U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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NANCY M.
MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER PROHIBITING COMMUNICATIONS WITH CLASS MEMBERS

Plaintiffs' opposition to Interior Defendants' Motion for Reconsideration of Order Prohibiting Communications with Class Members ("Motion for Reconsideration") sets forth a broad range of objections, generally supported by inconsistent, confusing, factually dubious, and vitriolic assertions.[1] A reasoned review of the Motion for Reconsideration, however, confirms that it is both brought properly before the Court and raises issues regarding the Court's Order filed on December 23, 2002, pursuant to Rule 23(d), (the "Rule 23(d) Order") which require reconsideration by the Court.

[1] On January 30, 2003, Interior Defendants filed their Motion To Strike Plaintiffs' Untimely Filings, and plaintiffs' brief in opposition to the Motion for Reconsideration is among the untimely pleadings included within the scope of the motion to strike. Pursuant to Local Civil Rule 7.1(b), because plaintiffs' opposing motion was "not filed within the prescribed time, the court may treat the motion as conceded."

I. Interior Defendants' Motion for Reconsideration Is Properly Before This Court

Plaintiffs initially attack Interior Defendants' decision to bring the Motion for Reconsideration before the Court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. While Interior Defendants believe that the Court's Rule 23(d) Order is properly the subject of a Rule 59(e) motion, even if the Court were to conclude otherwise, the issues raised by the Motion for Reconsideration are properly before the Court. As this Court recently recognized:

> District courts have broad discretion to grant or deny a motion for reconsideration. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233-34, 115 S. Ct. 1447, 131 L.Ed.2d 328 (1995); see also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). The court may invoke its discretion and deny such a motion unless it finds an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice. McDonnell Douglas Corp. v. NASA, 109 F. Supp. 2d 27, 28 (D.D.C. 2000); see also Firestone v. Firestone, 76 F.3d 1205, 1206 (D.C.Cir.1996); EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir.1997).

Cobell v. Norton, 226 F. Supp. 2d 175, 177 (2002). Notwithstanding plaintiffs' insupportable and erroneous assertion that the filing of the Motion for Reconsideration pursuant to Rule 59(e) was undertaken for a broad range of allegedly improper reasons, Plaintiffs' Opposing Brief ("Pl. Br.) at 1, 14-15, this Court retains the jurisdiction to reconsider any order until the order becomes final. Contrary to plaintiffs' assertions – and consistent with this Court's above-quoted recent statement – this Court retains broad discretion to consider and rule upon Interior Defendants' Motion for Reconsideration.

II. Plaintiffs' "Factual Background" Section is Fraught With Gross Misrepresentations and Mischaracterizations to Continue Their Indiscriminate Pattern of Defaming Government Officials

The Government recognizes that litigants can have widely disparate points of view; this is the origin of disputes and, often, litigation. That being said, the record of this case more than amply confirms that plaintiffs' approach to this litigation relies upon indiscriminate charges against virtually any Government official who becomes involved in this matter. Such a pattern – unsupported by facts or substance and directed toward virtually any action undertaken by the Government – does not simply fly in the face of the judicial presumption that Government officials are presumed to act in good faith, e.g., Marine Shale Processors, Inc. v. EPA, 81 F.3d 1371, 1385 (5th Cir. 1996) ("well-nigh irrefragable proof" required to rebut legal presumption that government officials act in good faith); Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976) (same), cert. denied, 434 U.S. 830 (1977); China Trade Center, L.L.C. v. Washington Metropolitan Area Transit Authority, 34 F. Supp. 2d 67, 70-71 (1999), aff'd, 1999 WL 615078 (D.C. Cir. July 2, 1999); it defies common sense.

A review of the "factual" background in plaintiffs' opposing brief highlights the lack of substance in their allegation that, in essence, every Government official involved in the mailing of the historical account statements misrepresented facts, acted unethically, and concealed information. Pl. Br. at 2-11. Plaintiffs initially mischaracterize and propound insupportable allegations in describing the procedural history leading to the Court's Rule 23(d) Order. Contrary to plaintiffs' assertion, Pl. Br. at 2 and 10, no basis exists for their claim that Interior Defendants "falsely" represented that historical account statements had been completed for approximately 7,900 IIM accounts. In fact, the only basis for this charge is buried in footnote 15 of plaintiffs'

brief, in which plaintiffs simply rely upon their arguments regarding work conducted approximately one year earlier. Plaintiffs' groundless allegation is wholly divorced from any facts that existed in September 2002.

