

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL <u>et al.</u> , on their own)	
behalf and on behalf of all persons similarly)	
situated,)	
)	
<u>Plaintiffs,</u>)	
)	
v.)	Civil Action
)	No. 96-1285 (TFH)
KEN SALAZAR, Secretary of the Interior, <u>et al.</u> ,)	
)	
<u>Defendants.</u>)	
)	
)	

**PLAINTIFFS’ NOTICE IN REPLY TO NARF’S OPPOSITION
TO NOTICE OF SUPPLEMENTAL INFORMATION**

On July 30, 2012, plaintiffs filed a Notice of Supplemental Information (“Plaintiffs’ Notice”) [Dkt. No. 3909] in support of Plaintiffs’ Opposition to NARF’s Petition for Attorneys’ Fees and Costs (“Pls.’ Opp.”) [Dkt. No. 3779]. In that Notice, plaintiffs provided this Court with information regarding attorneys’ fees that NARF has started to receive as payment for its representation of 42 tribes in tribal trust litigation, a client representation that NARF undertook in conflict with the interests of the Cobell plaintiffs and without the consent of the Class Representatives. In 2006, when NARF reallocated its resources to its representation of the aforementioned tribes, NARF ceased its representation of individual Indian trust beneficiaries. As a result, NARF has not represented the Cobell plaintiffs for more than six years and it has had no role in the settlement of this case, congressional approval of the settlement, or defense of the settlement on appeal.

At the time of Plaintiffs’ Notice, Plaintiffs were aware that 22 of NARF’s tribal clients settled for a total of almost \$350 million from the government and that on one of those tribal

settlement representations alone (Nez Perce Tribe's \$33.7 million settlement), NARF had been paid \$3 million in attorneys' fees. Dkt. No. 3909-2 at 1. Plaintiffs noted that if NARF is paid that same percentage on all of the known settlements, it would receive fees of approximately \$31 million. *Id.* at 3909 at 1. Because these settlements had just occurred in 2012, that information did not exist during the briefing in 2011 on NARF's petition for attorneys' fees.

In NARF's response to the Notice ("NARF Resp.") [Dkt. No. 3913], it admits that it received \$3 million from the Nez Perce Tribe, but does not reveal what it, in fact, has been paid as a direct result of representing the other settling tribes. *Id.* at 3913-1 at ¶¶ 4-5. It simply states that the amount was "nothing remotely close to the \$31 million." *Id.* 3913 at 5. Since the actual amount is known solely to NARF and it has declined to reveal it, there is an evidentiary inference against NARF on this point and the Court should conclude that NARF received payments in the tens of millions of dollars as a direct result of its representation of these settling tribes. *See generally Overnite Transp. Co. v. N.L.R.B.*, 140 F.3d 259, 266 n.1 (D.C.Cir. 1998) (holding that when evidence within a party's possession is withheld, it may be inferred that the evidence is unfavorable to it); *Arvin-Edison Water Storage Dist. v. Hodel*, 610 F. Supp. 1206, 1219 n.41 (D.D.C. 1988) (same). If that were not the case, there is no reason NARF would continue to conceal such pertinent information.¹

Moreover, NARF's statements in its response to the Notice about its expectations of payment in cases like the present support what Plaintiffs have been saying all along: that NARF was never to be paid out of the Plaintiffs' recovery and had no expectation that it would be paid out of Plaintiffs' recovery. On March 28, 2011, NARF represented to this Court that it "always

¹ NARF may also be paid millions of dollars more in attorneys' fees when the other 20 tribes that it chose to represent – in lieu of its representation of the Cobell plaintiffs – settle with the United States government.

intended to seek recovery of its attorneys' fees in this case, and the Plaintiffs understood this." Mot. to Intervene [Dkt. No. 3714] at 7. Now, for the tribal cases, which NARF admittedly expected to be "long and protracted," NARF represents that it "had no expectation that tribes would pay NARF's attorneys' fees," specifically stating that:

NARF expected [the tribal trust fund litigation] to be a long, protracted legal battle against the U.S. Government – similar to what the Cobell Class experienced in the Cobell vs. Salazar class action litigation.

When NARF agreed to represent tribes in the Nez Perce Action, **NARF had no expectation that the tribes would pay NARF's attorneys' fees and costs.** The engagement agreements NARF does have with some represented tribes do not include provisions requiring tribes to pay NARF's attorneys' fees. Several tribes formalized their engagement of NARF not through agreements with NARF, but through tribal resolutions. These resolutions do not refer to payment of fees and costs at all.

