

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA  
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ELOUISE PEPION COBELL, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
GALE A. NORTON, Secretary of the Interior, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 1:96CV01285  
(Judge Lamberth)

INTERIOR DEFENDANTS' MOTION TO STRIKE "PLAINTIFFS' NOTICE  
OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF COMPLAINTS FILED  
BY PLAINTIFFS ON AUGUST 27, 2003 AND SEPTEMBER 10, 2003  
REGARDING THIS COURT'S PRELIMINARY INJUNCTION" OR, IN  
THE ALTERNATIVE, INTERIOR DEFENDANTS' RESPONSE THERETO

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Interior Defendants respectfully move this Court for an order striking Plaintiffs' Notice of Supplemental Authority in Support of Complaints Filed by Plaintiffs on August 27, 2003 and September 10, 2003 Regarding this Court's Preliminary Injunction ("Plaintiffs' Notice") upon the ground that this submission by plaintiffs – not authorized by the rules governing practice and procedure in this Court – constitutes yet another scandalous attack upon numerous government officials that is factually incorrect and wholly inappropriate in a pleading before this Court. Pursuant to Local Civil Rule 7.1(m), counsel for Interior Defendants conferred with plaintiffs' counsel, Mr. Harper, on September 25, 2003, regarding this motion and plaintiffs' counsel stated that this motion would be opposed. In support of this motion, Interior Defendants state as follows.

Plaintiffs' Notice Should Be Stricken Because It Constitutes Yet Another  
Scandalous and Wholly Unsubstantiated Attack Upon Interior Defendants and  
Other Government Officials

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Rule 12(f) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[u]pon motion made by a party . . . the court may order stricken from any pleading any . . . scandalous matter." Fed. R. Civ. P. 12(f); see 5A C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 712 (1990) ("Scandalous' matter is that which improperly casts a derogatory light on someone, most typically a party to the action.") (footnote omitted); see generally Johnson v. McDow, 236 B.R. 510, 523 (D.D.C. 1999) (striking "scandalous and highly insulting allegations . . ."); Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998) (finding "no evidence to support the claim made by plaintiffs" and therefore striking it from the record ); Pigford v. Veneman, 215 F.R.D. 2, 4-5 (D.D.C. 2003) (striking unsubstantiated allegations against government counsel). Moreover, while motions to strike are generally disfavored, "the disfavored character of Rule 12(f) is relaxed somewhat in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the subject of the allegations." 5A C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 714<sup>1</sup>; see also Metrokane, Inc. v. The Wine Enthusiast, 160 F. Supp. 2d 633, 641-42 (S.D.N.Y. 2001) ("Generally, motions to strike are disfavored and usually granted only for scandalous material.") (citation omitted).

Plaintiffs' Notice is precisely the sort of pleading for which Rule 12(f) relief is

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<sup>1</sup> Indeed, the relief provided for in Rule 12(f) need not be granted only upon motion of a party; the Court may strike such material sua sponte. Fed. R. Civ. P. 12(f).

appropriate insofar as it constitutes yet another unauthorized submission<sup>2</sup> with the Court for the obvious purpose of creating highly prejudicial, negative publicity. Moreover, while Plaintiffs' Notice makes the inflammatory broad conclusions that various declarations filed by Interior Defendants were false, that Secretary Norton and her counsel acted with "willful intent to mislead this Court," and that the security of the Department of the Interior's Information Technology ("IT") systems and individual Indian trust data is "contrary to explicit representations repeatedly made by [Secretary] Norton, her managers, experts and defense counsel," e.g., Pl. Notice at 1-2, 1 n.2, 2-3, 2 n.4, 3, Plaintiffs' Notice does not even attempt to substantiate these outrageous assertions by any specific discussion of the declarations or the "explicit representations."

That Plaintiffs' Notice is lacking in substance is confirmed by a review of the two pages of actual text constituting the submission. The vast majority of the text on those two pages consists of selected, and largely out-of-context, excerpts from the Secretary of the Interior's Financial Management Status Report and Strategic Plan FY2004-FY2008 transmitted to the Office of Management and Budget on September 8, 2003 (the "Financial Management Report") regarding the Department of the Interior's financial reporting systems.<sup>3</sup> Beyond the excerpts,

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<sup>2</sup> Once again, in filing their so-called "notice of supplemental authority," plaintiffs do not even purport to file their submission pursuant to the Federal Rules of Civil Procedure, the Local Civil Rules, or otherwise by motion seeking leave of Court.

