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' MEMORANDUM AS TO THE EFFECT OF THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *COBELL V. NORTON*, 334 F.3d 1128 (D.C. CIR. 2003) UPON PLAINTIFFS' PENDING SHOW CAUSE MOTIONS AND CONTEMPT PROCEEDINGS

By Order dated March 3, 2005, this Court mandated that individuals named in plaintiffs' various show cause motions in this case (hereafter "Contemnors"), file by March 18, 2005 a brief setting forth their views on the effect of the Court of Appeals decision of July 18, 2003, *Cobell v. Norton,* 334 F.3d 1128 (D.C. Cir. 2003) (hereafter, "*Cobell VIII*"). The Court required that plaintiffs file a memorandum setting forth their views of the effect of *Cobell VIII* by March 28, 2005. This memorandum is submitted in accordance with that order.

The sole argument Contemnors make in their brief[1] is that, in their view, *Cobell VIII* precludes

[1]A single brief was filed entitled on behalf of Named Individuals entitled *Named Individuals' Memorandum on the Effect of the Court of Appeals' Opinion in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003)* (hereafter "Contemnors Brief"). A separate brief was filed by Herb Fenster on behalf of a single potential contemnor, Gale Norton, entitled *Memorandum on the Effect of the Court of Appeals in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003)* (hereafter, "Norton Brief"). Parenthetically, plaintiffs' note that Mr. Fenster's statement is true that plaintiffs did not oppose his entry of appearance as personal counsel for Norton. However, it is not true that plaintiffs have changed their views with respect to Norton's status as a contemnor. In fact, plaintiffs' counsel informed Fenster that they would be satisfied if Norton is held in contempt in her official capacity but conceded, in response to questions from Fenster regarding the personal culpability of Norton, that this Court could, based on the facts stated in plaintiffs' various show cause motions and facts obtained in discovery and, of course, in accordance with the Court's discretion and its broad inherent authority, commence contempt proceedings against Norton in her personal capacity. Quite frankly, however, plaintiffs don't care if this

any civil contempt for any show cause motion plaintiffs have filed in this litigation. *See Contemnors Brief* at 1-7. The Norton Brief makes a similar argument, but also raised a patently specious *res judicata* assertion. As plaintiffs show below, the notion that this Court has somehow lost its plenary authority to commence civil rather than criminal contempt proceedings against Contemnors for violations of this Court's orders and other litigation misconduct and malfeasance – in either their personal or official capacity – is utter nonsense.

We do not dispute that there are undoubtedly numerous incidents of willful violations of reasonably clear and unambiguous orders by these Contemnors that will make criminal contempt both appropriate and necessary. In no way should the Court read plaintiffs' comments here as suggesting that the Court should not proceed down the criminal contempt route with certain individuals. Our sole point is that civil contempt is available as well and is in no way precluded by *Cobell VIII*. Indeed, as plaintiffs' counsel informed this Court on March 3, 2005, we are ready and able to assist in the prosecution of Norton, *et al*.

While both civil and criminal contempt options are available, as discussed in greater detail below, they are not the only ways this Court may decide to proceed. It is well-settled that a federal district court has substantial inherent authority to protect the integrity of the judicial process beyond contempt powers. *See, e.g.*, *Shepherd v. American Broadcasting Companies*, Inc., 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments. ") For certain individuals and for the named defendants, this Court may exercise of its sound discretion and choose sanctions other than contempt proceedings, exercising

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Court chooses to commence personal proceedings advocated by Fenster to warrant his appearance. No matter how offensive, if Norton wants to spend taxpayer funds in her defense to pay Fenster, that's between her, Congress, her personal counsel, the Justice Department, and the IRS. After all, such payments to Fenster do constitute personal taxable income to Ms. Norton so the government will be getting a small return on her investment in Fenster – if and when she is held in contempt (again).

the Court's broad inherent authority to safeguard the integrity of the judicial process in accordance with both *Shepard* and *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991).

This Court has full authority to review the record for each Contemnor including the named defendants based on the evidence proffered to decide how it wants to proceed. Civil contempt certainly is appropriate in many instances. Willful violations of orders may call for criminal contempt – and worse where perjury or subornation of perjury is implicated (and it is) – for others. And, inherent powers of the Court can address other forms and variations of litigation misconduct that is unprecedented in this litigation, permitting the imposition of sanctions other than contempt citations and the fashioning of equitable remedies "to protect [the Court's] institutional integrity and to guard against abuses of the judicial process." *Shepard*, 62 F.3d at 1472. Obviously, consideration of disbarment, removal, confinement, and similar such sanctions and equitable remedies are within the discretion of this Court, are within this Court's inherent authority, and are fully supported by the evidence. In fact, plaintiffs suggest that each sanction imposed and remedy fashioned should fit the proverbial crime.

