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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' MOTION TO STRIKE PLAINTIFFS' REQUEST FOR PERSONAL SANCTIONS IN PLAINTIFFS' COMMENTS TO THE JANUARY 27, 2003 CORRECTED REPORT AND RECOMMENDATION OF THE SPECIAL MASTER[1]

Interior Defendants move pursuant to FED. R. CIV. P. 12(b)(6) and 12(f) to strike Plaintiffs' request for personal sanctions contained in their Comments Concerning the Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal NcCaleb (January 27, 2003), ("Plaintiffs' Comments") filed February 10, 2003.[2] In their Comments, Plaintiffs ask the Court to "consider personal sanctions for each of the following individuals who have aided and abetted Mr. McCaleb:" Sabrina McCarthy, Peter Miller, Aurene Martin, Michael Rauh, Julie Campbell and James Cason. Plaintiffs' Comments at 2-3. The Court should strike this request for personal

[1] Interior Defendants hereby incorporate "The Department of the Interior's Objections to Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal McCaleb," filed February 10, 2003, into this motion.

[2] Counsel for Interior Defendants has consulted with counsel for Plaintiffs, who opposes this motion.

sanctions[3] because it is immaterial, impertinent, and scandalous.[4] As such, Plaintiffs request for personal sanctions fails to state a claim upon which relief can be granted.

I. The Law Permits a Court to Strike from a Pleading Any Matter that is Immaterial, Impertinent, or Scandalous.

Upon a party's motion or on its own initiative, a "court may order stricken from any pleading . . . any . . . immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Generally, courts do not favor motions to strike. Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Prop. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) ("[M]otions to strike, as a general rule, are disfavored."); Makuch v. FBI, No. 99-1094, 2000 WL 915767, at *2 (D.D.C. Jan. 7, 2000) ("[T]he courts view motions to strike portions of a complaint with such disfavor . . . . "); Wiggins v. Philip Morris, Inc., 853 F. Supp. 457, 457 (D.D.C. 1994) ("Generally, motions to strike are disfavored by federal courts."); Todhunter, Mandava, & Assoc. v. I.C.C.I. (Holdings) Prop. Ltd., No. 88-3031, 1991 WL 166585, at *1 (D.D.C. Aug. 14, 1991)

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[3] Specifically, the Court should strike the request for personal sanctions as it pertains to Sabrina McCarthy, Peter Miller, Michael Rauh, Julie Campbell, and James Cason. Interior Defendants also oppose Plaintiffs' request for personal sanctions against Aurene Martin because such a request is irrelevant to the underlying issue of whether the Court should adopt The Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal McCaleb ("Corrected Report"). Nonetheless, in light of the Corrected Report's discussion of Ms. Martin, see generally, "Martin Assisted McCaleb in the Creation of his Fictional Account," Corrected Report at 47-51, Defendants cannot argue pursuant to Rule 12(f) that Plaintiffs' request for sanctions against Ms. Martin is immaterial to the Court's consideration of the Corrected Report. Although offensive and unsupported, Plaintiffs' allegations against Ms. Martin may be viewed as relevant because of the Special Master's comments. See generally, Court's Order Denying Defendants' Motion to Strike Scandalous Materials, issued March 3, 2003. The same cannot be said of Plaintiffs' accusations against Ms. McCarthy, Mr. Miller, Mr. Rauh, Ms. Campbell, and Mr. Cason.

[4] Plaintiffs cite no legal authority justifying their request that the Court consider personal sanctions against these individuals. Plaintiffs' requested sanctions are not appropriate under Fed. R. Civ. P. 11, the Court's "inherent power" authority, or any other provisions of law.

("[T]he standard for prevailing in a motion to strike is high . . . . "); see also, Skadegaard v. Farrell, 578 F. Supp. 1209, 1221 (D.N.J. 1984) ("'[M]otions to strike . . . are not favored.'").

Although courts generally disfavor motions to strike[5], the "disfavored character is relaxed '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.'"

