IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, et al.	
Plaintiffs,	**CIVIL ACTION No. 10-1663(F)(2)**
v.	**SECTION F**
KENNETH LEE "KEN" SALAZAR, et al,	**JUDGE FELDMAN**
Defendants.	**MAGISTRATE 2** **MAGISTRATE WILKINSON**

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CIVIL CONTEMPT AND FOR ATTORNEY'S FEES

Defendants, Kenneth Lee Salazar, United States Department of the Interior, Michael R. Bromwich, and the Bureau of Ocean Energy Management, Regulation, and Enforcement, ("Defendants"), hereby oppose Hornbeck Offshore Services' ("Plaintiffs") Motion for civil contempt and for attorney's fees under the Equal Access to Justice Act.

INTRODUCTION

On June 7, 2010, Plaintiffs filed a complaint challenging the Secretary of the Interior's ("Secretary") May 28, 2010 decision ("May Directive") to suspend certain deepwater drilling operations for a period of six months. They argued that the suspension was unsupported by sufficient facts, data, or analysis, and that the Secretary had failed to articulate a rational connection between the facts found and the choice made. The Court agreed and, on that basis, it preliminarily enjoined the Department of the Interior ("Interior") from enforcing the May Directive.

In response, Defendants immediately notified operators that the suspension letters they had received no longer had any legal effect. In this manner, Defendants fully complied with the preliminary injunction. Moreover, while not required by to do so, Defendants rescinded the May Directive and issued a new decision addressing each of the procedural defects that this Court and the Plaintiffs had attributed to the May Directive.

Plaintiffs now argue that Defendants' act of rescinding the May Directive and issuing a new decision was contemptuous, because it "re-implemented precisely the same rule" that the Court had previously enjoined. This contention, however, falls far short of the requisite showing – by clear and convincing evidence – that a violation has occurred. The contention, moreover, is based on a fundamental mischaracterization of the nature of Plaintiffs' claims. Plaintiffs alleged, and this Court endorsed, only *procedural* deficiencies in the decision process for the May Directive. By addressing those alleged deficiencies in a new decision, Interior showed this Court the utmost respect, and granted Plaintiffs all of the relief they could reasonably demand in an Administrative Procedure Act case. Plaintiffs' motion for civil contempt and for attorney fees is therefore baseless and must be denied.

BACKGROUND

The facts of this case are familiar to the Court. On April 20, 2010, an explosion and fire erupted on an offshore drilling rig in the Gulf of Mexico called the Deepwater Horizon, causing the rig to sink to the ocean floor. Eleven members of the Deepwater crew lost their lives. In addition, the riser connecting the rig to the well head ruptured, causing nearly five million barrels of oil to spew into the Gulf of Mexico. The incident is widely regarded as the worst environmental disaster in the history of the United States and, since April 2010, Interior has worked tirelessly to ensure that nothing like it ever happens again.

As part of Interior's response, the Secretary, on May 28, 2010, directed the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE") to issue a temporary six-month suspension of certain pending, current, and approved deepwater drilling operations. See Dkt. #7-2, Ex. G. This temporary suspension was intended, *inter alia*, to afford BOEMRE the time it needed to issue new safety and environmental protection rules.

On June 7, 2010, Plaintiffs filed this lawsuit and moved for a preliminary injunction alleging that the May Directive was not supported in the administrative record by sufficient "facts, data, or analysis." Dkt. #5 ¶¶ 77, 79. The administrative record, unfortunately, could not be compiled in time for the hearing on Plaintiffs' motion. The Court, therefore, was able to review only the May Directive, its implementing Notice to Lessees ("NTL"), and eight other documents that were submitted as attachments to the Declarations of Steve Black and Deputy Secretary David J. Hayes. See Dkt. ## 33-1, 33-2, 33-5. Other documents that would have formed part of the administrative record could not be provided to the Court during the expedited proceedings.

Based on the limited record before it, the Court granted Plaintiffs' motion and, on June 22, issued a preliminary injunction ("Preliminary Injunction") preventing the enforcement of the May Directive and the associated NTL. In so ruling, the Court concluded that Plaintiffs would likely prevail on the merits of their claim that the Secretary had not adequately explained why he exercised his discretion under the Outer Continental Shelf Lands Act ("OCSLA") in the given manner. See Dkt. #67.

Interior immediately complied with the Preliminary Injunction by (1) notifying all Department employees that they were not to take any action to enforce the May 28 Directive and NTL and (2) notifying each operator who had received a suspension letter that "neither the NTL nor the order directing suspension of operations has legal effect on your operations at this time."

See Dkt. ## 77, 137. In a press release dated June 22, 2010, Interior also indicated that it would issue a new suspension decision, this time with the explanation the Court had found missing from the May Directive, so as to leave no doubt that a broad suspension was legal, appropriate, and within Interior's authority under the OCSLA. See Dkt. #69-2.

