

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' REPLY MEMORANDUM IN FURTHER
SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' REPLY
AND NOTICE OF SUPPLEMENTAL INFORMATION SUBMITTED
IN SUPPORT OF THEIR CONSOLIDATED MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendants respectfully submit this reply memorandum in further support of their motion to strike the reply brief and "notice of supplemental information" filed by Plaintiffs in support of their motion for a temporary restraining order and preliminary injunction.¹ In their opposition brief,² Plaintiffs misconstrue the law governing motions to strike, and concede that the notice they filed, consisting of a letter from a New Jersey Congressman to the Attorney General, is devoid of

¹ Plaintiffs' Reply To Interior Defendants' Opposition To Plaintiffs' Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction (Oct. 24, 2003) ("Plaintiffs' Reply"); Plaintiffs' Notice Of Supplemental Information In Support Of Plaintiffs' Consolidated Motion For Temporary Restraining Order And Motion For Preliminary Injunction (Oct. 28, 2003) ("Plaintiffs' Notice").

² Plaintiffs' Opposition To Defendants' Motion To Strike Plaintiffs' Reply And Plaintiffs' Notice Of Supplemental Information Submitted In Support Of Their Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction And Plaintiffs' Request For The Court To Consider Sanctions Sua Sponte For Filing A Frivolous Motion (Dec. 1, 2003) ("Plaintiffs' Opposition").

any legal or factual weight that could make it relevant to this motion. The motion to strike should be granted.

ARGUMENT

As argued in Defendants' moving papers,³ neither Plaintiffs' Reply nor Plaintiffs' Notice is authorized by Local Civil Rule 65.1(c), which governs the briefing of preliminary injunction applications and expressly contemplates only an application and opposition, unless leave is sought. See LCvR 65.1(c).⁴ Moreover, even if such filings were permitted under the rule, both the reply and the notice suffer from independent defects that require that they be stricken. Plaintiffs' Reply is rife with false personal attacks that violate Federal Rule 12(f), as well as the rules of civility that are supposed to govern litigation before this Court. Defendants' Motion to Strike at 2-4; see LCvR 83.8(b)(6)(v) (requiring counsel to be familiar with the D.C. Bar Voluntary Standards for Civility in Professional Conduct). With respect to Plaintiffs' Notice, it consists only of the personal opinions of a New Jersey Congressman and, as such, has no legal or factual relevance to the application before the Court. Defendants' Motion To Strike at 4. These defects require that both Plaintiffs' Reply and Plaintiffs' Notice be stricken.

In response, Plaintiffs raise two arguments. First, Plaintiffs argue that, notwithstanding the specific briefing requirements for preliminary injunction applications set forth in Local Civil Rule

³ Defendants' Motion To Strike Plaintiffs' Reply And Plaintiffs' Notice Of Supplemental Information Submitted In Support Of Their Consolidated Motion For A Temporary Restraining Order And Preliminary Injunction (Nov. 17, 2003) ("Defendants' Motion To Strike").

⁴ Local Rule 65.1(c) requires that a preliminary injunction application be supported by all affidavits on which plaintiff intends to rely, and that the opposition be filed, with all supporting affidavits, within 5 days after service of the application.

65.1(c), the general briefing rules of Local Civil Rule 7(d) apply to such applications. Plaintiffs' Opposition at 2. Second, Plaintiffs contend that Rule 12(f) authorizes striking only a pleading, not a reply or a notice. Id. at 2-3 n.3. As to the substance of their "notice," Plaintiffs do not dispute that it lacks even marginal factual or legal relevance to the preliminary injunction application. See id. at 3 (stating that "Plaintiffs simply provided information to this Court" concerning the opinions of a New Jersey Congressman).

I. Plaintiffs' Notice and Plaintiffs' Reply Should Be Stricken Under Local Rule 65.1

Local Civil Rule 65.1(c) reflects a conscious effort by the Court to delineate, in a manner distinct from the general motions provisions of Rule 7, the form and timing for briefing preliminary injunction applications. Thus, for example, while Rule 7(b) allows an opposition to a motion to be filed within 11 days of service of the motion, Rule 65.1(c) requires an opposition to a preliminary injunction application to be filed within 5 days of service of the application. Given the specific requirements enumerated by the Court for preliminary injunction applications, it is illogical to conclude that a reply brief on such an application, nowhere authorized in Rule 65.1, is permitted under Rule 7. It is less plausible, still, to conclude that a "notice of information" or other invented filings may be submitted (without limitation on number, type or timing) in purported support of a preliminary injunction application, notwithstanding the fact that the Court specifically itemized the briefing it wished to permit on such an application.⁵ Had the Court wished to invite reply briefs (or notices attaching irrelevant information) in the preliminary injunction context, there is every reason to believe that it would have explicitly done so in Rule 65.1, and included appropriate timing provisions governing such submissions. It did not.

⁵ Indeed, Plaintiffs do not argue that their notice is authorized by any rule.

