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' UNOPPOSED MOTION FOR LEAVE TO
FILE DEFENDANTS' BENCH MEMORANDUM REGARDING
ISSUES PRESENTED IN APRIL 20, 2007 MEMORANDUM ORDER

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Civil Rule 7, Defendants respectfully request leave of Court to file a bench memorandum regarding issues presented in the Court's April 20, 2007 Memorandum Order, attached hereto as Exhibit I. Defendants believe this memorandum will assist the Court in addressing issues at the May 14, 2007 status conference. In accordance with Local Civil Rule 7(m), Defendants' counsel conferred with Plaintiffs' counsel on May 11, 2007, and Plaintiffs' counsel stated that our motion for leave to file our bench memorandum was unopposed by Plaintiffs, although he further stated that the absence of opposition to the filing of the bench memorandum should not be construed as Plaintiffs' concurrence with any of the statements contained within our bench memorandum.

For the foregoing reasons, we respectfully request that the Court grant Defendants leave to file our bench memorandum, attached hereto as Exhibit I.

Respectfully submitted,

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J. CHRISTOPHER KOHN
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May 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2007 the foregoing *Defendants' Unopposed Motion for Leave to File Defendants' Bench Memorandum Regarding Issues Presented in April 20, 2007 Memorandum Order* 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' BENCH MEMORANDUM REGARDING
ISSUES PRESENTED IN APRIL 20, 2007 MEMORANDUM ORDER

I. Background

In 1996, a class of present and former holders of Individual Indian Money ("IIM") accounts filed this lawsuit, claiming, among other things, that the Government had failed to provide a timely, adequate accounting, as required by the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, codified at 25 U.S.C. § 4001 et seq. ("1994 Act"). In 1999, this Court issued a declaratory judgment holding that Interior has an enforceable duty to account for the balances in the IIM accounts and remanding the matter to allow Defendants the opportunity to come into compliance. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31, 56 (D.D.C. 1999), aff'd sub nom. Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001).

In 2001, the D.C. Circuit largely affirmed the declaratory judgment, concluding that the agency had unreasonably delayed performance of accounting activities within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001). The D.C. Circuit noted, however, that this Court had properly remanded

the matter to Interior, leaving to the agency the choice of how the accounting activities would be conducted. Id. at 1104, 1109. The appellate court further upheld the use of periodic reporting requirements to monitor Interior's progress, but admonished the Court "to be mindful of the limits of its jurisdiction." Id. at 1109-10. In concluding its discussion, the Court of Appeals stated:

> It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction. Again, however, until these proceedings have begun, and specific objections are brought, these are questions we cannot address.

Id. at 1110 (emphasis added).

As this Court explained in its Memorandum Order entered April 20, 2007, after years of litigation and numerous appeals, "the orders that remain in effect still require the government to produce an accounting for each IIM account, to make quarterly reports of its progress toward that goal, and to comply with a consent order regarding IT security." Memorandum Order at 2 (Apr. 20, 2007) (Dkt. No. 3312) ("Memorandum Order"). In this filing, we address the future proceedings that pertain to the order to produce account statements for IIM accounts.

II. Overview of Defendants' Proposal for Further Proceedings

Defendants have urged that the Court allow Interior to conduct and finalize its historical accounting and should restrict its judicial oversight to monitoring progress through periodic reports, such as the Quarterly Reports currently being filed by Defendants. We recognize that, as reflected in the Court's Memorandum Order, the Court desires further proceedings, and while

the historical accounting plan has not been fully executed and, thus, does not constitute final agency action in its most "traditional" APA form, Interior has made certain determinations in the course of proceeding with the accounting. Those determinations primarily pertain to the scope of the accounting, and they have largely been disclosed in prior proceedings in this matter.[1] Further, as the Court is aware, Interior is proceeding to finalize adaptations to the January 2003 historical accounting plan, which was the subject of the "Phase 1.5" proceedings in 2003. The adaptations will result in a 2007 historical accounting plan and will include determinations which, if specifically objected to, could be reviewable under the APA to ascertain whether they constitute "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 240 F.3d at 1110.

