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.	)	
	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER SEEKING STAY OF RULE 11 MOTION

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") state the following as their opposition to Plaintiffs' Motion for Protective Order Seeking Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees ("Plaintiffs' Motion" or "Pl. Mo."), which Plaintiffs filed on or about August 5, 2002.

Introduction

On June 28, 2002, Interior Defendants served (but, pursuant to Fed. R. Civ. P. 11(c)(1)(A)), did not file with the Court) Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold ("Rule 11 Motion"). Under Fed. R. Civ. P. 11(c)(1)(A), Plaintiffs had 21 days within which to withdraw the papers challenged by Defendant's Rule 11 Motion. Plaintiffs did not do so. However, on July 5, 2002, Plaintiffs filed with the Special Master a motion seeking a blanket stay of Interior Defendants' Rule 11 Motion as well as all discovery by Interior Defendants, based upon the legally insufficient and unjustified grounds that Defendants allegedly had not complied with

Plaintiffs' discovery or had committed sundry other acts of which Plaintiffs' disapproved.

On July 16, 2002, Interior Defendants filed their Opposition to Plaintiffs' July 5, 2002 motion to stay. In that Opposition (at 13-14), Interior Defendants objected to Plaintiffs' presentation of their motion to stay to the Special Master, because the Court has not referred such matters to the Special Master. The present Plaintiffs' Motion apparently is filed in response to that objection.

Because Plaintiffs did not withdraw their offending papers, Interior Defendants filed their Rule 11 Motion on July 25, 2002. Plaintiffs' Motion apparently reiterates some (not all)[1] of the arguments stated in their July 5, 2002 motion to stay, and the discussion below largely mirrors the points raised in Interior Defendants' July 16, 2002 Opposition regarding those arguments.

Argument

I. Because the Rule 11 Motion Involves Matters Segregable From the Merits of the Case, It Should Be Decided Promptly

The Rule 11 Motion charges that Plaintiffs' lead attorney, Dennis Gingold, filed false or misleading affidavits, including apparently false supporting documents, in support of Plaintiffs'

---

[1] Plaintiffs' Motion omits, and thus Plaintiffs appear to have abandoned, the argument contained in their July 5, 2002 motion to stay, that Plaintiffs needed a "respite" and they were too busy working on their ill-conceived "bills of particular" to work on anything else. Subsequent events call those arguments into doubt: In the more than one month since that motion to stay, Plaintiffs filed only two of their bills of particular, neither of which reflects much new thought or work. Moreover, on August 2, 2002, Plaintiffs announced their intention to seek discovery in aid of a new series of allegations based upon the recent resignation of the Special Trustee and his Congressional testimony. Plaintiffs obviously are not as pressed for time as they claimed, and the fact that they relied upon such a flimsy argument shows the weakness of their claimed right to a stay.

April 29, 2002 application for fees.[2] Plaintiffs' first argument (Pl. Mo. at 3) appears to be that, because Plaintiffs have a supposed "right" to obtain fees, it was improper and "bad faith" for Interior Defendants even to serve the Rule 11 Motion. But the supposed "right" to fees does not include permission to file false or misleading affidavits in support of the amount of fees claimed.

Plaintiffs turn the theory behind Rule 11 on its head. Rule 11(c)(1)(A) includes a "safe harbor" provision that allows the offending party an opportunity to withdraw the improper paper within 21 days after service of the motion, so that the court will not be misled by that paper, and the filing of the sanctions motion will not be necessary. But in order for that provision to work, the Rule 11 Motion must be served, and the offending party must remain obliged to withdraw the improper paper. The Advisory Committee Note to the 1993 amendments to Rule 11 states:

> The [1993 revision to Rule 11] leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. . . . Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

(Emphasis added.); see also 2 James Wm. Moore, Moore's Federal Practice § 11.22[1][c], at 11-42 (3d ed. 2002) ("[A] party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the 'safe harbor' provision [Rule 11(c)(1)(A)] would be nullified." (footnotes omitted)). Plaintiffs' approach

---

[2] In particular, Mr. Gingold's two affidavits (dated April 29 and May 23, 2002) were false or misleading in suggesting that he charged Plaintiffs hourly rates ranging from $325 to $475 (plus 15%), when, in fact, he did not do so. Additionally, Mr. Gingold attached to his April 29, 2002 affidavit what appear to be fictitious "billing statements" to falsely support his rates.

would violate this principle, for it would leave their false or misleading affidavits on file, thus continuing to mislead the Court regarding Plaintiffs' fee application.

