Hornbeck Offshore Services, L.L.C. v. Salazar et al Doc. 213 Att. 1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, L.L.C.,	*	**CIVIL ACTION NO. 10-1663(F)(2)**
Plaintiff	*	
VERSUS	*	**SECTION F**
	*	
KENNETH LEE "KEN" SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES DEPARTMENT OF INTERIOR; ROBERT "BOB" ABBEY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, MINERALS MANAGEMENT SERVICE; AND MINERALS MANAGEMENT SERVICE,	*	**JUDGE FELDMAN**
	*	**MAGISTRATE 2**
	*	**MAGISTRATE WILKINSON**
	*	
	*	
	*	
Defendants	*	

* * * * * * *

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECOVERY OF ATTORNEY'S FEES

NOW INTO COURT, through undersigned counsel, come Plaintiffs Hornbeck Offshore Services, L.L.C., the Chouest Entities and the Bollinger Entities (collectively, "Plaintiffs"), which respectfully submit this memorandum of law in support of their motion for recovery of their attorney's fees from Defendants. Plaintiffs assert that Defendants' flagrant and continuous

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disobedience of this Court's preliminary injunction order entitles them to reimbursement of their expenses – their attorney's fees – as compensation for Defendants' civil contempt. Plaintiffs additionally assert entitlement to recovery of their attorney's fees on the basis that Defendants' bad faith tactics in this litigation authorize an attorney's fee award against Defendants pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b).

From the day of its entry, Defendants defied compliance with this Court's preliminary injunction order. In the weeks following entry of the order, Defendants continued their pattern of disobedience, which culminated with their replacement of the enjoined agency action with a mirror image moratorium and their simultaneous proclamation that they had thereby successfully defeated the courts' jurisdiction and evaded judicial review. Defendants' contemptuous, bad faith conduct in this litigation effectively stripped Plaintiffs of the judicial relief they had properly obtained and burdened them with additional cost and expense. Once they lost in court, every step Defendants took was part of a concerted plan of manipulation and defiance, which Plaintiffs were forced to defend against at substantial expense. Simply put, once the moratorium was enjoined without a stay, rather than obeying the Court's order pending the outcome of their appeal, Defendants directed all their efforts and resources to noncompliance and evasion of judicial review. This Court should therefore order Defendants to reimburse Plaintiffs for the significant attorney's fees they incurred as a result of Defendants' blatant "litigation posturing."[1]

Background and Procedural History

In the aftermath of the April 20, 2010 Deepwater Horizon explosion and spill, President Obama directed Defendant Secretary Salazar to review the incident and to report within 30 days

[1] Rec. Doc. 165 at 18.

on "what, if any," safety improvements should be required for OCS exploration and production operations.

Immediately following the Deepwater Horizon incident, the Minerals Management Service ("MMS"), which is now known as the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEM"), performed inspections at 29 of the 33 permitted wells being drilled in the Gulf of Mexico at water depths greater than 500 feet and found that 27 of the 29 inspected rigs were fully compliant with all regulations and their permits and that there were only minor violations at the other 2 rigs, which were quickly corrected. Rec. Doc. 5-1 at 54-56.

Pursuant to the President's directive, on May 27, 2010, Secretary Salazar issued a Report entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" ("the Safety Report"). Rec. Doc. 5-1 at 9-52. In addition to recommendations on blowout preventers and related safety equipment used on floating drilling operations, the Safety Report's "Executive Summary," but not its body, contained a recommendation for "a six-month moratorium on permits for new wells being drilled using floating rigs" and "an immediate halt to drilling operations on the 33 permitted wells . . . currently being drilled using floating rigs in the Gulf of Mexico." The paragraph directly following the recommendation for a six-month moratorium in the Executive Summary misrepresented:[2]

> The recommendations contained in the report have been peer-reviewed by seven experts identified by the National Academy of Engineering. Those experts, who volunteered their time and expertise, are identified in Appendix 1. The Department also consulted with a wide range of experts from government, academia and industry.[3]

[2] Rec. Doc. 67 at 3 ("As the plaintiffs, and the experts themselves, pointedly observe, this statement was misleading.")

[3] The actual text of the Safety Report similarly provided that the recommendations had undergone expert peer review. Safety Report text at 1.

Five of the seven experts identified by the National Academy of Engineering to peer-review the Safety Report, plus three consulting experts, later stated that the report "misrepresents our position." Rec. Docs. 29 and 89. In a letter to Governor Jindal and Senators Landrieu and Vitter, as well as in Affidavits and a Declaration submitted to this Court, they asserted that they did "not agree with the six-month blanket moratorium" and that they did not "review" that recommendation as it "was added after the final review and was never agreed to" by them. *Id.*

The experts' concern over the misrepresentation prompted an investigation by Interior's Office of Inspector General ("OIG"), which resulted in a November 8, 2010 Investigative Report of Federal Moratorium on Deepwater Drilling prepared by the OIG. According to the Investigative Report, the OIG determined that a last-minute late-night "White House edit of the original DOI draft Executive Summary," which Interior reviewed and approved as final, "led to the implication that the moratorium recommendation had been peer reviewed by the experts." 11/8/10 Investigative Report at 1, 3 and 8, attached as Exhibit "A."

