IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' FEBRUARY 15, 2002 MOTION FOR SANCTIONS AND A CONTEMPT FINDING PURSUANT TO FED. R. CIV. P. 56(G)

1. Introduction

Defendants submit this opposition to Plaintiffs' February 15, 2002 Motion for Sanctions And A Contempt Finding Pursuant to Fed. R. Civ. P. 56(g).

Defendants' Third Phase II Motion for Partial Summary Judgment ("Third Summary Judgment Motion" or "Third Motion") attempted to frame the difficult issues surrounding the accounting phase of this case and was a good-faith attempt to keep the litigation moving toward resolution notwithstanding the pending Phase I appeal. Plaintiffs, however, twist this effort. Plaintiffs then engaged in unfounded personal attacks in moving on February 15, 2002 for a contempt finding and other sanctions pursuant to Federal Rule of Civil Procedure 56(g), on the ground that Defendants allegedly filed affidavits in bad faith in conjunction with their Third Summary Judgment Motion.

Plaintiffs' argument that Defendants filed affidavits in bad faith derives from a willful misreading of the Third Motion's argument–an argument that Plaintiffs clearly understood at the time they filed their initial Opposition on November 3, 2000. Plaintiffs then point to isolated phrases from three other documents in Defendants' possession at the time the Third Motion was filed to argue that these documents are inconsistent with the Third Motion (as misread by Plaintiffs) and that Defendants therefore knowingly sought to perpetrate a fraud on the Court. These three documents are (1) the Declaration of Frank Sapienza filed with the Third Motion, (2) an August 27, 1999 letter regarding GAO documents, and (3) historical reports prepared by Morgan Angel & Associates, L.L.C. at Defendants' request. In a concluding salvo, Plaintiffs claim that a November 17, 2001 memorandum written by Joe Walker, more than a year after the filing of the Third Motion, is evidence of Defendants' efforts to perpetuate the fraud they allegedly committed by filing the Third Motion. As with Plaintiffs' analyses of the other documents on which they rely, this reading of the memorandum is unsupported by its text and is based entirely on taking isolated phrases out of context and supplying an interpretative spin lacking evidentiary basis.

A fair reading of the Third Motion and the other documents to which Plaintiffs refer reveals that Defendants filed the Third Motion and the attached Declaration in good faith and that they did not seek to perpetrate a fraud on this Court. That the Third Motion and Sapienza Declaration were filed in good faith does not require that the Third Motion prevail as a matter of law and that no disputed facts exist. If it did, there would be no need for courts to decide motions for summary judgment, or opportunities for parties opposing such motions to raise

genuine issues of material fact that remain in dispute. As demonstrated below, Defendants filed the Motion and Declaration in good faith, after a "reasonable inquiry into the law and facts of this case." Conn. Gen. Life Ins. Co. v. Thomas, 910 F. Supp. 297, 304 (S.D. Tex. 1995) (denying motions for sanctions under Rules 11, 26(g)(3), and 56(g)).

2. The Standard for Establishing "Bad Faith" Pursuant to Fed. R. Civ. P. 56(g)

Plaintiffs move for a contempt finding and other sanctions pursuant to Federal Rule of Civil Procedure 56(g), which provides as follows:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Fed. R. Civ. P. 56(g).

Rule 56(g) has been applied only rarely, and there appear to be no reported cases in which it was used as the basis for a contempt sanction. See 10B Wright & Miller, Federal Practice and Procedure § 2742 (stating that a contempt sanction pursuant to Rule 56(g) is a penalty that "does not appear to have been applied in any reported case" and that, in general, "[t]here appear to be few situations in which the courts have resorted to Rule 56(g)"); Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co., 866 F.2d 11, 15 (1st Cir. 1989) ("There is little case law applying Rule 56(g)."); accord Jaisan, Inc. v. Sullivan, 178 F.R.D. 412, 415 (S.D.N.Y. 1998).

A court may impose sanctions pursuant to Rule 56(g) only upon a showing that the party offering the affidavits did so "in bad faith or solely for the purpose of delay." Fed. R. Civ. P.

56(g). Although "bad faith" is not defined in the Rule or in the few cases applying it, see Jaisan, 178 F.R.D. at 415 ("The Rule does not define the term 'bad faith,' and there is little case law applying Rule 56(g)."), it is clear that the conduct alleged to be in bad faith must be especially reprehensible, going beyond mere negligence and evincing some element of intent. Thus, in "[t]he rare instances in which Rule 56(g) sanctions have been imposed, the conduct has been particularly egregious." Fort Hill Builders, 866 F.2d at 15; see also Jaisan, 178 F.R.D. at 415; Conroy v. Anchor Sav. Bank, 810 F. Supp. 42, 48 (E.D.N.Y. 1993). Even if misinformation has been negligently included in the affidavit, this does not amount to the bad faith necessary for the imposition of Rule 56(g) sanctions.[1] See Instituto Per Lo Sviluppo Economico Dell'Italia Meridionale v. Sperti Prods., Inc., 323 F. Supp. 630, 640 (S.D.N.Y. 1971) (holding that "plaintiff has failed to make a sufficient showing of bad faith" under Rule 56(g) because, inter alia, "[a]lthough it was negligent [for defendant] not to have verified the true facts . . . , the misstatement hardly amounts to bad faith").

No clear authority establishes the burden of proof necessary to demonstrate bad faith under Rule 56(g). As a general matter, however, civil contempt must be established by clear and convincing evidence. See Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1477 (D.C. Cir. 1995) (holding that "civil contempt . . . requires the petitioner to bear 'a heavy burden of proof, often

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[1]Because of the dearth of case law applying Rule 56(g), it has not been decided whether bad faith under the Rule is to be measured by an objective standard of reasonableness, or by the subjective intent of the party offering the affidavit. That mere negligence is insufficient, however, suggests that the standard for assessing bad faith contains at least some subjective component focused on the party's intent. As demonstrated below, Plaintiffs offer no plausible evidence of a bad-faith intent to defraud.

described as proof by clear and convincing evidence'") (citing Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co., 626 F.2d 1029, 1031 (D.C. Cir.1980)); see also Bradley v. United States, 14 Cl. Ct. 741, 744 (1988) (holding that "in order to show bad faith on the part of a Government official [pursuant to Rule 56(g)], the [plaintiff] must submit well-nigh irrefragable proof to sustain the charge, as it is presumed that Government officials act in an appropriate and lawful manner in the discharge of their duties") (internal citation omitted), vacated on other grounds, 870 F.2d 1578 (Fed. Cir. 1989)).