Accordingly, for the upcoming proceeding in this Court, Interior will produce its 2007 historical accounting plan, which will include a forecasted schedule for completion of the historical accounting, in timely fashion and an administrative record to support its determinations. Plaintiffs may then, if they choose, identify and challenge "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 240 F.3d at 1110. This review will require the Court to assess whether the ultimate provision of the historical accounting under Interior's plan, i.e., the final agency action, will be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

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[1] Many of those decisions were examined, in detail, during the course of the "Phase 1.5" proceedings in 2003, and they have been described in various Quarterly Reports filed with the Court. For example, Interior has stated that it will not perform a historical accounting for so-called "direct pay" transactions or deceased beneficiaries; that it will recognize the results of probate determinations; and that the historical accounting will be provided for IIM accounts open as of October 25, 1994, and that the historical accounting will go back to the inception of the account or June 24, 1938, whichever is later.

See 5 U.S.C. § 706(2)(A); Islamic American Relief Agency v. Gonzales, 477 F.3d 728, 732 (D.C. Cir. 2007); Nuvio Corp. v. FCC, 473 F.3d 302, 305 (D.C. Cir. 2007). Any other purported purpose for judicial review – such as the four-month "impossibility" trial suggested by Plaintiffs, e.g., Transcript of Status Conference at 13-14 – would be beyond the scope of this Court's subject matter jurisdiction and would result in a waste of valuable judicial resources. E.g., Cobell v. Kempthorne, 455 F.3d 301, 305 (D.C. Cir. 2006) (discussing Cobell v. Norton, 392 F.3d at 472), cert. denied, 127 S. Ct. 1875 (2007).

Finally, as we explain in the last section of this brief, the October 2007 proceeding should be restricted to the historical accounting issues. For the reasons set forth below, this Court need not address either Interior's prospective accounting duties, e.g., Interior's "To-Be" Plan, or Treasury's document retention practices.

III. Further Proceedings in This Matter Should Follow the Normal Process and Practice Applicable to Judicial Review Under the Administrative Procedure Act

In assessing what is to be heard, this Court should start with Plaintiffs' complaint, which is jurisdictionally grounded in the APA. E.g., Cobell v. Babbitt, 30 F. Supp. 2d 24, 31-33 (D.D.C. 1998). It is well-established that "under the APA, courts may only review specific agency action or unreasonable delay by an agency . . . ." Cobell v. Kempthorne, 455 F.3d at 305; see 5 U.S.C. § 706. The D.C. Circuit recently reaffirmed that "jurisdiction is limited to addressing specific agency action or inaction." 455 F.3d at 307 (citing 392 F.3d at 472). Thus, this Court's power to fashion an equitable remedy is bounded by an "inability to order broad, programmatic reforms" and "in the opposite direction by an inability to require the agency to follow a detailed plan of action." 455 F.3d at 307.

The D.C. Circuit has provided the methodology for judicial review of the accounting plan and has stressed that Interior's plan is entitled to "substantial deference." 428 F.3d at 1076. While the 1994 Act "clearly reaffirms the requirement that the Secretary complete an accounting, its text offers little help in defining the accounting's scope." Id. at 1074. In particular, "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." Id. at 1076. "The choices at issue require[] both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Id. The Court of Appeals applied these principles to analyze the use of statistical sampling, see id. at 1077-79, and declared that other challenges should be resolved "under the same principles that we have applied here." Id. at 1079. Thus, this Court "must allow Interior to exercise its discretion and utilize its expertise in complying with broad statutory mandates." 455 F.3d at 307 (citations omitted).

This comports with traditional APA process, and while the D.C. Circuit further stated that "[r]ather than its normal freedom to choose 'any reasonable option,' the agency's actions must satisfy fiduciary standards," 455 F.3d at 307 (citing Cobell VI, 240 F.3d at 1099), the appellate court's decision confirmed that this Court may not abandon APA process for judicial review of agency action. Thus, the Court of Appeals enunciated this standard: "whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting . . . ." 240 F.3d at 1110. Such an inquiry might occur if Plaintiffs identify specific aspects of the 2007 historical accounting plan which, if retained, ultimately would be found to be arbitrary,

capricious, an abuse of discretion or contrary to law when the final agency action occurs, i.e., the historical accountings are completed.

