

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	Civil Action No. 96-1285 (RCL)
v.)	
)	
DIRK KEMPTHORNE, Secretary of)	
the Interior, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION TO STRIKE
DEFENDANTS’ RESPONSE TO PLAINTIFFS’ OPPOSITION TO MOTION
TO COMPEL ATTORNEYS TO SIGN STATEMENT OF NON-PARTY OR RELEASE
EDDIE JACOBS AND ORDER RECONCILIATION AND REIMBURSEMENT**

Defendants respectfully oppose Plaintiffs’ motion to strike Defendants’ response to Plaintiffs’ opposition to the August 30, 2006 filing of Mr. Eddie Jacobs (Dkt. No. 3265) (filed Oct. 2, 2006). Plaintiffs offer three arguments. These arguments are without merit and should be rejected.

Plaintiffs argue that our filing is “unauthorized and untimely.” Plaintiffs assert that our response could be viewed as an untimely opposition to Mr. Jacobs’ motion. Defendants’ submission was not, however, an opposition to Mr. Jacobs’ pro se motion, but a response to Plaintiffs’ September 15, 2006 filing (Dkt. No. 3261) (filed Sept. 15, 2006). Thus, it was timely. Defendants were not obliged to oppose Mr. Jacobs’ motion because it is undisputed that Mr. Jacobs is a member of the plaintiff class represented by plaintiffs’ counsel, and not an individual named party. See Cobell v. Norton, 407 F. Supp.2d 140, 148 (D.D.C. 2005). Further, on September 2, 2003, the Court denied Mr. Jacobs’ request for amicus status. Order, Sept. 2, 2003, Dkt. No. 2666. Thus, Mr. Jacobs’ inability to seek relief from the Government in this case

outside of the relief sought by the plaintiff class is settled.

Plaintiffs alternatively assert that Defendants' response must be stricken because it constitutes an unauthorized "putative Reply." Our response was not a reply filed under LcvR 7(d). Defendants were not the "moving party" as that term is used in LcvR 7(d), and did not proceed under it. Moreover, as a party in this case, Defendants must be allowed to respond to any potentially prejudicial allegations made by the opposing party.

Finally, plaintiffs argue that Defendants' response should be stricken under Rule 12(f) because it is "immaterial," "impertinent," and "scandalous." The response is clearly none of those things, and plaintiffs' motion does not demonstrate any basis for finding that our response meets Rule 12(f) standards. Contrary to plaintiffs' assertions, it is not false or misleading. It only conveys facts to apprise the Court more fully of the circumstances surrounding Mr. Jacobs' request, and concisely notes allegations in Plaintiffs' opposition that are misleading or not factually supported.

For these reasons, the motion to strike should be denied.¹

¹ Unrelated to their motion to strike, Plaintiffs assert that Defendants do not deny that Ross Swimmer and Donna Erwin "engaged in explicitly prohibited class communications." This is false. We clearly denied Plaintiffs' allegations. We stated that the fact that "Mr. Jacobs has persisted in attempting to bring his claims to the attention of Mr. Swimmer and others presents no reasonable basis to raise the specter of a violation of any communications order in this case." Resp. at 5. We also stated, "No reasonable basis exists to conclude that Mr. Jacobs was faced with a 'threat' to have his historical accounting handled differently than any of the other Cobell class members," and offered to provide further information regarding this matter should the Court deem it necessary. Resp. at 4, 5 n.2. Significantly, even Plaintiffs' counsel concede that they are "unable to confirm that he [Mr. Jacobs], in fact, had been threatened by Special Trustee Ross Swimmer, and Deputy Special Trustee Donna Erwin, that no accounting would be rendered . . . ," although they proceed to treat that assertion as fact. See Resp. at 4.

Dated: October 6, 2006

Respectfully submitted,

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J. CHRISTOPHER KOHN
Director

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CERTIFICATE OF SERVICE

I hereby certify that, on October 6, 2006 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Strike Defendants' Response to Plaintiffs' Opposition to Motion to Compel Attorneys to Sign Statement of Non-Party or Release Eddie Jacobs and Order Reconciliation and Reimbursement* 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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