To ensure against future abuses, plaintiffs believe that it is necessary to proceed against Contemnors who have committed misconduct or violated orders, as well as defendants themselves in their official capacity. Because of the massive and intentional spoliation of evidence, plaintiffs believe that evidentiary sanctions are necessary in this case. If this Court does not exercise its discretion to sanction defendants for their misconduct, including the spoliation of evidence by imposing appropriate evidentiary sanctions then defendants will surely profit from their spoliation and their other bad acts. *See, e.g., Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir.1977) (it is axiomatic that a party litigant who abuses the litigation process, "cannot profit from its own failure"). Exercising inherent power sanctions are particularly appropriate, where, as here, they will "ensure that a party will not be able to profit from its own failure to comply with the rules set forth by the court." *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001).

These three issues touched upon here are discussed with greater specificity below.

I. *COBELL VIII* IN NO WAY PRECLUDES CIVIL CONTEMPT AGAINST

CONTEMNORS

The principle argument by the Contemnors and Norton is that *Cobell VIII* rules out civil contempt in these proceedings. It does no such thing. In fact, *Cobell VII* expressly acknowledges that civil contempt serves either of two purposes – to "compel compliance with an order" or to "compensate[] the complainant for losses" resulting from the contemptuous conduct. *Cobell VIII*, 334 F.3d 1145-46. As long as the "purpose" of the contempt proceeding is to compensate for a loss or coerce compliance, then civil contempt is perfectly appropriate.

Indeed, this is a well-settled rule that has been consistently supported by decisions of the D.C. Circuit and the Supreme Court alike. In *Food Lion, Inc. v. United Food and Commercial Workers Intern. Union,* 103 F.3d 1007 (D.C. Cir. 1997), for example, the court explained that "civil contempt action is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Id.* at 1016 (citations and internal quotations omitted). The Supreme Court in *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 (1994), a decision relied on by the *Cobell VIII* decision, put it in strkingly similar terms: "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.'" *Id.* at 827 (brackets in original) (*quoting United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947). In fact, in *Bagwell*, the Court took pains to make clear that it was leaving "unaltered the longstanding authority of judges ... to enter broad compensatory awards for all contempts through civil proceedings." *Id.* at 838 (emphasis added). *See, also Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) ("The District Court imposed a variety of contempt sanctions in this case, including fines ..., a computerized recordkeeping requirement, and attorney's fees and expenses. Petitioners claim that these sanctions, while ostensibly imposed for civil contempt, are in fact punitive, and were issued without the procedures required for criminal contempt proceedings .... We reject this contention."). This Court recently reiterated these well settled principles in *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp.2d 70 (D.D.C. 2003), specifically concluding that compensation for losses sustained due to a parties'

contemptuous conduct is a basis for civil rather than criminal contempt: "Traditionally, whether a contempt is civil or criminal has depended on the character and purpose of the sanction. A 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." *Id.* at 75-76.

In light of the extensive, unrebutted and conclusive authority on this point making unmistakably clear that compensation for contemptuous conduct is a sufficient basis alone for civil contempt, Norton's conclusory assertion – that "a sanction for past failures is criminal in nature because it intends to punish rather than coerce compliance"[2] – is patently frivolous in the Rule 11 sense. This position is completely unsupported by any authority – past failures are addressable through civil contempt – as the above authorities make clear, so long as there is a remedial purpose. Indeed, the very section of *Cobell VIII* that Norton cites, expressly recognizes the propriety of civil contempt for the purpose of "compensat[ing] the complainant for losses."[3]

The Contemnors are not all that better. While they grudgingly concede, as they must, that compensatory awards, alone, can be sufficient remedial basis to justify civil contempt, they seem to argue that an award of attorneys fees and other costs associated with delays, multiplication of the

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[2]Norton Brief at 3 (emphasis added)

[3]*Cf id. with Cobell VIII* 334 F.3d 1145-46. Given Norton's and her counsel's failure to follow Rule 11's limitations on presenting frivolous arguments, this court may well want to consider the imposition of Rule 11 sanctions *sua sponte.*

Norton and her counsel make an additional specious argument. They assert *citing not a single case* that *Cobell VIII* is *res judicata* and somehow precludes additional contempt proceedings. Of course to establish *res judicata* to bar an action, four mandatory elements "must" exist and it is the burden of the party seeking to preclude litigation on the merits to establish each element: "(1) an identity of the cause of action in both suits; (2) identity of the parties in both suits; and (3) a final judgment on the merits by a court of competent jurisdiction." *Velikonja v. Ashcroft*, 355 F. Supp.2d 197, 201 (D.D.C. 2005). *Accord Does I through III v. Dist. Of Columbia*, 238 F. Supp.2d 212, 217 (D.D.C.2002). Despite the well settled nature of this clear rule, Norton and her counsel fail to even mention the four elements, let alone demonstrate, as is their burden, how *Cobell VIII* satisfies those four elements. Apparently, they believe that just throwing out terms like *res judicata* are sufficient – standing alone, without citing any authority – to evade further contempt proceedings. However, the facts found by this Court in *Cobell VIII* are established and themselves demonstrate the culpability of the defendants' predecessors, subordinates, and counsel.

