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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

2003 AUG 22 PM 5: 25

NANCY M.
MAYER-WHITTINGTON
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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
IN SUPPORT OF MOTION TO REQUIRE PLAINTIFFS' COMPLIANCE
WITH COURT'S ORDERS CONCERNING "ATTACHMENT C"**

The seal on "Attachment C" and its privileged status entitle the document to protection from public disclosure. The Court should reject Plaintiffs' assertion that, despite the Court's rulings, they may continue publicizing references to Attachment C that have been stricken from the record in this case, and grant Interior Defendants' May 1, 2003 motion for an order requiring Plaintiffs to (1) remove from their website (Indiantrust.com) all references to "Attachment C" that are covered by the Court's October 18, 2002 Order and the Court's April 11, 2003 Memorandum Opinion and accompanying Order of the same date; and (2) return to Defendants all copies of Attachment C in their possession or control.¹

¹ Plaintiffs moved for an extension of time to respond to this motion, requesting until "14 days after proposed findings and conclusions are due in Trial 1.5." Plaintiffs' Motion for Enlargement of Time to File Opposition to Interior Defendants' Motion and Memorandum to Require Plaintiffs [sic] Compliance with Court's Orders Concerning "Attachment C" at 1 (May 15, 2003). Interior Defendants opposed Plaintiffs' motion on May 19, 2003, and as of this date the Court has not ruled on that motion.

Plaintiffs, in short, take the unsupportable position that even after the Court orders them to "protect the seal" on a document, orders them not to disclose information contained in the document and orders references to the document stricken from the record, they nevertheless may publicize stricken documents and stricken references to that sealed document. Such actions are not only anathema to protecting the seal and honoring the privilege on a document, but undermine the Court's orders and its authority. The Court specifically held that "plaintiffs have failed to demonstrate that their need for the information [in Attachment C] outweighs the interest of defendants in **preventing disclosure of the information.**" Memorandum Opinion at 6 (April 11, 2003) (emphasis added). Defendants' present motion is aimed at preventing further disclosure of the information in Attachment C.

Although the Court has ruled that Attachment C is protected by the deliberative process privilege and may not be disclosed, Plaintiffs have simply refused to comply with that ruling and are now trying to reargue that issue. They seek to render the Court's privilege ruling meaningless by arguing that the Court's order is only relevant to the documents actually present in the Court's docketed record in this case and not to electronic copies of those documents in their possession and on their website. Opposition at 4-5 (arguing Court's order "address[es] matters solely on the Court record and mandate nothing in regard to material on any website" (emphasis in original)). Plaintiffs' argument – if adopted by this Court – would lead to the absurd result that the parties in this case could publicize documents that reference the content of other Court-sealed records.

Further, the First Amendment – contrary to Plaintiffs' bald contention, Opposition at 4 – is not implicated by their wrongful publications. See Seattle Times v. Rhinehart, 467 U.S. 20, 32 (1984).

"A litigant has no First Amendment right of access to information made available only for purposes of

trying his suit." Id. Plaintiffs urge the Court to allow them to continue to publicize sealed and/or stricken references to Attachment C because the web-posted documents are "in the public record." Opposition at 1, 4. The Plaintiffs' documents – not Attachment C – are in the public record because Plaintiffs' blatantly and repeatedly have refused to protect the seal on Attachment C, first in violation of the Court's October 18, 2002 Order and now in violation of the Court's Memorandum Opinion and separate Order of April 11, 2003. See Defendants' Motion at 2-3. Courts will protect the seal on privileged documents by removing them from the public domain, even where such documents are inadvertently made public. United States v. Visa U.S.A., No. 98 CIV 7076, 2000 WL 1682753, at *1 (S.D.N.Y. Nov. 9, 2000) (inadvertent posting of antitrust defendant's privileged documents on government's website cured by ordering third parties who downloaded copies to return or destroy copies and "any other documents reflecting the confidential information contained therein").

Plaintiffs should not be rewarded for attempting to vitiate the effect of the Court's April 11, 2003 Order. See Ginther v. O'Connell, 791 F.2d 1151, 1154 n.2 (5th Cir. 1986).² They argue that the news reports and unsealed papers about the incidents surrounding Attachment C reveal the document's content. Opposition at 3. The Court – in its Memorandum Opinion – implicitly disagrees. See Memorandum Opinion at 5 (refraining from discussing content of Attachment C because electing to "maintain the seal"). Plaintiffs also argue that the August 8, 2002 report of the former Court Monitor reveals the document's content and supports the propriety of Plaintiffs' disclosures. Id. at 2-4. The

² In Ginther, the Fifth Circuit found no abuse of discretion in the district court's granting a protective order compelling return of privileged documents. The offending party had "incorporated privileged documents into pleadings filed as part of a public record, and disseminated copies to other counsel occupying an adverse position to the [bankruptcy] Trustee. The district court was astonished, . . . observing that 'we certainly have a question of contempt of this court.'" 791 F.2d at 1154 n. 2 (citations omitted).

illogic of the argument is apparent: the report was one of the primary bases of the Court's decisions and orders to protect Attachment C's seal and forbid its disclosure. See Memorandum Opinion at 2 (April 11, 2003).


The Court has issued successive rulings that support Defendants' position on this motion and that should have made this motion unnecessary. Unfortunately, this motion and the requested order are needed to stop Plaintiffs from continuing to flout the Court's orders.

For these reasons and those expressed in Defendants' motion and initial supporting memorandum, Interior Defendants' motion should be granted.

August 22, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 22, 2003 I served the foregoing *Interior Defendants' Reply in Support of Motion to Require Plaintiffs' Compliance with Court's Orders Concerning "Attachment C"* by facsimile in accordance with their written request of October 31, 2001 upon:

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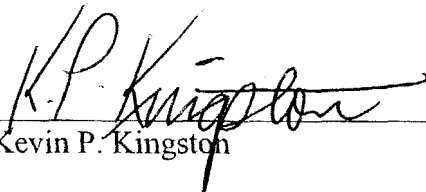
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Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

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