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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.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") state the following as their opposition to Plaintiffs' Motion for Protective Order Seeking (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; and (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees ("Plaintiffs' Motion" or "Pl. Mo.").

Introduction

Plaintiffs' Motion seeks to exempt Plaintiffs from all discovery obligations and to excuse them from complying with the requirements of Fed. R. Civ. P. ("Rule" or "Rules") 11 regarding Plaintiffs' attorney's filing of a false or misleading affidavit in connection with a pending fee application. As shown below, Plaintiffs fail to meet their burden of showing they are entitled to such extraordinary relief. Their request is not supported by pertinent legal authority or the facts.

Background

Pending Discovery. On June 5, 2002, Interior Defendants served their Request for

Production of Documents, Dated June 5, 2002. Plaintiffs' response was due by July 8, 2002, but Plaintiffs submitted no response. On July 2, 2002, Interior Defendants served a Notice of Deposition, setting the deposition of Plaintiff Elouise Cobell for July 30, 2002. Interior Defendants also notified Plaintiffs' counsel that Interior Defendants plan to schedule the depositions of the other named Plaintiffs.

Rule 11 Motion Served. On June 28, 2002, pursuant to Rule 11(c)(1)(A), Interior Defendants served Plaintiffs' attorneys with a motion (the "Rule 11 Motion") for sanctions, and a supporting brief, under Rule 11 (or, alternatively, under the Court's inherent power to sanction improper conduct), based upon Plaintiffs' lead attorney's (Dennis Gingold) filing of two false or misleading affidavits in connection with an April 29, 2002 application for fees regarding discovery motions. Under Rule 11(c)(1)(A), if Plaintiffs do not withdraw the offending papers (the affidavits and supporting documents) within 21 days after service, Interior Defendants will file the Rule 11 Motion.

Argument

I. No Basis Exists to Exempt Plaintiffs From Discovery Obligations

Plaintiffs seek a blanket exemption from all discovery (pending and even not-yet-served discovery) because, they allege, Defendants have not complied with Plaintiffs' discovery or because of other alleged acts that Plaintiffs claim are improper. Plaintiffs thus rely on the "unclean hands" doctrine as a basis to shield themselves from disclosing discoverable facts and information. Plaintiffs fail to show a protective order is warranted.

A. Plaintiffs Fail to Meet Their Burden of Showing "Good Cause" for a Protective Order

A party seeking a protective order staying or otherwise limiting discovery bears the burden of showing "good cause." See Rule 26(c) (requiring "good cause" for protective orders). As stated by this Court in Lohrenz v. Donnelly, 187 F.R.D. 1, 3 (D.D.C. 1999), "[t]he required showing of good cause under Rule 26(c) must be sufficient to overcome defendants' legitimate and important interest in trial preparation."[1] As shown below, Plaintiffs fail to make such a showing of good cause.

B. The Law Does Not Support Denying a Party Discovery Because of Alleged "Unclean Hands"

Plaintiffs appear to argue that, because they have outstanding discovery requests, Interior Defendants should not be allowed to conduct discovery. But it is axiomatic that a party is not excused from responding to discovery merely because the opposing party has discovery requests outstanding. Rule 26(d) provides:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

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[1] See also General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (Rule 26(c) requires "'good cause' be shown for a protective order to be issued" and this "contemplates 'a particular and specific demonstration of fact'" (quoting Wright & Miller, Federal Practice and Procedure § 2035, at 264-65)); United States v. Swissco Properties etc., 821 F. Supp. 1472, 1474 (S.D. Fla. 1993) (party "must demonstrate 'good cause' for a stay of civil discovery"); Abex Corp v. Maryland Cas. Co., No. 82-2098, 1987 WL 10238 at *1 (D.D.C. April 21, 1987) (stay of discovery denied where party "has shown neither the good cause required for a protective order, nor any persuasive reason why a stay of discovery would serve the interests of justice"); Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985) ("courts do not generally grant protective orders without a strong showing of 'good cause.' . . . And the burden of establishing 'good cause' lies with the party seeking the protective order" (citation omitted)).

(Emphasis added.) See also 8 Charles Alan Wright and Arthur R. Miller et al., Federal Practice and Procedure § 2047, at 593 (2d ed. 1994) ("There is no rule of priority, and the fact that one party is conducting discovery does not delay any other party's discovery.").

