IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96cv01285(TFH)
	)	
KEN SALAZAR, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF CLASS REPRESENTATIVES' EXPENSE APPLICATION

INTRODUCTION

Plaintiffs have moved the Court to reconsider its denial of approximately $10.5 million in litigation expenses that they presented as part of their request for incentive awards to the Class Representatives. [Dkt. 3839] The Court's ruling at the June 20, 2011, fairness hearing is supported by the evidence and the law. Plaintiffs' motion for reconsideration neither establishes the requisite elements for reconsideration and nor raises any grounds for disturbing the Court's decision on the merits. It should be denied.

ARGUMENT

I. Plaintiffs Fail To Allege, Let Alone Establish, The Factors That Justify Reconsideration

Plaintiffs cite no authority on which to base their motion for reconsideration, but Rule 59(e), which provides for a "motion to alter or amend a judgment," is applicable. Fed. R. Civ. P.

59(e).[1] In the D. C. Circuit, a Rule 59(e) motion "'is discretionary' and need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *Nat'l Trust v. Dep't of State,* 834 F. Supp. 453, 455 (D.D.C.1993), *aff'd in part and rev'd in part on other grounds sub nom Sheridan Kalorama Historical Ass'n v. Christopher,* 49 F.3d 750 (D.C. Cir.1995)). This Court has consistently applied that standard. *Adams v. D.C.*, 2011 WL 2530676, *2 (D.D.C. June 27, 2011); *Elec. Frontier Found. v. Dep't of Justice*, 532 F. Supp.2d 22, 23 (D.D.C. 2008).

Plaintiffs cite no intervening change of controlling law, nor can they. They also offer no new evidence. In fact, they offer no evidence at all, presenting only a cursory two-and-one-half page affidavit filled with hearsay from their litigation team's accountant, Geoffrey Rempel. And the affidavit quotes a selective portion of evidence that defendants already provided to the Court. *See* Exhibit 11 of Defendants' Objections to Class Representatives' Petition for Incentive Awards and Expenses [Dkt. 3697-11] (Reproduced here as Exhibit 1).

Plaintiffs do not claim that the Court needs to correct a clear error. Rather, they suggest that they "may not have been sufficiently clear," Mot. at 1, and offer arguments that they could have made, or essentially did make, in their motion for incentive awards [Dkt. 3679] and supporting reply brief [Dkt. 3706]. A Rule 59(e) motion is not "simply an opportunity to reargue facts and theories upon which a court has already ruled," nor a means to present "theories or

[1] Here, of course, plaintiffs have not waited for the Court to issue a written opinion and final judgment, but they are nonetheless seeking to have the Court amend a judgment. Also, courts "typically treat motions to reconsider as motions to alter or amend a judgment under [Rule 59(e)]." *Howard v. Gutierrez*, 503 F. Supp.2d 392, 394 (D.D.C. 2007).

arguments that could have been advanced earlier." *Howard*, 503 F. Supp.2d at 394 (citations omitted). But plaintiffs are attempting to do precisely that here. Alleging no error by the Court, they assert without any substantiating proof that "the entirety of the incentive awards plus additional funds ***may*** be taken from" the Class Representatives, and state that "this is not the result this Court intended." Mot. 2 (emphasis added). This baseless assertion does not constitute an allegation of clear error.

Although plaintiffs assert that it would be "demonstrably unjust" if the Class Representatives had to use all of their incentive awards to pay litigation expenses, this contention reiterates previous arguments that the Court correctly discounted. This bald allegation is not enough for the Court to find a "manifest injustice." *See Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (no manifest injustice where a plaintiff alleges only what *may* happen and fails to make a clear argument in a timely fashion). Because plaintiffs' motion neither alleges nor establishes the elements necessary for reconsideration, it should be summarily denied.

Indeed, to the extent any argument is new, plaintiffs have waived it. Plaintiffs advanced the same weak arguments in their original motion for the incentive awards that they make here. Defendants rebutted those arguments and plaintiffs thereafter filed a reply. To the extent plaintiffs' new motion asserts facts or legal contentions not contained in their prior reply brief, those arguments are waived. *See Estate of Gaither ex rel. Gaither v. District of Columbia,* 655 F. Supp.2d 69, 89 (D.D.C. 2009) (failure to respond in a reply to argument asserted in opposition deemed a concession); *cf. Kifafi v. Hilton Hotels Retirement Plan,* 616 F. Supp. 2d 7, 38 (D.D.C. 2009) (when opposing summary judgment, if a party fails to respond to an argument, he is "deemed to have conceded the point"). Similarly, it is axiomatic that arguments raised for the

first time in a Rule 59(e) motion are waived. *E.g., Estremera v. United States,* 442 F.3d 580, 587 (7th Cir. 2006) ("an argument raised for the first time in a Rule 59(e) motion is waived"); *McGuire v. Davidson Mfg. Co.,* 398 F.3d 1005, 1009 (8th Cir.2005) (same).

