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

DEFENDANTS' REPLY IN SUPPORT OF
(1) MOTION FOR EXPEDITED CONSIDERATION; AND
(2) MOTION FOR CLARIFICATION THAT
DEFENDANTS AND THEIR ATTORNEYS ARE
PERMITTED TO CONTACT PLAINTIFF EARL OLD PERSON
OR, IN THE ALTERNATIVE, FOR PERMISSION TO DO SO

Defendants state the following reply to the Plaintiffs' Opposition ("Plaintiffs' Opposition") (April 3, 2003) to Defendants' Consolidated (1) Motion for Expedited Consideration; and (2) Motion for Clarification that Defendants and Their Attorneys Are Permitted to Contact Plaintiff Earl Old Person or, in the Alternative, for Permission to Do So ("Defendants' Motion").

Introduction

Plaintiffs' Opposition ignores several crucial points on the merits. Rather, Plaintiffs launch vitriolic attacks on Defendants and their attorneys, and Plaintiffs appear even to attack Mr. Old Person,[1] all while claiming to still represent him as a class member. Plaintiffs fail to

[1] See Plaintiffs' Opposition at 5 (accusing Mr. Old Person of "ignor[ing] this Court as he has persistently ignored the four named plaintiffs and their counsel"). Perhaps it is more than mere coincidence that Plaintiffs' attacks on Mr. Old Person come just after he has been quoted in the press as criticizing their approach to this case. See Defendants' Motion at 6. Moreover, whether he has really ignored them, or whether class counsel rejected his offers to comply with

overcome Defendants' clear showing that good cause exists for Defendants and their attorneys to be able to communicate directly and freely with Mr. Old Person.

Argument

I. Plaintiffs Have Not Opposed Expedited Disposition of Defendants' Motion

Plaintiffs' Opposition (at 1 n.1) incorrectly asserts that Defendants' request for expedited consideration is moot and, therefore, declines to address it. In fact, Defendants' request for expedited consideration remains in play and is all the more pressing because of the rapidly approaching trial of Phase 1.5 and the need to adduce information from Mr. Old Person before that trial. Defendants respectfully ask that the Court rule on this matter as soon as possible so that any discovery of Mr. Old Person can be completed and any information he knows can be presented to the Court.

II. Plaintiffs' Arguments Highlight the Need for the Court to Enter an Order Permitting Defendants and Their Counsel to Communicate With Mr. Old Person

Defendants' Motion noted a seeming contradiction in the Court's Order dated March 5, 2003 (the "3/5/03 Order"), which, on the one hand, stated that Mr. Old Person is not in the class, but, at the same time, might be read to suggest that class counsel still represents Mr. Old Person as a member of the class. Plaintiffs' Opposition (at 1) asserts that the Court already ruled on the issue "clearly and unambiguously." Plaintiffs also criticize Defendants for a "feigned plea for clarity where no ambiguity exists." Plaintiffs' Opposition at 4 n.8. But Plaintiffs' own arguments highlight the seeming contradiction or ambiguity in the 3/5/03 Order and demonstrate that clarification is necessary.

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discovery, remains to be seen.

The 3/5/03 Order (at 6) states that Mr. Old Person is no longer a class representative, "will not become an absent class member," and shall proceed pro se as to his individual claims. Yet, relying on other provisions of the 3/5/03 Order, Plaintiffs' Opposition (at 2) states: "Mr. Old Person, as a member of the *Cobell* class, is represented by plaintiffs' counsel."[2] (Emphasis added.) Thus, far from showing that no clarification is needed, Plaintiffs' arguments demonstrate that confusion exists over (1) whether Mr. Old Person is a member of the class; and (2) whether, notwithstanding his pro se status, class counsel still represents him in some other capacity; and (3) whether Defendants and their attorneys are barred from contacting him.

