

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

Freedom NY, Inc., \*  
Plaintiff, \*  
v. \* Case No.: 86 Civ. 1363 (CBM)  
United States of America, \* Filed: February 24, 2006  
Defendant \*  
\* \* \* \* \*

**AMENDED MEMORANDUM IN SUPPORT OF PLAINTIFF’S  
MOTION TO CORRECT OR, IN THE ALTERNATIVE,  
TO VACATE JUDGMENT PURSUANT TO RULE 60(b)(6)**

Plaintiff, Freedom NY, Inc., by counsel and pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, submits this Amended Memorandum in Support of its Motion to Correct or, in the Alternative, to Vacate Judgment.

**INTRODUCTION**

This case involves the petition by a Government contractor, Freedom NY, Inc. (“Freedom”), to correct a decision by this Court in the interests of justice. In the underlying proceeding before this Court, a Contracting Officer for the United States of America, Frank Bankoff, lied to this Court in order to defeat Freedom’s Complaint for Injunctive Relief. The stakes in that proceeding were immense, affecting hundreds of millions of dollars in future government contracts for Freedom -- and Mr. Bankoff had an axe to grind with Freedom, an African-American owned company. At the time, Freedom knew that Bankoff was lying, but Freedom could not prove it. Now, while Freedom continues to grapple with the fallout of the fraud that Bankoff perpetrated on this Court, Freedom has obtained the evidence to prove that Bankoff (1) deliberately lied to this

Court; and (2) withheld from this Court vital information which was final, conclusive and binding on him and the United States Department of Defense.

This evidence demonstrates that Bankoff violated federal contract procurement regulations, including the Contracting Officer's Authority under the Federal Acquisition Regulations ("FAR") 1.602-1(b), which prohibits contracting officers from awarding illegal contracts:

No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met;

and FAR 1.602-2(b), which requires the Contracting Officer to:

Ensure that contractors receive impartial, fair and equitable treatment.

By ignoring these obligations, Bankoff violated his authority and undermined the very tenets of the Industrial Mobilization Planned Producer program under 10 U.S.C. §2304(c)(3), which provides for other than full and open competition in case of a national emergency, or to achieve industrial mobilization. By lying to this Court, Bankoff improperly obtained this Court's imprimatur for his unlawful actions, to the detriment of both Freedom, who did not receive impartial, fair or equitable treatment, and the United States, which could not properly mobilize with MREs during "Operation Desert Storm."

It is not too late for this Court to correct the injustice that was perpetrated on Freedom, as Freedom is still today being denied re-entry into the MRE program, and Freedom respectfully asks the Court to right this wrong and restore to Freedom the relief to which it is entitled.

## **PROCEDURAL BACKGROUND**

On February 14, 1986, Freedom filed with this Court a Complaint for Injunctive and Declaratory Relief and a Motion for Preliminary Injunction, seeking to enjoin the United States of America (the “Government”) from awarding a contract to Cinpac, Inc. (“Cinpac”) for the prime assembly of Meals Ready-to-Eat (“MRE”s).<sup>1</sup> Cinpac had not previously served as an MRE prime contractor. Nevertheless, Cinpac was the company that Bankoff – Freedom’s nemesis – wanted to insert in the program to replace Freedom. Freedom, an existing MRE prime contractor, had definitive evidence that Cinpac did not qualify as a “manufacturer” under the Walsh Healey Act, 41 U.S.C. §§35 et seq. and, therefore, did not qualify for an MRE prime contractor award. Administrative protests filed by Freedom and others were referred by the Government to none other than Bankoff, who summarily dismissed the protests. Freedom had no choice but to seek court intervention.

In response to Freedom’s Complaint, the Government filed a Motion to Dismiss, arguing that Cinpac was a necessary party to the proceedings. In an Affidavit submitted to support the Government’s position, Frank Bankoff swore under the penalties of perjury that Cinpac qualified for an award. ([Exhibit 1, attached.](#)) Bankoff claimed under oath that Cinpac had control over the necessary physical plant, equipment, and personnel for Cinpac to qualify as a manufacturer under Walsh Healey, a prerequisite to an MRE award. ([Exhibit 1, ¶¶14-20.](#))f

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<sup>1</sup> The award at issue was for the sixth annual award of MRE contracts and, therefore, was known as the “MRE-6” award.

Bankoff's statements, however, were deliberate lies intended to induce this Court into helping him hurt Freedom. Bankoff had prior knowledge that the physical plant, equipment, and personnel described in Cinpac's MRE submission were owned and controlled by another company, Star Food, and that all of those resources already were committed to MRE production for that contractor. Freedom placed evidence before this Court demonstrating that Cinpac did not control the resources necessary to qualify as a manufacturer. Nevertheless, Freedom did not have sufficient evidence to demonstrate that Bankoff flatly was lying to this Court, and the Court, therefore, accepted Bankoff's voluntary misrepresentations in his sworn affidavit. On May 27, 1986, the Court granted the Government's Motion to Dismiss.

