U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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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' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE SCANDALOUS MATERIALS FROM PLAINTIFFS' RESPONSE TO DEFENDANTS' HISTORICAL ACCOUNTING PLAN FOR INDIVIDUAL INDIAN MONEY ACCOUNTS

I. Introduction

Plaintiffs' opposition to Interior Defendants' motion to strike scandalous materials from their response to Defendants' historical accounting plan ("Plaintiffs' Opposition") makes no attempt to address the substantial case law discussing the impropriety of using pleadings as a vehicle for launching vile attacks upon individuals. See Motion to Strike at 3-5. Rather than attempt to defend their personal attacks upon Mr. Edwards – in a pleading purportedly directed to the merits of Defendants' historical accounting plan – plaintiffs seek refuge in a procedural objection.[1] As we explain below, plaintiffs' procedural argument is insupportable and should be summarily rejected by this Court.

[1] Plaintiffs also apparently choose to "grant" themselves an enlargement and leave to file further arguments by referencing a "concurrently-filed" motion for an order to show cause, which they subsequently note will be filed "within 48 hours." Plaintiffs' Response at 3-5 and nn. 3 and 5.

II. Plaintiffs' "Procedural" Objections to the Motion to Strike Are Without Merit and Should be Summarily Rejected by This Court

Plaintiffs initially argue for "strict" construction of the motion to strike against Interior Defendants, Plaintiffs' Response at 5-6, but their argument simply reiterates law – consistent with the law cited in Interior Defendants' motion to strike – recognizing that motions to strike are generally disfavored. See Motion to Strike at 3. Plaintiffs' argument makes no effort, however, to address the exception discussed in the motion to strike, i.e., where "scandalous" matter has been included in a pleading. See id. at 3-5 (citing and discussing numerous authorities).

Plaintiffs cannot credibly deny that their twenty-one page assault upon Mr. Edwards satisfies the standard for "scandalous" material under Rule 12(f) of the Federal Rules of Civil Procedure. Instead, they contend that because Mr. Edwards' "credibility and representations" will be at issue in the upcoming Phase 1.5 trial, they possess an unfettered license to attack him publicly within the text of their response to the historical accounting plan.

While it is certainly correct that motions to strike are disfavored, Rule 12(f) motions will be granted in appropriate circumstances, particularly where pleadings include personal attacks such as those contained in plaintiffs' response to the historical accounting plan. A review of the outrageous and extensive attacks upon Mr. Edwards confirms that Interior Defendants have more than satisfied the requirements to establish grounds for granting a motion to strike.

III. Plaintiffs' Response to the Historical Accounting Plan is Subject to Review Pursuant to Rule 12(f)

At no point do plaintiffs actually dispute that their statements about Mr. Edwards were scandalous. Instead, they argue that their response to the historical accounting plan was not a "pleading" and that, accordingly, it is beyond the reach of Rule 12(f). Plaintiffs are plainly

wrong.

Plaintiffs' argument – based upon an overly narrow reading of Rule 12(f) – apparently presumes that their response to the historical accounting plan is not a pleading because it is not among the pleadings specifically enumerated in Rule 7(a). Fed. R. Civ. P. 7(a). As a consequence, plaintiffs rely upon a series of cases which hold that motions may not be attacked by a motion to strike. Plaintiffs' Response at 7 n. 9.[2]

Plaintiffs' response to the historical accounting plan was not filed as a motion or other paper, pursuant to Rule 7(b) of the Federal Rules of Civil Procedure; it was filed in accordance with this Court's Order dated September 17, 2002, which set forth a schedule for submissions required for the issues to be tried in the Phase 1.5 trial. Cobell v. Norton, 226 F. Supp. 2d 1, 148-49, 162 (D.D.C. 2002). Because these submissions were designed to frame the issues for the Phase 1.5 trial, which was ordered and scheduled in the Court's September 17, 2002 order, they can only be reasonably construed to be pleadings.

Moreover, while there are cases, such as those cited by plaintiffs in their footnote 9, which properly reject the use of a Rule 12(f) motion as a substitute for a response to a motion, the courts do not uniformly limit motions to strike to only those pleadings specifically enumerated in Rule 7(a). Indeed, in Nault's Automobile Sales, Inc. v. American Honda Motor Co., 148 F.R.D. 25 (D.N.H. 1993), the district court ordered stricken, pursuant to Rule 12(f), a

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[2] Among the cases cited in plaintiffs' footnote 9 is Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880 (9th Cir. 1983). In their parenthetical description of this case, plaintiffs virtually quote, without attribution, the text of Westlaw headnote 4 for the case, with two exceptions. First, they insert the word "this" before the text "rule providing that . . . ." Of greater significance, plaintiffs omit the next statement in the headnote, which described the appellate court's conclusion that the trial court's striking of the motion for reconsideration was harmless error.

memorandum in support of a motion for default, an objection to a motion for a protective order, and two additional legal memoranda because they contained scandalous allegations. 148 F.R.D. at 35.[3] See also Theriault v. Silber, 574 F.2d 197 (5th. Cir 1978) (order striking "vile and insulting references to the trial judge" from notice of appeal) (citing Rule 12(f)), cert. denied, 440 U.S. 917 (1979).

In fact, in Alexander v. FBI, 186 F.R.D. 21 (D.D.C. 1998), this Court relied upon Rule 12(f) in striking allegations from a motion. In Alexander, the plaintiffs filed a motion seeking sanctions for a variety of alleged improprieties. In response, one of the defendants, then-First Lady Hillary Clinton, filed a motion pursuant to Rule 12(f) asking the Court to "strike plaintiffs' charges that attorney Paul Gaffney 'threatened Plaintiffs' counsel and family.'" 186 F.R.D. at 56. This Court, finding no evidence to support the allegation against Mr. Gaffney, granted Mrs. Clinton's motion, pursuant to Rule 12(f).

Thus, the premise of plaintiffs' argument – that Rule 12(f) affords no basis for striking scandalous material from their response to the historical accounting plan – is insupportable as a matter of law. This Court has the authority and the duty, pursuant to Rule 12(f), to preserve the dignity of the Court and to protect individuals, such as Mr. Edwards, from plaintiffs' transparent efforts to harass, intimidate, and embarrass him in this public fashion.[4]

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[3] Significantly, Nault's Automobile Sales was the principal case discussed in Interior Defendants' motion to strike, yet plaintiffs wholly ignore it in their opposition to the motion to strike.

[4] Plaintiffs suggest that this Court cannot order them to remove stricken pleadings from their website. Plaintiffs' Response at 8 n. 11. If plaintiffs persisted in publishing a stricken pleading through its website, their counsel would be using the website to misrepresent the status of a case before this Court. We are confident this Court possesses the power to enter an order preventing a party or its counsel from publicly misrepresenting the status of a case before it.

Conclusion

For the foregoing reasons and the reasons set forth in the motion to strike, 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 and to order that plaintiffs remove the offensive sections from www.indiantrust.com.

Respectfully submitted,

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February 25, 2003

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 25, 2003 I served the foregoing *Interior Defendants' Reply Brief in Support of Motion to Strike Scandalous Materials from Plaintiffs' Response to Defendants' Historical Accounting Plan for Individual Indian Money Accounts* by facsimile in accordance with their written request of October 31, 2001.

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