Consistent with the experts' statements, the Safety Report itself nowhere referred to any sort of moratorium nor did it contain any facts, data, analysis or risk assessment to support the Secretary's recommendation that a blanket moratorium be imposed on any and all new deepwater drilling activity for a six-month period or that supported a prohibition of drilling beyond an arbitrary depth of 500 feet. It likewise contained no facts, data or analysis concerning why the Secretary imposed a moratorium on further drilling by the "33 permitted wells." Instead, the text of the Safety Report set forth an analysis of many known and expected risks involved in OCS drilling that have long been the subject of industry study and government regulation and further provided a series of 22 recommendations to improve OCS drilling safety related to equipment enhancements and additional certification and testing requirements, many

of which were intended for "immediate implementation." Safety Report at 18. Consequently, the text shows that it was prepared to support an outcome different from a blanket moratorium; it was prepared to allow the immediate resumption of drilling once the rigs came into compliance with the new safety measures.

On May 28, 2010, Secretary Salazar issued a one-page Memorandum imposing the moratorium:

> I find at this time and under current conditions that offshore drilling of new deepwater wells poses an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment as that is specified in 30 C.F.R. 250.172(b). I also have determined that the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment. 30 C.F.R. 250.172(c).

Based on these findings, the Secretary directed MMS to issue "a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells" and that, "For those operators who are currently drilling new deepwater wells, they shall halt drilling activity at the first safe . . . stopping point and take all necessary steps to close the well." He also directed: "MMS shall not process any new applications for permits to drill consistent with this directive." The one-page memorandum did not set forth any facts to support these findings but relied instead on the facts set forth in the Safety Report.

Effective May 30, 2010, MMS issued a Notice to Lessees, NTL No. 2010-N04 ("NTL-04"), which implemented the Secretary's directives. NTL-04 notified lessees and operators that "MMS will not consider for six months from the date of this Moratorium NTL" (or until November 30, 2010) "drilling permits for deepwater wells." NTL-04's "Findings" stated that it was based on the Secretary's one-page memorandum and the recommendations in the Safety Report and itself did not set forth any facts to support its findings.

On June 7, 2010, Plaintiffs filed this suit seeking declaratory and injunctive relief based on allegations that the blanket moratorium exceeded Defendants' substantive authority under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*., and violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

On June 21, 2010, this Court heard oral argument on Plaintiffs' motion for preliminary injunction. During the argument, Interior's counsel attempted to conceal the Executive Summary's misleading expert peer-review statement from the Court by referring the Court instead to a similar statement regarding the experts' peer-review contained in the text of the Safety Report and suggesting that the only reasonable implication was that the experts peer-reviewed only the Safety Report's 22 technical safety recommendations, and not the Executive Summary's six-month blanket moratorium recommendation. Rec. Doc. 72 at 53-54. This attempted obfuscation of the facts is now known to be contrary to what actually occurred as determined and detailed in the OIG report.

A day after the hearing, on June 22, 2010, the Court granted Plaintiffs' motion for preliminary injunction, recognizing that, in this case of national significance, the government-ordered industry wide shut down of deepwater drilling had not complied with APA standards. In its Order and Reasons, the Court expressed concern about "the probity of the process that led" to the Safety Report and concluded that Defendants had "failed to cogently reflect the decision to issue a blanket . . . moratorium with the facts developed during the thirty-day review." Rec. Doc. 67 at 3, 21. The Court thus determined that Plaintiffs had a probability of success on the merits of their claims and that the equities weighed in favor of injunctive relief. Rec. Docs. 67, 68. Accordingly, the Court issued an order that "immediately prohibited" Defendants from

enforcement of the blanket six-month deepwater drilling moratorium "as applied to all drilling on the OCS in water at depths greater than 500 feet." Rec. Doc. 68.

This Court's concerns with probity were prescient. At nearly every turn since the entry of the preliminary injunction, the Government's practices have cast doubt not only on the probity of the original moratorium decision, but also on the means by which the Government implemented its policy to perpetuate the moratorium. Indeed, nowhere in the extensive pleadings and Declarations submitted by Defendants in this case did they admit the critical fact that the administration added the moratorium recommendation so late in the process that the facts, data and analysis in the Report, which had been subject to appropriate expert peer review, did not support or provide any rational basis for that recommendation.

Within hours of the entry of the preliminary injunction, Secretary Salazar publicly announced Defendants' intention to defy the order, stating: "The decision to impose a moratorium on deepwater drilling was and is the right decision" and "I will issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and within our authorities." Rec. Doc. 69-2. On the day following the entry of the preliminary injunction, Secretary Salazar reaffirmed his intention to disobey this Court's order, testifying before a Senate Subcommittee that he planned to issue an identical "moratorium on all exploration of oil in the Gulf of Mexico at depths of more than 500 feet" and refusing to concede the preliminary injunction's effect by repeatedly stating that the moratorium remained "in place." Rec. Doc. 134-1 at 9, 15, 17 and 21. The statements of the Secretary were intended to, and did in fact, chill any resumption of deepwater drilling,[4] in blatant disregard of this Court's order, which

[4] In fact, even more than a month after the government formally "lifted" the twice-imposed deepwater drilling moratorium, no deepwater drilling activities that were prohibited have resumed. *See, e.g.*, David Hammer, "First New Drilling Permits Issued Since Moratorium Was Lifted," The Times-Picayune, November 10, 2010 ("Neither" of the two permits issued since the moratorium was lifted "would have been prohibited by the moratorium.")

determined that the resumption of drilling was necessary to protect the local economy, the Gulf region and the availability of domestic energy in this country.[5] Indeed, Secretary Salazar concluded his Congressional testimony with an answer to a question about the enjoined moratorium's effect on drilling in Alaska, stating: "you know, the moratorium that is in place does, in fact, apply to the Alaska wells and to the exploration wells that Shell had proposed to put into place." Rec. Doc. 134-1 at 21 (emphasis added).