proceedings and obstruction generated by the contempt cannot be the basis of the contempt award. That argument too is specious and not supported by *Cobell VIII* or any other authority.[4]

It is true, of course, that *Cobell VIII* held that the narrow award this Court made in *Contempt II* of "expenses incurred in the contempt trial," standing alone, could not be considered compensatory for the underlying contemptuous conduct and thereby a adequate basis for civil contempt. *Cobell VIII*, 334 F.3d 1145-46. The point was not that an award of attorneys' fees resulting from delays and multiplication of proceedings for past misconduct can never be an underpinning of civil contempt – such a holding would be directly contrary to Supreme Court case law. Rather, in *Cobell VIII* an order that explicitly limited plaintiffs' compensation to attorneys' fees they incurred solely in contempt **trial** time – notwithstanding that the order was in conflict with this Court's thoughtful and considered opinion that stated much more compensation was contemplated – was not enough. There, the limitations in the order were interpreted by the court of appeals to trump the broader language in the opinion. Here, plaintiffs seek far more. And, here, plaintiffs are confident that the order entered will exclude such ambiguities and limitations and accurately reflect the nature and scope of compensation this Court intends to award.

Contemnors should be assessed jointly and severally for all additional litigation costs and expenses, including attorneys fees resulting from their contemptuous activity. Contemnors repeatedly have violated orders, such as the order to report on the status of trust reform. As a result, plaintiffs have been forced to perform substantial and tedious independent investigations into the status of their reform effort and their failure to perform, *inter alia*, data cleanup at BIA and implementation of

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[4]Contemnors cite statements plaintiffs' counsel made during the March 3rd hearing as a foundation to assert that plaintiffs have brought these contempt motions to punish and it is therefore criminal contempt. Their attempted "gotcha" utterly fails because plaintiffs have never disavowed the notion that <u>*some*</u> Contemnors should be criminally sanctioned for their willfully contemptuous conduct. Others should receive civil contempt and plaintiffs appropriately compensated. Nothing in plaintiffs' statements suggest that all individuals fall within the category of those who should be punished criminally. Although, if each Contemnor works out an appropriate plea bargain for his or her criminal contempt, plaintiffs will consider in accordance with any expressed preferences of this Court narrowing the scope of their civil contempt specifications.

TAAMS. But for Contemnors' failure to honestly report, plaintiffs would not have had to incur the extraordinary time and costs of seeking out the truth.

Simply put, it was Contemnors' violations of orders that resulted in plaintiffs incurring significant expenses and wasting resources they would not have otherwise spent but for the malfeasance of Contemnors. A proceeding to determine who is culpable for the order violations and, therefore, who should make plaintiffs whole is precisely the type of proceeding that courts have long held is civil rather than criminal in nature and purpose. *See Sheet Metal Workers*, 478 U.S. at 444, n.23 (civil contempt where "the assessment of attorney fees and expenses compensated respondents for costs occasioned by petitioners' contemptuous conduct"); *Dow Chem. Co. v. Chem. Cleaning, Inc*., 434 F.2d 1212, 1215 (5th Cir.1970) ("There are contempt cases in abundant number holding that a court has discretion to award reasonable attorney's fees and other expenses necessary to make an innocent party whole." (citations omitted)). *See also* Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 972 ("[T]he goal of compensatory contempt is to indemnify the plaintiff directly for the harm the contemnor caused by breaching the injunction. Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. The remedy is not penal, but rather remedial."). This Court's decision in *Landmark Legal Foundation,* is illuminating on this issue as well and conclusively rebuts the contention of Contemnors that civil contempt is unavailable:

> Because the purpose of a civil contempt proceeding is to vindicate the rights of the non-violating party, not to punish the violator, the relief granted will be either coercive or compensatory in nature. ... [C]ourts may ... award compensatory relief to the wronged party in a civil contempt proceeding.[*Bagwell*, 512 U.S.] at 838, 114 S.Ct. 2552 ("Our holding ... leaves unaltered the longstanding authority of judges ... to enter broad compensatory awards for all contempts through civil proceedings."). Thus, a court may order a civil contemnor to compensate the injured party for losses caused by the violation of the court order, and such an award will often consist of reasonable costs (including attorneys' fees) incurred in bringing the civil contempt proceeding.

