UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, ET AL	CIVIL ACTION
VERSUS	NO. 10-1663
KENNETH LEE "KEN" SALAZAR, ET AL	SECTION "F"

ORDER & REASONS

Before the Court is the plaintiffs' motion for recovery of attorney's fees. For the following reasons, the motion is GRANTED.

Background

The facts of this case are well-known. As Deepwater Horizon's April 20, 2010 explosion gave way to a massive oil spill, the President of the United States formed a bipartisan commission—the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling—and tasked it with investigating the facts and circumstances concerning the cause of the blowout. The President also ordered the Secretary of the Interior to conduct a thorough review of the Deepwater Horizon blowout and to report, within thirty days, "what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the outer continental shelf." The results of this review were published on May 28, 2010 in an Executive Summary and Safety Report, and offered the appearance that it had been peer reviewed by a panel of scientists—a claim

which was publicly repudiated by several of them.

Invoking this study, the Secretary of the Interior ordered a moratorium on all drilling at depths greater than 500 feet in the Gulf of Mexico. The plaintiffs in this case soon challenged the lawfulness of the moratorium. On June 22, 2010, this Court granted the plaintiffs' motion for a preliminary injunction and ordered the Administration not to enforce the moratorium:

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

In that Order, this Court found that the plaintiffs had established a likelihood of successfully showing that the Secretary's decision to issue a six-month blanket moratorium against all companies involved in deepwater drilling in the Gulf of Mexico was arbitrary and capricious and, therefore, unlawful. The government apparently notified operators that suspension notices issued under the first moratorium no longer had legal effect and ordered BOEMRE[1] personnel not to take action to enforce the moratorium. It is undisputed, however, that deepwater drilling activities did not commence after this Court's Order. Instead, over the next two weeks, the Secretary of Interior repeatedly affirmed his intention and resolve

[1] Bureau of Ocean Energy Management, Regulation and Enforcement.

to impose a moratorium on deepwater drilling in the Gulf of Mexico.

The government appealed the Court's injunction Order, and sought a stay of the preliminary injunction pending appeal. On July 8, 2010, the U.S. Court of Appeals for the Fifth Circuit rejected a stay, over one dissent. Four days later, on July 12, 2010, the Interior Secretary issued a twenty-two page decision memorandum rescinding the first blanket moratorium and directing BOEMRE to withdraw the suspension letters issued under it; but the Secretary also ordered the agency to issue new blanket suspensions based on a second moratorium. The second moratorium disabled precisely the same rigs and deepwater drilling rigs and activities in the Gulf of Mexico as did the first one (although it superficially, rather than continue the 500-foot depth standard, purported to restrain all rigs that use subsea blowout preventers or surface blowout preventers on a floating facility); the second moratorium was to apply also through November 30, 2010, the same expiration date that the first moratorium anticipated. The government defended the new moratorium's justness, explaining that though similar (identical) in effect to the first, it addressed the technical concerns highlighted in the Court's first Order.

The second moratorium was then lifted on October 12, 2010, the same day the parties were to submit some additional briefing. Still, however, no drilling permits have been issued for activities barred by it as of this date. That was October. In November 2010,

it also was exposed that an important White House official had changed the Safety Report before its public release, which created the misleading appearance of scientific peer review.[2]

The plaintiffs now move for reimbursement of their significant attorney's fees on two theories: first, under a civil contempt theory, and second under a common law claim of bad faith.

Law & Analysis

I.

Article III courts have inherent authority in cases of civil contempt to enforce their judicial orders through an assessment of attorney's fees. Cook v. Ochsner Found. Hosp., 559 F.2d 270, 272 (5th Cir. 1977); see In re Bradley, 588 F.3d 254, 263 (2009) ("If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil."). "Civil contempt can serve two purposes, either coercing compliance with an order or compensating a party who has suffered unnecessary injuries or costs because of contemptuous conduct." 588 F.3d at 263 (internal quotations and modifications omitted). The present motion centers on entitlement to compensation for the cost of the

[2] Even though the Office of the Inspector General found no conclusive evidence of wrongdoing on the part of the Department of Interior or its employees, at the hearing on the first moratorium, in response to a question by the Court, the government's answer then was wholly at odds with the story of the misleading text change by a White House official, a story the government does not now dispute.

government's conduct.

To establish civil contempt in this setting, the plaintiffs must show "by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the [government], and 3) that the [government] failed to comply with the court's order." Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574, 581 (5th Cir. 2000). The evidence required to establish all three factors must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 582 (5th Cir. 2005) (internal quotations omitted); see Armstrong v. Exec. Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (finding contempt may lie only for the violation of the clear terms of a court's order).

The government does not credibly dispute, and the Court holds, that the formula's first two prongs are satisfied by clear and convincing evidence: the Court ordered a preliminary injunction, which required the government not to enforce the first moratorium and its associated suspensions. What remains to be resolved by this Court is whether the plaintiffs have established that the "the [government] failed to comply with the court's order," Am. Airlines, 228 F.3d at 581, by evidence "so clear, direct and weighty and convincing as to enable the fact finder to come to a

clear conviction, without hesitancy, of the truth of the precise facts of the case." Singh, 428 F.3d at 582.

II.

The plaintiffs' civil contempt claim focuses on the government's imposition of a second blanket moratorium hurriedly on the heels of the first; plaintiffs argue that moratorium amounts to a flagrant and continuous disregard of the Court's Order. But a finding of contempt of the preliminary injunction Order for that reason alone falls short. The plaintiffs read this Court's preliminary injunction Order too broadly; that Order emerged from the Court's finding that the plaintiffs were substantially likely to prove that the process leading to the first moratorium was arbitrary and capricious as a matter of law. As an answer to the plaintiffs' quarrel with the second moratorium, the government maintains that it merely met the Court's concerns and resolved each of the procedural deficiencies the Court found in the first.[3] Perhaps. Under these facts alone, then, the Court could not, at least not clearly and convincingly, find the government in contempt of the preliminary injunction Order. See Singh, 428 F.3d at 582 (finding standard not satisfied when district court simply expressed doubts about the sincerity of a party's compliance with

[3] The government's answer, however, is diminished by the Secretary's undisputed public statements of determination to ban deepwater drilling out of his concern for systemic dangers. These public statements were silent about addressing the Court's Order.

an injunction order).

There is, however, more to the story. The plaintiffs also stress that the government did not simply reimpose a blanket moratorium; rather, each step the government took following the Court's imposition of a preliminary injunction showcases its defiance: the government failed to seek a remand; it continually reaffirmed its intention and resolve to restore the moratorium; it even notified operators that though a preliminary injunction had issued, they could quickly expect a new moratorium. Such dismissive conduct, viewed in tandem with the reimposition of a second blanket and substantively identical moratorium and in light of the national importance of this case, provide this Court with clear and convincing evidence of the government's contempt of this Court's preliminary injunction Order. To the extent the plaintiffs' motion asserts civil contempt based on the government's determined disregard of this Court's Order of preliminary injunction, it is GRANTED.

III.

The Court concludes that the plaintiffs have established the government's civil contempt of its preliminary injunction Order by evidence "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." Singh, 428 F.3d at 582. Thus, the Court need not reach the plaintiffs' secondary bad

faith challenge.

The issue of quantum shall be referred to Magistrate Judge Wilkinson.

New Orleans, February 2, 2011

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE