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 A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTIONS FOR PROTECTIVE ORDERS WITH REGARD TO PLAINTIFFS' NOTICES OF DEPOSITION DIRECTED TO DONNA ERWIN AND ELOUISE CHICHARELLO AND REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED TO INTERIOR DEFENDANTS AND OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL

I. Procedural Overview

Without any prior communication with Defendants' counsel, Plaintiffs served a deposition notice dated October 30, 2003, regarding Ms. Donna Erwin, which included a request for production of documents directed to Interior Defendants. In serial fashion, Plaintiffs subsequently served, without prior communication, a deposition notice dated November 5, 2003, regarding Ms. Elouise Chicharello. Following a meet-and-confer conference initiated by Defendants' counsel, Defendants filed separate motions for protective orders with regard to these discovery notices. *Defendants' Motion for a Protective Order with Regard to Plaintiffs' Notice of Deposition Directed to Donna Erwin and Request for Production of Documents Directed to Interior Defendants* (filed Nov. 19, 2003) (Dkt. # 2386) ("Erwin Motion"); *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Elouise Chicharello* (filed Nov. 20, 2003) (Dkt. # 2388) ("Chicharello Motion").

Although Plaintiffs served separate notices and a document production request, and Defendants filed separate motions for protective orders regarding these requests, Plaintiffs have further complicated the procedural history surrounding their discovery requests by filing a combined opposition to the protective order motions, combined with an unsupported motion to compel.[1] *Plaintiffs' Consolidated Opposition to Defendants' Motions for Protective Orders Regarding the Depositions of Donna Erwin, [sic] and Elouise Chicharello and Related Request for Production of Documents and Motion to Compel* (filed Dec. 3, 2003) (Dkt. # 2410) ("Plaintiffs' Consolidated Brief" or "Pl. Cons. Br.").[2] In an attempt to simplify the procedural morass created by Plaintiffs' various notices and pleadings, this pleading is filed as a consolidated reply brief in support of Defendants' separate motions for protective orders and in

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[1] Although Plaintiffs' pleading seeks relief in the form of a motion to compel, Plaintiffs' do not explain why such a motion is necessary. In fact, Plaintiffs' pleading does not even discuss the standards for such a motion, pursuant to Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure, or how Plaintiffs' purport to meet their burden under those standards. Moreover, Plaintiffs' motion to compel does not include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action," as required by Federal Rule 37(a)(2)(B), nor does it comply with Local Civil Rule 7(m)'s meet-and-confer requirements. Notwithstanding Plaintiffs' disregard for the requirements of the Federal and Local Rule provisions designed to conserve judicial resources, as we explain below, Plaintiffs' requests for relief in the form of orders compelling discovery are without any merit and should be denied.

[2] Plaintiffs subsequently filed a corrected version of this consolidated brief. *Plaintiffs' Notice of Errata Regarding: (1) Consolidated Opposition to Defendants' Motions for Protective Orders Regarding the Depositions of David L. Bernhardt, Lucy Querques Denett and Gabriel Sneezy and Motion to Compel; (2) Consolidated Opposition to Defendants' Motions for Protective Orders Regarding the Depositions of Donna Erwin, [sic] and Elouise Chicharello and Related Request for Production of Documents and Motion to Compel; and (3) Reply in Support of Plaintiffs' Motion to Compel Production of MMS Audit Documents and Deposition of Gibbs, Tshudy and Kimball and Request for Sanctions Pursuant to Rule 37* (filed Dec. 8, 2003) (Dkt. # 2414).

opposition to plaintiffs' motion to compel.

II. Plaintiffs' Consolidated Brief Fails to Demonstrate That Plaintiffs Are Entitled to Conduct Any Discovery At This Time

Plaintiffs' Consolidated Pleading opens with generalized statements that they have "legitimate and important interests at stake in this litigation." Pl. Cons. Br. at 5-6. They further attack Defendants' motions, asserting that Defendants have failed to show sufficient good cause for a protective order. Id. (discussing Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986), and Alexander v. FBI, 186 F.R.D. 1 (D.D.C. 1998)). Plaintiffs' reliance upon these two cases is plainly flawed and should be rejected.

