

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
ELOUISE PEPION COBELL, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
GALE A. NORTON, Secretary of the Interior, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 1:96CV01285  
(Judge Lamberth)

**DEFENDANTS' NOTICE OF FILING OF  
(1) DEFENDANTS' MOTION FOR SANCTIONS REGARDING  
SUBMISSION OF FALSE OR MISLEADING AFFIDAVITS  
BY PLAINTIFFS' ATTORNEY DENNIS M. GINGOLD;  
AND (2) SUPPORTING MEMORANDUM**

To: Mr. Dennis M. Gingold  
Mr. Mark Kester Brown  
1275 Pennsylvania Avenue  
Ninth Floor  
Washington, D.C. 20004

PLEASE TAKE NOTICE that on the 25th day of July, 2002, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), filed their Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold, and the memorandum in support thereof, copies of which are attached hereto and, pursuant to Fed. R. Civ. P. 11(c)(1)(A), were served upon you more than 21 days prior to this date.

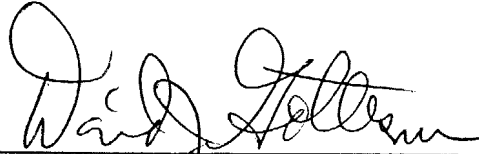
Dated: July 25, 2002

(CONTINUED ON NEXT PAGE)

(page 2 of Defendants' Notice of Filing)

Respectfully submitted,

ROBERT D. McCALLUM  
Assistant Attorney General  
STUART E. SCHIFFER  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director



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SANDRA P. SPOONER  
Deputy Director  
JOHN T. STEMPLEWICZ  
Senior Trial Attorney  
DAVID J. GOTTESMAN  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 514-7194

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 25, 2002 I served the Foregoing *Defendants' Notice of Filing of (1) Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold; and (2) Supporting Memorandum*, by hand:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036-2976  
202-822-0068


Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004  
202-318-2372

By U.S. Mail upon:

Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

Courtesy Copy of the Motion Only By Facsimile on July 25, 2002  
Complete Copy By Hand Delivery the Morning of July 26, 2002:

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Avenue, N.W.  
12th Floor  
Washington, D.C. 20006  
(202) 986-8477

  
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' MOTION FOR SANCTIONS  
REGARDING SUBMISSION OF FALSE OR MISLEADING  
AFFIDAVITS BY PLAINTIFFS' ATTORNEY DENNIS M. GINGOLD**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), pursuant to Fed. R. Civ. P. ("Rules") 11, hereby move that this Court impose sanctions upon Plaintiffs' attorney, Dennis M. Gingold ("Gingold"), for his submission of false or misleading affidavits in connection with a pending proceeding for the recovery of fees. In support of this motion, Interior Defendants state:

Pursuant to Rule 11(c)(1)(A), Interior Defendants served this motion upon Plaintiffs at least 21 days prior to its being filed, but, by the time of that filing, Plaintiffs have not appropriately corrected their improper actions, and Interior Defendants' counsel conferred by telephone or in person with Plaintiffs' counsel, who refused to agree to this motion.

On April 29, 2002, Gingold filed an affidavit in support of Plaintiffs' Statement of Fees and Expenses, in which Plaintiffs sought recovery of attorney fees and expenses in connection with two discovery motions of Interior Defendants which had been denied. On May 23, 2002, Gingold filed a supplemental affidavit in support of the fee application. As shown in Interior

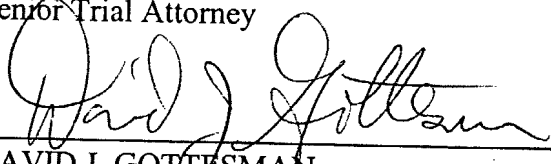
Defendants' memorandum in support of this motion, those affidavits contain false or misleading statements of material fact regarding matters within Gingold's personal knowledge, and Gingold has violated Rule 11(a)(1) and (3). Alternatively, this Court has the inherent authority to sanction Gingold because his false or misleading statements were made in bad faith.

For the reasons discussed in Interior Defendants' memorandum in support of this motion, Interior Defendants request that the Court enter an order (1) specifically finding that Gingold filed one or more affidavits in which he knowingly and in bad faith made false or misleading statements of material fact; (2) requiring Gingold to submit a copy of such finding to each of the named Plaintiffs, and ordering Plaintiffs to disseminate a copy to the class members; (3) disallowing all fees and expenses claimed by Gingold; and (4) imposing such other sanctions as this Court deems appropriate.

Respectfully submitted,

ROBERT D. McCALLUM  
Assistant Attorney General  
STUART E. SCHIFFER  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director

SANDRA P. SPOONER  
Deputy Director  
JOHN T. STEMPLEWICZ  
Senior Trial Attorney

  
\_\_\_\_\_  
DAVID J. GOTTESMAN  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice

P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 307-0183

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER IMPOSING SANCTIONS UPON  
PLAINTIFFS' ATTORNEY, DENNIS M. GINGOLD, FOR  
HIS SUBMISSION OF FALSE OR MISLEADING AFFIDAVITS**

This matter comes before the Court on Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold, and any responses thereto, the Court finds that the motion should be GRANTED.