Moreover, case law holds that one party's alleged failures to comply with discovery do not excuse the other party from responding to discovery requests. In Land Ocean Logistics, Inc. v. Aqua Gulf Corp., 181 F.R.D. 229, 235 (W.D.N.Y. 1998), the court stated:

> Defendants' failure to respond to Plaintiff's [discovery] Requests does not, however, excuse Plaintiff from complying with Defendants' discovery requests. Plaintiff's withholding of production of the requested information and documents contingent upon the production of discovery by the opposing party in this case was clearly improper.

Accordingly, the court in Willemijn Houdstermaatschaapij v. Apollo Computer, Inc., 707 F. Supp. 1429, 1440 (D. Del. 1989), expressly rejected the use of the "unclean hands" doctrine to avoid discovery obligations. In that case, the court held that one party's alleged shortcomings in responding to discovery did not excuse the other party from answering interrogatories. The court stated, "'unclean hands' arguments have no relevance to a motion to compel [discovery]." Id.

In Elkay Manufacturing Co. v. Ebco Manufacturing Co., No. 93C5106, 1995 WL 389822, at *8 (N.D. Ill. Feb. 15, 1995), the court also held that the unclean hands doctrine offered no basis to resist discovery. That court's remarks are particularly apropos here. A respondent to a motion to compel discovery sought to avoid its discovery obligations by alleging that the movant had failed to comply with its discovery obligations. The court readily disposed of that defense, stating, "[the respondent's] argument on this point amounts to nothing more than a cry of 'you started it!' – the kind of statement one hears on playgrounds but which has no place in a court of law." Id. Similarly, in Blake Associates, Inc. v. Omni Spectra, Inc., 118 F.R.D.

283, 288 (D. Mass. 1988), the court held that a party had no valid basis to resist a court order to produce documents merely because the opponent allegedly had not complied with discovery requests.

Even where the courts have sanctioned one party for violating discovery obligations, they still are loathe to bar that party from conducting its own discovery. In Black v. Sheraton Corp. of America, 371 F. Supp. 97, 102 (D.D.C. 1974), the court found that the government had not produced documents in response to an order, and the court overruled the government's claims of executive privilege. The court sanctioned the government by deeming certain facts established. Nonetheless, the court denied the plaintiff's motion to stay all government discovery, finding that the plaintiff failed to make a sufficient showing to justify such relief. Id.

In contrast to the above cases that reject the notion that a party is exempt from discovery if its opponent allegedly failed to comply with discovery, Plaintiffs fail to cite a single case, treatise or other authority holding otherwise. They rely principally upon Fayemi v. Hambrecht and Quist, Inc., 174 F.R.D. 319, 326 (S.D.N.Y. 1997), but that case and its holding are inapposite. First, Fayemi did not involve precluding a party from conducting discovery or exempting a party from complying with discovery requests. Rather, Fayemi merely involved the question of whether to impose the equitable relief of barring a party from using a particular piece of evidence because he improperly obtained it from his opponent. The court declined to impose that remedy because the opponent improperly tried to destroy that same evidence.

But the holding of Fayemi hardly supports denying a party the right to conduct any discovery simply because of disputes over other discovery matters. Unlike Fayemi, Interior is not seeking "equitable relief," but instead is seeking production of evidence and information in

discovery. The Rules grant every party the right to discovery; it is a basic right in litigation, not an equitable remedy dependent upon a weighing of the equities. Fayemi says nothing to indicate that the unclean hands doctrine could be used as a defense to discovery requests.

Second, the Fayemi court focused on the fact that the conduct comprising "unclean hands" (i.e., destruction of copies of particular evidence) and the equitable relief requested (i.e., barring the use of that evidence) both involved precisely the same piece of evidence. The court stated, "courts apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." 174 F.R.D. at 326 (emphasis added) (citation omitted). Thus, even if Interior's efforts simply to obtain responses to discovery were considered "equitable relief," Plaintiffs fail to show that such "relief" (i.e., production of documents and sitting for a deposition) has the requisite "immediate and necessary relation" to the other discovery disputes or alleged conduct regarding other matters of which Plaintiffs complain.

Nor do any of the other cases cited Plaintiffs support their argument. In Studebaker Corp. v. Allied Products Corp., 256 F. Supp. 173, 191-92 (W.D. Mich. 1966), the court disapproved of a party's filing of suit in one jurisdiction that had only a remote connection to the dispute, while obtaining a more favorable discovery ruling in a different jurisdiction. Thus, the court overruled the party's objections to the court's exercise of equitable powers. But that principle has not even the remotest connection to whether a party should be allowed discovery.