True to his word, the Secretary issued a new directive suspending deepwater drilling ("July Directive") on July 12, 2010. See Dkt. #125-4, Ex. A. While nearly identical to the May Directive in its scope and substance, the July Directive addressed the inadequacies that the Plaintiffs and this Court had preliminarily attributed to the May Directive, by providing a new, more robust explanation for the Secretary's revised action. Defendants then reasonably defended the July Directive from litigation, in this case and in the related case, Ensco Offshore Company v. Salazar, 10-cv-1941 MLCF-JCW, until it was determined on October 12, 2010, that a suspension of deepwater drilling operations was no longer needed. See Ex. 1.

ARGUMENT

A. There is No Basis For a Finding of Civil Contempt

Article III courts have inherent authority, in cases of civil contempt, to enforce their judicial orders through an assessment of attorney's fees. United States v. Alcoa, Inc., 533 F.3d 278, 287 (5th Cir. 2008). A finding of contempt in this case, however, would be wholly unfounded. To establish contempt, a movant must show "by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." American Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574, 581 (5th Cir. 2000). The evidence required to establish all three factors must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 582 (5th Cir. 2005) (internal quotations omitted).

The third element of this test is not satisfied here because the record demonstrates that Defendants fully complied with the terms of the Court's Preliminary Injunction. That Preliminary Injunction stated in relevant part:

> [Defendants] are hereby immediately prohibited from enforcing the Moratorium, entitled 'Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells,' dated May 28, 2010, and NTL No. 2010-N04 seeking implementation of the Moratorium, as applied to all drilling on the OCS in water at depths greater than 500 feet.

Dkt. #68 at 2-3. To implement these terms, Interior immediately notified all Department employees that they were not to take any action to enforce the May Directive and NTL. Interior also notified each affected operator that "neither the NTL nor the order directing suspension of operations has legal effect on your operations at this time." See Dkt. ## 77, 137. Finally, Interior rescinded the May Directive on July 12, 2010, and that rescission remains effective today. Defendants, therefore, did not violate any element of the Preliminary Injunction.

Plaintiffs attempt to avoid this conclusion in two ways. First, they interpret the Preliminary Injunction broadly, as if it had imposed an unqualified prohibition on deepwater "moratoria" in general, and they argue that the July Directive flouted that prohibition. See Dkt. #213-1 at 16. The Preliminary Injunction, however, said no such thing. It prohibited only the enforcement of the May Directive. Notably, this Court did not hold that a broad suspension order, if fully and adequately explained, would violate the OCSLA. To the contrary, the Court has recognized that Interior has broad and continuing authority under the OCSLA to suspend drilling operations. See Ex. 2 at 62:18-22 ("That's never been disputed, not even by this Court."); see also 43 U.S.C. § 1334(a)(1) (describing Secretary's broad suspension authority). The Court held only that Plaintiffs would likely succeed on the merits of their claims because Interior had failed *to explain* adequately the basis for its decision. The Preliminary Injunction, therefore, was specific to the circumstances presented by the May Directive; it clearly did not enjoin any future exercise of

the Secretary's suspension authority under the OCSLA. See Ex. 3 at 24:10-12 (The Court: I think it's inappropriate to characterize the [July Directive] as defiance.").

Indeed, the Preliminary Injunction could not form the basis for a finding of contempt if it were any less clear in this regard, because it would run afoul of the particularity requirement for injunctions in Federal Rule of Civil Procedure 65(d). Rule 65(d) requires that every order granting an injunction "describe in reasonable detail . . . the act or acts restrained or required." F. R. Civ. P. 65(d)(1)(c). This requirement is "an important procedural safeguard," see Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 800 (5th Cir. 1990), designed "to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974). Accordingly, contempt may lie only for the violation of a clear and unambiguous order, see Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993), and "any ambiguities or uncertainties in such a court order must be read in a light favorable to the person charged with contempt." Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991). The plain language of the Preliminary Injunction in this case unambiguously directed Defendants not to enforce the May Directive, but omitted any reference to any other exercise of the Secretary's suspension authority. The Preliminary Injunction, therefore, cannot be read as a general prohibition on deepwater "moratoria."