Bolstered by this Court's ruling, Bankoff proceeded unlawfully to push Freedom out of the MRE program. After Freedom received a positive pre-award survey for MRE-7 on September 25, 1986, Bankoff ordered an unprecedented second pre-award survey on November 19, 1986. Bankoff made certain that the results of Freedom's second survey, issued on December 4, 1986, were negative. Freedom's administrative protests – which the Government referred to Bankoff for determination – were denied. At the same time, Bankoff made certain also to award a follow-on MRE-7 contract to his favored contractor, Cinpac. Finally, having cut off Freedom's future in the MRE program, Bankoff then destroyed Freedom's current participation as an MRE prime contractor as well. On June 22, 1987, Bankoff wrongfully terminated for default Freedom's existing MRE-5 contract, thus, completely removing Freedom from the MRE program, and destroying Freedom as an active business.

Freedom spent the next two decades bogged down in litigation with the Government seeking to correct these wrongs. Freedom only managed to overturn Bankoff's unlawful termination for default of Freedom's MRE-5 contract in 1996 after almost a decade of litigation. See Freedom NY, Inc., ASBCA No. 35671, 96-2 BCA ¶128,328. It was not until August 28, 2001 that Freedom finally received a decision from the Armed Services Board of Contract Appeals<sup>2</sup> finding that the Government had: (1) breached Freedom's MRE-5 contract in more than 20 ways; (2) subjected Freedom to unlawful duress; and (3) wrongfully delayed Freedom's performance. Through the appeals process, which continues today,<sup>3</sup> Freedom's charges of unlawful treatment in connection with its MRE-5 contract have been proven and affirmed.

Freedom's unlawful treatment under MRE-6, however – which is the issue Freedom sought to have reviewed by this Court in 1986 – never has been rectified and continues to have ripple effects today. But for Bankoff's knowingly false affidavit, this Court would have recognized that the Government was prohibited by law to award an MRE-6 contract to Cinpac, a determination for which Cinpac was not an indispensable party. Although this Court's decision was garnered through false affidavit testimony, the Defense Logistics Agency ("DLA") continues to use this Court's decision as an excuse for refusing to reinstate Freedom into the MRE program. For example, in response to recent questions from Congress about why Freedom is not a participant in the DLA Planned Producer Program for MREs, the Director of DLA, Admiral Keith W. Lippert,

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<sup>2</sup> Freedom NY, Inc., ASBCA No. 43965, 01-2 BCA ¶131,585, *reconsideration denied*, 02-1 BCA ¶131,676; *affirmed in part, reversed in part*, Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1330 (Fed.Cir.2003); *cert. denied*, Freedom NY, Inc. v. Rumsfeld, 541 U.S. 987, 124 S.Ct. 2016, 158 L.Ed.2d 491 (2004).

<sup>3</sup> A further appeal currently is pending before the United States Court of Appeals for the Federal Circuit, Freedom NY, Inc. v. Rumsfeld, Docket No. 05-1500. The appeal is fully briefed and awaiting the scheduling of oral argument.

stated in a letter dated July 25, 2005 to Congressman Jo Bonner (and in a similar letter to Senator Jeff Sessions), that “Freedom **unsuccessfully** challenged this decision [not to award MRE-6 to Freedom] to the GAO and in U.S. District Court.” ([Exhibit 8; emphasis added.](#)) This Court’s decision continues to have the effect two decades later that Frank Bankoff intended when he lied to this Court – to remove Freedom from the MRE program once and for all.

At the time of these proceedings below, Freedom knew, but could not prove, that Bankoff was lying. Now it can. Through the litigation process in which Freedom has been forced to engage for 20 years, Freedom has obtained documentation which demonstrates conclusively that Bankoff lied to this Court in his Affidavit, and that Bankoff failed to disclose information that would have changed the outcome of this Court’s decision. Now that Freedom can prove that Bankoff defrauded this Court, Freedom is entitled to a ruling that the MRE-6 contract award to Cinpac was illegal and a nullity, and Freedom requests just such a ruling.

### **STANDARD OF REVIEW**

Rule 60(b) provides, in pertinent part, that “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.” The courts repeatedly have emphasized that Rule 60(b)(6) grants the trial courts broad equitable powers to correct or set aside a judgment where there are exceptional or extraordinary circumstances that result in extreme or undue hardship to the claimant. Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986)(and cases cited therein). Furthermore, the courts liberally exercise these powers because of

the strong judicial policy in favor of hearing claims on their merits, a policy that has been described by the Second Circuit as “preeminent”. Kotlicky v. U.S. Fidelity & Guaranty Co., 817 F.2d 6, 9 (2d Cir. 1987). Moreover, all doubts must be resolved in favor of granting the motion to set aside the judgment. Kotlicky, 817 F.2d at 9 (citing Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 576 (4th Cir. 1973)).

### **ARGUMENT**

#### **A. An MRE Contractor Must be a Walsh-Healey “Manufacturer,” a Determination Made by the Secretary of Labor**

The solicitation and award of MRE contracts, which was at the heart of the issue presented to this Court in the underlying action, is a matter of vital importance, not only to the Plaintiff, but to the security of the United States as well. MREs constitute the food supply that is provided to our nation’s troops as combat rations during times of war and national emergency. Designated as “mobilization essential items” by the Department of Defense, MREs also are known as “war stoppers.” As such, the procurement of MREs is part of the Government’s Industrial Preparedness Program (“IPP”), as are the procurement of guns, ammunition, and uniforms. To qualify as an MRE Prime Contractor, companies must first become Walsh-Healey qualified and then certified as IPP contractors.

