil fine or recission if the company were found in civil contempt. Id. He also discussed both corporate and individual criminal contempt. Id. Mr. Boland then told the Smith Board that its members had to make the decision about whether to proceed because he could not make that decision for them. Tr., 11/19/99, at 158:10-159:17 (Boland)

d. Smith believed that there was a fifty-fifty chance that the Justice Department would do nothing. Sutton Dep. at 203:1-203:13 (Tr., 11/18/99, at 171:9-20). And even if the Justice Department did pursue a contempt action, Smith believed that the worst result would be that Smith would have to pay a civil fine. Sutton Dep. at 201:12-201:23, 203:14-204:1 (Tr., 11/18/99, at 169:24-170:8, 171:21, 172:8). Smith knew that recission of the joint venture was a possible remedy if Smith were found in civil contempt, but did not think that the Court would order that remedy. Sutton Dep. at 201:24-202:8 (Tr., 11/18/99, at 170:9-170:17).

e. Smith's Board knew that there was some risk that the contrary interpretation of the Final Judgment taken by the Justice Department could prevail. Rock Dep. at 204:13-204:16 (Tr., 11/18/99, at 7:2-5). It was clear to Mr. Sutton after the Board meeting that criminal contempt was a possibility. Tr., 11/24/99, at 61:11-61:15 (Sutton). But to Mr. Sutton a finding of civil liability can be more serious than a violation of federal criminal law, if the resulting damages award is high enough. Sutton Dep. at 187:3-187:18 (Tr., 11/18/99, at 169:9-169:22).

f. At the July 13 Board meeting, there was no discussion or mention of the fact that the literal language of Paragraph IV.F. of the Final Judgment covered a combination of Smith's and Schlumberger's drilling fluid businesses regardless of where the assets were located. Sutton Dep. at 258:4-258:23 (Tr., 11/18/99, at 172:10-173:3). Smith's outside counsel had advised them that it was outside the authority of the Court to prohibit the revised joint venture between Smith and Schlumberger. Rock Dep. at 213:18-213:25, (Tr., 11/18/99, at 166:17-23); Sutton Dep. at 122:9-123:5, (Tr., 11/18/99, at 121:8-122:3). To Smith, whether the revised joint venture could be consummated did not "depend on" the proper interpretation of Paragraph IV.F. of the Final Judgment; that provision was "just part of the overall legal landscape," and only existed within the "ambiance" of the Anchor transaction, the Complaint, the Competitive Impact Statement, and the antitrust laws. Rock Dep. at 215:27-216:7 (Tr., 11/18/99, at 166:25-167:25); Sutton Dep. at 83:13-84:5, (Tr., 11/18/99, at 88:4-92:5)

50. On July 13, 1999, John Nannes, Deputy Assistant Attorney General for the Antitrust Division, sent by facsimile a letter to Sean Boland, outside counsel for Smith, with a copy to Rufus Oliver, outside counsel for Schlumberger. GX 27; GX 42, Admissions 30, 31, 32, 33.

a. The letter stated that in the view of the Justice Department, consummating the joint venture "would clearly violate the Final Judgment." The letter explained that "Section IV.F. of the Final Judgment restricts the transactions that Smith, as the purchaser of

Dresser's 64 per cent interest in M-I, may enter: 'The purchaser of the divested drilling fluid business shall not sell that business to, or combine that business with the drilling fluid operations of . . . Schlumberger Ltd. . . . or any of [its] affiliates or subsidiaries during the life of this decree.' The proposed joint venture would violate both the 'sell' and 'combine' provisions of the decree." GX 27.

b. The letter concluded by stating that if the companies proceeded with the transaction, "the Department will take appropriate action in the District Court." GX 27.

51. Smith received the letter from DAAG Nannes before the transaction with Schlumberger was consummated.

a. Smith's outside counsel, Sean Boland at Collier, Shannon, Rill & Scott, received the letter from Mr. Nannes in the late afternoon of July 13. GX 42, Admission 34. Mr. Boland then transmitted the letter to Smith on July 13. GX 42, Admission 35.

b. Smith's General Counsel, Neal Sutton, received the letter from Sean Boland the evening before the transaction was consummated. The letter was also shown to Smith's CEO and Chairman, Douglas Rock. Rock Dep. at 200:18-200:22, (Tr., 11/19/99, at 6:7-10); Sutton Dep. at 226:16-227:1 (Tr., 11/19/99, at 7:21-8:4); see also Tr., 11/22/99, at 214:25-215:2 (Rock). The letter was then faxed to the members of Smith's Board, and Mr. Sutton and Mr. Rock then discussed the contents of the letter with Board members. Rock Dep. at 200:23-201:6 (Tr., 11/19/99, at 6:11-17); Tr., 11/24/99, at 62:4-63:7 (Sutton); GX 42, Admission 36.

c. After receiving the letter, Smith knew that it was being told that in the view of the Justice Department, Smith and Schlumberger would be violating the Final Judgment if they consummated the joint venture. Tr., 11/22/99, 216:14-216:17 (Rock); Sutton Dep. at 230:1-231:7, 302:20-303:8 (Tr., 11/19/99, at 8:6-9:19). Indeed, Smith's own General Counsel understood that the literal language of Para. IV.F. "standing by itself without the support of the way to explain it by means of the complaint, Competitive Impact Statement and our experience in Anchor, yes, that by itself it did not say [the interpretation given to the language by Smith's outside counsel]." Tr., 11/24/99, at 86:3-18 (Sutton). There are no contemporaneous documents prepared by Smith or its outside counsel stating that the meaning of the language of Paragraph IV.F. of the Final Judgment is affected by the Complaint or Competitive Impact Statement filed in 1993.

d. Smith's outside counsel, Sean Boland, believed he could "interpret" the Final Judgment, even if it contained no ambiguity. Tr., 11/22/99, at 13:7-8, 14:17-25 (Boland). Mr. Boland in fact believed that the existence of a difference of opinion in the meaning of the Judgment's language between himself and DAAG Nannes creates an ambiguity. Tr., 11/22/99, at 14:17-25 (Boland). Smith's General Counsel, Neal Sutton, believes that an ambiguity in decree language can be "created" by looking at other applicable portions of the Judgment. Tr., 11/24/99, at 69:9-24 (Sutton); Sutton Dep. at 64:9-67:2, 83:13-84:5, 258:4-23, (Tr., 11/18/99, at 88:4-92:5, 172:10-173:3)

e. Smith also understood from the July 13 letter from Mr. Nannes that the Justice

Department was more likely than not to take them to court if Smith and Schlumberger consummated the joint venture, although Mr. Sutton also felt there was a chance that the letter was a "colossal bluff." Tr., 11/24/99, at 65:1-67:5 (Sutton). Smith also understood, based upon advice received by Sutton from Boland, that were the court to require it to show cause why it should not be held in criminal contempt for proceeding to close the Revised Joint Venture, it could defend by arguing that it acted in good faith on the legal advice it received, and therefore would not have willfully violated the Final Judgment. Tr., 11/24/99, at 95:1-96:5 (Sutton).