II. The Evidence Does Not Demonstrate That Ms. Cobell Or Other Class Representatives Are Personally Liable For Over $4.5 Million

Plaintiffs submit no new evidence to support their motion; they offer only Mr. Rempel's hearsay. In his affidavit, Mr. Rempel quotes selectively from the Lannan Foundation Grant Agreements (LFGAs) but conspicuously fails to attach the documents themselves. The LFGAs are the best evidence of what those agreements state, and plaintiffs' omission alone is sufficient reason for the Court to deny reconsideration. Moreover, defendants have already debunked plaintiffs' unsupported theory that "Ms. Cobell and the other Class Representatives who guaranteed the repayment will remain personally liable and will be thrust into a precarious financial position." Mot. 5. The evidence demonstrates, to the contrary, that if anyone must repay the funds, it is Ms. Cobell's attorneys and not her personally.

Plaintiffs quote the following paragraph from the LFGAs:

> By separate assignments to the Blackfeet Reservation Development Fund, Elouise Pepion Cobell, Earl Old Person, Thomas Maulson, and James Louis Larose, beneficiaries of this Agreement, have agreed to pay to the Blackfeet Reservation Development Fund all amounts that any or all of them recover from the United States (including any agency or department thereof) ***related to attorney's fees and/or costs and/or expenses of the Litigation***.

Mot. 5; Rempel Affidavit, 2; *see* Exhibit 1 at P000477 (attached) (emphasis added). In their motion, plaintiffs highlight the language indicating that the Class Representatives have agreed to pay "all amounts that any or all of them recover from the United States," but ignore the

qualifying language that follows: "related to attorney's fees and/or costs and/or expenses of the Litigation."

The only award "related to attorney's fees and/or costs and/or expenses of the Litigation" is the $99 million the Court awarded. The Court's only award to the Class Representatives personally are not attorney fees or expenses but incentive awards, which "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation," *In re Lorazepam*, 205 F.R.D. 369, 400 (D.D.C. 2002) (citations and internal quotation marks omitted). Indeed, the Court properly rejected plaintiffs' request to award the Class Representatives a separate amount for litigation expenses. Tr. 243.[2] Because they received incentive awards not related to attorney's fees or litigation costs and expenses, the quoted language from the LFGAs does not impose liability on the Class Representatives. If anything, it imposes liability on class counsel, and counsel have the capacity to pay that out of the $99 million award.

Language in the only LFGA of record demonstrates that these expenses are an obligation of counsel, not of any individual plaintiff. Defendants attached an LGFA obtained during discovery to their objections to the incentive award petition in February 2011, when this entire issue was first briefed. [Dkt. 3697-11.] Plaintiffs' lead counsel Dennis Gingold signed this document. Plaintiffs omit mention of these provisions in their motion, but they are unequivocal:

- If, pursuant to judgment or settlement, ***Plaintiffs in the Litigation or their attorneys*** recover from the United States (including any

[2] The Court also ruled that, to the extent that Ms. Cobell had personal expenses, she would have to deduct them from her incentive award. Tr. 241. Plaintiffs refer to these as "Category one" expenses, totaling $390,000. Mot. 3.

> agency or department thereof) ***any attorney's fees and/or costs and/or expenses of the Litigation***, the Grantee shall take all appropriate action to ensure prompt payment to the Foundation of ***one-half of all such amounts recovered***, until the grant is repaid in full. In the event that one or more other non-profit entities contributed or have contributed funds toward the Litigation, the Grantee will share the one-half of the amounts recovered, pro rata, in proportion to amounts advanced by the other non-profit entities.
>
> • By his signature, Dennis M. Gingold, their lead counsel, acknowledges that ***one-half of any attorney's fees and/or costs and/or expenses of the Litigation recovered from the United States, by judgment or settlement, shall be paid to the Grantee, until the grant is repaid in full***.

Exhibit 1 at P000477 (emphasis added). If, as Mr. Rempel seems to indicate, seven of eight LFGAs contain the same language, then the attorneys, rather than the individual Class Representatives, are liable to repay the amounts owed from the attorney fees awarded by the Court.[3]

Seeking to recover an additional $10.5 million under the guise of an incentive award is just a second attempt to enrich Class Counsel by relieving them from paying outstanding expenses out of their $99 million attorney's fee and expense award. Such a ploy should not be countenanced. Plaintiffs did not provide the attached document (or any LFGA) with their motion and omit any mention of the relevant language quoted above, even though Exhibit 1 was previously attached as Exhibit 11 [Dkt. 3697-11] to Defendants' Objections to Class Representatives' Petition for Incentive Awards and Expenses (Obj.) [Dkt. 3697]. In fact,

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[3] Language contained in an April 14, 1999, engagement letter between Ms. Cobell and Class Counsel is consistent with the proposition that individual Class Representatives are not personally responsible for the cost of this litigation. That letter is contained in the sealed Exhibit 2 to Mark Kester Brown's February 28, 2011, Motion for Attorney's Fees. *See* Dkt. 3696, 3698, 3699, 3699-2.

defendants relied upon Dkt. 3697-11 at P000479 to explain specifically that "the record shows that the class representatives have no obligation to repay expenses unless they recoup money for expenses." Obj. 25. Plaintiffs did not rebut that contention then,[4] and they fail to do so now. This wholesale failure of proof does not improve with repetition.

