U.S. DISTRICT COURT
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)
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' CONSOLIDATED MOTIONS (1) TO MODIFY OR IN THE ALTERNATIVE STAY THE PRODUCTION ORDER OF DECEMBER 23, 2002 AS IT PERTAINSSOLELY TO NAMED PLAINTIFF EARL OLD PERSON, AND (2) FOR PROTECTIVE ORDER TO PREVENT THE DEPOSITION OF MR. OLD PERSON

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), state the following as their opposition to Plaintiffs' Consolidated Motions to Modify or in the Alternative Stay the Production Order of December 23, 2002 As It Pertains Solely to Named Plaintiff Earl Old Person and for a Protective Order to Prevent the Deposition of Mr. Old Person (collectively, "Plaintiffs' Motion to Stay Discovery Regarding Earl Old Person").

Introduction

Plaintiffs offer no good reason to excuse Plaintiff Earl Old Person from discovery. Mr. Old Person's sudden alleged refusal to cooperate with class counsel – just when the parties have filed their January 6, 2003 plans, and just when Mr. Old Person was to be examined about his knowledge of this case – is highly suspicious and only makes discovery of Mr. Old Person all the

more appropriate.

Background

Plaintiffs' Motion to Stay Discovery Regarding Earl Old Person involves two aspects of discovery due from Plaintiff Earl Old Person. First, Mr. Old Person was required by court order to produce documents by January 8, 2003. On December 23, 2002, this Court entered an order requiring the named Plaintiffs to produce, within 10 days, the documents called for by Interior Defendants' Request for the Production of Documents, Dated June 5, 2002. The due date for production (calculated pursuant to Fed.R.Civ.P. ("Rules" 6)) was January 8, 2003. Second, Defendants duly noticed the deposition of Mr. Old Person for January 9, 2003.

Mr. Old Person failed to comply; he neither produced documents nor appeared for his deposition. Rather, on January 8, 2003 – the date his documents were due and the eve of his deposition – Plaintiffs filed their Motion to Stay Discovery Regarding Earl Old Person, asking the Court to stay the production order and defer the deposition. As justification, Plaintiffs point to another motion ("Motion to Remove Earl Old Person") filed by the Plaintiffs other than Earl Old Person on January 8, 2003, in which those other Plaintiffs seek the removal of Mr. Old Person as a named Plaintiff on the grounds that he "failed to cooperate with class counsel, most particularly with regard to discovery."[1] See Plaintiffs' Brief in Support of Motion to Remove Earl Old Person at 3 (emphasis added.). They also alleged that "class counsel has not been able

[1] In addition to the Motion to Stay, to which this brief is addressed, the Plaintiffs other than Earl Old Person, together with their attorneys, filed two other motions on January 8, 2003, entitled "Motion of Elouise Pepion Cobell, Thomas Maulson, James Louis LaRose and Penny Cleghorn to Remove Earl Old Person as a Named Class Representative and Motion of Class Counsel to Withdraw from the Representation of Earl Old Person In Any Capacity Other Than as Class Counsel for a Member of the Certified Class." These motions will be referred to as the "Motion to Remove Earl Old Person" and "Counsel's Motion to Withdraw," respectively.

to discuss the Court's [December 23, 2002] production order with [Mr. Old Person] because of our inability to contact him."[2] See Plaintiffs' Motion to Stay Discovery Regarding Earl Old Person at 2.

Argument

I. Plaintiffs Offer No Persuasive Justification For Mr. Old Person's Failure to Comply With Discovery

Mr. Old Person's failure to comply with discovery and his alleged non-contact with class counsel are serious matters that could have a profound impact on this case. As the D.C. Circuit explained, "[f]ailure of a representative plaintiff [in a class action] to respond to discovery or to keep class counsel informed of his whereabouts is a serious matter which ought to be discouraged by appropriate sanctions." Dellums v. Powell ("Dellums II"), 566 F.2d 231, 236 (D.C. Cir. 1977).[3] At this time, Interior seeks no sanctions against Mr. Old Person, but instead seeks discovery of information from him.

As movants for a protective order, Plaintiffs have a heavy burden to show that they are entitled to such relief. See Rule 26(c), requiring "good cause" for issuance of a protective order; Alexander v. F.B.I., 186 F.R.D. 71, 75 (D.D.C. 1998) ("'moving party [for a protective order] has a heavy burden of showing 'extraordinary circumstances' based on 'specific facts' that would justify such an order'"), quoting Prozina Shipping Co. v. Thirty-Four Automobiles, 179 F.R.D. 41

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[2] We can only imagine how shrill Plaintiffs' counsel's cries of "contempt" and "misconduct" would be if Defendants offered such unpersuasive excuses for not complying with an order of this Court.

