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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	(Special Master Alan L. Balaran)
GALE A. NORTON, et al.,	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES, AND "BILLS OF PARTICULARS" FILED BY PLAINTIFFS IN SUPPORT OF SUCH MOTION

On January 6, 2003, the government moved to dismiss the "Bills of Particulars" filed by plaintiffs against defendants Gale Norton and Neal McCaleb[1] and the seven non-party respondents (collectively referred to as the "Named Individuals") in their official capacities for failure by the Department of the Interior's Office of Solicitor to preserve certain backup e-mail tapes.

Plaintiffs' Bills of Particulars claimed that the Solicitor's backup e-mail tapes were federal records and apparently attempted to allege that the Named Individuals committed civil or

[1] Neal McCaleb has resigned his position as Assistant Secretary of the Interior. However, Plaintiffs' Bill of Particulars named Mr. McCaleb only in his official capacity as Assistant Secretary and his successor has been automatically substituted. Federal Rule of Civil Procedure 25(d)(1). Since all of the other briefs referred to Mr. McCaleb, for consistency, this reply brief will identify the defendants who are subject to the Bills of Particulars solely in their official capacity as Gale Norton and Neal McCaleb.

criminal contempt, or committed fraud on the court in connection with the overwriting of Office of the Solicitor's backup e-mail tapes. The memorandum filed by the government in support of its motion to dismiss (the "Government Memorandum") contended that:

- The Bills failed to allege essential elements of civil contempt, criminal contempt under 18 U.S.C. § 401(3), or fraud on the court.
- Sovereign immunity precluded the imposition of civil monetary penalties or criminal sanctions in any form against the Named Individuals in their official capacity.
- Plaintiffs' filings did not comply with directives of the Special Master[2] and the Court[3] that Bills of Particulars state with specificity the conduct which allegedly constituted the contempt charged.
- Plaintiffs had not presented a *prima facie* case of contempt against any of the Named Individuals, either in an official or in a personal capacity, and had not presented evidentiary support for their charges that any of the Named Individuals destroyed federal records or covered up the destruction of federal records.
- The Bills violated the civility provisions of the Revised Procedures Memorandum.

Plaintiffs' consolidated opposition to the motions by the government and the Named Individuals to dismiss the Bills of Particulars ("Plaintiffs' Opposition"), filed February 19, 2003 is filled with the namecalling and adolescent invective which are the unfortunate hallmarks of

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[2] Directing that plaintiffs submit bills of particulars which "articulate with specificity whether the conduct alleged against each of the Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court." *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), Memorandum of November 4, 2002 From Special Master Alan L. Balaran Regarding Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause (the "Revised Procedures Memorandum") at 2.

[3] Directing plaintiffs to state "individual defendant by individual defendant" specific contempt charges and evidence supporting those charges. *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), Transcript of March 15, 2002 Status Hearing, at 21:10-14 ("3/15/02 Tr.").

plaintiffs' memoranda.[4] Plaintiffs Opposition, however, does not even attempt to address most of the substantive arguments presented by the government in support of its motion to dismiss and similar arguments presented by the Named Individuals.

Most strikingly, Plaintiffs' Opposition does not contest the government's argument that the Bills of Particulars do not allege essential elements of civil contempt, criminal contempt, or fraud on the court. The government argued that violation of a court order is an essential element of both civil contempt and criminal contempt. Government Memorandum at 11-12, 15. Plaintiffs' Opposition does not disagree. Plaintiffs' Opposition also does not challenge the government's statement that "the overwriting of the backup tapes did not violate any court order, and plaintiffs no longer contend otherwise." Government Memorandum at 24. Since the government and plaintiffs agree that violation of a specific court order is a prerequisite to both civil and criminal contempt, and since plaintiffs have not shown that a Named Individual violated any court order in regards to the backup e-mail tapes, the Bills of Particulars must be dismissed to the extent that they request orders to show cause why Named Individuals should not be held in contempt.

