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' RESPONSE TO PLAINTIFFS' FURTHER BRIEF RE SEQUESTRATION ISSUE

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Defendants") hereby respond, as requested by Special Master-Monitor Joseph S. Kieffer, III, to the brief submitted by Plaintiffs on December 4, 2002, entitled Plaintiffs' Further Brief Re Sequestration Issue[1] (hereinafter cited "Pl. Br."). Plaintiffs' brief demonstrates a fundamental misreading of both the facts and the law concerning the "sequestration" of witnesses.

On the facts, Plaintiffs quote selectively from the October 3, 2002 discovery conference in order to invent some sort of binding and enforceable agreement on sequestration. See Pl. Br. at 1-2. They entirely ignore the fact that Plaintiffs' own counsel offered, and the Special Master-Monitor requested, that Plaintiffs prepare a *written* proposal on sequestration for consideration.

> MR. KIEFFER: Is this, on the record, good enough for that, or do you want to propose writing up something?
> *MR. HARPER: We'll prepare a sequestration language.*
> MR. STEMPLEWICZ: That we can look at before.

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[1]Defendants are at a loss to understand the title of Plaintiffs' brief, as Defendants are not aware of any previous brief having been submitted to the Special Master-Monitor addressing this issue.

> MR. KIEFFER: Send it to them, send it to me, and you respond and send it to me and to them.

Discovery Conference Tr. at 230 (Oct. 3, 2002)(emphasis added). Thus, despite Plantiffs' claims now, not even Plaintiffs considered there to be any "agreement" on sequestration reached at the October 3, 2002 conference. Notably, this is the only evidence Plaintiffs cite concerning the existence of a sequestration agreement.

As Defendants amply demonstrated in their own opening brief already, there was no full delineation of the terms on sequestration, and Plaintiffs, in any event, failed to fulfill the prerequisites for adopting – much less enforcing – such onerous and needless restrictions. See Defendants' Brief In Opposition To Restrictions On Deposition Witnesses (Dec. 4, 2002) (hereinafter cited "Def. Br."). Instead, Plaintiffs contend there has been "bad faith" and focus solely on the perceived "breach" of a so-called "discovery agreement," claiming that Defendants are "violating it at their whim." Pl. Br. at 3.

The bad faith clamor, however, is all sound and fury signifying nothing. Plaintiffs claim "bad faith" simply because Defendants will not agree to further "sequestration" of three witnesses. Plaintiffs, tellingly, do not even pretend that an enforceable order on sequestration exists. Instead, they complain about a violated "agreement," but even that deflated accusation is false. No violation of any agreement on sequestration has occurred. Defendants honored Plaintiffs' request for sequestration throughout the entire first round of depositions of three government witnesses, the Deputy Secretary of the Department of the Interior, the Associate Deputy Secretary and the Director of the Office of Indian Trust Transition. When it became evident that further sequestration would be onerous and impose the conflicting and absurd result

of permitting public distribution of their deposition testimony while continuing to obligate these witnesses to avoid discussing the testimony with anyone but their attorneys, Defendants wrote to Plaintiffs and advised that they no longer intend to sequester these witnesses. Thus, while there exists a disagreement about whether there should be sequestration, it is a *good faith* disagreement and involves no discovery misconduct.

Consequently, the cases Plaintiffs cite about discovery "violations" and "bad faith" discovery conduct have no application in these circumstances. The cases have nothing to do with witness exclusion or the advisability of sequestering deposition witnesses, nor do they establish any grounds favoring sequestration. Instead, Plaintiffs' cases involve either enforcement of an *existing* court order or consideration of sanctions for breaching discovery obligations imposed by a *rule* of civil procedure. See Baker Indus. v. Cerberus Ltd., 764 F.2d 204 (3d Cir. 1985) (dealing with appeal from *order* referring issues to a master for final decision following express agreement of the parties); Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977) (upholding dismissal of one plaintiff from a case because he completely failed, without excuse, to answer interrogatories); Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D. Ga. 1994) (violations of both order to compel and discovery rules), aff'd, 987 F.2d 1536 (11th Cir.), cert. denied, 510 U.S. 863 (1993) ; Brandstetter v. National Railroad Passenger Corp., No. 86-2893, 1987 WL 25422 (D.D.C. Nov. 19, 1987) (deciding specific discovery disputes with no mention of witness sequestration). The facts of these other cases easily distinguish themselves, therefore, from the present case.

Plaintiffs analogize how "the whole purpose of procedural rules such as the meet and confer requirement would be rendered nugatory" unless parties are required to abide by their

agreements. Pl. Br. at 2. Plaintiffs' own recent conduct, however, disproves their assertion. On December 6, 2002, just two days after filing their brief drawing this analogy, Plaintiffs opposed a motion to which they had previously stipulated on the record they had *no* opposition. Compare Plaintiffs' Opposition to Defendants' "Unopposed" Motion by Interior Defendants for Order Allowing Piecemeal Adoption of Special Master-Monitor's Recommendation Regarding Plaintiffs' Trifold Protective Order (filed Dec. 6, 2002) with Discovery Status Conference Tr. at 4-14 (Nov. 20, 2002). As Plaintiffs' own conduct demonstrates, the process of discovery is a dynamic one, such that parties' concerns and priorities change as the case moves forward. That is why important limitations on discovery, *especially* those that seek to impose sanctionable ongoing obligations regarding the conduct of litigants or witnesses, *must* be entered as formal protective orders under Federal Rule of Civil Procedure 26 in order to be enforceable.

The act of "sequestering" witnesses, especially in the deposition context, is strongly disfavored in any event. As this Court has previously observed, it is a restriction that may not be imposed absent a clear finding of "compelling or extraordinary" circumstances. See, e.g., Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998) (Lamberth, J.). Plaintiffs attempt to divert attention from this critical prerequisite, because Plaintiffs (as the parties seeking a protective order) have completely failed to demonstrate that any good cause exists for the protection they seek. It is their burden to demonstrate good cause, and their own brief fails even to mention it.

Plaintiffs have wholly failed at every turn to make any showing of good cause that would entitle them to sequestration. The absence of "good cause" based upon a showing of "compelling and extraordinary" circumstances is fatal to their effort and demonstrates conclusively that no

grounds exist to enter a sequestration order.[2]

For the same reasons, Plaintiffs' entire discussion of sanctions is wholly inappropriate.[3] Their mention of liability for "excessive costs" under 28 U.S.C. § 1927 is particularly without merit, for Defendants have not done anything "unreasonable" and "vexatious" by merely deciding not to sequester witnesses when they were not under any order to do so in the first instance. Although Plaintiffs charge "dilatory and obstructionist" conduct, they fail to identify any conduct that has been either. Defendants have acted promptly and in good faith and no basis exists for imposing sequestration or sanctions in any form.

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[2]Defendants also incorporate by reference the points and authorities set forth in their brief on sequestration, Defendants' Brief in Opposition to Restrictions on Deposition Witnesses (filed Dec. 4, 2002).

[3]Plaintiffs appear more interested in obtaining attorneys' fees than sequestration itself, for an award of "fees and expenses" is the only relief Plaintiffs mention in their brief. Pl. Br. at 4.

CONCLUSION

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

Dated: December 9, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 9, 2002, I served the foregoing Defendants' Response to Plaintiffs' Further Brief re Sequestration Issue by facsimile, in accordance with their written request of October 31, 2001 upon:

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