

U.S. DISTRICT COURT  
 DISTRICT OF COLUMBIA  
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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

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

Case No. 1:96CV01285 (RCL)  
 (Judge Lamberth)

**INTERIOR DEFENDANTS'  
 (1) OPPOSITION TO MOTION OF ELOUISE COBELL ET AL.  
 TO REMOVE EARL OLD PERSON AS A NAMED CLASS  
 REPRESENTATIVE, AND (2) OPPOSITION TO MOTION OF  
 CLASS COUNSEL TO WITHDRAW FROM THE REPRESENTATION OF  
EARL OLD PERSON IN ANY CAPACITY OTHER THAN AS CLASS COUNSEL**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), state the following as their opposition to Plaintiffs' filing of January 8, 2003 (docket number 1718)<sup>1</sup>, which consists of the motion of Plaintiffs Elouise Cobell, Thomas Maulson, James Louis LaRose and Penny Cleghorn for the removal of Earl Old Person as a named class representative ("Motion to Remove Earl Old Person"), and the motion of Plaintiffs' class counsel to withdraw as attorneys for Earl Old Person in his individual capacity ("Counsel's Motion to Withdraw").

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<sup>1</sup> The full title of Plaintiffs' filing (docket number 1718) is "Motion of Elouise Pepion Cobell, Thomas Maulson, James Louis LaRose and Penny Cleghorn to Remove Earl Old Person as a Named Class Representative and Motion of Class Counsel to Withdraw from the Representation of Earl Old Person in any Capacity Other Than as Class Counsel for a Member of the Certified Class."

## Introduction

Six-and-one-half years into this complex litigation, one of the five named Plaintiffs, Earl Old Person, suddenly has refused to comply with discovery or, supposedly, even to have contact with class counsel. All of this occurred just when the parties filed their respective January 6, 2003 plans for "fixing the system" and for an historical accounting, and just when Mr. Old Person was to be deposed. The remaining named Plaintiffs reacted by seeking to remove Mr. Old Person as a class representative, and by class counsel's seeking to withdraw as his attorneys – all of which has been done without Mr. Old Person stating whether he consents. It would be hard to imagine a set of facts that could more clearly raise legitimate questions that should be answered before the relief sought by the remaining named Plaintiffs and their counsel could be considered.

The highly irregular circumstances involving Mr. Old Person indicate that the Motion to Remove Earl Old Person and Counsel's Motion to Withdraw should be denied or at least a decision on them deferred until the full story surrounding Mr. Old Person's apparent change of heart can be uncovered. First, the facts call for an inquiry into whether Mr. Old Person's sudden recalcitrance is because of purely personal reasons or because of his views about the way the case is proceeding or is being handled, and whether he is aware of significant antagonistic interests among the class members or the class representatives, which could necessitate relief such as division of the class into subclasses. Mr. Old Person has a fiduciary duty to the class to reveal any such information.<sup>2</sup>

Second, the other named Plaintiffs and class counsel have duties to Mr. Old Person that

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<sup>2</sup> Interior has filed herewith a motion to compel discovery from Mr. Old Person.

should preclude their seeking to remove him until it can be determined whether he consents and whether the facts call for adjustment to the class (e.g., formation of subclasses). Third, removal of Mr. Old Person should not be allowed if it would result in delay or prejudice to Defendants because of, for example, potential introduction of a new named Plaintiff. Fourth, withdrawal by class counsel as the attorneys for Mr. Old Person should be denied or a decision deferred at least until it can be determined whether Mr. Old Person seeks other counsel or whether class counsel in fact have a conflict of interest in representing him.

### **Background**

The history surrounding certification of the class is significant to the present motions. On or about January 14, 1997, Plaintiffs submitted their Revised Memorandum of Points and Authorities in Support of Motion for Class Certification ("Pl. Mo. for Certif."). That motion stated that Earl Old Person was a proper class representative because his claims were typical of the claims of the class (id. at 9), that he held no interests adverse to those of the class (id. at 10), and that he "can be counted on to see the job [of being a class representative] through" (id.). Plaintiffs further relied upon their assertions that Mr. Old Person was a long-time IIM trust account holder and had been Chairman of the Blackfeet Indian Tribe for 40 years. Id. at 11. Plaintiffs submitted an affidavit of Mr. Old Person attesting to those and other facts.