Plaintiffs' second argument (Pl. Mo. at 3) is that the Rule 11 Motion cannot be decided until the Court rules on the fee application to which the challenged affidavits relate. But Plaintiffs fail to show a principled reason for staying the Rule 11 Motion. The fee application is fully briefed and awaiting a ruling by the Court. Plaintiffs show no reason why the Court should not rule on the fee application and the Rule 11 Motion at the same time.

Plaintiffs complain (Pl. Mo. at 3) that the Rule 11 Motion does not cite cases in which a Rule 11 motion attacking a false affidavit was filed before a court "had an opportunity to pass on the affidavit." But the lack of reported cases involving Rule 11 sanctions for attorneys' filing of false affidavits has to do with how rarely attorneys file (or are immediately discovered filing) false affidavits, not with a legal prohibition on challenging them when they do.

Plaintiffs (Pl. Mo. at 4-7) misstate the law by suggesting that Rule 11 motions cannot be decided until the end of the case or until the court otherwise decides the merits of the offending paper. The general rule is just the opposite. As stated in Wright & Miller:

> Rule 11 motions should be made promptly after the challenged conduct takes place. If the alleged misconduct occurs during pretrial or discovery, the matter usually should be resolved at once, in order to avoid prejudicing the disposition of the substantive issue on the merits, and to discourage further abuses. If the challenged conduct is the institution of the action or occurs during a hearing or at trial, however, the question generally is not decided until after the litigation, in order to avoid delaying the disposition of the merits of the case.[3]

[3] Unfortunately, Plaintiffs' quotation from Wright and Miller (Pl. Mo. at 7 n.9) leaves out the directly relevant first two sentences (underscored above) of this passage.

5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1337, at 120-21 (2d ed. 1994) (emphasis added) (footnotes omitted). In the present case, the Rule 11 Motion challenges affidavits supporting a fee application arising out of discovery motions; it involves neither the "institution of the action" nor conduct at a trial or hearing. Therefore, it should be "resolved at once." Id.

Case law (including Plaintiffs' cited cases) interprets Rule 11 in just that way. Plaintiffs do not prove their argument by citing cases involving Rule 11 challenges to the underlying merits of the case (which await resolution of the merits of the case), rather than discovery or other segregable issues such as the fee application at bar (which are to be "resolved at once").

Plaintiffs (Pl. Mo. at 4) misrepresent the holding of Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust Co., 120 F.R.D. 53 (N.D. Ill. 1988), aff'd, 880 F.2d 928 (7th Cir. 1989). The court did not hold, as Plaintiffs suggest (Pl. Mo. at 4), that serving a Rule 11 motion under "similar circumstances" was a Rule 11 violation. On the contrary, the facts in Mars do not even remotely resemble the facts here. In Mars, the court denied an oral motion to preclude the use of affidavits at a fairness hearing in a class action case. After the hearing, counsel filed a written motion to strike the affidavits. The court ruled that the motion violated Rule 11 because it "was not well grounded in fact nor warranted under existing law." Id. at 56 n.2. The court said nothing that could possibly support Plaintiffs' argument in this case; Mars did not involve allegations of false affidavits, nor any indication that an opponent is somehow precluded from seeking sanctions for the filing of false affidavits, nor that such a challenge is barred until after the court relies upon the false affidavits.

Plaintiffs (Pl. Mo. at 4) cite and quote Birch v. Kim, 977 F. Supp. 926, 938 (S.D. Ind.