f. The Smith Board of Directors could have reversed its decision to consummate after receiving the July 13 letter from DAAG Nannes. Rock Dep. at 201:11-201:15 (Tr., 11/19/99, at 6:22-7:1). However, the Board was "very, very anxious about this transaction. It was very, very important to them. All kinds of financial implications if the deal didn't get done." Tr., 11/19/99, at 157:13-19 (Boland). Smith viewed Schlumberger as the "technology partner" it needed in the oilfield services business. Tr., 11/22/99, at 146:13-147:25 (Rock).

g. Smith's Chairman and CEO, Douglas Rock, admitted in his testimony at trial that when he read the quotation from the Final Judgment included in DAAG Nannes's letter, that may have been the first time he had seen language from the Judgment. Tr., 11/22/99, at 204:11-22 (Rock). Mr. Rock did not review the Final Judgment after receiving the July 13 Nannes letter. Tr., 11/22/99, at 215:18-215:19 (Rock). Nor did Mr. Rock

ask Mr. Sutton to review Paragraph IV.F. after reading the letter from Mr. Nannes. Tr., 11/22/99, at 215:25-216:2 (Rock).

h. In the decision by Smith to proceed with the joint venture, Mr. Sutton, General Counsel to Smith, "wasn't exercising [his] independent judgment in any way." Tr., 11/24/99, at 70:16-71:5 (Sutton). Smith did not ask for a written legal opinion from Mr. Boland before consummating the transaction. Tr., 11/22/99, at 216:12-216:13 (Rock). Smith did not seek out a "second opinion" from another law firm on the legality of consummating the transaction without first seeking modification. Tr., 11/22/99, at 217:18-218:1 (Rock). Nor did Smith seek a meeting with Mr. Nannes or Mr. Klein after receiving the letter from Mr. Nannes on July 13. Tr., 11/22/99, 218:2-218:5 (Rock).

i. Mr. Sutton understood that the company could have come to this Court for modification and clarification and avoided a contempt action. Tr., 11/24/99, at 82:5-85:2 (Sutton). In contrast, Smith's outside counsel, Sean Boland, maintains he could not come to the Court: "I couldn't come in and tell Judge Sporkin, Your Honor, give me an advisory opinion. I'm feeling a little shaky about this. I made my determination. I thought it was clear." Tr., 11/19/99, at 144:4-144:7 (Boland).

j. Smith decided to proceed with the transaction on July 14. GX 31.

k. Smith had no other basis for its good faith belief that the Revised Joint Venture would not violate the Final Judgment other than the legal advice it received from Collier,

Shannon, Rill & Scott, and the advice Baker & Botts provided Schlumberger. Tr., 11/22/99, at 217:18-218:1 (Rock).

l. Smith's outside counsel, Sean Boland, and Smith's Chairman and CEO, Douglas Rock, admit that the Revised Joint Venture that was consummated on July 14, 1999, combined the drilling fluid businesses of Smith and Schlumberger. Tr., 11/22/99, at 3:16-19 (Boland); Tr., 11/22/99, at 203:4-6 (Rock); see also, GX 33 at Slides 2 and 3 (of 17).

52. Schlumberger received the warning letter from DAAG Nannes before the transaction with Smith was consummated. GX 42, Admissions 30, 32-35, 37-38.

a. Gary Wilson, General Counsel of Schlumberger's Oilfield Services operations, was in the Baker & Botts offices when the letter arrived. Tr., 11/24/99, at 12:24-13:16 (Wilson). The letter arrived at approximately 4 p.m., Central Daylight Savings Time (5 p.m., Eastern Daylight Savings Time). See Tr., 11/23/99, at 83:11-85:2 (Grijalva). Mr. Wilson called Neal Sutton, General Counsel of Smith, to determine if he had received the letter as well. Tr., 11/24/99, at 12:24-13:16 (Wilson).

b. Mr. Wilson called James Gunderson, General Counsel of Schlumberger, to inform him of the letter from DAAG Nannes. Tr., 11/24/99, at 12:24-13:16 (w

c. Mr. Gunderson sent an e-mail to Schlumberger's Chairman, Euan Baird, at 6:07 p.m. Eastern Daylight Savings Time -- approximately one hour after the letter from DAAG Nannes had arrived at Baker & Botts. GX 29. Mr. Gunderson wrote,

> Gary just called to report that the Justice Department has indicated that it will sue in court for violating the consent decree if they go ahead with the closing. The good news is that means Justice will not try to block closing with a temporary restraining order, and its [sic] my impression that they are viewing it as a civil matter between them and Smith (not a criminal one directed at us).
>
> We disagree with the Justice Department's view that the closing violates the consent decree, and so we are still going to close tomorrow as planned. We will deal with the Justice Department objections in court after the fact.

GX 29

d. At approximately 6:50 p.m. Central Daylight Savings Time Gary Wilson sent an e-mail that included the text of the letter from DAAG Nannes. GX 28. The e-mail was sent to Victor Grijalva, Vice-Chairman of Schlumberger, and James Gunderson, General Counsel of Schlumberger. After the letter was quoted, Mr. Wilson added,

> Please note that this is not a Temporary Restraining Order - which DOJ could have obtained prior to closing - and indicates an intention to institute proceedings post closing. . . .
>
> Rock, Sutton, and Boland have reviewed this and have confirmed that the closing should proceed as planned and without delay as has Oliver and I will advise you as soon as the transfer has been effected tomorrow.

Id.

"Rock" is Douglas Rock, Chairman and CEO of Smith; "Sutton" is Neal Sutton, General Counsel of Smith, "Boland" is Sean Boland of Collier, Shannon, Rill, & Scott,

Smith's outside counsel, and "Oliver" is Rufus Oliver of Baker & Botts, Schlumberger's outside counsel.

e. Schlumberger employees who either received a copy of the letter from DAAG Nannes or who were informed of the letter's substance prior to consummation included Gary Wilson, Victor Grijalva and James Gunderson. GX 42, Admission 37. Mr. Grijalva, Vice-Chairman of Schlumberger, received the letter before the transaction was consummated. Grijalva Dep. at 218:3-218:21 (Tr., 11/19/99, at 10:7-19); Tr., 11/23/99, at 42:7-42:16, 82:11-86:17 (Grijalva); GX 28.

f. Schlumberger's General Counsel, James Gunderson, knew that the letter was directed at both Smith and Schlumberger because Schlumberger was "actively participating with Smith." Tr., 11/24/99, at 134:5-19 (Gunderson).

g. After reviewing the July 13 letter from Mr. Nannes, Mr. Grijalva understood that the Justice Department believed that Smith and Schlumberger would violate the Final Judgment if they consummated the joint venture. Grijalva Dep. at 218:22-219:12 (Tr., 11/19/99, at 10:20-11:16). There are no contemporaneous documents prepared by Schlumberger or its outside counsel stating that the meaning of the language of Paragraph IV.F. of the Final Judgment is affected by the Complaint or Competitive Impact Statement filed in 1993.

h. Schlumberger also knew that the letter meant that the Justice Department would take some kind of action against Schlumberger if it proceeded with the transaction. Tr.,

