IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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' REPLY IN SUPPORT OF MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS WITH RESPECT TO VARIOUS INDIVIDUALS IDENTIFIED IN PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE[1]

[1]Preliminarily, this Court will recall that plaintiffs' counsel extended a forbearance offer to contemnors during the course of the March 3, 2005 hearing: "We would easily forego contempt and allow these people to continue their lives without any further interference from us if we can go to a trial on the merits." *See* Hearing Tr. at 15:18-21. To date, neither this Court nor plaintiffs have received a response to their request to resolve this case on the merits. Thus, plaintiffs hereby withdraw their overly generous offer.

Instead, contemnors chose to distort plaintiffs' offer, suggesting that it is plaintiffs' counsel who act in bad faith ("a recklessness that is inconsistent with ethical practice in the Federal Courts" (*see* Government Opposition at 7)) by seeking to leverage the dishonest and otherwise contemptuous behavior against the government in the litigation on the merits. This would be laughable were it not so pathetic. It is not plaintiffs' counsel who has and continues to destroy documents in this litigation, it is not plaintiffs' counsel who is habitually dishonest, it is not plaintiffs' counsel who consciously violates orders, it is not plaintiffs' counsel who has been repeatedly sanctioned, it is not plaintiffs' counsel who has engaged in egregious practices that have undermined the integrity of these proceedings. It is the contemnors who have and continue to do so.

Lest they forget: more than a year ago the government demanded that plaintiffs withdraw pending show cause motions related to willful violations of an injunction this Court had entered to preserve trust data. The government did so as a condition precedent to the commencement of mediation urged by Congress to settle this litigation – including the issues related to the on-going failure of the trustee-delegates to ensure the security of IT systems that house and access Trust data – on the merits. Plaintiffs acceded to the government's demand and withdrew their motions notwithstanding their belief that the government would stonewall this mediation as it had done in September 1999 when this Court ordered mediation – at the request of the government. And, of course, the government behaves as badly in the current mediation as they have in seven other efforts made by plaintiffs to settle this case on the merits. To no surprise, the dishonesty of the government continues; no progress has been made in mediating a settlement of the egregious IT security issues. None. Still, the fact remains that plaintiffs withdrew show cause motions **at the insistence of contemnors** in order to facilitate progress in the litigation on the merits. If

In seeking an enlargement of time within which to complete preparation of 39 bills of particulars, plaintiffs outlined five bases that militate in favor of granting plaintiffs a reasonable enlargement of time: First, that discovery of contemnors violations of law had been barred at all times relevant to these proceedings; second, this Court had expressly granted leave for plaintiffs to refile their motion for enlargement once relevant appellate proceedings were concluded; third, the contemnors, themselves, had requested and obtained from both this Court and the Court of Appeals separate stays vitiating any claim that the interregnum had harmed them in any way; fourth, this Court instructed the special master in its September 17, 2002 to "develop a complete record with respect to these 37 non-party individuals," yet no record – lest the "complete record" ordered by this Court – was developed by the master; and, fifth, the trustee-delegates and their managers, counsel, and agents unlawfully and contemptuously have systemically destroyed relevant e-mail

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contemnors continue to claim that plaintiffs' counsel is behaving unethically, plaintiffs will request that the Court moot the March 3, 2004 motion to withdrawal their show cause motion (Docket # 2510) and vacate the order granting the motion to withdrawal (Docket #2542).

In addition, lead defense counsel made repeated offers to plaintiffs' counsel on the eve of the first contempt trial to consent to dates certain for trial of Phase II issues if plaintiffs would withdraw their then pending show cause motion. Plaintiffs did not accept that offer and the contempt trial resulted in this Court's decision to hold Messrs. Rubin, Babbitt and Gover in contempt. Thus, if it is improper for plaintiffs to propose such a solution, it is equally improper for government attorneys to do so, particularly where, as here, the proposal was made by, and on behalf of, certain of the contemnors themselves. Ironic, isn't it?

In any event, they lose sight of the fact that **the contemnors purport represent the government** – no matter how much they disgrace their position and stain the government. At the time they engaged in dishonesty and fraud described in the show cause motions, they held positions of responsibility in the Department of the Interior and the Department of Justice. And, now that certain of these contemnors have left the employ of the trustee-delegates they act shocked that the contempt proceedings are viewed by plaintiffs as essential to restoring the integrity of these proceedings. Their mendacity knows no bounds.