[3] While Plaintiffs saw fit to cite (Plaintiffs' Motion to Stay Discovery Regarding Earl Old Person at 2) an earlier, January 14, 1977, decision in Dellums v. Powell ("Dellums I"), 566 F.2d 167 (D.C. Cir. 1977), they failed to bring to the Court's attention the more directly relevant subsequent Dellums II decision (566 F.2d at 236).

(D. Mass. 1998).

Further, a party seeking to prevent a deposition in its entirety bears an even higher burden. As this Court stated, "the complete prohibition of a deposition [is an] extraordinary measure[] which should be resorted to only in rare occasions." Alexander v. F.B.I., 186 F.R.D. at 75; see also Jennings v. Family Mgt., 201 F.R.D. 272, 275 (D.D.C. 2001) (same) and cases cited therein, including Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error"); Naftchi v. New York Univ. Med. Ctr., 172 F.R.D. 130, 132 (S.D.N.Y. 1997) ("it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition").

Plaintiffs fail to meet their heavy burden. Their first argument is that Plaintiffs' counsel has not been able to contact Mr. Old Person. They state that they have "not been able to discuss the Court's production order with named plaintiff Old Person because of our inability to contact him." Motion to Stay Discovery Regarding Earl Old Person at 2. But that cursory allegation fails to show any cause, let alone "good cause," to excuse Mr. Old Person from discovery, particularly the discovery required here: Document production mandated by a Court order and a deposition which, under the authorities cited above cannot be precluded absent a showing of "extraordinary circumstances."

Second, Plaintiffs' counsels' explanation rings hollow. Plaintiffs fail to explain why Mr. Old Person failed to attend his deposition on January 9, 2003. Interior served its First Amended Deposition, which set that deposition, on December 11, 2002 (a copy of which is attached as Exhibit 1). Once served with the notice of deposition on December 11, 2002, Plaintiffs' counsel

should have been in immediate contact with Mr. Old Person to ensure that he would make the necessary arrangements to be at the deposition. If Mr. Old Person was unwilling at that time to commit to attend the deposition, Plaintiffs' counsel should have notified Interior and the Court immediately. On the other hand, if Mr. Old Person originally committed to attend the deposition, but now suddenly refuses to have contact with Plaintiffs' counsel, they owe Interior and the Court much more of an explanation of the circumstances surrounding that turn of events.

Also, presumably Plaintiffs' counsel immediately sent Mr. Old Person a copy of the Court's production order when it was issued on December 23, 2002. That Mr. Old Person would simply disregard a court order is not credible. Also, Plaintiffs' counsel fail to explain why they have been unable to contact Mr. Old Person, and they fail to show sufficient facts to conclude that they have been sufficiently diligent in trying to reach him. They owe the Court a far better explanation than they have provided. They have shown no good cause to excuse Mr. Old Person from complying with that discovery order.

II. Mr. Old Person Should Not Be Excused From Discovery Merely Because Other Named Plaintiffs Seek to Remove Him

Plaintiffs' next argument is that Mr. Old Person should be granted the protective order because the remaining named Plaintiffs have moved to remove Mr. Old Person as a class representative and his counsel seek to withdraw from representing him. Plaintiffs assert a circular argument which makes no sense: They seek to remove him as a named Plaintiff because he has not complied with discovery, and they seek to excuse him from discovery because they have asked to remove him as named Plaintiff. As movants, Plaintiffs have the burden of showing good cause for the relief they seek. Their circular argument fails to do so.

Moreover, Plaintiffs' logic is backwards. Mr. Old Person's resistance to mandatory discovery (including document production specifically ordered by the Court) does not justify excusing compliance with discovery, but rather makes discovery of his knowledge all the more important. As discussed more fully in Interior's Opposition to Plaintiffs' Motion to Remove Earl Old Person and to Counsel's Motion to Withdraw (at 5-6), the Court has a continuing duty to ensure that all of the class requirements of Rule 23 remain satisfied. If some class members hold interests antagonistic to those of the named Plaintiffs or other class members, it might be appropriate for the class to be modified or subclasses to be formed, with separate counsel. See id. at 6 & 8-9.

The circumstances surrounding Mr. Old Person's sudden apparent refusal (after this litigation has been going on for 6-1/2 years) to participate in this case raise serious and urgent questions: Is his non-participation due to purely personal reasons or does it have to do with his attitudes about the case? Is he aware of antagonistic interests among class members or between class members and the other named Plaintiffs?[4] Additionally, media reports indicate that Mr. Old Person may be in disagreement with the lead named Plaintiff, Elouise Cobell, with regard to some aspects of this case. See Interior's Opposition to Plaintiffs' Motion to Remove Earl Old Person and Counsel's Motion to Withdraw at 9.