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[5] Interior Defendants are also aware of Plaintiffs' argument in their Opposition to Interior Defendants' 'Motion to Strike Scandalous Materials from Plaintiffs' Response to Defendant's [*sic*] Historical Accounting Plan for Individual Indian Money Accounts (filed February 24, 2003) that "Numerous cases have held motions, or papers responding thereto, not to properly be subject to a motion to strike." Id. at 6-7 and at 7, n.9; see also, Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co., 747 F. Supp. 1299, 1303 (S.D. Ill. 1990) (motion to strike objection to Magistrate's report and recommendation inappropriate under Rule 12(f)). While there are cases, such as those cited by plaintiffs in their footnote 9, which limit the use of a Rule 12(f) motion to striking pleadings specifically enumerated in Rule 7(a), the courts in this jurisdiction have not imposed such a limitation. In Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998), the plaintiffs filed a motion seeking sanctions for a variety of alleged improprieties. In response, one of the defendants filed a motion pursuant to Rule 12(f) asking the Court to "strike plaintiffs' charges that [defendant's counsel] 'threatened Plaintiffs' counsel and family.'" Id. The court, finding no evidence to support the allegation against defendant's counsel, struck the accusations contained in plaintiff's motion pursuant to Rule 12(f). Id. In Johnson v. McDow, 236 B.R. 510, 517, 519-523 (D.D.C. 1999), although the Bankruptcy Court had found a motion to strike a Debtor's response to the Trustee's objection moot, the District Court, in addressing the Debtor's request for sanctions, emphasized that the Trustee was justified in filing the underlying motion to strike. As in Alexander, the motion to strike in Johnson involved a filing other than those specifically enumerated in Rule 7(a). See also, Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) (though court denied motion to strike portion of appellant brief because it was frivolous and burdened the court, court never stated that an appellate brief was not the proper object of a motion to strike).

Outside this jurisdiction, courts have also permitted Rule 12(f) motions to strike for those pleadings not specifically enumerated in Rule 7(a). In Nault's Automobile Sales, Inc. v. Am. Honda Motor Co., 148 F.R.D. 25, 35 (D.N.H. 1993), the court struck, pursuant to Rule 12(f), a 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. See also Theriault v. Silber, 574 F.2d 197, 197 (5th Cir. 1978) (order striking "vile and insulting references to the trial judge" from notice of appeal) (citing Rule 12(f)).

Stabilisierungsfonds, 647 F.2d at 201 n.1 (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1382, at 827 (1969).

Definitionally, "[i]mmaterial and impertinent matter is matter that is not materially relevant to any pleaded claim for relief or defense." Makuch, 2000 WL 915767 at *2. "[M]any courts" will grant motions to strike immaterial matter "only if the portions sought to be stricken as immaterial are also prejudicial or scandalous." Id. "'Scandalous material is that which 'casts an adverse light on the character of an individual or party.'" " Nault's Auto. Sales, Inc. v. Am. Honda Motor Co., 148 F.R.D. 25, 30 (D.N.H. 1993). "Scandalous pleadings . . . must 'reflect cruelly' upon the defendant's moral character, use 'repulsive language' or 'detract from the dignity of the court.'" Skadegaard, 578 F. Supp. at 1221; accord, Nault's, 148 F.R.D. at 30.

When ruling on a motion to strike, courts should also analyze the relevance of the allegations and their potential prejudice. Wiggins, 853 F. Supp. at 457 ("[I]f allegations in a complaint are irrelevant and prejudicial to the defendant, a motion to strike will be granted."); Todhunter, 1991 WL 166585 at *1 ("The allegations which plaintiff presents . . . are irrelevant to its . . . cause of action."); see also, Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir. 1992) ("Allegations may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice."); Skadegaard, 578 F. Supp. at 1221 ("To be scandalous such 'degrading charges [must] be irrelevant, or, if relevant, [must be] gone into in unnecessary detail . . . . '").

In considering a motion to strike, courts should also analyze whether there is a lack of evidence to support the allegations. Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998) ("[C]ourt finds no evidence to support the claim made by plaintiffs" that opposing counsel had

threatened "Plaintiffs' counsel and family."); see also, Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976) ("[I]t is settled that the motion [to strike] will be denied, unless it can be shown that no evidence in support of the allegation would be admissible.")

Though not cited by courts, it is also useful to examine the dictionary definitions of "immaterial," "impertinent," and "scandalous" when analyzing a motion to strike. Merriam-Webster defines "immaterial", in relevant part, as "of no substantial consequence: unimportant." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 578 (10th ed. 2002). Merriam-Webster defines "impertinent" as "not pertinent: irrelevant . . . not restrained within due or proper bounds esp. of propriety or good taste . . . given to or characterized by insolent rudeness." Id. at 581. The same dictionary defines "scandalous" as "libelous, defamatory . . . offensive to propriety or morality: shocking." Id. at 1039.

