IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

No. 1:96CV01285
(Judge Lamberth)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CONTINUE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56(f) AND TO ENLARGE PLAINTIFFS' TIME TO RESPOND THERETO

Defendants respectfully submit the following opposition to Plaintiffs' Motion to Continue Defendants' Motions for Summary Judgment Pursuant to Fed. R. Civ. P. 56(f) and to Enlarge Plaintiffs' Time to Respond Thereto ("Motion for Continuance"). The Motion for Continuance should be denied.

INTRODUCTION

On October 17, 2002, this Court entered a trial discovery schedule order that incorporated the date set in its September 17, 2002 Order for submission of summary judgment motions. Phase 1.5 Trial Discovery Schedule Order, dated October 17, 2002 ("Scheduling Order") at 1. Pursuant to that Order, on January 31, 2003, Defendants filed three motions for partial summary judgment, with accompanying memoranda in support: (1) Defendants' Motion for Partial Summary Judgment that Interior's Historical Accounting Plan Comports with Their Obligation to Perform an Accounting ("Accounting Plan Summary Judgment Motion"); (2) Defendants' Motion for Partial Summary Judgment that Interior's Trust Management Plan Comports with

Their Obligation to Perform an Accounting ("Trust Management Plan Summary Judgment Motion"); and (3) Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches ("Statute of Limitations Summary Judgment Motion").

Under LCvR 7.1(b), Plaintiffs' oppositions were due on February 11, 2003. On that date, Plaintiffs filed a motion for a 30-day enlargement of time in which to oppose Defendants' three summary judgment motions ("First Motion for Enlargement"). The Court did not grant, or otherwise rule on Plaintiffs' First Motion for Enlargement as of February 11, 2003, and Plaintiffs did not file any opposition to Defendants' summary judgment motions. Any opposition is now untimely and Defendants' motions should be treated as conceded. See LCvR 7.1(b).

On March 13, 2003, Plaintiffs filed the Motion for Continuance, announcing that they were not going to oppose the summary judgment motions within the 30-day period of enlargement which they had apparently granted themselves. In their Motion for Continuance, Plaintiffs do not ask for the same relief with respect to all three summary judgment motions. With respect to the Statute of Limitations Summary Judgment Motion, Plaintiffs ask for permission to file an opposition 10 days after all documents have been produced pursuant to all "Production Orders of this Court." Motion for Continuance at 1; Proposed Order at 14 [sic]. With respect to the Accounting Plan and Trust Management Plan Summary Judgment Motions Plaintiffs ask that they be allowed to file their oppositions "10 days after the final expert witness depositions." Motion for Continuance at 1; Proposed Order at 14 [sic]. Finally, Plaintiffs ask that if the Motion for Continuance is denied they be given an additional 10 days to file oppositions to the summary judgment motions. Plaintiffs' Motion for Continuance should be denied in all respects.

ARGUMENT

After almost seven years of this litigation, after approximately 600,000 pages of documents have been produced to Plaintiffs in response to their discovery requests, after millions of pages of additional documents have been made available to plaintiffs for their inspection in response to their requests, after over 200,000 pages of documents have been given to Plaintiffs in response to requests from the Special Master and Special Master-Monitor, it is nothing short of astonishing for Plaintiffs now to claim that they are unprepared to respond to a summary judgment motion because they need more time to gain more knowledge about their case. If the need for additional discovery were, as described in the Motion for Continuance, so critical to Plaintiffs' ability to respond to the summary judgment motions, it is more than passing strange that Plaintiffs made no mention of this urgent need a month earlier when they filed their first Motion for Enlargement. No good cause exists for the relief sought, and as noted below, granting the motion would greatly prejudice Defendants.