As a named Plaintiff, Mr. Old Person has a fiduciary duty to the class. To carry out that duty, he owes an explanation of why he has failed to comply with discovery, why he supposedly

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[4] These pertinent circumstances include the fact that Mr. Old Person's refusal to participate in the case occurred just when the parties filed their January 6, 2003 plans for "fixing the system" and for an historical accounting, and just as Mr. Old Person was to be subjected to questioning in a deposition.

cannot be contacted by class counsel (see Dellums II, 566 F.2d at 236), why he apparently refuses to participate in this case, and whether he is aware of antagonistic interests within the class. Thus, now more than ever, his deposition and compliance with other discovery obligations are important and appropriate. No basis exists to excuse those obligations.

Plaintiffs argue that the Court should defer deciding what discovery is appropriate until it decides the Motion to Remove Earl Old Person. On the contrary, the Court cannot properly decide whether to remove Mr. Old Person as a named Plaintiff until he responds fully to discovery and reveals the facts surrounding his apparently sudden change of heart about this case.

III. Even If Mr. Old Person Were Removed as a Named Plaintiff, Discovery Would Be Appropriate

Plaintiffs' cited cases[5] (Plaintiffs' Motion to Stay at 2-3) are plainly distinguishable from the facts here. Those cases involved the question of whether discovery of rank-and-file class members should be allowed. None of those cases involved discovery of a still-named class representative who is the target of a motion to remove by other class representatives. None of those cases involved a class representative who inexplicably and suddenly refuses to carry on with the case just at the time that the parties have filed plans and the class representative is about to be questioned. These unusual facts make all the difference, for, as indicated above, they raise legitimate and serious class issues that cannot be answered until discovery of Mr. Old Person delves into those questions. Thus, even if the Court were to remove Mr. Old Person as a named Plaintiff, the class-related issues raised by his recent actions would remain open issues that still

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[5] See Dellums I, 566 F.2d at 187; Clark v. Universal Builders, Inc., 501 F.2d 324,340 (7th Cir. 1974); Baldwin & Flynn v. National Safety Assoc., 149 F.R.D. 598, 600 (N.D. Cal. 1993); Enterprise Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); Robertson v. National Basketball Assoc., 67 F.R.D. 691, 700 (S.D.N.Y. 1975).

could be answered only by questioning Mr. Old Person.

Moreover, the law on conducting discovery of class members is not as restrictive as Plaintiffs suggest. First, one of the key reasons why discovery of absent class members often is not allowed is the concern over burdening class members who did not undertake the responsibilities of being a class representative. See 7B Charles Alan Wright, Arthur R. Miller and May Kay Kane, Federal Practice and Procedure § 1796.1 at 335 (2d ed. 1986) ("the court must balance defendant's need for detailed information against the burden on the absent class members, who did not initiate the action and are not actively participating in it"). But Mr. Old Person assumed those responsibilities and burdens when he voluntarily sought to be and became a class representative. Thus, he can properly be required to bear the relatively modest burdens of the discovery Interior Defendants seek.

Second, discovery into class-related issues is clearly appropriate. See Kamm v. California City Dev. Co., 509 F.2d 205, 210 (9th Cir. 1975) ("The propriety of a class action cannot be determined in some cases without discovery, as for example, where discovery is necessary to determine the existence of a class or set of subclasses. To deny discovery in a case of that nature would be an abuse of discretion") (footnote omitted); see also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978) ("discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation"). Because of the unusual circumstances discussed above, Mr. Old Person may have information that cannot be obtained elsewhere regarding, for example, whether antagonistic interests exist between class members and the other named Plaintiffs and, therefore, whether relief such as

formation of subclasses is appropriate.

Third, the law allows discovery of absent class members under appropriate circumstances, which certainly exist here. Krueger v. New York Tel. Co., 163 F.R.D. 446, 450 (S.D.N.Y. 1995) (noting "there is authority for the use of both interrogatories and depositions against members of Rule 23 classes," the court refused to grant a protective order against the deposition of class members).

The allowability of discovery of absent class members, under appropriate circumstances, is especially clear in the D.C. Circuit. In Plaintiffs' cited case of Dellums I, 566 F.2d at 187, the D.C. Circuit stated, "[w]hile it is true that discovery against absentee class members under Rules 33 and 34 cannot be had as a matter of course, the overwhelming majority of courts which have considered the scope of discovery against absentees have concluded that such discovery is available, at least when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties." (Emphasis added.) Plaintiffs cite Clark v. Universal Builders, Inc., 501 F.2d at 340, but even that case noted that "[t]he taking of depositions of absent class members is [] appropriate in special circumstances." Id. at 341.

