IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	Case No.96CV1285 (RCL)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

PLAINTIFFS' THIRD NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' EQUAL ACCESS TO JUSTICE ACT PETITION FOR INTERIM FEES THROUGH THE PHASE 1.0 PROCEEDING (AUGUST 16, 2004)

With this Court's approval, on August 16, 2004, plaintiffs filed their *Equal Access to Justice Act Petition for Interim Fees Through the Phase 1.0 Proceeding* ("*Petition*") to obtain interim fees for professional services rendered several years ago in connection with the government's bad faith defense of this litigation.[1]

Attached hereto as Plaintiffs' Exhibit 1 is the Memorandum Opinion, dated March 28, 2005, of this Court in *U.S. v. Philip Morris USA Inc., f/k/a Philip Morris Inc., et al.*, Civil Action No. 99-3496 (GK) ("BATCo Decision"). That Memorandum Opinion restates that bad faith is established where, as here, a party willfully has misled the Court and repeatedly has violated its orders.[2]

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[1]Plaintiffs note that their fees remain unpaid notwithstanding their "stunning" victories over the course of many years and the unprecedented bad faith litigation conduct of the government that has undermined the integrity of these proceedings. Ironically and in stark contrast, contemnors' counsel have been, and continue to be, paid millions of dollars in appropriated funds in defense of contemnors' bad faith dealings with this Court and plaintiffs.

[2]*Id.* at 2 ("BATCo's conscious choice of this course of action amounted to reckless misconduct and bad faith dealings with this Court."). *See also* Plaintiffs' Exhibit 2 (*U.S. Motion for Sanctions Against BATCo and Motion for Reconsideration of Its Motion in Limine Precluding BATCO from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which It Failed to Produce a Knowledgeable 30(B)(6) Witness with Incorporated Statement of Supporting Points and Authorities,* dated March 8, 2005 at 2 ("BATCo's lack of candor before

Specifically, as documented in the Petition, the trustee-delegates directed, permitted, and engaged in the spoliation of irreplaceable electronic and hard copy trust records in violation of law, federal rules, and this Court's orders and they covered-up their malfeasance. Moreover, plaintiffs chronicled the trustee-delegates' pervasive lack of candor throughout Phase 1.0. Such dishonesty includes the concealment of known material inadequacies in their management of the Trust in conscious violation of this Court's May 5, 1998 scheduling order, further evidencing the bad faith litigation conduct in this litigation.[3]

> Importantly, the Court asked the government to in good faith concede the manner in which 'present management' as opposed to 'future' or 'planned' management was inadequate. The government responded by boldly stating in total disregard of the facts as they knew it: 'Defendants hold the view that **the present management of the trust,** taking into account the changes that are in progress, **is inadequate.** Because defendants in bad faith would not admit the ways in which present management was inadequate, plaintiffs had to continue their efforts to prove that point through conducting discovery, reviewing material and drafting legal arguments. We did so. It is now quite clear that defendants' statement[] that systems were 'adequate' was plainly and demonstrably false.[4]

The BATCo Decision reconfirms governing law with respect to the meaning of bad faith conduct in this jurisdiction. Here, the conduct of the government at all times relevant to the Phase 1.0 Proceedings meets, and materially exceeds, every standard set forth by the BATCo court, a standard vigorously advocated and wholly endorsed by the United States. Accordingly, the government should not be permitted to disavow in *Cobell* that which it argues is bad faith conduct

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this Court is inexcusable, ... [and] [t]ime and time again BATCo has willfully refused to comply with this Court's Orders.")); Plaintiffs' Exhibit 3 (*U.S. Reply in Support of Its Motion for Sanctions Against BATCo and Motion for Reconsideration of Its Motion in Limine Precluding BATCo from Introducing at Trial Evidence or the Subject Matters Specified in Order No. 341 for which It Failed to Produce a Knowledgeable 30(B)(6) Witness*, dated March 16, 2005 ("In light of BATCo's repeated violations of this Court's Orders and its on-going dishonesty, only the Court's sanctions can deter BATCo from continuing its brazen misconduct.")). Of course, BATCo's conduct pales in comparison with the dishonesty and disobedience of the trustee-delegates and their counsel in the case at bar.

[3]*See* May 5, 1998 Order at 2, ¶ 1("On or before June 10, 1998, defendants shall serve and file a statement of the specific respects, if any, in which they concede that the present management of the trust here involved is inadequate.").

[4]*Id.* at 22 (emphasis in original, internal citation omitted).

in another case in this Court.

Respectfully submitted,

/s/ Dennis Gingold

DENNIS M. GINGOLD
D.C. Bar No. 417748
P.O. Box 14464
Washington, D.C. 20044-4464
202 824-1448

Of Counsel:

JOHN ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
303-447-8760

/s/ Keith Harper

KEITH HARPER
D.C. Bar No. 451956
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
202 785-4166

Attorneys for Plaintiffs

March 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' SECOND NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' EQUAL ACCESS TO JUSTICE PETITION FOR INTERIM FEES THROUGH THE PHASE 1.0 PROCEEDING (AUGUST 16, 2004) was served on the following via facsimile, pursuant to agreement, on this day, March 30, 2005.

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

/s/ Geoffrey Rempel

Geoffrey M. Rempel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 99-2496 (GK)**
	:	
PHILIP MORRIS USA INC.,	:	
f/k/a PHILIP MORRIS INC.,	:	
et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

The United States has filed a Motion for Sanctions Against BATCo and Motion for Reconsideration of Its Motion in Limine Precluding BATCo From Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which it Failed to Produce a Knowledgeable 30(b)(6) Witness ("Motion for Sanctions"). Upon consideration of the Motion for Sanctions, BATCo's Opposition, the United States' Reply, and the entire record relating to the issues raised in the Motion for Sanctions, the Court concludes that the Motion should be **granted.**

On March 9, 2005, the Government filed the present Motion requesting (1) reconsideration of the denial of its motion in limine; (2) sanctions against BATCo (including an appropriate fine and reimbursement for the costs associated with the July 24, 2003 deposition of Alison Kay Kinnard); and (3) an Order precluding

BATCo from introducing at trial any evidence or making any arguments relating to the publicly-available portions of the Foyle Memorandum and the document management policies and procedures addressed in the McCabe decision. On March 14, 2005, the Court issued Order #896, which set forth in great detail factual findings and conclusions regarding BATCo's failure to comply with Order #341.

First, given the findings and conclusions reached in Order #896, there can be no doubt that there is "new evidence" which justifies reconsideration of the Government's motion in limine. United States v. Philip Morris USA Inc., 200 F.R.D. 109, 112 (D.D.C. 2004), quoting Pearson v. Thompson, 141 F. Supp.2d 105, 107 (D.D.C. 2001). During the hearing on the Gulson testimony, the Court received evidence from which it found by clear and convincing evidence that:

> BATCo violated the plain command of Order #341, as it later acknowledged in oral argument relating to these Objections – by failing to prepare its witness to comply with that Order's requirement that she be able to testify about the publicly available portions of the Foyle Memorandum and document management issues discussed in McCabe.

Mem. Op. accompanying Order #896 at 12.

Second, Fed. R. Civ. P. 37(b)(2) authorizes the trial court to impose such orders "as are just" to sanction a party that fails to obey an order to provide or permit discovery. Shepherd v. American

Broadcasting Cos., 62 F.3d 1469, 1474 (D.C. Cir. 1995). In this case, BATCo violated Order #341.

