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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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CLERK

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.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' AND JOE CHRISTIE'S MOTION FOR A PROTECTIVE ORDER, MOTION TO COMPEL DISCOVERY FROM JOE CHRISTIE, AND REQUEST FOR EXPEDITED CONSIDERATION

Interior Defendants file this opposition to the April 2, 2003 Motion of Plaintiffs and Joe Christie for a Protective Order ("Motion,") pertaining to Mr. Christie's deposition.[1] Interior Defendants also move to compel Mr. Christie's deposition and document production. In their Motion, Plaintiffs and Mr. Christie ("Movants") seek a protective order limiting the scope of documents Mr. Christie must produce, limiting the range of questions Interior Defendants can pose to Mr. Christie, relocating Mr. Christie's deposition to Washington, D.C., requiring Interior Defendants to tender an expert witness fee to Mr. Christie in advance of his deposition, and requiring Interior Defendants to bring any motion regarding Mr. Christie's deposition in this Court. Defendants respectfully request that the Court deny the motion and instead compel the

[1] Plaintiffs' counsel Mr. Gingold advises that he also represents Mr. Christie in this matter. Motion at 2 n.4-5.

witness to afford the discovery Defendants seek. Defendants also respectfully request expedited consideration of these issues.[2]

A protective order is not warranted because Interior Defendants must be permitted to question Mr. Christie about all potential sources of bias affecting his opinions, including his work for the Special Master and whether it has influenced his expert opinions regarding the parties' trust reform plans.[3] If the Court does not permit Interior Defendants to question Mr. Christie regarding his contacts with the Special Master, it should exclude Mr. Christie's testimony at trial. A protective order is also unnecessary because Interior Defendants do not oppose taking Mr. Christie's deposition in Washington; however, having noticed it for Albuquerque and being prepared to take it there, they do not agree to fund Mr. Christie's travel expenses to and from Washington or to pay for his travel time. Pursuant to FED. R. CIV. P. 26(b)(4)(C), Interior Defendants will compensate Mr. Christie $130 an hour for his deposition testimony. Upon receipt of an invoice by or for Mr. Christie setting forth his time and fee for deposition, Interior Defendants will duly issue a check to Mr. Christie. Mr. Christie is not

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[2] Defendants' counsel conferred with Plaintiffs' counsel on April 14, 2003 in connection with Defendants' request for an order compelling discovery and for expedited consideration and were advised that Plaintiffs opposed both requests. Counsel for Interior Defendants also attempted to consult with counsel for Joe Christie, but was unable to reach Mr. Christie's counsel.

[3] Movants' Motion appears to be nothing more than an attempt to frustrate Interior Defendants' ability to prepare for Trial 1.5 by limiting Defendants' discovery as to expert opinions.

entitled to compensation prior to his testimony.[4] Finally, Interior Defendants agree to bring any motion regarding Mr. Christie's deposition in this Court.

THERE IS NO NEED TO LIMIT THE SCOPE OF MR. CHRISTIE'S DOCUMENT PRODUCTION OR DEPOSITION QUESTIONING

The subjects about which Interior Defendants intend to examine Mr. Christie are relevant to the testimony Plaintiffs propose to offer and necessary to Defendants' preparation of cross-examination in Trial 1.5. Because "[i]t is anticipated that Mr. Christie will testify regarding the two compliance plans of the parties," Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 ("Disclosure") (unnumbered) at 3 (filed Feb. 28, 2003), Interior Defendants must be permitted to explore all potential bases of and influences on Mr. Christie's opinions regarding those plans.[5]

In his affidavit, Mr. Christie states,

> Such documents obtained or prepared by me in connection with these consulting services [for the Special Master] will not be relied on or considered by me in expert testimony that I might provide if I am called by plaintiffs to testify in Trial 1.5.

