IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' TRIAL BRIEF

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The United States has filed petitions with the Court for Orders to Show Cause why Respondents Smith International, Inc. ("Smith") and Schlumberger Ltd. ("Schlumberger") should not be held in civil and criminal contempt for violating the Final Judgment in United States v. Baroid, et al. (Civil Action No. 93-2621). The evidence will show that Respondents willfully

violated the clear and unambiguous terms of the Final Judgment. This memorandum sets out the factual background of the case and discusses the substantive legal issues relating to civil and criminal contempt.

I. Statement of the Case

On July 14, 1999, Respondents consummated a joint venture transaction that combined the drilling fluid operations of Smith subsidiary M-I L.L.C. (formerly M-I Drilling Fluids and hereinafter referred to as M-I) with certain drilling fluid operations of Schlumberger. This transaction violated the Final Judgment in United States v. Baroid, which prohibits Smith from selling its drilling fluid business to Schlumberger or combining its drilling fluid business with that of Schlumberger. Final Judgment ¶ IV.F.

By proceeding with the transaction, Respondents have violated the clear and unambiguous prohibitions of the Final Judgment and should be held in civil contempt. The only effective way to restore the status quo ante, and thus remedy the civil contempt, is recission of the joint venture. Furthermore, Respondents' violation, undertaken in the face of a clear warning by the Department of Justice, was willful. Given the clarity of the plain language of the Final Judgment and the wholly twisted and unreasonable interpretation offered by Respondents, alleged reliance on advice of counsel cannot shield Smith and Schlumberger from responsibility for their willful violation of the decree. In addition to remedying the violation of the decree by ordering recission, the Court should impose criminal fines on each of the Respondents to punish their willful violation of the consent decree.

II. Statement of Facts

On December 23, 1993, the United States filed a civil antitrust Complaint under Section 7

of the Clayton Act to block the merger of Dresser Industries, Inc. ("Dresser") and Baroid Corp. ("Baroid"), alleging that the transaction would substantially lessen competition in the diamond drill bit and drilling fluid markets. Dresser competed in the drilling fluid business through its 64 percent interest in M-I; Baroid competed through its subsidiary Baroid Drilling Fluids.[1] 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.[2] Simultaneously with the Complaint, the United States filed a proposed Final Judgment. To preserve competition in drilling fluids, Paragraph IV.A. of the Final Judgment ordered Dresser to divest the "drilling fluid business," which was defined as either its 64 percent interest in M-I or all assets of Baroid Drilling Fluids, plus any other assets of Baroid used for its domestic or international drilling fluid business.

Paragraph IV.F. of the Final Judgment sought to prevent further concentration in the U.S. drilling fluids market, by merger, during the period of the decree. Thus, it prohibited Dresser from divesting the drilling fluid business to certain specified companies, including Schlumberger, that were actual or potential competitors.[3] Furthermore, to insure that this clear prohibition on Dresser would not be circumvented by subsequent transactions, the Final Judgment imposed the same restrictions on the purchaser of the drilling fluid business:

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[1] 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 functioning of the drill string and tools in the hole.

[2] Today, the U.S. drilling fluid market is even more concentrated, with the top three firms accounting for more than 70 percent of revenues.

[3] "The defendant 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." Final Judgment ¶ IV.F.

> 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., Schlumberger Ltd., or Anchor Drilling Fluids, or any of their affiliates or subsidiaries during the life of this decree.[4]

The Court entered the Final Judgment on April 12, 1994. Dresser chose to divest its interest in M-I and sold the interest to Smith. As required by Paragraph III.B. of the Final Judgment, Smith, as a condition of the divestiture, agreed to be bound by the provisions of the Final Judgment.[5] Thus, under the Final Judgment, Smith, as the purchaser of the drilling fluid business, was barred until April 2004 from selling the drilling fluid business to Baker Hughes, Schlumberger, Anchor Drilling Fluids ("Anchor"), or Dresser, or from combining that business with the drilling fluid operations of any of those firms.