Third, the Court possesses inherent authority, as our Court of Appeals recognized in Butera v. District of Columbia, 235 F.3d 637, 661 (D.C. Cir. 2001)(internal citations omitted), "to 'protect [its] integrity and prevent abuses of the judicial process.'" See also Shepherd, supra, 62 F.3d at 1474-1475. As the facts set forth in Order #896 make clear, BATCo not only violated Order #341, but also misled the Court about whether or not it had told the Court of its intention to violate that Order. BATCo's conscious choice of this course of action amounted to reckless misconduct and bad faith dealings with the Court.

Fourth, the sanction which the Government requests -- preclusion of evidence on the subject matter specified in Order #341 for which BATCo failed to produce a knowledgeable 30(b)(6) witness -- is entirely appropriate and "proportionate" to the conduct engaged in. See Shea v. Donohoe Constr. Co., 795 F.2d 1071, 1077 (D.C. Cir. 1986); Shepherd, supra, 62 F.3d at 1478 (approving use of issue related sanctions to correct and deter discovery misconduct).

Finally, it must be noted that this is not the first time that BATCo has been sanctioned for failure to comply with the Court's Orders. On October 3, 2003 in Order #411, BATCo was held in

contempt of Court for violation of Order #343 and ultimately sanctioned in Order #419. Pursuant to those Orders, BATCo paid $25,000 a day, totaling $1,400,000, into the Court registry. It would appear from BATCo's egregious lack of candor regarding compliance with Order #341 that BATCo does not seem to have learned any lesson from that experience. In this instance, BATCo not only violated a Court Order, but also misled the Court in its submissions about whether it was going to comply with the Order, and then misrepresented the facts about what it had previously told the Court on that subject during oral argument on issues relating to the Gulson testimony, as described in detail in the Memorandum Opinion accompanying Order #896.

For all these reasons, sanctions are fully justified. The testimony precluding sanctions is directly related to the subject matter of Order #341. The requirement of reimbursement for the costs associated with the deposition of Ms. Kinnard is similarly related to the subject matter of Order #341.

A more difficult issue is the Government's request for imposition of a fine. As noted earlier, BATCo has already paid a substantial fine into the Court registry for failing to comply with an earlier Court Order. In determining an appropriate fine for BATCo's latest transgression, the Court can certainly consider that the previous fine did not serve to effectively deter BATCo's non-

compliance with Court Orders. "The district court's interest in deterrence is a legitimate one, 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) (internal citations omitted). The Court of Appeals in Bonds cautioned that sanctions based on principles of deterrence "'call for careful evaluation to ensure that the proper individuals are being sanctioned (or deterred) and that the sanctions or deterrent measures are not overly harsh.'" Id. (internal citations omitted). Taking these principles into account, as well as BATCo's prior history, and in order to deter further non-compliance with mandates of this Court, the Court will impose a fine of $250,000, payable within thirty days from the date of this Order.

March 28, 2005

/s/
Gladys Kessler
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 99-2496 (GK)**
	:	
PHILIP MORRIS USA INC.,	:	
f/k/a PHILIP MORRIS INC.,	:	
et al.,	:	
	:	
Defendants.	:	

ORDER #904

Upon consideration of the United States' Motion for Sanctions Against BATCo and Motion for Reconsideration of its Motion in Limine Precluding BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which it Failed to Produce a Knowledgeable 30(b)(6) Witness, BATCo's Opposition, the United States' Reply, and the entire record herein, it is hereby

ORDERED that the United States' Motion for Sanctions Against BATCo is **granted**; and it is further

ORDERED that within 30 days of the date of this Order, BATCo shall pay a monetary sanction of $250,000 to the Court's Registry; and it is further

ORDERED that within 30 days of the date of this Order, counsel for BATCo shall by $10,015.33 to the United States as reimbursement

for the costs associated with the Rule 30(b)(6) deposition of Alison Kay Kinnard, taken July 24, 2003; and it is further

ORDERED that the United States' Motion for Reconsideration of its Motion in Limine Precluding BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which it Failed to Produce a Knowledgeable 30(b)(6) Witness is **granted**; and it is further

ORDERED that BATCo is precluded from introducing at trial any evidence or making any arguments relating to the publically available portions of the Foyle Memorandum and any document management practices or procedures described therein; and it is further

ORDERED that BATCo is precluded from introducing at trial any evidence or making any arguments relating to the document management issues addressed in the McCabe decision, specifically including any consideration, decision, policy, practice or procedure concerning the destruction, editing or management of documents at BATCo or any affiliate of BATCo, in Australia or elsewhere, for the purpose of avoiding discovery of such documents in United States litigation or preventing the public from learning the true effects of smoking.

March 28, 2005 /s/

Gladys Kessler
United States District Judge

Copies via ECF to all counsel record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 99-CV-02496 (GK)**
PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., et al.,	)	**Next scheduled appearance: Trial (ongoing)**
Defendants.	)	

UNITED STATES' MOTION FOR SANCTIONS AGAINST BATCO AND MOTION FOR RECONSIDERATION OF ITS MOTION IN LIMINE PRECLUDING BATCO FROM INTRODUCING AT TRIAL EVIDENCE ON THE SUBJECT MATTERS SPECIFIED IN ORDER No. 341 FOR WHICH IT FAILED TO PRODUCE A KNOWLEDGEABLE 30(B)(6) WITNESS WITH INCORPORATED STATEMENT OF SUPPORTING POINTS AND AUTHORITIES [1]

INTRODUCTION

BATCo deliberately misled this Court about its non-compliance with Order #341. As the Court is aware, Order #341 required BATCo to produce a knowledgeable Rule 30(b)(6) witness on, among other topics, the "publicly available portions of the Foyle Memorandum" and the "document management issues addressed in the McCabe decision." Order #341 at 2-3. In Court on February 15, 2005, counsel for BATCo, Bruce Sheffler, made the startling admission that BATCo had knowingly and intentionally violated Order #341 by producing a witness who had no

[1] Given that Defendants' presentation of the their evidence has already commenced, the United States seeks expedited consideration and expedited briefing of its Motion for Sanctions. The United States respectfully requests that the Court require BATCo to file its Opposition by Monday, March 14. The United States would then file any Reply by Thursday, March 17. For the Court's convenience, the United States has included a separate proposed order granting expedited consideration and briefing. The parties met and conferred on the United States' underlying motion and request for expedited consideration and briefing. BATCo has indicated that it opposes the United States' underlying motion and request for expedited consideration and briefing.

knowledge of the Foyle Memorandum because BATCo believed that compliance with Order #341 would have risked waiver of its privilege in the Foyle Memorandum. Rather than seeking formal relief from Order #341 either from this Court or the D.C. Circuit, BATCo itself engaged in self help by choosing to willfully violate Order #341. In addition, Mr. Sheffler misrepresented to the Court on February 15, 2005 that BATCo had informed the Court in advance of its decision not to comply with Order #341. As described in detail below, until Mr. Sheffler's admission, BATCo had repeatedly told this Court that it had fully complied with Order #341. Moreover, BATCo had never before previously indicated that it was unable to comply with Order #341 on privilege or any other grounds.

The United States is well aware of the tremendous workload of the Court and files the instant motion only after careful consideration. However, BATCo's lack of candor before the Court is inexcusable, and the United States respectfully requests that the Court impose sanctions against BATCo and its counsel. Such sanctions are necessary not only to punish BATCo and its counsel, but also to deter future litigation misconduct by Defendants. In a case of this magnitude, the candor of the parties is essential to the efficient administration of justice. This Court is empowered to order sanctions against BATCo's counsel pursuant to 28 U.S.C. §1927, as well as against BATCo under its own inherent authority to sanction litigation misconduct.

