IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' "REPORT" REGARDING THE ERWIN SCHEDULING MATTER

Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' Report Regarding What Defendants Term "The Erwin Scheduling Matter" (filed Dec. 13, 2004) ("Opposition") fails to offer any legitimate justification for the filing of plaintiffs' "Report" in the record of this case. Plaintiffs still have not identified any rule of procedure or any ruling of this Court that authorized them to place this material on the public record. Moreover, if the "Report" itself left any doubt as to its purpose, plaintiffs' Opposition makes it clear that plaintiffs are attempting to instigate a criminal investigation of their opposing counsel and to force them to testify, notwithstanding this Court's ruling that plaintiffs were not entitled to take defense counsel's depositions.

1. Plaintiffs criticize defendants for filing a "motion to strike" without citing a provision of the Federal Rules. Plaintiffs misapprehend that they are permitted to file whatever they want on the record of the Court. They cite no authority for this remarkable proposition. Plaintiffs' "Report" is neither a "pleading" within the meaning of Rule 7(a)[1], nor a "motion" within the meaning of Rule 7(b); it is not a proper filing and, as such, should be stricken from the

[1] *See* Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1189 at 41 (2004) (noting Rule 7(a)'s "brief list of permissible pleadings and [] flat prohibition against any pleading other than those listed. . . .").

record.[2] Plaintiffs' "Report" was not accompanied by a motion, as required by the Local Rules, nor did plaintiffs comply with the "meet and confer" requirement. Local Rules 7(a) and 7(m). Further under the Federal Rules of Civil Procedure, a motion must "state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Civ. P. 7(b)(1). Plaintiffs' "Report" meets none of these requirements and therefore is an improper filing. Further, as plaintiffs correctly point out, a motion to strike may also be filed under Rule 12(f), which permits the court to order stricken "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiffs' "Report" levels unsubstantiated accusations of criminal wrongdoing against defense counsel. Consequently, it meets the standards of Rule 12(f) and should be stricken on that ground as well. *See* Wright & Miller, *supra*, § 1382 at 465 & note 56 (collecting cases in which Rule 12(f) applied to "scandalous" allegations).

Tellingly, although plaintiffs claim this Court authorized them to prepare and submit the "Report" in its Feb. 5, 2003 Order, they point to no such directive in the text of that ruling. This Court determined that the facts surrounding the miscommunication regarding Ms. Erwin's availability for deposition in December 2002 related to her credibility as a witness for Trial 1.5. It did not anoint plaintiffs as roving special prosecutors. The Court made clear its intentions in the Sept. 2, 2004 Order, which denied plaintiffs' demand to depose defense counsel on the matter.

Accordingly, plaintiffs have failed to demonstrate any provision of the Federal or local rules or any order of the Court that allowed them to file their opinions about the Erwin matter in the record of this case.

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[2]Parties are permitted, of course, to file other sorts of papers in the Court record, such as notices of appearance and withdrawal of counsel, requests for hearings, and requests for status conferences, but those are procedural in nature, are customarily short and non-substantive, and seek some sort of action by the Court or the clerk. Plaintiffs' "Report" plainly is not procedural or short, and it does not purport to seek any action by the Court. The rules of Court do not permit parties to file editorial comments or partisan opinions on the record of the Court, yet that is exactly what plaintiffs have attempted to do in filing this "Report."

2. In its September 2, 2004 Order (the "Sept. 2, 2004 Order"), the Court quashed plaintiffs' notices of deposition for government counsel Sandra Spooner, Terry Petrie and Michael Quinn. In doing so, the Court explicitly found: "Any deposition of defendants' trial counsel would appear to be directed only at uncovering facts useful for the prosecution of criminal contempt. Plaintiffs are ineligible to undertake such an investigation." Sept. 2, 2004 Order at 4-5, citing *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987) (plaintiff's counsel was ineligible to serve as special prosecutor of civil adversary's alleged criminal contempt). Plaintiffs make clear in their Opposition that, despite the Court's ruling, their "Report" is intended to serve as a brief for prosecuting their opposing counsel for an alleged "fraud on the court." Opposition at 4 & note 6. The Court of Appeals concluded in *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003), that allegations of "fraud on the court" should be treated as criminal, rather than civil, in nature.[3] In such matters, the accused are "entitled to the usual protections of the criminal law, such as trial by jury and proof beyond a reasonable doubt." *Id.* at 1147. Yet plaintiffs demand that the Court make adverse inferences against defense counsel on the grounds that defense counsel have not submitted sworn declarations. The Opposition makes clear that plaintiffs not only intend to ignore the restrictions set forth by the Supreme Court in *Young* and by this Court in its Sept. 2, 2004 Order, but they also ask the Court to deprive these individuals of their Constitutional rights by forcing them to testify and by shifting the burden to them to "prove" their innocence. Opposition at 4 n.6. The Court should decline plaintiffs' invitation to violate the Constitution.