IPP certification requires prospective MRE contractors to establish to the Government in detail their war production operations and their war production capability. Contractors must certify that they are able to produce a specific number of MREs per month currently, and that they are able to mobilize and “ramp up” that production quickly to a specified level within 90 days of a declared date in the event of war or national emergency (*i.e.*, “M+90 days”). The company’s modest peace-time production (*i.e.*,

known as a “warm mobilization base”) is intended, in part, to keep the MRE contractor in business and readily available in accordance with FAR 6.302-3, to quickly spike their production levels when ordered to do so. The country’s ability to feed its troops – and, therefore, accomplish its wartime objectives – depends entirely upon the ability of MRE prime assemblers to meet the war production levels that they certified they could achieve at M+90 days.

For this reason, it was crucial that an MRE prime contractor qualify as a “manufacturer” under the Walsh-Healey Act, 41 U.S.C. §35 et seq. (the “Act” or “Walsh Healey”)(for contracts above \$10,000, contractor must be a “manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract”). The DOL regulations in effect at the time of the MRE-6 contract (41 C.F.R. Part 50-206, copy attached as Appendix A) made clear that the Act not only protects employees “but also the competitive interest of all firms qualified to compete for covered contracts.” 41 C.F.R. §50-206.2(b).

The Regulations emphasized that to qualify as a manufacturer, a contractor had to perform the manufacturing operations “on its own premises.” §50.206.51. The contractor also had to have full, complete, and unrestricted control of the equipment necessary to perform the contract. §50-206.51(c)(2)(ii). Similarly, the contractor had to have sufficient personnel in place to perform the contract. §50-206.51(c)(2)(iii).

The Regulations specifically prohibited a contractor from arranging to obtain these resources through some arrangement on an “as needed” basis. §50-206.51(e)(“a bidder’s arrangements to use, rent, or share the equipment, personnel, or space of another legal entity on a time and material or ‘as needed’ basis do not constitute the making of all

necessary prior arrangements or definite commitments”). These requirements eliminate the possibility of a contractor’s subcontracting out all of its manufacturing activities, even to another contractor that may independently qualify as a “manufacturer.” §50-206.51(f).

Since a contractor’s eligibility for IPP contractor status (and, therefore, the right to be an MRE prime assembler) hinges on whether it is determined to be a “manufacturer” under Walsh-Healey, it is crucial to identify the final arbiter for such a determination. The Walsh-Healey Act was and is a labor statute which is administered by the Secretary of Labor. Therefore, it is the Secretary of Labor who has the authority to make final rulings, which are binding on the Government, regarding Walsh-Healey status. See 41 U.S.C. §38; 41 C.F.R. §50-206.2 (“The Secretary of Labor has delegated to the Administrator of the Wage and Hour Division through the Assistant Secretary for Employment Standards the authority to promulgate regulations and to issue official rulings and interpretations”).

**B. Bankoff Lied to this Court When He Intentionally Misrepresented in his Sworn Affidavit that Cinpac Was a “Manufacturer.”**

In 1986, Cinpac did not qualify as a “manufacturer” under Walsh Healey, and everyone involved in the MRE Program knew it. The MRE industry is huge when measured by dollars, but small when measured by number of participants. During the life of the MRE Program, there have been only three MRE prime contractors and a handful of subcontractors who have received awards for each solicitation.<sup>4</sup> At the time of the MRE-6 award in 1986, all the MRE contractors knew which companies were producing MRE-related products, where their facilities were located, and how much they could produce.

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<sup>4</sup> Rafco and Sopakco (or their successors) have received an award for every solicitation since the inception of the MRE program in 1979; Freedom received an MRE-5 award in 1984; and Cinpac has received an award for every solicitation since 1986.

Production capability was the key to MRE awards, and the few companies in the program jockeyed for the limited specialized equipment that was available, the supplies needed for production, and the output from the few MRE subcontractors in the industry.

In 1986, Star Food Processing, Inc. in San Antonio, Texas (“Star Food”), was an established MRE subcontractor that produced MRE components to be provided to the 3 prime contractors for final assembly. All of the MRE prime contractors knew Star Food’s personnel, knew Star Food’s production capability, and knew that Star Food was using its plant to produce components of the MREs pursuant to its own MRE subcontract. Therefore, when Cinpac (a Cincinnati company) claimed on its IPP forms that it qualified as a “manufacturer” by means of leasing Star Food’s plant, equipment, and personnel (in San Antonio, Texas), the MRE prime contractors knew that Cinpac was lying. Cinpac could not have exclusive use of Star Food’s plant because Star Foods was using it to perform its own MRE contract.