Plaintiffs' Opposition (at 4-5) argues that no clarification is needed because of the Court's December 2002 order prohibiting communications with class members regarding claims involved in the litigation. First, that argument begs the question because the December 2002 Order pertained to communications with class members, whereas one of the points now needing clarification is whether Mr. Old Person still is a class member (see above). Second, even if he were deemed a member of the class, he stands in a different position from any other class member because he also is an individual plaintiff proceeding pro se. The December 2002 Order does not address pro se individual plaintiffs. Therefore, it is far from clear whether the December 2002 Order applies to Mr. Old Person at this juncture. Thus, it is perfectly reasonable for Defendants to be uncertain of whether contacts with Mr. Old Person remain prohibited.

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[2] In support, Plaintiffs' Opposition (at 3 n.5) relies upon the fact that the 3/5/03 Order also granted class counsel's motion to withdraw from the representation of Mr. Old Person in any capacity other than as class counsel for a member of the certified class.

III. Plaintiffs Fail to Overcome Defendants' Showing That Defendants and Their Attorneys Should be Allowed to Contact Mr. Old Person

A. Defendants Should Be Allowed to Communicate With Mr. Old Person In Order to Help Bring About His Compliance With Discovery and Regarding Motions and Other Proceedings In the Case

Plaintiffs' Opposition (at 2) notes that Mr. Old Person still has not provided discovery, although Plaintiffs fail to articulate why that fact should preclude Defendants or counsel from talking to him. On the contrary, Defendants' attorneys need to contact Mr. Old Person in order to help bring about the discovery (e.g., to try to set an agreed-upon deposition date). Defendants' or their attorneys' direct communications with Mr. Old Person are likely either to bring about his voluntary and cooperative compliance with discovery or to reveal the need for Defendants to request that the Court employ more compulsory methods of ensuring compliance.

Also, Defendants and counsel should be permitted to serve Mr. Old Person with papers (just as Defendants serve named Plaintiffs' counsel) and to contact him regarding motions and other litigation matters that arise (just as Defendants' attorneys communicate about those items with counsel for named Plaintiffs).[3] In order for the case to proceed properly, parties should be served and included in the proceedings. This cannot be accomplished effectively if Defendants' attorneys are prohibited from serving Mr. Old Person with papers and contacting him regarding proceedings in the case.

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[3] Plaintiffs' Opposition (at 2 n.4) notes that they now serve him by facsimile with papers in this case. Thus, they seem to concede that he should be served as is any party, yet if Defendants sent papers directly to Mr. Old Person, Plaintiffs might claim this violated the Court's Order prohibiting contact with class members. Defendants appropriately ask the Court for clarification as to such matters.

B. Plaintiffs' Unsubstantiated Assertions That Mr. Old Person Possesses Unspecified "Privileged Information" Are Not Sufficient to Justify a Complete Ban on Communicating With Him

Plaintiffs next argue that no contact should be allowed because, they contend, Mr. Old Person possesses unspecified types of "privileged information." Plaintiffs' Opposition at 2-3. This argument is insufficient to justify a total ban of communications with Mr. Old Person. First, even if Plaintiffs had established that he possesses some privileged information, that would furnish no basis for precluding communications with Mr. Old Person (who now proceeds pro se as an individual Plaintiff) regarding non-privileged matters, including but not limited to those identified above.

Second, Plaintiffs fail to establish that Mr. Old Person actually possesses privileged information. Plaintiffs fail even to specify which privileges might apply. They state only that he "acquired privileged information." Plaintiffs' Opposition at 3. Perhaps Plaintiffs mean to imply that he has attorney-client privileged information, but they fail to state this outright and they fail to prove it.

As the parties asserting a privilege, Plaintiffs bear the burden of proving that it exists. In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). Merely because Mr. Old Person had communications with class counsel does not mean that all such communications are necessarily privileged. See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (the attorney-client privilege "'protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege'" (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). As this Court has noted, "[t]he attorney-client privilege, [] does not protect an attorney's opinion or advice, but only the 'secrecy of the underlying facts obtained from

the client.'" Alexander v. F.B.I., 193 F.R.D. 1, 5 (D.D.C. 2000) (quoting Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977)).