The Bills of Particulars apparently also attempted to allege that Named Individuals Brooks, Findlay and Perlmutter had committed fraud on the court. The government pointed out that in order to support a claim for fraud on the court, plaintiffs must initially show, by clear and convincing evidence, that (1) a Named Individual committed a wrongful act directed to the judicial machinery itself, (2) the Named Individual acted with intent to deceive or intent to defraud the court, and (3) the wrongful act prejudiced plaintiffs in presenting their case or affected a ruling by the court. Government Memorandum at 18-19. Plaintiffs' Opposition does not take issue with the

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[4] Despite the explicit directive of the Special Master that the respondents be referred to as "Named Individuals," plaintiffs call the respondents "Malfeasors." Plaintiffs' insistence on continuing their practice of personal attacks needs to be further addressed by the Special Master.

government's statement of the elements of a claim of fraud on the court. The government also demonstrated at length that the Bills of Particulars did not allege conduct on the part of Ms. Perlmutter or Messrs. Brooks and Findlay meeting any of the elements of a fraud on the court. Government Memorandum at 28-40. Plaintiffs' Opposition still fails even to attempt to show that the conduct met the elements of fraud on the court and still fails to specify how any Named Individual's actions evidence an intent to deceive or defraud the court. Consequently, any claims that a Named Individual defrauded the court must also be dismissed.[5]

Plaintiffs Opposition does state, over and over again, that the overwriting of the e-mail backup tapes destroyed "federal records, "trust records," or "official records." But simply repeating a false statement does not make the statement true - it is just as false the hundredth time it is stated as it is the first time. And plaintiffs' endlessly-repeated assertion that the backup tapes were "federal records" is indeed false. As the government pointed out in detail, Government Memorandum at 20-22, under the Federal Records Act, General Records Schedule 20 and other regulations implementing the Federal Records Act, and Department of the Interior policy, e-mails and other data on Solicitor's Office backup tapes were not "federal records." E-mails that were "federal records " were to be printed out and maintained in paper form. The printed out e-mails were the "federal records" and "official records" that were to be preserved. The Department was not required to maintain the backup tapes, for purposes of fulfilling its obligations to retain "federal records." To the contrary, General Records Schedule 20 provides for deletion of e-mail

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[5] Moreover, although the matter is not completely clear, as is typical with plaintiffs' pleadings, plaintiffs appear to have abandoned claims that any Named Individual committed fraud on the court. Plaintiffs now appear to be requesting civil and criminal contempt trials for the non-party Named Individuals and civil contempt trials for the Named Individuals who are defendants. Plaintiffs' Opposition at 11. Plaintiffs' Opposition does not even request a finding that Named Individuals committed fraud on the court, let alone provide any facts that could justify such a finding.

records from the e-mail system after they have been copied into a paper or other recordkeeping system, and 36 C.F.R. § 1234.24(c) provides that backup tapes are not to be used for recordkeeping purposes. *See* Government Memorandum at 21.[6]

Plaintiffs do not attempt to address the government's discussion why the backup tapes are not federal records. Indeed, the plaintiffs do not even mention General Records Schedule 20. Instead, plaintiffs simply assume that the backup tapes are federal records. The plaintiffs' fundamental assumption is false. The government's argument is therefore unrefuted.

Plaintiffs also argue that they are not bound by the directives of the Special Master and of the Court to specify the conduct which allegedly constituted the contempt or fraud on the court charged because they are really charging constructive fraud against fiduciaries and therefore need not comply with the specificity requirements of Federal Rule of Civil Procedure 9(b). Plaintiffs' Opposition at 9-10. Whether or not plaintiffs are required to comply with Rule 9(b), they were required to comply with the directions of the Court and the Special Master which told plaintiffs what they needed to set forth in Bills of Particulars. The Bills of Particulars do not comply with the Court's and the Special Master's directives, and therefore must be dismissed. Moreover, the constructive fraud doctrine as set forth in the case cited by plaintiffs (Plaintiffs' Opposition at 10), *Rosales v. AT&T Information Systems, Inc.*, 702 F. Supp. 1489, 1498 (D. Colo. 1988), is only relevant in a suit by a beneficiary against a fiduciary for breach of a fiduciary duty. The doctrine has no application to this or any other contempt proceeding. Plaintiffs are not asking in the

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[6] Plaintiffs' Opposition once again cites, at 6 n.8, the provision in the Department of the Interior's Manual that official records are to remain in the custody of the Department until there is official authorization for disposal. Leaving aside that data on the backup tapes were not official records, Department employees were officially authorized to delete e-mails which constituted federal records from their system after the e-mails were printed out, and the Archivist officially authorized the Department to destroy data on backup tapes. Government Memorandum at 21-22.

contempt proceedings for a determination that the Named Individuals violated a fiduciary duty owed to plaintiffs.[7] Rather, plaintiffs are asking for findings of contempt or findings of fraud on the court, for alleged violations of duties owed to the Court.

