

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior,
et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
"REPORT" REGARDING THE ERWIN SCHEDULING MATTER**

On November 15, 2004, plaintiffs filed a combined "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic] and Request for Attorney's Fees with Respect Thereto." As explained in further detail in the accompanying Memorandum of Points and Authorities, defendants move that plaintiffs' "Report" and its exhibits be struck from the record because (1) the "Report" was never authorized by this Court or by any provision of the Federal Rules of Civil Procedure, and (2) it is entirely improper under *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 807 (1987); *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003); and this Court's September 2, 2004 Memorandum and Order at 4-6.¹

In the alternative, defendants request that the Court grant them 30 days from the date of its ruling upon this Motion to file a substantive response to the "Report."

In accordance with the Local Rules of the Court, defendants' counsel conferred with counsel for plaintiffs concerning this Motion. Plaintiffs' counsel informed us that they oppose the Motion to Strike, and they have not taken a position regarding the alternative request for 30 days to respond to the Report.

¹Defendants move only that the "Report" and its exhibits be struck from the record, not the plaintiffs' request for attorneys' fees. Defendants intend to file their response and objections to the fee request on or before December 14, 2004, in accordance with the Court's February 5, 2003 Order at 30.

A proposed order accompanies this Motion and the Memorandum of Points and Authorities.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

MICHAEL F. HERTZ
Director

/s/ Tracy L. Hilmer
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Washington, D.C. 20044
(202) 307-0474

DATED: November 29, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on November 29, 2004 the foregoing *Defendants' Motion to Strike Plaintiffs' "Report" Regarding the Erwin Scheduling Matter* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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

/s/ Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS'
"REPORT" REGARDING THE ERWIN SCHEDULING MATTER**

Plaintiffs have filed a combined "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic] and Request for Attorney's Fees with Respect Thereto." Defendants move to strike the "Report" portion of the filing and the exhibits to the "Report."¹ Plaintiffs' "Report" was never authorized by this Court and is entirely improper under *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 807 (1987); *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003); this Court's September 2, 2004 Memorandum and Order at 4-6; and the Federal Rules of Civil Procedure.

Background

In early December 2002, plaintiffs sought to take the deposition of Donna Erwin, who was then the Acting Special Trustee, as part of the preparation for Trial 1.5. The government sought to defer Ms. Erwin's deposition, and that of Bert Edwards, until after January 6, 2003, the date the Court had assigned for the government to file its historical accounting plan. As grounds for the motion, the government argued that Ms. Erwin was intensely involved in the creation of the plans and had certain personal obligations in late December 2002 that would make it overly

¹Accompanying the "Report" is a claim for an astonishing \$162,761.52 in attorney's fees. We do not move to strike the fee request, but rather intend to address it separately on or before December 14, 2004, in accordance with the Court's February 5, 2003 order at 30.

burdensome for her to be deposed before January 6, 2003. The Court held a hearing on the matter on December 13, 2002. A misunderstanding between government counsel and Donna Erwin and her staff resulted in inaccurate information concerning Ms. Erwin's plans to be in Washington, DC prior to January 6, 2003 being given to the Court at the December 13 hearing. As a result, the Court ordered Ms. Erwin to submit to deposition the week following the December 13 hearing in Albuquerque, New Mexico, where she resided. Following a subsequent hearing before the Court on December 17, 2002 at which government counsel attempted to explain the misunderstanding regarding Ms. Erwin's schedule, Ms. Erwin was deposed by plaintiffs in Washington, DC on December 20, 2002. Ms. Erwin was not called to appear in person as a witness by either side at Trial 1.5.

Plaintiffs had agreed to conclude Ms. Erwin's December 20, 2002 deposition by 4:30 pm so that Ms. Erwin could make her flight back to Albuquerque. Dec. 20, 2002 Erwin Dep. at 4 (Exhibit A). Shortly before 4:30, after having apparently concluded their questioning of Ms. Erwin regarding Trial 1.5 issues, plaintiffs' counsel asked Ms. Erwin regarding the December 13 and 17, 2002 hearings: "And you believe your attorneys have been fully truthful with the Court?" *Id.* at 284. Government counsel asserted a privilege and, after a conference with Ms. Erwin, directed her not to answer the question. Plaintiffs filed a motion to compel Ms. Erwin to answer the question. The Court granted the motion. The Court also awarded plaintiffs sanctions for reasonable attorney's fees and costs incurred in presenting the motion to compel and in re-deposing Ms. Erwin upon the matter she had been directed not to answer. *Cobell v. Norton*, 213 F.R.D. 16, 32-33 (D.D.C. 2003). The Court did not in that order or subsequently authorize or direct the plaintiffs or anyone else to file a "report" regarding the Erwin scheduling matter.