3. Plaintiffs Fail to Meet the Burden of Proof Necessary to Establish that Defendants Filed the Third Motion and Sapienza Declaration in Bad Faith, With Intent to Defraud the Court

A. The Context in which Defendants Filed the Third Motion and the Attached Sapienza Declaration

Defendants filed the Third Motion on September 19, 2000, as the final in a series of motions for partial summary judgment brought while appeal of the Phase I decision was pending and intended to frame the issues that would be at stake in Phase II. That Defendants filed the Third Motion (and the attached Sapienza Declaration) in an effort to move the litigation towards resolution is a clear indication that the filing was not done "solely for the purpose of delay." Fed. R. Civ. P. 56(g). Nor did Defendants file in bad faith.[2]

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[2]A Rule 56(g) motion requires a showing of prejudice as a result of the alleged bad-faith filing. See Hadley v. Gerrie, 124 B.R. 679, 686 (D.V.I.) ("The court will not impose sanctions under Rule 56(g) unless it is convinced that the Hoffman affidavit was presented in bad faith or solely for the purpose of delay. Moreover, the court may not apply sanctions when, although an affidavit was entered in bad faith, there was no prejudice to the opposing party." (citing Faberge, Inc. v. Saxony Prods., Inc., 605 F.2d 426 (9th Cir. 1979); 10B Wright & Miller, Federal Practice

Defendants filed the Third Motion approximately five months before the Court of Appeals held that Defendants' duties to Plaintiffs derive from "a general trust relationship which imposes distinctive obligation[s] in addition to those established by statute." Cobell v. Norton, 240 F.3d 1081, 1100 (D.C. Cir. 2001) (internal citation omitted). At that time, the law of the case, as established in this Court's December 21, 1999 opinion, was that "Plaintiffs' actionable rights in this case . . . are created by–and therefore governed by–statute." Cobell v. Babbitt, 91 F. Supp. 2d 1, 29 (D.D.C. 1999). The Court therefore dismissed Plaintiffs' common-law claims with prejudice. See id. at 58.

In the Third Summary Judgment Motion, Defendants argued that because Plaintiffs' actionable rights were statutory, Defendants' trust obligations could be determined only by discovering how "Congress defines the[se] . . . obligations . . . through the enactment of statutes or the authorization of regulations." Third Motion at 23. If Defendants "complied with the statutory and regulatory requirements governing the accounting for IIM accounts," the Third Motion reasoned, then "Defendants complied with their fiduciary obligation to account holders." Id. How these statutory and regulatory requirements compared to common-law trust obligations was, under this line of reasoning, irrelevant.

The Third Motion argued that between 1817 and 1951, the only statutory and regulatory law pertaining to Defendants' IIM accounting obligations consisted of the various statutes and

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and Procedure § 2742)), aff'd 952 F.2d 1392 (3d Cir. 1991) (Table). Plaintiffs have made no such showing. That evidence of prejudice is not offered is not surprising in light of the fact that, even if the documents cited by Plaintiffs are relevant, Plaintiffs possessed them before the Court ruled on the Third Motion, which, in any event, Defendants seek to withdraw.

regulations providing for the settlement of Indian disbursing agents' accounts. See Third Motion at 1-2. Indian disbursing agents were authorized to receive and disburse money on behalf of federal agencies, including money belonging to the IIM accounts. See id. at 2 n.2. Under governing law, these agents were required regularly to submit their accounts for settlement, first by the Indian Office in Washington, D.C. and then by a second agency. Until 1921, this second agency was the Department of the Treasury, and between 1921 and 1951, it was the General Accounting Office. See id. Settlement of the Indian disbursing agents' accounts entailed an examination of both the collections and disbursements that these agents had made. See id. at 16. Thus, as the Third Motion explained, "[t]his settlement process provided a regular and specific procedure for checking the accuracy of accounts maintained on behalf of individual Indians and was the only accounting or reconciliation required by law at the time." Id. Because Defendants complied with the only statutory and regulatory law then pertaining–albeit indirectly–to the accounting of IIM monies, the Motion contended that Defendants had satisfied their statutory accounting obligations as of 1951. The Third Motion never argued that the settlement process with which Defendants complied was equivalent to the accounting required under common-law trust principles, or even that it would conform to standard accounting practices in the public or financial sector today. To the contrary, the Motion was premised on this Court's December 21, 1999 holding–since modified by the Court of Appeals decision–that the scope of Defendants' accounting obligations is defined solely by statute.

In support of the Third Motion, Defendants filed, inter alia, the Declaration of Frank Sapienza, the then Director of the Indian Trust Accounting Division ("ITAD") of the General

Services Administration. See Declaration of Frank Sapienza ¶ 1 (Ex. 1). ITAD prepares accounting reports for cases heard by the Indian Claims Commission and the U.S. Court of Federal Claims. See id. At the time the Third Motion was filed, Sapienza had more than 25 years experience with ITAD and had been involved in more than fifty accounting cases filed by Indian tribes, which dealt "almost exclusively with [p]re-1951 accountings" and thus with the settlement of Indian disbursing agents' accounts. Id.

Defendants, however, did not rely exclusively on Sapienza's Declaration to establish the existence and nature of the settlement process. For example, they also submitted sealed exhibits, providing concrete examples of how the settlement of Indian disbursing agents' accounts could result, indirectly, in an accounting or reconciliation of IIM accounts. See Third Motion at Exs. 10-12 (Sealed Exs.).

