UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **Plaintiff** **v.** **PROJECT ON GOVERNMENT OVERSIGHT** **and** **ROBERT A. BERMAN,** **Defendants**	**Civil Action No. 03-0096 (JDB)**

ROBERT BERMAN'S MEMORANDUM IN OPPOSITION
TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Defendant Robert Berman, by his undersigned counsel, submits his the United States' Motion for Summary Judgment. Except as noted herein, he adopts and principally relies on the Project on Government Oversight's Opposition to Government's Motion for Summary Judgment and its Statement of Material Facts as to Which the Project on Government Oversight Contends are Necessary to be Litigated (Document No. 47, filed July 30, 2007). Although Mr. Berman agrees with almost all of POGO'S factual assertions and legal arguments, he would nonetheless have preferred to file an entirely independent response. He is compelled to proceed in this manner, however, in order to mitigate the financial burden he has had to bear in defending himself against the decade-long onslaught from the Department of Justice's Criminal Division[1], the Congress.[2], and,

[1] The Public Integrity Section spent four years trying to uncover evidence that would support its unfounded theory that POGO's awards to Messrs. Speir and Berman were actually payoffs that violated either the bribery or illegal gratuities provisions in 18 U.S.C. § 201. From the outset of the investigation, Mr. Berman was represented by his current counsel, who contacted the prosecutors to request an opportunity to discuss the case and assure them of Mr. Berman's cooperation. Yet, more than a year later, when DOJ wanted documents it believed were in Mr. Berman's

now, the Civil Division[3] for accepting an unsolicited award that recognized his role in exposing the fraudulent practices of the oil industry and the Department of the Interior's failure to do address that conduct.

A. Mr. Berman's Adoption of POGO's Statement of Material Facts as to Which the Project on Government Oversight Contends are Necessary to be Litigated

1. Headings IV-V and Paragraphs 1-26

a. **Mr. Berman adopts ¶¶ 1-26 of POGO's Statement of Material Facts as to Which the Project on Government Oversight Contends are Necessary to be Litigated in their entirety without modification.**

b. Mr. Berman disputes the assertions in the headings to sections "IV" and "V" of the Government's Statement of Material Facts.

Though it is unclear whether the Government is asserting that its conclusory and argumentative section headings (Roman numerals) are themselves "material facts as to which there is no genuine issue," Mr. Berman states in response that the "facts" set forth in the Arabic-numbered paragraphs within §§ IV and V do not establish as an issue beyond

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possession, the prosecutors did not issue a grand jury subpoena, as is the usual practice. Rather they obtained a search warrant for Mr. Berman's DOI office -- based upon an affidavit that remains under seal.

[2] Protected by the Speech and Debate Clause, Members of Congress who sought to protect the fraudulent conduct of the oil producers repeatedly defamed Mr. Berman during the hearings that led to the report contained in Ex. 10 to the Government's instant motion. Then, despite the pendency of the grand jury investigation, the House subpoenaed Mr. Berman, apparently intending either to ensnare him in a "perjury trap", a well-known ploy in which a witness's mere denial of an outrageous accusation becomes the basis for a referral from Congress to the DOJ for a perjury investigation; or to embarrass him were he to invoke his Fifth Amendment privilege (in light of the ongoing grand jury investigation) pursuant to the advice of counsel. Mr. Berman, however, declined to play their disreputable game; *instead he offered to waive his Fifth Amendment protections and answer all questions about his conduct with respect to POGO and the oil regulations if the Members who had defamed him would waive their Speech and Debate Clause immunity from civil liability for their conduct.* When Mr. Berman maintained his position in the face of the Members' increasingly bellicose threats that his continued refusal to accept either of the unpalatable choices provided by the committee would result in contempt of congress charges, the committee sought to have the full House hold Mr. Berman in contempt. Their effort failed.

