**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Case No.96CV1285 (RCL) |
| GALE NORTON, Secretary of the Interior, et al., | ) | |
| Defendants. | ) | |

**PLAINTIFFS' NOTICE OF REFILING PLAINTIFFS' MOTION TO COMPEL MICHAEL CARR'S DEPOSITION AND THE PRODUCTION OF DOCUMENTS RELATED THERETO [2298]**

On September 2, 2004, this Court denied as moot *Plaintiffs' Motion to Compel Michael Carr's Deposition and the Production of Documents Related Thereto,* dated September 24, 2003, [2298] ("Motion to Compel") and granted leave for plaintiffs to refile the Motion to Compel once contemnors' desperate efforts to disqualify this Court on appeal were resolved.[1] They are conclusively resolved. The Supreme Court summarily and emphatically rejected contemnors' meritless petition for a writ of certiorari on February 22, 2005.

Therefore, in accordance with this Court's instructions, attached hereto is the Motion to Compel and plaintiffs' reply.[2] As this Court may note, this matter has been fully briefed for a year

[1]*See Order*, dated September 2, 2004, at 2 ("It is FURTHER ORDERED that ... Plaintiffs' Motion to Compel Michael Carr's Deposition and Production of Documents Related Thereto [2298] shall be and hereby [is] ... DENIED AS MOOT, with leave to refile ....").

[2]The Motion to Compel, Plaintiffs' Exhibit 1, was filed as part of *Plaintiffs' Consolidated Opposition to Defendants' and Michael Carr's Motions for Protective Order and to Quash Notice of Deposition of Michael Carr and Motion to Compel* [2297] and [2298]. *Plaintiffs' Consolidated Reply re Motion to Compel Michael Carr's Deposition and the Production of Documents Related Thereto,* dated October 14, 2003, Plaintiffs' Exhibit 2, replies to both the trustee-delegates' and Michael Carr's responses to the Motion to Compel. Plaintiffs note that since the filing of the Motion to Compel several events have occurred that vitiate both Carr's and the government's opposition to the Motion to Compel. First, on April 5, 2004, the master resigned

and one-half – since October 14, 2003 – and is ripe for a decision so plaintiffs finally can begin to hold Carr and his fellow contemnors fully accountable for their deplorable deception, their conscious violations of this Court's orders, and for some of the harm they have inflicted unconscionably on 500,000 individual Indian trust beneficiaries.[3]

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without preparing a report and recommendation that assessed the culpability of any contemnor. Second, on May 20, 2004, the Court of Appeals barred the master from preparing any such report and recommendation. Third, on February 8, 2005, this Court again rejected the government's claim that plaintiffs' discovery is limited by APA constraints and expressly reconfirmed plaintiffs' right to full discovery under federal rules. Thus, the superficial arguments raised by Carr and the government relative to the timing and the nature and scope of plaintiffs' discovery have been vitiated by events as well as pertinent decisions of this Court, the Court of Appeals, and the U.S. Supreme Court.

Finally, plaintiffs have discovered no governing law that bars the deposition of Carr by notice and bars document discovery through a request for production where, as here, both the deponent and his counsel entered an appearance in these proceedings and the latter's appearance is for the general purpose of defending the contemnor before this Court. Moreover, Carr's counsel not only entered an appearance, he has participated in hearings and status conferences presided over by the master and filed papers on matters related thereto. Finally, it is clear that the representation of Carr is solely "in connection" with the *Cobell* litigation. Otherwise, the generous payments to Carr's counsel would constitute a misappropriation of federal funds since the payments can only be made if the professional services are rendered "in connection" with the *Cobell* litigation.

[3]This is a Notice of refiling the Motion to Compel for which this Court has already granted leave. Therefore, no motion is required under local rules. Further, there is no requirement to meet and confer under local rules. However, in anticipation of righteously protests from the usual suspects, plaintiffs met and conferred with Carr's counsel and counsel for the government, each of whom opposes this filing. Because contemnors' counsel have been, and continue to be, paid millions of dollars in appropriated funds to defend the contemptuous behavior of the contemnors, plaintiffs expect to continue to be deluged with frivolous motions and oppositions. Apparently, there is no incentive for contemnors to be circumspect since the American taxpayer is paying their bills. Fortunately, the IRS should be recovering a sizeable portion of the value of such funds inasmuch as the payments to private counsel constitute taxable income to the contemnor.

Respectfully submitted,

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March 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' NOTICE OF REFILING OF PLAINTIFFS' MOTION TO COMPEL MICHAEL CARR'S DEPOSITION AND THE PRODUCTION OF DOCUMENTS RELATED THERETO [2298] was served on the following, on this day, March 30, 2005.

**Via Facsimile, Pursuant to Agreement**

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/s/ Geoffrey Rempel

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated,** | |
| **Plaintiffs,** | |
| **vs.** | **Case No.96CV1285 (RCL)** |
| **GALE NORTON, Secretary of the Interior, et al.,** | |
| **Defendants.** | |

**PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' AND MICHAEL CARR'S MOTIONS FOR PROTECTIVE ORDER AND TO QUASH NOTICE OF DEPOSITION OF MICHAEL CARR[1]**
**and**
**MOTION TO COMPEL MICHAEL CARR'S DEPOSITION AND THE PRODUCTION OF DOCUMENTS RELATED THERETO[2]**

## INTRODUCTION

On September 17, 2002, this Court conferred on plaintiffs "full discovery" rights as "Further Relief-Discovery," after recognizing that "defendants have amply demonstrated during

[1]Plaintiffs file this consolidated opposition with respect to two motions for protective order and to quash plaintiffs' discovery filed by Interior Defendants and Michael Carr, respectively: (1) *Interior Defendants' Motion for Protective Order and Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-party Michael Carr and Defendants* (September 11, 2003); and (2) *Non-party Michael Carr's Motion to Quash Plaintiffs' Notice of Deposition and for a Protective Order to Prevent Discovery Relating to Contempt Charges* (September 10, 2003). Plaintiffs have filed duplicate originals of their consolidated opposition and motion to compel with both this Court and the Master because the Court has not specifically directed the Master to handle this specific discovery matter in accordance with its September 17, 2003 decision. *See Cobell v. Norton*, 226 F.Supp.2d at 159 ("[U]nless the Court specifically directs that they be handled by Special Master Balaran," these issues are not within his purview).

