IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' BRIEF IN OPPOSITION TO RESTRICTIONS ON DEPOSITION WITNESSES

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Defendants") hereby respond, as requested by Special Master-Monitor Joseph S. Kieffer, III, with a brief on the issue of "sequestration" of certain witnesses called for deposition. The Special Master-Monitor convened a telephone conference on Tuesday, November 26, 2002, after Plaintiffs complained about Defendants' letter, sent following the conclusion of the initial round of depositions of three officials of the Department of the Interior, notifying Plaintiffs that they did not intend to keep these three witnesses "sequestered." As demonstrated below, Defendants have no obligation to perpetuate the sequestration of any witnesses, and Plaintiffs can show no prejudice whatsoever. The act of "sequestering" witnesses, especially in the deposition context, is strongly disfavored and may not be imposed absent a clear finding of "compelling or extraordinary" need. See, e.g., Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998)(Lamberth, J.). Plaintiffs bear the burden of demonstrating such "extraordinary" need but have completely failed to do so.

The essential background facts regarding sequestration are not in serious dispute. On September 17, 2002, the Court ordered that Defendants submit by January 6, 2003 a plan for "conducting a historical accounting of the IIM trust accounts" and a plan for "bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries. Order, Sept. 17, 2002, at 3. The Court also authorized discovery to be taken prior to a trial on the merits of the plans, set for May 2003.

At the first discovery conference held by the Special Master-Monitor on October 3, 2002, Plaintiffs requested certain modifications to the Federal Rules. One modification Plaintiffs sought was "sequestration" of three witnesses, J. Steven Griles, James Cason and Ross Swimmer, each of whom is an official of the Department of the Interior involved in work on the plans ordered by the Court. Discovery Tr. at 229 (Oct. 3, 2002). Defendants agreed only to consider such a proposal, and the Special Master-Monitor directed Plaintiffs to submit a proposed form of sequestration. Id., tr. at 230.

The matter was discussed again during a second discovery conference on October 18, 2002. The Special Master-Monitor described a general understanding on "sequestration" with respect to the depositions of Messrs. Griles, Cason and Swimmer to be held during the month of November.

> MR. KIEFFER: Here's what he [Defendants' counsel] is going to do. There is going to be a deposition with Cason. Cason can talk to his counsel. Cason can't talk to Griles or anyone about that deposition. The counsel may [or may] not be the same counsel that Cason spoke to that then preps Swimmer in his deposition. In that prep, they can talk about a whole range of subjects, but they will not indicate that any particular subject was discussed at the deposition. And in that range, the subject is going to be larger than what was in that deposition, so there is going to be no knowledge on the part of Mr. Swimmer

> that the subjects they are prepping him on are just the subjects that were discussed in the deposition.

Discovery Conference Tr. at 19-20 (Oct. 18, 2002). The full terms of "sequestration," however, were never specified and were not thereafter reduced to a formal written protective order. The Special Master-Monitor previously noted that "[a]ll three deponents would be subject to a sequestration order to be agreed to by the parties to prevent their talking to each other about their individual depositions." Letter from Special Master-Monitor Kieffer to the parties, dated October 14, 2002 at 4 (emphasis added) (citing the Discovery Conference Tr. at 229-230 (Oct. 3, 2002). No protective order, however, was ever proposed to, considered or entered by the Court on the subject of sequestration; nor has the Court made any independent determination of "good cause" for entering a protective order.

During November, Plaintiffs took depositions of Messrs. Griles, Cason and Swimmer. Initially, Plaintiffs asked for each of these witnesses to be produced for three days of deposition in November, with the possibility that these witnesses might be deposed again in January, following the filing of the Defendants' plans with the Court. The Special Master-Monitor summarized as follows:

> MR. KIEFFER: Let's take *three days now* and see what's left over. I would rule that they have the right to take them *again* after the plan. But there's so much that they have to do with them, let's see how fast they finish the *first* three days. And I'll be there. I'm going to come to these depositions to make sure they progress fairly but rapidly. Then we'll address that issue later on.

Discovery Conference Tr. at 197 (Oct. 3, 2002) (emphasis added). As things proceeded, however, Plaintiffs took only one full day of deposition for each witness during November. At present, no additional deposition dates have been sought by Plaintiffs for these three witnesses.

After the initial round of depositions of the three witnesses was complete, Defendants notified Plaintiffs in writing that they did not intend to keep these witnesses "sequestered." Letter from Sandra P. Spooner to Keith M. Harper, dated November 25, 2002. This notice prompted Plaintiffs' complaint, the Special Master-Monitor's subsequent telephone conference, and his request for this brief.

ARGUMENT

A. The Sequestration "Issue" Is Not Ripe For Decision

Before establishing the total lack of merit in Plaintiffs' demand for witness sequestration, Defendants note that the matter is not even ripe for decision by the Special Master-Monitor. The issue, simply put, has not been properly presented to you for consideration, or for a report and recommendation.

Plaintiffs have made no motion for the Special Master-Monitor to consider. The relief they seek can only be afforded, if at all, by means of a protective order entered by the Court pursuant to Federal Rule of Civil Procedure 26(c). Plaintiffs have not sought such an order, nor have they attempted to demonstrate their entitlement to such extraordinary relief. By failing to carry this burden, Plaintiffs' request should be summarily denied.

In the order of the Court establishing the role of the Special Master-Monitor, the Court expressly instructs the Special Master-Monitor "to ensure that discovery is conducted in the manner *required by the Federal Rules of Civil Procedure* and the orders of this Court." Order of Sept. 17, 2002, ¶8 at 4 (emphasis added). Under the Federal Rules, there is no automatic exclusion of witnesses in depositions. Rule 30(c), which governs the conduct of depositions, expressly provides that "[e]xamination and cross-examination of witnesses may proceed as

permitted at trial under the provisions of the Federal Rules of Evidence except Rules 103 [concerning the making of objections] and 615 [regarding the exclusion of witnesses]." Fed. R. Civ. P. 30(c) (emphasis added). The Advisory Committee notes to the 1993 amendments to this rule state that the "revision [adding an exception to Rule 615] provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate." Fed. R. Civ. P. 30(c) advisory committee note.

Rule 26(c), however, only comes into play upon a "motion by a party . . . and for good cause shown." Fed. R. Civ. P. 26(c). No motion and no showing of good cause has been made. Therefore, it is not proper for the Court (or the Special Master-Monitor) to consider the issue at this time.

B. Plaintiffs Are Not Entitled To Demand An Informal Protective Order

Defendants cannot be compelled to adhere to what had been nothing more than an informal, and not fully defined, arrangement to "sequester" certain witnesses. With the terms of the sequestration not completely identified, as through an order entered by the Court, there is no obligation on either party to observe any "sequestration."

Rule 26(c) expressly requires entry of a protective order. No protective order was issued. Indeed, even a stipulated protective order – one agreed to by both parties – cannot be properly entered without the court first making its own independent determination that "good cause" exists for the order. Jepson, Inc. v. Makita Elec. Works, 30 F.3d 854, 858-59 (7th Cir. 1994) (overturning sanctions for violation of stipulated protective order where no "good cause" determination was made by magistrate); cf. United States v. Kentucky Utils. Co., 124 F.R.D.

146 (E.D. Ky.1989), rev'd on other grounds, 927 F.2d 252 (6th Cir. 1991) (stipulated confidentiality orders should not be given binding effect even if they are entered by the court; court should balance the interests between privacy and public access at the time the motion to modify a protective order is made). The record here is entirely devoid of any "good cause" determination as required by Rule 26(c). Thus, there having been no such determination and no protective order entered, no party is under any duty to sequester any witnesses.

Indeed, even if it were possible to interpret Defendants' observance of sequestration during the initial round of depositions as somehow evidencing a complete "agreement" on a sequestration practice, such a so-called "agreement" would not be enforceable. Courts have held that even when parties agree or simply "stipulate" to protective orders under Rule 26(c), and even when such stipulated orders are entered by the court, those orders are not enforceable unless: (1) the party seeking protection under the order has demonstrated "good cause" for the restriction and (2) the Court has made an independent determination that "compelling or extraordinary circumstances" exist warranting enforcement. See Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227-228 (6th Cir. 1996) ("good cause" determination needed even when protective order terms are stipulated); FTC v. Digital Interactive Associates, 1996 WL 912156, at *3 (D. Colo. 1996)("court in determining whether or not to enforce a confidentiality agreement which has not been entered by the court as a protective order [must consider] whether the party seeking to enforce its provisions can demonstrate 'good cause' for doing so under Fed. R. Civ. P. 26(c)") (denying enforcement). Neither condition is satisfied here.

C. The Sequestration of Witnesses Plaintiffs Seek Is Strongly Disfavored

1. Rule of Evidence 615 Does Not Apply

The entire idea of "sequestering" witnesses is foreign to deposition discovery. The notion of "sequestering" a deposition witness is founded on an ill-advised extension of an *unwritten* expansion of a rule of evidence employed at trials. The concept of "excluding" or sequestering witnesses is found in the trial context. Federal courts may order people who will be witnesses at a trial excluded from the courtroom "so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion." Fed. R. Evid. 615 (emphasis added). This rule, by its own terms does not authorize the type of restrictions Plaintiffs want to impose on Interior Department officials. It says absolutely nothing about preventing witneses from speaking to others; it merely prevents them from sitting in court and listening to other testimony. Thus, Rule 615 cannot be a basis for the broad "gag" rule that Plaintiffs want.

Moreover, Rule 615 simply does not apply to deposition discovery and cannot be a basis for authorizing restrictions on deponents. The Court opined on this very issue in Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998), when it refused to impose witness restrictions that were far narrower than the ones Plaintiffs seek here. In Alexander, the plaintiffs sought only to keep certain potential witnesses from sitting in on the deposition of other witnesses; the plaintiffs there were not seeking to "gag" witnesses, as Plaintiffs are here.

The Court, however, denied the plaintiffs' motion, discussing Rule 615 as follows:

> Finally, plaintiffs request that this court prohibit Sally Paxton, Special Associate Counsel to the President, and David Cohen, attorney for Craig Livingstone, from appearing at any further depositions in this case. Plaintiffs make this request pursuant to Rule 615 of the Federal Rules of Evidence.

> Rule 615 states in relevant part that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses ..." Fed. R. Evid. 615. Plaintiffs contend that Paxton and Cohen are material witnesses in this case and therefore, these individuals should be excluded from future depositions.
>
> *Plaintiffs' reliance on Rule 615 is misplaced.* Rule 30(c)of the Federal Rules of Civil Procedure governs the conduct of depositions and states that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence *except Rules 103 and 615."* Fed. R. Civ. P. 30(c). The Advisory Committee notes to Rule 30(c) add that "[t]he revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate." Id. (Advisory Committee Notes for Rule30(c), 1993 Amendments). Rule 26(c)(5) permits the court to enter a protective order ordering "that discovery be conducted with no one present except persons designated by the court." Fed. R. Civ. P. 26(c)(5).
>
> . . . [P]laintiffs have failed to identify *any compelling or extraordinary circumstances* warranting the exclusion of these witnesses from future depositions.

186 F.R.D. at 53 (emphasis added). The decision in Alexander makes two things clear, First, it is not Rule of Evidence 615 that governs depositions, but Fed. R. Civ. P. 26(c). Second, there must be "compelling or extraordinary circumstances" before a restriction on deposition witnesses can be justified or imposed.

