IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Lamberth)
v.	)	
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' NOVEMBER 26, 2003 REQUEST FOR AWARD OF ATTORNEY'S FEES AND RELATED EXPENSES

INTRODUCTION

Defendants file this Opposition to Plaintiffs' Request for Award of Attorney's Fees and Related Expenses Based Upon Findings Establishing Defendants' Litigation Misconduct, filed November 26, 2003 ("Request").[1] Plaintiffs ignore the ruling of the Court of Appeals, which not only vacated this Court's contempt rulings against Secretary Norton and Assistant Secretary McCaleb, but also vacated this Court's award of fees and expenses to Plaintiffs. Plaintiffs' request for sanctions has been disposed of by the Court of Appeals, is *res judicata*, and may not be relitigated. Accordingly, this Court's underlying factual findings provide no basis for Plaintiffs' renewed request for sanctions. In addition, Plaintiffs are barred by the doctrine of sovereign immunity from obtaining the award they seek. Moreover, to the extent Plaintiffs seek to recover sanctions for matters that have not already been adjudicated, they have failed to provide any factual basis for their claim that sanctions are warranted.

[1] Plaintiffs also filed a fee request pursuant to the Equal Access to Justice Act on October 9, 2003.

I. The Court of Appeals Opinion Precludes A Fee Award Against Defendants.

Plaintiffs' Request asks this Court to award fees that were previously requested by Plaintiffs, ordered by this Court, and then vacated by the Court of Appeals. The "mandate rule" prohibits the relief sought in Plaintiffs' Request. Under the mandate rule, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 306 (1948). "The mandate rule is a 'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." Indep. Petroleum Ass'n of America v. Babbitt, 235 F.3d 588, 597 (D.C. Cir. 2001) (quoting LaShawn A. v. Barry, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996)); see also New York v. Microsoft Corp., 209 F. Supp. 2d 132, 141 (D.D.C. 2002); R.G. Johnson Co. v. Barnhart, No. 97-00003, 2003 WL 22273238, at *2 (D.D.C. Oct. 3, 2003).

In vacating this Court's contempt rulings against Secretary Norton and Assistant Secretary McCaleb, the Court of Appeals also vacated the award of fees and expenses to Plaintiffs. Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003) ("The *Contempt Order* is vacated insofar as it sanctions the defendants on specifications one through five and directs the payment of expenses and fees incurred by the plaintiffs."). Incomprehensibly, Plaintiffs spend eight pages of their Request[2] repeating, reanalyzing, and rearguing the very same contempt specifications vacated by the Court of Appeals. Calling the Court of Appeals' vacatur "limited," Plaintiffs contend that "the Court of Appeals purposefully let stand the findings and conclusions of the *Contempt II* decision" and "took great pains to enter the judg[]ment they did and circumscribe its judgment by vacating only certain limited provisions of the *Contempt Order* . . . ." Request at 1-2. Plaintiffs'

[2] Request at 13-20.

argument that the trial court findings following the Contempt II trial provide a basis for sanctions is meritless. The Court of Appeals unequivocally vacated the fees and costs this Court had awarded as sanctions against the Defendants.

Plaintiffs argue that this Court's "litigation misconduct" findings "remain undisturbed after the Court of Appeals' remand" and therefore warrant relitigation of the fees-as-sanctions issue. Id. at 13. Plaintiffs are incorrect. Plaintiffs themselves included the issue of "litigation misconduct" among the issues to be tried in the Contempt II trial, they asked the Court to invoke its "inherent powers," and they sought an award of their attorney fees in the show cause motion that was the basis for the Contempt II trial and Order. See Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One In This Action to Appoint A Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection With Trial One (filed Oct. 19, 2001) ("Show Cause Motion") at 60 ("defendants and their counsel's misconduct is precisely the type of activity that the exercise of inherent power is intended to cure."); see also id., Proposed Order at 2 (seeking award of "legal fees resulting from defendants' bad faith, fraudulent conduct and violation of Court orders"). In its opinion, this Court clearly based its award of fees and expenses on findings of litigation misconduct as well as findings of contempt and fraud on the court. See Cobell v. Norton, 226 F. Supp. 2d 1, 152-55 (D.D.C. 2002), vacated, 334 F.3d 1128 (D.C. Cir. 2003).