11/24/99, at 34:13-39:1 (Wilson); GX 29. After receiving the July 13, 1999 letter from DAAG Nannes, it was absolutely clear to Schlumberger's General Counsel, James Gunderson, that the Department would take Smith and Schlumberger to court if they consummated the joint venture. Tr., 11/23/99, at 134:4-136:7 (Gunderson). Both Mr. Grijalva and Mr. Gunderson realized that criminal contempt charges were a possibility. Tr., 11/23/99, at 58:7-58:21 (Grijalva), 134:5-137:11 (Gunderson).

i. Mr. Gunderson noted in his trial testimony that he and the Chairman of Schlumberger had extensive discussions on July 6th "about what dangerous waters we [Schlumberger] were headed into." Tr., 11/23/99, at 138:1-138:5 (Gunderson). He explained in his testimony that David Browning, former General Counsel of Schlumberger, was brought in as a special advisor because "we were going into choppy waters." Tr., 11/23/99, at 151:8-20 (Gunderson). Nonetheless, Mr. Gunderson considered -- and still considers -- the process of modifying the Final Judgment so that Schlumberger could lawfully proceed with the joint venture a Washington "game." Tr., 11/23/99, at 134:21-134:5, 139:19-139:24 (Gunderson), see also Tr., 11/23/99, at 92:3-92:10 (Grijalva).

j. Chad Deaton, who was one of Schlumberger's signatories to the Revised Joint Venture agreement and who received a copy of Deputy Assistant Attorney General Nannes' letter, understood that there was a risk of being charged with criminal contempt, including individually. Deaton Dep. at 65:12-67:22, 69:12-76:6 (Tr., 11/24/99, at 98:24-106:1). Mr. Deaton was told that the corporation was behind him, which he

assumed meant that the corporation would pay any fines that were subsequently assessed against him. Deaton Dep. at 65:12-67:22, 69:12-76:6 (Tr., 11/24/99, at 98:24-106:1).

k. Schlumberger's General Counsel, James Gunderson, was aware that because the company proceeded with the transaction, he was potentially exposed to criminal charges. Tr., 11/23/99, at 136:8-16 (Gunderson).

l. Schlumberger could have stopped the closing after receiving the Nannes letter. Grijalva Dep. at 219:13-221:5 (Tr., 11/19/99, at 11:7-12:9); Tr., 11/24/99, at 19:5-16 (Gunderson).

m. Mr. Grijalva has never read the Final Judgment; he did not review the Final Judgment after receiving the July 13 letter from Deputy Assistant Attorney General Nannes. Tr., 11/23/99, at 86:18-87:10 (Grijalva).

n. Mr. Grijalva understood that there were two avenues open to him: approach the Court for modification, or consummate the transaction in the face of the warning from the Department of Justice. He also understood that the parties could move for modification, but that closing the transaction without modification might be illegal. Tr., 11/23/99, at 92:11-93:12 (Grijalva).

o. Mr. Gunderson, Schlumberger's General Counsel, never undertook an independent review of whether the revised joint venture was prohibited by the Final Judgment, either before or after he reviewed the July 13 letter from Deputy Assistant Attorney General

Nannes. Tr., 11/23/99, at 144:7-145:14, 146:11-146:19, 148:22-148:25 (Gunderson); Gunderson Dep. at 90:11-92:12, 93:9-93:20 (Tr., 11/19/99, at 12:22-14:17). He failed to do this even in light of the fact that he he was Schlumberer's top legal officer and he knew that the key legal instrument in determining whether Smith and Schlumberger could consummate the revised joint venture was the Final Judgment. Gunderson Dep. at 95:21-97:11 (Tr., 11/19/99, at 14:18-15:21).

p. Neither Mr. Grijalva nor Mr. Gunderson asked Baker & Botts for a written opinion on the legality of proceeding with the closing of the revised joint venture without modifying the Final Judgment. Tr., 11/23/99, at 89:12-90:10, 97:23-98:7 (Grijalva); Gunderson Dep. at 175:14-176:10 (Tr., 11/19/99, at 15:22-16:11); see also Tr., 11/23/99, at 98:12-98:21 (Grijalva). Nor did Mr. Gunderson ask Mr. Wilson or Baker & Botts for copies of all legal memoranda or documents that had been prepared concerning the proper interpretation of the Final Judgment. Tr., 11/23/99, at 153:9-154:5 (Gunderson).

q. On July 14, 1999, Chad Deaton wrote to Andrew Gould reporting that Victor Grijalva had called Doug Rock and said that Smith should not be swayed by the Justice Department. GX 30. Mr. Deaton explained in his deposition that he had spoken with Victor Grijalva, Vice-Chairman of Schlumberger, and that Mr. Grijalva had told him "we have done a lot in terms of our outside opinion and looking at that and weighing that, and we think that we are in the right or we should do that and we should realize

that we're going to disagree with the DOJ on this and go for it." Deaton Dep. at 108:10-112:2 (Tr., 11/19/99, at 18:2-20:15).

r. Schlumberger decided to proceed with the transaction on July 14. The decision by Schlumberger to proceed with the transaction despite having received the warning letter from DAAG Nannes was made by Euan Baird, Chairman; Victor Grijalva, Vice-Chairman; and James Gunderson, General Counsel. GX 46 at 7. Schlumberger proceeded with the transaction based on the authorization the company received from its board of directors in the fall of 1998. Tr., 11/23/99, at 60:11-60:17 (Grijalva). Schlumberger did not ask for authorization from its Board of Directors for the Revised Joint Venture because the commercial aspects of the transaction had not changed in a substantial way. Tr., 11/23/99, at 114:8-116:16 (Grijalva). The Schlumberger Board of Directors was not told of the letter from DAAG Nannes before the transaction was consummated on July 14. Tr., 11/23/99, at 114:8-116:16 (Grijalva).

s. Schlumberger had no other basis for its good faith belief that the Revised Joint Venture would not violate the Final Judgment other than the advice it had received from Baker & Botts and the advice Collier, Shannon, Rill & Scott had provided Smith. Tr., 11/23/99, at 60:22-61:14 (Grijalva).

53. On July 14, 1999, at approximately noon Central Daylight Savings Time, Smith and Schlumberger consummated the joint venture. Tr., 11/24/99, at 19:5-16 (Wilson); GX 31; GX 32; GX 42, Admission 39. Mr. Wilson transferred the funds from Schlumberger to Smith shortly before noon

Central Daylight Savings Time on July 14. Tr., 11/24/99, at 19:5-16 (Wilson).

54. The Revised Joint Venture agreement provides that, with certain limited exceptions, Smith and Schlumberger will not compete with the joint venture. GX 32 at 69, ¶9.6; GX 42, Admission 40. The Revised Joint Venture agreement also gave Schlumberger six months to wind down its U.S. operations. GX 42, Admission 41. Once Schlumberger's U.S. operations were shut down, Schlumberger had covenanted not to compete in the United States in the drilling fluid business independent of the joint venture. GX 42, Admission 42. Even though Schlumberger had advised the Department of Justice that it had shut down its U.S. drilling fluids business, it continued to provide drilling fluids for U.S. drilling projects until September 15, 1999. GX 42, Admission 43.

