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.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND BERT T. EDWARDS, EXECUTIVE DIRECTOR – OFFICE [of] HISTORICAL TRUST ACCOUNTING, SHOULD NOT BE HELD IN CIVIL AND CRIMINAL CONTEMPT

This brief is submitted on behalf of the Secretary of the Interior and the Assistant Secretary – Indian Affairs ("Interior Defendants") and Bert T. Edwards in his official capacity in opposition to *Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards, Executive Director – Office [of] Historical Trust Accounting Should Not Be Held in Civil and Criminal Contempt for Lying Under Oath Regarding the Nature and Scope of the Historical Accounting* (served Feb. 26, 2003) ("Plaintiffs' Motion").[1] With this motion, plaintiffs have now

[1]Government counsel and private counsel for Mr. Edwards filed a motion for enlargement of time to and including March 27, 2003 in which to file their oppositions to Plaintiffs' Motion. *Interior Defendants' and Bert T. Edwards' Motion for Enlargement of Time to Respond to Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards, Executive Director – Office of Historical Trust Accounting, Should Not be Held in Civil and Criminal Contempt* (filed Mar. 7, 2003); *see also Notice of Errata* (filed Mar. 10, 2003); *Further Notice of Errata* (filed Mar. 11, 2003). Also on March 7, 2003, Government counsel and Mr. Edwards' private counsel filed a motion for expedited review. On March 20, 2003, plaintiffs opposed the motion for enlargement. Government counsel and Mr. Edwards' reply is due on March 31, 2003. The Court has

(continued...)

sought contempt sanctions against some five dozen current and former government employees. While Plaintiffs' Motion is replete with invective – an unfortunate characteristic of their pleadings – it is bereft of legal and factual support for the severe sanctions they seek to impose upon Interior Defendants and Mr. Edwards.

Plaintiffs' Motion is essentially a cut-and-paste of Section IV of *Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts* (dated Jan. 31, 2003) ("Historical Accounting Plan"). With the same recklessness as in that response, Plaintiff's Motion makes unwarranted attacks on Mr. Edwards' integrity by deliberately misstating and unfairly skewing certain statements made by Mr. Edwards in his December 18, 2002 deposition and in a portion of his resume. Most of plaintiffs' "refutations" amount to no more than disagreements with Mr. Edwards' testimony – hardly a basis for sanctions. And plaintiffs themselves have omitted material portions of that testimony in a manner that could mislead the Court. Indeed, Plaintiffs' Motion is so flawed legally and factually that it cannot stand.

First, plaintiffs have not presented a *prima facie* case of contempt, let alone made the heightened showing necessary to establish criminal contempt or commission of fraud on the court. Plaintiffs identify no court order that they claim was violated, and thus they fail to allege an essential element of civil contempt or of criminal contempt. To the extent that plaintiffs charge Interior Defendants and Mr. Edwards with committing a fraud on the court, plaintiffs have failed to address two essential elements: that Interior Defendants or Mr. Edwards intended to deceive or defraud

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[1](...continued)
not yet ruled on the motion for enlargement.

the Court, and that the conduct of Interior Defendants or Mr. Edwards has in any way prejudiced plaintiffs in presenting their case or affected a court ruling.

Second, plaintiffs have not presented evidentiary support for their charges that Mr. Edwards made any material misrepresentations, as opposed to simply stating his own recollection and opinion of matters. Plaintiffs likewise have failed to support their claim of intentional misconduct by Interior Defendants or Mr. Edwards.

Third, sovereign immunity precludes the imposition of civil penalties or criminal sanctions against Interior Defendants and Mr. Edwards in their official capacities.

Although plaintiffs accuse Interior Defendants and Mr. Edwards of "contempt" and "fraud on the court", plaintiffs themselves have flouted court directives in filing this motion. *See Interior Defendants' (1) Motion and Memorandum to Strike Plaintiffs' References to and Quotation of the Content of "Attachment C" in (A) Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards Should Not Be Held in Civil and Criminal Contempt, and in (B) Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts; and (2) Notice of Plaintiffs' Violation of Protective Order in Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards Should Not Be Held in Civil and Criminal Contempt* (**filed under seal** Mar. 27, 2003). Plaintiffs have violated the Court's November 27, 1996 Protective Order by including as exhibits to their motion two documents that the government clearly marked as protected (Exhibits 3 and 7). Plaintiffs published these exhibits in full on their website. Although the government requested that they remove these documents from their website and from the public record and refile the documents under seal, plaintiffs refused to do so. They have also refused to follow the procedures

set out in the Protective Order for challenging the documents' designation as protected. Similarly, plaintiffs' have ignored the Court's October 18, 2002 Order directing that "Attachment C" be kept under seal and that its contents not be published. Plaintiffs have quoted substantial portions of "Attachment C" verbatim at page 19 of their motion. *Id.* Given plaintiffs' clear violations of court orders within the four corners of their motion, the Court should consider disregarding the motion entirely.

Argument

Plaintiffs contend that contempt sanctions are warranted based on testimony given by Mr. Edwards in his December 18, 2002 deposition and based on certain material in his November 26, 2001 declaration. Plaintiffs' Motion, however, fails to set forth the requisite *prima facie* case that, if believed, would be sufficient to sustain a finding under the appropriate standard of proof that Interior Defendants and Mr. Edwards committed civil or criminal contempt or committed a fraud on the court. Consequently, Plaintiffs' Motion should be denied.