[3] The Civil Division's instant summary judgment motion continues the pattern of disingenuousness described in the preceding footnotes. This is manifested in its treatment of three factual issues that are central to this lawsuit: (a) in characterizing (implicitly and explicitly) its own theory or opinion as undisputed fact, specifically in regard to the reason POGO made its awards to Messrs. Berman and Speir; (b) in *materially mischaracterizing* the affidavit (Gov't. Ex. 22) from William Bettinger, former Director of the Office of Policy Analysis ("OPA") at DOI, the unit in which Mr. Berman worked, concerning responsibility for language appearing in proposed 1996 regulations pertaining to the calculation of oil royalties (see discussion in the text, *infra*); and (c) in failing to bring to the court's attention deposition testimony from another DOI official -- H. Theodore Heintz, Jr., Mr. Berman's direct supervisor at OPA and Bettinger's subordinate -- that materially modifies Mr. Heintz's earlier affidavit (Gov't. Ex. 17), which the Government cites, in regard to Mr. Berman's assignments within the OPA and the nature and scope of his involvement in oil royalty issues after 1994.

genuine dispute “”Why POGO paid Mr. Berman” as the Government claims. For example, POGO’s possession of DOI documents that are cited in POGO reports that pre-date the filing of its *qui tam* suit does not establish the absence of a genuine issue on POGO’s reason for making its awards. It is worth noting that the DOJ’s Criminal Division spent four years unsuccessfully pursuing the theory that POGO paid Mr. Berman for having misused his government position to assist POGO in bringing the suit. Even allowing for the lesser burden that the Government must shoulder in a civil case, the evidence that it has proffered does not suffice to transform its previously still-born theory into a fact that is beyond genuine dispute so as to make the case ripe for summary judgment. That the Government has chosen not to credit the evidence which refutes its theory does not justify the conclusion that there is not a factual issue to be resolved by a presumably more objective fact-finder.

2. **Heading VI and Paragraphs 27-33**

a. **Mr. Berman disputes the assertion in heading “VI”.**

In section VI the Government has chosen not simply to ignore the evidence that contradicts the conclusions it has drawn and wants endorsed by the court. Instead, it actively mischaracterizes William Bettenberg’s affidavit (Gov’t Ex. 22) on this point in order to fabricate support for two otherwise unsupportable contentions: (a) that Mr. Berman was, for all intents and purposes, singularly responsible for key suggestions contained in a December 1996 OPA memorandum that was drafted in connection with a proposed rulemaking to amend the regulations that controlled the valuation of oil for royalty calculations; and (b) that Mr. Berman made his suggestions solely for the purpose of increasing POGO’s recovery if it ultimately prevailed in the *qui tam* litigation.

As noted, in December 1996 Mr. Bettenberg was acting as the Director of the OPA. He begins the affidavit by describes a meeting he and Mr. Berman attended that month "to discuss a proposed rulemaking to amend the regulations for valuing crude oil for royalty purposes" and certain "issues that had been agreed upon at the meeting, namely, that the new regulations should (1) preserve MMS's 'policy flexibility regarding collecting additional royalties' under the existing regulations and (2) use certifications 'to limit the use of posted prices to those situations where the lessee clearly has no alternative.'" *Id*.¶¶ 2-3. Bettenberg goes on to describe the "memorandum to the Director of MMS [that] Mr. Berman and I drafted to address" these two issues. *Id*. ¶ 3 and Attachment 1(the memorandum from Mr. Bettenberg to the Director, MMS)). Though Bettenberg ascribes "the majority of the edits" reflected in OPA's proposed revisions to the regulations to Mr. Berman (*id*. ¶ 5), he carefully uses plural pronouns and possessives (explaining the antecedent where necessary) to describe this joint effort:

- "In preparing the memorandum, ***we (Mr. Berman and I) wanted to make sure*** that the preamble and rule did not abandon the principles in the 1988 valuation rules.". The purpose of the memorandum was to better characterize why the rule was being amended, namely, because posted prices had been below market value and DO1 was losing royalties. *Id.* ¶ 6 (emphasis added)
- ***We also wanted to maintain*** the standard that royalties would never be based on an amount lower than the lessees' gross proceeds. *Id*. (emphasis added)
- ***We also wanted to ensure*** that certain cases then pending against a number of oil companies for alleged underpayment of royalties would not be compromised. *Id.* ¶ 7 (emphasis added)
- For example, ***we edited*** the preamble to emphasize that the rules were being amended to 'clarify,' rather than 'modify' the valuation procedures. . . . ***We believed*** that such clarifications would minimize the likelihood that the existing regulation would be interpreted as prescribing a valuation procedure based solely on posted prices, which could have undermined the position taken in pending cases and reduced DOI's chances of recovery. *Id*.

