UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

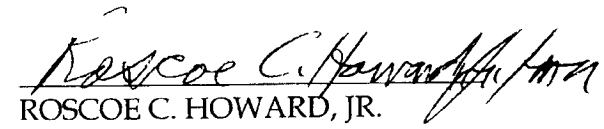
ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS FOR SPECIFICATIONS ONE, TWO AND THREE OF THE COURT'S NOVEMBER 28, 2001 ORDER TO SHOW CAUSE

As stated in Court on January 10, 2002, and pursuant to Fed. R. Civ. P. 52(c), Defendants Gale Norton, Secretary of the Interior, and Neal McCaleb, Assistant Secretary of the Interior for Indian Affairs, (collectively "Interior Defendants"), respectfully move pursuant to Rule 52(c) of the Federal Rules of Civil Procedure for judgment on partial findings with respect to the first three specifications of contempt in the Court's November 28, 2001 Order. Now that the plaintiffs have been fully heard on the issues contained in the first three contempt charges, and because plaintiffs have failed to sustain their heavy burden of demonstrating by clear and convincing evidence conduct which could warrant a finding of contempt as a matter of law, the Interior Defendants respectfully request that partial judgment be entered in their favor. A

memorandum of points and authorities in support of this motion and proposed order are submitted herewith.

Respectfully submitted,



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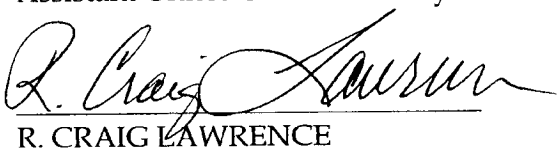

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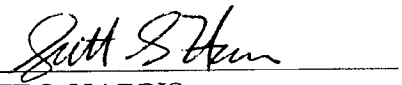

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FILED
JAN 1 8 2002
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON PARTIAL FINDINGS FOR SPECIFICATIONS ONE, TWO AND THREE OF THE COURT'S NOVEMBER 28, 2001 ORDER TO SHOW CAUSE

Defendants Gale Norton, Secretary of the Interior, and Neal McCaleb, Assistant Secretary of the Interior for Indian Affairs, (collectively "Interior Defendants") submit this memorandum in support of their motion for judgment on partial findings as to the first three specifications in the Court's November 28, 2001 Order to show cause why they should not be held in contempt. Stated simply, the record developed over the course of the trial proceedings between December 10, 2001 and January 10, 2002 is insufficient as a matter of law to permit the Court to sustain findings of contempt against the Interior Defendants.

ARGUMENT

I. Legal Standards

This Court undoubtedly has the inherent authority to enforce its orders through the exercise of its contempt powers. See Shillitani v. United States, 384 U.S. 364 (1966); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993). That authority, however, is to be exercised sparingly, with "restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). As this Court has noted, "the 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" S.E.C. v. Life Partners, Inc., 912 F. Supp. 4, 11 (D.D.C. 1996), quoting Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). Further, in light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." Life Partners, 912 F. Supp. at 11, citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882, 885 (Fed. Cir. 1985).

The elements of contempt are well established. Specifically, a party seeking contempt must show: (1) an order that is clear and reasonably specific; and (2) that the alleged contemnor violated that order. Armstrong, 1 F.3d at 1289; Food Lion v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016-17 (D.C. Cir. 1997); Shuffler v. Heritage Bank, 720 F.2d 1141, 1146 (9th Cir. 1983). Furthermore, because the contempt power is to be reserved for only clear violations of the Court's authority, the burden of demonstrating conduct warranting its use is a heavy one. Washington-

Baltimore Newspaper Guild v. The Washington Post, 626 F.2d 1029, 1031 (D.C. Cir. 1980). In contrast to the ordinary burden of persuasion used in the trial on the merits of this case, Plaintiffs must prove the elements of contempt by clear and convincing evidence. See, e.g., NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981); McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000). Applying the clear and convincing standard requires the Court to "reach a firm conviction of the truth of the evidence about which he or she is certain." See United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994) (comparing the preponderance of evidence burden to the clear and convincing evidence standard). When high government officials are the target of contempt proceedings, the remedy must be reserved as a "last resort." In re Attorney General of the U.S., 596 F.2d 58, 65 (2d Cir.) ("holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted"), cert. denied, 444 U.S. 903 (1979).