In response to the Secretary's public announcement and testimony, Plaintiffs immediately filed a Motion to Enforce Preliminary Injunction Order, asserting that the Secretary's announcements were a *de facto* continuance of the moratorium in direct defiance of the Court's preliminary injunction order. Rec. Doc. 69-1. On June 24, 2010, this Court denied Plaintiffs' Motion to Enforce "as premature." Rec. Doc. 82. In the fullness of time, it is now apparent that the Secretary's conduct was the first step in an orchestrated plan of defiance of this Court's order undertaken to perpetuate the enjoined moratorium. First through words, and later through deeds, the Secretary discouraged and prevented even the thought of resumed drilling.

On the same day that Secretary Salazar testified to Congress that the moratorium remained "in place" despite the preliminary injunction against its enforcement, June 23, 2010, Defendants filed a Notice of Appeal, purportedly to have the Fifth Circuit overturn the preliminary injunction order, and further filed a Motion to Stay, which this Court denied. Defendants then filed a Motion to Stay with the Fifth Circuit. On July 8, 2010, within hours of holding oral argument on Defendants' Motion to Stay, the Fifth Circuit denied it by a vote of 2 to 1 and ordered expedited briefing and an expedited hearing on the Government's appeal. As their actions immediately following the Fifth Circuit's denial show, once they lost their stay request,

[5] Rec. Doc. 67 at 22.

Defendants had no intention to pursue their Fifth Circuit appeal any further and instead sought to manipulate their way out of any sort of judicial review of their actions, in utter disregard of the adverse effects of this defiance on the judicial system and the burdens they placed on Plaintiffs.

On July 12, 2010, just four days after losing the Motion to Stay, Secretary Salazar reissued a blanket deepwater drilling moratorium that covered "precisely the same rigs and precisely the same deepwater drilling in the Gulf of Mexico as did the first moratorium," for the exact same duration as the first one, until November 30, 2010. Rec. Doc. 165 at 2. Secretary Salazar concluded the July 12th decision memorandum with a declaration that the May 28th enjoined moratorium was replaced, rescinded and superseded, notwithstanding that it was the subject of this Court's preliminary injunction order and despite that it was the subject of the Government's own appeal. Rec. Doc. 125-4 at 22. The Secretary's unilateral reconsideration of his administrative action without first asking this Court to remand the case to the agency was not only a calculated act of evasion, it was also directly contrary to the law. *Broussard v. United States Postal Serv.*, 674 F.2d 1103, 1108 n.4 (5th Cir. 1982) ("The rule is that once a judicial suit is filed, an agency should not unilaterally reopen administrative proceedings – the agency should first ask the court to remand the case to it."), citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1316 (5th Cir. 1977); *Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962), *cert. den'd*, 370 U.S. 922; Rec. Doc. 165 at 10.

Simultaneously with the issuance of the July 12th moratorium, Defendants filed a Motion to Dismiss in this Court and a Motion to Vacate the Preliminary Injunction as Moot in the Fifth Circuit, asserting that the Secretary's rescission of the first moratorium had defeated the courts' jurisdiction. Defendants premised their assertion of mootness on their unilateral decision to impose a second moratorium while, at the same time, rescinding the challenged one, which was

part of their deliberate plan to avoid compliance with this Court's order. In essence, Defendants asserted that they could eliminate an adverse decision at any time simply by reissuing the same agency decision in a new guise and declaring the first agency decision superseded, all while continuing to engage in the very conduct that had been enjoined. Like their appeal that they had no intent to pursue, Defendants' filings asserting mootness as a bar to jurisdiction put Plaintiffs to the task of a needless defense at a substantial cost, all without receipt of the beneficial effects that should have arisen from the relief this Court properly granted to them.

On September 1, 2010, this Court denied Defendants' Motion to Dismiss, finding that the voluntary cessation exception to the mootness doctrine applied. Rec. Doc. 165. In its denial, the Court concluded that the "government has yielded nothing" and that there was "no way on this record to accord defendants the solicitude they claim they deserve when only hours after this Court enjoined the enforcement of the first moratorium, the Secretary stated publicly on more than one occasion his resolve to soon issue a new moratorium." Rec. Doc. 165 at 13, n.5 and 18. The Court continued that it was "difficult to square" the Government's pre-announced "public expression of resoluteness" to re-impose a moratorium once the Court declared the first one legally invalid "with the Government's assertion that its rescission of the first moratorium and its issuance of the new moratorium is entitled to solicitude and should not be considered litigation posturing." Rec. Doc. 165 at 18.