Moreover, these findings of "litigation misconduct" were specifically challenged before the Court of Appeals. See Defendant-Appellant's Brief on Appeal at 42 n.9 (attached as Exhibit

1). Having considered this record, the Court of Appeals vacated the award of fees and did not limit its vacatur to fees associated with this Court's contempt findings. The Court of Appeals did not remand with instructions for the District Court to consider whether sanctions might be appropriate on any other grounds, such as "litigation misconduct." Thus, the Court of Appeals clearly intended its order to vacate the award of fees entirely. The Court of Appeals decision has resolved the question of whether Plaintiffs are entitled to fees and expenses for the conduct at issue in Contempt II. The Court of Appeals has decided that Plaintiffs are not entitled to fees and the mandate rule deprives this Court of authority to revisit that issue.[3]

The cases Plaintiffs cite do not help them overcome the mandate rule. Plaintiffs rely heavily on Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911). Gompers, however, primarily addresses the distinction between civil and criminal contempt. See generally id. at 444-49. Gompers held that a lower court could impose monetary sanctions on remand if the underlying conduct was still wrong, albeit not criminal conduct justifying confinement as had been imposed in the court below. Id. at 451-52. But before imposing such sanctions, the lower court was instructed to determine whether such conduct was contemptuous. Id. at 450 ("[I]f, upon the examination of the record, it should appear that the defendants were in fact and in law guilty of the contempt charged . . . ."). Gompers has no application to this case, however, because the Court of Appeals has already ruled upon the bases for sanctions set forth in the

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[3] The doctrines of *res judicata* and collateral estoppel also preclude relitigation of the fee issue. See, e.g., Price v. Socialist People's Libyan Arab Jamahiriya, 274 F. Supp. 2d 20, 23 (D.D.C. 2003) (the principle of *res judicata* mandates that a district court dismiss an amended complaint to the extent that it asserts claims that had been reversed on appeal); see also Restatement (Second) of Judgments § 27, comment o (1980) ("If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court . . . this latter judgment is conclusive between the parties.").

record of the Contempt II trial, including "litigation misconduct," and it has vacated the very sanctions that Plaintiffs seek in their motion.

In Exxon Chem. Patents, Inc. v. The Lubrizol Corp., 137 F.3d 1475 (Fed. Cir. 1998), the court of appeals ruled that its earlier judgment reversing the trial court did not preclude plaintiffs from asking for a new trial based on a new legal theory. Id. at 1478, 1484. Exxon is inapposite, however, because Plaintiffs here are not seeking sanctions based on new findings and conclusions (i.e., a new theory), but rather on the same findings and conclusions addressed by the Court of Appeals. Similarly, in Westwego Citizens for Better Gov't v. Westwego, 906 F.2d 1042 (5th Cir. 1990), the Fifth Circuit ruled that its earlier vacatur did not preclude the trial court from considering new "developments in the two years since the case was originally tried . . . ." Id. at 1043. Plaintiffs, however, do not seek sanctions based on new developments, but rather on the same record that was before this Court and the Court of Appeals in Contempt II.[4]

As in Exxon and Westwego, in United States v. Bell Petroleum Serv., Inc., 64 F.3d 202 (5th Cir. 1995), the Fifth Circuit ruled that its earlier reversal and vacatur did not preclude the trial court on remand from considering additional evidence, this time on a different theory of liability apportionment. Id. at 204, 205-06. Plaintiffs argue that Bell stands for the proposition that "even where an appellate court reverses a district court on all issues presented, related issues that not considered [sic] or directly affected by that ruling remain open and subject to separate adjudication." Request at 7. This argument does not help Plaintiffs here, however, because they

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[4] As explained below, to the extent Plaintiffs are seeking sanctions for conduct other than that which was adjudicated in Contempt II or in any of the other sanctions orders that this Court has entered against the Defendants, they have failed to state a sufficient factual basis for their claimed entitlement to sanctions. See Part III, infra.

seek sanctions based on the same issues and arguments considered and disposed of by the Court of Appeals.