Other of Plaintiffs' cited cases are inapposite because they merely involved application of the unclean hands doctrine (based in part upon discovery conduct) as a defense on the merits of the case – not to resolve disputes over the allowance of discovery. See McCormick v. Cohn, No.

CV 90-0323H, 1992 WL 687291, at * 6 (S.D. Cal. July 31, 1992) (court set aside a judgment on the merits because of a variety of factors, including newly discovered evidence, fraud and discovery abuse that prevented a fair trial), aff'd, 17 F.3d 395 (9th Cir. 1994); Reyher v. Trans World Airlines, Inc., 881 F. Supp. 574, 577 (M.D. Fla. 1995) (defendant allowed to raise unclean hands, based upon discovery disputes in related litigation, as an affirmative defense on the merits in a suit against an ERISA plan).

International Business Machines Corp. v. Sperry Rand Corp., 44 F.R.D. 7, 8 (D. Del. 1967), offers no support for Plaintiffs' argument. One party "contend[ed]" that the other was not entitled to discovery because of laches and unclean hands. But the court said nothing other than that the movant failed to "sustain[] the contentions." Contrary to Plaintiffs' description of the case (Pl. Mo. at 8), the court said nothing to indicate whether "unclean hands" would be a proper basis to deny a party discovery.

Novo Nordisk of North America, Inc. v. Genentech, Inc., No. 94 CIV 8634, 1995 WL 512171, at *25-*26 (S.D.N.Y. Aug. 28, 1995), vacated, 77 F.3d 1364 (Fed. Cir. 1996), involved a motion for preliminary injunction, in which one of the elements was a balancing of the equities. That itself renders the case inapposite, because – unlike a preliminary injunction – a party's right to conduct discovery is not conditioned upon a balancing of equities. Moreover, the Novo court did not even indicate whether the alleged discovery abuses would have been a valid consideration, because it determined that those discovery matters already had been dealt with in the other case in which they occurred.[2] Id. at *25.

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[2] Also, the Novo court observed that the allegedly offending party already had been sanctioned for the alleged discovery abuses in a prior proceeding and had cured the abuses. Therefore, no basis existed for imposing a further sanction. Id. at * 26. In this case, Plaintiffs

C. Plaintiffs Fail to Show How Any Alleged Acts of Defendants Would Justify Exempting Plaintiffs From Normal Discovery Obligations

Even if Plaintiffs had shown sufficient authority for their proposition that the "unclean hands" doctrine may be used to deny an opponent all discovery, Plaintiffs fail to show that they would be entitled to such relief in this case.[3] Their allegations of wrongdoing are deficient and Plaintiffs fail to show how those allegations, even if they were true, would justify exempting Plaintiffs from discovery obligations.

1. Plaintiffs' Allegations Are Deficient

Plaintiffs' litany (Pl. Mo. at 2-3 and 5 n.3) of alleged bad acts is deficient and improper in many ways. First, Plaintiffs' allegations generally are conclusory, unsubstantiated, one-sentence assertions that do not reasonably specify how Defendants allegedly have not complied with discovery or other requirements.[4] Unless and until Plaintiffs assert their complaints in proper motions under the Rules, Defendants are not required, and cannot reasonably be expected, to respond specifically to such overly vague allegations, and Plaintiffs cannot obtain the drastic relief they seek based upon such generalized comments. Nor should Plaintiffs be allowed to use

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cite actions that were the subject of the first contempt trial (see Pl. Mo. at 5 n.3). But Court already has supplied the remedy for those matters, and Plaintiffs offer no basis to pile on more sanctions after the fact.

[3] If such relief were allowable, the standard must be exceedingly high – so high that, as discussed above, Plaintiffs have not cited a single case in which the unclean hands doctrine ever has been used to provide such relief.

[4] For example, Plaintiffs' Motion (at 2, ¶ 2) alleges "Defendants' refusal to complete Paragraph 19 production." But Plaintiffs fail to prove up such "refusal." In fact, Defendants have produced well over 400,000 pages of responsive material. Also, Plaintiffs complain (Pl. Mo. at 3, ¶ 7) about Defendants' production of what Plaintiffs term "highly relevant documents." Plaintiffs' casual allegation that Defendants "somehow overlooked" the documents is insufficient to show wrongdoing.

their reply brief to shore up their fatally deficient allegations; the reply brief is no place to offer new alleged proof.