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO SHOW THE NEED FOR A CONTINUANCE OF DEFENDANTS' STATUTE OF LIMITATIONS SUMMARY JUDGMENT MOTION

A. Plaintiffs Have Not Identified The Facts Essential To Justify Their Opposition That They Have Been Unable To Obtain in Discovery

A party seeking a continuance of a summary judgment motion on the grounds that it needs additional discovery must identify "facts essential to justify the party's opposition" that it has been unable to obtain. Fed. R. Civ. Proc. 56(f). A party seeking deferral of summary judgment proceedings under Rule 56(f) cannot rely upon generalized conclusions that information not yet obtained in discovery might be useful. Rather, the party seeking deferral

must "indicate what facts she intended to discover that would create a triable issue and why she could not produce them in opposition to the motion." Carpenter v. Federal Nat'l Mortgage Ass'n, 174 F.3d 231, 237 (D.C. Cir. 1999). In Carpenter, the party seeking deferral failed that test because she offered mere conclusions about what discovery might show, if conducted. Id. As the D.C. Circuit repeatedly has stated, "[i]t is well settled that [c]onclusory allegations unsupported by factual data will not create a triable issue of fact." Id. at 237 (quoting Exxon Corp. v. FTC, 663 F.2d 120, 126-27 (D.C. Cir. 1980)) (quotation omitted, alteration of original). In Exxon, the court observed that "[i]t is not the intent of Rule 56 to preserve purely speculative issues of fact for trial." 663 F.2d at 128.

Thus, controlling precedent requires that a movant under Rule 56(f) state the specific evidence that it would obtain in discovery and show how that evidence would demonstrate a genuine issue of material fact.[1] In Byrd v. EPA, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999), the court affirmed the district court's denial of a Rule 56(f) motion, noting that the movant "merely alleged that 'there may well be knowledge on the part of EPA employees or undisclosed documents'" on an issue. This "plainly conclusionary assertion without any supporting facts" was insufficient. Id.

Plaintiffs' cited case (Motion for Continuance at 6), Pacquin v. Federal Nat'l Mortgage Ass'n, 119 F.3d 23 (D.C. Cir. 1997), is not to the contrary. In that employment discrimination case, the Rule 56(f) movant identified specific evidence (narrative evaluation reports for executives at the movant's level) that it needed, and showed how that evidence would create a

---

[1] Any purported facts that may be offered by Plaintiffs in a reply brief on this motion should be rejected as untimely.

triable issue of fact.[2]

Plaintiffs mischaracterize Paquin in suggesting that Rule 56(f) entitles a respondent to delay summary judgment proceedings whenever it desires more "foundational" (Motion for Continuance at 7) information. The movant under Rule 56(f) is required to show what specific evidence it needs and how that evidence will demonstrate a genuine issue of material fact.[3]

Plaintiffs' Motion fails under this standard. The only showing that Plaintiffs offer is

---

[2] The defendant-employer in Paquin asserted that the plaintiff received lower numerical evaluation scores than other officers. Plaintiff claimed that this was a pretext, and that he needed to obtain in discovery the narrative evaluations. Those evaluations would reveal whether the employer's explanation was pretextual, because "were the evaluations to reveal that other executives received written evaluations less favorable than those of [plaintiff] but nonetheless received higher numerical scores, this would tend to discredit [the employer's] explanation that [plaintiff] was terminated for a legitimate non-discriminatory reason." 119 F.3d at 28. Thus, the plaintiff specified the precise evidence he needed in discovery and showed how that particular evidence could create a genuine issue of fact.

[3] The Supreme Court cases cited by Plaintiffs (Motion for Continuance at 2-3) do not establish a different standard for Rule 56(f) motions than the one enunciated by the D.C. Circuit. See Farmer v. Brennan, 511 U.S. 825, 849 (1994) (in papers accompanying his Rule 56(f) motion, movant identified specific facts pertinent to his Eighth Amendment claim which he expected to be contained in outstanding document requests); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986) (no Rule 56(f) motion had been filed and the Court merely noted in dicta that this rule ensures the opportunity to discover essential "information"); Crawford-El v. Britton, 523 U.S. 574 (1998) (again, no Rule 56(f) motion was filed and Court's dicta notes existence of rule to obtain essential "facts"). Similarly, the cases from other jurisdictions cited by Plaintiffs (Motion for Continuance at 4-6) do not set a Rule 56(f) standard at odds with D.C. Circuit precedent and do not permit a party to make conclusory claims about the need for more discovery without identifying the specific facts the party has been unable to obtain. See, e.g., Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 35 (1st Cir. 1995) (Rule 56(f) motion properly denied where movant's affidavit did not address any specific undisputed facts); Resolution Trust Corp. v. North Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994) (movant must "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist"); Willmarr Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 292 (8th Cir. 1975) (summary judgment on statute of limitations grounds may be appropriate without any discovery); Commonwealth Aluminum Corp. v. Markowitz, 164 F.R.D. 117, 120-21 (D. Mass. 1995) (no discovery had taken place and movant identified specific issues which it needed from discovery).