The D.C. Circuit recently explained the process of APA review in Aguayo v. Harvey, 476 F.3d 971 (D.C. Cir. 2007):

> [J]udicial review of an administrative decision is generally limited to the existing administrative record. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) (quoting Camp v. Pitts, 411 U.S. 138 (1973)). . . . Under the Administrative Procedure Act ("APA"), agencies generally must state the grounds for their decision . . . . See 5 U.S.C. § 555(e); Tourus Records, Inc. v. Drug Enforcement Admin., 259 F.3d 731, 737 (D.C. Cir. 2001); Roelofs v. Sec'y of the Air Force, 628 F.2d 594, 599 (D.C. Cir. 1980). This requirement facilitates judicial review, because one of the tasks of the reviewing court is to determine whether an agency decision finds adequate support in the administrative record. Accordingly, when the statement of reasons is inadequate, in an APA case "the usual remedy is a 'remand to the agency for additional investigation or explanation.'" Tourus Records, 259 F.3d at 737 (quoting Florida Power & Light, 470 U.S. at 744).

476 F.3d at 976 (parallel citations omitted).

Moreover, as the D.C. Circuit explained in Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration, 429 F.3d 1136 (D.C. Cir. 2005):

> An agency's rule will be found arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could

> not be ascribed to difference in view or the product of agency expertise."

Id. at 1144-45 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43(1983)).

It is significant that the "heavy burden" placed upon Plaintiffs requires them to challenge the contents of the administrative record, either by showing that Interior's actions are based upon factors not contemplated by Congress when it enacted the 1994 Act or that the actions are unsupported by the record. As explained in Aguayo, such a challenge does not contemplate the creation of a new record; indeed, if the administrative record is deemed inadequate, the matter should be referred back to Interior "'for additional investigation or explanation.'" Aguayo, 476 F.3d at 976 (citing Tourus Records, 259 F.3d at 737 (quoting Florida Power & Light, 470 U.S. at 744)).

Currently, no specific allegations before this Court argue that Interior is unreasonably delaying final agency action justifying review pursuant to 5 U.S.C. § 706(1). If, however, Plaintiffs were to make such an allegation (as opposed to contending that the required agency action is impossible to perform), the Court should consider the matter on briefs and review the allegations under the "steps so defective" standard prescribed by the D.C. Circuit.

Therefore, the hearing scheduled to begin on October 10, 2007, should not be an extensive in-court proceeding. Although this case has had many detours between 2001 and the present time, Interior has been and is continuing to perform the accounting referenced by the D.C. Circuit. Under the APA, Interior will provide the administrative record supporting the factual conclusions or predictive judgments that led to the 2007 historical accounting plan. Plaintiffs, in turn, will bear the burden of demonstrating that specific aspects of Interior's

accounting plan, if unchanged, would ultimately result in a finding that they were arbitrary, capricious, an abuse of discretion, or contrary to law, and thus now constitutes "steps so defective" as to unreasonably delay or unlawfully withhold action in which Plaintiffs have an interest. Cobell, 240 F.3d at 1110. Such a process will involve review of the administrative record and briefing by the parties. The Court will not have to devote its scarce resources to conducting yet another multi-month trial or hearing, however.

IV. Plaintiffs Are Not Entitled to Conduct Discovery

The law is well-settled that in an APA case, discovery generally is not permitted. In Community for Creative Non-Violence v. Lujan, 908 F.2d 992 (D.C. Cir. 1990), the D.C. Circuit reviewed a party's right to conduct discovery in the context of APA litigation as follows:

> [Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)] allows discovery of the agency decisionmaking process only in two circumstances. First is the familiar case in which there has been a strong showing of bad faith or improper behavior. Id. at 420, 91 S. Ct. at 825. . . . Second, Overton Park states that examination of decisionmakers may be required when such examination provides the only possibility for effective judicial review and when there have been no contemporaneous administrative findings. . . .
>
> If the agency's explanation were insufficient, the decision could not stand. If the [agency] had not provided an adequate statement, [the plaintiff] might have been entitled to a remand to the agency for further explanation, Roelofs v. Secretary of the Air Force, 628 F.2d 594, 601 (D.C. Cir. 1980), but it would not have been entitled to depose the agency decisionmaker. Only in the rare case in which the record is so bare as to frustrate effective judicial review will discovery be permitted under the second exception noted in [Overton Park].

908 F.2d at 997-98; see also Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (citing Overton Park and quoting Community for Creative Non-Violence).