Third, even if Mr. Old Person possesses privileged information, that is no basis to preclude Defendants' and their attorneys' communications with him. Class counsel are free to inform him of what they consider privileged, and Mr. Old Person, as a pro se party, is to decide what he is free to discuss.

Plaintiffs analogize the attorney-client privilege in this class action to the attorney-client privilege that exists in a corporate setting, noting that corporate officials must exercise the privilege in a manner "consistent with their fiduciary duty to act in the best interest of the corporation." Plaintiffs' Opposition at 3 n.7. But if Mr. Old Person's position were analogized to that of a former corporate employee, then contacts with him would be allowed.[4] Of course, Defendants are mindful of the rules (see note 4, supra) against soliciting legitimately privileged information, and would not solicit such information in private conversations with Mr. Old Person.

But the mere possibility that Mr. Old Person might know of some privileged information cannot shield any nonprivileged facts showing conflicts of interest that Plaintiffs or class counsel might have with other class members. As discussed in Defendants' Motion, the relationship

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[4] See D.C. Bar Legal Ethics Opinion No. 287 (January 19, 1999), which states that "[a] lawyer may contact unrepresented former employees of a party-opponent without obtaining consent from that party irrespective of the position formerly held by the ex-employee in the opposing organization. Prior to any substantive communication, the lawyer must disclose to the former employee the lawyer's identity and that the fact that the lawyer represents a party adverse to the ex-employee's former employer. During the communication the lawyer may not solicit privileged information of the party opponent."

between class counsel and class members is subject to "substantial scrutiny by the court." NEWBERG ON CLASS ACTIONS § 15.03, at 15-9 (3d ed. 1992).

C. Mr. Old Person's Statements Quoted in the Press Raise Crucial Issues and Are Not Entitled to Privilege

The record contains sufficient evidence that Mr. Old Person is likely to have knowledge of matters important to this case, seemingly not covered by any recognizable privilege. Defendants should be free to explore these matters with Mr. Old Person and to encourage him to bring these matters out into the open. Plaintiffs' Opposition implies that Plaintiffs might attempt to muzzle Mr. Old Person's disclosure of crucial information.

For example, as discussed in Defendants' Motion, the March 9, 2003 article in the GREAT FALLS TRIBUNE (attached to Defendants' Motion), quotes Mr. Old Person as indicating that he told "the lawyers" (presumably class counsel) that "he is ready to carry out his duty as a lead plaintiff and wants to stay on the team," but that they "want him off the case [] because he has publicly criticized some of their tactics." These statements attributed to Mr. Old Person appear to be directly at odds with what class counsel repeatedly have represented to this Court. For example, Plaintiffs' Opposition (filed on or about April 4, 2003) (at 2 n.4) states that Mr. Old Person "continues to remain mute and unresponsive to plaintiffs." Also, certain Plaintiffs' January 8, 2003 Motion to Remove Earl Old Person as a Named Class Representative (at 2) stated, "Earl Old Person is no longer able or willing to fulfill his duties as a named class representative in this case."[5]

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[5] Further, Plaintiffs' January 29, 2003 Consolidated Reply Brief (at 2) stated that "[c]lass counsel does not know exactly why Mr. Old Person no longer wants to serve as a class representative." That reply, however, was stricken by the Court's Order dated March 3, 2003, as being untimely filed.

Conspicuously absent from Plaintiffs' Opposition is any denial that Mr. Old Person made the statements attributed to him by the GREAT FALLS TRIBUNE or any denial that class counsel failed accurately to disclose (see above) to the Court what Mr. Old Person told class counsel.