within the Affidavit of Dennis M. Gingold ("Gingold Aff."), attached to their Motion for Continuance. The affidavit fails to show how any allegedly non-produced information would demonstrate the existence of genuine issues of material fact. For paragraphs 2 through 11, Plaintiffs' counsel makes generalized allegations of failures to comply with production requests and production orders, but identifies no specific documents and fails to show how any allegedly non-produced material would indicate a genuine issue of material fact. For example, paragraph 9 contains the conclusory allegation that "the e-mail recovery and search is likely to produce data . . . and shed light on additional evidence that is relevant to material facts stated by defendants in support of their motions for summary judgment." This is precisely the type of "plainly conclusionary assertion without any supporting facts" that the court rejected in Byrd v. EPA, 174 F.3d at 248 n.8.

The rest of the affidavit offers no better support for the Motion for Continuance. Paragraphs 12 and 13 refer to a list of specific documents, but Plaintiffs' counsel fails to show how even a single one of those documents would create a genuine issue of material fact; under the cases discussed above, it is not sufficient that documents allegedly "relate directly" to the parties' respective plans or expert reports (Gingold Aff. at 4, ¶ 13) or that they "are expected to contain evidence relevant to facts" in Defendants' summary judgment motions (id. at 8, ¶ 14) or that they "should shed light" on "discovery of other evidence." (id.).

Paragraph 18 of the Gingold Affidavit refers to documents requested by the Special Master-Monitor, but merely concludes that "it is expected" that such information "will provide additional evidence that is important and relevant to plaintiffs' opposition to defendants' motions for partial summary judgment." That conclusory remark utterly fails to demonstrate what

evidence Plaintiffs need and fails to show how it would demonstrate a genuine issue of material fact. Indeed, it would be difficult to come up with a better example of an insufficient statement under Rule 56(f).

The central focus of Defendants' Statute of Limitations Summary Judgment Motion is that Plaintiffs' cause of action accrued – and the statute of limitations began to run – when Plaintiffs' knew or should have known of allegations of trust violations. See Memorandum in Support of Statute of Limitations Summary Judgment Motion at 2. The material facts which support this contention are not contained in secret government documents unavailable to Plaintiffs. The summary judgment motion is not based upon what Defendants knew, but rather is based upon what Plaintiffs knew or should have known, as demonstrated by their own admissions and in publicly available documents. Therefore, Plaintiffs cannot claim that they need still more government documents in order to respond.

As discussed in Defendants' Memorandum accompanying the Statute of Limitations Summary Judgment Motion, the Court's 1998 opinion, Cobell v. Babbitt, 30 F. Supp. 2d 24, 44 (D.D.C. 1998), set the standard for the statute of limitations issues in this case. The Court ruled that the limitations period would run from when Plaintiffs knew or should have known of their right of action. 30 F. Supp. 2d at 44.

Defendants' Statute of Limitations Summary Judgment Motion addresses that precise question. The Statement of Material facts in support of the Statute of Limitations Summary Judgment Motion relies upon the named Plaintiffs' own deposition testimony and their other responses to discovery, public reports and documents that Plaintiffs cited in their recently filed plan and in their prior responses to discovery, other publicly available government reports, and

publicly available articles from the media and other public sources.

Because the summary judgment motion involves the question of what Plaintiffs knew, or should have known, and is based upon their own admissions and public documents that demonstrate knowledge or constructive knowledge, Plaintiffs cannot credibly assert a lack of access to the relevant information. Plaintiffs have not shown, and cannot show, that any specific evidence allegedly not produced to them would undercut the clear showing that they knew, or should have known, of their claims prior to October 1, 1984. Thus, they fail to show that alleged non-responsiveness to discovery justifies a continuance of the Statute of Limitations Summary Judgment Motion.

