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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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

UNOPPOSED MOTION BY INTERIOR DEFENDANTS 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"), pursuant to Fed. R. Civ. P. ("Rule" or "Rules") 53(e)(2), hereby move that this Court enter an order adopting those portions of the October 18, 2002 Report and Recommendation of Special Master- Monitor Joseph S. Kieffer, III (the "Special Master-Monitor") that recommend denying Plaintiffs' motion to stay their obligation to produce documents, and that recommend granting Interior Defendants' motion to compel production of documents, and that this Court order Plaintiffs to produce the requested documents immediately. In support, Interior Defendants state:

1. This motion is presented to the Court (rather than the Special Master-Monitor) because Rule 53(e)(2) provides for parties to apply "to the court for action" upon the report of a special master. This motion asks the Court to enter an order to enforce the Special Master-Monitor's October 18, 2002 recommendation that the Court grant Interior's Motion to Compel

Discovery (regarding a request for the production of documents), and his recommendation that the Court deny Plaintiffs' motion for a protective order.

2. On or about June 5, 2002, Interior Defendants served upon Plaintiffs the Interior Defendants' Request for the Production of Documents, Dated June 5, 2002 ("Request for Production"), a copy of which is attached hereto as Exhibit A.

3. Plaintiffs' response was due July 8, 2002.

4. On or about July 5, 2002, Plaintiffs filed a motion for a protective order, seeking to stay their obligation to respond to the Request for Production. Plaintiffs' motion also sought to stay depositions of the Plaintiffs.

5. On July 16, 2002, Interior Defendants filed their Motion to Compel Discovery, with regard to the Request for Production. Defendants also filed their objections to Plaintiffs' motion for a protective order, and filed a separate motion to compel the deposition of Plaintiff Elouise Cobell.

6. On October 18, 2002, the Special Master Monitor issued a Report and Recommendation[1] regarding, among other things, the motions described above. The Report and Recommendation recommends granting Interior Defendants' Motion to Compel Discovery, and recommends denying Plaintiffs' motion for a protective order regarding that discovery. The

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[1] The full title of the Report and Recommendation is, ""Report and Recommendation of the Special Master-Monitor on '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; (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees (Served June 28, 2002)'; and 'Defendants' Motion to Compel Discovery' and 'Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition' and 'Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold.'"

Report and Recommendation states (at 13-14), in pertinent part:

> Specifically, it is recommended that the Court deny the [Plaintiffs' Motion for Protective Order] with respect to 1) a "Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002," and ; 2) a "Stay of Threatened Depositions of the Five Named Plaintiffs," . . . ."
>
> It is further recommended that this Court grant Defendants' "Motion to Compel Discovery" and defendants' "Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition."

7. Plaintiffs filed no objection or other response to the Report and Recommendation.

8. On November 1, 2002, Interior Defendants filed their Comments and Objections to the Report and Recommendation, stating agreement with the provisions quoted above.[2]

9. Thereafter, by agreement, the parties scheduled the deposition of Plaintiff Elouise Cobell to begin on December 4, 2002.

10. Interior Defendants then sought to obtain Plaintiffs' compliance with the Request for Production, informing Plaintiffs' counsel that the requested documents were needed to prepare for the deposition. On November 14, 2002, Interior Defendants' counsel sent a letter (Exhibit B hereto) to Plaintiffs' counsel asking them to produce the requested documents by November 21, 2002, and to state whether they would do so. In a subsequent telephone conversation among counsel, Plaintiffs' counsel stated that he would reveal Plaintiffs' position on Monday, November 18, 2002. Plaintiffs failed to do so. Rather, Plaintiffs merely sent a letter on November 20, 2002 (Exhibit C hereto), asking when and on what basis Interior contends Plaintiffs are obliged to produce documents. Plaintiffs thus indicated their belief that they are no obligation to produce

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[2] Interior objected to other aspects of the Report and Recommendation, which the Court need not reach in order to determine this motion.

documents by the date requested.

11. Interior Defendants need the requested documents to assist in preparing for the upcoming deposition of Elouise Cobell, which begins on December 4, 2002. The Request for Production (Exhibit A) is narrow in scope, and pertains to documents that the named Plaintiffs ought to have readily at hand.

12. As revealed by the above facts, Plaintiffs are not likely to voluntarily produce the requested documents by the dates needed.

13. Therefore, because the Special Master-Monitor already recommended granting Interior's Motion to Compel production of the documents, and Plaintiffs have not objected to that recommendation, Plaintiffs should be ordered to produce the requested documents forthwith.

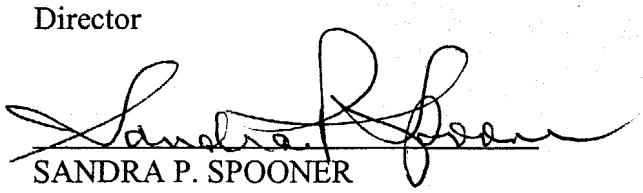
14. In a conference among counsel on November 20, 2002, counsel for Plaintiffs stated that he did not oppose the relief requested by this motion, but only opposed expedited consideration of this motion (which Interior Defendants seek in a separate motion filed herewith).