<sup>3</sup> Several of the bullet points quotations listed by the Plaintiffs are not relevant to IT security issues and warrant no discussion. For instance, the third bullet deals with the adequacy of control over trust funds and not IT security issues. The fifth bullet simply notes that the growth in electronic commerce and the growing vulnerabilities of information systems have resulted in the need for comprehensive improvement to IT security. Material Weakness column of Exhibit 3-4, Financial Management Report at 33. The next column of the table labeled Exhibit 3-4, Corrective Actions, informs the reader that "[t]he Department has conducted a

however, plaintiffs devote none of the remaining half-page or so of text to any discussion of the previously filed declarations or representations broadly referenced by plaintiffs. Rather, they simply rely upon their unsupported statement that the Financial Management Report excerpts confirm that the Secretary "knowingly filed misrepresentations . . . ." Pl. Notice at 1 n.2; see also id. at 2 n.4 (unsupported conclusion that failure to file Financial Management Report "is telling evidence of willful intent to mislead this Court").<sup>4</sup>

Plaintiffs begin their Notice with the misleading assertion that the Secretary admits to the OMB Director that "serious material weaknesses render the aforementioned Interior IT systems [MMS, NBC, BLM and OIG and other IT systems that house or access IITD] subject to 'the risk of unauthorized modification, loss, or disclosure of sensitive or confidential data.' *Id.* at 31." Pl. Notice at 2 (bracketed material added to explain "aforementioned"). First, the section of the Financial Management Report referred to by the plaintiffs pertains to a "Remediation Plan" designed for the "Correction of Federal Financial Management Improvement Act Deficiencies," ("FFMIA") noted in a prior year financial statement audit. Financial Management Report at 30.

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comprehensive IT security assessment to determine security and control issues in bureaus and offices. Based on the findings, the Department has developed and will implement a comprehensive information security plan , including capital budgeting requirements." Financial Management Report at 33. The Financial Management Report also describes the plan for the comprehensive improvement to IT security. See Computer Security Improvement Project, Financial Management Report at 65-68.

<sup>4</sup> The Report and its annual predecessors (from 1997 to the present) are publicly available on the Internet. See <http://www.doi.gov/pfm/5year2004/index.html> and <http://www.doi.gov/pfm/deptrept.html>. The Department of Interior is required to file a large number of periodic reports on a wide range of subjects. The Department of Interior does not routinely file these reports with the Court and is unaware of any requirement to do so.

The Financial Management Report noted that because of "material weaknesses"<sup>5</sup> identified in security and other controls over information technology systems and resources during the prior year audit, the Department of the Interior concluded that its financial management systems did not substantially comply with financial management systems requirements of the FFMIA. Id. The Financial Management Report does not refer to the "aforementioned Interior IT systems" as asserted by the Plaintiffs' Notice.<sup>6</sup> Second, the selection of the material quoted by the Plaintiffs from the "Access Controls" section<sup>7</sup> of the Remediation Plan is misleading. The full sentence conveys a different meaning: "**In some instances, the Department has not established access controls that limit or detect inappropriate access to information technology systems and related resources, thereby increasing** the risk of unauthorized modification, loss, or disclosure of sensitive or confidential data." Financial Management Report at 31 (language omitted by

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<sup>5</sup> Paragraph 2i of OMB Bulletin 98-08, Audit Requirements for Federal Financial Statements, August 24, 1998, states that "Material weaknesses in internal control" are reportable conditions in which the design or operation of the internal control does not reduce to a relatively low level the risk that errors, fraud or noncompliance in amounts that would be material in relation to the Principal Statements or Required Supplementary Stewardship Information being audited or material to a performance measure or aggregation of related performance measures may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions.

<sup>6</sup> Moreover, it should be noted that none of the IT security material weaknesses referenced in Exhibit 3-2, page 24, pertained to MMS, BLM, or NBC.

<sup>7</sup> The fourth bullet presented by the Plaintiffs is also from this "Access Controls" section. A review of the Preliminary Injunction Certifications submitted by the various bureaus and offices detail many of the access control measures taken. The Financial Management Report was not intended to be and is not a detailed recitation of each and every improvement in IT security undertaken by the Department since the prior year audit. Rather, the Financial Management Report is, as its title states, a status report and strategic plan for financial management and mentions information technology issues to the extent they impact the assessment of financial management systems under the variety of federal statutes.

