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DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER REQUIRING
DEFENDANTS TO PAY PLAINTIFFS' EXPERT DEPOSITION FEES AND EXPENSES

Plaintiffs have moved for a "protective order" under Rule 26(b)(4)(C) and Rule 26(c) of the Federal Rules of Civil Procedure concerning expert witness depositions that have already been completed, when what Plaintiffs really want is reimbursement for all fees and expenses purportedly related to the completed depositions of their experts, regardless of whether the costs are reasonable or unconscionable, documented or entirely unsubstantiated. Rather than present a cogent explanation of the charges and Plaintiffs' entitlement to them, most of Plaintiffs' motion is spent complaining that Defendants have not simply paid the bill – a bill totaling nearly $71,000 for fewer than 40 hours of deposition, almost half of which is composed of blatant overcharges and unsubstantiated expenses.[1] Given these excesses, Plaintiffs' motion should be denied.

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[1] Defendants will not waste the Court's time by refuting, tit for tat, every exaggeration and misstatement Plaintiffs tender concerning the "background" of the parties' discussions about reimbursement. Plaintiffs' portrayal is not accurate, but none of it is pertinent to the ultimate issue concerning the amount of reimbursement due. Suffice it to say that when Defendants objected to Plaintiffs' self-serving mischaracterizations of the parties' discussions, Plaintiffs chose to quarrel and accuse rather than focus on making certain that the materials they provided to Defendants adequately explained and substantiated every dollar of their claim. Even upon filing the instant motion, Plaintiffs have done nothing further to substantiate or document their

Plaintiffs demand reimbursement for fees and expenses that are unreasonable, unrecoverable and, in some cases, entirely undocumented. Defendants are not opposed to paying Plaintiffs for the reasonable expenses, actually incurred, of their experts' depositions in accordance with the Federal Rules, but nothing obligates Defendants to blindly pay whatever amount Plaintiffs claim. Defendants object to Plaintiffs' claim to the extent it seeks reimbursement for (1) unreasonably high witness fees, (2) overcharges for time, (3) exorbitant, lavish expenses and (4) undocumented fees or costs. In turn, Defendants are also entitled to setoff against the reasonable amount due Plaintiffs all corresponding reasonable fees and costs that Defendants incurred in producing their own experts for deposition by Plaintiffs. With these adjustments, Plaintiffs are not due the $70,990 their motion suggests, but an amount closer to $25,780.

Plaintiffs basically contend that they have submitted a bill to Defendants and Defendants must pay it, regardless of how unreasonable or questionable the charges are and without setoff for any expenses due Defendants. Their position is as unreasonable as it is untenable. Had Plaintiffs submitted a statement containing only reasonable and documented charges, the matter could have been resolved more readily. Plaintiffs neglect to mention, however, that the amount they seek is padded with excesses, such as:

- a $1,000 hotel bill for a one-day deposition;
- a lavish $139 meal at an exclusive restaurant;
- over $100 of charges at a hotel lobby bar;
- hourly fees of $1,000 for testimony by one expert;

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reimbursement claim.

- time charged for attending another expert's deposition;
- charges for meeting with Plaintiffs' counsel; and
- what appears to be first class airfare.

These are just examples of the excesses behind Plaintiffs' motion. No litigant should have to cover such spending.

As Plaintiffs note in their motion, the parties did discuss prior to the depositions whether the government would pay for the experts' travel time to Washington. The parties did reach an agreement that such billable travel time would not exceed twelve to thirteen hours round trip per witness. The parties, however, did not agree to abandon the prescription in the Federal Rules that charges for expert fees and related travel must be reasonable to be reimbursable. No basis exists, therefore, to assert that every dollar Plaintiffs claim is recoverable simply because the charge appears on their list.

ARGUMENT

I. A Party Seeking Reimbursement Under Rule 26 Bears The Burden Of Proving Reasonable Expenses

A party seeking reimbursement of deposition fees bears the burden of proving reasonableness. Royal Maccabees Life Ins. Co. v. Malachinski, No. 96-C-6135, 2001 WL 290308, at*16 (N.D. Ill. Mar. 20, 2001). Unless Plaintiffs have documented each item of expense for which they seek reimbursement with, for example, receipts, it necessarily follows that they cannot discharge their burden of proving they were reasonable. In Part III below, Defendants identify those charges claimed by Plaintiffs that are unreimbursable because they are not substantiated.