In vacating this Court's contempt rulings against Secretary Norton and Assistant Secretary McCaleb, the Court of Appeals also vacated the payment of fees and expenses to Plaintiffs on all grounds presented in the Contempt II record, including "litigation misconduct." Plaintiffs' Request is nothing more than an attempt to circumvent the Court of Appeals' order. It must be denied.

II. Plaintiffs Are Barred By The Doctrine Of Sovereign Immunity From Obtaining The Fees And Expenses They Seek.

Plaintiffs urge the Court to employ its "inherent powers" to grant their fee request.[5] This Court expressly cited its "inherent powers" as a basis for its award of attorney fees against Defendants for the conduct at issue in the Contempt II trial and order. Cobell, 226 F. Supp. 2d at 154. Further, Plaintiffs had urged the Court to rely upon "inherent powers" to award them fees as sanctions in their October 19, 2001 Show Cause Motion. Show Cause Motion at 60 ("defendants and their counsel's misconduct is precisely the type of activity that the exercise of inherent power is intended to cure."). Thus, these arguments were included in the record that was presented to the Court of Appeals, and Plaintiffs are therefore precluded from relitigating them.

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[5] Plaintiffs do not explain why they have filed this additional request for fees when they already have pending before the Court a petition under 28 U.S.C. § 2412(d) of the Equal Access to Justice Act ("EAJA") for what appear to be the same fees and expenses as those sought in the current motion. Perhaps Plaintiffs recognize that their EAJA petition fails to meet the specific requirements of § 2412(d).

In any event, however, Plaintiffs have failed to establish any of the grounds for the Court to exercise "inherent powers" to afford them the relief they seek. The Supreme Court has stated that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citation omitted); see also id. at 50 ("A court must, of course, exercise caution in invoking its inherent power . . . ."). In its July 2003 decision in this case, the Court of Appeals cautioned:

> A judicial claim to an "inherent power" is not to be indulged lightly, lest it excuse overreaching "[t]he judicial Power" actually granted to federal courts by Article III of the Constitution of the United States, and the customs and usages that inform the meaning of that phrase. Such a claim, therefore, must either be documented by historical practice . . ., or supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught.

Cobell, 334 F.3d at 1141 (internal citations omitted).

Plaintiffs fail to identify a single authority that would support their claim that this Court may, through "inherent powers," award a monetary sanction against an agency of the United States in the absence of an express Congressional waiver of sovereign immunity. The doctrine of sovereign immunity bars the imposition of fines, penalties or monetary damages against the government, except to the extent that the United States has explicitly consented to such sanctions. The doctrine of sovereign immunity "stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." United States v. Horn, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. Id. at 762 (citing United States v. Mitchell, 445 U.S. 535, 538 (1980), and United

States v. Nordic Village, Inc., 503 U.S. 30 (1992)). The determinations in this case that sovereign immunity does not bar either Plaintiffs' claim for prospective action or their claim for retrospective relief in the form of an accounting[6] have no bearing on the separate issue of whether the government has waived sovereign immunity for monetary sanctions. A waiver of sovereign immunity as to one available remedy does not, by implication, waive sovereign immunity as to other remedies. See Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990) (waiver of sovereign immunity as to back pay awards for discriminatory denial of promotion did not waive sovereign immunity for prejudgment interest on such back pay awards).

Congress has enacted certain waivers of sovereign immunity to permit parties in litigation against the United States to seek attorney fees. The only such waiver potentially applicable here is found in 28 U.S.C. § 2412(b) ("Equal Access to Justice Act" or "EAJA"), which permits an award of attorney fees and expenses "**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 acting in his or her official capacity in any court having jurisdiction of such action." 28 U.S.C. § 2412(b) (emphasis added).[7] The Supreme Court has held that "[t]he EAJA renders the United States liable for

