UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

OBJECTIONS OF THE UNITED STATES TO THE REQUESTS FOR PRODUCTION OF DOCUMENTS INCLUDED IN THE NOTICES FOR THE DEPOSITIONS OF TERRY PETRIE, MICHAEL QUINN, AND SANDRA SPOONER

Plaintiffs have noticed the depositions of Terry Petrie, Michael Quinn, and Sandra Spooner for October 8, 14, and 17, 2003 respectively. The notices of deposition incorporate requests that "defendants and the deponents" produce documents on or before October 6, 2003. The requests for production in the notices for the depositions of Mr. Petrie, Mr. Quinn and Ms. Spooner overlap the requests for production included in the notices for the depositions of Donna Erwin and Michelle Singer, which were served on or about February 6, 2003. The United States produced responsive, non-privileged documents during the Trial 1.5 discovery period in response to the Erwin and Singer requests for production. To the extent the Petrie, Quinn, and Spooner requests for production differ from the Erwin and Singer requests, the United States, on the behalf of defendants and on behalf of Mr. Petrie, Mr. Quinn and Ms. Spooner in their official capacities, object to the requests in their entirety.[1]

[1] Ms. Spooner, who is not represented by private counsel, has authorized the United States to present these objections on her behalf in her individual capacity.

As discussed in the Memorandum of Points and Authorities in Support of the Motion of the United States for a Protective Order and the Motion to Quash the Subpoena Issued to Government Trial Attorneys Petrie, Quinn and Spooner, which is attached hereto (without exhibits) and incorporated by reference herein, plaintiffs are not authorized to take discovery at this time, and the persons to whom the requests for production are directed are not obligated to provide responsive documents. As also discussed in the memorandum in support of the motion for a protective order, to the extent the current requests differ from the Erwin and Singer requests, plaintiffs appear to be requesting information that is privileged, is work product, and/or is totally unrelated to Ms. Erwin's December 2002 schedule or communications about that schedule. In particular, to the extent that they are not duplicative of the Erwin and Singer document requests, the current requests appear to encompass communications among Department of Justice trial attorneys concerning the February 6, 2003 notice for Ms. Erwin's deposition, and the February 12 and 13, 2003 sessions of her deposition. All such documents are privileged or work product.

In addition, the individual requests, to the extent that they do not duplicate the Erwin and Singer requests, are vague, ambiguous, overbroad, and unduly burdensome. The first request to both the Erwin notice of deposition and the current notices of deposition request documents relating to Ms. Erwin's December 2002 schedule. However, the first request in the current notices also asks for all documents concerning "all issues and strategies relating thereto." It is unclear whether the antecedent to "thereto" is Ms. Erwin's schedule or documents relating to her schedule, or what plaintiffs believe the term "issues and strategies" adds to the Erwin request. The same ambiguity and uncertainty lurk in the third request and subpart (1) of the fourth request, which ask for documents concerning the scheduling of Ms. Erwin's trip to Washington on December 16, 2003 and "logistical and strategic decisions made with respect thereto."

The second request to the current notices requests documents concerning phone calls "concerning Donna Erwin since December 2002." This request appears to encompass all communications concerning Donna Erwin **except** contemporaneous discussions about her schedule and her availability for a deposition in December 2002. The request therefore seeks information which, in addition to being privileged and work product, is neither relevant to Ms. Erwin's December 2002 schedule nor availability for a deposition, nor is reasonably calculated to lead to the discovery of relevant evidence.

The fourth request asks for communications between any Department of Justice employees on specified topics and thus necessarily sweeps in privileged communications and work product. Subpart (3) of the fourth request asks for communications with the Department of Justice concerning "the notice of deposition or the deposition of Donna Erwin." Plaintiffs served two notices of Ms. Erwin's deposition, one in December 2002 and the other in February 2003. Ms. Erwin was deposed on December 20, 2002 and on February 12 and 13, 2003. If the request asks for communications concerning the February 2003 notice and deposition sessions, which is not clear, all such communications are privileged or are work product.

