IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR AN ENLARGEMENT OF TIME

On August 28, 2007, Plaintiffs filed a motion [Dkt. 3375] seeking to enlarge the amount of time Plaintiffs will have to proffer affidavits or declarations of absent fact witnesses in lieu of personal appearance at trial. Although Defendants have been and remain willing to accommodate reasonable and well-grounded requests for additional time, Plaintiffs' request for more time is in this instance neither reasonable nor well-grounded. Defendants, therefore, promptly submit this opposition to Plaintiffs' motion and request that their motion be denied in all respects. The grounds for Defendants' opposition are as follows:

1. This matter is set for an evidentiary hearing commencing October 10, 2007. At the last status conference, on July 9, 2007, Plaintiffs sought leave to take *de bene esse* depositions of fact witnesses that Plaintiffs claimed could not appear for trial. The Court denied leave for such depositions but authorized Plaintiffs to submit an affidavit or declaration from each such witness providing a proffer of testimony and averring the justification for the witness' inability to appear personally at trial.

2. The Scheduling Order [Dkt 3359] entered by the Court on July 11, 2007

establishes the ground rules and deadlines for proffering such testimony:

> If plaintiffs wish to offer statements, by affidavit or declaration, of persons unable to attend the trial because of some disability, they must provide such statements to defendants by August 31, together with appropriate identification of the affiants or declarants and the reasons why they cannot appear for trial. Objections must be made by September 7 and will be ruled on immediately. Upon notice by the government under Rule 30, any such affiant or declarant must be made available for *de bene esse* deposition a reasonable time before trial.

Id. ¶ 4. Thus, Plaintiffs are presently obligated to submit their sworn proffers by August 31, 2007, with Defendants to object by September 7, and to complete any *de bene esse* depositions before trial.

3. Despite being aware at the time of the July 9 status conference that certain witnesses would likely be unable to appear personally at trial, Plaintiffs have as yet still not tendered one such affidavit or declaration. Instead, Plaintiffs filed their August 28 motion for an extension, just days before the ordered deadline of August 31, seeking what amounts to a forty-day enlargement of time to file the absent witness affidavits or declarations. If the motion were granted, these witnesses and the circumstances surrounding their availability and testimony would remain unknown to Defendants until October 10, 2007, the opening date of the trial. Such a late disclosure would needlessly prejudice Defendants' ability to prepare for the trial and would inevitably force Defendants to conduct fact investigations and depositions contemporaneously with the presentation of Defendants' case-in-chief.[1]

4. Plaintiffs' sole stated reason for the extension of time is dubious at best. The only reason stated is that Plaintiffs desire to see Defendants' response to Plaintiffs' August 8, 2007

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[1] It was agreed before the Court that although Plaintiffs bear the burden of proof in the case, Defendants would go first with their evidence to aid the Court's consideration of the historical accounting plan adopted by Interior Defendants.

request for production [Dkt. 3366] ("RFP") before preparing any witness affidavit or declaration pursuant to the Scheduling Order. Plaintiffs argue that "[i]t is critical for plaintiffs to review the information sought through the RFP prior to determining whether to we will exercise our right to file affidavits for any potential *de bene esse* witnesses." Plffs.' Motion at 2. At the status conference on July 9, however, Plaintiffs advocated for both the right to take *de bene esse* depositions and to propound another document request for electronic records for certain named individuals, but nowhere did Plaintiffs draw any connection between the two or suggest that the depositions were dependent upon the results of any new RFP. The instant motion asserts such a relationship for the very first time.[2]

5. Even if Plaintiffs' asserted reason for needing more time were accepted, the time crunch is entirely of Plaintiffs' own making. The response deadline for the RFP was within Plaintiffs' control.[3] The Scheduling Order issued July 11, 2007, set August 31 as the deadline for submitting proffers for unavailable witnesses. Although Plaintiffs' counsel told the Court on

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[2] Indeed, Plaintiffs' counsel's representations to the Court at the July 9 status conference indicate a present awareness of these potential witnesses and their expected testimony:

> What we particularly had in mind, Your Honor, are some of our clients who may be because of health reasons or because of specific economic circumstances unable to come to trial. There are witnesses out in Indian country who have information regarding the issues that you have raised about the problems with the estates, about the problems of not being an account holder yet having -- being a beneficiary.