1997), which involved a request for Rule 11 sanctions regarding factual allegations underlying the merits of the case. Thus, the motion could not be resolved until the case was decided by the trier of fact. Plaintiffs (Pl. Mo. at 5) eagerly quote the parts of the opinion so holding.

But Birch expressly distinguished the treatment of Rule 11 motions that do not go to the underlying merits of the case, observing that they should be addressed promptly. Unfortunately, Plaintiffs omit that crucial language from their quotation of the case. The complete quotation is this:

> . . . the Advisory Committee Notes to [Rule 11] state, "The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation." Fed.R.Civ.P. 11 advisory committee's note. The Seventh Circuit in Kaplan v. Zenner, 956 F.2d 149 (7th Cir. 1992) held, "The situation contemplated by the committee notes is one in which the basis for factual allegations in pleadings cannot be determined until such time as the party claiming those facts has had an adequate opportunity to develop his proof." [citation omitted.] Otherwise, where appropriate, the court in Zenner recommends a prompt motion for sanctions as soon as the party has discovered an abuse of Rule 11, rather than waiting to the end of the litigation."

977 F. Supp. at 938 (emphasis added).

Plaintiffs also fail to prove their argument by citing other cases in which the Rule 11 motions attacked the underlying merits of the case. See Lichtenstein v. Consol. Servs. Group, Inc., 173 F.3d 17, 23 (1st Cir. 1999) (In a Rule 11 challenge to the merits of the plaintiff's claims, the court observed that deferring a decision on the Rule 11 motion until the end of the trial was "a sensible practice where the thrust of the sanctions motion is that institution of the case itself was improper." (emphasis added)); Sound Video Unlimited, Inc. v. Video Shack, Inc., 700 F. Supp. 127, 149 (S.D.N.Y. 1988) (defendants' claim for baseless prosecution of the case would be ripe at the end of the case); Sierra Rutile Ltd. v. Bomar Res., Inc., No. 90CIV0835, 1990 WL

83510 (S.D.N.Y. June 12, 1990) (Rule 11 motions by the parties attacking each other's claims). Plaintiffs cite Gotro v. R&B Realty Group, 69 F.3d 1485 (9th Cir. 1995), but that case did not even consider the question of the appropriate timing for Rule 11 motions.[4]

The two affidavits and supporting documents that are challenged by Interior Defendants' Rule 11 Motion pertain only to the Plaintiffs' April 29, 2002 fee application and its related affidavits. The allowance of fees arose out of two discovery motions decided in Plaintiffs' favor. Thus, the subject matter of the Rule 11 Motion is entirely separate from the merits of this case. Accordingly, the Court ought to rule on it in conjunction with ruling on the fee application itself.

II. The Facts Do Not Justify Exempting Plaintiffs From Rule 11's Requirements, Nor Deferring Application of Rule 11

A number of factors indicate that Plaintiffs should not be given the "free pass" from Rule 11 that they seek. First, the particular conduct alleged in Interior Defendants' Rule 11 Motion is especially egregious and in need of the corrective action and redress that Rule 11 provides. Interior Defendants' Rule 11 Motion alleges that Plaintiffs' lead counsel knowingly filed one or more affidavits containing false or misleading statements of fact regarding the amounts he has billed his clients, as part of an effort to enhance the amounts he might recover from the Government. The seriousness of these allegations justifies subjecting Plaintiffs and their attorneys to the full weight of the requirements of Rule 11.

Second, Plaintiffs' own positions throughout this case belie their current argument that sanctions motions should be deferred until the end of the case or until the Court decides the

---

[4] Nor is Gotro otherwise pertinent on the merits or regarding the substantive standards of Rule 11, for that case was decided under the pre-December 1993 version of Rule 11, which contained substantially different and weaker provisions than the present rule. See 69 F.3d at 1488.

merits of the papers that are the subject of the sanctions motion. Plaintiffs have filed numerous motions seeking sanctions,[5] including under Rule 11,[6] before the Court has ruled on the underlying merits of the pleadings or papers that Plaintiffs attack. Unlike Plaintiffs' motions, which are baseless and fail to comply with Rule 11's requirements, Interior Defendants' Rule 11 Motion is well-grounded and complies with Rule 11.

