

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' OMNIBUS MOTION TO COMPEL:
(1) DEPOSITION OF GALE NORTON; (2) DEPOSITION OF DAVID L. BERNHARDT;
(3) DEPOSITION OF GABRIEL SNEEZY; (4) DEPOSITION OF LUCY QUERQUES
DENETT; (5) DEPOSITION OF DONNA ERWIN AND RELATED REQUEST FOR
PRODUCTION OF DOCUMENTS; (6) DEPOSITION OF ELOUISE CHICHARELLO;
(7) DEPOSITION OF BERT T. EDWARDS; (8) DEPOSITION OF JAMES CASON AND
RELATED REQUEST FOR PRODUCTION OF DOCUMENTS; (9) PLAINTIFFS'
TENTH REQUEST FOR PRODUCTION OF DOCUMENTS; (10) PLAINTIFFS'
ELEVENTH REQUEST FOR PRODUCTION OF DOCUMENTS; AND (11)
PLAINTIFFS' TWELFTH REQUEST FOR PRODUCTION OF DOCUMENTS;
AND REQUEST FOR SANCTIONS PURSUANT TO RULE 37**

Plaintiffs' Omnibus Motion to Compel the depositions of eight individuals and the production of documents responsive to five sets of requests is improper, unnecessary, and mostly duplicative of earlier motions to compel the same discovery. The Omnibus Motion should be denied, along with the accompanying Request for Sanctions.

ARGUMENT

I. THE OMNIBUS MOTION IS LARGELY UNNECESSARY AND DUPLICATES EARLIER MOTIONS

All of the proposed depositions referenced in the Omnibus Motion, and the two sets of document requests that were attached to the deposition notices for Mr. Cason and Ms. Erwin, are already the subject of motions for protective order. The Omnibus Motion does not raise any new

arguments with respect to this discovery that were not already fully briefed in Defendants' motions for protective order and replies, or Plaintiffs' oppositions to the motions. Indeed, the first four pages of the Omnibus Motion are consumed with merely restating the titles of these earlier briefs so that Plaintiffs may then incorporate them by reference.

Plaintiffs do not dispute that ordinarily a motion to compel discovery that is already the subject of protective order motions would be unnecessary and improper. See Omnibus Motion at 5 n.2. If the Court denies the protective order motions, the discovery will proceed. If the protective order motions are granted, any motion to compel then becomes moot, along with the response to the unnecessary motion. The movant is then subject to sanctions for the costs incurred in responding to the unnecessary motion. See Fed. R. Civ. P. 37. Plaintiffs' only stated explanation for filing a motion to compel under these circumstance is that they are "convinced" that an order compelling the discovery is nonetheless necessary here because otherwise Defendants might not comply with a possible Court order denying the protective order motions. Omnibus Motion at 5 n.2. Plaintiffs may have convinced themselves of the need for this Omnibus Motion, but their baffling explanation is unpersuasive and the Omnibus Motion should be summarily denied to the extent that the discovery it seeks to compel is already the subject of prior motions for protective orders.¹

Moreover, much of the discovery that Plaintiffs seek to compel in the Omnibus Motion is already the subject of prior motions to compel by Plaintiffs. With the lone exception of the deposition noticed for Secretary Norton, Plaintiffs filed motions to compel all of the proposed

^{1/} Defendants served responses but did not file motions for protective order with respect to Plaintiffs' Tenth, Eleventh, and Twelfth Requests for Production of documents. These are discussed below.

depositions and the document requests included with the deposition notices for Mr. Cason and Ms. Erwin. Admittedly these earlier motions to compel were improper in that Plaintiffs failed to comply with the meet and confer requirements in Federal Rule of Civil Procedure 37(a)(2)(B) and Local Rule 7(m), and Plaintiffs are seeking to withdraw the earlier motions. See Plaintiffs' Notice of Withdrawal (filed December 16, 2003). However, as of today – and, importantly, as of the date the Omnibus Motion was filed – the Court has not entered an order permitting Plaintiffs to withdraw the earlier motions, and Defendants were forced to incur costs in responding to each of those motions. Because the earlier motions to compel have not yet been withdrawn, the Omnibus Motion is duplicative to the extent it seeks to compel the same discovery and should also be summarily denied for this reason.

II. NO DISCOVERY IS AUTHORIZED AT THIS TIME

Relying upon the Federal Rules of Civil Procedure and the Court's October 17, 2002 Phase 1.5 Trial Discovery Order, Defendants demonstrated in the earlier motions for protective order that no discovery is appropriate or permissible at this stage of the litigation. In response, Plaintiffs continue to rely exclusively upon the language of the Court's September 17, 2002 Order restoring certain discovery rights that had been previously denied to them in this case. They contend that the September 17, 2002 Order somehow conferred upon them "unfettered" discovery rights and surprisingly again argue that Defendants have not identified any Order which restricts their discovery now that the Phase 1.5 trial has concluded. Omnibus Motion at 6-7. Plaintiffs have unaccountably chosen to ignore the language in the Federal Rules and the October 17, 2002 Order, discussed in each of Defendants' motions for protective order, that unambiguously restricts Plaintiffs' discovery rights.