But while Mr. Bettenberg is careful to describe the so-called "preamble memorandum"

as the product of a joint effort by himself and Mr. Berman -- including, specifically, the expressed concerns about the effect that new regulations might have on theories of recovery in pending cases brought under the extant valuation regulations -- the Government's Statement of Material Facts makes it appear as if this memorandum was solely Mr. Berman's work. Thus, Bettenberg states that "*we (Mr. Berman and I) drafted* a memorandum to the Director of MMS"; but paragraph 28 of the Statement of Material Facts reports that "*Mr. Berman drafted* a memorandum to the Director of MMS." More generally, the Government amends Mr. Bettenberg's description of his role from that of co-drafter to the more limited role of a supervisor who merely "reviewed and approved" a memorandum of which Mr. Berman was the "principal author". *Id.* ¶ 29.

Mr. Bettenberg's affidavit also puts to rest the absurd notion that the substance of the editorial suggestions grew out of Mr. Berman's self-interest in the size of POGO's potential *qui tam* recovery. To the contrary, he makes the self-evident point that because DOI was already pursuing cases in which it was arguing that existing regulations entitled it to royalties based upon market values and not posted prices, it was in the federal government's interest not to draft a document that could be used by the oil companies to argue that the existing regulations did not permit market-based value calculations. *Id.*¶7. Moreover, according to Bettenberg, this potential problem was identified at the meeting at which OPA received the assignment to edit the proposed rule making notice. *Id.*¶ 1 In other words, when Berman and Bettenberg edited the proposed rule to ensure that it did not undercut DOI's position in existing litigation, they were simply executing their assignment in a manner that was consistent with their instructions.

Finally, the assertion that Mr. Berman's advocacy of the positions taken in the

preamble memorandum was motivated by his supposed interest in the *qui tam* litigation runs into several other obstacles, not least of which is that Mr. Berman had been advocating the use of market prices for calculation of royalties since 1986. *See* Ex. 1 (containing Exhibits 1-5 to Mr. Berman's Memorandum Of Points And Authorities In Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Defendant POGO's Cross Motion For Summary Judgment (Document 28, filed in July 2004)) which contains, *inter alia*, Mr. Berman's 1986 memorandum analyzing pricing practices in the oil industry and demonstrating the inefficacy of relying on the oil companies' "posted prices" as the basis for royalty assessments; Ex 1(a) (Ex. 12 to Heintz Deposition) Memorandum from MMS in 1987 rejecting Berman position; and Ex 2 (Exs. 2-8 to Heintz Deposition), Memoranda from 1993-1994 which Mr. Berman sent to Brooks Yeager, then the Deputy Assistant Secretary at DOI with jurisdiction over the OPA, to protest both the substance of settlements that MMS was about to enter into with several oil companies to recover additional royalties and the exclusion of OPA and the DOI's legal personnel from the settlement process. Furthermore, in December 1996 POGO had not filed a *qui tam* action. Gov't. Statement of Material Facts ¶ 3. Thus, Mr. Berman had no financial stake to protect. Nor can Mr. Bettenberg's expressed intention of not undermining DOI's recovery in "pending cases" (Gov't Ex. 22 ¶ 7) be construed as a reference to any other pending *qui tam* action because the action by the other relator groups was still under seal.