[2]Counsel for plaintiffs and defendants have attempted to meet and confer with Norton's counsel and Carr's personal counsel in accordance with the Local Rule 7.1(m), in an attempt to resolve this matter and narrow the areas of disagreement. Messages were left at counsel's office. Since neither responded prior to the filing of this motion to compel, plaintiffs presume they oppose these motion and the relief sought herein.

the two and a half years since this Court's Phase I trial ruling that they cannot be trusted to report in a timely manner complete and accurate information regarding the status of trust reform and their efforts to discharge their fiduciary responsibilities properly." *Cobell v. Norton*, 226 F. Supp.2d 1, 159 (D.D.C. 2002). Critically, the Court emphasized the need for discovery because defendants' self-reporting was inadequate:

> At the time the Court issued its Phase I trial decision, the Court found that it was sufficient for the defendants to file quarterly status reports and for plaintiffs to then "petition the court to order defendants to provide further information as needed if such information cannot be obtained through informal requests directly to defendants." *Cobell V*, 91 F. Supp.2d at 59. *See also* Contempt II Tr. at 1474-75. **The Court finds that this approach is no longer appropriate** in light of the false and misleading quarterly status reports filed by the defendants since March 2000. Accordingly, the Court will permit plaintiffs **full discovery** on matters that they otherwise would not have been able to explore prior to this decision. While the Court will thus expand the scope of discovery for the plaintiffs, the Special Master-Monitor shall ensure that such discovery does not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court. As noted above, the Court will also continue to require the defendants to file quarterly status reports pursuant to the December 21, 1999 Order.

*Id.* (emphasis added). Thus, not only have plaintiffs' been granted unfettered and full discovery rights, but the Court has recognized the importance of plaintiffs' role in uncovering misconduct and fraud in this litigation.

Norton and Carr, unwilling to accept the Court's mandate, attempt to impede plaintiffs' discovery efforts through every means possible including the filing of frivolous motions and baseless assertion of privileges. This Court has routinely rejected these attempts at obfuscation. *See e.g., Cobell v. Norton,* 212 F.R.D. 24 (D.D.C. 2002) *appeal dismissed with prejudice* slip op. No. 03-5093 (D.C. Cir. September 9, 2003) (denying Norton's assertion of attorney client privilege to limit discovery); *Cobell v. Norton,* 213 F.R.D. 16, 19, 31 (D.D.C. 2003) (rejecting Justice counsel's attempt to limit deposition testimony and obstruct review of Justice counsel misrepresentation to Court and sanctioning Justice counsel); *Cobell v. Norton,* 213 F.R.D. 1 (D.D.C. 2002) (rejecting Norton's assertion of work product doctrine to limit discovery).

Disregarding these decisions and the awarded sanction of full discovery, Norton and Carr

remain undeterred. Again, she and Carr seek to obstruct and subvert this Court's truth-seeking function[3] by preventing the deposition of Michael Carr – a *former* government lawyer who made an appearance in this case and had been involved in much of the litigation misconduct and fraudulent activities perpetrated by Norton and her senior managers and counsel. Because of his involvement, there can be no dispute that Carr has information directly relevant to the culpability of the Named Individuals and their involvement in the litigation misconduct and fraud on this Court. Indeed, it is noteworthy that neither Norton nor Carr dispute this critical fact.

In short, plaintiffs have "full discovery" rights as ordered by this Court. We seek to take a deposition that will elicit information highly probative to issues before this Court. Therefore the Carr deposition is not only appropriate, but necessary to the development of a complete record for this Court's consideration. As we will show with greater specificity below, neither Norton nor Carr cite any legitimate justification to limit plaintiffs' "full discovery" rights, generally, or to prevent the deposition of Carr, specifically. Accordingly, Norton's and Carr's motions (hereafter referred to collectively as the "Carr Motion") for a protective order and to quash the subpoena should be denied. Moreover, inasmuch as Norton and the other Named Individuals will surely file similarly frivolous motions for protective order to quash depositions and discovery into their malfeasance, plaintiffs respectfully request that this Court reaffirm plaintiffs' right to engage in full discovery and admonish Interior Defendants and counsel for the Named Individuals that further frivolous motions to obstruct plaintiffs' discovery will be sanctioned.

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[3] *Cobell v. Norton*, 226 F. Supp.2d 126 (D.D.C. 2002) ("In my fifteen years on the bench I have never seen a litigant make such a concerted effort to subvert the truth seeking function of the judicial process. I am immensely disappointed that I see such a litigant today and that the litigant is a Department of the United States government.").

## ARGUMENT

Carr, as an individual with specific information relevant to issues presently before this Court is subject to deposition. Rule 30(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] Party may take the deposition of any person, including a party, by deposition upon oral examination without leave of the court ...." *See also Dowd v. Calebrese*, 101 F.R.D. 427, 439 (D.D.C. 1984); *Daniels v. Hadley Memorial Hospital*, 68 F.R.D. 583, 588 (D.D.C. 1975); *In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453, 462 (S.D.N.Y. 1973).