NARF Resp., Echohawk Decl. [Dkt. No. 3913-1] at ¶¶ 2, 3 (emphasis added). NARF further concedes that its practice of not charging fees in cases that are "extremely difficult to win" is in accordance with its "founding principles," and that it only accepts "**voluntary donations.**"²

NARF's "founding principles" of working for the greater good for Indian Country is exposed as legal sophistry through their demands that 500,000 of this nation's poorest citizens pay their fees after NARF walked away. Consider that on one hand, NARF claims that in 1996 plaintiffs understood that NARF "always intended to seek recovery of its attorneys' fees." However, on the other hand, NARF now represents some of the richest tribes in the country and enters into engagement letters that only provide compensation through "**voluntary donations.**"³

The truth is that NARF's agreement with the *Cobell* class was no different than with its tribal clients. As set forth expressly in NARF's engagement letter between Elouise Cobell and

² NARF Resp. [Dkt. No. 3913] at 2-4 (emphasis in original).

³ Presumably, NARF will be filing motions for attorneys' fees against those tribes that elected not to make a "voluntary donation."

NARF;⁴ the affidavits of Elouise Cobell,⁵ Robert Peregoy⁶ (former NARF attorney), and Dennis M. Gingold;⁷ Echohawk's Congressional testimony;⁸ NARF's annual reports;⁹ and Echohawk's statements to the press,¹⁰ NARF disavowed contingent fees and would not charge the Cobell plaintiffs attorneys' fees out of their recovery. Rather, it would fund the litigation through voluntary donations, which it did.

The rest of NARF's Response consists of a regurgitation of portions of its petition that have nothing to do with the supplemental information in Plaintiffs' Notice. The Court should disregard those additional bites at the apple inasmuch as untimely and redundant briefing on the NARF petition that was concluded more than a year ago. The latest iteration of its arguments contain no newly discovered information. For example, NARF reiterates its argument that it never discontinued work on the *Cobell* litigation, without acknowledging or reconciling contrary admissions of John Echohawk in NARF's Annual Reports and on its website in the years prior to this settlement. Those admissions are abundantly clear – that NARF was required to assess conflicts of interest in representing the *Cobell* plaintiffs and its tribal clients, and that it ultimately reached a determination that it would “no longer [be] involved” in *Cobell* due to its representation of the tribes. *See* Pls.' Opp. [Dkt. No. 3779] at 13-14, and Exhibits 17 – 21. NARF never contended otherwise until long after a settlement was reached in this litigation and

⁴ Mot. to Intervene [Dkt. No. 3714-1] at 19.

⁵ Pls.' Opp to Mot. to Intervene, Cobell Aff. [Dkt. No. 3731-1] at ¶¶ 17-18, 23-31, and 27.

⁶ *Id.*, Peregoy Aff. [Dkt. No. 3731-2] at ¶¶ 18-20.

⁷ *Id.*, Gingold Aff. [Dkt. No. 3731-3] at ¶¶ 34-38.

⁸ *Id.*, Echohawk Congressional testimony, [Dkt. No. 3731-7] at 3.

⁹ *Id.*, NARF Annual Report [Dkt. No. 3731-9] at 2 (“NARF is a non-profit organization that survives financially on the donations and contributions of philanthropic groups and on the generosity of Tribes, individuals and limited federal grants.”).

¹⁰ *Id.*, *The BIA Banker Trust is Hard When Billions Disappear*, The Cherokee Observer (Feb. 28, 2003) [Dkt. No. 3731-8] at 9-10.

it sought recovery of fees notwithstanding that its belated request for attorneys fees denied class members the opportunity to review, comment, and object to its fees at the fairness hearing.

Finally, NARF attempts to deflect the Cobell plaintiffs' opposition to its efforts to collect fees out of Plaintiffs' recovery by suggesting that it is Class Counsel, not the class members themselves, who oppose NARF's fees. The record is plainly to the contrary; the Cobell plaintiffs vigorously oppose NARF's fee petition. *See generally*, Cobell Decl. [Dkt. No. 3731-1], and specifically at ¶¶ 57-63 ("I do not believe it is fair or proper to award NARF fees and expenses out of plaintiffs' recovery"). Class members believe that they are entitled to the same ethical considerations and the same duty of loyalty that any other client is entitled to, including NARF's tribal clients.

Respectfully submitted this 17th day of September 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' NOTICE IN REPLY TO NARF'S OPPOSITION TO NOTICE OF SUPPLEMENTAL INFORMATION was served on the following via facsimile, pursuant to agreement, on this day, September 17, 2012.

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/s/ Shawn Chick