

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE A. NORTON, Secretary of the)	
Interior, et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS' MOTION TO STRIKE
PLAINTIFFS' REPLY AND PLAINTIFFS' NOTICE OF SUPPLEMENTAL
INFORMATION SUBMITTED IN SUPPORT OF THEIR CONSOLIDATED MOTION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Interior Defendants respectfully move to strike (1) Plaintiffs' Reply To Interior Defendants' Opposition To Plaintiffs' Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction (Oct. 24, 2003) ("Plaintiffs' Reply"); and (2) Plaintiffs' Notice Of Supplemental Information In Support Of Plaintiffs' Consolidated Motion For Temporary Restraining Order And Motion For Preliminary Injunction (Oct. 28, 2003) ("Plaintiffs' Notice").¹ Neither Plaintiffs' Reply nor Plaintiffs' Notice (which consists of a letter in which a Congressman from New Jersey expresses his personal opinions to the Attorney General) is authorized by the rules of this Court. Accordingly, they should be stricken.

¹ Pursuant to Local Civil Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs regarding this motion, and Plaintiffs oppose it.

ARGUMENT

Local Civil Rule 65.1 sets forth the provisions governing applications for restraining orders and preliminary injunctions. With respect to preliminary injunctions, the rule provides as follows:

An application for a preliminary injunction shall be made in a document separate from the complaint. The application shall be supported by all affidavits on which the plaintiff intends to rely. The opposition shall be served and filed within five days after service of the application for preliminary injunction, and shall be accompanied by all affidavits on which the defendant intends to rely. Supplemental affidavits either to the application or the opposition may be filed only with permission of the court.

LCvR 65.1(c).² Thus, this Court's rules do not expressly contemplate the submission of papers, other than an application and opposition, in the absence of leave of Court. Plaintiffs' Reply and Plaintiffs' Notice were not filed with leave of Court and, accordingly, they should be stricken.

Even if Plaintiffs' extraneous filings were permissible under Local Rule 65.1, they still would be inappropriate. In typical fashion, Plaintiffs' Reply serves as a vehicle for continued personal attacks against the individuals involved in defending this litigation. See, e.g., Plaintiffs' Reply at 1, n.1 ("Obviously, Norton and her counsel cannot be trusted . . ."); id. at 2, n.2 (accusing Department of Justice counsel of, inter alia, concealing information from the Special Master and withholding evidence); id. at 5 (" . . . this Court and plaintiffs would be forced to rely on the absurd: the good faith of Norton . . ."); id. at 7, n.7 (accusing the Secretary of the Interior of "shrill rantings"); id. at 8,

² The provision relating to temporary restraining orders states only that such an application "shall be made in a motion separate from the complaint," and sets forth the notice requirements for seeking such relief. See LCvR 65.1(a).

n.10 (asserting that Department of Justice counsel "routinely files papers with this Court that are false and materially misleading . . .").³ As an initial matter, the offensive material is simply gratuitous; it bears no relevance to the issue of whether any irreparable harm results from the presence of Defendants' counsel at site visits conducted by the Special Master. Moreover, the language is meant solely to malign the individuals who work for or represent the Department of the Interior.⁴ On both counts, Plaintiffs' Reply should be stricken under Federal Rule 12(f). See Fed.