In addition, in light of Mr. Sheffler's admission about BATCo's non-compliance with Order #341, the United States seeks reconsideration of its Motion in Limine to preclude BATCo from introducing any evidence or making any argument in its affirmative case about those topics for which it failed to produce a knowledgeable Rule 30(b)(6) witness. Time and time again, BATCo has willfully refused to comply with this Court's orders. As the United States previously

argued in its Motion in Limine, precluding BATCo from introducing any evidence or making any argument relating to the publicly available portions of the Foyle Memorandum and the document management policies and procedures addressed in the McCabe decision is also an appropriate sanction for BATCo's refusal to comply with Order #341.

FACTUAL BACKGROUND[2]

I. BATCo's Material Omissions and Misrepresentations to This Court

A. BATCO In Its Opposition to the United States' Motion to Compel Never Asserted The United States was Seeking Privileged Information

On September 27, 2002, the United States filed before the Special Master its Motion to Compel BATCo to Produce Testimony Pursuant to its Rule 30(b)(6) Document Management Notice. (R. 1649). The crux of the United States' argument in its Motion to Compel was that BATCo's original 30(b)(6) designee, Alison Kay Kinnard, was not adequately prepared with respect to many of the topics specified in the United States' Rule 30(b)(6) document management notice.[3] Attached to the United States' Motion to Compel was a proposed order requesting, among other things, that BATCo "produce witnesses pursuant to Federal Rule of Civil Procedure 30(b)(6) who are competent to testify about the following subject matters: . . . [t]he publicly available portions of the Foyle Memorandum and any practices or procedures described

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[2] The procedural history leading up to Order #341 was previously addressed in great detail in the "United States' Motion in Limine to Preclude BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which BATCo Failed to Produce a Knowledgeable 30(b)(6) Witness." (R. 3126). The United States incorporates by reference in its Motion in Limine and Reply in Support its Motion in Limine (R. 3286).

[3] Fed. R. Civ. P. 30(b)(6) provides: "[a] party may in the party's notice and in a subpoena name as the deponent a public or private corporation or partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . The persons so designated shall testify as to matters known or reasonably available to the organization. "

therein . . . [and] [t]he document management issues addressed in the McCabe decision." (attached as ex. 1). BATCo filed its Opposition to the United States' Motion to Compel and Cross-Motion for a Protective Order on October 9, 2002. (R. 1681 &1682). BATCo in its Opposition and Cross-Motion argued that it had satisfied its obligations to produce a knowledgeable witness in response to the United States' 30(b)(6) Document Management Notice. Id. at 12-15. Most importantly, in its Opposition and Cross-Motion, BATCo never asserted that it risked waiver of privilege over the Foyle Memorandum if it put forth a knowledgeable Rule 30(b)(6) designee about the publicly available portions of the Foyle Memorandum or the document management issues addressed in the McCabe decision. Id. BATCo also filed a Reply brief in support of its Cross-Motion for a Protective Order. (R. 1713). Again, BATCo in its Reply failed to make any argument about waiver of privilege over the Foyle Memorandum or any other documents referenced in the McCabe decision. Id.

On April 2, 2003, the Special Master issued Report & Recommendation #109 and a proposed Order which would explicitly require BATCo to "designate one or more persons pursuant to Fed. R. Civ. P. 30(b)(6) to testify on its behalf as to matters known or reasonable available to BATCo on the following subject matters: . . . "[t]he publicly available portions of the Foyle Memorandum . . . [and] [t]he document management issues addressed in the McCabe decision." Despite being on notice that Special Master was recommending that it produce a 30(b)(6) witness to offer testimony about the publicly available portions of the Foyle Memorandum and the McCabe decision, BATCo did not object to Report & Recommendation

#109 on any grounds,[4] let alone on the basis that it risked waiver of its privilege by producing a knowledgeable witness to testify about the publicly available portions of the Foyle Memorandum and the document management issues raised in McCabe.[5] On April 14, 2003, this Court issued Order #341, adopting Report & Recommendation #109, including the provision requiring BATCo to produce a 30(b)(6) designee on the publicly available portions of the Foyle Memorandum. BATCo neither appealed Order #341,[6] nor filed a motion requesting relief from

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[4] During the February 15, 2005 argument on the Gulson objections, there was some confusion on the part of both BATCo and the United States over whether BATCo objected to R&R #109 at all and, if so, on what bases. See Tr. 2/15/05 at 13304, 13308. A review of the docket in this case reveals that no objection was filed by either party to R&R #109.

[5] Given the pendency of the Foyle Appeal during the briefing leading up to R&R #109, BATCo was certainly aware of the need for it to zealously protect its privilege interest in the Foyle Memorandum.

[6] During oral argument on the Gulson objections, Mr. Sheffler argued that BATCo, in contrast to when it was ordered to produce the Foyle Memorandum in Order #183, did not appeal Order #341 because:

> "it was within [BATCo's] control to have . . . a witness produced on 30(b)(6) that could or could not affirm the Foyle memorandum. That was within our control. And we could not get collateral order jurisdiction without showing irreparable harm. We could not show irreparable harm because we could act as we did by producing a witness who knew nothing about the Foyle memorandum and would not disclose any information about it. That's what we did."

2/15/05 Tr. at 13304-13305. In other words, according to Mr. Sheffler, BATCo could not show irreparable harm as a basis for an immediate appeal of Order #341, because it could deliberately violate the order instead of complying. Assuming arguendo that BATCo had not waived its right to appeal Order #341 by failing to object to R&R #109, which Order #341 adopted, Mr. Sheffler's analysis that BATCo could not have obtained collateral order jurisdiction is flawed. The situation facing BATCo with respect to Order #341 was identical to the situation BATCo faced when this Court issue Order #183 requiring it to produce the Foyle Memorandum. As with Order #183, BATCo faced the prospect of either revealing its privileged information if it complied with Order #341 by producing a witness with knowledge of the Foyle Memorandum or risking contempt if it violated Order #341 by failing to produce such a knowledgeable witness.

Contrary to Mr. Sheffler's claim that the situation with respect to Order #341 was different because BATCo could produce a witness with no knowledge of the Foyle Memorandum, the situations are the same because in each one, BATCo could allege that it would suffer irreparable harm if it complied with this Court's orders. After all, showing that "irreparable harm" would result from a court order means showing that harm would come from complying with the order in question. Just as BATCo gained an immediate appeal of Order #183 by alleging that it would suffer irreparable harm by losing its privilege if it produced the Foyle Memorandum as Order #183 commanded, so BATCo now contends that it "would have violated the privilege" if it produced a knowledgeable witness as Order #341 commanded. Tr. 2/15/05 at 13305:16-17. BATCo was well aware that it could take an immediate interlocutory appeal if it believed that Order #341 required it to reveal its privileged information. Indeed, this was established in BATCo's interlocutory appeal from Order #183. United States v. Philip Morris Inc., 314 F.3d 612, 618 (D.C. Cir. 2003) (issued January 7, 2003) ("Similarly, we today conclude that the institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review

Order #341 on the basis that it risked waiver of its privilege in the Foyle Memorandum and other documents cited in McCabe if it complied with Order #341. Moreover, BATCo never informed either the Court or the United States of its intention not to comply with Order #341 because of its fear of waiving privilege over the Foyle Memorandum and other documents referenced in McCabe. Instead, BATCo, in response to Order #341, sua sponte engaged in self-help and purposefully designated a 30(b)(6) witness, Alison Kay Kinnard, whom Mr. Sheffler acknowledged could not comply with Order #341. 2/15/05 Tr. at 13305.[7] Ms. Kinnard's deposition went forward on July 24, 2003.

