U.S. DISTRICT COURT
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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
SCANDALOUS MATERIALS FROM PLAINTIFFS' RESPONSE TO DEFENDANT'S
HISTORICAL ACCOUNTING PLAN FOR INDIVIDUAL INDIAN MONEY ACCOUNTS

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Interior Defendants respectfully move this Court for an order striking sections IV and V from Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts ("Plaintiffs' Response") upon the grounds that both sections consist of scandalous attacks upon a government official which are wholly inappropriate in a pleading before this Court. Pursuant to Local Civil Rule 7.1(m), counsel for the Interior defendants conferred with plaintiffs' counsel on February 10, 2003, regarding this motion and plaintiffs' counsel stated that this motion would be opposed.[1]

[1] During the course of the meet-and-confer discussion, plaintiffs' counsel, Mr. Harper, asked specifically about the Interior Defendants' position as to plaintiffs' assertion that Mr. Edwards is not a Certified Public Accountant. The undersigned Government counsel explained that regardless of plaintiffs' views as to Mr. Edwards' credentials, such challenges are not responsive to the Government's historical accounting plan and, accordingly, are beyond the subject matter as to which leave was granted for plaintiffs' filing in the Court's September 17, 2002 Order. Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002) (Order). Moreover, in light of the tenor of the twenty-one pages constituting sections IV and V of Plaintiffs' Response, the Government's objections cannot be resolved by focusing solely upon plaintiffs' assertion regarding Mr. Edwards' credentials. Beyond the foregoing, we feel compelled to note that

In support of this motion, Interior Defendants state as follows.

I. This Court Should Strike Sections IV and V of Plaintiffs' Response

On January 31, 2003, plaintiffs filed their response to the Government's historical accounting plan, pursuant to paragraph 7 of the Court's September 17, 2002 Order. See Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002) (Order). Paragraph 7 of the Court's Order provided:

> 7. It is further ORDERED that the parties shall be granted leave to file a response to the plans of the other party. These responses shall be filed with the Court and served on the other party no later than January 31, 2003.

Id. (emphasis added). Plaintiffs' Response went much further than simply setting forth their response to the Government's historical accounting plan, however. Sections IV and V of Plaintiffs' Response – which constituted twenty-one pages of their pleading – consisted of pernicious attacks upon Mr. Bert Edwards, the Director of Interior's Office of Historical Trust Accounting ("OHTA"). Within those sections, plaintiffs repeatedly – and with no justification – smeared Mr. Edwards' name with assertions that he is a liar, a perjurer, incompetent, and unfit.[2] In presenting this vicious attack upon Mr. Edwards, plaintiffs make no attempt to demonstrate how their charges are "responsive" to the Government's historical accounting plan and, of course, they are not responsive to the plan. Rather, plaintiffs' vicious charges are transparently intended to embarrass, harass, and intimidate Mr. Edwards through their public filing, which they have

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plaintiffs' assertions regarding Mr. Edwards' credentials as a Certified Public Accountant are wholly lacking in substance and factually and legally insupportable.

[2] The Government does not wish to dignify these disgraceful assertions by repeating them at length in this motion. The Court, of course, may refer specifically to sections IV and V of Plaintiffs' Response for the details of this shameful pleading.

made accessible to the world through their website (www.indiantrust.com).[3]

Rule 12(f) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[u]pon motion made by a party . . . the court may order stricken from any pleading any . . . scandolous matter." Fed. R. Civ. P. 12(f). See 5A C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 712 (1990) ("'Scandalous' matter is that which improperly casts a derogatory light on someone, most typically a party to the action.") (footnote omitted). Moreover, 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 subject of the allegations." Id. at 714.[4] See also Metrokane, Inc. v. The Wine Enthusiast, 160 F. Supp. 2d 633, 641-42 (S.D.N.Y. 2001) ("Generally, motions to strike are disfavored and usually granted only for scandalous material.") (citation omitted). Such relief is particularly appropriate where, as in the case of sections IV and V of Plaintiffs' Response, the offensive material is not responsive to the Government's plan but, instead, inappropriately seizes upon the leave granted in the Court's September 17, 2002 Order as a vehicle to attack Mr. Edwards 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").

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[3] A review of the WHOIS database confirms that the Administrative Contact for www.indiantrust.com is Mr. Geoffrey Rempel, a litigation consultant engaged by plaintiffs' counsel.

[4] Indeed, the relief provided for in Rule 12(f) need not be granted only upon motion of a party; the Court may strike such material sua sponte. Fed. R. Civ. P. 12(f).

