U.S. DISTRICT COURT
2002 DEC -2 PM 6:36
NANCY M.
MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' CONSOLIDATED SUPPLEMENTAL REPLY IN SUPPORT OF A MOTION FOR A PRELIMINARY INJUNCTION REGARDING HISTORICAL STATEMENTS OF ACCOUNT AND PLAINTIFFS' "REQUEST" FOR A RULE 23(e) ORDER REGARDING COMMUNICATIONS WITH CLASS MEMBERS

Pursuant to the November 1, 2002 Order of the Court, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following opposition to Plaintiffs' Consolidated Supplemental Reply ("Supplemental Reply") in support of a Motion for a Preliminary Injunction halting distribution of historical statements of account ("Preliminary Injunction Motion") and "Request" for a Rule 23(e) Order Regarding Communications with Class Members ("Request"). Briefing on this issue is now complete. Both the Preliminary Injunction Motion and the "Request" should be denied to permit distribution of the 14,235 completed historical statements of account to the account holders for whom they were prepared.

INTRODUCTION

On September 20, 2002, Plaintiffs filed the Preliminary Injunction Motion to prevent Individual Indian Money ("IIM") account holders from receiving the historical statements of

account that Interior has prepared for them. Interior opposes the Preliminary Injunction Motion. At a November 1, 2002 hearing, and in a follow-up Order on the same date, the Court requested additional briefing regarding the appropriateness of Interior's communications with class member account holders in distributing the historical statements of account. Interior agreed to suspend transmittal of the statements pending resolution of the Preliminary Injunction Motion. Pursuant to the Court's order, Interior filed a supplemental opposition on November 15, 2002. On December 2, 2002, Plaintiffs filed a consolidated paper, including both its Supplemental Reply and its "Request." Interior opposes both, and with today's consolidated opposition, the requested supplemental briefing is now complete. Interior urges the Court to deny both the Preliminary Injunction Motion and the "Request."

I. THE PRELIMINARY INJUNCTION MOTION SEEKING TO BAR DISTRIBUTION OF THE HISTORICAL STATEMENTS OF ACCOUNT SHOULD BE DENIED

Plaintiffs' Supplemental Reply is long on the generalized allegations of Interior wrongdoing that seem to be cut-and-pasted into every paper recently filed by Plaintiffs and short on the particularized arguments requested by the Court addressing transmittal of the historical statements of account. It remains undisputed that there is no statute, no local or federal rule, no order of the Court, and no case law that operates to prevent Interior from distributing the historical statements of account to the account holder class members. To the contrary, the 1994 Act, the prior Orders of this Court, and the opinion of the D.C. Circuit all indicate that Interior is authorized to prepare and transmit the statements of account.[1] Indeed, the Court has already

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[1] In addition, the provision of an accounting is the very relief requested by Plaintiffs in their complaint. It is puzzling why Plaintiffs now seek to prevent account holders from receiving an accounting. Perhaps Plaintiffs' counsel are concerned that their baseless, but oft-repeated,

indicated that sending the statements themselves is not improper. See November 1, 2002 Transcript ("Tr.") at 16, 19, 33, 34.

In the face of this overwhelming authority permitting distribution of the statements,[2] the only putative counter-argument that Plaintiffs can muster in their Supplemental Reply is the ethical rule prohibiting an attorney from contacting a represented party. Interior agrees with Plaintiffs' description of D.C. Rule of Professional Conduct 4.2(a) and its application to communications by attorneys with class members. The problem, however, is that Plaintiffs cannot, and do not, show how a rule governing attorney communications has any application here where the communication with class member account holders is initiated and transmitted by Interior as part of its statutory and trust obligations and is not a communication directly, or indirectly, from any attorney to a represented party.[3]

Each of the hypothetical dangers resulting from an account holder receiving an historical statement of account that Plaintiffs set forth in the Supplemental Reply (at 11-13) is entirely within the power of Plaintiffs' counsel to prevent since they will also receive copies of each statement that is transmitted. They are free to communicate with their clients, inform them of this litigation and of their representation by counsel, inform them of any concerns Plaintiffs'

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claim that no accountings can ever be done by Interior is manifestly untrue.