In its denial of Defendants' dismissal motion, this Court also examined "just how new" the Administrative Record for the Secretary's July 12th moratorium was, concluding that Plaintiffs had demonstrated "that nearly every statement in the July 12 decision memorandum is anticipated by documents in the May 28 record, or by documents that were otherwise available to the Secretary before May 28." Rec. Doc. 165 at 16. The Court further found that, while Interior

suggested that over 6000 pages were created after May 28th and used in the decision-making process for the July 12th moratorium, "plaintiffs impressively counter that these pages only make up twenty-two percent of the entire July 12 administrative record, quite possibly even less." *Id.*

Upon a more thorough review of the Administrative Record for the July 12th moratorium, the Magistrate Judge confirmed that, "as of June 22, 2010" – the day of entry of the preliminary injunction order – "the Secretary had already arrived at his decision on an agency policy that the First Moratorium would be reinstated or replaced as soon as possible by a largely identical Second Moratorium." Rec. Doc. 67 at 19 in *Ensco Offshore Co. v. Kenneth Lee Salazar, et al.*, No. 10-1941 ("*Ensco*"). He further observed: "the record of withheld materials dated after June 21, 2010, which I am ordering must be disclosed, is rife with evidence that the Second Moratorium decision was made on June 22nd and that the subsequent agency deliberations were after-the-fact justifications for that decision." *Ensco* Rec. Doc. 67 at 24. In affirming the Magistrate's decision, this Court agreed, concluding that "the Magistrate's determination that the Secretary had reached a decision to issue a new moratorium on June 22 is not clearly erroneous and, moreover, is supported by the law and the administrative record." *Ensco* Rec. Doc. 96 at 9 (emphasis added).

Following the Court's denial of Defendants' Motion to Dismiss, Plaintiffs filed a Renewed Motion to Enforce Preliminary Injunction Order, asserting that Defendants had impermissibly chosen disobedience as their method to test the preliminary injunction order and that, after the Fifth Circuit denied a stay, Defendants had improperly sought to evade judicial review by arguing that their pre-announced and preordained defiant act had mooted the case. Plaintiffs therefore asked the Court to enforce its preliminary injunction order against Defendants' July 12th carbon copy moratorium. Before this Court had the opportunity to reach

Plaintiffs' Renewed Motion to Enforce, however, the Fifth Circuit on September 29, 2010, in a *per curiam* decision with one dissent, dismissed Defendants' appeal of the preliminary injunction order as moot on the basis that Defendants' rescission of the of the May 28th moratorium resulted in the preliminary injunction order's legal and practical death. Rec. Doc. 206-1 at 2-3. Nevertheless, the Fifth Circuit specifically reserved any opinion on "whether the issuance of the second moratorium (1) violated the district court's preliminary injunction; (2) was done to avoid judicial review of the first moratorium; or (3) renders moot the merits of the underlying suit." Rec. Doc. 206-1 at 3, n. 2.

One day later, this Court denied Plaintiffs' Renewed Motion to Enforce, "In light of the United States Court of Appeals for the Fifth Circuit's September 29th opinion declaring moot the appeal of the preliminary injunction." Rec. Doc. 185.

On October 12, 2010, "after being unsuccessful in Court,"[6] Defendants lifted (at least as a formality) the deepwater drilling moratorium earlier than its declared November 30th end date. In conduct reminiscent of that practiced upon these Plaintiffs, Defendants then moved to dismiss certain counts in the *Ensco* matter that had challenged the May 28th and July 12th deepwater drilling bans.[7] In its Order and Reasons, dated November 3, 2010, this Court granted Defendants' motion to dismiss, finding that, based on the Secretary's decision to lift the July 12th deepwater drilling moratorium, the Court "ought not gamble that past improprieties will be repeated." *Ensco* Rec. Doc. 129 at 9. Quoting the Fifth Circuit's admonition in *Sossaman v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009),[8] against "'litigation posturing,'" the

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6 *Ensco* Rec. Doc. 129.

7 As this Court observed, Defendants lifted the second moratorium "on the very date additional briefing was due" on Ensco's partial summary judgment motion that challenged the validity of the second moratorium and therefore before the Court could rule on that issue. *Ensco* Rec. Doc. 126.

8 *Cert. granted in part*, 130 S.Ct. 3319 (2010).

Court referred to this case and emphasized that it stood in "stark contrast" to the circumstances in the *Ensco* matter. *Id.* at 10, n. 8. As the Court set forth with respect to this case: "The government, after an unfavorable appeal, lifted the enjoined moratorium and flagrantly reinstated it. Quite sensibly, such continued conduct could have been taken to be contemptuous." *Id.*

Law and Argument

I. Civil Contempt Standard.

"When duly issued orders of a court, in the exercise of its jurisdiction, are disobeyed, the recalcitrant may be cited, according to the circumstances, for criminal contempt or civil contempt or both." *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976). *See Wafenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985), *cert. den'd*, 474 U.S. 1056 (1986) (observing that "Courts possess inherent authority to enforce their own injunctive decrees" and affirming the district court's compensatory civil contempt award, which included attorney's fees, against two individuals for violation of the court's temporary restraining order); 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, Federal Practice and Procedure § 2960 (2010) ("A court's ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots.")