I. Plaintiffs Have Failed to Demonstrate that Issuance of Show Cause Orders for Civil Contempt is Warranted.

A. Legal Standards

The standards for civil contempt have been set forth in the contempt hearings in this case, *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) ("*Cobell I*"), and *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002) ("*Cobell II*"), and other cases in this circuit. As the Court stated in *Cobell II:*

> Two elements must be established before a party may be held in civil contempt for violating an order. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993). First, the Court must have issued an order that is clear and reasonably specific. *Id.* at 1289; *Project B.A.S.I.C. v. Kemp,* 947 F.2d

> 11, 16-17 (1st Cir. 1991) (noting that in order for a party to be held in civil contempt, the court must have issued "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 whether an order is clear and reasonably specific, courts apply "an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order." *United States v. Young,* 107 F.3d 903, 907 (D.C. Cir. 1997). *See also Project B.A.S.I.C.,* 947 F.2d at 16-17 (finding that "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden [] or what acts are required."). Second, the putative contemnor must have violated the court's order. *Armstrong,* 1 F.3d at 1289 (recognizing that "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous.").

Cobell II, 226 F. Supp. 2d at 21. Thus, a party seeking a finding of contempt must initially show, by clear and convincing evidence, that (1) a court order was in effect, (2) the order clearly and unambiguously required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *Petties v. District of Columbia*, 897 F. Supp. 626, 629 (D.D.C. 1995). Once the movant has made a *prima facie* showing that the respondent did not comply with the court's orders, the burden shifts to the respondent to produce evidence justifying the noncompliance. *Bilzerian*, 112 F. Supp. 2d at 16.

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997), *quoting NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The goal of a civil contempt order is not to punish, but to exert only so much of the court's authority as is required to assure compliance. *Petties*, 897 F. Supp. at 629.

B. Plaintiffs Have Not Shown that Interior Defendants or Mr. Edwards Violated a Court Order.

Violation of a court order is a prerequisite to civil contempt. *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 738 (7th Cir. 1999) ("irrespective of the nature of the civil contempt, whether it be coercive or remedial, any sanction imposed by the court must be predicated on a violation of an explicit court order."), *cert. denied*, 529 U.S. 1067 (2000); *Russell v. Sullivan*, 887 F.2d 170, 171 (8th Cir. 1989) (*per curiam*) (District Court lacked jurisdiction over motion for civil contempt order for failure to pay attorney's fee since there was no court order directing payment of fees), *cert. denied*, 494 U.S. 1027 (1990). Since Plaintiffs' Motion identifies no order that Interior Defendants or Mr. Edwards are supposed to have violated, their motion must be dismissed for failure to allege a basic element of a claim for civil contempt. Plaintiffs strain to claim that the Court's December 13, 2002 order requiring Mr. Edwards to appear for deposition in December 2002 satisfies this element of the legal standard for civil contempt. However, "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden[] or what acts are required." *Cobell II*, 226 F. Supp. 2d at 21, *quoting Project B.A.S.I.C. v. Kemp,* 947 F.2d 11, 16-17 (1st Cir. 1991). Plaintiffs do not say what part of the Court's December 13, 2002 order Mr. Edwards supposedly violated. The record shows that he appeared on the date appointed by the Court and that he answered questions beginning at 9:29 am and ending at 6:01 pm with various breaks during the day. Govt. Ex. 1 (Edwards Dep. at 1, 373). That plaintiffs may not have liked Mr. Edwards' answers or may offer evidence at some future trial in an effort to counter

his statements does not by any stretch support a claim that he violated the Court's December 13, 2002 order.[2]

C. Even If Plaintiffs Could Show a Violation of a "Clear and Unambiguous" Order, Imposing Coercive Civil Contempt Sanctions Here Would Be Inappropriate.

Civil contempt sanctions are used either to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance. *Food Lion*, 103 F.3d at 1016. Coercive contempt sanctions are intended to force the offending party to comply with the court's order. *Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993). Compensatory contempt sanctions compensate for damages that the offending party has caused the other party by its contempt. *Id.* As discussed below, the doctrine of sovereign immunity precludes the imposition of compensatory sanctions for civil contempt against Mr. Edwards in his official capacity. Further, coercive sanctions are not appropriate here.

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[2]The cases cited by plaintiffs do not support a departure from the standard set forth in *Armstrong* and other authorities that have articulated the standards for civil contempt. *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999), involved failure to provide truthful testimony to a specific line of questions the judge had required the deponent to answer, both in an oral order given at the deposition itself and in a prior written order. The judge found that the failure to give truthful, non-evasive responses constituted contempt of discovery orders under Fed. R. Civ. P. 37(b)(2). By contrast, this Court's December 13, 2002 order addressed only the question of **when** Mr. Edwards should be deposed and did not require him to respond to any particular question or line of questioning. Thus, the December 13, 2002 order cannot meet the *Armstrong* requirement of a "clear and unambiguous" order for purposes of proving a contempt. Plaintiffs' reliance on *United States v. Watt*, 911 F. Supp. 538 (D.D.C. 1995), is entirely inapposite, in that the portion they cite did not even involve a contempt allegation, but rather a specific statute, 18 U.S.C. § 1503, that concerns false testimony given to a grand jury. Plaintiffs are not a grand jury, nor is this action a criminal investigation, and the statute is thus plainly inapplicable to the Edwards deposition. Moreover, the Court observed in *Watt* that the government would be required to prove not only that a false statement had been made to the grand jury, but additionally that such false statement had resulted in "obstruction to the Court in the performance of its duty." 911 F. Supp. at 546-47 (internal citation omitted). As noted above, plaintiffs have not attempted to demonstrate that any of the testimony they criticize has obstructed the Court in the performance of its duties.