B. In Its Opposition to the United States' Motion in Limine, BATCo Misled the Court by Maintaining That it Had Complied With Order #341

On April 15, 2004, the United States filed its Motion in Limine to Preclude BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which BATCo Failed to Produce a Knowledgeable 30(b)(6) Witness. (R. 3126). In its Motion in Limine, the United States sought sanctions against BATCo pursuant to Fed. R. Civ P. 37(b)(2) and 37(d) for its failure to comply with Order #341. Id at 7-10. Specifically, the United States requested that the Court preclude BATCo from introducing at trial any evidence or making any argument relating to the publicly available portions of the Foyle Memorandum and the document management policies and procedures addressed in the McCabe decision. Id. at 15.

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that may result"). And the same decision established that the "irreparable injury" requirement is satisfied by a district court order compelling the release of privileged information. Id. at 622 ("[T]he general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged [information] to an adverse party is clear enough. . . . The implications of this use of privileged material would be very difficult to remedy on appeal.").

[7] BATCo had initially designated Ms. Kinnard in response to the United States' 30(b)(6) Document Management Notice.

BATCo filed its Opposition to the United States' Motion in Limine on May 17, 2004 (R. 3220), more than a year after the Court issued Order #341. BATCo did not at the time concede in its Opposition that it had violated Order #341, but rather continued to argue just the opposite--that it "[f]ully complied with Order 341 . . . [and] provided complete and knowledgeable testimony regarding both the document management issues discussed in McCabe and the publicly-available portions of the Foyle Memorandum." Id. at 8 (emphasis added). BATCo did, for the first time, in its Opposition, raise the issue of waiver of privilege, arguing that it did not have Ms. Kinnard consult privileged documents or obtain other privileged information in preparation for her deposition to avoid any risk of waiver of its privilege in such documents as the Foyle Memorandum. Id. at 9-10. Nevertheless, BATCo insisted that there was no need for Ms. Kinnard to review such material to comply with Order #341, and insisted that it "fully complied." On July 23, 2004, the Court, presumably taking into account the representations made in the briefing submitted by the parties, issued Order #606 denying the United States' Motion in Limine.

C. Representations Made By Counsel for BATCo During the February 15, 2005 Argument Over the Gulson Objections

During the course of argument over Defendants' objections to the Gulson testimony, counsel for BATCo, Bruce Sheffler, admitted that, contrary to all of BATCo's prior representations to this Court that it had complied with Order #341, BATCo in fact had intentionally violated Order #341 by producing a witness without the requisite knowledge of the topics outlined in that Order:

> MR. SHEFFLER: . . . Why didn't we take up Ms. Kinnard's testimony? One answer, Your Honor. Because it was within our control to have Ms. -- to have

> a witness produced on 30(b)(6) that could or could not affirm the Foyle memorandum. That was within our control. And we could not get collateral order jurisdiction
> without showing irreparable harm. We could not show irreparable harm because we could act as we did by producing a witness who knew nothing about the Foyle memorandum and would not disclose any information about it. That's what we did.
>
> * * *
>
> THE COURT: **So you chose to produce a witness who clearly couldn't comply with my order in the case.**
> MR. SHEFFLER: **We did, Your Honor**, and we told the court exactly what we were going to do and we did it. And we told the court in opposition to their motion in limine the reasons why we had to do is that. Your Honor, I confess that we did produce a witness who had no knowledge of the Foyle memorandum with the portions about the Foyle memorandum quoted in McCabe. We did do that, Your Honor, and we did that because we felt anything else would have violated the privilege, and we could not do that. We could not violate the privilege.

2/15/05 Tr. at 13304-13305 (emphasis added). Mr. Sheffler's statement was unambiguous – BATCo knowingly violated an express order of this Court. However, BATCo's egregious conduct did not end with its refusal to comply with Order #341. Counsel for BATCo's statement to the Court that BATCo had previously informed the Court of its intentions with respect to Order #341was false, or at the very least mistaken.[8] As described above, BATCo had never previously informed the Court that it intended to produce a witness who could not comply with Order #341. To the contrary, in its Opposition to the United States' Motion in Limine, BATCo explicitly argued that it had produced a witness, Alison Kay Kinnard, who was in full compliance with Order #341. As the factual background above reveals, BATCo clearly committed a fraud

[8] Although we appreciate that no counsel can be expected to remember every detail of every prior submission and representation made to the Court in this massive case, the Court should be able to rely upon representations of counsel about such fundamental issues as a party's non-compliance with a court order. Remarkably, not a single defense counsel has to date undertaken to correct the misstatement made by Mr. Sheffler in open court.

upon the Court by repeatedly representing that it had produced a knowledgeable Rule 30(b)(6) witness in compliance with Order #341 when, by its own counsel's admission, it had no intention of ever complying with Order #341.

ARGUMENT

I. BATCo Should Be Sanctioned For Misleading The Court About Its Non-Compliance With Order #341

A. Legal Standard

BATCo's conduct in misleading the Court and the United States about its non-compliance with Order #341 warrants sanctions under 28 U.S.C §1927 and the inherent authority of this Court. Title 28 U.S.C. §1927 provides that "[a]ny attorney or other persons 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."[9] To impose sanctions under §1927, a "district court must find that the offending attorney's multiplication of the proceedings was both unreasonable and vexatious." LaPrade v. Kidder Peabody& Co., Inc., 146 F.3d 899, 906 (D.C. Cir. 1998) (internal citations and quotations omitted). The purpose of §1927 is to allow the court "to assess attorney's fees against an attorney who frustrates the progress of judicial proceedings." United States v. Wallace, 964 F.2d 1214, 1218 (D.C. Cir. 1992). The issue of whether bad faith is required for the imposition of sanctions under §1927 is unsettled in this Circuit, but the conduct must be "at least reckless."

[9] The imposition of sanctions under 28 U.S.C. §1927 is discretionary, not mandatory. Runfola & Associates, Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368, 375 (6th Cir. 1996); Burrul v. First National Bank of Minneapolis, 831 F.2d 788, 790 (8th Cir. 1987).

Naegele v. Albers, CA-NO. 03-2507, 2005 WL 13294 at *13 (D.D.C. Jan. 3, 2005)(internal quotations and citations omitted) ("Unintended, inadvertent, and negligent acts [, however,] will not support an imposition of sanctions under section 1927 . . . For an act to be considered reckless misconduct, there must be a 'conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man'"); Laprade, 146 F.3d at 905.