Apparently relying upon Plaintiffs' submissions, the Court entered an order certifying the class on February 4, 1997. The Court's order (at 2) found that the claims of the named Plaintiffs (including Mr. Old Person) "are typical of the claims of the Class," that the named Plaintiffs "have no interests adverse to the other members of the Class, and can be relied on to prosecute this action vigorously on behalf of the Class," and that they "will fairly and adequately protect the

interests of the Class in this action." The Order (at 3) also provided, however, that the Court retains jurisdiction "to modify this Order as the interests of justice may require."

For all that appears in the record, Mr. Old Person duly functioned as a class representative and named Plaintiff until now. Recently, however, he failed to comply with discovery that was due from him on January 8 and 9, 2003. First, this Court's order of December 23, 2002, required Plaintiffs to produce certain requested documents within 10 days, which made them due on January 8, 2003. Plaintiffs other than Mr. Old Person responded, but Mr. Old Person produced no documents nor a written response under Fed.R.Civ.P. ("Rules") 34. Second, Interior Defendants properly noticed the deposition of Mr. Old Person for January 9, 2003. Mr. Old Person did not appear for the deposition.

Rather, on January 8, 2003 – the due date for production of documents and one day before Mr. Old Person's scheduled deposition – the named Plaintiffs other than Mr. Old Person, together with Plaintiffs' attorneys, filed two papers (docket numbers 1718 and 1719) containing four motions: (1) the Motion to Remove Earl Old Person; (2) Counsel's Motion to Withdraw; (3) a motion to stay the Court's Order of December 23, 2002 as it regards Mr. Old Person's production of documents; and (4) a motion for a protective order to prevent the deposition of Mr. Old Person.<sup>3</sup> As grounds for this extreme relief, the moving Plaintiffs rely upon the vague allegation that "Earl Old Person has failed to cooperate with class counsel, most particularly with

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<sup>3</sup> The third and fourth motions were included in a filing (docket number 1719) entitled, "Plaintiffs' Consolidated Motions to Modify or In the Alternative Stay the Production Order of December 23, 2002 As It Pertains Solely to Named Plaintiff, Earl Old Person, Motion for Protective Order to Prevent the Deposition of Mr. Old Person and Memorandum of Points and Authorities in Support Thereof" (hereafter, "Plaintiffs' Consolidated Motion to Stay"). Interior has filed a separate Opposition to those motions.

regard to discovery." See Plaintiffs' Brief in Support of Motion to Remove Earl Old Person at 3 (emphasis added.). They also allege that "class counsel has not been able to discuss the Court's [December 23, 2002] production order with [Mr. Old Person] because of our inability to contact him." See Plaintiffs' Consolidated Motion to Stay at 2.

Significantly, neither the Motion to Remove Earl Old Person nor Counsel's Motion to Withdraw indicates whether Mr. Old Person consents to these motions and the relief they seek. Indeed, the record is silent on what Mr. Old Person's position is.

The circumstances described above are made all the more noteworthy because they occurred just days after the parties filed their January 6, 2003 plans for "fixing the system" and for an historical accounting.

### **Argument**

#### **I. The Court Should Defer Ruling on Whether to Remove Mr. Old Person As a Named Plaintiff Until Defendants Complete Their Discovery Into the Reasons for His Non-Compliance and Non-Cooperation**

Even though the class already has been certified, the Court has a continuing duty to ensure that the requirements for class certification remain satisfied. Nat'l Assoc. of Reg'l Med. Programs v. Mathews, 551 F.2d 340, 344 (D.C. Cir. 1976) ("Basic consideration of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent [class] members will be bound"); see also Hervey v. City of Little Rock, 787 F.2d 1223, 1227 (8th Cir. 1986) ("The court's duty to assure compliance with Rule 23(a) continues even after certification"); In re Great So. Life Ins. Co. Sales Practices Litig., 192 F.R.D. 212, 215 (N.D. Tex. 2000) (noting that "the Court's duty to ensure compliance with Rule 23 continues after

certification"); In re Hartford Sales Practices Litig., 192 F.R.D. 592, 602 (D. Minn. 1999) (same); Hum v. Dericks, 162 F.R.D. 628, 633 (D. Haw. 1995) ("The court has an ongoing duty to ensure compliance with Rule 23(a), even after certification"); Baldrige v. Clinton, 139 F.R.D. 119, 126 (E.D. Ark. 1991) (same).