In addition, Plaintiffs have long known that the statute of limitations issue would come before the Court. If they lack any necessary evidence it is because they did not responsibly pursue such information. The Court's 1998 opinion (cited above) placed the parties on notice of the precise factual matters that it would consider in ruling on limitations questions. Plaintiffs would be hard-pressed to feign surprise that they now must present facts going to those questions. Plaintiffs have had almost four and a half years since the Court so ruled to gather their facts. Moreover, as discovery for Phase 1.5 commenced, Defendants expressly put Plaintiffs on notice that they intended to pursue the defense of limitations. See Discovery Conference Transcript at 112-13, 129 (Oct. 3, 2002) (statements of counsel for Defendants). If they believed that Defendants withheld information specifically pertinent to that issue, they should have sought relief long ago, rather than waiting in the grass and using an allegation of non-compliance as though it is a complete defense to responding on the merits.

This is the first time that Plaintiffs have indicated that they need additional information to

demonstrate that many of their claims in this case are not barred by the applicable statute of limitations and the doctrine of laches. Indeed, tellingly, no mention of this supposed need for additional information was made in their First Motion for Enlargement. For the reasons discussed below in Section III., Defendants would be unduly prejudiced if Plaintiffs are permitted their requested delay.

Plaintiffs have not met, nor can they meet, their burden of identifying the specific facts, which they reasonably expect to obtain in any further discovery, that are allegedly needed to oppose the Statute of Limitations Summary Judgment motion and create a triable issue of material fact.

B. Plaintiffs Have Had Ample Opportunity To Discover Facts Essential To Their Opposition, If Such Facts Existed

Because Plaintiffs have not identified which essential facts they reasonably expect to obtain from any further discovery, it is perhaps unnecessary for Defendants to address the conclusory allegations regarding the status of discovery in this litigation contained in the Gingold Affidavit. Defendants, however, do not want the wholly improper and misleading claims in the Gingold affidavit to go unchallenged and cloud the record in this case.

The Gingold affidavit identifies eight areas where Plaintiffs claim (in conclusory fashion) that additional discovery is needed. These areas are: (1) Paragraph 19 of the First Order for Production (Gingold Aff. at ¶¶ 3-5); (2) "1,001 Interrogatories,"[4] dated July 5, 2001, related to Treasury Defendants' Paragraph 19 productions (Gingold Aff. at ¶ 6); (3) Plaintiffs' formal Requests for Production of Documents, Two through Five ("RFP 2-5") (Gingold Aff. at ¶ 7);

---

[4] With subparts, over 1,500 interrogatories were included in this document.

(4) Plaintiffs' Eighth Formal Request for Production of Documents ("RFP 8") (Gingold Aff. at ¶ 7); (5) Production of emails by Defendants (Gingold Aff. at ¶¶ 8-11); (6) Production of Documents associated with what is described by Plaintiffs as the "Joe Christie Inventory" (Gingold Aff. at ¶¶ 12-13); (7) GAO correspondence (Gingold Aff. at ¶ 14); and (8) Documents associated with Special Master Monitor requests (Gingold Aff. at ¶ 18).

Paragraph 19 productions. As to Paragraph 19 discovery, Defendants' have produced over 460,000 pages of documents and have made available millions of more pages for inspection by Plaintiffs. See, e.g., Paragraph 19 Transmittal Letters, attached as Exhibit 1; Paragraph 19 Inspection Letters, attached as Exhibit 2. Plaintiffs have never even taken the opportunity to view any of these documents that Defendants have made available.

Contrary to the implication in the Gingold affidavit (Gingold Aff. at ¶¶ 3-6), Treasury Defendants have completed their Paragraph 19 production and a motion to purge contempt is pending before the Special Master on this issue. As Plaintiffs have noted, out of an abundance of caution, Interior continues to assess the completeness of its Paragraph 19 production. However, as described above, Interior has produced an enormous volume of Paragraph 19 documents at tremendous cost. Plaintiffs simply do not, and cannot, identify the specific facts essential to their opposition that they reasonably expect to come from any additional Paragraph 19 documents.