A federal court has the inherent authority to impose sanctions against a party to "protect [its] integrity and prevent abuses of the judicial process." Butera v. District of Columbia, 235 F.3d 637, 661 (D.C. Cir. 2001); Shepeard v. American Broadcasting Cos., 62 F.3d 1469, 1472 (D.C. Cir 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process"); Alexander v. FBI, 192 F.R.D. 25, 31 (D.D.C. 2000) ("The Court possesses the inherent power to monitor litigation closely and to sanction litigants for abusive practices"). Courts have "the inherent authority to impose sanctions against an attorney for misconduct" upon a showing of bad faith by clear and convincing evidence. Morrison v. International Progams Consortium, Inc., 240 F. Supp. 2d 53, 56 (D.D.C. 2003) (imposing monetary sanctions against attorney who failed to appear for trial); Wallace, 964 F.2d at 1219 ("By contrast with section 1927, it is settled that a finding of bad faith is required for imposition of sanctions under the court's inherent power").[10] This Court is not required to conduct an evidentiary hearing before imposing sanctions against BATCo. Laprade,

[10]As this Court has previously stated when it held BATCo in conditional contempt, "[l]itigants may not defy court orders because their commands are not to the litigants' liking. If the rule of law is to be upheld, it is essential that the judiciary takes firm action to vindicate its authority to compel compliance with lawfully issued directives, and to not reward delay and disobedience." United States v. Philip Morris, 287 F.Supp 2d 5, 14 (D.D.C. 2003).

146 F.3d at 907 (holding that district court did not abuse its discretion in imposing §1927 sanctions without holding evidentiary hearing); see Pigford v.Veneman, 307 F. Supp. 2d 51, 58 (D.D.C. 2004) ("As for a hearing, due process does not require a hearing every time sanctions are imposed"). The facts are clear. As detailed above, BATCo in its written and oral representations misled the Cour with respect to its compliance with Order #341. Under either a standard of recklessness or the more stringent standard of bad faith, BATCo's conduct, and the conduct of its counsel, with respect to BATCo's failure to comply with Order #341 is sanctionable.[11]

B. BATCo Circumvented An Express Order of This Court By Intentionally Producing A Witness That Could Not Comply With Order #341

As Mr. Sheffler openly acknowledged during the February 15, 2005 argument over the Gulson Objections, BATCo evaded the provision in Order #341 requiring BATCo to produce a knowledgeable witness on, among other topics, the publicly available portions of the Foyle Memorandum by producing a witness who "had no knowledge of the Foyle Memorandum." 2/15/05 Tr. at 13305. Given Mr. Sheffler's statement that BATCo "did produce a witness who had no knowledge of the Foyle memorandum with the portions about the Foyle memorandum quoted in McCabe. We did do that, Your Honor, and we did that because we felt anything else would have violated the privilege, and we could not do that," id, there can be no question that BATCo's failure to comply with Order #341 was intentional. The United States wasted considerable time and expense in preparing for and taking the deposition of BATCo's 30(b)(6) designee on the publicly available portions or the Foyle memorandum, when it now emerges that

[11] The decision by a district court to impose sanctions pursuant to 28 U.S.C. §1927 is not immediately appealable. See Cunningham v. Hamilton County, 527 U.S. 198, 209 (1999); Manion v. American Airlines Inc., 2002 WL 31818922 at *1 (Dec. 12, 2002 D.C. Cir). A district court's imposition of sanctions pursuant to 28 U.S.C. §1927 is reviewed under the abuse of discretion standard. Wallace v. Skadden, Arps, Slate, Meagher & Flom, LLP., 362 F.3d 810, 813 (D.C. Cir. 2004).

BATCo all along had no intention of ever producing a 30(b)(6) designee knowledgeable about the Foyle Memorandum.[12]

Other courts in this Circuit have previously imposed monetary sanctions under §1927 against parties who attempted to "circumvent a district court ruling." Reynolds v. The U.S. Capital Police Board, No. 01-810, 2004 WL 3168226 at *5 (D.D.C March 31, 2004) (imposing §1927 sanctions against party and his counsel for seeking to amend complaint to include claims previously dismissed by prior rulings); see John Akridge Co. v. Travelers Co., 944 F.Supp. 33, 34 (D.D.C. 1996) (imposing monetary sanctions where party "filed the instant suit with the specific intent of circumventing this Court's dismissal of its earlier suit"); see Laprade, 146 F.3d at 905 (upholding District Court's imposition of §1927 sanctions where party sought to evade the Court's Order staying an action pending arbitration by obtaining ex parte order from a New York State court staying the arbitration). Just as courts sanction parties under § 1927 for ignoring prior rulings by refiling claims previously dismissed – forcing their opponents to expend time and money opposing these recycled claims – this Court should sanction BATCo for intentionally violating Order #341 and forcing the United States to expend time and money taking the deposition of a Rule 30(b)(6) witness without the requisite knowledge.

C. BATCo Filed A Baseless Opposition To the United States' Motion in Limine

This Court should also sanction BATCo for filing a meritless and misleading Opposition to the United States' Motion in Limine to Preclude BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which BATCo Failed to Produce a

[12] Counsel for the United States was required to travel to London at substantial expense.

Knowledgeable 30(b)(6) Witness. BATCo in its Opposition strenuously argued that it had fully complied with Order #341. See 5/17/04 BATCo Opposition at 8-13. (R. 3220). Given Mr. Sheffler's admission that BATCo deliberately produced a witness who could not comply with Order #341, BATCo's Opposition to the United States' Motion in Limine was completely baseless.

In Smigna v. Dean Witter Reynolds, Inc., 766 F.2d 698, 708 (2nd Cir. 1985), the Second Circuit upheld a district court's imposition of §1927 sanctions against a party who filed a "frivolous, unreasonable and groundless opposition" to a motion. See, e.g. Baker Indust. v. Cerebus Ltd., 764 F.2d 204, 208 (3rd Cir. 1985) (upholding district court's imposition of §1927 sanctions under standard of "bad faith" against law firm of Cravath Swaine & Moore for filing objections to decision of referee in violation of express provision of stipulation between the parties barring such objections). BATCo should similarly be sanctioned because its Opposition to the United States' Motion in Limine was "frivolous" and "groundless" in that it was premised on the argument that it had complied with Order #341-an argument that Mr. Sheffler acknowledged was false in his admission to the Court that BATCo purposefully produced a witness who could not comply with Order #341.

D. BATCo Misled The Court By Maintaining that It Complied With Order #341 and By Erroneously Claiming That It had Informed the Court of Its Intention to Produce a 30(b)(6) Designee With No Knowledge of the Foyle Memorandum

As described above, BATCo in both the 2002 briefing before the Special Master on the United States' Motion to Compel which resulted in Order #341 and the 2004 briefing on the United States' Motion in Limine made material misrepresentations and omissions. In its

Opposition to the United States' Motion to Compel – which specifically requested that BATCo produce a witness "[t]he publicly available portions of the Foyle Memorandum and any practices or procedures described therein . . . and [t]he document management issues addressed in the McCabe decision" – BATCo never indicated that it risked waiver of its privilege in the Foyle Memorandum or any other documents by producing such a witness. Furthermore, BATCo never informed the Court of its position with respect to waiver of its privilege by either objecting to R&R #109 or seeking any type of relief from Order #341. BATCo's lack of candor continued when it maintained in its Opposition to the United States' Motion in Limine that it had fully complied with Order #341. Finally, Mr. Sheffler in his representations to the Court on February 15, 2005, misrepresented the record by erroneously stating that BATCo had previously informed the Court of its intention to produce a witness with no knowledge of the Foyle Memorandum: "[W]e told the court exactly what we were going to do and we did it." 2/15/05 Tr. at 13305.