Plaintiffs next argue that the July Directive was subject to the Preliminary Injunction – notwithstanding the Injunction's plain language – because it was virtually identical in scope and substance to the May Directive. See Dkt. 213-1 at 17 (arguing that the Secretary "'re-implement[ed] precisely the same rule' that this Court had enjoined"); id. at 22 (asserting that the Secretary replaced the May Directive "with precisely the same substantive action"). This argument also fails, however, because it was not the scope or substance of the May Directive that

formed the basis for the Preliminary Injunction. To the contrary, Plaintiffs asserted and the Court endorsed only *procedural* claims in challenging the May Directive. See Dkt. #165 at 17 ("[Defendants] correctly point out that the plaintiffs' complaint challenges the decision-making *process* leading up to the May 28 moratorium . . .") (emphasis added). Similarly, in issuing its Preliminary Injunction, this Court held only that Plaintiffs would likely succeed on the merits of their claims because Interior had failed *to explain* adequately the basis for its decision. Hornbeck v. Salazar, 696 F. Supp. 2d 627 (E.D. La. 2010). The relevant inquiry, therefore, is whether Defendants' issuance of the July Directive was a bona fide attempt to correct the *procedural* infirmities that the Court had attributed to the May Directive. The answer is clearly "yes." For example:

1. The Court cited a lack of inspection data specific to equipment and operators other than those involved in the Deepwater Horizon blowout as part of its decision to enjoin the May Directive. See Dkt. #67 at 17. It observed on that basis that the May Directive appeared to extrapolate improperly from the BP Oil Spill to conclude that all deepwater drilling operations pose an unacceptable risk. See Dkt. #67 at 21 (concluding that May Directive "seems to assume that because one rig failed . . . all companies and rigs drilling new wells over 500 feet also universally present an imminent danger"). The July Directive addressed this issue by explaining that performance problems were identified in the blowout preventers ("BOP") used to drill BP's relief wells, and that these problems are likely to recur elsewhere due to the small number of BOP manufacturers, as well as the industry-wide use of standardized components. See Dkt. #125-4, Ex. A at 9. In addition, the July Directive explained that the decision to suspend drilling operations was based on three separate and independently adequate rationales: the safety risks posed by deep water drilling, the industry-wide inadequacy of containment and wild well intervention capabilities, and the industry-wide inadequacy of oil spill response capabilities. See

Dkt. #125-4, Ex. A at 2, 7-16. All three rationales unquestionably identified systemic flaws that reached far beyond the Deepwater Horizon. Accordingly, Interior was justified in taking broad remedial measures.

2. As part of its basis for enjoining the May Directive, the Court also cited a lack of explanation for two of the parameters of the suspension: the six-month duration and the depth of 500 feet. See Dkt. #67 at 4, 18-19. Here again, the July Directive fully explained the Secretary's rationale for using those parameters. With respect to depth, it explained that the 500 foot figure had been used only as a proxy in the May Directive to denote operators that use the riskiest equipment configurations, *i.e.*, subsea BOPs and BOPs on floating platforms. Moreover, it ultimately abandoned that proxy to avoid any confusion by the regulated community or the general public. See, e.g., Dkt. #125-4, Ex. A at 8-9 & n.6. As to duration, the July Directive explained that the November 30, 2010 end-date was based on the amount of time needed to, *inter alia*, improve containment and response capabilities, complete relevant investigations, implement new safety requirements, and develop interim rules to address recently discovered safety issues. See Dkt. #125-4, Ex. A at 20-21.

3. The Court also previously faulted the Secretary for failing to demonstrate that he had considered, prior to issuing the May Directive, an alternative whereby individual rigs would be suspended until they achieved "compliance with new regulations said to be recommended for immediate implementation." Dkt. #67 at 20. Although such consideration of "alternatives" is not required prior to invoking OCSLA's suspension authority, especially under the emergency circumstances presented by this case, Interior nevertheless addressed the Court's concern by conducting the referenced analysis prior to issuing the July Directive. On June 29, 2010, Director Bromwich instructed BOEMRE to:

> [P]rovide options for proposed actions to ensure safe and environmentally protective drilling in the OCS, including the viability of an option for addressing these issues on a case-by-case basis. Please make sure each of your options considers the following factors, if applicable: . . . Whether the proposed action should be applied to rigs individually or more broadly. . . . Whether operations must be suspended to implement the proposed action, and if so, for how long. In addition, are there terms and/or conditions that an operator could fulfill that would justify a lifting of the suspension for that particular operator?

Ex. 4 at 2. In response, BOEMRE prepared an Options Memorandum relying in part on the information gathered pursuant to the June 29 instruction and, in that Memorandum, discussed the relative merits of a series of potential options for addressing the risks exposed by the blowout, including the one proposed by this Court. See Ex. 5 at 24-29. The Secretary ultimately explained on July 12 that he could not implement such an alternative because Interior had not yet determined what criteria, if met, might justify relieving individual operators from the suspension prior to November 30, 2010. The Secretary, however, instructed the Director of BOEMRE to identify such criteria through continued analysis, and to submit a report on his findings for the Secretary's consideration no later than October 31. See Dkt. #125-4, Ex. A at 18, 21. That Report, which was submitted on October 1, served as the primary basis for the Secretary's decision on October 12, 2010, to lift the July Directive and its corresponding suspensions in advance of November 30.

