[Conformed Copy] **No. 03-102**

IN THE

Supreme Court of the United States

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, & RUSSELL D. VARNADO.

JOEL Z. ROBINSON

Petitioners,

V.

CACI, INTERNATIONAL INC., CACI, INC - FEDERAL, CACI SYSTEMS INTEGRATION, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May a court use the provisions of Federal Rule of Civil Procedure 11, 28 U.S.C. Section 1927 or 28 U.S.C. Section 1651, as authority to suspend an attorney from further representation of his client in any lawsuits in the district?

II. May a court use a statutory based attorney sanction issued in one case as the basis to suspend the same attorney in a different second case involving different Respondents, where there has been no violation of any sanction principles in the second case?

III. In the circumstances of this case, should the orders resulting in the suspension or disqualification of counsel be reversed?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Respondents include:

- United States, ("Govt") the SBIS Contractor,
- International Business Machines Corp. ("IBM") SBIS's Prime Contractor with team support ("IBM Team")
- Lockheed Martin Corp. ("Lockheed-Martin"), a SBIS IBM Team member
- AT&T Corp ("AT& T"), a SBIS IBM Team member
- PRC Inc. ("PRC"), a SBIS IBM Team member
- I-Net Inc. ("I-Net"), a SBIS IBM Team member
- Statistica Inc. ("Statistica"); a SBIS IBM Team member
- Express Company Secretaries Limited ("Express"), the English dormant non-trading secretary of PTI;
- Jordan & Sons Limited ("Jordan"), and
- Jordan Group Ltd ("Jordan Group"), the English owner of Express
- Steptoe and Johnson ("Steptoe"), CACI's attorneys
- J. William Koegel, Jr., Esq. ("Koegel"), the member of Steptoe representing CACI
- Davies Arnold & Cooper ("Davies"), Express, Jordan and Jordan Group's English Solicitors
- George Menzies, Esq. ("Menzies"), the member of Davies representing Express, Jordan, and Jordan Group

were parties before the District Court, and the Court of Appeals but were not parties to the Sanctions, or to the Appeal and will not be parties to this Petition.

RULE 29(6) DISCLOSURE STATEMENT

Pentagen Technologies International Limited has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Pentagen Technologies International Limited ("Pentagen" or "PTI"), Russell D. Varnado ("Mr. Varnado") (collectively "Relators") and Joel Z. Robinson, Counsel to PTI and Relators, ("Counsel") respectively request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit recommending suspension, reported as *Pentagen Technologies Intern. Ltd. v. U.S.,* 2003 WL 1977386 (2nd Cir. (N.Y.)), appears in Appendix A hereto at 1a-5a ("App").[1] The opinion of the United States District Court for the Southern District of New York imposing lesser sanctions, officially reported as *Pentagen Technologies v. United States et al.* 172 F.Supp.2d 464 (2001, SDNY), appears in Appendix A hereto at 5a-20a. The opinion in the merits of the case is officially reported as *Pentagen Technologies v. United States et al.* 103 F.Supp.2d 232 (2001, SDNY) and appears at App C,44a-59a.

This case arose after Pentagen had obtained a judgment in *Runaway Development Group S.A. et al v. Pentagen Technologies Int'l Ltd., et al.*, 91 Civ 5643, (JES) SDNY, which is not officially reported, and which appears at App B, 23a-34a

JURISDICTION

The Decision imposing sanctions was issued in the District Court on November 8, 2001; on February 6, 2002, the amount of costs payable under the sanction was set at $75,000, and a Notice of Appeal to the Court of Appeals was filed on March

[1] Subsequent to the Court of Appeals Order, on May 2, 2003, an Order implementing the Court of Appeals ruling and suspending Counsel, was issued by Judge Sprizzo, which is not officially reported, appears in App. B, 38a-40a.

27, 2002. The Court of Appeals dismissed the Appeal by an unpublished Summary Order filed April 23, 2003 and recommended that Counsel be suspended under 28 U.S.C. 1651(a). In accordance with Rule 13.1 of this Court this Petition is filed within 90 days of the date of entry of the Order. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (2002) because a party to a civil case seeks the grant of a writ of certiorari before or after the rendition or decree of the Court of Appeals. There are no other issues presently outstanding other than post-judgment or enforcement issues in other actions, as more particularly set out herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

None Specifically Involved.

2. Statutory Provisions

Rule 11 of the Federal Rule of Civil Procedure provides in pertinent part:

> (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Section 1927 of Title 28, Judiciary and Judicial Procedure of the United States Code provides in pertinent part:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and

> vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct

Section 1651 of Title 28, Judiciary and Judicial Procedure of the United States Code provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF CASE

In an adversarial system of justice, a judge's role to protect the public good must take into account counsel's obligations to protect a client's rights. Unauthorized or excessive sanctioning of counsel unnecessarily weighs the balance in the court's favor. In the case now presented for your consideration, the court's unauthorized suspension of counsel creates the appearance that the judiciary is protecting a Government that had been concealing for years it's unlawfully use of the clients' property.

This court has consistently held that the Courts' power to suspend and discipline counsel, while wide, is not unfettered or unlimited. Suspending counsel should only be undertaken where specific authority exists to do so, and only if, in the words of the Second Circuit, the actions complained of "taint" the trial process or "is necessary to preserve the integrity of the adversary process." The courts have consistently held that any motion seeking to either suspend or disqualify counsel should only be taken after specific notice, with forewarning of the authority under which the sanctions are being considered, after a fair hearing, and only where proper reasons for such action are clearly present and set out.

The facts presented in this Petition have constitutional ramifications. Petitioners' valuable software had been stolen at gunpoint. After many years of litigation, the Government recently revealed that at least one copy of a derivative version of

the seized property, which by then was subject to a constructive trust in favor of the PTI, had been loaded and tested by the Government on their workhorse 3090 mainframe computers.

During the period since the seizure, the Government's many acts of concealment resulted in an unnecessary delay in PTI's efforts to recover their stolen property, and in many lawsuits arising out of inconsistencies from the Respondents' continual presentation of false evidence and litigation misconduct.

When the Government's unlawful possession was finally revealed, rather than address the judgment creditors' rights for a post-judgment Turnover Order for the return of the stolen property, the Court of Appeals and the District Court joined together to issue orders leading to the suspension of counsel under 28 U.S.C. Section 1651, Federal Rule of Civil Procedure 11, and/or 28 U.S.C. Section 1927, none of which provides any authority to suspend counsel.

In addition, none of the safeguards afforded counsel prior to suspension was correctly observed. Moreover, the suspension order was issued in an action in which Counsel had originally succeeded in obtaining judgment in favor of his client, where there had been no prior sanctions, and where there had been no previous "misconduct." Nor had Counsel committed any acts of "contemptuous or contumacious conduct", nor is Counsel "unfit to practice" so as to justify any suspension in any action.

The act of suspension was taken in post-judgment turnover proceedings, prior to the learned District Judge making any decision on the underlying enforcement action and where the District Judge specifically would not make a ruling in the underlying Motion sought, thus leaving the stolen property out of the hands of its true owners. Both courts were made fully aware that the suspension order would result not only in the suspension of counsel but also in the suspension of the enforcement action to recover the judgment creditors' property from the Government.

This Petition should be granted because, here, there is more than no basis to suspend counsel. It is, indeed, a constitutional "slippery slope" if courts are permitted to use "intimidation" so as to permit the unlawful possession of stolen software by an unauthorized Government while depriving counsel's clients of their property and of their rights to recover their property.

STATEMENT OF FACTS

1. Govt interested in PTI's MENTIX software for use on thousands of 3090 IBM Computers

In a May 17, 1990 Letter (App E,115a-116a), the U.S. ("Govt") Army Material Command ("AMC") expressed interest in licensing PTI's software product, MENTIX, to assist in the modernization of their aging, thousands of COBOL mainframe computer programs. PTI introduced CACI[2], an established procurement contractor, to MENTIX in March 1990 as a possible teaming partner. CACI noted at the time that there was no competing technology to the MENTIX capability (App E,116a-117a).

2. MENTIX stolen from PTI by gunmen and then offered to AMC by CACI

Just as AMC was preparing to award the $3,000,000-odd contract to PTI and CACI to develop a 3090 ported version of MENTIX (then only in UNIX language) which could be licensed for use on the several thousands of Govt's 3090 mainframe computers, gunmen, contracted to Runaway Development Group, ("Runaway") seized all copies of MENTIX. CACI was immediately notified of the seizure. (App D,84a; App B,23a-31a). Runaway immediately entered into a Joint Development Teaming Agreement with CACI and transferred at least one copy of the seized software to CACI. The joint-venturers then set about secretly developing MENTIX

[2] CACI International Inc., CACI Systems Integration, Inc., and CACI, Inc.-Federal (collectively "CACI").

for the 3090 Govt Contract themselves, to the exclusion of PTI. CACI then included the MENTIX software in its applications' modernization methodology it called "RENovate." (App E,123a-124a). CACI continues to offer RENovate to date.

3. PTI "wins" Runaway Action Judgment with Runaway, and recovers UNIX version of MENTIX software

In the meantime, PTI sought to recover its software[3]. To that end, litigation immediately followed between PTI and Runaway. *Runaway v. Pentagen Tech. Int'l Ltd., et al.,* 91 Civ 5643 (JES) SDNY, ("Runaway Action") which was assigned to Judge Sprizzo. PTI's counterclaim, founded (inter alia) in tort, was actively litigated. In 1992, Mr. Varnado, who was the AMC employee directly involved with the MENTIX 3090 porting AMC project, gave a deposition disclosing that CACI and Runaway had made a series of presentations to AMC including the "White Paper" (App E,117a-123a), and an August 1991 Briefing, explaining how the 3090 Version of MENTIX could be used as the software tool in CACI's RENovate methodology, and how the 3090 MENTIX version could be used to modernize AMC's COBOL applications (App D,85a). One of the major advantages of using MENTIX was that, once ported to the 3090 machine, an at least 50 percent reusability-of-existing-code rate was expected to be achieved. (App E,121a (6:1);App E,134a).

In 1993, just before trial, after full discovery, and after motions for summary judgment had been denied by Judge Sprizzo, PTI obtained judgment by confession against Runaway. Appropriate orders were entered in favor of PTI confirming full legal title of MENTIX to PTI. All known versions (Unix only) of the software were returned. Judge Sprizzo also imposed a series of constructive trusts on MENTIX and its derivatives

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[3] PTI immediately reported the robbery to the U.S. Marshals' Office in Manhattan, who apparently did nothing to investigate the matter or assist in the return of the software.

(and all proceeds from such use) over persons claiming title through Runaway and awarded damages in favor of PTI for $1,700,000. (App B,23a-34a).

4. CACI denies 3090 MENTIX development; PTI sues.

The Runaway Action Judgment was entered just after CACI and a team of contractors[4] ("IBM Team") had been awarded the "flagship" $474,000,000 Sustaining Bases Information Services ("SBIS") Govt Contract to modernize 89 software computer 3090 applications. The IBM Team offered software, which had strikingly similar characteristics as had been offered by MENTIX, including the 50 percent high reusability-of-existing-code rate (App E,138a) which was then-double industry standards. In late 1993, PTI requested CACI to confirm it was not using MENTIX. CACI adamantly denied any use. Nevertheless, as was later revealed, in November, 1993, IBM secretly ordered CACI not to use the CACI-offered "RENovate process" (not "methodology") on SBIS. (App E,97a-98a).

PTI sued CACI in tort in New York[5]; CACI countered by seeking a declaration under copyright law in Virginia. In discovery, in March, 1994, PTI issued a Subpoena to Govt specifically requesting (inter alia) all and any MENTIX test results (App E,98a-102a). None was forthcoming. CACI represented to Judge Brinkema that they had never used MENTIX other than had been previously disclosed and no evidence of the development of a 3090 Version of MENTIX was produced. (App D,88a-89a). Based thereon, CACI was awarded its declaration in 1994.[6] (*CACI Intern., Inc. v.*

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[4] The IBM Team included CACI, International Business Machines Corporation ("IBM"), Lockheed Martin Corporation ("Lockheed Martin"), AT & T Company ("AT & T"), PRC Inc. ("PRC"), I-Net Inc. ("I- Net"), and Statistica Inc. ("Statistica")

[5] CACI's denial of use excluded constructive trust rights at the time.

[6] Mandamus proceedings (*see CACI International Inc. v. Pentagen Techs. Int'l Ltd.*, 1995 WL 679952 (4th Cir. Nov. 16, 1995)) arose after PTI (… continued)

Pentagen Technologies Intern., Ltd., 1994 WL 1752376 (E.D.Va., Jun 16, 1994) (NO. CIV.A.93-1631-A), (App D,81a-94a), *affirmed CACI Intern., Inc. v. Pentagen Technologies Intern., Ltd.*, 70 F.3d 111 (Table, Text in WESTLAW), Unpublished Disposition, 1995 WL 679952 (4th Cir. (Va.), Nov 16, 1995)). Based on Judge Brinkema's decision, judgment was entered in CACI's favor in the New York tort actions in 1996. (*Pentagen Technologies International, Ltd. v. CACI International Inc., CACI Systems International, Inc., CACI, Inc.-Federal,* 1996 WL 396140, 1996 Copr.L.Dec. P 27,578 (S.D.N.Y., Jul 16, 1996) (NO. 93 CIV. 8512, 94 CIV. 0441, 94 CIV. 8164 (MBM))

5. PTI reports inconsistencies to FBI and launches series of False Claims Actions as IBM Team fails to deliver any modernized software applications in SBIS Contract

By early 1994, the inconsistencies of evidence created by Mr. Varnado's and Govt's evidence apparent in the litigation, caused PTI to report the matter to the Federal Bureau of Investigation ("FBI") and to immediately commence an action under 31 U.S.C. §3729 ("False Claims Act") against the IBM Team, which was placed under seal. In May 1994, FBI deferred to the U.S. Attorney's Office, (SDNY) who "investigated" the matter.[7] (App E,102a-103a). In April 1995, the Govt declined to intervene, and PTI, as relator, began its own investigations[8].

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discovered that Judge Brinkema had not informed the parties that her husband, John Brinkema, a computer specialist who had published articles on software modernization issues, was the contracting officer for CACI at the Administrative Office of the U.S. Courts. Judge Brinkema ruled she was not required to disclose the relationship, which she held was insufficient for recusal, and the Fourth Circuit agreed.

[7] Mr. Varnado was never approached by either the FBI or the U.S. Attorney's Office.

[8] DoD Fraud Hotline, I-G's Office etc.: PTI also met, in June 1995, with House of Representatives Appropriations Committee, Investigation and Survey

(… continued)

On June 16, 1995, the Govt issued a "gag" order (App E,103a-105a) barring PTI from any communications with any member of Executive Branch of Govt. Nevertheless, IBM Team was unable to identify the software product that they had offered Govt under SBIS. Govt informed the Court by an *amicus curiae* brief (App E,105a-108a) that, by June 1995 (when about 30 applications should have been delivered), not a single modernized application had been delivered. (App E,107a). Judge Carter denied a preliminary injunction sought by PTI, and then dismissed the action. (*U.S. by Dept. of Defense v. CACI Intern. Inc.,* 953 F.Supp. 74, 40 Cont.Cas.Fed. (CCH) P 76,813 (S.D.N.Y., Jul 06, 1995) (NO. 94 CIV. 2925 (RLC))(preliminary injunction); *U.S. ex rel. Pentagen Technologies Intern. Ltd. v. CACI Intern., Inc.,* 1996 WL 11299 (S.D.N.Y., Jan 04, 1996) (NO. 94 CIV. 2925 (RLC))(dismissal).

By late 1996, and even though they had been paid at least $209,000,000 in taxpayers' money, IBM Team had still failed to deliver a single modernized application, or any of the software that had the touted characteristics similar to MENTIX[9]. PTI

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Team and exchanged information including the Project Manager's Report which established that the IBM Team had been completely unable to perform the software portion of the SBIS Contract.

[9] The SBIS Contract was effectively cancelled in late 1996 without a single modernized application delivered. Nevertheless, since then, CACI has publicly announced that its "RENovate" was included in many contracts, including (1) CACI's $66M subcontract with VGS Inc. to provide information processing support services to the Federal Systems Integration and Management Center (FEDSIM) Federal Information Processing Support Services program in 1996; (2) CACI alliance with PKS Information Services, Inc. (PKS), a subsidiary of Peter Kiewit Sons', Inc., one of the largest privately held companies in the U.S. in 1996; (3) CACI's $110.9 Million Contract for Information Technology Support Services Contract by Department of Justice referred to as ITSS in 1996; (4) CACI's (with Lockheed Martin) Contract with the Office of the Secretary of Defense (OSD) Program Analysis and Evaluation
(… continued)

sued again, as relator, with Mr. Varnado, on grounds of the total failure to deliver. Govt declined to intervene, and this action was dismissed, even though Judge Sweet characterized IBM Team's performance on SBIS as "abysmal", (*U.S. ex rel. Pentagen Technologies Intern. Limited v. CACI Intern. Inc.,* 1997 WL 724553 (S.D.N.Y., Nov 19, 1997) (RWS)).

6. PTI commences Litigation Misconduct Action after obtaining evidence of Govt collusion against PTI in False Claims Actions.

In April 1997, CACI misdirected one of its "blind-copy" distribution-list pages of a letter it had sent to PTI. Two of the U.S. Attorneys involved in PTI litigation were on the list. As a result, on May 27, 1997, PTI filed a Freedom of Information ("FOIA") Request seeking all existing non-court-filed documents between IBM Team and Govt. 800-odd pages of previously undisclosed documents were ultimately produced by

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Office to provide support to the Joint Warfare System (JWARS) development in1997; (5) CACI's contract to Support Naval Information Systems Management Command, Washington, D.C. with Lockheed Martin (which "continues [CACI's] long-standing relationship with the Navy and Lockheed Martin") under which CACI will provide information technology support services to the Navy's Space and Naval Warfare Systems (SPAWAR) Command in 1997; (6) CACI's $58 million Contract to Support Navy Fleet Material Support Office Information Technical Support Services of the Fleet and Industrial Supply Center Norfolk Detachment Philadelphia in 1997; (7) CACI's partner's Quality Consulting Services (QCS), MatriDigm "highly automated factory solution" project on Northrop Grumman's Data Systems and Services Division ("DSSD", who has "established relationships with the military and other federal customers"), "significant mission-critical subsystem applications" containing more than 20 million lines of COBOL code.(It was reported that "[a]fter successful completion of a benchmark test case, the DSSD witnessed how the ... process verified that the code was modified correctly.") in 1997; and (8) CACI's partner's MatriDigm's IBM COBOL Code Renovation Project for Wells Fargo in 1998.

November 1998[10], *(Pentagen Technologies Intern. Ltd. v. U.S.,* 1999 WL 378345 (S.D.N.Y., Jun 09, 1999) (NO. 98 CIV. 4831 AGS THK); *Pentagen Technologies Int'l Ltd. v. U.S.,* 2000 WL 347165 (S.D.N.Y., Mar 31, 2000) (NO. 98CIV.4831 (AGS)(THK)) and PTI commenced this action underlying the sanctions being appealed. ("Litigation Misconduct Action"). Judge Sprizzo, by chance, was assigned to the action.

The ***800***-odd FOIA-released documents established that IBM Team and Govt had been jointly preparing the pleadings that IBM Team had filed in the False Claims Act actions, even though, notwithstanding Govt's obligation not to "handicap" relators, Govt had issued the PTI June 1995 "gag" order prohibiting its contact with the Executive Branch. Govt was assisting IBM Team while it was handicapping the relators.

7. Litigation Misconduct Action founded in tortious acts of Govt and IBM Team committed in False Claims Actions

Relators must not be handicapped. *U.S. Dep't of Defense v. CACI Int'l Inc.*, 885 F.Supp. 80, 82 (S.D.N.Y.1995), had held:

> ...Given Congress's clear mandate that qui tam relators be able to effectively bring civil suits under the FCA, it follows that *once the government has decided not to intervene, it should not be able to handicap the relator's action* by keeping materials under seal without some showing of good cause or ample justification" (emphasis added)

Relying on Judge Carter's ruling, the Relators alleged that they had been "handicapped" in their False Claims Actions.[11]

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[10] A few pages, including pages that had made reference to meetings with other counsel were withheld under FOIA.

[11] By way of example, on December 5, 1996, in Judge Sweet's False Claims action, PTI had filed for a default judgment in the amount of $464,282,485.80 against IBM who had failed to file any pleadings in the action, when due. To defeat the default, on December 6, 1996, IBM/Lockheed Martin's then counsel, Fried Frank Harris, Shriver & Jacobson, relying on the "reasonable excuse" defense to overcome the default, submitted a letter to

(… continued)

Specifically, with respect to the United States defendants, plaintiffs alleged that Govt improperly (1) filed an *amicus curiae* brief in the first *qui tam* action; (2) colluded with non-performing IBM Team in their defense of the first and second *qui tam* actions; (3) prohibited PTI from meeting with members of the Executive Branch to assist them in their prosecution of the first and second *qui tam* actions; and (4) permitted Mr. Brasseur, a Government employee, to meet with IBM Team and others and provide a witness statement ("the Brasseur statement") for use in related litigation proceedings pending in England. Similarly, PTI claimed that the remaining respondents colluded with Govt in preparing the *amicus curiae* brief and the Brasseur statement, and in otherwise seeking Govt's assistance in preparing for their defense of the *qui tam* actions. (App C,49a-50a).

No discovery was permitted, and motions to dismiss were filed by the Respondents, (App C,42a-44a).

A. For seven years, CACI and Govt denied any use of MENTIX in responses to subpoenae and FOIA Requests

Until April 2000, Govt and IBM Team's position in all litigation had been that MENTIX had not been ported to the 3090 mainframe, that Govt, IBM Team were NOT interested in MENTIX, had not used MENTIX or any derivative thereof, and that all copies of MENTIX software (which consisted only of the UNIX version), had been returned (see e.g. App E,124a-129a).

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Judge Sweet explaining that "the complaint was not provided to us until today." Govt was "copied" on the letter but remained silent. Two years later, the FOIA-released documents established that on November 1, 1996, Govt had faxed a copy of the complaint to the Fried Frank firm. While the Fried Frank firm immediately resigned from the case, to this day, the default was not reversed. Govt's failure to inform the court of the November 1, fax in 1996, "handicapped" the taxpayers out of $464,282,485.80 (App E,108a-114a). PTI's exposure of such pre-Enron misconduct was met with yawns from courts and the Justice Department alike, despite PTI's protestations for action.

Prior to April 2000, and in response to legal process including subpoenae, CACI, IBM Team and Govt had filed representations that they had not used MENTIX (other than had been previously disclosed). No disclosure of any developed 3090 version of MENTIX was ever made. Govt also provided responses to four further FOIA requests and one litigation subpoena in the E.D. Va case (e.g. App E,95a-102a), that there had been no tests of MENTIX other than the Varnado test, which had been previously disclosed. PTI efforts to resolve the conflicting evidence (v. Mr. Varnado's) had all been thwarted.

B. In 1997, Govt filed a False Witness Statement in English High Court Action

Throughout, there had also been litigation in English High Court. PTI sued its English secretary and others ("English Respondents"), for breach of contract/tort/fraud. In 1996, to address issues of causation and quantum, Govt, with collusion of CACI's legal advisors, provided the English Respondents with a Witness Statement [12] from the AMC[13],(App E,124a-127a), which repeated their position of no interest in MENTIX. Steptoe (Mr. Koegel) then insisted on a bogus interpretation of the Witness Statement, threatening PTI (App E,127a-129a).

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[12] By Mr. Varnado's "boss", Mr. Brasseur, later certified under 28 U.S.C. §2679.

[13] English Respondents had contracted to provide PTI with a corporate secretary, Express Company Secretaries Ltd, to maintain its corporate filings in England. No registration filings were made, which, in March, 1990, resulted in the loss of PTI's corporate identity necessary for the AMC 3090 Contract which was due to be let the same week as the loss of registration. PTI was informed of the loss when it sought a "good standing certificate" for AMC, which PTI was unable to produce. It was later discovered that the English Respondents' secretary was a dormant non-trading company incapable of any trading. CACI assisted the English in obtaining the 1996 Witness Statement.

Unable to depose AMC in the U.S., PTI turned to the English Court[14] in 1999, which ruled that the conflicting testimony was important and issued a Letter of Request under the Hague Convention addressed to Govt in Virginia, (App E,129a-135a).

8. In 2000, Govt finally admits to loading and testing a derivative 3090 version of MENTIX

In April 2000, after seven years of effort to resolve the contradictory evidence, PTI cross-examined Mr. Brasseur[15] in E.D. Va, in response to the Letter of Request. The AMC admitted, for the first time (at e.g. p.60) (App E,129a-135a) that MENTIX had been tested on the AMC's 3090 computers at their Chambersberg PA facility, and had attained the 50 percent rate similar to IBM Team's SBIS contract rate (App E, 134a).

While this evidence conflicted with Mr. Brasseur's previous evidence, it established that Govt and the Respondents had previously provided false evidence, upon which all the courts had relied, in virtually all decisions rendered since 1994.

The Cross-examination established that MENTIX had been developed as contemplated by the 1990 CACI Development Contract and ported to the 3090 machine. IBM Team and Govt had concealed that the objective of the AMC Contract had been achieved[16]. The 2000 evidence proved that the Govt and CACI and others, had all provided false information either in response to court subpoenae, or under FOIA, or to the English High

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[14] Counsel, an English Solicitor-Advocate (Civil), represented PTI in the English Action.

[15] Mr. Brasseur died in early 2003.

[16] In 1999, Govt had hinted to CACI's involvement in the then Secret Test when it informed the Court, during argument, in *Pentagen Techs. Ltd., Inc. v. United States*, 175 F.3d 1003 (Fed. Cir. 1999) "The letter is quite confusing. It is very broad. It is a very broad demand. It is, I believe, a demand for all use of the software and, I am not sure, Your Honor, to be honest, but I believe CACI, if there was this second or first evaluation, I believe it was involved in that one, too....", (App E,114a).

Court, in various combinations. The evidence also established that CACI's expert, (App D,89a-90a), upon whom Judge Brinkema had relied in 1994, had provided incorrect evidence.

As a result of IBM Team's seven years of false representations, PTI had also been deprived of its rights to enforce the constructive trusts created by Judge Sprizzo in the 1993 Runaway Judgment.

9. In response, Court dismisses Litigation Misconduct Complaint and imposes Sanctions.

Judge Sprizzo dismissed Relators' complaint in tort, even though he could point to no direct controlling authorities against those presented in support. (App C,52a-53a), Relators' argument that they should not have been "handicapped" in their efforts by a secret "conspiracy of silence" that obviously operated between the Govt and IBM Team, and that had now been exposed, was unavailing. The learned judge further ruled that any amendment of the complaint would be futile because PTI had no such right of action in tort in any event[17], (App C,56).

Nevertheless, Judge Sprizzo specifically limited the extent of his ruling to exclude the state claims, which had been made, such as those included in the Runaway Action. (App C,56-57)

Judge Sprizzo then granted the sanctions the subject of this appeal (App A,5a-20a), even though the "litigation misconduct" allegations against the Respondents were un-refuted, even though Govt had now admitted that they had used the

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[17] PTI moved, under seal, to file a Third Amended Complaint containing a *qui tam* action under the False Claims Act which Judge Sprizzo denied on the grounds that "the Court may not properly consider the entirely new claims proposed in plaintiffs' Third Amended Complaint in ruling on the instant motions for reconsideration and relief from judgment." (App C,57a-59a). Believing such a ruling addressed *res judicata* and related implications, PTI then filed a new action based on the "entirely new claims" which Judge Batts also dismissed *U.S. ex rel. Pentagen Tech et al v. USA*, 00 CIV. 6167(DAB), (App D,60a-80a).

developed software, and even though PTI still had not recovered the 3090 Version of the MENTIX property which the Govt now admitted it had loaded and tested.

10. Judge ignored 2000 Evidence in Sanction Order

Judge Sprizzo imposed sanctions in November 2001, and ordered Counsel to reimburse CACI for $75,000 of its costs and fees. In imposing the sanctions, he made no reference to, and completely ignored, the April 2000 Evidence which had been presented to him, (*id*.). Even though he imposed sanctions, no order of suspension was entered against Counsel, (*id.*).

11. Judge Sprizzo then permitted PTI to commence enforcement under Runaway Action Judgment

By November 2001, the English Respondents acknowledged that the AMC's 2000 Cross-examination contained "corrective evidence", and in early 2002, PTI sought, and Judge Sprizzo granted, further permission to present a Turnover Petition in the Runaway Action against certain IBM Team members and Govt to enforce the constructive trust imposed in the Runaway Action in 1993. PTI filed subpoenae and, in November, 2002, Judge Sprizzo denied enforcement of the subpoenae against the non-parties, without prejudice, but permitted PTI to depose the Judgment Debtors to establish if the software had been "transferred" (App F,145a-148a). Further evidence was obtained by early 2003, prior to the Hearing of the Appeal on March 31, 2003, which established that Runaway had not transferred MENTIX to anyone other than CACI. Runaway's new evidence established that Govt could only have obtained its version of MENTIX through Runaway and CACI.

12. Appeal Court disregards Turnover Petition

On March 26, 2003, one week prior to the Court of Appeals Hearing in the Second Circuit, PTI requested an adjournment of the Sanctions Appeal pending further consideration by Judge Sprizzo of the new evidence to be filed in the Runway Action

(App F,139a-145a). The court summarily denied the request on March 28, 2003 without comment.

13. Judge Sprizzo implements Order in Runaway Action, not Sanction Case

The Second Circuit heard the appeal on March 31, 2003, and issued its Order affirming Judge Sprizzo's sanctions, on April 23, 2003, (App A,1a-5a), In the meantime, on March 30, 2003, PTI had filed for permission from Judge Sprizzo to re-file its motion for a Turnover Order and related orders,(App B,35a-38a). Judge Sprizzo granted PTI permission and, on May 2, 2003, heard arguments from all sides on PTI's Turnover/Subpoena Motions, except the Judgment Debtor who was not present. (App F,148a-151a),

At the May 2, 2003 Hearing, all Respondents publicly acknowledged to Judge Sprizzo that "[t]here is some testimony to the effect that, yes, maybe this was tested, maybe Mentix was tested on a 3090 U.S. mainframe at some point", (id.,149-50a).

Nevertheless, the learned judge, effectively *sua sponte*, immediately suspended Counsel from any further appearances in any further case in the District for PTI, using the Appeal Court's April 23, 2003 Order as basis for his decision.(App B,38a-40a).

Judge Sprizzo then stayed any further enforcement action in the Runaway Action, without prejudice to the merits of the Turnover Motions, until new counsel had been appointed.(*id*.)

PTI and Counsel now file this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Sanction Order in the Litigation Misconduct Case is a final order for the purposes of 28 U.S.C. §1291

In issuing its ruling on sanctions in the Litigation Misconduct Action, the Second Circuit determined that the sanction issue in this case is a final order for the purposes of §1291. (App A,2a),

> Title 28 U.S.C. 1291 provides for appeal to the courts of appeals only from "final decisions of the district courts of

> the United States." For purposes of 1291, a final judgment is generally regarded as "a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v. Biard,* 486 U.S. 517, 521 (1988), quoting *Catlin v. United States,* 324 U.S. 229, 233 (1945)

Lauro Lines S.R.L. v. Chasser et al. 490 U.S. 495, 497-8 (1989).

While this Court has ruled that an order disqualifying counsel in a civil case is not a collateral order subject to an immediate appeal, *Richardson-Merrell, Inc v. Koller* 472 U.S. 424, 430, and 440-441 (1985), *Cunningham v. Hamilton County* 527 U.S. 198 (1999),[18] the fact situation presented in this case distinguishes it from the usual type of order disqualifying counsel considered in the cases referred to above. In the cited cases, suspension orders were made at an early stage of actions, with, e.g. conflicts of interest issues.

