IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 1:96CV01285 |
| | ) | (Judge Lamberth) |
| GALE A. NORTON, Secretary of the Interior, et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' COMMENTS ON SPECIAL MASTER-MONITOR'S OCTOBER 2, 2002 REPORT AND RECOMMENDATION**

*Plaintiffs' Opposition to Defendants Motion to Strike Plaintiffs' Comments on Special Master-Monitor's October 2, 2002 Report and Recommendation* (dated Nov. 20, 2002) ("*Plaintiffs' Opposition*") cites no record evidence, no statute, no rule, and no case law in support of plaintiffs' request that this Court summarily imprison six current and former Department of Justice lawyers for having filed a meritorious discovery motion. Instead, plaintiffs simply ratchet up the level of their customary invective. Plaintiffs' (or perhaps more accurately, plaintiffs' counsel's) ill-will towards opposing counsel is not a sufficient basis for the Court to ignore the Constitution or the Federal Rules of Civil Procedure.

It must be reiterated that the subject of the Special Master-Monitor's October 2, 2002 Report and Recommendation were two notices of deposition issued by plaintiffs that the Special Master-Monitor correctly determined were defective for failure to comply with the Federal Rules of Civil Procedure and the Local Rules of this Court. Plaintiffs have not challenged that finding.

Despite the fact that they were solely responsible for the defects in the notices, plaintiffs seek to have sanctions imposed upon the six Justice attorneys whose names appeared on the signature block of the government's meritorious motion for protective order. Plaintiffs cite no authority for their remarkable proposition, and we know of none. Plaintiffs have not pointed to any record evidence that could support their contention that the government's meritorious motion was filed with any improper intent, nor in fact did the Special Master-Monitor cite any such evidence in his October 2, 2002 Report and Recommendation.[1]

Leaving aside the significant fact that plaintiffs have not bothered even to file a show cause motion, they have made no effort at all to meet the stringent legal and factual requirements for a civil or criminal contempt finding against these six attorneys. *See Defendants' Mem. of Points and Authorities In Support of Their Motion to Strike Plaintiffs' Comments on Special Master-Monitor's Oct. 2, 2002 Report and Recommendation* (filed Nov. 6, 2002) at 3-4 (setting forth legal standards). Their failure to do so renders their *Comments* – as well as their *Opposition* – no more than a poison pen letter.

The Special Master has found it necessary to admonish plaintiffs' counsel not to use the kind of unsubstantiated invective and *ad hominem* attacks that unfortunately permeate so many of plaintiffs' pleadings. *Special Master's Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause* (dated Nov. 4, 2002) at 4 ("As was noted

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[1]The Special Master has properly recognized that factual findings stemming from proceedings in which accused individuals have had no opportunity to participate by putting on evidence, cross-examining evidence put on by others, or making objections and legal arguments on their own behalf may not be used against those individuals. *Special Master's Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause* (dated Nov. 4, 2002) at 4.

during the October 30, 2002 case management conference, civility has been conspicuously absent during the development of this action. These proceedings will be different. Ad hominem attacks, spurious accusations and inappropriate tactics will not be tolerated."). The Special Master also has required that the persons named in the show cause motions "be addressed either by title and name or as a 'Named Individual(s).'" *Id.* This requirement was imposed because of plaintiffs' counsel's persistent labeling of the Named Individuals as "contemnors" when none of their accusations has been established against any individual. The Court should tolerate no lesser adherence to the principles of civility than the Special Master has required. On their face, neither *Plaintiffs' Comments*, nor their *Opposition*, pass this civility standard.

## Conclusion

*Plaintiffs' Opposition*, like their *Comments*, offer no factual or legal basis for imposing sanctions on any of the Justice attorneys they attack, and both pleadings accordingly fail under Fed. R. Civ. P. 12(b)(6). Moreover, the Court should demonstrate that it will not tolerate the sort of uncivil and irresponsible *ad hominem* attacks contained in these pleadings by striking both from the record.

Respectfully submitted,

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DATED: November 27, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 27, 2002 I served the foregoing *Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' Comments on Special Master-Monitor's October 2, 2002 Report and Recommendation*, by first-class mail, postage prepaid, and by facsimile transmission, pursuant to agreement, upon:

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