II. A Party Is Not Required To Pay More Than The Actual, Reasonable Cost Of Expert Discovery

Rule 26 of the Federal Rules of Civil Procedure provides that a party deposing an adversary's expert should pay for the "reasonable" cost of providing that discovery. Fed. R. Civ. P. 26(b)(4)(C) ("party seeking discovery [should] pay the expert a reasonable fee for time spent responding to discovery"). The obligation is also reciprocal: Plaintiffs are equally obligated under the same rule to pay the reasonable cost of producing Defendants' experts for deposition.

The key limitation to recovery of such fees and expenses, however, is that they be "reasonable." If one side decides to spend lavishly on an expert, the opposing side should not be obligated to pay for that exorbitance. As one court put it, "[w]hile plaintiff may contract with any expert of plaintiff's choice and, by agreement, that expert may charge unusually high rates for services, the discovery process will not automatically tax such unreasonable fees upon the defendant." Bowen v. Monahan, 163 F.R.D. 571, 574 (D. Neb. 1995) (ordering defendant to pay half of expert's proposed fee); accord U.S. Energy Corp. v. NUKEM, Inc., 163 F.R.D. 344, 347 (D. Colo. 1995) ("[U]nless the courts patrol the battlefield to insure fairness, the circumstances invite extortionate fee setting.").

In determining whether an expert's fee is reasonable, courts consider the following factors: (1) the witness's area of expertise; (2) the education and training required to provide the type of expert insight that is sought; (3) prevailing rates of other comparable experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular area; and (6) any other factors likely to be of assistance to the court in balancing the interests implicated by Rule 26. E.g., Bowen, 163 F.R.D. at 573; accord Magee v. Paul Revere

Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997) (commenting that none of these factors has "talismanic qualities" but serve as a "guide for the Court"). The same test of reasonableness applies to the recovery of related expenses. See, e.g., Frederick v. Columbia University, 212 F.R.D. 176, 177-78 (S.D.N.Y. 2003) ("defendants are not required to provide first class travel or first class accommodations" for plaintiffs' expert); cf. Mathis v. Nynex, 165 F.R.D. 23 (E.D.N.Y. 1996) (deposing party not obligated to pay for expert's copy of transcript).

Defendants identify below each fee charge and expense item that they challenge and explain the basis for their objection. With but one exception, Defendants will not quarrel with the professional rates applied by Plaintiffs' experts, but Defendants do object where the experts have padded their hours. In other instances, Plaintiffs have claimed reimbursement for expenses that they do not bother even to document, much less itemize. These costs are all objectionable because Plaintiffs have failed to prove these unsubstantiated expenses are reasonable. Finally, other expenses, although documented, are just plain unreasonable.

Table A, submitted herewith as Exhibit 1, summarizes Defendants' objections and the adjustments that the Court should make to Plaintiffs' claim. Column one lists each of Plaintiffs' experts and, for convenience of reference, notes each expert's affiliated firm where one exists.[2] The second column lists the number of hours that the expert was deposed.[3] (One expert, Dwight Duncan, was deposed in excess of eight hours because he was deposed as both an affirmative and rebuttal witness.) The next three columns summarize the fees and expenses that Plaintiffs appear

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[2] In some cases, documents provided by Plaintiffs bear letterhead of only the expert's affiliated firm.

[3] The length of deposition is a useful yardstick for considering whether certain claimed expenses are reasonable (e.g., 3 days of lodging are patently unreasonable for a 2-hour deposition).

to claim for each listed witness. The next three columns summarize the dollar value of the various objections Defendants assert in connection with the claimed amounts. The last two columns, on the far right, summarize the total amount of fees and expenses that should be disallowed for each witness, and the dollar value of Plaintiffs' claim after adjusting for disallowed amounts. The bottom row provides a grand total for the major categories.

III. Plaintiffs' Claimed Fees And Expenses Require Adjustment Because They Are Excessive And, In Several Cases, Unproven

Defendants set forth below their objections to the fees and expenses Plaintiffs have claimed in connection with the deposition of each of their expert witnesses. For ease of reference, Defendants will address each objection, witness by witness.