Plaintiffs do not explain what value coercive sanctions would have in this instance. It is not as if Mr. Edwards did not appear for deposition or refused to answer plaintiffs' questions. Plaintiffs simply disagree with Mr. Edwards regarding certain of his recollections, positions and opinions. In the absence of any evidence that these recollections, positions and opinions were not honestly held, it is improper for the plaintiffs to suggest that the Court direct Mr. Edwards to alter his responses to plaintiffs' questions or punish him and Interior Defendants for those answers. If plaintiffs have contradictory arguments or evidence to offer concerning the scope of the historical accounting required under the 1994 Act and the efforts made by Mr. Edwards and the Department of the Interior (the "Department") to carry out an historical accounting, they should do so in an appropriate proceeding on the merits, not in a show cause motion.

Plaintiffs have also failed to demonstrate that they have suffered damages from the specific conduct about which they complain. They attempt to assign Mr. Edwards "indirect responsibility" for events that took place before he even joined the Department (Plaintiffs' Motion at 2 n. 3), but make no explanation as to how Mr. Edwards' deposition responses or declaration have caused them to incur any damages.

II. Plaintiffs Have Failed to Demonstrate that Issuance of Show Cause Orders for Criminal Contempt Are Warranted.

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

In asking that Mr. Edwards be held in criminal contempt, plaintiffs do not identify any legal standard for their claim. In the past, plaintiffs have invoked 18 U.S.C. § 401(3),[3] which permits the

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[3]*See Interior Defendant's Motion to Dismiss Plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt in Connection With the Overwriting of Backup Tapes and "Bills of Particulars"*
(continued...)

court "to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful . . . order." To convict a defendant of criminal contempt under § 401(3), the Court must find, beyond a reasonable doubt, that the defendant willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach*, 108 F.3d 1477, 1481 (D.C. Cir.), *cert. denied*, 522 U.S. 983 (1997), *citing United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993), and *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir. 1987). For a violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *Roach*, 108 F.3d at 1481, *citing In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994), and *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974). Thus, in order to support a referral for criminal contempt, plaintiffs must initially show, by clear and convincing evidence, that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by Mr. Edwards, and (3) that Mr. Edwards willfully violated the court's order.

As discussed in Part II(B), below, sovereign immunity bars the imposition of sanctions for criminal contempt or compensatory civil sanctions against Interior Defendants and Mr. Edwards in his official capacity. Moreover, § 401(3), the statute upon which plaintiffs have previously relied, requires disobedience or resistance to a "lawful writ, process, order, rule, decree or command." Plaintiffs have not identified a writ, process, order, rule, decree or command which they allege Mr. Edwards disobeyed or resisted. As demonstrated in Section I(B), above, the December 13, 2002

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[3](...continued)
Filed by Plaintiffs in Support of Such Motion (filed Jan. 6, 2003) at 14.

order is an insufficient basis for criminal contempt for the same reasons it is an insufficient basis for civil contempt: the order specified only the date and location of Mr. Edwards' deposition, and there is no dispute that he appeared on that date, and in that location, and answered questions put to him. Therefore, Plaintiffs' Motion must be dismissed for failure to allege a basic element of criminal contempt.

B. Sovereign Immunity Precludes the Imposition of Criminal Penalties or Compensatory Sanctions for Civil Contempt Against Interior Defendants or Mr. Edwards in His Official Capacity.

Plaintiffs request civil penalties and criminal sanctions against Interior Defendants and Mr. Edwards. Because of sovereign immunity, these forms of sanctions are not available against the government or against Mr. Edwards in his official capacity.[4]

The doctrine of sovereign immunity bars the imposition of fines, penalties or monetary damages against the government, except to the extent that the United States has explicitly consented to such sanctions. "[The doctrine of sovereign immunity] stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *Id.* at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

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[4]"As long as the government entity receives notice and an opportunity to respond, a suit against a government employee in his official capacity is to be treated as a suit against the entity." *Coleman*, 986 F.2d at 1189, *citing Kentucky v. Graham,* 473 U.S. 159, 166 (1985). *See also Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein.

The United States has not waived sovereign immunity from citation for criminal contempt, nor for court-imposed fines for civil contempt. *Coleman v. Espy*, 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed Case*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) (*per curiam*) ("...it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt. . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[5] Similarly, the court in *In re Newlin*, 29 B.R. 781, 785 (E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt.

To the extent that plaintiffs are seeking money damages other than attorney's fees and costs, their claims are barred because the United States has not waived its immunity to the imposition of compensatory monetary damages based on contempt. *Coleman*, 986 F.2d at 1191; *Horn*, 29 F.3d at 763; *McBride v. Coleman*, 955 F.2d 571, 577-78 (8th Cir.), *cert. denied sub nom. McBride v. Madigan*, 506 U.S. 819 (1992); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989).

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[5]As the Court acknowledged in *Cobell II*, whether a court can order the government to compensate a party for losses sustained as a result of the government's contempt has not been decided by the Court of Appeals in this Circuit. *Cobell II*, 226 F. Supp. 2d at 154 n.163. The District Court in *United States v. Waksberg*, 881 F. Supp. 36, 41 (D.D.C. 1995), *vacated and remanded*, 112 F.3d 1225 (D.C. Cir. 1997), held that sovereign immunity barred recovery of damages as compensation for the government's violation of an injunctive order. The Court of Appeals vacated and remanded with directions to withhold a ruling on the sovereign immunity issue pending a determination on whether Waksberg had incurred damages. 112 F.3d at 1228.