Second, Plaintiffs severely mischaracterize many of the acts that they purport to describe. For example, Plaintiffs begin (Pl. Mo. at 2, ¶ 1) by referring to the alleged "refusal" of Defendants to respond to Plaintiffs' Third Set of Interrogatories. But Defendants duly and timely filed a Motion for Protective Order on or about July 13, 2001, asking that Defendants be relieved of the obligation to answer the interrogatories. The Special Master has not yet ruled on that motion. Thus, Plaintiffs cannot fairly characterize Defendants' response as nothing but a "refusal to respond." Defendants' Motion for a Protective Order was no more a "refusal" to respond to discovery than is Plaintiffs' Motion, which also seeks a protective order to excuse it from responding to discovery.

Similarly misleading is Plaintiffs' characterization of the June 6, 2001 e-mail attached to their motion as Exhibit 1. Plaintiffs unfairly and with no basis ascribe improper motives to the e-mail author's sensible observation that some subjects are not appropriate for communication by e-mail.

Third, if Plaintiffs seek relief for alleged discovery violations, they fail to comply with the requirements of Rule 37. See 8A Wright & Miller, supra, § 2282 ("it is ordinarily inappropriate to look beyond the clearly delineated procedures of Rule 37 for the imposition of sanctions in the discovery context"). Plaintiffs show no extraordinary circumstances that would justify "looking beyond" Rule 37 for relief.[5] To comply with that Rule, Plaintiffs would have had to file an

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[5] Defendants do not concede, however, that Plaintiffs still could properly file motions on the matters they raise. Some such motions, for example, might be untimely.

appropriate motion, setting forth each specific failure of which they complain, citing the portion of the rule that supports the relief they seek, and certifying that they have first "in good faith conferred or attempted to confer" on the matters. Rule 37(a)(2); see also 7 James Wm. Moore, Moore's Federal Practice § 37.05[5] (3d ed. 2001) ("A motion to compel discovery . . . should both identify specifically the portions of the responses that are inadequate, and explain, at least briefly, what is missing or what kind of information would be necessary to make the responses adequate."). Plaintiffs have failed to do this.[6] They cannot short-circuit Rule 37 by conclusory allegations that fail to show all of the specific non-complying acts of which they complain.

Fourth, a number of Plaintiffs' allegations are the subject of pending proceedings that have not been decided.[7] For example, Plaintiffs allege "intentional destruction of e-mail." (Pl. Mo. at 2, ¶ 5). That appears to be the same subject matter as is presently before the Court in connection with Plaintiffs' March 20, 2002 motion.[8] The matter has been briefed, but not decided. Plaintiffs allege a "refusal to cooperate in discovery before the Court Monitor" (Pl. Mo. at 2, ¶ 3), but the issue of whether the Court Monitor is entitled to conduct "discovery" already is

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[6] For example, with regard to the alleged "refusal" to respond to Plaintiffs' Third Set of Interrogatories, Plaintiffs apparently have not moved to compel answers. As noted above, Interior Defendants moved for a protective order as to those interrogatories, but that motion has not been ruled upon. Another example: Plaintiffs (Pl. Mo. at 2, ¶ 2) complain of "Defendants' refusal to complete Paragraph 19 production." They offer no details of how or why they believe Defendants "refuse" to complete such production. Such a conclusory allegation is inadequate to obtain relief under Rule 37.

[7] As to the alleged discovery failures that Plaintiffs have not brought before the Court in a motion to compel, Plaintiffs' failure to do so indicates their complaints are unwarranted. Surely if Plaintiffs had actual grounds to complain of non-compliance, they long ago would have filed motions to compel.

[8] See Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, Should Not Be Held In Contempt for Destroying E-Mail, filed March 20, 2002.

before the Court in connection with another motion[9] and pursuant to copies of letters that the Court Monitor sent to the Court.[10] As noted above, Plaintiffs' Third Set of Interrogatories (Pl. Mo. at 2, ¶ 1) already is the subject of Defendants' motion for a protective order. Plaintiffs cannot obtain relief as to such matters before the Court has even decided the merits of those pending matters.

2. Even If Plaintiffs Had Proven Their Allegations of Wrongdoing, They Fail to Show How or Why That Should Exempt Them From Discovery

Even if Plaintiffs' allegations of wrongdoing were not deficient for the reasons indicated above, it would not follow that the appropriate remedy is to excuse Plaintiffs from their proper discovery obligations. Defendants' discovery (e.g., the document request and depositions of the named Plaintiffs) is properly aimed at uncovering facts and information going to the merits of the case. Plaintiffs show no basis to allow them to keep such material under wraps.

