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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
	)	(Special Master Balaran)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER AND OPPOSITION TO PLAINTIFFS' REQUEST FOR SANCTIONS UNDER RULE 37

INTRODUCTION

Interior Defendants respectfully submit this reply in support of their Motion for a Protective Order and in opposition to Plaintiffs' Request for Sanctions Under Rule 37. Plaintiffs' Opposition to Defendants' Motion for Protective Order and Memorandum of Points and Authorities in Support Thereof and Plaintiffs' Request for Sanctions Under Rule 37 ("Plaintiffs' Opposition and Request for Sanctions") argues that defendants have failed to state any good cause for the entry of a protective order. To make this argument, plaintiffs avoid any reference to the arguments defendants made in their Motion for a Protective Order. Plaintiffs also argue that defendants' allegations of harm are broad and unsubstantiated. To make this argument, plaintiffs avoid any reference to the Special Master's review of documents produced in connection with the Minerals Management Service ("MMS") proposal to reconnect to the Internet its information technology systems, which house individual Indian trust data (the "MMS Proposal"), and specifically the Special Master's proposed redactions to those documents, finding that release of

the redacted information could create a security risk. Plaintiffs also argue that defendants ignore the law of the case on whether blanket protective orders are permissible. To make this argument, plaintiffs avoid any acknowledgment that the Special Master entered a protective order on February 7, 2002, that is at least as restrictive as the one defendants seek here.

As stated in their Motion for a Protective Order, defendants' request is based on their experience in producing documents requested by the Special Master and his experts pursuant to the Special Master's validation of the MMS Proposal. During that process, the need to agree upon a protective order to cover sensitive and confidential materials relevant to the proposal delayed the production of those materials. Because any delay in the process of validating Interior proposals and, consequently, approving the proposals, is contrary to the interests of individual Indians and others who rely on the services provided by Interior bureaus and offices,[1] defendants sought this protective order as a way to advance the process while still making available to plaintiffs for their use in this litigation all of the documents produced. Moreover, because the materials at issue are of the same type as those produced in connection with the Special Master's review of the MMS Proposal, and the Special Master has found that substantial portions of those documents should not be publicly available, defendants have shown good cause for the entry of a protective order.

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[1] To the extent that the Special Master has recently given preliminary approval to several of Interior's proposals to reconnect to the Internet, pursuant to an established protocol, future delays in consideration of such proposals would not have the same implications for the provision of necessary services. However, three proposals that have not received either final or preliminary approval are currently pending before the Special Master, and Interior plans to submit additional proposals in the future.

ARGUMENT

I. The Law, and the Law of the Case, Support Entry of this Form of Protective Order

Contrary to plaintiffs' argument, although "umbrella" protective orders are sometimes disfavored, as the Special Master has noted, they are a permissible and frequently used mechanism in complex litigation. For example, the Manual for Complex Litigation describes umbrella protective orders as one of two alternative forms of protection available for documents that are considered sensitive. Manual for Complex Litigation § 21.432 ("Limited Disclosure/Protective Orders") (3d ed. 1995). The manual provides the following discussion of umbrella orders:

> When the volume of potentially protected material is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication. Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. The orders are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.

Id.[2] Courts find such orders to be valid and useful in spite of the lack of a determination as to whether good cause exists for blocking public access to each individual document before the protective order is entered. See Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring) ("To facilitate prompt discovery and the

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[2] Insofar as the Special Master and his experts are evaluating numerous Interior proposals involving information technology security, an umbrella protective order is appropriate because the volume of potentially protected material may be large. The alternative is for Interior and its contractors to move for separate protective orders every time a sensitive security document is sought. Such an effort, which would require separate consideration of each motion, would require a considerable waste of judicial resources.