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

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

attorney fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." Ardestani v. INS, 502 U.S. 129, 137 (1991); see also St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446 (D.C. Cir. 1989). Thus, even assuming Plaintiffs could otherwise meet the stringent standards for establishing "bad faith" sufficient to warrant an award of attorney fees (see Part III, infra), they still must meet **all** the requirements of the EAJA, including the requirement that they be the prevailing party, in order for the waiver of sovereign immunity to be effective. As demonstrated in Defendants' Opposition to Plaintiffs' Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act (filed Oct. 23, 2003) at 10-11, 17-18, Plaintiffs cannot establish that they were the "prevailing party" in the Contempt II proceeding. To the contrary, the Court of Appeals found sufficient basis to **revoke** the award of fees that this Court had made to Plaintiffs based on "inherent powers" and other grounds.

Defendants are aware that this Court has imposed compensatory sanctions against the United States earlier in this case and more recently in Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003); see also Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999) ("Contempt I"). Defendants elected not to appeal the Contempt I decision, but that election does not constitute a waiver of sovereign immunity, which only Congress can effect. Further,

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Waksberg court noted that only one other Circuit had addressed this issue, and that court decided it in favor of the government. Id. In Coleman v. Espy, 986 F.2d 1184, 1191 (8th Cir. 1993), the Eighth Circuit declined to "imply into [18 U.S.C. § 401] an express waiver of sovereign immunity for the federal government to be sued for civil compensatory contempt." The court thus held that "compensatory civil contempt actions [against the United States] are barred under the doctrine of sovereign immunity." Id. at 1187. In any event, the Court of Appeals has already concluded in this case that the allegations in the record from the Contempt II trial and Order did not provide a basis for an award of attorney fees to Plaintiffs.

Defendants suggest that the Court's award of fees as compensatory damages for civil contempt in Landmark is not in accord with the July 2003 decision of the Court of Appeals in this case. See Cobell, 334 F.3d at 1145 (observing that an award of expenses incurred by Plaintiffs in the contempt trial "cannot be considered relief for the underlying contempt. . . ."). Accordingly, Plaintiffs are barred by the doctrine of sovereign immunity from obtaining an award of fees and expenses incurred in connection with the Contempt II proceedings.

III. Plaintiffs Have Failed to Identify Specific Conduct of Defendants That Has Not Already Been Adjudicated and That Meets the Stringent Standards Required for Sanctions Based on "Bad Faith."

In order to recover fees and expenses based on "inherent powers," Plaintiffs are required to establish that Defendants have willfully disobeyed a court order, or acted in bad faith, vexatiously, wantonly or for oppressive reasons. Chambers, 501 U.S. at 45-46; Aleyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). Yet the only conduct Plaintiffs identify with any particularity to support their Request is the conduct at issue in the Contempt II proceeding, see Request at 13-20, which, as established in Parts I and II above, cannot provide the basis for a renewed request for fees and expenses.[8] Plaintiffs are left with nothing more than general and unsubstantiated accusations of wrongdoing, which – however often repeated by Plaintiffs – cannot support an award of attorney fees or expenses. The Supreme Court has made clear that "[a] court must . . . exercise caution in invoking its inherent

[8] Plaintiffs contend that the Court of Appeals left undisturbed the District Court's findings of fact in the Contempt II order. As explained in Parts I and II, the mandate rule and principles of *res judicata*, collateral estoppel and sovereign immunity bar the relitigation of Plaintiffs' sanctions request regardless of whether the Contempt II factfinding remains intact. Moreover, the fact that the Court of Appeals did not feel it necessary to comment upon the District Court's factfinding in order to reach its decision does not imply that the Court of Appeals agreed with that factfinding.

power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." Chambers, 501 U.S. at 50; see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."). Plaintiffs here have not even attempted to identify any specific conduct of the Defendants, other than that which they are barred from relitigating. That failure alone requires that their motion be denied.

