IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 03-5500 (LDD)

MOTION FOR LEAVE TO FILE REPLY BRIEF
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant United States of America hereby moves for leave to submit the attached reply brief in support of its Motion To Dismiss, filed January 23, 2004. As set forth below, defendant wishes to address a number of issues raised for the first time in Plaintiffs' Memorandum in Opposition to Defendant's Motion To Dismiss, filed February 24, 2004 ("Pl. Mem."), that are not covered by defendant's original submission in support of its motion.

On March 18, 2004, undersigned counsel conferred by telephone with counsel for plaintiffs regarding this motion. Plaintiffs' counsel advised that they cannot take a position on defendant's motion without having reviewed the proposed reply brief, but once they have had an opportunity to evaluate defendant's brief they will inform the Court promptly of their position.

Plaintiffs filed this action seeking to re-open judgments that this Court entered in 1953, following remand from the Supreme Court's decision in United States v. Reynolds, 345 U.S. 1 (1953). Independent Action for Relief from Judgment To Remedy Fraud on the Court, dated October 1, 2003 (the "Complaint") at 3. As grounds for this relief, plaintiffs assert a single claim

of a "fraud on the courts." Id. at 11. They in turn base that claim on an allegation that, contrary to the government's assertion of privilege in Reynolds, the Air Force's report of investigation of the fatal airplane crash at issue in that case, which the plaintiffs there had sought in discovery, did not contain military secrets whose disclosure would have been harmful to national security. Id., ¶ 32. See Brief in Support of Defendant's Motion To Dismiss, dated January 23, 2004 ("Def. Br.") at 11-12.

Defendant has moved to dismiss plaintiffs' claim on the ground that they have not pleaded a fraud on the court. Specifically, plaintiffs have not alleged a scheme to corrupt or undermine the courts' *impartiality* in Reynolds, nor have they alleged involvement by officers of the Court in making the allegedly fraudulent claim of privilege, as would be necessary to state a claim for fraud on the court. Def. Br. at 14-15, 21-22.

In their opposition brief, plaintiffs argue that their allegations state a fraud on the court because the alleged "lie" told by the Air Force in asserting the military secrets privilege was told "to this Court," as distinguished from a "lie" told merely to the plaintiffs themselves. Pl. Mem. at 17. Additionally, plaintiffs argue that Secretary of the Air Force Finletter, and Judge Advocate General Harmon, assumed the role of officers of the Court when they asserted the military secrets privilege, thus raising their allegedly false statements to the level of a fraud on the court. Id. at 18-19. Finally, plaintiffs also maintain that, even if their allegations do not state a claim for fraud on the court, they have nonetheless alleged grounds for maintaining an independent action in equity for relief from judgment, based on fraud perpetrated upon a party. Id. at 19-21.

These theories of liability appear for the first time in plaintiffs' opposition memorandum, and are nowhere stated in the Complaint. The Complaint makes no assertion that the allegedly

false statements made by the Air Force constituted a fraud on the court specifically because they were made to the Court, rather than having been made, solely, to an opposing party. Nowhere does the Complaint allege that Secretary Finletter or General Harmon acted as officers of the court when they made these allegedly false statements. Likewise, the Complaint makes no allusion to an independent action for fraud perpetrated upon a party, which, as a basis for relief, is conceptually distinct from a claim of fraud on the court. See, e.g., Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 661 (2d Cir. 1997); George P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48-49 (1st Cir. 1995). As a result, defendant had no reason to address these issues when it submitted its initial brief in support of its motion to dismiss.

Defendant therefore respectfully requests leave to file the attached reply brief addressing the following three issues raised for the first time in plaintiffs' opposition brief:

(1) Whether the allegation that the Air Force lied, specifically, "to this Court," rather than simply making false statements to a party, is sufficient to state a claim of fraud on the court;

(2) Whether Secretary of the Air Force Finletter and Judge Advocate General Harmon acted as officers of this Court when they submitted statements asserting the military secrets privilege in Reynolds; and

(3) Whether plaintiffs' allegations can support an independent action in equity for relief from judgment, even if they do not state a claim of fraud on the court.

For the reasons stated herein, defendant's request for leave to file a reply brief addressing these issues should be granted.

