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.	)	
	)	

REPLY BRIEF IN SUPPORT OF DEFENDANTS' EMERGENCY
MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

On April 7, 2004 – since the filing of Plaintiffs' Opposition to Defendants' Emergency Motion to Stay the Preliminary Injunction Pending Appeal ("Plaintiffs' Opposition" or "Pl. Opp.")(Dkt. No. 2555) – the U.S. Court of Appeals for the District of Columbia Circuit entered its order which, in pertinent part, granted the motion to stay this Court's March 15, 2004 preliminary injunction pending the appeal before that court. Order, No. 03-5262 (D.C. Cir.) (filed Apr. 7, 2004). Inasmuch as the relief granted by the appellate court provides the same relief previously sought in Defendants' Emergency Motion to Stay Preliminary Injunction Pending Appeal (the "emergency motion" or "Def. Mot."), the Court of Appeals' order renders moot Defendants' emergency motion filed in this Court. Defendants submit the following reply brief, however, to address some of the outrageous and ungrounded assertions set forth in Plaintiffs' Opposition.

Plaintiffs' Opposition is the latest effort in Plaintiffs' long-standing practice of tarring the reputations of Government officials and contractors, without regard to the absence of any factual

or legal support for their assertions. Such assertions are pervasive in Plaintiffs' Opposition, beginning with the first paragraph of their introduction, in which they assert that this Court "correctly found that defendants had repeatedly and willfully violated the July 2003 Injunction." Pl. Opp. at 2. Not only are such assertions without any basis; they are not even contained within the Court's March 15, 2004 preliminary injunction or its accompanying memorandum opinion.

Not content to simply mischaracterize the Court's findings, Plaintiffs proceed to dredge up, again, their improper practice of using the pejorative term "contemnors" to refer the Defendants. Pl. Opp. at 2. Plaintiffs revive this outrageous practice in defiance of the facts and the law in this case. See, e.g., Cobell v. Norton, 334 F.3d 1128, 1145-50 (D.C. Cir. 2003).

While it is not worth the space of a reply brief to catalog each instant of Plaintiffs' latest irresponsible use of a pleading to damage the reputations of individuals, Defendants must add one further instant to the list: Plaintiffs' reckless allegations regarding Mr. Hart Rossman, whose employer is under contract to the Department of the Interior. In their Opposition, Plaintiffs allege that Mr. Rossman has engaged in perjury and "is not safe from prosecution." Pl. Opp. at 21-22 n. 23. Such an assertion is utterly unfounded, yet Plaintiffs hide behind the immunity of making such an allegation in a pleading, leaving Mr. Rossman's name and character impugned in the public record. Contrary to Plaintiffs' baseless allegations, both of Mr. Rossman's declarations were limited in scope, truthful in nature, and entirely consistent with each other.

In a recent memorandum opinion, this Court chastised the practice so frequently relied upon in Plaintiffs' submissions to this Court:

> The Court feels compelled to comment on part of plaintiff's counsel's litigation tactics, which the Court can term as nothing other than petty name-calling, hollow claims of bad faith, and

> mean-spirited invectives. . . . Plaintiff's counsel's tactics only diminish the civility that should exist between members of the Bar and in this judge's opinion are unprofessional and did nothing to strengthen his client's position.

Smith Property Holdings, 4411 Connecticut, L.L.C. v. United States, 2004 WL 715834 *5 n. 8 (D.D.C. Mar. 31, 2004) (Walton, J.). It is the sorry state of affairs in this case that this footnote applies equally to a remarkably large percentage of Plaintiffs' submissions in this case.

Insofar as Plaintiffs' Opposition largely ignores the substance of Defendants' emergency motion, we are comfortable relying upon our emergency motion and will respond briefly to select arguments made in Plaintiffs' opposing brief. Plaintiffs repeatedly level the broad assertion that there is current support for concluding that individual Indian trust data ("IITD") is at risk. In making these assertions, Plaintiffs rely upon conditions at the time of the first court-ordered disconnection from the Internet, e.g., Pl. Opp. at 6 ("As recently as January 2002, . . ."), and reports and scorecards having no relationship to IITD and/or Information Technology ("IT") security. Defendants explained these fundamental errors in the emergency motion, but Plaintiffs have simply disregarded the initial motion and invented facts to serve their own rhetorical purposes.

Plaintiffs also ask this Court to ignore Congress's enactment of Public Law Number 108-108, apparently comfortable with the notion that courts may ignore Congress if one repeatedly refers to its legislation by a derisive term, such as the "Midnight Rider." We have previously explained the applicability of Public Law Number 108-108 to this matter, and we are confident that this Court requires no further discussion regarding the respective roles of the judicial and legislative branches.

Plaintiffs continue their attack on the validity of the language of the certifications utilized in Defendants' August 2003 submissions. While the parties plainly are at odds over the requirements of 28 U.S.C. § 1746 and Local Civil Rule 5.1(h), and we respectfully disagree with the Court's conclusions on this issue when it issued the March 15, 2004 preliminary injunction, Cobell v. Norton, Memo. Op. at 9-11 (D.D.C. Mar. 15, 2004), we note that the Special Master's counsel apparently is comfortable filing a certification containing the following language: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief." Final Monthly Report of Special Master, Ex. 4 at 6 (Apr. 5, 2004)(Dkt. No. 2558)(Declaration of Douglas B. Huron at 6)(emphasis added). Under Plaintiffs' analysis, such a declaration is insufficient insofar as it contains the allegedly qualifying language "to the best of my knowledge and belief." It is sufficient to note that Defendants do not share Plaintiffs' position on this point and that Defendants consider Mr. Huron's declaration to be legally in compliance with 28 U.S.C. § 1746 and Local Civil Rule 5.1(h).

Conclusion

In light of the intervening Court of Appeals Order on April 7, 2004, Defendants respectfully submit that this Court need not rule upon the emergency motion filed in this Court. Defendants reserve the right to reassert entitlement to the relief sought in the emergency motion if future circumstances dictate a need to do so.

Respectfully submitted,

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April 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on April 12, 2004 the foregoing *Defendants' Reply Brief in Support of Defendants' Emergency Motion to Stay Preliminary Injunction Pending Appeal* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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