No. 11-5158

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, *et al*.,
Plaintiffs-Appellees,

HARVEST INSTITUTE FREEDMEN FEDERATION, *et al*.,
Movants-Appellants,

v.

KENNETH LEE SALAZAR, *et al*.,
Defendants-Appellees.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND RESPONSE TO APPELLANTS' CROSS MOTION FOR SANCTIONS

HIFF's former counsel, Percy Squire, submitted a *pro se* response to Plaintiffs' motion, which the Harvest Institute Freedman Federation and Leatrice Tanner-Brown (both acting *pro se*) asked to join by separate letter to the Court (Squire, Tanner-Brown and the Harvest Institute Freedman Federation are collectively referred to herein as "HIFF").[1] That response does not contest that, as

[1] William Warrior did not file an opposition to Plaintiffs' motion. In addition, it is improper for the Harvest Institute Freedman Federation—a limited liability company—to attempt to appear *pro se*. "It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201-02 (1993); *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 166 n.1 (D.C. Cir. 1990) ("As a

this Court found, HIFF made "no argument" concerning the sole issues raised in this appeal. Instead, HIFF (solely through Mr. Squire's *pro se* response) again attempts to re-litigate legal claims that were not at issue in this appeal and, in an effort to distract the Court, makes a frivolous request to sanction Plaintiffs' lead counsel by removing him from the case. The Court should grant Plaintiffs' motion for attorneys' fees and costs and deny HIFF's cross-motion for sanctions against Plaintiffs' lead counsel.

ARGUMENT

I. HIFF FAILS TO SHOW THAT ITS APPEAL WAS NOT FRIVOLOUS.

Plaintiffs' motion for attorneys' fees and costs is based on HIFF's complete failure to present any argument on appeal challenging the denial of permissive intervention—the sole basis for HIFF's appeal. In response, HIFF (through its counsel's *pro se* response) concedes that it did not present any argument for why the denial of intervention was erroneous. But HIFF contends that it was "inappropriate" to discuss the district court's intervention ruling because its motion to intervene was "merely a means to obtain the physical ability to file

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corporation, [defendant] could not appear *pro se*."). The same rule applies to LLCs. *See, e.g.*, *Lattanzio v. COMTA*, 481 F.3d 137, 140 (2d Cir. 2007) ("a limited liability company also may appear in federal court only through a licensed attorney"). The Harvest Institute Freedman Federation thus should be treated as if it did not respond to, and has conceded, Plaintiffs' motion. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 192 (2d Cir. 2006); *Perez v. Berhanu*, 583 F. Supp. 2d 87, 89 (D.D.C. 2008).

electronically" and that it had the right to object to the settlement under *Devlin v. Scardelletti*, 536 U.S. 1 (2002). (Resp. 8-9.) HIFF's arguments fail for three reasons.

First, it is irrelevant whether HIFF sought to intervene solely as a means to "obtain 'filer' status" with the electronic case filing system. (Resp. 8.) HIFF moved for permissive intervention under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure. (Doc. 3684.) Regardless of its motives for the motion, HIFF was required to satisfy Rule 24(b) in order to intervene under that rule. The district court denied HIFF's motion because HIFF did not satisfy the mandatory criteria for intervention under Rule 24(b), including: (1) the motion was not timely filed; (2) HIFF did not have a claim or defense that shared a common question of law or fact with the class action as required under Rule 24(b); and (3) HIFF already had pursued its claims, and lost, in other federal courts. (Doc. 3772 at 1-3.)

HIFF filed a notice of appeal from the district court's order denying permissive intervention but did not (and could not) file a notice of appeal from the final judgment or any other substantive orders in this case. Thus, the sole legitimate issue in this appeal was whether the district court abused its discretion by denying HIFF's request to intervene. But, as this Court held, HIFF made "*no argument*" on appeal in support of its challenge to the denial of permissive intervention. (App. Doc. 1350153) (emphasis added). HIFF's only explanation for

why this appeal was not frivolous is that it believes its underlying claims "are not frivolous." (Resp. 9.) But those underlying claims were not before the district court or this Court, and HIFF's belief that those underlying claims are non-frivolous does not justify its failure to present any argument in support of its appeal.