The Court's class certification order found that Mr. Old Person's claims were typical of the claims of the class (see Rule 23(a)(3)) and that the named Plaintiffs would adequately represent the class (see Rule 23(a)(4)). Settled law holds that "the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." General Tel. Co. v. E.E.O.C., 446 U.S. 318, 331 (1980). The D.C. Circuit repeatedly has held that one of the requirements for determining the "adequacy of representation" is that "the named representatives must not have antagonistic or conflicting interests with the unnamed members of the class." Twelve John Does v. Dist. of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997), quoting Nat'l Assoc. of Reg'l Med. Programs, 551 F.2d at 345; Nat'l Assoc. for Mental Health v. Califano, 717 F.2d 1451, 1458 (D.C. Cir. 1983); see also Tice v. Pro Football, Inc., 812 F. Supp. 255, 258 (D.D.C. 1993) (class representatives cannot have a conflict of interest with the class).

Determination of the adequacy of the class representatives did not end with certification of this class in 1997; the Court has an obligation to conduct a "stringent and continuing examination of the adequacy of representation" by the class representatives. Nat'l Assoc. of Reg'l Med. Programs, 551 F.2d at 344; Nat'l Assoc. for Mental Health, 717 F.2d at 1457.

The record is devoid of any explanation as to why Mr. Old Person suddenly will not participate in this case. Perhaps it is due to purely personal reasons, but the circumstances

surrounding Mr. Old Person's sudden refusal to be deposed, to produce documents or allegedly even to have contact with his own counsel at this critical point in the case at least raise legitimate questions as to whether Mr. Old Person – and the other class members with similar claims – hold views and have interests adverse to the positions being advanced by the remaining named Plaintiffs and their attorneys. If so, then removal of Mr. Old Person as a class representative may not be appropriate, and other action (such as creation of subclasses and appointment of other counsel for subclasses) may be appropriate. These matters cannot be determined until Mr. Old Person is fully examined as to the reasons for his sudden apparent refusal to participate in this case.

The circumstances involving Mr. Old Person are most unusual. He has been a named Plaintiff for the more than 6-1/2 years during which this case has been pending. Plaintiffs held him out as recognized and well-respected tribal leader. On January 8, 2003 – the date for him to produce documents, the eve of his January 9, 2003 deposition, and just days after the parties submitted their plans for "fixing the system" and for an historical accounting<sup>4</sup> – Plaintiffs suddenly announced that Mr. Old Person will not produce documents, will not appear for his deposition, and that he apparently refuses even to talk to class counsel. Even counsel's statement that "Earl Old Person has failed to cooperate with class counsel, most particularly with regard to discovery"<sup>5</sup> raises the question of what other matters (besides discovery) lack his cooperation.

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<sup>4</sup> On January 6, 2003, Plaintiffs filed their "Plaintiffs' Compliance Action Plan Together With Applicable Trust Standards" and "Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust." On that same date, Interior filed its "Historical Accounting Plan for Individual Indian Moneys" and its "Fiduciary Obligations Compliance Plan."

<sup>5</sup> See moving Plaintiffs' Brief in Support of Motion to Remove Earl Old Person at 3 (emphasis added).

These highly unusual circumstances raise legitimate questions as to whether Mr. Old Person – and the other class members who share his "typical" claims – have disagreements with the other named Plaintiffs' and their attorneys' approach to this case and the plans they submitted.