Dated: March 19, 2004

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-5500 (LDD)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Dated: March 19, 2004

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INTRODUCTION[1/]

Once a year or more has passed, courts do not lightly upset their judgments except to remedy the most egregious miscarriages of justice. That should be all the more so where the judgment attacked is one that has lain undisturbed for more than half a century. Plaintiffs struggle, therefore, to portray bare allegations of perjury, having no foundation except in plaintiffs' own reading of the Air Force's crash investigation report, as a fraud on the court that would justify re-opening the generous settlement that they willingly entered into in 1953. Their effort necessarily fails. Plaintiffs are steadfast in maintaining that the Air Force "lied to this Court" when it asserted the state secrets privilege as ground for withholding the report, but they have alleged no scheme on the government's part to corrupt the courts' impartiality in adjudicating their claims. Nor have they shown, as a matter of law, or fact (even as asserted), that either Secretary Finletter, or General Harmon, acted in the capacity of an officer of this Court when they asserted the military secrets privilege on the government's behalf. Hence, plaintiffs have not alleged a fraud on the court.

Perhaps so recognizing, plaintiffs maintain for the first time in their opposition brief that they have alleged grounds for bringing a so-called independent action for relief from judgment, based on fraud perpetrated upon a party. As the Supreme Court has held, however, independent actions are reserved for only the most gross injustices warranting departure from the principles of res judicata. At bottom, the injustice complained of here is that, owing to the government's assertion of the state secrets privilege, the plaintiffs in Reynolds were confronted with the prospect of making their case through routine discovery, an effort they might have avoided with

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[1/] Terminology used but not otherwise defined herein shall have the same meaning as in the Brief in Support of Defendant's Motion To Dismiss, dated January 25, 2004, cited herein as "Def. Br." Plaintiffs' Memorandum in Opposition to Defendant's Motion To Dismiss, filed February 24, 2004, is cited herein as "Pl. Mem."

the benefit of the Air Force's report. Rather than pursue discovery and trial, they chose instead to settle their claims on highly attractive terms. These allegations do not describe a gross injustice of the kind required to maintain an independent action for relief from judgment. Plaintiffs' request to re-open the judgments in Reynolds (and Brauner) must therefore be denied.

ARGUMENT

I. PLAINTIFFS HAVE NOT PLEADED A FRAUD ON THE COURT.

A. Plaintiffs Have Not Alleged a Corruption of the Court's Impartiality.

As this Court has previously summarized the law, fraud on the court "is limited to that species of fraud which does or attempts to subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." United States v. Zinner, No. 95-0048, 1998 WL 57522, *2-*3 (E.D. Pa. Feb. 9, 1998) (citation omitted). See also Def. Br. at 14-15 (and cases cited therein). Plaintiffs also acknowledge that "'fraud on the court' is a fraud designed not simply to cheat an opposing litigant, but to 'corrupt the judicial process' or 'subvert the integrity of the court'" itself. Pl. Mem. at 14 (citations omitted). It is fraud, including fraud perpetrated by officers of the court, that prevents the court from "perform[ing] in the usual manner its *impartial* task of adjudicating cases." Id., quoting 12 Moore's Federal Practice 3d ¶ 60.21[4][a] (2003) (emphasis added).

Plaintiffs maintain that they have pleaded a fraud on the court under these established standards. They allege that the crash investigation report and witness statements contain no military secrets whose disclosure would have been harmful to national security, contrary to the claim of privilege asserted by Secretary Finletter and General Harmon. Complaint, ¶ 32. Thus, say plaintiffs, "[t]he Air Force lied *to this Court*" for the purpose of "'improperly influenc[ing]

the court in its decision' regarding production of the [crash investigation] report and [witness] statements." Pl. Mem. at 17 (citation omitted). But, as the courts have explained, short of counsel's involvement as an officer of the court (a subject dealt with below), "to improperly influence" a court so as to give rise to a fraud on the court, a party must engage in "the most egregious" of conduct such as "bribery of a judge or members of a jury," Fierro v. Johnson, 197 F.3d 147, 154 (5th Cir. 1999), or other conduct that "subvert[s] the [court's] integrity," Zinner, 1998 WL 57522, *2-*3, and "interfere[s] with the judicial system's ability *impartially* to adjudicate a matter . . .." Simon v. Navon, 116 F.3d 1, 6 (1st Cir. 1997) (emphasis added).[2/]