The fifth request asks for all communications between Ms. Erwin's personal counsel and anyone acting on the behalf of defendants, including Department of Justice attorneys. The United States produced non-privileged documents in response to the identically worded request in the Erwin notice of deposition. However, the request on its face is grossly overbroad and burdensome, since it is unlimited by time, scope or subject matter of communications.

Therefore, the United States objects to all of the requests for production in the notices of the depositions of Terry Petrie, Michael Quinn, and Sandra Spooner.

Respectfully,

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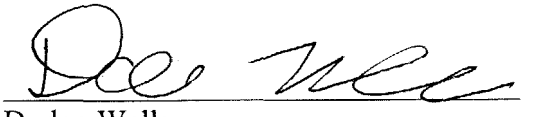

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
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GALE A. NORTON, et al.,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF THE UNITED STATES FOR A PROTECTIVE ORDER AND THE MOTION TO QUASH THE SUBPOENA ISSUED TO GOVERNMENT TRIAL ATTORNEYS PETRIE, QUINN AND SPOONER

Plaintiffs have noticed the depositions of Terry Petrie, Michael Quinn and Sandra Spooner for October 8, 14 and 17, 2003 respectively and have served each of the proposed deponents with subpoenas. Ms. Spooner is a Deputy Director in the Civil Division of the Department of Justice and is lead trial counsel for the United States in this case. Mr. Petrie and Mr. Quinn are trial attorneys employed by the Civil Division of the Department of Justice and are among the litigation counsel representing the United States in this case. Any information that Ms. Spooner, Mr. Petrie and Mr. Quinn have which is related to any conceivable issue in this case was obtained in their capacities as litigation counsel.

Plaintiffs may take the depositions of the United States' trial counsel only under limited circumstances which do not exist here. Further, plaintiffs are not authorized to take any depositions at this time, and, in fact, are precluded by Federal Rules of Civil Procedure 26(d) and

Attachment A

30(a)(2)(C) from doing so. Discovery for Trial 1.5 (as well as the trial itself) has been completed, and discovery has not commenced in any subsequent stage of this proceeding.

Federal Rule of Civil Procedure 26 provides the Court with broad discretion to issue orders prohibiting or limiting discovery. Fed. R. Civ. P. 26 (b)(2) & (3). Rule 26(c) provides that a court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including . . . that discovery not be had." Further, Rule 45(c)(3)(A)(iv) provides that a subpoena shall be quashed if it subjects a person to undue burden. The circumstances here warrant both a protective order under Rule 26 and an order quashing the subpoena under Rule 45.[1] Accordingly, the Court should issue an order that the depositions not go forward and quashing the subpoenas. The notices of deposition incorporate document production requests. The document requests seek privileged documents and are ancillary to the impermissible deposition notices and subpoenas. Further, since discovery is not open, plaintiffs are not authorized to propound new requests for the production of documents. Therefore, the United States requests that the protective order also provide that no response to the document production requests is required.

FACTS

Plaintiffs are attempting to depose three trial attorneys about a controversy concerning the December 2002 schedule of Donna Erwin, her availability for a deposition during that month, and statements made to the Court by counsel during hearings on December 13 and December 17,

[1] Service of the subpoena on Ms. Spooner was defective because she was not tendered the required attendance and mileage fee. Fed. R. Civ. P. 45(b)(1). Therefore, she is not required to appear for her deposition. Ms. Spooner, who is not represented by private counsel, has authorized the United States to present this objection on her behalf. Messrs. Petrie and Quinn are represented by private counsel, who may make additional objections on their behalf.