To be clear, the gross misconduct of these contemnors infects the very integrity of these proceedings. Thus, the contempt remedies should be draconian. Had these contemnors in their official capacities obeyed this Court's orders and candidly and honestly dealt with this Court and plaintiffs, this case would have been resolved on the merits long ago. Apart from a trial on the merits, it is difficult to envision an aspect of this case that is more central to its timely and just resolution. And, while plaintiffs acknowledge that leaving the government's employ has affected certain contemnors' ability to encourage the government to accept such an offer, that would not in any way impair the ability of those contemnors who remain in the government. Indeed, for purposes of these proceedings, they are the government.

and other evidence that would have shed light on their contumacious behavior. *See* Motion[2] at 2-3.

Various contemnors have filed oppositions to plaintiffs motions. It is revealing that not one single contemnor has challenged plaintiffs' five bases for a reasonable enlargement of time. Not one. Instead, contemnors treat their opposition as yet one more opportunity to re-litigate untenable arguments made elsewhere (*e.g.* that the Court of Appeals has immunized these contemnors from all accountability, that party litigants are not permitted discovery into litigation misconduct or violations of court orders).[3] Plaintiffs will not take the bait and re-brief the same issues yet again inasmuch as they are wholly meritless, have been briefed thoroughly, and are irrelevant to plaintiffs' motion for an enlargement of time.

Simply put, plaintiffs need an enlargement of time to compile a "complete record with respect to these 37 non-party individuals." Contemnors suffer no harm from such enlargement of time other than that which would occur when further evidence of malfeasance is discovered. That is not the sort of harm that ever justifies denial of this motion. Of course, contemnors wish for this Court to deny the show cause motions notwithstanding that they are sufficient as they stand to proceed with contempt trials. Instead, contemnors conveniently feign amnesia that this Court granted plaintiffs' first show cause motion with much less particularity, commenced a twenty-nine day contempt trial, and held the contemnors in contempt for their dishonesty with this Court and

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[2]*Plaintiffs' Motion for Enlargement of Time to File Bills of Particulars with Respect to Various Individuals Identified in Plaintiffs' Motions for Order to Show Cause*, filed March 8, 2005.

[3]Parenthetically, the **government and contemnors have conceded plaintiffs right to discovery in these contempt proceedings** – albeit after the Special Master issued his report and recommendation: "[I]t was entirely proper for the Special Master to defer the commencement of any civil discovery until he and the Court had first reviewed the plaintiffs' allegations for legal sufficiency . . . ." *See e.g. Interior Defendants' Reply in Support of Their 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 and Opposition to Plaintiffs' Motion to Compel Michael Carr's Deposition and the Production of Documents Related Thereto*, filed October 3, 2003 at 7. Now, contemnors suggest that discovery should be barred because they have forced the special master to resign, ensuring that he can never develop a complete record that they say was a condition precedent to plaintiffs' discovery on contempt matters. This Court should not countenance any further delay in the development of the complete record. Nor should it countenance specious claims by contemnors' counsel.

plaintiffs and their deliberate violations of Court orders. It is not our system of government to permit Interior and Justice Department officials to undermine the integrity of judicial proceedings, consciously violated Court orders, and habitually deal with this Court and plaintiffs with dishonesty and other bad faith. This Court and 500,000 individual Indian trust beneficiaries are entitled to the whole truth – nothing less. That is our system of government.[4]

[4]Plaintiffs note that counsel for contemnor James Simon, the former deputy assistant attorney general, who, among other things, dishonestly represented to plaintiffs in June 1996 that Interior and Treasury would preserve all hard copy and electronic records – when, in fact, such records were being systemically destroyed – stated in error that plaintiffs' counsel did not meet and confer with him with respect to the instant motion. In fact, on March 8, 2005 at 3:25 PM, Dennis Gingold left a voice mail message with Eugene R. Fidell in accordance with local rules and requested that Fidell call if he decided to consent to plaintiffs' motion. No return call was received from Fidell by any of plaintiffs' counsel. The call to Fidell was placed one minute after a similar call was placed to contemnor Anne Shields' counsel and five minutes before the same message was left with contenmnor Lois Schiffer's counsel. Plaintiffs will assume that Fidell is confused.

Respectfully submitted,

/s/ Dennis Gingold

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March 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS WITH RESPECT TO VARIOUS INDIVIDUALS IDENTIFIED IN PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE was served on the following via facsimile, pursuant to agreement, on this day, March 30, 2005.

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406.338.7530 (fax)

/s/ Geoffrey Rempel

Geoffrey M. Rempel