The second and third specifications of the order to show cause why the Interior Defendants should not be held in contempt are denominated as alleged "frauds on the Court. " A fraud on the court occurs where it can be demonstrated – also by clear and convincing evidence – "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the opposing party's claim or defense." See Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118-19 (1st Cir. 1989);

Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460 (2d Cir. 1994) (fraud on the court limited to "that species of fraud which does or attempts to defile the court itself, or ... fraud perpetrated by officers of the court so that the judicial machinery cannot perform in its usual manner its impartial task of adjudging cases"), quoting Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972); see also Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (emphasizing that fraud in litigation cannot be tolerated because it is a "wrong against the institutions set up to protect and safeguard the public"). "But the concept of fraud on the court . . . does not extend to an omission more fairly characterized as a 'mistake of judgment.'" Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 278 n.16 (D.C. Cir. 1971) (citations omitted).

II. The First Specification Should Be Discharged

The first specification of the show cause order alleges a failure "to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project." Any inquiry into this specification must, of necessity, begin with the plain language of the Court's December 21, 1999 Order itself. See Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16-17 (1st Cir. 1991) ("For a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the intended fashion. In determining specificity, the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden.") (emphasis added) (internal quotation marks omitted).

First, it bears emphasizing that the portion of the December 21, 1999 Order apparently relied upon by Plaintiffs – set forth in Section II – is a declaratory judgment. Compare Section II ("Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. §§ 702 & 706, the court HEREBY DECLARES that ...) with Section III (The Court ORDERS that ...). This distinction is a vitally important one for the purposes of this case, as the D.C. Circuit has held unambiguously that alleged noncompliance with a declaratory judgment cannot serve as the foundation for a finding of contempt. See Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993), citing Steffel v. Thompson, 415 U.S. 452, 471 (1974). The D.C. Circuit has reasoned:

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

Id., at 1290 (emphasis added); see also Perez v. Ledesma, 401 U.S. 82, 125-26 (1971).

Second, even if the operative language relied upon by Plaintiffs were not contained in a declaratory judgment, the language itself does not direct Defendants to "initiate a Historical Accounting Project." Rather, Section II sets forth a series of legal conclusions concerning Defendant's noncompliance with the 1994 Act and statements concerning what Defendants must do to come into compliance. Of most importance are paragraphs 2, 3, 5 and 7 of Section II. Specifically, paragraphs 2-3 explain that the Interior Defendants owe Plaintiffs the duties to:

- retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust.
- establish the following written policies and procedures that are necessary to render an accurate accounting:
  - to collect missing information from outside sources;
  - to retain IIM-related trust documents;
  - for computer and business systems architecture; and
  - for the staffing of trust management functions.

Paragraphs 5 then finds that the Interior Defendants are not in compliance with those duties, and paragraph 7 concludes that they "must promptly come into compliance by establishing written policies and procedures not inconsistent with the courts Memorandum Opinion that rectify the breaches of trust declared in subparagraphs II(2)-(4)."[1]

Even assuming that these provisions had not been set forth in a declaratory judgment, none of them specifically require the Interior Defendants to "initiate a Historical Accounting Project." Rather, these are more targeted statements addressing what the Interior Defendants must do in order to comply with their legal duties, i.e., to collect missing information from outside sources, to retain IIM-related trust documents, etc. Judged against the actual language of the Section II, the evidence submitted by

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[1] Because paragraph 4 relates to duties owed by the Secretary of the Treasury, it is not relevant to these contempt proceedings. Similarly, paragraph 1 sets forth the purely legal principle that Defendants are obligated "to provide plaintiffs an accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited."