Indeed, the Federal Rules of Civil Procedure expressly recognize that plaintiffs in APA cases are generally not entitled to conduct discovery. See Fed. R. Civ. P. 26(a)(1)(E)(i) (exempting "an action for review on an administrative record" from Initial Disclosures required under Rule 26(a)(1)). Thus, the Supreme Court, the D.C. Circuit, and the Federal Rules of Civil Procedure all provide clearly and beyond serious dispute that discovery is not appropriate in this proceeding.

V. The D.C. Circuit Has Concluded That Interior May Be Allowed to Use Statistical Sampling as a Component of Its Accounting Plan

The Court's Memorandum Order states, "Also unresolved is a subset of [the details of defendants' historical accounting obligations] – the question of whether statistical sampling will 'satisfy fiduciary standards.'" Memorandum Order at 2 (citing Cobell v. Kempthorne, 455 F.3d 301, 307 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1875 (2007). In this regard, Defendants respectfully refer the Court to Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005), which expressly approved the use of statistical sampling as a component of the plan to prepare Historical Statements of Account.

The D.C. Circuit framed the question as follows: "Although it is unnecessary at this stage to review all of the defendants' specific objections to the injunction, which if to be reissued at all will require drastic modification, one central point, the provision barring statistical sampling, see Cobell XIV, 357 F. Supp. 2d at 304, deserves mention." 428 F.3d at 1077. It then reviewed this Court's prior rejection of statistical sampling and Plaintiffs' preference for a complete, 100 percent "vouching" of all transactions:

> Under the circumstances presented here, neither beneficiaries' preferences nor the absence of precedent, nor the combination, could properly be deemed controlling. Where trade-offs are

> necessary because it is costly to increase accuracy, the preference of a party that will bear none of the monetary costs can't sweep the cost issue off the table. And in the situation here, where common law precedents don't map directly onto the context, the absence of precedent tells us little. Interior's decision to use statistical sampling seems especially reasonable in light of information submitted to the district court after it issued the injunction: for the subset of transactions valued at less than $500, Interior estimated that the average cost of accounting, per transaction, would exceed the average value of the transactions.

Id. at 1078 (citation omitted). The D.C. Circuit then concluded, "Because the district court's ban on statistical sampling reflected no deference to defendants' expertise or to their judgment regarding the allocation of scarce resources, the district court abused its discretion by including that provision in the injunction." Id. at 1078-79. Accordingly, statistical sampling is legally permissible as a component of Interior's plan to prepare Historical Statements of Account.

VI. The October 2007 Proceeding Should Be Restricted to Interior's Plan to Prepare Historical Statements of Account and Should Not Address Interior's "To-Be" Plan or Treasury's Document Retention Practices

The Court's Memorandum Order includes the following question to be resolved by the upcoming proceeding: "Have the defendants cured (or are they curing) the breaches of their fiduciary duty that were found in Cobell V?". Memorandum Order at 3. The referenced decision – Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) – followed a Phase I or "fixing-the-system" trial and found four trust duty breaches by Interior and one by Treasury. The Court retained jurisdiction for five years, and required Defendants to file quarterly reports explaining the steps taken to rectify the breaches found. The Court of Appeals affirmed but also held that the actual legal breach was failure to provide an accounting and not "failure to take the discrete individual steps that would facilitate an accounting." Cobell v. Norton, 240 F.3d 1081, 1106

(D.C. Cir. 2001).

A. Interior's To-Be Plan Should Not Be Addressed in the October 2007 Proceedings

In 2002, this Court ordered the government to submit a plan for an accounting as well as a plan for achieving compliance with specified fiduciary obligations, to be evaluated by the Court with a view to conducting additional fixing-the-system proceedings and approving an approach to historical accounting of IIM accounts. Cobell, 226 F. Supp. 2d 1, 148-49 (D.D.C. 2002). In July 2003, the Court of Appeals vacated that order, Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), but meanwhile, in January 2003, Interior submitted accounting and fiduciary obligations compliance plans. Following a 44-day trial, this Court issued a Structural Injunction in September 2003 encompassing both the performance of an accounting and the implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). However, the Court of Appeals vacated the September 25, 2003 Structural Injunction with only a single exception, the requirement that Interior complete and file its "To-Be Plan" for fixing the IIM trust management system. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004).

The Court of Appeals sustained the requirement that Interior complete and file its "To-Be Plan," but only to the extent that the requirement serves as "a device to gather information for the court[.]" Id. at 474. In all other respects, the Court not only vacated the Structural Injunction but also clarified that the injunction exceeded this Court's authority.