The September 17 Order merely restored the usual discovery rights that had been denied Plaintiffs by a previous order. After entry of the September 17 Order, Plaintiffs were in the same position as any other litigant with regard to their discovery rights. On October 17, 2002, the Court entered a Phase 1.5 discovery scheduling order. See Phase 1.5 Discovery Schedule Order (October 17, 2002). Pursuant to that Order, fact discovery closed on March 24, 2003,² and all discovery terminated on April 10, 2003. Plaintiffs do not, and cannot, explain how the September 17 Order granted them discovery rights that exceed the limits established by the Court's subsequent scheduling order. There is no other order granting Plaintiffs the right to take discovery and Plaintiffs cite none in the Omnibus Motion.

Plaintiffs are also bound by the Federal Rules, which forbid discovery prior to a Rule 26(f) planning conference.³ See Fed. R. Civ. P. 26(d). The parties have not held a discovery planning conference on any post-Phase 1.5 proceeding. Therefore, discovery has not commenced for any subsequent proceedings and Plaintiffs are precluded from requesting documents and noticing depositions without leave of Court. Id.; Fed. R. Civ. P. 30(a)(2)(C).⁴

² The close of fact discovery was subsequently extended by the Special Master-Monitor until March 28, 2003.

³ One exception to this prohibition is that Rule 27(b) permits a district court to allow, upon motion that sets forth certain prescribed information, the taking of depositions of witnesses to perpetuate testimony “for use in the event of further proceedings in the district court,” pending appeal of a judgment. Fed. R. Civ. P. 27(b). Plaintiffs have not filed any such motion to take the depositions noticed here and therefore have obviously not met the requirements of Rule 27.

⁴ To the extent Plaintiffs are seeking discovery for the purpose of investigating potential criminal contempt allegations, see, e.g., Omnibus Motion at 1, 6-9, 11, this Court’s decision in Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70, 76-77 (D.D.C. 2003), makes clear that the Plaintiffs cannot assume a prosecutorial role. See also Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 814 (1987) (reversible error to appoint the attorney for an interested private beneficiary as prosecutor of contempt allegations).

III. PLAINTIFFS FAIL TO IDENTIFY ANY RELEVANT DISCOVERY THEY SEEK

Plaintiffs' Omnibus Motion also reveals a fundamental misunderstanding about the type of information that is discoverable in this case. Plaintiffs claim that they need the depositions and requested documents because they are entitled to all "information relevant to the management and administration of our own trust assets." Omnibus Motion at 9; see also id. at 4 n.1 (Plaintiffs seek "information regarding the management and administration of our trust assets"); id. at 5 (arguing that under "the Law of Trusts," Plaintiffs are entitled to "access to all information relevant to the administration and management of the Individual Indian Trust"); id. at 22 (asserting that as trustee, "the United States has an obligation to produce material relevant to the trust upon the beneficiaries' request."); id. at 25 (asserting that the trustee-delegate has a "Duty to Furnish Information"). Even if applicable restrictions on discovery in Administrative Procedure Act ("APA") cases were disregarded,⁵ Plaintiffs' attorneys are not entitled to use the Federal Rules of Civil Procedure to discover all information that might otherwise be obtainable by an IIM trust beneficiary. They represent the certified class of IIM beneficiaries only with respect to the issues and claims in this lawsuit. Simply alleging that a beneficiary has a right to certain information about the IIM trust is not enough to make that information relevant to this lawsuit, and thus discoverable under the Federal Rules. If beneficiaries believe that they have a right under trust law to certain information, they should ask the appropriate Interior official for

⁵ Plaintiffs acknowledge in the Omnibus Motion that discovery is impermissible in APA cases, but argue that such a restriction should not apply here because this "litigation is not a run-of-the-mill administrative law case." Omnibus Motion at 22. Defendants are unaware of any uniqueness exception in the APA that would permit otherwise unauthorized discovery in any APA case that a plaintiff designates as special. In short, the restrictions on discovery in all APA cases apply with equal force to this APA case, notwithstanding its supposedly unconventional status.

that information in the ordinary course of business. The Plaintiffs in this class action, however, are not entitled to use the formal discovery mechanisms in the Federal Rules to gather information that beneficiaries would merely like to obtain. The requested information must be relevant to an issue in this litigation.⁶

As Defendants have discussed repeatedly, there are no current proceedings that require discovery. However, even if this changes, Plaintiffs would only be entitled to the discovery of information related to the claims at issue in such a proceeding. They are not entitled to discover any information they seek merely because it has some relation to the IIM trust.

In short, because there is no current proceeding requiring discovery, and no current claim being litigated to which any discovery could possibly be relevant, Plaintiffs' discovery at this time is improper. The Omnibus Motion should be denied.

⁶ Plaintiffs are surely aware of the relevancy requirement because they quote the appropriate language from Rule 26(b) in their Omnibus Motion. Omnibus Motion at 11. They are also surely aware of the issues in this case because they were framed in the Complaint filed by Plaintiffs. It is therefore puzzling that at this late date Plaintiffs are apparently still unaware that information relevant to the individual Indian trust is not coextensive with information relevant to the issues in this case.

IV. PLAINTIFFS' ARGUMENTS CONCERNING DOCUMENT DISCOVERY ARE DEFICIENT, IMMATERIAL, UNSUPPORTED, PREMATURE AND MOOT

A. Plaintiffs' Motion To Compel Needlessly Complicates The Dispute By Ignoring Procedural Prerequisites

As part of their Omnibus Motion, Plaintiffs seek an order compelling full production of all documents they request in five separate document requests, but the motion is improper on its face. First, Federal Rule of Civil Procedure 37(a)(2)(B) requires that "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material *without court action.*" Fed. R. Civ. P. 37(a)(2)(B) (emphasis added). Contrary to both the spirit and letter of this rule, Plaintiffs made no effort to narrow the discovery disputes. Had Plaintiffs made a good faith effort to confer, they would have learned, for example, that some of the concerns expressed in their motion are entirely unfounded.⁷

The motion is also improper because Plaintiffs failed to comply with local rules that require a motion to compel to set forth each request at issue and recite the response being challenged. LCvR 26.2(d), 30.4. Plaintiffs, however, have ignored this requirement. The result is a generalized attack on the format of Defendants' general objections that wholly ignores the substance of the specific responses Defendants have provided to the requests.