When a party seeks to prevent a deposition of any person they must move for a protective order under Rule 26(c); such a motion, however, will only be granted for "good cause shown." Fed. R. Civ. P. 26(c).[4] And it is well-established that "[t]he burden of establishing good cause for entry of a protective order in unambiguously on the party seeking the order." *United Phosphorous*, 164 F.R.D. at 247; *accord Ellsworth Associates. Inc. v. United States*, 917 F. Supp. 841, 845 (D.D.C. 1996); *Hoh Co. v. Travelers Indemnity Co.*, 1991 WESTLAW 229948, at *3 (D.D.C. Oct. 25, 1991) (Lamberth, *J.*) ("the party seeking protection from . . . deposition carries the burden of showing good cause . . ."). In the leading case on the issue, *Cipollone v. Ligaett Group. Inc.*, 785 F.2d 1108 (3rd Cir. 1985), the court explained that:

> Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.

*Id.* at 1121 (citations omitted).

Norton and Carr assert three grounds as justification for the protective order: (1) that

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[4]Rule 26(c) provides, in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

Special Master Balaran has prohibited plaintiffs' discovery; (2) that Carr is a non-party to the contempt proceedings and therefore is not subject to a notice of deposition and (3) the contempt is solely criminal in nature and, thus, they argue discovery is not permitted. As plaintiffs demonstrate below, these reasons fail to satisfy the heavy burden of establishing the "good cause" required for a protective order. We address defendants' arguments seriatim.

## I. SPECIAL MASTER ALAN BALARAN DOES NOT HAVE THE AUTHORITY TO LIMIT THE DISCOVERY OF PLAINTIFFS

The Carr Motions' primary argument is that by letter dated December 4, 2002, the Special Master purported to prevent plaintiffs' discovery until the report and recommendation on the legal sufficiency of he claims lodged against each of the Named Individuals was completed. There are two independent infirmities with this argument. First, the Master had no authority to make this determination and second, such a determination would be in direct contravention of this Court's Order, described *supra*, that plaintiffs have "full discovery" rights. Nor has this Court specifically directed the Master to oversee this discovery, a jurisdictional condition precedent for the Master to intervene in the discovery process other than with respect to the two matters discussed above.

Special Master Alan Balaran has no authority to oversee the **discovery process** regarding the culpability of Michael Carr and thirty-six other current and former government officials who have been charged with perpetrating fraud on this Court and other litigation misconduct (collectively "Named Individuals"). Nothing in the September 17, 2002 Order can be read to confer on Master Balaran such broad powers. Rather, that Order confers on plaintiffs "full discovery" rights and at the same time ordered the Master to complete a limited task: "issue a report and recommendation with respect to the 37 non-party individuals named in plaintiffs' [show cause] motion." *Cobell v. Norton*, 226 F. Supp. 2d 1, 162 (D.D.C. 2002). Defendants, for their own cynical purposes, would like to construe this limited referral as giving the Master

full authority over any issue relevant to Named Individuals' misconduct – including any discovery by plaintiffs. But such a broad interpretation is plainly at odds with the Court's sanction of defendants and its broad conferral on plaintiffs of unfettered and full discovery rights.

The correctness of this reading of the September 17, 2002 Order has already been confirmed by the Court in addressing the various Named Individuals' motions to disqualify Master Balaran and the Court. *See generally Cobell v. Norton*, 237 F. Supp.2d 71 (D.D.C. 2003) (denying recusal motions). The Court described the limited role of the Master in his task regarding the Named Individuals:

> **The tasks of the Master will be to investigate the issues raised in plaintiffs' bills of particulars; to take sworn, transcribed deposition testimony of material witnesses with counsel present; and to identify relevant documents produced in the litigation.** The aim of all these tasks is to refine and explicate the issues involved for consideration by the Court. In his report to the Court, the Master will state whether or not there are sufficient grounds for plaintiffs' motions to show cause that would merit further proceedings by this Court in the form of oral or evidentiary hearings on the motions. Following the filing of the Master's report with the Court will be a ten-day comment period during which objections and other recommendations may be made. And in accordance with the principles articulated in *Young v. Pierce* and *Lelsz v. Kavanagh*, cited above, in any objections to the report, movants may seek both factual and legal review de novo.

*Cobell*, 237 F. Supp.2d at 86 (emphasis added). As would be expected given the September 17 Order, there is not even a hint that the Master has any authority over plaintiffs' discovery; rather, he is only tasked with "investigat[ing] the issues raised by plaintiffs' bills of particulars." *Id.*[5]

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[5]Indeed, the Court took pains in the recusal decision to describe the Master's limited role in the proceedings:

> [T]he Court instructed the Master to review the allegations lodged by plaintiffs in their show cause motions dated October 19, 2001 and March 20, 2002, and to file a report and recommendation after investigating those claims. **The Court did not ask the Master to adjudicate any of the issues raised in plaintiffs' contempt motions**, and did not bestow on the Master any authority to render any decision as to whether contempt should lie. Rather, the Court directed the Master to assess whether the thirty-nine individuals had violated the Court's orders: (1) to retain trust records in the form of e-mail backup tapes and (2) to report candidly to the Court concerning the progress of trust reform initiatives.

*Id.* at 80 (emphasis added).

Nevertheless, defendants base their principal argument on the notion that the Master has authority to prevent plaintiffs' "full discovery." This is a curious position for a party that has sought recusal of the Master for exceeding his authority and has vigorously argued – repeatedly – that the Court must restrain the Master. *See, e.g., Interior Defendants' Motion For an Order Directing the Special Master to Conform His Conduct To Limits Stated By the Court of Appeals; To vacate or Clarify Existing Orders as Appropriate; And to Act on the Motion on an Expedited Basis*, September 24, 2003. Moreover, to the extent that Norton and Carr have not moved this Court to adopt the Master's purported limitation on plaintiffs' discovery, defendants' litigation position is that such a decision by the Master is merely advisory.

