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 A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' COMMENTS ON SPECIAL MASTER-MONITOR'S OCTOBER 2, 2002 REPORT AND RECOMMENDATION

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants hereby move to strike *Plaintiffs' Comments in Support of October 2, 2002 Report and Recommendation of the Special Master-Monitor on "Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses" and "Defendants' Motion for Protective Order"* (dated Oct. 17, 2002) ("*Plaintiffs' Comments*"). As explained more fully in the accompanying Memorandum of Points and Authorities, *Plaintiffs' Comments* should be stricken because plaintiffs improperly seek the imposition of contempt sanctions against Interior Secretary Gale Norton, Interior Assistant Secretary Neal McCaleb, six current and former Department of Justice attorneys and, apparently, other unnamed "senior managers and counsel" for making valid objections to two defective deposition notices. Plaintiffs seek punitive sanctions, including imprisonment, against these individuals without even attempting to make the requisite legal or factual showing that could justify recourse to such extreme remedies.

For these reasons, and the additional reasons set out in the accompanying Memorandum of Points and Authorities, defendants move that the *Plaintiffs' Comments* be stricken from the record and afforded no consideration. A proposed order is attached.

Counsel for defendants have conferred with counsel for the plaintiffs and have been informed that plaintiffs do not consent to this motion.

Respectfully submitted,

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Assistant Attorney General

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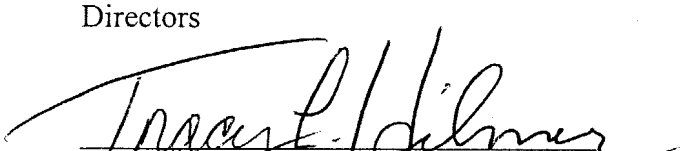

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DATED: November 6, 2002

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 A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' COMMENTS ON SPECIAL MASTER-MONITOR'S OCTOBER 2, 2002 REPORT AND RECOMMENDATION

In *Plaintiffs' Comments in Support of October 2, 2002 Report and Recommendation of the Special Master-Monitor on "Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses" and "Defendants' Motion for Protective Order"* (dated Oct. 17, 2002) ("*Plaintiffs' Comments*") at 1, 3, plaintiffs improperly ask the Court to summarily impose contempt sanctions, including confinement, upon Secretary Norton, Assistant Secretary McCaleb, six current and former Department of Justice attorneys and other unnamed "senior managers and counsel." In seeking such extreme sanctions, plaintiffs have not even bothered to file a show cause motion, much less to identify a "definite and specific" order of the Court that was allegedly violated or the particular conduct of any individual that could possibly justify such extreme remedies. *See SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996) (requiring movant to show that a "definite and specific" court order was in effect, that the order required certain conduct by the respondents, and that the respondents failed to comply with the court's order). Plaintiffs' failure is particularly egregious because the government plainly was the prevailing party on the two motions at issue in the Special Master-Monitor's Report and Recommendation. *See Report and Recommendation of the Special Master-Monitor on "Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses" and "Defendants' Motion for Protective Order"* (dated Oct. 2, 2002) ("*SMM Oct. 2,*

2002 Report") at 7-9 (acknowledging validity of government's procedural objections to plaintiffs' deposition notices). Because *Plaintiffs' Comments* are not supported by law or fact and fail utterly to comply with the required procedures for the imposition of contempt sanctions, their pleading should be struck from the record.

The Court's power to find a party in civil contempt for violation of discovery orders may be based either on Federal Rule of Civil Procedure 37(b)(2) or the Court's inherent power to protect its integrity and prevent abuses of the judicial process. *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.D.C. 1999). However, remedies drawn upon under the court's inherent power should be exercised only when the rules do not provide the court with sufficient authority to protect its integrity and prevent abuse of the judicial process; therefore, when a discovery order has been violated, the court should turn to its inherent powers only as a secondary measure. *Id.* at 11.

Since Rule 37 specifies the conditions under which a court can impose contempt sanctions upon a litigant in connection with a discovery matter, there is no basis for the Court to invoke its inherent powers here. Accordingly, the sole rule of decision for the sanctions sought in *Plaintiffs' Comments* is Fed. R. Civ. P. 37(b)(2). Rule 37(d), under which plaintiffs sought their expenses incurred in litigating their motion to compel, does not by itself permit a court to impose contempt sanctions. Indeed, Rule 37 permits a court to impose contempt sanctions only for failure to obey an **order**. Fed. R. Civ. P. 37(b)(2)(D). Here, however, the Court never issued any order requiring the defendants to comply with plaintiffs' defective deposition notices. To the contrary, the Special Master-Monitor has acknowledged the validity of the government's procedural objections, a finding that is not contested by plaintiffs in their *Comments*. Thus, there is no legal basis to impose any sanctions upon the government or any individual government employee in connection with plaintiffs' defective deposition notices and failed motion to compel.[1]

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[1]Incorporated by reference here is *Interior Defendants' Objections to the October 2, 2002 Report and Recommendation of the Special Master-Monitor* (filed Oct. 21, 2002).

