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
(Judge Lamberth)

INTERIOR DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 11, 2003 MEMORANDUM AND ORDER INSOFAR AS IT GRANTED PLAINTIFFS' MOTION FOR SANCTIONS

Interior Defendants submit this reply memorandum in further support of their motion for reconsideration of the Court's March 11, 2003 Memorandum and Order ("Memorandum and Order") insofar as it granted Plaintiffs' motion for sanctions. In their opposition brief, Plaintiffs present arguments that are premised upon gross misstatements of both fact and law and, accordingly, should be rejected. The motion should be granted.

DISCUSSION

Interior Defendants seek reconsideration of the Court's Memorandum and Order and vacatur of that portion imposing sanctions on Defendants because the Court lacked an appropriate basis to take such action under Federal Rule of Civil Procedure 56(g). As discussed in Interior Defendants' moving papers, it was error for the Court to conclude that the Declaration of Frank Sapienza, subscribed September 18, 2000 under penalty of perjury and supported by substantial documentary evidence ("Sapienza Declaration"), was false based upon statements contained in an unsworn letter from an official in the General Accounting Office ("GAO") who

acknowledged that, "[g]iven the number of years that have passed, we have no direct knowledge about the nature of any accounting regarding individual Indian accounts previously undertaken by GAO, or the standards or procedures used." Letter from Gene L. Dodaro to John Berry of August 27, 1999 ("Dodaro Letter"), attached as Exhibit 1 to Interior Defendants' Motion And Supporting Memorandum For Reconsideration Of The Court's March 11, 2003 Memorandum And Order Insofar As It Granted Plaintiffs' Motion For Sanctions ("Interior Defendants' Moving Brief").

The infirmity of the foundation underlying the Court's opinion was clearly set out in Interior Defendants' motion. First, the opinion rests on inadmissible hearsay. Interior Defendants' Moving Brief at 7. Second, it deems dispositive statements from an individual who concedes he and his office lack foundational knowledge concerning the Indian fund activities that are the subject of the declaration that the Court has found to be false. Id. at 7-8. Third, even if the Dodaro Letter did not suffer from evidentiary defects that render it inadmissible, the Court's finding of bad faith still could not stand because, to the extent the letter can be considered inconsistent with the Sapienza Declaration, the result would be a contested factual issue that would warrant a hearing and opportunity for the parties to be heard before a proper credibility assessment could be made by the Court. Id. at 9. And fourth, in any event, the lack of clarity that the Court perceives in Mr. Sapienza's Declaration simply does not rise to the level at which Rule 56(g) sanctions should be imposed. Id. at 9-10; see Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co., 866 F.2d 11, 16 (1st Cir. 1989) (courts have imposed sanctions under Rule 56(g) only in rare circumstances in response to egregious conduct) (citations omitted); Jaisan, Inc. v. Sullivan, 178 F.R.D. 412, 415-16 (S.D.N.Y. 1998) (Rule 56(g) sanctions appropriate only where

affidavit contains "perjurious or blatantly false allegations or omitted facts concerning issues central to the resolution of the case.") (citation omitted).

Plaintiffs purport to answer only the first two points raised by Interior Defendants. They respond to the contention that Mr. Dodaro's letter is inadmissible hearsay by arguing that he is an "Executive Branch employee" and that, accordingly, "the Dodaro Letter is not hearsay, but rather is a party admission" under Federal Rule of Evidence 801(d)(2). Opposition To Defendants' Latest Motion For Reconsideration With Respect To This Court's March 11, 2003 Memorandum And Order And Request For Enlargement Of Time Within Which To Submit Filing Detailing Amount Of Reasonable Expenses And Attorneys' Fees Incurred ("Plaintiffs' Opposition Brief") at 1-2, n.2. This argument is wrong from both a legal and factual standpoint. First, Mr. Dodaro is not an employee of the Executive branch. The General Accounting Office, by which Mr. Dodaro is employed, is part of the Legislative Branch of government. This fact would have quickly become apparent to Plaintiffs, had they conducted a reasonable inquiry before making such an erroneous factual assertion to the Court. The very first sentence of GAO's Internet site informs as follows: "The General Accounting Office is the audit, evaluation and investigative arm of Congress." See GAO Homepage, www.gao.com (emphasis added). Plaintiffs' reliance on a false factual predicate reflects a failure to conduct even the most cursory inquiry to determine whether their argument had any factual support.

Plaintiffs' argument also fails on the law. Mr. Dodaro, and more generally GAO, are not even parties to this litigation. The only defendants are the Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Secretary of the Treasury. The proposition that a statement from a nonparty -- a GAO official in this case -- could be deemed a party-opponent admission by

those defendants has no legal basis and, not surprisingly, Plaintiffs proffer no legal citation to support it. See Fed. R. Evid. 801(d)(2).[1] This is particularly so when the statements at issue come from an official in a branch of government that is wholly independent and outside the control of the branch to which the party defendants belong.