Any remarks by Mr. Old Person on this subject should not be hidden by claims of privilege. Such communications by Mr. Old Person (e.g., simply informing class counsel that he wanted to remain as a class representative and that he was willing to comply with his duties) appear not to be privileged. This Court's Order dated February 5, 2003 regarding the deposition of Donna Erwin is pertinent to this issue. The Court found that conversations between Ms. Erwin (an official of Interior) and Defendants' attorneys regarding Ms. Erwin's schedule for deposition were not privileged because these communications were not "made for the purpose of obtaining legal advice or services." February 5, 2003 Order at 12. Similarly, if Mr. Old Person indeed made the remarks attributed to him by the cited newspaper article, which merely seem to be his announcement that he wished to submit to discovery and remain as a class representative, those statements do not appear to have been made for the purpose of obtaining legal advice or services. Thus, such conversations would not be privileged.

The GREAT FALLS TRIBUNE article also stated that Mr. Old Person disagrees with the tactics and relief sought by class counsel in this case. See Defendants' Motion at 6. Plaintiffs' Opposition also fails to deny this. While class counsel understandably may wish to silence Mr. Old Person's criticisms, and hide such remarks under a shroud of "privilege" or "duty" to the class, just the opposite result should obtain. As Defendants' prior briefs on this subject have discussed, conflicting interests among class members must be considered and appropriate relief

granted to address them, such as formation of subclasses. See Defendants' Motion at 7 n.4. Plaintiffs' Opposition does not dispute these principles.

If Mr. Old Person knows of conflicts of interest between class members and the class representatives (or class counsel), those facts known to him or opinions held by him do not by themselves come within the definition of privileged communications, for they are not communications with counsel for the purpose of obtaining legal advice or services. At a minimum, Plaintiffs – as the parties asserting privilege – have the burden of establishing that a privilege applies, and they cannot rely on vague, conclusory assertions of privilege to squelch all communications with an individual plaintiff such as Mr. Old Person.

Defendants' and their attorneys' ability to communicate freely with Mr. Old Person as to non-privileged matters – without class counsel present to interfere with that process – will help bring to light any existing class conflicts known to Mr. Old Person so that they then can be developed in the record.[6]

Plaintiffs' Opposition (at 6) inappropriately suggests that the Court "sua sponte consider appropriate sanctions" against Defendants and counsel for even asking for permission to contact Mr. Old Person. Obviously, no such sanctions are warranted. Defendants' motion is reasonable and well-founded, points out a legitimate issue unresolved by the Court's prior orders, and properly asks for permission to contact a pro se party as to non-privileged matters. Nothing about the motion warrants sanctions.

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[6] Of course, if the Court were to conclude that such information about class conflicts should be developed only on the record in a deposition, the Court could so order. But, as discussed above, that would not justify what Plaintiffs advocate, which is a total ban on all private discussions between Mr. Old Person and Defendants or their counsel.

Conclusion

For the reasons stated above, Defendants respectfully request that the Court enter an order clarifying the 3/5/03 Order, or otherwise enter an order, so as to permit Defendants and their attorneys to communicate directly with Plaintiff Earl Old Person.

Dated: April 14, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 14, 2003 I served the foregoing *Defendants' Reply in Support of (1) Motion for Expedited Consideration; and (2) Motion for Clarification That Defendants and Their Attorneys Are Permitted to Contact Plaintiff Earl Old Person Or, In The Alternative, for Permission To Do So* by facsimile in accordance with their written request of October 31, 2001 upon:

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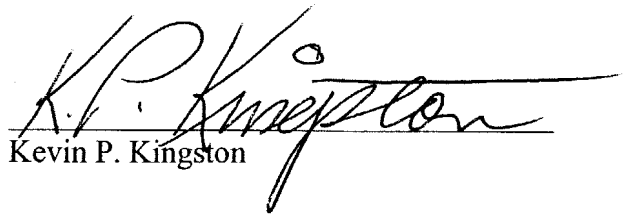

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