The Court finds that on April 29, 2002, Plaintiffs' attorney, Dennis M. Gingold ("Gingold") submitted an affidavit in support of Plaintiffs' Statement of Fees and Expenses, in which Plaintiffs sought to recover attorney fees and expenses from Defendants, arising out of the Court's prior denial of two discovery motions of Defendants, as set forth in this Court's orders entered on March 29, 2002. On May 23, 2002, Gingold filed a supplemental affidavit in further support of Plaintiffs' effort to recover attorney fees and expenses. Each of those affidavits stated supposed hourly billing rates of Gingold. Additionally, Gingold attached to his April 29, 2002 affidavit purported "Billing Statements" to Plaintiffs, which also stated those supposed hourly rates. The only fair reading of those affidavits and Billing Statements is that Gingold represented to this Court that he in fact charged those hourly rates to the Plaintiffs in this case, for the time

claimed in his affidavits and shown on those supposed Billing Statements. In fact, Gingold did not charge the stated hourly rates to Plaintiffs in this case, and the supposed Billing Statements were fictitious.

Accordingly, the Court further finds that Gingold's statements in the two affidavits, and the Billing Statements, regarding his hourly rates were misrepresentations of material fact, were false and misleading, that Gingold had no evidentiary support or basis to make them, that he made them for an improper purpose of needlessly increasing the cost of litigation or to mislead the Court, and that he acted knowingly and in bad faith in making those misrepresentations. The Court further finds that the sanctions imposed by this Order are necessary in order to deter future misconduct by Gingold.

IT IS THEREFORE ORDERED that:

(1) The Court hereby censures Gingold for his actions described above.

(2) Gingold shall send a copy of this Order each of the named Plaintiffs. Within 10 days from the date hereof, Gingold shall file a certification with the Court, stating whether he has complied with this paragraph.

(3) Plaintiffs are ordered to prominently post a copy of this Order on the website they maintain at [www.indiantrust.com](http://www.indiantrust.com), within fifteen days from the date hereof, and it shall remain posted in accordance with this paragraph for at least the subsequent 120 days. Such Order shall be posted in the column entitled "Latest Information," with the following description: "Court Order censuring Plaintiffs' attorney, Dennis M. Gingold, for filing false or misleading affidavits."

(4) Any and all attorney fees and costs claimed by Gingold pursuant to this Court's orders of March 29, 2002, are hereby disallowed in their entirety.



SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2002.

---

ROYCE C. LAMBERTH  
United States District Judge

cc:

Sandra P. Spooner  
John T. Stemplewicz  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 514-7194

Dennis M Gingold, Esq.  
Mark Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004  
202-318-2372

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, NW  
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Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
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CERTIFICATE OF SERVICE

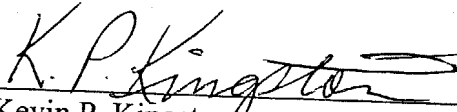
I declare under penalty of perjury that, on June 28, 2002 I served the foregoing *Defendant's Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold*, by hand:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036-2976

Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004

By U.S. Mail upon:

Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
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Case No. 1:96CV01285  
(Judge Lamberth)

**DEFENDANTS' MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION FOR SANCTIONS  
REGARDING SUBMISSION OF FALSE OR MISLEADING  
AFFIDAVITS BY PLAINTIFFS' ATTORNEY DENNIS M. GINGOLD**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") state the following in support of their Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold.

**INTRODUCTION**

In connection with a recent fee application, Plaintiffs' attorney Dennis M. Gingold ("Gingold") signed and filed one or more affidavits containing false or misleading statements as to material facts plainly within his personal knowledge, and which his earlier and other submissions to the Court reveal that he must have known were false or misleading at the time they were made.

In April, 2002, as part of his effort to recover attorney fees and expenses in connection with discovery motions on which Plaintiffs had prevailed, Gingold filed an affidavit which states his alleged hourly billing rates. He attached to his affidavit what purported to be copies of

"Billing Statements" (which now appear to be fictitious) to the Plaintiffs, stating those rates and computing his fees and charges based upon them. The only fair reading of the affidavit and Billing Statements is that Gingold was representing that the stated hourly rates are what he has charged Plaintiffs in this case.

Interior Defendants' opposing briefs observed that a prior, 1999 affidavit filed by Gingold in this case demonstrates that he actually charged lower rates to Plaintiffs. Gingold then filed a second affidavit, in May, 2002, which perpetuated his misleading representation. Interior Defendants sought leave to file a Surreply which notes that Gingold continues to mislead, and observes that Plaintiffs had not even denied this in their reply brief.

Caught making a misrepresentation to the Court, Plaintiffs then filed a paper admitting that none of the hourly rates claimed by Gingold in his recent affidavits are actually charged in this case. Plaintiffs offered the excuse that no one should have assumed that the hourly rates stated in his affidavits are the rates he charges in this case. The wording and structure of the affidavits, the supposed "Billing Statements" attached to one of the affidavits, and other circumstances belie Plaintiffs' argument.