In 1996, Respondent Smith sought its first modification of the Final Judgment to allow it to acquire Anchor, a Norwegian company that produced and sold drilling fluids worldwide. The United States agreed to support a modification that permitted Smith to proceed with that transaction provided it divested the United States drilling fluid operations of Anchor ("Anchor USA"), along with a barite and chemicals supply contract and a technical support contract with Anchor's Norwegian research and development center. While the modification changed the

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[4] The Competitive Impact Statement, filed by the United States in conjunction with the Final Judgment, described the effect of Paragraph IV.F:

> The proposed Final Judgment prohibits the sale by the defendants of the drilling fluid business to their major competitors in the drilling fluid market: Baker Hughes, Inc., Schlumberger Ltd., and Anchor Drilling Fluids. This prohibition lasts for the life of the decree. The purchaser of the drilling fluid business is also prohibited from combining that business with the drilling operations of any of those three companies or Dresser.

Competitive Impact Statement at 11.

[5] In 1998, Smith acquired the remaining 36 percent interest in M-I from Halliburton Company, giving Smith complete ownership of M-I.

restriction in Paragraph IV.F. to permit the acquisition of Anchor, the Final Judgment as amended continued the ban on selling the divested drilling fluid business to, or combining that business with, the drilling fluid operations of Schlumberger:

> 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.

That 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.

In 1998, Smith was back requesting a second modification of Paragraph IV.F. Smith and Schlumberger started discussing the formation of a joint venture of M-I and Schlumberger's drilling fluid operations in 1998 and informed the Antitrust Division of the discussions at the end of September of that year. The companies signed a Memorandum of Understanding on October 21, 1998, and executed a formal joint venture agreement on February 5, 1999. Under the joint venture agreement, Schlumberger would pay Smith $280 million for a 40 percent interest in a joint venture that included M-I, and the parties would combine the operations of M-I and Schlumberger's worldwide drilling fluid business. Smith and Schlumberger recognized that the transaction could not proceed without modification of the Final Judgment and requested that the Department of Justice consent to a modification. The Department opened an investigation to

determine whether support for Smith's second requested modification was warranted.

The staff conducting the investigation advised Respondents in March 1999 that it might recommend to superiors that the Department not join in a motion to modify the Final Judgment. Respondents promptly began considering their options, including appealing any adverse recommendation within the Department, independently requesting the Court to modify the Final Judgment, and limiting the transaction to a combination of assets located outside the United States and proceeding to close without obtaining modification (although Schlumberger's attorneys noted that such a "transaction likely would violate the consent decree"). While the latter option would subject them to possible contempt proceedings, Schlumberger's counsel reasoned that this might be preferable to asking the Court for a modification because if the Respondents simply proceeded, the Department could decide, as a matter of prosecutorial discretion, not to take enforcement action.

Respondents initially pursued appeal within the Department, meeting with a deputy assistant attorney general on June 16. Without awaiting a decision from the Department, Schlumberger advised the Department on June 28 that it had made a "unilateral" decision to close its U.S. drilling fluids business and hoped that would resolve the consent decree issue since Smith would no longer be combining M-I with U.S. assets of Schlumberger. The Department expressed doubts that such a revised transaction resolved the matter, but invited Schlumberger to make a written submission setting forth its views if it felt differently, which Schlumberger did on July 1. The letter maintained that the Court lacked jurisdiction over the revised joint venture.

Again without awaiting a response from the Department, Respondents decided to consummate the joint venture, apparently for purely economic reasons. Smith, which had

borrowed money to pay Halliburton for the remaining interest in M-I, wanted to close the joint venture transaction so that it could use the money from Schlumberger to pay off the loan and thereby reduce its interest expense. Schlumberger, which had lost some foreign drilling fluid contracts because customers were operating under a misimpression that Schlumberger had already combined operations with M-I, also wanted to consummate the joint venture quickly.

Respondents concluded that the economic benefits of proceeding with the joint venture were more important to them that the risk that doing so would put in contempt of the Final Judgment. On July 8, Respondents advised the Department that they intended to proceed to consummate the transaction; the targeted closing date was July 14, but Smith agreed to provide the United States with at least 48 hours notice in any event. A letter sent by Smith's counsel on July 12 advised that the parties intended to close the transaction on July 14.