Plaintiffs proceed to argue, repeatedly, that the Government "concealed" from plaintiffs and the Court the notice contained in the historical account statements. Pl. Br. at 2 n.4, 9, 9-10 n.14. The critical fact missing from plaintiffs' irresponsible charge of concealment, however, is that Interior Defendants' initial motion, filed on September 10, 2002, asked the Court for an order, pursuant to the Privacy Act, permitting disclosure to plaintiffs' counsel. Interior Defendants' Motion and Supporting Memorandum for Order Permitting the Provision of Copies of Historical Statements of Account to Class Counsel (filed Sept. 10, 2002). Interior Defendants affirmatively acted to disclose the information to plaintiffs' counsel, and the only barrier was plaintiffs' opposition to Interior Defendants' Privacy Act motion.

Plaintiffs proceed to argue that the Government's decision to provide historical account statements to account holders[2] was part of a scheme to evade Rule 4.2(a) of the Model Rules of Professional Conduct. Pl. Br. at 4-7. In support of this erroneous assertion, plaintiffs rely largely upon selected and mischaracterized excerpts from the deposition of Mr. Bert Edwards and statements of counsel in this matter. For example, plaintiffs claim Mr. Edwards' testimony

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[2] Consistent with their design to portray the Government as comprised of evil people intent on taking advantage of beneficiaries, the plaintiffs repeatedly state that Interior Defendants provided the statements to "juveniles" and "children." Pl. Br. at 4, 5-6 n.8, 7. Plaintiffs even argue, at one point, that "the targets are unsuspecting children." Pl. Br. at 10 n.16. In fact, the statements were not provided to children, but were provided to the parents and guardians of the beneficiaries, a fact recognized by this Court during the November 1, 2002 hearing and unquestionably known by plaintiffs' counsel. Tr. 37:14-38:9. See also Deposition Testimony of Bert Edwards (Dec. 18, 2002) (Tr. 28:22-29:5) (attached as Exhibit A).

confirmed "that 15 officials from Interior and Justice met frequently on these matters [regarding direct communications with class members] and that this group was in agreement on the language of the communications as well as the decision to send such information to 1,200 juvenile class members without the approval of this Court." Pl. Br. at 4 n.4 (emphasis in original) (citing Edwards Depo. Tr. at 28-31 (Dec. 18, 2002)). Plaintiffs failed to attach the transcript to their opposing brief, however, for one obvious reason: Mr. Edwards' testimony, unencumbered by plaintiffs' selective edits and mischaracterizations, does not support plaintiffs' argument. We have attached pages 28-31 of Mr. Edwards' deposition transcript to this brief, and a review of those pages confirms that Mr. Edwards' testimony stated nothing about the Court's role with regard to the statements to be provided. See Exhibit A to Reply Brief ("Ex. A."). Simply put, plaintiffs' entire discussion about Government counsel's allegedly unethical conduct is, in fact, premised upon a misrepresentation of Mr. Edwards' testimony, and Mr. Edwards' testimony hardly "demonstrates decisively" that Government counsel engaged in unethical behavior. Pl. Br. at 3-7.[3]

Mr. Edwards also testified, in the pages relied upon by plaintiffs, that the statements were sent only to parents and guardians, not juveniles. Ex. A (Tr. 28:22-29:5). As is explained above in footnote 2, this fact has been repeatedly mischaracterized within plaintiffs' opposing brief.

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[3] It is plainly unremarkable that Mr. Edwards confirmed that disregarding the legal advice of Interior Department's Solicitor's Office would require "pretty good reasons" or that disregarding the Solicitor's advice would cause Mr. Edwards to act "at some peril." Pl. Br. at 4 n.7 (partially quoting Edwards Depo. Tr. 294:7-12). In an attempt to make Mr. Edwards' testimony more supportive of their position, however, plaintiffs omitted a portion of the question from their quotation in their footnote 7. In fact, the full question asked "Are you free to disregard the Solicitor's advice with regard to the preparation of your plan?" Edwards Depo. Tr. 294:7-8 (omitted language emphasized). In that full context, Mr. Edwards' response is clearly reasonable.