Plaintiffs themselves makes clear that contempt is inappropriate. Most obviously, the Seven Quarterly Reports submitted to the Court by the Department – which have been admitted into evidence as Plaintiffs' Exhibits 7-13 – narrate in detail the efforts that the Department has taken to remedy these specific breaches. Where the plain language of Section II of the Court's Order sets forth specific breaches and declares it necessary to remedy those breaches, and where the Plaintiffs' own evidence demonstrates that this has occurred, contempt is not warranted.

Third, it is a predicate for contempt that the order in question give sufficiently precise direction such that the alleged contemnor can be held to have notice of what he or she is required to do. International Longshoremen's Ass'n Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967) (reversing contempt finding based on violation of order that "did not state in 'specific . . . terms' the acts that it required or prohibited"), quoting Fed. R. Civ. P. 65(d); Spallone v. United States, 493 U.S. at 276-77 (reversing contempt finding against individual city council members where the underlying decree to desegregate public housing did not direct them personally to take any affirmative steps). In this case, there is nothing in the Court's December 21, 1999 Order setting forth a precise schedule for an accounting or explaining specific details – other than the specific breaches listed above – of how that task should be accomplished. Because the order in question is not explicit on how and when an accounting should take place, the Court should resolve this contempt specification in favor of the Interior Defendants. See United States v. Microsoft Corp., 980 F. Supp. 537, 541 (D.D.C. 1997),

rev'd on other grounds, 147 F.2d 935 (D.C. Cir. 1998), citing Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927-28 (D.C. Cir. 1982).

This principle applies with particular force where the Court requires government agencies to follow the law without specifying exactly what steps are required to avoid possible exposure to contempt. In Armstrong, for example, several government agencies appealed from an order by Judge Richey holding them in contempt of a prior order enjoining the Archivist of the United States to "take all necessary steps" to preserve federal records and requiring the agencies not to remove, alter, or delete any information until the Archivist took action to prevent the destruction of federal records. See Armstrong, 1 F.3d at 1277. Because the agency did not violate a clear order requiring certain conduct, the Court of Appeals reversed and remanded. Id. at 1277, 1288-90. In holding that the District Court had abused its discretion, the Court of Appeals emphasized that "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous." Id. at 1289 (emphasis added), quoting Project B.A.S.I.C., 947 F.2d at 16-17 (citations omitted; emphasis added).

Finally, even if the Court had specifically ordered the Interior Defendants to "initiate a Historical Accounting Project," the facts in the record do not support a finding of contempt because steps have been taken to embark upon an accounting. For instance, Mr. Thompson explained that the Interior Defendants have undertaken a

reconciliation of the accounts of the five named Plaintiffs.[2] He also explained that, since its inception in July 2001, the Office of Historical Trust Accounting has been established, obtained funding, and generated two reports planning for how the accounting will be conducted.[3] Mr. Thompson also noted that other steps explained at trial and in the Department's Quarterly Reports will contribute directly to the Department's ability to carry out such an accounting, such as planning for the collection of records necessary to conduct the accounting.[4] And the Interior Defendants' summary judgment motion practice in March and September 2000 was an effort to define the temporal scope of the accounting to be done. Although Plaintiffs have disputed the methods by which the Interior Defendants have gone about the initial phases of performing the accounting, and suggested that the effort has not been well coordinated, and in their view, not even

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[2] See Tr. at 48, ll. 11-15 ("Arthur Andersen was doing work on the five named plaintiffs. They had pulled data from the Interior Department to -- electronic data to look at the accts [stet] of the five named plaintiffs and try and do a reconciliation of those accounts.")

[3] See Tr. at 1964-65; see also Notice of Filing Blueprint for the Comprehensive Historical Accounting Plan (Sept. 12, 2001); Tr. at 338 ("the Secretary established a separate office high in the Department to undertake a historical accounting. That was a position OST had advanced earlier also. I think those are positive steps towards a historical accounting."); Tr. at 1868-70 (describing funding obtained from Congress for OHTA).