55. The joint venture includes four technology centers. The centers in Houston, Norway, and Latin America were part of M-I before the joint venture was formed. The fourth center, in St. Austell, England, was part of Schlumberger's drilling fluid operations. The St. Austell facility provided support to Schlumberger's U.S. drilling fluid business. Tr., 11/22/99, at 198:21-200:9 (Rock); Tr., 11/23/99, at 110:12-23 (Grijalva).

56. One Schlumberger executive who now works for the joint venture is John Oliver. Mr. Oliver was the worldwide marketing manager for Schlumberger's drilling fluid business, including its business in the United States. Tr., 11/24/99, at 50:10-21 (Wilson).

V. Conclusions -- Criminal Contempt

57. In order for Smith and Schlumberger to be found in criminal contempt under 18 U.S.C. § 401(3), the United States must prove beyond a reasonable doubt that: (1) a clear and reasonably

specific order of the court existed; (2) Smith and Schlumberger each had knowledge of that order, (3) they violated the order, and (3) the violation by each of them was willful. See United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993); see also United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 659 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990); Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193, 195 (9th Cir. 1979); In re Economou, 645 F. Supp. 1055, 1057 (S.D.N.Y. 1986), aff'd sub nom. SEC v. American Bd. of Trade, Inc., 830 F.2d 431, 439-40 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). The United States has met its burden in this case with respect to each of the elements of criminal contempt and with respect to both Smith and Schlumberger.

A. A Clear and Reasonably Specific Court Order Existed

58. To make the determination of whether the actions in question violated the Final Judgment, this Court must construe the language of the Final Judgment. A consent decree is read essentially as a contract. United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975); United States v. Western Elec. Co., 894 F.2d 1387, 1390 (D.C. Cir. 1990). Thus, the Court should look first to the "plain meaning of the Decree's language." Western Elec., 894 F.2d at 1394; see United States v. Armour & Co., 402 U.S. 673, 678 (1971). Under Armour, the scope of a consent decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Id. At 682. Moreover, " . . . the instrument must be construed as it is written, and not as it might have been written. . . ." Id.

59. The plain language of Paragraph IV.F. of the Final Judgment states that "[t]he

purchaser of the divested drilling fluid business [Smith] shall not sell the drilling fluid business to, or combine that business, with the drilling fluid operations of . . . Schlumberger Ltd., or any of [its] affiliates or subsidiaries during the life of this decree."

60. The Final Judgment's restriction on transactions that Smith may enter is simple and straightforward: Smith is barred from selling its 64 percent interest in M-I to Schlumberger and from combining that business with Schlumberger's drilling fluid operations. The evidence in this case demonstrates beyond a reasonable doubt that the Final Judgment was sufficiently clear and specific to inform Smith and Schlumberger that the joint venture they consummated was prohibited by Paragraph IV.F. of the Judgment.

B. Smith and Schlumberger Knew of the Existence of the Decree

61. The second element of criminal contempt, that Smith and Schlumberger had knowledge of the decree, is not in dispute in this case. Both Smith and Schlumberger have admitted that they had knowledge of the decree before the joint venture was formed on July 14, 1999, and knew that it was a lawful order of this Court. GX 42, Admissions 8, 10, 11, 18, 22.

62. Key executives of Smith and Schlumberger, including Smith's Chairman and CEO and its General Counsel, and Schlumberger's Vice-Chairman and its General Counsel specifically had knowledge of the prohibitions set forth in Paragraph IV.F. of the Judgment before they consummated the joint venture on July 14, 1999. Findings of Fact 51 & 52.

C. Smith and Schlumberger Violated the Decree

63. The third element of criminal contempt, that Smith and Schlumberger violated this

Court's decree, has also been proven beyond a reasonable doubt. In forming the joint venture, Smith and Schlumberger violated the Final Judgment's clear and unambiguous prohibitions on both selling the drilling fluid business to Schlumberger and combining the divested "drilling fluid business" with the drilling fluid operations of Schlumberger. Prior to formation of the joint venture, Smith owned 100 percent of M-I (the 64 percent interest it acquired from Dresser and the 36 percent interest it acquired from Halliburton). In consummating the joint venture, Smith sold to Schlumberger for $280 million a 40 percent interest in a joint venture that includes M-I, thereby selling a portion of the original 64 percent Dresser interest -- the divested "drilling fluid business." Smith's action thus violated the decree's prohibition against selling the drilling fluid business to Schlumberger.

64. Also, in consummating the joint venture, Smith combined M-I (including the original 64 percent interest) and most of Schlumberger's drilling fluid operations. Smith's action thus violated the Final Judgment's prohibition on combining the divested "drilling fluid business" with the drilling fluid operations of Schlumberger.

65. Smith and Schlumberger's claim that Paragraph IV.F.'s prohibitions only bar transactions that include Schlumberger's U.S. drilling fluid assets is meritless. No such limitation is included in the paragraph. To the contrary, the language is quite broad -- barring sales to or combinations with the drilling fluid operations of Schlumberger or any of its affiliates or subsidiaries.

66. Respondents' cites to the definition of geographic market in the Complaint and Competitive Impact Statement that originated the action provide no basis for limiting the clear language of Paragraph IV.F. Respondents have ignored the fact that the divestiture required by the Final

Judgment was international in scope although the alleged geographic market being protected by the decree provision was limited to the United States. The 1996 modification of the Judgment likewise provides no basis for inferring a limitation on the plain language of Paragraph IV.F. Respondents incorrectly claim that the divestiture required as part of the 1996 modification was limited to U.S. assets. It was not. Included with Anchor's U.S. assets was a five year supply contract for crude barite ore, a key ingredient in drilling fluids, which the purchaser of the Anchor assets could extend five additional years and the right to technical support equivalent to the Technical Service Agreement between Anchor Drilling Fluids USA and Anchor Drilling Fluids AS. GX 6 at 5-6. But even if the divestiture required in 1996 had been limited to Anchor's U.S. assets, the scope of the divestiture that was part of the 1996 modification did not interpret, define or limit the language of Paragraph IV.F.

67. Although the prohibitions in Paragraph IV.F. of the Final Judgment are not limited to transactions that include Schlumberger's U.S. drilling fluid operations, the transaction consummated by Smith and Schlumberger on July 14, 1999 affected U.S. commerce. The joint venture was intended to compete, and is competing, in the United States. The joint venture agreement bars Schlumberger from competing against the joint venture in the United States. Schlumberger contributed to the joint venture a research and engineering facility that supported its U.S. drilling fluid operations.

D. Willful Intent

68. The fourth, and final, element of criminal contempt, that Smith and Schlumberger's violation was willful, has been proven beyond a reasonable doubt. Willfulness can be inferred from conduct that evidences a reckless disregard of a court order. In re Holloway, 995 F.2d 1080, 1082

(D.C. Cir. 1993), cert. denied, 511 U.S. 1030 (1994); Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir. 1971). The Court may find that Respondents acted with reckless disregard for the Final Judgment if (a) they understood the decree and ignored it, or (b) they acted in reckless disregard of the plain language of the decree. See Rapone, 131 F.3d at 195 (proof that the contempt defendant "was well aware" of the order, had warnings to comply with the order, and continued to violate the order was adequate to demonstrate intent); United States v. Schafer, 600 F.2d 1251, 1253 (9th Cir. 1979) (evidence that the defendant had helped negotiate the order and admitted violations of the order was adequate to demonstrate intent).