2. No "Extraordinary" Circumcstances Exist To Justify Sequestration

Federal Rule of Civil Procedure 26(c) allows for entry of a protective order limiting discovery, but only when certain "extraordinary" circumstances are shown to exist, none of which are present here. Rule 26(c) provides in pertinent part(s):

> Upon motion by a party or by the person from whom discovery is sought, . . .for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from *annoyance, embarrassment, oppression, or undue burden or expense,* including one or more of the following:

. . .

(5) that discovery be conducted with no one present except persons designated by the court . . . .

Fed. R. Civ. P. 26(c) (emphasis added). Before an order can be recommended or issued under Rule 26(c), there must be proof of specific "annoyance, embarrassment, oppression, or undue burden or expense" that requires intervention. These are the "compelling or extraordinary circumstances" that must exist and that the Court found lacking in Alexander. As in Alexander, no "extraordinary" grounds exist here.

To the contrary, Plaintiffs have done no more than insinuate generally that Defendants (and, by implication, their employees) cannot be trusted. A generic claim is plainly insufficient. Courts have required specific facts that establish serious, well-founded concern that coercion or collusion will, in fact, occur absent restrictions. "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that '[t]he burden is upon the movant to show the necessity of its issuance, which contemplates *a particular and specific demonstration of fact* as distinguished from stereotyped and conclusory statements.'" In re Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998) (per curiam) (quoting United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)) (emphasis added). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987); Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 16-17 (E.D. Wisc. 1996) (protective order denied where there were no "distinct facts that would lead the court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other's depositions will otherwise affect their testimony"); see also 8 C. Wright & R. Marcus, FEDERAL PRACTICE AND

PROCEDURE §2035 (1994) ("The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory allegations.").

3. Strong Policy Reasons And Practical Concerns Also Militate Against Sequestration In Depositions

Several substantial reasons exist for setting the threshold for witness restrictions so high. First, Federal Rule of Civil Procedure 30, by its own terms, does not contemplate such restrictions as a matter of course. Without a specific showing of *real* harm, almost every deposition could qualify for some kind of witness restriction. In one case, the Fifth Circuit granted mandamus in order to vacate a district court's sequestration order. In re Terra Int'l, 134 F.3d at 306-07. The order was based on a "conclusory allegation that a substantial majority of the fact witnesses . . . are employees of Terra [a party] and that they will therefore be subject to Terra's influence and will be inclined to protect each other through a sense of 'camaraderie.'" Id. at 306. The court held that no good cause for sequestration existed and "[t]o conclude otherwise would indicate that good cause exists for granting a protective order any time fact witnesses in a case are employed by the same employer or are employed by a party in the case." Id. The court noted that such a low threshold would be "inconsistent with this court's admonition that a district court may not grant a protective order solely on the basis of 'stereotyped and conclusory statements.'" Id.; see also Jones v. Circle K Stores, Inc., 185 F.R.D. 223, 224 (M.D.N.C. 1999) (denying protective order where facts alleged did not appear "as being anything more than ordinary garden variety or boilerplate 'good cause' facts which will exist in most litigation") (quoting BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 160 (N.D. Ala. 1986)); Tuszkiewicz, 170 F.R.D. at 17 (protective order sought because witnesses were

employees of a party did not prove "good cause"; to grant the order "would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result").

Second, the process of deposition discovery is such that restrictions on witnesses are wholly unnecessary. Opposing parties can explore at length the contacts one witness has had with another, the transcripts or documents a witness reviewed before being deposed, whether the witness discussed previous depositions with other witnesses, and what the content and purpose of those discussions were. All of these avenues are open to examination, and permit the examiner to ferret out collusion or, more innocently, a polluted recollection based on conversations with others. By contrast, a "gag" on deposition witnesses is no guarantee against collusion or pollution (both can still take place prior to the first deposition) and promises no real improvement over effective deposition questioning.