B. Plaintiffs Base Their Argument that the GAO Letter Demonstrates Bad Faith on a Willful Misreading of the Third Motion, the Sapienza Declaration, and the GAO Letter

Plaintiffs argue that an August 27, 1999 letter to John Berry, Assistant Secretary–Policy Management and Budget, from Gene Dodaro, Principal Assistant Comptroller General, GAO ("GAO Letter") (Ex. 2), is inconsistent with Defendants' Third Summary Judgment Motion. Because Defendants possessed this letter at the time they filed the Third Motion, Plaintiffs assert, they knew the settlement "process did not constitute the accounting required by this Court in its December 21, 1999 order," and they therefore allegedly filed the Motion and the attached Declaration of Frank Sapienza in bad faith. Plaintiffs' Motion at 8. In addition, Plaintiffs claim

that Defendants' failure to disclose the GAO Letter at the time they filed the Third Motion contravened their duty to "bring . . . relevant evidence to the attention of the Court" and the "explicit discovery requests" made in Paragraph 35 of Plaintiffs' Sixth Formal Request for Production ("Sixth Request"). Id. at 8-9 and n.14.

i. Defendants Had a Good-Faith Basis For Concluding that the GAO Letter Was Consistent With the Third Motion and the Sapienza Declaration

Plaintiffs' argument that the GAO Letter proves the Defendants' bad faith is based on a willful misreading of the Third Motion, the Sapienza Declaration, and the GAO Letter. Plaintiffs misread these documents by focusing on isolated phrases, which they interpret only after divorcing them from the context in which they appear, and by playing off the inherent ambiguities of such terms as "accounting" and "audit."[3]

The GAO Letter, Plaintiffs observe, states that GAO "records do not establish that GAO conducted a 'final' GAO comprehensive audit of IIM accounts, nor do they establish any regular

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[3] See, e.g., DCAA Contract Audit Manual, § 2-001 (Jan. 2002) ("The term 'audit' is used to refer to a variety of types of evaluations of various types of data by a person other than the preparer of the data. There is no commonly accepted definition of precisely what constitutes an audit that can be assumed to apply to all cases in which the term is used. In order to be understood, the term 'audit' must be accompanied by an explanation (1) of the type of data being evaluated; (2) for data falling within the category of financial information, the auditing standards followed; and (3) if not otherwise implied by the standards, of the purpose and scope of work undertaken."), available at http://web2.deskbook.osd.mil/data/0018M002DOC.DOC; Matter of: Coleman Research Corp., No. B-278,793, 98-1 CPD, 1998 WL 179957 (Comp. Gen. Mar. 16, 1998) (unpublished) (citing section 2-001 of the DCAA Contract Audit Manual (July 1997)); see also In re Brown's Estate, 183 A.2d 307, 316 (Pa. 1962) ("There has been in Pennsylvania no uniform or universal understanding and interpretation of the word 'audit', and the practice of auditing and/or confirming a[] [trustee's] account differs widely [from county to county].").

practice of auditing IIM accounts." Plaintiffs' Motion at 5 (quoting GAO Letter (Ex. 2) at 2). This statement, they argue, is inconsistent with the Third Motion's claim that the settlement of Indian disbursing agents' accounts was a "regular and specific procedure for checking the accuracy of accounts maintained on behalf of individual Indians."[4] Id. at 8. n.12 (quoting Third Motion at 2).

But the Third Motion never asserted that the GAO settlement process constituted a "final GAO comprehensive audit," or for that matter, an accounting consistent with common-law trust principles. To the contrary, the Third Motion made the much narrower argument that the settlement process was the only applicable statutory and regulatory law pertaining to the accounting of IIM monies at the time and that Defendants complied with this law. The Third Motion made clear, however, that the settlement process provided for an indirect, rather than direct, audit of IIM accounts; it provided, in other words, for the settlement of the Indian disbursing agents' accounts and, through these, of any IIM accounts for which these agents were responsible. While it is possible to isolate particular phrases from the Third Motion that refer to the auditing of IIM accounts, these can be read fairly only in the context of the clear, overarching

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[4]Plaintiffs also make the totally unsupported allegation that because the GAO Letter refers to "numerous telephone conversations" with individuals from the Departments of Interior and Justice, "defendants and their counsel were badgering the GAO to provide an answer contrary to the facts." Plaintiffs' Motion at 5 n.8. Defendants contacted GAO because they sought to obtain as much information as possible about the GAO documents that they had found in the National Archives, which contained information relating to IIM accounts. See June 18, 1999 letter from John Berry to Gene Dodaro, at 1 (Ex. 3) ("seeking the assistance of GAO in evaluating these records" and in particular, "historical information about the nature of any accounting regarding individual Indian accounts," as well as help in "understanding how the documents might have been created and organized").

argument that any such auditing was an indirect result of the settlement process. Indeed, as the GAO Letter itself states, "audits of the IIM accounts . . . took place at various times from the 1920s through the 1950s." GAO Letter (Ex. 2) at 1 (emphasis added). Thus, the Third Motion's argument that the GAO had a regular practice of settling Indian disbursing agents' accounts is consistent with the GAO Letter's statement that GAO had not "conducted a 'final' GAO comprehensive audit of IIM accounts" and had no "regular practice of auditing IIM accounts."

Like the Third Motion itself, the Declaration of Frank Sapienza, detailing the process whereby Indian disbursing agents' accounts were settled prior to 1951, is careful to distinguish between a direct audit of IIM accounts and the indirect audit provided by the settlement of the disbursing agents' accounts.[5] Plaintiffs, however, obscure this distinction. Thus, the language of the Sapienza Declaration on which Plaintiffs rely to prove Defendants' alleged bad faith is presented as follows:

> In sum, between 1921 and 1950, three government agencies–the Indian Office (now the BIA), the Treasury Department, and the GAO–each dealt separately with [Individual Indian money] accounts. **All three agencies had separate accounting controls in place for ensuring that accounts were properly**

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[5]Plaintiffs argue that the fact that Defendants attach a declaration of Edward Angel "attesting to the authenticity and validity of documents utilized and relied upon by Sapienza" but had Sapienza, rather than Angel, discuss the settlement process "only serves to compound the fraud and crystallize the intent." Plaintiffs' Motion at 22 and n. 27. According to Plaintiffs, "[i]t was Angel and his firm that assisted in the preparation of the Useless Papers Report," and thus Angel should have written the declaration concerning the settlement process. Id. at 22. There is no rational basis for Plaintiffs' argument that Defendants' selection of Sapienza, rather than Angel, to write the declaration is evidence of intent to commit fraud. Defendants selected Sapienza because he was an accountant who had more than twenty-five years experience with the pre-1951 process whereby Indian disbursing agents' accounts were settled. Because of his professional experience, Sapienza was, in Defendants' good-faith opinion, uniquely suited to write a declaration describing this settlement process.