Plaintiffs compound their legal error by relying upon yet another unsworn letter from a GAO official in an attempt to advance their argument. See Plaintiffs' Opposition Brief at 3-5 (quoting Letter from Anthony H. Gamboa to Bert T. Edwards (April 19, 2002) ("Gamboa Letter").[2] But all the evidentiary defects that encumber Mr. Dodaro's letter render Mr. Gamboa's statements inadmissible as well. See Interior Defendants' Moving Brief at 7-11. As such, neither letter provides a proper foundation for the imposition of sanctions under Federal Rule 56(g).

Even if the Gamboa Letter were competent evidence, it would not "underscore[] the falsity of the Sapienza Declaration," as Plaintiffs contend. See Plaintiffs' Opposition Brief at 3. Plaintiffs quote various statements by Mr. Gamboa setting forth his opinion that GAO settled disbursing agents' accounts, but did not settle IIM accounts. Id. at 4-5. But Mr. Sapienza also concluded that GAO settled disbursing agents' accounts. See Sapienza Declaration at ¶¶ 50-51 ("'[T]he best remembered feature of the first GAO was its receipt and review of the disbursing

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[1] Rule 801(d)(2) provides, in pertinent part, that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

[2] A copy of the letter was transmitted to the Court via Interior Defendants' Notice of Filing of April 19, 2002 Letter from General Accounting Office General Counsel.

officers' accounts with their accompanying vouchers and supporting documents . . . .' When the auditors could find no flaw in the account, they would clear, certify, and thus settle it."). The process of reviewing and settling disbursing agents' accounts, Mr. Sapienza explained, also involved an examination by GAO of IIM transactions that were included in the disbursing agent's account package. See id. at ¶ 34 ("Prior to settlement of accounts by GAO, the Indian agent was required to prepare an 'account current' that showed: 'the opening balance, receipts, disbursements, and closing balance of each class of individual Indian money and special deposits . . . .'"). Mr. Gamboa confirmed Mr. Sapienza's testimony in this regard. See Gamboa Letter at 6 ("Undoubtedly, given the nature of their work, Indian Service disbursing officers would have engaged in transactions with individual Indians and IIM accounts. Because GAO examined disbursing officers' disbursement and receipt vouchers, GAO's settlement of disbursing officers' accounts likely would have confirmed the accuracy of, or taken exception to, the disbursing officers' withdrawals from and credits to the IIM account so long as those transactions were vouchered transactions."). Thus, even if Mr. Gamboa's statements could be accorded evidentiary weight, there is no merit to Plaintiffs' assertion that they would render false the testimony of Mr. Sapienza.

Plaintiffs also claim that it is "telling that Interior Defendants' expert, Edward Angel . . . has opined that the settlement process did not constitute an historical accounting." Plaintiffs' Opposition Brief at 5. It is difficult to ascertain just what Plaintiffs contend Mr. Angel's testimony is "telling" of, but in any event, their characterization of the deposition testimony they rely upon is inaccurate. Mr. Angel did not testify that "the settlement of accounts process did not constitute an historical accounting." Rather, he testified that he did not know, and that in his view, an audit and an accounting are "two different things." Transcript of Deposition of Edward

Angel at 53. Such testimony does not contradict the Declaration of Mr. Sapienza, who made no statement at all concerning whether GAO's review of IIM transactions through its settlement of disbursing agents' accounts constituted an "historical accounting."

Plaintiffs' arguments are based upon plain misstatements of fact and fundamental errors of law. They do not address at all the relevant standards under Federal Rule 56(g), upon which the Court's ruling is based. Accordingly, they should be flatly rejected, and Interior Defendants' motion granted.

CONCLUSION

For the reasons set forth above and in their Moving Brief, Interior Defendants respectfully request that the Court enter an Order granting their motion for reconsideration of the Memorandum and Order, and vacating the imposition of sanctions against Defendants.[3]

Dated: April 18, 2003

Respectfully submitted,

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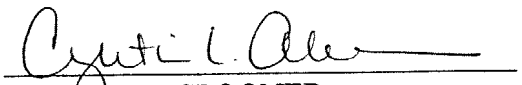

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[3] Interior Defendants do not oppose Plaintiffs' request for a 30-day extension of time to submit the filing required by the Memorandum and Order.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 18, 2003 I served the foregoing *Interior Defendants' Reply Brief in Further Support of Their Motion for Reconsideration of the Court's March 11, 2003 Memorandum and Order Insofar as it Granted Plaintiffs' Motion for Sanctions* by facsimile in accordance with their written request of October 31, 2001.

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