It is puzzling why the Interior defendants and certain Named Individuals have moved to disqualify the Master and alleged bias when the Master has taken extraordinary steps to protect their interests. Specifically, not only did the Master take no depositions and request no documents (or otherwise undertake to compile a complete record with respect to the culpability of each Named Individual), he has interfered with plaintiffs' discovery rights in conflict with the explicit terms of the September 17, 2002 Order. In short, the Master has failed to undertake – much less initiate – an investigation into the Named Individuals' violations of court orders and litigation misconduct in accordance with this court's September 17, 2003 Order.

Moreover, the Master has bent over backwards to accommodate the Named Individuals. First, the Master required plaintiffs to file all bills of particular for the 37 Named Individuals on May 1, 2003, **the same day Trial 1.5 was to commence**. Second, the Master scheduled oral arguments the week before Trial 1.5 was scheduled to begin. Third, the Master required plaintiffs' responses/replies to be filed **the same day Trial 1.5 proposed findings and conclusions were due**, August 4, 2003. Fourth, the Master has apparently prepared a report and recommendation to dismiss plaintiffs' motion for order to show cause with respect to certain individuals without developing, or permitting the development of, **any** record regarding the culpability of those Named Individuals. To be clear, the Master has denied all requests of

plaintiffs for enlargements of time notwithstanding direct conflicts with the Trial 1.5 Scheduling Order.

Notably, based solely on the wishes of a vote of a majority of the Named Individuals (a democratic process akin to polling inmates regarding connubial visits), the Master intervened on their behalf and by memorandum to counsel purported to stay plaintiffs' discovery:

> In accordance with the position urged by the majority of counsel for the Named Individuals, the Special Master will preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery.

*See* November 11, 2002 Master letter to counsel at 2 (emphasis in original).

## II. CARR IS A PARTY TO THE CONTEMPT PROCEEDINGS AND THUS A NOTICE OF DEPOSITION IS ADEQUATE TO COMPEL HIS APPEARANCE[6]

The Carr Motions assert that Carr cannot be compelled to attend a deposition by notice of deposition since, they contend, he is not a party to this litigation. Although it is true that Carr is a non-party in the case-in-chief, he and each of the other Named Individuals are parties to the contempt proceedings. How else could Mr. Carr's counsel routinely file motions and other papers without leave of Court? Mr. Carr's counsel has made an appearance on Mr. Carr's behalf as a party to certain aspects of this litigation. Indeed, the petitions for mandamus before the Court of Appeals by some of Carr's fellow Named Individuals are styled "In re," reflecting their status as parties for purposes of the contempt proceedings. And, Carr has participated fully in the proceeding before the Master.[7] Moreover, Carr had entered an appearance in this litigation and thereby placed his conduct squarely within the jurisdiction of this Court; which jurisdiction is not

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[6]As a seeming throw away argument, Norton also contends that the discovery is inappropriate because, she asserts, there has been no Rule 26(f) conference. But there has been numerous such conferences and this Court has already decided that plaintiffs have "full discovery" rights. Thus, this argument too in unavailing.

[7]Plaintiffs' acknowledge that Carr, as a non-party to the case in chief, is authorized to appeal immediately a civil contempt judgement whereas this Circuit prohibits such an appeal as interlocutory for the parties to the case in chief.

extinguished by his resignation from the government. Accountability for litigation misconduct and for violations of ethical dutics governing conduct before this Court is a fiction if government lawyers can escape accountability for their misconduct simply by resignation of their office.[8] Therefore, contrary to the defendants assertions, a notice of deposition is sufficient and proper to compel appearance.[9]

## III. PLAINTIFFS SEEK INFORMATION REGARDING CONTEMPTUOUS CONDUCT; SINCE SUCH INFORMATION COULD PROVIDE EVIDENCE OF BOTH CIVIL OR CRIMINAL CONTEMPT, FEDERAL RULES OF CIVIL PROCEDURE GOVERN PLAINTIFFS' DISCOVERY

The final argument in the Carr Motions is the most specious of all. Quoting snippets from the Court of Appeals' July 18, 2003 decision that **all contempt in this case** is by definition criminal rather than civil in nature and therefore the Federal Rules of Criminal Procedure (with its less liberal discovery rules) apply rather than the Federal Rules of Civil Procedure. This argument is fatally flawed for a number of reasons.[10]

Neither Norton nor Carr cite a single case standing for the curious proposition that ***in a civil proceeding*** because discovery **may** uncover misconduct that is criminal in nature, the limited discovery of federal criminal procedure governs. Plaintiffs independent research has found no caselaw supporting this notion. And indeed such a rule would be anomalous since any

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[8]*See generally Supplemental Recommendation and Report of the Special Master Regarding the Delayed Disclosure of the Destruction of Uncurrent Check Records Maintained by the Department of the Treasury* at 15-24.

[9]Carr erroneously filed his motions to block the deposition of Carr before Special Master Balaran, whose authority with respect to discovery has been limited by this Court to three matters: Department of Treasury, Paragraph 19 and records preservation and retention. Accordingly, Carr failed to file with this Court a timely motion to block the deposition of Carr and the production of documents pertinent to his deposition with this Court.

[10]As an initial matter, it is critical to note that the Court of Appeals decision is the subject of plaintiffs' petition for *en banc* review and this matter is not settled.

hint of fraud or misconduct would bind the Court and the parties before any determination that the misconduct at issue was truly criminal in nature.

Further, and contrary to Norton and Carr's insinuations, there is nothing in the Court of Appeals decision that suggests that all contempt of Court is necessarily criminal in nature. To be sure, the Court of Appeals delineated the line between criminal and civil contempt:

> A contempt proceeding is either civil or criminal by virtue of its "character and purpose," not by reason of the trial judge so denominating the proceeding. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911). Civil contempt is ordinarily used to compel compliance with an order of the court, *Bagwell*, 512 U.S. at 828, 114 S.Ct. at 2557, **although in some circumstances a civil contempt sanction may be designed to "compensate[ ] the complainant for losses sustained."** *Id.* at 829, 114 S.Ct. at 2558. By contrast, criminal contempt is used to punish, that is, to "vindicate the authority of the court" following a transgression rather than to compel future compliance or to aid the plaintiff. *Id.* at 828, 114 S.Ct. at 2557.

*Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. Jul 18, 2003) (emphasis added). Since the Court found that the particular contempt citations against Norton and McCaleb contained no civil remedy, the Court concluded that those specific contempt citations were criminal in nature.[11] But there was no broad pronouncement that all contempt in this case must be criminal contempt as Norton and Carr suggest. Indeed, the Panel's decision holds that if this Court granted an award of fees to "'compensate[ ] the complainant for losses sustained,'" *id.* (quoting *Bagwell* 512 U.S. at 829), then a civil contempt would be appropriate.

The deposition and documents plaintiffs seek will aid in determining culpability of various Named Individuals. After depositions are complete it may turn out that civil contempt is appropriate. Of course, it may be that pursuit of criminal contempt is also appropriate. Furthermore, to the extent that Carr's testimony sheds light on the criminal conduct of others, the discovery rights of plaintiffs are clear. But, in no way does that possibility of criminal contempt

[11] *Id.* ("On its face, that is, the Contempt Order appears to find the defendants in contempt, and then to impose no sanction. . . . Examining this sanction in light of the principles set forth in *Gompers* and *Bagwell*, therefore, it is clear the proceeding was, and should have been treated as being, for criminal contempt.").

mean that at this juncture in a civil proceeding, plaintiffs' "full discovery" rights can be fettered by premature supposition that criminal penalties may also lie.[12]

Accordingly, Federal Rules of Civil Procedure and their broad discovery rules continue to apply in this civil action.

## CONCLUSION

Since Norton and Carr have failed to demonstrate the "good cause" necessary to justify the protective order and support their motion to quash, the Carr Motions should be denied.

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[12]Carr also argues that civil contempt would not be appropriate because Carr cannot be liable personally for his contemptuous conduct and therefore he could only be criminally liable. But Carr was counsel of record in this case and made appearances before this Court by virtue of signing briefs. And like other counsel he therefore can be personally sanctioned as the Court did on February 5, 2003. *See Cobell v. Norton*, 213 F.R.D. 16, 32, 34 (D.D.C. 2003) ("ORDERED that defense counsel Sandra P. Spooner, Assistant Attorney General Robert D. McCallum, Deputy Assistant Attorney General Stuart E. Schiffer, and Justice Department attorneys J. Christopher Kohn, John T. Stemplewicz, and Timothy E. Curley personally shall pay to plaintiffs all reasonable expenses, including attorney's fees, incurred as a result of having to re-depose Donna Erwin."). Indeed, the Court explained its authority to order that these individuals not be reimbursed:

> The leading commentators on federal procedure have noted an "increasing interest [by federal courts] in imposing a sanction against the attorney where the fault is counsel's rather than imposing the ultimate sanction against his or her client." 8A Wright, Miller & Marcus, Federal Practice and Procedure § 2284 (2d ed.1994). The Court sees no reason why taxpayers should foot the burden of remedying the harm to plaintiffs caused by the unjustifiable conduct of government attorneys. Accordingly, the Court will order sanctions to be imposed against defense counsel personally, together with the Justice Department attorneys who filed the meritless opposition brief that defended her conduct.
>
> However, the Court will not bar the United States from reimbursing these attorneys. It is true that sufficient precedent exists for this Court to do so. See, e.g., Chilcutt, 4 F.3d at 1325-27 (ordering government counsel to pay all costs, including attorney's fees, that plaintiffs had incurred in preparing their motions to compel and for sanctions, and forbidding counsel to seek reimbursement from the government); United States v. Sumitomo Marine & Fire Ins. Co., Ltd., 617 F.2d 1365, 1370 (9th Cir.1980) (assessing Rule 37 sanctions against government counsel personally); United States v. Shaffer Equipment Co., 158 F.R.D. 80, 88 (S.D.W.Va.1994) (assessing Rule 26 sanctions against government counsel and barring reimbursement from the government).

*Id.* at 32.

Further, since plaintiffs are merely exercising their "full discovery" rights by deposing Carr, plaintiffs' motion to compel Carr at deposition should be granted.

Respectfully submitted,

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September 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' AND MICHAEL CARR'S MOTIONS FOR PROTECTIVE ORDER AND TO QUASH NOTICE OF DEPOSITION OF MICHAEL CARR AND MOTION TO COMPEL MICHAEL CARR'S DEPOSITION AND THE PRODUCTION OF DOCUMENTS RELATED THERETO was served on the following by facsimile pursuant to agreement, or by first class mail postage prepaid, on this day, September 24, 2003.

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| **ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated,** | |
| **Plaintiffs,** | |
| **vs.** | **Case No.96CV1285 (RCL)** |
| **GALE NORTON, Secretary of the Interior, et al.,** | |
| **Defendants.** | |

**ORDER**

This matter comes before the Court on *Non-Party Michael Carr's Motion to Quash Plaintiffs' Notice of Deposition and For a Protective Order to Prevent Discovery Relating to Contempt Charges* filed September 10, 2003 and *Interior Defendants' Motion for a Protective Order And Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-Party Michael Carr and Defendants* filed September 11, 2003 and *Plaintiffs' Consolidated Opposition to defendants' and Michael Carr's Motion for a Protective Order and to Quash Notice of Deposition of Michael Carr and Motion to Compel Michael Carr's Deposition and The Production of Documents Related Thereto* filed September 24, 2003. Upon consideration of these Motions, the responses Thereto, and the record in this case, it is HEREBY:

ORDERED that *Non-Party Michael Carr's Motion to Quash Plaintiffs' Notice of Deposition and For a Protective Order to Prevent Discovery Relating to Contempt Charges* and *Interior Defendants' Motion for a Protective Order And Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-Party Michael Carr and Defendants* are DENIED. It is further

ORDERED that *Plaintiffs' Consolidated Opposition to defendants' and Michael Carr's*

*Motion for a Protective Order and to Quash Notice of Deposition of Michael Carr and Motion to Compel Michael Carr's Deposition and The Production of Documents Related Thereto* is GRANTED, It is further

ORDERED that Michael Carr shall at a time and place of plaintiffs choosing submit to deposition.