BATCo's misrepresentations to the Court about its compliance with Order #341 and its failure to inform the Court of its intention not to comply with Order #341 until months after the deposition of Ms. Kinnard took place are sanctionable under 28 U.S.C. § 1927. See Malhiot v. Southern California Retail Clerks, 735 F.2d 1133, 1138 (9th Cir. 1984) (imposing sanctions under § 1927 against attorneys where "counsel's brief to th[e] court contain[ed] many misrepresentations of the record and an intentional misstatement of California law"); See e.g, Fann v. Giant Food, Inc., Civ. A. No. 86-3376, 1987 WL 12370 at *2 (D.D.C June 16, 1987) (denying defendant's motion to reconsider discovery order and concluding that "defendant's argument is disingenuous and that defendant's conduct may violate . . . 28 U.S.C. § 1927. If defendant's words and omissions were designed to mislead the Court . . . then this is indeed a

serious matter").[13]

BATCo's misrepresentations in its filings and statements before this Court also rise to the more stringent level of bad faith required in order to impose sanctions under this Court's inherent authority to sanction litigants for abusive litigation practices. See Lipsig v. Nat. Student Marketing Corp., 663 F.2d 178, 181 (D.C. Cir. 1980) (upholding district court's finding of bad faith and award of counsel's litigation costs and counsel fees where district court found party "seriously misled the Court by misquoting or omitting material portions of documentary evidence"). As the facts described above demonstrate, BATCo misled the Court in arguing that (1) it had complied with Order #341 when, as Mr. Sheffler conceded, BATCo produced a witness it knew could not comply with the Court's Order and (2) representing during the February 15, 2005 argument that it had informed the Court of its intention not to produce a witness who could comply with Order #341 when the record clearly indicated the opposite.

E. The Court Should Fine BATCo Pursuant To Its Inherent Authority For Misleading The Court And For Its Non-Compliance With Order #341

Courts are empowered to impose monetary fines under their inherent authority to sanction abusive litigation practices. Shepherd v. American Broadcasting Cos., Inc., 62 F.3d 1469, 1474-1475 (D.C. Cir. 1995). This Court has previously imposed monetary sanctions

[13] Mr. Sheffler's misrepresentation to the Court that BATCo had informed the Court of its intention not to comply with Order #341 appears to violate an attorney's ethical obligations under Rule 3.3 of the D.C. Rules of Professional Conduct. Rule 3.3 states that: "[a]lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a tribunal." This rule applies to a "statement in open court." Id. cmt. 2. An attorney's violation of ethical rules can serve as the basis for the imposition of sanction under 28 U.S.C. §1927. Malhiot, 735 F.2d at 1138 (finding that counsel's violation of the American Bar Association's Code of Professional Responsibility's disciplinary rules requiring "that attorneys not engage in conduct that involves misrepresentation . . . constitutes the requisite bad faith and intentional misconduct for which sanctions under Section 1927 are appropriate").

against BATCo in this litigation for its failure to comply with Order #343. See United States v. Philip Morris U.S.A. Inc., No. Civ.A.99-2496, 2003 WL 22462167 (D.D.C Oct. 20, 2003) (imposing daily sanctions against BATCo of $25,000); see also United States v. Philip Morris U.S. A. Inc., 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (imposing monetary sanction of $2,7500,00 against Philip Morris and Altria Group for its violation of Order #1). BATCo's refusal to comply with yet another Order of this Court warrants the imposition of harsh sanctions for its repeated litigation misconduct. Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2nd Cir. 1979) (a court "'should not shrink from imposing harsh sanctions where . . . they are clearly warranted").

Not only did BATCo violate Order #341, it misled the Court in misrepresenting to the Court that it had complied with Order #341. Courts pursuant to their inherent authority have routinely imposed monetary fines against parties and their counsel for misleading the Court. See El-Gharabli v. INS, 796 F.2d 935, 938-940 (7th Cir. 1986) (imposing $500 fine against counsel for misleading the Court in motion for extension of time to file brief); see e.g., Kliener v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1209-1210 (11th Cir. 1985) (imposing fine $50,000 fine against attorneys for their misconduct in litigation); Carrol v. Jacques Admiralty Law Firm P.C., 110 F.3d 290, 293(5th Cir. 1997) (district court did not abuse its discretion in imposing $7,000 fine against attorney for misconduct during his deposition). Given BATCo's substantial financial resources,[14] the United States respectfully requests that the Court impose an appropriate

[14]The extent of the BATCo's financial resources and those of its ultimate parent corporation, British American Tobacco p.l.c. were presented to the Court in the "United States' Opposition to BATCo's Motion for a Protective Order Regarding Compliance with Order #343 And Cross Motion for a Finding of Contempt Against BATCo and for Imposition of Continuing Monetary Sanctions." (R.2271 & 2272 at 31) ("The 2002 Annual Review and Summary Financial Statement of British American Tobacco p.l.c.-BATCo's ultimate parent-indicates operating

monetary fine against BATCo.

F. Ordering BATCo's Counsel To Reimburse the United States for Costs Associated With the July 24, 2003 Deposition of Alison Kay Kinnard Is An Appropriate Sanction

This Court should order counsel for BATCo to reimburse the United States for the costs associated with the July 24, 2003 deposition of Alison Kay Kinnnard which took place pursuant to Order #341. Title 28 U.SC.§1927 authorizes sanctions against attorneys, as opposed to parties. Westmorland v. CBS, Inc. 770 F.2d 1168, 1173 (D.C. Cir. 1985).[15] BATCo's misconduct resulted in substantial prejudice to the United States. As a result of BATCo's intentional violation of Order #341, the United States wasted a significant amount of time and money traveling to London to take the deposition of BATCo's admittedly unprepared Rule 30(b)(6) designee. This Court has previously ordered a Defendant in this case to reimburse the United States for costs associated with a deposition resulting from the violation of a Court Order. United States v. Philip Morris U.S. A. Inc., 327 F. Supp. 2d at 26 (ordering Philip Morris to reimburse the United States for the costs associated with the Rule 30(b)(6) deposition on email destruction taken after Philip Morris violated Order #1 ¶7 at 4-5). Similarly, counsel for BATCo should reimburse the United States for the costs associated with Ms. Kinnard's July 24, 2003 deposition.

The United States requests that the Court order counsel for BATCo to reimburse the

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profit of £2.77 billion in 2001 and £2.68 billion in 2002").

[15] A district court has jurisdiction to impose §1927 sanctions against any attorney who appears before it, regardless of whether the attorney was formally admitted to practice before the court or admitted by pro hac vice motion. Mitchell v. Sonies, 56 F.3d 61 (4th Cir. 1995) (unpublished opinion). This Court granted a motion for Mr. Sheffler to appear pro hac vice on June 19, 2002. (R. 1314).

United States for the costs paid to the court reporter and videographer at the deposition and the travel expenses incurred by the primary attorneys attending the deposition. These costs are itemized in the invoices and travel voucher summaries attached as exhibits 2-4. See Anglo-American Invoice # 11353(court reporter and videographer costs for July 24, 2003 deposition, attached as ex. 2); Travel Voucher Summary for Carolyn I. Hahn (attached as ex. 3); Travel Voucher Summary for James G. Gette (attached as ex. 4). The costs total $ 10,015.33.

II. In Light Of The Admission By Counsel For BATCo, The United States Seeks Reconsideration Of Its Motion In Limine To Preclude BATCo from Introducing at Trial Evidence on the Subject Matters Specified in Order No. 341 for Which BATCo Failed to Produce a Knowledgeable 30(b)(6) Witness

The United States respectfully requests that this Court reconsider Order #606 denying the United States' Motion in Limine. As described above, BATCo made material misrepresentations of fact in its Opposition to the United States' Motion in Limine-mainly that it had fully complied with Order #341. Mr. Sheffler explicitly admitted to this Court on February 15, 2005 that BATCo had, contrary to the representation made in its Opposition that it had "fully complied with Order #341 (R. 3220), intentionally produced a witness who could not comply with Order #341. 2/15/05 Tr. at 13305. Mr. Sheffler's admission warrants reconsideration of Order #606 under the standards for reconsideration previously articulated by this Court.