Here, the Court of Appeals noted specifically that a decision has been already been made on the merits on the Litigation Misconduct Action (App A,2a). Prior to the Hearing, Counsel had sought an adjournment pending Judge Sprizzo's determination of the underlying facts of the Turnover Petition. (App F,139a-144a). Had the Court of Appeals believed that the Runaway Action deprived it of the necessary jurisdiction under §1291, it would have ordered that it was unable to review the sanction order itself until the Runaway Action issues were finally resolved. *see Cunningham* 527 U.S. at 200.

However, the Court of Appeals' rejected Counsel's reasons for the stay as "a frivolous last minute motion for postponement" and then ruled that it was permissible for a court to suspend counsel under §1651, (App A,4a-5a). This Petition

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[18] Adopted by the Second Circuit in *New Pacific Overseas Group v. Excal International* 252 F3d 667 (2dCir 2001)

seeks review of that determination, which is now final in all respects for the purposes of §1291.

In addition, Judge Sprizzo effectively short-circuited the collateral order issue[19] by immediately implementing the Court of Appeal's recommendation in the Turnover Petition case, effectively *sua sponte,* by issuing his order dated May 16, 2003, (App B,38a-40a).

Given the history of this case, it might be considered contemptuous conduct for Counsel to even suggest that he had not been suspended in the Litigation Misconduct Case, given the unusual circumstances set out herein. In any event, the Runaway Action Judgment only addresses post-judgment matters. Whether a constructive trust imposed in 1993 attaches to a non-party who has admitted possession, in enforcement proceedings is a question of post-judgment fact only and well within the cases noted above.

Accordingly, there is a final decision of suspension for the purposes of §1291.[20]

2. A court may not use the provisions of 28 U.S.C. Section 1651, Federal Rule of Civil Procedure 11, or 28 U.S.C. Section 1927 to suspend an attorney from further representation of a client in any lawsuits in the district

The Court of Appeals founded its authority for implementing sanctions on §1651, using the District Court's ruling made under Rule 11, and §1927 as its basis of the offending conduct. None of these provisions create any such authority on the issue of suspension of counsel.

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[19] Over the objection of PTI who, on May 16, 2003, wrote directly to Judge Sprizzo requesting that Counsel be permitted to continue to act on their behalf in all matters.

[20] As noted in the concurring opinion of Kennedy J in *Cunningham.,* 527 U.S. at 210-1, mandamus may also be available in this case.

A. §1651

As Chief Justice Rehnquist has recently noted in *Brown v. Gilmore* 533 U.S. 1301(2001):

> The All Writs Act, 28 U.S.C. 1651(a), is the only source of this Court's authority to issue such an injunction. It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc. v. NRC,* 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers) (quoting *Fishman v. Schaffer,* 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). Such an injunction is appropriate only if "the legal right at issue are 'indisputably clear.'" 479 U.S., at 1313 (quoting *Communist Party of Ind. v. Whitcomb,* 409 U.S. 1235 (1972) (Rehnquist, J., in chambers)).

The issue presented in this case is not whether an injunction under §1651 (a) may be used to stop frivolous litigation because Judge Sprizzo specifically held that the suspension order was to be without prejudice to PTI's right to proceed in its enforcement action. The learned judge would have dismissed the Turnover Petition as frivolous, had he so ruled. Accordingly, this injunction was issued for the sole purpose to suspend counsel by way of punishment and the two courts intended to issue an injunction as an alternative to disciplinary proceeding.

The courts do not favor the use of extraordinary relief when another statutory or other procedure is available.

> "Although that [All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.,* 474 U.S. 34, 43 (1985).

As noted in *Syngenta Crop Protection v. Henson* 537 U.S. 28 (2002), the All Writs Act should not be used to ""fill the

interstices of federal judicial power when those gaps threate[n] to thwart the otherwise proper exercise of federal courts" jurisdiction." "

In the case of suspension or disqualification of attorneys there is ample authority outside the All Writs Act to sanction or disqualify counsel; see e.g. 28 U.S.C. 1654, and Local Civil Rule 1.5 of the Southern and Eastern Districts of New York.

B. Rule 11

> We give the Federal Rules of Civil Procedure their plain meaning, *Walker v. Armco Steel Corp.,* 446 U.S. 740, 750, n. 9 (1980), and generally with them as with a statute, "[w]hen we find the terms… unambiguous, judicial inquiry is complete," *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Pavelic & Leflore v. Marvel Entertainment, 493 U.S. 120, 123 (1989) *Cotter & Gell v. Hartmax Corp,* 496 U.S. 384, 391 (1990)

Rule 11 is clear as to the nature of the sanction that may be imposed. The rule makes no mention of any power to suspend or disqualify any counsel. While mention is made that "directions" may be given, no reference is made to any disciplinary action. To include the right to suspend or discipline in such vague terminology, seems overly broad. While there appear to be no appellate cases on point, at least one district court has ruled that the section never contemplated that an appropriate sanction under the rule would be disbarment from practice. *Piazza v. Carson* 652 F.Supp. 1394 (D.Nev.1987) Neither the Second Circuit nor Judge Sprizzo cited to any such authority

C. §1927

Similarly, sanction under §1927 by its very wording, is limited to money. Reference is made to *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-758 (1980) where the court gave a complete review of the statutory history of this section from 1813 when it was first adopted. No mention is made that suspension or disqualification of counsel is included for any

breach of this section. Indeed, as *Roadway* points out, the section is involved only with "costs" and "fees."

Section 1927 provides that lawyers who multiply court proceedings vexatiously may be assessed the excess "costs" they create.

> Courts generally have defined costs under 1927 according to 28 U.S.C. 1920, which enumerates the costs that ordinarily may be taxed to a losing party. *e.g.*, *United States v. Ross*, 535 F.2d 346, 350 (CA6 1976); *Kiefel v. Las Vegas Hacienda, Inc*., 404 F.2d 1163, 1170 (CA7 1968), *cert. denied sub nom*. *Hubbard v. Kiefel*, 395 U.S. 908 (1969). Section 1920 lists clerk's and marshal's fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts. Section 1920 also permits the assessment of the attorney "docket" fees set by 28 U.S.C. 1923. In this case, that fee is $20. 28 U.S.C. 1923 (a).

The statute makes no mention of any disciplinary action against counsel which may be taken by the court. Nor has this counsel found any supporting authority. Neither the Second Circuit or Judge Sprizzo cited to any such authority.

3. A court may not use a statutory based attorney sanction issued in one case as the basis to suspend the same attorney in a different second case involving different issues and Respondents, where there has been no violation of any sanction principles in the second case

A. Court's power to suspend/discipline counsel

This Petition does not question the courts' inherent power to suspend or disbar lawyers. A lawyer's actions must be read in light of a complex code of behavior to which attorneys are subject, reflecting burdens inherent in attorney's dual obligations to clients and to system of justice. *In re Snyder* 472 U.S. 634, 644 (1985)

In *Synder*,(id.) the Supreme Court noted, with approval, Justice Cardozo's observation as follows:

> "'Membership in the bar is a privilege burdened with conditions'. [An attorney is] received into that ancient fellowship for something more that personal gain. He [becomes] an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928) (citation omitted)"

In *Synder*, the court held that the facts, even as the district court understood them, did "not support a finding of contemptuous or contumacious conduct, or a finding that [the] lawyer is "not presently fit to practice law in the federal courts.' " Id. at 647.

The Supreme Court has cautioned against the free use of courts' inherent powers, and emphasized that use of such powers is discretionary. See *Chambers v. NASCO*, 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion.") With regard to the supervisory powers, the Supreme Court has held they must be applied consistent with "the principle of right and justice." *Frazier v. Heebe* 482 U.S. 641, 645 (1986).

The Second Circuit has ruled that a "restrained approach" should be adopted in considering disqualification motions and requires an appearance of impropriety, as well as a showing that the proceedings were somehow tainted by counsel's conflict of interest. *See Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980) (in banc), *vacated on other grounds*, 449 U.S. 1106 (1981); *see also Bottaro v. Hatton Assocs*., 680 F.2d 895, 896-97 (2d Cir. 1982), *Bd. of Ed. of N.Y. City v. Nyquist* 590 F.2d 1241, 1246 (2nd Cir.1979).

B. Counsel's actions are not such misconduct

(1) Litigation Misconduct Action

Throughout the entire litigation, there has been no suggestion that Counsel has committed any acts of contempt, nor had he failed to comply with any orders of the court, other than his financial inability to pay the $75,000 costs order issued in the Litigation Misconduct Case

In this case, both the Court of Appeals and the District Court have failed to explain why any suspension order was or should have been made, except to refer to the statutory provisions of Rule 11, §1927, and §1651.(App A,2a-3a), (App B,38a-40a). They have pointed to no "contemptuous or contumacious conduct, or made any finding that [the] lawyer is not presently fit to practice law in the federal courts."

For example, in the case at bar, since 1999, when permission seems to have been required prior to filing pleadings, Counsel has always sought and obtained such necessary permission. Even though Counsel had been unable to pay the ordered costs to CACI, his failure is due to his financial inability, and not his refusal to pay,[21] (App F,150a-151a). Counsel has responded to all discovery relating to his assets. This court has held that punishment based on "inability to comply" is inappropriate whereas punishment based on "ability but refusal" is appropriate. see e.g. *U.S. v. Rylander* 460 U.S. 752, 757 (1983). Moreover, there has been no "tainting" of the process by Counsel. Suspension was never formally raised or considered as an issue, prior to the Suspension rulings.

No Orders to Show Cause, or prior motions for disciplinary proceedings were filed, pending, or served by the courts prior to the suspension.

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[21] Since the commencement of this litigation in 1990, Counsel has had to resort to the provisions of Chapter XI of Title 11 of the United States Code twice.

The Court, in effect, *sua sponte*, decided the order of punishment and suspension without proper foundation. Such conduct is entirely outside even the least restrictive requirement parameters of notice and hearing.

Accordingly, suspension was not an option open to a court.

(2) Runaway Action

A fortiori, there has been no sanctionable conduct in the Runaway Action. PTI is a judgment creditor; PTI is pursuing its property and seeking to enforce the constructive trusts imposed in 1993, by orders issued by Judge Sprizzo. Counsel has been PTI's counsel throughout and the judge could point to no basis for any sanction against either the judgment creditor or its counsel in the Runaway Action.

Moreover, Counsel had made both courts aware of the Govt's admission of their possession of the 3090 MENTIX version, and PTI's Turnover Petition should, at a minimum, have been considered and decided upon prior to the issuance of any sanction. (App F,139a-145a; App B,38-40). In addition, any and all of the arguments presented by Govt to retain possession of stolen property are not sustainable because the Govt now openly admits possession, *see e.g. Golden State Bottling Co., v. NLRB* 414 U.S. 168, 179 (1973).

(3) Baseless Suspension results in continued Govt use

It is obvious that the issuance of a Turnover Order will deprive the Govt of the use of a product that it has had access to and has used, albeit unlawfully, for the last ten years. During that period, Govt has taken positive continuous steps to conceal the possession by filing false court process. A troubling aspect of the issuance of the suspension order in this litigation is that, given the supposed lack of interest in MENTIX repeated by the Respondents over the many years, the Respondents nevertheless continue to object to the issuance of the Turnover Order. If the stolen property has no value to Govt and IBM Team, why resist its return to its rightful owner.

Govt and the Respondents have made it clear to the Courts that they object to any Turnover Order or to the issuance of a subpoena relating thereto (App F,145a-148a), even although they now all admit that Govt had possession of the derivative 3090 version of the product. (App F,149a-150a) No court has power under the All-Writs Act to enjoin PTI, a successful claimant, from proceeding with a Petition Turnover to seek to enforce its judgment-creditor rights in the Runaway Action.

A possible explanation for the suspension of counsel is to delay any ruling in favor of the Judgment Creditor on the Turnover Petition, so as to protect Govt's interests, even although such action would also obviously be without authority.

It would be wrong at law to unlawfully suspend a counsel so that Govt may retain unlawful possession of counsel's client's property.

4. In the circumstances of this case, there is no basis for the orders made against Counsel resulting in the suspension or disqualification of counsel

A. No basis for suspension in litigation

In this case, sanctions issued against Counsel were founded on the alleged presentation of "vexatious and frivolous" litigation. The courts made mention of the many cases presented by PTI. (App A,2a-5a).

Yet, the sanction issued against Counsel was issued in the Litigation Misconduct Action where factually, the undisputed allegations of misconduct had been committed by sanctioned counsel's opponents which has, in turn, resulted in the many lawsuits because of the inconsistency of evidence. (App C,49a-50a). There is no dispute that Respondents filed false evidence in the pre-2000 litigation, and undertook the many acts complained of. It is inappropriate for Counsel to be sanctioned after he had obtained evidence from an English Court proving that opposing counsel themselves had committed litigation misconduct to conceal their clients' use and possession of

Counsel's client's stolen property and had caused the many lawsuit by their own acts of misconduct.

B. 2000 Evidence not res judicata in Runaway Action

Counsel presented to Judge Sprizzo the 2000 evidence which proved that Govt had unlawfully used PTI's MENTIX product which, in turn, established the factual basis of the Litigation Misconduct Case that Govt and the others had concealed their unlawful possession of the stolen software. In response, Judge Sprizzo immediately sanctioned Counsel, and not the Respondents, even though there had been no controlling authority or rulings on the subject of the right of a relator to sue under tort for litigation misconduct committed to defeat a false claims action. To the contrary, there is clear authority from Judge Carter, and the other cases cited therein, that Govt must not undertake any action to "handicap" a relator.

Judge Sprizzo's suggestion that Judge Carter permitted the conduct now complained of cannot be correct; (App C,53a). Neither Judge Carter nor counsel was aware, at the time (1995) of the collusive conduct (amounting to a "conspiracy of silence"[22]) between Govt and the IBM Team being undertaken at the time to conceal the material fact in the litigation, i.e. that the Govt had possession of a 3090 derivative version of PTI's MENTIX software. Had both Govt and IBM Team produced that information either in the subpoenae filed or the FOIA Responses, as they were required by law to do, neither Judge Carter nor PTI would even have had the discussion, because the litigation would have been over there and then. In addition, PTI would now have had possession of its property, and no issue of sanction would have arisen.

In its April 23, 2003 Order, the Second Circuit commented that the 2000 evidence had already been considered and "found

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22. S.Rep. No. 345, 99th Cong., 2d Sess. 6, *reprinted in* (1986) U.S.C.C.A.N. 5266, 5272.

insufficient to allow Pentagen to 'escape the preclusive effect of prior judgments.'" (App A,5a). With respect, such comment cannot be correct, for the following reasons.

Firstly, Judge Sprizzo June 2000 Order by its own terms, excluded the Runaway Action (state tort/conversion/constructive trust actions) from his consideration. In the Litigation Misconduct Case, he held (App C,56a-57a) that

> …[m]oreover, as all federal and state claims properly before the Court have been dismissed, the Court declines to exercise supplemental jurisdiction over plaintiffs' state claims (citations omitted).

This reservation specifically excluded the Runaway Action (based on state tort/conversion/constructive trust rights) from the learned judge's consideration.

Secondly, PTI is ***not*** seeking to escape any "preclusory effect" of the Runaway Action Judgment; on the contrary, it is Govt and IBM Team who seek to escape the "preclusive effect" of the Runaway Action Judgment. PTI seeks in the turnover proceedings to *enforce* the Runaway Action Judgment against anyone subject to the constructive trust which Judge Sprizzo himself had imposed over the product in his 1993 Judgment.

Thirdly, none of the post-1993 decisions referred to in the Court of Appeals Order (or elsewhere, including any of the post-2000 decisions), could have affected the Runaway Action Judgment. Indeed, not a single decision since the Runaway Action Judgment in 1993, has ever questioned PTI's ownership rights to MENTIX nor has any decision remotely suggested that MENTIX had passed from PTI to either CACI or Govt. On the contrary, all of the prior decisions were based on the opposite premise presented at the time by CACI and Govt, i.e. that there was no interest in MENTIX and that PTI's claims to the contrary, were baseless in fact.

Fourthly, the constructive trust was imposed by Judge Sprizzo in the Runaway Action Judgment and therefore "attached" to

the property in 1993 when Judge Sprizzo made the Runaway Action Judgment. At law, therefore, MENTIX (and the proceeds from any unlawful use) was, from 1993, continuously subject to the constructive trust under the order issued in the Runaway Action Judgment. At law, the constructive trust "attached" to the property well before any of the other later judgments were even considered or entered. *see Great-West Life & Annuity Ins. Co. V. Knudsen* 534 U.S. 204 (2002) (*see also e.g. In re North American Coin & Currency, Ltd.,* 767 F.2d 1573, 1575 (9th Cir. 1985), property subject to a constructive trust is excluded from a bankruptcy estate, *and In re Columbia Gas,* 997 F.2d 1039, 1059 (3dCir.1993)). Therefore, the only issue to be decided in such post-judgment circumstances is whether a non-party, in this case, Govt, had possession of the asset, the subject of the Runaway Action Judgment. From the beginning, CACI and Govt knew of the dispute and the resulting litigation Now, the Govt and the other relevant Respondents have now, also, admitted that Govt had possession of the 3090 derivative version of MENTIX.

Fifthly, the Runaway Action Judgment predates all other actions considered by the courts. It is obvious that *res judicata* issues cannot have an effect on decisions made previous to the decision intended to be affected by *res judicata*. It is conceptually impossible for a later court decision to have *res judicata* effect on a judgment existing prior to it, because the later decision was made later in time to the earlier decision. *Res judicata*/issue preclusion only applies to *subsequent* cases between the same parties or their privies respecting the same cause of action, not to *earlier* decisions. *G. & C. Merriam Co., v. Saalfield* 241 U.S. 22, 29 (1916).

Using the fact situation presented in this case, in 1993, Judge Sprizzo ruled that MENTIX, wherever situated, was subject to constructive trusts in favor of PTI. The 2000 evidence established that Govt, by its own admission, had loaded and tested the 3090 Version of MENTIX. The 2000 admission

creates the imposition of the constructive trust on the MENTIX property that was loaded and tested. Govt's concealment of its prior (unlawful) use of the product and the later (wrongly based) judgments can have no effect on Govt's liability to PTI under the 1993 Runaway Action Judgment, because the trusts already existed as of 1993 and the later decisions are irrelevant. Moreover, Govt's concealment of the existence of the trusts in no way destroys the trusts. The whole purpose of constructive trusts is to ensure that such concealment of property, as encountered in this case, does not amount to loss of ownership.

Lastly, in any event, *res judicata* principles cannot be used as a shield for fraud.

CONCLUSION

For the reasons presented, this Court should grant the Petition sought.

Respectfully submitted

July 18, 2003

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APPENDIX A – LITIGATION MISCONDUCT ACTION SANCTIONS

1. Order of United States Court of Appeals for the Second Circuit, Dated April 23, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Summary Order

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

(02-6061)

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of April, two thousand and three.

Present: JON O. NEWMAN,
ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
Circuit Judges.

PENTAGEN TECHNOLOGIES INTERNATIONAL LTD. AND RUSSELL D. VARNADO,

Plaintiffs,

JOEL Z. ROBINSON,

Appellant

-v-

Appendix A

UNITED STATES OF AMERICA, CACI INTERNATIONAL INC., CACI SYSTEMS INTEGRATION, INC., CACI, INC. FEDERAL, INTERNATIONAL BUSINESS MACHINES CORPORATION, LOCKHEED MARTIN CORPORATION, AMERICAN TELEPHONE & TELEGRAPH COMPANY, PRC, INC., I-NET INC., STATISTICA, INC., EXPRESS COMPANY SECRETARIES LIMITED, JORDAN & JORDANS & SONS LIMITED, JORDANS GROUP LTD, STEPTOE & JOHNSON, J. WILLIAM KOEGEL, JR, ESQ., DAVIES ARNOLD & COOPER, AND GEORGE MENZIES, ESQ.

Defendants-Appellees.

Appearing for Plaintiffs-Appellants:

JOEL Z. ROBINSON,
New York, NY.

Appearing for Defendants-Appellees:

J. WILLIAM KOEGEL, JR.,
Steptoe & Johnson, Washington, D.C.

Appeal from the United States District Court for the Souterern (sic) District of New York (John E. Sprizzo, District Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

In an opinion, dated June 29, 2000, the District Court dismissed plaintiffs' claims as to all defendants and denied plaintiffs' motion to file an amended complaint. *See Pentagen Techs. Int'l Ltd. v. United States*, 103 F. Supp. 2d 232 (S.D.N.Y. 2000). Defendants CACI International Inc., CACI Systems Integration, Inc., and CACI Inc., Federal (collectively "CACI") subsequently filed a motion for sanctions against plaintiffs and their counsel of record, Joel Z. Robinson ("Mr. Robinson"), which motion was granted in an opinion dated, November 5, 2001. *See Pentagen Techs. Int'l Ltd v. United States*, 172 F. Supp. 2d 464 (S.D.N.Y. 2001). Specifically, the District Court ordered sanctions against Mr. Robinson pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. Section

1927, and enjoined plaintiffs pursuant to 28 U.S.C. Section 1651(a) from filing any further litigation in the Southern District of New York without permission of the court. Mr. Robinson now appeals this grant of sanctions.

The instant case forms a small part of a remarkable torrent of litigation arising from the failure more than a decade ago of Pentagen Technologies International Limited ("Pentagen") to obtain a contract to provide computer software to the United States Army. Since losing the contract Pentagen has sought relief from a roster of defendants in a number of judicial fora pursuant to a range of statutory and common law claims.

Several highlights of Pentagen's litigiousness stand out. Three actions it filed in the Southern District of New York were consolidated and dismissed in 1996. *See Pentagen Techs. Int'l. Ltd. v. CACI Int'l, Inc.*, 1996 WL 435157 (S.D.N.Y. Aug. 2, 1996). CACI brought suit in the Eastern District of Virginia seeking, inter alia, a declaratory judgment against Pentagen that it violated none of Pentagen's copyright and trademark rights with respect to CACI's marketing of computer software to the United States Army. This relief was granted, *see CACI Int'l Inc. v. Pentagen Techs. Int'l Ltd.,* 1994 WL 1752376 (E.D. Va. June 16, 1994), and affirmed by the Fourth Circuit. *See CACI Int'l Inc. v. Pentagen Techs. Int'l Ltd.,* 1995 WL 679952 (4th Cir. Nov. 16, 1995) (per curiam). As part of that appeal, the Fourth Circuit considered Pentagen's motion for recusal of the district judge on the ground that she has decided the case in a manner that benefitted her husband. The Fourth Circuit characterized this motion as "frivolous on [its] face" and "reprehensible." Id. at *6, n.12. In a later related action, the Fourth Circuit affirmed an award of monetary sanctions against Mr. Robinson for misconduct. *See In re Joel Z. Robinson*, 1996 WL 597829 (4th Cir. Oct. 18, 1996) (per curiam).

The Southern District of New York has also dismissed an action brought by Pentagen under the False Claims Act, 31

U.S.C. Section 3729, characterizing some of its arguments as 3 "admittedly ridiculous." *See United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc*., 1996 WL 11299 at *16 (S.D.N.Y. Jan. 4, 1996). Yet another action was dismissed on grounds of res judicata, *see United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* 1997 WL 473549 (S.D.N.Y. Aug. 18, 1997), a dismissal affirmed by this Court. *See United States ex rel. Pentagen Techs. Int'l v. CACI Int'l Inc.*, 1999 WL 55259 (2d Cir. Feb. 5, 1999). During oral argument on that appeal, Mr. Robinson represented to this Court that he would not file any further related actions.

Another action against the U.S. Army brought in the Federal Court of Claims was dismissed for failure to state a claim, see *Pentagen Techs. Ltd., Inc. v. United States*, No. 97-245 (Fed Cl.), aff'd, 175 F.3d 1003 (Fed. Cir. 1999), as was an action against the United States House of Representatives. *See Pentagen Techs. Int'l Ltd.. v. Comm. of Appropriations of the U.S. House of Representatives*, 20 F. Supp. 2d 41 (D.D.C. 1998), aff'd., 194 F.3d 174 (D.C. Cir. 1999) (table). What is more, in spite of his representation to this Court in 1999, Mr. Robinson filed two more actions in the Southern District of New York on behalf of Pentagen. Both have been dismissed. *See Pentagen Techs. Int'l Ltd. v. United States,* 2002 WL 465308 (S.D.N.Y. March 26, 2002), *United States ex rel. Pentagen Techs. Int'l.Ltd. Ltd. v. United States*, 2001 WL 770940 (S.D.N.Y. July 10, 2001); Pentagen's filing of one of these actions was characterized as a "pusillanimous attempt" to circumvent Judge Sprizzo's dismissal of the instant case. 2001 WL 770940 at *10.

Perhaps inevitably, Mr. Robinson tried to head off oral argument on the instant appeal by filing a frivolous last-minute motion for postponement. At oral argument itself, Mr. Robinson pressed the Court to reconsider the imposition of sanctions in light of "new evidence," discovered in 2000, which purportedly

establishes the efficacy of Pentagen's claims. But such evidence has already been considered and found insufficient to allow Pentagen to "escape the preclusive effect of prior judgments." 2002 WL 465308 at *6.

Mr. Robinson's conduct has been bizarre and intolerable. We are in full agreement with the District Court's assessment "that this is a most appropriate case" for the imposition of sanctions, 172 F. Supp. at 473, and we affirm its decision in all respects. In addition, at the suggestion of CACI's counsel, we recommend that the District Court consider extending the injunction imposed under 28 U.S.C. Section 1651(a) to require that any further papers or process filed on behalf of Pentagen in the Southern District of New York be signed by counsel independent of Mr. Robinson.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk of Court
s/Lucille Car Mandate issued 6/20/03

2. Memorandum Decision and Order of Judge Sprizzo dated November 5, 2001.

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

Pentagen Technologies International Limited and Russell D. Varnado

Plaintiff(s),

v.

UNITED STATES OF AMERICA, CACI INT'L INC., CACI SYSTEMS INTEGRATION, INC., AND CACI, INC.–FEDERAL INTERNATIONAL BUSINESS MACHINES CORPORATION, LOCKHEED MARTIN CORPORATION, AT & T COMPANY, PRC INC., I-NET INC., STATISTICA INC., EXPRESS COMPANY

Appendix A

SECRETARIES LIMITED, JORDANS & JORDANS & SONS LIMITED, JORDANS GROUP LTD., STEPTOE & JOHNSON, AND J. WILLIAM KOEGEL, JR., ESQ., DAVIES ARNOLD & COOPER, AND GEORGE A. MENZIES, ESQ., E.F. BRASSEUR,

Defendant(s).

No. 98 CIV. 1090 (JES)

Nov. 5, 2001.

Joel Z. Robinson & Co., New York City (Joel Z. Robinson, of counsel), for plaintiffs.

Owen & Davis PC, New York City (James M. Davis, of counsel), Steptoe & Johnson LLP, Washington, DC (J. William Koegel, Jr.), for CACI Intern., Inc., CACI Systems Integration, Inc., CACI Inc.-Federal.

Mary Jo White, U.S. Atty., New York City, for U.S.

McKenna & Cuneo, Washington, DC (Frederic M. Levy, of counsel), Trachtenberg & Rodes, New York City (Leonard A. Rodes, Barry J. Friedberg, of counsel), for International Business Machines, Corp., Lockheed Martin Corp., PRC, Inc., defendants.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York City (Thomas A. Leghorn, Brett A. Scher, of counsel), for Express Co. Secretaries Limited, Jordan and Sons, Limited, Jordan Group Limited, Davies Arnold & Cooper, George A. Menzies.

American Telephone & Telegraph Corp, Liberty Corner, NJ (Kevin T. O'Reilly, of counsel), for AT&T Corp.

MEMORANDUM OPINION AND ORDER

SPRIZZO, District Judge.

Pentagen Technologies International Limited. ("Pentagen") and Russell D. Varnado ("Varnado") (collectively "plaintiffs") filed the instant action alleging violations of 31 U.S.C. §§3729-33 (2001) (the "False Claims Act" or the "FCA") and abuse of

process against defendants United States of America ("United States") and E.F. Brasseur ("Brasseur") (collectively "the Government defendants"), CACI Int'l, Inc., CACI Systems Integration, Inc., and CACI, Inc. Federal (collectively "CACI"), and various other individual corporations, attorneys, and law firms. On October 6, 1998, defendants submitted motions to dismiss. The CACI defendants also filed a motion for sanctions against Pentagen and its counsel of record, Joel Z. Robinson ("Mr. Robinson" or "plaintiffs' counsel"), pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. §1927 (2001), and sought an injunction pursuant to 28 U.S.C. §1651(a) (2001), preventing Pentagen from filing further litigation. By Memorandum Opinion and Order dated June 29, 2000, the Court granted defendants' motion to dismiss and requested a response from plaintiffs with respect to the sanctions motion. The Court hereby grants CACI defendants' request for sanctions, in part, and directs the CACI defendants to submit detailed affidavits outlining its costs and expenses in defending against this action.

BACKGROUND

The underlying facts related to the instant matter are summarized briefly below. The Court assumes familiarity with its prior Opinion dated June 29, 2000.

On February 19, 1998, Pentagen filed this action, the ninth in a long history of litigation, alleging that Pentagen's failure to secure a software contract with the Department of Defense was due to the surreptitious conduct of defendants as well as others in stealing its so-called MENTIX software ("MENTIX"). Pentagen's first action against the CACI defendants, which alleged copyright and trademark violations of MENTIX, was removed to federal court by CACI in January, 1994. *See Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* No. 94 Civ. 0441 (N.Y. Sup.Ct. filed July, 1993, removed to S.D.N.Y. Jan. 26, 1994) ("Pentagen I"). Before CACI removed Pentagen I,

Pentagen filed another action in this district alleging the same copyright and trademark infringement claims detailed in the prior action. *See Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* No. 93 Civ. 8512 (S.D.N.Y. filed Dec. 10, 1993) ("Pentagen II"). Pentagen I and II were merged as related actions and dismissed together along with Pentagen IV, discussed below, in an opinion by Judge Mukasey. *See Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* Nos. 93 Civ. 8512, 94 Civ. 0441, 94 Civ. 8164, 1996 WL 435157 (S.D.N.Y., August 2, 1996). After Plaintiff filed Pentagen II, CACI filed suit in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that, *inter alia,* CACI had not infringed on any of Pentagen's copyrights and trademarks during CACI's marketing and contract work for the United States Army. *See CACI Int'l v. Pentagen Techs. Int'l Ltd.,* No. 93- 1631-A, 1994 WL 1752376 (E.D.Va. June 19, 1997) ("*Pentagen III*"). The district court granted defendants' motion for summary judgment on its claims for declaratory relief and denied plaintiff's motions for reconsideration and recusal.[1] *See id.* Plaintiff then appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed all of the lower court's holdings. *See CACI Int'l Inc. v. Pentagen Techs. Int'l Ltd ,* No. 93-1631-A, 1995 WL 679952 (4th Cir.1995) (per curiam). In so doing, the Fourth Circuit included language of the district court's opinion that Pentagen had "'overlooked an essential element of an infringement claim: that the work was copied.'" *Id.* at *3 (quoting *Pentagen III,* 1994 WL 1752376, at *1). As to Pentagen's motion for recusal of the district judge, the court admonished plaintiff's counsel, stating that the claim was

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[1] Plaintiff had alleged that the district judge decided the case in a way that benefitted her husband. *See CACI Int'l Inc. v. Pentagen Techs. Int'l Ltd.,* No. 93-1631-A, 1995 WL 679952, at *1 (4th Cir. Nov. 16, 1995) (per curiam) (citations to Appellant's brief omitted).