On July 13, 1999, the Division warned Smith and Schlumberger in writing that proceeding with the proposed joint venture would violate the Final Judgment. The letter, sent by facsimile to counsel for both parties, stated: "In our view, such action by Smith would clearly violate the Final Judgment entered by Judge Sporkin in United States v. Baroid Corporation, et al., Civil Action No. 93-2621." Counsel for both companies received the letter on July 13, and the decision makers at each company either received a copy of the letter or were informed of its substance prior to closing the joint venture transaction. Smith and Schlumberger chose to ignore this warning, took no new steps to confirm the merits of their position, and consummated the transaction on July 14.

III. Legal Standards for Civil and Criminal Contempt

To prove civil contempt, Petitioner must show by clear and convincing evidence that

there was a lawful Final Judgment, that Respondents had knowledge of the Final Judgment, and that they violated a "'clear and unambiguous' provision of the consent decree." Washington-Baltimore Newspaper Guild v. Washington Post Co., 626 F.2d 1029, 1031 (D.C. Cir. 1980); United States v. Greyhound Corp., 363 F. Supp. 525, 570 (N.D. Ill. 1973), aff'd, 508 F.2d 529 (7th Cir. 1974). Evidence of intent or willfulness on the part of the Respondents is not required for a finding of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

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

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

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

To make the determination of whether the actions in question violated the Final Judgment, this Court must construe the language of the Final Judgment. 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).

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." The Smith/Schlumberger joint venture violates both the "sell" and "combine" provisions of the Final Judgment.

Prior to formation of the joint venture, Smith owned M-I. 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 divested "drilling fluid business" to Schlumberger. Also, in consummating the joint venture, Smith combined M-I with Schlumberger's drilling fluid operations. Smith's action thus violated the Final Judgment's clear and unambiguous prohibitions on both selling the drilling fluid business to Schlumberger and combining the divested "drilling fluid business" with the drilling fluid operations of Schlumberger.

B. To Escape the Plain Language of the Decree Respondents Resorted to Tortured Interpretations

Faced with the plain language of the Final Judgment, Respondents offer this Court interpretations of the Decree that imply territorial limitations that are not present or logical. In an attempt to evade their clear obligations, Respondents argue that the Decree should now be read as applying only to U.S. operations or assets and that the Court is somehow without jurisdiction to prevent or rescind the transaction Respondents have consummated. These interpretations are completely without merit and cannot insulate Respondents from contempt sanctions.

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

Respondents' argument that the Final Judgment does not apply to the Smith/Schlumberger transaction because Schlumberger claims to have exited the U.S. market has

no basis in the Final Judgment. It is transparently a *post hoc* interpretation invented by Respondents in an attempt to reconcile their conduct with the express terms of the Final Judgment. Paragraph IV.F. of the Final Judgment contains no language limiting the Final Judgment's restriction to Schlumberger's U.S. drilling fluid assets or operations. The plain language of IV.F. states Dresser could not have divested M-I to Schlumberger in 1994; there was no "exception" if Schlumberger had first "shut down its U.S. operations," and Smith cannot sell M-I to Schlumberger now. Smith and Schlumberger seek to read into the Final Judgment's plain language a limitation that they -- and they alone -- have invented.

Respondents assert that because the Final Judgment was intended to protect competition in the drilling fluid business in the United States, it should be read as limiting the application of Paragraph IV.F. to U.S. assets only.[6] It does not follow, however, that because the Final Judgment was aimed at protecting U.S. competition it must be construed as barring only sales or combinations of U.S. assets. The Final Judgment ordered Dresser to divest an ongoing, worldwide drilling fluid operation to protect competition in the United States, and expressly prohibited divestiture to a specified list of actual or potential competitors in the U.S. drilling fluid market: Schlumberger, Baker Hughes, and Anchor.[7] The Final Judgment also prevented

[6] Respondents' argument that the 1996 modification "interpreted" or "limited" the Final Judgment in any way is without merit. The Department determined that, in that particular instance, the prophylactic purpose of the Paragraph IV.F. prohibition -- maintaining actual or potential competition -- would not be compromised if Smith divested the U.S. assets of Anchor (plus technical support and supply contracts). No statement by the United States -- and, more importantly, no action taken by the Court -- in connection with the 1996 modification in any way purported to interpret or modify the Final Judgment to apply only to transactions involving U.S. assets.

