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DISTRICT OF COLUMBIA
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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 LEAVE TO SUPPLEMENT THEIR MOTION FOR RECONSIDERATION OF THE MARCH 5, 2003 MEMORANDUM AND ORDER INSOFAR AS IT IMPOSED SANCTIONS ON INTERIOR DEFENDANTS AND THEIR COUNSEL

Interior Defendants respectfully submit this reply memorandum in further support of their motion for leave to supplement their motion for reconsideration of the March 5, 2003 Memorandum and Order insofar as it imposed sanctions on Interior Defendants and their counsel. This motion seeks vacatur of the Court's sanctions ruling based upon the recent decision in this case by the Court of Appeals, which found that Interior Defendants were entitled to relief with respect to the actions of former Special Master-Monitor Joseph Kieffer. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). In opposing this motion, Plaintiffs rely upon the remarkable contention that the Court of Appeals decision is "irrelevant" to this Court's sanctions ruling, despite the fact that the Court of Appeals considered, and agreed with, arguments that this Court deemed frivolous and which formed the bases for its sanctions ruling. This desperate effort to avoid the substance of the Court of Appeals decision must fail, and Interior Defendants' motion should be granted.

ARGUMENT

In the most fundamental sense, the holding of the Court of Appeals decision is that Interior Defendants were entitled to the relief they sought with respect to the actions of former Special Master-Monitor Kieffer. The foundation of this holding was the appellate court's determination that the scope of Mr. Kieffer's authority was "truly extraordinary," and that he "was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Cobell v. Norton, 334 F.3d at 1142.

The foregoing cannot be disputed. Nor can the fact that arguments Interior Defendants made to this Court in seeking a protective order, and for which sanctions were imposed, were expressly cited and relied upon by the Court of Appeals in reaching its determination. See id., 334 F.3d at 1142; Interior Defendants' Motion for Leave and Supplemental Memorandum in Further Support of Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar as It Imposed Sanctions on Interior Defendants and Their Counsel (Sept. 11, 2003) at 8. Even Plaintiffs do not dispute that the Court of Appeals agreed that Mr. Kieffer assumed an extraordinary role akin to a party litigant. See Plaintiffs' Opposition to Defendants' Motion for Leave and Supplemental Memorandum in Further Support of Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar As It Imposed Sanctions On Interior Defendants And Their Counsel (Sept. 25, 2003) ("Plaintiffs' Opposition") at 3. Plaintiffs try desperately to dodge this dispositive point by arguing that the Court of Appeals "had an entirely different reason" for agreeing with Interior Defendants. See id. at 3-4. Specifically, Plaintiffs contend that the Court of Appeals reached its conclusion concerning Mr.

Kieffer based on the fact that the parties did not consent to his "powers of investigation and ex parte communication." Id. at 4. This semantic argument rings hollow.

The Court of Appeals' finding that Mr. Kieffer was akin to a party litigant was made in the broad context of the court's determination that his "investigative, quasi-inquisitorial, quasi-prosecutorial role" was "unkown to our adversarial legal system." See Cobell v. Norton, 334 F.3d at 1142. That holding parallels the position Interior Defendants took when they sought a protective order from this Court: "The Special Master-Monitor has, in essence, assumed the role of a roving investigator who identifies issues, seeks related discovery, and develops his own record with respect to those matters." Interior Defendants' 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 (Jan. 23, 2003) ("Protective Order Motion") at 16. Plaintiffs' contention that the express adoption by the appellate court of this position should be cast aside as "irrelevant" to a motion to reconsider this court's determination that the position was frivolous, simply because Interior Defendants did not consent to the Special Master-Monitor's excesses, defies logic and is untenable.[1]

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[1] Plaintiffs also assert that Interior Defendants "objected in many ways . . . as to how they contended the Special Master-Monitor was abusing his power in their view, but they did not assert that he did not have the continuing power or jurisdiction to do so." Plaintiffs' Opposition at 6-7 (footnote omitted). The relevance of this baffling assertion is dubious, and it is, in any event, a gross misstatement of fact. See Cobell v. Norton, 334 F.3d 1128 (ruling on, inter alia, Interior Defendants' appeal of Mr. Kieffer's reappointment); Interior Defendants' Response To Court Order Dated April 3, 2002 Regarding Court Monitor (Apr. 11, 2002) (objecting to Mr. Kieffer's reappointment under the terms established by the Court); Protective Order Motion at 16 ("the Court did not – and could not – vest in the Special Master-Monitor the broad investigatory powers that he has assumed for himself") (citation omitted); id. at 21 (arguing that Mr. Kieffer's claimed authority to resolve substantive discovery disputes during depositions was "contrary to the appointment order and, in any event, improper").

Plaintiffs devote the balance of their brief to the proposition that "even after a court loses jurisdiction over the action by settlement or dismissal, it may still sanction improper conduct that occurred before it," Plaintiffs' Opposition at 9-10, and the notion that "an order of a court must be obeyed even if ultimately found to have been incorrect," id. at 10-12. Those concepts, and Plaintiffs' discussion related thereto, have nothing to do with the motion before the Court. Neither the jurisdiction of the Court nor the duty to obey its orders is an issue presented by this motion. Here, the Court's determination that Interior Defendants' arguments were frivolous has been determined to have been erroneous; hence, the very basis for the sanctions ruling has been eviscerated. The authorities Plaintiffs discuss and purport to interpret simply are not germane to that issue.

CONCLUSION

For all of the foregoing reasons, Interior Defendants respectfully request that the Court enter an order granting leave to file these supplemental memoranda, granting their motion for reconsideration, vacating the imposition of sanctions, and denying Plaintiffs' application for fees.

Dated: October 6, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 6, 2003 I served the foregoing *Interior Defendants' Reply Memorandum in Further Support of Their Motion for Leave to Supplement Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar as it Imposed Sanctions on Interior Defendants and Their Counsel* by facsimile in accordance with their written request of October 31, 2001 upon:

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By Facsimile and U.S. Mail upon:

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Per the Court's Order of April 17, 2003,
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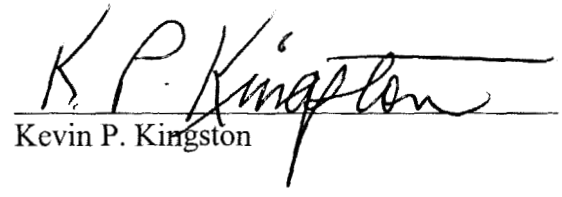

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