A review of case law confirms that this Court should grant Interior Defendants' motion to strike sections IV and V of the Plaintiffs' Response. In Nault's Automobile Sales, Inc. v. American Honda Motor Co., 148 F.R.D. 25 (D.N.H. 1993), the court addressed the merits of a Rule 12(f) motion in the context where

> With each passing week the pleadings assumed a more hostile and accusatory tone. Terms such as "perjury," "contempt," "liar," and "suborning of perjury" became almost routine in [the plaintiffs'] pleadings.

148 F.R.D. at 29. Thus, the court considered the defendant's motion to strike in which it asserted that "several of [the plaintiffs'] pleadings contain reckless and baseless accusations of perjury, subornation of perjury, discovery abuses, and criminal conduct," id., and reviewed the law applicable to Rule 12(f) motions:

> "Scandalous material is that which 'casts an adverse light on the character of an individual or party.'" Scandalous pleadings for the purpose of Rule 12(f) are those which, "'reflect cruelly' upon the defendant's moral character, use 'repulsive language' or 'detract from the dignity of the court' . . . to be scandalous such 'degrading charges must be irrelevant, or, if relevant, must be gone into in unnecessary detail.'"

148 F.R.D. at 30 (quoting, among others, Skadegaard v. Farrell, 578 F. Supp. 1209, 1221 (D.N.J. 1984) (quoting 2A Moore's Federal Practice ¶ 12.21, at 2429 (1983))). After reviewing the various charges, the court ordered stricken all of the offensive allegations set forth in the Rule 12(f) motion. 148 F.R.D. at 30-34. See also 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 '[l]ike vultures feeding on the dead'" and cautioning

parties "to refrain from attempting to litigate their dispute in the media"); Bureerong v. Uvawas, 922 F. Supp. 1450, 1479 (C.D. Cal. 1996) (striking term "Slave Sweatshop" from amended complaint "[b]ecause the term 'Slave Sweatshop' appears only for inflammatory effect, and because it is immaterial, scandalous, and highly prejudicial").

As noted above, in its September 17, 2002 Order, the Court granted leave to the parties to file "responses" to the plans. 226 F. Supp. 2d 1, 162 (D.D.C. 2002) (Order). The plaintiffs – through their "response" – chose to devote one-third of their pleading to leveling facially inflammatory and inappropriate assertions about Mr. Edwards, not the Government's historical accounting plan. Moreover, because the assertions are so plainly inappropriate in their lack of civility, see generally D.C. Bar Voluntary Standards for Civility in Professional Conduct, quoted in Alexander v. FBI, 1999 WL 314170 (D.D.C. May 17, 1999), they have no place in a pleading filed with this Court.

Conclusion

Mr. Edwards is a public servant, but this fact does not provide plaintiffs with a license to tar him personally and professionally in this highly public and vicious fashion. For the foregoing reasons, Interior Defendants respectfully request this Court to enter its order striking sections IV and V from Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts. Moreover, insofar as plaintiffs have utilized their website to publicly

humiliate Mr. Edwards, Interior Defendants further request that this Court order that plaintiffs remove the offensive sections from www.indiantrust.com.

Respectfully submitted,

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February 10, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Interior Defendants' Motion to Strike Scandalous Materials from Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts. After considering that motion, any responses thereto, and the record of the case, the Court finds that the motion to strike should be, and hereby is, GRANTED. It is further

ORDERED that sections IV and V of Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts are ordered stricken from the record, and it is further

ORDERED that plaintiffs shall remove any reference to sections IV and V of Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts from

www.indiantrust.com, the website managed and controlled by plaintiffs' counsel.

SO ORDERED this ___ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 10, 2003 I served the foregoing *Interior Defendants' Motion to Strike Scandalous Materials From Plaintiffs' Response to Defendant's Historical Accounting Plan for Individual Indian Money Accounts* by facsimile in accordance with their written request of October 31, 2001 upon:

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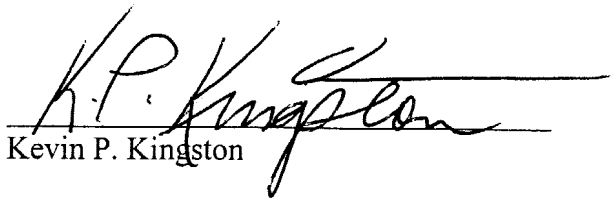

Kevin P. Kingston