FILED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2002 OCT 21 PM 3:42
NANCY M.
MAYER-WHITTINGTON
CLERK

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' OBJECTIONS TO THE OCTOBER 2, 2002 REPORT AND RECOMMENDATION OF THE SPECIAL MASTER-MONITOR

The Secretary of the Interior and the Assistant Secretary - Indian Affairs (collectively, "Interior Defendants" or "Interior") submit this response to the "Report and Recommendation of the Special Master-Monitor on 'Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses' and 'Defendants' Motion for Protective Order,'" ("SMM Report and Recommendation") filed October 2, 2002.[1] The Special Master-Monitor ("SMM") correctly reports that Interior Defendants' objections to the Slonaker and Thompson deposition notices were proper according to the federal and local rules. However, Interior Defendants object to the SMM's recommendation that the Court should award expenses to the Plaintiffs despite this compliance with the discovery rules. No legal authority permits an award of attorney fees and costs against a party who properly invokes the discovery rules, even if it does

[1] Interior Defendants are aware of the Court's ruling in this matter issued on October 18, 2002. As Interior Defendants are timely filing these objections today, Interior Defendants will soon file a Motion to Reconsider the Court's October 18, 2002 ruling.

so for an allegedly improper purpose. Moreover, no factual basis supports an allegation of an improper purpose here. Therefore, the Court should deny Interior Defendants' Motion for a Protective Order as moot, and deny Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses. In the event the Court elects to consider the facts found by the SMM, the Interior Defendants respectfully request a hearing.[2]

---

[2] Findings of fact in a special master's report are ordinarily reviewed for clear error, Fed. R. Civ. P. 53(e)(2), while conclusions of law must be reviewed de novo. See Oil, Chemical & Atomic Workers Int'l Untion, AFL-CIO v. NLRB, 547 F.2d 575, 580 (D.C. Cir. 1976); In re Vitamins Antitrust Litig., 198 F.R.D. 296, 297-98 (D.D.C. 2000); Hartman v. Duffey, 973 F. Supp. 199, 200 (D.D.C. 1997). However, reports, findings, and conclusions of a special master that are not "based on hearings conducted on the record after proper notice" should not "be accorded any presumption of correctness and the 'clearly erroneous' rule [should] not apply to them." Ruiz v. Estelle, 679 F.2d 1115, 1163 (5th Cir. 1982), vacated in part and amended in part on other grounds, 688 F.2d 266 (5th Cir. 1982). Here, because the Special Master-Monitor has not held a "hearing[] conducted on the record after proper notice," id., and has not "file[d] with the report a transcript of the proceedings and of the evidence and the original exhibits," Fed. R. Civ. P. 53(e)(1), the "clearly erroneous" rule cannot apply to the findings or conclusions in the SMM Report and Recommendation.

Before adopting or taking any action on the report of the Special Master-Monitor, the Court must hold a hearing: "The court *after hearing* may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." Fed. R. Civ. P. 53(e)(2) (emphasis added). Interior Defendants respectfully request a hearing on this matter. A party making objections to a special master's report has a right to a hearing by the court. See In re Kosmadakes, 444 F.2d 999, 1003 (D.C. Cir. 1971). Accord Hartman, 973 F. Supp. at 199 ("*After a hearing*, the court may adopt the report of the Special Master, modify it, reject it in whole or in part, receive further evidence, or recommit it to the Special Master with instructions." (emphasis added)); Walker v. NCNB Nat'l Bank of Florida, 810 F. Supp. 11, 12 (D.D.C. 1993) ("*After a hearing* and thorough review of the Defendant's objections, this Court must conclude that the Report of the Special Master is accurate . . . ." (emphasis added)). See also Kieffer v. Sears Roebuck & Co., 873 F.2d 954, 956 (6th Cir. 1989) ("One who files objections to the report of a Special Master thus has a right to be heard on those objections before the court acts on the report.").

I. The Special Master-Monitor Correctly Reports that Plaintiffs Failed to Comply with the Discovery Rules Regarding the Slonaker and Thompson Depositions.

The SMM correctly reports that the federal and local rules support Interior Defendants' objections to the Slonaker and Thompson deposition notices. As the SMM notes, the Plaintiffs provided only two business days notice for the depositions of Mr. Slonaker and Mr. Thompson. SMM Report and Recommendation at 7. The Federal Rules of Civil Procedure ("Rules") require a party to provide "reasonable notice" of a deposition that it wishes to take. Fed. R. Civ. P. 30(b)(1). Local Civil Rule 30.1 defines "reasonable" as five-day notice in most instances. Because the Plaintiffs did not provide a five-day notification, Interior Defendants properly objected to their deposition notices.