"frivolous on its face" and "reprehensible." *Id.* at *6, n.12. In a later related action, the Fourth Circuit affirmed the imposition of monetary sanctions on plaintiff's counsel for misconduct.[2]

Ignoring the adverse judgments, Pentagen continued to file suit. *See, e.g., Pentagen Techs. Int'l Ltd. v. J.P. London,* No. 94 Civ. 8164 (N.Y. Sup.Ct. filed Sept. 1994, removed to S.D.N.Y. Nov. 10, 1994) ("Pentagen IV"). Judge Mukasey, who had combined and then suspended Pentagen I and II pending the outcome of Pentagen III, dismissed Pentagen I, II, and IV in part on *res judicata* grounds, observing that the court was presented with a "paradigm of the situation that *res judicata* is intended to avert and resolve." *Pentagen IV,* 1996 WL 435157, at *9. While Pentagen III was being litigated, Pentagen filed another suit in this district, again alleging that CACI improperly marketed Pentagen's software to the United States Army; this time, however, Pentagen brought the action under the *qui tam* provisions of the FCA. *See Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* No. 94 Civ. 2925, 1996 WL 11299, at *3 (S.D.N.Y. Jan.4, 1996) ("Pentagen V"). Judge Carter denied plaintiff's request for a preliminary injunction and dismissed the claims against CACI defendants for lack of subject matter jurisdiction. The court found that Pentagen failed to demonstrate--as it must in a *qui tam* action--that it was the "original source" of the information forming the basis of its claims. *See id.* at *7-8. Judge Carter observed further that the

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[2] In *In Re Joel Z. Robinson,* No. 95-2506, 1996 WL 597829 (4th Cir. Oct. 18, 1996) (per curiam), the Fourth Circuit affirmed the district court's decision to impose sanctions on plaintiffs and Mr. Robinson for failing to appear at depositions. The lower court had noted that "[their] conduct on repeated occasions has been willful, deliberate, flagrant and dilatory in their effort to obstruct this litigation." *CACI Int'l Inc. v. Pentagen Techs. Int'l Ltd.,* No. 93 Civ. 1631-A (E.D.Va. July 7, 1995) (affirming order of the magistrate judge and imposing sanctions).

claims arose from "the same nucleus of facts as the copyright and trademark infringement claims in Pentagen III," and, while declining to impose monetary sanctions, noted that dismissal would be an "appropriate sanction" because it "dispos[ed] of the fruit of [plaintiff's] questionable efforts." *Id.* at *13. Judge Carter also characterized some of plaintiff's counsel's arguments as "admittedly ridiculous." *Id.* at *16.

Undeterred, counsel added Varnado as a plaintiff in a new action alleging the same claims as in Pentagen V but now with Varnado as the original source of the information at issue.[3] *See United States ex. rel. Pentagen Techs. Int'l Ltd. v. Caci Int'l Inc.,* No. 96 Civ. 7827, 1997 WL 473549, at *8 (S.D.N.Y. Aug.18, 1997) ("*Pentagen VI*"). Judge Sweet dismissed the case, *inter alia,* on *res judicata* grounds finding that except for the addition of Varnado the claims were "factually identical" to the prior action. *Id.* at * 9-10.[4] Plaintiffs then appealed unsuccessfully to the United States Court of Appeals for the Second Circuit. *See United States ex. rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.,* No. 97-6326, 1999 WL 55259 (2d Cir. Feb.5, 1999). In the course of that appeal, plaintiffs' counsel represented to the court ***470** that he would refrain from bringing any further related actions.

Thereafter, Pentagen filed two (2) more suits against the United States. The first, alleging Government infringement on Pentagen's ownership of MENTIX during the Army's evaluation of the software, was dismissed for failure to state a

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[3] Judge Carter had denied Pentagen's motion to add Varnado in Pentagen V. *See Pentagen VI,* 1997 WL 473549, at *8.

[4] In granting defendant's motion to dismiss, Judge Sweet observed that the case was "the most recent, and hopefully the last in a series of cases brought by Pentagen against the defendants, all arising out of a dispute over software and its origins." *Pentagen VI,* 1997 WL 473549, at *1.

claim, *see Pentagen Techs. Int'l Ltd. v. United States,* No. 97-245 (Fed.Cl.), *aff'd,* 175 F.3d 1003 (Fed.Cir.1999) ("Pentagen VII"); the second, alleging that the United States House of Representatives had reports providing evidence for plaintiffs' abuse of process claim in the instant case, was dismissed similarly and plaintiffs' motion for re-argument was denied. *See Pentagen Techs. Int'l Ltd. v. Comm. on Appropriations of the United States House of Representatives,* 20 F.Supp.2d 41 (D.D.C.1998) ("*Pentagen VIII*").

Persisting, plaintiffs brought their third *qui tam* action, which is the basis for defendants' instant sanctions motion. *See Pentagen Techs. Int'l Ltd. v. United States,* 103 F.Supp.2d 232 (S.D.N.Y.2000) ("*Pentagen IX*"). Plaintiffs alleged that defendants' behavior in litigating the first two *qui tam* actions constituted an abuse of process under state law and was in violation of the FCA. Specifically, Pentagen alleged that CACI colluded with the United States defendants in filing an *amicus curiae* brief, in meeting with a member of the Executive Branch to obtain a witness statement (the "Brasseur Statement"), and in otherwise seeking the assistance of the United States in preparing their defense. The Court held that plaintiffs' claims under the FCA must be dismissed because the United States never waived sovereign immunity in this area and the FCA does not provide for a private right of action. *See Pentagen IX,* 103 F.Supp.2d at 236. The Court then dismissed plaintiffs' abuse of process claim, finding that it was barred by the applicable statute of limitations. *See id.* at 237. Plaintiffs also requested leave to amend the complaint a second time, but the Court denied that application because the claims asserted were without merit and because plaintiffs failed to produce any new evidence, further amending the complaint would be "futile." *Id.*[5]

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[5] Plaintiffs subsequently filed an appeal with the Second Circuit, which (… continued)

DISCUSSION

Sanctions

CACI defendants request sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and 28 U.S.C. §1927. The Court will address each of defendants' requests in turn.

The district court has broad discretion in determining whether to grant Rule 11 sanctions. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402-05, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Rule 11 sanctions are appropriate where a person signs a filing for "an improper purpose such as to delay or needlessly increase the cost of litigation," or "without a belief formed from a reasonable inquiry" that the argument is non-frivolous. Caisse Nationale de Credit Agricole-CNCA, New York Branch v. Valcorp., Inc., 28 F.3d 259, 264 (2d Cir.1994). A filing is frivolous if it is " 'clear under existing precedent that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.'" Simon DeBartolo Group, L.P. v. Richard E. Jacobs, Inc., 186 F.3d 157, 167 (2d Cir.1999) (quoting ***471**Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir.1990)). Finally, in assessing a claim for Rule 11 sanctions, courts apply a standard of " 'objective unreasonableness.'" Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 96 (2d Cir.1997) (quoting United States v. Intern. Bhd. of Teamsters, 948 F.2d 1338, 1345-46 (2d Cir.1991)).

In the instant matter, plaintiffs' counsel has failed to demonstrate that he made any reasonable inquiry before

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was dismissed because of plaintiffs' default in July, 2001. Furthermore, plaintiffs filed what amounts to their fourth *qui tam* action in this district, all four of which originated from the same nucleus of facts. *See U.S. ex. rel. Pentagen Techs. Int'l Ltd. v. United States,* No. 00 Civ. 6167, 2001 WL 770940 (S.D.N.Y. July 10, 2001).

deciding to sue these particular defendants on the specific grounds chosen. With respect to plaintiffs' qui tam claim under the FCA, at the time of filing there existed clear, long-standing precedent establishing that the Government cannot be sued unless it has waived its sovereign immunity. See e.g., F.D.I.C. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); United States v. Mitchell, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Moreover, even after being given the opportunity to amend the complaint and despite a specific warning by this Court that it considered the Government immune in the context of this action, plaintiffs' counsel failed to offer any meaningful argument that the Government had waived its sovereign immunity.[6] See Hr'g Tr. of March 19, 1999, at 47. Counsel's inclusion of the non-Government defendants in this action, specifically CACI, was also clearly improper. As this Court discussed in its previous opinion, the FCA on its face does not provide a private right of action for litigation misconduct, see 31 U.S.C. §3730(b), nor is there any credible argument to support a claim that the Court should recognize such an implied right of action in the instant case.[7] See Pentagen IX, 103 F.Supp.2d at 236-37. Moreover,

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[6] Given the governing statutory scheme, it is likely that any argument maintaining that the Government intended to waive its sovereign immunity in the context of the FCA would be meritless. Indeed, because the FCA allows individuals to sue on behalf of the Government to recover federal monies, it is illogical that the Government itself could be sued under the same Act. *See* 31 U.S.C. §3730.

[7] On the contrary, as the Court noted, the explicit inclusion in the statute of a private right of action based upon the making of a false claim for payment upon the United States cuts against plaintiff's argument that the Court should read into the statute further private rights of action. *See Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 488, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996) ("[W]here a statute expressly provides a particular remedy or remedies, a court

(… continued)

plaintiffs' counsel should have know that his qui tam claim stood no chance of success on the merits. Since his previous two (2) qui tam actions had been dismissed, plaintiffs' counsel could not have reasonably believed that the third such action, absent any relevant new facts or law, would fare any better. Despite repeated dismissals, however, plaintiffs' counsel continues to file actions based on the same facts and circumstances previously addressed by this and other courts.

Indeed, plaintiffs' counsel was specifically advised of the frivolous nature of his claims when Judge Carter, although declining to impose sanctions, observed that plaintiffs' claims arose from "the same nucleus of facts" as Pentagen III and that dismissal would "dispose of the fruit of [plaintiffs'] questionable efforts." Pentagen V, 1996 WL 11299, at *13. Judge Sweet's similar dismissal of plaintiffs' second qui tam action on res judicata grounds should have given plaintiffs' counsel ***472** further notice of the frivolousness of any additional litigation. See Pentagen VI, 1997 WL 473549, at *9-10. Undeterred, however, plaintiffs' counsel filed his third qui tam action against defendants. This time, in addition to alleging essentially the same facts, plaintiffs' counsel ignored Judge Carter's prior opinion relating to Pentagen V in which Judge Carter held that the activities supposedly constituting plaintiffs' "litigation misconduct" claim were--far from being misconduct--proper in the context of a qui tam action. [8] Thus, Pentagen and its counsel

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must be chary of reading others into it.") (citations omitted). Furthermore, although plaintiffs' counsel makes much of the fact that the Government and non-Government defendants acted improperly, the mere existence of such wrongful actions, even assuming their impropriety, is not sufficient to create a private right of action under the FCA.

[8] Judge Carter's opinion stated that: "[N]othing in the [False Claims Act's] language prohibits the government from communicating with the defendants or submitting an amicus curiae brief on their behalf ... [and]
(… continued)

have again attempted to use the FCA's qui tam procedure to litigate its original copyright and trademark action and to continue pressing harassing litigation in the face of contrary direction from the courts.

Plaintiffs' decision to bring its abuse of process claim was similarly unreasonable. Plaintiffs' counsel brought the abuse of process claim without any credible basis for believing that the applicable statute of limitations had been tolled. Under New York law, the statute of limitations for plaintiffs' abuse of process claim is one (1) year. See N.Y.C.P.L.R, §215(3) (2001); Heinfling v. Colapinto, 946 F.Supp. 260, 266 (S.D.N.Y.1996). Plaintiffs' counsel filed this action on February 17, 1998, over two (2) years after the Government supposedly engaged in litigation misconduct by filing an amicus brief on or before June 26, 1995, and over a year after the non-Government defendants' supposedly engaged in litigation misconduct by obtaining the Brasseur Statement on or before August 14, 1996. Accordingly, plaintiffs' abuse of process claim was clearly time-barred. See Pentagen IX, 103 F.Supp.2d at 237; see also Borison v. Corracchia, No. 96 Civ. 4783, 1997 WL 232294 (S.D.N.Y. May 7, 1997).[9]

(Continued…)
communications between defendants and the [G]overnment are common in an action where the Government has not intervened." *U.S. Dep't of Defense v. CACI Int'l Inc.,* 953 F.Supp. 74, 78 (S.D.N.Y.1995).

[9] Plaintiffs maintain that the one (1) year statute of limitations should be tolled because defendants fraudulently concealed relevant evidence and did not disclose such evidence until after the statute of limitations period had run. *See* Pls.' Br. Opp'n., at 17-18. Specifically, plaintiffs state that "[o]n February 3, 1997, plaintiffs issued a FOIA Request concerning the evidence contained in the [Brasseur] Statements, and the U.S. responded with false information thus concealing the evidence upon which the abuse of process claim is based." *Id.* As an initial matter, plaintiffs fail to offer any support for their otherwise bare assertion that defendants concealed evidence. Furthermore, as explained
(… continued)

Assuming, arguendo, that Pentagen brought its abuse of process claim within the statute of limitations, plaintiffs' counsel could not have reasonably believed that the claim could survive on the merits. Although plaintiffs' counsel went to great lengths to allege that defendants actually caused process to issue, [10] he ignored the ***473** further fact that under New York law he also needed to plead some purpose collateral to the litigation for engaging in these acts. See Curiano v. Suozzi, 63 N.Y.2d 113, 116, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984) ("Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective."). The only such purpose plaintiffs' counsel offered was that defendants wanted to prevail in the litigation itself; this is not a sufficient under New York law. See Bernard v. United States, 25 F.3d 98, 104 (2d. Cir.1994) ("[P]erson activating the process must be

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(Continued…)
above, plaintiffs' abuse of process claim was based on the Brasseur Statement *and* the government's *amicus* brief; there is no contention that plaintiffs were not in possession of the latter in 1995. Nor do plaintiffs maintain that they were without the Brasseur Statement itself in 1997. Thus, plaintiffs were well aware of the nature of their claims before the one (1) year limitations period expired. Plaintiffs' delay in receiving additional information contained in the Statement--none of which to this date has been shown to have relevancy--is inconsequential. *See Corcoran v. New York Power Auth.,* 202 F.3d 530, 543 (2d Cir.1999) (stating that alleged concealment must prevent plaintiff from discovering the nature of his claim within the limitations period).

[10] Plaintiffs ultimately amended their complaint to include allegations that defendants caused process to issue, but the lack of such an inquiry at the outset caused the Court to warn plaintiffs' counsel at a Pre-Trial Conference of the potential frivolousness of his claim. *See* Hr'g Tr. of March 19, 1999, at 28. Had plaintiffs agreed to dismiss their claims at that juncture, the Court would likely have been more reluctant to impose sanctions given that defendants had exerted minimal effort in defending against this claim.

seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of process.") (citing Hornstein v. Wolf, 109 A.D.2d 129, 491 N.Y.S.2d 183, 187 (1985), aff'd, 67 N.Y.2d 721, 499 N.Y.S.2d 938, 490 N.E.2d 857 (1986)); Am. Compl. ¶42.

It follows that this is a most appropriate case for imposition of Rule 11 sanctions. Rule 11 was designed to curb the effect of baseless litigation. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 553, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). Here, defendants have been forced to defend yet another in a long series of complaints that, beyond simply being unsuccessful, have had " 'absolutely no chance of success under existing precedents.'" Shafii v. British Airways, PLC, 83 F.3d 566, 570 (quoting Mareno, 910 F.2d at 1047 (2d Cir.1990)). Indeed, counsel, by seeking to contravene the explicit findings of prior litigation without any meritorious arguments to extend the law, went far beyond the standard of objective unreasonableness in filing this action. As such, the Court finds Rule 11 sanctions against plaintiffs' attorney are appropriate in an amount to be determined upon review of the appropriate affidavits and objections.

The CACI defendants have also moved for sanctions pursuant to 28 U.S.C. §1927. Section 1927 allows a court to impose sanctions when an attorney "'multiplies the proceedings in any case unreasonably and vexatiously,'" Schlaifer Nance & Co., Inc. v. Estate of Warhol, 194 F.3d 323, 336 (2d Cir.1999) (quoting 28 U.S.C. §1927), and obliges attorneys throughout the litigation "to avoid dilatory tactics." MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 73 F.3d 1253, 1261 (2d Cir.1996). Unlike Rule 11's objective standard, however, section 1927 requires the additional showing of subjective bad faith. See Lapidus, 112 F.3d at 96. Bad faith can be inferred when an attorney's actions are "so completely without merit as to require the conclusion that they must have been undertaken for some

improper purpose such as delay." Schlaifer, 194 F.3d at 336 (internal quotations and citations omitted).

Evidence of plaintiffs' counsel's bad-faith in litigating the instant claim is abundant. Most egregiously, plaintiffs' counsel has engaged in a pattern of litigation designed to evade previous rulings. In Pentagen VI, the court noted that "by filing [the] action, Pentagen ha[d] impermissibly attempted to evade" the dismissal in Pentagen V. Pentagen VI, 1997 WL 473549, at *8. Not surprisingly, plaintiffs' were keenly aware of the repetitive nature of their claims, admitting that "except for the addition of Varnado as a plaintiff," the claims ***474** were "factually identical." Id. at *7. Moreover, the similarity between plaintiffs' claims here and those presented in Pentagen V reflects a continuing intent to evade the rulings of courts in this district. Not only was this litigation frivolous and repetitive, therefore, but it was intentionally so.

Other courts have also been frustrated by the litigation brought by plaintiffs' counsel. In addition to Judge Sweet's comments noted above, Judge Newman, in one of Pentagen's appeals before the Second Circuit, threatened to impose sanctions because of the amount of repetitive litigation brought by plaintiffs. See Hr'g, No. 97-6326, Feb. 5, 1999. It was in the course of that same hearing, furthermore, that Judge Newman elicited a promise from plaintiffs' counsel not to initiate future litigation based on these same operative facts. Id. Plaintiffs' counsel broke that promise by filing his subsequent qui tam actions.

As a result of plaintiffs' counsel's vexatious litigation strategy and needless occupation of judicial resources, the Court feels compelled to exercise its discretion to punish counsel for its abuse of the judicial process. See Shafii, 83 F.3d at 571. The Court is authorized to exercise such power where, as here, plaintiff presents claims: (1) without a colorable basis; and (2) in bad-faith. See Schlaifer, 194 F.3d at 336. Accordingly, the

Court imposes sanctions against plaintiffs' counsel under section 1927 to stem counsel's consistent pattern of harassment.

Award of Compensatory Fees and Costs

The Court must now determine the appropriate method and degree of sanctions. The Court has discretion in determining the appropriate amount of attorney's fees. See Eastway Const. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir.1987). The fees should be the minimum needed to deter plaintiffs' counsel's conduct without over-punishing him. See id. Accordingly, pursuant to Rule 11 and 28 U.S.C. §1927, the Court hereby directs Mr. Robinson to personally compensate the CACI defendants for their attorneys' fees and costs incurred defending the instant matter.[11]

Injunction on Further Litigation

Pentagen's long history makes it clear that mere dismissals and/or monetary sanctions will not alone be an effective means of deterring future frivolous litigation. Although the Court recognizes the danger of imposing limits on a party's access to the courts, it also recognizes the superseding danger of allowing a party like Pentagen to occupy the sparse resources of the judiciary with its baseless claims. Therefore, in accordance with its authority under 28 U.S.C. §1651(a), the Court enjoins Pentagen from filing any further litigation without permission of the Court. See Malley v. New York City Bd. of Educ., 112 F.3d 69 (2d Cir.1997) (finding an injunction appropriate where the plaintiff persisted in spite of adverse judgments in frivolous and repetitive litigation).

CONCLUSION

---

[11] The Court declines to order plaintiffs to share jointly and severally in the judgment with their counsel. Although plaintiffs' counsel should have been aware of the impropriety and frivolousness of the complaint before filing, there is little evidence in the record to support a finding against plaintiffs directly.

For the foregoing reasons, the CACI defendants' motion for sanctions against plaintiffs' counsel under Rule 11 and section 1927 is granted. The CACI defendants should submit affidavits within thirty (30) days of the date of this Order addressing the appropriate amount of sanctions in ***475** light of the standards articulated above. The Court also grants the CACI defendants' motion for an injunction pursuant to 28 U.S.C. §1651.

It is SO ORDERED.

Reported at 172 F.Supp.2d 464

3. Notice and Motion by CACI for Sanctions in Litigation Misconduct Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED and RUSSELL D. VARNADO	:	
Plaintiffs,	:	No. 98CIV.1090(JES)
-against-	:	
UNITED STATES OF AMERICA et al	:	
Defendants	:	

NOTICE AND MOTION OF DEFENDANTS CACI INTERNATIONAL INC, CACI SYSTEMS INTEGRATION INC AND CACI, INC.-FEDERAL FOR SANCTIONS

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law, the undersigned will move this Honorable Court at the United States Courthouse, 500 Pearl Street, New York, New York, on October 9, 1998, at 12:00 p.m., or as soon thereafter as counsel may be heard, for an Order Imposing Sanctions against Joel Z. Robinson, Esquire,

and Pentagen Technologies International, Ltd., and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 2, 1998

Respectfully submitted

OWEN & DAVIS
By: s./James M. Davis
James M. Davis (JD 4986)
805 Third Avenue
New York, New York 10022
(212) 754-1700

And

J. William Koegel, Jr.
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Defendants CACI International Inc, CACI Systems Integration Inc and CACI. Inc.-Federal

To:

Joel Z. Robinson, Esquire
JOEL Z. ROBINSON & CO.
116 John Street
New York, New York 10038
Counsel for Plaintiffs

Rachel D. Godsil, Esquire
Assistant United States Attorney
Office of the United States Attorney
100 Church Street
New York, New York 10007
Counsel for the United States

Appendix A

Frederic M. Levy, Esquire
McKenna & Cuneo
1900 K Street, N.W.
Washington, D.C. 20006
Leonard A. Rodes, Esquire
Barry J. Friedberg, Esquire
Trachtenberg & Rodes
545 Fifth Avenue
New York, New York 10017
Counsel for Defendants
International Business Machines Corp.,
Lockheed Martin Corp. and PRC, Inc.

Thomas A. Leghorn, Esquire
Brett A. Scher, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
150 East 42nd Street
New York, New York 10017-5639
Counsel for Defendants
Express Company Secretaries Limited,
Jordans & Sons Limited,
Jordan Group Limited,
Davies Arnold & Cooper and
George Menzies

Kevin T. O'Reilly, Esquire
American Telephone & Telegraph Corp.
150 Allen Road Suite 3000
P. O. Box 1995 Liberty Corner,
New Jersey 07938-1995
Counsel for Defendant
American Telephone & Telegraph Corp.

APPENDIX B –
RUNAWAY ACTION SANCTION MATERIAL

1. Runaway Action Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A.	:	
Plaintiff,	:	91 Civ. 5643
-against-	:	(JES)
	:	
PENTAGEN TECHNOLOGIES INT'L.	:	ORDER
Defendants	:	

The above-captioned action having come before this Court, and the parties having filed a Stipulation and Orders for Amendment of Pleadings and Judgment dated August 2, 1993 on August 4, 1993, and the Court having considered all matters raised, it is

ORDERED that that the Clerk of Court shall be directed to close the above-captioned action.

Dated: New York, New York
September 2, 1993

s/John E. Sprizzo
John E. Sprizzo
United States District Judge

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A.	:	91 Civ. 5643(JES)
Plaintiff,	:	STIPULATION
-against-	:	AND ORDERS FOR
	:	AMENDMENT OF

Appendix B

PENTAGEN TECHNOLOGIES	:	PLEADINGS AND
INTERNATIONAL LIMITED,	:	JUDGMENTS
JOHN C. BAIRD AND	:	
MITCHELL R. LEISER	:	ACTION No. 1
Defendants	:	
----------X		
PENTAGEN TECHNOLOGIES	:	USDC, SDNY
INTERNATIONAL LIMITED,	:	
JOHN C. BAIRD AND	:	COURT STAMP
MITCHELL R. LEISER	:	AUGUST 4, 1993
Counterclaim Plaintiff	:	
-against-	:	ACTION No. 2
RUNAWAY DEVELOPMENT	:	
GROUP, S.A., EXPERT OBJECTIVE	:	
SYSTEMS DEVELOPMENT	:	
CORPORATION, and	:	
ROBERT A. O'BRIEN	:	
Counterclaim Defendants	:	
----------X		
RUNAWAY DEVELOPMENT	:	
GROUP, S.A., and EXPERT	:	
OBJECTIVE SYSTEMS	:	
DEVELOPMENT CORPORATION	:	
Counterclaim Plaintiff	:	
-against-	:	ACTION No. 3
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED,	:	
JOHN C. BAIRD AND	:	
MITCHELL R. LEISER	:	
Counterclaim Defendants	:	
----------X		

IT IS HEREBY STIPULATED AND AGREED that:

1. Joseph L. Spiegel, Esq. of Spiegel, Pergament & Brown be granted leave to appear as attorney of record for

RUNAWAY DEVELOPMENT GROUP, S.A., ("RDG") EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION ("EOSD") and ROBERT A. O'BRIEN.

2. The annexed Affidavit For Judgment by Confession sworn to on July 22, 1993 by ROB, be filed in this action.
3. THAT ROB, RDG, and EOSD consent to the entry of an order in the actions in this court as follows:

IT IS ORDERED that

Action No. 1, the main action by RDG against Pentagen Technologies International Limited ("PTI"), John C. Baird ("JCB") and Mitchell R. Leiser ("MRL"), is dismissed as to all claims with: prejudice and without costs or attorneys' fees;

Action No. 3, counterclaims by RDG and EOSD against PTI, JCB and MRL, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

Action No. 2, counterclaims by PTI against ROB, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

Action No 2, counterclaims, judgment in the amount of ONE MILLION, SEVEN HUNDRED THOUSAND DOLLARS ($1,700,000.00) shalt be granted in favor of PTI and against RDG on the FIRST through TENTH counterclaims and aqainst EOSD on the SECOND and FOURTH counterclaims and against RDG and EOSD jointly and severally, said counterclaims being set forth with more particularity in a pleading dated February 3, 1992 and RDG and EOSD admit the allegations of such counterclaims;

The relief demanded by the defendants against each of RDG, and EOSD in relation to each and ever cause against them and either of them, be granted in each and every respect; and

All the Intellectual Property in ROB's possession including but not limited to, the copies of the documentation and source code

on diskettes and all other items relating thereto returned to EOSD on January 20, 1992, be delivered to PTI at the offices of its counsel no later than seven (7) days from the date of the entry of this Order;

Dated: New York, New York
July 28 1993

LAW OFFICES OF
JOEL Z. ROBINSON & CO.
by: s/Joel Z. Robinson
Joel Z. Robinson (JZR 9082)
Attorneys for the Defendants
110 Wall Street
New York, New York 10005
(212) 344-2040

SPIEGEL, PERGAMENT
& BROWN
By: s/Joseph L. Spiegel
Joseph L. Spiegel (JLS-7110)
Attorneys for Plaintiff and Counter-claim Defendants
272 Mill Street, P.O. Box 831
Poughkeepsie, NY 12602
(914) 452-7400

SO ORDERED 8/2/93
s/Peter K. Leisure for John E. Sprizzo
John E. Sprizzo
United States District Judge

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RUNAWAY DEVELOPMENT GROUP, S.A.	:	91 Civ. 5643 (JES)

Appendix B

Plaintiff,	:	AFFIDAVIT
-against-	:	FOR JUDGMENT
	:	BY CONFESSION
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED,	:	
JOHN C. BAIRD AND	:	
MITCHELL R. LEISER	:	ACTION No. 1
Defendants	:	
----------X		
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED,	:	
JOHN C. BAIRD AND	:	
MITCHELL R. LEISER	:	
Counterclaim Plaintiff	:	
-against-	:	ACTION No. 2
RUNAWAY DEVELOPMENT	:	
GROUP, S.A., EXPERT OBJECTIVE	:	
SYSTEMS DEVELOPMENT	:	
CORPORATION, and	:	
ROBERT A. O'BRIEN	:	
Counterclaim Defendants	:	
----------X		
RUNAWAY DEVELOPMENT	:	
GROUP, S.A., and EXPERT	:	
OBJECTIVE SYSTEMS	:	
DEVELOPMENT CORPORATION	:	
Counterclaim Plaintiff	:	
-against-	:	ACTION No. 3
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED,	:	
JOHN C. BAIRD AND	:	
MITCHELL R. LEISER	:	
Counterclaim Defendants	:	
----------X		

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STATE OF)
)
COUNTY OF)

ROBERT O'BRIEN being duly sworn, deposes and says:

1. THAT he Robert O'Brien ("ROB") is the Chairman of the Board, President, and shareholder of RUNAWAY DEVELOPMENT GROUP S.A., ("RDG") the Plaintiff, one of the counterclaim defendants and counterclaim plaintiff in the abovementioned action and EXPERT OBJECTIVE SYSTEMS DEVELOPMENT CORPORATION ("EOSD") one of the counterclaim defendants in the above entitled action.
2. THAT RDG is incorporated in Panama with offices in the Bahamas, EOSD is a Delaware Corporation and has its place of business in the Commonwealth of Virginia and ROB resides in Arlington, Virginia. ROB, RDG and EOSD designate the court in which this action is pending as the court in which the judgment consented to herein may be entered.
3. THAT ROB, RDG, and EOSD consent to the entry of an order in the actions in this court as follows:

   IT IS ORDERED that

   Action No. 1, the main action by RDG against Pentagen Technologies International Limited ("PTI"), John C. Baird ("JCB") and Mitchell R. Leiser ("MRL"), is dismissed as to all claims with: prejudice and without costs or attorneys' fees;

   Action No. 3, counterclaims by RDG and EOSD against PTI, JCB and MRL, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

Action No. 2, counterclaims by PTI against ROB, all counterclaims are dismissed with prejudice and without costs or attorneys' fees;

Action No 2, counterclaims, judgment in the amount of ONE MILLION, SEVEN HUNDRED THOUSAND DOLLARS ($1,700,000.00) shalt be granted in favor of PTI and against RDG on the FIRST through TENTH counterclaims and aqainst EOSD on the SECOND and FOURTH counterclaims and against RDG and EOSD jointly and severally, said counterclaims being set forth with more particularity in a pleading dated February 3, 1992 and RDG and EOSD admit the allegations of such counterclaims;

The relief demanded by the defendants against each of RDG, and EOSD in relation to each and ever cause against them and either of them, be granted in each and every respect; and

All the Intellectual Property including but not limited to, the copies of the documentation and source code on diskettes and all other items relating thereto returned to EOSD on January 20, 1992, be delivered to PTI at the offices of its counsel no later than seven (7) days from the date of the entry of this Order;

4. THAT each of RDG, EOSD and ROB hereby authorize PTI its successors, or assigns to enter judgment in the form as set out above.
5. THAT this action has been actively litigated since August 9, 1991 and the facts of the case are fully set out n the extensive pleadings filed therein which are incorporated herein by reference,
6. THAT each of RDG, EOSD, and ROB have conferred with Joseph L. Spiegel Esq of Spiegel, Pergament & Brown regarding this confession and are fully aware of the implications of this settlement.

7. THAT ROB represents and warrants that all necessary corporate action has or will be taken to ensure that the judgment contained herein against RDG and EOSD is fully binding upon each of them.

