IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

INTERIOR DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR AUTHORITY TO COMMUNICATE WITH CLASS MEMBERS REGARDING THE HISTORICAL STATEMENTS OF ACCOUNT

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following Reply in Support of Motion for Authority To Communicate with Class Members Regarding Historical Statements of Account ("Interior's Class Communication Motion").[1]

1/ Plaintiffs' recent penchant for consolidating in one paper somewhat related, but conceptually distinct, issues may have some limited conservation benefits, but necessarily produces confusion and interferes with the orderly and efficient briefing of issues. It also seems to be a calculated effort to improperly assert arguments in a surreply, without bothering to ask authority from the Court. For example, in Plaintiffs' Consolidated Reply and Opposition: (1) Reply re Motion for Order Directing Defendants to Rescind Notice Sent to 1200 Juvenile Trust Beneficiaries and (2) Opposition to Interior Defendants' Motion For Authority To Communicate with Class Members Regarding the Historical Statements of Account ("Opposition"), Plaintiffs actually provide arguments related to three distinct motions before the Court: (1) they improperly assert additional surreply arguments opposing Interior's Motion for Reconsideration of the Court's December 23, 2002, Rule 23(d) Order (see, e.g., Opposition at 1-5, 9-10); (2) they provide a reply in support of their motion to rescind accountings; and (3) they oppose Interior's Class Communication Motion. Interior will limit the scope of this Reply to arguments raised by Plaintiffs in opposition to Interior's Class Communication Motion. It will not address the misleading arguments related to the Motion for Reconsideration and urges the Court to ignore such improper surreply comments.

In Interior's Class Communication Motion, Interior seeks authority to communicate with two different sets of account holders regarding historical statements of account. First, it seeks authority to communicate with the approximately 14,000 account holders for whom historical statements of account have been completed, but not yet mailed. For class member account holders Interior is willing, if desired by the Court, to include in the notice sent to the account holders along with their historical statement of account the information set forth in the proposed order accompanying Interior's Class Communication Motion. Second, if desired by the Court, Interior seeks authority to communicate with the class member account holders who have already received historical statements of account and inform them of the effect, if any, of the prior communication.[2]

In their Opposition, Plaintiffs do not seriously dispute the substance of the communication proposed by Interior. Indeed, in many respects, the notice proposed by Interior with respect to those account holders who have already received statements is not significantly different from the communication proposed by Plaintiffs.[3] It also remains undisputed that any order from the Court regarding further communication related to the historical statements of account should be limited to those account holders who are class members.[4] The issue that

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2/ As discussed in Interior's Opposition to Plaintiffs' Motion for an Order Directing Defendants to Rescind Notice Sent to 1200 Trust Beneficiaries ("Interior's Opposition), Interior currently believes that only one account holder who received the prior communication is a class member, with another 73 that need further investigation. See Interior's Opposition at 7.

3/ The differences between the communication proposed by Interior and that proposed by Plaintiffs are described in Interior's Opposition. See Interior's Opposition at 3-4.

4/ Under the Court's December 23, 2002 Rule 23(d) Order, Interior does not believe that it needs Court permission to communicate with account holders who are not class members, but because there is a dispute about which account holders are class members, Interior will not mail

remains in dispute is which account holders are class members.

Interior believes that the February 4, 1997 class certification Order provides the current definition of the scope of the class and that under that Order only account holders whose accounts were created on, or before, February 4, 1997, are class members. Plaintiffs previously indicated that they believed that even account holders whose accounts were created after February 4, 1997 were class members. See Plaintiffs' Supplemental Reply in Support of Preliminary Injunction at 5 n.4 (filed December 2, 2002). In their Opposition, Plaintiffs do not advance this argument again, but do not provide any indication as to their understanding of the current scope of the class. Although Plaintiffs concede that Interior's position has "superficial merit," (Opposition at 3 n.6), rather than give their own interpretation Plaintiffs content themselves with disagreeing with Interior and simply describe Interior's view as "overly-narrow." Opposition at 7.[5]

Plaintiffs' reliance on the Court's December 23, 2002 Rule 23(d) Order as support for their attack on Interior's interpretation of the scope of the class is misguided. The Court makes

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any historical statements of account until this dispute is resolved by the Court.