Plaintiffs' mischaracterizations of Government counsel's statements during the November 1, 2002 hearing are equally unfounded. Pl. Br. at 5-6 n.8. Contrary to plaintiffs' assertions, a review of the transcript confirms that Government counsel's statements regarding the appellate rights of account holders was restricted to the administrative process. See Tr. 6:15-8:6. In fact, the following exchange took place during the hearing:

> THE COURT: I understand, but nobody is losing any rights with those statements.
>
> MR. SELIGMAN: Well, there is no definitive loss of any rights with these statements. The only –
>
> THE COURT: I thought the regulation said, if you don't appeal in 60 days you lose all your rights?
>
> MR. SELIGMAN: Well, they may lose -- there can be an argument later about which rights they have lost. Of course there is a -- there is a -- the case has been proceeding for six years now before you, and if anybody wishes to challenge the accounting that's in that statement that's sent out to them, they certainly are -- they are represented by counsel, and they can go to their counsel and they can -- they can eventually raise the issue before you, which I assumed was going to be at some later –

Tr. 7:17-8:6. Contrary to plaintiffs' assertion, Government counsel never stated that Interior Defendants intended to attempt to terminate class rights through the provision of the historical account statements. For similar reasons and the reasons set forth in the Motion for Reconsideration at 8-11, this Court should reject plaintiffs' argument that Interior Defendants "improperly attempt to eat their cake and have it too." See Pl. Br. at 16-17.[4]

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[4] We also note that in their opposition, plaintiffs take the wholly inconsistent position of attacking the Government's assertion regarding the legal import of the notice in the historical account statements while, at the same time, "not[ing] that plaintiffs are in agreement with the implicit premise of the Interior defendants and their counsel in this phase of the argument: that in the absence of a decision from this Court, no rights of a single member of the

Plaintiffs argue that the historical account statements were not made in the regular course of business, but rather than addressing whether the statements were, in fact, products of the Interior Department's statutory responsibilities, plaintiffs argue that "there is no 'regular course of business' other than malfeasance, misfeasance and nonfeasance regard the Individual Indian trust." Pl. Br. at 8 n.10.[5] Plaintiffs then attack the Government's assertion that the communications from the Interior Department's Office of Historical Trust Account ("OHTA") were not communications by counsel, concluding with the ad hominem attack that

> [D]efendants and their counsel have placed themselves in the unenviable but classic position of an inveterate prevaricator – to whom the only relevant question is: "Are you lying now . . . or were you lying then?"

Pl. Br. at 8 n.11. These are not legal arguments. Rather, they are simply more of the sort of rhetoric – wholly lacking in the civility required of litigants in this Court – which poisons the atmosphere of this litigation. See generally D.C. Bar Voluntary Standards for Civility in Professional Conduct, quoted in Alexander v. FBI, 1999 WL 314170 (D.D.C. May 17, 1999).

Finally, plaintiffs attack the statement in the Motion for Reconsideration, that "Interior has relied upon the Court's statements allowing day-to-day communications that the agency would otherwise be making independent of the litigation as a limitation on such a broad construction." Motion for Reconsideration at 7. Rather than cite a relevant example supportive

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Cobell class may be terminated." Pl. Br. at 6 n.8 (emphasis in original).

[5] Plaintiffs' challenge regarding the Secretary's duty to provide historical account statements is equally pernicious. Pl. Br. at 10 and n.16. Rather than addressing the Secretary's legal duties, plaintiffs allege that the actions "are never taken by a fit trustee-delegate" and that the Secretary's actions – directed at "unsuspecting children" – constitute either "actual fraud" or "constructive fraud." Pl. Br. n.16. See also footnote 2, above.

of their attack – undoubtedly for lack of such an example – plaintiffs cite a wholly irrelevant communication between Government counsel and the Special Master-Monitor. Pl. Br. at 11 n.17. Their purpose in citing this communication is transparently unrelated to the motion before this Court.