Bankoff also knew that Cinpac was lying. As Bankoff explained in his Affidavit to this Court, he was responsible for reviewing Cinpac’s representations about its production capabilities, and for reviewing the purported lease arrangements between Cinpac and Star Food for Cinpac’s “exclusive” use of the Star Food plant. ([Exhibit 1, ¶16](#)) (“the fact that Cinpac’s Form 1519 based its production commitments upon such a lease arrangement, involving a Texas facility, obliged us to examine both the terms of the lease arrangement, and the capacities of the Texas facility”). Bankoff sent representatives to Star Food’s plant who purportedly saw Star Food’s operations and evaluated Star Food’s capability. In his Affidavit, Bankoff resorted to a classic feint for deflecting responsibility – he denied any personal knowledge and claimed to be relying

on what his subordinates told him. ([Exhibit 1, ¶19.](#)) In this case, he claimed, they told him that Cinpac's lease arrangement with Star Food satisfied the Walsh Healey criteria.

(Id.)

At the time, Freedom knew that Bankoff's claims were false, but it could not prove it. Now Freedom can. Through the litigation process, Freedom has obtained documentation which proves that Bankoff had prior knowledge that Cinpac's "lease" arrangement with Star Food was a sham, and that Cinpac did not qualify as a manufacturer under Walsh Healey. Two pieces of evidence directly reveal Bankoff's duplicity.

When Bankoff awarded an MRE-6 contract to Cinpac, Freedom was not the only contractor to file a protest. At the time, Sopakco (which performed MRE prime assembly and component production) was competing with Star Food for the MRE subcontract that Star Food had been awarded. The import of Bankoff's award to Cinpac was not lost on Sopakco, which filed a protest with Bankoff on February 6, 1986. Sopakco pointed out to Bankoff that since Cinpac received an award, Defense Personnel Support Center ("DPSC") must have determined that the lease between Star Food and Cinpac provided: (1) for Cinpac's "exclusive and unrestricted use" of the San Antonio facility; (2) that the term of lease is of "sufficient duration [to permit Cinpac] to clearly fulfill the contract before the lease expires"; and (3) that Cinpac will have "full, complete, and unrestricted control of the necessary equipment for manufacturing MRE components." Sopakco correctly advised Bankoff that, under the Walsh Healey Regulations and applicable case law, Star Food and Cinpac cannot both use the facility on a time-and-material or as-needed basis. If Cinpac actually intended to use Star Food's plant to produce Cinpac's

MREs, then Star Food no longer had the production capability to perform its own contract. It was one or the other – Star Food’s plant was not big enough to perform both.

Sopakco had raised such compelling issues to Frank Bankoff that Bankoff had his supervisor, M.K. (“Peggy”) Rowles, provide the response. In a letter dated March 11, 1986 ([Exhibit 2, attached](#)), Ms. Rowles denied Sopakco’s protest, stating that Star Food’s production capability had been fully investigated prior to award. Using the information that Bankoff provided to her, Ms. Rowles stated that there was no evidence that the arrangement between Star Food and Cinpac encroached upon Star Food’s production capability. In response to Sopakco’s assertion that Star Food’s plant was not big enough for both Star Food and Cinpac, DPSC did not disagree – DPSC simply declared that Star Food had use of the plant for its own contract production on its own premises.

Three days later in his voluntary and sworn Affidavit before this Court, knowing fully that his office had just determined that Star Food was using its plant for its own MRE contract (and denied a protest on that basis), Bankoff swore under oath that it was Cinpac that had exclusive control over the Star Food plant. Bankoff did not mention to this Court Sopakco’s protest. Bankoff did not mention to this Court DPSC’s prior determination that Star Food had exclusive use over its plant. With prior knowledge that Cinpac’s arrangement with Star Food *did not* provide Cinpac with the qualifications to be a Walsh Healey “manufacturer,” Bankoff voluntarily and deliberately lied to this Court when he swore that it did.

Another document that Freedom obtained during discovery removes any doubt whatsoever that Bankoff knew that Cinpac’s lease did not meet Walsh Healey requirements, and that Cinpac was not a “manufacturer” under the Act. That document

was a determination by the Department of Labor addressing this specific issue and which reached those very conclusions. On April 15, 1986, DLA had submitted a request to the DOL for “a final determination [by DOL] as to whether CINPAC was eligible for the award . . . as a manufacturer within the meaning of the Walsh-Healey Public Contracts Act and the regulations issued thereunder.” In a letter to Bankoff’s office dated May 23, 1986 ([attached as Exhibit 3](#)), DOL explained that it had “carefully consider[ed] the evidence submitted by the protesters and CINPAC.” After doing so, DOL concluded that: “it is our determination that CINPAC, Inc. did not qualify for award under the Public Contracts Act and 41 CFR 50-201.101(a)(1).”

In its analysis, DOL identified the same facts and reached the same conclusions that Freedom and Sopakco had presented to Bankoff in their protests:

In this regard, the firm did not show that it had made all necessary prior arrangements for manufacturing space, equipment, and personnel to perform on its own premises the manufacturing operations required for fulfillment of the contract (41 CFR 50-206.51(b)). **Specifically, the lease agreement with Star Food Processing, Inc. does not allow CINPAC the complete and unrestricted use and control of the manufacturing space and equipment as required under 41 CFR 50-206.51(c)(2)(i) and (ii)**, but rather sets a schedule for their use which is convenient for both parties. As set forth in 41 CFR 50-206.51(e), a contractor’s ‘arrangements to use, rent, or share the equipment, personnel, or space of another legal entity on a time and material or ‘as needed’ basis do not constitute the making of all necessary prior arrangements or definite commitments.’

