

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, et al., |) | |
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| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 1:96CV01285 |
| |) | (Judge Robertson) |
| DIRK KEMPTHORNE, Secretary of the Interior, et al., |) | |
| |) | |
| Defendants. |) | |
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**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’
MOTION IN LIMINE TO EXCLUDE TESTIMONY OF ALL WITNESSES,
INCLUDING EXPERT WITNESSES, WHOSE SUPPORTING
DOCUMENTATION HAS NOT BEEN PROVIDED**

Defendants respectfully oppose Plaintiffs’ Motion in Limine to Exclude Testimony Of All Witnesses, Including Expert Witnesses, Whose Supporting Documentation Has Not Been Provided (Dkt. No. 3405) (filed Sept. 21, 2007) (“Plaintiffs’ Motion” or “Pl. Mot.”).¹ In their motion, Plaintiffs seek to preclude the complete testimony of eight witnesses identified by Defendants. Plaintiffs have characterized these witnesses as “defendants’ designated experts” despite the fact that two are fact witnesses and four others are identified by Defendants as witnesses who will offer both fact and expert testimony. Pl. Mot. at 1. Because Defendants have provided Plaintiffs with all the required disclosures, and for the additional reasons set forth below, this Court should deny Plaintiffs’ Motion.

¹ In accordance with the Court’s directive, Defendants are filing this response on an expedited basis. See Tr. 70:1-7 (May 14, 2007).

I. Defendants’ Witnesses Who May Offer Expert Opinions Have Disclosed Those Documents That They Considered In Reaching Their Opinions And Are Not Required To Produce More

Contrary to Plaintiffs’ allegation, Defendants have not failed to produce documents considered by Defendants’ witnesses in the preparation of their expert reports. Defendants have provided all such materials to Plaintiffs.

Defendants are not required to go further and produce every document that these witnesses may have seen throughout the long course of their performance related to the Department of the Interior’s historical accounting project. Federal Rule of Civil Procedure 26(a)(2)(B) requires disclosure of only the “data or other information considered by the witness in forming the opinions,” FED. R. CIV. P. 26(a)(2)(B), and not every document the expert may have encountered, viewed, or prepared over the years in the course of work on the historical accounting project. Also, the fact that some witnesses may testify as both fact and expert witnesses creates no requirement that all documents related to their fact testimony be produced. See Bynum v. MVM, Inc., 241 F.R.D. 52, 53-54 (D.D.C. 2007) (a treating physician may be both a fact and expert witness and, as a fact witness, is not subject to the disclosure requirements of Rule 26(a)(2)). Plaintiffs have cited no authority to the contrary.² Instead, consistent with

² The cases cited by Plaintiffs are inapposite. In those cases, the experts were specially retained to provide expert testimony and had not been involved in the matter for years in a regular personal capacity. Their reports or testimony were not excluded because they failed to provide years of background information. See Mems v. City of St. Paul, Dept. Of Fire and Safety Services, 327 F.3d 771, 779-80 (8th Cir. 2003) (doctor re-interviewed plaintiffs during recess week of trial and did not provide new information on plaintiffs’ symptoms until night before he was to testify); Sharpe v. United States, 230 F.R.D. 452, 458 (E.D.Va. 2005) (doctors’ expert reports rejected because they were conclusory and provided no supporting rationale). In Day & Zimmerman, Inc. v. United States, 38 Fed. Cl. 591, 599 (1997), a Government fact witness had a significant document in her hotel room, but it had not been made available to the opposing party. In that situation, the court rejected the Government’s request to allow the

claims made in Plaintiffs' other recent motion, their allegation here is erroneously premised on the view that Rule 26(a)(2) effectively mandates disclosure of every document ever reviewed by these individuals during the several years they have performed work related to Interior's historical accounting project.³

As Plaintiffs readily acknowledge, many of these witnesses have been employed by Interior for years and have performed work for Interior related to the historical accounting project. Pl. Mot. 3-6, 9. Because some of these individual witnesses are both fact and expert witnesses, a common sense distinction must be made between those documents which these individuals actually considered in preparing their expert reports and those encountered only in their work on the historical accounting project and which may reflect their knowledge that they bring to the task.

Moreover, Plaintiffs' argument is based upon assumptions or allegations that are in several instances simply incorrect. For example, Plaintiffs assert that "Ms. Dunne has been involved in completeness testing, specifically identifying a "Land to Dollar" Completeness Test at the Horton Agency. Dunne Report at p. 17." Pl. Mot. at 6. However, neither Ms. Dunne nor her firm was involved in completeness testing at the Horton agency, and her report does not indicate otherwise. Ms. Dunne merely reviewed a document that had in fact first been considered by Plaintiffs' expert, Don M. Pallais, see Pallais Report at 34, and she therefore listed it as one of the items considered for her responding report. Similarly, the mere fact that historic

witness to testify about its contents.