First, because the goal of discovery is to further the search for truth, it should be allowed to proceed. See Odone v. Croda Int'l PLC, 950 F. Supp. 10, 12 (D.D.C. 1997) ("discovery should be liberal and broad in furtherance of the search for truth"); PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 256 (D.D.C. 1991) (same). Plaintiffs show no justification for allowing them to frustrate that process, no matter how much they criticize the Interior Defendants' responses. Indeed, a number of Plaintiffs' allegations do not even pertain to discovery disputes. Plaintiffs

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[9] See Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Senior Managers and Counsel Should Not Be Held In Civil Contempt for Violating the Court's April 16, 2001 and April 15, 2002 Orders, filed May 31, 2002.

[10] See letter dated May 28, 2002, from the Court Monitor to Sandra P. Spooner, which states (at 3) that it and a prior letter are being provided to the Court "for further consideration."

fail to show how the alleged bad acts of which they complain would justify interfering with discovery.

Second, Plaintiffs appear to argue that they wish to have the Court set a discovery schedule and set a date for a "phase II" trial on the merits.[11] Plaintiffs cannot consistently argue for a hearing on the "merits," while at the same time seeking to prevent the merits from being uncovered in discovery. Assuming that Plaintiffs genuinely are interested in having the case decided promptly and on the merits, and if they believe that their claims regarding phase II of the case could withstand scrutiny on the merits, they should welcome discovery rather than running from it.

II. Plaintiffs Should Not Be Excused From Discovery or Motions Because They Want a "Respite" or Are Too Busy Working on Other Matters

The second basis upon which Plaintiffs seek a stay is even more suspect. They claim (Pl. Mo. at 1) that as a matter of "timing," they would like a "respite" and that they are too busy working on the "specifications" of contempt allegations related to the 39 individuals, as requested by the Court on March 15, 2002. First, Plaintiffs show no basis for their desired "respite" from having to do what all other litigants do – respond to discovery and motions that are filed. Plaintiffs erroneously claim that Interior Defendants' motions are, in their view, "irrelevant" or "tangential." But it is for the Court, not Plaintiffs, to decide the merits of any motions that are filed, and Plaintiffs show no basis for preempting the Court's review of motions.

Second, Plaintiffs' claimed preoccupation with working on the "specifications" that this

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[11] See Plaintiffs' Notice of Supplemental Authority in Support of Plaintiffs' Findings and Conclusions of Law Submitted With Respect to the Second Contempt Trial, filed on or about July 8, 2002.

Court requested from Plaintiffs months ago rings hollow. If that were such an all-consuming task, they offer no explanation of how they have been able to file their numerous motions and briefs in this case over the past months. Nor do they explain their obvious hypocrisy in arguing that only Interior Defendants' discovery and motions should be stayed, while Plaintiffs apparently would be free to file and serve discovery and motions.

III. Plaintiffs Show No Basis to Avoid the Requirements of the Rule 11 Motion

A. The Law Does Not Support Plaintiffs' Argument

Interior Defendants have served Plaintiffs with the Rule 11 Motion, charging that Plaintiffs' lead attorney, Dennis Gingold, filed false or misleading affidavits, including apparently false supporting documents, in support of Plaintiffs' April 29, 2002 application for fees.[12] Plaintiffs argue (Pl. Mo. at 9) that it is "bad faith" to challenge Plaintiffs' conduct because of Plaintiffs' "right" to obtain fees. But the supposed "right" to fees does not include permission to file false affidavits in support of the amount of fees claimed. Plaintiffs' request for a "stay" of the Rule 11 Motion (before it is even filed) is baseless: Plaintiffs' request is procedurally improper, contrary to the express provisions of Rule 11, and unsupported by case law.

First, Plaintiffs' seeking of a stay regarding the Rule 11 Motion is procedurally improper. Plaintiffs submitted their Motion to the Special Master (see title page of Plaintiffs' Motion), but

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[12] In particular, Mr. Gingold's two affidavits (dated April 29 and May 23, 2002) were false or misleading in suggesting that he charged Plaintiffs hourly rates ranging from $325 to $475 (plus 15%), when, in fact, he did not do so. Additionally, Mr. Gingold attached to his April 29, 2002 affidavit what appear to be fictitious "billing statements" to falsely support his rates. Contrary to Plaintiffs' assertion (Pl. Mo. at 11), the Rule 11 Motion is not based upon mere "disagree[ment] with [the] content" or "exception to [the] form" of the affidavits. Rather, the affidavits make objectively false or misleading statements of material fact, apparently intended to deceive the reader.

the Court has not referred such matters to the Special Master. See Order, February 24, 1999, appointing the Special Master.