(Emphasis added.) As set forth above, the Walsh Healey Act and its supporting regulations make it abundantly clear that the Secretary of Labor’s determination on this issue is conclusive.

Accordingly, the MRE-6 award that Bankoff made to Cinpac was illegal. The DOL’s decision was dated May 23, 1986 – several days *before* Chief Judge Motley’s decision in the instant case, which was issued on May 27, 1986. Bankoff not only had a

duty to notify the Court that DOL had made a final ruling as to Cinpac's eligibility, but he also had a duty to terminate the award to Cinpac. Steuart Petroleum Co. v. United States, 438 F. Supp. 527 (D.D.C. 1977). The Steuart Petroleum case, like the instant case, involved an award that was made notwithstanding a protest on the basis of urgent need for the supplies. However, said the court, if DOL would later decide, as it did with respect to Cinpac, that the awardee did not qualify as a "manufacturer or regular dealer" under the Walsh-Healey Act, the award would have to be terminated. Id., 438 F.Supp. at 530 ("If the Department of Labor determines that the DFSC erred in finding Roarda qualified as a 'regular dealer' in petroleum, the agency is bound to terminate the award and take necessary measures to obtain an alternate supply of fuel").

In the present case, Mr. Bankoff did not terminate the Cinpac contract. Nor did he notify the Court of DOL's final determination that Cinpac was not eligible for award. Whether Bankoff received the DOL determination before he received Chief Judge Motley's decision and failed to disclose it, or he received it after Chief Judge Motley's decision and he failed to correct the record, Bankoff's uncorrected statements to this Court remain a blatant, voluntary, and deliberate lie.<sup>5</sup>

Moreover, all payments made to Cinpac under the MRE-6 contract were illegal. The Disbursing Officer who approved the payments to Cinpac had an obligation to verify that the payments were being made pursuant to a legal contract. Therefore, the

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<sup>5</sup> This Court is not the only tribunal to which Bankoff has lied. In 1996 in ASBCA 35671, Judge Grossbaum found that Frank Bankoff had lied in an affidavit submitted to the Armed Services Board of Contract Appeals. Freedom NY, Inc., ASBCA No. 35671, 96-2 BCA ¶ 28,502 at n.7 (euphemistically referring to Bankoff's sworn averment to allegedly first-hand information as "inaccurate"). In 2001 in ASBCA 43965, Judge James said: "Considering the documents in evidence and **Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the 'side agreement' attached to P00025.**" (Emphasis added.) Now, in 2006, Freedom has proof that Bankoff also deliberately lied to Chief Judge Motley during this case in 1986.

Disbursing Officer who approved the payments to Cinpac also violated the law, violations for which he may be held personally liable. See, e.g., Principles of Federal Appropriations (3<sup>rd</sup> Ed.), *Chapter 9: Liability and Relief of Accountable Officers*, p. 9-6 (“It is often said that an accountable officer is, in effect, an ‘insurer’ of the funds in his or her charge. [Citations omitted.] The liability is automatic, and arises by operation of law at the moment a physical loss occurs or an erroneous payment is made.”)

Bankoff did not stop there. Not only did he award the MRE-6 Contract to Cinpac despite DOL’s final, conclusive, and binding determination that Cinpac was ineligible for the award, but he also awarded an additional illegal contract to Cinpac for MRE-7. At the time of award of the MRE-7 Contract, Cinpac still did not have its own plant and equipment and was still relying on its subcontract arrangements and lease with Star Food.<sup>6</sup> Therefore, the DOL’s determination applied with equal force to the MRE-7 award to Cinpac.

Bankoff’s failure to terminate Cinpac’s MRE-6 Contract and his subsequent award to Cinpac of the MRE-7 Contract exhibited contempt for the law. His failure to inform this Court of the final and binding determination by DOL that Cinpac was ineligible for award exhibited contempt for this Court. Justice requires that the Court’s decision be corrected.

**C. Freedom Suffered Irreparable Harm because of Bankoff’s Actions.**

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<sup>6</sup> After the award of MRE-7, following Bankoff’s wrongful termination of Freedom’s MRE-5 contract and Bankoff’s wrongful taking of Freedom’s equipment, Freedom’s equipment was auctioned off and Cinpac bought much of it at auction. At that time, well after the award to Cinpac of MRE-7, and only because of the illegal termination for default of Freedom, Cinpac finally had MRE equipment it owned. Cinpac did not, however, have the equipment at the time of the MRE-7 award to it, let alone at the time of the MRE-6 award.

The harm that Bankoff's deliberate actions caused Freedom to suffer is immeasurable. The consequences to Freedom of Bankoff's wrongdoing include the following.

When Bankoff improperly terminated Freedom, he caused over 442 South Bronx employees, who processed, manufactured and delivered more than six million (6,000,000) MREs, to lose their jobs and income. This loss not only caused undue hardship for the employees, but it destroyed Freedom's workforce – a workforce that Freedom had painstakingly trained and encouraged during the tumultuous years of the Government's wrongful interference with Freedom's MRE-5 contract.