⁷ For example, Plaintiffs complain about Defendants' objection that the requests are not proper discovery for cases arising under the Administrative Procedure Act. Although Defendants do not agree that the breadth of discovery afforded to Plaintiffs in this case is appropriate for a case premised upon APA jurisdiction, Defendants do not intend to withhold any otherwise discoverable documents on this basis alone.

B. Defendants' Motion To Compel Is Irreparably Deficient

1. Plaintiffs Offer No Justification Or Explanation For The Discovery Sought

The defects in Plaintiffs' motion to compel document production become evident upon review of the document requests and Defendants' considered responses. First, Plaintiffs' motion makes no effort to demonstrate the propriety or validity of any document request other than a few generic assertions that Plaintiffs are "entitled" to discovery. See Omnibus Motion at 11. Their argument erroneously presumes that this case is now in an open discovery period, notwithstanding that the last order entered by the Court on the matter closed all discovery more than six months ago.⁸ Remarkably absent from Plaintiffs' motion is any effort to demonstrate that their document requests are reasonable in scope and seek information relevant to some claim or defense in the case.

Although Federal Rule 26 affords broad discovery, it does not confer any automatic entitlement to unlimited or boundless discovery. Discovery requests must not only be propounded within the time frame established by rule and Court order, but the scope of discovery also must not extend beyond "matter, not privileged, that is relevant to the claim or defense." Fed. R. Civ. P. 26(b)(1). Plaintiffs have not established any basis on which the requested discovery can be justified. They make the naked assertion that "Plaintiffs have important interests at stake . . . and the information plaintiffs seek is necessary for plaintiffs to protect those interests." Omnibus Motion at 11. Nowhere do Plaintiffs identify (1) what "interests" they are referring to; (2) how such "interests" relate to a claim or defense in the case; or (3) how any of

^{8/} See Section II, supra. (addressing this fundamental difference of opinion between the parties).

the "information" they seek is at all related to such "interests." These omissions are sufficient reason to sustain all of Defendants' relevancy objections.

2. Defendants' Common Objections Have General Application For A Reason

Plaintiffs focus on Defendants' "General Objections," a group of objections that are common to most, if not all, of the requests in each set. Plaintiffs, however, do little more than question the form in which the general objections are set forth. Plaintiffs wrongly contend that stating common objections once with "the incorporation of every general objection into each particular response" somehow renders them invalid. Omnibus Motion at 11-12. Plaintiffs proffer no support for their position.⁹ Instead, they simply presume that, because a common objection exists as to each and every document request, the objection has no validity. No rule requires that a party must repeatedly and separately state -- over and over -- the same objection to multiple requests. When an objection has equal applicability to numerous discovery requests, stating the objection once and making it generally applicable to those requests saves resources and time. In the instant case, for example, Defendants object to each document request because no discovery period is open at this time. That objection is common to all requests. It serves no purpose to require that the objection be repeated for each request to which it applies.

Rule 34(b), which governs responses to requests for production, requires merely that the "response shall state, with respect to each item or category, that inspection and related activities

⁹ The cases on which Plaintiffs principally rely, such as Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181 (D.D.C. 1998) and Pulsecard, Inc. v. Discover Card Svcs., 168 F.R.D. 295 (D. Kan. 1996), see Omnibus Motion at 14, are inapposite here. Those cases deal with naked, unexplained objections, not the sort of substantive assertions Defendants have made here. Even Pulsecard, for example, sustains a privilege objection for documents that were added (presumably after the initial response) to an "amended privilege log." 168 F.R.D. at 307.

will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated." Fed. R. Civ. P. 34(b). Defendants completely discharged this obligation under Rule 34(b) for each document request by fully stating the objections and the reasons therefor.

Defendants' objections are carefully and completely set forth. They are not mere "boilerplate," but each asserted objection sets forth the reasons for each objection. If an objection and the reasons for it are the same from one repetitive request to the next, the objection has "general" application and need only be stated once. Such a careful and detailed approach to stating common objections complies fully with Rule 34's requirements. Moreover, where a particular objection has a specific basis unique to one request, Defendants have made a good faith effort to put Plaintiffs on notice of that additional basis in the response to the particular request.

C. Many Of Plaintiffs' Arguments Are Immaterial Because Plaintiffs Challenge Only Defendants' "General Objections" And Not Those Stated In The Specific Responses

Plaintiffs' motion to compel omits any consideration of the specific objections Defendants have asserted and treats Defendants' document responses as if they contained nothing but "General Objections." Where the motion to compel is silent on objections set forth in any of Defendants' document responses, those objections should be taken as conceded. The motion to compel -- as to all such requests -- may be readily denied on the basis of all the conceded specific objections.