The SMM also correctly notes that the Plaintiffs improperly noticed Mr. Thompson's deposition a second time without seeking leave of the Court. SMM Report and Recommendation at 8. Because the Federal Rules of Civil Procedure require a party to obtain leave of the court before noticing an individual's second deposition, see Fed. R. Civ. P. 30(a)(2)(B), Interior Defendants had an additional basis to object to the deposition notice for Mr. Thompson.

Therefore, the Court should adopt the SMM's conclusion that the federal and local rules support Interior Defendants' procedural objections to the Slonaker and Thompson deposition notices.

II. The Special Master-Monitor's Recommendation that Interior Should Pay Expenses to Plaintiffs for Invoking the Discovery Rules for an Allegedly Improper Purpose Cannot Be Supported in Law or Fact.

Although the SMM concludes that Interior Defendants' objections to the Slonaker and Thompson deposition notices were supported by the federal and local rules, he accuses Interior

Defendants of invoking those rules for an improper purpose: "Plaintiffs' failure to comply with the procedural rules regarding depositions gave the defendants a perfect means to continue to cover up their fraud on this Court." SMM Report and Recommendation at 10. The SMM concluded that this alleged improper purpose warrants monetary sanctions: "Under the circumstances in this case, plaintiffs are entitled to sanctions for the defendants' successful, but contemptuous, efforts to block this Court from learning of the history behind the statistical sampling decision." Id. Contrary to the SMM's conclusions, there is no basis in law or fact to support an award of expenses against Interior Defendants.

A. The Plaintiffs' Failure to Issue Proper Deposition Notices Precludes the Award of Expenses.

After concluding that Interior Defendants' procedural objections to the Slonaker and Thompson deposition notices were proper, the SMM states, "However, this cannot be the end of the inquiry." Id. at 9. But a finding that the Plaintiffs' deposition notices were flawed does end the inquiry. Federal Rules of Civil Procedure 37(d) provides that "If a party . . . designated ... to testify . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . the court . . . may make such orders in regard to the failure as are just . . ." The language "after being served with a proper notice," set off in this rule by a comma, makes a proper deposition notice the predicate for any motion to compel and, by implication, any award of expenses for failure to comply with the rule. See 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2291 (2002).

Put another way, the Court may not even consider a motion to compel or a motion for expenses until the plaintiffs meet the premise of a proper discovery request. "A defective

discovery notice or motion cannot be treated as proper start [sic] of discovery by the party filing such defective notice or motion." Fitzmaurice v. Calmar S.S. Corp., 26 F.R.D. 172, 174 (E.D. Pa. 1960). More specifically, issuance of a faulty deposition notice leaves a court "hard pressed" to grant a motion to compel. Miller v. Bluff, 131 F.R.D. 698, 700 (M.D. Pa. 1990). This is true even when the notice is improper due to an oversight. Srybnik v. Epstein, 13 F.R.D. 248, 249 (S.D.N.Y. 1952). Because the premise of a motion to compel and a motion for expenses is a proper discovery request, the Plaintiffs' failure to issue proper deposition notices precludes an award of expenses.

B. No Provision in the Federal Rules of Civil Procedure Permits An Award of Expenses to a Party Who Does Not Prevail on a Motion to Compel.

Even if the Court were to cross the initial hurdle of the Plaintiffs' flawed discovery request and consider the motion to compel, no provision in the Federal Rules of Civil Procedure permits an award of expenses to a party who does not prevail on a motion to compel. In Owens-Corning Fiberglas Corp. v. Sonic Development Corp., 546 F. Supp. 533 (D. Kan. 1982), the defendant filed a motion to compel discovery and a motion for associated attorney fees. Id. at 543. After dismissing the motion to compel as moot, the court also denied the motion for attorney fees, holding that "there is no provision in the Federal Rules of Civil Procedure for the award of expenses to a party who does not prevail on the motion to compel discovery." Id. (citing Fed. R. Civ. P. 37(a)(4)).

In Owens-Corning, the defendant sought attorney fees incurred in pursuing its motion to compel discovery, even though that motion later became moot. Similarly, the Plaintiffs in this case seek their attorney fees and expenses associated with their motion to compel, even though

that motion has since become moot. As in Owens-Corning, however, this Court should deny the Plaintiffs' motion for expenses because there is simply no provision in the rules permitting the award of expenses to a party who does not prevail on a motion to compel, even if the party does not prevail because the motion to compel is denied as moot.

C. No Provision in Law Permits an Award of Expenses Against a Party that Invokes the Discovery Rules Even for an Allegedly Improper Purpose.