A. Mr. Sheffler's Admission Warrants Reconsideration Of Order #606

As the Court has articulated in two prior opinions in this case, "a motion for reconsideration should be granted only if the Court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Mem. Op. accompanying Order #399 at 3 (internal citation and quotations omitted); United States v. Philip Morris, 130 F. Supp. 2d 96, 99 (D.D.C. 2001) ("To prevail on a

motion for reconsideration, it is the moving party's burden to show new facts or clear errors of law which compel the Court to change its prior position") (internal citations and quotations omitted); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Mr. Sheffler's recent admission to this Court regarding BATCo's non-compliance with Order #341constitutes "new evidence" under the requirements for reconsideration. Indeed, whether or not BATCo had complied with Order #341 was the central issue raised by the United States' Motion in Limine and which the Court implicitly ruled on in Order #606.[16] Moreover, reconsideration of Order #606 is necessary to prevent "manifest injustice." The Court in deciding the United States' Motion in Limine presumably relied on the misrepresentations made by BATCo in its Opposition regarding its compliance with Order #341. BATCo's lack of candor to the Court in its Opposition to the United States' Motion in Limine should not condoned. Failure to reconsider Order #606 would serve to reward BATCo for misleading the Court in its Opposition.

B. The Court Should Specifically Preclude BATCo from Introducing at Trial Any Evidence or Making Any Argument Relating to the Publically Available Portions of the Foyle Memorandum and the Document Management Policies and Procedures Addressed in the McCabe Decision

As the United States previously addressed in its Motion in Limine, precluding BATCo from introducing any evidence at trial or making any argument relating to the publicly available portions of the Foyle Memorandum and the document management policies and procedures addressed in the McCabe decision is an appropriate sanction for its failure to comply with Order

[16] The Court has previously reconsidered a prior decision on a motion in limine when after initially denying Defendants' Motion to Exclude Evidence with Respect to Banded Paper and Coal Drop Off it precluded the testimony of Dr. Watkins on this subject matter. 2/8/05 Tr. at 12402-12408

#341.[17] BATCo's failure to produce a knowledgeable Rule 30(b)(6) witness prejudiced the ability of the United States to put on its document suppression case against BATCo. Not only was the United States prior to trial unable to obtain adequate discovery concerning BATCo's worldwide document management policies, but BATCo's refusal to produce Alison Kay Kinnard as a live witness further denied the United States the opportunity to elicit testimony on this issue. See 5/26/04 letter Wallace to Eubanks (attached as ex. 5).

BATCo has already submitted counter-designations from Ms. Kinnard's July 23, 2004 deposition which should be stricken from the record. In addition, Ms. Kinnard is listed as a witness (prior) on Defendants' Anticipated Order of Witnesses for Trial submitted on February 23, 2005. (attached as ex. 2). This Court should also preclude BATCo from offering testimony in its case in chief from any other witnesses it may call live or by prior testimony on the publicly available portions of the Foyle Memorandum or the document management issues raised in McCabe.

CONCLUSION

The candor of litigants in their written submissions and oral representations to the Court is the sine qua non of the judicial system. In order to deter future misconduct by BATCo and any other Defendant in this case, the Court should sanction BATCo and its attorneys. BATCo's conduct and the conduct of its counsel demonstrate a complete lack of candor with this Court about compliance with Order #341. Not only did BATCo mislead the Court in its submissions to this Court, but counsel for BATCo during oral argument over the Gulson objections

[17] The United States in Its Motion in Limine sought these sanctions against BATCo pursuant to Fed. R. Civ. P. 37(b)(2)(B) and 37(d). (R.3126 at 7-10).

misrepresented the facts in stating that BATCo had previously informed the Court of its intention not to comply with Order #341. BATCo has repeatedly throughout this litigation demonstrated a propensity for violating express orders of this Court. Despite having been previously held in contempt of Court in Orders #411 and #419, BATCo has not demonstrated that it is willing to respect and abide by the authority of this Court. BATCo's open acknowledgment of its failure to comply with Order #341(and its decision to engage in self help by producing a non-compliant witness) is the latest example of the BATCo's abuse of the litigation process. For the foregoing reasons, the United States respectfully requests that the Court grant the United States' Motion for Sanctions Against BATCo and Motion for Reconsideration of its Motion in Limine, and the Court should (1) impose an appropriate fine against BATCo; (2) order counsel for BATCo to reimburse the United States for the costs associated with the July 24, 2003, deposition of Alison Kay Kinnard, taken pursuant to Order #34; (3) preclude BATCo from introducing at trial any evidence or making any argument relating to the publicly available portions of the Foyle Memorandum and the document management policies and procedures addressed in the McCabe decision; and (4) any other relief the Court deems just and proper.

Dated: March 8, 2005
Washington, D.C.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

/s/ Sharon Y. Eubanks
SHARON Y. EUBANKS (D.C. Bar # 420147)
Director, Tobacco Litigation Team

/s/ Stephen D. Brody
STEPHEN D. BRODY (D.C. Bar # 459263)
Deputy Director, Tobacco Litigation Team

/s/ Carolyn I. Hahn
CAROLYN I. HAHN
Trial Attorney, Tobacco Litigation Team

Torts Branch, Civil Division
United States Department of Justice
Post Office Box 14524
Washington, D.C. 20044-4524
Telephone: (202) 616-4185

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**Civil Action No. 99-CV-02496 (GK)**
PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., et al.,	**Next scheduled appearance: Trial (ongoing)**
Defendants.	

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS AGAINST BATCO AND MOTION FOR RECONSIDERATION OF ITS MOTION IN LIMINE PRECLUDING BATCO FROM INTRODUCING AT TRIAL EVIDENCE ON THE SUBJECT MATTERS SPECIFIED IN ORDER No. 341 FOR WHICH IT FAILED TO PRODUCE A KNOWLEDGEABLE 30(B)(6) WITNESS

BATCo in its Opposition offers no explanation for its lack of candor to the Court and the United States about its failure to comply with Order #341. BATCo, instead relies on a tortured analysis of both the facts and Order #341 in a misguided attempt to justify its litigation tactics. However, no amount of obfuscation can alter the fact that; 1) Order #341 required BATCo to produce a knowledgeable Rule 30(b)(6) witness on the publicly available portions of the Foyle Memorandum; 2) BATCo did nothing to seek relief from that order; and 3) BATCo misled the Court and the United States about its non-compliance with Order #341. BATCo's misconduct, as well as its continuing efforts to mislead the Court, justifies both the imposition of sanctions and the reconsideration of the United States' Motion in Limine. A strict sanction against BATCo is necessary to deter it from continued violation of the Court's Orders. BATCo's ongoing failure – even

after its deception came to light – to come clean with the Court demonstrates that its improper, unethical, and recidivist litigation tactics can only be curbed through the Court's sanction.

