[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-