SO ORDERED.

DATE:_____

_____
Royce C. Lamberth
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **ELOUISE PEPION COBELL, *et al.*,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | **Civil Action** |
| **v.** | ) | **No. 1:96 CV 01285 RCL** |
| | ) | |
| **GALE NORTON, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**PLAINTIFFS' CONSOLIDATED REPLY RE MOTION TO COMPEL MICHAEL CARR'S DEPOSITION AND THE PRODUCTION OF DOCUMENTS RELATED THERETO[1]**

[1]Plaintiff consolidate in this document their Replies to the Oppositions of both defendants and Michael Carr to plaintiffs' Motion to Compel filed on September 25, 2003 (the "Motion to Compel"). Interior Defendants' *Opposition to Plaintiffs' Motion to Compel Michael Carr's Deposition and the Production of Documents Related Thereto* was filed on October 3, 2003 ("Defendants' Opposition"); Carr's *Non-Party* [sic] *Michael Carr's Reply in Support of Motions for a Protective Order and to Quash Notice of Deposition of Michael Carr and Opposition to Plaintiffs' motion to compel Discovery* was filed October 6, 2003 (the "Carr Opposition").

These documents were filed on a consolidated basis together with memorandum addressing defendants' and Carr's motion for protective order and motion to quash with respect to Mr. Carr's deposition.

## Table of Contents

# I. Defendants Once Again Feign Misunderstanding of the Nature of Civil Contempt

In their Motion to Compel, plaintiffs set forth defendants' and Carr's clear failure to cite relevant case law:

> Neither Norton nor Carr cite a single case standing for the curious proposition that ***in a civil proceeding*** because discovery **may** uncover misconduct that is criminal in nature, the limited discovery of federal criminal procedure governs.

*Id*. at 9 (emphasis original). Both defendants and Carr have failed to address their absence of authority on this key issue.[2]

Indeed, Carr implicitly admits that in order for defendants' and his argument (that plaintiffs are supposedly seeking criminal discovery) to have any merit, plaintiffs would have to be pursuing **only** criminal contempt against Carr and his fellow putative contemnors:

> [T]he only allegedly civil remedy identified by defendants is not available. Plaintiffs' motion must, therefore, be considered criminal in nature.
>
> **Because plaintiffs' contempt motion undeniably seeks only criminal sanctions against Mr. Carr, no civil deposition of Mr. Carr should be permitted**.

Carr Opposition at 5 (emphasis added; footnote omitted). As demonstrated in plaintiffs' Motion to Compel and as set forth below, neither plaintiffs' request for an order to show cause re contempt – nor this Court's power – is so limited.

[2]Indeed, Carr does not even cite any case law authority in his Reply (beyond references to opinions issued in this litigation).

### *A. Civil Contempt Includes a Compensatory (as well as a Coercive) Component that Defendants and Carr Conveniently Forget*

The notion that civil contempt is remedial goes back to the beginning of the Twentieth Century in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, in which the Supreme Court enunciated the core distinction between civil and criminal contempt as civil contempt being remedial whereas criminal contempt was punitive. *See Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827-28 ("Thus, a contempt sanction is considered civil if it 'is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'" (citing *Gompers* at 441)); *see also Bagwell* at 829 ("A contempt fine accordingly is considered **civil and remedial** if it **either** 'coerce[s] the defendant into compliance with the court's order, **[or]** ... compensate[s] the complainant for losses sustained.'" (Emphasis added; brackets and ellipses original; citing *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947).).[3]

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[3]Defendants entirely and deceptively ignore the compensatory nature of civil contempt and misleadingly cite *Bagwell* in circular fashion:

> [T]he particular allegations made against Mr. Carr and the other Named Individuals cannot be characterized as civil in nature because plaintiffs have identified no action these individuals could take to purge the allegedly contumacious conduct, nor any damages they have allegedly suffered because of the claimed actions of any of these individuals. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829 (1994) ("Where a **fine** is **not compensatory**, it is civil only if the contemnor is afforded an opportunity to purge.");....

Defendants' Opposition at 2-3 (emphasis added). There are only two components of civil contempt – compensatory and coercive. **This passage underscores precisely what defendants and Carr conveniently forget – that civil contempt can be compensatory.** But if a fine is presupposed not to be compensatory, of course it can be civil only if it falls within the coercive category – and the test of whether it is coercive (as opposed to punitive) is whether it can be purged. Put another way, the opportunity to purge pertains **only** to the coercive aspect of civil contempt – not the compensatory aspect of civil contempt.

Indeed, the Supreme Court in *Bagwell* the page before confirmed the limited number of

(continued...)

There is no doubt that this Court can fashion a civil contempt remedy – and that plaintiffs' discovery can assist it in doing so.

An award of attorney's fees incurred by a party is quintessentially civil in terms of contempt remedies. Such awards are coercive, as well as compensatory, because they remind a contemnor that the court and the opposing parties will be vigilant to his future fraud and litigation misconduct – and that he will ultimately be footing the bill for uncovering and rectifying such misconduct.