III. Counsel for the Parties Did, In Fact, Meet and Confer Pursuant to Local Civil Rule 7.1(m)

Contrary to plaintiffs' initial assertions, Pl. Br. at 15 n.24 and 22 n.34, counsel for the Government did have a telephonic conversation with plaintiffs' counsel, pursuant to Local Civil Rule 7.1(m), prior to filing the Motion for Reconsideration. Moreover, contrary to the initial statement in footnote 24 of plaintiffs' opposing brief, the meet-and-confer discussion was specifically referenced in the first paragraph of the Motion to Reconsideration. Compare Pl. Br. at 15 n.24 with Motion for Reconsideration at 1.

On January 30, 2003, plaintiffs filed their "Notice of Errata re Plaintiffs' Opposition to Interior Defendants' Motion for Reconsideration of Order Prohibiting Communications With Class Members" ("Notice of Errata"). Plaintiffs' Notice of Errata was filed following discussion and correspondence between counsel for the parties, which commenced with a letter from Government counsel to plaintiffs' counsel on January 24, 2003, the date plaintiffs' opposing brief actually was sent to Government counsel. Ex. B (letter from J. Warshawsky to D. Gingold dated January 24, 2003). During the course of those discussions, Government counsel advised plaintiffs' counsel that he was confident he advised plaintiffs' counsel fully regarding the relief to be sought in the Motion for Reconsideration.[6]

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[6] Government counsel's signature at the conclusion of this pleading serves as certification of the facts asserted in this section of the reply brief.

The Notice of Errata states that "Plaintiffs can recall no meet and confer conducted by defendants with respect to the second separate order sought, namely 'that the Court's referral of government attorneys for disciplinary investigation set forth in the Rule 23(d) order is rescinded.'" Notice of Errata at 1-2. The Government, of course, cannot address whether plaintiffs' counsel lacks recollection of such a conference – and we do not dispute plaintiffs' counsel's assertion regarding his mental state. As noted above, however, Government counsel is confident that both elements of the proposed order were discussed during the Local Civil Rule 7.1(m) conference on January 8, 2003.

While the Government disputes that its counsel participated in what the Notice of Errata refers to as "unconstructive bickering on this point," Notice of Errata at 2,[7] in light of plaintiffs' statement that "plaintiffs prefer that this Court deny defendants' motion on the merits," id., Interior Defendants assume plaintiffs' Local Civil Rule 7.1(m) arguments have been rendered moot by plaintiffs' subsequently filed Notice of Errata.[8]

III. This Court Should Reject Plaintiffs' Request for a "Broad Order" Requiring the Submission of "All Non-Routine Communications With Class Members to the Court and to Plaintiffs for Prior Approval"

Plaintiffs' brief argues, at length, regarding the clarity of the Court's Rule 23(d) Order and

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[7] In fact, as noted above, plaintiffs' errors in their opposing brief were only brought to the Court's attention following discussions initiated by Government counsel. See Ex. B. Consequently, the discussions were constructive in clarifying at least some of the facts preceding the filing of the Motion for Reconsideration.

[8] In the event the Court wishes to consider the merits of plaintiffs' allegations regarding the Government's compliance with Local Civil Rule 7.1(m), the undersigned Government counsel is willing to further supplement this pleading to satisfy the Court that, in fact, there was a legally sufficient meet-and-confer discussion prior to the filing of the Motion for Reconsideration.

concludes by asking, without the submission of a proper motion, for a "broad order" requiring the submission of "all non-routine communications with class members to the court and to plaintiffs for prior approval." Pl. Br. 18-22. The Court should reject plaintiffs' request, if for no other reason, because it has not been brought before the Court through a motion complying with the Court's rules. E.g., Local Civil Rule 7.1(a) (setting forth requirements for motions) and 7.1(c) (requiring motions to accompanied by a proposed order).

Moreover, plaintiffs' opposing brief provides no justification for the entry of such a broad order. Plaintiffs attack the Government for suggesting that the Rule 23(d) Order arguably could be interpreted as barring plaintiffs' counsel from communicating with members of the class. Pl. Br. at 18. In asking for the Court's confirmation regarding Interior's understanding of the Rule 23(d) Order, the Motion for Reconsideration did note that "a broad construction of the Court's order would arguably preclude Interior officials, their agents, and even plaintiffs' counsel, from communicating with class members . . . ." Motion for Reconsideration at 7. This is because the Rule 23(d) Order prohibits certain communications by "parties to the litigation, their agents and officials, and their counsel" Rule 23(d) Order at 18-19, and plaintiffs and their counsel certainly fall within the literal scope of this language.