II. The Court Should Strike Plaintiffs' Request for Personal Sanctions Against Sabrina McCarthy, Peter Miller, Michael Rauh, Julie Campbell, and James Cason.

A. The Court Should Strike Plaintiffs' Request for Personal Sanctions Against Sabrina McCarthy.

Plaintiffs' urging of the Court to consider personal sanctions against Sabrina McCarthy is immaterial, impertinent, and scandalous. The Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal McCaleb ("Corrected Report") refers to Sabrina McCarthy seven times (pp. 1, 2-3, 16, 20-21, 35, 38 and 41). Each reference to her is in the context of two letters from her to Department of Justice (DOJ) attorney Peter Miller. In each of these references, not only does the Special Master not suggest sanctions against Ms. McCarthy, much less personal ones, he never even hints

at any wrongdoing on Ms. McCarthy's part. In fact, it was Ms. McCarthy who wrote to Mr. Miller on October 16, 2002, informing him of the deletion of Mr. McCaleb's e-mails.

There is absolutely no suggestion in the Special Master's Corrected Report that Ms. McCarthy "knowingly drafted materially false information that was transmitted to Special Master Balaran, covering up the Assistant Secretary's culpability . . . and delaying his ultimate accountability." Plaintiffs' Comments at 2. Rather than "covering up" and "delaying" "ultimate accountability," it was Ms. McCarthy who first informed the Department of Justice of Mr. McCaleb's possible deletion of e-mails. Corrected Report at 1. In this context, Plaintiffs' allegations against Ms. McCarthy are immaterial and impertinent because they are not "materially relevant" to any portion of the Special Master's Corrected Report. See Makuch, 2000 WL 915767, at *2 ("Immaterial and impertinent matter is matter that is not materially relevant to any pleaded claim for relief or defense.") Plaintiffs cannot make their allegations against Ms. McCarthy relevant simply by stating them in the absence of any evidence, much less any evidence in the Corrected Report. See Alexander,186 F.R.D. at 53 (no evidence of threats from opposing counsel). Plaintiffs' allegations against Ms. McCarthy are also scandalous because they "reflect cruelly" on Ms. McCarthy's moral character and constitute "degrading charges." See Skadegaard, 578 F. Supp. at 1221. For an attorney, it is difficult to imagine more cruel and degrading charges than allegations that one has "knowingly drafted materially false information," that one has "cover[ed] up" a client's culpability, and that one has delayed a client's "ultimate accountability." Such baseless charges clearly prejudice Ms. McCarthy in her professional reputation. Being irrelevant and baseless, the Court should strike them. See Talbot, 961 F.2d at 665 ("Allegations

may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice.")

B. The Court Should Strike Plaintiffs' Request for Personal Sanctions Against Peter Miller.

Plaintiffs' urging of the Court to consider personal sanctions against Peter Miller is immaterial, impertinent, and scandalous. The Special Master's Corrected Report mentions Mr. Miller a mere two times (pp. 1 and 2). The Special Master only mentions Mr. Miller to note that he received two letters from Ms. McCarthy. In these two brief references to Mr. Miller, the Special Master never hints of any wrongdoing by Mr. Miller, much less suggests sanctions of any kind against him.

The Special Master never accuses Mr. Miller of transmitting "materially false and misleading letters" and "perjurious testimony," never accuses him of failing to conduct "due diligence," never accuses him of "derogation of his duties as an officer of the Court," and never argues that Mr. Miller "knew or should have known the mendacious nature of Assistant Secretary McCaleb." Plaintiffs' Comments at 2. Certainly, the Special Master never even hints that "instead of embarking on a diligent search for the truth, Mr. Miller deliberately looked the other way and filed the Assistant Secretary's perjurious affidavit." Id.

These accusations are immaterial and impertinent because they cannot possibly be "materially relevant" to any portion of the Special Master's Corrected Report. See Makuch, 2000 WL 915767, at *2. As with Ms. McCarthy, Plaintiffs recklessly level pernicious allegations against Mr. Miller without a scintilla of evidence in the Corrected Report or elsewhere to support them. See Alexander, 186 F.R.D. at 53. Such unfounded accusations against Mr. Miller clearly

prejudice his professional reputation. The Court should strike these assertions as baseless and irrelevant. See Talbot, 961 F.2d at 665.