Ms. Erwin retained personal counsel and submitted to re-deposition on February 12 and 13, 2003. She was re-deposed again on October 14, 2004, pursuant to the Court's September 2, 2004 Memorandum and Order at p. 7 ("Sept. 2, 2004 Order").

Argument

In filing this “Report,” absent an order of the Court, plaintiffs have assumed the mantle of a special master or a special prosecutor – positions they, as interested parties in this litigation, are legally ineligible to hold. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 807 (1987) (plaintiff’s counsel was ineligible to serve as special prosecutor of alleged criminal contempt); *Jenkins v. Sterlacci*, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988) (ethical restrictions of 28 U.S.C. § 455 apply to a special master), cited with approval in *Cobell v. Norton*, 334 F.3d 1128, 1144 (D.C. Cir. 2003). Plaintiffs do not expressly specify the purpose of the document, but the opening sentences of the “Report” level charges of unethical and even criminal conduct by various government attorneys and officials. “Report” at 2. Thus, it is apparent that plaintiffs’ unstated purpose in submitting this “Report” is to instigate some sort of criminal or disciplinary proceeding against the named attorneys and officials. Plaintiffs do not state under what authority they purport to submit their “findings”, but no order of this Court and no rule of procedure has authorized them to undertake the role of investigator or prosecutor.

The Court did not appoint plaintiffs to serve in such a role. Indeed, the Court refused to permit the plaintiffs to depose the government’s counsel in connection with the Erwin scheduling issue in part because it found: “Any deposition of defendants’ trial counsel would appear to be directed only at uncovering facts useful for the prosecution of criminal contempt. Plaintiffs are ineligible to undertake such an investigation.” Sept. 2, 2004 Order at 4-5. The Court’s September 2, 2004 ruling was therefore consistent both with *Young* and with the Court of Appeals’ holding that district courts are not empowered to appoint agents to function in “an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system.” *Cobell v. Norton*, 334 F.3d at 1142. Plaintiffs’ counsel, however, have clearly decided to ignore the holdings of the Court of Appeals and this Court in their continuing unsavory effort

to accumulate attorneys' fees and tarnish the reputations of defendants and their counsel.² Submission of the "Report" violates the principles set forth by the Supreme Court in *Young*, and by the Court of Appeals and this Court in this very case. Indeed, the bias that is evident in plaintiffs' "Report" perfectly illustrates the reason why the Supreme Court refused to allow a party in a civil case to serve as a special prosecutor regarding alleged misconduct of its adversary.

Further, even if plaintiffs were not ineligible to pursue criminal sanctions, the "Report" is procedurally defective. It is not a motion or any other type of pleading recognized by the Federal Rules of Civil Procedure. The "Report" is entirely improper and should therefore be struck from the record.

If, despite the authorities cited above, the Court determines that it will entertain plaintiffs' "Report" on the merits, defendants respectfully request 30 days from the Court's ruling upon this motion to strike for responses to be filed to the "Report." Such time would be necessary to make a substantive response because the "Report" is not only lengthy, but also based upon a biased and incomplete selection of portions of the depositions and documents pertaining to the Erwin scheduling issue.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

MICHAEL F. HERTZ
Director

²Although plaintiffs' accuse their opposing counsel of "once more flouting their ethical obligations", Report at 2, it must be noted that referrals of the government's current defense counsel to the Disciplinary Committee of the Bar of the District Court for other matters related to this litigation have resulted in findings that no further proceedings were warranted.

/s/ Tracy L. Hilmer
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Washington, D.C. 20044
(202) 307-0474

DATED: November 29, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELUISE PEPION COBELL, *et al.*,

Plaintiffs,

v.

BRUCE BABBITT, Secretary of the
Interior, *et al.*,

Defendants.

No. 1:96CV01285 RCL

Washington, D.C.

December 20, 2002

DEPOSITION OF:

DONNA ERWIN,

called for examination by counsel for the plaintiffs,
pursuant to notice of subpoena, in the law offices of
Kilpatrick and Stockton, 607 Fourteenth Street, N.W.,
at 10:30 a.m., when were present on behalf of the
respective parties:

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

EXHIBIT A
Defendants' Memorandum of Points and
Authorities in Support of Their Motion to
Strike Plaintiffs' "Report" Regarding the
Erwin Scheduling Matter

www.nealrgross.com

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:35 a.m.)