69. Here the language of the decree plainly barred the transaction. The decision makers at both companies knew of this Court's Order. In fact, both Smith and Schlumberger had full knowledge of the plain language of the Court's order. The clear applicability of the Order to the transaction the companies completed on July 14 was brought directly to the attention of both companies by the Department of Justice with the admonition that consummation of the joint venture would violate the Decree. Further, Neal Sutton, General Counsel for Smith, had read the Decree -- for general information when Smith acquired the divested drilling fluid business and later with regard to this specific joint venture. Schlumberger's General Counsel was aware of the company's inclusion in the Decree in 1994, and the General Counsel of its oil field services division reviewed Paragraph IV.F. of the decree in 1998 in connection with the joint venture with Smith. Being aware of the plain language of the decree, and advising their companies on the prohibitions of the Court's Order, was directly within the scope of both General Counsels' authority. The knowledge of Smith's and Schlumberger's General

Counsel must be imputed to the corporation, see New York Central & Hudson R.R. v. United States, 212 U.S. 481, 494-95 (1909), following the general rule that a corporation is criminally liable "for the acts of its managerial agents 'done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform.'" United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981) (quoting jury instruction given by district court).

70. That other officials of Smith and Schlumberger may not have read the Final Judgment cannot save Respondents from contempt sanctions. Indeed, maintaining a "studied ignorance" of the terms of the Final Judgment is the very definition of reckless disregard. See United States v. McMahon, 104 F.3d 638, 644-45 (8th Cir. 1997) ("If McMahon truly remained ignorant of the sequestration order, it was indeed a 'studied ignorance.'"). As the Second Circuit noted: "[A] party to an action is not permitted to maintain a studied ignorance of the terms of a decree in order to postpone compliance and preclude a finding of contempt." Perfect Fit Indus. v. Acme Quilting Co., 646 F.2d 800, 808 (2d Cir. 1981). Both Smith and Schlumberger had full knowledge of the plain language of the Court's order. The clear applicability of the Order to the transaction the companies completed on July 14 was brought directly to the attention of both companies by the Department of Justice with the admonition that consummation of the joint venture would violate the Decree. Their counsel had told them so in April of this year, and the Department of Justice told them so before they proceeded.

71. Smith and Schlumberger proceeded with the transaction even though:

C they recognized that the clear and unambiguous language of Paragraph IV.F. of the Judgment prohibited it, but chose to follow their counsels' tortured and twisted

interpretation of the plain language;

- the Department of Justice warned them that proceeding with the transaction would violate the decree;
- they realized that if they proceeded the Department of Justice would take them to court;
- they understood that they could be charged with criminal contempt and had been told by their counsel that both the corporation and individuals could be charged;
- documents generated three months earlier reflected information from their outside counsel stating that the Final Judgment would bar a transaction even if Schlumberger made a "unilateral" decision to shut down its U.S. drilling fluid business and those assets were excluded from the venture;
- they had experienced General Counsels who knew the corporation had many options to avoid being found in contempt, including coming to the Court for clarification or modification, seeking a second opinion from another law firm, asking for its firm's opinion in writing, and contacting the Department of Justice to discuss the letter from DAAG Nannes;
- their counsels' legal advice was based primarily on an argument that this Court would not have the authority to find them in contempt.

72. Respondents' only basis for claiming they had a good faith belief that proceeding would not violate the decree is advice from their outside counsel. But advice of outside counsel will not

insulate Respondents from criminal liability here. It was not objectively reasonable for Respondents to rely on their counsels' advice. See United States v. Benson, 941 F.2d 598, 614 (7th Cir. 1991), amended in part, 957 F.2d 301 (7th Cir. 1992) (Benson I); see generally Hawes & Sherrard, supra, at 19-37. "[T]he reasonableness of a belief is a factor which bears upon whether the belief was in fact held in good faith." United States v. Benson, 67 F.3d 641, 649 (7th Cir. 1995) (Benson II). Reliance on advice of counsel is "not a safe harbor if a reasonable man would know that the opinion does not reflect a prudent lawyer's serious efforts to ascertain the applicable law." Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962).

73. Where the defendants are sophisticated corporations like Smith and Schlumberger, the reasonableness standard is heightened. See John Hopkins Univ. v. CellPro, 978 F. Supp. 184, 190, 194 (D. Del. 1997) (holding that a corporation with in-house counsel had a heightened obligation to investigate opinions from outside counsel); Mitchell, 299 F.2d at 286 (holding that an experienced businessman had a heightened responsibility to be aware of shoddy lawyering in producing a legal opinion); cf. SEC v. Sorrell, 679 F.2d 1323, 1327 (9th Cir. 1982) (holding a securities broker to a higher standard when assessing the reasonableness of reliance on counsel); Schafer, 600 F.2d at 1253 (holding that a counseled businessman with experience in the relevant field of business was more likely to be aware of the obligations imposed by a court order); In re Muscatell, 113 B.R. 72, 75 (Bankr. M.D. Fla. 1990) (rejecting the advice of counsel defense in part relying on "the fact that the Debtor is a sophisticated and experienced businessman").

74. Measured against objective indicia of reasonableness, Smith's and Schlumberger's

reliance on advice of counsel falls far short. Respondents disregarded the clear and plain meaning of the Order; they adopted counsels' tortured reading; they ignored the warning letter from the Department of Justice; they failed to seek clarification from the Court; they elevated business expedience over legal obligations; and they embraced legal advice that the Court lacked authority to enforce the Order. In these circumstances, Respondents' reliance on an advice of counsel defense is so disingenuous in nature that it itself serves as evidence of reckless disregard for this Court's Order. See Johns Hopkins Univ., 978 F. Supp. at 193 ("Ironically, CellPro almost proved plaintiffs' case for them, with its weak and disingenuous defense of alleged good-faith reliance on the advice of counsel.").

75. The very clarity of this Court's decree makes unreasonable any reliance on outside counsel's twisted and tortured interpretation. The "advice of counsel" defense requires that Smith and Schlumberger sought the advice of outside counsel in good faith, see United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993) (Cheek II), which in turn requires that some legitimate question exist as to whether this Court's Order proscribed the joint venture. Where a decree is as clear as the Court's Final Judgment in this case, the only possible value for the legal opinion would be for use "in a cynical effort to try to confuse or mislead." See Johns Hopkins Univ., 978 F. Supp. at 193.

76. That counsel devised an interpretation that disregarded the Order's plain language does not protect Respondents. The courts have rejected attempts to hide behind interpretations clearly at odds with the plain meaning of orders, whether the interpretations come from the defendant itself, see United States v. Greyhound, 508 F.2d 529, 533 (7th Cir. 1974) ("Greyhound's explanation of its failure to comply with this provision consists of strained and twisted interpretations of the order. . . .