The determinations in this case that sovereign immunity does not bar either plaintiffs' claim for prospective action or their claim for retrospective relief in the form of an accounting[6] have no bearing on the separate issue of whether the government has waived sovereign immunity for money damages for civil contempt. A waiver of sovereign immunity as to one available remedy does not, by implication, waive sovereign immunity as to other remedies. *See Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990) (waiver of sovereign immunity as to back pay awards for discriminatory denial of promotion did not waive sovereign immunity for prejudgment interest on such back pay awards), *cert. denied,* 502 U.S. 810 (1991). Moreover, the holdings that sovereign immunity did not bar plaintiffs' claims were based explicitly on the finding that plaintiffs were not seeking money damages. *See Cobell v. Babbitt*, 52 F. Supp. 2d 11, 21 (D.D.C. 1999) ("defendants' sovereign immunity in the context of this case is simply not an issue as long as plaintiffs do not seek money damages.").

III. Plaintiffs Have Not Shown That Interior Defendants or Mr. Edwards Committed a Fraud on the Court.

The standards required for a finding of "fraud on the court" are more stringent than those for contempt based on violation of a court order. "Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.*, 98 F.3d 640, 642 (D.C. Cir. 1996), *quoting Bulloch v. United States,* 721 F.2d 713, 718 (10th Cir. 1983).

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[6]*See Cobell v. Babbitt*, 30 F. Supp. 2d. 24, 31-33, 38-42 (D.D.C. 1998) (denying defendants' motion for judgment on the pleadings); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 21 (D.D.C. 1999) (denying defendants' motion for summary judgment); *see also Cobell v. Norton,* 240 F.3d 1081, 1094-95 (D.C. Cir. 2001) (agreeing that plaintiffs' action was not barred by sovereign immunity).

Examples of the type of conduct which constitutes fraud on the court include the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony. *Id.* at 643. Moreover, "fraud on the court" requires a showing of intent to deceive or intent to defraud the court. *Cobell II*, 226 F. Supp. 2d at 26; *United States v. Buck*, 281 F.3d 1336, 1343 (10th Cir. 2002) ("[R]elief based on fraud upon the court must be founded on intentional misconduct.").

Cases that have addressed the issue indicate that "fraud on the court" does not exist unless the alleged misconduct has prejudiced the opposing party in presenting its case or has affected a court ruling. *Baltia Air Lines*, 98 F.3d at 643 (Although there were suggestions in the record that witnesses committed perjury or that counsel misled the court, "[t]here is still no basis for a finding of fraud on the court as that concept has been defined. It is particularly noteworthy in this regard that any misrepresentations to the District Court were not relevant to the court's decision. . . ."); *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir.), *cert. denied*, 531 U.S. 876 (2000); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir.), *cert. denied*, 531 U.S. 813 (2000); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Synanon Church v. United States*, 820 F.2d 421, 428 (D.C. Cir. 1987). In sum, in order to support a claim for fraud on the court based on Mr. Edwards' testimony, plaintiffs must initially show, by clear and convincing evidence, that (1) Mr. Edwards committed a wrongful act, (2) Mr. Edwards acted with intent to deceive or intent to defraud the court, and (3) the wrongful act prejudiced plaintiffs in presenting their case or affected a ruling by the court. Plaintiffs have shown none of these elements.

Plaintiffs cite three categories of supposed "misrepresentations" or "lies" in Mr. Edwards' deposition and declaration as the support for their motion. These are (a) the nature of the work performed by two accounting firms regarding the reconciliation of IIM judgment accounts; (b) the Department's intention to include reporting on non-financial trust assets in the historical accounting; and (c) Mr. Edwards' status as a certified public accountant. Not only do plaintiffs fail to establish that any of the challenged testimony is false, but they also fail to prove their claim that the testimony was intended to "conceal defendants' true intentions with respect to their historical accounting project." Plaintiffs' Motion at 2. Finally, plaintiffs fail to identify any manner in which the challenged testimony has improperly prejudiced them in presenting their claims or has affected any court ruling.

A. Mr. Edwards' Description of The Work by CD&L and Grant Thornton Provides No Basis for a Claim of Fraud on the Court.

In Items A and B of their motion, Plaintiffs claim that Mr. Edwards deliberately misrepresented the nature of the work performed by two accounting firms, Chavarria, Dunne & Lamey, LLC ("CD&L") and Grant Thornton, LLP, in connection with OHTA's efforts to reconcile IIM judgment accounts. Mr. Edwards plainly did not do so. In support of their accusation, plaintiffs rely upon an excerpt from Mr. Edwards' deposition. Plaintiffs' Motion at 7. However, plaintiffs have altered significant portions of Mr. Edwards' response in their citation of it. The unadulterated question and response sequence cited by plaintiffs reads as follows:

> Q. But you have no – you don't know what the reliability of the data in the systems is, do you?
> A. We will be determining that. So far the reliability in the system that we've done has been right to the penny.
> Q. And that's been certified, correct?
> A. Two different CPAs have done this.

Q. Have certified that the Individual Indian Trust accounts for 270,000 people or so –

A. No, no. They've concluded for roughly the 14,000 that are done, that they constitute historical accountings.

Q. Based upon agreed-upon procedures, correct? That's not an accounting, is it?

A. No, they're not agreed. They have concluded that they constitute historical accountings. I'd have to get the exact wording. That's in the letter to Mr. Slonaker, which I assume you're going to ask for.

Deposition of Bert T. Edwards (Dec. 18, 2002) at 252:2-20 (emphasis added) (Plaintiffs' Ex. 1). The emphasized portion above is materially different from plaintiffs' recasting of it in their brief. Plaintiffs altered Mr. Edwards' response in the emphasized portion by adding their own words to the first sentence of the response and omitting the last two sentences of it. The emphasized portion shows that plaintiffs' counsel asked a compound question. It is obvious from the complete answer given by Mr. Edwards to the compound question that he had qualified his answer regarding the accountants' work by stating that he needed to get the "exact wording" from a document he did not have before him. The full response, which plaintiffs unfairly truncated, disposes of their challenge to this testimony.