2/ Indeed, the sections of the Restatement (Second) of Trusts, and all of the cases discussing the obligations of a trustee affirmatively to supply information to a beneficiary, cited by Plaintiffs (see Supplemental Reply at 13-16), only bolster Interior's contention that it is required to send the statements to the account holders.

3/ Plaintiffs' strained interpretation (Supplemental Reply at 5 n.4) of the scope of the class as certified by the Court on February 4, 1997, is utterly nonsensical. Plaintiffs would have us believe that "present" somehow means "future."

counsel may have about the accuracy of the statements, advise them of their rights, and caution them about the production of privileged material. It is baffling that Plaintiffs do not even discuss in their Supplemental Reply Interior's proposal to add language to the transmittal letter informing class members of this litigation and of the existence of class counsel.[4] Plaintiffs' silence on this proposal can only be interpreted as a rejection of the proposed language. Apparently Plaintiffs believe that counsel's opportunity to contact class members who receive the statements is sufficient.

Interior has completed 14,235 historical statements of account and is ready to resume mailing them to the IIM account holders as soon as the Court denies the Preliminary Injunction Motion.[5] Recognizing that the Court has a busy schedule, Interior nonetheless urges the Court to rule on this dispute as soon as possible so that the account holders may receive their statements.

II. THE "REQUEST" FOR A RULE 23(e) ORDER REGARDING COMMUNICATION WITH CLASS MEMBERS SHOULD BE DENIED

Perhaps recognizing that a preliminary injunction barring distribution of the historical statements of account is unjustified, Plaintiffs have now included, as an alternative to a

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[4] Plaintiffs are also conspicuously silent about Interior's argument (Supplemental Opposition at 8-9) that the statements of account and the accompanying transmittal letter currently avoid mention of the litigation precisely because any reference to the litigation without prior approval of the Court might have been misleading. See Rankin v. Board of Educ., 174 F.R.D. 695 (D. Kan. 1997).

[5] Without citation, Plaintiffs have inaccurately informed the Court that it is Interior's policy to appoint a BIA Agency Superintendent as the guardian of an IIM account holder who is a minor. Supplemental Reply at 3 n.2. To the contrary, Interior's policy requires BIA supervision of a minor's IIM account, but information about the account is transmitted to the address of record of the minor's custodial parent or legal guardian. See 25 C.F.R. §§ 115.400, 115.403. Of the approximately 1,200 statements mailed thus far, none was addressed to a BIA Superintendent, as Plaintiffs' counsel are aware since they have copies of these statements.

preliminary injunction, a "request" for an order pursuant to Fed. R. Civ. P. 23(e)[6] restricting communications with class members. As a preliminary matter, requests for an order from a court are typically styled as motions and Interior is unable to determine why Plaintiffs chose not to file a motion here.

In addition, the "Request" and the proposed order are hopelessly vague as to what types of communication would be barred.[7] Plaintiffs' proposed order could be interpreted to prohibit all sorts of ordinary course of business communications between Interior and class members, even those that do not remotely apply to the litigation. On its face, the proposed order would also operate to prevent communications with Interior employees who are also class members. Perhaps Plaintiffs only want an order that would require Interior to submit all historical statements of account to the Court and to Plaintiffs' counsel and withhold them from the account holders. It is hard to see how this is any different from the improper relief requested in the Preliminary Injunction Motion, except that it would be contained in a Rule 23(d) order rather than an injunction. As written, however, Plaintiffs "Request" and proposed order would impermissibly restrict communications with class members.

