

security of the Department of the Interior's information technology systems.

On January 27, 2004, the United States filed a comprehensive memorandum (the “Response”) opposing Plaintiffs’ motion. The Response addressed all issues raised in Plaintiffs’ motion and demonstrated the motion was utterly baseless. Plaintiffs have now filed a motion requesting that eleven of the Named Individuals be deemed to have conceded Plaintiffs’ motion because they did not personally file additional, redundant memoranda also showing that Plaintiffs’ motion was meritless.¹

Plaintiffs’ motion to default the eleven Named Individuals and the companion motion to default “Citizen Norton” have met the considerable challenge of being even more frivolous than the contempt motion itself. The responsive memorandum filed by the United States addresses all issues raised by Plaintiffs' motion, and the Named Individuals may rely on that response.

Plaintiffs simply have no basis to claim that the Named Individuals had to file separate briefs in their personal capacities or risk default. Moreover, the motion filed by Plaintiffs is so lacking in specificity that the Named Individuals could not present individual responses, and Plaintiffs' assertion that they were required to do so is inconsistent with their due process rights.

A. The Government's Response Addressed All Issues

The Government's Response addressed all issues raised in Plaintiffs’ motion. The Response demonstrated that Plaintiffs’ contentions that one or more orders had been violated rested on misrepresentation and misinterpretation of four reports on which Plaintiffs relied. Response at 7-14, 24, 28-32. The Response demonstrated that Plaintiffs had not established that Defendants violated any of the orders at issue, which was sufficient to require that Plaintiffs’

¹ Plaintiffs have not moved to default Hart Rossman, the twelfth Named Individual.

motion be denied. Response at 14-32, 34-35. The Response also demonstrated that all of the orders in question were addressed solely to Defendants, and, therefore, Secretary Norton and the Named Individuals personally could not be held in civil contempt even if an order had been violated. Response at 36-37. The Response demonstrated that the eight Department of Justice attorneys who were accused of failing to conduct reasonable inquiry in connection with certifications filed pursuant to the preliminary injunction had completely fulfilled their professional obligations and, therefore, contempt sanctions or referral to the Disciplinary Panel, as requested by Plaintiffs, were totally unwarranted. Response at 25-28. The Response also showed that Plaintiffs had not even attempted to fulfill their evidentiary burden to show the elements of criminal contempt. Response at 40-41. In sum, the Response covered every issue raised by Plaintiffs' contempt motion directed to the Named Individuals, in any capacity. The arguments made in the Government's brief are before the Court, and the Named Individuals may rely on them, whether or not they filed additional responses.

Plaintiffs' contention that the Named Individuals conceded the motion because they did not file a one-sentence pleading adopting the Response or a longer memorandum echoing the Response is without merit. Plaintiffs point out that Local Rule 7(b) requires opposing parties to respond to a motion within a specified time and authorizes the Court to deem a motion conceded if opposing parties do not file a timely opposition. The Government is the opposing party in this case, and the Government did file a response. Rule 7(b) is inapplicable to the Named Individuals because they are not parties.

Plaintiffs failed to specify whether their allegations applied to the Named Individuals in their official or individual capacities. Because Plaintiffs failed to make this distinction, and

because all of the allegations pertained to actions taken by the Named Individuals in the course of their official duties, the Government responded to all the allegations as to them.

At bottom, Plaintiffs are arguing that if the Court agrees with the United States that Plaintiffs' motion is without merit, it should nevertheless grant Plaintiffs' motion because the Named Individuals did not file separate responses. Plaintiffs' contention is clearly incorrect.

B. Plaintiffs' Motion Lacks Sufficient Specificity to Allow or Require Separate Response

Plaintiffs' contention that the Named Individuals should be deemed to have conceded contempt liability would lack merit even if the United States had not filed an opposition. As movants for a show cause order, Plaintiffs have an initial burden of establishing a prima facie case. Until they do so, Defendants and the non-party individuals are not required to do anything. Plaintiffs' motion fell woefully short of discharging their burden.