Plaintiffs have not alleged, nor could they, that the Air Force bribed Judge Kirkpatrick (or the judges of any other court), or engaged in misconduct of any other kind that subverted Judge Kirkpatrick's integrity, or affected his impartiality, in adjudicating the Reynolds and Brauner cases. Plaintiffs lay emphasis instead on the fact that the "lie" allegedly told by the Air Force was told "to this Court." Pl. Mem. at 17. That circumstance is insufficient, however, to establish a fraud on the court. Perjury alone, absent involvement by an officer of the court, has never been accepted as a fraud on the court, see Def. Mem. at 15-16 (and cases cited therein), and it makes no difference that the alleged "lie" was told to the court, rather than to a jury, or an opposing party. "[N]ondisclosure *to the court* of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002) (emphasis added); Fierro, 197 F.3d at 154 (same); Star Brite Distributing, Inc. v. Gavin, 746 F. Supp. 633, 649 (N.D. Miss. 1990) (same).

[2/] See also Def. Mem. at 14-15 (and cases there cited); King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) (fraud on the court occurs "only in the most egregious cases . . . in which the integrity of the court and its ability to function impartially is directly impinged").

For example, in Lacy v. Gen. Elec. Co., No. 81-2958, 1993 WL 53570 (E.D. Pa. Mar. 3, 1993), the plaintiff moved to reopen an adverse judgment on the ground that the defendant had presented false and perjurious testimony during a bench trial, resulting in an incorrect ruling. Id., *1-*2. This Court denied plaintiff's request for relief, concluding that the motion "d[id] not sufficiently allege fraud upon the court," id., *2, even though the alleged misrepresentations there, as here, were made "to th[e] Court." Pl. Mem. at 17. See also Simon, 116 F.3d at 5, 6 (deceit by plaintiff, not only of defendant, but of the bankruptcy court, and the district court, did not establish fraud on the court).[3/] Plaintiffs' allegation that the Air Force lied "to this Court," without any evidence or allegation that defendant subverted the Court's integrity or impartiality, is insufficient to state a fraud on the court warranting relief from a 50 year-old judgment.

B. Secretary Finletter and General Harmon Were Not Officers of the Court.

Plaintiffs also maintain that they have pleaded a fraud on the court "because [Secretary] Finletter and [General] Harmon were acting as officers of the court in asserting [the state secrets] privilege on behalf of the Air Force." Pl. Mem. at 18. While perjury, standing alone, does not rise to the level of a fraud on the court, it is equally well established, as plaintiffs say, Pl. Mem. at 15, that a fraud on the court has occurred where an attorney, as an officer of the court, was

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[3/] If every misrepresentation made to a court that later affected its decision making were deemed a fraud on the court, then every allegation of fraud and deceit by a party during a bench trial would be sufficient to establish a fraud on the court. Indeed, even perjured testimony before a jury, if relied upon by a reviewing court on appeal, would be thus converted into a fraud on the court. That result cannot be squared with the admonition that fraud on the court may be found "only where there has been the most egregious conduct involving a corruption of the judicial process itself," Zinner, 1998 WL 57522, *3; see Greiner v. City Champlin, 152 F.3d 787, 789 (8th Cir. 1998), lest the concept of fraud on the court undermine the "deep-rooted federal policy of preserving the finality of judgments." Travelers Indemnity Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985). See also Great Coastal Express, Inc. v. Int'l B'hood of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982).

involved in the allegedly fraudulent scheme to present perjured testimony.[4/] Secretary Finletter and General Harmon were not acting in a capacity as "officers of the court," however, when they asserted the military secrets privilege on the government's behalf.