2002 concerning Ms. Erwin's schedule. In February and March 2003, plaintiffs submitted document requests, to which the United States responded, concerning Donna Erwin's December 2002 schedule and her communications with the Department of Justice on her schedule, and they conducted depositions lasting two and a half days of Donna Erwin and Michelle Singer, an associate of Donna Erwin, during which they had a full opportunity to question Ms. Erwin and Ms. Singer on those issues. Although six months have passed since plaintiffs deposed Ms. Erwin and Ms. Singer and received the government's documents in response to the document production requests, plaintiffs have not attempted to show, and could not show, that the controversy concerning Ms. Erwin's December 2002 schedule was anything but a result of an unintentional, inadvertent misunderstanding.

The notices of deposition assert that the depositions are being conducted "pursuant to the February 5, 2003 Order." That order, reported as *Cobell v. Norton*, 213 F.R.D. 16 (D.D.C. 2003) (hereinafter the "Erwin Order"), addressed a motion to compel in connection with the deposition during discovery for Trial 1.5 of Donna Erwin, who was then the Acting Special Trustee.

On December 9, 2002, plaintiffs noticed Ms. Erwin's deposition, and defendants moved for a protective order. At a December 13, 2002 hearing on the motion for a protective order, Mr. Quinn stated his understanding that Ms. Erwin did not expect to be in Washington prior to January 6, 2003. Erwin Order, 213 F.R.D. at 19. The Court denied the motion for a protective order, but directed that Ms. Erwin be deposed in Albuquerque, New Mexico, where she resided. *Id.*

Ms. Erwin attended a Tribal Task Force Meeting in Washington that started December 16, 2002. The Court held a hearing on December 17, 2002, which Ms. Erwin attended. At the hearing, Mr. Petrie noted that the statements Mr. Quinn had made at the December 13 hearing

were based on information conveyed to Mr. Quinn by Mr. Petrie, and he explained at length the circumstances which had led to "an unintentional, inadvertent misunderstanding between what was represented to you [at the December 13 hearing] and what Ms. Erwin's plans were regarding this week." Erwin Order, 213 F.R.D. at 19-22.

At Ms. Erwin's deposition on December 20, 2002 (in Washington), counsel for plaintiffs asked a series of questions which the Court stated "may be paraphrased as 'To your knowledge, did government counsel make any misrepresentations to the Court during the December 17 hearing?'" *Id.* at 23. Ms. Spooner directed Ms. Erwin not to answer the questions, and plaintiffs filed a motion to compel. On February 5, 2003, the Court granted plaintiffs' motion to compel, and ordered that "[A]cting Special Trustee Donna Erwin be deposed by plaintiffs at a time and place determined by plaintiffs, and that she respond to the questions set forth in plaintiffs' above-mentioned motion to compel, and all other questions related to the subject matter of those questions." *Id.* at 32.

Ms. Erwin was deposed again on February 12 and 13, 2003. Although the line of questions set forth in plaintiffs' motion to compel and other possible questions related to the subject matter of those questions should not have taken more than an hour, the deposition consumed 10 hours. Despite the length of the deposition, plaintiffs never directly asked the question which the Court correctly saw as the crux of the motion to compel - whether, to Ms. Erwin's knowledge, government counsel made any misrepresentations to the Court during the December 17 hearing. Instead, plaintiffs dragged out the deposition through persistent attempts to elicit privileged information on other subjects.

Plaintiffs also deposed Michelle Singer on March 4, 2003. Ms. Singer is an associate of Ms. Erwin, and she communicated directly with Mr. Petrie concerning the notice for Ms. Erwin's

deposition and her schedule. The United States also produced documents through March 11, 2003, in response to document production requests included in the notices for the depositions of Donna Erwin and Michelle Singer. Thus, while discovery was open for Trial 1.5, plaintiffs submitted document requests, to which the United States responded, concerning Donna Erwin's December 2002 schedule and her communications with the Department of Justice on her schedule, and they conducted two and half days of depositions during which they had the opportunity to question Ms. Erwin and her office associate on those issues.

Plaintiffs stated at the close of the Erwin depositions that they had not completed their examinations of Ms. Erwin and Ms. Singer, but they made no attempt to schedule concluding sessions of those depositions during the Trial 1.5 discovery period. Discovery in Trial 1.5 was closed on April 10, 2003, and Trial 1.5 itself concluded on July 8, 2003.