As discussed in the Response, at 16 and 34, in order to require Defendants to respond to a charge of civil contempt, Plaintiffs have the burden of showing, by clear and convincing evidence, that (1) a court order was in effect, (2) the order clearly and unambiguously required certain conduct by the respondents, and (3) the respondents failed to comply with the Court's order. Plaintiffs' motion did not identify any order which required conduct by the Named Individuals in their personal capacities, and there is none. The December 21, 1999 Order, the TRO and the Preliminary Injunction by their terms were directed to Defendants. Therefore, Plaintiffs' motion falls by its own weight because Plaintiffs have failed to make the threshold showing of an order which required certain conduct by the Named Individuals in their personal capacities.

Even if Plaintiffs had identified an order binding the Named Individuals personally, Plaintiffs' motion was insufficient to require them, or even allow them, to present responses. Indeed, Plaintiffs' attempt to default them for not filing separate briefs runs afoul of due process. As noted in the Response, Plaintiffs failed to specify which acts taken by the Named Individuals allegedly violated the court orders in question. This Court has recognized that such a specification is required even for civil contempt proceedings. After Plaintiffs had filed a motion accusing dozens of individuals of committing civil and criminal contempt, the Court directed Plaintiffs to lay out "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." Transcript of March 15, 2002 Status Hearing, at 21:10-14. The Court concluded that "you need to specify by person so that each of them can respond to what the specifications would be and what the evidence would be so that each of them can have an opportunity to have due process." *Id.* at 23:7-10. Plaintiffs failed to particularize their allegations as to specific individuals in their January 13, 2004 motion. Accordingly, Plaintiffs did not meet the minimum measure of due process that this Court has already required for allegations of contempt. In the absence of specific allegations addressed to their personal behavior, the Named Individuals could neither present a written response nor show cause why they should not be held in contempt.

Plaintiffs' request that the Named Individuals be deemed to have conceded allegations that they committed criminal contempt is even more frivolous. First, Plaintiffs did not even attempt to establish the elements of criminal contempt. Criminal contempt requires an initial showing that evidence exists that, if believed, could establish beyond a reasonable doubt that (1)

a clear and reasonably specific court order was in effect, (2) the order required certain conduct by a Named Individual, and (3) the Named Individual willfully violated the court's order. As discussed in the Response at 41, Plaintiffs fail to establish any of the elements. Plaintiffs' motion did not specify any evidence which, if believed, would establish beyond a reasonable doubt that any Named Individual willfully violated any order. Until each Named Individual is provided with a prima facie case of criminal contempt, he or she could not frame a response. Moreover, requiring the Named Individuals to respond to charges of criminal contempt, as Plaintiffs request, would violate their rights of due process. The Court of Appeals made it abundantly clear that a criminal contempt proceeding is a criminal proceeding, and an accused is entitled to the full measure of due process rights guaranteed by the Constitution. *Cobell v. Norton*, 334 F.3d 1128, 1147 (D.C. Cir. 2003). A person accused of criminal liability cannot be deemed to have conceded liability by remaining silent.

At a minimum, each Named Individual has a right to know what he or she is personally accused of, whether the accusation is civil or criminal in nature, and whether the accusation pertains to his or her official or individual capacity. Yet, Plaintiffs' January 13, 2004 motion made no distinction between acts allegedly constituting civil contempt and acts allegedly constituting criminal contempt, or between acts taken by a Named Individual in an official capacity versus acts in a personal capacity. In sum, to the extent that Plaintiffs' January 13, 2004 motion attempts to state a case against the Named Individuals personally, the allegations are insufficient to allow them to respond, and, in any event, they would not be required to respond on risk of default, even if the motion had stated a case against them personally.

Additionally, the Court must make an independent determination of whether a party

requesting a contempt proceeding has stated a prima facie case, particularly when the party is alleging criminal contempt. As this Court recognized in *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 70, 77 (D.D.C. 2003): "[I]t is the court that makes the initial decision whether a criminal contempt proceeding should take place." Plaintiffs' effort to default the Named Individuals is an improper attempt to short-circuit the contempt process, to shift the burden of proof, and to deprive them of their rights of due process.

