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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.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' RESPONSE AND OBJECTIONS TO THE "REPORT AND RECOMMENDATION OF THE SPECIAL MASTER-MONITOR ON THE EXTENT OF THE AUTHORITY OF THE SPECIAL MASTER-MONITOR TO REGULATE ALL PHASE 1.5 TRIAL DISCOVERY PROCEEDINGS AND THE NEED FOR CLARIFICATION OF THE SEPTEMBER 17, 2002 ORDER APPOINTING THE SPECIAL MASTER-MONITOR"

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit the following response and objections to the Special Master-Monitor's November 18, 2002 Report and Recommendation[1] and his November 21, 2002 Report and Recommendation, which both recommend that paragraph 8 of this Court's September 17, 2002 Order be amended. For the reasons set forth herein, the Court should decline to adopt the recommended amendment.

I. BACKGROUND

A. The September 17, 2002 Order

This Court issued an order on September 17, 2002, appointing Joseph S. Keiffer, III as Special Master-Monitor (the "September 17, 2002 Order"). The September 17, 2002 Order, inter

[1] The service page attached to the Special Master-Monitor's Report and Recommendation erroneously indicates a service date of November 15, 2002. Interior Defendants were actually served via fax on November 18, 2002, which makes the response date December 6, 2002.

alia, refers oversight of discovery to the Special Master-Monitor but also clearly directs that all discovery disputes which cannot be resolved by the parties are to be referred by the Special Master-Monitor to the Court:

> The Special Master-Monitor shall also oversee the discovery process in this case and administer document production . . . to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court. *The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties.*

September 17, 2002 Order ¶ 8, at 3-4 (emphasis added). The September 17, 2002 Order requires that the Special Master-Monitor "periodically" bring unresolved discovery disputes to the attention of the Court for review and need not halt discovery every time a dispute arises:

> The Special Master-Monitor is directed to *periodically* file reports with the Court, with copies to defendants' and plaintiffs' counsel, that *bring to the Court's attention all discovery disputes encountered in this case, as contemplated in paragraph 8 of this order.* These reports shall also apprise the Court of the status of the Special Master-Monitor's report and recommendation as to *all* such disputes.

Id. ¶ 9, at 4 (emphasis added). The September 17, 2002 Order does not confer on the Special Master-Monitor the authority to make final discovery rulings or, as the Special Master-Monitor suggests, to determine which discovery disputes he thought were not "case dispositive" and only report "case dispositive" disputes to the Court. To the contrary, pursuant to the September 17, 2002 Order, the Court is to review and remain the final arbiter of all unresolved discovery disputes irrespective of whether they are case dispositive. Id. ¶ 8, at 3-4.

B. The Special Master-Monitor's Proposed Amendment

On November 18, 2002, the Special Master-Monitor filed a Report and Recommendation in which he recommended a "clarification" of the September 17, 2002 Order (hereinafter the "November 18, 2002 R&R"). The Special Master-Monitor recommends that this Court replace the final line of paragraph 8 of the September 17, 2002 Order with the following language:

> The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any dispositive issue of fact and law genuinely disputed by the parties. This direction is not meant to limit the power and authority of the Special Master-Monitor conveyed to him in paragraph 3 to regulate all discovery proceedings and resolve all disputes not involving dispositive issues of fact and law going to the ultimate question of the liability of defendants.

November 18, 2002 R&R at 16.[2] Unlike the September 17, 2002 Order, which explicitly requires that the Special Master-Monitor periodically report to the Court "any discovery dispute that arises which cannot be resolved by the parties," the Special Master-Monitor's proposed amendment apparently contemplates that he will be the final adjudicator of what is and is not case dispositive, and will only be required to report "case dispositive" or "bottom line" disputes to the Court for review and a ruling. Id. at 12 ("the determination of those types of disputes requiring this Court's attention and the filing of a report and recommendation by the Special Master-Monitor can be made by the Special Master-Monitor."). Thus, the Special Master-Monitor apparently envisions certain discovery disputes for which he would make final rulings without district court review. The Special Master-Monitor suggests that granting him such powers is necessary to prevent delay in discovery for the Phase 1.5 trial.

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[2] The Special Master-Monitor makes the same recommendation on page 4 of his November 21, 2002 Report and Recommendation (hereinafter the "November 21, 2002 R&R").

November 18, 2002 R&R at 11; November 21, 2002 R&R at 3-4. He contends that the plain language of the September 17, 2002 Order as it currently stands -- that "any" unresolved discovery disputes be brought to the Court's attention would, if interpreted literally, mean that he is merely a "potted plant" with no power to enforce this Court's order. November 18, 2002 R&R at 10-11. Interior Defendants object to the Special Master-Monitor's interpretation of the September 17, 2002 Order and to the proposed amendment.