8. THAT in addition to the entry of the judgment, and in partial satisfaction of the judgment so entered, ROB, RDG, and EOSD, jointly and severally undertake to do the following:

   return and transfer to Pentagen Technologies International Limited ("PTI") all right title and interest in any outstanding shares held by the plaintiffs in PTI;

   all parties shall release one another from any and all debt, dues, sums of money, accounts, reckoning, bonds, bills specialties, contracts, controversies agreements, promises, variances, trespasses damages, judgments extents, executions claims and demands whatsoever in law, admiralty, or equity that is presently outstanding to any or all of the plaintiffs, whether secured or unsecured or of any nature, and to return to PTI any interest securing any indebtedness except as contained in this Affidavit for Judgment by Confession and as noted in paragraph 3D above;

   in addition to the obligations contained in the judgment above, to transfer to PTI all right, title, and interest which either ROB, RDG, or EOSD has or any person holding any interest on their behalf or through them, to any additions improvements enhancements, and source code relating to the intellectual property the subject of this action, together with any patent applications made in relation thereto;

   resign from any position either as officer, director employee or independent contractor of PTI;

   deliver to PTI, at the offices of its counsel within seven days of the date of the signing of this affidavit, the Toshiba laptop

Model 5100 containing the intellectual property, and further represents and warrants that he holds and has no interest in any other intellectual property owned by PTI;

(intentionally left blank)

ROB, EOSD and RDG each confirm that none of them have any interest of whatever nature in Baird Technologies Inc. ("BTI"); and

undertake to sign, enter into, execute, and deliver, in all of their names, forthwith, the attached letters and any contract, agreement, conveyance, and any other instrument as may be necessary to perform any of the undertakings contained in this affidavit or the judgment.

SWORN to at)
Palm Beach County, Florida) s/Robert A O'Brien
this July 22 1993) ROBERT A O'BRIEN

BEFORE me: s/Kathryn A. Pierce
Notary Public

[Seal]

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RUNAWAY DEVELOPMENT GROUP, S.A.	:	91 Civ. 5643 (JES)
Plaintiff,	:	SECOND AMENDED
-against-	:	ANSWER
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, JOHN C. BAIRD AND MITCHELL R. LEISER	:	PLAINTIFF DEMAND TRIAL BY JURY
Defendants	:	

Appendix B

PENTAGEN TECHNOLOGIES	:
INTERNATIONAL LIMITED,	:
JOHN C. BAIRD AND	:
MITCHELL R. LEISER	:
Counterclaim Plaintiff	:
-against-	:
RUNAWAY DEVELOPMENT	:
GROUP, S.A., EXPERT OBJECTIVE	:
SYSTEMS DEVELOPMENT	:
CORPORATION, and	:
ROBERT A. O'BRIEN	:
Counterclaim Defendants	:

COUNTERCLAIMS

Counterclaim Plaintiff Pentagen Technologies International Limited, by its attorneys, Law Offices Joel Z. Robinson, alleges the following as its Amended Counterclaims:

WHEREFORE, Defendants demand judgment:

Dismissing the Complaint;

On its First Counterclaim declaring that RDG does not possess a security interest in the Intellectual Property or in its Patent Applications, that the Assignment is null and void, that PTI has title to the Intellectual Property and the Patent Applications and the right to use such property, and enjoining RDG and EOSD, its successors, assignees, and nominees from claiming ownership or using in any way the Intellectual Property or patent Applications;

On its Second Counterclaim for the imposition of a constructive trust as to the Intellectual Property and proceeds of any sale of the Intellectual Property and directing that RDG and ESOD, their successors, assignees and nominees account for all income derived from the Intellectual Property;

On its Third Counterclaim against RDG and O'Brien for an order directing that RDG withdraw the Assignment, for imposition of a constructive trust as to the Intellectual Property, and directing that RDG, its successors, assignees and nominees account for income derived from the Intellectual Property and for damages in an amount to be determined at trial not less then $1.5M together with interest from July 24, 1990.;

On its Fourth Counterclaim for an injunction preventing RDG, its successors, assignees and nominees for utilizing in any way the Intellectual Property;

On its Fifth, Sixth, Seventh, Eighth, and Ninth Counterclaims for damages in an amount to be determined at trial not less than $2.5M, together with interest from July 24, 1990;

On its Tenth Counterclaim, for damages in an amount to be determined at trial not less than $50,000 together with interest from August 13, 1990;

On all its causes of action for its costs and for such other and further relief as this court deems necessary and appropriate.

Dated: New York, New York
February 3, 1992

LAW OFFICES
JOEL Z. ROBINSON
Attorneys for Defendants and Counterclaim Plaintiff
By: s/Joel Z. Robinson (am)
Joel Z. Robinson (JZR:9802)
110 Wall Street
New York, New York 10005-3801
(212) 344-2040 (tel)
(212) 344-2070 (fax)

baird3/pent/2dans

Appendix B

* * *

TO: U.S. Army Material Command
Washington, D.C.

TO: CACI, Inc - Federal
1100 North Glebe Road
Arlington, Virginia, 22201

AND TO: Any Other Interested Parties

RE: Acknowledgment of Title

Runaway Development Group, S.A. Expert Objective Systems Development Corp., and Robert A. O'Brien (hereinafter the "Group") hereby acknowledge and confirm that:

no member of the Group has, or claims, title to the technology known as MENTIX and used in the MENTIX-MVS product, subject only to the security interest of Runaway Development Group in such technology;

insofar as the Group is concerned, Pentagen Technologies International Limited ("PTI") owns the MENTIX technology and MENTIX-MVS product; and

any license by PTI of the MENTIX technology will not violate any rights of the Group.

Dated: February 12, 1992

RUNAWAY DEVELOPMENT GROUP, S.A.
By: s/Robert A. O'Brien
EXPERT OBJECTIVE SYSTEMS
DEVELOPMENT CORP.
By: s/Robert A. O'Brien Pres.
s/Robert A. O'Brien
Robert A. O'Brien

* * *

Appendix B

2. Letter and Proposed Motion dated March 26, 2003

LAW OFFICES JOEL Z. ROBINSON
116 John Street
New York, New York 10038

spr005.WP8/RUN

March 30, 2003

Hon. John E. Sprizzo
U.S. District Court Judge
U.S. District Court
40 Foley Square
New York, New York 10007

BY HAND

Re: Runaway Dev. Group et al., v. Pentagen
Tech Int'l Ltd et al No 91-5643 (JES)

Dear Judge Sprizzo:

This firm acts for the Judgment Creditor in this action. In accordance with your Order dated October 31, 2002, a copy of which is enclosed herewith, please note that since that date, the Judgment Creditor has taken further depositions from the Judgment Debtors and from persons associated with them.

Judgment Creditor is of the view that the new evidence confirms that Judgement Creditors' MENTIX property was assigned or otherwise transferred to the each of the identified constructive trustees. Judgment Creditor has therefore prepared a renewed Motion for Turnover and other Orders. Your attention is respectfully drawn to the proposed Memorandum in support, and the evidence summarized therein, where the basis of the renewed Motion is described.

Mindful of the Sanction Order you have imposed on counsel in a related action, my clients request permission to call a pre-motion conference to consider the new evidence and your permission for my clients' request to move for the Orders

sought. Please inform me accordingly, and I will then serve the other parties accordingly. Thank you for your consideration of this matter.

Respectfully submitted,

Very truly yours,

s/. Joel Z. Robinson
Joel Z. Robinson

cc: Opposition Counsel as listed on the pleadings (without Pleadings)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A.,	:	91 Civ. 5643 (JES)
Plaintiff	:	
-against-	:	
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, JOHN C. BAIRD AND MITCHELL R. LEISER	:	
Defendants	:	

Proposed/

NOTICE OF MOTION OF JUDGMENT CREDITOR FOR TURNOVER ORDERS OR TO COMPEL PRODUCTION OF EVIDENCE UNDER SUBPOENA UNDER Fed. R. Civ. P. 45 (c)(2)(B) OR OTHER ORDERS AS THE CASE MAY BE

PLEASE TAKE NOTICE that upon the filed Letter-Brief filed in Opposition to the United States dated August 15, 2002, the Opposition to IBM's Motion to Quash and Responses to IBM's Objections filed August 15, 2002, and the Opposition to CACI's

Motion to Quash filed August 22, 2002, the Order of the Court October 30, 2002, and other pleadings since filed or previously considered by the Court relating thereto ("Pleadings"), Judgment Creditors' Attorney, Law Offices Joel Z. Robinson & Co., will move this Court, before the Honorable John Sprizzo, at the United States Court House Courtroom 705, 40 Centre Street, New York, New York 10007, on Wednesday, 30th day of April, 2003, at 10.00 p.m. or so soon thereafter as counsel may be heard, for orders, pursuant to C.P.R.L. 5225, Fed. R. Civ. P. 45 (c)(2)(B) and C.P.R.L. 5224 or otherwise as is further set out in the Pleadings, for Turnover Orders, Accountings, or such other Orders as the court may Order consistent with the Judgment entered into in this action, and /or in the alternative, as the case may be, compelling each of the United States, IBM, CACI, and others to appear and respond to the Subpoenae issued herein on the grounds that each of United States, IBM, and CACI and the others Motions and/or Objections are unsustainable, and for such other order as the court thinks fit and proper.

Respectfully submitted

Dated: New York, New York
March 26, 2003

LAW OFFICES
JOEL Z. ROBINSON & CO.
s./Joel Z. Robinson
Joel Z. Robinson (JR-9802)
Attorney for Plaintiffs
116 John Street, Suite 320
New York, New York 10038
(212) 791-7360

CERTIFICATE OF SERVICE (When served)

I hereby certify under the penalty of perjury that on day of March, 2003, a copy of the foregoing Motion to Turnover etc.,

with supporting Memorandum were served on VIA FIRST CLASS MAIL on:

Natasha Young, Esq Hogan & Hartson LLP 875 Third Avenue New York, NY 10022	Robert W. Sadowski, Esq Assistant United States Attorney Civil Division Southern District of New York 100 Church Street New York New York, 10007
James Davis Esq Owens & Davis 805 Third Ave., New York, NY 10022	Robert O'Brien Runaway Dev. Group, Expert Objective Systems Dev. Corp 4620 Lee Highway, Suite 202 Arlington VA 22207

3. Order dated May 16, 2003 Suspending Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A., *Plaintiff*	:	91 Civ. 5643 (JES)
-against-	:	ORDER
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL *Defendant(s)*	:	
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL *Counter-claimant(s)*	:	
-against-	:	
RUNAWAY DEVELOPMENT GROUP, S.A., *Counterclaim Defendant*	:	

Appendix B

All parties in the above-captioned action, as well as those non-parties listed below, having appeared for a Hearing on May 2, 2003, and defendant/counter-claimant/judgment- creditor Pentagen having previously-filed a Motion for Turnover Order, seeking to execute a consent judgement it received in the above-captioned action, and Pentagen having previously served subpoenas in connection with such Motion on non-parties International Business Machines Corporation (IBM), CAC I - Federal , and the United States ("the Government"), which were denied by the Court in an Order dated November 4, 2002, and Pentagen having taken the deposition of plaintiff/counter-defendant/judgment-debtor Runaway Development Group, and the United States Court of Appeals for the Second Circuit ("Second Circuit") having issued a Summary Order in the case Pentagen Technologies Int'l. Ltd. v. United States, et al., 98 Civ. 1090 (JES), dated April 23, 2003, which affirmed the sanctions this Court imposed against Pentagen's counsel, Joel Z. Robinson, and recommended that "the District Court consider extending the injunction imposed ... to require that any further papers or process filed on behalf of Pentagen in the Southern District of New York be signed by counsel independent of Mr. Robinson," and the Court having considered all matters raised, it is

ORDERED that, for the reasons stated on the record at the aforementioned Hearing, defendant/counter-claimant's Motion for a Turnover Order is denied without prejudice to being renewed if and when it retains new counsel; and it is further

ORDERED that, pursuant to the Second Circuit's Summary Order, and in light of Mr. Robinson' s refusal, to date, to pay the sanctions levied against him by the Court, Mr. Robinson is enjoined from any further appearance in this action unless and until such sanctions are paid; and it is further

ORDERED that, even if Mr. Robinson pays such sanctions, he is only permitted to participate in the above-captioned case, or

any case on behalf of Pentagen, where any papers or process filed are done so by counsel independent of Mr. Robinson.

Dated: New York, New York
May 16, 2003

s./ John E. Sprizzo
John E. Sprizzo
United States District Judge

4. Summary Order of Judge Sprizzo June 5, 2003 denying Motion for Reconsideration of Order May 16, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A., *Plaintiff*	:	91 Civ. 5643 (JES)
-against-	:	
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL *Defendant(s)*	:	SUMMARY ORDER
PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL *Counter-claimant(s)*	:	
-against-	:	
RUNAWAY DEVELOPMENT GROUP, S.A., *Counterclaim Defendant*	:	

The above-captioned action having come before the Court by letter dated June 2, 2003, and defendant /counter-claimant/ judgment-creditor Pentagen having filed a Motion for

Reconsideration of the Court's May 16, 2003 Order, enjoining counsel, Mr. Joel Z. Robinson, from any further representation of Pentagen until he pays the sanctions previously imposed on him by the Court and requiring, in the event counsel does pay such sanctions, that Pentagen obtain additional and independent counsel to be responsible for the filing of any papers or process in this or any other action, and the Court having considered all matters raised, and

WHEREAS the Court now finds that defendant/counter-claimant/judgment-creditor's Motion fails to "demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion," as required for reconsideration, Shamis v. Ambassador Factors Corp., 187 F.R.D. 148, 151 (S.D.N.Y. 1999); it is

ORDERED that defendant/counter-claimant/judgment-creditor's Motion for Reconsideration shall be and hereby is denied.

Dated: New York, New York
June 5, 2003

s./John E Sprizzo
John E. Sprizzo
United States District Judge

APPENDIX C – MISCELLANEOUS ORDERS IN LITIGATION MISCONDUCT CASE

1. Orders Prior to Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL	:	98 CIV.1090 (JES)
Plaintiffs	:	
-against-	:	ORDER
UNITED STATES ET AL	:	
Defendant(s)	:	

All counsel in the above-captioned action having come before the Court for a Pre-Trial Conference on July 13, 1998, and the Court having considered all matters raised, it is

ORDERED that the parties shall comply with discovery as directed at the Pre-Trial Conference, and it is further

ORDERED that defendants shall answer on or before August 31, 1998, and it is further

ORDERED that defendants may file a motion to dismiss on or before September 30, 1998, and it is further

ORDERED that a Pre-Trial Conference shall be held on October 9, 1998 at 1:00 p.m. in Courtroom 705 at 40 Centre Street.

Dated: New York, New York
July 14, 1998

s./John E Sprizzo
John E. Sprizzo
United States District Judge

* * *

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, ET AL	:	98 CIV.1090 (JES)
Plaintiffs	:	
-against-	:	ORDER
UNITED STATES ET AL	:	
Defendant(s)	:	

All counsel in the above-captioned action having appeared before this Court for a Pre-Trial Conference on October 9, 1998, and the Court having considered all matters raised, it is

ORDERED that defendant Davies, Arnold & Cooper shall file an answer on or before November 9, 1998, and it is further

ORDERED that all discovery shall be stayed pending resolution of defendants' motion to dismiss, and it is further

ORDERED that defendants' motion to dismiss as to personal jurisdiction is denied without prejudice, and it is further

ORDERED that plaintiff shall file a response to defendants' motion to dismiss, limited to forty (40) pages in length, on or before December 31, 1998, and it is further

ORDERED that Oral Argument shall be held on March 19, 1999, at 1:30 p.m. in Courtroom 705, 40 Centre Street.

Dated: New York, New York
October 13, 1998

s./John E Sprizzo
John E. Sprizzo
United States District Judge

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Appendix C

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PENTAGEN TECHNOLOGIES	:	98 CIV.1090 (JES)
INTERNATIONAL LIMITED, ET AL	:	
Plaintiffs	:	
-against-	:	ORDER
UNITED STATES ET AL	:	
Defendant(s)	:	

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All counsel in the above-captioned action having come before the Court for Oral Argument on defendants' motions to dismiss on March 19, 1999, and the Court having considered all matters raised, it is

ORDERED that defendants may file a supplemental memorandum of law, not to exceed fifteen (15) pages, on or before April 2, 1999, and it is further

ORDERED that defendant the United States may file a separate supplemental memorandum of law, not to exceed five (5) pages, on or before April 2. 1999, and it is further

ORDERED that a Pre-Trial Conference shall be held on April 9, 1999, at 1:00 p.m. in Courtroom 705, 40 Centre Street.

Dated: New York, New York
March 22 ,1999

s./John E Sprizzo
John E. Sprizzo
United States District Judge

* * *

2. Judgment in Litigation Misconduct Case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PENTAGEN TECHNOLOGIES	:	SEAL
INTERNATIONAL LIMITED, ET AL	:	FILED JUN 30, 2000

Appendix C

Plaintiffs	:	
-against-	:	98 CIV.1090 (JES)
UNITED STATES ET AL	:	JUDGMENT
Defendant(s)	:	#64

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Plaintiff having requested to amend and defendants having moved to dismiss, having been submitted to the Honorable John E Sprizzo, United States District Judge, and the Court thereafter, on June 29,2000 having rendered its Memorandum Opinion (84154) and Order granting defendants' motion to dismiss-and denying plaintiffs' request to amend, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated June 29, 2000, the plaintiffs' request to amend is denied, defendants' motion to dismiss is granted in its entirety; furthermore plaintiffs are directed to file their response to defendants' CACI motion for sanctions before July 31, 2000.

DATED: New York New York
June 30, 2000

JAMES M. PARKISON
Clerk of Court

BY: s./ James Funein
Deputy Clerk

Microfilm
Jul 6-2000-1200PM

This Document was entered
On the Docket on July 7, 00.

* * *

3. Memorandum Opinion-Order issued by Judge Sprizzo dated June 29, 2000.

United States District Court, S.D. New York.

Appendix C

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED, et al., Plaintiffs,

v.

UNITED STATES of America, et al., Defendants.

No. 98 CIV. 1090(JES).

June 29, 2000.

Joel Z. Robinson & Co., for Plaintiffs, New York, NY, Joel Z. Robinson, Of Counsel.

Mary Jo White, United States Attorney for the Southern District of New York, New York, NY, Rachel D. Godsil, Assistant United States Attorney, Of Counsel.

Owen & Davis, for Defendants CACI International Inc., CACI Systems Integration, Inc., CACI, Inc.-Federal, Steptoe & Johnson and J. William Koegel, Jr., New York, NY, James M. Davis, Of Counsel.

Trachtenberg & Rose, LLP, for Defendants International Business Machines Corporation, Lockheed Martin Corporation, PRC Inc. and AT & T Company, New York, NY, Leonard A. Rodes, Barry J. Friedberg, Of Counsel.

McKenna & Cuneo, L.L.P., for Defendants International Business Machines Corporation, Lockheed Martin Corporation, and PRC Inc., Washington, D.C., Frederick M. Levy, Of Counsel.

Kevin T. O'Reilly, for Defendant AT & T Company, Liberty Corner, N.J.

Wilson, Elser Moskowitz, Edelman & Dicker LLP, for Defendants Express Company Secretaries Limited, Jordans & Jordan & Sons Limited, Jordan Group, Ltd., Davies Arnold & Cooper, and George Menzies, New York, NY, Thomas A. Leghorn, Of Counsel.

Steptoe & Johnson, for Defendants Steptoe & Johnson and J. William Koegel, Jr., Washington, D.C., J. William Koegel, Jr., Of Counsel.

MEMORANDUM OPINION AND ORDER
SPRIZZO, District Judge.

Plaintiffs Pentagen Technologies International Limited ("Pentagen") and Russell D. Varnado (collectively "plaintiffs") bring the instant action alleging violations of the Federal False Claims Act ("False Claims Act") and abuse of process by defendants United States of America ("United States"), E.F. Brasseur ("Brasseur")[1] (collectively "United States defendants"), CACI International Inc. ("CACI International"), ***234** CACI Systems Integration, Inc. ("CACI Systems"), CACI, Inc.--Federal ("CACI Federal"), International Business Machines Corporation ("IBM"), Lockheed Martin Corporation ("Lockheed Martin"), AT & T Company ("AT & T"), PRC Inc. ("PRC"), I-Net Inc. ("I-Net"), Statistica, Inc. ("Statistica"), Express Company Secretaries Limited ("Express"), Jordans & Jordan & Sons Limited ("Jordan"), Jordan Group LTD ("Jordan Group"), Steptoe and Johnson ("Steptoe"), J. William Koegel,

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[1] On October 1, 1998, the United States Attorney for the Southern District of New York certified that actions taken by Defendant Brasseur relevant to this action were within the scope of his employment as Deputy Chief of Staff for Corporate Information, United States Materiel Command. Accordingly, pursuant to the Federal Tort Claims Act, 28 U.S.C. §2679(b)(1) (2000) ("FTCA"), this action is deemed to be against the United States, and the United States is substituted as party defendant for defendant Brasseur. *See also* 28 C.F.R. §15.3(a) (2000). In any event, the FTCA precludes all claims against the United States, defendant Brasseur, and other relevant employees of the United States (including United States Attorneys and their assistants involved in litigating these claims) for intentional tort claims including those based upon abuse of process. *See* 28 U.S.C. §2680(h); *Gray v. Bell,* 542 F.Supp. 927, 933 (D.D.C.1982), *aff'd,* 712 F.2d 490 (D.C.Cir.1983), *cert. denied,* 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984).

Jr., Esq., Davies Arnold & Cooper ("Davies"), and George Menzies, Esq. ("Menzies") (collectively "non-United States defendants"). United States defendants and non-United States defendants have moved to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. Moreover, during the pendency of these motions, plaintiffs have requested leave to file a Second Amended Complaint which includes several new causes of action based upon evidence they claim was recently discovered. Defendants have opposed such request by arguing that all new claims asserted by plaintiffs must be dismissed and, accordingly, the proposed amendment would be futile. For the reasons set forth herein, this action is dismissed in its entirety with prejudice and plaintiffs' request to amend their complaint is denied.

BACKGROUND

This action, like approximately ten other actions previously brought by plaintiffs, stems from Pentagen's failure to procure a substantial contract to provide software to the United States Army ("the software contract"). Most relevant here, after the software contract was awarded to several other contractors and subcontractors, many of them defendants in the instant action, plaintiffs brought forward an action against such contractors and subcontractors under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §3729, *et seq.* In that action which was before Judge Robert L. Carter of this Court ("the first *qui tam* action"), plaintiffs alleged, *inter alia,* that (1) such contractors and subcontractors had without plaintiffs' permission submitted a proposal to the Army that required the use of a software application owned by plaintiff ("Mentix"); and (2) defendants, upon being awarded the software contract, were generally failing in their performance obligations under such contract.[2]

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[2] Plaintiffs' claims alleging that defendant CACI had violated its (… continued)

Judge Carter dismissed the first *qui tam* action for lack of subject matter jurisdiction on November 21, 1995.[3] *See United States ex rel. Pentagen Tech. Int'l Ltd. v. CACI Intern. Inc.,* No. 94 Civ. 2925(RLC), 1995 WL 693236 (S.D.N.Y.).

In the instant action, plaintiffs allege that defendants' conduct while litigating the *qui tam* actions constituted an abuse of due process under state law and was in violation of the False Claims Act.[4] Specifically, with respect to the United States defendants, plaintiffs allege that the United States improperly (1) filed an *amicus* ****235*** *curiae* brief in the first *qui tam* action; (2) colluded with non-performing government contractor defendants in their defense of the first and second *qui tam* action; (3) prohibited plaintiffs from meeting with members of the Executive Branch to assist them in their prosecution of the first and second *qui tam* actions; and (4) permitted defendant Brasseur, a

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(Continued…)
copyright and trademark in Mentix were previously dismissed in *CACI Int'l, Inc. v. Pentagen Tech. Int'l, Ltd.,* No. 93-1631-A. slip op. (E.D.V.A. June 16, 1994) ("the *Copyright Action* ").

[3] After plaintiffs' request for reconsideration by Judge Carter was denied, plaintiffs subsequently filed another *qui tam* action alleging similar claims before Judge Robert W. Sweet of this Court. Judge Sweet dismissed this action by opinion dated August 15, 1997. *See United States ex rel., Pentagen Tech. Int'l Ltd. v. CACI International Inc., et al.,* No. 96 Civ. 7827(RWS), 1997 WL 473549 (S.D.N.Y.) ("the second *qui tam* action"). Plaintiffs' motion for reargument of this dismissal was denied by Judge Sweet on November 19, 1997. *See United States ex rel., Pentagen Tech. Int'l Ltd. v. CACI Int'l. Inc.,* No. 96 Civ. 7827(RWS), 1997 WL 724553 (S.D.N.Y.), *aff'd,* 172 F.3d 39, 1999 WL 55259 (2d Cir.1999).

[4] While plaintiffs' Amended Complaint specifically lists only claims of "abuse of process of the courts," the Court liberally construes the complaint to include a False Claims Act violation, particularly in light of plaintiffs' allegations in the body of the Amended Complaint that defendants had "obligations" under the False Claims Act which they did not fulfill. *See* Amended Complaint dated April 3, 1998 ("Amend.Cmplt.") at ¶¶22-25.

Government employee, to meet with defendant contractors and provide a witness statement ("the Brasseur statement") for use in related litigation proceedings pending in the United Kingdom ("the U.K. Proceeding"). *See* Amend. Cmplt. at ¶¶ 41, 46. Similarly, plaintiffs claim that the remaining defendants colluded with the United States in preparing the aforementioned *amicus curiae* brief and the Brassuer statement, and in otherwise seeking the United States' assistance in preparing for their defense of the *qui tam* actions. *See id.* at ¶¶ 42-45.

DISCUSSION

Personal Jurisdiction

Defendants CACI Systems, CACI International, CACI Federal, Davies, Menzies, Express, Jordan and Jordan Group each move to dismiss plaintiffs' complaint pursuant to Fed. Rule Civ. Proc. 12(b)(2) for lack of personal jurisdiction. Here, where the parties have not engaged in discovery, "a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith ... legally sufficient allegations of jurisdiction, i.e., by making a prima facie showing of jurisdiction." *See Jazini v. Nissan Motor Company, Ltd.,* 148 F.3d 181, 184 (2d Cir.1998) (citations and quotations omitted).

With respect to defendants CACI Systems, CACI International, Express, Jordan, and Jordan Group, plaintiffs' Amended Complaint pleads absolutely no factual allegations detailing the basis for this Court's jurisdiction over such defendants. Moreover, plaintiffs have entirely failed to respond to such defendants' arguments that the Court lacks personal jurisdiction over them. In these circumstances the Court must dismiss plaintiffs' action as to such defendants.

As to defendant CACI Federal, plaintiffs' complaint alleges that such defendant is authorized to do business in New York and is presently found in the State of New York. *See* Amend. Cmplt. at ¶ 6. Similarly, plaintiffs plead that law firm Davies is

comprised in part of New York attorneys, namely its partner defendant Menzies, who allegedly is licensed to practice in New York and met with plaintiff Pentagen in New York at times relevant to this action. *See id.* at ¶ 15. While defendants argue that such allegations are either inaccurate or legally insufficient to assert personal jurisdiction over them, at this early stage of litigation they constitute *prima facie* jurisdictional allegations sufficient to survive a motion to dismiss.[5]

False Claims Act

The False Claims Act empowers the United States to recover damages from those who knowingly make false claims for payment upon the United States. *See* 31 U.S.C. §3729(a); *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13, 16 (2d Cir.1990). As noted by the Supreme Court, a "claim against the Government normally connotes a demand for money or for some transfer of public property." *United States v. McNinch,* 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958) (internal quotation and citation ***236** omitted). Accordingly, the terms "claim against the government ... must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." *Id.*

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[5] Defendants' argue that because the parties have engaged in discovery in prior actions, plaintiffs allegations of jurisdiction must be factually supported. *See Ball v. Metallurgie Hoboken-Overpelt, S.A.,* 902 F.2d 194, 197 (2d Cir.), *cert. denied,* 498 U.S. 854, 111 S.Ct. 150, 112 L.Ed.2d 116 (1990). However, this Court stayed discovery during the pendency of the instant motions, and defendants have not provided the Court with evidence that plaintiffs were accorded an adequate opportunity to develop a factual basis for their jurisdictional allegations. In any event, plaintiffs' claims against all defendants are dismissed on other grounds, as discussed *infra*

To encourage reporting of false claims, any person may commence a civil action on behalf of the United States for a violation of the False Claims Act. *See* 31 U.S.C. §3730(b). Such person must serve a copy of the complaint upon the United States, which may proceed with the action and take "primary responsibility" for its prosecution. *See* 31 U.S.C. §3730(c)(1). It may also decline to proceed with the action, whereupon the originator of the suit may proceed as a *qui tam* plaintiff. *See id.* Should the Government decline to proceed with the action, it is still entitled to be served with copies of all pleadings in the action and may upon good cause intervene at a later date. *See id.* at §3730(c)(3). In either case, if the action is ultimately successful, the *qui tam* plaintiff is entitled to a portion of the recovery. *See id.* at §3730(d).

As to the United States defendants, plaintiffs claims under the False Claims Act must be dismissed as the United States has never waived its sovereign immunity with respect to such suits. The United States is immune from suit unless it has unequivocally waived its sovereign immunity by statute. *See United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). No such waiver has been promulgated by Congress and, to the contrary, the False Claims Act provides that any person who violates the Act will be "liable to the United States Government." *See* 31 U.S.C. §3729(a); *see also Juliano v. Federal Asset Disposition Ass'n,* 736 F.Supp. 348, 352, 353 (D.D.C.1990) ("The Court is aware of nothing in the Act that allows a private individual to sue selected federal agencies to recover money from the United States, and to reap a sizable profit in the process."), *aff'd.,* 959 F.2d 1101, 1992 WL 76922 (D.C.Cir.1992).[6]

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[6] While plaintiff cites several cases for the proposition that the United

(… continued)

As to the non-United States defendants, plaintiffs' claims must be dismissed because the False Claims Act provides no private right of action for litigation misconduct during the pendency of a *qui tam* action. Four factors must be considered in determining whether a statute implies a private right of action: (1) whether the plaintiff is part of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent that would either favor or oppose creation of a private remedy; (3) whether implication of a private remedy is consistent with the underlying ***237** purposes of the statute; and (4) whether the cause of action is one traditionally relegated to state law, such that it would be inappropriate to infer the existence of a federal cause of action. *See Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

(Continued…)
States may not interfere with the prosecution of a *qui tam* action after it has declined to prosecute such action, these cases are readily distinguishable from the instant action. For example, *Bush v. United States,* 13 F. 625, 626 (C.C.D.Or.1882), and *United States ex rel. Smith v. Gilbert Realty Co.,* 9 F.Supp.2d 800, 803 (E.D.Mich.1998), both involved properly brought *qui tam* actions in which *qui tam* plaintiffs alleged only that the Government had failed to pay them a part of the damages due to them under section 3730(d). Similarly, plaintiff's reliance on Judge Carter's opinion in *U.S. Dept. of Defense v. CACI Int'l, Inc.,* 885 F.Supp. 80 (S.D.N.Y.1995) is misplaced, as this decision only provided that the Government could not keep virtually all litigation materials under seal during the pendency of a *qui tam* action without any showing of good cause. *See id.* at 82. Plaintiffs' reliance on this decision is particularly unwarranted given Judge Carter's subsequent holding during the course of the first *qui tam* action that "nothing in the [False Claims Act's] language prohibits the government from communicating with the defendants or submitting an amicus curiae brief on their behalf ... [and] communications between defendants and the [G]overnment are common in an action where the Government has not intervened." *See U.S. Dep't of Defense v. CACI Int'l Inc.,* 953 F.Supp. 74, 78 (S.D.N.Y.1995). This decision, of course, dealt with the exact same conduct that plaintiff alleges was improper in this action.