The license taken (and the distortion created) by the Government's fictional re-creation of the process that resulted in the OPA's contribution to the proposed rulemaking take on even greater significance in light of Mr. Bettenberg's emphatic disapproval (expressed in each of his two affidavits) of Mr. Berman's accepting POGO's award without first

obtaining permission to do so. Simply put, there is no reason to believe that a bias in favor of Mr. Berman motivated Mr. Bettenberg to depict himself as sharing primary responsibility for the creation of the "preamble memorandum" and the policy choices reflected in it if in fact his role was the more limited one preferred by the Government.

b. Mr. Berman adopts POGO's position with respect to ¶27.

c. Mr. Berman adopts POGO's position and statements with respect to ¶¶ 28-32. Further, he incorporates ¶ 2a, supra, as a further response to the assertions in ¶¶ 28-32 of the Government's Statement of Material Facts.

d. With respect to ¶ 33, Mr. Berman disputes that he had a financial interest in the qui tam litigation at the time he assisted Mr. Bettenberg in drafting the proposed regulations

3. **Heading VII -- Mr. Berman does not dispute**.

a. With respect to ¶ 34, Mr. Berman does not dispute that he did not contact his ethics officer concerning his acceptance of the award from POGO. Once again, however, the Government employs creative editing -- in this instance, excising Mr. Berman's express reference to Brooks Yeager -- in an effort to bolster its position by making it appear as if Mr. Berman expressed a disdain for ethics officers generally, rather than a particular a specific concern over the objectivity of Mr. Yeager. Government Ex. 33 at 242:16-244:5. Mr. Berman explained, however, that he decided not to consult Mr. Yeager, the ethics officer for OPA, "because of a long history of dealing with Brooks from the day he got to the department. . . .I was concerned that I would get a non-objective assessment from Brooks Yeager and a lot of hollering and screaming,

and decided I was going to pursue another way to check it out." Id. 4 Mr. Berman further points out that at the time POGO tendered the award, he understood from his conversations with Danielle Brian and Lon Packard, POGO's attorney in the qui tam litigation, that the DOJ had no objection to POGO making the awards. Id. at 247:11-249:7. In addition, he researched the issue of his accepting money from POGO and found that there were some restrictions on accepting items from a "prohibited source" (a concept that, at his deposition many years later, he was able to explain correctly); he concluded that POGO was not prohibited because it was not "someone who does business with the agency and has a financial gain from its dealings with the agency, like a company that contracts with the agency or deals with the agency on something." *Id.* at 245:2-22.

b. With respect to ¶ 35, Mr. Berman disputes the assertion as both speculative and irrelevant in light of the facts set forth in his response to ¶ 34.

4. **Heading VIII** - Mr. Berman does not dispute that he was a senior economist at DOI.

a. ¶ 36- Mr. Berman adopts POGO's response. See below for further response

b. ¶ 37- Mr. Berman adopts POGO's response. See below for further response

c. ¶ 38- Mr. Berman adopts POGO's response. See below for further response

Mr. Berman further states that substantially before POGO filed its *qui tam* action, Brooks Yeager, the Deputy Assistant Secretary for Policy and International Affairs, told Mr. Berman's immediate supervisor that "he didn't want Mr. Berman to work on royalty issues anymore" Ex. 3, Deposition of Howard Heintz, Jr., at 48:15-49:13. Mr. Heintz directed Mr. Berman to stop working on the oil royalties issue. *Id.* at 60:18-61:7.

[4] As discussed in the next section, several years earlier, Mr. Yeager had directed Mr. Berman's supervisor, Howard Heintz, Jr., to stop doing any work on the oil royalty issue.

Furthermore, by September 1994, pursuant to a request from MMS, OPA -- and, therefore, Mr. Berman -- was excluded from reviewing settlements between MMS and the oil companies pertaining to the collection of underpaid royalties. *Id.* at 80:19-81:11; 84:11-16; 85:8-95:3. Moreover, the market-centered approach that Mr. Berman advocated was opposed by the MMS and was never adopted. *Id.* at 43:14-20; 44:17-19; 54:4-55:1.