When the purpose of a contempt order "is to compel obedience of the court order or to compensate the litigant for injuries sustained from the disobedience, civil contempt is proper." *Norman Bridge*, 529 F.2d at 827. As a result, "Civil contempt divides into two general classes: coercive and compensatory." *Id.* "Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's non-compliance," and the reimbursement owed is for the "losses flowing from noncompliance and expenses reasonably and necessarily incurred in an attempt to enforce compliance." *Id.*

Because "Courts have, and must have, the inherent authority to enforce their judicial orders and decrees in cases of civil contempt," a court must have discretion, "including the discretion to award attorneys' fees, . . . in the enforcement of its decrees." *Cook v. Ochsner Foundation Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977); *see Baker v. St. Bernard Parish Council*, 2008 WL 4681373 (E.D. La. 2008) ("Courts have discretion to enforce their judicial orders in cases of contempt by awarding attorney's fees."), citing *Cook*, 559 F.2d at 272; *Board of Supervisors of Louisiana State Univ. v. Smack Apparel Co.*, 574 F. Supp.2d 601, 606 (E.D. La. 2008) (awarding compensatory civil contempt damages of disgorgement of profits, plus attorney's fees and costs). In *Cook*, the Fifth Circuit articulated the theory "for allowing attorneys' fees for civil contempt" as arising from the basis that "civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *Id.*, citing *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947). "Otherwise, the benefits afforded by" a court's order "might be diminished by the attorneys' fees necessarily expended in bringing an action to enforce that order violated by the disobedient parties." *Id.*

II. Standard for an Attorney's Fee Award under the Equal Access to Justice Act, 28 U.S.C. § 2412(b).

In addition to the authority of courts to award attorney's fees in cases of civil contempt, the Equal Access to Justice Act provides the courts with authority to award attorney's fees and expenses against the Government:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, . . . to the prevailing party in any civil litigation by or against the United States . . . . The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b).

"Section 2412(b) incorporates the 'American rule' for fee-shifting, which permits a fee award only when the losing party acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992), quoting *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974). The "American Rule" generally "imposes the burden of attorney's fees upon the individual litigants." *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 129 (5th Cir. 1991) (citation omitted). "A federal court may, however, award attorney's fees to a successful litigant when his opponent has commenced or conducted an action in bad faith, vexatiously, or for the purposes of harassment." *Id.*, citing *F.D. Rich Co.*, 417 U.S. at 129. In other words, under Section 2412(b), "the federal government is now subject to the 'bad faith' . . . exception[] to the traditional 'American Rule' that litigants bear their own costs, including attorneys' fees," and "an award will be allowed against the losing party if it has willfully disobeyed a court order or otherwise acted in bad faith." *Knights of The Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parish Sch. Bd.*, 679 F.2d 64, 67 (5th Cir. 1982), citing *F.D. Rich*, 417 U.S. at 129-130. To determine bad faith, the "court may consider conduct both during and prior to the litigation, although the award may not be based solely on the conduct that led to the substantive claim." *Perales*, 950 F.2d at 1071, citing *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989); *see Baker v. Bowen*, 839 F.2d 1075, 1081-1082 (5th Cir. 1988) (concluding that the government's conduct was in bad faith based on its concealment that it had lost a tape recording of a social security benefits petitioner's administrative hearing and remanding to the district court "for a determination and award of the fee at an appropriate market rate and in the discretion of the district court.")

As a result, both the inherent authority of this Court to enforce its orders through a finding of civil contempt and Section 2412(b) of the Equal Access to Justice Act fully support

Plaintiffs' request for reimbursement of their attorney's fees. As the history of this litigation reveals, once Plaintiffs prevailed on their motion for preliminary injunction, Defendants resisted compliance every step of the way, impermissibly seeking to make Plaintiffs "mere supplicants of the federal government" and this Court "a mere supplicant of the executive branch." *Cobell v. Norton*, 226 F. Supp.2d 1, 164 (D.D.C. 2002), *vacated and remanded on other grounds*, 334 F.3d 1128 (D.C. Cir. 2003). Consequently, this Court should sanction Defendants both to rightfully compensate Plaintiffs for their losses and "to protect the sanctity of judicial decrees and the legal process." *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir. 2000), *cert. den'd*, 531 U.S. 1191 (2001).

III. Defendants' Contemptuous Conduct Merits the Reimbursement of Plaintiffs' Attorney's Fees.

To establish civil contempt, the movant must show by clear and convincing evidence: (a) that a court order was in effect; (b) that the order required certain conduct by the respondent; and (c) that the respondent failed to comply with the court's order. *American Airlines*, 228 F.3d at 581; *Smack Apparel*, 574 F.Supp. at 604, citing *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 581-582 (5th Cir. 2005).

It is beyond dispute that this Court's preliminary injunction order was validly in effect from the date of its entry – June 22, 2010 – until July 12, 2010, when, as the Fifth Circuit has determined, Defendants' declaration of the rescission of the May 28th moratorium resulted in its expiration. It is further beyond dispute that the preliminary injunction order required Defendants to refrain from enforcement of a blanket six-month deepwater drilling moratorium "as applied to all drilling on the OCS in water at depths greater than 500 feet." Rec. Doc. 68. Notwithstanding this judicial prohibition, Secretary Salazar immediately publicly announced Defendants' intention to defy compliance with the preliminary injunction and then followed through on his

stated intention by replacing the legally invalid action with precisely the same substantive action. Given that Secretary Salazar announced to the public and Congress that he would simply re-impose an identical moratorium and that he further repeatedly stated that the moratorium, albeit enjoined, "remains in place," Defendants' superficial efforts to demonstrate "compliance" with the preliminary injunction[9] were nothing short of "mere litigation posturing." *Sossamon*, 560 F.2d at 325. This is particularly true when, after the Fifth Circuit rejected Defendants' motion for a stay, the Secretary, "[u]ndaunted by this repudiation, . . . in effect, implemented the stay on his own" by "simply re-implement[ing] precisely the same rule" that this Court had enjoined. *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984), *cert. den'd*, 469 U.S. 820 (1984).