4. The Court expressed a concern relating to the economic impacts of the May Directive. In response, the July Directive explained that the OCSLA does not require BOEMRE to conduct a balancing of harms analysis in connection with the suspension of drilling operations. See Dkt. #125-4, Ex. A at 16. The statute requires only that the Secretary conclude that there is a threat of serious or irreparable harm to life, property or the marine, coastal or human environment. Compare 43 U.S.C. § 1334(a)(1) with 43 U.S.C. § 1334(a)(2)(i)-(iii). Notwithstanding this, BOEMRE and the Secretary examined economic impacts, including

comments submitted by the State of Louisiana. See Dkt. #125-4, Ex. A at 16-17; see also Ex. 5 at 19-24.

The above are only examples, but they clearly show that the Secretary took into consideration the Court's criticism of the May Directive. They also illustrate the fallacy in Plaintiffs' argument that Defendants somehow robbed them of their "statutory rights under the APA." See Dkt. #213-1 at 10. The Plaintiffs' alleged only procedural claims, viz., that the May Directive was unsupported by sufficient "facts, data, or analysis" and that it did not contain an adequate "explanation" articulating a "connection between the facts found and the choice made." See Dkt. #5 (First Am. Compl.) ¶¶ 46-47, 78-79.[1] As demonstrated above, the July Directive addressed precisely those alleged procedural shortcomings, as well as the Court's criticisms of the May Directive in its Preliminary Injunction and corresponding Order and Reasons.

This case, therefore, is easily distinguished from International Ladies' Garment Workers' Union v. Donovan, 733 F.2d 920 (D.C Cir. 1984) (Donovan II), which Plaintiffs cite for the proposition that an agency may not respond to an injunction by "re-implement[ing] precisely the same rule." See Dkt. #213-1 at 17. The plaintiffs in the Donovan cases originally challenged a rule rescinding a decades-old prohibition on the employment of industrial workers in their homes. See Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 799 (D.C. Cir. 1983) ("Donovan I"). In vacating the rule, the circuit court explained that the agency had failed to consider factors relevant to, *inter alia*, the enforcement of fair labor standards for homeworkers. Id. at 823-24. The court then remanded the matter to the agency for further proceedings consistent with its findings, and

[1] The First Amended Complaint also alleged that the May Directive "exceeded Defendants substantive authority under the Outer Continental Shelf Lands Act . . . ," see Plfs' Br. at 6, but Plaintiffs ultimately conceded that the OCSLA authorizes the Secretary to issue broad suspensions when it finds systemic flaws. See Ex. 6 at 24-25. The Court has similarly confirmed that the Secretary has such authority. See Ex. 2 at 62:18-22 (stating that Interior's broad statutory authority to impose "moratoria" has "never been disputed, not even by this Court").

ordered that "[t]he restriction against industrial homework shall be reinstated and remain in effect unless properly modified pursuant to 'reasoned decisionmaking' consistent with the opinion of this court." Id. at 828 (emphasis added). Despite those instructions, the agency responded by issuing a rule which once again rescinded the ban on homeworking without first addressing any of the procedural errors identified in Donovan I. See Donovan II, 733 F.2d 923. This finding is what motivated the court to enforce its prior order. In stark contrast to the agency in Donovan, Interior's issuance of the July Directive fully addressed the Court's findings rather than ignoring them.

The remaining cases on which Plaintiffs rely also bear no resemblance to the circumstances presented by this case and, therefore, provide no support for Plaintiffs' civil contempt motion. In Walker v. City of Birmingham, 388 U.S. 307 (1967), for example, protest marchers had been enjoined from engaging in mass demonstrations without first obtaining a parade permit from the City of Birmingham. Id. at 309. The protesters purposely ignored the injunction and conducted the planned marches without applying for a permit. Id. at 310. Unlike the protesters in Walker, the Secretary fully complied with this Court's injunction and also directly addressed the potential legal infirmities the Court had identified. Plaintiffs' reliance on Norman Bridge Co. v. Banner is similarly flawed. 529 F.2d 822 (5th Cir. 1976). In that case, drug enforcement agents simply refused to return confiscated property in direct violation of the court's restraining order. Id. at 825. Here again, Defendants' have not ignored the Court's injunction but have complied in all respects with its terms. Thus, Plaintiffs' Motion for civil contempt must be denied.

B. Recovery of fees under the common law doctrine of "bad faith"

Plaintiffs' motion for attorney fees under the common law "bad faith" exception to the American Rule is similarly meritless and must also be denied. The "American Rule," established in 1786, provides that a winning litigant in a civil action "ordinarily may not collect attorney's fees

from the loser." Sanchez v. Rowe, 870 F.2d 291, 293 (5th Cir. 1989). As an exception to this Rule, however, a court may assess attorney's fees to the losing party if it determines that the party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991). The Equal Access to Justice Act ("EAJA") adopts both the American Rule and its common law exception; it provides in relevant part:

> [A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of 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 . . . .