A reasoned reading of the Motion for Reconsideration simply confirms that Interior Defendants raised the breadth of the Rule 23(d) Order in the context of providing the Court and plaintiffs' counsel with notice regarding Interior's "reasonable" interpretation of the Court's order. Motion for Reconsideration at 7-8. It was not intended to suggest that the Rule 23(d) Order should be construed to bar plaintiffs' counsel's contact with class members; it merely sought guidance if, in fact, the Interior Department should construe the Rule 23(d) Order more narrowly.

IV. This Court Should Withdraw Its Reference of Justice Department Attorneys for Disciplinary Investigation

Plaintiffs offer two challenges to the Government's request that the Court withdraw its referral of Justice Department attorneys for disciplinary investigation. Initially, plaintiffs argue that the Government lacks "standing" to seek such relief, Pl. Br. at 11-13, but plaintiffs' argument simply misapplies the concept of legal standing. Interior Defendants – the movants in the Motion for Reconsideration – are already parties to this litigation, and as such, they possess standing to ask this Court to reconsider any of its rulings. Moreover, none of the cases relied upon by plaintiffs support the notion that the Interior Defendants lack standing to ask that this Court reconsider its prior order of referral.[9] While plaintiffs' arguments would have arguable relevance if Interior Defendants pursued dismissal of the disciplinary proceedings in a motion brought before the Court's Disciplinary Committee, their arguments are plainly inapposite here.

In their opposition to the Government's request for reconsideration of the referral order, plaintiffs attempt, at length, to distinguish two cases cited in the Motion for Reconsideration. Pl. Br. at 22-27. As is explained below, neither purported distinction is persuasive.

Plaintiffs argue that the Motion for Reconsideration sets forth "a gross distortion" of the

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[9] Plaintiffs principally rely upon three cases, all of which are similarly distinguishable. In Mattice v. Meyer, 353 F2d 316 (8th Cir. 1965), the court simply held that a private citizen lacked standing to initiate disbarment proceedings in federal district court. The citizen could provide information to the court for the court's consideration, but the citizen could not prosecute the disbarment action. In Colon v. United States Attorney, 576 F.2d 1 (1st Cir. 1978), the court similarly distinguished the right of a citizen to complain to a court from standing to prosecute a disciplinary action. Finally, in In re Teitelbaum, 253 F.2d 1 (7th Cir. 1958), the court held that the a United States Attorney who unsuccessfully sought disbarment of an attorney lacked standing to file a notice of appeal. Again, the court relied upon the distinction between the United States Attorney's status as an informer and his lack of standing to prosecute an appeal following the denial of the disbarment request.

holding in United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). Pl. Br. at 23. In so doing, plaintiffs assert – wrongly – that the Motion for Reconsideration "implies that the case turns on" the "alter ego" discussion in Lemonakis. Id.

In fact, the Motion for Reconsideration cited Lemonakis for the proposition that "the D.C. Circuit has made clear that an attorney is not responsible for communications made by another unless that person is acting as the attorney's 'alter ego,'" Motion for Reconsideration at 12, and the Lemonakis Court could not have been clearer in relying upon the alter ego distinction in finding that "there was no ethical breach by the U.S. Attorneys prosecuting the case." 485 F.2d at 956. Specifically, the Court addressed whether the "initiation and recording of the conversations" between an informant and criminal suspects constituted a "'communication' between an attorney and an adverse party who has retained counsel, without the latter attorney's consent or authority of law" in violation of the ABA's Code of Professional Responsibility. Id. at 955.