3 Whereupon,

4 DONNA ERWIN

5 was called as a witness by counsel for the plaintiffs
6 and, having been first duly sworn, was examined and
7 testified as follows:

8 MR. BROWN: Good morning, Ms. Erwin. My
9 name is Mark Brown. I am one of the attorneys for the
10 plaintiffs. I apologize for our late start here. You
11 need to catch a plane and be out of here at 4:30. Is
12 that right?

13 THE WITNESS: Yes.

14 MR. BROWN: All right. We are going to do
15 our best to accommodate you.

16 MS. SPOONER: We really appreciate that.
17 Can I have a moment to put a couple of
18 things on the record?

19 MR. BROWN: Sure.

20 MS. SPOONER: First is to thank you for
21 agreeing to start earlier, although I know that wasn't
22 the detail there, and for agreeing to let Ms. Erwin

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1 THE WITNESS: Yes.

2 By MR. BROWN:

3 Q And you believe your attorneys have been
4 fully truthful with the Court?

5 MS. SPOONER: I'm going to object on that
6 on the grounds that it's protected by the attorney-
7 client privilege.

8 MR. BROWN: It can't possibly be.

9 MR. KIEFFER: It's her belief she has
10 about her attorneys. It's not whether her attorney
11 said --

12 MS. SPOONER: Yes, except that we've had
13 a number of discussions about that and I don't
14 believe, as with Ms. Skobell, when Mr. Gingold made
15 objections that she can properly separate her
16 discussions with her attorneys from her beliefs.

17 MR. GINGOLD : We're dealing with a
18 finding by the Court that Ms. Erwin deliberately
19 deceived the Court. That's a finding of fraud with no
20 exceptions to privilege to the extent it exists
21 applies here in the --

22 MS. SPOONER: Absolutely not. I'm

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WASHINGTON, D.C. 20005-3701

1 THE WITNESS: No.

2 MR. BROWN: Who is your personal counsel?

3 THE WITNESS: I am just in the process of
4 discussing with someone.

5 MR. BROWN: So you have not obtained
6 personal counsel?

7 THE WITNESS: I've not obtained personal
8 counsel. I am in the process.

9 MR. BROWN: Okay. Ms. Erwin, don't you
10 have the opportunity to do that.

11 MS. SPOONER: Ms. Erwin has to go. It's
12 now 4:37 by my clock.

13 MR. BROWN: Well, we've taken that break,
14 so I want to finish that line of questions.

15 MS. SPOONER: We were 5 minutes on that
16 break. It's now 4:38 by my clock.

17 MR. BROWN: Are you instructing her not to
18 answer any further questions?

19 MS. SPOONER: What other lines of
20 questioning do you have?

21 MR. BROWN: We're going to find out.

22 MS. SPOONER: No, given those certain

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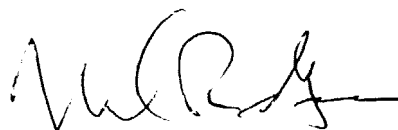
CERTIFICATE

This is to certify that the foregoing proceedings in the
matter of: The Deposition of
 DONNA ERWIN

held on: December 20, 2002,

at the location of: 607 - 14th Street, NW,
 Washington, DC,

were duly recorded and accurately transcribed under my
direction; further, that said proceedings are a true and
accurate record of the testimony given by said witness; and
that I am neither counsel for, related to, nor employed by
any of the parties to this action in which this deposition
was taken; and further that I am not a relative nor an
employee of any of the parties nor counsel employed by the
parties, and I am not financially or otherwise interested in
the outcome of the action.



Notary Public/Reporter in and for

the District of Columbia.

My commission expires

March 31, 2006.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of *Defendants' Motion to Strike Plaintiffs' "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic]"* (filed Nov. 15, 2004), and the entire record in this case, it is this _____ day of _____, 2004, hereby

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

FURTHER ORDERED that *Plaintiffs' "Report on the Status of the Evidence Concerning Defendants' and the Department of Justice's Misrepresentations to this Court on December 13 and December 17, 2003[sic]"* (filed Nov. 15, 2004) and the exhibits thereto be struck from the record in this case.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

cc:

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