The second factor, legislative intent, is central in such analysis with the other factors looked upon as "proxies for legislative intent." *DiLaura v. Power Authority of New York,* 982 F.2d 73, 77-78 (2d Cir.1992) (citations omitted). When a statute fails to provide for a private right of action, legislative intent is determined by reference to "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Schuloff v. Queens College Foundation, Inc.,* 994 F.Supp. 425, 427 (E.D.N.Y.1998) (citations omitted), *aff'd,* 165 F.3d 183 (2d Cir.1999).

The False Claims Act specifically provides for private actions based upon the making of a false claim for payment upon the United States. Beyond creating this type of action, the Act provides a specific and detailed procedure for how such actions are to proceed, either with or without Governmental involvement. *See* 31 U.S.C. §3730. No other mention of a private action is made by the statute, and, in particular, no mention is made of a private action based upon litigation misconduct during the pendency of a False Claims Act proceeding. In these circumstances, this Court cannot infer the right of a party to instigate such an action. Indeed, as the Supreme Court has noted, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 488, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996) (citations omitted).

Abuse of Process

Plaintiffs' abuse of process claims are clearly time-barred under the applicable limitations period. Under New York law, the statute of limitations for plaintiffs' abuse of process claims is one year. *See* N.Y.C.P.L.R. §215(3); *Heinfling v. Colapinto,* 946 F.Supp. 260, 266 (S.D.N.Y.1996). Here, plaintiffs'

Amended Complaint alleges that the United States filed its *amicus* brief on or before June 26, 1995, and that certain non-United States defendants obtained the Brassuer Statement for use in the U.K. Proceeding on or before August 14, 1996. *See* Amend. Cmplt. at ¶¶ 31, 33-34. Assuming that such actions do in fact constitute an abuse of process,[7] they occurred one year before February 17, 1998, the date upon which this action was commenced. Accordingly, plaintiffs' abuse of process claims must be dismissed.

Plaintiffs' Motion to Amend their Complaint

Finally, while plaintiffs have requested leave to file a Second Amended Complaint, the Court denies such request because the federal claims asserted by such complaint would be futile. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Initially, plaintiffs' claims under the False Claims Act must be dismissed for the reasons stated above. Moreover, as defendants argue, plaintiffs' new RICO claims must be dismissed because they fail to identify any "enterprise" separate from each individually named defendant. *See Discon, Inc. v. NYNEX Corp.,* 93 F.3d 1055, 1063 (2d Cir.1996); Notice of Motion of Relator for Relief from Final Judgment dated May 30, 1998, Proposed Complaint ("Proposed Complaint") at ¶¶ 52-52M. ***238** Plaintiffs also fail to plead any facts permitting a rational inference that defendants participated in the "operation or management of a RICO enterprise," further necessitating dismissal. *See Reves v. Ernst & Young,* 507 U.S. 170, 179, 113

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[7] Alternatively, plaintiffs abuse of process should be dismissed on the merits, as plaintiffs have failed to allege that defendants caused any process to issue at all, or that such process was issued for some purposes collateral to the litigation between the parties. *See Bernard v. U.S.,* 25 F.3d 98, 104 (2d Cir.1994); *Chamberlain v. Lishansky,* 970 F.Supp. 118, 121 (N.D.N.Y.1997).

S.Ct. 1163, 122 L.Ed.2d 525 (1993); Proposed Complaint at ¶¶ 52-55M.

Similarly, assuming this Court could even entertain this application, plaintiffs' requests for relief from the final judgments in *Pentagen I, Pentagen II,* and the *Trademark Action* must also be denied because plaintiffs present no new evidence that warrants such relief. *See* Proposed Complaint at 53; *cf. M.W. Zack Metal Co. v. Navigation Corp. of Monrovia,* 675 F.2d 525, 530 (2d Cir.1982) (denying request for relief because fraud was "intrinsic" to prior proceedings and thus not reviewable in an independent action); James Wm. Moore, *et al.,* Moore's Federal Practice ¶ 60.81[1][b][i-ii] (1999). Specifically, *Pentagen I* and *Pentagen II* were each dismissed for lack of subject matter jurisdiction because plaintiffs could not demonstrate that they were the "original source" of a false claim as required by the False Claims Act. *See Pentagen I,* 1995 WL 693236 at *11; *Pentagen II,* at 1997 WL 473549 at *6-*10. As no new evidence of collusion by defendants speaks to that issue, relief from such judgments is inappropriate.

Additionally, while plaintiffs point to new evidence that defendants copied their Mentix software in violation of the Copyright Act, such evidence does not provide any basis for relief from the judgment in the *Copyright Action. See* Proposed Complaint at ¶¶ 26B-26E. Indeed, according to such evidence, this copying occurred prior to December 1990, well before December of 1993 when Pentagen registered its copyright in Mentix. *See Copyright Action* at 8; Cross-Examination of E.F. Brasseur dated April 12, 2000, at 38.

In sum, all the federal claims advanced by plaintiffs' proposed Second Amended Complaint would be futile, and the Court denies leave to amend on that basis. Moreover, as all federal and state claims properly before the Court have been dismissed, the Court declines to exercise supplemental jurisdiction over plaintiffs' state claims. *See* 28 U.S.C. §1367(c)(3); *United Mine*

Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are hereby granted and plaintiffs' request to amend their complaint shall be and hereby is denied. Plaintiffs are directed to file their response to defendants' CACI International, CACI Systems and CACI Federal's motion for sanctions on or before July 31, 2000.

It is SO ORDERED.

Reported in 103 F.Supp.2d 232

4. Summary Order dated July 19, 2000, denying Motion for Reconsideration of Order dated June 29, 2000.

Judge Sprizzo's Subsequent Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENTAGEN TECHNOLOGIES	:	FILE NO.
INTERNATIONAL LIMITED, ET AL	:	98 CIV.1090 (JES)
Plaintiffs	:	
-against-	:	SUMMARY ORDER
UNITED STATES OF AMERICA ET AL	:	
Defendant(s)	:	

The above-captioned action having come before the Court, and the Court having granted each defendants' motion to dismiss and denied plaintiffs request for leave to file a Second Amended Complaint by Memorandum Opinion and Order dated June 29, 2000, and plaintiffs having moved for reconsideration of the aforementioned Opinion and Order on July 17, 2000 pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, and plaintiffs having further requested leave from the

Court to file a Third Amended Complaint containing new allegations and claims against defendants, and

WHEREAS plaintiffs' motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure was not filed within ten days after the entry of judgment and, as such, is time-barred, see Fed. Rule Civ. Proc. 59(e), and

WHEREAS plaintiffs' motion for relief from judgment presents no newly discovered evidence that warrants relief from this Court's dismissal of this action, see Fed. Rule Civ. Proc. 60(b), and

WHEREAS the Court may not properly consider the entirely new claims proposed in plaintiffs' Third Amended Complaint in ruling on the instant motions for reconsideration and relief from judgment, and

WHEREAS to the extent that plaintiffs argue that the Court's dismissal of this action as to any party for lack of personal jurisdiction was improper, plaintiffs are not prejudiced in any way because this action was also dismissed on the merits as to all parties, and

WHEREAS the Court finds that all other arguments made by plaintiffs in the instant motion are either simply repetitive of arguments previously rejected by this Court, do not involve "controlling decisions or factual matters that were put before [the Court] on the underlying motion" *see Yurman v. Chaindom Enterrnises. Inc*., No. 99 Civ. 9307, 2000 WL 217480, *1 (S.D.N.Y. Feb. 22, 2000) (Keenen, J.), or are without merit, it is

ORDERED that plaintiffs' motions to alter judgment and for relief from judgment shall be and are hereby denied, and it is further

ORDERED that plaintiffs' request for leave to file a Third Amended Complaint shall be and is hereby denied.

Appendix C

DATED: New York, New York
July 19, 2000

s/John E. Sprizzo
John E. Sprizzo
United States District Judge

APPENDIX D –
OTHER RELEVANT DECISIONS
(in reverse chronological order)

1. Memorandum Opinion and Order issued by Judge Batts on July 10, 2001

United States District Court, S.D. New York.

UNITED STATES of America ex rel. Pentagen Technologies Int'l Ltd., et al.,

Relators,

v.

UNITED STATES of America, et al., Defendants.

No. 00 CIV. 6167(DAB).

July 10, 2001.

Joel Z. Robinson & Co., New York, for Relators.

Mary Jo White, United States Attorney for the Southern District of New York by Robert W. Sadowski, New York, for the United States defendants.

MEMORANDUM & ORDER OPINION
BATTS, District J.

*1 Pentagen Technologies Int'l Ltd., ("Pentagen"), and Russell D. Varnado ("Varnado") (collectively "Plaintiffs" or "Relators") commenced the above entitled *qui tam* action on August 17, 2000, pursuant to 31 U.S.C. §§3729-33 ("False Claims Act" or "Act"), and against defendants United States of America ("United States"), E.F. Brasseur ("Brasseur") (collectively the "United States defendants"), CACI International Inc. ("CACI International"), CACI Systems Integration, Inc. ("CACI Systems"), CACI, Inc.-Federal ("CACI Federal") (collectively "CACI"), International Business Machines Corporation ("IBM"), Lockheed Martin Corporation ("Lockheed Martin"), AT & T Company ("AT & T"), PRC Inc. ("PRC"), I-Net Inc. ("I-Net"), Statistica Inc. ("Statistica");

Express Company Secretaries Limited ("Express"), Jordans & Jordan & Sons Limited ("Jordan"), Jordan Group LTD ("Jordan Group"), Steptoe and Johnson ("Steptoe"), J. William Koegel, Jr., Esq. ("Koegel"), Davies Arnold & Cooper ("Davies"), George Menzies, Esq. ("Menzies"), Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"), John T. Boese ("Boese"), John A. Borek ("Borek"), LeBoeuf, Lamb, Greene, & Macrae ("LeBouf"), James F. Johnson, IV ("Johnson"), Donald J. Greene ("Greene"), Nicholas D. Rochez ("Rochez"), Owens & Davis P.C. ("Owens"), and James M. Davis ("Davis") (collectively "non-United States defendants"). On October 20, 2000, the Government filed its Notice of Election to Decline Intervention ("Declination"), dated October 18, 2000, pursuant to 31 U.S.C. §3730(b)(4)(B). On October 26, 2000 the Relators informed the Court that they opposed the Government's Declination. (*See* Relators' Oct. 26, 2000, Letter.) Relators submitted their formal application to this Court Opposing the Government's Declination on November 1, 2000. (*See* Relators' Nov. 1, 2000, Mem. Law.) Relators also requested, *inter alia,* that this Court appoint an independent investigator to investigate Relators' *qui tam* claims. *Id.* In response to the Relators' formal application, the Government moved to dismiss the Relators' Complaint pursuant to 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In its Motion to Dismiss the Government argues that (1) the doctrine of *res judicata* bars the claims against all Defendants; (2) the Relators' request that the Court appoint an independent investigator in this action is meritless; and (3) the Court should enjoin the Relators from filing any new actions relating to the subject matter of this suit.

Relators have also filed two Rule 11 motions seeking sanctions against the Government for alleged misrepresentations and meritless arguments contained in its submissions to this Court.

Appendix D

BACKGROUND

The above-captioned civil action, like many actions filed before it,[1] results from Pentagen's failure to secure a software contract from the Department of Defense. In this District alone, Relators have filed three other actions alleging violations of the False Claims Act. These *qui tam* suits all originate from the same factual nucleus. *See Pentagen V*[2], *Pentagen VI, Pentagen IX*[3].

*2 In sum, Relators complain that various Defendants misappropriated, or facilitated others in the misappropriation of

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[1] Civil actions filed in the United States that stem from Pentagen's failure to obtain a Government contract include, but are not limited to: *Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc .,* No. 94 Civ. 0441 (N.Y. Sup.Ct. filed July, 1993, removed to S.D .N.Y. Jan. 26, 1994) ("Pentagen I"); *Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.,* No. 93 Civ. 8512 (S.D.N.Y. filed Dec. 10, 1993) ("Pentagen II"); *CACI Int'l v. Pentagen Technologies Int'l Ltd.,* No. 93-1631-A (E.D. Va. filed June 16, 1994) ("Pentagen III"); *Pentagen Technologies Int'l, Ltd. v. J.P. London,* No. 94 Civ. 8164 (N.Y. Sup.Ct. filed Sept. 1994, removed to S.D.N.Y. Nov. 10, 1994) ("Pentagen IV"); *United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.,* No. 94 Civ. 2925, 1996 WL 11299 (S.D.N.Y. Jan. 4, 1996) ("Pentagen V"); *United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.,* No. 96 Civ. 7827, 1997 WL 473549 (S.D.N.Y. Aug. 18, 1997) ("Pentagen VI"); *Pentagen Technologies Int'l Ltd. v. United States,* No. 97-245 (Fed.Cl.), *aff'd,* 175 F.3d 1003 (Fed.Cir.1999) ("Pentagen VII"); *Pentagen Technologies Int'l, Ltd. v. Comm. on Appropriations of the United States House of Representatives,* No. CIV. A. 98-47, 20 F.Supp.2d 41 (D.D.C.1998) ("Pentagen VIII"); *Pentagen Technologies Int'l Ltd. v. United States,* No. 98 Civ. 1090, 103 F.Supp.2d 232 (S.D.N.Y.2000) ("Pentagen IX").

[2] Relator Varnado was not a party to *Pentagen V.*

[3] Although Relators did not initiate *Pentagen IX* as a False Claims Act case, the court in *Pentagen IX* "liberally construe[d] the complaint to include a False Claims Act violation." *Pentagen IX,* 103 F.Supp.2d at 234 n. 4.

a version of Pentagen's MENTIX software. (*See* Compl. ¶¶ 29-101 .) According to the Relators, use of the MENTIX software would have allowed the Government to modernize quickly its various software applications. (*See* Compl. ¶¶ 29, 30.) The Government contracts targeted by Pentagen, however, were awarded to other parties.

The prolix Complaint filed in this action provides an historical account of Relators' attempts to prosecute their various actions. To date, Relators' attempts to pursue relief under the *qui tam* provisions of the False Claims Act have yet to bear fruit. Pentagen alleged in its first *qui tam* action that various defendants violated the False Claims Act by, *inter alia,* "marketing and conspiring to deliver the MENTIX software to the AMC for payment without informing the AMC that MENTIX was subject to an ownership dispute during the alleged timeframe," (the "AMC contract"), *Pentagen V,* 1996 WL 11299, at *3, and by entering into and then failing to perform a contract that required the use of the MENTIX software, (the "SBIS contract"), *Pentagen V,* 1996 WL 11299, at *9. Judge Carter dismissed the claims against the defendants for lack of subject matter jurisdiction, as Pentagen was unable to demonstrate that it was the "original source" of the publicly disclosed information that served as the basis for its complaint. *Pentagen V,* 1996 WL 11299, at *8, *12. Relators, in their second *qui tam* action, *Pentagen VI,* again "alleg[ed] that the defendants had submitted false claims to the United States arising out of two contracts." *Pentagen VI,* 1997 WL 473549, at *1. Judge Sweet dismissed the Relators' suit on the same grounds Judge Carter relied upon in *Pentagen V*.[4] Plaintiffs'

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[4] In fact, with respect to one of the claims the court stated that Judge Carter's decision regarding jurisdiction, barred, under the doctrine of *res judicata,* relitigation of that issue. *Pentagen IV,* 1997 WL 473549, at *7. ("[res judicata] does preclude relitigation of the issues determined in ruling on the

(… continued)

motion for reargument was denied. *See United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.,* No. 96 Civ. 7827, 1997 WL 724553 (S.D.N.Y. Nov. 19, 1997), *aff'd,* 172 F.3d 39, 1999 WL 55259 (2d Cir.1999). Relators' third *qui tam* action, the most relevant to the claims that the Relators seek to raise here, alleges that the defendants engaged in "litigation misconduct," in violation of state law and the False Claims Act. *Pentagen IX,* 103 F.Supp.2d at 234. In *Pentagen IX* the Relators claimed that the United States defendants improperly:

> (1) filed an amicus curiae brief in the first qui tam action; (2) colluded with non-performing government contractor defendants in their defense of the first and second qui tam action; (3) prohibited plaintiffs from meeting with members of the Executive Branch to assist them in their prosecution of the first and second qui tam actions; and (4) permitted defendant Brasseur, a Government employee, to meet with defendant contractors and provide a witness statement ("the Brasseur statement") for use in related litigation proceedings pending in the United Kingdom ("the U.K. Proceeding").

*3 *Id.* at 234-35.

Relators alleged the other defendants named in the amended complaint "colluded with the United States in preparing the aforementioned amicus curiae brief and the Brasseur statement, and in otherwise seeking the United States' assistance in preparing for their defense of the qui tam actions." *Id.* at 235. With respect to the Relators' claims against the United States defendants, the court in *Pentagen IX* held that "plaintiffs' claims under the False Claims Act must be dismissed [since] the United States has never waived its sovereign immunity with respect to

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(Continued…)
jurisdiction question" (quoting 18 Wright, Miller, Cooper Federal Practice and Procedure: Jurisdiction, §4436 at 340-41 (1981)).

such suits." *Id.* at 236. The claims against the other defendants, were likewise dismissed as "no private right of action for litigation misconduct during the pendency of a qui tam action" exists under the Act. *Id.* at 236. During the time the motions to dismiss in *Pentagen IX* were *sub judice,* the Relators sought leave to file a second amended complaint.[5] Their request was denied since alleging "the federal claims asserted by such complaint would be futile." *Id.* at 237. In substance, the claim against the Government contained in the Complaint filed in this action and made pursuant to the Act, differs imperceptibly from the second amended complaint the Court denied Relators leave

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[5] The second amended complaint is attached as Exhibit B to the Government's Notice of Motion. In Paragraph 41 the Relators state their claims against the Government pursuant to the False Claims Act: In knowingly undertaking the conduct alleged in ¶¶26B, 26G, 30, 30A, 30B, 31, 31A, 31B, 32, 32A, 32C, 32D, 34, 34A, 34B, 34C, 34D, 35, 36, 36A, 36D, 36E, 36F, 36G,36H, [sic] 37A, 38, 39, 40, 40A, 40B, 40D, and 40H, including but not limited to the failing to produce documents commanded to be delivered in the 1994 Subpoenas, in denying documents in May 1995, in filing the *amicus curiae* brief in the circumstances set out herein; in secretly colluding with non-performing government contractors from time to time thereafter, at a time when the non-performing contractors were the subject of an action under 31 U.S.C. §3729 et seq. so as to defeat, obstruct, handicap and hinder the activities of each of the relators and to assist Defendants, in prohibiting plaintiffs from meeting with members of the Executive Branch for the purpose to investigate and conduct an action under 31 U.S.C. §3729 et seq.; in preparing a false and misleading Witness Statement for use against a relators [sic] in an unrelated action; in permitting the non performing contractors to met [sic] with a member of the Executive Branch and obtain a false and misleading witness statement for use in the U.K. Action intended to defeat proceedings of a relator; all acts having been committed after Government has declined to intervene in an action under 31 U.S.C. §3729 et seq., the Government, for the purpose of defeating plaintiffs' valid lawsuits, has committed acts in violation of 31 U.S.C. §3730, has committed a Fraud on the Court and has abused the process of the courts and defeated the purpose of the Act. (Govt's Notice of Motion, Ex. B, second amended complaint ¶41 .)

to file in *Pentagen IX*.[6] In addition, little difference exists in the claims asserted against E.F. Brasseur in the proposed second amended complaint presented to the court in *Pentagen IX* and the Complaint filed in this action. The Relators moved for reconsideration of the Opinion and Order reported at 103 F.Supp.2d 232. The Relators' request was denied in a Summary Order dated, July 19, 2000. (*See* Govt.'s Mem. Law, Ex. C.)

DISCUSSION

The False Claims Act

The *qui tam* provisions of the False Claims Act permit private parties to bring suits on behalf of the United States to enforce the Act's prohibitions against the submission of false claims to the Government. 31 U.S.C. §3730(b)(1). If a *qui tam* action has been brought, the United States must be given the opportunity to intervene and take control of the action. To inform the Government's decision whether or not to intervene, the Act requires that the relator serve the Government with a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. §3720(b)(2). The complaint must be filed in camera and is to

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[6] Even the mistakes denoted in paragraph 41 of the second amended complaint filed in *Pentagen IX,* quoted *supra* at n. 5, are contained in the Complaint filed in this action. Besides the renumbering of internal paragraphs, the only difference that exists between paragraph 41 of the second amended complaint filed in *Pentagen IX* and paragraph 102 of the Complaint filed in this action may be found at the end of each of the respective paragraphs. *Compare* Govt.'s Notice of Motion, Ex. B, second amended complaint ¶41 ("the Government, for the purpose of defeating plaintiffs' valid suits, has committed acts in violation of 31 U.S.C. §3730, has committed a Fraud on the Court and has abused the process of the courts and defeated the purpose of the Act") *with* Complaint ¶102 ("the Government, for the purpose of defeating the plaintiffs' valid lawsuits, has committed acts in violation of 31 U.S.C. §3729 and have [sic] committed overt acts to enable the Second Defendants to commit breaches of the False Claims Act set out herein").

remain under seal for at least 60 days. *Id.* The seal may be extended provided that the Government demonstrates good cause. 31 U.S.C. §3730(b)(2). Further, the complaint shall not be served on the defendants until the court so orders. 31 U.S.C. §3730(b)(2). After the Government receives the complaint and the material evidence it has 60 days to intervene in the relator's action. *Id.* Before the expiration of the 60 day period including any extensions granted by the court, the Government must either proceed with the action, or notify the court that it declines to do so. 31 U.S.C. §3730(b)(4).

*4 If the Government intervenes, and takes control of the action, the *qui tam* relator may continue as a party except that the Government may (1) dismiss the action over the objection of the person initiating the action as long as that person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion, 31 U.S.C. §3730(c)(2)(A), (2) settle the action notwithstanding the objections of the person initiating the action, as long as "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances, 31 U.S.C. §3730(c)(2)(B), or (3) seek to limit the involvement of the person initiating the action, 31 U.S.C. §§3730(c)(2)(C)-(D). Where the Government moves to dismiss, the court need not determine that the Government's decision is reasonable. *United States ex rel. Stevens v. State of Vermont Agency of Natural Res.,* 162 F.3d 195, 201 (2d Cir.1998), *rev'd on other grounds,* 529 U.S. 765 (2000), (citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir.1998) (stating that the standard applied by the district court to evaluate the government's decision to dismiss a *qui tam* suit, including a meritorious one, i.e., that the decision is supported by a 'valid government purpose' that is not arbitrary or irrational and has some rational relation to the dismissal, was a reasonable one)).

If the Government elects not to proceed with the action, it may request copies of all the pleadings filed in the action and may, upon a showing of good cause, intervene at a later date. 31 U.S.C. §3730(c)(3). However even where the Government decides not to intervene, it may still move to dismiss the relator's suit. *See United States Department of Defense v. CACI Int'l Inc.,* 953 F.Supp. 74, 77 (S.D.N.Y.1995); *see also Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 943 n. 2 (1997) (suggesting that the government need not intervene in order to move to dismiss the action); *Riley v. St. Luke's Episcopal Hospital,* No. 97-20948, 2001 WL 568727, at *3 (5th Cir. May 25, 2001) (stating that "the government retains the unilateral power to dismiss an action" (citing *Searcy v. Philips Electronics N. Am. Corp.,* 117 F.3d 154, 160 (5th Cir.1997)); *see, e.g., United States ex rel. Sequoia Orange Co.,* 151 F.3d at 1145 (" §3730(c)(2)(A) may permit the government to dismiss a qui tam action without actually intervening in the case at all." (citing *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 753 n. 10 (9th Cir.1993))).

Appointing an Independent Investigator

Relators contend that Government employees[7] were "so deeply involved" in alleged misconduct, (Relators' Nov. 1, 2000, Mem. Law at 3-4.), that the Attorney General is unable to discharge the §3730 duty to diligently investigate the False Claims Act violations contained in the Complaint[8]. In particular,

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[7] According to the Relators, the Government employees, referred to as the "Executive Group," are named in paragraph 48 of the Complaint. This paragraph, however, names no such employees, and is totally unrelated to the point for which it is cited.

[8] This Court notes that this argument contradicts Relators' earlier position contained in Relators' Oct 26, 2000, Letter at 1, where Relators argue that it is inappropriate for the "Government" to be involved in any decision making process required in this case. As will be explained in greater detail

(… continued)

Relators assert that the United States participated in the suppression of evidence relevant to the Relators' claims. (Relators' Nov. 1, 2000, Mem. Law at 5.) Relators also allege other improper conduct by Defendants in support of their request.[9] (*Id.* at 6-9) This allegedly improper conduct includes various violations of criminal statutes, and "litigation misconduct."[10] However, despite the variety of alleged misconduct cited by the Relators, the causes of action alleged against every Defendant in this action is premised solely upon the False Claims Act, 31 U.S.C. §§3729-33.

*5 To resolve the conflict Relators perceive to exist between the Attorney General's duty to investigate their claims while at the same time representing the United States and E.F. Brasseur as Defendants, Relators request that the Court appoint an independent investigator to investigate the False Claims Act violations contained in the Complaint.

(Continued…)
infra, Relators now argue that it *is* appropriate for the Government, which includes this Court, to be involved in the decision to intervene, but that it is not appropriate for the Attorney General to be so involved.

[9] Relators do not specify which of the Defendants named in the Complaint participated in the complained of misconduct.

[10] Although Relators argue that Judge Sprizzo in Pentagen IX, 103 F.Supp.2d 232, "labeled the Attorney General's conduct as 'Litigation Misconduct,'" (Relators' Nov. 1, 2000, Mem. Law at 8), a closer reading of the case suggests something altogether different. First, Judge Sprizzo dismissed the False Claims Act violations against the United States defendants since the United States has never waived its immunity with respect to such suits. Id. at 236. Then, turning to the claims alleged against the other defendants, Judge Sprizzo characterized the allegations as amounting to "litigation misconduct" and then dismissed these claims since the False Claims Act "provides no private right of action for litigation misconduct during the pendency of a qui tam action." Id. Nowhere does Judge Sprizzo suggest that any defendant actually engaged in litigation misconduct.

The False Claims Act does not provide for the participation or appointment of an independent investigator in *qui tam* actions. 31 U.S.C. §§3729-33. Relators admit as much and state that there exists no case on point that supports their request for the appointment of an independent investigator. Nevertheless, Relators propose that this Court appoint the independent investigator to discharge, pursuant to a Court Order, the Attorney General's duty to "diligently investigate" the False Claims Act violations alleged in the Complaint.

In support of their request Relators make a statutory argument that seeks to attach great significance to the Congressional decision to use both "Attorney General" and the "United States Government" in various provisions of the Act itself. Specifically, Relators argue §3730(a), the section of the Act which requires the Attorney General "diligently ... investigate violations under section 3729," does not address the Attorney General's right to become involved in *qui tam* actions under §3730(b). (Relators' Nov. 1, 2000, Mem. Law at 12.) The Relators then suggest that since §3730(b) places its primary obligations on the "United States Government" and the "Government," while limiting the obligations of the Attorney General to consenting to dismissals of False Claims Act suits, the Act contemplates that other branches of the Government will inform the Government's decision whether or not to intervene. (*Id.*) Thus, Relators conclude that they have the right to petition this Court to ensure that the Government faithfully, and without any conflict of interest, executes its duty to investigate Relators' claims. Relators also argue that this Court may rely on its inherent powers to appoint an independent investigator to assist in the determination to intervene, thus limiting the statutory duties Congress has placed upon the Attorney General. (*Id.* at 17.)

This Court finds the Relators' statutory argument unavailing. As an initial matter "it is an elemental canon of statutory

construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Pentagen IX,* 103 F.Supp.2d at 237 (internal quotations omitted) (quoting *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 488 (1996). Additionally, while the Attorney General is required to investigate alleged False Claims Act violations before the Government decides whether or not to intervene, it is clear that Congress did not intent its use of "Government" in 31 U.S.C. §3730 to include the court. 31 U.S.C. §3730(b)(4) provides that "the Government shall--(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." The above-quoted language of the Act illustrates that Congress intended the Government simply to relay its intention regarding the decision to intervene to the court, not for the court to participate in that determination.

*6 Although courts are available to litigants seeking to enforce, interpret, and apply the law, this Court rejects Relators' invitation to take the extraordinary step of interjecting itself into the elaborate procedures established by Congress to resolve and litigate *qui tam* actions. Further, the plain reading of the statute suggests that any investigation triggered by alleged False Claims Act violations is to be conducted by the Attorney General: "The Attorney General diligently shall investigate a violation under section 3729." 31 U.S.C. §3730(a). This provision applies whether the action is instituted first by the Government or by a private person pursuant to §3730(b), since the cause of action always arises under 31 U.S.C. §3729. *See* 31 U.S.C. §3730(b) (providing private person the opportunity to bring a civil action for a violation of §3729).

The primary cases cited by the Relators, which are easily distinguishable from the case at bar, do not convince this Court to utilized its inherent powers to appoint an independent investigator in this case. For example, Relators rely on *Young v.*

United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, for the proposition that in appropriate circumstances district courts may limit the role of the Attorney General. However, as even Relators acknowledge, *Young* addresses a district court's authority to appoint a private attorney to prosecute criminal contempt. As the Supreme Court explained in *Young,* Rule 42(b) of the Federal Rules of Criminal Procedure, the provision that governs contempt proceedings, requires that "when a private prosecutor is appointed, sufficient notice must be provided that the contempt proceeding is criminal in nature." *Young,* 481 U.S. at 794. The Rule 42(b) presumption that private attorneys may be used to prosecute contempt actions originates from the need of the court "to vindicate its own authority without complete dependence on other Branches." *Young,* 481 U.S. at 796. Here, there is no indication in the Act that the Attorney General's role may be limited in any way, nor is the appointment necessary for this court "to vindicate its own authority." The other case upon which Relators primarily rely, *Favell v. United States,* 27 Fed. Cl. 724 (1992), does not apply to the facts of this case. The court in *Favell* stated that "if ... an agency of the executive branch, including the Department of Justice, were to be *adjudicated by a federal court* to have flagrantly violated or abused the due process rights guaranteed under the Constitution, ... our constitutional form of government must provide for and allow a remedy." *Id.* at 750 (emphasis added). However, in this case there has been no adjudication by a federal court that any agency of the executive branch violated or abused Relators' due process rights.

Furthermore, the "sixty-day sealing period, in conjunction with the requirement that the government, but not the defendants, be served, was 'intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the

Government's interest to intervene and take over the civil action." ' *United States ex rel. Pilon v. Martin Marietta Corp.,* 60 F.3d 995, 998-99 (2d Cir.1995) (quoting S.Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* U.S.C.C.A.N. 5266, 5289). Congress thus, did not intend to limit the Government's investigation to the merits of the suit. The Government must also determine whether it is currently involved in investigating the claims in the Complaint. In addition, the Government must make the subjective determination of whether pursuing the suit is in the "Government's interest." Such determinations, are best left to the Government and not to an independent investigator appointed by this Court.

*7 Moreover, the Relators' argument for the appointment of an independent investigator rests heavily upon the perceived conflict of interest resulting from the Attorney General's duty to represent the Government as plaintiff and defendant in this case. The Relators have manufactured this conflict. After *Pentagen IX,* 103 F.Supp.2d 232, Relators were well aware that claims against the United States defendants pursuant to 31 U.S.C. §3730 are improper since "the United States has never waived its sovereign immunity with respect to [False Claims Act] suits." *Id.* at 236. Relators may not name the United States, and a government employee as defendants and then assert that an alleged conflict prevents the Attorney General from discharging its duty to diligently investigate the §3729 violations alleged in the Complaint.[11]

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[11] What's more, this Court notes that the appointment of an independent investigator to assist in the intervention decision would not cure the perceived conflict Relators seek to remedy. Even if an independent investigator were to recommend that the Government intervene, the litigation would still be conducted by the Government, and the Government would still have the right to seek dismissal of the action.