III. Interior Defendants' Motion Alternatively Relies Upon the Court's Inherent Power to Sanction, and Plaintiffs Fail to Show Any Time Limitations on That Authority

If, for any reason, Rule 11 were found to be inapplicable, then Interior Defendants' Rule 11 motion relies, in the alternative, upon the Court's inherent power to sanction bad-faith conduct. Plaintiffs cite no authority for restricting the timing of the Court's exercise of its inherent power to sanction such conduct. Moreover, because Plaintiffs have filed numerous motions in this case purporting to rely upon the Court's inherent power to sanction (see above), they can hardly complain about its being exercised against them.

---

[5] See, e.g., Plaintiffs' Consolidated Opposition to Defendants' Motion to Expand the Protective Order Entered March 29, 2000 and Plaintiffs' Cross-Motion to Vacate the March 29, 2000 Protective Order and Request for Further Sanctions (filed January 16, 2001); Plaintiffs' Consolidated Opposition to Defendants' Motion to Weaken Bi-weekly Reporting Requirement and Request for Further Sanctions (filed January 29, 2001); Plaintiffs' Opposition to Interior Secretary Norton's Motion for a Stay of Depositions of Interior Personnel Pending Resolution of Secretary Norton's Motion for a Protective Order and Request for Sanctions (filed March 9, 2001); Plaintiffs' Opposition to Motion to Withdraw Defendants' Motions for Summary Judgment, Plaintiffs' Cross-Motions for Summary Judgment as to (A) There Being No Temporal Limit to Defendants' Obligation to Account, and (B) the Non-Settlement of Accounts; and 3) Plaintiffs' Motion for Sanctions and Contempt Finding Pursuant to F.R.C.P. 56(g) (filed February 15, 2002).

[6] See Plaintiffs' Motion for Rule 11 Sanctions Against Kenneth Rossman and His Counsel, filed October 1, 2001, well before the Court ruled on Rossman's papers.

IV. Plaintiffs Are Not Entitled to An Award of Fees and Expenses

Plaintiffs' Motion (at 8) seeks recovery of fees for "the time expended in this unnecessary exercise." But it is Plaintiffs' Motion that has created an "unnecessary exercise" by attempting, without citing any pertinent legal authority, to forestall the inevitable review of the propriety of their submission of false or misleading affidavits. Interior Defendants have followed the requirements of Rule 11. Thus, Plaintiffs are not entitled to a "stay" of proceedings, and a fortiori, are not entitled to an award of fees for raising baseless claims for a stay.[7]

Conclusion

For the foregoing reasons, Plaintiffs' Motion should be denied.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
DAVID J. GOTTESMAN

[7] Additionally, even if Plaintiffs were entitled to an award of expenses, their proposed order (at 2) improperly asks that Interior Defendants be ordered to pay whatever amount Plaintiffs claim, even before the Court assesses its reasonableness or propriety. Plaintiffs cite neither authority nor a rationale that justifies such an extraordinary proposition. On the contrary, in light of the extremely improper nature of the last statement of fees and expenses submitted by Plaintiffs (see Defendants' Objections to Plaintiffs' Statement of Fees and Expenses Filed April 29, 2002, which Defendants filed May 13, 2002), any future statements of fees and expenses by Plaintiffs should be subjected to greater, not less, scrutiny before payment is required.

Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dated: August 16, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 16, 2002 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Motion for Protective Order Seeking Stay of Rule 11 Motion* by facsimile upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

and by U.S. Mail upon:

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

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

Courtesy Copy by U.S. Mail upon:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

K. P. Kingston

Kevin P. Kingston

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 NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER

This matter comes before the Court on Plaintiffs' Motion for Protective Order Seeking Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees. After considering that motion, any responses thereto, and the record of the case, the Court finds that the Plaintiffs' motion should be DENIED.

IT IS THEREFORE ORDERED that said motion for protective order filed by Plaintiffs is hereby denied.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

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