The Court of Appeals stressed that this Court may not use the plan "as a device for indefinitely extended all-purpose supervision" of Interior's compliance with its fiduciary duties. Id. As the Court of Appeals explained in summary, this Court's authority "is limited to considering specific claims that Interior breached particular statutory trust duties, understood in

light of the common law of trusts, and to ordering specific relief for those breaches." Id. at 477. As this Court has acknowledged, Plaintiffs' "single 'live' cause of action seeks a remedy for [failure to provide an accounting]," and the remedy available is "limited to ensuring that the defendants produce the requisite accounting of the Indian trust." Cobell v. Norton, No. 96-1285, 2005 WL 310516, *8 (D.D.C. Feb. 8, 2005).

Interior completed and filed its "To-Be Plan" as well as the Fiduciary Trust Model with this Court, thereby satisfying the only obligation sustained by the Court of Appeals. Dkt. No. 2882.[2] Accordingly, no basis exists for further proceedings to address the breaches that Cobell V identified in regard to Interior.

B. Treasury's Document Retention Practices and Policies Should Not Be Addressed in the October 2007 Proceedings

In regard to Treasury, Defendants respectfully suggest that a trial regarding Treasury's document retention practices and policies – the one breach Cobell V identified – would be redundant, would not resolve any pending issue, and would not be relevant to issues regarding the historical accounting being performed by Interior. Treasury committed to correct its document retention policy and to take other measures concerning its handling of IIM funds, in stipulations described in the Cobell V opinion and earlier court filings. Id. at 21-24, 50-51. Since Cobell V, Treasury's efforts to satisfy these stipulations have been reported in various forms to this Court. For example, in preparation for the Phase 1.5 trial, Treasury summarized its

[2] While Interior completed the To-Be Model, which led to the Fiduciary Trust Model, some trust reform activities, as previously reported to the Court, are not fully implemented as of this time. See, e.g., Interior Defendants' 28th Quarterly Report to the Court at 9 (Feb. 1, 2007) (Dkt. No. 3290).

work in a pretrial statement. Notice of Filing ("Treasury's Statement Regarding the Court's September 17, 2002 Opinion and Order in Cobell, et al. v. Norton, et al.") (filed Jan. 6, 2003) (Dkt. 1706). There, Treasury reported that it had completed the following measures:

- Treasury developed and began operating systems that allow Treasury to search for and retrieve IIM checks drawn on Treasury without requiring a check symbol or serial number from Interior. Id. at 2.

- Treasury revised its record retention schedules for IIM-related documents, and submitted those schedules to the National Archives and Records Administration for approval. Id. at 2-3.

- Treasury began allowing Interior to make "as of" investments for deposits whose amounts are not immediately known, resulting in additional interest being earned on trust funds that OTFM administers. Id. at 4.

- Treasury completed a study of IIM check negotiation practices to determine the average time between issuance and negotiation of IIM checks, and provided a copy of that study to Interior. Id.

Further, in the Phase 1.5 trial, Treasury's Fiscal Assistant Secretary testified at length regarding Treasury's retention policies and practices for IIM documents. Phase 1.5 Tr. AM, pages 1-113, and PM, pages 1-73 (May 13, 2003) (testimony of Donald V. Hammond). Finally, to date, Treasury has filed twenty-nine Quarterly Reports discussing its document retention practices. Thus, the record is well-developed regarding Treasury's efforts to address the breach found in Cobell V so that there is no need to revisit that issue. An evidentiary hearing on this subject would serve only to take valuable time and resources away from the historical accounting issues central to this case.

For the foregoing reasons, we respectfully request that the Court confirm that the hearing

contemplated to begin on October 10, 2007, will not involve Interior's prospective accounting duties or Treasury's document retention practices.

Respectfully submitted,

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J. CHRISTOPHER KOHN
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May 11, 2007

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v.	)	Case No. 1:96cv01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,	)	
Defendants.	)	

ORDER

This matter comes before the Court on *Defendants' Unopposed Motion for Leave to File Defendants' Bench Memorandum Regarding Issues Presented in April 20, 2007 Memorandum Order* [_____]. Upon consideration of the Defendants' Motion and the entire record of this case, it is hereby

ORDERED that the Unopposed Motion is, GRANTED.

_____
James Robertson
UNITED STATES DISTRICT JUDGE

Date:_____