

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<p>LARRY D. STEWART, <u>et al.</u></p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>JOHN ASHCROFT¹, in his official capacity as ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Civil Action No. 90-2841 (RCL)</p>
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MOTION FOR ENTRY OF JUDGEMENT PURSUANT TO RULE 54(b)

Plaintiffs Larry D. Stewart et al., by and through their undersigned counsel, respectfully submit this Motion for Entry of Judgment pursuant to Fed. R. Civ. P. 54(b). Pursuant to Local Rule 7.1(m), Plaintiffs met and conferred regarding the motion and Defendant's counsel indicated the government would oppose the motion at this time.

BACKGROUND

On March 28, 2002, Plaintiffs filed a Motion seeking a Show Cause Order against former Treasury Secretary Paul O'Neill for civil contempt in failing to comply with the Settlement Agreement approved in Stewart v. Rubin, 948 F. Supp. 1077 (D.D.C. 1996). Former Secretary Paul O'Neill was responsible for directing the compliance efforts of the Bureau of Alcohol, Tobacco and Firearm ("BATF").

¹ On January 24, 2003, the Bureau of Alcohol, Tobacco & Firearms transferred from the Department of Treasury to the Department of Justice. Accordingly, Attorney General John D. Ashcroft is now the proper Defendant in this action.

Specifically, Plaintiffs alleged that the BATF violated the Settlement Agreement because it:

- (1) failed to complete personnel reforms on time, including the promotion assessment system;
- (2) failed to provide monitoring data on various personnel issues;
- (3) failed to implement the equitable relief due to class members with regard to retirement contributions and retroactive promotions;
- (4) failed to pay taxes due on the back pay fund established by the Settlement Agreement;
- (5) failed to pay the appellate official and technical official designated by the Settlement Agreement; and
- (6) failed to demonstrate compliance with Section IV.C.11.d, Section IV.C.10.c., Section IV.C.6., and IV.C.4.v. of the Settlement Agreement.

On September 3, 2002, this Court issued a Memorandum Opinion and Order, Stewart v. O'Neill, 225 F. Supp. 2d 6 (D.D.C. 2002), denying Plaintiffs' motion. The Court found it only had jurisdiction over the following Sections of the Settlement Agreement: Sections IV.C.1 (Data Collection), IV.C.2 (Analysis of Data), and IV.C.5 (Promotions Assessment System). The Court held that Plaintiffs were not entitled to a show cause order because they would not be able to show by clear and convincing evidence that there was a "clear and reasonably specific order" that might have been violated. The Court ruled that the Settlement Agreement had never been given the force of a Court Order, but had merely been approved pursuant to Fed. R. Civ. P. 23(e) and Section 108 of the Civil Rights Act of 1991.

Even assuming that there was an Order, the Court held that it was unlikely that Plaintiffs would be able to prove a violation of Defendant's duty to make its best efforts to comply with the Settlement Agreement. The Court denied Plaintiffs request for a modification of the Agreement pursuant to Fed. R. Civ. P. 60 because defendant's failure to comply with the deadlines were not the sort of changed circumstances that would permit modification under Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992).

The Court noted that "the implementation of some terms of the settlement agreement—in particular, the Promotion Assessment System and the data collection and analysis—is far behind the schedule envisioned by the agreement." Stewart v. O'Neill, 225 F.Supp.2d 6, 16 (D.D.C. 2002).

Plaintiffs filed a motion for reconsideration which was denied on November 8, 2002. Immediately thereafter, Plaintiffs filed a notice of appeal to the U.S. Circuit Court of Appeals for the District of Columbia.

Defendant filed a motion to dismiss or in the alternative for summary affirmance in the D.C. Circuit. After briefing was completed, the D.C. Circuit granted Defendant's motion to dismiss on April 17, 2003. The court never reached the merits because it found that the court lacked jurisdiction over the appeal because the district court's orders of September 3, 2002 and November 8, 2002 did not dissolve or modify an injunction. Nor was the case appealable pursuant to 28 U.S.C. § 1292(b). See April 17, 2003 Order, attached hereto as Exhibit 1.

On June 2, 2003, Plaintiffs filed a petition for rehearing. The D.C. Circuit Court denied Plaintiffs' petition on June 19, 2003. See June 19, 2003 Order, attached hereto as Exhibit 2. On August 25, 2003, Plaintiffs filed a motion for leave to file a petition for rehearing en banc out of

time and a motion to recall the mandate. The D.C. Circuit denied those motions on November 21, 2003. See November 21, 2003 Order, attached hereto as Exhibit 3.

Thereafter, Plaintiffs' counsel and Defendants' counsel met and conferred in an attempt to resolve the dispute without further court proceedings. Those efforts were not successful.

ARGUMENT

By finding in its September 3, 2002 decision, Stewart v. O'Neill, 225 F.Supp.2d 6 (D.D.C. 2002), that the Settlement Agreement was not entered as a Court Order, the Court rendered a final decision as to any injunctive or equitable relief that Plaintiffs were entitled under the Agreement.

Plaintiffs respectfully request that the Court enter its September 3, 2002 and November 8, 2002 Orders as a Judgment under Fed. R. Civ. P. 54(b), which authorizes the district court to “direct the entry of a final judgment as to one or more but fewer than all of the claims [in an action] . . . upon an express determination that there is no just reason for delay.” Petties v. District of Columbia, 227 F.3d 469 (D.C. Cir. 2000). The rule thus permits the district court to determine in its sound discretion when a claim should proceed to appellate resolution. Taylor v. FDIC, 132 F.3d 753, 760 (D.C. Cir. 1997).

Plaintiffs submit that there is “no just reason for delay” and that appellate review of this matter is appropriate and necessary.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court enter its September 3, 2002 and November 8, 2002 Orders as a final judgment under Fed. R. Civ. P. 54(b).

Respectfully submitted,

_____/s/_____
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