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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER AS TO DISCOVERY BY THE SPECIAL MASTER-MONITOR AND AS TO THE RULE ANNOUNCED BY THE SPECIAL MASTER-MONITOR CONCERNING DEPOSITION QUESTIONING

Interior Defendants hereby submit this Reply Memorandum in further support of their motion, pursuant to Federal Rule of Civil Procedure 26(c), for a protective order that (1) relieves them of any obligation to respond to document requests issued by the Special Master-Monitor, Joseph S. Kieffer, III; and (2) proscribes the Special Master-Monitor from implementing a rule he has announced that would enable him to make dispositive substantive rulings at depositions and to compel witnesses, under threat of potential disciplinary action against their counsel, to answer questions over the objections and instruction of their counsel.

In their moving papers, the Interior Defendants urged that a protective order be granted with respect to discovery by the Special Master-Monitor because the manner in which he has sought documentary evidence has created an unreasonable burden for the Interior Defendants. In support of their motion, Interior Defendants made a showing that the Special Master-Monitor's pursuit of evidence

was inappropriate because it made him tantamount to a litigant in the case, denied Interior Defendants, under threat of disciplinary or other adverse action to their counsel, of a fair hearing on objections, and unreasonably required Interior Defendants to simultaneously respond to parallel discovery from both the plaintiffs and the Special Master-Monitor. In their opposition brief, plaintiffs have largely skirted these issues. Instead, they have devoted their argument primarily to the contention that the Special Master-Monitor's appointment was proper and that he has the *authority* to issue document requests, matters generally not at issue in connection with this motion.[1]

The Interior Defendants have also asked the Court to issue an order that proscribes the Special Master-Monitor from implementing a new rule he has announced that would enable him to make substantive, dispositive rulings on discovery disputes arising during depositions. The law is clear that the Special Master-Monitor lacks the authority to exercise such power, and even plaintiffs concede, at least in the context of an instruction to a deposition witness not to answer a question pursuant to Federal Rule of Civil Procedure 30(d), that the Special Master-Monitor is required to refer such matter to the Court for decision.

For the reasons set forth below and in the Interior Defendants' moving papers, the motion should be granted.

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[1] Interior Defendants are challenging the propriety of the Special Master-Monitor's appointment in proceedings presently before the Court of Appeals. Cobell v. Norton et al., No. 02-5374 (D.C. Cir. Nov. 18, 2002).

DISCUSSION

I. Interior Defendants Have Made A Showing Of Good Cause For A Protective Order With Respect To Disclosure Requests By The Special Master-Monitor That Has Not Been Rebutted

In their moving papers, Interior Defendants requested that the Court issue a protective order with respect to discovery[2] by the Special Master-Monitor based on three compelling grounds. First, the Special Master-Monitor has become an active participant in the discovery process, assuming the role of a roving investigator and pursuing information relating to a variety of matters that have little or no relationship to the role for which he was appointed. See Interior Defendants' Memorandum of Points and Authorities in Support of Their Motion For A Protective Order As To Discovery By The Special Master-Monitor And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning ("Interior Defendants' Moving Brief") at 14-16 (filed Jan. 23, 2003). Second, the manner in which the Special Master-Monitor has pursued discovery has created a conflict with his oversight responsibility, because he has made it his practice to respond to objections to his disclosure requests with accusations of bad faith and threats of personal disciplinary or other adverse action against the Interior Defendants' counsel, effectively depriving the Interior Defendants of neutral consideration of those objections. Id. at 16-19. Third, it is unreasonably burdensome for the Interior Defendants to be required to respond to pretrial document requests from the Special Master-Monitor while simultaneously being required to respond to extensive discovery from the plaintiffs concerning the

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[2] As used herein, the term "discovery" is intended to encompass all document requests issued by the Special Master-Monitor, regardless of their form or the purported capacity in which they are issued.

same general subject matter, particularly in light of the fact that the Court has scheduled a trial at which it has said it will address the status of trust reform and the Interior Defendants' compliance with the trust requirements ordered by the Court and prescribed by the 1994 Act. Id. at 19-20.