Moreover, Plaintiffs should not be heard now in their collateral attack on the Paragraph 19 production plans submitted to the Court by Defendants (see Gingold Aff. at ¶ 4). Plaintiffs allowed the Defendants to proceed with their bi-weekly status reports, detailing the progress of their compliance with Paragraph 19, and accepted the monthly reports of the Special Master detailing Defendants' Paragraph 19 search methodology without filing any pleading either

challenging the Plans or seeking any changes to the methodology being employed. Plaintiffs did not timely object to, or challenge, Defendants' Document Production Plans and have thus waived any objection to those plans.

"1,001" Treasury Interrogatories. As Plaintiffs well know, the set of "1,001" interrogatories, dated July 5, 2001, related to Treasury's compliance with its Paragraph 19 production obligations, were never signed nor properly served on Treasury.[5] See Correspondence between Counsel, attached as Exhibit 3. In addition, these interrogatories remain the subject of a Motion for Protective Order, filed by Treasury Defendants on July 13, 2001, pending before the Special Master. Moreover, even if the Court were to deny the Motion for Protective Order and require Treasury Defendants to answer, Plaintiffs have not identified any facts that they would reasonably expect to elicit from answers to these interrogatories that are essential for their opposition to Defendants' summary judgment motions.

RFP 2-5. Defendants have produced, or made available for inspection, approximately 35,000 pages of documents responsive to the requests in Plaintiffs' RFP 2-5, to which Defendants did not assert objections. See, e.g., Transmittal Letters, attached as Exhibit 4. Contrary to the surprising assertion by Mr. Gingold (Gingold Aff. at ¶ 7), Defendants did supplement their production after the Special Master issued a Report & Recommendation on Plaintiffs' motion to compel on May 11, 1999. See Transmittal Letter of May 25, 1999, attached as Exhibit 5.

On October 3, 2002, at the first Phase 1.5 discovery conference before Special Master-

---

[5] These interrogatories were transmitted by email to counsel for Treasury and described in that email as "1,001 Love You Nots."

Monitor Kieffer, Plaintiffs raised the issue of prior discovery which they claimed was outstanding. See Discovery Conference Transcript at 203-210 (Oct. 3, 2002), attached as Exhibit 6. In a letter issued the next day, the Special Master-Monitor told Plaintiffs that if they desired production of prior discovery which they felt had not been fully responded to and which were still relevant to remaining issues in the case they should go to the Court or Special Master Balaran for resolution of these matters. See Kieffer Letter of October 2[sic], 2002, attached as Exhibit 7. Plaintiffs did nothing. Plaintiffs should not get a continuance now if they were tardy over the last six months in seeking any old discovery they claim is outstanding, especially where, again, they are unable to identify specific facts which they reasonably expect to acquire from further discovery.

RFP 8. In Defendants' response to the 224 categories of document requests in Plaintiffs' RFP 8, served on December 16, 2002, Defendants asserted substantial objections. See Defendants' Joint Response to RFP 8, attached as Exhibit 8. Nevertheless, Treasury Defendants offered to make available certain documents for inspection by Plaintiffs and Interior Defendants have produced some responsive documents. See Joint Response to RFP 8; Transmittal Letter, attached as Exhibit 9. Plaintiffs did not avail themselves of the opportunity to inspect the Treasury documents and did not move to compel the production of any documents under RFP 8 to which Defendants had raised objection. More importantly, Plaintiffs again fail to identify any fact related to the summary judgment motion which they reasonably expect to obtain from an RFP 8 document request.

Emails. Defendants have produced thousands of emails to Plaintiffs in this litigation. See, e.g., Declaration of Michael Kingsley, attached as Exhibit 10. Plaintiffs make no attempt to

identify any prior discovery request to which an allegedly unproduced email would be responsive, much less reasonably likely to elicit a particular fact which Plaintiffs claim to need in order to respond to Defendants' summary judgment motion.

Joe Christie Inventory. Attached as Exhibit 1 to the Gingold Affidavit is a document which Plaintiffs cryptically refer to as the "Joe Christie Inventory." Plaintiffs do not identify who authored this document, when it was created, or how they obtained it. Curiously, the fax line across the top of each page, which might provide some clue as to the source of the document, has been mysteriously blacked out.