For example, Plaintiffs contend that Defendants' "General Objection" that Plaintiffs' requests are unreasonably cumulative and duplicative is "meaningless and obfuscatory" and urge

that the objection be overruled. Omnibus Motion at 23. Plaintiffs fail to disclose, however, that more specifics of this objection are expressly asserted in response to the individual requests. For example, in response to Request Category No. 1 of the Tenth Request, Defendants assert that

the request is unreasonably cumulative and duplicative to the extent it seeks documents previously requested by Plaintiffs. See, e.g., Plaintiffs' Eighth Request for Production of Documents, at 9-29 (Dec. 16, 2002). (Category Nos. 13-213).

Response to Tenth Request at 6. Thus, Defendants have not only asserted the objection and explained it but have also specifically identified the previous requests that are duplicated by the new request.

Another example is Defendants' objection as asserted in the Responses to the Eleventh and Twelfth Requests. In responding to the first category of the Eleventh Request, Defendants assert the following specific objection:

(i) this request is unreasonably cumulative and duplicative to the extent it seeks documents previously requested by Plaintiffs, see, e.g., Plaintiffs' Tenth Request for Production of Documents, at 6 (Oct. 21, 2003) (Category No. 1) (requesting all documents "which in whole or in part embody, refer or relate to – directly or indirectly and generally or specifically – the management and administration of the IIM TRUST"); Plaintiffs' Eighth Request for Production of Documents, at 9-17 (Dec. 16, 2002) (Category Nos. 13-15, 17, 22, 66, 72, 73, 91).

Response to Eleventh Request at 6-7. Such detailed articulation of the "duplicate" request objection is more than sufficient to satisfy Rule 34, and Defendants asserted this specific objection wherever appropriate in their specific responses. Plaintiffs challenge none of these specific objections.

D. Plaintiffs' Protestations About Defendants' "General Objections" Are Unsupported

Plaintiffs' argument that "General Objections" are "ineffective" and thus not sustainable is simply wrong. They misapply the authorities cited in their motion. Contrary to their arguments, a "General Objection" is neither improper nor automatically invalid, nor does the assertion of common objections under such a heading condemn the responding party to waiver of those objections, as Plaintiffs contend. See Omnibus Motion at 14-16.

The sufficiency of Defendants' objections must be judged in light of the circumstances under which the requests were made. E.g., Boca Investering P'ship v. United States, No. 97-602, 1998 WL 426567 (D.D.C. Jan. 20, 1998) (approving, in the case of privileged documents, a "two stage" discovery response, comprising an initial "blanket" objection followed later by a detailed privilege log as document production proceeds); High Tech Communications, Inc. v. Panasonic Co., No. 94-1477, 1995 WL 133344, at *2 (E.D. La. Mar. 24, 1995) (sustaining a general objection on privilege grounds where "necessitated by the nature of . . . [the discovering party's] document requests"). Indeed, even in cases involving access to potentially privileged records, courts have acknowledged that "the circumstances surrounding the assertion of a general objection" need to be considered. Id. At "times the blanket objection will be made for slothful reasons," but in other cases "there may exist an arguable reason" that justifies the general objection, even in the case of privilege claims. Id. (quoting Eureka Fin. Corp. v. Hartford Accident & Indem., 136 F.R.D. 179, 184 (E.D. Cal.1991)).

It is accepted practice in this district for a party to assert its objections using a "two-step" approach. This approach is described by the court in Boca Investering, at *1, as follows:

In the first stage, plaintiffs set forth their general objections and, subject to them, indicated what they would produce as to each individual request. In the second stage, they actually produced the documents they said they would produce in the first stage, renewed their general objections, and produced a privilege log setting forth their attorney-client privilege claim to justify their not producing eleven documents.

The court rejected the opposing party's claim that the privilege objections were waived because they had not been asserted as part of the original discovery response. The court observed that "no federal rule of civil procedure . . . condemns this two-stage procedure, [or] requires that, if it is used, the privilege log must be produced in the first stage rather than the second, or specifies that production at the second rather than the first stage constitutes a waiver of the privilege claimed in the log." Id. at *2.

In this instance, Plaintiffs propounded document requests, which under Rule 34 must be responded to within 30 days, assuming that a response is required when discovery is not open. Defendants expressly warn Plaintiffs in each written discovery response that the "Response reflects the Defendants' good faith diligent efforts to consider and investigate the subject matter covered by the Requests and to respond to each of the Requests *within the allotted time*. The statements made herein are based upon the information *known as of the date of this response and are subject to correction, modification and supplementation* if and when additional relevant information becomes known to Defendants." Response to Erwin Request at 1 (emphasis added); see also Response to Cason Request at 1; Response to Tenth Request at 1; Response to Eleventh Request at 1; Response to Twelfth Request at 1. Plaintiffs are thus on notice that Defendants reserve the right to amplify and refine their discovery responses as the search for responsive documents proceeds.

Due to the breadth of Plaintiffs' documents requests and the various locations throughout the country where responsive documents may be present, it is not possible for Defendants to identify and review all responsive documents by the time a written response to a request is due. Consequently, Defendants have followed a "two-step" approach to their discovery responses.

In the instant situation, this approach is both practical and reasonable. Because no discovery is even appropriate at this time, Defendants have no obligation to collect and review all potentially responsive documents, but the responses provided to Plaintiffs afford them adequate notice of problems with their requests. Plaintiffs suffer no prejudice by this approach, as no discovery period is now open and Plaintiffs face no impending discovery or trial deadline.

Although Plaintiffs cite a number of cases that criticize reliance upon generic, "boilerplate" objections, the "General Objections" here are not mere boilerplate. The cases Plaintiffs cite criticize the naked assertion of objections without explanation. There is a substantive difference between a perfunctory "blanket" objection and the detailed "common" objections Defendants asserted here.