[7] The purchaser of the divested drilling fluids business is also prohibited from selling it back to Dresser. Like many divestitures in our increasingly global economy, the Dresser divestiture included significant foreign assets: either Dresser's entire interest in M-I, an international drilling fluids company, or Baroid Drilling Fluids,

circumvention of that prohibition by placing identical restrictions on the buyer, which turned out to be Smith. Schlumberger was included on the "short list" of prohibited buyers because it was one of the largest oilfield service companies in the world. Backed by its size, success, and experience in providing oil field services in the United States and throughout the world, Schlumberger at the time was capable of expanding its fledgling drilling fluid business in the United States.

The remedy needed to protect competition in a particular geographic market can extend to assets and firms physically located outside the affected geographic market. See, e.g., United States v. Jos. Schlitz Brewing Co., 253 F. Supp 129, 145, 147-48 (N.D. Cal.), aff'd, 385 U.S. 37 (1966); United States v. Halliburton Co., et al., Civil Action No. 1:98CV02340 (D.D.C. Apr. 1, 1998); United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215, 237 (S.D.N.Y. 1952).

If Respondents believed in retrospect that the scope of relief seemed broader than necessary to protect the public interest, their only proper course was to seek a modification or construction of the decree language from the Court. They were not free to "construe" the decree in a manner they saw fit, in contradiction of its plain language and the clearly expressed warning of the United States, the only party to the original decree that is also party to the current proceeding.[8]

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which was also an international drilling fluids company, 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 . . . ." Final Judgment ¶ II.H.

[8] [T]he law is clear that a party who makes his own determination as to the meaning of a decree, acts at his peril. If Greyhound had doubts as to its obligations under the order, it could have petitioned this court for a clarification or construction of that order. McComb, 336 U.S. at 192 [full citation omitted]. The law is equally clear that even where there is "no open and direct defiance," a company which acts under a "twisted interpretation" that would render a

2. Respondents' "Jurisdictional" Arguments are Similarly Twisted

Respondents advance the remarkable proposition that the Court cannot find them in contempt even if the Court finds that they violated a clear and unambiguous provision of the Final Judgment.[9] They claim, relying on principles of extraterritorial application of the antitrust laws, that the Court must also find that their transaction has a "direct, substantial, and reasonably foreseeable anticompetitive effect on U.S. commerce."[10]

This Court obviously had jurisdiction to enter the Final Judgment negotiated by the original parties in the Baroid case, which encompassed remedies designed to protect and promote competition in the United States. The very language of the Final Judgment states that the Court had personal jurisdiction over the defendants, Dresser and Baroid, and had subject matter jurisdiction over the litigation under the federal antitrust laws. See Final Judgment ¶ I.

The Final Judgment can validly prohibit transactions, even if those transactions would not themselves independently violate the antitrust laws. A court's equitable power is broad, and not limited to enjoining illegal activity. The court can also impose prophylactic or remedial provisions that prohibit otherwise legal conduct if it concludes that those measures are an aid to,

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decree ineffective may be found guilty of civil and criminal contempt. United States v. Gamewell Co., 95 F. Supp. 9, 13 (D. Mass. 1951). Greyhound Corp., 363 F. Supp. at 534; see also United States v. United Mine Workers, 330 U.S. 258, 293 (1947)("The defendants, in making their private determination of the law, acted at their own peril.").

[9] The strained and post hoc nature of Respondents' "jurisdiction" argument is illustrated by the recent assertion by Schlumberger's counsel that the Court lacked subject matter jurisdiction over the original divestiture by Dresser. According to Schlumberger counsel, inclusion of Baroid assets used outside the United States in the definition of the divested drilling fluids business (Final Judgment ¶ II.H.) raised a "serious question of subject matter jurisdiction." :Letter from Rufus W. Oliver, III to John Nannes (July 1, 1999).