3. Plaintiffs contend that defense counsel have failed in their duty of candor to the Court by not responding substantively to the "Report." That contention rests upon flawed characterizations of the facts. First, it wrongly assumes that the "Report" is a legitimate pleading that requires a response. Second, the argument ignores the fact that defense counsel Terry Petrie

[3]Plaintiffs actually cite this holding in their Opposition at 14 note 32, but they completely ignore its significance by attempting to force defense counsel to testify to what plaintiffs claim is criminal conduct.

did explain the misunderstanding to the Court at the December 17, 2002 hearing, which is part of the public record. Further, the Court has received, at its request, transcripts of the two sessions of deposition of Ms. Erwin taken in February 2003. Thus, the Court has defense counsel's explanation of the miscommunication, as well as Ms. Erwin's. Defendants fully complied with the Court's Feb. 5, 2003 Order to produce Ms. Erwin for deposition and to permit her to testify about the scheduling matter. Defendants responded to plaintiffs' requests for documents and, at plaintiffs' request, also produced Michelle Singer for deposition. Aside from unfounded innuendos and name-calling, plaintiffs can point to nothing that defendants or their counsel have withheld from the Court that should have been disclosed about this issue. There is simply no evidence that anyone deliberately misinformed the Court about Ms. Erwin's travel plans.

The cases cited by plaintiffs do not support their position. *See* Opposition at 16. In particular, *Hartsell v. Source Media*, 2003 WL 21245989 (N.D. Tex. Mar. 31, 2003), upon which plaintiffs particularly rely, in fact demonstrates that there has been no violation here of defense counsel's duty of candor to the Court. In *Hartsell*, one of plaintiffs' class counsel learned that a named class member had been convicted of a crime, but did not report the conviction to the Court. No such circumstances exist here. Further, the Court in *Hartsell* held that "[t]he duty of candor includes a 'continuing duty to inform the Court of any development which may *conceivably* affect the outcome of the litigation.'" *Hartsell*, 2003 WL 21245989 at *3 (quoting *Board of License Comm'rs. v. Pastore*, 469 U.S. 238, 240 (1985)) (emphasis in original). Plaintiffs, however, have conspicuously failed to demonstrate how the misunderstanding regarding Ms. Erwin's December 2002 schedule could "*conceivably* affect the outcome of the litigation" two years after the deposition took place and almost one and a half years after the conclusion of Trial 1.5. If the plaintiffs believed that the miscommunication materially affected her credibility as a witness and could have conceivably affected the outcome of the litigation, they could have called Ms. Erwin to the witness stand and examined her in open court about the matter, armed with her deposition transcripts and the documents produced by defendants. Plaintiffs strain their own credibility by claiming that defendants somehow have violated a duty

of candor to the Court when plaintiffs themselves waited 20 months to complete the deposition of Ms. Erwin and file a "report" about it.

Moreover, the *Hartsell* Court declined to sanction the class counsel because it found class counsel had not withheld the information about the conviction in bad faith. Plaintiffs have demonstrated no bad faith on the part of defendants here, who have complied fully with the Court's Feb. 5, 2003 and Sept. 2, 2004 Orders. Defense counsel were sanctioned for objecting to a single question at Ms. Erwin's December 20, 2002 deposition and for filing an opposition to a motion to compel in support of that objection. The Court ruled in its Sept. 2, 2004 Order at 4: "The February 2003 opinion granted plaintiffs prospective relief in the form of a second deposition of Ms. Erwin, and compensatory relief in the form of sanctions for having to redepose Ms. Erwin and file a motion to compel. *Cobell v. Norton*, 213 F.R.D. at 28, 32. Plaintiffs have received all of the relief to which they are entitled." There simply is no basis for further sanctions in connection with this issue.

4. Plaintiffs' "Report" is improper on its face. Defendants should not be required to devote resources to refuting its biased and incomplete substance until the Court has ruled upon the propriety of the filing in the first instance. Accordingly, defendants reiterate their request that, if the Court requires a response to the "Report", the Court afford 30 days from the date of the Court's order for the filing of any such response.

Respectfully submitted,

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DATED: December 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on December 23, 2004 the foregoing *Defendants' Reply in Support of Their Motion to Strike Plaintiffs' "Report" Regarding the Erwin Scheduling Matter* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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