The Government's depiction of Mr. Berman as an active participant in rulemaking process after 1996 is further belied by the fact that Mr. Berman was never invited to participate in the numerous public discussions of the proposed regulations conducted by MMS across the country. Ex. 4, Records of MMS Public Meetings on Proposed Regulations. Mr. Berman further states that in 1999, in response to a Congressional inquiry after POGO announced its awards, DOI Assistant Secretary Sylvia Baca told Senator Murkowski that "the two employees in question [Mr. Berman and Mr. Speir] were not involved in drafting the first proposed oil valuation rule, which was published in January 1997, nor did they participate in developing subsequent versions of the proposed rule." Ex.5 (Ex. 10 to Heintz Dep.), Baca Letter to Senator Frank Murkowski.

Moreover, with respect to the portion of Mr. Heintz's affidavit quoted by the Government in ¶ 37 of its Statement of Material Facts, Mr. Heintz subsequently explained in his deposition testimony that (a) his statement was *not* intended to convey that Mr. Berman was responsible for the formulation or issuance of "policies and procedures used for the collection of royalties on oil and gas leases issued by the Department," *only that Mr. Berman was the person within OPA who reviewed proposals concerning these issues*; and (b) that even within OPA, the statement quoted by the Government did not accurately describe Mr. Berman's "area of responsibility" at any time after 1994. *Id.* at 117:11-

118:18; 119:5-8; 119:21-121-9. Mr. Heintz also identified a series of memoranda from Mr. Berman through Mr. Heintz to Mr. Yeager in 1993 and 1994 in which Mr. Berman "complain[ed] that he's not being involved by MMS." *Id.* at 90-91. Independent of his reviewing Berman's memoranda, Heintz recalled that Mr. Berman persistently complained about his exclusion from the negotiations between MMS and the oil companies regarding royalties owed and MMS's failure, in Berman's view, to adequately protect the public's interest. Heintz further acknowledged that Mr. Berman's memoranda reflect Berman's becoming increasingly intense in expressing his complaints about the substance of the settlements that he was hearing about second-hand and his criticism of DOI officials who were involved. Although Heintz recalled being instructed by Mr. Yeager to tell Mr. Berman not to work on oil royalty issues, Mr. Heintz had no recollection of Yeager changing his mind in the face of Berman's repeated efforts to participate in the settlement discussions. In sum, Mr. Heintz's testimony makes clear that the Government's description of Berman as "Interior's 'lead analyst on oil royalty valuation issues'" (Gov't. Statement of Material Facts ¶ 39) is at best misleading to the extent that it purports to describe his actual involvement in the process by which DOI was seeking to recover royalties that the oil companies were evading through their fraudulent undervaluation practices.[5]

5. **Heading IX** - Mr. Berman does not dispute.

   a. 40. Mr. Berman adopts POGO's response.

   b. 41. Mr. Berman adopts POGO's response.

   c. 42. Mr. Berman adopts POGO's response.

[5] Mr. Heintz testified that in response to Congressional requests after POGO made its award, he compiled a document listing Mr. Berman's assignments for the years 1994-1999. Ex. 6 (Ex. 9 to Heintz Deposition).

B. Mr. Berman adopts POGO's Opposition to the Government's Motion for Summary Judgment

The only limitation with respect to Mr. Berman's adoption of POGO's Opposition pertains to Mr. Berman's pending Motion for Summary Judgment. We do not interpret POGO's argument that the factual disputes require a trial to mean that Mr. Berman's motion, which raises the legal issue of what constitutes "salary" in 18 U.S.C. 209(a), should be denied. It is Mr. Berman's position that the granting of his motion would eliminate the need for a trial. But with that sole exception, Mr. Berman agrees that the disputed factual issues require a trial for their resolution.

C. Mr. Berman incorporates herein portions of the following documents previously filed in this matter . The excerpted portions are attached as exhibits.

1. Ex. 7 -Memorandum Of Points And Authorities In Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Defendant POGO's Cross Motion For Summary Judgment , pages 5-10.(Document Number 28, filed July 19, 2004).

2. Ex. 8 Response and Counter-Statement Of Material Facts As To Which There Is Genuine Issue (filed as part of Document 28, July 19, 2004).

Respectfully submitted,

_____/s/_____

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