Moreover, Plaintiffs attempt a sleight of hand by relying on cases that address the sufficiency of arguments on a motion to compel and improperly grafting those briefing requirements onto what must be contained in a simple discovery response. For example, Plaintiffs parenthetically quote from Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington, 103 F.R.D. 52, 59-60 (D.D.C. 1984), see Omnibus Motion at 16, to suggest that Defendants' discovery responses required "'submitting affidavits or offering evidence'" of an undue burden. But a discovery response need only state the objection and explain the reason(s) for it. Fed. R. Civ. P. 34(b). The Chubb case addresses the support required in responding to a motion to

compel or in moving for a protective order – it does not describe the sufficiency of a discovery response, as Plaintiffs improperly contend.

Moreover, Defendants do not rely only upon their asserted objections but have appended to this submission (as Exhibits A, B and C) Declarations by James Cason, which support the burdensomeness objections asserted in the Tenth, Eleventh and Twelfth Requests. The declarations demonstrate that full compliance with Plaintiffs' Tenth, Eleventh and Twelfth Requests as drafted would require, respectively, at least 192,000, 2,800 and 11,000 employee-hours to complete.¹⁰ These estimates substantiate the burdensomeness objections.

E. Plaintiffs' Challenge To Privilege Claims Is Both Defective And Premature

Plaintiffs make a two-fold argument against Defendants' assertion that some documents otherwise responsive to the discovery requests may be privileged on one or more grounds. Plaintiffs assert that (i) any objection has been waived because no privilege log was produced with the written responses and (ii) Defendants' role as "trustees" for the class members (the "beneficiaries"), eliminates any basis for an assertion of privilege, because Defendants act for the benefit of the beneficiaries. The first contention has already been refuted above. With discovery closed, Plaintiffs are not entitled to any production, much less a privilege log. Even if discovery were open, Defendants, as already demonstrated, may assert their objections in two stages by providing a privilege log once that review is complete. Defendants have also already refuted Plaintiffs' second argument that Defendants' "trustee" status negates all claims of privilege in

¹⁰ The enormous number of hours estimated for the Tenth Request is likely due to the fact that Plaintiffs' demand seeks, *inter alia*, every email in the possession of Secretary Norton that touches on any aspect of IIM trust matters. A search for documents responsive to this request alone would necessitate retrieving and reading virtually every email sent to or from the Secretary in her official capacity.

responding to Plaintiffs' previous motion to compel. Defendants' Opposition To Plaintiffs' Consolidated Motion To Compel Production Of Documents And Request For Sanctions Pursuant To Rule 37, at 14-17 (October 30, 2003). Rather than restate the fallacy of Plaintiffs' position, Defendants incorporate their previous response herein by reference.¹¹

F. All Of Defendants' Other Challenged Objections Should Be Sustained

1. The Objection To Duplicate Requests Is Meritorious

The defects of Plaintiffs' contentions concerning this objection have already been addressed above. See Section IV. C., supra.

2. Objections To Searching Electronic Records On Back Up Tapes Should Be Sustained

In response to prior discovery requests, the Department of the Interior has invested substantially in the creation of an e-mail capture and back-up system that will allow archived e-mails to be searched. Known informally by the name of the contractor providing this service to the Department, ZANTAZ, the project has processed many e-mail back-up tapes that were not searchable into an electronic archive that is searchable. See generally ZANTAZ Status Report for DOI (January 15, 2004) attached to United States' Status Report To The Special Master Of January 20, 2004. The project, however, is not complete, and there remain some back-up tapes that have not yet been processed. To this extent, then, Defendants object to having to search through old-format archive tapes that may still exist.¹²

¹¹ Defendants acknowledge the Court's previous rulings in this area, but the Court has not held that no privileges apply. The privilege objections are also asserted here to preserve the issue for appeal.

¹² This objection is distinct from any burdensomeness objection that arises because of the breadth or nonspecific nature of Plaintiffs' demands for searches of the ZANTAZ archives.

3. Objections Based Upon Compliance With Court Orders Should Be Sustained

Plaintiffs complain that Defendants' discovery responses include an objection to requests that might require Defendants to violate a Court order. In its Memorandum and Order of December 22, 2002, this Court expressly prohibited Defendants from having any contact with members of the Cobell class. To the extent a discovery request would obligate Defendants to contact a class member in violation of the Order, Defendants object to the request. To date, however, Defendants are not aware that the limitation imposed by the Order has prevented the production of any otherwise discoverable document.¹³ Nevertheless, Defendants must not be forced by mere reason of a discovery request to face the intractable dilemma of being sanctioned for a discovery violation or for violating a standing order of the Court. Defendants' objection should be sustained.

4. Plaintiffs Concede That Defendants' Objection To Producing Documents Beyond Their Possession And Control Is Valid

Several of Plaintiffs' recent requests demand production of documents in the possession of certain individuals within the Department of the Interior. Defendants have asserted an objection to make clear that they do not have any duty to obtain copies of documents that are not in the possession or control of Defendants. While Plaintiffs challenge the objection, their argument seems to concede its very viability. Citing In re Bankers Trust Co., 61 F.3d 465 (6th Cir. 1995), Plaintiffs assert that documents are deemed to be within a responding party's control

^{13/} As with the privilege objections, this is a prophylactic objection designed to place Plaintiffs on notice of all potential problems that may arise as Defendants search for otherwise responsive records. If such a situation arises, Defendants will put Plaintiffs on notice of the specifics of the objection.

if the party has a legal right to obtain them. Omnibus Motion at 24. Thus, it seems that Plaintiffs agree that where no legal right exists to obtain documents, Defendants have no duty to produce them. This is precisely the essence of the challenged objection. The Court, therefore, may treat the issue as resolved.

