U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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NANCY M.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' MOTION
TO STRIKE PLAINTIFFS' UNTIMELY FILINGS

The Secretary of the Interior and the Assistant Secretary-Indian Affairs (the "Interior Defendants") hereby move to strike four of Plaintiffs' filings as untimely, specifically:

(1) Plaintiffs' January 24, 2003 Opposition to Interior Defendants' Motion for Reconsideration of Order Prohibiting Communications with Class Members[1] ("January 24, 2003 Opposition");

(2) Plaintiffs' January 28, 2003 Reply In Further Support of Motion To Compel Testimony Of Acting Special Trustee Donna Erwin Who Was Directed Not to Answer Certain Questions on the Basis of Attorney-Client Privilege and Harassment and Motion for Sanctions ("January 28, 2003 Reply");

(3) Plaintiffs' January 29, 2003 Reply in Support of their Consolidated Motion to Remove Earl Old Person as a Class Representative and Motion of Class Counsel to Withdraw As

[1] Defendants' are not moving to strike the portion of Plaintiffs' filing denominated as Motion for Order Directing Defendants to Rescind Notice Sent to 1200 Trust Beneficiaries.

Counsel for Earl Old Person in Any Capacity Other Than as Class Counsel for a Member of the Certified Class ("January 29, 2003 Reply No. 1"); and

(4) Plaintiffs' January 29, 2003 Reply in Support of Their Consolidated Motion to Modify or in the Alternative Stay the Production Order of December 23, 2002 as It Pertains to Earl Old Person and Motion for Protective Order to Prevent the Deposition of Mr. Old Person ("January 29, 2003 Reply No. 2").

Plaintiffs failed to file and serve any of the foregoing pleadings within the time prescribed by the rules and did not seek leave for an enlargement of time. In two recent orders in this case, the Court struck from the record out-of-time filings for which the late-filing party did not move for leave to make an untimely filing. Order (Jan. 17, 2003, Dkt. No. 1738) (granting Plaintiffs' motion to strike Defendants' statement regarding Plaintiffs' comment on Court Monitor's Seventh Report); Order (Jan. 17, 2003, Dkt. No. 1744) (granting Defendants' motion to strike Plaintiffs' comment on Report and Recommendation of Special Master-Monitor). These four late filings by Plaintiffs should likewise be ordered stricken from the record as untimely filed.

As required by LCvR 7.1(m), government counsel conferred by telephone with Keith Harper, counsel for Plaintiffs, on January 30, 2003. Mr. Harper stated that Plaintiffs intended to oppose this motion.

A. Plaintiffs' Untimely January 24, 2003 Opposition to Motion for Reconsideration

Local Civil Rule 7.1(b) provides that a memorandum in opposition to a motion must be filed "[w]ithin 11 days of the date of service" and that "[i]f such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded." LCvR 7.1(b). Three

days are added for mail or facsimile service, which includes weekends and holidays. Fed. R. Civ. P. 6(e); CNPq–Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc., 50 F.3d 56, 58 (D.C. Cir. 1995) (additional three calendar days for mail service are added at the end and include weekends and holidays). Interior Defendants filed and served (by facsimile) their Motion For Reconsideration of the Order Prohibiting Communications with Class Members on January 8, 2003. Plaintiffs' Opposition was due 14 days later on January 22, 2003 (eleven days plus three additional calendar days for mailing, including weekends and holidays). Plaintiffs did not file their opposition until January 24, 2003, 16 days later, thus exceeding the filing deadline. Plaintiffs did not move for an enlargement of time and did not seek leave to file their opposition out of time. They have, therefore, waived their opportunity to oppose Interior Defendants' motion, and the Court should treat the motion as conceded.

B. Plaintiffs' Untimely January 28, 2003 Reply Supporting Motion to Compel

Interior Defendants filed and served (by facsimile) their Opposition to Plaintiffs' Motion to Compel the Testimony of Donna Erwin and for Sanctions on January 15, 2003. Plaintiffs' reply was due on January 27, 2003 (five days excluding weekends and holidays, plus an additional three calendar days for service by facsimile, including weekends and holidays). LCvR 7.1(d); Fed. R. Civ. P. 6(a). Plaintiffs filed and served their reply on January 28, 2003, thus exceeding their filing deadline. Plaintiffs did not move for an enlargement of time and did not seek leave to file their reply out of time. They have, therefore, waived their opportunity to reply to Interior Defendants' opposition.

