**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF LOUISIANA**

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| **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** |
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| **Defendants** | * | |
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**PLAINTIFFS' REPLY BRIEF IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECOVERY OF ATTORNEY'S FEES**

Plaintiffs, Hornbeck Offshore Services, L.L.C., the Chouest Entities and the Bollinger Entities ("Plaintiffs"), respectfully submit this reply memorandum in response to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Recovery of Attorney's Fees.

Although usually quick to invoke the special protections accorded to a federal agency in litigation, for purposes of assessing Plaintiffs' assertions of contempt and bad faith, the Government asks this Court to hold it to the same standard applied to any private civil litigant. Rec. Doc. 220 at 12. Plaintiffs agree absolutely that the Court should afford the Government no leniency and should view the Government's conduct throughout these proceedings in the same manner as it would a private litigant's. Faced with grave issues concerning the livelihoods of thousands and thousands of Gulf Coast families and businesses, as well as our delicate coastal environment, the Court has exercised the utmost restraint in its treatment of the litigants on both sides of this matter of national significance. The Government's conduct in response to that deference speaks for itself and should be judged in accordance with the same rules applied to any ordinary civil litigant. In such context, the Government's actions have been contemptuous and in bad faith warranting an award of attorney's fees to Plaintiffs.

## I. Plaintiffs Have Met Their Burden to Demonstrate The Government's Disobedience of The Court's Order Clearly and Convincingly.

Defendants' primary argument in opposition to Plaintiffs' request for a civil contempt order against them is that Plaintiffs cannot satisfy their burden to show, by clear and convincing evidence, that Defendants failed to comply with this Court's preliminary injunction order. Rec. Doc. 220 at 4-5. They assert to the contrary their "full compliance" with the order by: (a) their notification to "all Department employees that they were not to take any action to enforce the May Directive and NTL;" (b) their notification to the operators of the 33 permitted deepwater wells that the NTL and orders directing suspensions of their operations had no "legal effect . . . at this time;" and (c) the July 12th rescission of the enjoined May 28th moratorium and contemporaneous issuance of a second, carbon copy moratorium.

Defendants' "compliance" through notification assertion ignores that the preliminary injunction did not apply only to the operators of the 33 permitted wells. Rather, it applied to all deepwater OCS drilling, in total nearly 4,500 active leases in the Gulf of Mexico's deepwater.[1] The notification of the preliminary injunction received by the operators of those nearly 4,500 active leases came immediately and directly from Secretary Salazar: Interior would simply replace the enjoined moratorium with an identical one and that, despite the court order against its enforcement, the moratorium remained "in place."[2] Indeed, this "notification" was within twenty-four hours of the Court's issuance of the preliminary injunction first through a press release and then while testifying before a Senate Subcommittee.[3] The Secretary, therefore, was extremely public in announcing the continued effect of the enjoined moratorium and extremely private in his notifications to the 33 permit holders.

Defendants' letters to the operators of the 33 permitted wells and their intra-departmental memorandum therefore fall far short of compliance, particularly given their countervailing public pronouncements. As the Fifth Circuit has held, an enjoined party's conduct satisfies the contempt standard for disobedience of an order when its notification of the enjoined activity is "'so lacking in authoritative forcefulness that [it] either [was] not heard at all . . . or [was] discounted as merely stage lines parroted for the benefit of some later judicial review.'" *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 582 (5th Cir. 2000) (quoting *American Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp.2d 909, 921-22, quoting *United States Steel v. United Mine Workers of America*, 598 F.2d 363, 366 (5th Cir. 1979)). This is true even when the notification quotes the injunction order language verbatim. *Id.* (finding that the

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1 Rec. Doc. 5-1 (Safety Report at 3 ("The Gulf of Mexico has nearly 7,000 active leases . . ., 64 percent of which are in deepwater."))

2 Rec. Doc. 69-2; Rec. Doc. 134-1 at 9, 15, 17 and 21.

3 In their opposition, Defendants fail to address whatsoever Secretary Salazar's testimony to the Senate.

enjoined parties' communication "was a minimalist, non-authoritative directive that was merely accompanied by a verbatim quotation of the TRO.") Here, viewing Secretary Salazar's conflicting communications on the preliminary injunction's effect, the only one with authoritative forcefulness was his notification that Interior would replace the enjoined moratorium with an identical one. Such conduct, given the context of this dispute, the national significance of the issues and the national prominence of the Secretary, conflicts directly with the Government's current professions about the respect it has shown to this Court.