Second, Plaintiffs cite no authority (and we have found none) that would support "staying" a Rule 11 motion that has not been filed, so that the respondent would not even have to withdraw the improper paper. See proposed order submitted with Plaintiffs' Motion (asking that Plaintiffs be given permission to not respond to the Rule 11 Motion until after the Court rules on the subject fee application). Plaintiffs' requested stay turns the theory behind Rule 11 on its head. Rule 11(c)(1)(A) includes a "safe harbor" provision, that allows the offending party an opportunity to withdraw the improper paper within 21 days after service of the motion, so that the court will not be misled by that paper, and the filing of the sanctions motion will not be necessary. But in order for that provision to work, the Rule 11 Motion must be served, and the offending party must remain obliged to withdraw the improper paper. The Advisory Committee Note to the 1993 amendments to Rule 11 states:

> The [1993 revision to Rule 11] leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. . . . Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

(Emphasis added.) See also 2 James Wm. Moore, supra, § 11.22[1][c], at 11-42 ("a party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the 'safe harbor' provision [Rule 11(c)(1)(A)] would be nullified" (footnotes omitted)). Plaintiffs' approach would violate this principle, for it

would leave their false affidavits on file, thus continuing to mislead the Court regarding Plaintiffs' fee application.

Third, Plaintiffs misstate the law by suggesting that Rule 11 motions cannot be decided until the end of the case or until the court otherwise decides the merits of the offending paper. The general rule is just the opposite. As stated in Wright & Miller:

> Rule 11 motions should be made promptly after the challenged conduct takes place. If the alleged misconduct occurs during pretrial or discovery, the matter usually should be resolved at once, in order to avoid prejudicing the disposition of the substantive issue on the merits, and to discourage further abuses. If the challenged conduct is the institution of the action or occurs during a hearing or at trial, however, the question generally is not decided until after the litigation, in order to avoid delaying the disposition of the merits of the case.[13]

5A Wright and Miller, supra, § 1337, at 120-21 (emphasis added) (footnotes omitted). In the present case, the Rule 11 Motion challenges affidavits supporting a fee application arising out of discovery motions; it involves neither the "institution of the action" nor conduct at a trial or hearing. Therefore, it should be "resolved at once." Id.

Case law (including Plaintiffs' cited cases) interprets Rule 11 in just that way. Thus, Plaintiffs do not prove their argument by citing cases involving Rule 11 challenges to the underlying merits of the case (which await resolution of the merits of the case), rather than discovery or other segregable issues such as the fee application at bar (which are to be "resolved at once"). For example, Plaintiffs (Pl. Mo. at 11) cite and quote Birch v. Kim, 977 F. Supp. 926, 938 (S.D. Ind. 1997), which involved a request for Rule 11 sanctions regarding factual

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[13] Unfortunately, Plaintiffs' quotation from Wright and Miller (Pl. Mo. at 13 n.14) leaves out the directly relevant first two sentences (underscored above) of this passage.

allegations underlying the merits of the case. Thus, the motion could not be resolved until the case was decided by the trier of fact. Plaintiffs (Pl. Mo. at 11) eagerly quote the parts of the opinion so holding.

But Birch expressly distinguished the treatment of Rule 11 motions that do not go to the underlying merits of the case, observing that they should be addressed promptly. Unfortunately, Plaintiffs omit that crucial language from their quotation of the case. The complete quotation is this:

> . . . the Advisory Committee Notes to [Rule 11] state, "The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation." Fed.R.Civ.P. 11 advisory committee's note. The Seventh Circuit in Kaplan v. Zenner, 956 F.2d 149 (7th Cir. 1992) held, "The situation contemplated by the committee notes is one in which the basis for factual allegations in pleadings cannot be determined until such time as the party claiming those facts has had an adequate opportunity to develop his proof." [citation omitted.] Otherwise, where appropriate, the court in Zenner recommends a prompt motion for sanctions as soon as the party has discovered an abuse of Rule 11, rather than waiting to the end of the litigation."

