

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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|  |   |                  |
|--|---|------------------|
| 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.                            | ) |                  |

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**DEFENDANTS' MOTION FOR LEAVE TO FILE A SURREPLY  
IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DEPOSITION  
TESTIMONY OF ANSON BAKER AND REQUEST FOR SANCTIONS**

In their Reply In Support of Motion to Compel Deposition Testimony of Anson Baker And Request for Sanctions ("Reply"),<sup>1</sup> Plaintiffs employ their most trusted litigation tactic: When their position is unsupported and insupportable, they engage in name-calling and mud-slinging as a substitute for proper legal argument. In this vein, the Reply includes an allegation that ". . . the referral of the Associate Attorney General and five other Justice Department attorneys to the Disciplinary Panel of this Court [is] powerful evidence that they have neither the character nor fitness to continue as fiduciaries for the Trust." Reply at 1. This issue – whether a referral to a "Disciplinary Panel" is somehow evidence that Anson Baker (who is not a lawyer and was not referred to any such panel) should sit for more deposition questions from Plaintiffs' counsel – was not addressed in their original motion to compel, was not raised by Defendants in their Opposition, and is thus not properly a subject addressed in the Reply. See Board of Regents of the Univ. of Washington v. EPA, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (to prevent

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<sup>1</sup> On May 19, 2004, Plaintiffs confusingly filed two papers with the same title. This Motion seeks leave to file a surreply in response to Plaintiffs' Reply with the Docket entry # 2571.

"sandbagging," issues not raised until the reply brief are waived); GFL Advantage Fund v. Colkitt, 216 F.R.D. 189, 197 (D.D.C. 2003) (if the reply raises new matters then the opponent may be "sandbagged" by not being able to answer). Indeed, Plaintiffs' personal attacks have no possible relation to the Motion to compel further deposition testimony from Anson Baker. However, because Plaintiffs have raised this new issue for the first time in a reply, Defendants should be permitted to file a surreply which responds to this new allegation.<sup>2</sup> See Ben-Kotel v. Howard Univ., 319 F.3d 532, 536 (D.C. Cir. 2003) (the district court "routinely" grants motions for leave to file a surreply when a party is "'unable to contest matters presented to the court for the first time' in the last scheduled pleading") (quoting Lewis v. Rumsfeld, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)).

As set forth in the attached Surreply,<sup>3</sup> the referral of the attorneys to the Committee on Grievances was not "evidence" of unfitness. The referral itself was only evidence that based upon the limited and incomplete information available, the Court felt further investigation was warranted. As the Court is aware,<sup>4</sup> the Committee on Grievances has "completed its investigation." See, e.g., Letter from Laurel Malson, Chair, Committee on Grievances to Sandra Spooner (February 27, 2004) (attached as Exhibit 2). The Committee "has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the

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<sup>2/</sup> Although Plaintiffs' allegation is "new" in the sense that it was not raised or discussed in the underlying motion or opposition, Plaintiffs have, of course, raised this allegation many previous times in equally meaningless contexts in other papers filed in this litigation.

<sup>3/</sup> The Surreply is attached as Exhibit 1.

<sup>4/</sup> The Committee chair advised undersigned counsel that the Court has been informed of the Committee's conclusions.

matter is now closed." Id. Each of the individuals referred by the Court has received such a notice from the Committee. Because Plaintiffs' Reply makes new allegations not raised in their initial brief or Defendants' response, Defendants should be permitted to file a surreply that explains why Plaintiffs are mistaken.<sup>5</sup>

### **CONCLUSION**

For these reasons, Defendants' Motion should be granted and Defendants' Surreply should be accepted for filing.

Dated: May 25, 2004

Respectfully submitted,

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

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

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<sup>5</sup> Plaintiffs' counsel has informed Defendants' counsel that Plaintiffs will oppose this Motion.

