

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 A. NORTON, Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' MOTION FOR
RECONSIDERATION OF THE COURT'S MAY 28, 2004 ORDER
REGARDING HISTORICAL STATEMENTS OF ACCOUNT AND TO
ADMONISH PLAINTIFFS' COUNSEL TO COMPLY WITH THE D.C. BAR'S
VOLUNTARY STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Defendants respectfully move this Court for an Order (a) striking Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account (Dkt. No. 2647) ("Plaintiffs' Reconsideration Motion"); (b) directing Plaintiffs to remove Plaintiffs' Reconsideration Motion and references to it from their website (www.indiantrust.com) and to take all steps necessary to prevent the further publication of it in any other forum; and (c) admonishing Plaintiffs' counsel to comply with the D.C. Bar's Voluntary Standards for Civility in Professional Conduct.

Defendants seek such relief upon the grounds that Plaintiffs' Reconsideration Motion represents yet another instance in which Plaintiffs improperly utilize the process of filing pleadings with this Court for the purpose of launching scandalous attacks upon government officials and contractors, and as such they are wholly inappropriate in pleadings before this Court and should

be stricken pursuant to Rule 12(f).¹ Pursuant to Local Civil Rule 7(m), counsel for the Defendants conferred with Plaintiffs' counsel on September 10, 2004, regarding this motion and Plaintiffs' counsel stated that Plaintiffs would oppose this motion. In support of this motion, Defendants state as follows.

I. This Court Should Strike Plaintiffs' Reconsideration Motion Because of Its Pervasive Scandalous Material

Rule 12(f) provides, in pertinent part, that “[u]pon motion made by a party . . . the court may order stricken from any pleading any . . . scandalous matter.” Fed. R. Civ. P. 12(f); see 5C C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 465 (2004) (“Scandalous' matter is that which improperly casts a derogatory light on someone, most typically on a party to the action.”) (footnote omitted); 2 Moore's Federal Practice § 12.37[3] at 12-97 (“Scandalous' generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.”) (footnote omitted).

While motions to strike are generally disfavored, “the disfavored character of Rule 12(f) is relaxed somewhat in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the person who is the subject of the allegations.” 5C C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 466-67 (2004);² see Metrokane, Inc. v. The Wine Enthusiast, 160 F. Supp. 2d 633,

¹ Defendants will file a substantive response to Plaintiffs' Reconsideration Motion, but in so doing, Defendant do not expressly or implicitly waive their right to seek relief pursuant to Rule 12(f).

² Indeed, the relief provided for in Rule 12(f) need not be granted only upon motion of a party; consistent with the Court's inherent powers to protect the decorum of proceedings

641-42 (S.D.N.Y. 2001) (“Generally, motions to strike are disfavored and usually granted only for scandalous material.”) (citation omitted).

The striking of offensive material is particularly appropriate when the offensive material is not responsive to an argument but, rather, constitutes an inappropriate attempt to abuse the Court's process to attack an individual personally. See, e.g., Magill v. Appalachia Intermediate Unit 08, 646 F. Supp. 339, 343 (W.D. Pa. 1986) (striking allegations that “reflect adversely on the moral character of an individual who is not a party to this suit” which were “unnecessary to a decision on the matters in question”); see also Pigford v. Veneman, 215 F.R.D. 2, 4-5 (D.D.C. 2003) (striking unfounded accusations that opposing counsel was racist); Murray v. Sevier, 156 F.R.D. 235, 258 (D. Kan. 1994) (striking allegation that defendant and his counsel “bought off” and paid “hush money” to prospective witnesses); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (striking allegation that “defendants are '[I]ike vultures feeding on the dead”); Nault's Automobile Sales, Inc. v. American Honda Motor Co., 148 F.R.D. 25, 29-34 (D.N.H. 1993) (noting that “[w]ith each passing week the pleadings assumed a more hostile and accusatory tone” and striking scandalous assertions).

While Defendants have, in the past, attempted to restrict requests for relief under Rule 12(f) to specific offensive statements or sections within a pleading filed by Plaintiffs, in the case of Plaintiffs' Reconsideration Motion, the scandalous content pervades the entire motion. The following sets forth examples of Plaintiffs' rhetorical excesses and abuses:

- Footnote 2 on pages 3-4 continues Plaintiffs' multi-year diatribe against Mr. Bert

before it, the Court may strike such material sua sponte. Fed. R. Civ. P. 12(f); see Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (U.S. 1821)).

Edwards, in which they, once again, level highly improper and baseless allegations against Mr. Edwards.

- Footnote 2 characterizes government counsel as "attorneys who habitually breach their ethical duties."
- The third paragraph on page 4 criticizes Defendants' application of the Court's May 28, 2004 Memorandum and Order, characterizing, with no foundation, the allegedly "distorted" application "as license to transmit fraudulent statements to Indian children and *non compos mentis*" and concluding with the highly charged and groundless statement, "This is an ugly tradition at Interior and Justice"
- Plaintiffs' pleading repeatedly refers to beneficiaries as being "targeted." Plaintiffs' Reconsideration Motion at 4, 6, 7, 14, 16 n.17, and 17.
- The final two sentences of the second paragraph on page 6 allege that Secretary Norton "and her managers and counsel have no trouble exploiting minors and *non compos mentis*" beneficiaries "inasmuch as they prefer to prey on the weakest class members."
- Page 11 presents more baseless and improper instances in which Plaintiffs tar Mr. Edwards' reputation, referring to him as "wholly discredited" and his efforts as being "dishonest." Footnote 13 on that page contains a vulgar reference to Mr. Edwards' "habitual prevarications."
- Footnote 14 on page 12 contains the childish yet inflammatory assertion, "It should be obvious to even the most dense trustee-delegates"
- The final sentence on page 13 refers to "Norton and her most unethical managers and counsel."
- Page 16 contains the highly charged and groundless rhetorical question, "Was [Mr. Cason] lying then; or is [sic] Norton and her counsel lying now?"
- Page 18 provides another example of vile rhetoric that has no place in a judicial pleading: "Reasonably well-trained monkeys would ensure a more intellectually honest and accurate 'accounting' than Bert Edwards has done here."
- Page 19 levels more groundless assertions of "fraud and deception" against Secretary Norton and former Assistant Secretary Neal McCaleb, who has been a private citizen since January 4, 2003.
- The caption for Part VIII on page 22 refers to "Contemnors," in spite of the fact

that nobody identified within Part VIII has been properly held in contempt by any Court.³