And of course where contemnors have committed various frauds on the court such that the very integrity of the judicial process is at stake, these remedies are remedial on a second and independent level: to remedy and rectify the damage to the integrity of the judicial process itself – either because of the innately coercive component recognized in the *Bagwell* passage above,[4] or because a court has the power to order a contemnor to make compensatory payment into court for the waste of judicial resources his contemptuous conduct has caused. *See, e.g., Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989) (court has inherent power to order party destroying

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[3](...continued)
situations in which a fine or other sanction did not have civil contempt components because of the hybrid nature of contempt remedies: "Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience." Id. at 828.

Thus, defendants' citation of *Bagwell* is inapposite and misleading.

[4]*See also* the case defendants cited, *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), in which this Circuit reasoned:

> Certain out-of-court contempts, such as failure to comply with document discovery, "impede the court's ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power," and therefore may be treated as **civil** contempts.

*Id.* at 659 (emphasis added; quoting *Bagwell*).

documents to pay as sanction the expenses the court incurred to reimburse it for unnecessary consumption of judicial time and resources); *Itel Containers Int'l v. Puerto Rico Marine Mgt.*, 108 F.R.D. 96, 106 (D.N.J. 1985) (paid-into-court sanctions awarded pursuant to inherent powers)[5]; *see also Turner Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (citing with approval *Capellupo v. FMC Corp.*, *supra*, for the proposition that sanctions for destruction of documents can be based on inherent powers). Moreover, in *Rose v. Franchetti*, 979 F.2d 81 (7th Cir. 1992), the Seventh Circuit affirmed the district court's imposition of paid-into-court sanctions and underscored the flexibility trial courts possess in protecting the integrity of their proceedings, noting that "[w]hether the district judge used his common law power to penalize frivolous motions, see *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32 (1991)], or Fed.R.Civ.P. 11, does not matter." *Id.* at 86.

Thus, this Court – either independently or pursuant to plaintiffs' motion for order to show cause seeking both civil and criminal remedies depending upon the facts discovered and adduced – has the power to hold Carr in civil contempt and have him pay an appropriate compensatory award to this Court **or** to plaintiffs for his participation in defendants' fraud on this Court.

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[5]The court in *Itel*, *supra*, set forth the policy reasons that justified such sanctions as follows:

> The affront to the court cannot be dismissed lightly. Courts would soon be laughing-stocks and objects of ridicule if counsel could with impunity toy with them, as defendant's counsel did here, engaging for example in serious arguments addressed to the merits of motions to a court that had no right to hear those arguments. As the Court of Appeals of this Circuit recently stated:
>
> > ... The dramatic rise in litigation in the last decade has led trial judges to conclude that indulgent toleration of lawyers' misconduct is simply a luxury the federal court system no longer can afford.

*Id.* at 106 (ellipsis original; citations omitted).

### *B. There Can Be No Doubt That Carr, like Justice Department Lawyers, Is Subject to Being Held Personally Responsible for Attorney's Fees His Misconduct Has Caused*

Rather than addressing the argument plaintiffs set forth in footnote 12 of their Motion to Compel regarding why Carr has appeared and has party status by reason of his having served as litigation counsel – and in addition has personal civil liability for attorney's fees incurred due to his possible malfeasance – Carr suggests wrongly[6] that only criminal contempt remedies are possible against him. Plaintiffs will not belabor this further; for reasons analogous to why Spooner, McCallum, Schiffer, Kohn, Stemplewicz, and Curley "personally shall pay to plaintiffs all reasonable expenses, including attorney's fees, incurred as a result of having to re-depose Donna Erwin,"[7] Carr likewise has similar civil exposure.

### *C. Carr Is a Party Upon Whom No Subpoena Need Be Served*

Carr subjected himself personally to the authority of this Court to sanction his misconduct as an officer of this Court by reason of his appearing on behalf of his clients as an officer of this Court. Just as there was no requirement that this Court or plaintiffs serve Spooner, McCallum, Schiffer, Kohn, Stemplewicz, and Curley with process before the Court issued its sanctions described above, there is no need to serve Carr.

Moreover, he has voluntarily made an appearance in the contempt proceeding and exercised the full rights of a party thereto, making motions and filing papers. Defendants and

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[6] *See* discussion at page 1, *supra*.

[7] *See Cobell v. Norton*, 213 F.R.D. 16, 32, 34 (D.D.C. 2003).

Carr[8] add nothing of substance to plaintiffs' analysis in their Motion to Compel as to why Carr has party status with respect to the contempt proceeding.

Simply put, there is no need for a subpoena to require his to testify.[9]

## II. Defendants Attempt to Turn the Concept of Wrongdoing into a Shield Against Discovery for Their Implicitly Admitted Criminal Conduct

### *A. The Case Law Does Not Support Defendants' and Carr's Interpretation that Discovery Is Barred Because There Is a Possibility of a Criminal Contempt Proceeding Being Initiated in the Future*

As noted above, defendants and Carr failed to cite any relevant case law for their curious proposition that in a civil proceeding discovery rights should be barred because discovery may uncover misconduct that is criminal in nature.

The few cases that defendants cite[10] are inapposite. Defendants' citation of *Bagwell* has been dealt with above.[11]

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[8]While Carr states that "these contempt proceedings do not constitute a separate matter" apparently has found no authority to support such odd notion and declines to address plaintiffs' point that the styling of the petitions for mandamus before the Court of Appeals with "In re" in the caption reflects the understanding that this is indeed a separate proceeding.

[9]If for any reason plaintiffs are wrong in such analysis, the appropriate resolution would be to order the deposition to go forward at a future date on the condition that plaintiffs serve Carr with a subpoena.

[10]Carr cites no case law.

[11]*See* discussion at footnote 3, *supra*.