[10] Smith and Schlumberger Responses to United States Request for Admissions, No. 83. The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, codified existing case law to make it clear that the Sherman Act is applicable to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on United States commerce.

or are necessary or important for, ensuring effective relief. United States v. Loew's, Inc., 371 U.S. 38, 53 (1962) ("Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined."); United States v. United States Gypsum Co., 340 U.S. 76, 88-89 (1950); see also United States v. Grinnell Corp., 384 U.S. 563, 580 (1966); FTC v. National Lead Co., 352 U.S. 419, 429 (1957). Thus, whether a combination of M-I and Schlumberger's non-U.S. assets would constitute a separate violation of Section 7 of the Clayton Act is irrelevant in a contempt action. The Court had the power to prohibit such a transaction as a means of furthering the goal of protecting competition in the U.S. drilling fluid market.[11]

Equally irrelevant are the standards for extra-territorial application of the antitrust laws. This is a contempt proceeding to enforce a lawfully entered court order, not a Clayton Act or Sherman Act case.[12]

This Court had jurisdiction over the original action and the parties to that action; it had jurisdiction to enter the Final Judgment, including Paragraph IV.F.; it has jurisdiction over Smith and Schlumberger; and it has jurisdiction to enforce the Final Judgment against Respondents.

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[11] Remedial measures are not improper simply because they apply to firms headquartered outside the United States and to foreign assets of those firms. The Court's jurisdiction over foreign firms and their assets in antitrust cases is firmly established. United States courts have ordered relief involving foreign firms and foreign assets to protect competition in the United States. Schlitz, 253 F. Supp. at 145, 147-48 (divestiture of interest in Canadian brewery ordered because its acquisition by U.S. company eliminated potential competitor into the U.S. market); United States v. True Temper Corp., 1959 Trade Cas. (CCH) ¶ 69,441, at 75,663 (1959) (consent decree ordering U.S. corporation to divest interest in foreign corporations and refrain from agreements that limited competition in the United States); see also Imperial Chem. Indus., 105 F. Supp. at 237.

[12] Even if this were a Clayton Act or Sherman Act case, extraterritorial standards would have applicability, as Respondents' joint venture operates in the United States and is a combination of two firms operating in the United States. There is absolutely no doubt that an antitrust case relating to the joint venture would be within the Court's jurisdiction.

Respondents' jurisdictional arguments are without merit.

V. Respondents Willfully Violated the Final Judgment

A. Respondents Acted with Reckless Disregard for this Court's Order

The Court may find that Respondents acted with reckless disregard for the Final Judgment from the evidence that the Respondents knew of the clear and unambiguous terms of the Order and yet proceeded to violate it. 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).

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).[13]

B. Advice of Outside Counsel Will Not Insulate Respondents From Criminal Liability

Smith and Schlumberger have indicated that they intend to argue that any violation of the Final Judgment was not willful because it was undertaken in reliance on the advice of counsel.[14] A party charged with a crime involving an intent element can, in very limited circumstances, defeat proof of intent by demonstrating an advice of counsel defense. See Williamson v. United States, 207 U.S. 425, 453 (1908). But to avail themselves of the defense, Respondents must show they acted in good faith in relying on counsel's advice, and "no man can wilfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he

[13]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).

[14] Although the United States has the burden of proof on the intent element of the crime of criminal contempt, Smith and Schlumberger must present some evidence of good faith before the United States is required to refute the defense. See United States v. Marquardo, 149 F.3d 36, 44 (1st Cir. 1998) (the absence of good faith is not a separate element of the crime of criminal contempt).

followed the advice of counsel." Williamson, 207 U.S. at 453.[15]

In determining whether Respondents' claim of good faith reliance on the advice of counsel is credible, the Court should consider whether such reliance was objectively reasonable. 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). Thus, 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).

