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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 (RCL)
	)	
GALE A. NORTON, Secretary of the Interior, et al.,)		
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' REPLY
IN SUPPORT OF MOTION
FOR ORDER ADOPTING SPECIAL MASTER-MONITOR'S
RECOMMENDATIONS REGARDING PLAINTIFFS'
PRODUCTION OF DOCUMENTS, AND ORDERING
PLAINTIFFS' IMMEDIATE PRODUCTION OF DOCUMENTS

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), state the following as their reply in support of their Unopposed Motion for Order Adopting Special Master-Monitor's Recommendations Regarding Plaintiffs' Production of Documents and Ordering Plaintiffs' Immediate Production of Documents ("Interior's Motion"), filed on November 20, 2002.[1]

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[1] Plaintiffs filed an opposition on or about December 5, 2002, entitled, "Plaintiffs' Opposition to Defendants' 'Unopposed' Motion by Interior Defendants for Order Allowing Piecemeal Adoption of Special Master-Monitor's Recommendations Regarding Plaintiffs' Trifold Protective Order."

While Plaintiffs seemingly agreed to Interior's Motion when it was discussed on November 20, 2002 – and thus, the motion was labeled, "Unopposed" when filed on November 20, 2002 -- Plaintiffs filed a "Notice of Intention to File Opposition" to the Motion on November 21, 2002.

Introduction

Interior's Motion simply asks the Court to act on the Special Master-Monitor's recommendations, contained in his Report and Recommendation dated October 18, 2002, that the Court grant Interior's motion to compel Plaintiffs' production of documents, deny Plaintiffs' motion for a protective order regarding such production of documents, and thus order the immediate production of those documents.

Plaintiffs' Opposition notes that Plaintiff Cobell produced her documents prior to her deposition sessions on December 4 and 5, 2002, and that the documents were used in the deposition. Interior simply asks that the remaining named Plaintiffs produce their documents forthwith to be used, as needed, in their depositions. Interior has scheduled the depositions of Plaintiffs James Larose for January 6, 2003, Earl Old Person for January 9, 2003, and Thomas Maulson for January 14, 2003. Interior needs the requested documents in advance of the depositions.

Argument

I. Plaintiffs Have No Credible Basis for Avoiding Immediate Production of the Requested Documents

Plaintiff Opposition (at 3 n.7) complains that Plaintiffs would have to "go back through years, and perhaps decades, of records and locate what papers they have." That argument rings hollow. First, as Plaintiffs' Opposition notes (at 1), Plaintiff Elouise Cobell produced requested documents just prior to her deposition sessions on December 4 and 5, 2002. The fact that Ms. Cobell was able to produce documents indicates that locating and producing such documents is not an unreasonably difficult task. Second, the production request was issued on June 5, 2002.

Thus, Plaintiffs should have begun their search for documents long ago.

Third, the request for documents (see the Request for Production, attached as Exhibit A to Interior's Motion) is limited in scope, including only five categories of documents, such as documents reflecting the named Plaintiffs' complaints or demands regarding the administration of the IIM accounts, copies of account statements that the named Plaintiffs received from the Government regarding the IIM accounts, and so on. It is inconceivable that, at this stage of the case, Plaintiffs would not have such documents readily at hand or at least have identified where they are.

Plaintiffs Opposition (at 3 n.7) next incorrectly argues that, "[g]iven that a protective order has been, and remains, pending," Plaintiffs should be allowed additional time – 30 days – to gather documents and "interpose any objections or privilege logs." That argument is a transparent stalling tactic. First, no protective order is "pending" with regard to Plaintiffs' obligation to produce the documents. Plaintiffs filed a motion for a protective order in July, 2002, but the motion was not granted, so Plaintiffs cannot fairly claim that a "protective order" is "pending." Second, the fact that Plaintiff Cobell was able to gather and produce documents without the need for additional time, and without need to "interpose objections" indicates that the other named Plaintiffs can do the same.[2]

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[2] Plaintiffs' Opposition to Defendants' Motion for Expedited Consideration, etc., filed by Plaintiffs on or about November 25, 2002, cites three cases for the proposition that Plaintiffs should be allowed to raise new, additional objections to the Request for Production. But those cases do not support Plaintiffs' argument under the facts here. The fundamental point of two of those cases is simply that a party may choose to lodge objections either by a motion for a protective order or through written objections. See Alexander v. F.B.I., 186 F.R.D. 54, 59 (D.D.C. 1998) (objections waived if party filed neither motion for protective order nor written objections); Nelson v. Capital One Bank, 206 F.R.D. 499, 500 (N.D. Cal. 2001) (motion for protective order is suitable method for stating objections). That point is not in dispute. In those

Plaintiffs' Opposition (at 1) wrongly accuses the Government's lawyers of being "openly disdainful" of the Special Master-Monitor during Ms. Cobell's deposition. Government counsel merely stated legitimate, good-faith objections for the record. But aside from being flatly untrue, Plaintiffs' accusations have nothing to do with whether Plaintiffs should produce requested documents in advance of their depositions.