The document to which Mr. Edwards' referred in the above full response appears to be his July 16, 2002 letter to former Special Trustee Thomas Slonaker, which is included with its first three exhibits in Govt. Ex. 2.[7] Although plaintiffs go on at some length to distinguish between an "agreed-upon" procedures engagement and an "audit," Mr. Edwards' July 16, 2002 letter makes

[7]Attachment III to Govt. Exhibit 2 is submitted in redacted form to omit material the government has designated as subject to the Court's November 27, 1996 Protective Order. The redacted material is not relevant to this discussion. Attachments IV and V to the letter remain under seal by direction of the Special Master-Monitor and are excluded from the exhibit and from this discussion.

no claim that the accounting firms performed an "audit," nor does Attachment III, which consists of the reports of the accountants, make such a claim. To the contrary, Mr. Edwards and the firms refer to the work as a "reconciliation." Further, Attachment II to the July 16, 2002 letter is the June 5, 2002 letter from Mr. Slonaker to Mr. Edwards that plaintiffs cite at page 9 of their motion. Govt. Ex., Att. II. This letter describes the scope of the accounting firms' work: ". . . Grant Thornton LLP conducted a quality review of the agreed-upon procedures CD&L was tasked to perform." *See also* Plaintiffs' Motion at 9 & Ex. 6.

Given Mr. Edwards' statement in his deposition that he needed the "exact wording" from his letter in order to respond to plaintiffs' question, there is no reason to think he was trying to conceal the nature of the firms' engagement when this letter and its attachments clearly laid that out. Plaintiffs have failed to identify any motive for Mr. Edwards to lie about the nature of the accountants' work. In the full version of the testimony cited by plaintiffs in Item A, Mr. Edwards stated that he assumed the plaintiffs would obtain his letter. There is no evidence of any attempt by Mr. Edwards to keep this information from plaintiffs. To the contrary, it is clear that Mr. Edwards was concerned about being accurate – hence his reference to "exact wording."

Further, plaintiffs have made no showing how this exchange between their counsel and Mr. Edwards has caused any prejudice to their ability to present their case. What the accounting firms did is reflected in their reports. Plaintiffs' suggestion that Interior Defendants and Mr. Edwards are attempting to mislead the Court into believing that CD&L and Grant Thornton used audit standards to perform the work is thus both unfounded and illogical, since the firms' reports state what they have done and describe the nature of the engagement. The April 8, 2002 letter from Grant

Thornton to OHTA notes that Grant Thornton was "not engaged to conduct an audit of CD&L's work," but rather was engaged to perform a "quality review" of CD&L's "agreed-upon" procedures reconciliation work on certain IIM judgment accounts. Govt. Ex. 2, Att. III at SMMREQ0000022R.[8] Indeed, plaintiffs cite no basis for their claim that Interior Defendants and Mr. Edwards have attempted to mislead the Court into believing the accounting firms conducted an audit. Mr. Edwards was not asked whether the firms had done an audit, and he did not claim they had. He stated his belief that they had conducted an "historical accounting", a phrase which is not defined in the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4230 (the "1994 Act"), upon which plaintiffs have based their suit.[9] Whether the Court ultimately agrees with Mr. Edwards' view that the work performed by CD&L and Grant Thornton concerning the IIM judgment accounts meets the Department's obligation to provide an historical accounting as to those funds will be determined in future proceedings on the merits. While plaintiffs evidently disagree that the firms' work constitutes an historical accounting, they have given no reason to doubt the good faith of Mr. Edwards' opposite view.

In an attempt to support their claims, plaintiffs quote the June 5, 2002 letter from Mr. Slonaker to Mr. Edwards, where Mr. Slonaker appeared to base his concerns about the judgment

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[8]The government relies on redacted versions of the Grant Thornton and CD&L reports. The redacted material, which the government has previously designated as subject to the Court's November 27, 1996 Protective Order, is not material to the issues raised in Plaintiffs' Motion or this opposition.

[9]The Department's *Historical Accounting Plan for Individual Indian Money Accounts* (filed Jan. 6, 2003) offered the following definition of the term: "...Interior recognizes that it has a duty under Section 4011(a) to account for 'all funds held in trust' as of the date of the 1994 Act (and thereafter), including a duty to account for the pre-October 25, 1994 'history' of those funds. Accounting for this pre-October 25, 1994 'history' is what is meant by the term 'historical accounting.'" *Id.* at II-2 (footnote omitted).

account reconciliations upon the lack of "an overall historical accounting definition for all IIM accounts or a specific definition by account type. . . ." Plaintiffs' Motion at 9 and Ex. 6. In the same letter, Mr. Slonaker stated: "Once an historical accounting is defined, I will be happy to reconsider my position should you desire." Plaintiffs' Ex. 6. Mr. Edwards' July 16, 2002 letter is in response to this June 5, 2002 letter. In a July 26, 2002 response to Mr. Edwards' July 16, 2002 letter, Mr. Slonaker stated that he was "pleased to see the definition of a historical accounting for the IIM judgment and per capita accounts set out on pages 23 and 24 of your *Report to Congress on the Historical Accounting of Individual Indian Money Accounts* dated July 2, 2002." Plaintiffs' Ex. 2 at 1. Mr. Slonaker went on to say that "[s]ubject to comments noted below, I have no issue with your assessment that the initial 7,903 IIM judgment accounts comply with the definition of a historical accounting." *Id.* The comments dealt with documentation issues, not whether the accounting firms should have used "audit" procedures instead of "agreed-upon" procedures. It is indeed baffling that plaintiffs place such reliance upon the June 5, 2002 letter, which after all was superseded by the July 26, 2002 letter's expressions of approval for the definition of "historical accounting." In any case, plaintiffs have not come close to proving any falsehood by Mr. Edwards in the challenged testimony, much less an intentional deceit.