> **processed and the balances were accurately stated.** The Indian Office and the Treasury Department used internal control procedures to ensure the accuracy of the transactions they processed. **The GAO later audited those same transactions to provide their accuracy and validity, and any exceptions were promptly resolved.**

Plaintiffs' Motion at 14 (quoting Sapienza Declaration (Ex. 1) ¶ 52) (emphases added by Plaintiffs).[6]

Plaintiffs' insertion of the phrase "[individual Indian money]" in the first sentence of this quoted material significantly distorts Sapienza's actual language and clearly intended meaning. Sapienza's actual language was that "three government agencies–the Indian Office (now the BIA), the Treasury Department, and the GAO–each dealt separately with accounts." Sapienza Declaration ¶ 52 (emphasis added). Read in context, the term "accounts" clearly refers back to the preceding paragraphs' discussion of the Indian disbursing agents' accounts, and not to individual Indian money accounts. Thus, Paragraph 50 begins by observing that "[t]he best remembered feature of the first GAO was its receipt and review of the disbursing officers' accounts," and Paragraph 51 goes on to state that "[w]hen auditors could find no flaw in the account, they would clear, certify, and thus settle it." Sapienza Declaration ¶¶ 50-51.

Having mischaracterized the Third Motion and Sapienza Declaration as arguing that the GAO settlement process constituted an audit of the IIM accounts that went beyond the narrow dictates of then-applicable statute, Plaintiffs turn to the recent trial testimony of Thomas M. Thompson to bolster their mischaracterization. Mr. Thompson, they argue, recognized that the GAO settlement process was "merely a review of the disbursing officers' disbursements in

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[6]Plaintiffs mistakenly cite ¶ 46. See Plaintiffs' Motion at 14.

general–and not of the disbursing officers' IIM disbursements." Plaintiffs' Motion at 2. Defendants, however, never asserted that the settlement process served as a direct audit of IIM accounts, but to the contrary, explained that these IIM accounts were audited only indirectly in the process of settling the Indian disbursing agents' accounts. Furthermore, in the very testimony cited by Plaintiffs, Mr. Thompson did not deny, as Plaintiffs imply, that the settlement process provided "'an accounting or audit . . . of a beneficiary's account.'" Id. at 3 n.5 (citing Thompson Testimony, Contempt Trial II at 959 (Dec. 17, 2001)). Instead, he stated simply that "I haven't got enough specific information to be able to answer that question.'" Id. In addition, Plaintiffs distort Mr. Thompson's testimony by characterizing it as evidence that the settlement process "did not even purport to cover all IIM deposits and accruals" and was thus, they imply, sloppy or incomplete. Id. Shortly before the portion of Mr. Thompson's testimony that they quote, he described the "audit or . . . oversight process" as "pretty intensive," noting that "individual Indian disbursing agents' books or accounts were examined transaction by transaction, day by day" and "line by line." Thompson Testimony, Contempt Trial II at 957 (Dec. 17, 2001).

In spite of Plaintiffs' mischaracterization of Defendants' arguments, their own motion recognizes that Defendants never claimed that the GAO settlement process constituted a "'final' GAO comprehensive audit of IIM accounts" or a trust accounting of the IIM accounts. They assert that in a June 2, 2000 "meet and confer" regarding discovery pursuant to Paragraph 19 of the First Order of Production, "Fiscal Assistant Secretary, Don Hammond . . . informed the Special Master and plaintiffs in the presence of defendants' counsel that the 'settlement' of accounts process did not constitute an accounting of individual Indian trust funds." Plaintiffs'

Motion at 7. Plaintiffs cite Assistant Secretary Hammond's statement as evidence that Defendants "compounded their fraud." Id. But even assuming that Plaintiffs' recollection of the conversation is accurate, a point which the parties dispute,[7] Hammond's alleged statement supports the notion that Defendants had made clear, long before filing the Third Motion, that the pre-1951 settlements of Indian disbursing agents' accounts did not constitute a direct trust accounting of IIM accounts. Defendants' argument was not that the settlement process constituted such an accounting, but rather that this process was the only statutory and regulatory obligation regarding the auditing of IIM accounts that Defendants had at the time. Indeed, at least as far back as April 2000, Defendants informed Plaintiffs of their intention to file a Third Motion seeking partial summary judgment on precisely these statutory grounds. See May 26, 2000 letter from Phillip A. Brooks to Dennis M. Gingold (Ex. 5) ("As we informed you in early April, we intend to file a motion for summary judgment to the effect that the settlement of accounts process, conducted by the Department of the Treasury through approximately 1924 and the General Accounting Office through approximately 1953, satisf[ies] any obligation Defendants had, or have, regarding the 'accounting' sought in this action.")

Although Plaintiffs now argue that the Third Motion presents the settlement process as a comprehensive GAO or common-law trust accounting of IIM accounts, this was not the position they took in their Opposition to the Motion, filed on November 3, 2000. See Plaintiffs'

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[7]See June 16, 2000 letter from Brian L. Ferrell to Dennis M. Gingold (Ex. 4) ("[Y]ou have not accurately quoted Mr. Hammond, nor did Mr. Hammond say anything that is inconsistent with the defendants' position that the settlement of accounts process . . . satisf[ies] any obligation Defendants had . . . .").