II. Contrary To Plaintiffs' Statement Of The Law, Federal Rule 12(f) Is Not Limited To Pleadings

Plaintiffs' second argument is equally unavailing. This Court has recognized that, while the language of Rule 12(f) refers to striking pleadings, the Court has authority under the rule to strike inappropriate matter in other filings, as well. Pigford v. Veneman, 215 F.R.D. 2, 4 n.1 (D.D.C. 2003) ("Although Rule 12(f) applies by its terms only to 'pleadings,' courts occasionally have applied the Rule to filings other than those enumerated in Rule 7(a) of the Federal Rules of Civil Procedure.") (citing Cobell v. Norton, No. 96-1285, 2003 WL 721477 (D.D.C. Mar. 3, 2003)); Larouche v. Department of the Treasury, No. 91-1655, 2000 WL 805214 (D.D.C. Mar. 21, 2000) (striking declaration that contained information that was irrelevant, speculative and redundant under Rule 12(f) and Rule 56(e)).

In Pigford, this Court relied on its "liberal discretion" under Rule 12(f) to strike scandalous and unsupported allegations of racism made by plaintiffs' class counsel against a Department of Justice lawyer in a response filed in connection with a motion to reopen late claims. Id. at 4-5. The Court also found that "the filing of a document containing such language is one form of harassment prohibited by Rule 11," and relied on that independent authority to strike class counsel's response to the motion to strike, in which scandalous accusations were repeated. Id. (citation omitted); see also Fed. R. Civ. P. 11(b) (attorney filing papers certifies that the papers are, inter alia, not being filed "for an improper purpose, such as to harass"). Thus, Plaintiffs' uninformed argument that Rule 12(f) does not apply to filings other than pleadings has been expressly rejected by this Court.

It bears mention that this latest episode of derogatory name calling carries on a now well-established practice by Plaintiffs. It has recently been held that such a seedy form of litigation has no place in this Court:

[Class counsel's] charges of racism are plainly scandalous within the meaning of the Rule, in that they 'improperly cast[] a derogatory light' on a dedicated government attorney who has done his best to navigate the deep and murky waters of this litigation. The accusations are indefensible and have no place in filings with this court. Because the accusations of racism in the [class counsel] filings are unsupported by facts or evidence, constitute a form of harassment, and are scandalous, the Court will grant defendant's motion to strike [class counsel's] Response Regarding Mail Delays and *sua sponte* will strike [class counsel's] Response to the Motion to Strike, based both on Rule 11 and Rule 12(f) of the Federal Rules of Civil Procedure.

Pigford, 215 F.R.D. at 4-5 (citation omitted). Yet, in this litigation, virtually every document filed by Plaintiffs is littered with the same unsupported and indefensible personal attacks that have no purpose other than to "improperly cast a derogatory light" on anyone associated with the Defendants.⁶ To allow Plaintiffs to continue this pattern with reckless abandon, and without consequence, makes a mockery of the rules that were specifically promulgated to prohibit such conduct. The Court should exercise its authority under those rules to put an end to the practice in this litigation.

⁶ Plaintiffs' brief in opposition to the motion to strike is no exception. See Plaintiffs' Opposition at 3 (referring to opposing counsel's behavior as "deviant"); id. at 4 (falsely stating that opposing counsel "lies to this Court and violates court orders").

III. Plaintiffs Concede That Their Notice Lacks Any Legal Or Factual Relevance To The Application Before The Court

Plaintiffs do not contest that the letter they filed, in which a New Jersey Congressman expresses his personal opinions concerning this litigation to the Attorney General, is neither factual evidence nor legal authority that could have any relevance to their application for a preliminary injunction. See Plaintiffs' Opposition at 3-4 (conceding that the notice "simply provided information" and "merely informs this Court" concerning the personal views of a congressman). That Plaintiffs continue to defend the submission of the letter in spite of this concession is unsupportable; that they move for sanctions against Defendants for seeking to strike this irrelevant material is frivolous.⁷ Plaintiffs' Notice should be stricken, and the sanctions request denied.⁸

⁷ Plaintiffs' motion for sanctions takes the familiar form of a boilerplate paragraph at the end of their opposition brief asking that the Court to "*sua sponte*" award them such relief. See Plaintiffs' Opposition at 4. Apparently unaware (or heedless) of the fact that the term "*sua sponte*" refers to action on the Court's own initiative, these requests are a transparent attempt to avoid the requirements for seeking sanctions under Federal Rule 11 and, therefore, they violate that rule. On that basis as well, their request is defective.

⁸ Insofar as the sanctions motion is made with respect to Defendants' request that the Court strike Plaintiffs' Reply, it is equally baseless for the reasons discussed supra in Sections I and II.

CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in Defendants' Motion To Strike, Plaintiffs' Reply and Plaintiffs' Notice should be stricken. Because Plaintiffs' Opposition includes a lengthy quotation of the irrelevant letter attached to their notice, and also repeats Plaintiffs' own improper derogatory remarks, their opposition brief should be stricken as well. See Pigford, 215 F.R.D. at 4-5 (*sua sponte* striking class counsel's response to motion to strike). Defendants therefore request that the Court issue an order striking Plaintiffs' Notice, Plaintiffs' Reply, and Plaintiffs' Opposition, and denying Plaintiffs' request for sanctions.

Dated: December 11, 2003

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

/s/ Sandra P. Spooner
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on December 11, 2003 the foregoing *Defendants' Reply Memorandum in Further Support of Their Motion to Strike Plaintiffs' Reply and Notice of Supplemental Information Submitted in Support of Their Consolidated Motion for a Temporary Restraining Order and Preliminary Injunction* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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

/s/ Kevin P. Kingston
Kevin P. Kingston