The Government's notification of the preliminary injunction, which it provided only to itself and the operators of the 33 permitted wells, "was a minimalist, non-authoritative directive"[4] that paled in comparison to the Government's larger, louder message that it planned to replace the enjoined moratorium with an identical one. *See, e.g.*, Declaration of James W. Noe (attached as Exhibit "A") (at a meeting between industry participants and senior Interior officials, including Secretary Salazar and Director Bromwich, held on June 28, 2010 (just days after issuance of the preliminary injunction), a senior Interior representative responded to a question about the industry's permission to resume drilling based on the injunction by indicating that Interior intended to issue a second moratorium). The Government's immediate message to the world about the preliminary injunction's effect on the resumption of deepwater drilling was crystal clear and undoubtedly convincing.

Defendants also argue that their rescission of the enjoined moratorium and replacement of it with a mirror image moratorium "complied in all respects" with the court's preliminary injunction because they designed their replacement moratorium to address "precisely" the "procedural shortcomings" of the first moratorium. Rec. Doc. 220 at 10-11. The Government,

[4] *Id.*

however, fails to address how its unilateral decision to rescind an agency action that was subject to judicial review (and its corresponding failure to request remand, as required by law)[5] was not itself an act of defiance. An agency cannot exercise its reconsideration authority when to do so would conflict with pending judicial proceedings. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 542 (1970) (an agency "is without power to act inconsistently with the Court's jurisdiction."); *Inland Steel Co. v. United States*, 306 U.S. 153, 160 (1939) (after a court issues temporary relief against an agency order, the agency may not "act inconsistently with the court's jurisdiction."); *B.J. Alan Co. v. ICC*, 897 F.2d 561, 563 (D.C. Cir. 1990) ("The Commission has discretion to reconsider, so long as its resumption does not conflict with proceedings in court.") Even the Fifth Circuit was careful not to endorse the Government's conduct when it dismissed the Government's appeal as moot. *See* Rec. Doc. 206-1 at 3, n. 2 (reserving any opinion on whether issuance of the second moratorium "violated the district court's preliminary injunction" or "was done to avoid judicial review of the first moratorium").

To avoid the prohibition against acting in conflict with pending judicial proceedings, the law therefore requires an agency to seek remand before it engages in reconsideration. *Broussard*, 674 F.2d at 1108 n. 4; *Anchor Line*, 299 F.2d at 125. The Government's calculated decision to bypass these long-established principles conflicted directly with these proceedings, as reflected, for example, by the Fifth Circuit's decision that the Government's actions required the dismissal of its appeal of the preliminary injunction order. By conscious design, the Government chose a legally invalid path for reconsideration of its enjoined action, and the path it chose was indeed in direct and calculated defiance of the preliminary injunction order.

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[5] *Broussard v. United States Postal Serv.*, 674 F.2d 1103, 1108 n. 4 ("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*, 544 F.2d 1310, 1316 (5th Cir. 1977); *Anchor Line Ltd. v. Fed. Mar. Comm'r*, 299 F.2d 124, 125 (D.C. Cir. 1962), *cert. den'd*, 370 U.S. 922 ("When an agency seeks to reconsider its action, it should move the court to remand or hold the case in abeyance pending reconsideration by the agency.")

Besides Defendants' silence in their opposition on the impropriety of failing to request remand, they likewise nowhere address the timing of their conduct with respect to their issuance of the successor moratorium. First, it is beyond speculation and has already been observed by this Court that the decision to issue a successor moratorium was made within hours of the Court's issuance of the preliminary injunction. And there was little – or no – intellectual honesty in the process followed to arrive at the decision purportedly made on July 12th. That decision was reached on June 22nd, just hours after Defendants' loss in this Court. Moreover, the timing of the "official" issuance of the successor moratorium – just four days after the Fifth Circuit denied their stay motion – speaks volumes about the Government's calculated abuse of Plaintiffs and the Court's resources. While Defendants painstakingly detail how the second moratorium was an effort to correct the procedural "infirmities" of the first, they omit any explanation of why they waited to implement the successor moratorium until just after they failed in their second and last resort for a stay. The reason is transparent: after the denial of the stay motion, the Secretary "implemented the stay on his own" by "simply re-implementing precisely the same rule" that this Court had enjoined. *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. 1984), *cert. den'd*, 469 U.S. 820 (1984). That the second moratorium may have had "administrative force"[6] does not excuse the legally invalid procedure Defendants followed to arrive at it, nor does it excuse Defendants' defiance in reissuing it just after an unfavorable result in court. That is the gravamen of the Fifth Circuit's observation in its decision dismissing the Government's appeal of the preliminary injunction. Rec. Doc. 206-1 at 3, n. 2 (leaving open for resolution whether issuance of the successor moratorium "violated the preliminary injunction" or "was done to avoid judicial review of the first moratorium").

[6] Rec. Doc. 165 at 11.

In short, the Government's decision to violate proper remand procedure and its subsequent decision to abandon its appeal by rescission of the enjoined action and implementation of a pre-announced second blanket deepwater drilling moratorium that covered "precisely the same rigs and precisely the same deepwater drilling"[7] were unmistakably calculated acts of defiance of the Court's preliminary injunction order. This undisputed conduct more than satisfies the "clear and convincing" standard of proof for an order of civil contempt.