As shown below, Gingold attempted to "put one over" on this Court by knowingly and in bad faith misrepresenting the facts. Accordingly, sanctions are warranted under either Fed. R. Civ. P. ("Rules") 11 or the Court's inherent authority. In particular, Interior asks that the Court make a specific finding that Gingold knowingly and in bad faith submitted false affidavits to the Court, that the Court's finding be distributed to Plaintiffs and members of the class, that all of Gingold's claimed fees and expenses be disallowed, and that the Court impose such other sanctions as it deems appropriate.

## BACKGROUND

On March 29, 2002, this Court entered two orders permitting Plaintiffs to recover reasonable expenses, including attorney fees, arising from their oppositions to two specific discovery motions which had been denied. The Court directed Plaintiffs to submit a statement of their reasonable expenses, including attorney fees, incurred as a result of opposing the two discovery motions.

On April 29, 2002, Plaintiffs filed their Statement of Fees and Expenses ("Plaintiffs' Statement"), in which they seek over \$409,000, for almost 1300 hours of time. Of that amount, Gingold claims to have spent over 347 hours, with fees and expenses totaling \$104,206.25. See Plaintiffs' Statement at 2-3. Gingold claims an hourly rate of \$325 for fifty of those hours<sup>1</sup> and rates of \$425 or \$475 per hour for the remainder. Id. Attached to Plaintiffs' Statement is an affidavit by Gingold, apparently dated April 29, 2002<sup>2</sup> (a copy of which is attached hereto as Exhibit 1), in which he attempts to establish the hourly rates he claimed in Plaintiffs' Statement. At paragraph 6, he states:

Through December 31, 1999, my billing rate had been \$325.00 an hour, plus 15% for overhead . . . . This is the same rate that I had billed for my time since 1989. After more than 10 years at this rate, on January 1, 2000, I changed my billing rate to be more in line with – but still less than – attorneys with my expertise, \$425.00 per hour generally, and \$475.00 for trial, hearing, or deposition time.

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<sup>1</sup> Plaintiffs' Statement at 2-3, indicating that Gingold seeks to recover for 46.9 hours at \$325 per hour, regarding "E-mail Matters," and for 3.8 hours at \$325 per hour for "Trade Secrets Matters." Additionally, as shown in Plaintiffs' Statement at page 3, Gingold seeks to add a flat 15% on top of those charges, supposedly to cover expenses.

<sup>2</sup> Although the affidavit bears a date of April 29, 2001, that appears to be a typographical error, and the correct year appears to be 2002.

Attached to Gingold's April 29, 2002 Affidavit (and within Exhibit 1 hereto) are what purport to be "Billing Statements" addressed to Elouise Cobell, that state they are from Dennis Gingold, and which list, inter alia, a "current hourly rate." The Billing Statements through December, 1999 list an hourly rate of \$325, and add another 15% for "overhead expenses." The Billing Statements for January, 2000 and forward list an hourly rate of \$425 or \$475, plus 15% for "overhead expenses."

Interior Defendants filed their Objections to Plaintiffs' Statement on May 13, 2002. Among other things,<sup>3</sup> the Objections note that, in a 1999 fee application submitted to this Court, Gingold included an affidavit dated April 2, 1999 (a copy of which is attached as Exhibit 2 hereto),<sup>4</sup> in which he made (§ 7) what appears to be a directly contradictory statement regarding his hourly rates since June 5, 1998:

Through June 5, 1998, my billing rate was \$325.00 an hour, plus 15% for overhead. This is the same rate, [sic] I have billed since 1989. For this reason, I believe this rate is conservative in the current market. One hundred and twenty-five dollars of that amount was deferred, so that on a current basis I billed at \$200 per hour plus 15% overhead. After June 5, 1998, my fee arrangement was for \$200 per hour plus 15% overhead, with no deferred fee and instead, as the Court was advised last summer, a fee to be applied to an appropriate time under the "common fund" doctrine.

(Emphasis added.)

On May 23, 2002, Plaintiffs filed their Reply. It did not deny the discrepancy, but it

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<sup>3</sup> Interior Objections also noted, for example, that over 40% of the hours claimed in Plaintiffs' Statement appear to pertain to matters other than those for which they were allowed recovery, and they spend unreasonable amounts of time on the matters for which they were allowed recovery.

<sup>4</sup> Exhibit 2 hereto is a copy of Gingold's April 2, 1999 Affidavit, along with samples of the "Billing Statements" that were attached to it.

included another affidavit by Gingold, dated May 23, 2002 (a copy of which is attached hereto as Exhibit 3), in which he states (¶ 3):

Through December 31, 1999, my billing rate had been \$325.00 an hour, plus 15% for overhead . . . . This is the standard hourly rate that I generally had billed and collected since 1989. After more than 10 years at this particular rate, on January 1, 2000, I changed my standard hourly rate to address materially increased responsibilities and to be more in line with attorneys who possess comparable expertise and assume similar responsibilities in complex financial matters such as this: \$425.00 per hour generally, and \$475.00 for trial, hearing, or deposition time.