Assuming the "Joe Christie Inventory" is itself authentic, and identifies authentic documents, Plaintiffs do not identify whether the inventory itself would be responsive to any prior document request and do not identify which prior requests they believe would call for the production of any of the documents described in the "inventory." Although Mr. Gingold concludes, without elucidation, that a listed subset of the "Joe Christie Inventory" documents "appear relevant to each of defendants' partial motions for summary judgment" (Gingold Aff. at ¶ 13), Plaintiffs' counsel again fails to grasp the requirement of Rule 56(f).[6] Plaintiffs must show what facts they reasonably expect to obtain from a document they claim should have been previously produced, and how those facts create a triable issue of material fact that would defeat summary judgment.

GAO correspondence. The requested GAO correspondence has already been produced

---

[6] It should also be noted that Plaintiffs only ask for a continuance of the Accounting Plan and Trust Management Plan Summary Judgment Motions until 10 days after the final expert deposition. With respect to those summary judgment motions, they do not ask for a continuance until after some putatively relevant documents are produced.

to Plaintiffs. See Transmittal Letter, attached as Exhibit 11. As with each of the other categories, although Plaintiffs airily conclude that this requested correspondence is related to the summary judgment motions (Gingold Aff. at ¶ 14), Plaintiffs do not describe the facts essential to their oppositions that this correspondence could reasonably be expected to contain.

Special Master-Monitor Requests. Plaintiffs have been given copies of all non-privileged documents that were produced to the Special Master-Monitor in response to his various requests. See, e.g., Transmittal Letters, attached as Exhibit 12. Plaintiffs do not cite any Order or Federal Rule of Civil Procedure, and Defendants are unaware of any, that would require a party to produce privileged information to the opposing party where such information has been produced to a court, or court-appointed official, for in camera review, and has been included on a privilege log. In any event, Plaintiffs again fail to disclose which necessary facts they expect to obtain by the production of further documents to the Special Master-Monitor.

Additional Document Productions. Although not addressed by Plaintiffs, the Court should be aware that, in addition to the documents produced to Plaintiffs as described above, Defendants have produced to Plantiffs, or made available for inspection, hundreds of thousands of pages of documents pursuant to: (1) informal requests by Plaintiffs; (2) Plaintiffs' various interrogatories; (3) RFP 6; (4) RFP 7; and (5) Special Master Balaran requests. See, e.g., Transmittal Letters, attached as Exhibit 13. In short, Plaintiffs have received a remarkable amount of information from Defendants over the course of this litigation.[7] It is entirely

---

[7] In addition to the immense number of documents that Defendants have produced thus far, Plaintiffs have also received considerable information from Defendants' answers to interrogatories. Plaintiffs have also gathered, or had the opportunity to gather, facts potentially related to their oppositions from the numerous depositions they have conducted.

inappropriate, on the eve of the Phase 1.5 trial, to grant Plaintiffs a continuance of any summary judgment motion.

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO SHOW THE NEED FOR A CONTINUANCE OF DEFENDANTS' ACCOUNTING PLAN AND TRUST MANAGEMENT PLAN SUMMARY JUDGMENT MOTIONS

Plaintiffs ask that the Accounting Plan and Trust Management Plan Summary Judgment Motions be continued "until 10 days after the final expert witnesses depositions." Motion for Continuance at 1. The only support they offer for this request is the conclusory allegation in the Gingold Affidavit that "additional significant information" will be elicited from the deposition testimony of the experts retained by Defendants for Phase 1.5 trial. Gingold Aff. at ¶ 17.

As discussed above, the standard for Rule 56(f) requires that a movant demonstrate facts essential to their opposition that they reasonably expect to elicit from further discovery. Plaintiffs do not identify what facts they expect to uncover during expert depositions. Perhaps this is because it is difficult to comprehend how Plaintiffs can reasonably expect to obtain facts from expert witness testimony, when an expert only testifies as to his opinion, based upon facts supplied by someone else. If an expert is testifying as to facts, he is no longer testifying as an expert. Plaintiffs cannot reasonably expect to elicit any facts from further expert witness deposition testimony.