II. ARGUMENT

The Special Master-Monitor's proposed amendments to the September 17, 2002 Order would, if adopted, result in the unwarranted expansion of the Special Master-Monitor's authority in two significant respects. First, while the Special Master-Monitor is currently empowered to act as a supervisor and facilitator of discovery and to prepare reports and recommendations to the Court as to "any" discovery disputes that cannot be resolved between the parties, the Special Master-Monitor now asks the Court to give him the power to make seemingly binding rulings on certain discovery disputes and compel the parties to proceed accordingly. See November 18, 2002 R&R at 14-15. Second, the Special Master-Monitor asks the Court for the power to determine independently which discovery disputes are, in his opinion, "case dispositive," thereby triggering their inclusion in his next periodic report and recommendation. For the remainder of disputes, the Special Master-Monitor recommends, in effect, that the Court delegate its Article III powers and grant the Special Master-Monitor unfettered authority. See, e.g., November 18, 2002 R&R at 14 ("Only when an issue regarding an ultimate question of fact and law is raised in a discovery dispute that will unavoidably affect the determination of

the liability of a party must a district court become involved in the discovery process assigned to a special master.").

The Court must reject the Special Master-Monitor's proposed amendments for the following reasons: (1) the September 17, 2002 Order appointing the Special Master-Monitor is pending appeal and thus, this Court currently does not have the power to modify the order itself during the appellate process; (2) referring additional powers to the Special Master-Monitor to make final discovery rulings is an unconstitutional delegation of this Court's Article III powers and has due process implications; and (3) the exceptional circumstances required in order to justify referring any additional powers to the Special Master-Monitor under Federal Rule of Civil Procedure 53 do not exist.

A. This Court Lacks Jurisdiction To Modify The September 17, 2002 Order While The Order is Pending Appeal.

Interior Defendants filed a notice of appeal of the Court's September 17, 2002 Order on November 18, 2002. This Court lacks jurisdiction to modify that order while it is on appeal. The filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control *over those aspects of the case* involved in the appeal. See generally Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam), superseded on other grounds, Fed R. App. P. 4(a)(4); Georgia v. Ashcroft, 195 F. Supp. 2d 25, 36 (D.D.C. 2002) (citing Griggs, supra). The Special Master-Monitor's recommendation that the Court change the language of the September 17, 2002 Order while the order is the subject of an appeal would be an impermissible amendment of that order at this point in time. Although the Special Master-Monitor characterizes his proposed changes as

an attempt to "clarify," see November 18, 2002 R&R at 16, he clearly seeks a significant modification of his powers, which are at issue in the appeal.

B. The Special Master-Monitor's Proposed Amendment Exceeds The Boundaries Of Article III And The Due Process Clause Of The Constitution

While Federal Rule of Civil Procedure 53 authorizes the district court to appoint a special master, Article III and the Due Process Clause of the Constitution limit that authority. See Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274, 282) (N.D. Ind. 1995) (upholding the authority of district court's reference to a special master but noting that "[t]he outer boundaries of Rule 53 authority are established by Article III and the due process clause of the Constitution"). In this case, the Special Master-Monitor's proposed amendment to his appointment exceeds both boundaries.

1. Article III

The Special Master-Monitor's proposed amendment would enable him to decide what disputes warrant a report and recommendation to the Court, presumably appointing him final arbiter of all remaining discovery disputes. See November 18, 2002 R&R at 12. Such a delegation of authority would be unconstitutional. A court is not permitted to delegate its Article III powers. Northern Pipeline Constr. Co., v. Marathon Pipeline Co., 458 U.S. 50, 80 (1982) ("the functions of the adjunct must be limited in such a way that 'the essential attributes of judicial power are retained in the Art. III Court'") (internal citations omitted); In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1168 (D.C. Cir. 1991) (Rule 53 "authorizes the appointment of special masters to *assist*, not to replace, the adjudicator, whether judge or jury, constitutionally indicated for federal court litigation."). Although a district court may refer discovery matters to a special master, the Court must always remain

the final arbiter of discovery disputes. The mechanism for doing that is a report and recommendation to the Court for its review and decisions. See Manual For Complex Litigation (3d ed.), §21.52 at 114 ("When appointed to resolve disputed issues, the special master must produce a report on the matters submitted by the order of reference, including in it any findings of fact or conclusions of law."). All of the Special Master-Monitor's rulings, whether case-dispositive or not, must be subject to review by the district court, which is required to review factual findings for clear error and conclusions of law de novo. See Fed. R. Civ. P. 53(e)(2); D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946), cert. denied, 330 U.S. 839 (1947).