Cipollone has no application to the issues presented by Defendants' motions for protective orders. In Cipollone, the district court was asked to consider the appropriateness of an umbrella protective order that would have barred public disclosure of matters that the defendants argued should be considered presumptively confidential. Purportedly relying upon Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the district court rejected a magistrate's protective order approving such a protective order. 785 F.2d at 1115. The district court further amended the magistrate's protective order to require "a document-by-document showing to the court that each document they believed to be confidential was so in fact." Id.

Contrary to the suggestion implicit in Plaintiffs' reliance upon Cipollone, however, the appellate court did not consider the sufficiency of the bases cited by the movants seeking protection. Rather, the Third Circuit rejected the district court's application of Seattle Times and remanded the case for determinations whether public dissemination of the discovered materials would cause annoyance and embarassment. In so doing, the appellate court also rejected the

district court's insistence upon a document-by-document showing for protection and, in fact, "commend[ed] the umbrella approach for consideration of the district courts in [the Third Circuit] in complex cases." 785 F.2d at 1123.[3] Thus, the dictum quoted by Plaintiffs in their brief simply does not address whether Defendants' motions have sufficiently established good cause for preventing the discovery sought in Plainitiffs deposition notices and document production requests.

Plaintiffs also rely upon this Court's prior opinion in Alexander for the proposition that a movant seeking protection must demonstrate entitlement to such relief by specific facts, rather than conclusory or speculative statements, and that the showing must be sufficient to overcome the other party's "legitimate and important interests." Pl. Cons. Br. at 5-6 (quoting Alexander). Plaintiffs' discussion of Alexander omits the Court's guidance, however, that "good cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarassment, oppression, or undue burden or expense." 186 F.R.D. at 3. Defendants' motions confirm that Plaintiffs' discovery requests are wide-ranging and unbounded and that Plaintiffs' counsel has repeatedly refused to identify any relevant subject areas for the inquiries. See Erwin Motion at 4-5; Chicharello Motion at 3-4. Simply put, the discovery requests are "roving inquiries" as to which protective orders are appropriate to bar discovery efforts that would cause annoyance, embarassment, or undue burden or expense.

Moreover, Plaintiffs' discussion of Alexander misstates the Court's language. While Plaintiffs assert that Alexander requires a showing of good cause "to overcome plaintiffs'

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[3] Given the prior history in this litigation, in which Plaintiffs repeatedly have attacked Defendants' efforts to utilize umbrella protective orders in an effort to facilitate more efficient discovery, Plaintiffs' reliance upon Cipollone is surprising in this regard.

legitimate and important interests in these proceedings" Pl. Cons. Br. at 6 (emphasis added), the actual language of the Court was that "the showing required under Rule 26(c) must be sufficient to overcome plaintiffs' legitimate and important interests in trial preparation," 186 F.R.D. at 3 (emphasis added). While we recognize that Plaintiffs did not purport to be quoting Alexander in this sentence of their brief, the reason Plaintiffs chose to forego the quotation at this point is obvious: as we explained in our protective order motions, Plaintiffs have no interests in trial preparation at this time.

Relying upon their mischaracterization of Alexander, Plaintiffs' Consolidated Brief asserts that discovery should be permitted because the Plaintiffs purportedly "have legitimate and important interests at stake in this litigation." Pl. Cons. Br. at 5. Plaintiffs make no attempt to define those interests – which are not apparent given the current status of the case – but rely upon this Court's presumed awareness of such interests. Id. at 6.[4] As we explained in our motions for protective orders, where the Court has issued its structural injunction following the Phase 1.5 trial and that matter is currently before the appellate court and subject to an administrative stay, and no further trial proceedings have been scheduled in this matter, Plaintiffs have no interests in

[4] While not referring to it in their argument, Plaintiffs have attached to their consolidated brief a copy of the Special Master's Site Visit Report regarding the Office of Appraisal Services of the Navajo Regional Office in Gallup, New Mexico, and the BIA's Realty Office in Window Rock, Arizona. Plaintiffs do not explain in their consolidated brief how this is germane to the historical accounting issues before the Court, however; the Special Master's Report is only attached to describe Ms. Chicharello's responsibilities and to recite the Special Master's conclusion about the adequacy of the Interior Department's appraisal process. Such a claim is plainly the sort of common law "mismanagement" claim previously excluded by the Court from consideration in this action. See Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998).