Plaintiffs do not maintain that the government attorneys who handled the Reynolds and Brauner cases, who presumably were officers of this Court, were "knowing participants" in the alleged fraud. Pl. Mem. at 19 n. 5. They also make no allegation, and present no evidence, that Secretary Finletter (whom they assert, without citation or explanation, was a lawyer) or General Harmon assisted the government's attorneys in the pre-trial litigation or presentation of the case. Thus, the circumstances here are unlike the situation in Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1130-31 (9th Cir. 1995), to which plaintiffs refer. Pl. Mem. at 15-16. Instead, plaintiffs argue that Secretary Finletter and General Harmon should be considered officers of the court on the ground that they assumed the role of fiduciaries to this Court when they asserted the state secrets privilege on the government's behalf. Id. at 18-19.

Plaintiffs offer no authority for this proposition except their own say-so. They cite no case in the 50 years since Reynolds was decided which holds that a government official asserting the military secrets privilege, or any other privilege, becomes ipso facto a fiduciary of the courts. The bankruptcy cases to which plaintiffs allude are not the least bit analogous. Pl. Mem. at 18. These cases concluded that fraud by a debtor-in-possession could be considered a fraud on the court, because debtors-in-possession had previously been held to act as officers of the court. In re Temtecho, Inc., No. 95-0596, 1998 Bankr. LEXIS 1612, *48-*49 (D. Del. Dec. 18, 1998); In

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[4/] Cleveland Demolition, 827 F.2d at 986; Zinner, 1998 WL 57522, *3; see Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003); Workman v. Bell, 245 F.3d 849, 852 (6th Cir. 2001); In re Genesys Data Technologies., Inc., 204 F.3d 124, 130 (4th Cir. 2000).

re Tri-Cran, Inc., 98 B.R. 609, 617 (D. Mass. 1989), citing Matter of Tudor Assoc., Ltd., II, 64 B.R. 656, 662 (E.D.N.C. 1986). Debtors-in-possession were considered officers of the court, however, because the Bankruptcy Code formerly provided, in express terms, that a debtor in possession of the bankrupt estate "shall . . . exercise all the powers of a trustee . . . subject, however, at all times to the control of the court . . .." Power-Pak Prod., Inc. v. Royal-Globe Ins. Co., 433 F. Supp. 684, 687 (W.D.N.Y. 1977) (quoting former 11 U.S.C. § 742) (the "special status" of debtors-in-possession arises under § 742), cited by Tudor Associates, 64 B.R. at 662.

While a debtor-in-possession was therefore considered "an officer subject to the bankruptcy court's complete power to control," Tudor Associates, 64 B.R. at 662, matters of national security, including the use and dissemination of military secrets, are entrusted by the Constitution and laws of the Nation to the political branches of government, not the courts. See Dep't of the Navy v. Egan, 484 U.S. 518, 527-28 (1988). Government officials do not hold national security information, like the assets of a bankrupt estate, in trust for the courts, nor is their use or disposition of national security information generally subject, if ever, to judicial control or oversight. See id. at 529-30. Hence, neither Secretary Finletter, nor General Harmon, acted as an officer of this Court when they asserted the military secrets privilege in Reynolds. Allegations that they "lied" in doing so are therefore insufficient to state a fraud on the court.

II. THE COMPLAINT DOES NOT ALLEGE SUFFICIENT FACTS TO MAINTAIN AN INDEPENDENT ACTION FOR RELIEF FROM JUDGMENT.

The Complaint asserts a single claim for fraud on the courts, see Def. Br. at 11-12, but in their opposition brief, plaintiffs argue in addition that, even if they have not pleaded a fraud on the court, they may still maintain this case as an independent action in equity for relief from judgment, based on fraud perpetrated upon a party. Pl. Mem. at 19-21; see Def. Br. at 16-17 n. 5 (discussing independent action preserved under Rule 60(b)'s "savings clause"). Although, as

plaintiffs observe, the fraud required to maintain an independent action need not qualify, necessarily, as a fraud on the court, they have nevertheless failed to plead facts which can support relief on this basis.