5. Defendants Are Entitled To Object To Expensive Productions Unless Plaintiffs Defray The Costs

Finally, Plaintiffs take issue with Defendants' notice to them that some requested materials may be so laborious or time-consuming to produce that Defendants may ask Plaintiffs to underwrite those costs or help defray them. This objection is designed to place Plaintiffs on notice that some materials sought by Plaintiffs may simply be prohibitively expensive to produce, in which event the parties will need to agree about how to cover the expense. Plaintiffs complain that such an objection must be preserved by a Protective Order, but no such requirement exists.¹⁴ To the contrary, a responding party is always entitled to object when the cost of complying with a document request would impose an undue burden.

¹⁴ Also, contrary to Plaintiffs' argument, Omnibus Motion at 24, a responding party does not need to file a motion for a protective order if it objects to a production request under Rule 34. A responding party need only object in the response. The requesting party may then abandon the request, seek to resolve the dispute through conference or, failing that, move to compel. Moreover, Rule 26(b) expressly authorizes a Court, by order, to limit discovery in a number of ways, including when the discovery is "unreasonably cumulative or duplicative," or "the burden or expense of the proposed discovery outweighs its likely benefit," taking into account such things as the needs of the case, the parties' resources, and "the importance of the proposed discovery." Fed. R. Civ. P. 26(b)(2).

V. PLAINTIFFS HAVE FAILED TO ESTABLISH ANY BASIS FOR THEIR REQUEST FOR RULE 37 SANCTIONS

Plaintiffs request attorney fees and costs pursuant to Rule 37(a)(4)(A) for what they claim is the "unjustified refusal of Defendants comply [sic] with Plaintiffs' Discovery Requests." Omnibus Motion at 27. However, as set forth fully above, and in the various applicable motions for protective orders, Defendants have filed their motions and have not produced the requested documents because discovery is closed, and Plaintiffs' discovery is unauthorized under Rule 26. In addition, Defendants have served specific responses and objections to each of Plaintiffs' various document requests. Defendants are thus substantially justified in opposing Plaintiffs' current round of discovery. An award of sanctions is unwarranted.

CONCLUSION

For these reasons, Plaintiffs' Omnibus Motion to Compel and Request for Sanctions should be denied.

Dated: January 23, 2004

Respectfully submitted,

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PETER D. KEISLER
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CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Omnibus Motion to Compel: (1) Deposition of Gale Norton; (2) Deposition of David L. Bernhardt; (3) Deposition of Gabriel Sneezy; (4) Deposition of Lucy Querques Denett; (5) Deposition of Donna Erwin and Related Request for Production of Documents; (6) Deposition of Elouise Chicharello; (7) Deposition of Bert T. Edwards; (8) Deposition of James Cason and Related Request for Production of Documents; (9) Plaintiffs' Tenth Request for Production of Documents; (10) Plaintiffs' Eleventh Request for Production of Documents; and (11) Plaintiffs' Twelfth Request for Production of Documents and Request for Sanctions Pursuant to Rule 37* 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*)
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/s/ Kevin P. Kingston
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 GALE NORTON, Secretary of the Interior, et al.,)
)
 Defendants.)
 _____)

Case No. 1:96CV01285
(Judge Lamberth)

ORDER

This matter comes before the Court on *Plaintiffs' Omnibus Motion to Compel*:

(1) Deposition of Gale Norton; (2) Deposition of David L. Bernhardt; (3) Deposition of Gabriel Sneezy; (4) Deposition of Lucy Querques Denett; (5) Deposition of Donna Erwin and Related Request for Production of Documents; (6) Deposition of Elouise Chicharello; (7) Deposition of Bert T. Edwards; (8) Deposition of James Cason and Related Request for Production of Documents; (9) Plaintiffs' Tenth Request for Production of Documents; (10) Plaintiffs' Eleventh Request for Production of Documents; and (11) Plaintiffs' Twelfth Request for Production of Documents and Request for Sanctions Pursuant to Rule 37 (Dkt. # 2439). Upon consideration of the Omnibus Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs' Omnibus Motion to Compel should be and hereby is DENIED in its entirety.

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JAMES E. CASON

1. I, James E. Cason, am the Associate Deputy Secretary of the United States Department of the Interior. In my capacity as Associate Deputy Secretary, I share authority and responsibility at the Secretarial level for the administration and management of the Department's Indian trust programs.

2. I have reviewed the Tenth Request for Production of Documents filed by the Plaintiffs on October 21, 2003. In order to evaluate how burdensome production of the requested documents would be to the Department, the Office of the Solicitor disseminated the Request to offices in the Department which were in its judgment most likely to possess high volumes of such documents. The following information was requested from each office:
 - a. Whether the office has documents potentially responsive to the Request;
 - b. An estimate of the volume of such documents in each office;
 - c. An estimate of the level of effort that would be required to search for and/or produce the documents.

3. In order to ensure that all persons responding to these inquiries performed their estimations in as uniform a manner as possible, the Office of the Solicitor advised that for Plaintiffs' Categories No. 1 through No. 8, only documents in the custody and control of, or transmitted to or received by, the individuals named in those categories should be considered for the purpose of estimating volume and effort. Documents held by representatives of those individuals were not to be included in the estimation exercise.