As is clear from the above, Plaintiffs' disregard for civility in pleadings filed with this Court saturates their entire pleading, and were the Court simply to order the deletion of offensive statements, Plaintiffs' Reconsideration Motion would more resemble Swiss cheese than a legal document. Moreover, it is the responsibility of Plaintiffs' counsel to file pleadings that conform to the Court's rules; it is not the responsibility of Defendants' counsel to seek relief to sanitize Plaintiffs' pleadings after they have become part of the public record and been publicized by Plaintiffs' website and often by their public relations agent. Accordingly, the only meaningful relief for Plaintiffs' abuse of the judicial process is an order striking their entire pleading, coupled with directives to remove it and any references to it from their website and to take all steps necessary to prevent the further publication of their motion in any other forum.

II. Because Plaintiffs' Reconsideration Motion Continues Their Well-Established Practice Of Filing Pleadings Containing Scandalous Material, Contrary to the D.C. Bar's Voluntary Standards for Civility in Professional Conduct, This Court Should Admonish Plaintiffs' Counsel to Comply With The D.C. Bar Civility Standards for Future Pleadings

Plaintiffs' Reconsideration Motion runs afoul of the D.C. Bar's Voluntary Standards for Civility in Professional Conduct. See D.C. Bar's Voluntary Standards for Civility in Professional Conduct, General Principles 1, 2, 3, 5, 6, 24, 25, 27, 28, quoted in Alexander v. FBI, Nos. Civ. 96-2123 and 97-1288, 1999 WL 314170, at *3 n.1 (D.D.C. May 17, 1999). While the D.C. Bar standards are “voluntary” by their terms, the Supreme Court has recognized that “Courts of

³ Part VIII refers to Secretary Norton, who was absolved of contempt findings in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), and various officials who have never been found in contempt, namely Norton's "senior manager," [sic] the Attorney General, and counsel.

justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (U.S. 1821)); see generally Jaen v. Coca-Cola Co., 157 F.R.D. 146, 152-53 (D.P.R. 1994) (discussing role of civility in litigation). Indeed, this Court's Order in Alexander recognized the role of the voluntary standards when it directed counsel intending to attend a deposition to “file in advance thereof a certificate with the Clerk of Court that they have carefully read the [D.C. Bar standards of civility].” Alexander v. FBI, Nos. Civ. 96-2123 and 97-1288, 1999 WL 314170, at *2 (D.D.C. May 17, 1999).

Defendants recently filed a motion to strike with regard to another of Plaintiffs' pleadings, and in that motion, Defendants asked that the Court admonish Plaintiffs to comply with the D.C. Bar's Voluntary Standards for Civility in Professional Conduct. Defendants' Motion to Strike Scandalous Material from Plaintiffs' Response to the *Amicus Curiae* Brief Filed by the Quapaw Tribe of Oklahoma and to Admonish Plaintiffs' Counsel to Comply with D.C. Bar's Voluntary Standards for Civility in Professional Conduct (Dkt. No. 2673) (filed Sept. 3, 2004). The need for such an order is all the more apparent in light of the content of Plaintiffs' Reconsideration Motion. To permit Plaintiffs to continue to file pleadings of this nature, without the Court's admonition, provides the Court's tacit approval of Plaintiffs' long-established abusive practices. Plaintiffs' tactics damage more than the targets of their vicious and groundless rhetoric; they damage the judicial process itself, and this Court should not countenance them.

Conclusion

For the foregoing reasons, Defendants respectfully ask this Court for an Order (a) striking

Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account (Dkt. No. 2647); (b) directing Plaintiffs to remove Plaintiffs' Reconsideration Motion and references to it from their website (www.indiantrust.com) and to take all steps necessary to prevent the further publication of it in any other forum; and (c) admonishing Plaintiffs' counsel to comply with the D.C. Bar's Voluntary Standards for Civility in Professional Conduct.

Respectfully submitted,

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September 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on September 10, 2004 the foregoing *Defendants' Motion to Strike Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account and to Admonish Plaintiffs' Counsel to Comply with the D.C. Bar's Voluntary Standards for Civility in Professional Conduct* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
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Plaintiffs,)	
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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 *Defendants' Motion to Strike Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account and to Admonish Plaintiffs' Counsel to Comply with the D.C. Bar's Voluntary Standards for Civility in Professional Conduct* (Dkt. # ____). Upon consideration of the Motion, the Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is GRANTED and;

It is FURTHER ORDERED that The Clerk of the Court is directed to strike *Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account* (Dkt. No. 2647) and

It is FURTHER ORDERED that the Plaintiffs will remove *Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account* from their website (www.indiantrust.com) and

It is FURTHER ORDERED that Plaintiffs will take all steps necessary to prevent the further publication of *Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account* in any other forum and

It is FURTHER ORDERED that Plaintiffs will certify per Local Civil Rule 5(h) and Rule 11 of the

Federal Rules of Civil Procedure they have carefully read and will abide by the D.C. Bar Standards of Civility.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE

Date _____

cc:

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