Second, HIFF's assertion that it need not intervene in order to object to the class settlement (and that it sought intervention solely as a technical matter to electronically file its papers) is wrong. Contrary to HIFF's assertion, *Devlin* does not permit non-parties to object to a class action settlement. Rather, *Devlin* held that class members themselves need not intervene to appeal a class settlement to which they timely objected. 536 U.S. at 6, 14. *Devlin* did not alter the well-settled rule that non-parties may not appear or file pleadings in a lawsuit unless first permitted to intervene. Indeed, the Federal Rules of Civil Procedure expressly state that only class members may file objections. *See* Fed. R. Civ. P. 23(e)(5) ("[a]ny *class member* may object to the proposal") (emphasis added); *see also Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (under Rule 23(e)'s language, non-class members have no standing to object); *Marino v. Ortiz*, 484 U.S. 301, 403 (1988) (holding that only class members may appeal a class action settlement).

In its Rule 24(b) motion, HIFF conceded correctly that it, and the individuals it purports to represent, do not have Individual Indian Money ("IIM") accounts or own any Indian Trust land, (Doc. 3684-1 at 7-9); therefore, they are not class members. The *Cobell* classes are limited to IIM account holders or beneficial owners of Indian Trust land as of the Record Date. (Doc. 3655-1 at 19-20.) Tellingly, HIFF's response quotes the class certification language but omits, without ellipses, the most critical language that defines class members as those "who had an IIM Account open during any period between October 25, 1994 and the Record Date." (*Compare* Resp. 13 *with* Doc. 3670 at 2-3.) The central premise of HIFF's unsuccessful lawsuit in the Court of Federal Claims (which it improperly sought to re-litigate in this appeal) was that its members had no IIM Accounts and had no beneficial ownership interest in IIM Trust land, but as the descendants of African-American slaves owned by certain Indian tribes, were entitled to IIM accounts and beneficial ownership of trust land in accordance with treaty provisions. *See Freedman Fed'n, LLC v. United States*, 80 Fed. Cl. 197, 199 (2008), *aff'd*, 324 F. App'x 923 (Fed. Cir. 2009), *cert denied*, 130 S. Ct. 1147 (2010). Thus, as HIFF conceded in the district court when it acknowledged that its members do not have IIM accounts or beneficial ownership of Indian Trust land, HIFF and its members do *not* qualify as class members in the *Cobell* litigation. (Doc. 3670.)

Third, HIFF's response ignores the fact that, even if it were permitted to raise its underlying racial discrimination claims in this appeal, those claims are barred by *res judicata* and thus are frivolous. HIFF previously asserted one or more of those claims—and lost—in three other federal suits. *See Harvest Inst. Freedman Fed'n*, 80 Fed. Cl. at 199; *Harvest Inst. Freedman Fed'n, LLC v. United States*, No. 2:10-cv-449, Doc. 10 (S.D. Ohio May 25, 2010); *Harvest Inst. Freedman Fed'n, LLC v. United States*, No. 2:10-cv-1131, Doc. 17 (S.D. Ohio Jan. 31, 2011). HIFF's attempt to further litigate those barred claims by intervening in *Cobell* is frivolous and a waste of this Court's scarce judicial resources.

II. HIFF'S CROSS-MOTION FOR SANCTIONS IS FRIVOLOUS AND SHOULD BE DENIED.

HIFF's response also includes a cross-motion for sanctions against Plaintiffs' lead counsel, Dennis Gingold. That motion is also frivolous and should be summarily denied. As an initial matter, HIFF does not identify any conduct by Mr. Gingold before *this Court* and in *this appeal* that is even remotely or arguably sanctionable. (Resp. 15-20.) Indeed, HIFF's cross-motion relies largely on district court proceedings in which HIFF was not involved, and for which no party requested sanctions. (*Id*.)

More fundamentally, both Rule 38 (which addresses sanctions against parties) and 28 U.S.C. § 1927 (which addresses sanctions against counsel) only permit a sanction awarding attorneys' fees and costs. Here, HIFF does not seek

attorneys' fees and costs, but instead requests that "sanctions should be awarded against Mr. Gingold, in the form of removing him as Plaintiffs' class counsel given his failure to adequately protect the interests of all class members, including Appellants." (Resp. 1.) Setting aside the fact that, as discussed above, HIFF and its members are *not* class members, and that Mr. Gingold did not engage in any sanctionable conduct, the relief HIFF seeks is not even available as a sanction by this Court. Accordingly, HIFF's cross-motion is frivolous and should be denied.

CONCLUSION

The Court should grant Plaintiffs' motion for attorneys' fees and costs jointly and severally against Appellants Harvest Institute Freedmen Federation, Leatrice Tanner-Brown, and William Warrior, and their counsel, Percy Squire, and deny the cross-motion for sanctions against Plaintiffs' lead counsel.

Respectfully submitted,

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May 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2012, I filed a copy of the foregoing with the clerk of court using the CM/ECF system and served a copy by first class mail on the following:

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