(Emphasis added.)

On June 5, 2002, Interior Defendants filed a motion for leave to file a Surreply. The Surreply further discusses the false and misleading statements in the Gingold affidavits, and indicates that this was a valid basis to deny all fees sought by Gingold.<sup>5</sup>

On or about June 12, 2002, Plaintiffs filed their Opposition to the motion for leave to file the Surreply. In that Opposition (at 5-6), Plaintiffs attempt to explain the obvious contradiction between Gingold's 1999 affidavit and his April 29, 2002 affidavit:

the paragraph from the 1999 Gingold Affidavit pertains to Mr. Gingold's fee agreement with the clients in this litigation whereas the paragraph in the recent Gingold Affidavit pertains to Mr. Gingold's client base in general over the years. . . . Nothing in the cited Paragraph from the recent [April 29, 2002] Gingold Affidavit (Paragraph 6) gives the honest reader any basis for concluding that the Paragraph is speaking to the rates in this case, as opposed to Mr. Gingold's rates in general.

(Emphasis in original; footnote omitted). Thus, Plaintiffs appear to concede that the rates stated

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<sup>5</sup> This motion for sanctions, however, seeks sanctions and relief in addition to the relief requested in Interior's Objections and its Surreply. Because of the willful and continuing nature of Gingold's violation, merely disallowing the claimed fees is not a sufficient sanction.



in Gingold's April and May, 2002 affidavits and in the putative "Billing Statements" attached to the April, 2002 affidavit, are not actually the rates he charges to Plaintiffs.

Although Gingold has not disclosed the rates and amounts that he actually has charged Plaintiffs, if he were charging the \$230 per hour that his 1999 affidavit stated he was charging, the amount of his claimed fees and expenses in his April, 2002 application for fees would have been only \$94,024.00 – which is over \$100,000 less than he actually claimed.<sup>6</sup>

### ARGUMENT

#### **I. The Court Has Authority to Impose Sanctions Under Rule 11 or the Court's Inherent Power**

Rule 11 states, in pertinent part:

(a) **Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . .

(b) **Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. . . . [and]

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<sup>6</sup> The figure of \$94,024 is calculated by multiplying \$230 per hour times the hours of Gingold shown on Plaintiffs' Statement at 1-3.

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonably opportunity for further investigation or discovery; . . . .

An attorney's filing of an affidavit (whether his own or another person's) that he knows to be false violates Rule 11. See Margo v. Weiss, 213 F.3d 55, 59 (2d Cir. 2000) (client and his attorney sanctioned under Rule 11 for filing "false affidavits . . . motivated by a desire to prolong what had become objectively baseless litigation"); Copelco Capital, Inc. v. General Consul of Bolivia, 940 F. Supp. 93, 95-96 (S.D.N.Y. 1996) (attorney ordered to show cause why he should not be sanctioned under Rule 11 for filing his own affidavit that misquoted a lease in a misleading way); Chaudhry v. Ksenzowski (In the Matter of Ksenzowski), 56 B.R. 819, 835 (Bankr. E.D.N.Y. 1985) (sanctions imposed upon attorney under Rule 11 for, *inter alia*, filing false affidavit of service; the court stated, "[counsel] has shown himself indifferent to the accuracy of the representations he makes to this Court").

Alternatively, if Rule 11 did not apply, the Court would have inherent authority to sanction Gingold. An attorney's submission of an affidavit that is false or misleading as to a material fact should be considered just the sort of "litigation misconduct" that the Court has inherent authority to punish by imposing appropriate sanctions. See Shepherd v. American Broad. Cos., 62 F.3d 1469, 1472 (D.C. Cir. 1995) (district courts have "inherent power" to sanction attorneys or parties for "litigation misconduct"); First Bank of Marietta v. Hartford Underwriters Ins. Co., 115 F. Supp. 2d 898, 904 (S.D. Ohio 2000) ("A district court may award sanctions pursuant to its inherent powers when bad faith occurs").

**II. Gingold's Affidavits of April 29, 2002 and May 23, 2002 Contain False or Misleading Statements of Material Fact**

Because Plaintiffs' Statement seeks to recover attorney fees attributable to Gingold's work, and seeks to prove his hourly rates based upon his affidavits, any statements in those affidavits regarding his hourly rates are material. In particular, because Gingold specifically seeks to recover fees at the hourly rate of \$325 through December, 1999 and at the rates of \$425 or \$475 per hour since January, 2000, his sworn statements regarding those rates are material.