Although it contains the usual dose of empty rhetoric,[3] plaintiffs' opposition brief contains little in the way of substance that is responsive to the issues that the Interior Defendants have placed before the Court. For example, in their discussion captioned "Defendants Have Made No Showing of 'Good Cause' to Justify Entry of a Protective Order Under Rule 26(c) to Prevent the Special Master-Monitor from Acquiring Information and Issuing Rulings During Depositions," plaintiffs do not contest any of the points raised by the Interior Defendants in support of their good cause showing. See Plaintiffs' Opposition Brief at 1-3. Rather, they simply cite to a number of cases that discuss the standard for establishing good cause under Federal Rule of Civil Procedure 26, without any discussion of how the standard applies in the context of this case or against the backdrop of the factors and circumstances discussed in the Interior Defendants' Moving Brief.

The only discernible contention made by plaintiffs (repeatedly throughout their brief) in opposing a protective order as to discovery sought by the Special Master-Monitor is simply that the Court has the power to appoint a special master-monitor, and that a special master-monitor has the

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[3] See, e.g. Plaintiffs' Opposition to Defendants' Motion For Protective Order As To Discovery By The Special Master-Monitor And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning ("Plaintiffs' Opposition Brief") at 3 (filed Feb. 1, 2003) ("It is an insulting approach akin to making a child write out 'I have been bad' 100 times."); id. at 5 ("In short, defendants are treating the Special Master-Monitor as a Potted Plant who must write a report and recommendation every time defendants sneeze and plaintiffs don't say 'Bless you.'").

authority to request documents. See Plaintiffs' Opposition Brief at 9 ("The Special Master-Monitor Has Authority to Require Defendants to Produce Documents and Other Material He Deems Necessary to Fulfill His Monitoring Role."); id. at 11 ("To determine if the Master-Monitor has the authority to demand documents from Interior defendants [sic] in order to carry out his monitoring function, it is important to bear in mind the following . . ."); id. at 12 ("It is unclear to plaintiffs on what authority defendants rely that supports their remarkable contention that a Special Master-Monitor . . . cannot be conferred authority to monitor trust reform."); id. at 13 ("Where necessary to permit a court to ensure compliance with its orders, monitors are appropriate"). Although virtually the entirety of plaintiffs' brief is consumed by this issue, the motion that is actually before the Court does not address the question of the propriety of the Special Master-Monitor's appointment, or of his authority under Federal Rule of Civil Procedure 53(c) and the Order appointing him with respect to seeking the production of evidence.[4]

Apparently lost on the plaintiffs (or purposely avoided) is the clear point of the Interior Defendants' motion: that the *manner* in which the Special Master-Monitor has pursued evidence has created an oppressive discovery environment that imposes unreasonable burdens on the Interior Defendants and deprives them of a fair opportunity to have their objections considered. Plaintiffs have no answer at all to Interior Defendants' argument that the Special Master-Monitor has become a *de*

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[4] In their moving papers, the Interior Defendants discussed, by way of background, the Court's Order appointing the Special Master-Monitor, and also noted that Federal Rule of Civil Procedure 53(c) generally provides masters with the power to require the production of evidence relating to matters encompassed in the reference. See Interior Defendants' Moving Brief at 3 & n.2.

facto litigant and a roving investigator in an ever-expanding quest for evidence, which has included such avenues of inquiry as the adequacy of judgment accountings completed by the Office of Historical Trust Accounting, the accuracy of deposition testimony, and the Government's regulations and policies concerning the provision of private representation at Federal expense as applied to a former Special Trustee for American Indian Affairs. See Interior Defendants' Moving Brief at 14-16. As discussed in Interior Defendants' Moving Brief, it is inappropriate for the Special Master-Monitor to engage in such a broad quest for evidence. See id. at 16. Likewise, plaintiffs proffer no response to the point that the Interior Defendants are being required to respond simultaneously to discovery from both the plaintiffs and the Special Master-Monitor concerning the same general subject matter, an unreasonable burden in and of itself, but particularly so given that the Court has scheduled a trial in which it has stated it will address the very issues that the Special Master-Monitor is charged with monitoring. See id. at 19-20.