CERTIFICATE OF SERVICE

I hereby certify that, on May 25, 2004 the foregoing *Defendants' Motion for Leave to File a Surreply in Opposition to Plaintiffs' Motion to Compel Deposition Testimony of Anson Baker and Request for Sanctions* 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

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

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**DEFENDANTS' SURREPLY IN OPPOSITION TO PLAINTIFFS'  
MOTION TO COMPEL DEPOSITION TESTIMONY OF  
ANSON BAKER AND REQUEST FOR SANCTIONS**

In their Reply In Support of Motion to Compel Deposition Testimony of Anson Baker And Request for Sanctions ("Reply"),<sup>1</sup> Plaintiffs allege that ". . . the referral of the Associate Attorney General and five other Justice Department attorneys to the Disciplinary Panel of this Court [is] powerful evidence that they have neither the character nor fitness to continue as fiduciaries for the Trust." Reply at 1. Although they do not elaborate, presumably Plaintiffs are referring to the Memorandum Opinion and Order of December 23, 2002, when the Court referred individuals to the District Court's Committee on Grievances. See Cobell v. Norton, 212 F.R.D. 14, 24 (D.D.C. 2002). The referral itself was never evidence of anything, except that based upon the limited and incomplete available information the Court felt further investigation of the matter was warranted. That investigation has taken place and the Committee on Grievances has "completed its investigation." See, e.g., Letter from Laurel Malson, Chair, Committee on Grievances to Sandra Spooner (February 27, 2004) (attached as Exhibit 1A). The Committee

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<sup>1</sup> On May 19, 2004, Plaintiffs confusingly filed two papers with the same title. This Surreply responds to Plaintiffs' Reply with the Docket entry # 2571.

"has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed." Id. Each of the individuals referred by the Court has received such a notice from the Committee.

The unspoken premise for any mention of the referral is the implied notion that, because attorneys representing Defendants were referred to the Committee, the Court cannot trust or believe anything those attorneys – or other attorneys aligned with them – represent to the Court and that therefore all argument – no matter how overwhelmingly persuasive – from Defendants should be ignored, and Plaintiffs thus granted any relief they request. The logic is faulty and the premise reprehensible. The referral to the Committee on Grievances – especially in light of the outcome of the subsequent investigation – provides no support for Plaintiffs' motion to compel further deposition testimony from Anson Baker and does not support their request for sanctions.

### **CONCLUSION**

For these reasons, and for the reasons in Defendants' Opposition, Plaintiffs' Motion to Compel Deposition Testimony of Anson Baker should be denied.

Dated: May 25, 2004

Respectfully submitted,

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

/s/ Sandra P. Spooner  
SANDRA P. SPOONER  
D.C. Bar No. 261495

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JOHN T. STEMPLEWICZ  
Senior Trial Counsel  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 514-7194

*Spooner*

**UNITED STATES DISTRICT COURT**  
FOR THE DISTRICT OF COLUMBIA  
**COMMITTEE ON GRIEVANCES**  
E. Barrett Prettyman United States Courthouse  
333 Constitution Avenue, N.W., Room 4106  
Washington, D.C. 20001

Laurel Pyke Malson, Chair  
(202) 624-2576  
(202) 628-5116 fax

February 27, 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Sandra P. Spooner, Esquire  
Deputy Director  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice  
P.O. Box 875, Ben Franklin Station  
Washington, D.C. 20044-0875

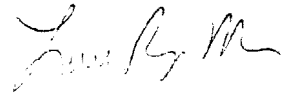
Re: Cobell v. Norton Referral

Dear Ms. Spooner:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,



Laurel Pyke Malson, Chair  
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge  
Sheldon Snook, Clerk



*Spooner*

**UNITED STATES DISTRICT COURT**

FOR THE DISTRICT OF COLUMBIA

**COMMITTEE ON GRIEVANCES**

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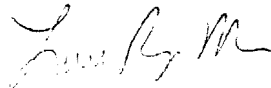
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The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,



Laurel Pyke Malson, Chair  
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge  
Sheldon Snook, Clerk

EXHIBIT 2  
Defendants' Motion for Leave to File a  
Surreply in Opposition to Plaintiffs' Motion to  
Compel Deposition Testimony of Anson Baker  
and Request for Sanctions

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

Case No. 1:96CV01285  
(Judge Lamberth)

**ORDER**

This matter comes before the Court on *Defendants' Motion for Leave to File a Surreply in Opposition to Plaintiffs' Motion to Compel Deposition Testimony of Anson Baker and Request for Sanctions* (Dkt No. \_\_\_\_\_). Upon consideration of the Defendants' Motion, Plaintiffs'

Opposition, any Reply thereto, the applicable law and the entire record of this case, it is hereby

ORDERED that Defendants are granted leave to file their *Surreply in Opposition to Plaintiffs' Motion to Compel Deposition Testimony of Anson Baker and Request for Sanctions*.

Their Surreply that was previously lodged with the clerk as an exhibit to their Motion (Dkt No. \_\_\_\_\_) shall be deemed filed this date.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge

cc:

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