Bankoff also caused Freedom to lose its \$8.5 million start-up investment and its 400,000 sq. ft. USDA food production and MRE assembly and mobilization plant, with a value of over \$10 million dollars. The damage from the loss of Freedom's facility, which was perfectly suited for the mobilization and assembly of MREs, cannot be measured by money damages alone.

The same is true for the impact on Freedom's business relationships. Of course, money damages flowed from Bankoff's actions. Bankoff left Freedom deeply in debt of over \$8.5 million, unable to pay its lenders and other creditors. But Bankoff also destroyed Freedom's reputation in the business community. Insurance companies, bonding companies, and lenders alike have refused to do business with Freedom or Henry Thomas. This tarnished reputation and the liens arising from Freedom's unpaid debts have left Freedom and its owner, Henry Thomas, who had personally guaranteed Freedom's loans, with no viable choice other than to fight for the past 20 years to clear their names and get justice. Bankoff's destruction of Freedom's business reputation and

opportunity is a harm that cannot be cured with an award of damages alone. It requires vindication through judicial recognition that Cinpac was unlawfully inserted into the MRE program in place of Freedom.

The financial harm to Freedom also is astronomical. The MRE program is a high-profile, no-bid contract program for which few companies ever have qualified. Once a company has invested the millions of dollars and extraordinary expertise into developing a viable MRE production facility, and the contractor has been approved as an IPP Mobilization planned producer under 10 U.S.C. §2304(c)(3), as implemented by FAR 6.302-3, the Government is required to maintain these MRE producers and keep them in business as a “warm base,” ready to mobilize. In the MRE program, Rafco, Sopakco, and Cinpac have been maintained continuously by the Government as the same three MRE prime contractors in the program since Bankoff unlawfully pushed Freedom out, and unlawfully put Cinpac in.<sup>7</sup> In his Determination and Findings for the MRE-8 solicitation, Bankoff even stated that no new MRE prime assemblers will be added to the program unless the Government’s needs increase, or one of the prime contractors drops from the program. [\(Exhibit 4, attached.\)](#) But for Bankoff’s actions, Freedom would have continued to be the third MRE prime contractor in the program.

The numbers involved are staggering. By way of example, in 1991 alone, Sopakco received MRE awards from the Government for \$184,500,000 and \$31,574,232.00 totaling \$216,074,232.00. Cinpac received MRE awards for \$51,455,000.00 and \$21,078,063.00 totaling \$72,533,063.00 and Rafco received \$32,417,625.00 all for Operation Desert Shield alone. [\(Exhibit 5, attached.\)](#) In 2003, Rafco a/k/a Wornick Co. was sold for \$155 million in cash, an astronomical purchase

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<sup>7</sup> Indeed, Rafco and Sopakco have been MRE prime contractors since the inception of the program in 1979.

price that reflects the value to Rafco of its status as an MRE prime contractor. ([Exhibit 6, attached.](#)) DLA records for 2003 show that Wornick (a/k/a Rafco) received \$233,721,082 in Government contracts, and Ameriquial Group LLC (Cinpac's successor) received \$150,237,336 in Government contracts. ([Exhibit 7.](#)) Clearly, the prospective financial loss to Freedom is immense.

**D. Bankoff Treated Freedom Unequally to the Detriment of Both Freedom and the United States.**

Contracting Officers are obligated by FAR 1.602-2(b) to "[e]nsure that contractors receive impartial, fair and equitable treatment." In this case, Bankoff flagrantly breached this obligation. Instead of being an impartial and principled repository for the public trust, Bankoff became a biased benefactor for Cinpac, harming both Freedom and the country as a result. Examples of Bankoff's gross abuse of his public charge include the following.

MRE Prime Contractors were required to have 150,000 sq. ft. (or 3,000,000 cubic feet) of contiguous space as a necessary component of their manufacturing operations under Walsh Healey. ([Exhibit 9.](#)) Freedom's plant had 400,000 sq. ft., clearly meeting this threshold requirement. At the time of MRE-6, however, Cinpac had 60,000 sq. ft. of space available. ([Exhibit 10.](#)) Freedom met the Walsh Healey requirements; Cinpac did not. Nevertheless, Cinpac received an MRE-6 award from Bankoff; but Freedom did not. Bankoff did not advise this Court in his Affidavit that Cinpac failed to meet this requirement, and he falsely represented instead that Cinpac was Walsh-Healey qualified.

Bankoff assured this Court that he relied in good faith on a Pre-Award Survey of Cinpac in determining that Cinpac was qualified under Walsh Healey. Bankoff failed to advise this Court, however, that the Pre-Award Survey he conducted of Cinpac was

materially deficient. As part of the Pre-Award Survey process, Bankoff was required to have a legal review performed by counsel for Defense Contract Administration Services Region (“DCASR”) to determine whether the contractor qualified under Walsh Healey. Bankoff made certain that a legal review of Freedom was performed. By letter dated October 7, 1986, DLA Attorney Michael Montefinise issued his legal opinion that Freedom “qualifies as a manufacturer/assembler under the Walsh-Healey Act and the regulations thereunder and also meets the requirements of the Solicitation as an MRE assembler.” [\(Exhibit 11.\)](#)

By contrast, Bankoff did not require a legal review of Cinpac’s operations. Knowing that Cinpac lacked the space, equipment, and personnel to qualify under Walsh Healey, Bankoff cleared this hurdle simply by failing to have a legal review of Cinpac performed. This favored treatment of Cinpac was not impartial, fair, or equitable, and Bankoff withheld this information from this Court when submitting his March 14, 1986 Affidavit.