CONCLUSION

Plainly, neither a legal nor factual basis exists for Plaintiffs' motion. For the reasons stated above, the Court should enter an Order denying Plaintiffs' motion that the Named Individuals be deemed to have conceded the contempt motion and admonishing Plaintiffs against filing such frivolous and reckless pleadings in the future.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
MICHAEL F. HERTZ
Director

/s/ Dodge Wells
Dodge Wells
D.C. Bar No. 425194
Tracy L. Hilmer
D.C. Bar No. 421219
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
(202) 307-0407

DATED: February 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2004 the foregoing *Memorandum of the United States in Response to Plaintiffs' Motion That Steven Griles, James Cason, Hord Tipton, Robert McCallum, Peter Keisler, Stuart Schiffer, Christopher Kohn, Sandra Spooner, John Stemplewicz, Glenn Gillett, and John Warshawsky Be Deemed to Have Conceded Plaintiffs' Motion of January 13, 2004 Asserting Violations of Court Orders* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 15 2003

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

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

Civil Action Number 96-1285 (RCL)

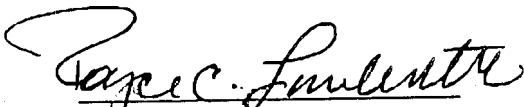
ORDER

Upon consideration of defendant Interior Secretary Gale A. Norton's motion for an order relating to service, plaintiffs' brief in opposition thereto, and the applicable law in this case, the Court finds that the motion should be denied. Defendant Norton is a party to the present suit solely in her official capacity as the Secretary of the Interior, not in her individual capacity. As a party in her official capacity, the Secretary is represented by the Department of Justice. Because the Secretary is not a party to the present suit in her individual capacity, it is only necessary that service of all pleadings and other filings in this suit be effected upon the Department of Justice attorneys representing the Secretary in her official capacity. Accordingly, it is hereby

ORDERED that defendant Norton's motion for an order relating to service [1907-1] be, and hereby is, DENIED.

SO ORDERED.

Date: APR 15 2003


Royce C. Lamberth
United States District Judge

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.)
 _____)

Civil Action Number 96-1285 (RCL)

FILED

SEP 16 2003

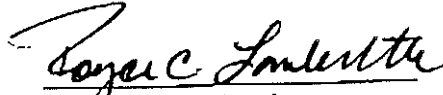
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

It is hereby ORDERED that the motion submitted in the present case on September 9, 2003 by attorneys for Gale A. Norton in her individual capacity be stricken from the record in this case. On April 15, 2003, this Court issued an order determining that "Defendant Norton is a party to the present suit solely in her official capacity as the Secretary of the Interior, not in her individual capacity." The Court therein denied the motion of attorneys for Gale A. Norton in her individual capacity to receive copies of all service made in this case, noting that Secretary Norton is represented by the Department of Justice, upon whom service is to be made. Accordingly, the Clerk of Court shall return the above-mentioned motion to the attorneys who submitted it. In light of this Order, the Clerk of Court shall return the combined opposition brief and cross-motion submitted by plaintiffs.

SO ORDERED.

Date: 9-16-03


 Royce C. Lamberth
 United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on *Plaintiffs' Motion to Treat as Conceded Plaintiffs' Motion for an Order to Show Cause Why the Department of the Interior, Interior Secretary Gale Norton, and Her Senior Managers and Counsel, Should Not Be Held in Civil and Criminal Contempt for Violating Court Orders, Including the Temporary Restraining Order and Preliminary Injunction Entered to Protect Trust Data and Assets (January 13, 2004) with Respect to Citizens Griles, Cason, Tipton, McCallum, Keisler, Schiffer, Kohn, Spooner, Stemplewicz, Gillett, And Warshawsky* (Dkt. # 2454). Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is DENIED.

SO ORDERED.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

Dodge Wells
Tracy L. Hilmer
Sandra P. Spooner
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004

Keith Harper, Esq.
Richard A. Guest, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530