In holding that the communications by the informant were not violative of the prohibition on communications with a represented party, the D.C. Circuit relied specifically upon and quoted from United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962), rev'd on other grounds, 377 U.S. 201 (1964). Lemonakis, 485 F.2d at 955-56. The Lemonakis Court did not simply quote from Massiah, however; it proceeded to state, as its own holding, "Similarly here, in a non-custodial situation, the Government's instructions to its informant, although provided by a U.S. Attorney as well as the investigating officers, were not such as to constitute [the informant] the 'alter ego' of the U.S. Attorney's Office." Id. at 956. This quotation is particularly relevant because plaintiffs wrongly assert that "defendants have chosen to quote no more than the words 'alter ego' from the

embedded quotation from the Massiah case which they have extracted without disclosure of its origin." Pl. Br. at 37. In fact, the phrase "alter ego" appears in both the D.C. Circuit's text as well as the quotation from Massiah. Finally, while Lemonakis is a criminal case, the D.C. Circuit's holding was issued in the context of analyzing communications with a represented party under the ABA's Code of Professional Conduct. The D.C. Circuit's distinction between criminal and civil matters, 485 F.2d at 956, quoted in Pl. Br. at 24, was but one factor weighed by the Court in finding the absence of an ethical violation, and the Court's analysis of the alter ego factor was prior to and independent of the civil-criminal distinction.

Plaintiffs also seek to distinguish Miano v. AC&R Advertising, Inc., 148 F.R.D. 68, 81-90 (S.D.N.Y. 1993), adopted and approved, 834 F. Supp. 632 (S.D.N.Y. 1993), which is cited in the Motion for Reconsideration for the proposition that "the DOJ attorneys were under no obligation to prevent communications made by their client (Interior) to its IIM account holders." Motion for Reconsideration at 12. Plaintiffs assert that Miano is "another clandestine tape recording case," Pl. Br. at 24 (emphasis added), wrongly implying that Miano is factually comparable to Lemonakis. Miano, however, involved the taping of a conversation in a civil context, a distinction which plaintiffs apparently considered to be significant in the context of Lemonakis but not in the context of Miano. Moreover, in arguing that Miano is "equally distinguishable," Pl. Br. at 24, plaintiffs repeatedly observe that Miano applied an ad hoc analysis to decide whether an attorney had improperly used his client to "circumvent" the ethical bar on communications with represented parties. Pl. Br. at 25-26. Plaintiffs conclude their effort at distinguishing Miano by repeating their unfounded and misleading allegations about the role of Government counsel and the testimony of Mr. Edwards. Pl. Br. at 27; see Part II, above

(discussing gross misrepresentations and mischaracterizations in plaintiffs' "Factual Background" section). A reasoned review of Miano confirms that the Court did, in fact, review the facts surrounding the alleged circumvention of the ethical rules governing attorney conduct in that case and concluded that the client acted independently in deciding to speak with the party and that he was not acting at the direction of his counsel. 148 F.R.D. at 81-90.

Even if the provision of the historical account statements constituted a communication by Interior with a represented party, the factual predicate for plaintiffs' allegation – based upon their mischaracterized presentation of Mr. Edwards' testimony – does not establish that Government counsel surreptitiously directed OHTA to communicate improperly with represented parties. Again, it is important to bear in mind the context of the communications at issue in this case. This is a case in which the Interior Department – long-criticized for failing to provide historical account statements – attempted to provide statements to account holders. Moreover, prior to providing the statements, the Interior Department sought to provide them to plaintiffs' counsel by way of the Interior Defendants' initial motion, filed September 10, 2002. Plaintiffs' counsel failed to see the statements only because of plaintiffs' objection to the Court's entry of an order permitting disclosure to their counsel under the Privacy Act. Moreover, the communication complained of is the statement of administrative appellate rights provided by law; surely, Interior Defendants would have been criticized even more vociferously if they had omitted a discussion of the administrative appellate rights. The conclusion that the facts of this case are anything approaching the sort of ethical violation proscribed by Rule 4.2(a) of the Model Rules of Professional Conduct is erroneous and, accordingly, requires reconsideration by this Court.

V. This Court Should Reject Plaintiffs' Improper Request for an Order Directing the Distribution of a Notice to Recipients of the Historical Account Statements

In the final section of their brief opposing the Motion for Reconsideration, plaintiffs ask the Court for an order directing defendants to send a wide-ranging notice to recipients of the historical account statements.[10] Again, plaintiffs' request fails to comply with the Court's rules governing the filing of motions and should be rejected on that basis, alone. Local Civil Rule 7.1(a) and 7.1(c). Moreover, plaintiffs' "request" provides no basis for this Court to conclude that the legal representatives of the account holders require such notice. Accordingly, this Court shoudl reject plaintiffs' request on its merits.