As an initial matter, plaintiffs err when they state that, "[i]n this Circuit, the elements of such an independent action 'are not different from those elements in a Rule 60(b)(3) motion.'" Pl. Mem. at 20, quoting Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1023 (3d Cir. 1987). As defendant noted previously, see Def. Br. at 17 n. 5, Averbach was overruled on that score by the Supreme Court's later decision in United States v. Beggerly, 524 U.S. 38 (1998). Beggerly held, in agreement with courts outside the Third Circuit, that relief may not be obtained through an independent action where the charges leveled "would at best form the basis for a Rule 60(b)(3) motion." Otherwise, "the strict 1-year time limit on such motions would be set at naught." Id. at 46. Independent actions, the Court explained, must therefore "be reserved for those injustices . . . deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata," and should be available "only to prevent a grave miscarriage of justice." Id. at 46-47. See also Buck, 281 F.3d at 1341; Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 663 (2d Cir. 1997); George P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48-49 (1st Cir. 1995); Cooey v. Bradshaw, 216 F.R.D. 408, 412 (N.D. Ohio 2003).

The allegations set forth in the complaint do not reflect the kind of gross injustice that would be sufficient (even if it could be proven) to warrant relief from a 50 year-old judgment. No matter how often and vigorously these allegations are voiced in plaintiffs' opposition brief, their case boils down to a charge of ordinary fraud and deceit -- that the Air Force "lied" about the national security implications of releasing the crash investigation report. Pl. Mem. at 1, 20-21. Maintaining an independent action "has long been regarded," however, "as requiring

more than common law fraud." "[P]erjury alone . . . has never been sufficient" to overcome principles of finality after the one-year limitation under Rule 60(b)(3) has expired. Reintjes, 71 F.3d at 48-49 (and cases cited therein). See also Travelers, 761 F.2d at 1552 ("[p]erjury . . . will not support relief from judgment through an independent action"); Porter v. Chicago Sch. Reform Bd. of Trustees, 187 F.R.D. 563, 566 (N.D. Ill. 1999).

Moreover, to prevail in an independent action, parties seeking to set aside a judgment must establish, among other elements, that the alleged fraud "prevented [them] from obtaining the benefit of [their] [claims]." SEC v. ESM Group, Inc., 835 F.2d 270, 273 (11th Cir. 1988). Equity will not set aside a prior judgment where the outcome of which a party complains was "in large measure due to its own lack of diligence." Reintjes, 71 F.3d at 49. See also Travelers, 761 F.2d at 1551; Great Coastal, 675 F.2d at 1358. Indeed, even under the more lenient standard for setting aside a judgment under Rule 60(b)(3), a party must demonstrate that "it was prevented by the [opponent's] misconduct from fully and fairly presenting its case." Bandai Am., Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73-74 (3d Cir. 1985) (denying Rule 60(b)(3) motion to reopen settlement where defendant failed to show that its "decision to relinquish further discovery was causally related to any alleged misrepresentation by counsel for [the plaintiff]").

As defendant observed before, plaintiffs had the opportunity on remand in Reynolds to conduct discovery, and to make their case against the Air Force without relying on the crash investigation report. If it proved impossible to discover the facts in that manner, they also retained the option of returning to court to make the showing of necessity for the report that, under the Supreme Court's ruling, would have subjected the government's claim of privilege to closer scrutiny by the courts. Instead, they relinquished those opportunities, and chose to settle on plainly generous terms. See Def. Br. at 23-25.

Plaintiffs claim in their opposition brief that they in fact took the depositions of the crash survivors, but maintain that they nevertheless had no choice except to settle the case because the discovery on remand would not have "focused on the legitimacy of the government's 'state secrets' claims," and the survivors had only "limited information" about the "core cause of the crash." Pl. Mem. at 23-25.[5/] These arguments miss the point. Discovery was not limited on remand to the depositions of the four crash survivors. Nothing prevented the plaintiffs, for example, from deposing the ground crew responsible for the upkeep and maintenance of the doomed aircraft. They were just as free to pursue the facts giving rise to the accident, applying the usual tools of discovery, as if the Air Force's report had never existed in the first place.

If the facts remained elusive, then plaintiffs could have made the requisite showing of necessity, and put the government to its burden of substantiating its claim of privilege. Plaintiffs made no such effort, as is undisputed. It remains the case, however, that even if the Air Force had truly perpetrated a fraud, and the crash investigation report contained no national security information whatsoever, nothing prevented the plaintiffs on remand, through the exercise of reasonable diligence, from either making their case, or, if discovery proved fruitless, returning to the Court to make a demonstration of need for the report.

In the end, therefore, plaintiffs' claim of injustice reduces to a complaint that they "should never have had to face the prospect of taking *any* further discovery in the trial court."