4. Because of this limitation on the scope of documents considered, and because not all offices were polled, the figures obtained by the Office of the Solicitor and presented in summary fashion in this Declaration cannot be considered to be a complete statement of the burden that would fall on the Department if it is required to produce all documents responsive to the Request. Most offices which responded to the Office of the Solicitor also did not estimate the volume of potentially responsive electronic records which may be in their custody and control, or the degree of effort that would be needed to search for and/or produce any such records.
5. Since filing systems vary and the subject matter of the Plaintiffs' Request is extremely broad, most of the offices polled responded with two sets of figures: an estimate of the volume of documents in its custody and control that it considered to be potentially responsive to the Plaintiffs' Request, with an estimate of the number of employee hours that would be needed to produce them; *and* an estimate of the volume of additional documents that would need to be searched in order to locate *all* of the potentially responsive documents in the office (which are likely to be scattered throughout a variety of types of files and co-mingled with a large volume of non-responsive documents), with an estimate of the number of employee hours that would be required to conduct such a search for and/or production of such documents.
6. Department staff estimated that potentially responsive documents, excluding those in the custody and control of representatives of the individuals named in the Plaintiffs' Categories No. 1 through No. 8 and electronic documents, totaled approximately 800 linear feet; and that those documents would require approximately 1,100 employee-hours to produce. However, the same staff estimated that an additional 80,000 linear feet of documents would need to be searched in order to locate *all* potentially responsive documents in their offices, even excluding those in the custody and control of representatives and electronic documents; and that the number of employee-hours which would be required to conduct such an extensive search would be approximately 192,000 hours.
7. In addition, Zantaz Inc., a contractor for the Department which provides email archival and retrieval services, has been asked to provide estimates of the volume of email messages transmitted to or received by the individuals named in Plaintiffs' Categories No. 1 through No. 8. Although Zantaz has not completed its estimation exercise, the number of such emails located has already exceeded one million. If production of email messages responsive to the Plaintiffs' Request is required, the Department will need to enter into a contract with Zantaz to retrieve copies of the individuals' email messages and then determine a method of separating responsive from non-responsive messages for purposes of production. A review of the messages retrieved by Zantaz would be extremely time-

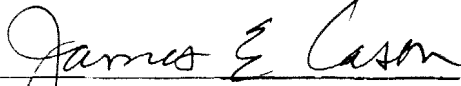
consuming and expensive. An alternative approach to limit the universe of messages, although possibly no less expensive, might be to further contract with Zartaz to perform word searches on the volume of emails of the individuals named.

8. The foregoing information is intended to provide a rough and partial estimate of the degree of effort that would be needed in order to comply with the Plaintiffs' Tenth Request for Production of Documents. In attesting to these estimated figures, I am relying on the information provided by the employees of the various bureaus consulted, and by the Office of the Solicitor.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date

11/24/03


James E. Cason
Associate Deputy Secretary
United States Department of the Interior

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JAMES E. CASON

1. I, James E. Cason, am the Associate Deputy Secretary of the United States Department of the Interior. In my capacity as Associate Deputy Secretary, I share authority and responsibility at the Secretarial level for the administration and management of the Department's Indian trust programs.
2. I have reviewed the Eleventh Request for Production of Documents filed by the Plaintiffs on November 6, 2003 ("the Request"). In order to evaluate how burdensome production of the requested documents would be to the Department, the Office of the Solicitor disseminated the Request to offices in the Department which were in its judgment most likely to possess high volumes of such documents. The following information was requested from each office:
 - a. Whether the office has documents potentially responsive to the Request;
 - b. An estimate of the volume of such documents in each office;
 - c. An estimate of the level of effort that would be required to search for and/or produce the documents.
3. The Department was advised by the Office of the Solicitor to interpret the ambiguous language of the Request as requesting information about only those IIM trust beneficiary land transactions in the Navajo Region of the Bureau of Indian Affairs. Accordingly, the phrase "within the Navajo Region" was considered a limitation on the subject matter of the Request.
4. In order to ensure that all persons responding to these inquiries performed their estimations in as uniform a manner as possible, the Office of the Solicitor further advised that for all of the plaintiffs' categories in the Request, only documents in the custody and

control of, or transmitted to or received by, the individuals identified by name in those categories should be considered for the purpose of estimating volume and effort. Documents held by representatives of those individuals were not to be included in the estimation exercise.

5. Because documents in the custody and control of, or transmitted to or received by, representatives of the individuals specifically named were not considered, because not all offices were polled, and because some offices responded with partial information, the figures obtained by the Office of the Solicitor and presented in summary fashion in this Declaration cannot be considered to be a complete statement of the burden that would fall on the Department if it is required to produce all documents responsive to the Request. Most offices which responded to the Office of the Solicitor also did not estimate the volume of potentially responsive electronic records which may be in their custody and control, or the degree of effort that would be needed to search for and/or produce any such records.
6. Some of the offices polled were able to estimate the volume of potentially responsive records without performing an extensive search, while others were able only to estimate the volume of documents that would need to be searched in order to locate all potentially responsive documents in the office. Department staff estimates of the volume of potentially responsive documents and the volume of documents that would need to be searched in order to locate all potentially responsive documents, excluding those in the custody and control of representatives of the individuals named in the plaintiffs' categories and electronic documents, totaled approximately 1,700 linear feet. Department staff estimates of the number of employee hours that would be required to search for and produce potentially responsive documents totaled approximately 2,800 employee-hours.
7. In addition, Zantaz Inc., a contractor for the Department which provides email archival and retrieval services, was asked to provide estimates of the volume of email messages transmitted to or received by the individuals specifically named in the Request. The number of such emails estimated by Zantaz exceeded 1.4 million messages, and would be expected to fill up to 80 compact disks if retrieved. Zantaz advises that this number is raw data as reported by its database upon inquiry, and may decrease by approximately 30% upon elimination of false positives and duplicate messages.
8. If production of email messages responsive to the Request is required, the Department will need to enter into a contract with Zantaz to retrieve copies of the individuals' email messages. Zantaz has estimated the cost of retrieval to email messages responsive to the Plaintiffs' Tenth, Eleventh, and Twelfth Requests for Production to be \$27,000. Approximately \$24,000 would be needed for messages responsive to the Eleventh Request alone. It would then be necessary to determine a method of separating responsive from non-responsive messages for purposes of production. A review of the messages retrieved by Zantaz would be extremely time-consuming and cause further substantial expense. An