II. An Order Regarding the Production of the Requested Documents Need Not and Should Not Await Rulings on Other Motions or Issues

Plaintiffs' Opposition (at 2) erroneously argues that the Court should delay its ruling regarding their obligation to produce documents until the Court rules on other, separate issues over the Special Master-Monitor's duties or other matters. First, issues concerning the Special Master-Monitor's duties are wholly separate from whether Plaintiffs should produce documents in discovery. Neither Plaintiffs' Opposition nor their prior brief[3] offers any logical or sensible reason why the Court must delay ruling on discovery disputes that arise, until issues regarding the Special Master-Monitor's role are resolved. On the contrary, the fact that Interior needs the documents at issue for depositions of the named Plaintiffs (which are now just a few weeks away) is ample reason to order their production now, regardless of when or how issues over the Special Master-Monitor's role are resolved.

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limited circumstances where the overbroad scope of a production request makes it too difficult to lodge more specific objections, a party must raise the overbreadth objection initially, within the time for responding to the production request, and if that objection later is overruled, the party may be allowed to assert more specific objections as it searches for documents. That is the import of Plaintiffs' other cited case, Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 319 n.50 (D. Del. 1979). But here, Plaintiffs failed to raise overbreadth or similar objections in their motion for a protective order, so any such objections are waived.

[3] See Plaintiffs Opposition to Defendants' Motion for Expedited Consideration, etc., filed by Plaintiffs on or about November 25, 2002.

Plaintiffs' Opposition (at 3) incorrectly argues that their July 2002 motion for protective order is "trifold" in nature and should not be ruled on in "piecemeal" fashion. Plaintiffs' characterization is misleading because, apparently, Plaintiffs' production of documents is the only one of the three issues in that "trifold" motion that remains alive and in need of court action. Plaintiffs' July, 2002 motion sought a stay of three matters: (1) Interior's Rule 11 motion regarding Plaintiffs' April, 2002 application for attorney fees, (2) Interior's "threatened" depositions of the five named Plaintiffs, and (3) Interior's request for Plaintiffs' production of documents. The first of those three (stay of proceedings regarding the Rule 11 motion) is entirely moot because the Court already has ruled on the Rule 11 motion. The second item (depositions of the named Plaintiffs) apparently does not need Court action at this time because the Plaintiffs seem willing to comply with demands that they appear.[4] Thus, the only part of the so-called "trifold" motion that needs Court action at this time is the Plaintiffs' obligation to produce the requested documents, which is exactly what Interior's Motion seeks.

Conclusion

Depositions of several more named Plaintiffs are scheduled to take place within the coming weeks. Interior Defendants need the requested documents in advance of those depositions. The Special Master-Monitor has recommended granting Interior Defendants' motion to compel production of those documents, and Plaintiffs neither objected to that recommendation nor have they shown any good reason to delay such production. Therefore, Interior Defendants respectfully request that the Court enter an order adopting the Special Master-Monitor's

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[4] We base this on the fact that Plaintiff Cobell appeared for deposition sessions. Of course, if the remaining Plaintiffs reveal that they will not appear for their scheduled depositions, Interior reserves its right to seek appropriate relief from the Court.

recommendation that Interior Defendants' motion to compel the production of documents be granted, that Plaintiffs' motion for protective order be denied, and that this Court order Plaintiffs to produce the requested documents forthwith.

Respectfully submitted,

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Dated: December 16, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 16, 2002, I served the foregoing *Interior Defendants' Reply in Support of Motion for Order Adopting Special Master-Monitor's Recommendations Regarding Plaintiffs' Production of Documents, and Ordering Plaintiffs' Immediate Production of Documents* by facsimile, in accordance with their written request of October 31, 2001 upon:

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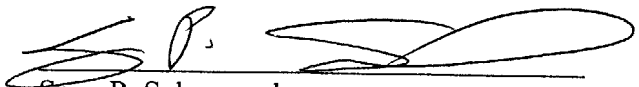

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