[5/] Although, as plaintiffs observe, the dockets of the original actions show that the depositions of at least some of the crash survivors were noticed following the Supreme Court's decision, Pl. Mem. at 24, citing Complaint, Exh. A at 2, there is nothing in the docket sheets to indicate that the depositions were ever taken. (At the time, Federal Rule of Civil Procedure 30(f)(1) required that depositions be "promptly file[d] . . . with the court in which the action is pending." See Exh. A, hereto.) Alluding to correspondence that they have not attached to the Complaint, plaintiffs assert that their counsel, in fact, took the noticed depositions, but speculate that the depositions were never transcribed. Pl. Mem. at 24 n. 9.

Pl. Mem. at 23-24. And perhaps, had plaintiffs been given access to the crash investigation report, they could have more easily prepared their case for trial, or secured an even more appealing settlement than the one they ultimately accepted, without undertaking discovery that would otherwise have been necessary. But putting the plaintiffs to the same burden of pursuing their case through routine discovery as would have normally been expected of litigants then, or now, does not constitute the kind of gross miscarriage of justice that warrants re-visiting a 50 year-old judgment, or embarking upon efforts now to re-create events from a half-century ago. Beggerly, 524 U.S. at 46-47; Reintjes, 71 F.3d at 48-49; cf. Bandai, 775 F.2d at 73-74. Plaintiffs have not alleged grounds in equity for re-opening the judgment that this Court entered on their behalf in 1953.

CONCLUSION

For the foregoing reasons, and those stated in defendant's earlier memorandum, plaintiffs' complaint, and this action, should be dismissed with prejudice.

Dated: March 19, 2004

Respectfully submitted,

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Assistant Attorney General

PATRICK L. MEEHAN
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VINCENT M. GARVEY
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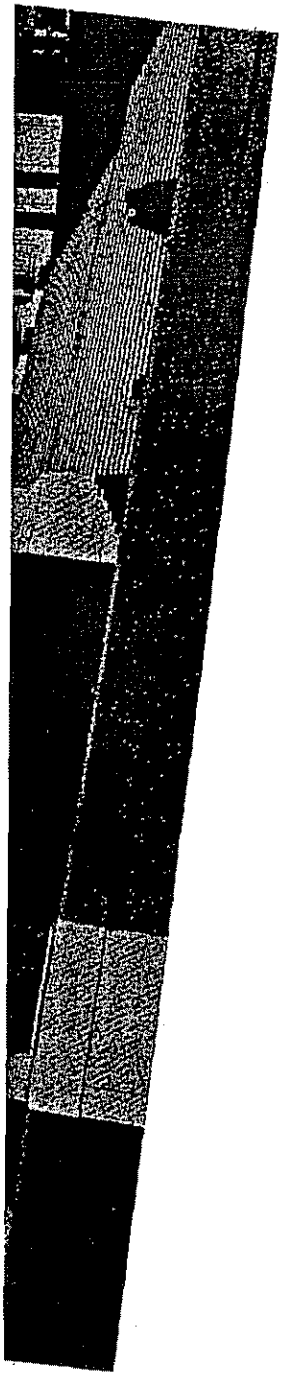
EXHIBIT A



Federal Rules of Civil Procedure

and

New Title 28 U. S. Code Judiciary and Judicial Procedure

with

Combined Index

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WEST PUBLISHING CO.

thorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. As amended Dec. 27, 1946, effective March 19, 1948.

(b) In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

RULE 29. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

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(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the

deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part

(f) **Certification and Filing by Officer; Copies; Notice of Filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

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(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Supreme Court Constructions

Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451.

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

CERTIFICATE OF SERVICE

I hereby certify that, on March 19, 2004, copies of the foregoing Motion for Leave To File Reply Brief in Support of Defendant's Motion To Dismiss, with attached Reply Brief in Support of Defendant's Motion To Dismiss, and form of proposed Order, were served by Federal Express and electronic mail delivery upon:

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Philadelphia, Pennsylvania 19107

counsel for plaintiffs in Herring v. United States, No. 03-5500 (LDD).

/s/ James J. Gilligan
JAMES J. GILLIGAN