Just one week before signing his Affidavit, Bankoff became aware of an emergency at the Star Food plant that resulted directly from Bankoff’s improper approval of Cinpac for the MRE Program. Star Food could not maintain proper quality control while laboring to satisfy its own MRE contracts, to perform subcontracting work for Freedom, and also to produce all of Cinpac’s MREs. As a result, Star Food/Cinpac’s food pouches began to swell up and burst in the Prime Contractors’ assembly plants. On March 7, 1986, Star Food/Cinpac’s plant was inspected and shut down by the U.S. Army Health Services Command’s medical team, which placed a “Medical Hold” on the entire production of MRE combat ration pouches from that plant. [\(Exhibit 12.\)](#) As set forth in

a Plant Visit Report dated March 11, 1986: “All plants are currently on Medical hold. No further product may be produced or shipped until further notice.” [\(Exhibit 13.\)](#)

Bankoff was aware of this debacle. On March 13, 1986 – just one day before submitting his Affidavit to this Court – Bankoff responded to a March 10, 1986 inquiry from Freedom [\(Exhibit 14\)](#) and confirmed that: “The AVI have placed all Star products on medical hold.” [\(Exhibit 15.\)](#) Bankoff knew that the shut down of Star Food’s plant meant that Cinpac’s “production” also was completely shut down since Cinpac’s MREs were being produced entirely by Star Food. Because this information further proved that Cinpac was not a Walsh Healey manufacturer, Bankoff concealed this information from the Court when signing his Affidavit the very next day.

The impact of this incident far exceeded that of the Medical Hold alone. Even after the Medical Hold was lifted, the Government continued to impose additional testing (medical “Zyglo testing”) requirements on the contractors for many months, causing additional expense and delay.

Because Bankoff did not hold Cinpac to the criteria necessary to qualify as an MRE prime contractor, Cinpac created another crisis during Operation Desert Storm when it was called upon to produce MREs at war mobilization levels, but was unable to do so. For each annual solicitation following Cinpac's entry into the MRE program, Cinpac submitted M+90 day war mobilization plans (“1519”s) to Bankoff, representing the level of mobilization production that Cinpac claimed it could achieve during war time. Bankoff, in turn, awarded annual MRE contracts to Cinpac, based entirely on these representations, without ever verifying Cinpac's ability to achieve these mobilization levels. For each solicitation, Bankoff issued a Justification for Authority to Negotiate

(“JAN”) simply adopting Cinpac's production capability and issuing an award to Cinpac based on these representations. [\(See, e.g., Exhibit 16, JANs for MRE-10 and MRE-11](#) declaring that Cinpac and other producers could produce 128% of DOD’s mobilization requirements.)

In 1990–91 during Operation Desert Storm, after Freedom’s MRE contracts were wrongfully terminated and its 400,000 sq. ft. mobilization plant destroyed, Bankoff ordered Cinpac to mobilize for war production and issued MRE Industrial Planned Producer (“IPP”) mobilization contracts to Cinpac. [\(Exhibit 17.\)](#) With these Desert Shield war contracts in hand, Cinpac only then began to build a new 200,000 sq. ft. production plant in a last-minute attempt to meet the M+90 day mobilization requirements that Cinpac previously had represented it could achieve. Cinpac, however, did not have the appropriate Walsh-Healey equipment or IPP production facilities to mobilize and deliver the MREs it had contracted to assemble. With its new unpaid-for MRE production plant, Cinpac had to file for bankruptcy.

The Department of Defense was forced to declare in the midst of Operation Desert Storm that a production shortfall of MRE combat rations existed. [\(Exhibit 18.\)](#) The DOD looked to Freedom to restart its defunct MRE production operations. [\(Exhibit 19.\)](#) The Government even was forced to purchase mobilization production equipment for Cinpac using Freedom’s 1984 production equipment model and design for MRE production.

When Bankoff discovered that Freedom had been solicited to return to the MRE program, Bankoff went to incredible lengths to cover up the Cinpac debacle and save face. Freedom has learned that Bankoff gave Cinpac a Government gift of \$10 million to

cover up Cinpac's failure and to bail them out financially. Bankoff's \$10 million expenditure kept Cinpac in business and in the MRE program. By contrast, Bankoff refused to pay Freedom over \$5 million that was owed to Freedom under its MRE contract,<sup>8</sup> wrongfully terminated Freedom's MRE-5 contract,<sup>9</sup> destroyed Freedom's participation in the MRE IPP Program, and tied Freedom up in litigation for almost 20 years.