272 F. Supp.2d at 76 (citations omitted; emphasis added).

In addition, it is important to recognize that certain individual Contemnors remain in positions where their compliance with orders can be coerced through civil contempt sanctions. For example,

certain senior officials are responsible still for reporting on trust reform as required by *Cobell V*. This Court has the plenary power to issue fines that will continue until they comply with the reporting requirement. This Court can also sanction them to confinement until they comply since it is the Contemnors who hold the keys to their jail cells. The same can be done until the defendants stop the continuing their spoliation of trust records.

In short, contrary to the assertions of Contemnors, absolutely nothing in *Cobell VIII* purports to overturn decades of Supreme Court case law and suggest that compensatory monies, including attorneys fees, cannot be the foundation and purpose of civil contempt proceedings. Although it is clear that certain Contemnors should proceed to criminal contempt because their willful violations of orders must be punished to deter future contempt, civil contempt is still plainly available as well. This Court has the option to choose for each Contemnor how to proceed. Indeed, the facts support a decision to proceed against certain of the Contemnors both civilly and criminally. And, to the extent that such Contemnors are concerned that their testimony in a civil contempt proceeding may incriminate them, they may assert their Fifth Amendment rights.

II. THIS COURT CAN ALSO EXERCISE ITS INHERENT AUTHORITY AND SANCTION THE TRUSTEE-DELEGATES AND OTHER CONTEMNORS

There may very well be circumstances when this Court finds it appropriate to proceed down a track other than civil or criminal contempt. Contempt may not always be the most appropriate avenue to travel. And it is not the only option available to ensure against litigation abuses and other bad faith conduct and protect the integrity of the judicial process.

Nearly two hundred years ago, the Supreme Court stated that "[c]ertain implied powers must necessarily result to our courts of justice, from the nature of their institution," and these powers "cannot be dispensed with in a court, because they are necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). More recently, the D.C. Circuit has held that "[a] district court may order sanctions, including a default judgment, for misconduct ... pursuant to the

court's inherent power to protect [its] integrity and prevent abuses of the judicial process." *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir.1998). In this Circuit, the central case on the issue of inherent authority sanctions is *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469 (D.C. Cir. 1995), which described the inherent power of the district court in these terms:

> The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment. See Chambers, 501 U.S. at 43-45, 111 S.Ct. at 2132-33; Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980); Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118-19 (1st Cir.1989); Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir.1982). Other inherent power sanctions available to courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence. See Gregory P. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 28(A) (2d ed. 1994).

Id. at 1475.

There may very well be circumstances where this court believes the underlying misconduct does not fit a specific definition of contempt. In those cases, this Court has ample authority to consider other options including *Shepard*-like inherent authority sanctions. Fines may be particularly appropriate for certain Contemnors as an appropriate sanction.

Plaintiffs also urge the Court to consider inherent power sanctions for the misconduct by the named defendants as well. This is especially appropriate and fitting for the systemic destruction of e-mail and other vital trust information. Such spoliation can be redressed through evidentiary sanctions and presumptions. Issue related sanctions, in fact, may well be the best – in fact the only – meaningful mechanism to properly address the trustee-delegates' massive destruction of trust material and evidence in this litigation. In this case, the spoliation of evidence is so prevalent, such a proceeding could properly lead to a default judgment or at a minimum setting aside defendants' ability to use certain evidence in the accounting components of this litigation. *See, e.g., Shepherd*, 62 F.3d at 1479 ("[C]ourts generally respond to document destruction or alteration with the ultimate sanction of dismissal or default in two types of cases: where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway, ... and where the guilty party

has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction. (Citations omitted) *See generally* Gorelick, DESTRUCTION OF EVIDENCE § 3.16, at 122-26.

CONCLUSION

The main point of this memorandum is that *Cobell VIII* offers important guidance. It informs us and this Court as how to proceed in civil contempt and criminal contempt. But it does not preclude either as Contemnors and Norton wishes. And, it certainly does not preclude this Court from commencing both such proceedings against the most culpable Contemnors and imposing the most draconian sanctions. Indeed, as we have shown, there are other avenues available to this Court – including disbarment – depending on how this Court decides that it wants to proceed. Such decisions are committed to its discretion.

Plaintiffs do urge that this Court consider at least one proceeding against the trustee-delegates in their official capacity, because that may be the most effective way to secure important elements of the most critical relief that could make plaintiffs whole, restore the integrity of these proceedings, and ensure that such abuse does not reoccur – meaningful evidentiary and issue related sanctions and, of course, removal.

Respectfully submitted,

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March 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PLAINTIFFS' MEMORANDUM AS TO THE EFFECT OF THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *COBELL V. NORTON*, 334 F.3d 1128 (D.C. CIR. 2003) UPON PLAINTIFFS' PENDING SHOW CAUSE MOTIONS AND CONTEMPT PROCEEDINGS** was served on the following via facsimile, pursuant to agreement, on this day, March 28, 2005.

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