ARGUMENT

I. PLAINTIFFS HAVE NOT AND CANNOT MAKE THE SHOWING NECESSARY TO DEPOSE OPPOSING COUNSEL.

Plaintiffs are not authorized to take the depositions of opposing counsel, including Ms. Spooner, Mr. Petrie and Mr. Quinn, except in limited circumstances which are not present here. While motions to prevent depositions are not routinely granted, the calculus is different when a party attempts to take the deposition of opposing counsel. Depositions of opposing counsel are disfavored. *Corporation for Public Broadcasting v. American Automobile Centennial Commission*, 1999 WL 1815561, at *1 (D.D.C. Feb. 2, 1999).

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the

> practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). The mere request to depose an opposing counsel constitutes "good cause" for a protective order, unless the party seeking the deposition can show both the propriety and need for the deposition. *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 210 (D.P.R. 1998); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987). See also *Jennings v. Family Management*, 201 F.R.D. 272, 277 (D.D.C. 2001) ("[A] party seeking to depose an adversary's counsel must prove its necessity."). Therefore, plaintiffs have the burden of demonstrating that depositions of Ms. Spooner, Mr. Petrie and Mr. Quinn are necessary.

Courts which have considered the issue, including courts in the District of Columbia, have generally applied the three factor test set forth in *Shelton*, 805 F. 2d at 1327, requiring the party seeking to depose opposing counsel to show that: (1) no means exist to obtain the information other than deposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *See Corporation for Public Broadcasting*, 1999 WL 1815561, at *1; *Jennings*, 201 F.R.D. at 277. See also *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir.1995); *D.O.T. Connectors, Inc. v. J.B. Nottingham & Co.*, 2001 WL 34104929 (N.D. Fla. Jan. 22, 2001); *Lajoie v. Pavcon, Inc.*, 1998 WL 526784 (M.D. Fla. June 24, 1998); *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208 (D. P.R. 1998) (citing numerous cases); *Pereira v. United Jersey Bank*, 1997 WL 773716 (S.D.N.Y. Dec. 11, 1997); *M & R Amusements Corp. v. Blair*, 142 F.R.D. 304, 305 (N.D. Ill.1992). Therefore, in

order to take the depositions of the trial attorneys, plaintiffs must show that Mr. Petrie, Mr. Quinn and Ms. Spooner have information that plaintiffs have been unable to obtain and cannot obtain from other sources; that the information which is only available through deposition of the trial attorneys is relevant and not privileged; and that the relevant, non-privileged information which is only available through deposition of trial attorneys is crucial to plaintiffs' preparation of their case. Plaintiffs cannot meet any of the governing factors which they must demonstrate in order to depose Ms. Spooner, Mr. Petrie or Mr. Quinn on matters related to the scheduling of Ms. Erwin's deposition.[2]

A. The Information is Available from Sources Other than Depositions of Opposing Counsel.

The courts have limited depositions of opposing counsel to those circumstances in which opposing counsel is the only available source of the factual information.[3] In most cases, the non-privileged factual information can be obtained from some source other than a deposition of counsel, for example, by the deposition of another person or by serving interrogatories on the opposing party's counsel. Courts have required parties seeking to depose counsel to show that such sources are not available to them before allowing such a deposition to occur. See, e.g., *Mike v. Dymon*, 169 F.R.D. 376, 379 (D. Kan. 1996) (The party seeking to depose opposing

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[2] If plaintiffs intend to address any other subjects in the depositions, they must identify the subjects and demonstrate that they meet the three factors as to those subjects. *Jennings*, 201 F.R.D. at 277.