timely resolution of disputes, this Court has upheld the use of umbrella protective orders similar to the one used in this case."); Pearson v. Miller, 211 F.3d 57, 73 (3d Cir. 2000) ("[I]n appropriate circumstances, a district court is empowered to issue umbrella protective orders protecting classes of documents after a threshold showing by the party seeking protection."); Citizens First Nat'l Bank of Princeton v. Cincinnati Insurance Co., 178 F.3d 943, 946 (7th Cir. 1999) (although broad umbrella orders are generally disfavored, "[w]e do not suggest that all determinations of good cause must be made on a document-by-document basis."); San Jose Mercury News, Inc. v. United States District Court, 187 F.3d 1096, 1103 (9th Cir. 1999) (noting that blanket protective order was "inherently subject to challenge and modification"); Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) (recognizing usefulness of blanket protective order without good cause showing for individual documents and noting that such orders are subject to later modification), cert. denied, 488 U.S. 1030 (1989); FEC v. Christian Coalition, 179 F.R.D. 22, 22 (D.D.C. 1998) (stating that although joint motions for protective orders should not be routinely granted, they may be issued "if another public policy favors non-disclosure").

In arguing that it is the "law of this case" that umbrella protective orders are not permitted, plaintiffs rely on the March 2, 2000 Report and Recommendation of the Special Master Concerning Defendants' Motion for Protective Order for Defendants' Production of Confidential Information ("March 2, 2000 Report and Recommendation"). In fact, the March 2, 2000 Report and Recommendation does not decide the issues raised in defendants' motion for two reasons. First, although the Special Master concluded that blanket protective orders are generally disfavored, his decision was based on a determination that defendants failed to

demonstrate resultant harm from the potential disclosure at issue, but that defendants instead relied on statutory prohibitions contained in the Trade Secrets Act and the Indian Mineral Development Act of 1982 and various Interior regulations. March 2, 2000 Report and Recommendation, at 11 (stating that defendants had not demonstrated "any resultant harm" from disclosure). The Special Master found that defendants could not meet their burden of showing good cause "by relying solely on statutory and regulatory authority." Id. at 12. The motion now before the Special Master is not based on the Trade Secrets Act, the Indian Mineral Development Act, or any other statutory or regulatory authority. Rather, it is based on the harm that would result from placing in the public arena information that a hacker could use to infiltrate or manipulate Interior information technology systems. Thus, strong public policy favors non-disclosure. See FEC, 179 F.R.D. at 22. As discussed below, the record in this case recognizes the probability of such resultant harm if the materials at issue are publicly released. The March 2, 2000 decision does not address the materials at issue or defendants' arguments regarding why protection is necessary for documents discussing the security of information technology systems.

Second, the March 2, 2000 Report and Recommendation supports the conclusion, also reached by several federal courts of appeals, see supra at 4, that umbrella protective orders are available upon a showing of good cause. The first section of that Report and Recommendation explains that such protective orders are generally disfavored. If that discussion had resolved the question of whether defendants' request for a protective order was permissible, the inquiry would have ended there. However, the Special Master went on to determine the merits of defendants' asserted bases for a protective order and made his decision based on his finding that defendants' bases did not constitute good cause. Id. ("[D]efendants have not met either the general 'good

cause' requirement articulated in Fed. R. Civ. P. 26(c), much less the specific requirements set out in Fed. R. Civ. P. 26(c)(7)."). Therefore, the Special Master's Report and Recommendation recognized that such protective orders are available, but only upon a showing of good cause.

Furthermore, in arguing that it is the law of the case that the protective order proposed by defendants is not permissible, plaintiffs completely ignore the Special Master's February 7, 2002 protective order covering documents produced or generated in the course of his review of the MMS Proposal. Similar to the protective order at issue here, the February 7, 2002 protective order protects documents generated by Interior, MMS, and MMS contractors that are identified on their face as "Confidential – Subject to Protective Order." Such protection is afforded "[i]n recognition of the fact that these documents may contain security information, the public disclosure of which would cause harm to individual beneficiaries as well as third parties unrelated to this litigation, and, in further recognition of the need for plaintiffs' counsel and their experts to view this information."