To the extent that plaintiffs attack the use of an "agreed-upon" procedures engagement, they have not shown that the engagement could not produce a reliable result that would meet the Department's obligation to provide an historical accounting. Grant Thornton specifically stated in its April 8, 2002 letter that in reviewing CD&L's work, it applied the standards of the American Institute of Certified Public Accountants ("AICPA") for consulting services and specifically applied

"the general standards of Independence, Due Professional Care, and Quality Control as prescribed by the General Accounting Office's *Government Auditing Standards*." Govt. Ex. 2, Att. III at SMMREQ0000022R. Plaintiffs have not challenged the validity of Grant Thornton's application of those standards. As plaintiffs themselves observe, "historical accounting" is not a term of art in the accounting field. Plaintiffs' Motion at 9. Nor is it defined by the 1994 Act. Plaintiffs' own Exhibit 5 indicates that "agreed-upon" procedures is an accepted practice in the accounting profession, and they offer no reason why the procedures adopted for the Department's historical accounting for IIM judgment funds are unreliable or otherwise improper. Of course, if it is plaintiffs' intent to attack the "agreed-upon" procedures employed for the IIM judgment accounts, they may offer evidence on that topic at an appropriate proceeding on the merits. It is, however, inappropriate for them to employ a show cause motion for that purpose.

In Item B of their motion, plaintiffs take issue with Mr. Edwards' statement in deposition that the accounting firms "looked at every transaction from the opening of the account right through December 31st, 2000." Plaintiffs' Motion at 11 (quoting Edwards Dep. at 252:21-24). Plaintiffs' cite a portion of CD&L's October 31, 2001 report to support their claim that this statement was untrue. Yet the CD&L report excerpt they cite at pages 11-12 of their motion actually corroborates Mr. Edwards' testimony since it explains that reconciliation of one or a few accounts participating in a particular judgment permits reconciliation of all accounts participating in that judgment. Govt. Ex. 3 at SMMREQ0000049R.

Furthermore, the April 8, 2002 Grant Thornton report found as follows:

> We found that CD&L used appropriate steps to conduct its consulting engagement and employed a methodology that was

> adequate for conducting reconciliation of IIM judgment accounts. During our quality review, we performed an analysis of CD&L's "Final Draft" report, reviewed its working papers, and conducted interviews to verify the pilot process steps used by CD&L to reconcile the judgment accounts. As a result, we agree with the outcome of the reconciliations, **which resulted in reconciliation of all transactions posted for 8,006 IIM judgment accounts totalling $22.7 million in balances as of September 30, 2000.**

Govt. Ex. 2, Att. III at SMMREQ0000022R-23R (emphasis added).[10] This same report (included in unredacted form as an exhibit to Plaintiffs' Motion) concluded that "[t]he approach employed by CD&L was appropriate for conducting historical accounting of judgment awards" and "that CD&L's approach taken to reconcile the judgment accounts was acceptable for conducting historical accounting of the IIM judgment accounts." *Id.* at SMMREQ0000027R and 34R. In view of these corroborative statements from Grant Thornton itself, plaintiffs' allegation against Mr. Edwards is simply reckless.

Finally, in Item F, plaintiffs take issue with Mr. Edwards' testimony regarding the July 26, 2002 Slonaker letter. Plaintiffs argue, contrary to the content of the letter itself, that Mr. Slonaker never opined that the judgment account reconciliations constituted an historical accounting. Plaintiffs' Motion at 21. While Mr. Slonaker qualified his opinion based upon a few comments[11], there is no question that he stated in the letter that, subject to these comments, "I

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[10]CD&L subsequently completed reconciliation for certain accounts through December 31, 2000, and Grant Thornton reviewed these reconciliations as well and again concurred with the CD&L updated reconciliations. Govt. Ex. 2, Att. III at SMMREQ0000015R.

[11]The comments are included in Plaintiffs' Exhibit 2. Essentially, they sought clarification regarding (1) whether CD&L had verified that the judgment amount distributed was the proper amount; (2) an explanation for multiple or differing amounts that appeared to have been made to participants in the same judgment; and (3) whether the Department can correctly identify every beneficiary of a judgment.

have no issue with your assessment that the initial 7,903 IIM judgment accounts comply with the definition of a historical accounting for these particular accounts." Plaintiffs' Ex. 2 at SMMREQ0000001. Mr. Edwards testimony fairly reported his understanding of Mr. Slonaker's letter. And here again, there would have been no reason for Mr. Edwards to dissemble. Mr. Edwards knew that plaintiffs could check the letter about which he had testified.

Further, Mr. Edwards solicited responses to Mr. Slonaker's comments from Grant Thornton, CD&L and Department staff. Govt. Ex. 4-6.[12] These responses do not indicate any difficulty in addressing the issues that Mr. Slonaker had raised. Although Mr. Slonaker had resigned before Mr. Edwards could respond to his comments, there is no reason to think that Mr. Slonaker himself viewed the comments as insurmountable objections to the assessment that the reconciliations constituted historical accountings. The absence of such evidence further weakens plaintiffs' accusations.

B. Plaintiffs' Attacks Regarding Accounting for Non-Cash Assets of the Trust Are Unsupported.

At page 2 of their Historical Accounting Plan, Interior Defendants state:

> Interior also intends to be in the position to provide the IIM account holder with information regarding their land assets as of December 31, 2000. The information on assets will be prepared by the BIA Land Title and Records Offices as a separate part of the package to be provided to IIM account holders. Together with the Historical Statements of Account, this will provide IIM account holders more information on their trust assets as of December 31, 2000. In the future, Interior intends to provide a listing of trust assets along with a report on the management of the funds

[12]Govt. Exhibit 4 is the comments provided by Theresa Beck of Grant Thornton; Govt. Exhibit 5 is the comments provided by Greg Chavarria of CD&L; and Govt. Exhibit 6 is the comment provided by Department employee Joseph Walker.