Accordingly, and for all of the foregoing reasons the Relator's request for the appointment of an independent investigator is DENIED.

Government's Motion to Dismiss the Complaint

The Government argues that the Relators' claims against all Defendants are barred by the doctrine of *res judicata.* In response, the Relators argue that the Government may not bring a motion to dismiss at this stage in the litigation, and that the doctrine does not operate to bar the claims Relators allege in their Complaint. As an initial matter, the False Claims Act allegations contained against the United States defendants must be dismissed as the "United States has never waived its sovereign immunity with respect to such suits." *Pentagen IX,* 103 F.Supp.2d at 236. Accordingly, the claims against the United States defendants are DISMISSED with prejudice. The question for this Court then becomes whether the Government may seek to dismiss the Complaint against the other Defendants at this stage in the litigation.

Relators' Procedural Challenge to the Government's Motion to Dismiss

The Relators argue that the Government may not, after the filing of its Declination, seek to dismiss the Relators' action. However, as stated earlier, the Government may move to dismiss the complaint even after it has declined to intervene.[12] The Act provides that "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action." 31 U.S.C. §3730(c)(2)(A). Before the Government may move to dismiss the action, however, the person initiating the

[12] Moreover, the Relators opposed the Government's Declination, effectively preventing any operative effect the Declination would otherwise have since the Relators' Opposition required the Court to first resolve the Relators' challenge to the Government's decision not to intervene.

action must be notified by the Government of the filing of its motion to dismiss, and the court must provide the person with an opportunity for a hearing on the motion. 31 U.S.C. §3730(c)(2)(A).

While the Second Circuit has yet to establish a standard to be applied when evaluating the Government's Motion to Dismiss a *qui tam* action pursuant to 31 U.S.C. §3730(c)(2)(A), it has, however, stated that "the court, need *not,* in order to dismiss, determine that the government's decision is reasonable." *United States ex rel. Stevens,* 162 F.3d 195, 201 (emphasis added), *rev'd on other grounds,* 529 U.S. 765 (2000), (citing *United States ex rel. Sequoia Orange,* 151 F.3d at 1145). In this case, the Government argues that the Relators' claims are barred by *res judicata.* With the decision to base its Motion to Dismiss on the legal doctrine of *res judicata,* the Government has taken a position that is inherently reasonable. Furthermore, the application of *res judicata* is an argument available to each Defendant if served with the Complaint. The Relators are not prejudiced in any way by this Court deciding the application of the doctrine now as opposed to after the non- United States defendants have been served with the Complaint. Thus, following the Second Circuit's pronouncement that district courts need not find the Government's decision to be reasonable, should the doctrine of *res judicata* apply to bar the Realtors' claims, no hearing shall be conducted.[13]

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[13] In the alternative, although not required by the Act, this Court permitted Relators to formally Oppose the Government's Motion to Dismiss. This Court's consideration of the arguments raised in the Relators' Opposition has provided the Relators with an opportunity to be heard on the Government's Motion.

Appendix D

The Merits of the Government's Motion

*8 The Government seeks to use the *res judicata* effect of Judge Sprizzo's decision in *Pentagen IX* to bar the Relators' claims in this action. Relators argue that *res judicata* does not apply because the claims raised in this action are new claims.

"The doctrine of *res judicata,* or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Monahan v. New York City Dep't of Corrections,* 214 F.3d 275, 284 (2d Cir.2000) (internal quotation marks omitted). Put another way, "upon a final judgment on the merits parties to a suit are barred, as to every matter that was offered and received to sustain or defeat a cause of action, as well as to any other matter that the parties had a *full and fair opportunity* to offer for that purpose." *Manhattan Eye Ear & Throat Hosp. v. NLRB,* 942 F.2d 151, 155- 56 (2d Cir.1991) (emphasis added) (citing *Montana v. United States,* 440 U.S. 147, 153 (1979). "Whether or not the first judgment will have preclusive effect depends in part on whether the same transactions [or connected] series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Monahan,* 214 F.3d at 285 (internal quotations omitted) (quoting *NLRB v. United Technologies Corp.,* 706 F.2d 1254, 1260 (2d Cir.1983). " 'Transaction' must be given a flexible, commonsense construction that recognizes the reality of the situation." *Id.* at 289 (internal quotations omitted) (citing *Interoceanica Corp. v. Sound Pilots, Inc.,* 107 F.3d 86, 91 (2d Cir.1997). Even claims based upon different legal theories are barred provided that they arise from the same transaction or occurrence. *See Woods v. Dunlop Tire Corp.,* 972 F.2d 36, 39 (2d. Cir.1992).

The first amended complaint ("initial complaint") that the Relators filed in *Pentagen IX,* named as defendants the United

States, Brasseur, CACI, IBM, Lockheed Martin, AT & T, PRC, I-Net, Statistica, Express, Jordan, Jordan Group, Steptoe, Koegel, Davies, and Menzies. Furthermore, the initial complaint relates to the same transactions and events that are the subject matter of this litigation. In *Pentagen IX* the Relators complained that the above-named defendants acted inappropriately during the course of litigating various actions initiated by the Relators. The section of the original complaint filed in *Pentagen IX* entitled "Factual Basis of Claim," is nearly identical to the "Factual Basis of Claim" section contained in the Complaint filed in this action. Judge Sprizzo dismissed the Relators' claims in *Pentagen IX.* Since the Relators seek to sue the same parties in this action, and since the claims relate to the same transactions and events as the claims in *Pentagen IX,* Relators' claims are barred by the doctrine of *res judicata.*

*9 Judge Sprizzo, however, not only dismissed, with prejudice, Relators' claims against the defendants named in the initial complaint, *Pentagen IX,* 103 F.Supp.2d at 234, he also denied the Relators leave to file a second amended complaint since "the federal claims asserted by such complaint would be futile." *Id.* at 237. The second amended complaint, in addition to containing claims against the defendants named in the initial complaint, also alleged claims against new defendants[14]. The Government also seeks to dismiss the claims the Relators allege against these Defendants.

In the "typical situation where claim preclusion would apply after a denial of leave to amend ... the plaintiff is seeking to add additional claims against the *same* defendant and leave to amend is denied without reaching the merits of the claim." *Northern*

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[14] Fried Frank, Boise, Borek, LeBoeuf, Johnson, Greene, and Rochez are the Defendants named in the second amended complaint which were not included in the initial complaint filed in *Pentagen IX.*

Assurance Co. of America v. Square D Co., 201 F.3d 84, 87 (2d Cir.2000). The Second Circuit explained that the decision to deny leave to amend "is not *necessary* for claim preclusion to apply." *Id.* at 88. Instead, the claim preclusion that follows from the denial of an amended complaint is usually based upon "the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event." *Id* . This Court, however, does not believe that the situation with which it is confronted constitutes the "typical situation" where claim preclusion applies. In denying leave to file the second amended complaint, Judge Sprizzo examined its contents and determined that both the reworded claims against the defendants named in the initial complaint and the new claims alleged against the new defendants were "futile." *See id.* at 237; *see, e.g., Foman v. Davis,* 371 U.S. 178, 230 (1962) (stating that leave to amend is properly denied if proposed amendment would be futile). By explicitly relying on his earlier dismissal of the Relators' False Claims Act causes of action, Judge Sprizzo in *Pentagen IX,* addressed the claims contained in the second amended complaint on their merits. *See Pentagen IX,* 103 F.Supp.2d at 237 ("Initially, plaintiffs' claims under the False Claims Act must be dismissed for the reasons stated above."); *see generally Health-Chem Corp. v. Baker,* 915 F.2d 805, 810 (2d Cir.1990) (affirming denial of leave to amend when "there is no merit in the proposed amendments"); *O'Conner v. Viacom, Inc.,* No. 93 Civ. 2399, 1994 WL 273378, at *1 (S.D.N.Y. June 17, 1994) ("If a complaint, as amended, could not withstand a motion to dismiss, the amendment would be futile and leave to amend need not be granted." (citing *Halpert v. Wertheim & Co.,* 81 F.R.D. 734, 735 (S.D.N.Y.1979)). Accordingly, the denial of the proposed amendment in *Pentagen IX* precludes the Relators from attempting to raise in this action claims which were already found to be futile. As such, the claims against Fried Frank, Boise, Borek, LeBoeuf, Johnson, Greene and Rochez are DISMISSED with prejudice.

*10 The only claims that remain in this action are those the Relators allege against Defendants Owens and Davis.[15] The factual allegations against these Defendants are contained in paragraphs 54 and 97 of the Complaint. In paragraph 54, the Relators allege that Steptoe's New York agent, Owens & Davis and Davis sent a letter to Judge Carter and to Relators containing a request to consolidate the case before Judge Carter, (Docket No. 94. Civ. 2925), with other cases involving CACI and Pentagen (the "Request"). The Plaintiffs further allege that the Request was initiated by an attorney at Steptoe and faxed to the Government in draft form. In paragraph 97 Relators allege (1) that Defendants Owens and Davis filed a pleading in *Pentagen IX* that sought to "obstruct the commencement of this action," (2) that Pentagen alerted Owens and Davis to "misleading aspects of the pleadings," and (3) that Owens and Davis should have known that the continuing use of these pleadings "amounted to knowingly obstruct[ionist] conduct, intended to handicap a relator under the False Claims Act and to assist the defendants." (Compl.¶ 97.) Relators also allege that Owens and Davis met with other Defendants and assisted in filing misleading pleadings in the New York federal courts. (Compl. ¶110.) This Court views the claims against Owens and Davis contained in this Complaint as the same type of "litigation misconduct" claim that the court in *Pentagen IX* dismissed because the False Claims Act provides for no such private right of action. Accordingly, Relators' claims against Owens and Davis are hereby DISMISSED with prejudice.

Finally, this Court notes that the Relators, through the filing of this action, have sought indirectly to accomplish what was

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[15] Relators allege that Owens is a law firm that has represented the CACI defendants "in several New York legal actions out of which this action arises," and that Davis is a partner of the firm who has filed appearances in the New York actions. (Compl.¶18.)

denied directly by Judge Sprizzo in *Pentagen IX*. Courts view such pusillanimous attempts to circumvent judicial rulings with a jaundiced eye. *See United Stated v. McGann,* 951 F.Supp. 372 (E.D.N.Y.1997). Such disregard for the decision in *Pentagen IX* provides, perhaps, yet another basis for granting the Government's Motion in this case.

Request for an Injunction

The Government has also requested that this Court enjoin the Relators from filing any new action relating to the subject matter of this suit. In their Opposition, the Relators state that this issue is currently *sub judice* before Judge Sprizzo. Accordingly, the Government's request is DENIED without prejudice at this time.

Relators' Request for Rule 11 Sanctions Against the Government

The Relators have submitted two separate motions in support of their request that this Court impose sanctions upon the Government under Rule 11 of the Federal Rules of Civil Procedure. The Court has reviewed the Relators' requests and find them to be without merit. Accordingly, the Relators' requests for sanctions are DENIED.

CONCLUSION

For all the foregoing reasons, Relators' Complaint is DISMISSED with prejudice; the Court declines to impose Rule 11 sanctions upon the Government; and the Government's request for an injunction is DENIED without prejudice at this time. The Clerk of the Court is hereby Ordered to remove the Complaint from under seal and to close the Docket in this matter.

*11 SO ORDERED.

2001 WL 770940 (S.D.N.Y.)

Appendix D

2. Memorandum Opinion of Judge Brinkema dated June 16, 1994 (E.D.Va)

United States District Court, E.D. Virginia.

CACI INTERNATIONAL INC. et al. Plaintiffs,

v.

PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., et al., Defendants.

No. CIV.A.93-1631-A.

June 16, 1994.

MEMORANDUM OPINION
BRINKEMA, District J.

*1 This matter is before the Court on motions for summary judgment. The central issue in this matter is whether plaintiffs have infringed a copyright by marketing software to a third party pursuant to a teaming agreement with the alleged copyright holder's subsidiary/licensee and the copyright holder's "successor in interest." Additionally, plaintiffs seek declaratory judgment regarding any infringement of defendants' trademark and damages for related state law claims of breach of contract, tortious interference with business relations, and defamation.

Plaintiffs moved for summary judgment on all issues pursuant to Fed.R.Civ.P. 56. Defendants filed an opposition to that motion in which they also moved for summary judgment on all issues. The Court's disposition of these matters is reflected in this opinion.

II

The ownership history of the software that is at the heart of this controversy is long and tortuous. Because this history bears on some of the issues in this matter, it will be necessary to recount it here, although every effort will be made to be succinct. The parties do not differ to any significant degree about these facts.

Appendix D

Defendant Pentagen Technologies International, Ltd. ("Pentagen") is an English corporation with an office in New York. Defendant Baird Technologies, Inc. ("BTI") is a Delaware corporation, also located in New York. BTI is the United States subsidiary of Pentagen. Defendant John Baird ("Baird") was an officer of both Pentagen and BTI during the time periods relevant to this lawsuit. He was also a developer of the MENTIX software, which is at the heart of the parties' dispute. Defendant Mitchell Leiser is a vice-president and director of Pentagen and was, at relevant times, an officer and director of BTI.

In 1989, Robert O'Brien invested in Pentagen through his company, Runaway Development Group, S.A. ("RDG"). Overall, O'Brien/RDG invested $400,000, part of which was common stock convertible into secured promissory notes of Pentagen. O'Brien exercised that option in Spring, 1990. Pentagen issued the notes which were secured by the intellectual property of Pentagen, namely MENTIX. On June 21, 1990, Pentagen assigned its patent applications to RDG. O'Brien also began acting as a director of Pentagen and BTI. Pentagen defaulted on the loan and O'Brien asserted ownership of the software through his own corporations RDG and Expert Objective Systems Development Corporation (EOSD). O'Brien also filed suit against Pentagen and BTI in New York alleging securities fraud. Pentagen counterclaimed, asserting that O'Brien/RDG converted the MENTIX software bacause the underlying security interest was void under English law which does not allow for equity interests to be converted into secured loans.

At about the same time O'Brien/RDG converted equity interest in the fledgling software enterprise into a secured loan, BTI was marketing the MENTIX software to the Army Materiel Command (AMC), which is part of the United States Government Department of Defense. From all reports, the AMC

was favorably impressed with the software, which purportedly translates programming applications from one language to another. Although the AMC expressed some interest in procuring the software, it had two notable reservations about the vendor, BTI. The first concern was that BTI had no "track record" of providing goods and services to the government, and therefore could not qualify as a "responsible party." The second concern was that BTI was a wholly owned subsidiary of an English company, and therefore its products would be difficult to procure in light of the Buy America Act. At this point BTI approached plaintiffs. CACI International ("CACI"), an international high-tech business for systems engineering and information sciences, is a Delaware corporation with its principal place of business in Virginia. CACI-Federal ("CACI-Fed") is a CACI subsidiary which focuses on systems integration, custom software development, and software engineering. BTI recognized that plaintiffs had significant experience marketing to the government and that CACI was recognized as a "responsible party." CACI and BTI, through its officer Baird and later through O'Brien, negotiated a teaming agreement under which CACI would market MENTIX to the AMC. BTI assured CACI that it had a Master Licensing Agreement with Pentagen which allowed it to license MENTIX to third parties, such as CACI and the AMC.

*2 During these negotiations two events occurred, unknown to CACI at the time, which bear on this present imbroglio. The first was Pentagen's defalcation on the O'Brien loan with the subsequent assertion of ownership rights over MENTIX by RDG. The second was Pentagen's failure to make the appropriate corporate filings in England, which resulted in the corporation being struck from the list of companies from March 1990 to September 14, 1990, during which time its assets, including the intellectual property MENTIX, was *bona vacantia,* and forfeit to the Crown.

O'Brien and BTI's counsel advised CACI that RDG was a successor in interest to Pentagen's MENTIX copyright. Having been provided with a copy of the assignment of Pentagen's rights by O'Brien, and having been informed that RDG was licensing its subsidiary EOSD to provide MENTIX for the teaming agreement, CACI amended the draft teaming agreement to reflect that change. CACI sent the revised draft to O'Brien and Baird. Baird did not respond, but O'Brien continued the negotiations. On August 15, 1990, CACI signed the teaming agreement with BTI (O'Brien signing as "acting CEO"), EOSD and O'Brien. In that agreement, BTI, EOSD and O'Brien warranted to CACI, Inc.-Federal that they had good title to or adequate rights to license MENTIX. However, later that same day, Baird told CACI that RDG did not have title to MENTIX and suggested that CACI not enter into the teaming agreement with them. CACI advised Baird that the teaming agreement had already been signed.

Concerned by this communication, CACI turned to O'Brien for assurances regarding the ownership of MENTIX and licensing capabilities of EOSD, BTI and O'Brien. O'Brien again sent a copy of the assignments. Thereafter, pursuant to the teaming agreement, CACI made a copy of the software in September 1990 and returned the original MENTIX disks to O'Brien[1].

Based on these representations, CACI proceeded to perform under the teaming agreement by sending a "white paper" to the AMC recommending a research project to develop MENTIX into a product that would serve the AMC's needs. Next, CACI prepared and presented a business proposal outlining the method

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[1] This copying was a two-step process. The first version of the software, which O'Brien sent reflected the copyright holder as Baird. CACI sought clarification and O'Brien sent new disks, which reflected that EOSD was the copyright holder.

of reengineering AMC information systems to integrate databases and modernize systems. Several meetings were held with AMC to make presentations and answer questions. At the end of September, 1991, after this work had been done, Baird again contacted CACI and disputed O'Brien's rights to MENTIX. Baird faxed to CACI a copy of the counterclaim to a suit brought by RDG against Pentagen and Baird in New York. Although CACI was referenced in the counterclaim, it was not a party in that lawsuit.

Three days later, Baird also asserted his belief that CACI was on the verge of entering into a contract with the AMC involving MENTIX, and offered to sign the teaming agreement and to provide the licensing rights for MENTIX to CACI. On October 3, CACI informed Pentagen that there was no contract with the AMC. Pentagen again offered CACI what it believed were the necessary licensing rights and indemnification should CACI wish to proceed with an AMC procurement. At that point O'Brien again assured CACI that RDG had title to MENTIX. O'Brien sent another copy of the assignments. Additionally, NSL, the owner of the software from which MENTIX was derived, informed CACI by letter that "[a]s far as we are concerned, Mr. Baird has no continuing arrangement or agreement with respect to Q'Nial."

*3 CACI discontinued all activity related to marketing MENTIX to the AMC and began its own internal review of the situation. Eight weeks later, in January 1992, CACI terminated the teaming agreement and returned its copy of MENTIX to O'Brien. Defendants have presented no evidence of CACI making any additional copies of MENTIX or of getting any contract from AMC for this project.

The next month, the U.S. Army Information Systems Selection and Acquisition Agency issued a request for proposals for the Army's Sustaining Base Information Services ("SBIS") Program. CACI teamed with IBM to submit a proposal. In July

1993, IBM was awarded the SBIS contract, and CACI currently serves as a subcontractor to IBM on that contract.

At this point CACI was drawn into the litigation quagmire surrounding the ownership of MENTIX. In July 1993 Pentagen filed suit against CACI in the Supreme Court of New York claiming conversion of MENTIX based on CACI's marketing of the software to the AMC, as well as violations of the New York Penal Code and nonexistent sections of the Virginia Code of Criminal Justice based on the same marketing activity. CACI moved to dismiss in September, and that motion was still pending when, in January 1994, the action became removable to the federal court. That lawsuit is now on the docket of the United States District Court for the Southern District of New York and the motion to dismiss remains pending.

In December 1993, Pentagen filed a complaint against CACI in federal court alleging (1) copyright infringement under 17 U.S.C. §501; (2) trademark infringement and unfair competition under §§ 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125; and (3) a violation of the Major Fraud Against the United States Act, 18 U.S.C. §1031. That complaint is based again on CACI's marketing MENTIX to the AMC and adds that CACI's use of its RENovate methodology and CACI's development of software on the SBIS contract will infringe Pentagen's copyright of MENTIX. CACI filed a motion to dismiss all counts of Pentagen's complaint on February 22, 1994.

Believing that the federal court in New York lacked jurisdiction over it and that Pentagen's claims would ultimately be litigated in the Eastern District of Virginia, CACI filed its complaint on December 22, 1993, seeking declaratory judgment regarding Pentagen's copyright infringement and trademark infringement and adding supplemental state law claims for damages arising from breach of contract, tortious interference with contract and defamation. Following this Court's ruling

denying defendants' motion to dismiss, defendant BTI failed to file an answer. An Order entering Default Judgment against BTI issued on March 17, 1994.

With this background in mind, the Court now addresses the legal issues raised in the summary judgment motions.

III

Copyright infringement

The defendant owners of the MENTIX copyright are precluded as a matter of law from establishing copyright infringement with respect to some of CACI's activity while CACI possessed the software. Registration of a copyright is a prerequisite for bringing an infringement claim 17 U.S.C. §411(a); *See Eastern Pub. and Advertising, Inc. v. Chesapeake Publ. & Advertising, Inc.,* 831 F.2d 488, 490 (4th Cir.1987). Pentagen did not register its MENTIX copyright until December 7, 1993. Additionally, the statute of limitations for copyright infringement claims is three years from the date the cause of action accrued. Because the registration did not occur until December 1993, activities that predate December 1990 are not actionable under a copyright infringement theory. Defendants argue that the Court should consider the teaming agreement and marketing to the AMC as a continuous and on-going scheme and have the later alleged acts of infringement relate back to earlier activities. This Court has rejected any application of a "rolling statute of limitations" theory under the copyright law. *Hoey v. Dexel Systems Corp., et al,* 716 F.Supp. 222, 223 (E.D.Va.1989). Therefore, activities predating December 7, 1990, are as a matter of law outside the scope of this lawsuit. Specifically, CACI's making one backup copy of MENTIX in September 1990 cannot constitute copyright infringement.

*4 This Court limits its examination of the copyright infringement question to the marketing activities to AMC that occurred after December 7, 1993 and in connection with the

SBIS contract. A claim of copyright infringement requires a showing of ownership of a valid copyright and unauthorized copying of the copyrighted work. *Avtec Systems, Inc. v. Pfeiffer,* 1994 U.S.App. LEXIS, *7 (4th Cir.1994). Although plaintiffs raise some challenges to defendants' ownership of a valid copyright, the central issue to be decided is whether marketing without actual distribution of a software package constitutes copyright infringement[2]. For the reasons set forth below, we hold that it does not.

The owner of a copyright under Title 17 has certain exclusive rights, including the right to authorize (1) the reproduction of a copyrighted work, (2) the preparation of derivative works based upon the copyrighted work, and (3) the distribution of copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, leasing, or lending. 17 U.S.C. §106. In marketing the work to the AMC, plaintiffs offered to prepare a derivative work, MENTIX-MVS. There is no evidence in the record that the derivative work was actually prepared or that MENTIX was copied (within the statutory time frame) or distributed in any respect pursuant to the AMC during CACI's marketing efforts under the teaming agreement. In rebuttal to plaintiffs' evidence that it did none of those things, defendants offer only a statement by an AMC employee that he overheard a comment related to MENTIX from which he inferred that a copy of the software had been made by CACI and provided to the AMC. Such evidence does not rise to a genuine dispute of

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[2] Plaintiff argues that during the time Pentagen was not a registered company, March to September 1990, it cannot assert ownership of the copyright because its assets were *bona vacantia* and property of the Crown. Though the intricacies of British property law as they relate to the application of copyright ownership under the U.S. Code are of keen academic interest, the Court finds that the issues in this case can be squarely addressed without resort to such Rumpolean antics.

material fact, let alone act as proof of infringement. In claiming that a mere offer to provide a derivative work of copyrighted material constitutes infringement, defendants overlook an essential element of an infringement claim: that the work was copied. A copyright holder may prove copying by showing access to the copyrighted work and substantial similarity between the copyrighted work and the infringing work. *M. Kramer Mfg. Co., Inc. v. Andrews,* 783 F.2d 421 (4th Cir.1986). Apart from the backup copy, there is no direct evidence of copying. There is no evidence in the record of a work that is "substantially similar" to MENTIX resulting from the AMC marketing efforts.

As to the SBIS contract, defendants contend that CACI's offer to provide re- engineering services through its RENovate methodology would necessarily require use of a product either derived from or substantially similar to MENTIX. CACI disputes that it had access to the MENTIX software at the time it teamed with IBM to prepare a proposal on the SBIS contract. The evidence supports CACI's assertion that MENTIX was returned the month before the government solicited SBIS proposals. Even if the Court draws the inference that CACI contemplated using a MENTIX-infringing copy or derivative in a government contract before the Army's request for proposals came out, particularly during the time before the backup copy of the software was returned, there is still no evidence in the record that CACI created a product that is substantially similar to MENTIX. Moreover, the unrebutted evidence, specifically the report of Dr. Rotenstreich, plaintiffs' expert, reflects that MENTIX (or its derivative) could not perform the reengineering offered by CACI in the SBIS project. That report also concluded that MENTIX is almost "identical" to Q'Nial and that "[a]s a software engineering tool Q'Nial can be replaced by many other tools that are much better and less expensive." Such a finding substantively undercuts defendants' arguments that a

software product developed by CACI under the SBIS contract to provide software reengineering depended on access to MENTIX or would be substantially similar to MENTIX. Therefore, the Court finds that with respect to both the AMC marketing effort and the SBIS contract proposal, plaintiffs are entitled to declaratory judgment on Count I.

Trademark infringement

*5 Plaintiffs seek declaratory judgment that their use of the word MENTIX in marketing efforts with the AMC does not constitute trademark infringement or unfair competition under 15 U.S.C. §§ 1114 and 1125. In addressing the issue of trademark infringement, the Court is without jurisdiction to look at claims arising before December 1991. Trademark infringement claims are subject to a two-year statute of limitations. *See Unlimited Screw Products, Inc. v. Malm,* 781 F.Supp. 1121, 1125 (E.D.Va.1991). Defendants allege that plaintiffs deceived the United States government by stating to the AMC that it could legally provide MENTIX software when it allegedly could not. Those proposals, however, were made before December 1991. There is no evidence in the record of activity by plaintiffs within the scope of the limitations period that could have infringed MENTIX's trademark. Therefore, this Court finds that plaintiffs are entitled to summary judgment as to count II.

Breach of Contract

Plaintiffs allege that defendants breached the teaming agreement which plaintiffs terminated on January 20, 1992. Under the terms of the August 15, 1990, teaming agreement between CACI and BTI/EOSD/O'Brien, BTI and EOSD warranted that they had good title or adequate right to license MENTIX and that they would indemnify and hold plaintiff CACI-Federal harmless with respect to infringement claims, and shall "(i) defend at its own expense, (ii) obtain through negotiation or (iii) modify the product to make it noninfringing

while preserving the original functionality, so as to enable the parties to continue using such products as originally intended under this Agreement." Pltf. Ex. 4B. Plaintiffs seek to enforce the indemnification clause against both BTI, a signatory to the agreement, and Pentagen, as the alter ego of BTI which exercised pervasive control over BTI. Plaintiffs also ask the Court to find defendants Baird and Leiser personally liable because they held themselves out as officers of Pentagen during the time Pentagen was not a corporation, which included the time the teaming agreement was signed.

The Court has already entered default judgment against BTI, requiring BTI to indemnify and hold CACI harmless with respect to the claims asserted by Pentagen. Under the terms of the May 2, 1994 Order of this Court, CACI needs to establish that: (1) Pentagen was BTI's alter ego; and (2) Baird and Leiser were Pentagen's or BTI's alter egos in order to obtain summary judgment against all three defendants.

The teaming agreement is governed by the law of Virginia. With respect to piercing the corporate veil, plaintiffs must show that BTI is "the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally and that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *RF & P Corp. v. Little,* 440 S.E.2d 908, 913 (Va.1994) (*quoting Cheatle v. Rudd's Swimming Pool Supply Co.,* 360 S.E.2d 828, 831 (Va.1987).

*6 Plaintiffs direct the Court to a number of factors in arguing that Pentagen was BTI's alter ego: the directors of Pentagen and BTI were "essentially identical", the boards of directors met simultaneously, BTI borrowed substantial sums from Pentagen which have not been repaid (because BTI is insolvent), and Pentagen owned a majority of BTI's stock. Given these facts, plaintiffs argue, the Court should find that Pentagen was the alter ego of BTI. Virginia courts are reluctant to pierce the corporate veil in contract situations. *Beale v. Kappa Alpha*

Order, 192 Va. 382 (1951); *Garnett v. Ancarrow Marine, Inc.,* 211 Va. 755 (1971). This is especially true where, as here, the two companies have held themselves out as separate entities, separate records are kept, and the formalities associated with corporate entities are observed. Moreover, under the facts developed in this record, it was BTI as controlled by O'Brien, not Pentagen, which entered into the teaming agreement. The Court, therefore, denies plaintiffs' request for summary judgment on Count III. Under the default judgment already entered plaintiffs are entitled to an *ex parte* hearing in which to offer proof of damages as to BTI.

Tortious interference with business relations

Plaintiffs claim that defendants Pentagen, Baird and Leiser have tortiously interfered with CACI's contract with IBM to perform work on the SBIS program. To prove tortious interference with contract under Virginia law, plaintiffs must show "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Doggone v. Adams,* 360 S.E.2d 832, 835 (Va.1987) (*quoting Chavez v. Johnson,* 335 S.E.2d 97, 102 (Va.1985).

Defendants do not dispute any of the facts alleged by plaintiffs. CACI teamed with IBM to perform work under the SBIS contract and is a subcontractor for the SBIS contract. Pentagen was aware of the contractual relationship between IBM and CACI, as evidenced by Pentagen's press releases of October 28, 1993 and December 10, 1993 which reference the IBM/CACI contract. There is also undisputed evidence that Pentagen communicated with other parties to the SBIS contract, such as the Army and other contractors in an attempt to interfere with CACI's contractual relationship with IBM.

Indeed, Pentagen threatened IBM, other subcontractors and the Army with litigation for associating with CACI and urged a losing bidder to pursue a bid protest of the SBIS award based on the allegation that CACI was infringing on the MENTIX software copyright.

CACI argues that Pentagen's interference was premeditated and harassing. As a result of Pentagen's action IBM advised CACI that CACI could not use its RENovate methodology on the SBIS contract without IBM's prior written authorization. Because of discovery abuses and failure to follow court orders, defendants were precluded on May 2, 1994, from submitting evidence on the issue of tortious interference.

*7 CACI has not submitted evidence that Baird and Leiser acted as other than officers of Pentagen when these interfering actions were made. All these actions were taken after Pentagen had been reinstated as a corporation. Therefore, the Court does not find individual liability on this count as to Baird and Leiser for whom summary judgment is granted. However, as to the corporate defendants, the Court finds that plaintiffs are entitled to summary judgment on Count IV in an amount to be determined at trial.