[4] See Tr. 1857 ("We were attempting to define what an accounting might look like and where we could -- where we had documents in hand to complete such an accounting. So most of the work in the first year was focused on extracting different series and parsing out the types of accounts to see where the documentation was sufficient that we had in hand."); see also Plaintiffs' Exhibits 6-13 (including reports on breach projects); Tr. 361-62 (Department developed plans, recruited staff, detailed staff, pulled in information, held meetings, "quite a bit of activity, in my book").

started, those abstract notions fall far short of the sort of clear and convincing evidence required for a finding of contempt.

II. The Second Contempt Specification Should Be Discharged.

The second specification of the Court's November 28, 2001 Order to Show Cause alleges that the Interior Defendants committed a fraud on the Court by "conceal[ing] the Department's true actions regarding the historical accounting project" from March 2000 until January, 2001. Although the allegedly concealed actions are not enumerated in the Order, Plaintiffs have relied chiefly upon their unfounded allegation that the Interior Defendants carried out a "sham" Federal Register process addressing how the agency might carry out a historical accounting. See Aug. 27, 2001 Contempt Motion, at 20.

But Plaintiffs' position on this point is fundamentally flawed on several different levels. First, to the extent that Plaintiffs are suggesting that the choice to utilize statistical sampling was itself inconsistent with this Court's December 1999 ruling, see Aug. 27, 2001 Contempt Motion, at 19-20, the plain language of that ruling and the Court of Appeals' decision show otherwise. This Court stated explicitly:

> It should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties.

Cobell v. Babbitt, 91 F. Supp. 2d 1, 40 n.32 (D.D.C. 1999); aff'd, Cobell v. Norton, 240 F.3d 1081, 1104 (D.C. Cir. 2001) ("The district court explicitly left open the choice of how

the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate").

What is more, the Department fully disclosed to the Court that it would undertake a Federal Register process, which it described as "an information gathering process in the course of determining the most reasonable method to carry out an accounting. See Tab 14 to Plaintiff's Exhibit 14, at 17521. The Department also never hid from anyone - including this Court - its view that a transaction-by-transaction accounting of every account potentially created serious challenges. See, e.g., Tab 14 to Plaintiff's Exhibit 1, at 17526 ("Given the enormous scope and costs of an account-by-account, transaction-by-transaction reconstruction, it is unlikely to expect that the Congress would provide the Department with the staggering appropriations needed to fund such a process."). The fact that DOI officials anticipated the possibility of some form of statistical sampling as part of their efforts even before receiving public comments is not only not "bad faith," but it is consistent with the Administrative Procedure Act.

And while Plaintiffs have alleged that Department officials purposely sought either to mislead the Court about the Federal Register process, the facts do not support such allegations of bad faith. Plaintiff's own witness, Mr. Thompson, testified:

> Now, you know, I cannot think of one meeting or one individual who would dare to try and deceive the Court. There is no reason to do that particularly, in my mind. There are people who at a moment may have not been as forthcoming as they should be, but in my mind, today, I don't know of any flat-out attempt to hide information from

the Court. I believe that today, I believed it a year ago.

Tr. at 1866, ll. 14-20. Mr. Thompson also testified that Department officials sincerely hoped that one or more financial institutions would propose methods or alternatives to enable DOI to perform an efficient and effective accounting. See Tr. 731-33. Beyond the Federal Register notice provision, the Interior Defendants' summary judgment motion practice in March and September 2000 placed before the Court the DOI's view as to the temporal scope of the accounting to be done. And Mr. Thompson's unchallenged testimony shows that, until the August 2, 2000 meeting, he understood it to be an open question as to how to carry out an accounting.[5] Once the results of that meeting were finally reduced to the Secretary's December 29, 2000 memorandum, that memorandum was promptly filed with the Court.

In short, the Interior Defendants have never hidden from the Court their expectations concerning how a historical accounting would be carried out. At a bare

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[5] Q. Do you believe at any point in time during the point that the Federal Register notice was published and it was provided to this Court and the United States Court of Appeals for the D.C. Circuit there was a reasonable chance that the Secretary would conduct a transaction by transaction accounting from the inception of the Trust?

A. I have to say yes to that because the preparations for the August meeting included work I did to try and locate experts who could advise us on the best way to approach historical accounting, including statistical sampling in some cases, including transaction by transaction and others.