Affidavit of Joe C. Christie at 3. Along with being self-serving, this statement is also inconsistent with Plaintiffs' assertion that Mr. Christie will likely testify regarding the "effectiveness and credibility of DOI fiduciary management," the "consequences of inadequate records management," and the "need for [sic] remedial order . . . ." Disclosure (unnumbered) at

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[4] See FED. R. CIV. P. 45(b)(1): "When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."

[5] Movants argue that Interior Defendants' discovery request of Mr. Christie is "intrusive" because, in part, Mr. Christie is "not within the control or employ of the designating party . . . ." Motion at 6-7. This argument is meritless because counsel for plaintiffs also represents Mr. Christie, even though Mr. Christie is also a court appointee.

this instance is 26(b)(4)(A) which permits Interior Defendants to examine Mr. Christie regarding his expert opinions and their bases.

Movants argue that, "Assuming F.R.C.P. 26(b)(4)(B) would be applicable by analogy, defendants have made no showing of the requisite exceptional circumstances." Motion, Pl. Ex. 1, ¶¶ 2, 8. Movants fail to note, however, that Rule 26(b)(4)(B) applies to "an expert who has been retained or specially employed by another party . . . . " This rule does not apply to Mr. Christie because Plaintiffs listed him as an expert witness "Not Retained or Specially Employed by Plaintiffs to Give Expert Testimony . . . . " Disclosure at (unnumbered) 2-3. Moreover, Rule 26(b)(4)(B) applies to an individual "who is not expected to be called as a witness at trial . . . ." The rule does not apply to Mr. Christie because Plaintiffs listed him among those "they expect to call as expert witnesses" at trial. Disclosure at (unnumbered) 2. Despite Movants' protestations, therefore, Interior Defendants are not required to make any showing of exceptional circumstances in order to depose Mr. Christie.

On the other hand, Rule 26(b)(4)(A) applies precisely to this situation. This rule states, "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." Because Plaintiffs have indeed identified Mr. Christie as an expert witness "whom they expect to call" at trial, Disclosure at (unnumbered) 2, Interior Defendants have a right to depose him.[6] See also Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 990 (D.C. Cir. 1980) ("A litigant is thus entitled automatically and without prior judicial

[6] The broad language of FED. R. CIV. P. 30(a)(1) also supports this right to depose Mr. Christie: "A Party may take the testimony of any person . . . by deposition upon oral examination without leave of court . . . . "

approval to substantial though not complete discovery from the expert who expectably will be used at trial.")

Movants specifically object that "Defendants Are Impermissibly Attempting to Invade the Judicial Officer's Investigative Privilege." Motion at 7. Claiming that Interior Defendants' subpoena to Mr. Christie is "impudently original," id. at 8, Movants claim that there is no authority supporting the discovery of communications between Mr. Christie and the Special Master.[7] To the contrary, FED. R. EVID. 706(a) permits a party to take the deposition of a court-appointed expert witness. Taking such a deposition, however, is subject to the limitation that such witnesses be testifying experts, not merely consulting experts.[8] Here, Plaintiffs have made Mr. Christie a testifying expert.

Rule 706(a) applies specifically to court-appointed experts and therefore applies by extension to experts retained by the Special Master. If a party intends to call a court-appointed

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[7] Though Movants claim that the subpoena is "impudently original," it is Plaintiffs themselves who cite no rule or reported case supporting their notion of a "Judicial Officer's Investigative Privilege," or that they have standing to assert such a "privilege." Defendants are not aware of any objection by the Special Master concerning the discovery sought from Mr. Christie. To allay any concern regarding disclosing the names of potential Interior sources, however, Government counsel will not ask Mr. Christie to disclose any of those sources.