Defamation

Plaintiffs seek recovery for defamation, contending that Pentagen alleged in a press release dated September 13, 1993, and elsewhere, that CACI used and marketed the MENTIX computer software or a derivative of MENTIX as a significant component of CACI's RENovate process. This Court must follow the legal standard for defamation articulated in *Swengler v. ITT Corp.,* 993 F.2d 1063 (4th Cir.1993), which holds that under Virginia law it is defamation *per se* to prejudice a person in his trade, and that prejudice arises from statements "which cast aspersion on its honesty, credit, efficiency or its prestige or standing in its field of business." *Id., quoting General Products Co., Inc. v. Meredith Corp.,* 526 F.Supp. 546, 549-50

(E.D.Va.1981). In an October 28, 1993, press release Pentagen alleged that CACI's SBIS software bears a striking similarity to MENTIX and infringes Pentagen's copyright and trademark in MENTIX. CACI offered to allow Pentagen to review records that would demonstrate that CACI was not using MENTIX software in connection with RENovate, but Pentagen did not accept the offer. The record further reflects that Pentagen made those public statements with knowledge that they were false. Specifically, after defendant Leiser conducted his own "investigation" in September, 1993 of plaintiffs' RENovate methodology he concluded that "Renovate is a process and it is !!!!!TOOL INDEPENDENT!!!!" To put it clearly, defendants knew that plaintiffs' RENovate process did not infringe the MENTIX copyright at all before they issued press releases to the contrary. After the public allegations were made, the defendants purposefully ignored opportunities to learn the facts relevant to their allegations. Plaintiffs have established by clear and convincing evidence that defendants acted with malicious intent and are therefore entitled to punitive damages. *Swengler, supra.*

Therefore, the Court finds that plaintiffs are entitled to judgment on count V and the trial will go forward to determine the amount of compensatory and punitive damages.

1994 WL 1752376 (E.D.Va.)

APPENDIX E – ADDITIONAL EVIDENCE

1. FOIA Request dated August 24, 1993 requesting MENTIX Test Results (File Copy) and Response

PENTAGEN TECHNOLOGIES INCORPORATED
430 East 86th Street Suite 9D
New York, New Pork 10028
Tel: (212) 988-0073
Fax: (212)879-6385

August 24,1993

Edgar Brasseur
GM15 CIS
Army Materiel Command
Room 4E22
5001 Eisenhower Ave
Alexandria, VA 22333.

Dear Sir:

Re: FREEDOM OF INFORMATION ACT ("Act") REQUEST

This corporation hereby makes formal request to you to release to us, material held by any department over which you have authority, relating to the following matters that are permitted to be released to us under the Act,

This request is made for all documents, letters, presentations, records notes of meetings, communications, memoranda, or any other material, prepared or dated from June 1989 to date, that make any reference in any way to any one or more of the following:

a) CACI International Inc, or CACI-Federal, Inc,
b) Pentagen Technologies International Limited,
c) Baird Technologies Inc,
d) Expert Objective Systems Development Corp,
e) Runaway Development Group,

f) Mr Robert A O'Brien,

g) software program known as MENTIX, in any form, and

h) a software program known as RENovate, in any form.

Could you also please supply a copy of DMR 923,

Please advise us of the copying and other costs relating thereto, and forward all documents to our attorneys, Law Offices Joel Z. Robinson & Co, 110 Wall Street New York, New York, 10005-3801; Tel:(212) 344 2040; Fax (212) 344 3070: Attention Joel Z. Robinson. Please accept this letter as your authority to discuss any item relating to this request with that firm.

Thank you for you assistance in this matter.

Very truly yours

Mitchell R. Leiser

President

* * *

Department of the Army
Headquarters, U.S. Army Materiel Command
5001 Eisenhower Avenue, Alexandria, VA, 22333-0001

September 10, 1993

INCPA

Mr. Mitchell R. Leiser
Suite 9D
430 East 86th Street
New York, New Pork 10028

Dear Mr. Leiser

This office has received your request of August 24, 1993, for information under the Freedom of Information Act.

Your request has been referred to the Corporate Information Office, this Headquarters, for action.

If you have any questions regarding this matter, Mr. John M. Gorgas is the point of contact in this office and can be reached at Area Code 703-274-8019.

Sincerely

s./John M. Gorgas

For Donald P. Kirchoffner

Chief of Public Affairs

* * *

2. Letter from IBM to CACI dated November 8, 1993 re: Use of RENovate on SBIS Program

[Fax Marks at Head: Apr 20'94 10:35 FR CACI INTERNATIONAL 703 522 6895 to 202 8293654-9025 P.02/02.

Nov 9 '93 16:21 FROM DEPT 832 PAGE 002]

IBM Logo
International Business Machines Corporation
Federal Systems Company
Route 17 C
Owego, New York, 13827-1296

Letter #93-DEH-184

November 8, 1993

CACI Inc – Federal
1100 North Glebe Road
Arlington, VA, 22201

Attention: Debbie Mays, Contracts Manager

Subject: Use of CACI's RENovate (TM) on the SBIS Program

Reference:

Dear Debbie.

Even though the CACI(TM) process was described in the SBIS Technical Proposal as a re-engineering approach that could be used within the SBIS solution, IBM FSC direct that this process NOT be used for any purpose under the SBIS contract unless express written authorization has first been obtained by CACI from IBM.

Please contact me with any questions on the above.

Very truly yours

s./Dale Howell
Dale Howell

Senior Subcontract Adminstrator

[Plaintiff's Exhibit 276]

**Total Page 002 **

* * *

3. Subpoena March 24, 1994 issued to Govt. in E.D.Va Action requesting MENTIX Test Results

Attachment to Production and Inspection Command contained in Subpoena issued on Subpoena Form in CACI Intern., Inc. v. Pentagen Technologies Intern., Ltd. et al, (E.D.Va; NO. CIV.A.93-1631-A), on March 24, 1994 by PTI and addressed to Govt. (Contracts Office/Army Information System Selection Acquisition Agency, Building 220 STOP 393, Fort Belvoir, VA 22060.

Attachment A

a) All documents. relating to the RENovate product described in the SBIS Program or MENTIX product including:

b) any documents relating to the development, operation, presentation, and marketing of RENovate or MENTIX either by IBM or CACI or any other person ;

c) all documents which explain or specify a description of the product; or products to be developed by CACI and or IBM for the Software Reuse Approach (described on page 4-92 of the SBIS Work Statement), the Reengineering Methodology (p 4-137) or the Conversion Methodology(p 4-141) and the design or development discussion(p 4-149) any other work performed or to be performed by CACI and/or IBM relating to the Software Reuse Approach, the Reengineering Methodology, the Conversion Methodology or the design or development discussion for the SBIS Proposal or described as to developed or performed in the SBIS Work Statement that is patterned on the RENovate process and that can achieve the results claim or otherwise;

d) all documents which explain or specify the description or descriptions of the two or more products developed or used by CACI and others for the Air Force Combat Ammunition System and the Air Force Standard Supply System that demonstrated substantial benefits to DoD from reuse referred to on pages $4-95 and 4-139 of the SBIS Proposal;

e) all documents which describe in detail any protected or copyrighted interest claimed by CACI in the material presented to Army Material Command in 1990 and 1991 or for the SBIS Program;

f) all documents that describe any products available commercially or otherwise referred to in the SBIS Program which execute on a program which runs POSIX compliant UNIX;

g) all documents, that describe any products referred to in the SBIS Program which execute on a platform that is compliant with FIPS-151-I POSIX;

h) all documents that describe any products referred to in the SBIS Program which generate ADA compliant with FIPS 119; and

i) all documents relating to either Runaway Development Group S.A., Robert A O'Brien, Expert Objective Systems Development Inc, Thomas M. Marshall, Robert S Pollock, John C. Baird, Mitchell R. Leiser, Pentagen. Technologies International Ltd, Baird Technologies Inc, N.S.L. Ltd, United states Army Material Command, or Russell Vanardo which make reference to MENTIX, CACI or RENovate,

2. All reports, evaluations, reviews, assessment, and opinion made by or for IBM or CACI or DoD regarding MENTIX, RENovate or any other Software Reuse Approach, Reengineering Methodology, Conversion Methodology or the design or development discussion for the SBIS Proposal or described as to developed or performed in the SBIS work`statement that is patterned on the RENovate process and that can achieve the results claim or otherwise related product referred to in the SBISProgram.

3. All documents relating to any and all marketing efforts .to DoD or others relating to the CACI or IBM RENovate or similar products or any products patterned thereon.

4. All documents accompanying the delivery of any product to be delivered under the SBIS Contract,

5. A copy of any product owned, used by licensed by or to CACI or IBM or DoD referred to above or which are or were marketed by or used by CACI or IBM in any presentation made by CACI with IBM/Loral to DoD including but not limited to computer software, source code, executable object code and the system documentation and related information.

6. All background material provided by CACI and/or IBM on the RENovate or MENTIX product.

7. All marketing material relating to RENovate or MENTIX received prior to the issuance of the Request for Proposal for the SBIS Program or prior to the letting of the SBIS contract.

Appendix E

8. List of any or all Government personnel who were involved with the marketing of RENovate by CACI or IBM under the SBIS program,

9. List of any and all IBM personnel who were involved with the marketing of RENovate by CACI or IBM to SBIS for the SBIS program.

10. Any written description of the solicitation of products, methods and services issued prior to or as part of or to be delivered as compliance with the SBIS program.

11. Documents describing the performance, testing, planned or performed, undertaken prior to, during, or after issuance of the SBIS contract, which verified CACI's and IBM's claims that are or were based on the product patterned on RENovate as set out in the SBIS Work Statement.

12. Documents showing that CACI had complied with the software compliance requirements of the Request for Proposal, and any and all documents supporting the technical review.

13. All documents which described how the services required to be performed by the software patterned on CACI's RENovate process were performed prior to the SBIS contract.

14. Documents describing the form of inducement thee was given by CACI, IBM or any other person, to the Army or DoD, that encouraged SBIS to let the SBIS contract to IBM using CACI's products patterned on CACI's RENovate product.

The SBIS Propasal made by I.B.M. and / or CACI responsive the SBIS Proposals Preparation Numbered paragraph 1.4.4. (Software Development Methodology Plan) 1.4.5.7 (Software Organization and resource Management), 1.4,5.8 SBIS Subcontracting Management Plan, and 1.4.6. Software Capability Evaluation (SCE)

Appendix E

Certificate of Service

I hereby certify that a true copy of the foregoing be served upon:

Christian R. Bartholomew
J. William Koegel, Jr,
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington D.C. 20036

by first class mail, postage pre-paid with a copy via fax to Fax number (202) 429-3902, this 28 th March, 1994

s./J.Z.Robinson

4. Letter from FBI to Counsel dated May 24, 1994 re DoJ's Investigation Activities

[Logo]
U.S. Department of Justice
Federal Bureau of Investigation
26 Federal Plaza
New York, New York 10278

May 23, 1994

In Reply, Please Refer to
File No.

Joel Z. Robinson
Attorney at Law
27th Floor
110 Wall Street
New York, New York 10005-3801

Re: CACI INC.
1100 North Gleve Road
Arlington, VA 22101

Dear Mr. Robinson:

On May 18, 1994, Supervisory Special Agent Robert E. Lee, Jr. of our Office met with Assistant United States Attorney (AUSA) David Koenigsberg of the Civil Division, Southern District of New York. Mr. Koenigsberg is charged with the responsibility of determining whether or not the United States Government will represent its own interest in civil action initiated by you as 94 CIV 2925.

After meeting with AUSA Koenigsberg, Supervisory Special Agent Lee found that the steps to be taken by AUSA Koenigsberg in determining the need for government intervention are the same as would be taken by our Office during the course of our preliminary inquiry. Since your suit is restrained by certain elements of confidentiality and since Civil Division is most appropriately suited to answer your suit, the FBI will be taking no further action, unless requested to do so by Mr. Koenigsberg or his office.

Joel Z. Robinson

Thank you for the opportunity of meeting with you. We appreciate your concerns in this matter.

Very truly yours,

WILLIAM A. GAVIN
Deputy Assistant Director

By:s./Timothy C. Dorch
TIMOTHY C. DORCH

Assistant Special Agent in Charge

5. "Gag" Letter from U.S. Attorneys' Office (SDNY) to Counsel dated June 16, 1995

(Logo)
U.S. Department of Justice
United States Attorney Southern District of New York
100 Church Street
New York, New York 10007

Appendix E

June 16, 1995

Joel Z. Robinson, Esq.
Law Offices of Joel Z. Robinson & Co.
67 Wall Street
New York, New York 10005-3101

Re: Pentagen Technologies Int'l v. CACI Int'l Inc.
94 Civ. 2925 (RLC)

Dear Mr. Robinson:

This letter relates to your recent efforts to arrange a meeting with U.S. Secretary of Defense William J. Perry "to establish the [Defense Department's] position on certain issues that are the subject" of the relator's pending application for a preliminary injunction in the above-captioned action. Plaintiff-Relator's Memorandum in support of Temporary Restraining Order and Further Preliminary Injunction, p. 3 (June 12, 1995).

Please be advised that because there is pending a litigation that you have initiated, all communications with any Government employee concerning the lawsuit should be conducted through the undersigned, the attorney for the Government assigned to represent the Government with respect to the above-captioned action. Although the Department of Justice has declined to intervene in the above-captioned qui tam action and the relator may proceed to assert a right of the United States in the lawsuit, the Department of Justice nevertheless continues to represent the interests of the United States with respect to the matters at issue in the suit. See, e.g., 31 U,S.C. S 3730(b)(1) (qui tam suit may be dismissed only upon consent of the Court and the Attorney General); § 3730(b)(4) (B) (if Government declines to intervene, relator has right "to conduct the action"); § 3730(c) (3) (same); id. (Government may intervene after it initially declined to do so). Accordingly, this Office requests that in the future you notify the undersigned in the event that you wish to communicate with any Government

employee with respect to this matter. See N.Y. Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1).

In addition, by letter dated June 13, 1995, you presume to instruct me not to communicate with the defendants or their counsel in this case and that all communications between the parties should be directed through you and your office. For the reasons stated above, your demand is baseless and rejected. The Department of Justice reserves the right to communicate with any person or party concerning the matters at issue in the above-captioned action.

Very truly yours,

MARY JO WHITE
United States Attorney

By:s./David A. Koenigsberg
DAVID A. KOENIGSBERG
Assistant United States Attorney

Telephone: (212) 385-4471

cc: All Named Defendants listed on the attached (not included)
Hon. William J. Perry
David T. Cohen, Esq.
Lt. Col. Craig Wittman
Richard McGinnis, Esq.

6. Excerpt from amicus curiae brief submitted by Govt in support of IBM Team on June 26, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA BY
THE DEPARTMENT OF DEFENSE AND

PENTAGEN TECHNOLOGIES
INTERNATIONAL LIMITED

Appendix E

Plaintiff

-against-

CACI INTERNATIONAL INC et al

Defendants

----------X

AMICUS CURIAE UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN OPPOSITION TO INJUNCTIVE RELIEF

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for the United States
Of America

-Of Counsel-
DAVID A. KOENIGSBERG
Assistant United States Attorney

…

FACTUAL BACKGROUND

Pentagen has asked the Court to enjoin the defendants, in particular Loral, from being paid under the SBIS contract or from performing under the contract. The Army's SBIS contract was awarded to IBM Federal Systems Company ("IBM") in June 1993,.... Loral later acquired IBM Federal Systems, and Loral Federal Systems, a subsidiary of Loral, became the prime contractor. …

The purpose of the SBIS program is to acquire and implement an automated information systems infrastructure for the Army's business process information operations that will operate in an Open System Environment. ... SBIS is the Army's largest effort to automate and modernize its business processes. The program's goal is to increase the Army's efficiency at a time of diminishing personnel and financial resources… The

3

contract calls for the supply of commercial, off-the-shelf computer hardware and software, computer maintenance, training, program management, engineering services, and software development…

The initial phase of the contract entails the development of seven systems, known as Increment 1. … Testing of Increment 1B is scheduled for completion in the second quarter of the 1996 fiscal year, which begins on January 1, 1996. …

4

…

B. The Public Interest Weighs Against Granting An Injunction

11

…

Contrary to Pentagen's claims, the public interest will be seriously harmed if an injunction is granted. An injunction in this case would likely mean the termination of the SBIS contract. ... This outcome would harm the Government because there would be an indefinite and costly delay to the Army's effort to upgrade and modernize its information services systems. ... Thus, notwithstanding the problems that Pentagen claims have caused costs to increase for the SBIS program, an injunction blocking further performance on the contract would force the Government, and the taxpayers, to incur additional and substantial unnecessary expense. The Army would continue to be saddled with its present outmoded information services system, and would have to pay even more at some future time to achieve the modernization the SBIS contract is intended to provide.... The public interest lies in ensuring that the SBIS program is not further delayed and that the Army is not forced to incur additional expense and be faced with disruptions to its field operations.

Pentagen's vague claim of theoretical harm to the public interest is far outweighed by the Government's and the public's interest in seeing that the partially completed SBIS contract continues without interruption…

12

…

Dated:New York, New York
June 26, 1995

Respectfully submitted

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for the United States
Of America

By:s./David A. Koenigsberg
DAVID A. KOENIGSBERG
Assistant United States Attorney

100 Church Street, 19th Floor
New York, New York 10007
Telephone: (212) 385-4471

7. Material re: Fried Frank false statement to Judge Sweet dated December 6, 1996

Clerk's Certificate for
Default against Defendants IBM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA by	:
THE DEPARTMENT OF DEFENSE and	:
PENTAGEN TECHNOLOGIES	:
INTERNATIONAL LIMITED and	:
RUSSELL D. VARNADO	:

Appendix E

Plaintiffs,	:	FILE No.
	:	98 CIV. 7827
-against-	:	(RWS)
	:	
CACI INTERNATIONAL et al	:	
First Defendants	:	
	:	
INTERNATIONAL BUSINESS	:	
MACHINES CORPORATION et al	:	
Second Defendants	:	

----------X

CLERK'S CERTIFICATE FOR DEFAULT
AGAINST DEFENDANTS IBM

I, James M. Parkison, Clerk of the United States District Court for the Southern District of New York, do certify that this action commenced on October 16, 1996, with the filing of a summons and complaint; a copy of the summons and complaint was served on defendant INTERNATIONAL BUSINESS MACHINES CORPORATION. ("IBM"); a copy of the summons and complaint was served on the defendant IBM on November 15, 1996 by personal service on Mr Plate, a manager of IBM, and a proof of service having been filed on November 19, 1996.

I further certify that the docket entries indicate that Defendant IBM has not filed an answer or otherwise moved with respect to the Complaint herein. The default of the Defendant IBM is noted

DATED: New York, New York
December 6, 1996

JAMES M.PARKISON
Clerk of the Court

By: s./ Robert H. Donovan
Deputy Clerk.

Appendix E

Statement for Default against IBM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA by	:	
THE DEPARTMENT OF DEFENSE and	:	
PENTAGEN TECHNOLOGIES	:	
INTERNATIONAL LIMITED and	:	
RUSSELL D. VARNADO	:	
Plaintiffs,	:	FILE No.
	:	96 CIV. 7827
-against-	:	(RWS)
	:	
CACI INTERNATIONAL et al	:	
First Defendants	:	
	:	
INTERNATIONAL BUSINESS	:	
MACHINES CORPORATION et al	:	
Second Defendants	:	

STATEMENT FOR DEFAULT
AGAINST DEFENDANTS IBM

Principal amount sued for	$458,516,262.00
Interest at 9% from October 16, 1996 through December 6, 1996	$5,765,998.80
Costs and Disbursements:	
Clerk's fee	$120.00
Process Server fee for service	$95.00
Statutory fee	$20.00
Total (as of December 6, 1996)	$464,282,495.80

Appendix E

Letter from Fried Frank dated December 6, 1996 to Judge Sweet requesting extension.

1

Fried, Frank, Harris, Shriver & Jacobson

…

One New York Plaza
New York, New York 10004-1980

…

Writer's Direct Line
212-859-8067
(FAX: 212)859-8584

December 6, 1996

BY FACSIMILE

Hen, Robert W. Sweet
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: U. S.A. and Pentagen Technologies Int'l
Ltd v. CACI Int'l Inc, et al.,
96 Civ 7827 (RWS)

Dear Judge Sweet:

This firm is counsel for defendants Lockheed Martin Corp. ("Lockheed") and International Business Machines Corporation ("IBM'') in the above action. ...

Accordingly, it appears that IBM's deadline to respond was yesterday, December 5. .... my firm did not learn of that service and the complaint was not provided to us until today. ... John T. Boese, Esq., a partner of this firm resident in our Washington Office, is in charge of and will be personally handling this matter. …

…For all of these reasons, I respectfully urge that the Court grant the requested extension.

Respectfully yours

s./ John A. Borek
John A. Borek (JB7128)
Managing Attorney

…

Fax from Govt to Fried Frank dated November 1, 1996 enclosing copy of Complaint in action, produced to PTI by Govt in response to FOIA Request of May 27, 1997.

FACSIMILE COVER SHEET
U,S, ATTORNEY'S OFFICE S.D.N.Y.
100 Church Street, 19th Floor
New York, New York 10007

****

From: DAVID A. KOENIGSBERG
Office phone No.: (212) 385-4471
Fax No.: (212) 385-6252
No pages (including cover sheet): 34
Date: November 1, 1996

****

…

****

Name	Fax Number
1. John T. Boese, Esq.	202-639-7003

Remarks: U. S. ex rel. Pentagen & Varnado v. CACI, 96 Civ 7827 (RWSweet)

0000094 RIF

Appendix E

…

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA by	:	
THE DEPARTMENT OF DEFENSE and	:	
PENTAGEN TECHNOLOGIES	:	FILE No.
INTERNATIONAL LIMITED and	:	96 CIV. 7827
RUSSELL D. VARNADO	:	(RWS)
Plaintiffs,	:	
	:	
-against-	:	COMPLAINT
	:	
CACI INTERNATIONAL	:	JURY TRIAL
CACI SYSTEMS INTEGRATION, INC	:	DEMANDED
CACI INC–FEDERAL	:	
First Defendants	:	
	:	
INTERNATIONAL BUSINESS	:	:
		STAMPED
MACHINES CORPORATION	:	"Copy
	:	Received
LOCKHEED MARTIN CORPORATION	:	Oct 16, 1996
	:	USAttorney
AT&T COMPANY	:	SDNY"
	:	s./MBermdez
PRC INC	:	
	:	
I-NET INC AND	:	
	:	
STATISTICA INC	:	
Second Defendants	:	

Plaintiffs, Pentagen Technologies International Ltd, ("Pentagen") and Russell D. Varnado ("Mr Varnado"), by their attorneys Law Offices Joel Z. Robinson & Co, for the benefit of the United States of America by the Department of Defense avers as follows as their Complaint

1

0000097 RIF

…

* * *

8. Statement made by Govt. on March 4, 1999 in United States Court of Appeals for the Federal Circuit Docket No: 99-5133 in Washington D.C. in Pentagen Technologies International Limited v. United States:

…

8

MR. BARRET: The letter is quite confusing. It is very broad. It is a very broad demand. It is, I believe, a demand for all use of the software and, I am not sure, Your Honor, to be honest, but I believe CACI, if there was this second or first evaluation, I believe it was involved in that one, too…

9. Conflicting Evidence Filed in English High Court Action

Letter from AMC May 17, 1990:
MENTIX Evaluation.

DEPARTMENT OF THE ARMY
U.S ARMY MATERIAL COMMAND
AMCIM-RB

17 May 90

Memorandum for Baird Technologies
(Attn: Mr Robert S. Pollock, President)

Subject: Information Concerning the evaluation of MENTIX

Appendix E

1. With reference to the evaluation of MENTIX that was loaned to us I would like to report on my team's experience with your product.
2. We chose a known application in our systems development group to be the productivity improvement claims of your MENTIX product. The chosen application was recently completed using our conventional software in 4.2 months. By the way, the four manual included with the software were most complete and very easily understood by members of my team. In fact, one of the team members commented on the time you must have spent to develop and validate the documentation to the MENTIX software. I was personally amazed to find that we did not need personal or telephone support from you in order to learn MENTIX and that we commenced this undertaking on our own, no contractor support, and completed this application successfully in 2.8 weeks. This is a direct contrast to the doubts I had during my visit to your offices earlier this year.
3. The staff also reported that what they liked about MENTIX was the ease of use, the fact that it's a highly predictable environment and the high productivity resulting in having to use only a fraction of the lines of code normally needed by alternative solutions.
4. Our evaluation platform, the AVION workstation, was a very good simulation of the normal UNIX area, but we would like to encourage you to port MENTIX to a platform equal to our IBM and all 3090 main frame platform. We base this on the current consolidation/migration strategies that require the move or revitalization of the old COBOL to either new COBOL or to ASMI standard. Although I have no authority to commit the Army, once you have accomplished this, I feel relatively secure that the Army will become a major client.

5. I was also very impressed with the performance gain displayed by the application development in the MENTIX environment.
6. Point of contact for this action, Mr. Russell D. Varnado; commercial phone number, (703)274-8325.

s./ Russell D. Varnado
Russell D. Varnado,
Chief of Plans Branch,
Resource and Plans Division.

* * *

CACI's Internal Memo dated 30 March 1990 re visit and assessment of MENTIX.

Sanitized for External Use

MEMORANDUM

Date: 30 March, 1990

To: ...

From: Larry Dean [of CACI]

Subj: Visit to Baird Technology Inc and Assessment of Their Products

…

2. There were three focuses to our visit:

- Look at and explore the potential valuer of BTI's current and evolving products (Mentix, Genotype);

…

The potential for [MENTIX and Genotype] is truly mind-boggling. Inasmuch as it sits atop an object oriented database management system, and the product provides the capability to use its imbedded computer language to build other languages, it would be an effective environment in which to design and develop software for parallel-processing. The range of

automatic source language translators which can be constructed to migrate existing applications into the higher-productivity environments of object-orientated software designs residing in CASE environments, alone, makes this a leading edge capability-one which is not currently possessed by any other tool vendor.

…

It can be coupled to numerous CASE environments which will generate application code that is a function clone of the original source code implementation. This type of integrated CASE ReEngineering tool suite will open up the entire existing applications market for cost effective modernization regardless of the motivation to do so. Moreover, there is no competing technology for this capability available which is independent of both the current and target application systems computing platforms. This could be a real money-maker....

CACI's White Paper to AMC
Presented October 1990

FACILITATING THE GOAL OF MODERNIZING
THE ARMY MATERIAL COMMAND'S
MISSION SUPPORT SYSTEMS
BY THE END OF FY92

A WHITE PAPER BY
CACI, Inc - FEDERAL

Background

The DOD has directed the individual services to develop plans for either modernizing their mission support systems, or transitioning the source form of these application systems to the Ada programming language. Each service is operating under a different deadline for achieving this outcome. The U.S. Army Information Systems Command (ISC) must accomplish this action by the end of FY92.

Appendix E

The Plans and Programs and Architecture and Resource Division of AMC-ISCR has responsibility for development of a cost-effective action plan to achieve the all-Ada software environment or, alternatively, to modernize their existing software. There is also interest in tying their Business and Research Systems together.

The Issues

All new application development projects will be accomplished using the Ada language and its associated programming support environment(s). Major modifications to existing applications, which have a net result of rewriting/modifying in excess of half an existing system, will be evaluated for complete rewrite into the Ada language (with attendant additional cost).

Existing mission support systems are written in a variety of source languages which include various versions of COBOL, (90%) FORTRAN (5%), PL-1 (5%), and Assembly languages. This further complicates planning for "pure" language-to-language translations to migrate to Ada,

Mission support systems within the AMC reside on numerous types and models of hardware platforms. The majority of the software resides on the IBM 3090 class of computing platform, of which over 150 are in operation at various sites throughout the command.

Current and forecasted ADP personnel levels are not sufficient to sustain both software/systems maintenance and modification as well as the actions necessary to either modernize or convert existing applications to Ada unless methods are found to "Work Smart". "Working Smart" demands the infusion of new methodologies and technologies which result in near-term , or immediate productivity gains of ADP personnel.

Aside from doing nothing, the choice of actions which are readily available to the ISC are:

- Redesign and Rewrite
- Reverse Engineer
- Redevelop/Resystematize
- Reengineer

Without achieving productivity gains several orders of magnitude greater than the current staff productivity, only the "do nothing" option is viable without obtaining additional personnel resources through procurement action.

A redesign and rewrite approach to achieving an all-Ada software environment is prohibitively costly, and probably cannot be accomplished in the time remaining between now and the end of FY92.

Reverse engineering of existing source code into Ada via translation process cannot be accomplished in a totally automated fashion and will require significant personnel resource expenditure to accomplish. Once accomplished, the result leaves the software maintenance staff with all the same obstacles under which they operate today - unstructured, poorly documented systems which do not exist within .any type of software engineering environment (CASE- environment) and cannot be adapted/changed in any responsive, predictable fashion.

Among the alternatives available, only those of redevelop/ resystematize and reengineer appear to be viable. Reengineering all the existing mission support systems currently in use within AMC is probably the "best" of the alternatives available, however, the size and cost of this alternative renders it an unlikely choice for achievement by FY92's end . Reengineering could be selectively applied to systems which either require frequent modifications. or which are being considered for major enhancement or modifications,

The remaining alternative, redevelopment/resystematization, could be achieved if two things happened, First, a "Work Smart' technology/methodology must be identified, which can be hosted on AMC-owned computing platforms. That technology/methodology must provide a quantum leap in productivity for the current and forecasted levels of ADP personnel. Second, a "work Smart' technology /methodology must be simple enough that it can be learned quickly in order to rapidly realize the associated productivity gains.

Potential Solutions

Recently, the AMC DCS-IM concluded an evaluation of a new technology called MENTIX. MENTIX is a proprietary product of Expert Objective Systems Development, Inc - a small high technology firm specifically incorporated to license and support MENTIX and other software. The MENTIX product is a total application environment which encompasses a multiparadigm high level language. To evaluate this product as a potential technology which might provide a suitable redevelopment/ resystemization environment, an evaluation copy was obtained and used in a "dual" application development study. A 4-man team of Army personnel developed an application using current technology and methods. The same team then developed the same application within the environment provided by MENTIX.

Extremely encouraging results were obtained. The test application was developed by the team using traditional methods and technology in just over 4.2 months. The same application was developed in MENTIX in just over 2.8 weeks. During the development in the MENTIX environment, the team did not receive any outside assistance from the product's proprietor, nor did they receive any prior training and familiarization. The documentation accompanying the product was the only source of technical/user information available to the team. Subsequent performance evaluation of the relative performance of each of

the two applications developed indicated that the version produced in the MENTIX environment performed noticeably better than the version produced using traditional technology.

While this experience was slightly skewed in favor of the MENTIX experience (the team already being familiar with the application to be developed), the apparent productivity gain in excess of 6:1 warrants further exploration. Additionally, the product proved relatively easy to learn and use, without a lengthy learning period. On the down side, the MENTIX implementation used in this evaluation was on an AVION/UNIX-OS workstation - presently there is no version which will host on AMC's principle platform, the IBM 3090.

Conclusions

MENTIX could provide the environment necessary for AMC to accomplish modernization of its mission support applications within the timeframes set forth by current policy. EOSD is willing to undertake the delivery of a MENTIX-based prototype application which will. clearly demonstrate a low-risk, cost-effective approach to incremental modernization of existing mission support systems. The initial estimate of the time necessary to develop and deliver the prototype application if between four and six months.

There are several factors which must be considered regarding the assessment of whether or not a small, firm like EOSD could successfully deliver the prototype project described herein. Chief among these concerns is whether or not they are financially strong enough to sustain the effort. The management of EOSD is well, aware of this concern and to overcome it, have established a strategic alliance with CACI. Inc, -Federal. CACI is an established firm which regularly undertakes software conversion, reengineering, and systems integration projects. CACI possesses sufficient corporate resources to ensure successful completion of a project of this nature, when teamed with EOSD. CACI looks for opportunities such as this, where

the edge of technology can be advanced. CACI is not only willing to lead the prototype development project, but is also confident that the project can be completed within the 4-6 month project duration estimate.