[3] For example, if a party is relying on an "advice of counsel" defense, there may be circumstances under which a deposition of counsel might be appropriate or where counsel is a "fact witness" because of his or her role in the underlying events or transactions upon which the claims are based. See e.g., *Jennings*, 210 F.R.D. 272, 277-78 (defendants had established that they could not obtain information about plaintiff's state of mind during relevant period other than through deposition of her counsel, who was also plaintiff's limited guardian). These circumstances are not present here.

counsel "must carry the burden to show that no other sources are reasonably available. To carry his burden, plaintiff must identify the specific unsuccessful measures he has taken to obtain the information, why they have failed, and that other resources are unavailable."); *M & R Amusements Corp.*, 142 F.R.D. at 306; *Marco Island Partners v. Oak Development Corp.*, 117 F.R.D. 418, 420 (N.D. Ill. 1987); *N.F.A. Corp. v. Riverview Narrow Fabrics*, 117 F.R.D. at 86.

Taken literally, the line of questions for which plaintiffs made a motion to compel related to Ms. Erwin's reaction to the December 17 hearing, and she therefore is the primary, or perhaps sole, source of the information. Taken most broadly, the line of questioning at issue in plaintiffs' motion concerned Ms. Erwin's schedule through January 6, 2003, her communications of her schedule to the Department of Justice, and the accuracy of statements made at the December 13 and December 17, 2002 hearings. Plaintiffs have numerous sources, other than depositions of opposing counsel, for obtaining information on these matters. The first source is the deposition of Donna Erwin.[4] As discussed, plaintiffs also deposed Michelle Singer about Ms. Erwin's schedule and about Ms. Singer's discussions with Department of Justice attorneys concerning Ms. Erwin's schedule.[5] The government also made an extensive document production in response to document requests included in the notices for the depositions of Ms. Erwin and Ms.

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[4] As discussed above, plaintiffs did not directly ask Ms. Erwin the questions for which they filed a motion to compel. However, any failure on their part to fully explore these subjects with Ms. Erwin or Ms. Singer is not a basis for satisfying the first *Shelton* factor. See *Boughton v. Cotter Corp.*, 65 F.3d at 830-31.

[5] Defendants did not object to Ms. Singer's deposition, which was noticed and taken while Trial 1.5 discovery was still open. While Ms. Singer is a lawyer, she was not employed during the time in question as an attorney, and did not act as a lawyer representing the defendants or Ms. Erwin. See Erwin Dep. at 357:17-362:9, attached as Appendix A. Rather, she was the main contact in Ms. Erwin's office on the matter of Ms. Erwin's schedule, a subject the Court had found in the February 5, 2003 Order was relevant to Ms. Erwin's credibility and was therefore an appropriate subject of Trial 1.5 discovery.

Singer. The plaintiffs received memoranda prepared by Ms. Erwin and Ms. Singer concerning the hearing on December 17, and the events leading up to that hearing. Finally, Mr. Petrie made an extensive presentation at the December 17 hearing on these matters. Rather than constituting the only source of information, depositions of Ms. Spooner, Mr. Petrie and Mr. Quinn would simply be cumulative of information plaintiffs have received from numerous other sources.

B. The Information Sought by Plaintiffs is Not Crucial to the Development of the Plaintiffs' Case.

In addition to showing that the subjects of the proposed discovery are not privileged and are obtainable from no other source, plaintiffs also have the burden of showing that the issue upon which they wish to depose government counsel is crucial to proof of their case. See, e.g., *Shelton*, 805 F.2d at 1330; *Mike v. Dymon*, 169 F.R.D. at 379; *Harriston v. Chicago Tribune* Co., 134 F.R.D. 232, 233-34 (N.D. Ill. 1990). "The deposition of an adverse attorney on central factual issues, rather than peripheral concerns, would weigh more heavily" in favor of the proposed discovery. *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 353 (D.N.J. 1990); accord, *Walker v. United Parcel Services, Inc.*, 87 F.R.D. 360, 362 (E.D. Pa. 1980) (denying deposition where the attorney's role not central to underlying dispute).