Taken together, Defendants' conduct and actions in response to their losses in this litigation reflect a calculated plan to interfere with enforcement of the remedy obtained by Plaintiffs and to insulate the moratorium decision from judicial review. The deliberately defiant approach Defendants elected to take in an effort to negate, by unilateral executive action, the authority of an Article III court to review and, where appropriate, overturn illegal agency action resulted in an extraordinary price tag in legal fees for Plaintiffs who had no choice but to defend against Defendants' multiple acts of defiance and tactics practiced upon them in this Court and the Court of Appeals.

While it is not possible now for this Court to coerce Defendants' compliance with the terms of the preliminary injunction order given their unilateral conduct, it is not too late to order them to compensate Plaintiffs for the losses they sustained – their significant attorney's fees –

[9] *See, e.g.*, Rec. Doc. 137.

because of Defendants' "flagrantly"[10] disobedient conduct. *See, e.g., American Airlines*, 228 F.3d at 585 (affirming the district court's compensatory civil contempt award of approximately $45.5 million for violation of a temporary restraining order). Indeed, the circumstances of this case to a certain extent parallel the circumstances in *Norman Bridge*, in which the Fifth Circuit affirmed the district court's compensatory civil contempt award against Drug Enforcement Agency ("DEA") officials based on their violation of a temporary restraining order. 529 F.2d at 829. Like the present circumstances, *Norman Bridge* concerned a public safety issue, the suspension of a pharmacy's right to dispense drugs based on its pharmacist's guilty plea to a charge of unlawful distribution of controlled substances. *Id.* at 823. Despite a temporary restraining order that directed the DEA officials to return the drugs they had seized from the pharmacy, they refused to obey it, retaining the seized drugs apparently under the guise of protecting the public. *Id.* On appeal and notwithstanding the pharmacist's illegal distribution conviction, the Fifth Circuit agreed with the district court that the DEA "should not have chosen disobedience to test the court order" because the drug store was "entitled to the benefit of the order" and the DEA "had no justification for trying to run roughshod over it." *Id.* at 829. The court accordingly affirmed the district court's compensatory civil contempt fine against the DEA. *Id.* In other words, irrespective of any laudable motive of public protection, the agency had to respect the court's injunction. Here, the facts are even more compelling based on the absence of any bad actor like the pharmacist.

Consequently, like the *Norman Bridge* drug store, Plaintiffs were fully "entitled to the benefit" of this Court's preliminary injunction order, and, like the *Norman Bridge* DEA officials, Defendants "had no justification to run roughshod over it." *Id.* In fact, Defendants themselves

[10] *Ensco* Rec. Doc. 129 at 10, n. 8.

acknowledge: "No one would dispute that agencies may not circumvent injunctions by merely changing the enjoined action's name or date." Rec. Doc. 183 at 9. But, dissatisfied with an adverse decision on appeal, changing the enjoined action's name and date is exactly what Defendants did.

Under the circumstances and applicable law, a civil contempt order against Defendants is plainly proper and necessary to compensate Plaintiffs for the losses they sustained by reason of Defendants' noncompliance with this Court's order. *See Walker v. Birmingham*, 388 U.S. 307, 320-321 (1967) (holding that litigants subject to an injunction cannot "by-pass orderly judicial review of the injunction before disobeying it."); *Norman Bridge*, 529 F.2d at 829. Accordingly, Plaintiffs respectfully request that this Court exercise its inherent authority to find Defendants in civil contempt and to order them to reimburse Plaintiffs' attorney's fees in an amount to be determined upon submission of appropriate substantiating evidence.[11]

IV. Defendants' Bad Faith Conduct Warrants an Attorney's Fee Award to Plaintiffs under 28 U.S.C. § 2412(b).

To satisfy 28 U.S.C. § 2412(b), a party must have prevailed in a civil action "against the United States or any agency or official of the United States acting in his or her official capacity." Based on Plaintiffs' success on their preliminary injunction motion and Defendants' conduct in response to this Court's entry of the preliminary injunction order, Plaintiffs squarely satisfy Section 2412(b)'s "prevailing party" requirement. The Fifth Circuit, in *Dearmone v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008), *cert. den'd*, 129 S.Ct. 131 (2008), addressed whether

[11] Besides the *Norman Bridge* compensatory civil contempt award against a United States agency, a number of other authorities support such a sanction under circumstances in which an agency has conducted itself contemptuously. *See, e.g.*, *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp.2d 70, 89 (D.D.C. 2003) (ordering the EPA to pay the adverse party's attorney's fees and costs caused by EPA's "contumacious conduct" in violating the court's preliminary injunction order); *Cobell*, 226 F. Supp.2d at 152-153 (finding the Secretary of Interior in civil contempt and ordering payment of plaintiffs' attorneys' fees), *vacated and remanded on other grounds*, 334 F.3d 1128 (D.C. Cir. 2003); *Cobell v. Babbitt*, 37 F. Supp.2d 6, 39 (D.D.C. 1999) (ordering the Secretaries of Interior and Treasury to pay plaintiffs' reasonable expenses including attorneys' fees caused by the Secretaries' failure to obey the court's order).