[5] Plaintiffs assert that Interior's position on the scope of the class has changed and that Interior somehow conceded at a November 1, 2002 hearing that all account holders are class members. See Opposition at 6 n.9. As even the abbreviated portion of the transcript quoted by Plaintiffs in their Opposition makes clear, counsel for Interior never told the Court that all account holders that had received, or would receive, the historical statements of account were class members. To the contrary, at the time of the hearing Interior did not know how many account holders who received statements were class members, but did know that many of the thousands yet to be sent were for accounts that had been created before February 4, 1997. Interior promptly notified the Court of this issue in the initial supplemental paper regarding class issues that was ordered by the Court at the November 1, 2002 hearing and informed the Court that it was investigating which account holders, if any, might be class members. See Supplemental Opposition to Plaintiffs' Motion for a Preliminary Injunction Regarding Historical Statements of Account at 5 n.4 ("Supplemental Opposition") (filed November 15, 2002).

no mention of the scope of the class in the Rule 23(d) Order. Therefore, unless Plaintiffs have some sort of telepathic powers, it is impossible for them to assert that "[i]t is quite clear that this Court does not interpret its Scope of Class Order in the overly-narrow manner defendants would wish for." Opposition at 7.

In addition, Interior does not argue anywhere that the scope of the class is "undefined." Opposition at 8. To the contrary, the scope of the class is defined quite clearly in the February 4, 1997 class certification Order: "present and former beneficiaries of Individual Indian Money accounts." February 4, 1997 Order at 2-3. Interior has merely noted that since the Court has not amended that Order, or otherwise described the scope of the class pursuant to Rule 23(c)(3), the February 4, 1997 definition of the class is the current, and only, definition of the class.[6]

Also, contrary to Plaintiffs' mischaracterization (Opposition at 7), Interior is not arguing that only one of the judgment account holders, who would receive statements of account if Interior's Class Communication Motion is granted, is a class member. Indeed, of the additional approximately 14,000 historical statements of account that have been completed, a large portion are for judgment accounts that were created before February 4, 1997 and thus would be sent to the parents or legal guardians of class members. Interior is merely informing the Court that of the approximately 1,200 historical statements of account already sent out, as of today only one of the account holders for whom the statements were prepared can be conclusively identified as a

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[6] Plaintiffs deliberately misconstrue Interior's position as one seeking an amendment of the class certification order (see Opposition at 6 n.10). Interior is not asking the Court to modify the scope of the class. Interior is simply informing the Court that the scope of the class currently is limited to account holders whose accounts were created on, or before, February 4, 1997 and that any further communication related to historical statements of account permitted, or ordered, by the Court should take into account whether the recipient is a class member or not.

class member.[7]

CONCLUSION

For these reasons, Interior's Class Communication Motion should be granted.

Dated: February 24, 2003

Respectfully submitted,

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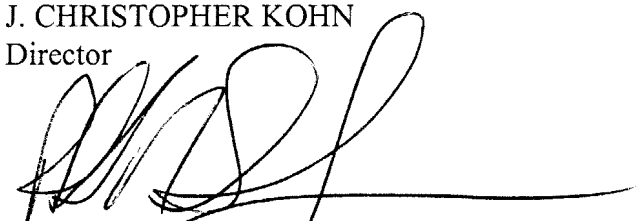

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7/ Plaintiffs suggest that it was improper to give Plaintiffs' counsel copies of the historical statements of account that have already been mailed if the account holder was not a class member. Opposition at 6 n.9. The November 1, 2002 Order authorizes Interior "to provide plaintiffs' counsel with a copy of any historical statements of account provided to any Individual Indian Money account holder," November 1, 2002 Order at 1, and is not limited to class member account holders. As the November 1, 2002 Order indicates, the information provided to Plaintiffs' counsel is subject to the terms of the November 27, 1996 Protective Order.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 24, 2003, I served the foregoing *Interior Defendants' Reply in Support of Motion for Authority to Communicate with Class Members Regarding the Historical Statements of Account* by facsimile, in accordance with their written request of October 31, 2001 upon:

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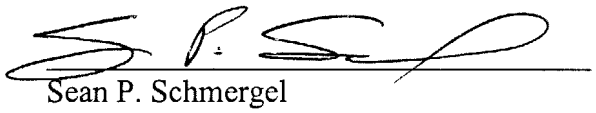

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