> generated from those assets and from other sources with each quarterly statement.

Given this statement of defendants' intent to report on IIM land assets, it is difficult to comprehend any legitimate basis for plaintiffs' attacks upon Interior Defendants and Mr. Edwards concerning this issue. True to form, however, plaintiffs simply accuse Interior Defendants and Mr. Edwards of lying without a shred of supporting evidence.

The statement of intent in the Historical Accounting Plan is consistent with the OHTA Mission Statement quoted in Mr. Edwards' November 26, 2001 declaration upon which plaintiffs' base their attacks. Plaintiffs Ex. 8 at ¶ 9 ("This accounting will include, at an appropriate level of detail, an assessment of the accuracy of the balances in IIM accounts, reports to individual beneficiaries of the money and real property held in trust for their benefit, and reports to individual beneficiaries that contain sufficient information to allow beneficiaries to determine whether the trust has been faithfully performed.") (quoting from *Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts* ("the Blueprint") at 20 (Govt. Ex. 7). Plaintiffs do not even mention the Historical Accounting Plan's statement, which is indeed ironic since they first launched this particular attack in their response to that plan.

Plaintiffs accuse Mr. Edwards in Item C of their Motion of filing a "perjurious" declaration based on the quotation of OHTA's mission statement. Plaintiffs make no showing that the mission statement did not reflect Interior Defendants' and Mr. Edwards' intent at the time the Blueprint and declaration were filed. The sole grounds for their accusations of deceit and perjury are Mr. Edwards' statements in his deposition that "minds [were] changed" about the need to include information on non-financial assets in the accounting during the 13 months between the date of that

declaration and the date of Mr. Edwards' deposition. Plaintiffs' Ex. 1 (Edwards Dep. at 336:4-15).

Plaintiffs claim that Mr. Edwards was obliged to file a supplemental declaration stating that Interior Defendants no longer intended to include information about non-financial assets in the accounting, but there is no evidence that the Department ever made a final decision not to include such information.[13] Rather, Mr. Edwards testified that Mr. Slonaker questioned whether he was obliged to account for those assets, and Interior Defendants "sort of drifted out of that position." Plaintiffs' Ex. 1 (Edwards Dep. at 333:11-334:12). Plaintiffs have themselves pointed out in their motion that the term "historical accounting" is not a term of art in the accounting profession. Plaintiffs' Motion at 9. No ruling of the Court to date has specified whether or not the historical accounting sought in this case must report information on non-financial assets, and the 1994 Act offers no specific direction either. Further, the Blueprint itself – which was prepared only 60 days after OHTA was established – explicitly recognized that "[m]odifications . . . will be made as subjects covered in this Blueprint are further researched and refined. . . ." Govt. Ex. 7 at 5. Given

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[13] Q. (by Mr. Petrie). The language in that sentence that Mr. Gingold focused on was the portion of the sentence that indicates that part of OHTA's mission statement was to provide reports to individual beneficiaries of money and real property held in trust.

Has there been a decision, a final decision, made yet to actually in fact back away from that providing reports to individuals?

A. I think that's still open, an open question.
Q. That's what you were referring to earlier in the day?
A. Yes.

Plaintiffs' Ex. 1 (Edwards Dep. 371:11-23).

these circumstances, Interior Defendants and Mr. Edwards cannot be held in contempt simply because they continued to engage in a deliberative process over whether the Department is obliged to include in the accounting information about non-financial trust assets. Interior Defendants still intend to include those assets in the accounting.

In short, plaintiffs have offered no evidence that the declaration was untrue when given, nor have they offered any evidence to contradict Mr. Edwards' testimony about why the Department reconsidered the inclusion of non-financial assets in the accountings. Further, they have failed to demonstrate that Interior Defendants and Mr. Edwards intended to deceive the Court or that the particular statement at issue in Mr. Edwards' declaration affected any Court ruling or plaintiffs' ability to present their case.[14] In view of these failings, plaintiffs' accusations fall far short of their burden to establish a *prima facie* case for contempt or fraud on the court.

Plaintiffs take issue with Mr. Edwards' testimony that Mr. Slonaker had questioned whether the Department had to include non-financial trust assets in the accounting. *See* Plaintiffs' Motion, Item E; *Plaintiffs' Notice of Supplemental Authority in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards, Executive Director – Office [of] Historical Trust Accounting, Should Not Be Held in Civil and Criminal Contempt for Lying Under Oath Regarding the Nature and Scope of the Historical Accounting* (dated Mar. 3, 2003) ("*Plaintiffs' Supplement*"). The Court should, however, disregard Item E of Plaintiffs' Motion because it relies upon material that the government has designated as privileged

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[14]Plaintiffs claim that Mr. Edwards' declaration was intended to dissuade the Court from conducting the contempt trial. The Court, of course, conducted the contempt trial, and thus plaintiffs have not shown that the portion of the declaration they criticize either prejudiced their ability to present their case or affected a court ruling. *Baltia Air Lines*, 98 F.3d at 643.

and that the Special Master-Monitor has sealed pending the Court's ruling on the privilege assertion. Plaintiffs' use of the material, which was disclosed to them solely for purposes of addressing the privilege claim, is improper.