Tr. 248.

minimum, there is no clear and convincing evidence to support the view that they "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the opposing party's claim or defense." See Aoude, 892 F.2d at 1118-19. As a result, the Court should discharge the Interior Defendants from the second specification of contempt.

III. The Third Specification Should Be Discharged

The third specification of the Court's November 28, 2001 Order to show cause asserts that the Interior Defendants committed a fraud on the Court by failing to inform the Court of TAAMS developments between September 1999 and the Court's decision of December 21, 1999. Defendants have acknowledged – both in pleadings in this case and in contemporaneous internal communications – that the delays in the TAAMS project during the summer and fall of 1999 should have been disclosed to the Court. Nevertheless, the failure to do so does not support a finding of contempt by means of fraud on the Court.

As noted above, it is a prerequisite to fraud on the Court that the alleged perpetrator have "sentiently" set in motion an unconscionable scheme "calculated to interfere" with the Court's ability to adjudicate the case. Id. As with the other specifications, this very high standard must be established by clear and convincing evidence. Id.

In this case, the uncontradicted testimony from every knowledgeable witness has

been that Department officials made an affirmative decision on September 8, 1999 to disclose developments since Trial One to the Court. See, e.g., Tr. 157-60 (Testimony of Thomas Thompson); Tr. 2550 (Testimony of Daryl White). For instance, Mr. Thompson was questioned by both Plaintiffs' counsel and the Court about the September 8, 1999 meeting:

> Q. Was there a significant amount of concern expressed by those of you who attended this meeting?
>
> A. I think that's fair to say. The fact that it was a presentation to the chief of staff is an indication of that. Also the level of people attending.
>
> Q. Do you recall what the chief of staff stated in that regard?
>
> A. My take on the meeting, as I recall it, was that the decision was made to inform the Court of this situation. I don't know that we had an actual final draft of the actual information to be provided the Court, but it was clear to me that steps were going to be taken to inform the Court of these issues, and the chief of staff concurred with that.
>
> Q. Were you aware that during this same period of time this was being discussed that counsel for the defendants requested that the Court appoint a mediator to mediate a resolution of this dispute with regard to Trial 1?
>
> A. I recall in this time frame that there was mediation efforts going on.
>
> Q. Do you recall whether or not anyone suggested that disclosures not be made because of the concern as to how the mediation would be affected?
>
> A. I don't recall any conversations to that effect.
>
> Q. I'd like to point you to the category called Outside --
>
> THE COURT: In fact, I take it from the way you've characterized the

meeting, there was no one speaking out about not informing the Court.

THE WITNESS: On the contrary, Your Honor. My sense, and I guess my shock expressed earlier, was that you didn't receive that information. There was nobody who was, that I recall, who suggested or thought that the information should not be provided to you.

THE COURT: We don't know whether it was the Solicitor or the Secretary that decided I wouldn't be told. You don't know?

THE WITNESS: I do not know or whether it was just a bureaucratic bungle.

Tr. 1171-72 (emphasis added). There has been no evidence suggesting any affirmative decision not to file such a report, and, of particular relevance to this contempt proceeding, no evidence of any intention to hide relevant information from the Court.

At the time the Interior Defendants presented their oral motion for judgment on partial findings, the Court inquired as to whether it could draw the inference that Department officials intended to defraud the Court from the fact that the draft report was never filed. See Tr. 2559. As the Court noted, it is undoubtedly true that the finder of fact - in this case the Court - may draw reasonable inferences from the facts actually presented. Where there is an absence of any affirmative evidence in the record of an intent to defraud, and where there is affirmative evidence from several witnesses of an intent to disclose, it is not a reasonable inference to presume that the Interior Defendants actually intended to defraud the Court. Particularly where the relevant legal question is whether Department officials "sentiently" set in motion an "unconscionable scheme" that was "calculated to interfere" with the Court's ability to

adjudicate the case, and particularly where Plaintiffs must prove these elements by clear and convincing evidence, the record as presented simply does not meet their high burden of proof.