The false or misleading nature of Gingold's affidavits is evident from Gingold's and Plaintiffs' own submissions. In his Affidavit of April 29, 2002 (Exhibit 1 hereto), Gingold states (¶ 6) that "since 1989" and "[t]hrough December 31, 1999, my billing rate had been \$325.00 an hour, plus 15% for overhead." Similarly, in his May 23, 2002 Affidavit (Exhibit 3 hereto), he states (¶ 3) that "[t]hrough December 31, 1999, my billing rate had been \$325.00 an hour, plus 15% for overhead," and that "[t]his is the standard hourly rate that I generally had billed and collected since 1989."

These assertions simply cannot be reconciled with Gingold's April 2, 1999 Affidavit, which states (¶ 7) that "[a]fter June 5, 1998, my fee arrangement was for \$200 per hour plus 15% overhead."<sup>7</sup> Additionally, attached to that 1999 affidavit are "Billing Statements" which state "hourly rates" which correspond to the hourly rates asserted in the affidavit.<sup>8</sup> The Court relied

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<sup>7</sup> Although his April 2, 1999 Affidavit went on to assert that he also sought to collect under the "common fund" doctrine, that is irrelevant to the simple fact of whether his hourly rates were \$325 or \$200. Regardless of whether Gingold thinks he is entitled to additional recoveries (under a "common fund" theory or otherwise), he is not entitled to pretend to be charging Plaintiffs hourly rates other than what he really has charged them.

<sup>8</sup> Exhibit 2 hereto includes the April 2, 1999 Affidavit and a sample of the Billing Statements that were filed with it.

upon that 1999 affidavit in determining the award of fees and expenses to Plaintiffs. See Cobell v. Babbitt, 188 F.R.D. 122, 126 (D.D.C. 1999).

Thus, Gingold's 2002 affidavits plainly misrepresent that his billing rate was \$325 (plus 15%) per hour, between June 5, 1998 and December 31, 1999. His affidavits plainly assert that fact, without qualifying it or stating that there are exceptions to it. Yet, his own prior affidavit, dated April 2, 1999, proves the falsity of his statement.

Moreover, another of Plaintiffs' recent filings reveals an even broader deception by Gingold. In their June 12, 2002 Opposition to Defendants' motion for leave to file a Surreply regarding Plaintiffs' fee application, Plaintiffs (at 5-6) attempt to finesse the misrepresentation by arguing that Gingold's 1999 affidavit refers to the present case, while his April 29, 2002 Affidavit pertains to his rates generally and, apparently, not to this case.<sup>9</sup> They argue that no "honest reader" would think that the April 29 and May 23, 2002 Affidavits refer to Gingold's rates in the present case. But their argument is insupportable.

First, Plaintiffs' own evidence makes their argument impossible on its face. Attached to Gingold's April 29, 2002 Affidavit (Exhibit 1 hereto) are what purport to be monthly "Billing Statements" which state that they are "from" Gingold, are addressed to "Elouise Cobell, Project Director, IIM Trust Correction and Recovery Project" and state that they pertain to the "IIM Litigation Project." Each states the amount of time allegedly spent in certain work on this case on a given date, a description of the work and the "current hourly rate." The total "time charge" for each month reflects the number of hours times that hourly rate.

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<sup>9</sup> Yet, Plaintiffs still fail to disclose the rates that Gingold actually charges in this case. We are left to wonder why Gingold goes to such lengths to avoid disclosing that information.

The Billing Statements for the months of May through December, 1999 (which are the only ones prior to 2000) list a "current hourly rate" of \$325, and they add another 15% for "overhead." The Billing Statements since January, 2000 state a "current hourly rate" of \$425 to \$475, and add another 15% for overhead.

By attaching to Gingold's affidavit (Exhibit 1 hereto) the "Billing Statements" addressed to Elouise Cobell, referring specifically to the "IIM Litigation Project" and stating a "current hourly rate" of \$325 through 1999 and a "current hourly rate" of \$425 to \$475 thereafter, Plaintiffs cannot reasonably have expected any reader of the Gingold affidavits to conclude anything other than that those were indeed the hourly rates that Gingold charged Plaintiffs in this case. No other inference is possible. This is especially so because Gingold attached similar "Billing Statements" to his 1999 affidavit (Exhibit 2 hereto), and those Billing Statements listed the "hourly rate" that he apparently actually did charge Plaintiffs at that time (i.e., \$325 before June 5, 1998, and \$200 after that date). By attaching similar (but this time apparently fictitious) Billing Statements to his April, 2002 affidavit, he compelled the reader to believe that these too reflected amounts he actually charged to Plaintiffs.

In plain language, Gingold tried, by his 2002 affidavits, to mislead this Court into believing that he charged Plaintiffs in this case \$325 per hour (plus 15%) through December, 1999 and charged them \$425 to \$475 per hour (plus 15%) thereafter, when in fact he did not do so.