In beginning his discussion on "The Award of Reasonable Expenses," the SMM writes: "Expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court." SMM Report and Recommendation at 5. Here, Interior Defendants "acted justifiably" in following the discovery rules. The SMM continues his discussion of expenses, however, by stating that "inquiry must be made into the appropriateness of the discovery sought by plaintiffs and whether the defendants' objections were justified in refusing that discovery in the environment surrounding the discovery dispute." Id. The SMM provides no authority for this proposition. Indeed, there appears to be no authority for a court to examine "the environment surrounding the discovery dispute" when simply determining whether parties adhered to the discovery rules. The SMM goes beyond the discovery rules and attempts to discern Interior Defendants' motives in adhering to those rules. In doing so, the SMM attributes an allegedly improper purpose to Interior Defendants' proper invocation of those discovery rules. In fact, there is simply no statutory or case law which permits a court to impute improper motives to a party and then punish a party for those allegedly improper motives in adhering to the discovery rules.

Federal Rule of Civil Procedure 37(d) provides that failure to respond to a discovery request "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order . . . . " In other words, a party may not refuse an improper discovery request unless it seeks a protective order. Quadrozzi v. City of New York, 127 F.R.D. 63, 75 (S.D.N.Y. 1989); Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Auth., 93 F.R.D. 62, 67 (D.P.R. 1981).

Here, Interior Defendants sought a protective order on February 1, 2001. Therefore, Interior Defendants complied with the statutory and case law requirement before refusing to produce Mr. Slonaker and Mr. Thompson for depositions. Aside from this requirement, with which Interior Defendants complied, there was nothing else that Interior Defendants were required to do before objecting to the Plaintiffs' deposition notices. Because Interior Defendants complied with this sole requirement, no authority permits an award of expenses against Interior Defendants for following the discovery rules with an allegedly improper intent.

At least in the context of a Rule 37(b)(2) motion,[3] a court may not impose sanctions until the offending party refuses to comply with a court order. In refusing to produce Mr. Slonaker and Mr. Thompson, Interior violated no such court order. The "authority to impose sanctions under Rule 37(b)(2) is triggered only by the violation of a production order issued by the district court." Webb v. District of Columbia, 146 F.3d 964, 973 n.16 (D.C. Cir. 1998). "There must be some valid order compelling discovery, however, be it oral or written, and a failure to obey the order to warrant the imposition of sanctions under Rule 37(b). Rule 37(b) sanctions are appropriate only after disobedience of a valid discovery order." Paula F. Wolff, Annotation, *Federal District*

---

[3] The plaintiffs filed their motion to compel under Rule 37(d).

Court's Power to Impose Sanctions on Non-parties for Abusing Discovery Process, 149 A.L.R. FED. 589, § 2[b], at 15 (1998). Because Interior Defendants did not violate a Court order, the Court should not assess expenses.[4]

D. No Factual Basis Exists for Awarding Expenses Against Interior.

Interior Defendants were procedurally correct in refusing to produce Mr. Slonaker and Mr. Thompson for the January 16, 2001 depositions. The Court's inquiry should stop here. Even if the Court continues further, however, no factual basis exists for awarding expenses against Interior Defendants.

In refusing to produce Mr. Slonaker, Interior properly argued that the Plaintiffs had not made the requisite showing necessary to depose a high level government official. Interior Defendants' February 1, 2001 Motion for Protective Order ("Interior's Motion") at 14-16. Interior also properly argued that the Secretary's statistical sampling decision did not constitute final agency action and that both depositions would thus improperly intrude on the agency's decision-making process.[5] Interior's Motion at 18-24.

---

[4] Even though there is no legal basis under Rule 37 to award expenses in this case, the SMM seeks to award them anyway. To the extent that these expenses become, in effect, Rule 11 sanctions, Interior Defendants object that the Court has not afforded them Rule 11's procedural protections.

[5] Although the Court of Appeals found that the District Court had jurisdiction to hear the Plaintiffs' claims under an unreasonable delay theory, it questioned the District Court's finding that the HLIP was a final agency action. Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001). This supports Interior Defendants' position in their Motion for a Protective Order that deposing those involved with the HLIP would constitute improper interference with the agency's decision-making process. Moreover, the Special Master has specifically found that Plaintiffs may not have unfettered discovery into Interior Defendants' decision-making process regarding the method of accounting.

(continued...)

Moreover, no evidence supports a finding of an evil intent on the part of Interior Defendants to invoke the discovery rules to perpetrate a fraud on the Court. In attributing such an evil intent to Interior's Motion for a Protective Order, the SMM states:

> It was just as likely that defendants were fully aware of what Messrs. Slonaker and Thompson would say had Mr. Gingold gotten them across the deposition table from him as he did on the witness stand in the second contempt trial a year later. Thus, they spent twenty-five pages of arguments in their "Motion for Protective Order" to ensure those depositions did not take place.