Tr. at 35 (July 9, 2007). No mention is made of expected testimony concerning the results of the Interior Defendants' search for electronic records.

[3] Federal Rule of Civil Procedure 34 affords a responding party thirty days for answering a request for production. Thus, Plaintiffs could control the response deadline for the RFP by serving it earlier or later. Plaintiffs chose to serve it nearly a month later.

July 9 that "we could provide a list next week of those beneficiaries that we want," Tr. at 45, Plaintiffs waited almost an entire month, until August 8, 2007, to serve their RFP with its corresponding list of 67 names, thereby guaranteeing that Plaintiffs would not have a response until September 10, well beyond the deadline for filing their unavailable witness proffers. Had Plaintiffs served their RFP promptly after the last status conference, Plaintiffs would already have Defendants' response in hand and would not have any basis for seeking this enlargement.[4]

6. Plaintiffs' argument that they must have Interior Defendants' production in response to the RFP in order to make any witness proffer necessarily constitutes a representation that Plaintiffs' proffers regarding unavailable witnesses will solely concern testimony about whatever electronic record information the Interior Defendants produce in response to the RFP.[5] Such testimony, however, will be irrelevant to any issue to be considered by the Court at the hearing set to commence on October 10, 2007. Complaints or challenges by individuals concerning parts of the electronic record produced in response to Plaintiffs' RFP are not proper challenges to Interior Defendants' accounting plan, nor will it be probative of the reasonableness

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[4] Plaintiffs' RFP also goes well beyond the narrow leave the Court appeared to grant Plaintiffs at the July 9 hearing. The Court stated that it would "permit the plaintiffs to file a discovery request for either the downloaded or printed out electronic information that may exist in IRMS, LRIS or TA[A]MS for not more than 100 names of the plaintiffs' choosing." Tr. at 55. Plaintiffs' RFP lists 67 names, but in their Notice of Filing for the RFP, Plaintiffs expressly "reserve the right to seek information related to additional beneficiaries (up to 100) at a later juncture." Notice at 1 (August 8, 2007) [Dkt. 3366]. The RFP itself is also much broader than the Court described and encompasses "[a]ll electronically stored documents, records and other information that embody, refer or relate to IIM trust assets . . . whose data and other information is housed in IRMS, LRIS, TAAMS, TFAS, MRMS, and any other electronic system operated or administered by or for the Interior Department . . . [and] includes those electronic systems operated or administered by contractors. . . ." RFP at 2.

[5] Indeed, if the testimony were to touch on other topics, Plaintiffs would have no basis at all for their instant motion.

of the historical statements of account. First, no assurance exists that such individuals' circumstances are at all representative of the class as a whole. Second, whatever records may be produced in response to the RFP cannot be equated to the historical accounting. The historical accounting is an expensive, painstaking, iterative task. It does not rely upon a superficial glance at a transaction, nor does it collapse or cease if a discrepancy is found. In contrast, the potential testimony Plaintiffs seek to preserve with this motion would be precisely that – superficial, anecdotal recollections, likely imbued with multiple suppositions. If such testimony were to be allowed at all, then Defendants need sufficient time to investigate the underlying claims and surrounding facts. That is very difficult to undertake in the midst of trial, which is what would result if the motion were granted. Plaintiffs' motion for enlargement would unfairly impede Defendants' reasonable efforts to prepare for and present their case at trial.

Conclusion

For the foregoing reasons, Plaintiffs' motion for enlargement should be denied.

Dated: August 30, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion for an Enlargement of Time* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Defendants.	)	

ORDER

This matter comes before the Court on Plaintiffs' Motion titled, *Plaintiffs' Opposed Motion for an Enlargement of Time,* filed August 28, 2007 [Dkt. No. 3375]. Upon consideration of said Motion, Defendants' opposition and any reply thereto, and the entire record of this case, the Court having determined that said Motion is not well-taken, it is hereby

ORDERED, that Plaintiffs' Motion should be and hereby is DENIED.

Dated: ________________, 2007

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Hon. James Robertson
UNITED STATES DISTRICT JUDGE