In some ways, the proposed protective order is even less burdensome than the February 7, 2002 protective order. For example, the proposed protective order sets out an explicit procedure by which plaintiffs can object to any designation of protected material by defendants, with defendants maintaining the burden of persuasion to demonstrate that the materials at issue merit continued protection. If plaintiffs object to any designation of protected material, defendants would identify with specificity the materials for which they seek continued protection. If the parties are still unable to resolve the objection informally, plaintiffs can bring the dispute before the Special Master, where defendants would have the burden of persuasion to demonstrate that the materials at issue merit continued protection.

Defendants' request for a protective order is not in violation of the law of this case. Neither the Special Master's March 2, 2000 decision nor any other authority cited by plaintiffs prohibits seeking or obtaining such orders. Moreover, the Special Master entered a protective order substantially similar to the proposed protective order, covering the identical types of documents, just over one month before plaintiffs filed their Response. Plaintiffs fail to even mention, much less distinguish, this protective order in making their claim that defendants have requested relief that is unavailable.

II. Defendants Have Established Good Cause for Entry of a Protective Order

The basis for defendants' Motion for a Protective Order, which plaintiffs fail to acknowledge, much less address, is two-fold: (1) It is important that the materials at issue be available to be produced quickly upon request;[3] and (2) the Special Master has already reviewed documents of the same type as the relatively narrow set of documents that would be covered by the proposed protective order and found that significant portions of those documents should not

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[3] In defendants' Motion for a Protective Order, defendants argued that

> [i]f defendants are required to seek a new protective order to cover such sensitive materials after each request by the Special Master or his experts and before the materials are produced, it is likely to result in a delay in consideration of Interior's proposals to reconnect to the Internet certain information technology systems and, consequently, a delay in resumption of important services provided by Interior bureaus and offices for individual Indians and for the rest of the country.

Motion for a Protective Order, at 2.

be made publicly available.[4] It is important that the materials at issue be available to be produced quickly upon request. In the process of validating the MMS Proposal, the Special Master and his experts requested that defendants produce certain materials describing and discussing the security of those systems. Many of these materials necessarily involve the details of the security in place protecting the MMS systems and, therefore, would be valuable to anyone who wanted to penetrate those systems. Although defendants have provided all of the materials requested, the production was delayed by the need to obtain a protective order to ensure that the materials would not be made publicly available. That protective order, entered on February 7, 2002,[5] covered materials produced and generated in the course of the Special Master's review of MMS systems, but not of other Interior bureaus and offices.[6] Defendants' request for a protective order is designed to eliminate any such delay in reviewing other Interior proposals.

Second, defendants have already provided the Special Master and plaintiffs with the

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[4] In defendants' Motion for a Protective Order, defendants argued that

> [a]s has been the case with the MMS System Security Documents, Defendants and third parties are likely to have security and/or proprietary concerns that could lead to harm, including weakening the security of information technology systems protecting Indian trust data, if the materials are publicly disclosed.

Motion for a Protective Order, at 2. The Special Master and plaintiffs were both provided copies of these documents on February 8, 2002, one day after the Special Master entered a protective order covering them.

[5] The Special Master also entered a protective order on January 24, 2002, covering a subset of these documents containing information proprietary to Interior's contractors, Accenture and USinternetworking.

[6] The Special Master's preliminary approval of several of defendants' proposals *subsequent to filing this motion for a protective order* affects, but does not eliminate, this good cause basis for a protective order. See footnote 1, supra.

documents the Special Master requested as part of his review of the security of MMS's information technology systems. This is the same category of documents, along with materials generated during the course of site visits, for which defendants seek protection with respect to other bureaus and offices. The Special Master has already reviewed these documents for precisely the purpose of determining whether material in them should be made public. See Report and Recommendation of the Special Master, dated February 28, 2002 (filed under seal).[7] Therefore, the Special Master and plaintiffs already have examples of the types of materials that would be subject to the protective order.