trial preparation at this time.[5]

III. Contrary to Plaintiffs' Assertion That They Are Authorized to Conduct "Full Discovery," No Discovery Is Currently Authorized By This Court

Relying upon the Federal Rules of Civil Procedure and the Court's October 17, 2002 Phase 1.5 Trial Discovery Order, Defendants demonstrated in the Erwin Motion and the Chicharello Motion (collectively the "Motions") that no discovery is appropriate or permissible at this stage of the litigation. In response, Plaintiffs rely exclusively upon the language of the Court's September 17, 2002 Order restoring certain discovery rights that had been previously denied to them in this case. They contend that the September 17, 2002 Order conferred upon them "'full discovery' rights" and make the remarkable argue that Defendants have not identified any Order which restricts their discovery now that the Phase 1.5 trial has concluded. Pl. Cons. Br. at 6-8. Plaintiffs have unaccountably chosen to ignore the language in the Federal Rules and the October 17, 2002 Order, discussed in the Motions, that unambiguously restricts Plaintiffs' discovery rights.

The September 17, 2002 Order merely restored the usual discovery rights that had been denied Plaintiffs by a previous order. After entry of the September 17, 2002 Order, Plaintiffs were in the same position as any other litigant with regard to their discovery rights. On October 17, 2002, the Court entered its Phase 1.5 trial discovery scheduling order. See Phase 1.5 Discovery Schedule Order (October 17, 2002). Pursuant to that Order, fact discovery closed on

[5] As we explain below, Plantiffs are simply wrong in arguing that they currently have discovery rights in this case.

March 24, 2003,[6] and all discovery terminated on April 10, 2003. Plaintiffs do not, and cannot, explain how the September 17, 2002 Order granted them discovery rights that exceed the limits established by the Court's scheduling order. There is no other order granting Plaintiffs the unfettered right to conduct discovery, and the fact that Plaintiffs cite none in their consolidated brief confirms the dearth of such authority.

Plaintiffs'argument also defies the Federal Rules of Civil Procedure, which forbid discovery prior to a Rule 26(f) planning conference, as described in the Motions.[7] See Fed. R. Civ. P. 26(d). The parties have not held a discovery planning conference on any post-Phase 1.5 proceeding. Therefore, discovery has not commenced for any subsequent proceedings, and Plaintiffs are precluded from requesting documents and noticing depositions, without leave of Court. Fed. R. Civ. P. 26(d) and 30(a)(2)(C).

IV. Even Assuming, for the Sake of Argument, That the APA Restrictions on Discovery Are Not Applicable in This Case, Plaintiffs Have Failed to Identify Any Relevant Discovery Sought In Their Requests

As explained in the Motions, Defendants reject Plaintiffs' assertion that the APA restrictions do not apply to discovery in this case. Erwin Motion at 2 note 2 (incorporating by reference *Defendants' Motion for Protective Order Regarding Plaintiffs' Notice of Deposition of*

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[6] The close of fact discovery was subsequently extended by the Special Master-Monitor until March 28, 2003.

[7] One exception to this prohibition is that Rule 27(b) permits a district court to allow, upon motion that sets forth certain prescribed information, the taking of depositions of witnesses to perpetuate testimony "for use in the event of further proceedings in the district court," pending appeal of a judgment. Fed. R. Civ. P. 27(b). Plaintiffs have not filed any such motion to take the depositions noticed here and therefore have obviously not met the requirements of Rule 27.

the Secretary of Interior, pages 5-7 (filed Nov. 10, 2003)); Chicharello Motion at 2 note 3 (same). For the sake of brevity, we will not restate those arguments here, but even if the restrictions on discovery in APA cases were disregarded,[8] Plaintiffs are not permitted to use the Federal Rules of Civil Procedure to discover all information that might otherwise be obtainable by an IIM trust beneficiary. Plaintiffs must still establish that the information sought is relevant to the litigation.