[8] See, e.g., Ass'n of Mexican-Am. Educators v. State of California, 231 F.3d 572, 591 (9th Cir. 2000) (no right to cross-examine court-appointed expert witness where witness did not testify at trial, where court did not rely on witness as source of evidence, and where witness "acted only as a court-appointed technical advisor . . . . "); Reid v. Albemarle Corp., 207 F. Supp. 2d 499, 507 (M.D. La. 2001) (depositions not necessary when witness' role is that of a technical advisor to the court rather than a "court expert witness."); Hemstreet v. Burroughs Corp., 666 F. Supp. 1096, 1124 (N.D. Ill. 1987), rev'd on other grounds, 861 F.2d 728 (Fed. Cir. 1988) (deposition of court-appointed expert not necessary where expert was not asked for his expert opinions and did not give them; "[h]ad he done so for purposes of a trial, his deposition would be appropriate.")

witness to testify at trial, then the opposing party has the right to depose that witness in advance of trial.

More fundamentally, far from attempting to interfere with any "Judicial Officer's Investigative Privilege," Interior Defendants are simply entitled to know how, if at all, Mr. Christie's experience working with the Special Master has influenced his views "regarding the two compliance plans of the parties . . . . " Disclosure at 3. If Mr. Christie is to testify regarding the "effectiveness and credibility of DOI fiduciary management," the "consequences of inadequate records management and compliance," and his perceived "need for [sic] remedial order," then Interior Defendants are entitled to question Mr. Christie about all bases for his opinions, including his experience. Here, that experience necessarily includes his work for the Special Master related to records management and compliance, and thus is discoverable.

Even the cases cited by Movants support Interior Defendants' right to depose Mr. Christie. Movants cite B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc., 171 F.R.D. 57 (S.D.N.Y. 1997), in support of their argument to narrow the scope of Interior Defendants' discovery request of Mr. Christie. Motion at 6. The B.C.F. court, however, held that while "documents having no relation to the expert's role as an expert need not be produced," "any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery." Id. at 62. The court further held that an expert could not withhold requested documents when "it is not clear whether the expert reviewed them solely as a consultant or whether they informed his expert opinion as well." Id. Thus, Interior Defendants must be permitted to explore the impact of Mr. Christie's work for the Special Master on his expert opinions.

Movants also cite Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991), in arguing that any discovery of an expert's views is limited. Motion at 6. Intermedics, however, expressly states that "all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable." Intermedics, 139 F.R.D. at 397.[9] Although in the context of communications between a party's counsel and the expert, the Intermedics holding also applies to this situation because Mr. Christie unquestionably had communications with the Special Master that relate to the subject of his Trial 1.5 testimony. The thrust of the Intermedics holding is "that there are likely to be many instances in which knowing the *real source* of an expert's views would add significantly to the trier of fact's ability to assess their reliability and persuasive power." Id. at 395. This is important because

> [k]nowing that some or all of the reasoning and opinion that is being presented by an expert is not her own, but is a lawyer's, might well have an appreciable effect on the probative value the trier of fact ascribes to the expert testimony.

Id.

Finally, Movants cite Detwiler Trust v. Offenbecher, 124 F.R.D. 545 (S.D.N.Y. 1989), for the proposition that "documents reviewed by [a] testifying expert in his earlier role as [a] consulting expert [are] not discoverable as not relating to [the] expert's opinion." Motion at 6. Detwiler also held, however, that "[o]f course, to the extent [the expert] reviewed documents in his role as an expert that he previously had reviewed in his role as consultant, the delineation between those roles would become blurred and those documents would be discoverable . . . ." Id. at 546. That caveat is important in this case because Mr. Christie may very likely review the

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[9] But see All W. Pet Supply Co. v. Hill's Pet Prod. Div., Colgate-Palmolive Co., 152 F.R.D. 634 (D. Kan. 1993) (some courts reject Intermedics view that documents normally protected by work product privilege lose such protection once considered by a party's expert).

same documents in preparation for his trial testimony that he reviewed in his role as consultant for the Special Master. It cannot be so easy for Mr. Christie to distinguish documents he relied on in his role as consultant to the Special Master from documents he is relying on in his role as testifying expert for Plaintiffs. As such, Interior Defendants must be permitted to explore how his role as consultant to the Special Master now affects Mr. Christie's expert opinions. In short, Interior Defendants must be permitted to explore the bases of and influences on Mr. Christie's opinions regarding the parties' plans.