28 U.S.C. § 2412(b).

The bad faith exception, therefore, may be applied against the United States, but only "to the same extent" as any other defendant. See id. § 2412(b). The United States may not be held to a higher standard than other civil litigants, nor is it appropriate to apply common law fee-shifting doctrines more liberally against the Government because of its deeper pockets. "The standards for bad faith are necessarily stringent." Batson v. Neal Spelce Assocs., Inc., 805 F.2d 546, 550 (5th Cir. 1986). While a court has "inherent power" to award fees when it finds that a litigant has acted "in bad faith," this power "must be exercised with restraint and discretion." Hunting Energy Servs. v. Inter-Mountain Pipe & Threading Co., 242 Fed. Appx. 257, 260 (5th Cir. 2007). More specifically, "[a] court should invoke its inherent power to award attorneys' fees only when it finds that 'fraud has been practiced upon it, or that the very temple of justice has been defiled.'" Id. (quoting Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1005 (5th Cir. 1995)).

The evidentiary standards that apply to bad faith determinations are similarly stringent. A court may consider "a party's conduct *in response* to a substantive claim, whether before or after an action is filed, but [a finding of bad faith] may not be based on a party's conduct *forming the basis* for that substantive claim." Sanchez, 870 F.2d at 295 (emphasis in original). Any finding of bad

faith, moreover, must be supported by "clear and convincing evidence"; this "generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." See Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton, 187 F.3d 655, 660 (D.C. Cir. 1999) (internal quotations and citations omitted).

1. Plaintiffs' assertion that the decision process for the May Directive lacked probity is both irrelevant and inaccurate

Plaintiffs argue that the bad faith standard is satisfied here because, "even prior to the litigation, the process that led to the imposition of the [May Directive] was of questionable probity." See Dkt. #213-1 at 22. Plaintiffs refer here to the Executive Summary for the May 27, 2010 Safety Report, which inadvertently implied that the Secretary's recommendation to suspend deepwater operations for six months had been peer-reviewed. See id. at 3-4, 22. The argument is irrelevant to Plaintiffs' motion for fees because, under the "bad faith" exception to the American Rule, a movant is entitled to recover fees only for bad faith conduct occurring "*in response* to a substantive claim." See Sanchez, 870 F.2d at 295 (emphasis in original). A movant's recovery "may not be based on a party's conduct *forming the basis* for that substantive claim."[2] Id. (emphasis in original); see also

[2] Relying on Perales v. Casillas, 950 F.2d 1066 (5th Cir. 1992), Plaintiffs assert that a 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*." See Dkt. #213-1 at 15 (quoting Perales, 950 F.2d at 1071) (emphasis added). The italicized text may be read as implying that conduct underlying the substantive claim can form part of the basis for a finding of bad faith, so long as it does not serve as the "sole" basis. That, however, is not the law, as made clear by the authority on which the Perales panel relied for its assertion, *i.e.*, the Fifth Circuit's decision in Sanchez v. Rowe. The court in Sanchez explained that "[e]xtending the bad-fath exception to include bad faith in the acts giving rise to the substantive claim is inconsistent with the rationale behind the American Rule." 870 F.2d at 294. On that basis, the Sanchez court held that "the requisite bad faith may be found in a party's conduct *in response* to a substantive claim, whether before or after an action is filed, but it may not be based on a party's conduct *forming the basis* for that substantive claim." Id. at 295 (emphasis in original). To the extent there is tension between the two decisions, the rule as articulated in Sanchez must govern, both because the panel in Perales purported to endorse it and because the Sanchez decision was first in time. See Burge v. Parish of St. Tammany, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting

Hillman Lumber Products, Inc. v. Webster Mfg., Inc., 727 F. Supp. 2d 503, 509-510 (W.D. La. 2010) ("An award of attorneys' fees under the 'bad faith' exception is designed to punish the abuse of judicial process rather than the original wrong underlying the action") (internal quotations and citations omitted).

Even if the alleged misconduct were relevant, however, it still could not serve as a basis for finding bad faith because a Report by the Office of Inspector General ("OIG") determined, after a thorough investigation, that none of the Interior personnel involved in the preparation of the Safety Report or its Executive Summary had committed any wrongdoing. See Exs. 7, 8. The OIG was charged with determining whether senior DOI officials, "in an effort to help justify their decision to impose a 6-month moratorium on deepwater drilling . . . misrepresented that the moratorium was reviewed and supported by a group of scientists and industry experts." See Ex. 7 at 1. After completing its investigation, the OIG found that Interior officials were surprised by the misunderstanding, and that they had not intended to imply that peer-reviewers had endorsed the decision to suspend deepwater drilling. See Ex. 8 at 4-5. The OIG further found that Interior immediately apologized to the peer-reviewers in a formal letter, and in person, after learning of the misunderstanding, and publicly corrected the misunderstanding. Id. Finally, the three peer-reviewers interviewed as part to the OIG investigation indicated that they believed the wording of the Executive Summary was the result of an editing mistake, and that it was not an intentional attempt to mislead the public. Id. at 6.