1. Richard Fasold

Mr. Fasold appeared for deposition on March 21, 2003. According to the transcript, his deposition commenced about 9:30 a.m. and concluded shortly before 5:00 p.m., with a break for lunch.[4] For this one day of deposition, Mr. Fasold submitted an invoice totaling $14,416.77. That invoice includes charges of $1,000 per hour for the time spent in deposition, and $500 per hour for exactly six hours travel to Washington and back home. It includes $402.47 for – not one – but two nights of lodging, while other receipts for his trip clearly indicate that Mr. Fasold

[4] All deposition times cited in this response are based on the time entries made by the stenographer on the record for each session.

remained in Washington for several more days, presumably at Plaintiffs' request.[5] For example, his bill includes $114.30 in charges for two dinners.[6]

A. Mr. Fasold's Rate Is Unreasonable

A professional fee of $1,000 per hour for deposition testimony and a base rate of $500 per hour is unconscionable. Mr. Fasold testified at trial that he is a business partner and friend of Plaintiffs' lead counsel, Dennis Gingold. He claims his customary rate is $500 per hour, but that he doubles the rate for time spent testifying. Phase 1.5 Trial Tr., May 14, 2003 a.m., at 71:21-72:9 (R. Fasold) (attached at Exhibit 2). Although Mr. Fasold is surely overpaid at $500 an hour, Mr. Fasold did charge his stated rate for travel time within the limits agreed to by Defendants last March, so Defendants do not object here to paying $500 per hour for travel. Defendants do, however, object to paying anything more for his time spent in deposition. See, e.g., Frederick, 212 F.R.D. at 177 (exorbitant $975 hourly deposition fee for toxicologist reduced to $375); Edin v. Paul Revere Life Ins. Co., 188 F.R.D. 543, 547 (D. Ariz. 1999) (refusing to condone under Rule 26 an "extortionist practice" of charging multiples of usual rate for testimony).

B. Some of Mr. Fasold's Expenses Are Unreasonable

The records submitted by Plaintiffs indicate that Mr. Fasold traveled to Washington several days early, presumably to observe depositions of other expert witnesses. Given that Mr. Fasold's own deposition was completed by 5:00 p.m. on March 21, it is not reasonable to ask

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[5] Defendants did not request Mr. Fasold's presence beyond his own deposition.

[6] Based upon the receipts for the meals, it also appears that Mr. Fasold dined with another party and then simply billed for one-half the amount of the total. Defendants cannot confirm whether the bills reflect the actual cost of Mr. Fasold's meal or whether the amount claimed would subsidize the meals of Mr. Fasold's guest.

Defendants to pay for any of Mr. Fasold's lodging or meals after his own deposition concluded. At that time, as far as Defendants were concerned, he was free to return home. The charge for his second night of lodging and second dinner should be disallowed as unreasonable.

2. John Wright

John Wright's deposition was held on March 13, 2003. It began at about 10:10 a.m. and ended shortly after 3:00, for a total duration just shy of five hours, including all breaks. Mr. Wright's bill for this part-day deposition is $8,848.23. Although Plaintiffs' counsel agreed that experts would not bill travel time in excess of six hours in either direction, Mr. Wright billed a total of 13.3 hours for his trip to Washington and return travel home, exceeding the agreed ceiling. Although the transcript shows that the deposition took less than five hours to complete, Mr. Wright billed for 5.4 hours. The time exceeding five hours is also unreasonable.

Once he arrived in Washington, Mr. Wright treated himself to a $325 (plus taxes) per night room at the Willard Hotel, one of the priciest hotels in Washington. Although his deposition took less than five hours and was finished by three o'clock, Plaintiffs seek to recover three days lodging at the Willard. His hotel bill includes over $100 in what appear to be charges from the hotel's lobby bar.[7] His invoice includes a $139 dinner at the Oceanaire restaurant and an additional $230 unexplained charge from his travel agent.

Defendants do not object to paying for one night of lodging and related meals, if billed at a reasonable amount. Defendants do object, however, to lavish spending on premium hotels, exclusive restaurants, and for more than one day of accommodations. The Willard room was

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[7] The Willard hotel bill lists three charges from "Round Robin Beverage." When contacted to explain the reference, the hotel identified it as being the lobby bar. The hotel's web site also gives a similar description.