C. Plaintiffs' Untimely January 29, 2003 Replies in Support of Earl Old Person Motions

On January 16, 2003, Interior Defendants filed and served (by facsimile) their (1) Opposition to Motion of Elouise Cobell et al. to Remove Earl Old Person as a Named Class Representative, and (2) Opposition to Motion of Class Counsel to Withdraw from the Representation of Earl Old Person in Any Capacity Other than as Class Counsel. On that day, Interior Defendants also filed and served (by facsimile) their Opposition to Plaintiffs' Motion to Modify or Stay the December 23, 2002 Production Order as It Pertains to Earl Old Person and Motion for a Protective Order to Prevent the Deposition of Old Earl Person. Both of Plaintiffs' replies (January 29, 2003 Reply No. 1 and January 29, 2003 Reply No. 2) were due on Monday, January 27, 2003 (five days excluding weekends and holidays, plus an additional three calendar days for service by facsimile, including weekends and holidays). LCvR 7.1(d); Fed. R. Civ. P. 6(a). Plaintiffs filed and served both their replies on January 29, 2003, thus exceeding their filing deadline in both instances. Plaintiffs did not move for an enlargement of time and did not seek leave to file their reply out of time. They have, therefore, waived their opportunity to submit replies to Interior Defendants' oppositions.

CONCLUSION

For the foregoing reasons, this Court should issue the attached order[2] striking January 24, 2003 Opposition, Plaintiffs' January 28, 2003 Reply, Plaintiffs' January 29, 2003 Reply No. 1 and

[2] Interior Defendants reserve the right to move for leave to file surreplies if the late-filed replies are not stricken.

Plaintiffs' January 29, 2003 Reply No. 2.

January 30, 2003

Respectfully submitted,

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ELOUISE PEPION COBELL, et al.,	)	
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Defendants.	)	
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ORDER

Upon consideration of Defendant's Motion to Strike Plaintiffs' Untimely Filings, any response thereto, and the record in this case, the Court finds that the motion should be granted.

Plaintiffs failed to timely file and serve, pursuant to LCvR 7.1, and failed to seek leave for an enlargement of time to file and serve late the following papers:

(1) Plaintiffs' January 24, 2003 Opposition to Interior Defendants' Motion for Reconsideration of Order Prohibiting Communications with Class Members ("January 24, 2003 Opposition");

(2) Plaintiffs' January 28, 2003 Reply In Further Support of Motion To Compel Testimony Of Acting Special Trustee Donna Erwin Who Was Directed Not to Answer Certain Questions on the Basis of Attorney-Client Privilege and Harassment and Motion for Sanctions ("January 28, 2003 Reply");

(3) Plaintiffs' January 29, 2003 Reply in Support of their Consolidated Motion to Remove

Earl Old Person as a Class Representative and Motion of Class Counsel to Withdraw As Counsel for Earl Old Person in Any Capacity Other Than as Class Counsel for a Member of the Certified Class ("January 29, 2003 Reply No. 1"); and

(4) Plaintiffs' January 29, 2003 Reply in Support of Their Consolidated Motion to Modify or in the Alternative Stay the Production Order of December 23, 2002 as It Pertains to Earl Old Person and Motion for Protective Order to Prevent the Deposition of Mr. Old Person ("January 29, 2003 Reply No. 2").

Accordingly, it is hereby

ORDERED that Defendants' motion to strike Plaintiffs' January 24, 2003 Opposition, Plaintiffs' January 28, 2003 Reply, Plaintiffs' January 29, 2003 Reply No. 1 and Plaintiffs' January 29, 2003 Reply No. 2 be, and hereby is, GRANTED WITH PREJUDICE.

SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

cc:

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Cynthia L. Alexander
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 30, 2003, I served the foregoing *Interior Defendants' Motion to Strike Plaintiffs' Untimely Filings* by facsimile, in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
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202-822-0068

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and by U.S. Mail upon:

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and by U.S. Mail and by facsimile upon:

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and by Hand Delivery upon:

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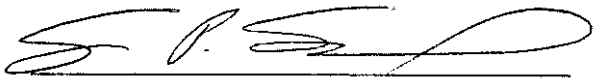

Sean P. Schmergel