ARGUMENT

I. BATCo Violated The Express Requirements of Order #341

BATCo conflates the production of the Foyle Memorandum in its entirety with the production of the witness to testify about the publicly available portions of the Foyle Memorandum contained in the McCabe decision in a misguided attempt to justify its failure to comply with Order #341. Indeed, in its Opposition, BATCo claims that it was faced with the Hobson's choice of either producing a witness with knowledge of the Foyle memorandum – thereby risking waiver of its privilege- or producing a witness with no knowledge of the Foyle memorandum. BATCo Opp. at 1. What BATCo fails to acknowledge is Order #341 required something in between – that BATCo produce a witness knowledgeable about the publicly available portions of the Foyle Memorandum. Therefore, compliance with Order #341 by producing a witness with knowledge about the public portions of Foyle Memorandum would not have risked waiver of privilege over the entire Foyle memorandum.[1]

BATCo carries forward the erroneous premise that it could only either produce a witness who knew everything about the Foyle Memorandum or a witness who knew nothing about it to make the absurd argument that the Court in issuing Order #341 did not mean what it expressly stated – that BATCo was required to produce a witness who knew about the publicly available portions of the

[1]While BATCo has argued that Mr. Gulson's testimony about the publicly available portions of the Foyle Memorandum quoted in the McCabe decision is privileged – an argument this Court just rejected in Order #896, it never once sought relief from Order #341 on the basis that any testimony concerning the publicly available portions of the Foyle Memorandum would be privileged.

Foyle Memorandum. See Id. at 7. BATCo has the audacity to claim that "[a] failure to produce a 30(b)(6) witness with knowledge of the Foyle Memorandum is not the same thing as a failure to comply with Order #341." Id. at 6. To the contrary, as this Court stated:

> In short, BATCo violated the plain command of Order #341, as it later acknowledged in oral argument relating to these Objections-- by failing to prepare its witness to comply with that Order's requirement that she be able to testify about the publicly available portions of the Foyle Memorandum and the document management issues discussed in McCabe.

Mem. Op. accompanying Order #896 at 12.

BATCo's latest claim that its only choice was to produce a witness who knew nothing about the Foyle Memorandum is contrary to its admittedly false assertion in its Opposition to the United States' Motion in Limine that Ms. Kinnard was knowledgeable about the publicly available portions of the Foyle Memorandum. BATCo 5/17/04 Opp. at 8. (R. 3220). In the absence of any effort on the part of BATCo to seek relief from Order #341 (or even raise very privilege issue that BATCo says drove it to violate the Court's Order), it was more than reasonable for the Court and the United States to assume that BATCo would produce a witness who was knowledgeable about the publicly available portions of the Foyle Memorandum, and not, as Mr. Sheffler conceded in open court on February 15, 2005, violate the Court's Order by producing a witness who knew nothing about the Foyle Memorandum.

II. BATCo Cannot Rely On Its Appeal of Orders #157 and #183 To Argue That the Court and the United States Was On Notice Of Its Intention To Violate Order #341

BATCo alleges that both the Court and the United States should have been on notice that it never intended to produce a witness with any knowledge about the Foyle Memorandum because of its appeal of this Courts' Orders requiring the production of the Foyle Memorandum. BATCo Opposition at 1-3. BATCo's argument is devoid of any merit. BATCo never sought relief from

Order #341 on the basis that it risked waiver of its privilege in the Foyle Memorandum by producing a 30(b)(6) witness on the publicly available portions of the Foyle Memorandum,[2] so how could the United States and the Court have known that BATCo's appeal of Orders #157 and #183 – addressing the production of the actual Foyle Memorandum, not sections that were already publicly available in the McCabe judgment – meant it would not fully comply with Order #341. Indeed, the United States has consistently maintained the position that the publicly available portions of the Foyle Memorandum are not privileged.

III. Sanctions Are Warranted Against BATCo

As this Court stated regarding BATCo's actions in response to Order #341: "BATCo's conduct was, at best, deceptive and, at worst, in flagrant violation of Order #341." Mem. Op. accompanying Order #896 at 13. Even BATCo's belated admission to the Court that it intentionally violated Order #341 and its subsequent actions have been misleading:

> THE COURT: So you chose to produce a witness who clearly couldn't comply with my order in the case.
> MR. SHEFFLER: We did, Your Honor, and we told the court exactly what we were going to do and we did it. And we told the court in opposition to their motion in limine the reasons why we had to do is that. Your Honor, I confess that we did produce a witness who had no knowledge of the Foyle memorandum with the portions about the Foyle memorandum quoted in McCabe. We did do that, Your Honor, and we did that because we felt anything else would have violated the privilege, and we could not do that.

Tr. 2/15/05 at 13305 (emphasis added).[3] However, BATCo clearly did not tell the Court exactly

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[2] BATCo does not even attempt to respond to the United States' argument that Mr. Sheffler's assertion on February 15, 2005 that BATCo could not appeal Order #341 because it could not demonstrate irreparable harm was simply erroneous in light of the decision by the D.C. Circuit in United States v. Philip Morris Inc., 314 F.3d 612, 618 (D.C. Cir. 2003).

[3] Even BATCo's citation of this very passage is designed to mislead the Court. In quoting this exchange at page 8 of its opposition to the instant motion, BATCo uses ellipses to obscure the its false statement, "and we told the court exactly what we were going to do and we did it."

what they were going to do. Rather, in BATCo's Opposition to the United States' Motion in Limine, BATCo denies – falsely – that it willfully violated the Court's Order, declaring that "BATCo prepared a 30(b)(6) witness, Ms. Alison K. Kinnard, with the information reasonably available to BATCo and Ms. Kinnard provided knowledgeable and complete testimony on all areas covered by Order 341."[4] BATCo 5/17/04 Opp. at 4. This statement was not true at the time and is not true today. Nevertheless, BATCo opens its opposition to the instant motion by baldly asserting – despite Mr. Sheffler's recent revelation before the Court – that "no new facts have been presented to this Court or to plaintiff since Order #606 [denying the United States' Motion in Limine] was issued." BATCo's dishonest statements and ongoing failure to come clean fully warrant this Court's sanction.[5]

CONCLUSION

In light of BATCo's repeated violations of this Court's Orders and its ongoing dishonesty regarding its actions, only the Court's sanction can deter BATCo from continuing its brazen misconduct. Accordingly, the United States respectfully request that the Court grant the United States' Motion for Sanctions Against BATCo and Motion for Reconsideration of its Motion in Limine.

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[4] Furthermore, the opening paragraph of BATCo's Opposition to the United States' Motion in Limine declared:

> [P]laintiff's gripe is that BATCo's 30(b)(6) witness did not know every single fact and did not answer certain discrete questions with the desired level of specificity, not that she or BATCo willfully shirked their discovery obligations.

BATCo 5/17/04 Opp. at 1 (emphasis added). Despite raising the matter, BATCo did not admit that it had, in fact, "willfully shirked [its] discovery obligation", instead implying that it had not.

[5] BATCo incorrectly sets forth the standard for sanction. The issue of whether bad faith is required for the imposition of sanction under §1927 is unsettled in this Circuit, but the conduct must be "at least reckless." Naegele v. Albers, CA-NO. 03-2507, 2005 WL 13294 at *13 (Jan. 3, 2005 D.D.C)(internal quotations and citations omitted).

Dated: March 16, 2005
Washington, D.C.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

/s/ Sharon Y. Eubanks
SHARON Y. EUBANKS (D.C. Bar # 420147)
Director, Tobacco Litigation Team

/s/ Stephen D. Brody
STEPHEN D. BRODY (D.C. Bar # 459263)
Deputy Director, Tobacco Litigation Team

CAROLYN I. HAHN
BRETT D. SPIEGEL
Trial Attorneys, Tobacco Litigation Team
Torts Branch, Civil Division
United States Department of Justice
Post Office Box 14524
Washington, D.C. 20044-4524