IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER REGARDING PLAINTIFFS' NOTICES OF DEPOSITION OF HORD TIPTON, BRIAN BURNS, PAT MOLONEY [SIC], THAO LE, AND JOHN MESSANO

In their Opposition to Defendants' Motion for a Protective Order ("Opposition"), Plaintiffs[1] try to turn back the clock nearly two and one half years to September 17, 2002, when the Court granted them broader discovery rights. They myopically ignore the far more recent limitations on discovery prescribed by the Court's September 2, 2004 orders on discovery,[2] and the Court's December 20, 2004 Order denying Plaintiffs' request for a discovery schedule, as well as the limitations on the Court's powers, discussed in the opinions from the Court of Appeals on December 3 and 10, 2004.[3] Plaintiffs do not even discuss the September 2 Orders. Instead, they

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1/ In their Opposition Plaintiffs' attorneys inform the Court, without citation, that the class has grown to "more than 500,000 individual Indian trust beneficiaries." Opposition at 3 n.2, 13 n.14. It is difficult to understand how the number of absent class members has relevance to the arguments asserted by Plaintiffs in their Opposition, but Plaintiffs' estimation lacks citation for the simple reason that no evidence supports such a claim.

2/ The Court issued two orders on September 2, 2004, that use identical language in discussing the discovery available to Plaintiffs.

3/ Although the mandates have now been issued for both of the December 2004 Court of Appeals' opinions, neither had issued when Plaintiffs noticed the depositions on December 30, 2004.

unaccountably chide Defendants for "wholly ignoring – without so much as a reference let alone an honest discussion of – this Court's most recent decision on discovery, rendered less than a year ago," citing the Court's March 15, 2004 discovery opinion. Opposition at 8. How Plaintiffs can make this accusation, while ignoring the September 2, 2004 and December 20, 2004 Orders, is mystifying.

As discussed in Defendants' Motion, the September 2 Orders limited discovery to those circumstances where Plaintiffs first demonstrate that the requested discovery involves IIM trust record retention and preservation issues. Motion at 2. Although Plaintiffs blithely mention that each of the officials noticed for deposition "plays an important role in matters related to the preservation of Trust records," Opposition at 2, Plaintiffs do not seek to take discovery about the current state of document retention and preservation at Interior.[4] Instead, they admit that the real reason for the noticed depositions is to try to prove that statements and certifications provided by Interior officials regarding IT security were false. Opposition at 2 n.2, 3 n.3. As discussed in the Motion, this type of investigation, monitoring and oversight by Plaintiffs is inappropriate. Motion at 5.[5]

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[4] Plaintiffs tell the Court that at the noticed depositions they expect to elicit information about "instructions, assignments, limitations and tasks – from . . . defense counsel." Opposition at 6. To the extent Plaintiffs seek information protected by the attorney-client privilege, such discovery is impermissible.

[5] Plaintiffs' recent actions have demonstrated their willingness to abuse the discovery process. Since December 20, 2004, when the Court denied their request to set a discovery schedule, Plaintiffs have noticed twenty-three depositions and served two sets of requests for production of documents (by contrast Plaintiffs only took eleven depositions during the discovery period permitted by the Court for Phase 1.5 trial, and five of those were of experts). The depositions were noticed for almost every business day from January 13 through February 17. Plaintiffs have even noticed the deposition of Professor Pierce, a non-party with no possible information relevant to any of Plaintiffs' claims in this lawsuit. Because there is no proceeding set and no

Moreover, even if Plaintiffs were able to meet their burden under the September 2 Orders, they refuse to limit the scope of the noticed depositions to document preservation and retention matters.[6] They insist that they have "full discovery rights." Opposition at 7, 10; see also January 3, 2005 Letter from Dennis Gingold to John Siemietkowski at 1 (Exhibit A) ("plaintiffs intend to depose Messers. Tipton, Burns, and Maloney to obtain information on all matters relevant to this litigation . . . .").

Defendants do not argue that Plaintiffs can never get discovery in this case. Defendants simply explain that discovery is not authorized now. Discovery under the Federal Rules of Civil Procedure requires an object: a party takes discovery to acquire information relevant to a claim or defense for some future proceeding at which that claim or defense is to be litigated. Given the recent appellate decision, the future course of this litigation is unclear. In any event, no proceeding at which any identified claim of Plaintiffs is to be litigated has been scheduled. Therefore, neither Plaintiffs nor Defendants are currently able to determine "relevant" discovery to which Plaintiffs would be entitled. Plaintiffs seemed to recognize as much when they asked the Court (twice) to set a trial date on IT security issues and a "comprehensive discovery schedule related thereto." See Plaintiffs' Request for Emergency Status Conference Regarding the Security of Electronic Trust Records, at 1 (December 3, 2004); Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records, at 2

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need for discovery at this time, especially the overwhelming barrage of discovery initiated by Plaintiffs, this suggests an effort at harassment.

[6] Plaintiffs allege that "full discovery" is needed "to begin the difficult process of uncovering racketeering and other malfeasance engaged of [sic] the trustee-delegates and their managers, agents and counsel . . . ." Opposition at 9 n.9. Again, this is precisely the type of oversight, monitoring, and investigation that Plaintiffs are not entitled to undertake. See Motion at 5.

(January 4, 2005).[7] Until the Court rules on the two pending motions from Plaintiffs regarding the scheduling of future proceedings, discovery is premature.