977 F. Supp. at 938 (emphasis added).

Plaintiffs also fail to prove their argument by citing other cases in which the Rule 11 motions attacked the underlying merits of the case. See Lichtenstein v. Consolidated. Services Group, Inc., 173 F.3d 17, 23 (1st Cir. 1999) (In a Rule 11 challenge to the merits of the plaintiff's claims, the court observed that deferring a decision on the Rule 11 motion until the end of the trial was "a sensible practice where the thrust of the sanctions motion is that institution of the case itself was improper." (emphasis added)); Sound Video Unlimited, Inc. v. Video Shack, Inc., 700 F. Supp. 127, 149 (S.D.N.Y. 1988) (defendants' claim for baseless prosecution of the case would be ripe at the end of the case); Sierra Rutile Ltd. v. Bomar Res., Inc., No. 90CIV0835,

1990 WL 83510 (S.D.N.Y. June 12, 1990) (Rule 11 motions by the parties attacking each other's claims). Plaintiffs cite Gotro v. R&B Realty Group, 69 F.3d 1485 (9th Cir. 1995), but that case did not even consider the question of the appropriate timing for Rule 11 motions.[14]

Plaintiffs misrepresent the holding of Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust Co., 120 F.R.D. 53 (N.D. Ill. 1988), aff'd, 880 F.2d 928 (7th Cir. 1989). The court did not hold, as Plaintiffs suggest, that serving a Rule 11 motion under "similar circumstances" was a Rule 11 violation. On the contrary, the facts in Mars do not even remotely resemble the facts here. In Mars, the court denied an oral motion to preclude the use of affidavits at a fairness hearing in a class action case. After the hearing, counsel filed a written motion to strike the affidavits. The court ruled that the motion violated Rule 11 because it "was not well grounded in fact nor warranted under existing law." Id. at 56 n.2. The court said nothing that could possibly support Plaintiffs' argument in this case; Mars did not involve allegations of false affidavits, nor any indication that an opponent is somehow precluded from seeking sanctions for the filing of false affidavits, nor that such a challenge is barred until after the court relies upon the false affidavits.

The two affidavits and supporting documents that are challenged by Interior Defendants' Rule 11 Motion pertain only to the Plaintiffs' April 29, 2002 fee application. The allowance of fees arose out of two discovery motions decided in Plaintiffs' favor. Thus, the subject matter of the Rule 11 Motion is entirely separate from the merits of this case. Pursuant to Rule 11(c)(1)(A), Plaintiffs should (after seeking and obtaining leave of Court) promptly withdraw the

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[14] Nor is Gotro otherwise pertinent regarding the substantive standards of Rule 11, for that case was decided under the pre-December 1993 version of Rule 11, which contained substantially different and weaker provisions than the present rule. See 69 F.3d at 1488.

false affidavits and supporting documents. If they fail to do so, Interior Defendants are entitled to file the Rule 11 Motion, and the Court ought to rule on it in conjunction with ruling on the fee application itself.

B. The Facts Do Not Justify Exempting Plaintiffs From Rule 11's Requirements, Nor Deferring Application of Rule 11

A number of factors indicate that Plaintiffs should not be given the "free pass" from Rule 11 that they seek. First, the particular conduct alleged in Interior's Rule 11 Motion is especially egregious and in need of the corrective action and redress that Rule 11 provides. Interior's Rule 11 Motion alleges that Plaintiffs' lead counsel knowingly filed one or more affidavits containing false or misleading statements of fact regarding the amounts he has billed his clients, as part of an effort to enhance the amounts he might recover from the Government. The seriousness of these allegations justifies subjecting Plaintiffs and their attorneys to the full weight of the requirements of Rule 11 (e.g., withdrawal of the offending papers they filed), and, if the Court so determines, sanctions.

Second, Plaintiffs' own positions throughout this case belie their current argument that sanctions motions should be deferred until the end of the case or until the Court decides the merits of the papers that are the subject of the sanctions motion. Plaintiffs have filed numerous motions seeking sanctions,[15] including under Rule 11,[16] before the Court has ruled on the

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[15] See, e.g., Plaintiffs' Consolidated Opposition to Defendants' Motion to Expand the Protective Order Entered March 29, 2000 and Plaintiffs' Cross-Motion to Vacate the March 29, 2000 Protective Order and Request for Further Sanctions (filed January 16, 2001); Plaintiffs' Consolidated Opposition to Defendants' Motion to Weaken Bi-weekly Reporting Requirement and Request for Further Sanctions (filed January 29, 2001); Plaintiffs' Opposition to Interior Secretary Norton's Motion for a Stay of Depositions of Interior Personnel Pending Resolution of Secretary Norton's Motion for a Protective Order and Request for Sanctions (filed March 9, 2001); Plaintiffs' Opposition to Motion to Withdraw Defendants' Motions for Summary

underlying merits of the pleadings or papers that Plaintiffs attack. Unlike Plaintiffs' motions, which are baseless and fail to comply with Rule 11's requirements, Interior Defendants' Rule 11 Motion is well-grounded and complies with Rule 11.