Plaintiffs now assert that the Bills of Particulars were filed against former government officials only in their personal capacities, Plaintiffs' Opposition at 5, n.6, and request contempt trials against Named Individuals Schiffer, Simon, Cohen and Perlmutter solely in their personal capacities. *Id.* at 11. The current assertion of who is and who is not charged in his or her official capacity is yet another change in theory by plaintiffs, continuing a pattern the government noted violated the due process rights of the Named Individuals. Government Memorandum at 5-8. Plaintiffs' current position appears to be an opportunistic attempt to take advantage of the fact that some Named Individuals and the government called their briefs motions to dismiss and others used different titles. However, plaintiffs should be bound by their current representation that the Bills of Particulars were not filed against Named Individuals Schiffer, Simon, Cohen and Perlmutter in their official capacities. An order should be entered granting as unopposed the government's motions to dismiss the Bills of Particulars against Named Individuals Schiffer, Simon, Cohen and Perlmutter in their official capacities. Moreover, the Bills of Particulars against the former government officials in their personal capacities should be dismissed for the substantive reasons stated in the Government's Memorandum and the briefs filed by the Named Individuals. The United States has demonstrated that the Bills of Particulars against the remaining Named

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[7] If plaintiffs are requesting contempt findings for breach of a fiduciary duty, they have failed to show that any Named Individuals in a personal capacity has any fiduciary duties to plaintiffs, that overwriting of the backup e-mail tapes constituted a breach of a fiduciary duty, or that contempt is a remedy for breach of a fiduciary duty. The constructive fraud claim in *Rosales* was dismissed for failure to allege sufficient facts to support a claim that defendant's alleged actions breached a fiduciary duty. 702 F. Supp. at 1499.

Individuals, Brooks, Findlay and Blackwell, are without merit and must be dismissed.[8] *See* Government's Memorandum at 28-40, and the Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes filed Aug. 12, 2002. All of the Bills of Particulars are spurious and fatally defective, and they should all be dismissed, regardless of how Named Individuals entitled their opposition memoranda.

In the same opportunistic spirit, plaintiffs assert that the government's motion to dismiss Neal McCaleb in his official capacity should be denied, since he has resigned and the government has not refiled the motion in the name of his successor. Plaintiffs' Opposition at 5. The government could use the same argument against the plaintiffs, since they did not refile the Bill of Particulars against Mr. McCaleb's successor. The government will not do so, because plaintiffs' argument has no merit. Federal Rule of Civil Procedure 25(d)(1) provides that when public officer who is a party in his official capacity resigns, his successor is automatically substituted. The Rule also provides that "[a]ny misnomer not affecting the substantial rights of the parties shall be disregarded." The motion to dismiss showed that the Bill of Particulars was insufficient to proceed against the government, and the motion is no less valid now than it was when the motion was filed.

CONCLUSION

Plaintiffs' Opposition is the latest of many spurious attempts by plaintiffs over a two and a half period to develop some justification for imposing sanctions, in addition to the attorney's fees

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[8] Plaintiffs' Opposition does not contest the government's argument that the doctrine of sovereign immunity precludes imposition of civil monetary penalties or criminal sanctions against the United States. Government's Memorandum at 15-18.

recommended in the Special Master's July 27, 2001 Order and approved by the Court on March 29, 2002, for the overwriting of Solicitor's Office backup e-mail tapes. These efforts have wasted substantial resources, have unfairly slandered the Named Individuals, and have violated their due process rights. Calling the Plaintiffs' Opposition feeble would be unduly complimentary. It is time to bring down the curtain on this sideshow. The motions to dismiss should be granted.

Respectfully submitted,

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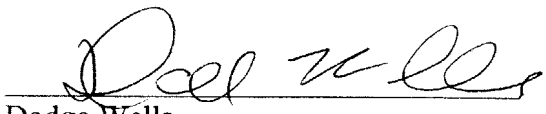

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DATED: March 5, 2003

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 5, 2003 I served the foregoing *Reply Memorandum of the Government's Motion to Dismiss Plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not be Held In Contempt in Connection with the Overwriting of Backup tapes, and "Bills of Particulars" Filed by Plaintiffs in Support of Such Motion* upon:

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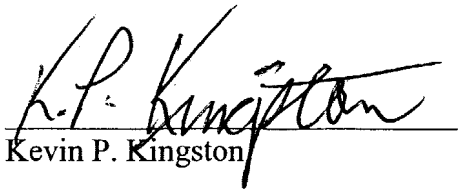

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