Plaintiffs cannot show that the depositions are necessary to obtain information crucial to the proof of their case. At this time, there is no case for them to prove, since the record on Trial 1.5 is closed. In any event, the factual circumstances concerning Ms. Erwin's schedule and travel plans in December 2002 and the communication of those plans to her attorneys has no conceivable bearing on any substantive issues in this case.

The Court found that the line of questions posed by plaintiffs to Ms. Erwin during her December 20, 2002 deposition which was the subject of the motion to compel were relevant to

her credibility as a potential witness in Trial 1.5. Erwin Order, 213 F.R.D. at 25. However, Trial 1.5 concluded two months ago. Moreover, although plaintiffs designated excerpts of her deposition, Ms. Erwin was not called as a witness by either side. There is no justification for conducting further discovery relating to the credibility of a person who was never called as a witness in a trial that has been completed. Further, Ms. Erwin is no longer Acting Trustee, and any suggestion that her credibility might be relevant to any further proceeding in this case would be pure speculation. In any event, testimony by an attorney that bears solely on the credibility of a potential witness is not the type of information which is sufficiently crucial to a party's case to justify a deposition of opposing counsel. *Walker v. United Parcel Services, Inc.*, 87 F.R.D. at 362.

The Court also stated that facts concerning Ms. Erwin's travel plans and whether she conveyed those plans to her attorneys were relevant to the credibility of the attorneys. Erwin Order, 213 F.R.D. at 25 n.3. However, as this Court recently noted, counsel for plaintiffs may not undertake a prosecution of possible sanctionable conduct of opposing counsel. *Landmark Legal Foundation v. E.P.A.*, 2003 WL 21715678 at *4 (D.D.C. July 25, 2003), citing *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987). Despite the Court's expressed concerns about statements by defense counsel, the February 5, 2003 Order did not compel any discovery beyond the redeposition of Donna Erwin, which has occurred.

C. The Information Sought by Plaintiffs is Not Relevant and May be Privileged.

Plaintiffs also cannot meet the third *Shelton* factor, that the information sought through the deposition of government counsel is relevant and non-privileged. The Court has determined that communications made between Ms. Erwin and government counsel regarding her December 2002 schedule or her availability to be deposed in that month are outside of the scope of the

attorney-client privilege. Erwin Order, 213 F.R.D. at 25. However, information about her schedule is not relevant for the same reason that it is not crucial to plaintiffs' case - any information any deponent provided about Ms. Erwin's December 2002 schedule could not have any conceivable bearing on any substantive issue on which plaintiffs' counsel may appropriately conduct discovery at this time.[6]

Since Ms. Spooner, Mr. Petrie and Mr. Quinn have participated in this case solely as litigation attorneys, attempts to elicit information on any other topics would almost certainly involve the attorney-client privilege or work product doctrine, even if the subjects addressed in the depositions were somehow relevant to any issue in this case. Further, it appears from the requests for production included in the notices of depositions that plaintiffs do plan to attempt to elicit privileged information and work product on matters unrelated to Ms. Erwin's December 2002 schedule or her availability to be deposed in that month. For example, the notice of deposition for Ms. Spooner requests notes of all telephone conversations "placed to or made by Sandra Spooner concerning Donna Erwin since December 2002" (emphasis added), internal Department of Justice communications concerning the deposition of Donna Erwin, and all communications between Ms. Erwin's personal counsel and attorneys in the Department of Justice and any attorneys in the Solicitor's Office of the Department of the Interior.

Where the subject of an attorney deposition is closely interwoven with privileged matters, most courts have urged caution about permitting such a deposition absent unusual circumstances, requiring a strong showing of need for the testimony and the unavailability of other means to

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[6] Therefore, the protective order should also be issued on the additional and separate ground that the information sought by the depositions is not relevant to the claim or defense of any party and is not reasonably calculated to lead to the discovery of admissible evidence. Fed R. Civ. P. 26(b)(1).

obtain the needed information. See, e.g., *Johnston Development Group, Inc.*, 130 F.R.D. 348 (caution appropriate where subject of deposition heavily intertwined with privileged or confidential information); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 429 (E.D. Pa. 1981) (same). As the magistrate judge noted in *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. at 85 (M.D.N.C. 1987), often a deposition of a trial attorney "merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine - that involving an attorney's mental impressions or opinions."