WHEREFORE, Interior Defendants request that the Court enter the attached order adopting those portions of the Special Master-Monitor's Report and Recommendation that recommend granting Interior Defendants' Motion to Compel Discovery, and that recommend denying Plaintiffs' motion for a protective order, and that this Court order Plaintiffs to produce immediately the documents called for by the Request for Production.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



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(202) 307-0183

Dated: November 20, 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 ADOPTING SPECIAL MASTER-MONITOR'S RECOMMENDATIONS REGARDING PLAINTIFFS' PRODUCTION OF DOCUMENTS, AND ORDERING PLAINTIFFS' IMMEDIATE PRODUCTION OF DOCUMENTS

This matter comes before the Court on Defendants' Unopposed Motion for Order Adopting Special Master-Monitor's Recommendations Regarding Plaintiffs' Production of Documents, and Ordering Plaintiffs' Immediate Production of Documents. After considering that motion, the October 18, 2002 Report and Recommendation of the Special Master-Monitor, any responses to the foregoing, and the record of the case, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED that Interior Defendants' Motion to Compel Discovery, filed July 16, 2002, is hereby GRANTED. FURTHER ORDERED that Plaintiffs' motion for a protective order, seeking a stay of Plaintiffs' obligations with regard to Interior Defendants' Request for Production of Documents, Dated June 5, 2002, is hereby DENIED. FURTHER ORDERED that Plaintiffs immediately shall produce to Defendants all documents requested by Interior Defendants' Request for the Production of Documents, Dated June 5, 2002.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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

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

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

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' REQUEST
FOR THE PRODUCTION OF DOCUMENTS, DATED JUNE 5, 2002

To: Mr. Dennis M. Gingold
Mr. Mark Kester Brown
1275 Pennsylvania Ave. NW
Ninth Floor
Washington, DC 20004

Mr. Keith Harper
Native American Rights Fund
1712 N. Street, NW
Washington, DC 20036-2976

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), pursuant to Fed. R. Civ. P. 34, hereby request that Plaintiffs produce the documents called for by this request, for inspection and copying at the office of Defendants' undersigned counsel, within 30 days from the date of service hereof.

DEFINITIONS AND INSTRUCTIONS

1. The terms "Named Plaintiffs" and "you," as used herein, shall mean and refer to each of the Plaintiffs who were designated as class representatives in this lawsuit, and anyone acting on their behalf.

EXHIBIT A

2. The term "Federal Agency," as used herein shall mean any department, bureau, office, agency or other component of the Executive Branch of the federal government of the United States, and any official thereof, including but not limited to the Bureau of Indian Affairs, the Department of the Interior and the Department of the Treasury.

3. The term "IIM Accounts," as used herein, shall have the same meaning as in the Complaint filed in this lawsuit.

4. The term "IIM Funds," as used herein, shall mean the trust funds that the Five Named Plaintiffs contend they beneficially own or are owed, as described in the answer to Interrogatory Numbers 1 and 3 in the Plaintiffs' January 31, 2000, "Supplemental Contention Answers on Behalf of Class to Defendants' Fourth Set of Interrogatories, Requests for Admission and Requests for Production dated October 15, 1999."

5. The term "documents," as used herein, shall mean, refer to and include all written, recorded, graphic or data-stored matters whatsoever, which are in your possession, custody and control or that of your attorneys, accountants or agents. This term includes all such materials, however produced, reproduced, stored or transcribed, whether draft, revision or final, and also all tangibles or intangibles from which written, recorded or graphic matters may be generated, produced or transcribed. This term includes, but is not limited to:

> all advertisements, affidavits, agreements, announcements, appointment books and records, assignments, bank records, bills, books, books of account, brochures, bulletins, cablegrams, calendars, catalogs, certificates, charts, checks (front and back), communications, compilations, computer data or files (whether on tape, disk or any other means of data storage) computer printouts, contracts, correspondence, deposit slips, delivery records, diaries, drafts, drawings, e-mail messages, estimates, faxes, files and file labels, financial statements or reports or analyses or compilations, forms, intraoffice or interoffice communications, instructions, invoices, itemizations, jottings, journals, ledgers, letters, licenses, lists, manuals, memoranda, messages, microfilm, microfiche,

minutes, notes, notations, notices, pamphlets, papers, permits, photographs or depictions, plans, proofs, publications, receipts, recordings (whether written, visual, sound or otherwise), records, reports, sketches, statements, studies, summaries, tapes or disc recordings, telegrams, telex messages, texts, transcripts, videotapes, visual displays, wire transfer orders or receipts, writings and work papers.

This term includes the original document (or a copy thereof if the original is not available to you) and any copies which differ in any way from the original or from each other, by reason of additional writing, notations, underlining or otherwise. Electronically or machine-stored data is to be produced in a legible and readable form.

6. Whenever appropriate herein, the singular form of a word shall be interpreted as the plural, and the plural interpreted as the singular.

7. "And" as well as "or" shall be construed in either the disjunctive or conjunctive form as necessary to bring within the scope of the request any information which may otherwise be construed to be outside its scope.