Opposition to Defendants' Third Phase II Motion for Partial Summary Judgment ("Opposition"). In their Opposition, Plaintiffs argued that "Defendants' reliance on settlement statutes to set the contours of their duty to account to individual Indian trust beneficiaries is misplaced" because, as the Court of Appeals subsequently ruled, "the duties imposed on defendants are those that correspond to a trustee who exercises complete control and comprehensive management and administration of beneficiaries' trust assets." Opposition at 21. In other words, as of November 3, 2000, Plaintiffs recognized that the basis of Defendants' Third Motion was that: (1) Defendants' trust obligations were purely statutory; (2) prior to 1951, the settlement process was the only applicable statutory law; and (3) Defendants had complied with this law.

ii. Defendants Had a Good-Faith Basis For Concluding that the GAO Letter Was Consistent With the Third Motion and, Furthermore, It Was Not Responsive to Any Discovery Request

As described in detail above, and as Plaintiffs themselves have recognized, the argument advanced in the Third Summary Judgment Motion was that Defendants complied with the only statutory law then pertaining to the accounting of IIM monies, and not that the statutorily-mandated settlement process constituted "a 'final' GAO comprehensive audit of IIM accounts" or a "regular practice of auditing IIM accounts." GAO Letter (Ex. 2) at 2. Thus, Defendants had a good-faith basis for concluding that the Third Motion was consistent with the GAO Letter, and the fact that they did not bring the letter to the Court's attention did not constitute bad faith.[8]

[8]It should be noted, furthermore, that the GAO Letter itself explicitly states that GAO lacks "direct knowledge about the nature of any accounting regarding individual Indian accounts previously undertaken by GAO, or the standards or procedures used." GAO Letter (Ex. 2) at 1.

Defendants also had a good-faith basis for determining that the GAO Letter did not come within Paragraph 35 of Plaintiffs' Sixth Request for Production. Paragraph 35 seeks "[a]ll audits and reports from the General Accounting Office relating to allotted Indian trust lands or the IIM Trust Fund or both from the period 1887 to 1999." Sixth Request ¶ 35. The term "report" is not defined anywhere in the Sixth Request, or in the "Definitions and General Instructions" that the Sixth Request incorporates from Plaintiffs' First Set of Interrogatories. See Sixth Request; First Set of Interrogatories. The term "GAO report," however, is commonly recognized to refer to the official reports of the General Accounting Office. Such reports can be found on the GAO website under the heading "GAO reports" and in a Westlaw database called "GAO-RPTS" or "General Accounting Office Reports." See also About GAO Reports, available at http://www.gao.gov (distinguishing between GAO "reports" and correspondence (letters)"). Given the widespread understanding that the term "GAO Report" designates the official reports produced by the GAO, Defendants had a good-faith basis for concluding that the GAO Letter was not such a report and thus did not fall within the scope of Paragraph 35. Moreover, GAO reports responsive to Plaintiffs' request existed, and although Plaintiffs now claim otherwise, see Plaintiffs' Motion at 9 n.14, they were invited to inspect and copy them. See Attachment to June 7, 2000 letter from David F. Shuey to Dennis Gingold, at 3 (Ex. 6).

This lack of knowledge contrasts starkly with that of Frank Sapienza and lends credibility to the bona fides of any conclusion Defendants might have drawn that the letter was of limited evidentiary value.

C. Plaintiffs Base Their Argument that the Morgan and Angel Historical Reports Demonstrate Bad Faith on a Willful Misreading of the Third Motion, the Sapienza Declaration, and the Historical Reports

Defendants commissioned Morgan Angel & Associates, L.L.C. to produce an historical report on the disposition and destruction of so-called "useless papers" by the federal government and obtained a draft of this report early in 2000. See Disposition or Disposal? An Investigation into the Historical Disposition of Indian Trust Records (March 2000) ("Disposition or Disposal Report"). The Report that Plaintiffs term the "Useless Papers Report" (EY0002325-EY0002455) is actually a compilation of two separate Morgan and Angel reports ("E & Y Compilation") (Ex. 7) that was produced to Plaintiffs as a single report in the November 16, 2001 response to Plaintiffs' discovery request to Ernst and Young.[9] The first 57 pages of this E & Y Compilation (EY0002325-EY0002383) is the Disposition or Disposal Report in its entirety and was first produced to Plaintiffs on November 16, 2001. The second half of the E & Y Compilation (EY0002384-EY0002455) is actually the back end of a Report entitled "The Historical Development of Individual Indian Moneys: Policies and Problems" ("Historical Development Report"), which Defendants obtained in January-February 2000 and produced to Plaintiffs in its entirety on August 10, 2001, as Exhibit 4 to the Department of the Interior's Response to the First Report of the Court Monitor.

As with the GAO Letter, Plaintiffs cite isolated snippets of the E & Y Compilation to argue that it is inconsistent with the arguments advanced in the Third Motion and the Sapienza

[9]That these two reports were produced as a single report was a mistake that Defendants just discovered in drafting this Opposition to Plaintiffs' February 15, 2002 Motion.

Declaration and that Defendants therefore filed the Motion and Declaration in bad faith. In addition, Plaintiffs argue that Defendants' failure to produce the E & Y Compilation contravened the requirements of the First Order of Production and of Paragraph 4 of Plaintiffs' Second Formal Request for Production.

i. Defendants Had a Good-Faith Basis For Concluding that the Morgan and Angel Historical Reports Were Consistent With the Third Motion and the Sapienza Declaration

All but one of the phrases from the E & Y Compilation on which Plaintiffs rely to allege Defendants' supposed bad faith are from that portion of the compilation that was originally produced to Plaintiffs on August 10, 2001. This belies Plaintiffs' totally unfounded assertion that "[h]ad the former–and now recused–Justice and Interior attorneys (or even the named defendants) been privy to the November 16, 2001 production of information, plaintiffs doubt that this Court and plaintiffs would now know of the existence of this series of historical analyses."[10] Plaintiffs' Motion at 12 n.18. The fact is that a very large portion of the E & Y Compilation was produced to Plaintiffs by the former Justice and Interior attorneys on August 10, 2001.[11]

Plaintiffs argue that the E & Y Compilation is "replete with citations and references to the continual–and often intentional–destruction of irreplaceable Indian trust records." Plaintiffs'

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[10]The only phrase cited by Plaintiffs from the Disposition or Disposal Report–the portion of the E & Y Compilation that was not produced to them until November 16, 2001, after the current Justice Department team had come aboard–is the statement that "[d]ocument-specific accountings were rare." Plaintiffs' Motion at 13.