In any event, plaintiffs have failed to establish that Mr. Edwards' testimony on this point was untruthful. Plaintiffs' citation of certain statements made by Mr. Slonaker in mid-2002 do not refute Mr. Edwards' testimony. Mr. Slonaker himself may have been in the process of trying to resolve what the Department's obligations were regarding the inclusion of information on non-financial assets – and particularly real property – in the accounting. Indeed, Mr. Edwards gave further testimony about Mr. Slonaker's explanation for his uncertainty in this regard. Concerning the contents of the July 2, 2002 report Congress, Mr. Edwards testified:

> Q. But the ultimate decision I believe you said was made by the Secretary, correct?
> A. She has to sign off on it.
> Q. So it's ultimately, it's her decision as a trustee delegate?
> A. And we also at that time had the ambivalent opinion of Mr. Slonaker. If he had said there is no goddamn way you're going to issue this report and not report land and the encumbrances on the land, which is what we would say, there's a mineral lease that can operate for years as long as there's production and you can take out so many tons of coal or something, we may have had a different conclusion.
>
> But he was very ambivalent when we talked to him about this. And the reason for that as I understand it was he explained that an individual Indian can go to an LTRO [Land Title and Records Office of BIA] and say, I have land in this LTRO and three others and I'd like to have a list of all the ownership, full or undivided interests in allotments, and you can get that information by overnight inquiry. Then if you wanted to get the chain of title on one or two of them, they can print that out for you as well.

Govt. Ex.1 (Edwards Dep. at 328:15-329:12). On the record presented by plaintiffs, there simply is no basis to conclude that Mr. Edwards "lied" in describing statements made to him by Mr.

Slonaker. Moreover, given defendants' intention to provide information regarding trust assets in the accounting, plaintiffs can demonstrate no harm in the presentation of their case, nor any interference with the judicial machinery.

C. Plaintiffs' Attacks on Mr. Edwards' Credentials Are Unfounded.

Plaintiffs recklessly – and falsely – claim that Mr. Edwards is not in fact a licensed Certified Public Accountant, but merely a "layman." Plaintiffs' Motion at 17. In fact, Mr. Edwards is licensed as a CPA in the District of Columbia. *See* Govt. Ex. 8. Plaintiffs also ignore his substantial and lengthy experience as a CPA, including some three decades of work as an accountant at a major accounting firm, Arthur Andersen, which makes clear that he has been licensed for decades. Plaintiffs' Ex. 8 at C-1 to C-3.

Plaintiffs also claim that Mr. Edwards is somehow in violation of Virginia law by stating in his resume that he "is a CPA in the District of Columbia and Virginia." Plaintiffs' Motion at 16 & Ex. 8. That he does not have a current active license to perform accounting services in Virginia has no bearing on the fact that he has in the past been licensed as a CPA in Virginia. *See* Govt. Ex. 9. Further, Virginia law permits a person who is licensed as a CPA by another jurisdiction to describe himself as a CPA in Virginia. Plaintiffs rest their scurrilous charge against Mr. Edwards on Va. Code Ann. § 54.1-4414 (Michie 2002). Plaintiffs' Ex. 10. That statute prohibits "[a] person who does not hold a valid CPA certificate" from, among other things describing himself as a certified public accountant. Va. Code Ann. § 54.1-4414(4). However, plaintiffs have neglected to inform the Court of a critical definition contained in the same statute upon which they base their false claims: Va. Code Ann. § 54.1-4400 defines "CPA certificate" to include "a corresponding

certificate as a certified public accountant issued after examination under the laws of any other state."[15] Not only does Mr. Edwards' District of Columbia license qualify him to hold himself out in Virginia as Bert T. Edwards, CPA, but also state rules allow him to engage in the practice of accounting without so much as registering in Virginia so long as his principal place of business is not in Virginia. Govt. Ex. 10.[16] Mr. Edwards, of course, had his principal place of business in the District of Columbia – at the Department – when the declaration was given, and he held an active CPA permit from the District of Columbia. Govt. Ex. 8. It is apparent that plaintiffs either deliberately sought to mislead by this completely unfounded attack on Mr. Edwards' professional credentials or were grossly negligent in researching their claims.

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[15]The statute defines "state" to include the District of Columbia. Va. Code Ann. § 54.1-4400.

[16]Virginia Board of Accountancy Regulation 18 VAC5-21-40(G) ("Privilege to practice without a CPA certificate by endorsement, substantial equivalency") states in pertinent part:

> 1. A holder of a CPA certificate from a state other than Virginia and with a principal place of business in a state other than Virginia shall either obtain a CPA certificate by endorsement as outlined in subsection C of this section or meet the substantial equivalency requirements of this subsection before beginning CPA practice in Virginia.
>
> 2. To implement the provisions of § 54.1-4411 A of the Code of Virginia, the privilege to practice under substantial equivalency shall be evidenced by the following:
>
> a. If the individual's CPA certificate is issued by a state that the board has determined is substantially equivalent, the CPA certificate issued by that state shall constitute evidence of the privilege to practice.

As shown in Govt. Ex. 11, Virginia recognizes CPAs who – like Mr. Edwards – are permit holders in the District of Columbia as meeting the substantial equivalency requirement.

Conclusion

Plaintiffs' unrestrained and unfair attacks upon Mr. Edwards' professional credentials as well as his personal integrity should not be condoned. If plaintiffs have a disagreement with Mr. Edwards on the merits, they are free to cross-examine him and offer competing evidence. Plaintiffs are simply abusing the show cause process in a clear attempt to intimidate government witnesses and to prevent the government from presenting its case. The Court should not permit such tactics.

Respectfully submitted,

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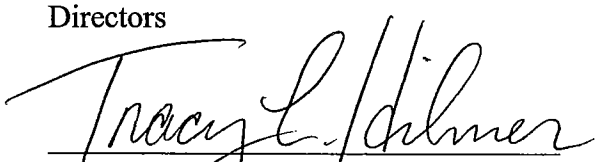

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