a plaintiff qualifies as a "prevailing party" under a federal fee-shifting statute under circumstances in which the plaintiff obtains a preliminary injunction and the defendant subsequently takes action that moots the case, preventing plaintiff from obtaining final relief on the merits. *Dearmone*, which concerned a claim for attorney's fees under 42 U.S.C. § 1988(b), set forth the following test for a plaintiff to qualify as a prevailing party: (1) the plaintiff "must win a preliminary injunction;" (2) the preliminary injunction must be "based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff;" and (3) the court order must cause "the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits." *Id.* at 524. After announcing its prevailing party test, the Fifth Circuit in *Dearmore* observed that the test it had articulated satisfied *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), "because it requires that a party obtain a judicial ruling which results in a material change in the legal relationship between the parties." *Id.* The court elaborated: "It also does not implicate the 'catalyst theory,' which the Supreme Court struck down in *Buckhannon*, because this test grants prevailing party status only when the defendant moots the plaintiff's action in response to a court order, not just in response to the filing of a lawsuit." *Id.*

Plaintiffs satisfy each of the three prongs of the *Dearmone* test: (1) they won their preliminary injunction; (2) this Court's preliminary injunction order unequivocally determined that Plaintiffs had established a likelihood of success on the merits that the Government had acted arbitrarily and capriciously in issuing the moratorium based on the Court's findings that it was unable, on the record before it, "to divine or fathom a relationship between" the Government's "findings and the immense scope of the moratorium" and the patent lack of "any

analysis of the asserted fear of threat of irreparable injury or safety hazards posed by the thirty-three permitted rigs also reached by the moratorium;"[12] and (3) after entry of the preliminary injunction, the Government sought to moot the case by rescinding the enjoined action and replacing it with a mirror image moratorium and then sought to moot this and other litigation challenging its drilling bans by lifting the second moratorium rather facing an adverse decision on partial summary judgment in the related *Ensco* matter, all of which prevented Plaintiffs from obtaining final relief on the merits of their claims. Given that Plaintiffs succeeded on the preliminary injunction and at every other step of this litigation and that the Government's rescission of the challenged moratorium and its reimposition of a carbon copy one, which it later lifted, were all actions in directly response to entry of the preliminary injunction order, (and certainly not just in response to the filing of this litigation), Plaintiffs plainly meet the "prevailing party" requirement of Section 2412(b).

Further, under Section 2412(b), the common law bad faith exception to the "American Rule" applies to the Government, and an attorney's fee award "will be allowed against" the Government "if it has willfully disobeyed a court order or otherwise acted in bad faith." *Knights*, 679 F.2d at 67, citing *F.D. Rich*, 417 U.S. at 129-130; *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) ("a party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.") (citation and internal quotations omitted).

For at the least the following reasons, Defendants' conduct in this litigation meets the bad faith standard:

[12] Rec. Doc. 67 at 17; *see also id.* at 21 ("On the record now before the Court, the defendants have failed to cogently reflect the decision to issue a blanket, generic, indeed punitive, moratorium with the facts developed during the thirty-day [safety] review.")

(1) As this Court determined, the process that led to the Safety Report lacked "probity,"[13] particularly given that the scientists asked to peer-review the Safety Report subsequently expressed disagreement with the blanket six-month moratorium recommendation and disappointment with the Executive Summary's misrepresentation that they had, in fact, peer-reviewed that recommendation. *See Perales*, 950 F.2d at 1071 (to determine a party's bad faith, a "court may consider conduct both during and prior to the litigation"). Thus, even prior to this litigation, the process that led to imposition of the moratorium was of questionable probity.

(2) As now confirmed by the November 8th OIG Report, Interior knew of and approved as final the late-night White House edit of the Executive Summary to the Safety Report that misrepresented the experts' peer-review of the blanket moratorium recommendation. Nevertheless, at oral argument on Plaintiffs' preliminary injunction motion, Interior's counsel sought to conceal the misrepresentation by referring the Court instead to a statement regarding the experts' peer-review in the text of the Safety Report in a misguided attempt to convince the Court that the statement was not misleading because it referred only to experts' peer-review of the 22 specific safety recommendations, and not the moratorium recommendation. *See Baker*, 839 F.2d at 1081-1082 (finding that the government acted in bad faith based on its concealment of the fact that it had lost a tape recording of petitioner's administrative hearing). Defendants acted in bad faith by seeking to conceal their misleading statement from the Court.

(3) Starting just hours after its entry on June 22nd, and continuing until they reimposed a mirror image moratorium on July 12th, Defendants defied compliance with this Court's preliminary injunction order that "immediately prohibited" them from enforcement of the deepwater drilling moratorium "as applied to all drilling on the OCS in water depths greater than 500 feet." Rec.

[13] Rec. Doc. 165 at 19; Rec. Doc. 67 at 3.