Further, plaintiffs have not even attempted to conform their request for sanctions to applicable legal standards. Plaintiffs should by now be fully aware that a party seeking a finding of contempt must initially show, by clear and convincing evidence, that (1) a court order was in effect, (2) the order required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *Petties v. District of Columbia*, 897 F. Supp. 626, 629 (D.D.C. 1995).[2] Only if the moving party has made a *prima facie* showing that the respondent did not comply with the court's orders does the burden shift to the respondent to produce evidence justifying the noncompliance. *See Bilzerian*, 112 F. Supp. 2d at 16. As this Court has noted, "the 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" *Life Partners, Inc.*, 912 F. Supp. at 11, *quoting Joshi v. Professional Health Servs., Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). Further, in light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." *Life Partners*, 912 F. Supp. at 11, *citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co.*, 767 F.2d 882, 885 (Fed. Cir. 1985).

Plaintiffs do not come close to demonstrating how the government's successful motion for a protective order could possibly provide a basis for contempt sanctions. Plaintiffs make no showing – nor can they – that Secretary Norton, Assistant Secretary McCaleb, the six named attorneys or the other unnamed "senior managers and counsel" violated an applicable discovery

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[2]A contempt order should be imposed, if at all, only at the conclusion of a three-stage proceeding involving:

> (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981), *citing Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1977); *Bilzerian*, 112 F. Supp. 2d at 16.

order by objecting to plaintiffs' defective deposition notices. In fact, there was no such order. Plaintiffs do not even mention the exacting legal requirements for contempt sanctions to be issued, much less attempt to meet these requirements with record evidence as opposed to mere speculation and vitriol. *Plaintiffs' Comments*, therefore, fail to justify the extreme – and plainly punitive – sanctions they seek. *Plaintiffs' Comments* are, in fact nothing more than additional reckless diatribe unsupported by evidence.

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997), *quoting NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The goal of a civil contempt order is not to punish, but to exert only so much of the court's authority as is required to assure compliance. *Petties*, 897 F. Supp. at 629; *see Food Lion*, 103 F.3d at 1016 (a civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance"), *quoting Blevins Popcorn*, 659 F.2d at 1184.

It is evident that plaintiffs do not really seek "corrective action" through their *Comments* – certainly they do not identify any specific "corrective" acts that the government or any individual government employee could take here, presumably because the government's motion was undisputedly valid. It is therefore clear that the primary purpose of *Plaintiffs' Comments* is to seek punitive sanctions (including imprisonment) against individuals whose "crime" is having filed valid objections to plaintiffs' defective deposition notices. This is obviously an improper purpose and should not be entertained by the Court.

In short, *Plaintiffs' Comments* should be stricken from the record under Fed. R. Civ. P. 12(b)(6). The government on behalf of itself, Secretary Norton, Assistant Secretary McCaleb, the six "implicated" attorneys, and the other unnamed "senior managers and counsel" in their official capacities, reserves all additional objections and claims – including objections based on sovereign immunity and claims for sanctions based on Fed. R. Civ. P. 11 – to any show cause

motion the plaintiffs might later seek to file regarding this discovery issue. Any individual government employee named in his or her personal capacity would, of course, have the right to raise any objections he or she deemed appropriate to an such unwarranted show cause motion.

Respectfully submitted,

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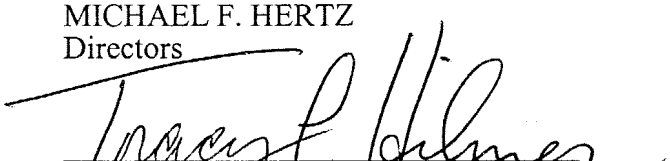

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DATED: November 6, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-CV-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Defendants' Motion to Strike Plaintiffs' Comments on Special Master-Monitor's October 2, 2002 Report and Recommendation, and the entire record in this case, it is this _____ day of _____, 2002, hereby

ORDERED that Defendants' Motion be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Plaintiffs' Comments in Support of October 2, 2002 Report and Recommendation of the Special Master-Monitor on "Plaintiffs' Motion to Compel Attendance of Witnesses at Deposition and to Award Reasonable Expenses" and "Defendants' Motion for Protective Order" (dated Oct. 17, 2002) be stricken from the record in this case.

_____
Honorable Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 6, 2002 I served the foregoing *Defendants' Motion to Strike Plaintiffs' Comments on Special Master-Monitor's October 2, 2002 Report and Recommendation and Defendants' Memorandum of Points and Authorities in Support of Their Motion to Strike Plaintiffs' Comments on Special Master-Monitor's October 2, 2002 Report and Recommendation* by facsimile in accordance with their written request of October 31, 2001 upon:

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