SMM Report and Recommendation at 9. This is an astounding leap for the SMM to make. The SMM does not limit his speculation to Interior Defendants' motives, however: "Possibly having strong concerns about the impact of that decision on this Court or the D.C. Circuit, plaintiffs had need to move quickly to counter it's [sic] effect by taking the depositions . . . . " Id. The SMM bases these statements on nothing but pure speculation. The SMM infers in this speculation that taking the depositions of Mr. Slonaker and Mr. Thompson would somehow have stopped

---

[5](...continued)

> In keeping with this acknowledgment and the Circuit's admonition to the District Court to remain "mindful" of its jurisdiction, it appears that if there is any arena within which defendant agencies might be expected to exercise their discretion and expertise, it should be in the choice and implementation of an accounting method. Permitting the agencies to formulate their methodology without subjecting every nuance of their decision-making process to inspection and challenge is ultimately in the interest of the plaintiff class, insofar as it should expedite the ultimate resolution in this case. The natural corollary of granting agencies some deference is, however, the required expectation that an administrative record will be created in accordance with traditional APA standards.

Opinion and Order of the Special Master, September 28, 2001, at 13-14, citing Cobell, 240 F.3d at 1110, 1104. Given this view of the Special Master in September 2001 that Interior Defendants should be able to proceed with an accounting without "every nuance of their decision- making process subject to inspection and challenge," Interior Defendants were especially justified in January and February 2001 in asserting arguments based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000).

Interior's statistical sampling project. The SMM further hypothesizes that "Defendants' main objective was not to protect a high-level government official . . . or to save another . . . from a second deposition; it was to prevent this Court from learning of the Interior Department's historical accounting subterfuge and the actual story behind the statistical sampling decision." Id. at 10.

The difficulty with all this speculation is just that - it's speculation, not fact. A court should base an assessment of sanctions on fact, not speculation. Although the SMM's frustration with Interior seems to derive from the Court's September 17, 2002 Memorandum Opinion, neither the SMM nor the Court should bootstrap that frustration onto speculation about Defendants' proper invocation of the discovery rules. The SMM quotes the September 17 opinion regarding the payment of expenses "to *litigate this contempt trial.*" Id. at 11 n. 7 (emphasis added by SMM). That language itself focuses the awarding of expenses on "*this contempt trial*", not on all discovery. The SMM and the Court must use facts, not conjecture, to analyze Interior Defendants' reliance on the discovery rules.

In conducting that analysis, the Court may not award expenses against Interior Defendants unless it finds clear and convincing evidence of Interior's misconduct. "[F]or those inherent power sanctions that are fundamentally penal . . . awards of attorney's fees, and the imposition of fines . . . the district court must find clear and convincing evidence of the predicate misconduct." Sheperd v. American Broadcasting Cos., Inc. 62 F.3d 1469, 1478 (D.C. Cir. 1995). Here, no factual basis supports a clear and convincing finding of any predicate misconduct by Interior Defendants meriting expenses.[6]

---

[6] Interior Defendants do not concede that the Plaintiffs' motion asks the Court to impose (continued...)

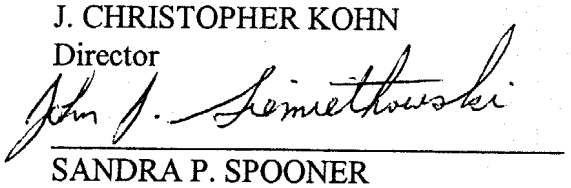
CONCLUSION

Interior Defendants' objections to the Slonaker and Thompson deposition notices were proper. Interior Defendants object to the SMM's recommendation that the Court award expenses to the Plaintiffs despite this procedural compliance with the discovery rules. No legal authority permits an award of attorney fees and costs against a party who properly invokes the discovery rules, but does so for an allegedly improper purpose. Moreover, no factual basis supports such an allegation of improper purpose. Therefore, the Court should deny Interior Defendants' Motion for Protective Order as moot, and deny Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses.

Dated: October 21, 2002

Respectfully submitted,

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



SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
JOHN J. SIEMIETKOWSKI
Trial Attorney
Commercial Litigation Branch
Civil Division

---

[6](...continued)
"inherent power" sanctions. To the extent, however, that these expenses approach "inherent power" sanctions, Interior Defendants object that these circumstances do not warrant such sanctions. See generally Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975).

P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-3368
(202) 514-9163 (fax)

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 21, 2002 I served the foregoing *Interior Defendants' Objections to the October 2, 2002 Report and Recommendation of the Special Master-Monitor* 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

and by U.S. Mail upon:

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

Copy 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

K.P. Kingston

Kevin P. Kingston