Plaintiffs' allegations against Mr. Miller are also scandalous because they "reflect cruelly" on Mr. Miller's moral character and constitute "degrading charges." See Skadegaard, 578 F. Supp. at 1221. Accusing an attorney of "deliberately look[ing] the other way" while filing a "perjurious affidavit", especially in light of no evidence supporting such denunciations, is precisely the conduct that one should call cruel and degrading in this matter. The Court should therefore strike Plaintiffs' request for personal sanctions against Mr. Miller.

C. The Court Should Strike Plaintiffs' Request for Personal Sanctions Against Michael Rauh and Julie Campbell.

Plaintiffs' urging of the Court to consider personal sanctions against Michael Rauh and Julie Campbell is immaterial, impertinent, and scandalous. Considering that the Special Master never mentions Mr. Rauh or Ms. Campbell in his Corrected Report, Plaintiffs' accusations can be seen as an attempt to harass Mr. Rauh and Ms. Campbell.

Plaintiffs' allegations against these two private attorneys are immaterial and impertinent because they are not "materially relevant" to any portion of the Special Master's Corrected Report. See Makuch, 2000 WL 915767, at *2. The Special Master never mentions Mr. Rauh and Ms. Campbell, much less accuses them of drafting a "materially false and misleading declaration." Plaintiffs' Comments at 3. Plaintiffs' allegations against these attorneys are also scandalous because they "reflect cruelly" on their moral character and constitute "degrading charges." See Skadegaard, 578 F. Supp. at 1221. Unsubstantiated allegations against attorneys not even mentioned in the Special Master's Corrected Report have no place in court pleadings.

D. The Court Should Strike Plaintiffs' Request for Personal Sanctions Against James Cason.

Plaintiffs' urging of the Court to consider personal sanctions against James Cason is immaterial, impertinent, and scandalous. Unlike Mr. Rauh and Ms. Campbell, the Special Master indeed mentions Mr. Cason in his Corrected Report. The only time that the Special Master mentions Mr. Cason is in note 44 on pages 45-46: "To his credit, Cason directed Martin to 'gather more facts' . . . , determine whether the lost e-mails could be restored and inform the Court." Plaintiffs echo this sole reference to Mr. Cason by stating that Mr. Cason "directed the internal investigation" into the destruction of Mr. McCaleb's e-mails. Plaintiffs' Comments at 3.

Directing the internal investigation in this instance is hardly the stuff of personal sanctions. Nonetheless, Plaintiffs urge the Court to consider personal sanctions against Mr. Cason. Plaintiffs' request for such sanctions is immaterial and impertinent because it is not "materially relevant" to any portion of the Special Master's Corrected Report. See Makuch, 2000 WL 915767, at *2. It is also scandalous because Plaintiffs request sanctions without even criticizing Mr. Cason in their sanctions request. See Plaintiffs' Comments at 3. Such a request for personal sanctions smacks of harassment. The Court should strike Plaintiff's request for personal sanctions against James Cason.

III. Johnson v. McDow Supports This Motion to Strike.

In Johnson v. McDow, 236 B.R. 510, 514 (D.D.C. 1999), the Trustee objected to the Debtor's "application for award of interim compensation." The Debtor's response to the Trustee's objections "raised issues pertaining to the Trustee's credibility and integrity." Id. at 515. Specifically, the Debtor's response attacked the Trustee's attorney as a liar and attacked DOJ attorneys as "miscreants." Id. The Trustee moved to strike the Debtor's response and "suggested

that Debtor be given time to file a response lacking the ad hominem attacks." Id. at 515-516. Later, the Debtor filed a motion for sanctions that attacked the Trustee and "railed against the alleged unjust actions of the Department of Justice." Id. at 517. The Bankruptcy Court denied the Debtor's motion for sanctions, and denied the Trustee's motion to strike as moot. Id. On appeal to the District Court, the Debtor asked the court to impose sanctions on the Trustee's Office. Id. at 518.

In analyzing the Debtor's argument that sanctions were appropriate against the Trustee for its motion to strike, the court noted, "One may have an easier task to argue that the earth is flat than to argue the Trustee had no factual basis for the motion to strike." Id. at 519. Finding that the "ad hominem attacks made in the Debtor's response did not address the validity of any argument put forward by the Trustee . . . ", the court found that the "assertion of the Trustee being a 'liar,' as made repeatedly in the Debtor's response and as it was irrelevant, could only mislead the court . . . . " Id. at 520. Furthermore, the court held that "by making such ad hominem attacks when they served no relevant purpose, the Debtor opened the door for the Trustee to move to strike the accusations." Id. The court added, "It is beyond doubt that the Trustee had a factual basis for his motion to strike the irrelevant, scandalous, and impertinent attacks from the response." Id.