Conclusion

For the foregoing reasons and the reasons set forth in the Motion for Reconsideration, this Court should grant the Interior Defendants' motion for reconsideration, vacate its order holding that the Interior Department made improper communications with class members, and rescind its referral of government attorneys for disciplinary investigation.

Respectfully submitted,

ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

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[10] In so doing, plaintiffs continue their practice of consolidating what they assert is a new motion with a pleading responsive to a previously filed Government motion. The Government will timely file a separate opposition to plaintiffs' "Motion for Order Directing Defendants to Rescind Notice Sent to 1200 Trust Beneficiaries."

J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
JOHN WARSHAWSKY (D.C. Bar No. 417170)
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

February 3, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Washington, D.C.
Wednesday, December 18, 2002

Deposition of BERT T. EDWARDS, a witness herein, business address 1801 Pennsylvania Avenue, N.W., Suite 400, Washington, D.C., called for examination by counsel for the Plaintiffs in the above-entitled matter, pursuant to notice, the witness having been first duly sworn by MARK T. EGAN, a Notary Public in and for the District of Columbia, taken at the offices of the Native American Rights Fund, fourth floor conference room, 1712 N Street, N.W., Washington, D.C., commencing at 9:29 a.m. and the proceedings being taken down by Stenomask by MARK T. EGAN, CVR-CM, and transcribed under his direction.

Exhibit A
Defendant's Reply in Support
of Motion for Reconsideration

Q. But you don't recall the nature and scope of the discussion in that regard?

A. Well, generally there were 15 people or so attending those meetings, so it's pretty hard to say who said what. The consensus was that we would go forward with them.

Q. Well, your understanding of a fiduciary is no different because the government is acting as a fiduciary; is that correct? You indicated in your definition that it was related to private parties, correct?

A. No, I didn't.

Q. Okay. What again is your --

A. Well, my experience with fiduciaries is mostly in the governmental sector. I worked -- my last 15 or so years with Andersen I was in charge of our government audit practice, our nonprofit audit practice, and almost all the activities that those organizations do are fiduciary in one way or another -- pension plans, unemployment compensation trust funds, second injury trust funds, etcetera.

Q. How many of the accounts that you are mailing out to juveniles were sent to the superintendent?

A. None.

Q. How many were sent out to guardians with expertise on financial matters?
A. I don't know whether the parents or guardians had expertise, but all of the mailings went to the parents or guardians.
Q. Did Mr. Griles make the decision to do the mailing?
A. He certainly concurred in it.
Q. Did you make the decision to do the mailing?
A. The conclusion of the group reviewing it was that we should go out.
Q. Who was in the group?
A. Well, it would be Mr. Griles, Mr. Cason, Mr. Swimmer, Ms. Erwin, Mr. Jensen.
Q. Who's Mr. Jensen?
A. Larry Jensen is counselor to the Solicitor of the Department of the Interior.
Q. Is he an attorney?
A. Yes, he is.
Q. And who else?
A. Ms. Spooner from Justice, Ms. Alexander of Justice, and I'm sure they probably consulted with their colleagues.
Q. Why are you sure?

A. Because --

MR. PETRIE: Be careful if what you're going to divulge is protected information under attorney-client. With that proviso, please respond.

BY MR. GINGOLD:

Q. Why are you sure?

A. They generally would say that sometimes some of their colleagues would attend the meeting, sometimes they wouldn't.

Q. Which colleagues are you referring to?

A. I'm sorry?

Q. Which colleagues are you referring to?

A. Mr. Kohn was one. Mr. Miller occasionally came to meetings.

Q. Is that Peter Miller?

A. Peter Miller.

I don't recall the others, but if you rattled off some names I could probably confirm whether they attended any meetings or not.

Q. Did anybody object to the distribution of the information to the trust beneficiaries?

MR. PETRIE: Again, if you can answer that without disclosing any information that's protected by the deliberative process privilege in the sense that people were offering advice or recommendations, you

can go ahead and answer it.

THE WITNESS: I don't believe anybody objected.

BY MR. GINGOLD:

Q. Do you believe that was a matter related to litigation, the distribution of the information?

A. Well, certainly the delay in sending it out. I believe there was a TRO filed and we actually pulled the distribution the day that was filed and waited several weeks. Nothing happened. The decision was made to then go forward.