Because the remedy sought by Plaintiffs' is the drastic sanction of contempt, it also bears noting that delays that occurred in the months after Trial One were of exactly the sort that several Department witnesses anticipated at the time of that trial. Indeed, the Court has remarked on various occasions during this contempt proceeding that it was cognizant that the schedule presented by the Interior Defendants during Trial One was an aggressive one. The developments in the project in Fall 1999 were all in the nature of delays of the sort that the Trial One testimony had contemplated, i.e., (a) delays in having system actually used on pilot basis in Billings; (b) a two-week delay in final system test; and (c) acceleration of deployment of title module, with leasing module at a slower pace. See Tab 5B to Plaintiffs' Exhibit 2. Calculating a schedule for software development is inherently subjective; a contempt finding for fraud on the Court should be based on evidence of considerably more objective and affirmative wrongdoing. See Oxxford Clothes XX, Inc. v. Expeditors Int'l of Washington, Inc., 127 F.3d 574, 578 (7th Cir. 1997) (mischaracterization of evidence, as distinguished from placing "bogus documents" before the court, does not amount to fraud on the court). Other courts have rejected contempt where presented with allegations of misconduct significantly more problematic than those presented here. Outen v. Baltimore County, Md., 177 F.R.D. 346 (D. Md. 1998) (county officials' allegedly false representations

regarding severity of fiscal crisis did not amount to fraud on the court), aff'd, 164 F.3d 625 (4th Cir. 1998) (table); see also Weldon v. United States, 225 F.3d 647, 2001 WL 1134358 (2d Cir. 2000) (mischaracterization of evidence and affidavits submitted to court "does not rise to the level of fraud on the court"); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 193-96 (8th Cir. 1976) (allegations of "failure to investigate" certain facts which the Court found was "a serious error in judgment," various misrepresentations of facts, and presentation of legal arguments of questionable basis, taken together did not warrant a finding of civil contempt), cert. denied, 429 U.S. 1040 (1977); United States v. International Tel. & Telegraph Corp., 349 F. Supp. 22, 29 (D. Conn. 1972) ("Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.") (citation omitted), aff'd without op. sub nom. Nader v. United States, 410 U.S. 919 (1973).

CONCLUSION

In light of the severity of the contempt sanction, the Court should not resort to it "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." Life Partners, 912 F. Supp. at 11, citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882, 885 (Fed. Cir. 1985). The Court's inquiry in the present proceeding must carefully separate any legitimate frustration about the lack of progress

in certain areas of trust reform from the question of whether contempt is appropriate.[6] While it is undoubtedly true that the Department has not made the progress that it had expected at the time of Trial One, it is also undoubtedly true that Department officials have undertaken determined efforts both to improve their accounting capabilities and, equally importantly, to inform the Court of those efforts. Failing to reverse a legacy of problems and overcome obstacles to a historical accounting, however frustrating to the parties and this Court, does not itself merit a finding of contempt. And as explained in detail above, there simply is no factual or legal basis for such a finding upon the record presented by Plaintiffs.

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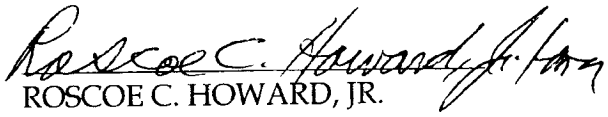
[6] As Mr. Thompson testified:

> I mean there are certainly people who worked very hard. There are some successes that can be pointed to, but overall you look at the result and this is certainly not where we hoped and wanted to be today.

Tr. at 154.

Respectfully submitted,



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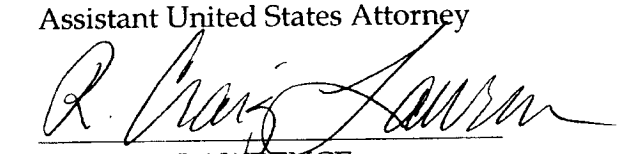

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CERTIFICATE OF SERVICE

I hereby declare that, on January 18, 2002, I served the foregoing motion for judgment on partial findings by facsimile only, in accordance with their written request of October 31, 2001, upon:

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