These interpretations of the order are patently unreasonable."), or from counsel. See Mitchell, 299 F.2d at 285-86, (where the court refused to accord weight to the defendant's advice of counsel defense because "it stretch[ed] the imagination beyond the breaking point to believe that the opinion was the result of serious research."); Muscatell, 113 B.R. at 75 (holding reliance on advice of counsel that certain assets need not be listed in a bankruptcy petition to be unreasonable in light of the "plain[] and clear[]" requirements of the law); Musser v. State, 124 S.W.2d 372, 375 (Tex. Crim. App. 1939) (distinguishing between an "obscure and confusing" law, where advice of counsel was a defense to willfulness, and a plain statute, where the defense was not available). Faced with an Order that, in plain terms, prohibited precisely what Smith and Schlumberger did, Smith and Schlumberger could not have reasonably relied on counsel's advice that the joint venture was not prohibited by the Final Judgment.

77. Respondents acted despite a warning from the Department of Justice that the joint venture violated the Final Judgment. The Respondents' unquestioning reliance on outside counsel's interpretation of the Court's Order is even more unreasonable in light of the warning they received from the Department of Justice. On July 13, 1999, respondents received a letter from Deputy Assistant Attorney General John Nannes informing them of the United States' position that their proposed joint venture violated the Court's Order. Yet, after receiving notice that the United States read the Final Judgment to mean precisely what it said, Smith and Schlumberger continued to rely on their counsels' twisted and tortured interpretation and proceeded to consummate the joint venture on July 14.

78. Ignoring a warning of the illegality of a proposed course of conduct is the kind of

unreasonable conduct that will defeat the advice of counsel defense. See Benson I, 941 F.2d at 614 ("If a person is told by his attorney that a contemplated course of action is legal but subsequently discovers the advice is wrong or discovers reason to doubt the advice, he cannot hide behind counsel's advice to escape the consequences of his violation."). In Lindquist & Vennum v. FDIC, 103 F.3d 1409 (8th Cir. 1997), the defendants sought to escape civil liability under the Change in Banking Control Act ("CBCA") -- which, like criminal contempt, carries an intent element -- by relying on their counsel's advice that their actions did not violate the CBCA. Id. at 1414. The FDIC had warned the defendants that their proposed conduct would violate the CBCA. Id. at 1414-15. Ignoring this warning defeated the defendants' attempt to rely on counsel's advice to escape liability. Id. See United States v. Michaud, 928 F.2d 13, 16 (1st Cir. 1991) (defendant who asserted a misunderstanding of its obligation to pay a fine no longer had an excuse "at least as of the date that the government notified [defendant] that it was seeking payment").

79. Following receipt of the warning from the Department, Respondents took no new steps to reconsider or try to reconfirm their position. Instead, anxious to close the joint venture transaction, they sought and received perfunctory oral confirmation from counsel of prior advice that the decree did not mean what it said. In such circumstances, advice of counsel cannot form a good faith basis for ignoring the Final Judgment. See United States v. Cable News Network, Inc., 865 F. Supp. 1549, 1559 (S.D. Fla. 1994)(CNN) ("advice fitted to accommodate" defendant's wishes is "weak on protection" against contempt sanctions).

80. In light of the obvious threat that the United States would seek contempt sanctions, it is

also probative of the reasonableness of Respondents' reliance on counsel that neither company ever sought a written opinion reflecting the advice they claim to have relied upon. Indeed, the only written, reasoned memoranda produced by Respondents' counsel regarding the applicability of the Final Judgment conclude that the joint venture is prohibited. Contemporaneous documents provide "cinematographic photographs" of a defendant's thoughts when written, and contradictory testimony only casts doubt on the witness's credibility. United States v. Corn Products Refining Co., 234 F. 964, 978 (S.D.N.Y. 1916) (Hand, J.); see also United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948).

81. Smith and Schlumberger chose not to avail themselves of procedures for obtaining clarification. Respondents' failure to seek clarification, even after receiving the warning letter from the Department of Justice, is particularly probative of their lack of good faith. Both Smith and Schlumberger were well aware of the available procedures to obtain clarification of the Order. But they chose not to do so, making a calculated decision to risk neither delay nor a negative decision from the Court in their haste to consummate.

82. Failure to seek clarification while relying on a questionable interpretation of an order is the kind of unreasonable conduct that precludes a good-faith defense to criminal contempt. See In re Grand Jury Proceedings, 875 F.2d 927, 934 (1st Cir. 1989); Greyhound, 508 F.2d at 532. In In re Grand Jury Proceedings, the defendant's failure to seek clarification prevented him from claiming to misunderstand the order. 875 F.2d at 934. In Greyhound, the court noted that the defendant was not required to seek clarification, but the failure to do so made more obvious the defendant's bad faith in

relying on a twisted interpretation. 508 F.2d at 534. That Respondents chose not to test their legal interpretations in Court is further evidence of their lack of good faith in relying on their counsels' arguments.

83. Belief that the Court lacked jurisdiction or that the Order was invalid will not excuse an intentional violation. Respondents also contend that they did not willfully violate the Final Judgment because they were advised by outside counsel that the Court's Order was invalid as applied to the joint venture or that the Court lacked jurisdiction to punish a violation. These jurisdictional arguments have no basis in law or fact. Even if they did, however, reliance on counsel's advice to violate a court order does not constitute a defense to the specific intent element of a crime. See Cheek v. United States, 498 U.S. 192, 206 (1991) (rejecting the defendant's claim of a good faith belief that the underlying law was invalid); United States v. Armstrong, 781 F.2d 700, 706 & n.4 (9th Cir. 1986). No matter how genuine Respondents' belief that the Order was invalid, it will not preclude a finding of a willful violation of the Order. See CNN, 865 F. Supp. at 1560-61.

84. Even if Smith and Schlumberger believed that the Final Judgment was invalid, they were obliged to obey it or to seek a modification with the Court. "'It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'" Walker v. City of Birmingham, 388 U.S. 307, 314 (1967) (quoting Howat v. State of Kansas, 258 U.S. 181, 189-90 (1922)).

85. Under facts far more sympathetic than those in the instant case, the Supreme Court affirmed criminal contempt sanctions against Dr. Martin Luther King and other civil rights protesters for violating a state-court injunction against demonstrating without a permit in Birmingham, Alabama. Walker v. City of Birmingham, 388 U.S. 307, 321 (1967). The Court said: "[I]n the fair administration of justice no man can be a judge in his own case, however exalted his station, however righteous his motives . . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law . . . ." In Walker, the decree in question was highly suspect as a constitutional matter. 388 U.S. at 316-17. However, the defendants "did not even attempt to apply to the Alabama courts for an authoritative construction" of the decree. "This Court cannot hold that the petitioners were . . . free to ignore all the procedures of the law . . . ." Id. at 316, 321.

86. In the instant case, by contrast, the decree is admittedly valid and lawful. GX #42, Admission #11. Smith's and Schlumberger's obligation to obey the Court's order cannot be questioned. Walker's admonition that one must abide by an injunction until it is overturned carries all the more force where the injunction is unquestionably valid.