Mr. Old Person should be given an opportunity – and indeed required – to explain his actions. When he assumed the role of class representative, he undertook a "court imposed, fiduciary responsibility" to the class. Austin v. Pennsylvania. Dep't of Corr., 876 F. Supp. 1437, 1457 (E.D. Pa.1995); Paper Sys., Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 610 (E.D. Wis. 2000) ("Class representatives owe fiduciary duties to the absent members of the class, and are entrusted with the responsibility to advance and protect their interests"). This obligation "may not simply be abandoned at will but can only be relinquished with court approval." Austin, 876 F. Supp. at 1457.

If information from Mr. Old Person were to reveal that any of the class representatives have interests that are antagonistic to or in conflict with other class members, that is a crucial fact that, at a minimum, would require formation of subclasses pursuant to Rule 23(c)(4), with separate counsel, and may require further relief. Rule 23(c)(4)(B) provides, "a class may be divided into subclasses and each subclass treated as a class." The 1966 Advisory Committee Notes to Rule 23(c)(4) state, "Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." See also Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980) (formation of subclass appropriate for class members who objected to a consent decree); Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975) (Rule 23(c)(4) "provides the mechanism of subsequent creation of subclasses [] to deal with latent conflicts which may surface as the suit progresses"). Indeed, the



presence of antagonistic interests within the class could even be grounds for decertification. See Swain v. Brinegar, 517 F.2d 766, 780 (7th Cir. 1975) (certification denied where plaintiffs held interests antagonistic to some other class members).

Thus, if Mr. Old Person knows of reasons why he and other class members have interests antagonistic to the other named Plaintiffs, he has a fiduciary obligation to the class to reveal that information so that appropriate action (e.g., formation of a subclass) can be taken. If it turns out that he has no such information, then other action may be appropriate. But the suspect circumstances surrounding Mr. Old Person's apparently sudden refusal to participate in the case are more than adequate to at least require that he explain himself.

Moreover, the press previously has reported that Mr. Old Person disagrees with the approach taken by the lead named Plaintiff with regard to at least some aspects of this case. Within the past year, a article about this case stated the following regarding Mr. Old Person's disagreements with the lead named Plaintiff, Elouise Cobell, regarding her approach to this litigation:

Cobell also has many detractors -- including some native Americans. Earl Old Person, Blackfeet tribal chairman, worries that a settlement that removes the BIA from trust management could hurt Indians, providing grounds for terminating the government's trust relationship with tribes that depend on funding.

Todd Wilkinson, A Blackfeet's Crusade to Settle Accounts with US, Christian Science Monitor March 20, 2002 (emphasis added). This adds further grounds to raise the question of whether Mr. Old Person knows of antagonistic interests within the class.

Therefore, sufficient grounds exist to require Mr. Old Person to fulfill his fiduciary duty to the class by explaining his refusal to participate in this case and to reveal whether he knows of

any antagonistic interests within the class.

Plaintiffs' cited cases (Brief in Support of Motion to Remove Earl Old Person at 3) are not to the contrary. In Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 617 (5th Cir. 1983), the court merely held that, after a claim on the merits has been determined and the class was duly certified, the fact that some of the class representatives' claims might not have all of the precise characteristics pertinent to the class claims does not mean that the class should be decertified on appeal. Rather new class representatives could be appointed. Similarly, in Umar v. Johnson, 173 F.R.D. 494, 504 (N.D. Ill. 1997), discovery resulted in narrowing the class, which then did not include the named plaintiff, so the court held that a new class representative could be appointed. But those cases are inapposite because the issue is not whether Mr. Old Person's claims place him within the class, but whether Mr. Old Person knows of facts showing antagonistic interests between the other named Plaintiffs and class members. Plaintiffs' cited case of Howard v. McLucas, 87 F.R.D. 704, 706 (M.D. Ga. 1980), is not contrary to the position we assert, for in that case, the court considered the relevant facts concerning a conflict between two class counsel, and the court determined which one best represented the class. If Mr. Old Person is indeed aware of a conflict in the class, full disclosure of the relevant facts is essential so that the Court may decide how the class will be properly represented.