[11]Also, as noted below, the Morgan and Angel Reports are cited in the September 10, 2001 "Blueprint" published by the Office of Historical Trust Accounting.

Motion at 13. But Plaintiffs' suggestion that massive document destruction occurred is belied by those portions of the E & Y Compilation that they fail to cite. See, e.g., EY0002332 (Ex. 7) ("[W]ithout documentation specifying that sundry Indian trust fund records actually were destroyed by fire, or by other means associated with inadequate guardianship, or by any involuntary instrument, one cannot be certain that such destruction took place." (emphasis added)). Indeed, in the case of Indian disbursing agents' accounts settled by Treasury, as opposed to GAO, well over 95% of the accounts identified in the National Archives have been found and reviewed.[12] Furthermore, the fact that some trust documents have been destroyed is not inconsistent with the Third Motion's argument that Indian disbursing agents' accounts were settled according to the document-review process established under then-applicable law. That some of these documents were destroyed before this lawsuit was filed and that Defendants failed fully to comply with their obligation to preserve them is a serious problem, which Defendants have been trying to rectify. Moreover, Defendants have acknowledged that some trust documents are missing, including those related to the settlement of Indian disbursing agents' accounts. See, e.g., Defendants' Reply to Plaintiffs' Opposition to Defendants' Third Phase II

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[12]Attachment B to United States' Status Report to the Special Master of September 19, 2000, at 2 ("Of a total of approximately 2,378 settled accounts that Arthur Andersen identified in entries within RG 217 [i.e., the Records Group for Treasury settled accounts] . . . approximately 2,336 have been located and reviewed (Arthur Andersen will report final totals when the search has been completed)."); Paragraph 19 Document Production Procedures and Findings Report (Attachment B to Ex. 5 of Department of the Treasury's May 1, 2001 Motion for Determination That It Has Purged Contempt), at 96 n.135 (Jan. 31, 2001) (Arthur Andersen's final report stating that only "42 of the 2,378 settled account packages searched for were not located" and that "no evidence has been found to indicate that any of these packages actually contained responsive documents").

Motion for Partial Summary Judgment, at 19 ("The Defendants do not dispute that in the many decades between 1817 and the present a certain number of settled accounts have been lost."); United States' Status Report to the Special Master of October 18, 2000, at 3 n.2 ("ITAD has informed us that they checked out certain settled account packages from Records Group 411 at the Archives [i.e., accounts settled by GAO], and that these may have been lost by ITAD. We believe that this loss occurred prior to the filing of this lawsuit and was inadvertent."); Sapienza Declaration (Ex. 1) ¶ 56 ("I have determined that at least some of the settled accounts have not survived to the present time."). This problem, however, does not implicate Defendants' argument in the Third Motion that there was a document-based settlement process prescribed by then-applicable statutory and regulatory law and that Defendants complied with this process. As Plaintiffs themselves recognize, such document destruction simply makes it harder for Defendants now "to prove the truth of their claims." Plaintiffs' Motion at 13 n.19.

The portion of the E & Y Compilation on which Plaintiffs place greatest emphasis is a 1933 quote from Senator William King of Utah, stating that he and other senators were '"accustomed to endless queries and complaints by individual Indians and by tribes of Indians having to do with their stated inability to obtain from the Indian Bureau an accounting for their money, individual and tribal,'" and that, in the view of these senators, it is "a matter of 'elementary necessity for the Indians . . . to obtain an accounting or satisfactory reporting when they ask for it.'" Id. at 13-14 (quoting E & Y Compilation, at EY0002415-16). It is obviously regrettable that the government failed to provide accountings that the Indians with whom these senators spoke deemed satisfactory. Indeed, Defendants have repeatedly acknowledged the many

problems in the IIM system. That there were such problems, however, in no way undermines Defendants' narrow argument in the Third Motion that they complied with what they considered to be applicable statutory and regulatory law by submitting Indian disbursing agents' accounts to the mandatory settlement process.

Plaintiffs also argue that the statement in the E & Y Compilation that "[d]ocument-specific accountings were rare" is evidence that the settlement process did not involve document-based verifications of the Indian disbursing agents' accounts, as claimed in the Third Motion and the Sapienza Declaration. Plaintiffs' Motion at 13. A fair reading of the statement in context, however, clearly indicates that the term "accountings" does not refer to financial accountings or audits of any type. Instead, as the author of the statement declares in his attached Declaration, "accounting" is used in its more "generic" sense, as a "reporting of facts–in this case, the disposition or destruction of financial records." Declaration of William A. Morgan ¶ 4 (Feb. 27, 2002) (Ex. 8); see also 1 The New Shorter Oxford English Dictionary 15 (1993), "accounting" ("1. Reckoning, counting."). That the term "accounting" is not used in its financial sense is confirmed by the text surrounding the statement. The immediately preceding discussion describes various decisions made by the Departments of the Interior and the Treasury to dispose of or destroy documents deemed useless. The discussion that follows the statement concerns reports of such document disposition or destruction and the extent to which such reports list specific documents. In this context, it is clear that the statement "[d]ocument-specific accountings" means reports itemizing specific documents that were disposed of or destroyed.

Plaintiffs not only obscure the meaning of this statement by suggesting that it is evidence

that the GAO settlement process did not result in an indirect audit of IIM funds, but they also fail to mention the numerous references contained in the E & Y Compilation to GAO "audits" of IIM accounts. See, e.g., E & Y Compilation (Ex. 7) at EY0002391 (stating that the "newly created General Accounting Office . . . would audit IIM accounts"); EY0002392-93 (explaining how "the acting Comptroller General described the audit process for Individual Indian Moneys" in his Annual Report for 1938);[13] EY0002410 (describing "an audit of tribal and individual moneys in banks" undertaken by GAO); EY0002418 (stating that "[t]he GAO continued to audit individual Indian money accounts"); EY0002433 (describing how "[f]ield auditors of the BIA would audit IIM accounts"); and EY0002454 (describing "[t]he 1956 General Accounting Office audit of Individual Indian Moneys"). Indeed, according to the E & Y Compilation, such "audits" entailed an examination of both collections and disbursements. See note 13, below.

