

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| _____) | |
| ELOUISE PEPION COBELL et al.,) | |
|) | |
| Plaintiffs,) | |
|) | |
| v.) | Case No. 1:96CV10285 |
|) | (Judge Lamberth) |
| GALE NORTON, Secretary of the Interior, et al.,) | |
|) | |
| Defendants.) | |
| _____) | |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO
FILE A SURREPLY IN RESPONSE TO DEFENDANTS' REPLY SUPPORTING
THEIR MOTION TO CLARIFY OR MODIFY THE DECEMBER 23, 2002 ORDER**

Defendants respectfully submit this response to Plaintiffs' Motion For Leave To File A Surreply In Response To Defendants' Reply Supporting Their Motion To Clarify Or Modify The December 23, 2002 Order ("Surreply Motion"). In the surreply they seek to file, Plaintiffs state that they were unable to file their brief in opposition to the underlying clarification motion¹ through the Court's Electronic Case Filing System ("ECF") due to technical difficulties that arose on the evening it was due. Instead, Plaintiffs state that they e-mailed a copy of their brief to the Clerk pursuant to guidelines set forth in the ECF User's Manual.

Plaintiffs never advised Defendants of the problems they were having filing their brief, and Plaintiffs did not provide Defendants with a fax or hard copy of their brief despite knowing that ECF service would not occur on the date the brief was due. Instead, Defendants received service via ECF notification on August 10, 2004, four days after it was due to be served and

¹ Defendants' Motion For Expedited Clarification Or, In The Alternative, Modification Of The December 23, 2002 Order (filed July 23, 2004) ("Clarification Motion"); Memorandum In Opposition To Motion Seeking Permission To Communicate With Class Members In Violation Of The December 23, 2002 Order ("Plaintiffs' Opposition").

filed, and the notification indicated that Plaintiffs' brief was not filed until August 9, 2004, three days after the filing deadline. The Court's docket, however, now states that Plaintiffs' brief was filed on August 6, 2004, the date on which it was due. Insofar as the docket indicates that the Clerk accepted Plaintiffs' filing as timely, Defendants no longer object to Plaintiffs' Opposition on timeliness grounds.

DISCUSSION

Plaintiffs were required to file their response to the Clarification Motion within eleven days of service of the motion, plus three additional days because service of the motion was made by electronic means. See LCvR 7(b) (requiring opposition to be filed within eleven days of service); Fed. R. Civ. P. 6(e), 5(b)(2)(D) (allowing three additional days for electronic service). Because Defendants filed and served the Clarification Motion on July 23, 2004, Plaintiffs were required to file their opposition by August 6, 2004.

In their proposed surreply, Plaintiffs state that they attempted to file their opposition brief late on the evening that it was due, but that the ECF "was inaccessible and would not accept [Plaintiffs'] filing." Surreply In Response To Defendants' Reply Supporting Their Motion To Clarify Or Modify The December 23, 2002 Order (attached to Surreply Motion) ("Proposed Surreply") at 1. Because of these technical difficulties, Plaintiffs state that they transmitted their brief to the Court by sending it to the Clerk in an e-mail at 11:38 pm on the evening of August 6. Id. at 2. They assert that this transmittal constitutes filing because the ECF User's Manual states that, in the event users are unable to file documents electronically, they may call the Clerk's office for advice and, if it appears that ECF or the user's computer system will be inaccessible for

an extended period, the user may file in person at the Courthouse or e-mail a PDF version of the filing to the Clerk.

Plaintiffs make no contention based on Local Civil Rule 5.4(g), which governs electronic filing in the event of technical difficulties. Captioned "Incorrect Filings and Technical Difficulties," it provides as follows:

The inability to complete an electronic filing because of technical problems may constitute "cause" for an order enlarging time or "excusable neglect" for the failure to act within the specified time, within the meaning of F.R.Civ.P 6(b). Counsel or parties encountering technical problems with CM/ECF filing shall immediately notify a Clerk's Office employee of the problem by telephone and immediately send written confirmation of that notification to the Office of the Clerk. This Rule does not provide authority to extend statutory and jurisdictional time limits.

LCvR 5.4(g)(3). It is unknown when Plaintiffs' counsel became aware of the alleged technical problems, but there is no indication that at any point they notified the Clerk's Office of the problem by telephone. Nor, apparently, did Plaintiffs send any written confirmation to the Clerk, as the rule requires. And while the rule provides that technical problems may constitute "cause" or "excusable neglect" that might support a motion for an extension of time, Plaintiffs made no such motion. See also Comment to LCvR 5.4(g) ("Notice to the Clerk that technical problems interfered with electronic filing can provide a contemporaneous record in support of a party's motion under F.R.Civ.P. 6(b) for an order enlarging time. Only the Court, not the Clerk, may enlarge time. . . .").

At no point did Plaintiffs advise Defendants of the technical problems associated with their filing or that ECF service of their brief would not occur on August 6, the date on which it was due. Nor did they serve their brief by other means on that date. Instead, Defendants were

not served until August 10, when Defendants received the ECF notification of the filing. See LCvR 5.4(d) ("Electronic filing of any document operates to effect service of the document on counsel or pro se parties who have obtained CM/ECF passwords. . . . The requirement of a certificate or other proof of service is satisfied by the automatic notice of filing sent by the CM/ECF software to counsel or pro se parties who have obtained CM/ECF passwords. A separate certificate or other proof of service showing that a paper copy was served on a party or counsel is required when that party or counsel does not receive electronic notification of filings."). And the ECF Notification indicated that Plaintiffs' brief was filed on August 9, three days late. Notwithstanding this, and the fact that Defendants were not served with Plaintiffs' opposition brief in a timely fashion, the Court docket indicates that the Clerk has accepted Plaintiffs' brief as timely filed. Based thereon, Defendants no longer object to the filing of Plaintiffs' Opposition on timeliness grounds.

Dated: September 16, 2004

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2004 the foregoing *Defendants' Response to Plaintiffs' Motion for Leave to File a Surreply in Response to Defendants' Reply Supporting Their Motion to Clarify or Modify the December 23, 2002 Order* 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*)
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/s/ Kevin P. Kingston
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