³ While accusing Defendants and their counsel of dishonesty at every turn, Plaintiffs' hypocritically rest their own positions on manifest untruthfulness. For example, Plaintiffs continue to characterize the October 28, 2002 meeting at which the Special Master agreed to cease conducting site visits outside the presence of counsel as a "secret oral agreement" that was conducted behind Plaintiffs' backs. See Plaintiffs' Reply at 7 ("Norton's sole argument is that some sort of 'secret oral agreement' had been consummated *ex parte* by her lead defense counsel . . . However, plaintiffs have been provided no copy of this 'secret agreement;' nor was plaintiffs' counsel present at the alleged meeting in that regard."); id. at 7, n.9 ("plaintiffs were never provided an agenda informing that the scope and nature of the August 12, 1999 Consent Order would be discussed."). Such a position cannot be squared with reality or the record on this motion, which includes a copy of the letter providing Plaintiffs' counsel with notice of the meeting and the proposed agenda, as well as the subsequent letter apprising Plaintiffs' counsel of the Special Master's representation that he would provide advance notice of site visits to counsel. See Interior Defendants' Opposition To Plaintiffs' Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction (Oct. 14, 2003), Ex. 1; Plaintiffs' Consolidated Motion For Temporary Restraining Order And Motion For Preliminary Injunction (Oct. 3, 2003), attachment to Ex. 1.

⁴ Among the more egregious examples is Plaintiffs' assertion that the Special Master is engaged in an examination of "obstruction" by Department of Justice counsel in connection with site visits to the Chickasaw and Wewoka Agencies in December 2002 and that Department of Justice counsel have withheld evidence relevant to this purported examination. Plaintiffs' Reply at 2, n.2. Although the Special Master expressed an intention to investigate "events surrounding the USi site visit to the Chicasaw [sic] Agency," following the issuance by Interior of a report concerning those events, see Letter from Alan L. Balaran, Special Master, to Glenn Gillett, Department of Justice, Mar. 25, 2003 (attached as Ex. 1 to Plaintiffs' Reply), he never indicated that the subject of his inquiry was any "obstruction" by Government counsel. Likewise, the outrageous allegation that Department of Justice counsel "have acted in concert to withhold evidence relevant to this and other malfeasance" has no record support and is purely fabricated.

R. Civ. P. 12(f) ("the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."). The fact that this has become a familiar tactic on the part of the Plaintiffs does not lessen its impropriety; rather, it magnifies the need for the Court to end this practice.

With respect to Plaintiffs' Notice, the grounds for striking are even more plain. The Notice consists solely of a letter from Representative Frank Pallone, Jr. to the Attorney General, in which Mr. Pallone expresses his personal opinions on certain aspects of the litigation. The letter is not legal authority; it is not factual evidence. It is simply the personal opinion of one individual who has no role in this litigation.⁵ See Cobell v. Norton, No. Civ. 96-1285, 2003 WL 22211405 at *118 (Sept. 25, 2003) ("the Court does not equate the opinions of a single current House Member (and two former Members) with the intent of the full House of Representatives, much less with the intent of the full Congress.").⁶ As such, it is wholly immaterial to the injunction motion and should be stricken under Federal Rule 12(f).

⁵ Even if Plaintiffs' Notice contained facts that could serve as competent evidence relevant to Plaintiffs' injunction motion -- which plainly it cannot -- it still would be improper because it was not submitted in the form of an affidavit. See LCvR 65.1(c).

⁶ Moreover, while the Court's statement was made in the context of comments made by Members of Congress concerning controlling statutory law, the statements of Mr. Pallone reflect only his personal views concerning the litigation.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court issue an Order granting their motion to strike Plaintiffs' Reply and Plaintiffs' Notice.

Dated: November 17, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2003 the foregoing *Defendants' Motion to Strike Plaintiffs' Reply and Plaintiffs' Notice of Supplemental Information Submitted in Support of Their Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction*. was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
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IN THE UNITED STATES DISTRICT COURT
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 the *Defendants' Motion to Strike Plaintiffs' Reply and Plaintiffs' Notice of Supplemental Information Submitted in Support of Their Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction*. (Dkt. # ____). Upon consideration of the Motion, any Response thereto, any Reply, 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' Reply To Interior Defendants' Opposition To Plaintiffs' Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction* (Dkt. # 2347); and *Plaintiffs' Notice Of Supplemental Information In Support Of Plaintiffs' Consolidated Motion For Temporary Restraining Order And Motion For Preliminary Injunction* (Dkt. # 2349) from the docket and the record of this case.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

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