In any event, Interior opposes Plaintiffs' "Request." Although the Court has the authority under Fed. R. Civ. P. 23(d) to enter an order restricting communication with class members, this

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[6] Although the caption of Plaintiffs' paper is styled as a request for a Rule 23(e) order, in the body of Plaintiffs' Supplemental Reply they cite Rule 23(d) as the authority for such an order. Rule 23(e), of course, has nothing to do with restrictions on communications with class members.

[7] Plaintiffs filed an untimely proposed order by letter dated December 9, 2002. Moreover, contrary to Plaintiffs' "Certification of Counsel," also filed with the December 9 letter to the Court, Plaintiffs did not confer with counsel for Interior prior to filing the "Request," as required by LCvR 7.1(m).

should be done only after a hearing to develop a record establishing why such an order is needed to protect the class from undue interference and false or misleading statements.[8] See Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). Courts routinely refuse to impose limitations on communications unless based on a clear record showing the need. See, e.g., Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 759 (7th Cir. 2000); Great Rivers Coop. v. Farmland Indus., Inc., 59 F.3d 764, 766 (8th Cir. 1995); In re School Asbestos Litig., 842 F.2d 671, 683-84 (3d Cir. 1988); Domingo v. New England Fish Co., 727 F.2d 1429, 1441 (9th Cir. 1984) (per curiam); Williams v. United States District Court, 658 F.2d 430, 434-37 (6th Cir. 1981).

Plaintiffs have not made the necessary showing here that Interior has engaged in the type of abusive communication with class members that would justify a Rule 23(d) order. Plaintiffs include the usual barrage of attacks on Interior and repeatedly restate their wholly unsubstantiated claim that the historical statements of account are false and misleading – as if repetition of a charge can somehow substitute for evidence – but they have not made any particularized showing in support of their reckless allegations. For over a month, Plaintiffs have had copies of the historical statements of account that have already been transmitted to account holders, but they have cited no inaccuracies.

It seems clear, then, that their allegations of inaccuracy seem to be more of an attack on the overall process in preparing these statements, rather than on any particular statement. For the Court's guidance, a description of the painstaking work done by the employees and accountants

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[8] Plaintiffs' counsel, of course, will already receive copies of the historical statements of account transmitted to class members. Interior is prepared to provide the Court with copies of the thousands of accounting statements. Interior opposes withholding the statements from the account holders while waiting for Court and Plaintiffs' counsel "approval" of them.

at the Office of Historical Trust Accounting, and the work of the two outside accountants, in preparing the historical statements of account can be found in the Report to Congress on the Historical Accounting of Individual Indian Money Accounts, at 17, 23-24, 30, 45 (this Report was filed with the Court by Interior on July 3, 2002), Interior's 10th Report to the Court, at 52-53 (filed August 1, 2002), Interior's 11th Report to the Court, at 51-53 (filed November 1, 2002), as well as the transmittal letter accompanying each of the statements.

Under these circumstances, an order restricting communication with class members regarding the historical statements of account is unjustified and Plaintiffs' "Request" should be denied.

CONCLUSION

For these reasons, and for the reasons discussed in Interior's Opposition to the TRO Motion filed on September 23, 2002, and in Interior's Supplemental Opposition filed on November 15, 2002, Plaintiffs' Preliminary Injunction Motion and "Request" for a Rule 23(e) order restricting communication with class members should be denied.

Dated: December 9, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 9, 2002 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Consolidated Supplemental Reply in Support of a Motion for a Preliminary Injunction Regarding Historical Statements of Account and Plaintiffs' "Request" for a Rule 23(e) Order Regarding Communications with Class Members* by facsimile in accordance with their written request of October 31, 2001 upon:

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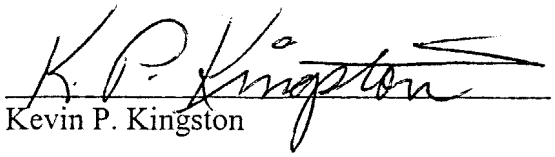

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