The only substantive point that plaintiffs purport to address that relates to the pursuit of evidence by the Special Master-Monitor is the fact that, in so doing, he has created an irreconcilable conflict with his obligation to oversee and administer the discovery process. See Interior Defendants' Moving Brief at 16-19. Even in this regard, however, plaintiffs raise an issue only with respect to how the Special Master-Monitor's requests for disclosure should be characterized, arguing that they are not

"technically" discovery because they were issued by a special master rather than a litigant.[5] See Plaintiffs' Opposition Brief at 7-8. Even if valid, this distinction rings hollow for purposes of this motion. The evidentiary campaign embarked upon by the Special Master-Monitor, and the manner in which he has pursued that campaign, is inappropriate whatever his capacity. Indeed, it is more pernicious under the circumstances present here because the Special Master-Monitor has denied the Interior Defendants even the most fundamental protections to which they would be entitled if their discovery disputes were instead with other party litigants. See, e.g. Interior Defendants' Moving Brief at 17-18 (Special Master-Monitor has attempted to preclude objections to discovery requests by employing threats of disciplinary and other adverse action); id. at 18-19 (Special Master-Monitor has not allowed the Interior Defendants sufficient time to respond to document requests). Ultimately, the label given the Special Master-Monitor's disclosure campaign matters little. The critical point is that the role he has assumed, and the manner in which he has purported to carry out that role, have made it impossible for him to objectively consider disputes that arise relating to his requests for disclosure. Interior Defendants' motion should be granted.

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[5] In fact, plaintiffs acknowledge the general impropriety of the Special Master-Monitor ruling on objections to his own document requests: "But plaintiffs have never contended, nor have understood the Court to suggest, that the Special Master-Monitor would pass on the propriety of his own request for documents as a discovery master." Plaintiffs' Opposition Brief at 8 (emphasis in original). Their attempt to justify his practice, however, by claiming that he is ruling on objections to his disclosure requests in his capacity as a monitor rather than as a discovery master amounts to no more than semantics in this case. The Special Master-Monitor's efforts to coerce the Interior Defendants to abandon objections they are obligated to assert on behalf of their clients and provide the Special Master-Monitor with whatever information he requests are improper regardless of what hat the Special Master-Monitor purports to be wearing.

II. It Is Beyond Dispute That The Special Master-Monitor Lacks Authority To Adjudicate Substantive Discovery Disputes

In their moving papers, Interior Defendants requested that a protective order issue precluding the Special Master-Monitor from implementing a rule he has announced by which he purports to assume the authority (also under threat of disciplinary action[6]) to make substantive rulings compelling deposition witnesses to answer questions over the objections and instructions of their counsel. See Interior Defendants' Moving Brief at 21-23. The Special Master-Monitor's rule is directly at odds with the Order appointing him and with the Constitutional prohibition, recognized by this Court, on substantive decision-making by special masters. See Order (filed Sept. 17, 2002) at ¶ 8 (requiring Special Master-Monitor to "file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties."); Memorandum and Order (filed Jan. 17, 2003) at 16 ("although Article III judges may render dispositions on contested substantive issues, the ability to make such determinations lies beyond the authority that may properly be referred to special masters.") (citing In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991); In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987)).

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[6] See Interior Defendants' Moving Brief at 22 & Exh. T at 3 ("should counsel refuse to abide by my direction on discovery disputes . . . including but not limited to the regulation of deposition questioning, consideration will be given to terminating the deposition and filing a Report and Recommendation to the Court recommending an Order to Show Cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action . . . and why his or her conduct does not warrant personal monetary sanctions . . . .").

Plaintiffs again avoid the question at issue, choosing instead to respond to a contention not presented here:

> In short, defendants are treating the Special Master-Monitor as a Potted Plant who must write a report and recommendation every time defendants sneeze and plaintiffs don't say "Bless you." In their efforts to obstruct this litigation, defendants are suggesting that there must be another intervening layer of briefing and delay even to issues so trivial that they could not suspend a deposition therefor.