Doc. 68. As this Court previously found: "The record is clear . . . . Immediately after this Court's first injunction order, the Secretary announced in public his determination to issue a new moratorium even before consideration of new information." Rec. Doc. 165 at 5, n.3 (emphasis added). And, as this Court previously concluded, Defendants – through their conduct and actions following entry of the preliminary injunction order – divested themselves of any entitlement to the solicitude normally afforded to an agency in its decision-making process. Rec. Doc. 165 at 18 (there is "no way on this record to accord defendants the solicitude they claim they deserve"). In short, Defendants' conduct following the entry of the preliminary injunction showed no respect for our judicial system and no respect for Plaintiffs' statutory rights under the APA; it was a classic example of bad faith. *See Knights*, 679 F.2d at 67 (an attorney's fee award based on the bad faith "will be allowed against" the government under Section 2412(b) "if it has willfully disobeyed a court order"); *see also Chambers*, 501 U.S. at 46 ("a party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.")

(4) The timing of Defendants' imposition of the successor moratorium, just four days after they lost their appeal, is further evidence of the pattern of bad faith conduct in which they engaged. Indeed, on the morning before the Fifth Circuit oral argument on Defendants' motion for a stay took place, a senior administration official announced that Interior "would immediately issue a new moratorium if it lost the court case." Rec. Doc. 134-2. After it lost and in complete disregard of authority of the federal judicial branch, Interior in effect implemented the stay on its own. *See International Ladies' Garment Workers' Union*, 733 F.2d at 923; *see also* Rec. Doc. 165 at 18 (it is "difficult to square" the Government's "public expression of resoluteness" to re-impose a moratorium once the Court declared the first one legally invalid "with the Government's assertion that its rescission of the first moratorium and its issuance of the new

moratorium is entitled to solicitude and should not be considered litigation posturing.") Defendants' decision to reimpose a mirror image moratorium within days of the denial of their motion for a stay was a flagrant act of litigation posturing.

(5) A review of the Administrative Record with respect to the July 12th moratorium provides an additional example of Defendants' abusive, bad faith tactics in their defense of this litigation. In particular, after the Magistrate Judge reviewed the Administrative Record documents that Defendants refused to produce on the basis of the deliberative process privilege (a total of almost 8,000 pages), he concluded that, on the day of entry of the preliminary injunction order, "the Secretary had already arrived at his decision . . . that the First Moratorium would be reinstated or replaced as soon as possible by a largely identical Second Moratorium." *Ensco* Rec. Doc. 67 at 19. He further observed: "the record of withheld materials . . . is rife with evidence that the Second Moratorium decision was made on June 22nd and that the subsequent agency deliberations were after-the-fact justifications for that decision." *Ensco* Rec. Doc. 67 at 24. This court agreed, concluding that "the Magistrate's determination that the Secretary had reached a decision to issue a new moratorium on June 22 . . . is supported by the law and the administrative record." *Ensco* Rec. Doc. 96 at 9 (emphasis added). The lack of documents in the Administrative Record to show that Defendants engaged in any meaningful deliberative process before issuance of the July 12th moratorium, and, worse, the Administrative Record documents that show that just the opposite is true, provides yet another instance of Defendants' bad faith.

(6) Simultaneously with their reissuance of the blanket deepwater drilling moratorium on July 12th, Defendants' bad-faith litigation posturing continued with their filing of a Motion to Dismiss Plaintiffs' Complaint in this Court and a Motion to Vacate in the Fifth Circuit. In both motions, Defendants claimed that their rescission of the challenged agency action and replacement of it

with a new, though substantially similar, action defeated jurisdiction, mooted Plaintiffs' claims and justified vacatur of this Court's order. Plainly, Defendants' actions were designed to eliminate the adverse decision against them and evade judicial review.

In response to Plaintiffs' challenge to the May 28th deepwater drilling moratorium, Defendants engaged in a pattern of abusive litigation tactics that both individually and collectively fall squarely within the bad faith standard for which an attorney's fee award against the government under Section 2412(b) is appropriate. Therefore, in accordance with 28 U.S.C. § 2412(b), Plaintiffs ask this Court to exercise its discretion to award to Plaintiffs, as the prevailing parties, their reasonable attorney's fees and expenses in an amount to be determined upon Plaintiffs' submission of appropriate evidence thereof.

Conclusion

For all the reasons set forth above, Plaintiffs respectfully ask this Court to grant their Motion for Recovery of Attorney's Fees.

Respectfully submitted,

s/ Carl D. Rosenblum

JOHN F. COONEY
(admitted Pro Hac Vice)
Venable LLP
575 7th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 344-4812

CARL D. ROSENBLUM, T.A. (2083)
GRADY S. HURLEY (13913)
ALIDA C. HAINKEL (24114)
MARJORIE A. MCKEITHEN (21767)
JONES, WALKER, WAECHTER, POITEVENT,
CARRÈRE & DENÈGRE
201 St. Charles Avenue, 49th Floor
New Orleans, Louisiana 70170
Telephone: (504) 582-8000 - Fax: (504) 589-8170
crosenblum@joneswalker.com

**Attorneys for Plaintiffs,
Hornbeck Offshore Services, L.L.C.,
The Chouest Entities, and The Bollinger Entities.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all parties by email or by using the CM/ECF system which will send a Notice of Electronic filing to all counsel of record, this 3rd day of December, 2010.

s/ Carl D. Rosenblum