Third, a "gag" restriction places onerous burdens on witnesses and other litigants that should be avoided absent the presence of truly exceptional circumstances. See Conrad v. Board of Comm'rs, No. 00-207, 2001 WL 1155298, at *2 (D. Kan. Sept. 17, 2001) ("Sequestration of deponents should be the exception rather than the rule."). The sequestration sought in this case would require three top officials of the Department of the Interior – the Deputy Secretary, the Associate Deputy Secretary and the Director of the Office of Indian Trust Transition – to conscientiously refrain from mentioning anything relating to their deposition questioning or testimony for as long as another four months, until discovery closes. These three officials are presently working day to day on matters of trust reform, which involves topics inextricably tied to the subjects covered in deposition. These gentlemen must also communicate and converse

with one another so that the plans ordered by the Court can be timely submitted on January 6, 2003. These circumstance place an enormous – and wholly unnecessary – burden on these witnesses to watch every word they say, so that some trivial revelation or recollection of some deposition moment is not unthinkingly spoken.

These officials should not be subjected to such a long, drawn out duty when they need to be free to put all their energy into trust reform efforts. As one court observed in the context of a criminal trial, "[i]t is somewhat unrealistic to expect policemen, agents, experts and witnesses who have known each other for years and who have worked together in preparing a case to sit for hours together in a witness room or a hall without carrying on some conversation." United States v. Scharstein, 531 F. Supp. 460, 464 (E.D. Ky. 1982) (denying new trial based on court's refusal to issue a "gag" order for witnesses). Indeed, sequestration in this circumstance would also burden the court, by plunging it into a "myriad of enforcement problems and a plethora of collateral issues," id., where no real need exists in the first instance.

Finally, such restrictions could, if imposed, deny Defendants fundamental fairness. By unnecessarily restricting how Defendants can prepare their witnesses and investigate the case in preparation for trial, a sequestration order can run afoul of the Constitution. As at least one court explains:

> In the view of this court, absolute adherence to the more stringent view [i.e., ordering witnesses not to discuss their testimony] involves such practical difficulties as to be for the most part unworkable. In any hard-fought case the parties adjust and revise their strategies as the trial proceeds. As the Supreme Court of the United States has pointed out:
>
> > "It is common practice during such (overnight) recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions

> to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without lawyer's guidance." [Quoting Geders v. United States, 425 U.S. 80, 88 (1976).]

> It is also common practice and an essential part of trying a case for the trial attorney to confer with his experts and other prospective witnesses during such recesses, as well as before trial. *It has been held that to deprive a party, even a corporate party in a civil case, of the right to consult with counsel as the trial proceeds is to infringe its right to due process of law. This court believes that similar considerations apply to the right of a party to have his counsel free to discuss with prospective witnesses developments in the case, including the testimony of other witnesses.*
>
> If counsel can relate to a witness what another witness has said, it would seem to be an exercise in futility for the court to try to prohibit one witness from talking to another about the case outside the courtroom. Although the United States in a criminal prosecution may not technically have a right to due process of law, this court believes that fairness requires that it be afforded the same latitude in the interpretation of Rule 615 that due process would afford a corporate defendant.

Scharstein, 531 F. Supp. at 463-64 (emphasis added) (footnotes omitted). No less concern exists here.

CONCLUSION

For the foregoing reasons, no order of sequestration is warranted and no sequestration obligation should be imposed on deposition witnesses.

Dated: December 4, 2002

Respectfully submitted,

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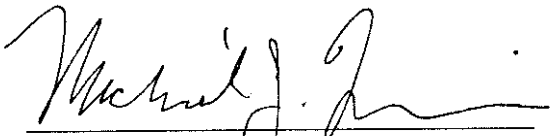

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 4, 2002, I served the foregoing *Defendants' Brief in Opposition to Restrictions on Deposition Witnesses* by facsimile, in accordance with their written request of October 31, 2001 upon:

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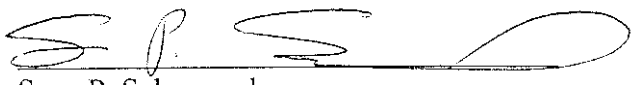

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