Second, the structure and wording of the April and May, 2002 affidavits indicate that they are representing that the hourly rates stated were the rates charged in this case. Paragraphs 4 and 5 of the April 29, 2002 Affidavit discuss Gingold's work in this case. Paragraph 4 states that

attached to the affidavit as exhibits 1 and 2 are "tabulations and my time records for work that I believe to be allocable fairly to matters covered by the subject sanctions orders." The Billing Statements are within those exhibits. In paragraph 5, Gingold states, "I have also attached as Gingold Exhibit 3 time records for April 2002 because these records state the time expended by me in preparing the attached time and charges for E-Mail and Trade Secrets." "Exhibit 3" to his affidavit is a putative Billing Statement for April, 2002, again reflecting the "current hourly rate" of \$425 to \$475 per hour. Gingold's reference to the Billing Statements as part of his "time records" for "work" on "matters covered" in this case, or as records that "state the time expended" by him in this case constitute his representation that the Billing Statements reflect the facts of his billing in this case, and inescapably imply that they contain the billing rates to which his affidavit refers.

In the immediately following paragraph (¶ 6), Gingold describes what his "billing rate had been" and what he "had billed for my time." The plain implication is that he is referring to what he has billed in this case. Included in that paragraph is his characterization of his work in this case (e.g., "I am required to devote 7 days a week to this litigation"). The fact that Gingold sandwiches his discussion of his billing rates in between his description of his time records in this case (¶¶ 4 and 5) and his characterization of this case as his "7 days a week" occupation (¶ 6) leads only to one conclusion: He must be describing the hourly rates he charges in this case. While paragraph 6 then goes on to assert that he charges the \$425 to \$475 rates in other cases, that does not change the implicit representation that these are the rates he has charged in this case too.

Similarly, the structure and wording of Gingold's May 23, 2002 Affidavit compel any

reader to conclude that the claimed hourly rates are those charged in this case. Paragraph 2 discusses his "tabulations and time records" reflecting his work in this case, and observes how carefully and precisely he supposedly has allocated his time in this case in accordance with the "exacting standards set forth by this Court." Paragraph 3 then immediately discusses what his billing rates have been (\$325 to \$475), thus leading any reader to conclude that he is discussing the billing rates in this case. Moreover, it states that on January 1, 2000, he increased his standard hourly rate "to address materially increased responsibilities." But his April 29, 2002 Affidavit asserts that this case is his principal activity. The clear implication of his statements is that he is referring to "increased responsibilities" in this case. While he goes on to assert that he charges the stated rates in other engagements, that does not detract from the clear impression that he is purporting to discuss rates he charges in this case too.

Third, the fact that this case is Gingold's principal professional occupation means that the rates he actually charges in this case must be the main determinant of his "standard" and "general" rates, and substantially reveal what rates he really can command in the marketplace.<sup>10</sup>

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<sup>10</sup> In their Opposition to Defendants' motion for leave to file the Surreply, Plaintiffs argue that cases such as Covington v. District of Columbia, 839 F. Supp. 894 (D.D.C. 1993), aff'd, 57 F.3d 1101 (D.C. Cir. 1995), would permit recovery of rates higher than those actually charged in the pending case. But that case law explicitly requires a fee applicant to "show that his or her custom of charging reduced rates is in fact attributable to 'public spiritedness.'" Covington v. District of Columbia, 57 F.3d 1101, 1108 (D.C. Cir. 1995). This court previously held that, if a fee applicant fails to make the required showing (and Plaintiffs here have not even attempted to do so), then the party "may recover nothing more than the rates that their counsel have charged them." (Emphasis added). Brown v. Pro Football, Inc., 846 F. Supp. 108, 114 (D.D.C. 1994), rev'd on other grounds, 50 F.3d 1041 (D.C. Cir. 1995), aff'd, 518 U.S. 231 (1996).

Thus, Plaintiffs' cited line of cases does not excuse a fee applicant from disclosing his actual rates in the pending case, and does not grant fee applicants a license to mislead the court by pretending to charge their claimed rate in the pending case when, in fact, they do not really charge that rate.

Gingold's April 29, 2002 Affidavit states (in ¶ 6) that he devotes "7 days a week" to this case and that, because of this case, he has been able to retain "few other clients through the duration of this case" (which was filed in 1996), and that he can only provide such other clients with "limited professional services." Thus, the present case is and has been his principal professional activity, so the rates he has charged in it are highly relevant and material to the amount of his billing rates, and must be the principal measure of the rate that he can obtain in the marketplace.

Plaintiffs cannot have it both ways. They cannot at once claim that this case is Gingold's principal professional activity, yet argue that the rates he charges in this case are such a minor part of his billings and collections that he need not even mention them and that no one could reasonably conclude that he was referring to them. Gingold's May 23, 2002 Affidavit only reveals a further attempt to mislead by claiming that \$325 (plus 15%) is the "standard hourly rate that [he] generally had billed and collected since 1989." If, as stated in his April 29, 2002 Affidavit (¶ 6) he has devoted "7 days a week" to this 1996 case, which, therefore, has left him "able to retain few other clients" to whom he only "provide[s] limited professional services," he cannot expect anyone to believe that the rates he supposedly charges to those "few" other clients for their limited engagements really reflect what he "generally had billed and collected" (at least during the duration of this case). Rather, what he has billed and collected in this case since 1996 (or since it has been his principal occupation) must, by definition, be the key factor in determining what he "generally" has billed and collected during that time.