Plaintiffs' Opposition Brief at 5.[7] Even the most cursory reading of the Interior Defendants' Moving Brief reveals, however, that the only issue presented by this motion relating to deposition questioning is the Special Master-Monitor's assertion of the authority to resolve contested substantive disputes arising during depositions. See Interior Defendants' Moving Brief at 21 ("The Special Master-Monitor's assertion of the authority to immediately resolve substantive discovery disputes as they arise during depositions is contrary to the express directive of the Court . . . .") (emphasis added); id. at 23 ("Rather than submit to the Court a Report and Recommendation describing the substantive discovery dispute at issue and making a recommendation with respect thereto, as he is required, the Special Master-Monitor would attempt to resolve the dispute without any involvement at all by the Court . . . .") (emphasis added). And in that regard, the law has long been clear that a master can have no such authority. See La Buy v. Howes Leather Co., 352 U.S. 249, 313, 315 (1957) (stating that the purpose of a master "is to aid judges in the performance of specific judicial duties as they may arise in

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[7] Plaintiffs' argument is essentially an elaboration of the position they have asserted with respect to the Report and Recommendation of the Special Master-Monitor on the Extent of the Authority of the Special Master-Monitor to Regulate All Phase 1.5 Trial Discovery Proceedings and the Need for Clarification of the September 17, 2002 Order Appointing the Special Master-Monitor (Nov. 15, 2002) at 16. That Report is presently sub judice.

the progress of a cause, and not to displace the court," and that litigants are entitled to "trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis.") (citation and internal quotation marks omitted); see also United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C. Cir. 1998) (granting mandamus where the "issue [delegated to the special master] is interpretation, not compliance; the parties' rights must be determined, not merely enforced."). So far from dispute is this fundamental principle that plaintiffs apparently concede it, at least in the context of an instruction not to answer given to a deponent by his or her counsel. See Plaintiffs' Opposition Brief at 5-6 (asserting that Special Master-Monitor must file a report and recommendation "[o]nly in those situations in which a party can instruct a witness not to answer and/or suspend the deposition and seek judicial intervention.") (emphasis in original).

There is no legal foundation for the Special Master-Monitor's claimed assertion of the power to adjudicate substantive disputes that arise during depositions. Accordingly, the Court should issue a protective order precluding the Special Master-Monitor from implementing the rule he has announced that purports to give him such power.

III. Plaintiffs' Request For Sanctions Has No Basis

Plaintiffs have included a three-sentence "add-on" paragraph at the end of their brief in which they contend, without citation to legal authority or factual support, that Interior Defendants' motion is baseless and warrants sanctions. This frivolous assertion is refuted alone by the fact that, as set forth supra, plaintiffs have failed altogether to rebut the critical points underlying Interior Defendants' request for relief, and have acknowledged that the Special Master-Monitor lacks the power to rule on

substantive disputes relating to an instruction not to answer given to a deponent by counsel pursuant to Federal Rule of Civil Procedure 30(d). The motion for sanctions should be denied.

CONCLUSION

For the reasons set forth above and in Interior Defendants' Memorandum of Points and Authorities in Support of Their Motion For A Protective Order As To Discovery By The Special Master-Monitor And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning, the Court should issue a protective order that discovery by the Special Master-Monitor not be had, and that substantive discovery disputes arising during depositions, including those relating to an instruction that a witness not answer a question, be submitted to the Court for resolution.

Dated: February 27, 2003

Respectfully submitted,

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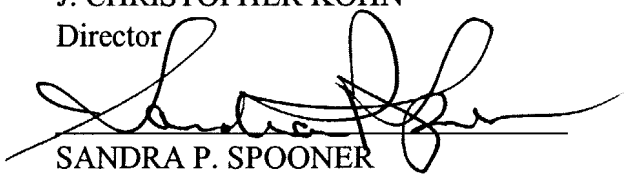

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 27, 2003 I served the foregoing *Interior Defendants' Reply Memorandum in Further Support of Their Motion for a Protective Order as to Discovery by the Special Master-Monitor and as to the Rule Announced by the Special Master-Monitor Concerning Deposition Questioning* by facsimile in accordance with their written request of October 31, 2001 upon:

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