While the OIG did not also investigate or opine on White House involvement, the OIG Report indicates that "[a]ll DOI officials interviewed stated that it was . . . rushed editing of the Executive Summary by DOI and the White House [that] resulted in this implication." Id. at 1. The

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en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.").

Report also confirms that the drafting process for the Executive Summary involved various drafters and editors, and that it was conducted under severe time pressure. See id. at 2-3. The evidence, therefore, does not suggest that anyone involved acted with intent to mislead the public. It suggests instead that an honest misunderstanding occurred under rushed circumstances. Accordingly, there is no basis for questioning the integrity of the decision process underlying the May Directive.

There is also no basis for Plaintiffs' allegations questioning integrity of the undersigned counsel. Plaintiffs argue that counsel for the Defendants, at the June 21, 2010 oral argument on the Preliminary Injunction Motion, attempted to conceal certain language in the Executive Summary because it implied that the Secretary's recommendation to suspend deepwater operations had been peer reviewed. See Dkt. 213-1 at 6, 22. This argument is unfounded and, considering the severity of the accusation, reckless. During the argument, this Court quoted from the portion of the Executive Summary that stated:

> The recommendations contained in this 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.

Ex. 6 at 52:13-17 (quoting from Ex. 9 at 3). The undersigned counsel responded, mistakenly at first, by explaining that the statement the Court had read appeared on the first page of the Safety Report. In reality, the text in that document was slightly different from what the Court had recited:

> In particular, seven members of the National Academy of Engineering peer-reviewed the recommendations in this report . . . . Appendix 1 lists expert consultations in from this report.

Ex. 6 at 54:4-8 (quoting from Ex. 10 at 1). Plaintiffs' assertion that counsel was deliberately attempting to mislead the Court or "conceal" the similar language in the Executive Summary, however, is belied by counsel's very next statement which acknowledged the ambiguity in the Executive Summary. The acknowledgement appears on the same page of the Transcript, and was not prompted by any question of this Court:

> Now, I think there is a fair reading *of the executive summary* that obviously after the fact, with 20/20 hindsight vision, does not dispel the notion or potential argument or the implication that these peer reviewers reviewed the recommendation for a six-month suspension.

Ex. 6 at 54:11-15 (emphasis added). Later during that same argument, while referring to the first paragraph on the third page of the Executive Summary, counsel again acknowledged the ambiguity:

> [T]he Plaintiffs are interpreting that – and I don't think unfairly – as suggesting that these people peer reviewed the recommendation that was only in the executive summary concerning suspensions. That's why I distinguish between the two documents. This executive summary is a cover letter from the Secretary to the President explaining the safety report that is attached. The summary is not a report. The safety report is a report. So when it says, 'the recommendations contained in this report,' it refers to the safety report. *Could that have been more clear? In 20/20 hindsight, absolutely*.

Ex. 6 at 87:15-25 (emphasis added).

The above excerpts clearly demonstrate that the undersigned counsel did not attempt to conceal relevant evidence, and did not at any point breach his duty of candor to this Court. Plaintiffs' argument to the contrary is baseless.

2. The July Directive was a lawful and appropriate exercise of Interior's authority under the OSCLA – it was not bad faith

Plaintiffs next argue that the decision to issue the Directive and the decision process that led to it reflect a "pattern" of bad faith. This argument is equally meritless.

For example, Plaintiffs note that "[i]mmediately after this Court's first injunction order, the Secretary announced in public his determination to issue a new moratorium even before the consideration of new information." Dkt. #213-1 at 23 (emphasis in original). That the Secretary did not conduct new studies and analysis prior to his June 22 announcement, however, in no way undermines the bona fides of the July Directive. An agency action may be deemed arbitrary and capricious for failure to examine relevant data, for failure to articulate a satisfactory explanation, for failure to consider relevant factors, or for making a clear error in judgment. See Motor

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). These legal infirmities can occur singly or in any number of combinations. It follows that the appropriate scope of an agency's proceedings in revisiting a decision is necessarily guided by the nature of the alleged error committed, which is often revealed in a reviewing court's decision. Thus, for example, an agency need not compile new evidence on remand if a court has found only that the agency's exercise of discretion was inadequately explained. It would suffice in such circumstances to simply provide the missing explanation. See Food Mktg. Inst. v. I.C.C., 587 F.2d 1285, 1290 (1978) (recognizing that the panel in the underlying case had required the agency to "further to elaborate its reasoning" on remand); see also Nat'l Grain & Feed Ass'n, Inc. v. OSHA, 903 F.2d 308, 310-311 (5th Cir. 1990) (recognizing that an agency need not always conduct supplemental fact gathering on remand).