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

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[15] Logically, at least, the more elusive the legal "answer" would be to a layman, the more weight a court should accord the evidence of his reliance. Where, in contrast, a court considers the legal advice relied upon to have been contrary to the plain language of the statute, or where it finds that the defendant's conduct defied common sense, it will usually find the advisee liable on the theory that the law was "clear" enough to negate any possibility of reasonable reliance on the contrary advice of counsel.

Douglas W. Hawes & Thomas J. Sherrard, Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases, 62 Va. L. Rev. 1, 39 (1976).

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").

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.").

1. 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.

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.[16] See 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 sought to do, Smith and Schlumberger could not have reasonably relied on counsel's advice that the joint venture was not prohibited by the Final Judgment.

[16] Courts consider the "substantive basis" for counsel's opinion when weighing its objective reliability. See Hawes & Sherrard, supra, at 32-33. In Mitchell, 299 F.2d at 285-86, 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." Likewise, in Johns Hopkins Univ., 978 F. Supp. at 193, the court emphasized the "obvious deficienc[y]" of the opinions allegedly relied on.

2. 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.

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. Here, Smith and Schlumberger could certainly be

expected to tread carefully and take careful steps to confirm their interpretation -- an interpretation that, unlike the Department's, ventured far from the plain language of the Order. 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").

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.[17] 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).

3. 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

[17] 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. "It would be reasonable to assume that an oral opinion is generally less formal, and therefore entitled to less reliance, than a written one." Hawes & Sherrard, supra, at 33. Indeed, the evidence will show that the only written, reasoned memoranda produced by Respondents' counsel regarding the applicability of the Final Judgment conclude that the joint venture is prohibited.

Smith and Schlumberger were well aware of the available procedures to obtain clarification of the Order.[18] 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.

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.

4. 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. As discussed above, these jurisdictional arguments have no basis in law or fact. Even if they did, however, good faith reliance on counsel's advice to violate a court order does not

[18] If there was any confusion about the availability of relief from the Court, Respondents should have inquired "whether there are practical alternatives available to test the legality of a proposed conduct short of actually engaging in the conduct." Marshall L. Small, The Evolving Role of the Director in Corporate Governance, 30 Hastings L. Rev. 1353, 1379 (1979).

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.

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.

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

VI. Recission of the Joint Venture is Appropriate Relief for Civil Contempt and

Imposition of a Fine is Warranted as Punishment for Criminal Contempt

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).

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 and protect the integrity of the Court's Order. Coca-Cola, 575 F.2d at 228.

In addition to ordering recission, the Court may order a fine to coerce a defendant 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 Business Machines Corp., 60 F.R.D. 658, 667 (S.D.N.Y. 1973), cert. denied, 416 U.S. 976 (1974). 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 additional profits they are reaping

from their illicit joint venture. Further, the Court should require Respondents to disgorge the profits they have earned through their violation. See In re General Motors Corp., 110 F.3d 1003, 1019 n.16 (4th Cir. 1997) ("[A] court is wholly justified in requiring the party in contempt to disgorge any profits it may have received that resulted in whole or in part from the contemptuous conduct.").

Finally, a criminal fine should be imposed to punish Respondents' contumacious behavior in merging their drilling fluid businesses in the face of the clear language of the Decree and the warning of the Department of Justice that their planned transaction violated this Court's Order. See United States v. NYNEX, 814 F. Supp. 133, 142 (D.D.C.), rev'd on other gnds. 8 F.3d 52 (D.C. Cir. 1993). The fine imposed on conviction of criminal contempt "is essentially punitive and deterrent in purpose, rather than remedial." United States v. Kiuri-Perez, 187 F.3d 1, 7 n.2 (1st Cir. 1999). The penalty must bear a relationship to "the violation and the offender's income, capital, or both," in order to avoid being regarded as "mere license fees for illegal conduct." NYNEX, 814 F. Supp. at 142. The NYNEX court imposed a fine of one million dollars for criminal contempt. Id. In this case, the United States seeks a fine of one million dollars on each of the Respondents to punish their reckless disregard of this Court's Order.

CONCLUSION

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

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Respectfully submitted,

"/s/"

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