Finally, Plaintiffs argue that the statement from the E & Y Compilation that "[t]he bulk of GAO's audit work involved checking vouchers" serves to corroborate the GAO Letter. Plaintiffs' Motion at 13. However, the fact that a large part of GAO's audit work consisted of checking vouchers in no way contradicts the description of the settlement process outlined in the Third Motion and the Sapienza Declaration, and is in fact fully consistent with it. For example, the Third Motion cited a letter from the Comptroller General of the United States to explain that

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[13]Under the heading "Individual Indian Moneys," the Report states: "These accounts embrace an accounting by agents of the Indian Service for private funds of individual Indians received and disbursed. The audit consists of a determination as to compliance with the laws, regulations and decisions governing the expenditure of Indian moneys. The complete accounting embraces both collections and disbursements for the account of the individual Indian." E & Y Compilation (Ex. 7) at EY0002393 (citing Annual Report of the Acting Comptroller General of the United States at 21 (1938)).

Indian disbursing agents' "[s]chedules of collections are supported with copies of official receipts issued for the moneys collected, and all disbursements are supported by vouchers or other documents showing the expenditures to have been properly authorized." Third Motion at 16.

ii. Defendants Had a Good-Faith Basis For Concluding that the Morgan and Angel Historical Reports Were Consistent With the Third Motion and, Furthermore, They Were Not Responsive to Any Discovery Request

As described above, Defendants had a good faith basis for concluding that the Disposition or Disposal Report and the Historical Development Report were consistent with the Third Motion and the Sapienza Declaration. Thus, they made a good-faith determination that they were under no obligation to bring these two reports ("Morgan and Angel Reports") to the Court's attention at the time they filed the Third Motion.

Plaintiffs, however, claim that Defendants were obligated to produce the Morgan and Angel Reports in response to the First Order of Production ("First Order") and Paragraph 4 of Plaintiffs' Second Formal Request for Production ("Second Request"). Although Plaintiffs do not identify the paragraphs of the First Order to which they believe the Reports are responsive, the only one broad enough would appear to be Paragraph 19. First Order ¶ 19 ("All documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest."). As for Paragraph 4 of the Second Request, it calls for:

> [a]ll memoranda and other documents which relate to problems or concerns of BIA or OTFM personnel in connection with the retrieval of documents relevant to the five named Plaintiffs in this action, including but not limited to problems and concerns associated with the transfer of IIM records from BIA area and agency

offices to the OTFM in Albuquerque . . . .

Second Request ¶ 4.

The Morgan and Angel Reports in question are broad-brushed historical surveys of the IIM accounts in general, the federal government's audits and investigations of these accounts, and the federal government's disposition and destruction of documents deemed "useless." See, e.g., Historical Development Report, at 1 (describing "three-part examination" that Defendants asked Morgan and Angel to undertake); Disposition or Disposal Report, at 1 (same). Because these Reports are so broad in scope, Defendants had a good-faith belief that they do not "embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest," or "relate to problems or concerns of BIA or OTFM personnel in connection with the retrieval of documents relevant to the five named Plaintiffs." Indeed, the Reports are analyses of publicly available information.

Furthermore, even if Defendants were mistaken in their conclusion that the Morgan and Angel Reports do not fall within the terms of the First Order and Second Request, they had a good-faith belief that they were protected by the work-product privilege. In his May 12, 1999 Opinion and Order, the Special Master held that work-product protection will be afforded Defendants for documents "prepared and created solely for use by counsel in anticipation of or in the course of this litigation." May 12, 1999 Order at 13. However, "[t]o the extent that the documents were created or used for any other purpose, including specifically . . . discharging the Defendants' legal responsibilities by corrective measures or otherwise," the Special Master held that "no work-product privilege shall attach." Id.

As of September 19, 2000, when Defendants filed the Third Summary Judgment Motion, they had a good-faith belief that these Morgan and Angel Reports had been prepared for use in the litigation and were not then being used for another purpose. See, e.g., Historical Development Report, at 1 ("On September 3, 1999, William Morgan and Edward Angel met with government attorneys to discuss how Morgan, Angel, and Associates could assist the United States in Eloise Pepion Cobell, et al. v. Bruce Babbitt, et al."); Disposition or Disposal Report, at 1 (same).[14] Developments since that time have caused Defendants to cease asserting the work-product privilege with respect to these Reports. In particular, the Office of Historical Trust Accounting ("OHTA") was created by Secretarial Order on July 10, 2001 for the purpose of planning and executing an historical accounting of IIM accounts. See United States Department of the Interior, Secretarial Order No. 3231 (July 10, 2001). On July 12, 2001, the various Morgan and Angel Reports, including the Disposition or Disposal Report and the Historical Development Report, were transmitted to OHTA on the direction of the Justice Department team, which sought to provide OHTA with all historical background research that had already been undertaken. See Letter from Michael P. Kingsley to Jeffrey Zippin (Ex. 9); Declaration of Michael P. Kingsley (Ex. 10). At the time these Reports were transmitted to OHTA, they ceased to be documents created solely for the litigation and became documents that were to be used to "discharg[e] the Defendants' legal responsibilities by corrective measures or otherwise." May 12,

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[14]It should be noted that Plaintiffs too maintain that the work product of experts is not producible until they testify. See, e.g., Plaintiffs' Response to Defendants' Request for Production of Documents and Requests for Admission of September 21, 1999, at 2-4 (objecting that requests for expert reports would "requir[e] the production of information and documents that are protected as attorney work-product").

1999 Order at 13; see also Attachment D to OHTA's Blueprint for Developing the Comprehensive Historical Accounting for Individual Indian Money Accounts at D-3 (September 10, 2001) (bibliography listing, inter alia, both Morgan and Angel Reports).