However, as discussed in the Motion, Defendants believe that even if the Court sets a trial date, Plaintiffs' discovery rights should be limited by the procedures prescribed by the APA and related authorities. See Motion at 2-5. Plaintiffs concede that discovery is limited in APA cases, but argue that "[t]he rationale behind the irrelevance of APA restrictions to this case is self-evident." Opposition at 11. Plaintiffs argue that "since this is a trust case and an Indian case" the ordinary limits imposed by the APA do not apply. Id. at 14. As discussed in the Motion, the Court of Appeals in its December 10 opinion rejected this argument. Plaintiffs ignore the extensive discussion in the December 10 opinion regarding the principles from Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), and Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004), and the limitations the APA places on the Court's powers. See Cobell v. Norton, 392 F.3d 461, 472-73 (D.C. Cir. 2004).

After ignoring the Court of Appeals' direct application of the APA limits to this case, Plaintiffs pretend to find authority for unrestrained discovery in the D.C. Circuit's observation that it was permissible for the Court to order Interior to file a plan, because the Court has authority to acquire "discovery" of Interior's plans. See Opposition at 12-13 (quoting Cobell, 392 F.3d at 474). It should go without saying that Plaintiffs' powers are not synonymous with the

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[7] Plaintiffs have also asked the Court to set a trial date on the work done by Ernst & Young regarding the named Plaintiffs' accounts. See Plaintiffs' Motion to Set Date Certain for Trial of Adequacy of Final "Accounting" for Named Plaintiffs (December 30, 2004). Plaintiffs do not ask for a discovery schedule associated with that Motion, but claim that the matter is "ready for adjudication," and describe for the Court what they will show at such a trial, implying that Plaintiffs do not need discovery for that matter. See id. at 5-7.

Court's. It is difficult to understand how the Court's authority to require Defendants to file reports confers upon Plaintiffs the authority to take unlimited discovery.

Finally, at the end of their Opposition, Plaintiffs assert that their discovery rights are also not constrained by the APA because the equity jurisdiction of the Court is equivalent to that of the "High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." Opposition at 14 (quoting Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999)). Of course, in chancery courts in 1789, the parties were not authorized to take discovery depositions. See 8 Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2002, at 51-2 (2d ed. 1994) ("Before 1938 there were several provisions for depositions in the federal courts but they were intended only for the preservation of proof; any discovery that resulted was only accidental and incidental."); Katie Eccles, Note, The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery, 42 Stan. L. Rev. 1577, 1593-95 (1990); see generally Stephen Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691 (1998). Application of the equity rules for chancery courts in 1789 would thus bar the depositions noticed by Plaintiffs. Nevertheless, the Federal Rules of Civil Procedure govern this case. Fed. R. Civ. Proc. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity . . . ."). Plaintiffs' request to adopt 1789 equity rules must be rejected.

CONCLUSION

For these reasons, and for the reasons in Defendants' Motion for Protective Order, the Motion should be granted.

Dated: February 7, 2005

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Sandra P. Spooner
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on February 7, 2005 the foregoing *Defendants' Reply in Support of Motion for a Protective Order Regarding Plaintiffs' Notices of Deposition of Hord Tipton, Brian Burns, Pat Moloney [Sic], Thao Le, and John Messano* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

Dennis M. Gingold
Box No. 6
607 14th Street, N.W.
Washington, D.C. 20005

BY FACSIMILE

January 3, 2005

John J. Siemietkowski
Civil Division
U.S. Department of Justice
P.O. Box 875
Washington, D.C. 20044-0875

Re: Deposition Notices Served on Messrs. Tipton, Burns, and Maloney.

Dear Mr. Siemietkowski:

This is in response to your letter to me of this date concerning notices served on the Department of Justice for the deposition of Messrs. Tipton, Burns, and Maloney.

In that regard, you demand that plaintiffs explain the scope of the depositions to be taken and suggest that you may attempt to block their deposition and, thereby, deprive plaintiffs and this Court of information that is probative to these proceedings.

First, as you know, the trustee-delegates and their counsel have been engaged in the systemic spoliation of electronic and hard copy trust records in breach of trust and in violation of law, federal rules, and Court orders. Second, the nature and scope of this spoliation and its impact on the Cobell class has been concealed by the trustee-delegates and their counsel. Third, such spoliation and its coverup is, in the opinion of plaintiffs' counsel, continuing malfeasance. Fourth, such spoliation necessarily includes Individual Indian Trust ("Trust") records, records that qualify both as "federal records" and Trust assets. Fifth, the deponents are believed to have information relevant to the trustee-delegates' conduct vis-a-vis the preservation and protection of electronic records. Sixth, such information is relevant to this litigation. Seventh, the trustee-delegates and their counsel have made representations to the Court concerning the preservation and protection of such records that are of grave concern to plaintiffs.

Therefore, plaintiffs intend to depose Messers. Tipton, Burns, and Maloney to obtain information on all matters relevant to this litigation in accordance with federal rules and intend to ask them questions that could lead to the discovery of information that has been concealed from plaintiffs and this Court. If you choose to obstruct plaintiffs' efforts, we will be forced to seek sanctions to enforce our clients' rights and protect them from the harm that the trustee-delegates and their counsel unconscionably force them to endure.

I trust that this is response to your inquiry and that you will produce Messers. Tipton, Burns, and Maloney at the time and place set forth in their notices. Have a good day.

Very truly yours,

/s/ Dennis Gingold

Dennis M. Gingold
For the Cobell plaintiffs