IF THE COURT DOES NOT PERMIT DISCOVERY OF MR. CHRISTIE REGARDING HIS CONTACTS WITH THE SPECIAL MASTER, THE COURT SHOULD EXCLUDE MR. CHRISTIE'S TESTIMONY

If the Court does not permit Interior Defendants to take discovery of Mr. Christie regarding his contacts with the Special Master, the Court should exclude Mr. Christie's testimony altogether as an expert witness at trial. It would be manifestly unfair to permit an expert witness to offer his opinions at trial while denying the opposing party an full opportunity to probe all of that witness' experiences relevant to the subject of his opinions. If this discovery is denied Defendants, then prejudice will be suffered by them if Mr. Christie testifies. Thus, the only alternative, should the Court foreclose discovery, is to prevent the prejudice by excluding the witness' testimony.

In analogous situations, where a party is denied effective discovery of a witness or other information, the Federal Rules provide that the evidence should not be used at trial. For example, Fed. R. Civ. P. 37(c)(1) provides that when a party "without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1)," that party "is not . . . permitted to use as evidence at trial . . . any witness or information not so disclosed." See, e.g., Foster v.

United States, 130 F. Supp. 2d 68, 70 n.1 (D.D.C. 2001) (court excluded testimony of four witnesses when party had not disclosed those witnesses till two weeks before trial); Jankins v. TDC Mgmt. Corp., Inc., 131 F.R.D. 629, 634-35 (D.D.C. 1989) (court precluded party from introducing evidence given history of party in not complying with discovery, and given that "[w]ith the trial just weeks away, plaintiff still has not received from defendants the evidence crucial to his claims."); see also Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776, 786 (7th Cir. 2000) (court limited expert testimony where party's failure to file expert's supplemental report "hampered" the opposing party's ability to examine the expert); Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 297 (1st Cir. 1999) (court excluded testimony of undisclosed witnesses); but see Wright v. United States, Civ. A. No. 95-0274-LFO, 1996 WL 589008, at *2 (D.D.C. Oct. 4, 1996) (court did not exclude undisclosed evidence where party did not act in bad faith and where opposing party had already obtained *same* evidence through other means).

In this case, it will likely be impossible for Mr. Christie to distinguish documents he relied on in his role as consultant to the Special Master from documents he is relying on in his role as testifying expert for Plaintiffs. If Interior Defendants are not permitted to explore how his role as consultant to the Special Master now affects his expert opinions, Interior Defendants will be deprived of any meaningful cross-examination of Mr. Christie. Therefore, if the Court forbids Interior Defendants from questioning Mr. Christie about his work for the Special Master, it should also exclude Mr. Christie's testimony at trial.

INTERIOR DEFENDANTS AGREE TO DEPOSE MR. CHRISTIE IN WASHINGTON AND TO PAY FOR HIS DEPOSITION TESTIMONY, BUT THEY SHOULD NOT HAVE TO FUND HIS TRAVEL TO WASHINGTON

Although Interior Defendants agree to take Mr. Christie's deposition in Washington, they remain ready to take it in Albuquerque as originally noticed. Therefore, while willing to pay Mr. Christie $130 an hour for his deposition testimony pursuant to FED. R. CIV. P. 26(b)(4)(C), they should not have to pay Mr. Christie's travel expenses to Washington simply to make the deposition more convenient for Plaintiffs' counsel.[10] Upon receipt of an invoice from or on behalf of Mr. Christie, Interior Defendants will duly pay that invoice to compensate Mr. Christie for the number of hours that he testifies.[11] See FED. R. CIV. P. 45(b)(1) ("When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.")

Finally, Interior Defendants agree to bring any motion regarding Mr. Christie's deposition in this Court.

CONCLUSION

A protective order is not necessary to limit the scope of documents which Mr. Christie must produce or to limit the scope of questions which Interior Defendants can pose to Mr.