D. Plaintiffs Base Their Argument that Joe Walker's Memorandum Demonstrates Continued Bad Faith on a Willful Misreading of the Third Motion, the Sapienza Declaration, and the Memorandum

Plaintiffs cite as evidence of a fraud on this Court a memorandum written by Joe Walker on November 17, 2001, at which time he was detailed from BIA to OHTA. Memorandum of Joe Walker ("Walker Memorandum") (Ex. 11). According to Plaintiffs, the memorandum

> in thinly veiled language sets forth the recommendation that the Interior defendants' lawyers should be encouraged to defraud this Court by pressing for a ruling on the Third Motion for summary judgment while at the same time suppressing the GAO letter and other related evidence that would highlight and make clear the misrepresentations that defendants and their counsel had made.

Plaintiffs' Motion at 15.

Plaintiffs refer to the first of four recommendations made by Walker:

> 1. DOI should press DOJ with great vigor to seek a ruling on Summary Motion Number Three which was filed in 2000, **approximately a year after being alerted to the role of the GAO in stating accounts. This could prove** of great value to "Cobell" and **an immeasurable benefit to the challenge of performing a historical accounting. The lawyer should be extremely well versed** in the history of the GAO prior to going [sic] the hearing.

Id. at 16 (citing Walker Memorandum) (emphases added by Plaintiffs).

They speculate that the underscored language refers to the GAO Letter and that Walker's

recommendation was an effort to perpetrate a fraud on the Court.[15] See id.

Plaintiffs' interpretation of the Walker Memorandum as evidence of an attempt to perpetrate fraud on the Court is based on a reading that is unsupported by the language of the memorandum itself and derives entirely from Plaintiffs' unfounded speculations about Walker's intent. The fact is that Walker's memorandum never mentions the GAO Letter. (And even if it did, Defendants had a good-faith basis to believe that the GAO Letter was not inconsistent with the Third Motion, was not subject to any discovery request, and thus did not have to be produced.)

As its title indicates, Walker's memorandum is a "Preliminary Report of Joe Walker on Review of GAO Records at the Federal Records Center in Chicago." Walker Memorandum at 1 (Ex. 11) (emphasis added). After describing the documents reviewed, Walker provides his own personal recommendations about where and how to conduct future searches and about how this search implicates the Cobell litigation. No rational basis exists for interpreting Walker's statement that, approximately one year before filing the Third Motion, Defendants were "alerted to the role of the GAO in stating accounts" as a veiled reference to the GAO Letter. Indeed, a far more reasonable interpretation of this language is that it refers to Defendants' discovery,

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[15]As described below, Plaintiffs offer no rational basis for this conclusion. In addition, they fail to note that in a December 3, 2001 "Addendum to Joe Walker's Report of November 17, 2001", Jeffrey Zippin, OHTA's Deputy Director, rejected Walker's recommendation. See Addendum to Joe Walker's Report of November 17, 2001, at 2 (Ex. 12) (stating, in response to "Mr. Walker's Recommendation Number One," that "[r]ather than 'press DOJ with great vigor to seek a ruling on Summary Motion Number Three,' we would like to discuss with the DOJ the appropriate role and responsibilities of the GAO in the *Cobell* litigation, Paragraph 19 document production, and in the historical accounting").

approximately one year before filing the Third Motion, that there was a large cache of GAO documents in the National Archives–a discovery by means of which, as the memorandum itself asserts, Defendants were "alerted to the role of the GAO in stating accounts." See Direct Examination of Ken Rossman, Phase I trial, at 1869-70 (June 24, 1999) (stating, in response to a question regarding "recent . . . discoveries" of GAO documents by Interior, that "they have discovered a cache of–tons, I think, would be a fair description, of GAO records, beginning in the 1950's, and working back to the turn-of-the-century when, in fact, they were Treasury records before" and that "[t]hese are in the National Archives").

Likewise, no rational basis exists for concluding that Walker's recommendation that any lawyer arguing the Third Motion "be extremely well versed in the history of the GAO" is coded language directing that counsel be prepared to conceal the GAO Letter and its facts. This letter neither refers to the GAO Letter nor advocates its concealment. Instead, it makes the obvious, common-sense point that a lawyer arguing a motion based, in part, on the process whereby Indian disbursing agents' accounts were settled by GAO ought to be familiar with the "history of GAO." This point is especially understandable where, as here, the subject-matter of the motion–the history of the GAO and its involvement in the settlement process–is so indisputably complex.

4. Conclusion

Plaintiffs have failed to meet the burden of proof necessary to establish that Defendants filed the Third Motion and the attached Sapienza Declaration with a bad-faith intent to defraud the Court. Their motion for a contempt finding and sanctions is based on a willful misreading of

the documents they cite, in which they interpret isolated phrases divorced from any context and play off the inherent ambiguities in such terms as "accounting" and "audit." Contrary to Plaintiffs' baseless assertions, which contradict their own prior brief in opposition to the Third Motion, Defendants filed the Third Motion and the Sapienza Declaration in a good-faith attempt to frame the difficult issues surrounding the accounting phase of this case. As Plaintiffs' motion lacks any foundation and serves only to deflect valuable time and resources away from the reforms they ostensibly seek, it must be denied.

Dated: March 1, 2002

Respectfully submitted,

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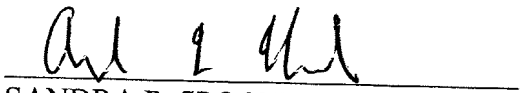

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' Motion for Sanctions and a Contempt Finding Pursuant to F.R.C.P. 56(g), filed on February 15, 2002 ("Motion"), and Defendants' Opposition thereto, it is by this Court hereby,

ORDERED that the aforementioned Motion is DENIED.

Date: _____

_____
Honorable Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 1, 2002, I served the foregoing Defendants' Opposition to Plaintiffs' February 15, 2002 Motion for Sanctions and a Contempt Finding Pursuant to Fed. R. Civ. P. 56(G), by facsimile only, in accordance with their written request of October 31, 2001, upon:

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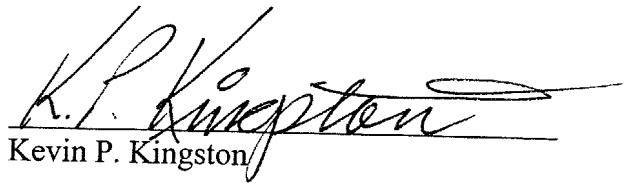

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