As in Johnson, Plaintiffs repeatedly assert, in so many words, that Ms. McCarthy, Mr. Miller, Mr. Rauh, Ms. Campbell, and Mr. Cason are liars. See Plaintiffs' Comments at 2-3 ("knowingly drafted materially false information," "covering up . . . culpability," "transmitted materially false and misleading letters and . . . perjurious testimony," "deliberately looked the other way and filed the . . . perjurious affidavit," "drafted the . . . materially false and misleading

declaration," "assisted . . . in drafting the . . . materially false and misleading declaration.") As in Johnson, Plaintiffs' "bald allegations and inferences of the . . . misconduct are unsupported by any reasonable interpretation of the record." Johnson, 236 B.R. at 523. As in Johnson, the Court should find "that the allegations of . . . being a 'liar' are so devoid of the necessary evidence to sustain them that they amount to little more than name-calling." Id.

Such unsupported and irrelevant ad hominem attacks by Plaintiffs waste the resources of all parties to this lawsuit.

> When making such scandalous and highly insulting allegations, counsel should be aware that, without credible evidence, the allegations seem childish at best. At worst these allegations strain the court's patience, waste the court's resources and smack of the improper purposes that both Rule 9011 and Rule 11 are supposed to prevent. Instead, and completely contradictory to its purpose, Rule 9011 has been used by counsel . . . to create more satellite issues that have little to do with the underlying . . . bankruptcy case and that are far removed from his client's best interests.

Id. As in Johnson, the Court should strike Plaintiffs' unsupported request for personal sanctions and return from Plaintiffs' satellite issues to focusing on the issues in the Special Master's Corrected Report.

CONCLUSION

In the absence of any substantiation, Plaintiffs' accusations against Ms. McCarthy, Mr. Miller, Mr. Rauh, Ms. Campbell, and Mr. Cason[6] are "of no substantial consequence" to the Special Maser's Corrected Report, are "characterized by insolent rudeness," and are "libelous" and "defamatory." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 578 (10th ed. 2002) (defining

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[6] As discussed supra, note 3, Interior Defendants do not concede the relevance of Plaintiffs' accusations against Ms. Martin to the issue of whether the Court should adopt the Special Master's Corrected Report. Interior Defendants reiterate that those accusations are offensive and unsupported. Given the Special Master's discussion of Ms. Martin, however, a motion to strike Plaintiffs' allegations against Ms. Martin is not appropriate under Rule 12(f).

"immaterial" at 578, "impertinent" at 581, and "scandalous" at 1039). The Court should therefore strike Plaintiffs' request for personal sanctions because it is immaterial, impertinent, and scandalous, and thus fails to state a claim upon which relief can be granted. Defendants respectfully request a hearing on this motion.

Dated: March 4, 2003

Respectfully submitted,

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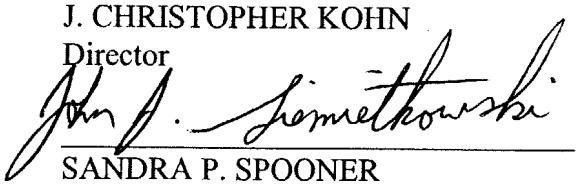

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Having considered Interior Defendants' Motion to Strike Plaintiffs' Request for Personal Sanctions, filed March 4, 2003, and having considered any responses to said Motion as well as the record, it is hereby **Ordered that**:

Interior Defendants' Motion is **GRANTED.** The Clerk shall strike from Plaintiffs' Comments Concerning the Corrected Report of the Special Master, filed February 10, 2003, any requests for consideration of personal sanctions against Sabrina McCarthy, Peter Miller, Michael Rauh, Julie Campbell and James Cason.

Dated: _____

_____

Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 4, 2003 I served the foregoing *Interior Defendants' Motion to Strike Plaintiffs' Request for Personal Sanctions in Plaintiffs' Comments to the January 27, 2003 Corrected Report and Recommendation of the Special Master* by facsimile in accordance with their written request of October 31, 2001 upon:

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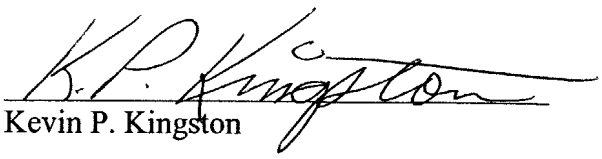

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