Defendants' remaining authorities are equally inapposite to any points defendants raise – and indeed strongly support plaintiffs' position. *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994) ("*NOW*") is distinguishable because it dealt with criminal fines, not an award of attorney's fees – and *NOW* went so far as to torpedo defendants' argument with the following reasoning:

> We cannot conclude from the record before us that these fines in their entirety are punitive and require criminal procedures. The district court expressed the view that some unspecified portion of these fines are "compensatory," and **it may well be that in further civil proceedings on remand compensable injuries to appellants may be proven, justifying reinstatement of some part of these fines as compensatory civil fines**.

*Id.* at 661 (emphasis added). Thus, this Circuit in *NOW* expressly contemplated further civil proceedings on remand in which proof might be developed – presumably through normal civil discovery channels. Similarly, *Evans v. Williams*, 206 F.3d 1292 (D.C. Cir. 2000) dealt with over $5 million of punitive fines for past misconduct and not an award of compensatory attorney's fees.[12]

What *Evans* and similar authorities do stand for is the proposition that if there is *prima facie* evidence of criminal conduct discovered such that Carr and other parties to the pending contempt proceeding have an order to show cause issued against them requiring them to show cause why they should not be held in criminal contempt, they will be afforded criminal due process rights in such proceeding.[13]

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[12] Defendants' authorities cited in their "Roving 'Inspectors General'" section are just plain irrelevant because the entire section is based on the false premise that these proceedings are necessarily criminal, which they are not.

[13] Of course, if one or more of defendants employees or agents – including Carr – wish to (continued...)

***B. Defendants and Carr Cannot Hide Behind the Special Master***

The issue of the limited power of the Special Master over discovery has been briefed at length. Plaintiffs will add only that Carr suggests that plaintiffs believe they "are entitled to flaunt the [discovery] schedule set by the Special Master." Carr Opposition at 3. Plaintiffs neither flaunt – nor flout – the Special Master's schedules and orders. Plaintiffs have spent considerable pages addressing why, while the Special Master can schedule the discovery this Court asked **him** to conduct,[14] plaintiffs' discovery rights cannot be curtailed as to matters with respect to which he has not been appointed the discovery master.[15]

Moreover, neither defendants nor Carr have addressed plaintiffs' key point[16] that, even if their interpretation were correct as to the Special Master's power to enter such an order or recommendation, neither defendants nor Carr have moved to adopt such order or recommendation pursuant to the provisions of Fed. R. Civ. P. 53. Carr asserts that plaintiffs have been dilatory or are untimely in stating their position as to the Special Master's power over

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[13](...continued)
plead the Fifth Amendment, they are free to do so.

[14]*See* Motion to Compel at 5-8.

[15]As noted previously, the Special Master's powers with respect to the parties' discovery can be no broader than the three discrete areas of discovery assigned to him in the September 17, 2002 Order – discovery relating to (1) the Department of Treasury, (2) Paragraph 19, and (3) records preservation and retention (the "Three Areas of Discovery"). *See also Cobell v. Norton*, 226 F. Supp. 2d at 159 ("[U]nless the Court specifically directs that they be handled by Special Master Balaran," these issues are not within his purview.).

[16]*See* plaintiffs' Motion to Compel at 7 ("Moreover, to the extent that Norton and Carr have not moved this Court to adopt the Master's purported limitation on plaintiffs' discovery, defendants' litigation position is that such a decision by the Master is merely advisory.").

plaintiffs' discovery as to other than the Three Areas of Discovery.[17] Rather, it is defendants and Carr who – despite defendants' having made laboriously clear in their many attacks on the Special Master-Monitor suggesting he was nothing more than a potted plant – conveniently feign ignorance now that an order or recommendation of the Special Master does not become binding until they (or another party) take action and move for the adoption of such recommendation or order pursuant to the dictates of Rule 54.

Defendants attempt to turn on their heads the discovery statutes and this Court's inherent authority to protect its judicial integrity via the fruits of such discovery, and blatantly thumb their noses at this Court should not be countenanced.

***C. Plaintiffs' Discovery Rights Are Not Limited***

In their desperate attempts to cover-up their wrongdoing, Carr and his fellow putative contemnors make much the same arguments that are being made by other Justice Department attorneys – Spooner, Petrie and Quinn – to avoid discovery of their possible fraud on this Court in the Donna Erwin apparition incident. In strikingly similar fashion, all these lawyers argue that discovery is closed or has not been extended to conduct discovery with respect to frauds on this Court.

Rather than engage in further prolonged dialogue or analysis of the point, plaintiffs are comfortable relying on the power, wisdom, and discretion of this Court to expand or limit the power of plaintiffs to conduct civil discovery into these issues in an effort to uncover and marshal

[17] *See, e.g.,* Carr Opposition at 3-4.

evidence demonstrating that this Court has been defrauded by defendants and their counsel on numerous occasions.[18]

## III. Conclusion

For the foregoing reasons plaintiffs respectfully request that their Motion to Compel the deposition of Carr and the production of documents by him and defendants be granted, and that an appropriate award of sanctions be issued.

[18]This Court's inherent power to ensure the integrity of its judicial processes is wholly independent from any ruling with respect to the Second Contempt Trial. Thus, defendants' argument that the plaintiffs are predicating their right to discovery on"vacated" remedies against Norton and McCaleb is misplaced. *See* discussion at Defendants' Opposition at 4-5. Not only do the underlying findings made by this Court in its September 17, 2002 opinion remain undisturbed by the Court of Appeals' ruling, but even if they did not, this Court would have the power, just as in the Erwin context, to allow discovery to root out defendants' and their agents' and counsel's fraudulent conduct on this Court.

October 14, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Plaintiffs' Consolidated Reply re Motion to Compel Michael Carr's Deposition and the Production of Documents Related Thereto** was served upon the following by facsimile, pursuant to agreement, and/or by first class mail on this day, October 14, 2003.[19]

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[19] Because fax services were unavailable on October 14th, this document was mailed by first class mail on that date, and a courtesy copy is to be faxed on the morning of October 15th.