Plaintiffs is emphasized). When viewed in context and quoted fully, it is clear that Secretary Norton did not state what the Plaintiffs assert.<sup>8</sup>

The Plaintiffs' second quotation from the Financial Management Report (the bullet starting with "Key departmental financial management systems") fares no better than their first attempt discussed above. The Plaintiffs emphasize the sentence "The systems do not have the necessary security capabilities to facilitate more open access via the Internet" as if this is an admission of some degree of insecurity. Financial Management Report at 5. However, as Chapter 4 of the Financial Management Report discusses in depth (at 55-60), the limitations of the old financial management systems (namely, Federal Financial System (FFS), ABACIS (an in-house developed core accounting system) and IDEAS (a procurement system)) prevent the Department of the Interior from implementing the e-Government initiatives. Financial Management Report at 60. Thus, the second quotation has nothing to do with the security of these old systems from unauthorized access from the Internet since the Department recognizes that the legacy programs do not have the capability to have support more open access via the

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<sup>8</sup> For example, the National Business Center Preliminary Injunction Justification ("NBC PI Justification") discusses the measures in place to protect the sensitive data. These include physical and environmental controls, network security controls, server security controls, applications security controls, audit logs and monitoring, audit and review of systems controls and contingency planning. NBC PI Justification at 32-40. Security measures for the access points to the Internet also have significant security controls. Id. at 42-5. The NBC PI Justification details the examinations the IT systems have received internally and externally. Id. at 49-66. Similar detailed substantive discussions are included in the Preliminary Injunction Justifications filed by Minerals Management Service and the Bureau of Land Management. See MMS PI Justification at 14-59 (describing Security Program Management, Security Awareness and Training Program, Computer Incident Response Capability, Program Reviews, Certification and Accreditation, Network Security Design, Perimeter Security Architecture (Firewall Systems), Intrusion Detection) and BLM PI Justification at 19-49 (describing the Security Program, tests on the security of the IT systems, policies and procedures, certification and accreditation process, training, IT security hardware and software, application security and assessments).

Internet. More open access via the Internet will have to wait until the new generation of software is implemented. Id.

Finally, the Plaintiffs selectively extract language concerning the National Business Center ("NBC"), PI. Notice at 3, and appear to assert that the selected language conflicts with the certifications filed on August 11, 2003. This is neither an accurate representation of the Financial Management Report nor the NBC PI Justification. First the language is taken from the Remediation Plan" designed for the "Correction of Federal Financial Management Improvement Act Deficiencies," ("FFMIA") (deficiencies noted in a prior year audit) and immediately following the language cited by the Plaintiffs is the following language:

Although the NBC has taken prompt action to improve security and controls for its information technology systems, the NBC will take steps to improve entity-wide security planning, system configuration and operating systems, system software controls, software development and change controls, and service continuity."

Financial Management Report at 31. The Financial Management Report briefly describes the improvements made by the NBC in financial performance, including IT security measures. Financial Management Report at 50-52. The NBC PI Justification details the security measures in place and the testing completed on its systems. See NBC PI Justification at 27-64 (network security controls at 33-35, server security controls at 35-38, application security controls at 38, security assessment and followup at 39-40, isolation of IITD systems at 45-48, Special Master reviews at 49-63). The "recently found" material weaknesses came from a prior year audit and pertained to certain financial managements systems not the NBC IT system as a whole. Simply stated, weaknesses found two years ago in certain NBC financial management systems is not probative of the IT security status of the NBC IT system today after extensive improvements

have been made and verified, in part, by testing conducted at the direction of the Special Master.

Plaintiffs' Notice contains no discussion regarding the sufficiency of any of the security measures described in Interior Defendants' submissions, but, instead, make the unjustifiable leap that because the Secretary's report to OMB identifies instances where IT security can be improved, any previously described security measures are per se inadequate and, worse, that Interior Defendants and other government officials have deliberately misled the Court.<sup>9</sup> In fact, a review of the declarations and other materials filed by Interior Defendants confirms that there is no "one-size-fits-all" standard for IT systems security, and the security of Interior Defendants' IT systems cannot be judged by a single standard. Rather, to the extent Interior Defendants' IT systems house or access individual Indian trust data, Interior Defendants made determinations about the security of the IT systems, for purposes of Internet connectivity, and advised the Court that sufficient security measures are presently in place to protect the individual Indian trust data from unauthorized Internet access. It is clear that the grave charges leveled by plaintiffs should be supported with substantiation, but the Court will search in vain through plaintiffs' meager submission for any attempt to support these outrageous charges.