In this case, the Court held only that Plaintiffs would likely prevail on the merits of their claims because the Secretary had not adequately explained the basis for his decision. Contrary to Plaintiffs' apparent belief, the Court did not hold that a broad suspension order, if fully and adequately explained, would nonetheless violate the OCSLA. Nor did the Court hold that the Secretary's factual and analytical record for the May Directive was inadequate. Indeed, it could not have, because the Court did not have the benefit of reviewing the administrative record for the May Directive prior to issuing its Preliminary Injunction. See Dkt. #67 at 21 (clarifying that the Court's decision was limited to "the record [then] before the Court"); compare id. at 5 (recognizing that "the Administrative record is not yet complete") with id. at 13 (confirming that "[a] court determining whether some agency action is arbitrary and capricious under the APA makes its decision *on the basis of the 'whole record'*") (emphasis added).

It was therefore reasonable for the Secretary to announce that he intended to issue a new decision to provide the explanation this Court had found lacking in the first decision. See Dkt. #69-2

(June 22, 2010 News Release) (indicating that the Secretary would issue a new suspension order "that eliminates any doubt that a moratorium is needed, appropriate, and within [the Department of the Interior's] authorities"). This is precisely what the APA contemplates, and it in no way evinces or suggests bad faith. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (holding that a court should remand to the agency for further explanation "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it").

The Secretary, however, did not strictly limit himself to providing a revised explanation. As the July Directive explains, "the BP Oil Spill [was] a dynamic situation, and new information [was] made available every day about the risks associated with deepwater drilling on the OCS." Dkt. #125-4, Ex. A at 2. Consistent with his "continuing supervisory obligations" under the OCSLA, see Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 752 (9th Cir. 1975), therefore, the Secretary also examined new information as part of the decision process underlying the July Directive.

Plaintiffs urge that it was improper for Defendants to consider new evidence because, as they argue, that evidence was sought only to provide after-the-fact justifications for a decision the Secretary had already made. See Dkt. #213-1 at 24.[3] Plaintiffs' argument is without merit. Even if the Secretary *had* made a final decision concerning the July Directive on June 22, as Plaintiffs urge, their argument ignores that "[a]gencies are, and properly should be, engaged in a continuing process of examining their policies." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151 n.18 (1975).

Consistent with Sears Roebuck, the Secretary requested BOEMRE Director Michael R. Bromwich to reopen the evidentiary record and examine options for the management of the

[3] Plaintiffs rely in this context on a decision by the Honorable Magistrate Judge Wilkinson in Ensco v. Salazar, where he determined that "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." See Dkt. 213-1 at 24. Defendants respectfully disagree with the Magistrate's findings, for the reasons explained in their objections to his Order. See Ensco v. Salazar, 10-cv-1941, Dkt. # 78, 82.

OCS. On June 29, 2010, Director Bromwich began this process by directing BOEMRE to gather additional information relevant to a number of topics, to supplement the ample body of evidence that Interior had already compiled as part of the decision-process for the May Directive. Those topics included, inter alia: (1) the potential risks of deepwater drilling; (2) the potential mitigating effect of the 22 safety measures described in the Safety Report; (3) the current status of deepwater containment capabilities; (4) the current status of oil spill response plans; (5) the relative risks presented by the failure of safety and operational equipment at various depths; and (6) improvements or changes that could be made to current inspection procedures to enhance safety. Ex. 4 at 1-2. Director Bromwich further instructed BOEMRE to:

> [P]rovide options for proposed actions to ensure safe and environmentally protective drilling in the OCS, including the viability of an option for addressing these issues on a case-by-case basis. Please make sure each of your options considers the following factors, if applicable: . . .
>
> Whether the proposed action should be applied to rigs individually or more broadly. . . .
>
> Whether operations must be suspended to implement the proposed action, and if so, for how long. In addition, are there terms and/or conditions that an operator could fulfill that would justify a lifting of the suspension for that particular operator?

Ex. 4 at 2. This analysis, which served to complement the volumes of information already before the Secretary on June 22, was an appropriate and responsible exercise of the Secretary's authority and obligation under the OCLSA to manage the OCS and to provide for its conservation. It cannot serve as a basis for concluding that Defendants litigated in bad faith.

Finally, Plaintiffs argue that Defendants, by issuing the July Directive, "showed no respect for our judicial system or for Plaintiffs' statutory rights under the APA." See Dkt. #213-1 at 23. Both assertions are clearly wrong. The July Directive showed utmost respect for this Court's preliminary findings – it provided the very explanation this Court asserted was missing

from the May Directive. Compare Aug. 11, 2010, Hearing Tr. at 19:10-14 (Defendants: "In the new decision-making process, the Secretary I think made clear that it heard and understood this Court's guidance. It addressed that guidance, I think in that way, showing the utmost respect to this Court's guidance.") with id. at 19:15-16 (The Court: "Oh, I don't disagree with that. I think the July 12 memorandum decision was respectful."). Defendants also showed respect for Plaintiffs' procedural rights – the only rights recognized under the APA – and directly redressed the alleged violations of those rights, by issuing a new decision to correct each of the procedural shortcomings that Plaintiffs had attributed to the May Directive.