Moreover, the Court of Appeals for the D.C. Circuit has held that the substantive standard for a finding of bad faith under § 2412(b) of EAJA is "stringent" and "attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand." Association of American Physicians & Surgeons, Inc. v. Clinton, 187 F.3d 655, 660 (D.C. Cir. 1999). A finding of bad faith must be supported by "'clear and convincing evidence,'" which "'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.'" Id. (quoting United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994)). Plaintiffs certainly cannot meet these standards, having failed to supply any particulars, backed up by evidence, of the generalized allegations they casually lob at Defendants. These allegations are nothing more than unsupported invective and cannot be the basis for sanctions under any standard, much less the stringent one required for a showing of bad faith under § 2412(b).

CONCLUSION

The Court of Appeals' July 2003 opinion on the Contempt II Order vacated this Court's fee award to Plaintiffs. Plaintiffs are therefore barred by the mandate rule and principles of *res*

judicata and collateral estoppel from relitigating the matters that were before the Court of Appeals. Further, the Court's ability to employ "inherent powers" to order an agency of the United States to pay monetary sanctions or compensation to Plaintiffs is constrained by the principle of sovereign immunity. Plaintiffs have failed to establish the prerequisites for the waiver of sovereign immunity contained in the EAJA, and thus would be unable to pursue their claim even if they were not barred from relitigating a decided issue. Finally, Plaintiffs have failed to identify any conduct of the government that has not already been adjudicated that could meet the stringent standards required for a showing of "bad faith" sufficient to permit the imposition of attorney fees or expenses.

Dated: December 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2003 the foregoing *Defendants' Opposition to Plaintiffs' November 26, 2003 Request for Award of Attorney's Fees and Related Expenses* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on *Plaintiffs' Request for Award of Attorney's Fees and Related Expenses Based Upon Findings Establishing Defendants' Litigation Misconduct* (Dkt. # 2399). Upon consideration of the Plaintiffs' motion, Defendants' opposition, any reply thereto, and the entire record of this case, it is hereby

ORDERED that *Plaintiffs' Request for Award of Attorney's Fees and Related Expenses Based Upon Findings Establishing Defendants' Litigation Misconduct* is DENIED.

SO ORDERED.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____

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No. 02-5374

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
OR IN THE ALTERNATIVE A PETITION FOR WRIT OF MANDAMUS

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McCaleb. The court could not properly declare these officials "unfit" based on their predecessors' conduct.

B. The District Court Committed Clear Error In Its Application Of Principles Of Contempt And Fraud On the Court.

1. The court's analysis uproots the concepts of contempt and fraud on the court from established law and transforms them into a means of exercising control over the ongoing operations of a federal agency.

Neither civil contempt nor fraud on the court is an elastic doctrine that allows courts to impose opprobrium and sanctions when they disagree with the manner in which parties have performed their duties. As the Supreme Court has emphasized, the "potent weapon" of contempt sanctions may not be "founded upon a decree too vague to be understood." International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Thus, "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous" and the violation has been "proved by 'clear and convincing' evidence." Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (internal citations omitted). Put another way, "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden." Drywall Tapers and Painters of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989).

Nor is "fraud on the court" a less stringent doctrine. As this Court has explained, "[f]raud upon the court refers only to very unusual cases involving far more than an injury to a single litigant," such as the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony. Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 642-43 (D.C. Cir. 1996) (citation omitted). This Court has suggested that "fraud on the court" cannot be found where the alleged misrepresentations have not affected any judicial ruling. Id. at 643 ("It is particularly noteworthy * * * that any misrepresentations to the District Court were not relevant to the court's decision"). See also Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460 (2d Cir. 1994) (fraud on the court is, inter alia, "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication").[9]

2. The district court's dissatisfaction with DOI's performance plainly cannot rise to the level of contempt or fraud on the court.

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[9] Likewise, the catch-all category of "litigation misconduct," which the district court also invoked, Dkt#1476, at 29-31, provides no basis for the drastic remedial sanctions imposed in this case. Although courts have power to protect the integrity of their processes and prevent litigation abuse, the Supreme Court has cautioned that these powers must be exercised "with restraint and discretion," and that a "primary aspect of that discretion" is the selection of an "appropriate sanction" for any asserted abuse. Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991). This doctrine cannot be extended to justify sanctions based on conduct ranging from filing a Federal Register notice to failing to identify all problems in a computer system.