Here, it appears from the document production requests that plaintiffs intend to go beyond questions concerning Ms. Erwin's schedule in December 2002, her availability for deposition during that month and her communications to counsel on her schedule - subjects well trod in the depositions of Ms. Erwin and Ms. Singer - and to inquire into subjects protected by the work product doctrine, the attorney-client privilege, and specific government privileges.

Much of the time during the Erwin and Singer depositions was consumed on efforts by plaintiffs to elicit privileged information on subjects totally unrelated to Ms. Erwin's December 2002 schedule and her communications with attorneys about her schedule. For example, plaintiffs attempted to question Ms. Erwin about discussions with an attorney which she testified was held solely to prepare her for her deposition. Frequent recesses were required to confer with the deponents to determine whether the government should assert a privilege, and to confer with attorneys responsible for the merits of this case for guidance about lines of questions that were unrelated to Ms. Erwin's schedule and communications with counsel about her schedule. Plaintiffs should not be permitted to repeat those performances through unauthorized depositions of opposing counsel.

II. Plaintiffs are Not Authorized to Conduct Any Discovery at This Time.

Even if plaintiffs were able to make the showing necessary to depose trial attorneys, discovery at this time is not authorized. Ms. Erwin's deposition, and the controversy about the scheduling of that deposition, was part of the discovery for Trial 1.5. Under the terms of the discovery scheduling order for Trial 1.5, fact discovery closed on March 24, 2003, and all discovery closed on April 10, 2003. See Appendix B. In fact, Trial 1.5 itself was completed two months ago. Discovery has not commenced on any subsequent proceeding in this case. The parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f), and therefore plaintiffs are not authorized to take any depositions at this time. Fed. R. Civ. P. 26(d) and 30(a)(2)(C).

The February 5, 2003 Order on which plaintiffs rely granted their motion to compel in regard to the deposition of Donna Erwin and authorized plaintiffs to redepose Ms. Erwin on the questions set forth in plaintiffs' motion to compel. Erwin Order, 213 F.R.D. at 32. The further deposition of Ms. Erwin in anticipation of Trial 1.5 was the only discovery addressed by the February 5, 2003 Order. Plaintiffs redeposed Ms. Erwin on February 12 and 13, 2003, and had the opportunity to ask her at that time the questions set forth in plaintiffs' motion to compel. The February 5, 2003 Order did not compel the taking of any depositions other than Ms. Erwin's and did not extend the closing date for discovery. Consequently, the February 5, 2003 Order does not authorize plaintiffs to take the depositions in question at this time. The notices of deposition and

subpoenas are nothing more than attempts by plaintiffs' counsel to conduct unauthorized and impermissible free-standing investigations of opposing counsel.[7]

The notices of deposition also request "defendants and the deponent" to produce documents. The notice for the deposition of Sandra Spooner is Appendix C hereto. Discovery for Trial 1.5 has been completed. The parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f) on any subsequent proceeding in this case. Therefore, plaintiffs are precluded under Fed. R. Civ. P. 26(d) and 34(b) from requesting defendants to produce documents.[8] The service of the new document requests is clearly improper under Rule 34(b). The February 5, 2003 Order said nothing about document production, so that order does not authorize the untimely new requests made by plaintiffs.

III. A Protective Order Should Be Issued Regarding the Document Production Request.

As discussed in Part II above, the document production requests included in the notices of depositions are unauthorized at this time. However, even if plaintiffs were authorized to make new production requests at this time, a protective order should be issued relieving defendants and the putative deponents of responding to the requests.

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[7] Plaintiffs scheduled the depositions without conferring with government counsel. Assigned government counsel is not available on October 8 and 14, the noticed dates for the depositions of Mr. Petrie and Mr. Quinn. We understand that Mr. Petrie's and Mr. Quinn's private counsel are also not available on the dates scheduled by plaintiffs.