Even if Gingold's statements were technically true (which they are not), they would still violate Rule 11 because they created the "misleading illusion" that he charges the rates shown in his affidavits and Billing Statements, and he omitted the facts that would correct that illusion.



Grove Fresh Distrib., Inc. v. John Labatt Ltd., 888 F. Supp. 1427, 1451 (N.D. Ill. 1995)(attorney's statement that he was "attorney or [counsel] of record," while literally true, created a "misleading illusion" because his client had discharged him, and the attorney failed to disclose that fact to the court, thus violating Rule 11), aff'd, 134 F.3d 374 (7th Cir. 1998).

Consequently, Gingold must be deemed to have represented to this Court that his billing rate in this case was \$325 per hour (plus 15%) from June 5, 1998, through December 31, 1999, and was \$425 or \$475 per hour thereafter. Plaintiffs' Opposition to Interior Defendants' motion for leave to file the Surreply admitted (at pages 5-6) that the rates stated by Gingold are not the rates he charges in this case. Thus, the representations in his April and May, 2002 affidavits are false and misleading. Accordingly, Gingold violated Rule 11(b) (3), which prohibits baseless factual contentions or allegations. Additionally, the false or misleading statements were made for an improper motive in violation of Rule 11(b)(1). For example, Gingold made those statements in order to obtain recovery of higher attorney fees, thus "needless[ly] increas[ing] . . . the cost of litigation."

Alternatively, even if Rule 11 did not apply, Gingold's submission of false or misleading statements appears to have been in bad faith (see below) and, therefore, is punishable under the Court's inherent authority. See Shepherd, 62 F.3d at 1475 (the court's "inherent power encompasses the power to sanction attorney or party misconduct"); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (before awarding sanctions, consisting of attorney fees, under its inherent authority, the court must make an explicit finding that counsel acted in bad faith); Alexander v. FBI, 192 F.R.D. 25, 31 (D.D.C. 2000) (same).

In assessing Gingold's conduct and the appropriate sanctions, his wilfulness and bad faith

should be considered. His false or misleading statements do not appear to be an accident or mistake caused by ignorance. First, the subject matter of the misrepresentation is a fact (his own billing rates) particularly within his own personal knowledge. Second, some of the apparently true facts (i.e., regarding the \$200 (plus 15%) that he charged after June 5, 1998) were the subject of a prior affidavit that he filed with the Court, and the subject of an important published opinion by this Court, so he must be deemed to have been aware of the truth. Third, even if he now tries to twist the words in his affidavits and suggests that they do not really mean what they say, the fact that his April, 2002 Affidavit included Billing Statements directed to Plaintiffs and expressly listing the hourly rates he claims, reveals that he knew full well what the reader of his 2002 affidavits would conclude. The fact that Gingold went to the effort of preparing what appear to be numerous fictitious Billing Statements further reveals a calculated effort to deceive.

Fourth, when the Interior Defendants pointed out Gingold's misrepresentation (in the discussion in Defendants' Objections), Gingold did not seek to withdraw his false or misleading affidavit, but instead filed a second misleading affidavit (the May 23, 2002 Affidavit). Fifth, Gingold and Plaintiffs further compounded the wrong by asserting a frivolous defense (i.e., that no "honest reader" would even think that Gingold was referring to his rates in this case) which is directly contradicted by their own evidence (see above).

### **III. Appropriate Sanctions**

In addition or in the alternative to the commonly claimed sanction of awarding fees and expenses to the movant, Rule 11 allows other sanctions. Subsection (c)(2) provides that "the sanction may consist of, or include, directives of a nonmonetary nature . . . ." The Advisory Committee Notes ("Notes") to the 1993 amendments to Rule 11 state:

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities.

The Notes further identify factors to consider in determining what sanctions, if any, should be imposed under Rule 11:<sup>11</sup>

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants.

In Bullard v. Chrysler Corp., 925 F. Supp 1180, 1191 (E.D. Tex. 1996), the court examined such factors and imposed sanctions upon an attorney for making a baseless factual allegation, including assessing a fine of \$2,500 against the attorney, publicly reprimanding him, ordering him to complete ten hours of continuing legal education in ethics, and referring the matter to the state bar disciplinary authorities for further investigation. See also Jennings v. Joshua Indep. Sch. Dist., 948 F.2d 194, 199 (5th Cir. 1991) ("Private or public reprimands or fixed compensatory or punitive fines may be less severe [than shifting of attorney fees] and equally or more effective").

A number of the factors cited by the Advisory Committee count against Gingold here.

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<sup>11</sup> If the Court chose to act under its inherent authority, the available sanctions "include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence." Shepherd, 62 F.3d at 1475.