8. The term "communication" or "communications", as used herein, shall mean and refer to and include any transmission of words or thoughts by a person or between or among two or more persons, including but not limited to spoken words, discussions, conferences, conversations, negotiations, agreements, understandings, interviews, inquiries, promises, correspondence, statements, whether oral or written, and whether transmitted in person or by electronic or other means, including but not limited to radio, telephonic, fax, e-mail or other means.

9. For each document, or portion thereof, that you seek to withhold on the basis of privilege or work product protection, provide a written response identifying the document, and described how and why it is privileged, all in sufficient detail to allow us and the presiding judge

to evaluate the merits of your claim of privilege.

10. The time period covered by this request is from the beginning of the time period for which Plaintiffs seek an accounting, through the time of your production of documents.

11. Pursuant to Fed. R. Civ. P. 34(b), you are requested to segregate documents produced in response hereto according to the paragraph or subparagraph to which they are responsive, or to produce them as they are kept in the ordinary course of business. You are also requested to identify in writing paragraphs or subparagraphs as to which no documents are produced.

12. You are to supplement your responses as required by Fed. R. Civ. P. 26(e).

DOCUMENTS TO BE PRODUCED

1. All letters or other documents that any of the Named Plaintiffs or anyone acting on their behalf ever sent to any Federal Agency, which contain any complaint, demand, request, inquiry, or notification regarding any of the following:

(a) the management, administration or handling of IIM Accounts or IIM Funds;

(b) accountings or any type of explanations, or the lack thereof, regarding IIM Accounts or IIM Funds; and

(c) any other matters that are the subject of paragraphs 3, 19 and 21 (including but not limited to all subparts thereto) of the Complaint filed in this lawsuit.

2. All letters or other documents ever sent by any Federal Agency in response to, or that refer to, any complaint, demand, request, inquiry or notification by any of the Named Plaintiffs with regard to any of the matters described in paragraph 1, above.

3. All other documents that reflect or evidence any communications by, from, or between any of the Named Plaintiffs and any Federal Agency, regarding any of the matters described in paragraphs 1 and 2, above.

4. All other documents that were created or generated by anyone, that refer to any complaint, demand, request, inquiry or notification made by any of the Named Plaintiffs to any

Federal Agency at any time before 1990, with regard to any of the matters described in paragraphs 1 and 2, above. This includes but is not limited to any newspaper or other articles, reports, memoranda, and letters.

5. All account statements, trust statements and any other document with a label or title that has or includes the word "statement," which any of the Named Plaintiffs ever received from any Federal Agency with regard to IIM Accounts or IIM Funds.

Respectfully submitted,

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

SANDRA P. SPOONER
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

OF COUNSEL:

Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on June 5, 2002 I served the Foregoing *Interior Defendants' Request for The Production of Documents, Dated June 5, 2002*, 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

Courtesy Copy by Facsimile and U.S. Mail:

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

K.P. Kingston

Kevin P. Kingston

U.S. Department of Justice

Civil Division

Commercial Litigation Branch

David J. Gottesman

P.O. Box 875 Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 307-0183
Fax: (202) 307-0494

November 14, 2002

BY FAX

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

Mr. Keith Harper
Native American Rights Fund
1712 N. Street, NW
Washington, D.C. 20036-2976
Fax: 202/822-0068

Re: Cobell v. Norton,
(D.D.C. Case No. 1:96CV01285 (RCL))

Dear Counsel:

This letter follows up on the voice-mail message that I left for Dennis Gingold and Mark Brown today. In order to facilitate the deposition of Ms. Cobell, we request that you promptly produce all of the documents requested in Interior Defendants' Request for the Production of Documents, Dated June 5, 2002 ("Request for Production"). Please produce the documents by Thursday, November 21, 2002. Also, please let me know no later than tomorrow, November 15, 2002, whether you will comply with that request. Thank you.

Very truly yours,

David J. Gottesman

DAVID J. GOTTESMAN
Trial Attorney
Commercial Litigation Branch
Civil Division

cc: Mr. Joseph S. Kieffer, III

EXHIBIT B

Mark Kester Brown
1275 Pennsylvania Ave., NW
Ninth Floor
Washington, D.C. 20004
(202) 661-6382

mkesterbrown@attglobal.net

November 20, 2002

VIA FAX (202-307-0494)

David Gottesman
United States Department of Justice,
1100 L Street, NW
Room 10012
Washington, D.C. 20005

Dear Mr. Gottesman:

I am in receipt of your letter of November 14, 2002 regarding your Request for Production of Documents. So that we can determine whether there is a dispute between us, please provide us with the following information:

1) When do you contend we are obligated to respond to such Request; and

2) What is the basis for your contention.

Very truly yours,

MARK KESTER BROWN

cc: The Honorable Joseph S. Kieffer, III

P.S. We still have yet to receive any of the OSM documents that were promised to be produced to us in early May 2002 – shortly before we were required to bring the motion to compel that is presently before the Special Master.

EXHIBIT C

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 20, 2002 I served the foregoing *Unopposed Motion by Interior Defendants 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:

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

K. P. Kingston

Kevin P. Kingston