alternative approach to limit the universe of messages, although possibly no less expensive, might be to further contract with Zantaz to perform word searches on the volume of emails of the individuals named.

9. The foregoing information is intended to provide a rough and partial estimate of the degree of effort that would be needed in order to comply with the Plaintiffs' Eleventh Request for Production of Documents. In attesting to these estimated figures, I am relying on the information provided by the employees of the various bureaus consulted, and by the Office of the Solicitor.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

January 23, 2004
Date

James E. Cason
James E. Cason
Associate Deputy Secretary
United States Department of the Interior

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JAMES E. CASON

1. I, James E. Cason, am the Associate Deputy Secretary of the United States Department of the Interior. In my capacity as Associate Deputy Secretary, I share authority and responsibility at the Secretarial level for the administration and management of the Department's Indian trust programs.
2. I have reviewed the Twelfth Request for Production of Documents filed by the Plaintiffs on November 10, 2003 ("the Request"). In order to evaluate how burdensome production of the requested documents would be to the Department, the Office of the Solicitor disseminated the Request to offices in the Department which were in its judgment most likely to possess high volumes of such documents. The following information was requested from each office:
 - a. Whether the office has documents potentially responsive to the Request;
 - b. An estimate of the volume of such documents in each office;
 - c. An estimate of the level of effort that would be required to search for and/or produce the documents.
3. In order to ensure that all persons responding to these inquiries performed their estimations in as uniform a manner as possible, the Office of the Solicitor advised that for all of the plaintiffs' categories in the Request, only documents in the custody and control of, or transmitted to or received by, the individuals identified by name in those categories should be considered for the purpose of estimating volume and effort. Documents held by representatives of those individuals were not to be included in the estimation exercise.

4. Because documents in the custody and control of, or transmitted to or received by, representatives of the individuals specifically named were not considered, because not all offices were polled, and because some offices responded with partial information, the figures obtained by the Office of the Solicitor and presented in summary fashion in this Declaration cannot be considered to be a complete statement of the burden that would fall on the Department if it is required to produce all documents responsive to the Request. Most offices which responded to the Office of the Solicitor also did not estimate the volume of potentially responsive electronic records which may be in their custody and control, or the degree of effort that would be needed to search for and/or produce any such records.
5. Some of the offices polled were able to estimate the volume of potentially responsive records without performing an extensive search, while others were able only to estimate the volume of documents that would need to be searched in order to locate all potentially responsive documents in the office. Department staff estimates of the volume of potentially responsive documents and the volume of documents that would need to be searched in order to locate all potentially responsive documents, excluding those in the custody and control of representatives of the individuals named in the plaintiffs' categories and electronic documents, exceeded 20,000 linear feet. Department staff estimates of the number of employee hours that would be required to search for and produce potentially responsive documents exceeded 11,000 employee-hours.
6. In addition, Zantaz Inc., a contractor for the Department which provides email archival and retrieval services, was asked to provide estimates of the volume of email messages transmitted to or received by the individuals specifically named in the Request. The number of such emails estimated by Zantaz exceeded 1.3 million messages, and would be expected to fill up to 80 compact disks if retrieved. Zantaz advises that this number is raw data as reported by its database upon inquiry, and may decrease by approximately 30% upon elimination of false positives and duplicate messages.
7. If production of email messages responsive to the Request is required, the Department will need to enter into a contract with Zantaz to retrieve copies of the individuals' email messages. Zantaz has estimated the cost of retrieval of email messages responsive to the Plaintiffs' Tenth, Eleventh, and Twelfth Requests for Production to be \$27,000. Approximately \$19,500 would be needed for messages responsive to the Twelfth Request alone, but if messages responsive to the Eleventh Request had already been retrieved, the additional cost for retrieval of all messages responsive to the Twelfth Request would be minimal. It would then be necessary to determine a method of separating responsive from non-responsive messages for purposes of production. A review of the messages retrieved by Zantaz would be extremely time-consuming and cause further substantial expense. An alternative approach to limit the universe of messages, although possibly no less expensive, might be to further contract with Zantaz to perform word searches on the volume of emails of the individuals named.

8. The foregoing information is intended to provide a rough and partial estimate of the degree of effort that would be needed in order to comply with the Plaintiffs' Twelfth Request for Production of Documents. In attesting to these estimated figures, I am relying on the information provided by the employees of the various bureaus consulted, and by the Office of the Solicitor.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

January 23, 2004
Date

James E. Cason
James E. Cason
Associate Deputy Secretary
United States Department of the Interior