These actions, which put the entire United States of America at risk, demonstrate an astonishing breach of Bankoff's obligation to "[e]nsure that contractors receive impartial, fair and equitable treatment." They further demonstrate that Bankoff's representations before this Court were not calculated to present a fair and accurate explanation of Cinpac's alleged qualification as a Walsh-Healey manufacturer. Rather, Bankoff had a personal agenda to support Cinpac as an MRE Prime Contractor, no matter what the cost – whether at Freedom's expense, or at the expense of the United States of America.

**E. Justice Requires that the Court's Decision be Corrected.**

Although Freedom has endured extreme and undue hardship, and is entitled to receive additional compensation for the wrongs perpetrated on it, this Court is the only tribunal that can correct the non-monetary injustice that Frank Bankoff committed against Freedom. This Court, in its original decision, ruled that Cinpac was an "indispensable party" to resolving the case. However, that ruling by this Court was without knowledge of the fact that DOL had made a final and conclusive determination that Cinpac was not a

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<sup>8</sup> On March 25, 2004, approximately 18 years later, Freedom received a payment of \$5,014,000 from the Government pursuant to Judge James's decision that Bankoff had wrongfully withheld payment to Freedom. See Freedom NY, Inc., ASBCA No. 43965, 01-2 BCA ¶31,585.

<sup>9</sup> In 1986, Judge Grossbaum overturned Bankoff's wrongful default termination of Freedom. Freedom NY, Inc., ASBCA No. 35671, 96-2 BCA ¶ 28,502.

“manufacturer” under the Walsh-Healey Act and was thus not eligible for award. Once DOL, the responsible Government agency, had ruled on this point, it was binding, and there was nothing that Cinpac could do, in this Court or elsewhere.<sup>10</sup> DOL’s determination also was binding on Bankoff, who then had no choice but to terminate the Cinpac contract. See FAR 22.608-6(b), as in effect at the time, Appendix B, attached; Steuart Petroleum Company, supra. Once DOL had issued its determination, there was no Rule 19(b) issue in this case.

This Court had personal jurisdiction over the Government and over the contract award at issue, which enabled it to rule on the validity of the MRE-6 contract award. Once DOL issued its final determination that Cinpac was not an eligible manufacturer, this Court no longer had discretion to rule that CINPAC was a “manufacturer.” Steuart Petroleum Company, supra.

This Court’s ruling was the direct result of Mr. Bankoff’s failure to properly inform the Court of the true facts and of the critical new developments, particularly DOL’s conclusive ruling, and of his otherwise incredible affidavit testimony. Justice requires that Mr. Bankoff’s sins of omission and commission not be allowed to dictate an incorrect and unfair result that has caused irreparable harm.

This Court should amend its earlier ruling to reverse its finding that Cinpac was an indispensable party in this case and to rule that, since Cinpac was not a “manufacturer” at that time, the Cinpac award had to be terminated.

This Court also should find that the award of the MRE-6 Contract at issue should have been awarded to Freedom in accordance with FAR 22.608-6(b) (as in effect at the

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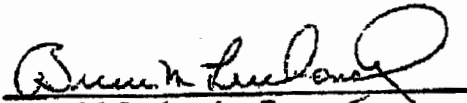
<sup>10</sup> Freedom notes that Cinpac had the opportunity to and did “submit...information” to DOL as to its claim to be a “manufacturer” prior to DOL’s final and conclusive determination.

time; Appendix B) as the only other qualified and eligible IPP producer for the third of the three MRE prime contracts to be awarded. See Complaint, at ¶¶13, 14, and 16. Since Cinpac was not eligible for award and Sopakco and Rafco already had received awards, the remaining quantity had to go to the third, and only other, eligible IPP producer, i.e., Freedom.

Justice requires that this Court correct its decision below by reversing its ruling that Cinpac was an indispensable party, and to rule that Cinpac was ineligible for the award, leaving Freedom as the only eligible IPP producer and therefore entitled to the award for MRE-6. Freedom respectfully requests that this Court also award such other and further relief as the Court deems necessary to correct the wrongs and irreparable injuries caused by Mr. Bankoff's deceit.

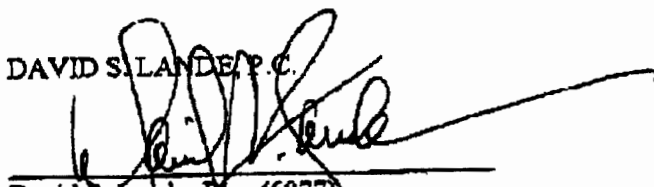
Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Freedom NY, Inc.,

Plaintiff,

v.

United States of America,

Defendant.

\*

\* Case No. 86 Civ. 1363 (CBM)

\* Filed: February 24, 2006

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CERTIFICATE OF SERVICE

I, DAVID S. LANDE, a Member of the Bar of this Court, certify that I have mailed a true copy of the foregoing AMENDED MEMORANDUM IN SUPPORT OF MOTION TO CORRECT OR, IN THE ALTERNATIVE, TO VACATE JUDGMENT PURSUANT TO RULE 60(b)(6) of the F.R.C.P. upon the Honorable Michael J. Garcia, United States Attorney for the Southern District of New York, to the attention of Honorable James L. Cott, Chief Civil Division, at 86 Chambers Street, New York, New York 10007, this 24th day of February, 2006.

Dated: New York, New York  
February 24, 2006

DAVID S. LANDE