Although it is not possible to produce copies of the materials at issue for review before they are identified and requested, there are two factors that provide the Special Master with an adequate opportunity to assess the need to protect the information at issue. First, the category of documents covered is relatively narrow, limited to materials that are requested or generated during the course of the Special Master's review of the security of Interior's information technology systems. The protective order would not cover materials produced in the course of discovery,[8] or materials requested by the Special Master in matters outside of his validation of Interior's compliance with the terms of the Consent Order, including his review of Interior's proposals to reconnect to the Internet. Second, as noted above, the Special Master already has

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[7] Because the Special Master's Report and Recommendation, which is not yet final, was filed under seal, defendants will not discuss the findings in it here. However, the Special Master has specified categories of information that warrant protection though a protective order.

[8] The materials at issue have been requested by the Special Master and his experts, not by plaintiffs. Nothing in the proposed protective order would prevent defendants from seeking additional protections if such materials are sought by plaintiffs directly.

access to the same type of documents at issue with respect to the MMS Proposal.[9]

As plaintiffs note, defendants bear the burden of establishing good cause for entry of a protective order. See, e.g., Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). "[T]he party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Id. Determining whether good cause exists requires the court to balance "the potential harm to litigants' interests against the public's right to obtain information concerning judicial proceedings." Hamilton v. State Farm Auto. Ins. Co., 204 F.R.D. 420, 424 (S.D. Ind. 2001) (quoting Makar-Wellbon v. Sony Electronics, Inc., 187 F.R.D. 576, 577 (E.D. Wis.1999)).

Here, defendants have established good cause for the entry of a protective order. First, defendants have provided specific examples of the type of information they seek to protect, which were already before the Special Master for review at the time defendants filed the motion

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[9] Although the Special Master's review of the MMS documents has provided an opportunity for a review of the types of materials at issue, defendants note that good cause can be established in the absence of a factual showing. See Lohrenz v. Donnelly, 187 F.R.D. 1, 9 n.4 (D.D.C. 1999). In Lohrenz, the Court stated:

> In responding to plaintiff's arguments, defendants emphasize that because plaintiff has relied upon conclusory allegations to support good cause her motion must be denied. This contention has been overruled, however, by well settled case law. See National Children's Ctr., Inc., 98 F.3d at 1411 ('[In re Halkin, 598 F.2d 176 (D.C. Cir. 1979),] was overruled by the Supreme Court in Seattle Times where the Court considered and rejected the argument that protective orders must be supported by factual showings.'). . . . Thus, the arguments presented by defendants have no merit.

at issue.[10] Second, defendants have articulated the need for a speedier review than will normally be possible if a new protective order needs to be negotiated with respect to each request for information. Third, the Special Master himself articulated the reasons why information in the materials at issue require protection from public disclosure in his February 28, 2002 Report and Recommendation.[11] The potential risk to the security of data housed in defendants' information technology systems by the release of the information at issue substantially outweighs the public's right to obtain this specific, mostly technical security information.

Although the factors enunciated by the Court of Appeals for determining whether to unseal documents that have previously been filed under seal, Johnson v. Greater S.E. Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991),[12] are not directly applicable to this situation, they afford a mechanism to balance the benefits against the harm of public disclosure and support defendants' request for a protective order. First, the public need for access to mostly technical information about the security of Interior's information technology systems, most of which are

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[10] To the extent that some of the MMS materials originally designated as protected – as a result of the speed of the production – did not include material requiring protection, defendants agreed to make those materials available to be publicly filed when the issue was raised by plaintiffs.

[11] Although it is possible that a redacted version of many of these documents could be publicly released, the requests of the Special Master and his experts are not for redacted versions of the documents. Therefore, defendants do not have the option of only producing redacted versions in response to the Special Master's requests.

[12] "These factors include: (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." Johnson, 951 F.2d at 1277 n.14.

not involved in this litigation, is minimal at best. Second, the public has never had access to the documents at issue. Third, based on the MMS documents requested by the Special Master and his experts, it is expected that similar materials will contain similar sensitive information that would be harmful if made public. Fourth, defendants' interest in the data it seeks to protect is significant, as described above. Fifth, the Special Master has already found that release of similar MMS materials could put at risk the information technology systems at issue. Sixth, the materials are being provided for the purpose of demonstrating and/or identifying the level of security maintained for defendants' information technology systems. Allowing this information to become public in such a way as to make those systems less secure would be contrary to the purpose for which the information is being sought and offered.