Q. But with regard to the decision and the preparation of this information, was that as you understand it in your capacity as a manager of the trust?

A. I'm the Executive Director of the Office of Historical Trust Accounting. I made the decision that the statements, historical statements of account, were ready for mailing. That was concurred in by the Special Trustee and by others on my staff.

Q. Did you make that in the context of a fiduciary in the administration and management of the trust?

A. I did it as a manager and sought the concurrence of the Special Trustee.

U.S. Department of Justice
Civil Division, Commercial Branch
1100 L Street, N.W., Room 10030
Washington, D.C. 20005

John Warshawsky *Telephone: (202) 307-0010 Facsimile: (202) 514-9163*

January 24, 2003

By Facsimile

Mr. Dennis M. Gingold
1275 Pennsylvania Avenue, N.W., Ninth Floor
Washington, D.C. 20004

Re: Cobell v. Norton – Plaintiffs' Opposition to Motion for Reconsideration of Rule 23(d) Order

Dear Mr. Gingold:

We received plaintiffs' opposition to Interior Defendants' Motion for Reconsideration of the Court's Rule 23(d) Order, issued December 23, 2002, and we are in the process of preparing a reply brief. I did, however, want to bring a specific matter to your attention because I believe your pleading misstates the facts regarding the meet-and-confer discussion which took place on January 8, 2003, pursuant to Local Civil Rule 7.1(m).

Your pleading states in both footnote 24 and footnote 34 that we failed to contact you to discuss our motion, as required by Local Rule 7.1(m). Moreover, footnote 24 states that our motion for reconsideration fails to contain any statement about our meet-and-confer discussion, as required by Local Rule 7.1(m). In fact, you and I spoke by telephone about this motion on January 8, 2003, at approximately 12:15 that afternoon. I left you a voicemail about the motion earlier that morning, and you returned my call. During our conversation, I described the motion that we planned to file and asked for your clients' position. You promptly advised me, during the same conversation, that the plaintiffs would oppose the motion.* Moreover, this conversation is specifically referenced in the first paragraph of our motion, where we stated, "On January 8, 2003, counsel for the Interior defendants conferred with plaintiffs' counsel regarding this motion and was advised that plaintiffs would oppose the motion."

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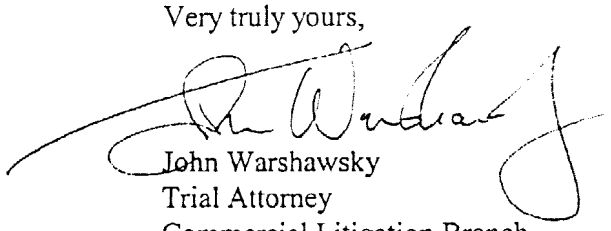
* In fact, since I fully anticipated from our conversation that plaintiffs would oppose the motion, I advised you that I was sitting down and awaiting your response. This prompted you to laugh before you advised me that the motion would be opposed.

Exhibit B
Defendant's Reply in Support
of Motion for Reconsideration

In light of the foregoing errors, which I assume were inadvertent, please advise us whether you will be withdrawing your assertions in footnotes 24 and 34. Thank you for your prompt attention to this matter.

Very truly yours,



John Warshawsky
Trial Attorney
Commercial Litigation Branch
Civil Division

cc: Mr. Keith Harper, Native American Rights Fund

********** -COMM. JOURNAL- ********** DATE JAN-24-2003 ***** TIME 16:03 *********

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FACSIMILE TRANSMITTAL

To: Mr. Dennis M. Gingold [Facsimile number (202) 318-2372]
Mr. Keith Harper [Facsimile number (202) 822-0068]

From: John Warshawsky, Trial Attorney
United States Department of Justice
Commercial Litigation Branch, Civil Division
1100 L Street, N.W., Room 10030
Washington D.C. 20005

Office telephone: (202) 307-0010
Facsimile number: (202) 514-9163

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Date of transmission: Friday, January 24, 2003

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 3, 2003 I served the foregoing *Interior Defendants' Reply Brief in Support of Motion for Reconsideration of Order Prohibiting Communications with Class Members* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

K.P. Kingston

Kevin P. Kingston