In his November 18, 2002 Report and Recommendation, the Special Master-Monitor cites In re Bituminous Coal, supra, Stauble v. Warrob, Inc., 977 F.2d 690 (1st Cir. 1992), and In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985) for support the proposed amendment, but none of these cases are directly on point. See November 18, 2002 R&R at 12-16. These cases do not clearly stand for the proposition that a special master can be the final adjudicator of discovery disputes. They merely mention in dicta that special masters can be referred discovery matters, as is presently done in this instant case. See In re Bituminous Coal, 949 F.2d at 1169 (stating in dicta that a special master can supervise discovery but silent as to whether a special master may be the final adjudicator of discovery disputes); Stauble, 977 F.2d at 695 (stating in dicta that the a special master may oversee pretrial discovery "as long as the district court discerns sufficient supporting evidence and is satisfied that the master applied the correct legal standards" silent as to whether a special master can be the final adjudicator of any dispute while), and In re Armco, 770 F.2d at 105 (affirming district court's authority to appoint a special master to supervise and conduct discovery, but silent as to whether the court may

appoint the special master as the final adjudicator of discovery disputes). Even where discovery matters have been referred to a special master, the district court is still required to be the final adjudicator of discovery disputes regardless of whether they appear to be case-dispositive. See, e.g., In re Vitamins Antitrust Litig., 120 F. Supp.2d 45, 57 (D.D.C. 2000) (discovery dispute over the propriety of a particular interrogatory was presented to district judge for a final ruling), amended in part on other grounds, No. 99-197, 2000 WL 33142129 (D.D.C. Nov. 22, 2000); In re Vitamins Antitrust Litig., 198 F.R.D. 296, 303 (D.D.C. 2000) (discovery dispute arising out of relevancy objection to a document request presented to district judge for a final ruling). In this case, the Special Master-Monitor's request to be the final adjudicator of what he considers non-dispositive discovery disputes would result in an unconstitutional delegation of the Court's Article III powers.

2. Due Process

The powers sought by the Special Master-Monitor also raise two due process concerns. First, as set forth above, his proposal envisions certain situations in which the Special Master-Monitor would rule upon discovery disputes and his rulings would not be subject to review by the Court, thus depriving a party of judicial review and, hence, due process on that issue. Second, meaningful due process is threatened by the peculiar nature of the Special Master-Monitor's dual role in this litigation as both special master and court monitor. It would be extremely difficult, even impossible, for the Special Master-Monitor to function as a dispassionate and impartial final adjudicator of discovery issues when he is also responsible for monitoring Interior Defendants' efforts with respect to trust reform. The Special Master-Monitor has knowledge of facts not only as a result of submissions by the parties, but also through his role as court monitor and through ex parte contacts, including contacts with unidentified

"third parties." To ensure even the possibility of due process, full review by the Court must continue to be available.[3]

C. The Special Master-Monitor's Proposed Amendment Violates Rule 53.

Assuming *arguendo* that the Court has jurisdiction to modify the September 17, 2002 Order and could do so within the bounds of Article III and the due process clause, the proposed amendment is still not warranted under the high standard Rule 53 prescribes. The proposed amendment would constitute an additional reference of power to the Special Master-Monitor, i.e., the power to make final discovery rulings. Pursuant to Rule 53, referring authority to a master must be done only in exceptional circumstances. See Fed. R. Civ. P. 53(b) ("A reference to a special master shall be the exception and not the rule . . . a reference shall be made only upon a showing that some exceptional condition requires it"); Alexander v. FBI, 186 F.R.D. 128, 133 (D.D.C. 1998) (rejecting plaintiff's request for a special master to oversee a discovery dispute and noting that "the appointment of a special master is an extraordinary action"). No exceptional circumstances exist here.