## II. Plaintiffs Have Demonstrated the Government's Bad Faith.

Defendants' initial argument in opposition to Plaintiffs' request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b), is that the misleading statement in the Safety Report that claimed that the moratorium recommendation had undergone expert peer review is irrelevant to the bad faith determination because the misstatement was not conduct that occurred during this litigation. Rec. Doc. 220 at 13. Irrespective of Plaintiffs' ability to rely on Defendants' conduct "both during and prior to the litigation"[8] to establish bad faith, the record establishes that Defendants continued to obfuscate their misrepresentation during and throughout this litigation. *See, e.g.*, *Perales*, 950 F.2d at 1072 ("although defendants' disregard of INS regulations was a basis for the suit, the fact that the regulations were still disregarded well over a year into the lawsuit, in contravention of the opinion of the INS Deputy District Director, also might support a finding of bad faith.")

For example, until their present opposition brief, Defendants have repeatedly insisted that only a strained, contrived reading of the Safety Report would suggest that the moratorium recommendation had been subject to peer review, refusing to concede that it, in fact, implied just that. *Compare* Defendants' opposition brief, Rec. Doc. 220 at 13 (the Safety Report "implied

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[7] Rec. Doc. 165 at 2.

[8] *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992).

that the Secretary's recommendation to suspend deepwater operations for six months had been peer-reviewed.") *with* Rec. Doc. 220-6 at 51 ("There was never any implication that the peer reviewers, the dissenting peer reviewers, reviewed the executive summary and the proposal for a six-month moratorium."); Federal Defendants' Opening Brief (Fifth Circuit Appellant Brief) at 51 ("whether a sentence in the record might be read incorrectly to claim" that the experts supported the six-month moratorium is "irrelevant") (emphasis added). Indeed, even now, Defendants seek to absolve themselves of responsibility for the misstatement, pointing instead to "White House involvement" and "rushed editing." Rec. Doc. 220 at 14-15. To the precise contrary, the OIG Report found that it was Secretary Salazar himself who insisted on placing the expert peer review statement in the only section of the Safety Report that contained the recommendation to impose a blanket six-month moratorium on deepwater drilling, its Executive Summary. Rec. Doc. 213-2 at 3 ("Salazar felt is was very important to have the recommendations undergo the peer review process and he wanted this stressed in the Executive Summary.") Despite Defendants' persistent efforts to minimize the significance of their expert peer-review misrepresentation, it had relevance from the inception of this litigation and has continuing relevance now to the determination of Defendants' bad faith.[9] Defendants' righteousness and obfuscation continues.

Defendants next challenge Plaintiffs' assertion of bad faith based on Defendants' rescission of the enjoined action and their simultaneous imposition of the successor moratorium just four days after they lost their Fifth Circuit stay motion, arguing that these actions were a valid exercise of an agency's authority to revisit its prior decision to correct its infirmities. Rec.

[9] Defendants likewise challenge Plaintiffs' assertion that Interior's counsel sought to conceal the misrepresentation at oral argument on Plaintiffs' preliminary injunction motion by selectively quoting parts of the argument without full context. Rec. Doc. 220 at 15-16. A review of the entire exchange speaks for itself. Rec. Doc. 220-6 at 49-55, 82, 86-88.

Doc. 220 at 16-20. Defendants' argument, however, rests on a false premise. As the authorities that Defendants cite as support establish, once judicial proceedings are pending, an agency's authority to revisit its prior decisions to conduct additional fact gathering and analysis is on remand, not by unilateral agency action.[10] Once this Court granted Plaintiffs' preliminary injunction motion, Defendants knew they had one of two choices, to appeal and seek a stay or to seek a remand to revisit the enjoined action. Their decision to partially pursue both courses to achieve a continuation of the enjoined moratorium was nothing less than a deliberate, bad faith subversion of the judicial process. Defendants should be ordered to reimburse Plaintiffs for the substantial attorney's fees they incurred in response to Defendants' multiple acts of gamesmanship and "litigation posturing."[11]

## Conclusion

For the reasons set forth in Plaintiffs' original motion, as well as those set forth above, Plaintiffs respectfully ask this Court to grant their Motion for Recovery of Attorney's Fees based on Defendants' contemptuous, bad faith conduct throughout these proceedings.

[10] *See* Rec. Doc. 220 at 17-18, citing *Food Mktg. Inst. v. I.C.C.*, 587 F.2d 1285, 1290 (1978), *Nat'l Grain & Feed Ass'n, Inc. v. OSHA*, 903 F.2d 308, 310-311 (5th Cir. 1990), *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), which all concerned agency reconsideration on remand.

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

Respectfully submitted,

*s/ Carl D. Rosenblum*

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**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 31st day of January, 2011.

*s/ Carl D. Rosenblum*