C. Interior Defendants' Motion Alternatively Relies Upon the Court's Inherent Power to Sanction, and Plaintiffs Fail to Show Any Time Limitations on That Authority

If, for any reason, Rule 11 were found to be inapplicable, then Interior Defendants' Rule 11 motion relies, in the alternative, upon the Court's inherent power to sanction bad-faith conduct. Plaintiffs cite no authority for restricting the timing of the Court's exercise of its inherent power to sanction such conduct. Moreover, because Plaintiffs have filed numerous motions in this case purporting to rely upon the Court's inherent power to sanction (see above), they can hardly complain about its being exercised against them.

IV. Plaintiffs Are Not Entitled to An Award of Fees and Expenses

Plaintiffs' Motion seeks an award of expenses under Rules 26(c) and 37(a)(4). Their request is baseless. Rule 26(c) adopts the standards of Rule 37(a)(4) with regard to the award of expenses pertaining to motions for protective orders. Rule 37(a)(4) does not permit the award of expenses if the opponent's position was "substantially justified" or if "other circumstances make an award of expenses unjust." See Rule 37(a)(4)(A) & (B). Plaintiffs' request fails under this

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Judgment, Plaintiffs' Cross-Motions for Summary Judgment as to (A) There Being No Temporal Limit to Defendants' Obligation to Account, and (B) the Non-Settlement of Accounts; and 3) Plaintiffs' Motion for Sanctions and Contempt Finding Pursuant to F.R.C.P. 56(g) (filed February 15, 2002).

[16] See Plaintiffs' Motion for Rule 11 Sanctions Against Kenneth Rossman and His Counsel, filed October 1, 2001, filed well before the Court ruled on Rossman's papers.

standard.[17]

First, the acts from which Plaintiffs' Motion seeks protection – the mere service of a Rule 34 request for documents and a notice of deposition – are not improper in any way. No order or rule barred Interior Defendants from serving discovery requests, so Defendants were more than "substantially justified" in serving and pursuing them.

Second, Interior Defendants' positions in this memorandum are more than "substantially justified." The case law and other authorities cited above plainly weigh in favor of Interior's position. It is Plaintiffs' Motion that is not substantially justified. Plaintiffs cite no valid authority that supports the extraordinary relief they seek.

Third, Plaintiffs cite no authority for recovering expenses for their efforts to stay proceedings regarding Interior's Rule 11 Motion.

(continued on next page)

[17] Additionally, even if Plaintiffs were entitled to an award of expenses, their proposed order (at 2) improperly asks that Defendants be ordered to pay whatever amount Plaintiffs claim, even before the Special Master or the Court assesses its reasonableness or propriety. Plaintiffs cite neither authority nor a rationale that justifies such an extraordinary proposition. On the contrary, in light of the extremely improper nature of the last statement of fees and expenses submitted by Plaintiffs (see Defendants' Objections to Plaintiffs' Statement of Fees and Expenses Filed April 29, 2002, which Defendants filed May 13, 2002), any future statements of fees and expenses by Plaintiffs should be subjected to greater, not less, scrutiny before payment is required.

Conclusion

For the foregoing reasons, Plaintiffs' Motion should be denied.

Respectfully submitted,

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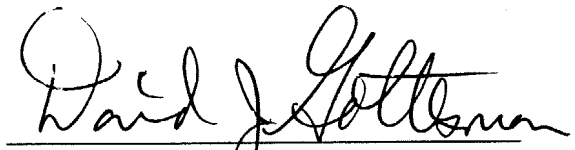
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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Dated: July 16, 2002

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 NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

This matter comes before the Court on Plaintiffs' Motion for Protective Order Seeking (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; and (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees. After considering that motion, any responses thereto, and the record of the case, the Court finds that the Plaintiffs' motion should be DENIED.

IT IS THEREFORE ORDERED that said motion for protective order filed by Plaintiffs is hereby denied.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 16, 2002 I served the foregoing *Defendants' Opposition to Plaintiffs' Motion for Protective Order*, by facsimile in accordance with their written request of October 31, 2001 upon:

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K.P. Kingston

Kevin P. Kingston