The manner in which discovery for the Phase 1.5 trial is proceeding does not reveal significant discovery delays arising from the Special Master-Monitor's inability to issue final orders. Instead, the Special Master-Monitor hypothesizes that disputes concerning harassing deposition questions could repeatedly delay discovery. See November 18, 2002 R&R at 7-8. However, the first three depositions by Plaintiffs have proceeded without delay. Where disputes arose, the parties were able, as envisioned by the Federal Rules of Civil Procedure, to resolve or set aside disputes on the record

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[3] Interior Defendants do not concede that the September 17, 2002 Order appointing the Special Master-Monitor, and currently being appealed, is proper.

and proceed with the deposition without the necessity of the Court's intervention. See e.g., Cason Dep. Tr. at 122-134 (Nov. 7, 2002) (the parties resolved a dispute as to whether a topic of inquiry was appropriate); Swimmer Dep. Tr. at 85-92 (Nov. 20, 2002) (setting aside a dispute over document production and proceeding with the deposition). The only exception has been when Court intervention was sought by the Interior Defendants concerning an important privilege issue, as to which the Special Master-Monitor apparently agrees that the Court's review was required. See November 18, 2002 R&R at 15. Moreover, as the Court recognizes, the deposition could (and ultimately did) move forward the next day once Plaintiffs' counsel asked the question in a different form, with the privilege issue preserved for the Court's review. See November 5, 2002 Oral Argument Tr. at 16-17.[4]

Interior Defendants are certainly not representing to the Court that there are no discovery disputes or that none will occur. As with any litigation, disputes exist and will continue to arise. For example, Interior Defendants have noticed the depositions of the remaining named plaintiffs, but Plaintiffs have not confirmed that they intend to make those witnesses available on those dates, despite the fact that the Special Master-Monitor already recommended, in an October 18, 2002 Report and Recommendation, that the Named Plaintiffs be deposed. The parties' are still in the process of attempting to negotiate the dispute. Another unresolved dispute between the parties concerns the

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[4] Interior Defendants object to characterizations Plaintiffs have made concerning Plaintiff Elouise Cobell's deposition. Plaintiffs have stated, "The Special Master-Monitor's authority repeatedly was challenged by Justice Department attorneys who were openly disdainful of the Special Master-Monitor during the deposition of Ms. Cobell, creating a hostile and argumentative environment for the deponent." See "Plaintiffs' Opposition To Defendants 'Unopposed' Motion By Interior Defendants For Order Allowing Piecemeal Adoption Of Special Master-Monitor's Recommendations Regarding Plaintiffs' Trifold Protective Order, filed December 5, 2002" at 1. Plaintiffs apparently equate the practice of stating objections for the record as "disdainful." Interior Defendants disagree. The transcript and the video record speak for themselves.

sequestration of deposition witnesses and the parties are providing briefs on their positions to the Special Master-Monitor. The briefing and the Special Master-Monitor's recommendation may resolve the dispute, but if not, either of the parties has the right to bring the dispute to the Court.

Finally, not all discovery disputes actually necessitate immediate rulings and in some instances do not require resolution at all. Objections that are initially (and often reflexively) asserted are usually not pursued at all or are mooted by subsequent events. For example, the mere occurrence of an "objection" during a deposition or in responding to a document request, does not, in the first instance, require intervention by the Special Master-Monitor. The ordinary practice in depositions where a special master is not used is to proceed with the examination with the objection noted and deferring the "dispute" for later reflection. The party making the objection or seeking discovery may or may not find it necessary to pursue the objection. If the Special Master-Monitor, however, is vested with the power to rule on objections (as is done by a court at trial), it changes the tenor of the discovery deposition and will likely provoke a plethora of briefing that will embroil the parties and the Court in disputes that otherwise would need no resolution.

CONCLUSION

For the reasons set forth above, the Court should not adopt the Special Master-Monitor's Recommendations to amend paragraph 8 of the September 17, 2002 Order.

Dated: December 6, 2002

Respectfully submitted,

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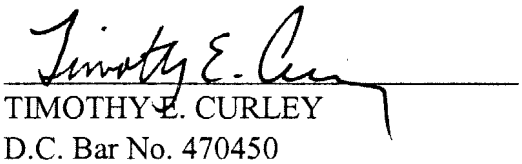

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 6, 2002 I served the foregoing *Interior Defendants' Response and Objections to the "Report and Recommendation of the Special Master-Monitor on the Extent of the Authority of the Special Master-Monitor to Regulate All Phase 1.5 Trial Discovery Proceedings and the Need for Clarification of the September 17, 2002 Order Appointing the Special Master-Monitor"* by facsimile in accordance with their written request of October 31, 2001 upon:

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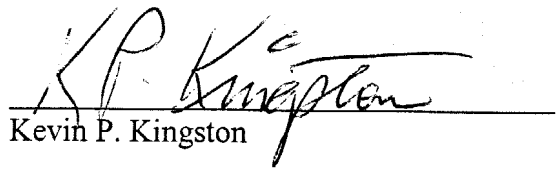

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