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DISTRICT OF COLUMBIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' CONSOLIDATED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following opposition to Plaintiffs' Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction ("TRO Motion"). The TRO Motion should be denied because Plaintiffs have not satisfied the requirements for such extraordinary emergency equitable relief.

INTRODUCTION

As described in Interior's Motion for Order Permitting the Provision of Copies of Historical Statements of Account to Class Counsel ("Interior's Motion"), Interior has prepared historical statements of account for approximately 7,900 Individual Indian Money ("IIM") account holders and is preparing to send them to the account holders as part of Interior's trust responsibility to these beneficiaries. In Interior's Motion, filed September 10, 2002, Interior sought Court permission to send these statements of account to Plaintiffs' counsel, citing Privacy

Act concerns. In a single pleading, Plaintiffs have both opposed Interior's Motion and requested emergency injunctive relief to prevent the statements from being sent to the IIM account holders.[1]

II. PLAINTIFFS' TRO MOTION SHOULD BE DENIED

In considering whether to grant an application for a TRO or a preliminary injunction, this Court must examine (1) whether there is a substantial likelihood that the applicant would succeed on the merits, (2) whether the applicant would suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the other party, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n.2 (D.D.C. 2001) (application for temporary restraining order would be denied when plaintiffs failed to show substantial likelihood of prevailing on merits or irreparable harm). As we explain below, the TRO Motion does not satisfy any of the four elements required for the issuance of a TRO or a preliminary injunction and must therefore be denied.

A. No Substantial Likelihood of Success on the Merits

One of the core demands by Plaintiffs in this rancorous litigation is that Interior must complete an historical accounting for the IIM account holders. Interior has now met that demand with respect to approximately 7,900 account holders and, inexplicably, without having even seen

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1/ In this paper Interior will only address the TRO Motion and the issue of whether the statements can be sent to the IIM account holders. The separate issue of whether Plaintiffs' counsel should be authorized to receive these statements from Interior, and the arguments raised by Plaintiffs in opposition to Interior's Motion, will be addressed in a separate pleading filed as a Reply in support of Interior's Motion.

the statements of account, Plaintiffs describe the statements as "misinformation" (TRO Motion at 3), "materially false and misleading" (TRO Motion at 5), and have asked this Court to prevent Interior from sending the statements to the account holders.

The statements of account are ready to be mailed to the account holders. Nowhere in their TRO Motion or proposed order do Plaintiffs request that the statements be treated secretly and kept from the account holders. Indeed they request that the statements be provided to Plaintiffs' counsel and filed with the Court, to become part of a Court process challenging their accuracy. See Proposed Order, attached to TRO Motion.[2] The only issue to be decided, then, is the timing and manner in which the account holders should see their statements of account.

Contrary to the arguments of Plaintiffs (see TRO Motion at 8-10, 15-17), nothing in the prior orders of this Court or in the opinion of the appellate court in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), requires Interior to file a statement of account first with the Court and Plaintiffs' counsel before it can be sent to the beneficiary for whom the statement was prepared. If, after actually reviewing a statement of account, Plaintiffs are not satisfied with its accuracy, they are certainly free to challenge it.[3]

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[2] Plaintiffs have also requested in their proposed order the immediate production of the "relevant memoranda and work-papers" related to the statements of account, but do not discuss this issue in the body of their TRO Motion. Such a wide-ranging, pro-active request in a motion for emergency injunctive relief should be denied.

[3] Plaintiffs obviously must do more than engage in a shotgun attack on Interior's overall record-keeping (TRO Motion at 5-7) without bothering to explain how any perceived, or actual, problem with respect to some records affects the particular accounts at issue here. Similarly, Plaintiffs need to come up with evidence that Interior's accounting does not meet "the standards promulgated by the AICPA or any other professional organization" (TRO Motion at 7). In fairness, however, Plaintiffs could not possibly provide at this time the requisite specific objections to support an attack on the statements of account at issue here since they haven't even seen them yet.

Interior is reviewing the recent orders of the Court and deliberating upon the best course of action with respect to its options as to how it wishes to proceed with the other IIM accounts at issue in this litigation. In the meantime, however, Interior has prepared the statements of account for approximately 7,900 account holders and, under the 1994 Act and the orders of this Court, Interior has a fiduciary obligation to provide the affected trust beneficiaries with their statements of account.[4]

Plaintiffs have not met their burden of citing to any order, statutory provision, or other source which would relieve Interior of its obligation to provide an IIM account holder with a statement of account. Therefore Plaintiffs cannot succeed on the merits.

B. <u>No Irreparable Injury if Injunctive Relief is Denied</u>

Plaintiffs claim that the 7,900 IIM account holders will be irreparably harmed if they receive their statements of account because, again without seeing them, Plaintiffs believe that the statements are inaccurate and that the account holders will be misled into thinking that they are accurate. TRO Motion at 17-18. Again, however, even if a TRO were issued here and the statements were first provided to the Court, there is nothing in Plaintiffs' proposed course of action that would prevent the account holders from seeing their statements of account. Indeed, one would certainly assume that the holder of an account would first see the statement before Plaintiffs challenge its accuracy. If the requested relief is denied, nothing would prevent

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[4] Plaintiffs also claim that the issuance of the accounting statements by Interior would somehow violate Interior's attorneys obligations under Ethical Rule 4.2(a). TRO Motion at 11-12. Although Solicitor's Office and DOJ attorneys participated in the effort to produce these statements of accounts to ensure that the Court's orders in this case were followed during this process, no lawyer communicated with, or "cause[d] another to communicate" with a represented party in this litigation. <u>See</u> Ethical Rule 4.2(a). Therefore, the issuance of these statements by Interior does not violate any ethical obligations and should not be prevented on this ground.

Plaintiffs, or their counsel, from informing the IIM account holders that they believe the statements they received are inaccurate. If, after reviewing the statements of account, Plaintiffs continue to believe they are inaccurate, nothing prevents them from challenging the statements.

In short, Plaintiffs have not demonstrated that the 7,900 IIM account holders will be harmed at all, much less irreparably harmed, by receiving their statements of account.

C. Granting the Injunctive Relief Would Substantially Harm the Government

Interior has an obligation as a trustee to provide the IIM trust beneficiaries their statements of account. Interior has prepared statements for approximately 7,900 IIM account holders and should be permitted to send these statements to the appropriate account holder.

D. Public Interest Is Not Served by Granting Emergency Injunctive Relief

The public interest is not served if the government is hampered in its efforts to satisfy its trust obligations. In addition, if the Plaintiffs' injunctive relief is granted, the 7,900 account holders at issue here could still obtain copies of their statements of accounts after they are filed with the Court but would be required to spend time and money in this effort that would be avoided if the statements were mailed to them directly. No public interest is served by preventing Interior from sending these statements to the account holders.

CONCLUSION

For these reasons, Plaintiffs' TRO Motion should be denied.

Dated: September 23, 2002

Respectfully submitted,

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Defendants.	)	
	)	

ORDER

This matter coming before the Court on Plaintiffs' Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction, filed on September 20, 2002, the Court finds that the Motion should be DENIED.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 23, 2002 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction* by facsimile, in accordance with their written request of October 31, 2001 upon:

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