#### Conclusion

Plaintiffs' Notice wholly fails to support its blanket assertions that various declarations filed by Interior Defendants were false, that Secretary Norton and her counsel acted with "willful

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<sup>9</sup> In their final extract from the Financial Management Report, Plaintiffs include material which related certain historical facts - that reviews of Interior's management of Indian Trust Funds have found problems and these reports have included comments that trust fund data was unreliable, inaccurate and inconsistent and that the systems were inadequate to comprehensively process trust data. The Financial Management Report, in summarizing the findings of various reviews of the Indian Trust System, does not admit or deny the accuracy of the findings; it merely reports on the findings.

intent to mislead this Court," and that the security of the Interior Department's IT systems and individual Indian trust data is "contrary to explicit representations repeatedly made by [Secretary] Norton, her managers, experts and defense counsel." Rather, Plaintiffs' Notice selectively quotes from the Financial Management Report without reference to the context of the quoted statements and with no reference to any of the allegedly false or misleading statements in the prior declarations or representations.

The content of such statements is facially inflammatory and derogatory and, like so many other statements in plaintiffs' filings in this case, has no proper place before this Court. For the foregoing reasons, Interior Defendants respectfully request that Court issue an order striking Plaintiffs' Notice, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

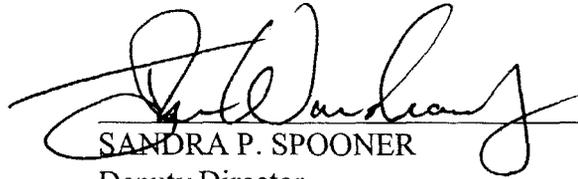
Respectfully submitted,

ROBERT D. McCALLUM, JR.  
Associate Attorney General

PETER D. KEISLER  
Assistant Attorney General

STUART E. SCHIFFER  
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN  
Director



---

SANDRA P. SPOONER

Deputy Director

JOHN T. STEMPLEWICZ

Senior Trial Attorney

GLENN D. GILLETT

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

Telephone: (202) 514-7194

September 25, 2003

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Interior Defendants' Motion to Strike "Plaintiffs' Notice of Supplemental Authority in Support of Complaints Filed by Plaintiffs on August 27, 2003 and September 10, 2003 Regarding this Court's Preliminary Injunction or, in the Alternative, Interior Defendants' Response Thereto." After considering that motion, any responses thereto, and the record of the case, the Court finds that the motion to strike should be, and hereby is, GRANTED. It is further

ORDERED that Plaintiffs' Notice of Supplemental Authority in Support of Complaints Filed by Plaintiffs on August 27, 2003 and September 10, 2003 Regarding this Court's Preliminary Injunction is ordered stricken from the record.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge

cc:

Sandra P. Spooner, Esq  
John T. Stemplewicz, Esq  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
Fax (202) 514-9163

Dennis M Gingold, Esq.  
Mark Brown, Esq.  
607 14th Street, N.W., Box 6  
Washington, D.C. 20005  
Fax (202) 318-2372

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

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

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
(406) 338-7530

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 25, 2003 I served the foregoing *Interior Defendants' Motion to Strike "Plaintiffs' Notice of Supplemental Authority in Support of Complaints Filed by Plaintiffs on August 27, 2003 and September 10, 2003 Regarding this Court's Preliminary Injunction"* Or, in the Alternative, *Interior Defendants' Response Thereto* 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

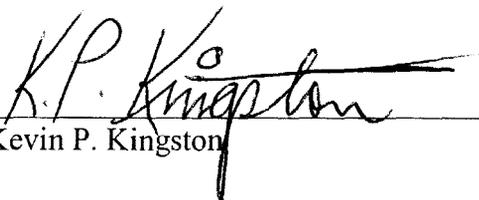
Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
607 - 14th Street, NW, Box 6  
Washington, D.C. 20005  
(202) 318-2372

Per the Court's Order of April 17, 2003,  
by facsimile and by U.S. Mail upon:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
(406) 338-7530

By U.S. Mail upon:

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

  
\_\_\_\_\_  
Kevin P. Kingston