[8] Rule 26(d) forbids the plaintiffs from seeking discovery "from any source" at this time, and plaintiffs therefore have no basis for requesting the putative deponents to produce documents.

The notices of deposition for Donna Erwin and Michelle Singer served by plaintiffs in February 2003 included document requests. The notice for the deposition of Michelle Singer is Appendix D.[9] Defendants reasonably interpreted the production requests ancillary to the notices for the depositions of Ms. Singer and Ms. Erwin as calling for documents which constituted or reflected contemporaneous communications concerning Ms. Erwin's December 2002 schedule and her availability for a deposition during that month and produced documents accordingly. Plaintiffs did not submit any supplemental document requests while discovery for Trial 1.5 remained open.

The document requests included in the notices for the depositions of Mr. Petrie, Mr. Quinn and Ms. Spooner considerably overlap those included in the Erwin and Singer notices. To the extent that the current requests duplicate the earlier requests, the responsive, non-privileged documents have already been produced. However, to the extent the current requests differ from the Erwin and Singer requests, plaintiffs appear to be requesting information that is privileged, is work product, and/or is totally unrelated to Ms. Erwin's December 2002 schedule or communications about that schedule.[10] Compare Appendix C and Appendix D. For example document request 2 to the Spooner notice requests documents concerning phone calls "concerning Donna Erwin since December 2002." This request appears to encompass all communications concerning Donna Erwin **except** contemporaneous discussions about her schedule and her availability for a deposition in December 2002. The request therefore seeks

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[9] The production requests included in the notice for the deposition of Donna Erwin were identical.

[10] We say that the requests appear to request privileged or irrelevant information in part because the requests are vaguely and ambiguously drafted.

information which is neither relevant to Ms. Erwin's December 2002 schedule or availability for a deposition, nor is reasonably calculated to lead to the discovery of relevant evidence, even if there still were a proceeding to which it might arguably pertain. Further, the requests almost necessarily include privileged communications. Items 1 and 3 request documents concerning "strategies" or "strategic decisions," and therefore necessarily encompass work product, particularly given that the requests are made in connection with the planned depositions of trial attorneys. Item 4 requests communications with the Department of Justice with respect to "the notice of deposition or the deposition of Donna Erwin," which presumably encompasses the notice served in February 2003 and the sessions of the deposition held on February 12 and 13, 2003.[11] The request also appears to encompass all communications and work product within the government concerning the response to plaintiffs' motion to compel, the February 5, 2003 Order, and other unquestionably privileged litigation documents. However, the request is not relevant to Ms. Erwin's December 2002 schedule and her communications at that time to counsel about her schedule. Plaintiffs' new document requests essentially ask the government to generate a new privilege log, and therefore are unreasonable and unduly burdensome on their face.

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[11] The government was represented at the February 2003 deposition of Ms. Erwin by different trial counsel, whose sole role was to defend the deposition and to respond to document requests included in the Erwin and Singer deposition notices. The request could be read as reaching the work product and privileged communications of these attorneys.

CONCLUSION

For the foregoing reasons, the United States requests that the Court enter an order granting this motion for a protective order and quashing the subpoenas served on Sandra Spooner, Terry Petrie and Michael Quinn.

Respectfully submitted,

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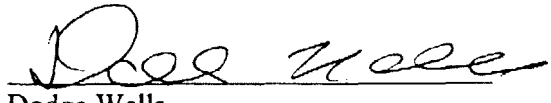

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DATED: September 12, 2003

CERTIFICATE OF SERVICE

I declare under penaltyof perjury that, on September 18, 2003 I served the Foregoing *Objections of the United States to the Requests for Production of Documents Included in the Notices for the Depositions of Terry Petrie, Michael Quinn, and Sandra Spooner*, by facsimile in accordance with their written request of October 31, 2001 upon:

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Per the Court's Order of April 17, 2003,
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