Here, of course, Mr. Old Person still is a class representative, but even if the Court removed him from that position, the "special circumstances" discussed in part II, above, justify taking his deposition, for they at least raise a legitimate implication that he might have class-related knowledge that cannot be obtained from any other source. Even if removed as a class representative, Mr. Old Person would not be in the same position as a passive class member, for

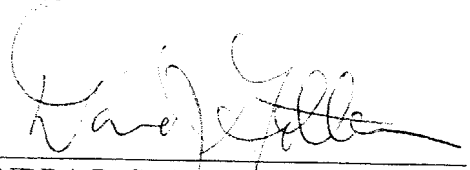
Mr. Old Person helped cause the Court to certify the class by representing in 1997, through his counsel, that he "can be counted on to see the job [of being a class representative] through." See Plaintiffs' Revised Memorandum of Points and Authorities in Support of Motion for Class Certification at 10, filed on or about January 14, 1997. Having held himself out as an active class representative, Mr. Old Person cannot be deemed the same as passive class members who never actively participated in the case.

Conclusion

Because Plaintiffs offer no legitimate basis to excuse Mr. Old Person from complying with the Court's production order and with the outstanding notice of deposition, their Motion to Stay Discovery Regarding Earl Old Person should be denied. The Court should set a new and final date for Mr. Old Person to produce the required documents, and should order him to appear for his deposition. Interior has filed herewith its Motion to Compel Plaintiff Earl Old Person to Comply With the Court's December 23, 2002 Production Order and to Appear and Testify at Deposition, which sets out the details of such relief.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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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)
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFFS' CONSOLIDATED MOTION TO STAY AND FOR PROTECTIVE ORDER

This matter coming before the Court on Plaintiffs' Consolidated Motions to Modify or in the Alternative Stay the Production Order of December 23, 2002 As It Pertains Solely to Named Plaintiff Earl Old Person and for a Protective Order to Prevent the Deposition of Mr. Old Person, and any responses thereto, the Court finds that said motion of Plaintiffs should be DENIED.

IT IS THEREFORE ORDERED that said motion of the Plaintiffs is hereby DENIED.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
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Keith Harper, Esq.
Native American Rights Fund
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202-822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 16, 2003 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Consolidated Motions (1) to Modify or in the Alternative Stay the Production Order of December 23, 2002 as it Pertains Solely to Named Plaintiff Earl Old Person, and (2) for Protective Order to Prevent the Deposition of Mr. Old Person* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

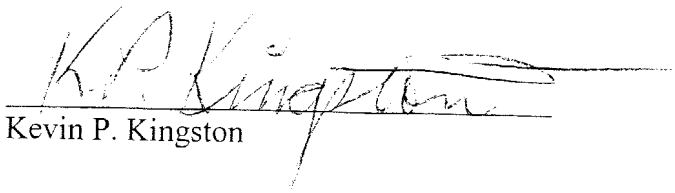
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958



Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
GALE A. NORTON, Secretary of the Interior, et al.,	)	(Judge Lamberth)
Defendants.	)	(Special Master-Monitor Joseph S. Kieffer, III)

FIRST AMENDED
NOTICE OF DEPOSITION - EARL OLD PERSON

TO: Mr. Dennis M. Gingold
Mr. Mark Kester Brown
P.O. Box 14464
Washington, D.C. 20044-4464
Fax: 202/318-2372

Mr. Keith Harper
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PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 30, the Secretary of the Interior and the Assistant Secretary - Indian Affairs shall conduct the oral deposition of Plaintiff **EARL OLD PERSON**, at the offices of Defendants' attorneys, U.S. Department of Justice, Civil Division, 1100 L Street NW, Washington, D.C., **beginning at 9:30 a.m. on January 9, 2003**, and, if necessary, shall continue on further dates to be scheduled, until completed.

This First Amended Notice of Deposition requires the appearance of the above-named deponent for the entirety of the deposition. The deposition will be recorded by sound-and-visual and stenographic means.

EXHIBIT # 1

This First Amended Notice of Deposition supersedes the prior Notice of Deposition that was served with regard to the above-named deponent.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

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Dated: December 11, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 11, 2002, I served the foregoing *First Amended Notice of Deposition - Earl Old Person* by facsimile, in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
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202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, NW
Ninth Floor
Washington, DC 20004
202-318-2372

and by U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

and by U.S. Mail and by facsimile upon:

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Special Master
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Sean P. Schmergel