3. Defendants' Motion to Dismiss Plaintiffs' challenge to the May Directive after that Directive was rescinded on July 12 does not constitute bad faith

After rescinding the May Directive, Defendants reasonably filed a motion with this Court to dismiss Plaintiffs' complaint, and a motion with the Fifth Circuit Court of Appeals to vacate the Preliminary Injunction, both on grounds that the rescission of the May Directive had rendered Plaintiffs' claims and the Preliminary Injunction moot. Inexplicably, Plaintiffs now argue that these motions were filed in bad faith because they sought to "defeat" this Court's jurisdiction. See Dkt. #213-1 at 24-25.

The argument is absurd. All motions to dismiss claims as moot serve to "defeat" a court's jurisdiction on some level, and appropriately so. Lorenz v. Texas Workforce Comm'n, 211 Fed.Appx. 242, 244 (5th Cir. 2006) ("[T]he court has the duty to ensure that it has jurisdiction"). That cannot serve as a basis for bad faith. Motions to dismiss instead amount to bad faith only when they are filed on frivolous grounds or for an improper purpose, and neither condition is satisfied here. Beginning with the motion to vacate, Defendants argued in that motion that "[b]ecause the Secretary's prior decision, which was enjoined by the district court, no longer has any legal effect, the district court's injunction has no remaining force and must be vacated." See Ex. 11 at 1. In an

order dated September 29, 2010, the Court of Appeals agreed that "the preliminary injunction no longer has the same, if any, legal or practical effect," and further observed that the Preliminary Injunction was "legally and practically dead." See Dkt. #206 at 1-2. That same order dismissed Defendants' appeal as moot but, in so doing, endorsed and adopted Defendants' legal position. Compare Dkt. #206 at 1-2 with Ex. 11 at 1. The motion to vacate, therefore, cannot have been frivolous.

The same is true of the motion to dismiss, which Defendants filed with this Court on July 12, 2010. While the motion was ultimately denied, the Court's comments at oral argument make clear that it did not consider the motion to be frivolous. See Ex. 3 at 4:14-17 ("I want to thank you all for the diligence with which you have pursued this and the professional manner in which you conducted yourselves. Your briefs, which I'm thoroughly familiar with, are very good."). Indeed, the court expressed doubts on several occasions regarding the continuing vitality of the Plaintiffs' claims. See, e.g., Ex. 3 at 23:23-25 (The Court: "[Y]ou have not hunted that same animal. You have only hunted an animal that is now extict."). It was only after requesting and examining supplemental briefing addressing the doctrine of voluntary cessation that the Court determined it could continue to exercise jurisdiction over Plaintiffs' challenge to the May Directive. It cannot be said, therefore, that the motion to dismiss was "entirely without color" such as to merit a finding of bad faith. See Kerin v. U.S. Postal Serv., 218 F.3d 185, 190 n.2 (2nd Cir. 2000) ("A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim") (internal citations omitted); Cf. United States v. Medica Rents Co. Ltd., Nos. 03-11297, 06-10393, 07-10414, slip copy, 2008 WL 3876307, at *4 (5th Cir. Aug. 19, 2008) ("The district court did not agree with Appellants' arguments, but Appellants did have a nonfrivolous argument").

Similarly, neither motion was filed for an improper motive, such as burdening the Plaintiffs with unnecessary expenditures. See Batson, 805 F.2d at 550 (holding that "advocacy simply for the sake of burdening an opponent with unnecessary expenditures of time and effort clearly warrants recompense for the extra outlays attributable thereto"). To the contrary, Defendants sought at all times to streamline the judicial proceedings by focusing litigation on the only possible source of a valid case or controversy – the July Directive. See Ex. 3 at 20-21; see also Ex. 11 at 14. This was eminently reasonable *and necessary* in light of Plaintiffs' stated intentions to seek summary judgment on the May Directive, see Ex. 3 at 28:1-6 – a pointless effort which, even if successful, could not have yielded any effective relief with respect to the suspensions authorized under the July Directive. See Ex. 3 at 7:8-14.[4] Defendants' decision to file a motion to dismiss and a motion to vacate, therefore, does not support Plaintiffs' allegations of bad faith.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for civil contempt and for attorney fees should be denied.

Respectfully submitted this 27th day of January, 2011.

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[4] Plaintiffs also argue that Defendants filed their motions in an improper attempt to "evade judicial review." See, e.g., Dkt. #213-1 at 25. This Court, however, has already rejected that argument. See Ex. 3 at 21:7-8 (The Court: "I'm not all that impressed with the argument about evasion of judicial review.").

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/Guillermo A. Montero__
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