**II. The Other Named Plaintiffs and the Plaintiffs' Attorneys Have a Duty to Earl Old Person That Precludes Them From Seeking His Removal Without His Permission**

Plaintiffs' counsel's primary fiduciary duty is to the class.<sup>6</sup> Thomas v. Albright, 77 F.

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<sup>6</sup> Plaintiffs' attorneys also have fiduciary duties to their client, Mr. Old Person. Although Plaintiffs' counsel now have moved to withdraw as counsel for Mr. Old Person (except to the extent that he would remain a class member, and thus represented by them as class counsel), that

Supp. 2d 114, 122 (D.D.C. 1999) ("Class counsel is required to act in the 'best interests of the class considered as a unit.'"), aff'd, 247 F.3d 260 (D.C. Cir.), cert. denied, 122 S. Ct. 347 (2001). Similarly, the class representatives owe a fiduciary duty to the class. Austin, 876 F. Supp. at 1457. For the reasons stated in part I, above, the class members have an interest in finding out whether Mr. Old Person is aware of class interests that are at odds with those of the other named Plaintiffs. Therefore, the moving named Plaintiffs and Plaintiffs' counsel have a duty to support that inquiry and to find out whether, for example, antagonistic interests exist within the class and whether formation of subclasses is appropriate. Simply seeking to remove Mr. Old Person as a class representative – without uncovering all of the relevant facts – does not fulfill that duty.

**III. Removal of Mr. Old Person Should Not Be Permitted If It Will Result in Delay or Other Substantial Prejudice to Any Party**

The movants do not state whether they would seek to add a new class representative to replace Mr. Old Person, but if so, that has the potential for dramatically delaying the case and working to the prejudice of Defendants. Defendants expended tremendous time and resources preparing this case under the assumption that Mr. Old Person would be one of the class representatives. For example, Defendants spent much time and resources to gather documents relevant to Mr. Old Person in connection with the so-called "paragraph 19" document production (i.e., production of documents pursuant to paragraph 19 of the document production order).

Defendants also spent enormous resources to analyze the history of IIM transactions of Mr. Old

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motion has not been granted. Unless and until that motion is granted, Plaintiffs' counsel remain counsel for Mr. Old Person, with all the fiduciary duties that are part of the attorney-client relationship. See Haines v. Liggett Group, Inc., 814 F. Supp. 414, 424 & 425 (D.N.J. 1993) ("[w]hen an attorney agrees to undertake the representation of a client, he or she is under an obligation to see the work through to completion" and "to fully protect his or her client's interests."

Person, and to trace Mr. Old Person's interests in IIM trust property all the way back to the original allotments in which he holds an interest. All of these tasks were performed with regard to each of the named Plaintiffs. If Mr. Old Person were removed as a named Plaintiff, the benefit of that work would be lost.

**IV. The Lack of Information Regarding Mr. Old Person's Position and Interests Precludes Withdrawal By Counsel At This Time**

Local Rule 83.6(d) states as follows regarding attorneys' motions to withdraw: "The court may deny an attorney's motion for leave to withdraw if the withdrawal would unduly delay trial of the case, or be unfairly prejudicial to any party, or otherwise not be in the interests of justice."

The Court thus has ample grounds to deny Counsel's Motion to Withdraw. As shown below, until more information can be gathered regarding Mr. Old Person's position and knowledge of possible conflicts of interest in this case, it is not in the interest of the class or in the interest of justice to allow counsel to withdraw.

First, the record is devoid of any information as to whether Mr. Old Person wants class counsel to continue to represent him. That at least is an important factor to consider.

Second, class counsel's vague allegation that Mr. Old Person "has failed to cooperate with class counsel, most particularly with regard to discovery" is not sufficient. They do not explain how he has failed to cooperate, claiming that such matters are privileged. Nor do they state whether he has stated a reason for his non-cooperation. But if such non-cooperation involves his assertion that the other class representatives or class counsel are not acting in the best interest of the class or a subgroup of the class, that is a matter of crucial importance that must be revealed so that all class members' interests may be protected (see above); class counsel are not entitled to

hide such facts under the guise of privilege.