CACI is in the process of consummating a cooperative arrangement with the Tennessee Valley Authority (TVA) to undertake research and development projects under the TVA's 1932 charter, which among other provision, permits them to do work-for-others in the conduct of prototypical and R&D efforts which contribute to the overall posture of our national defense. The contract work necessary to develop the MENTIX-based prototype application could be accomplished through that relationship, especially since the TVA will also benefit from having access to the MENTIX derivation for use in their own software modernization efforts.

Recommendation

The U.S. Army Material Command, in concert with the Information Systems Command, fund and sponsor a MENTIX-based prototype project to modernize an existing AMC application which will execute on the IBM 3090 platform. Further recommend that the TVA be explored as the agency through which the project be contracted.

* * *

CACI Briefing to AMC on August 5 1991
Using MENTIX with RENovate

CACI, Inc

Briefing to AMC

Regarding

A Proof-of-Concept Reengineering Project

To

Prove a Business Case for the Incremental Reengineering of AMC's Mission Essential Software Systems

…

Estimated Proof of Concept RENovation and Implementation Costs [in box presentation format]

[Box 1]

Original Proposal: using Oracle DBMS

RENovation

MVS Oracle DBMS Suite	216.2 K
3B2 Oracle DBMS Suite	12.8 K
Mentix for MVS (Dev Suite)	220.0 K
Ada Environment for 3B2	10.0 K
DOS CASE Tool	3.0 K
Labor	500.0 K
P-O-C- RENovation Sub Total	962.0 K **

Deployment

Oracle Run-Time for MVS (10 sites*)	1.6 M
Mentix Run Time (10 Sites)	500.0 K
Total REVovate and Deployment Cost	2.47 M

[Box 2]

Alternate Proposal: using Datacomm/DB DBMS

RENovation

3B2 Oracle DBMS Suite	12.8 K
Mentix for MVS (Dev Suite)	220.0 K
Ada Environment for 3B2	10.0 K
DOS CASE Tool	3.0 K
Labor	500.0 K
P-O-C- RENovation Sub Total	745.8 K **

Deployment

Mentix Run Time (10 Sites)	500.0 K
Total REVovate and Deployment Cost	1.25 M

* Assumes no Economies associated with Data Center Consolidations

** Proof of Concept (P-O-C) includes $171.8 Costs Associated with Demonstrations of migration to Ada Language and Unix Platform.

* * *

Govt 1996 Witness Statement filed in English Action

IN THE HIGH COURT OF JUSTICE 1993-P-No. 1802
QUEEN'S BENCH DIVISION

BETWEEN:

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED

Plaintiff

-and-

JORDAN & SONS LIMITED

First Defendant

-and-

JORDAN GROUP LIMITED

Second Defendant

CONSOLIDATED PURSUANT TO THE ORDER OF MASTER HODGESON DATED 18TH OCTOBER 1993

IN THE HIGH COURT OF JUSTICE 1990-P-No. 469

QUEEN'S BENCH DIVISION

BETWEEN:

PENTAGEN INTERNATIONAL TECHNOLOGIES LIMITED

Plaintiff

-and-

EXPRESS COMPANY SECRETARIES LIMITED

Appendix E

Defendant

WITNESS STATEMENT OF E. F. BRASSEUR

I, E.F. Brasseur of Alexandria, Virginia, WILL SAY as follows:

1. I am employed by U.S. Army Materiel Command ("AMC") as DCS Corporate Information, a position that I have held since March 1996. 1 began my employment in the AMC in March 1980.
2. During the period of 1988 to 1993, I was assigned to the Division Chief Plans and Resources Department within the AMC. My position was Chief, Plans and Resources Division. At that time I was the immediate supervisor of inter alios Russell Varnado. Mr. Varnado was a civilian whose position was a technical adviser although he, himself, was not responsible for undertaking technical evaluations. Mr. Varnado had absolutely no responsibility for the allocation or procurement of funding for contracts with the AMC, or for the awarding of contracts with or by the AMC.
3. The procedure involved in acquiring a contract with the AMC, as with any other Army Contract, is a very complex one which can be drawn out over many months or years. It would be practically impossible to describe how the process works in every situation. A crucial factor which is present in every contract with the AMC, however, is the availability of financial resources.
4. It was my duty to allocate funds from the Department of Defense's AMC budget for contractors whose proposals satisfied the AMC's technical criteria.
5. Before I would allocate funds to a project or award a contract, I would require a technical evaluation. If that technical evaluation demonstrated that the proposal did not meet the AMC's requirements, then I would not give

approval for funds to be allocated or for a contract to be awarded. That would have been the end of the matter, as far any project proposal submitted to the AMC was concerned, and no contract would have been concluded.

6. I recall attending a meeting regarding MENTIX at which a presentation was made by Mr. Baird or Mr. Leiser of BTI during the 1990 time frame. At the time the AMC's programs were written in the COBOL programming language. The AMC wanted to convert COBOL to ADA, another computer language. MENTIX was represented as capable of doing this. Further, any proposal to use computer software had to be compatible with the AMC's existing framework This meant that MENTIX had to be able to port to our IBM 3090 platforms.

7. A technical evaluation was undertaken by appropriate AMC personnel. I was subsequently informed by those personnel that MENTIX could not sufficiently translate COBOL to ADA. As a result of that evaluation, I directed Mr. Varnado to inform CACI or BTI that AMC was not interested in pursuing MENTIX. That was the end of the matter as far as I was concerned.

8. Subsequently, a proposal was put forward by CACI involving MENTIX. The AMC, however, never allocated, set-aside or earmarked any funds for that proposal or in any other way relating to MENTIX

9. In the Autumn of 1991, Mr. Leiser telephoned me. He enquired as to the status of the AMC Contract with CACI using MENTIX I told him that there was no such contract nor would there be. I remember telling him that Mr. Varnado should have told him this. Mr. Leiser seemed to be flabbergasted by this news. He said that Mr. Varnado had not informed him that this was the case. I told him that Mr. Varnado had not mentioned any further developments on

the CACI proposal to me since I had already rejected the proposal on behalf of the AMC.

10. I was unaware that there was a title dispute regarding MENTIX between members of BTI. I have never heard of Pentagen, the plaintiff in these proceedings.

I have read this statement and confirm that its contents are true to the best of my knowledge and belief.

DATED: 14 August, 1996

SIGNED: s./ E.F. Brasseur
E. F. BRASSEUR

* * *

Letter from Steptoe & Johnson to Counsel, April 25, 1997 re Brasseur Evidence and containing "bcc:" listing:

STEPTOE & JOHNSON LLP

…

J. William Koegel, Jr

(202) 429-6408

24 April 1997

Re: CACI International Inc, et al., v. Pentagen Technologies International Ltd et al., (No.93-1631-A; E.D.Va.)

Dear Joel:

This letter is to respond to your letter of April 21, 1997. You assert that Mr. Brasseur's reference to the AMC's evaluation of MENTIX, which established that MENTIX could not translate COBOL to Ada "must have been referring to another failed evaluation made after Mr. Varnado's evaluation because Mr. Varnado had reported on May 17, 1990 that his evaluation had been a success."

First, the record evidence referenced in my letter of April 14, 1997, particularly Mr. Vamado's testimony, established that the AMC performed only one evaluation of MENTIX. That evaluation, again according to Mr. Varnado showed that MENTIX could not translate COBOL to Ada. See 4/15/94 Varnado Dep. at 61-62. This testimony alone establishes that Mr. Brasseur and Mr. Varnado are talking about the same AMC evaluation of MENTIX

Your suggestion that there was another, subsequent evaluation of MENTIX, and that CACI was somehow involved is contradicted by the unrebutted Dean Affidavit which established that CACI never provided MENTIX to the AMC. …

Joel Z. Robinson, Esquire
24 April 1997
Page 3

…

Fourth, your insinuation regarding the SBIS Contract reflects a willful and deliberate disregard for both the Opinions and Judgment of the United States District Court for the Eastern District of Virginia, fully affirmed by the Fourth Circuit as well as the uncontradicted facts about the SBIS Contract set forth by the defendants in the qui tam actions filed by Pentagen.

Joel, please stop your ongoing efforts to perpetrate a fraud.

Sincerely,

s./ Bill Koegel
J. William Koegel, Jr.

JWKjr./mbl

Joel Z. Robinson, Esquire
24 April 1997
Page 4

bcc: Jeffrey P. Elefante, Esquire
George Menzies, Solicitor

Appendix E

David A. Koenigsberg, Esquire
Thomas J Byrnes, Esquire.

* * *

Relevant Portions of Cross-Examination of E.F. BRASSEUR of AMC, April 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Filed APR 25,2000
Clerk, U.S.D.C
Alexandria, Virgina

----------X

In re: LETTER OF REQUEST FROM THE	:	
QUEENS BENCH DIVISION HIGH COURT	:	
OF JUSTICE IN ENGLAND AND WALES.	:	Case#
	:	MC-00-14
E.F. BRASSEUR, Witness	:	

----------X

EXECUTION OF LETTER OF REQUEST

COMMONWEALTH OF VIRGINIA)
) ss.:
COUNTY OF FAIRFAX)

I, E.F.BRASSEUR, a citizen of the United States, and the person referred to in the Letter of Request abovementioned, presently residing within this District, state as follows under affirmation:

1. I have been furnished by Ms Priscilla Hopchas, the Commissioner appointed in this matter by the United States District Court for the Eastern District of\rirginia, Alexandria Division ("Commissioner"), a copy of the above-captioned letter of request dated February 29, 2000, issued under The Hague Convention on the Taking of Evidence Abroad in

Civil or Commercial Matters, requesting that I answer written Cross Examination Questions relating to the pending lawsuit before the Chancery Division of the High Court of Justice in England and Wales described therein.

2. Set out in the transcription attached hereto, and initialled by me, are my responses to the written questions taken before the Commissioner in this Commonwealth on April 12, 2000 and transcribed in writing thereafter.
3. I believe that the facts stated and the statements made by me, as set out in the transcription attached hereto, are true and correct.
4. I have read the transcription and I have initialed all corrections to conform the transcription to the taped recording taken of the responses.

Dated: April 25, 2000

s./ E.F. BRASSEUR
E.F. BRASSEUR

AFFIRMED before me under
the penalty of perjury
this 25th day of April, 2000.

s./PRISCILLA S. HOPCHAS
PRISCILLA S. HOPCHAS

The Court Appointed
Commissioner in this action,
A Notary Public, and A
person authorized to
administer the oath in this
Commonwealth.

My Notary Commission
expires 7/31/2003

ORIGINAL

Appendix E

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

B E T W E E N:

PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD.,

Claimants

AND

EXPRESS COMPANY SECRETARIES LIMITED

Defendant

B E T W E E N:

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED

Claimants

JORDAN & SONS LIMITED

First Defendant

JORDAN GROUP LIMITED

Second Defendant

CASE NUMBER 1996. - P- 3518

CROSS EXAMINATION OF:

E. F. BRASSEUR

a witness, called for examination by counsel on behalf of the Claimants, pursuant to notice and agreement, on Wednesday, April 12, 2000, in the law offices of Paul McGlone, Esq., Suite 300, 10513 Judicial Drive, Fairfax, Virginia 22030, at approximately 10:10 o'clock, a.m., before Priscilla S. Hopchas, CVR, a Commissioner and a Notary Public in and for the Commonwealth of Virginia at Large, when there were present on behalf of the respective parties:

3

P R O C E E D I N G S

(Whereupon, the witness was sworn by the Commissioner.)

MR. ROBINSON: My name is Joel Robinson. I appear as the solicitor and attorneys for the Claimants in an English action. Ms. Hardy is with LeBoeuf, Lamb, who appears for the Defendants in the English action.

MS. HARDY: Good morning.

MR. ROBINSON: Ms. Hopchas has been appointed a Commissioner for the purposes of taking your cross examination from the Court in England.

MR. BRASSEUR: Fine.

MR. ROBINSON: There's an action in England which is pending, and the Court in England has said that they want to get your evidence as to what took place in certain circumstances, so an order was made in England, which was transmitted to the Court, the U.S. District Court, Eastern District of Virginia, Alexandria Division, and the papers were served upon you through the AMC. And I am producing the Affidavit of Service and the Subpoena.

Ms. Hopchas, I'll put that on there. Here are a couple for you. And here is a copy for you.

4

(Claimant's Exhibit No. is marked by the Commissioner and received into evidence.)

MR. ROBINSON: I would also draw your attention that the Army has, in fact, consented to your making the answers to the cross examination, and that's included on the Affidavit of Service.

The Court in England has set out the questions that are to be asked, and, for the purposes of ease, because Ms. Hopchas is

taking a recording, I'11 ask the questions and you'll do the responses.

MR. BRASSEUR: Okay. …

37

Q. 7.4: Please identify the date, content

38

of, and who prepared, the technical evaluation on MENTIX stating that "MENTIX could not sufficiently translate COBOL to ADA" to which you refer?

A. There are no written reports. From my recollection, I never saw a written report an anything.

Q. It doesn't say written.

A. I got a verbal from a couple of folks in Chambersburg [PA] --

Q. Names?

A. I believe it was Lynn Byers and possibly --

Q. How do you spell that?

A. B-y-e-r-s, L-y-n-n, Lynn Byers.

Q. L-y-n-n?

A. Yeah, L-y-n-n B-e-y-e-r-s.

Q. B-e-y-e-r-s, yes.

A. And possibly Jim Hafer. I believe that was the two individuals.

Q. Hafer, how do you spell that?

A. H-a-f-e-r.

Q. H-a-f-e-r?

A. Yes.

…

45

A. SIMA's view of MENTIX as they stated to me, said that it converted only about 50 percent of the

46

COBOL code.

…

59

Q. Isn' t it true that the second evaluation -- there was a second evaluation undertaken by SIMA and that MENTIX was found acceptable to AMC criteria?

A. Is the second evaluation the 3090--

Q. Yes.

A. -- or are you referring to the AVION?

Q. No, the second one.

A. The 3090 was the first evaluation, and SIMA did the 3090 evaluation. I have no idea who did the AVION. I was -- I don't know anything about that one.

60

And I'm sure -- I always thought the 3090 --

Q. On the machine. I mean, you're talking about a 3090 evaluation on a machine.

A. That's right. My opinion is that MENTIX was tested one time on an IBM 3090, all right.

Q. It was actually loaded on the machine?

A. Yeah.

Q. And that was before the AVION, just to get the facts right?

A. Yeah, that's my interpretation. I don't

anything about the AVION.

Q. Your interpretation.

…

Appendix E

* * *

Evidence of Runaway given by Robert O'Brien on taken on November 26, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OFNEW YORK

----------X

RUNAWAY DEVELOPMENT GROUP, S.A.	: 91 Civ. 5643 (JES)
Plaintiffs,	:
-against-	:
PENTAGEN TECHNOLOGIES INTERNATIONAL	:
Defendant	:

----------X

Arlington, Virginia
Tuesday, November 26, 2002

Deposition of Robert A. O'Brien,

…

47

…

Q. Did you enter any similar arrangement with

48

anyone else in breach of this [CACI/RDGTeaming] agreement?

A. No.

Q. So you only dealt with CACI for the purposes of the Army?

A. Yes.

Q. Did you deal with anybody else, any non-government?

A. No.

Q. So as far as you were concerned, it was CACI or nobody?

A. Right.

Q. And you don't recall ever giving the product to anybody other than CACI if you did or did not give it to them?

A. That's correct, right.

Q. And, just to follow that point, if you go on to the statement of work page. Go back to the that page there. The one that's marked page 9. It says, "In no event shall either party to this Agreement grant licenses in source code form without the prior written approval of the other party."

A. Okay.

Q. Do you recall ever granting a license in

49

source code form to anybody else other than CACI, if you did or did not?

A. No.

Q. And do you recall CACI ever coming to you asking you to do the reverse, we want to give it to somebody else?

A. No.

Q. So as far as you were concerned, the product would only be with CACI, the intellectual property would only be with CACI under this agreement if, in fact, it was transferred?

A. Yes.

…

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…

Q. And your point is that in your view, given the circumstances and the fact the copy that turned up with the Army would

have been an unauthorized version of MENTIX, because there was no other way it could get it --

A. I don't know whether the Army has a copy or they don't have a copy.

Q. I understand that, but if they had a copy which they tested --

A. My position is that basically the only use we authorized, to the best of my recollection, was the [CACI/RDG] teaming agreement.

…

* * *

Relevant Provisions of SBIS Contract

… 4.3.5.1 Sofware Reuse Approach

…

We will achieve 40 to 50 percent component resuse in the first year, 70 percent in the second year, with a target of 80 to 90 percent by the completion of the first 89 SBIS application systems at the end of year three…

APPENDIX F –
MISCELLANEOUS FILED PLEADINGS

1. Affidavit of PTI in Support of Stay of Court of Appeals Hearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PENTAGEN TECHNOLOGIES	:	
	:	USCA FILE
-against-	:	No: 02-6061
	:	
UNITED STATES OF AMERICA et al	:	
	:	

AFFIDAVIT IN SUPPORT OF APPELLANTS' MOTION FOR A STAY PENDING DECISION OF DISTRICT COURT ON ISSUES BEFORE THIS COURT

JOEL Z. ROBINSON, under penalty of perjury, says as follows:

1. I am acting Pro Se in the Appeal in this action and I make this affidavit in support of a Motion, dated today, for a Stay on any further consideration of the issues before this court pending further consideration and decision of Hon. John Sprizzo, in the United States District Court, Southern District of New York in the action entitled Runaway Dev. Group et al., v. Pentagen Tech Int'l Ltd et al No 91-5643 (JES) ("Runaway Case") presently being prepared by my client, Pentagen Technologies International Ltd, ("PTI") at this time.
2. This Motion to grant a Stay is brought pursuant to Rule 27 of the Rules of Appellate Procedure.

Introduction

3. This Appeal has been brought by this Appellant against sanctions issued against me under Fed. R. Civ. P. 11 and 28

U.S.C. § 1927 by Hon. Judge Sprizzo on February 22, 2002. As a matter of general comment, the grounds for the sanctions were based on the fact that PTI commenced and prosecuted a series of law suits arising out of the seizure, by armed personnel, of PTI's MENTIX software, in August 1990. At the time of the seizure MENTIX was being developed for porting and licensing to the U.S. Army Material Command for use on the U.S. Government's many thousands of IBM 3090-mainframe MVS computers.[22]

4. Litigation immediately ensued, and in August 1993, in the Runaway Case, Judge Sprizzo awarded judgment to PTI and title to the software was confirmed in PTI's favor. The Judgment in the Runaway Case created a series of constructive trusts in PTI's favor, against any and all successors, assignees, or nominees who claimed title, or used the intellectual property ("Trustees"), through the armed personnel who had seized the property in 1990 (aptly named "Runaway").
5. From its first contact with PTI in 1991, until April 2000, CACI maintained a consistent position (inter alia) that there was no U.S. Government interest in MENTIX, that CACI had never used any unauthorized version of MENTIX, and that CACI had returned all copies of MENTIX it had received to Runaway in early 1992. However, from the beginning, CACI's legal posture did not completely jibe with other presented facts. In particular, CACI marketed and used an unidentified product which had very similar characteristics to the seized MENTIX.
6. CACI's legal posture remained consistent during the litigation throughout the 1990's. CACI stated (inter alia)

---

[22] Words and expressions have the same meaning as set out in previous pleadings.

that there was no U.S. Government interest in MENTIX, that CACI never used any unauthorized version of MENTIX, and that CACI had returned all copies of MENTIX it had received to Runaway in early 1992. CACI filed court pleadings to that effect; the U.S. filed subpoena responses to that effect; and the U.S. responded to Freedom of Information Requests accordingly, and failed to produce any report of a 3090- mainframe test of MENTIX, even though specifically requested. In 1996, CACI went so far as to arrange for the U.S. Government to file a Witness Statement in an unrelated U.K. High Court action supporting its allegations. Even though CACI's position was inconsistent with other evidence, the U.S. Courts continually sided with CACI, and ruled accordingly.

7. The High Court in England, however, was not so convinced. Because of the inconsistencies between the Witness Statement and other evidence presented, the High Court ordered the April 2000 cross-examination of the U.S. Government. During this procedure, the U.S. Government revealed, for first time, that a 3090-mainframe version of MENTIX had been tested at their SIMA laboratories in Chambersberg, PA. This evidence was inconsistent with the U.S., CACI-developed, earlier 1996 Witness Statement.

8. Nevertheless, the underlying litigation, out of which this Appeal arises, was dismissed by Judge Spizzo within three months of the cross-examination, on the grounds that even if litigation misconduct had been proved, PTI was not entitled to sue for any relief; 103 F.Supp.2d. 232 (S.D.N.Y.2000). CACI pressed for immediate sanctions of PTI's counsel, and Judge Sprizzo, ignoring the English evidence completely, obliged almost immediately thereafter and, in effect, prohibited any further litigation, without his approval.

b. 2000 Evidence proves U.S. is a Trustee under the Runaway Case Judgment

9. Even though all other litigation was halted, the U.S.'s admission of use in the U.K. litigation gave PTI its first piece of direct evidence that the U.S. had loaded and tested PTI's MENTIX software, in a derivative version, on at least one of its 3090-mainframe computers, which was identical to the MENTIX software offered by CACI to the AMC during 1990-1. This direct evidence made the U.S. subject to the constructive trust ordered by Judge Sprizzo in the Runaway Case.

10. As soon as the sanctions were ordered, PTI and its counsel wrote directly to Judge Sprizzo, (March 5, 2002, copy attached), referring to the Sanctions and seeking permission to proceed against the Trustees under the constructive trusts judgment, per his order in the Runaway Case, (e.g. directly against the United States Government and others who had possession or use). Judge Sprizzo granted permission.

11. After briefing, at a Hearing in October, 2002, Judge Sprizzo gave permission to PTI and its counsel to issue certain pleadings, consistent with his Order in the Runaway Case and notwithstanding his order of sanctions now currently before this court. A copy of Judge Sprizzo's October 30, 2002 Order is attached hereto.

12. Since the October 30, 2002 Order, and pursuant to all of Judge Sprizzo's Orders, counsel and PTI have continued to actively recover further evidence as to the identity of the Trustees. While there is no doubt that the U.S. Government is a Trustee under the Runaway Case, further direct evidence obtained from other witnesses has now assisted in identifying other Trustees under the Judgment. This new direct evidence provides insight regarding the theft and concealment of the MENTIX software, important to the resolution of the constructive trusts for the Runaway Case.

Appendix F

Judge Sprizzo's Later Permission to Proceed puts Earlier Sanctions in Question.

13. Judge Sprizzo was fully aware of the Sanctions that he imposed on Counsel when considering the Trust issues. Nevertheless, as the U.S. is clearly a Trustee by its own admission, Judge Sprizzo specifically left open the possibility of granting further relief. As noted in his October 30, 2002 Order, this relief could be forthcoming if PTI could produce evidence confirming that MENTIX was assigned or otherwise transferred to one of more of the Trustees.

14. The Sanctions, now the subject of this Appeal, should be considered moot at this time particularly as there is already direct evidence confirming that the U.S. is a Trustee. Obviously, in the event Judge Sprizzo ultimately rules the United States Government (and others) are Trustees in the Runaway Case, counsel will be in a position then to move to quash the sanctions on the grounds that the Trustee(s) concealed PTI's property, and deprived PTI of its property for over ten years. Such a result will, of necessity, taint all proceedings leading to the Sanctions.

Reasons for Delay

15. Currently, it would appear that counsel may have been intimidated (though admittedly unwittingly by Judge Sprizzo) by the Trustee(s). Accordingly, counsel is loath to present any pleading unless the conclusion presented is unequivocal. Counsel hoped, that by this week, such evidence could have been delivered for Judge Sprizzo's consideration, with a copy of the material to this court.

16. While new compelling evidence has been obtained, counsel is sufficiently cautious to wait until the evidence has been developed in further presentable form. Presenting evidence that identify Trustees who have breached their trusts, particularly given the history of this litigation, requires more

than passing preparation. For example, depositions and witness statements obtained, have only just been finalized. While counsel has been aware of the content of the material for some time, some of this material has only just been signed off on because of delays of the court reporters involved.

CONCLUSION

17. Counsel now respectfully submits that Judge Sprizzo's Order of October 30, 2002, coupled with the new direct evidence, makes Judge Sprizzo's earlier sanctions moot. Even if the October 30, 2002 Order had not made the Sanctions moot, the Sanctions Order itself has cautioned counsel to the point where I do not wish to file any pleading until I have satisfied what I believe are my obligations under the Fed. R. Civ. P. 11 and 28 U.S.C. § 1927.

18. Judge Sprizzo's Order, by its very terms, results in the U.S. being a Trustee, because of its 2000 admission that they had used MENTIX on an IBM 3090-mainframe computer. This court should allow counsel and PTI to present the additional evidence to Judge Sprizzo in order to identify the other trustees prior to making a final determination, should the U.S. admission not be sufficient.

19. Accordingly, Appellant respectfully requests that this Appeal be stayed (or allowed) until Judge Sprizzo has considered all further action in the Runaway Case.

Under penalty of perjury

Dated:New York, New York
March 26, 2003.

s./Joel Z. Robinson
Joel Z. Robinson

Appendix F

Certificate of Service

I hereby certify under the penalty of perjury that on this 26th day of March, 2003, a copy of the foregoing Appellant's Motion for Stay etc and supporting papers was served on:

VIA FIRST CLASS MAIL and FAX

J. William Koegel, Jnr, Esq
Steptoe & Johnson
1330 Connecticut Ave, N.W.
Washington D.C. 20036

s./Joel Z. Robinson
Joel Z. Robinson

affstay.wp/Absan]

2. Judge Sprizzo's Orders of August 29, & October 30, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OFNEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A. et al	:	91 Civ. 5643 (JES)
Plaintiffs,	:	ORDER
-against-	:	
PENTAGEN TECHNOLOGIES INTERNATIONAL LTD, et al	:	
Defendants and Counter-claimant(s)	:	

The above-captioned action having appeared before the Court, and defendant / counter-claimant Pentagen having filed a Motion for Turnover, Order dated April 17, 2002, and Pentagen having served non-party International Business Machines

Corporation ("IBM") with a subpoena on July 22, 2002, and IBM having filed a Motion to Quash and for Attorney's Fees dated August 8, 2002, and Pentagen having filed a Response to such Motion on August 15, 2002, and Pentagen having served a subpoena on non-party CACI International-Federa1 (`CACI") on July 25, 2002, and CACI having filed a Motion to Quash and for Disqualification of Attorney Joel Z. Robinson dated August 16, 2002, and Pentagen having filed a Response to such Motion dated August 22, 2002, and the Court having considered all matters raised, it is ORDERED that CACI shall file any Response to Pentagen's Motion for Turnover Order, not to exceed fifteen (15) pages, on or before September 29, 2002; and it is further

ORDERED that an Oral Argument and/or Hearing shall occur on all Motions on October 29, 2002 at 1:00 p.m. in Courtroom 705, 40 Centre Street.

Dated: New York, New York
August 29, 2002

s./John E Sprizzo
John E. Sprizzo
United States District Judge

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RUNAWAY DEVELOPMENT GROUP, S.A.	:	91 Civ. 5643 (JES)
Plaintiffs,	:	ORDER
-against-	:	
PENTAGEN TECHNOLOGIES INTERNATIONAL LTD, et al	:	

Appendix F

Defendants :

----------X

PENTAGEN TECHNOLOGIES :
INTERNATIONAL LTD, et al :
Counter-claimant(s) :
:
-against- :
:
RUNAWAY DEVELOPMENT :
GROUP, S.A. :
Counter-defendant :

----------X

The above-captioned action having come before the Court, and counter-claimant Pentagen having served subpoenas on non-parties International Business Machines Corporation (IBM), CAC I - Federal, and the United States ("the Government") in connection with its efforts to execute a consent judgement it received in the above captioned action, and such non-parties having each filed a Motion to Quash the Subpoena dated August 9, August 16 and August 6, 2002, respectively, and counter-claimant Pentagen having filed its Response to such Motions, as well as those additional Motions described below, on August 15, 22, and October 8, 2002, respectively, and non-party IBM having also filed a Motion for Attorney's Fees dated August 9, 2002, and non-party CACI-Federal having also filed a Motion for Attorney's Fees and for Disqualification of Counsel Joel Z. Robinson dated August 22, 2002, and Oral Argument having been held on all above Motions on October 29, 2002, and the Court having considered all matters raised, it is

ORDERED that, for the reasons stated on the record all the aforementioned Oral Argument, all non-party Motions to Quash shall be and hereby are granted, without prejudice to being renewed if and when, following the deposition of the party against whom the consent judgment was obtained, counter-

claimant Pentagen can make a particularized showing that the property in question was assigned or otherwise transferred to any of the subpoenaed non-parties; and it is further

ORDERED that, for the reasons stated on the record, both IBM and CACI-Federal's Motions for Sanctions shall be and hereby are denied, without prejudice; and it is further

ORDERED that, for the reasons stated on the record, CACI-Federal's Motion for Disqualification shall be and hereby is denied without prejudice to being renewed upon a finding that Attorney Joel Z. Robinson has something other than ~~soley~~ (JS) an equity interest in counter-claimant Pentagen corporation.

Dated: New York, New York
October 30, 2002

s./John E Sprizzo
John E. Sprizzo
United States District Judge

* * *

3. Transcript of Hearing Before Judge Sprizzo on May 2, 2003

1

UNITED STATES DISTRICT COURT 91 CV 5643
SOUTHERN DISTRICT OF NEW YORK

RUNAWAY DEVELOPMENT GROUP, S.A.,

Plaintiff,

PENTAGEN TECHNOLOGIES INTERNATIONAL LIMITED,

Defendant.

May 2, 2003
3:25 p.m.
Before:

Appendix F

HON. JOHN E. SPRIZZO
District Judge

APPEARANCES

JOEL ROBINSON
Attorney for Judgment Creditor Pentagen

FULBRIGHT & JAWORSKI
Attorneys for CACI, Inc. Federal
BY: JAMES M. DAVIS

DOUGLAS A. DONOFRIO
Attorney for International Business Machines Corp.

ROBERT SADOWSKI, Assistant United States
Attorney For the United States of America

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THE COURT: Runway versus Pentagen.

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MR. DAVIS: .... All we know is that somebody said that it might have been tested, Mentix that is, might have been tested on a United

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States 3090 main frame, whatever that is.....

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THE COURT: All right. I will hear from the government.

Is the government here?

MR. SADOWSKI: Robert Sadowski.

I would simply echo what counsel has said so far....

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THE COURT: .... Do you have anything you want to say? You represent who, IBM?

MR. DONOFRIO: For International Business Machines

Corporation. I echo what Mr. Davis and Mr. Sadowski have said ....

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MR. DAVIS: We would like to make that application, and we would like the Court's permission today to make it.

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Secondly, I would like to --

THE COURT: Do you want to make it on papers or not on papers?

MR. DAVIS: Well, your Honor, I think it would be best if we made it on papers. Procedurally, I think that we would feel comfortable in light of the onslaught that will come after the application, and after the order on the application, if we if we had some papers here.

THE COURT: Well, I am not adverse to you. You are under no sanction order. If you want to submit papers, I guess you are free to do it.

MR. DAVIS: We raised this in court before, and we did it because nothing has worked, and that's one of the things I want to talk about here today.

The Court's order and the Second Circuit's affirming the award of sanctions came down on April 23. And what happens here --

THE COURT: What are the sanctions, $75,000 here?

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MR. ROBINSON: May I speak?

THE COURT: Yes. When are you going to pay the

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sanctions?

MR. ROBINSON: Your Honor, I don't have the money to pay for it.

THE COURT: Then you are not going to proceed in this court in this the matter or other matter until you do. That's certainly within my discretion.

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