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[10] Had Plaintiffs truly desired to take Mr. Christie's deposition in Washington, it is only reasonable to expect that they would have so prevailed upon the witness earlier, instead of insisting initially that they did not have any control over the witness.

[11] This is the same billing procedure that Interior Defendants have followed for Plaintiffs' other expert witnesses in this phase.

Christie. Rather, Interior Defendants must be permitted to question Mr. Christie about the extent to which his work for the Special Master has influenced his expert opinions regarding the parties' trust reform plans. Interior Defendants therefore move this Court to compel Mr. Christie's deposition pursuant to Defendants' subpoena duces tecum. If the Court does not permit Interior Defendants to question Mr. Christie regarding his contacts with the Special Master, it should exclude Mr. Christie's testimony at trial. Interior Defendants do not oppose taking Mr. Christie's deposition in Washington, though being prepared to take it in Albuquerque, they do not agree to fund Mr. Christie's travel expenses to and from Washington. Pursuant to FED. R. CIV. P. 26(b)(4)(C), Interior Defendants agree to pay Mr. Christie $130 an hour for his deposition testimony and will compensate him using the same invoicing procedure that is used for the depositions of Plaintiffs' other experts. Finally, Interior Defendants agree to bring any motion regarding Mr. Christie's deposition in this Court. To the extent Defendants have agreed to Movants' demands, their motion is moot; the remainder has no merit. To the contrary, Defendants should be promptly granted the discovery they seek.

Given the approaching May 1 trial date, and considering Interior Defendants' need to examine the bases of Mr. Christie's expert opinions, Interior Defendants respectfully request expedited consideration of Plaintiffs'/Joe Christie's Motion for a Protective Order and of this Opposition/Motion to Compel.

Dated: April 14, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
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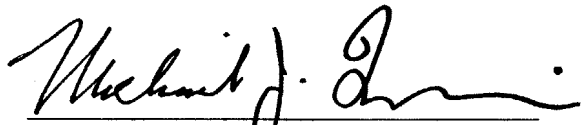

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Having considered Plaintiffs' and Joe Christie's Motion for a Protective Order, filed April 2, 2003, and having considered Interior Defendants' Opposition to Plaintiffs' and Joe Christie's Motion for a Protective Order, Motion to Compel Discovery from Joe Christie, and Request for Expedited Consideration, filed April 14, 2003, and all other argument of record, it is hereby:

ORDERED, the Defendants' request for expedited consideration of these motions be **GRANTED**; and it is further

ORDERED, that Plaintiffs' and Joe Christie's Motion for a Protective Order is **DENIED,** except for those parts of said motion relating to the place of deposition, Mr. Christie's compensation for deposition as an expert, the disclosure of the Special Master's sources and the submission of related issues to this Court with respect to said discovery, which are **DENIED** as moot; and it is further

ORDERED, that Interior Defendants' Motion to Compel Discovery from Joe Christie is **GRANTED** as follows:

1. Interior Defendants shall, by notice to counsel, notify Mr. Christie of a date to

appear for deposition in Washington, DC.

2. Mr. Christie shall produce all documents responsive to Interior Defendants' subpoena duces tecum at the time of or prior to his deposition.

3. Mr. Christie shall answer in deposition questions concerning his work for and communications with the Special Master.

4. Notwithstanding the foregoing, Mr. Christie may refuse to identify by name and may redact from documents produced under this order the name(s) of any person(s) known to him to be a confidential source of the Special Master in this case.

SO ORDERED.

Dated: _____, 2003

_____
Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 14, 2003, I served the foregoing *Interior Defendants' Opposition to Plaintiffs' and Joe Christie's Motion for a Protective Order, Motion to Compel Discovery from Joe Christie, and Request for Expedited Consideration* by facsimile, in accordance with their written request of October 31, 2001 upon:

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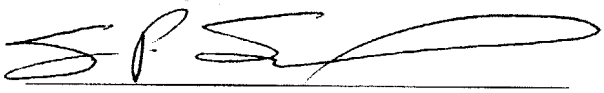

Sean P. Schmergel