87. This rule also applies to violating a court order in reliance on counsel's advice that the Court lacked jurisdiction to enforce the Decree. In United States v. Revie, 834 F.2d 1198 (5th Cir. 1987), the contempt defendant's apparent good faith belief that an order was beyond the court's authority to issue did not defeat a conviction for criminal contempt. Id. at 1205-06. Likewise, in In re Novak, 932 F.2d 1397 (11th Cir. 1991), the court did not question the validity of the contempt defendant's belief that the court lacked personal jurisdiction over him when affirming the conviction for

criminal contempt. Id. at 1409. A good faith belief that a court lacks jurisdiction does not provide a defense for a person who willingly engages in conduct falling within the prohibitions contained in the order. Even if Smith and Schlumberger genuinely believed this Court lacked jurisdiction over their joint venture, they nonetheless acted with intent to violate the language of the Final Judgment and cannot advance a good-faith defense to criminal contempt.

88. In sum, although Smith and Schlumberger may claim that they relied in good faith on advice of counsel, the objective evidence shows beyond a reasonable doubt that Respondents acted with reckless disregard and willfully violated the Court's Order.

1. Smith's Violation of the Decree Was Willful

89. The evidence proves beyond a reasonable doubt that Smith willfully violated the consent decree.

90. In the only written legal advice that Smith received from Collier, Shannon, Rill & Scott and the only oral advice the law firm provided Smith for which there is a written record, Smith was told that the decree would apply to the joint venture even if Schlumberger shut down its U.S. drilling fluids operations ( GX 13 at 20) and that the decree covered both international and domestic assets (GX 12 at 2 (read by author at Sutton Dep. at 112:20-112:21 (Tr., 11/18/99, at 119:19-119:20)). The April memorandum concluded that, assuming that Schlumberger had shut down its U.S. operations, "should a court decide that it has subject matter jurisdiction, we should anticipate that the court also would find that the joint venture is (or likely is) subject to the Baroid consent decree." GX 13 at 5, 20.

91. At the July 13, 1999 special meeting of the Smith Board of Directors, Smith's own

outside counsel told Smith that the Justice Department might file civil and criminal contempt charges if Smith consummated the joint venture. Tr., 11/24/99, at 60:17-61:15 (Wilson); Tr., 11/22/99, at 182:24-184:16 (Rock).

92. On July 13, 1999, before Smith and Schlumberger consummated the revised joint venture, Smith received a letter from Deputy Assistant Attorney General John Nannes telling Smith that in the view of the Justice Department, consummating the joint venture "would clearly violate the Final Judgment." GX 27; Rock Dep. at 200:18-200:22 (Tr., 11/19/99, at 6:7-10); Sutton Dep. at 226:16-227:1 (Tr., 11/19/99, at 7:21-8:5); see also Tr., 11/22/99, at 214:25-215:2. Smith knew that in the view of the Justice Department, Smith and Schlumberger would violate the Final Judgment if they consummated the joint venture. Tr., 11/22/99, 216:14-216:17; Sutton Dep. at 230:1-231:7, 302:20-303:8 (Tr., 11/19/99, at 8:5-9:19). Smith also understood from the letter that the Justice Department would more likely than not take them to court if Smith and Schlumberger consummated the joint venture. Tr., 11/24/99, at 65:1-67:5 (Wilson).

93. Smith never sought modification or clarification of the Final Judgment, even though they knew they could. Tr., 11/22/99, at 205:1-205:8; GX 12 at 2 (read by author at Sutton Dep. at 113:7-113:9 (Tr., 11/18/99, at 120:5-120:6)). Smith did not seek a meeting with Mr. Nannes or Mr. Klein after receiving the July 13 letter from Mr. Nannes. Tr., 11/22/99, at 218:2-218:7 (Rock). Smith did not seek a "second opinion" from another law firm on the legality of consummating the transaction without first seeking modification. Tr., 11/22/99, at 217:18-218:1 (Rock).

94. Smith's General Counsel abdicated his responsibility to render sound legal advice to the

corporation. When Smith decided to proceed with the joint venture, Mr. Sutton, Smith's General Counsel, stated that he "wasn't exercising [his] independent judgment in any way." Tr., 11/24/99, at 70:16-71:5 (Wilson).

95. Smith chose to proceed with the transaction because of business considerations. It wanted the money from Schlumberger to pay off an expensive bridge loan. It was concerned that Schlumberger might abandon the transaction because it was losing North Sea drilling fluid contracts. In the short run, Schlumberger's problems might result in additional drilling fluid business for Smith; in the long run, Smith felt that its interests were served by a joint venture with Schlumberger.

96. In 1993, Smith pleaded guilty to price fixing, and paid criminal fines of approximately $700,000 and approximately $19 million. Tr., 1/22/99, at 194:9-195:23 (Rock). The Supreme Court has indicated that in the antitrust arena evidence of prior behavior is probative of the likelihood of similar conduct occurring in the future. See United States v. ALCOA, 377 U.S. 271, 277 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 332 (1961); see also United States v. General Dynamics Corp., 258 F. Supp. 36, 62-63 (S.D.N.Y. 1966). Smith's prior conviction is indicative of the corporation's disregard of its obligations under the law. Even now, Smith's General Counsel expressed an surprisingly cavalier view of violations of criminal law by the corporation. To Mr. Sutton a finding of civil liability can be more serious than a violation of federal criminal law, if the resulting damages award is high enough. Sutton Dep. at 187:3-187:18 (Tr., 11/18/99, at 169:9-169:22).

97. The United States has proven beyond a reasonable doubt that Smith is guilty of criminal contempt in violation of 18 U.S.C. § 401(3).

2. Schlumberger's Violation of the Decree Was Willful

98. The evidence proves beyond a reasonable doubt that Schlumberger willfully violated the consent decree.

99. The only written legal advice that Schlumberger received from outside counsel said that the Final Judgment would apply to the joint venture even if Schlumberger shut down its U.S. drilling fluids operations. The April 7, 1999 Bruce McDonald memorandum to Gary Wilson stated that "[t]he decree prohibits the combination of Smith's original 64% M-I interest with the drilling fluids operations of Schlumberger. It is not limited to M-I or Schlumberger only in the U.S., but apparently applies to their assets worldwide." GX 11 at 3. The memorandum also noted that the "DOJ has a good argument that a consent decree gives a court jurisdiction to impose prohibitions that it could not have imposed otherwise, and therefore that the court may enforce the decree to stop even an outside-the-U.S. transaction." Id.

100. Gary Wilson had also been told in a June 21 e-mail from Bruce McDonald of Baker & Botts that "[t]he consent decree prohibits Smith from combining M-I with the drilling fluids business of SL, and the decree does not distinguish between the U.S. and the non-U.S. businesses of M-I and SL." GX 16 at 1. The e-mail stated that Schlumberger could argue that a transaction not involving the U.S. businesses of Smith and Schlumberger would be outside the Court's jurisdiction, but then went on to note that "DOJ's counter-argument is that, in the consent decree, Smith agreed to the non-U.S. prohibition and that the decree itself gives the Court jurisdiction, even if the Court would not otherwise have had jurisdiction." GX 16

101. Finally, Mr. Wilson stated in an e-mail sent to Jim Gunderson, General Counsel of Schlumberger, that if Schlumberger closed its U.S. drilling fluids business and consummated the joint venture with Smith on a worldwide basis -- the very transaction consummated by Smith and Schlumberger on July 14, 1999 -- "DOJ could oppose this and argue that it violates the Consent Decree which purports to apply to US and non US." GX 17 at 2-3.