First, the conduct was willful, as discussed above. Second, his conduct should be deemed as having been intended to injure, since it was included as part of a request for recovery of fees from the United States. By asking for a higher rate, Gingold sought to recover more in fees, to the detriment and pecuniary injury of the government. By using the higher, fictitious rates, Gingold sought to recover over \$100,000 more from the Government than if he had used the rates in his 1999 affidavit. Of course, we have no way of knowing what he actually has charged Plaintiffs in connection with the fees claimed in Plaintiff's Statement, so his use of fictitious rates may have inflated his claim by even more than \$100,000.

Third, the false or misleading representation has consumed considerable time of the Interior Defendants in challenging his statement (in Defendants' Objections and in this motion). Fourth, Gingold is trained in the law – he claims to have decades of experience as a lawyer. Sixth, the need for a sanction that will deter is reflected by Gingold's recalcitrance in refusing to acknowledge his wrongdoing, and instead submitting a second false or misleading affidavit, and Plaintiffs' frivolous arguments in their Opposition to Defendants' motion for leave to file their Surreply.

If left unpunished, Gingold's conduct in submitting a false or misleading affidavit is likely to repeat itself and the misrepresentations are likely to become greater and bolder. Sufficient sanctions should be imposed to deter such conduct. Interior Defendants propose and request that the Court impose the following sanctions, in addition to any other sanctions that the Court deems appropriate. First, in order to establish for the record (and, if necessary, to lay the predicate for further, increasingly severe sanctions if such misconduct is repeated), Interior Defendants respectfully request that the Court enter a specific factual finding that Gingold knowingly and in

bad faith filed false and misleading affidavits.

Second, Interior Defendants further ask that the Court order Gingold to distribute a copy of the Court's findings and censure to each of the named Plaintiffs, and further order that he or the named Plaintiffs disseminate a copy to all potential members of the class.<sup>12</sup> This is necessary in order to ensure that interested members of the Plaintiff class are aware of this important development regarding class counsel. See Leuallen v. Borough of Paulsboro, 180 F. Supp. 2d 615, 622 (D.N.J. 2002) (in sanctioning an attorney for filing a baseless complaint, and who had previously violated Rule 11 and who appeared recalcitrant, the court imposed sanctions including, inter alia, a reprimand, and the court further ordered that, "in an attempt to protect the rights of his clients, this Court directs [the attorney] to send a copy of this Opinion to each and every plaintiff ever named in this case.").

Third, even if the Court does not, on other grounds,<sup>13</sup> disallow all fees and expenses claimed by Gingold in this fee proceeding, then all of his claimed fees and expenses should be disallowed as a sanction for his false or misleading affidavits.

### CONCLUSION

For the foregoing reasons, Interior Defendants request that the Court enter an order (1) specifically finding that Gingold filed one or more affidavits in which he knowingly and in bad

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<sup>12</sup> One means of distribution to potential members of the class might be to post a copy on the website the Plaintiffs maintain at [www.indiantrust.com](http://www.indiantrust.com).

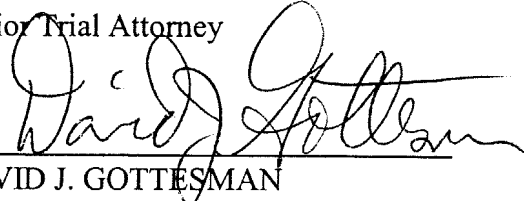
<sup>13</sup> Interior Defendants' Objections suggested that this Court deny Plaintiffs' entire fee application on the grounds that Plaintiffs included substantial fees and expenses on matters so clearly not covered by this Court's orders allowing recovery that their claim was "outrageously unreasonable." See Env'tl Def. Fund, Inc. v. Reilly, 1 F.3d 1254 1258 (D.C. Cir. 1993). Even if the Court chose not to deny Plaintiffs' entire fee application on that ground, at least Gingold's portion should be denied as a sanction for his submission of a false or misleading affidavit.

faith made false or misleading statements of material fact; (2) requiring Gingold to submit a copy of such finding to each of the named Plaintiffs, and to distribute it to members of the class; (3) disallowing all fees and expenses claimed by Gingold in connection with this fee proceeding; and (4) imposing such other sanctions as this Court deems appropriate.

Respectfully submitted,

ROBERT D. McCALLUM  
Assistant Attorney General  
STUART E. SCHIFFER  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director

SANDRA P. SPOONER  
Deputy Director  
JOHN T. STEMPLEWICZ  
Senior Trial Attorney



DAVID J. GOTTESMAN  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 307-0183

CERTIFICATE OF SERVICE

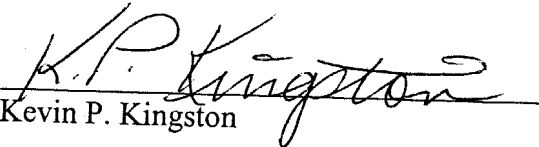
I declare under penalty of perjury that, on June 28, 2002 I served the foregoing *Defendant's Memorandum of Points and Authorities in Support of Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold*, by hand:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036-2976

Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004

By U.S. Mail upon:

Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

  
Kevin P. Kingston