Plaintiffs claim that they need the noticed depositions and document requests because "all information of this trust belongs to the plaintiffs and they have a right to such information irrespective of litigation – by right as beneficiaries." Pl. Cons. Br. at 9-10. Notwithstanding this overly broad assertion, Plaintiffs only represent the certified class of IIM beneficiaries with respect to the issues and claims in this lawsuit. Simply alleging that a beneficiary has a right to certain information about the IIM trust is not enough to make that information relevant to this lawsuit, and thus discoverable under the Federal Rules. If beneficiaries believe that they have a right under trust law to certain information they should ask the appropriate Interior official for that information in the ordinary course of business. The Plaintiffs in this class action, however, are not entitled to use the formal discovery mechanisms in the Federal Rules of Civil Procedure to gather information that beneficiaries would merely like to obtain: the requested information must be *relevant* to an issue in this litigation. Fed. R. Civ. P. 26(b)(1) ("Parties may obtain

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[8] Plaintiffs apparently acknowledge that discovery is impermissible in APA cases, but argue that such a restriction should not apply here because this case is "not a conventional APA case where discovery restrictions apply." Pl. Cons. Br. at 9. Defendants are unaware of a uniqueness exception in the APA that would permit otherwise unauthorized discovery in any APA case that a plaintiff designates as special. In short, the restrictions on discovery in all APA cases apply with equal force to this APA case, notwithstanding its supposedly unconventional status.

discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.").

Consistent with their previous serial filings related to their discovery attempts, in their consolidated brief, Plaintiffs identify the position and some of the responsibilities of Ms. Erwin and Ms. Chicharello, and allege that each has personal knowledge of information related to the IIM trust. Pl. Cons. Br. at 2-4. Plaintiffs do not explain how any information they could possibly elicit from these two individuals or the documents sought from the Interior Defendants would be relevant to a claim that is being litigated in any current proceeding requiring discovery, however, nor can they because, as Defendants have explained already, there are no current proceedings that require discovery.

Moreover, even if, in the future, there are proceedings pending for which discovery becomes appropriate, Plaintiffs are only be entitled to the discovery of information related to the claims or defenses of a party. Fed. R. Civ. P. 26(b)(1). Plaintiffs simply are not entitled to discover any information they seek merely because it has some relation to the IIM trust.

Conclusion

For the reasons set forth in the Erwin Motion and the Chicharello Motion and the foregoing reasons, Defendants respectfully request that this Court grant the protective orders sought in the Erwin Motion and the Chicharello Motion and that the Court deny Plaintiffs' Motion to Compel.

Respectfully submitted,

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December 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2003 the foregoing *Defendants' Consolidated Reply Brief in Support of Motions for Protective Orders with Regard to Plaintiffs' Notices of Deposition Directed to Donna Erwin and Elouise Chicharello and Request for Production of Documents Directed to Interior Defendants and Opposition to Plaintiffs' Motions to Compel* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Plaintiffs,	)	
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	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on *Defendants' Motion for a Protective Order with Regard to Plaintiffs' Notice of Deposition Directed to Donna Erwin and Request for Production of Documents Directed to Interior Defendants* (filed Nov. 19, 2003) (Dkt. # 2386); *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Elouise Chicharello* (filed Nov. 20, 2003) (Dkt. # 2388)*; and Plaintiffs' Motion to Compel* (filed Dec. 3, 2003) (Dkt. # 2410) these depositions. Upon consideration of the Motions, the responses thereto, and the record in this case, it is hereby

ORDERED that *Defendants' Motion for a Protective Order with Regard to Plaintiffs' Notice of Deposition Directed to Donna Erwin and Request for Production of Documents Directed to Interior Defendants* (Dkt. # 2386) is GRANTED; and it is further

ORDERED that the Plaintiffs are precluded from deposing Donna Erwin at this time; and it is further

ORDERED that the Plaintiffs are precluded from pursuing the document production requests attached to the deposition notice for Donna Erwin dated October 30, 2003; and it is further

ORDERED that *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Elouise Chicharello* (Dkt. # 2388) is GRANTED; and it is further

ORDERED that the Plaintiffs are precluded from deposing Elouise Chicharello at this time; and it is further

ORDERED that Plaintiffs' Motion to Compel the depositions of Donna Erwin and Elouise Chicharello and responses to the document production requests attached to the deposition notice for Donna Erwin dated October 30, 2003 (Dkt. # 2410) is DENIED;

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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