102. Schlumberger has produced nothing in writing that contradicts the legal advice set out in these three documents.

103. On July 13, 1999, before Smith and Schlumberger consummated the revised joint venture, Smith received a letter from Deputy Assistant Attorney General John Nannes telling Smith that in the view of the Justice Department, consummating the joint venture "would clearly violate the Final Judgment." GX 27; Grijalva Dep. at 218:3-218:21 (Tr., 11/19/99, at 10:7-19); Tr., 11/23/99, at 42:7-42:16, 82:11-86:17 (Grijalva); GX 28. Schlumberger knew that in the view of the Justice Department, Smith and Schlumberger would violate the Final Judgment if they consummated the joint venture. Grijalva Dep. at 218:22-219:12 (Tr., 11/19/9, at 10:20-11:6). Schlumberger also knew that the letter meant that the Justice Department would take some kind of action against Schlumberger if it proceeded with the transaction. Tr., 11/24/99, at 34:13-39:1 (Wilson); GX 29.

104. Schlumberger never sought modification or clarification of the Final Judgment before consummating the joint venture, even though they knew they could. GX 11 at 2; GX 15 at 1; GX 16 at 1; GX 17 at 2; GX 19 at 1; Tr., 11/23/99, 91:18-92:22 (Grijalva), 154:6-154:23 (Gunderson).

105. Schlumberger's General Counsel abdicated his responsibility to render sound legal

advice to the corporation. Jim Gunderson, General Counsel for Schlumberger, never undertook an independent review of whether the revised joint venture was prohibited under the Final Judgment. Tr., 11/23/99, at 144:7-145:14, 146:11-146:19, 148:22-148:25 (Gunderson); Gunderson Dep. at 90:11-92:12, 93:9-93:20 (Tr., 11/19/99, at 12:22-14:7). He failed to do this even in light of the fact that he knew that the key legal instrument in determining whether Smith and Schlumberger could consummate the revised joint venture was the Final Judgment. Gunderson Dep. at 95:21-97:11. When shown Paragraph IV.F. at his deposition, Mr. Gunderson was not sure he had ever read the provision before seeing it in the Government's contempt pleadings. Gunderson Dep. at 90:11-92:12, 93:9-20, 95:21-97:11 (Tr., 11/19/99, at 12:22-15:12).

106. As a further sign of Schlumberger's reckless disregard of this Court's Final Judgment, despite the clear warning from the Justice Department and the clarity of the language of the Final Judgment, Schlumberger chose to proceed based on business considerations. Schlumberger was losing significant business in the North Sea. GX 22. Schlumberger believed that Smith was unfairly telling customers that the joint venture between Smith and Schlumberger would go through, and that these customers were therefore giving Smith business under the assumption that Smith would ultimately be managing the drilling fluids contract. GX 22; GX 23. Schlumberger needed to consummate the transaction, or else Schlumberger "[w]ithin a couple of weeks [would] have very little to contribute to the JV," and Smith might "ask for more money or try to back out of the deal." GX 23.

107. The United States has proven beyond a reasonable doubt that Schlumberger aided and abetted Smith in committing criminal contempt and is therefore guilty of criminal contempt in violation of

18 U.S.C. §401(3).

VI. Conclusions -- Civil Contempt

a. A Clear and Reasonably Specific Decree Exists [IV.A. incorporated by reference]

b. Smith and Schlumberger Knew of the Existence of the Decree [IV.B. incorporated by reference]

c. Smith and Schlumberger Violated the Decree [IV.C. incorporated by reference]

d. Rescission or Disgorgement of Operating Profits is an Appropriate Remedy for Civil Contempt

108. The United States has proven by a preponderance of the evidence that Smith and Schlumberger are in civil contempt of this Court's order. Civil contempt "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." McComb, 336 U.S. at 191. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." Id. at 193. The equity power of the courts includes the authority to order rescission where that remedy is appropriate. See J.I. Case Co. v. Borak, 377 U.S. 426, 433-34 (1964); United States v. Coca-Cola Bottling Co., 575 F.2d 222, 228-30 (9th Cir. 1978).

**1. Recission**

109. Respondents have violated the clear and unambiguous provisions of the Court's order and continue to profit from their violation every day that the joint venture continues. See ITT Continental Baking, 420 U.S. at 240 (violation of consent decree by making prohibited acquisition

"continues until the assets obtained are disgorged"). Rescission of the transaction is the only remedy that would effectively restore the status quo ante and protect the integrity of the Court's order. Coca-Cola, 575 F.2d at 228. Respondents fully understood that recission was a possible remedy for contempt. Sutton Dep. at 201:24-202:8 (Tr., 11/18/99, at 170:9-170:17). Having ignored the Final Judgment to form the joint venture, Respondents cannot now avoid recission by arguing it would be burdensome or costly to undo the transaction. Any hardship resulting from recission is of Respondents' own making.

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

**2. Disgorgement**

111. In addition to ordering recission, the Court should order Respondents to disgorge all profits from the joint venture from July 14,1999, to the date that the transaction is rescinded or Respondents otherwise cease to be in contempt. See SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). The profits reaped from Smith and Schlumberger's illegal joint venture provides a surrogate measure of compensatory damages, because, in this case, no method exists to calculate the

harm to antitrust enforcement from Respondent's violation of the Court's decree. In re General Motors Corp., 110 F.3d 1003, 1018 n.16 (4th Cir. 1997); Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 6 (2d Cir. 1989) ("Such profits are 'an equivalent or a substitute for legal damages . . . .'"); Connolly v. J.T. Ventures, 851 F.2d 930, 934 (7th Cir. 1988). "'[U]nder a theory of unjust enrichment, a contempt plaintiff is entitled to defendant's profits without submitting direct proof of injury, much less proof that any such injury 'approximated in amount the defendant's profits . . . .'" Manhattan Indus., 885 F.2d at 6 (quoting Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 395 (2d Cir. 1965)).

112. The evidence at trial demonstrated that Smith and Schlumberger were driven by their bottom lines, despite knowing of legal limitations on their conduct. No remedy but recission or disgorgement would prevent their conduct from being financially beneficial -- and therefore worth repeating. The amount to be disgorged should include the profits realized by the joint venture during the period of the contempt, and the United States is entitled to those profits as a measure by which Respondents were "unjustly enriched." Id.; see also FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996) (the United States Treasury is the appropriate recipient of the disgorged funds).

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

the United States' costs in pursuing this contempt action.

Dated: December 3, 1999

Respectfully submitted,

"/s/"

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

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

BERNARD M. HOLLANDER
Senior Trial Attorney

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

Attorneys for the United States