Third, class counsel claim that they have had difficulty in contacting Mr. Old Person, but they do not reveal sufficient facts surrounding the alleged problems in contacting him. They fail to state how many times and in what ways they tried to contact him, and whether his unavailability to them was temporary (e.g., just over the holidays) or permanent. They do not disclose whether they actually sent him copies of the Court's December 23, 2002 Order and the notice of deposition, and whether they previously advised him that would seek to withdraw. No conclusion is possible about whether class counsel's efforts to contact him were sufficiently diligent.

In light of the paucity of information in the record, Counsel's Motion to Withdraw should be denied or at least not be ruled upon until the Court is able to determine Mr. Old Person's position on that motion and whether class counsel have conflicts of interest with Mr. Old Person because of the interests he asserts and holds in this case.

Moreover, withdrawal of counsel until such information is gathered would be particularly inappropriate, for it would deprive the Court and Defendants of the primary channel for contacting Mr. Old Person to obtain such information. Although Plaintiffs' counsel point to unspecified difficulties in contacting Mr. Old Person now, Plaintiffs' counsel nonetheless have been the primary means of reaching Mr. Old Person throughout the long history of this case. If they withdraw now, that would make it that much more difficult for the Court and Defendants to obtain Mr. Old Person's deposition or otherwise to obtain his information about the crucial class issues discussed above. See Ohntrup v. Firearms Ctr., Inc., 802 F.2d 676, 679 (3d Cir. 1986) (counsel not allowed to withdraw where that would have left the court without the possibility of

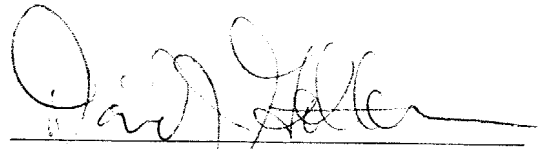
effective communication with the client) (per curiam).

**Conclusion**

For the foregoing reasons, we respectfully request that the Court deny the motion of Elouise Cobell, Thomas Maulson, James Louise LaRose and Penny Cleghorn for the removal of Earl Old Person as a named class representative, and deny the motion of Plaintiffs' class counsel for the withdrawal as attorneys for Earl Old Person in his individual capacity, or at least defer ruling on such matters until discovery of Mr. Old Person is completed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., )  
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Plaintiffs, )  
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v. ) Case No. 1:96CV01285 (RCL)  
 ) (Judge Lamberth)  
GALE NORTON, Secretary of the Interior, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

**ORDER DENYING MOTION OF ELOUISE PEPION COBELL, ET AL.  
TO REMOVE EARL OLD PERSON AS A NAMED CLASS REPRESENTATIVE  
AND MOTION OF CLASS COUNSEL TO WITHDRAW FROM REPRESENTATION**

This matter coming before the Court on the Motion of Elouise Pepion Cobell, Thomas Maulson, James Louis LaRose and Penny Cleghorn to Remove Earl Old Person as a Named Class Representative and Motion of Class Counsel to Withdraw from the Representation of Earl Old Person in any Capacity Other Than as Class Counsel for a Member of the Certified Class, and any responses thereto, the Court finds that the said motion should be DENIED.

IT IS THEREFORE ORDERED that the said motion of certain Plaintiffs and of class counsel is hereby DENIED.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 16, 2003 I served the foregoing *Interior Defendants' (1) Opposition to Motion of Elouise Cobell et al. To Remove Earl Old Person as a Named Class Representative, and (2) Opposition to Motion of Class Counsel to Withdraw from the Representation of Earl Old Person in Any Capacity Other than as Class Counsel* by facsimile in accordance with their written request of October 31, 2001 upon:

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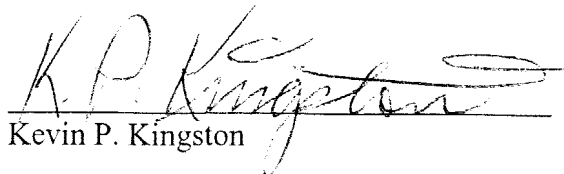
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