³ See Plaintiffs' Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding NORCs Meta-Analysis (September 20, 2007) [Dkt. 3402].

documents generated by Ms. Dunne's firm were referenced in the Administrative Record does not support an assumption that she considered them for her report nor provide a reason that those documents should have been produced to Plaintiffs under Rule 26(a)(2).

Other examples of Plaintiffs' erroneous assumptions relate to documents prepared by Morgan Angel. Pl. Mot. at 9. Plaintiffs' first bullet notes the existence of an "MMA report," but the cite actually refers to data reflecting year-end IIM balances. Defendants produced this data to Plaintiffs as DX 94 ("Total IIM Chart"), as well as the accompanying exhibits that support the chart. Plaintiffs' second bullet actually refers to data (not a report) concerning tribal receipts (not IIM), and also refers to "investment" documents produced to Plaintiffs as DX 8 - DX 25. Plaintiffs' third bullet refers to the identical data referenced in Plaintiffs first bullet, already produced by Defendants. Plaintiffs' fourth bullet quotes a NORC report's cites to several "MAA Preliminary Historical Research Reports." Pl. Mot. at 9. However, Defendants provided those "Preliminary Historical Research Reports" to Plaintiffs prior to the Phase 1.5 trial. See Tr. 3:10-16; 6:8-10 (June 17, 2003, AM).⁴

Plaintiffs also erroneously and unreasonably demand Historical Research Associates (HRA) documents. Pl. Mot. at 8. Though it is difficult to determine from the AR citations in Plaintiffs' first two bullets (2001 NORC report; 2002 CDL report) what specific HRA case studies Plaintiffs are requesting, what is clear is that Plaintiffs had access to 10 HRA documents during the Phase 1.5 trial, Tr. 75:10-77:13; 80:2-21; 83:13-85:18 (June 18, 2003, PM), and that

⁴ The NORC report cited in Plaintiffs' fourth Morgan Angel bullet also references "Statistical Tables," though it is unclear whether Plaintiffs claim those are Morgan Angel documents. Regardless, Defendants produced Statistical Table 3 to Plaintiffs during the Phase 1.5 trial as part of the "Indian land tenure report." Tr. 13:21-14:2 (June 12, 2003, PM).

they have listed 12 HRA reports on their current exhibit list as PPX 0854-0865. Plaintiffs' third bullet refers to an HRA report itself in the AR, but Plaintiffs nevertheless require the "CDs containing databases and images collected by HRA during 34 case studies." Pl. Mot. at 8. Clearly, Plaintiffs are asking for far more than is required under Rule 26(a)(2)(B).

With regard to Dr. Lasater, Plaintiffs cite numerous categories of FTI, KPMG, and Arthur Andersen documents and assert, with no factual basis, that Dr. Lasater considered them in forming the opinion in his August 16, 2007 expert report. A review of Dr. Lasater's report confirms that he listed, with great specificity, the documents and other information he considered, and Plaintiffs have been provided access to all of the materials considered by Dr. Lasater. Thus, Dr. Lasater's report complies with Rule 26(a)(2) and this Court's rulings, and Plaintiffs' assertions are wholly without merit.

II. Michelle Herman And James Hammond Will Not Be Presented As Expert Witnesses And Are Not Expected To Present Substantial Opinion Testimony

Plaintiffs erroneously characterize the expected testimony of Ms. Herman and Mr. Hammond as expert testimony. Ms. Herman has not prepared an expert report, nor is she required to do so to provide fact testimony. The Court has previously permitted her to testify as a fact witness, over the objections of plaintiffs, at the Phase 1.5 trial. Tr. 3:9-6:11 (June 6, 2003, AM). She will similarly offer fact testimony at the trial commencing on October 10. Any opinion testimony she may offer will only be incidental to her work experiences about which she will be testifying and will not constitute substantial opinion testimony. Accordingly, no basis exists to exclude Ms. Herman's testimony based upon the contention that documents related to the historical work that she and her firm have performed have not been provided to Plaintiffs.

Similarly, Mr. Hammond shall, if he testifies, be called upon to provide only fact testimony regarding the work he has performed, including his role in the development of Interior's Accounting Standards Manual and his use of that document. Therefore, the fact that Plaintiffs have not received every document that may have been generated by Mr. Hammonds' firm, Deloitte Touche, does not provide a basis to exclude his factual testimony.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Dated: September 25, 2007

Respectfully submitted,

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Deputy Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion In Limine to Exclude Testimony of All Witnesses, Including Expert Witnesses, Whose Supporting Documentation Has Not Been Provided* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
Kevin P. Kingston

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| ELOUISE PEPION COBELL, <u>et al.</u> , |) | |
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| |) | |
| DIRK KEMPTHORNE, |) | |
| Secretary of the Interior, <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |

ORDER

This matter comes before the Court on *Plaintiffs’ Motion In Limine to Exclude Testimony Of All Witnesses, Including Expert Witnesses, Whose Supporting Documentation Has Not Been Provided* [Dkt. No. 3405]. Upon consideration of the Plaintiffs’ Motion, Defendants’ Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

United States District Judge

Date: _____