It is also surprising that Plaintiffs would now request such a continuance. The Scheduling Order – to which Plaintiffs agreed – set a very carefully crafted sequence of events leading up to Phase 1.5 trial. Summary judgment motions were to be filed on January 31, 2003. Scheduling Order at 1. Expert discovery was to conclude on April 10, 2003. Scheduling Order at 2. No provision was made in the Scheduling Order to modify LCvR 7.1(b) and permit

oppositions to summary judgment motions to be filed on April 21, 2003 – seven business days before trial begins. If such a schedule as is suggested now by Plaintiffs were adopted, Defendants' replies to Plaintiffs' oppositions would be due on the day trial begins. Indeed, even Plaintiffs implicitly recognized that such a delay in filing an opposition would prejudice Defendants when they told the Court in their First Motion for Enlargement that they would file their oppositions 45 days prior to trial, and that this amount of time should not be deemed prejudicial to Defendants. First Motion for Enlargement at 3. Plaintiffs also failed to disclose in their First Motion for Enlargement their current urgent need to obtain expert witness testimony in order to respond to Defendants' summary judgment motions.

Plaintiffs' extraordinary, and wholly unsupported, Motion for a Continuance of the Accounting Plan and Trust Management Plan Summary Judgment Motions should be denied.

III. PLAINTIFFS' SECOND MOTION FOR ENLARGEMENT OF TIME TO RESPOND SHOULD BE DENIED

Plaintiffs squeeze in at the very end of their Motion for Continuance a "request" that if the Court denies their Motion for Continuance, they still get "10 days within which to respond to defendants' three motions for summary judgment." Motion for Continuance at 9. Plaintiffs' responses are already untimely. Defendants have already been prejudiced by Plaintiffs' delay in responding. At a critically important time of trial preparation, Defendants have had to waste valuable time in responding to Plaintiffs' two meritless Motions for Enlargement. For all of the reasons described in Defendants' Opposition to Plaintiffs' First Motion for Enlargement, which have only been exacerbated by the <u>further</u> enlargement Plaintiffs seek, Defendants will be unduly prejudiced by permitting Plaintiffs to file their oppositions at this late date. Plaintiffs' delay has also made it virtually impossible that the Court will have sufficient time to appropriately

consider, and rule upon, Defendants summary judgment motions. It would be unconscionable to permit Plaintiffs' to have 10 more days of delay on top of the more than 40 days they have already taken. Plaintiffs' second motion for enlargement should be denied.

CONCLUSION

For these reasons, Plaintiffs' Motion for Continuance should be denied.

Dated: March 27, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Plaintiffs' Motion to Continue Defendants' Motions for Summary Judgment Pursuant to Fed. R. Civ. P. 56(f) and to Enlarge Plaintiffs' Time to Respond Thereto. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs' Motion for a Continuance is DENIED;

ORDERED that Plaintiffs' Motion for an enlargement of time is DENIED.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

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

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 27, 2003, I served the foregoing *Defendants' Opposition to Plaintiffs' Motion to Continue Defendants' Motions for Summary Judgment Pursuant to Fed. R. Civ. P. 56(f) and to Enlarge Plaintiffs' Time to Respond Thereto* by U.S. Mail upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, DC 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, NW
Ninth Floor
Washington, DC 20004
202-318-2372

(Courtesy copy of Defendants' Opposition without exhibits by facsimile on Messrs. Harper, Gingold)

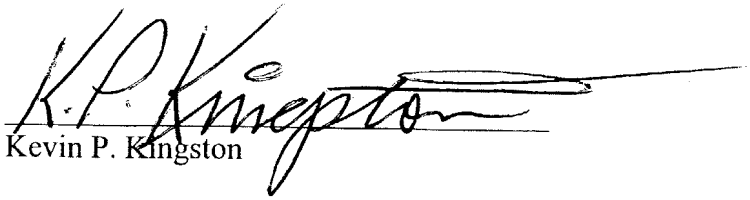
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

and by hand upon:

Joseph S. Kieffer, III, Esq.
Special Master-Monitor
420 7th Street, NW
Apt 705
Washington, DC 20004

facsimile of Defendants' Opposition without exhibits, and complete copy to be delivered by hand on March 28, 2003 upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., NW
12th Floor
Washington, DC 20006
202-986-8477



Kevin P. Kingston