III. No Other Basis Exists To Reconsider The Court's Ruling

Plaintiffs' remaining contentions are equally unavailing. They were previously made and rejected, and constitute no more than one final attempt to circumvent the agreed-upon range for attorney fees, expenses and costs. Plaintiffs claim that the parties entered into the Settlement Agreement understanding that Blackfeet Reservation Development Fund's expenses "would be paid from the common fund." Mot. 3-4. Indeed, the payment of reasonable litigation expenses and costs were agreed to be paid out of the amount the Court awarded for attorney fees, expenses, and costs which, of course, will be "paid from the common fund." And, as defendants previously demonstrated, this is consistent with the Settlement Agreement and the history of this case. Obj. 20-23.

Plaintiffs also contend that "the Settlement Agreement provides for payment of costs and expenses of approximately $15 million, wholly independent of, and in addition to, expenses and costs of Class Counsel." Mot. 4. That is wrong. The Settlement Agreement contained a notice provision that simply stated that plaintiffs would "file a notice with the Court stating the amount of incentive awards ***which will be requested*** for each Class Representative . . . ". Settlement

[4] Indeed, plaintiffs previously conceded that Ms. Cobell is not personally liable in their reply brief, where they state, "They [the expenses] have been paid by Ms. Cobell and organizations to which Ms. Cobell is indebted, *not personally, but solely in her capacity as lead plaintiff in the prosecution of this case*." [Dkt. 3706 at 17].

Agreement, ¶K.1 (emphasis added). The notice provision clearly did not indicate that $15 million ***would be paid***, and defendants certainly did not agree to that. To the contrary, Paragraph K.3 of the Settlement Agreement states clearly that "Defendants do not consent in any manner to an award of costs, expenses, or incentives, except to the extent supported by and consistent with controlling law."

When the parties negotiated the settlement, they agreed that attorney fees, litigation expenses, and costs would be litigated within a stipulated range. *See* Fee Agreement ¶ 4. Plaintiffs agreed to ask for no more than $99.9 million, and defendants would not assert that plaintiffs should be paid less than $50 million, in addition to amounts previously paid. *Id.* The agreement contemplated that the Court would award whatever sum it decides is reasonable and fair for "attorneys' fees, *expenses,* and costs" based on the record before it, and neither side would appeal the decision if the amount awarded for "attorneys' fees, *expenses,* and costs" falls within the parties' stipulated range. *Id.* ¶ 4 e. (emphasis added). The Settlement Agreement likewise refers to "a petition for fair and reasonable attorneys' fees, *expenses* and costs." SA § J.2. (emphasis added). On June 20, 2011, the Court awarded Class Counsel $99 million, and the settlement contemplates that this award also includes money for the reasonable and allowable expenses of the litigation. Plaintiffs' separate request for expenses is inconsistent with the settlement terms and is an attempt to circumvent the agreed-upon fee range.

Finally, plaintiffs' reliance upon the law of this case underscores the fallacy of their position. Mot. 10-11. Plaintiffs cite the Court's previous award of expenses incurred for work performed by their expert accounting firm, PricewaterhouseCoopers (PwC), but they ignore the fact that when the Court approved $2.5 million of those expenses in 2005, it did so in response to

plaintiffs' petition for ***attorneys fees and expenses*** under the Equal Access to Justice Act (EAJA). *Cobell v. Norton*, 407 F. Supp.2d 140, 163-65 (D.D.C. 2005).[5] This demonstrates that the PwC expenses, like those of the other experts listed by plaintiffs, are expenses that have been routinely submitted with counsel's fee petition as litigation expenses. Plaintiffs' motion for reconsideration offers no basis to now re-characterize the very same type of expenses as that of the Class Representatives. As defendants explained in their opposition brief:

> Plaintiffs' prior fee petitions reveal the pretense in their expense request here. . . . This history demonstrates that such expenses fall squarely within the ambit of plaintiffs' petition for attorney fees, expenses, and costs – not here [in a motion for incentive awards]. On this basis alone, plaintiffs are estopped from contending otherwise, and the Court can and should reject the entire $10.5 million request as improper.

Obj. 21-22. The Court's ruling at the June 20, 2011, fairness hearing fully accords with the law of this case.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration should be denied.

Dated: July 14, 2011

Respectfully submitted,

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[5] Plaintiffs's motion wrongly cites as support the Court's award of some of PwC's expenses as sanctions in *Cobell v. Babbitt*, 188 F.R.D. 122 (D.D.C. 1999), and the Court's statement there that additional PwC expenses could be "recoverable if plaintiffs ultimately prevail in this litigation." *Id.* at 129, 139. Mot. 10. This quoted language actually undermines plaintiffs' position because it demonstrates that the Court understood that any further request for expenses related to PwC's work would be submitted as part of an EAJA petition for attorney fees and expenses, and not as part of a motion for an incentive award to Class Representatives.

J. CHRISTOPHER KOHN
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CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2011, the foregoing *Defendants' Opposition to Plaintiffs' Motion for Reconsideration of Class Representatives' Expense Application* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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