III. The Proposed Protective Order

In addition to arguing that defendants are not entitled to any protective order at all, plaintiffs argue that the proposed protective order would improperly "shift the burden of persuasion" to the plaintiffs, Plaintiffs' Opposition and Request for Sanctions, at 6, and that specific provisions of the proposed order are unfair.[13] Id. at 4-6. The Special Master should reject these arguments for two reasons. First, the proposed protective order does not shift the burden of persuasion. To the contrary, the burden of persuasion remains with the defendants at

[13] If the Special Master concludes that defendants have demonstrated good cause for the entry of a protective order, but not for the precise terms in the proposed protective order, the Special Master can recommend entry of a different order. See, e.g., Hamilton, 204 F.R.D. at 425-25. Defendants have previously informed plaintiffs of their willingness to negotiate the terms of a mutually acceptable protective order, in consultation with the Special Master, and continue to be willing to discuss such an order.

all times. In re Alexander Grant & Co. Litigation, 820 F.2d 352, 356 (11th Cir. 1987) ("Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party."). Under the proposed protective order, plaintiffs would bear only the minimal burden of stating an objection to a designation made by defendants, upon which defendants would be required to identify with specificity the materials for which they seek protection and the reasons for seeking such protection. If plaintiffs' objections cannot be resolved informally, plaintiffs would again bear only the minimal burden of raising the issue before the Special Master. Defendants would bear the burden of demonstrating that the materials at issue merit protection.

Second, plaintiffs' argument that they will be prohibited from using such documents for various litigation purposes is meritless. The proposed protective order would make the materials at issue available to plaintiffs for general use in this litigation. If materials covered by the protective order should not be so covered, the protective order provides a simple procedure involving only minimal burden to the plaintiffs to challenge the designation. If only certain portions of such materials would create a security risk if made public, the parties, in conjunction with the Special Master, could agree to redact those portions, as has occurred with some of the MMS documents in the recent contempt trial. However, it is entirely appropriate to bar plaintiffs from distributing unredacted materials more broadly than is necessary for the purposes of the litigation where doing so would make the data in defendants' information technology systems more vulnerable to attack.

IV. Plaintiffs' Request for Sanctions

Plaintiffs' request for sanctions is groundless. They base their request for sanctions on a Report and Recommendation of the Special Master that found umbrella protective orders to be disfavored, but not unavailable if based on good cause, and that rejected most, but not all, of defendants' request for a protective order for reasons that are entirely inapposite to the instant request. In arguing that it is the law of this case that defendants are not entitled to the type of protective order they are seeking, plaintiffs completely ignore the fact that the Special Master entered a similar protective order less than a month before defendants' motion was filed. That, by itself, demonstrates that defendants' motion is not frivolous. Moreover, for the reasons stated above, defendants have shown good cause for the entry of a protective order, either in the form proposed or in an alternative form. Because Plaintiffs' request is meritless, it should be rejected summarily.

CONCLUSION

For the reasons stated above, defendants respectfully request that the Special Master find that they are entitled to a protective order and that plaintiffs' request for sanctions should be denied.

Dated: March 19, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 20, 2002 I served the foregoing *Reply in Support of Motion For a Protective Order And Opposition to Plaintiffs' Request For Sanctions Under Rule 37*, by facsimile in accordance with their written request of October 31, 2001, upon:

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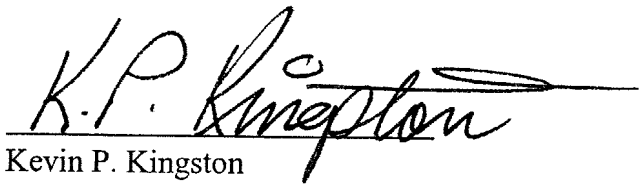

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