$325 a night plus taxes; by comparison the government per diem for Washington, D.C. is $200 per day for all meals and lodging. Defendants acknowledge that it may not be possible for non-government contractors to obtain government rates, but when an opposing expert consciously chooses premium accommodations, the taxpayers should not be compelled to underwrite the frivolity. Defendants, therefore, object to paying more than $200 per night for lodging and more than $50 for a dinner.

3. Landy Stinnett

A. Mr. Stinnett's Hours Are Wildly Overstated

Mr. Stinnett appeared for deposition on March 18, 2002. It began at 9:55 a.m. and ended by 1:49 p.m., for a total duration of less than four hours including all breaks. Plaintiffs have presented a bill of $5,368.77 in connection with this brief deposition. Although the deposition lasted less than four hours, Mr. Stinnett has billed time of twenty-four hours. The bill lists a charge of four hours of travel each way, plus a full eight-hour day for "preparation" in Washington the day before his deposition, plus eight hours of time for less than four hours of testimony. Such exorbitant billing is patently unreasonable and not reimbursable under Rule 26. Defendants do not object to the travel time billed or to four hours for deposition time, but do object to all other billed time as excessive.

Although there does not appear to be a set rule in this district concerning whether "preparation" time is a reasonable charge under Rule 26, the better view is not to authorize it. Some courts have disallowed such fees absent compelling circumstances, while others have allowed some preparation time in the belief that a deposition should proceed more efficiently when the expert has refreshed his recollection. See Magee, 172 F.R.D. at 646 (listing cases on

both sides); compare M.T. McBrian, Inc. v. Liebert Corp., 173 F.R.D. 491 (N.D. Ill. 1997) (no preparation fee allowed for contract case) with S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 154 F.R.D. 212, 214 (E.D. Wis. 1994) (testimony required review of one hundred schedules attached to expert report). The better approach is to prohibit recovery of such costs absent clear proof that the expert had to undertake specific work to ready himself for examination. In this case, no such independent work should have been necessary – each expert had submitted his report just two to three weeks prior to his deposition. In Mr. Stinnett's case, his expert report was only four pages long.

More important, authorizing recovery for preparation time opens the door to abuse. It tempts adversaries to charge for time that the expert actually spent working with the attorney who will defend his deposition. Defendants note that the full eight hours Mr. Stinnett charged for "preparation" occurred after he traveled to Washington for the deposition, suggesting that this time was likely far more beneficial to Plaintiffs' counsel than to Defendants. Courts have refused the invitation to shift the cost of conference time with defending counsel to the deposing party. See Magee, 172 F.R.D. at 647 (approving of some reasonable preparation time for expert but not that billed for time "preparing the attorney who retained him"). Thus, Defendants object to paying more than 12 hours for Mr. Stinnett's time (8 hours travel and 4 hours in deposition).[8]

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[8] Should the Court determine that reasonable preparation time is recoverable, Defendants ask the Court to permit Defendants to amend their compensation claim to include preparation time spent by Defendants' own experts prior to deposition. Presently, Defendants do not include such charges in calculating the amount of setoff to which Defendants are entitled. Preliminary inquiry indicates that if such preparation time were included, it would add approximately $13,500 to Defendants' reimbursement claim because of the depositions of Edward Angel (42.5 preparation hours at $105 per hour); Alan Newell (34 preparation hours for two deposition days at $150 per hour); and Dr. David Lasater (7.9 preparation hours for two deposition sessions at $500 per hour).

B. Expenses Relating To Mr. Stinnett's Travel Are Unsubstantiated

Plaintiffs also seek compensation for related expenses in the amount of $1,768.77. The bill from Pincock Allen & Holt, Mr. Stinnett's employer, merely lists two dollar figures, $1,110.77 for "Expenses" and $658.00 with a label of "American Express" without explanation. No receipts or other proof of the expenses have been provided. None of the papers Plaintiffs submitted to Defendants or to the Court (with the motion) prove that these expenses were incurred. Without receipts or other explanation to demonstrate these costs were actually incurred and are reasonable, Defendants cannot properly be asked to pay them. Defendants, thus, object to all expenses listed by Plaintiffs in connection with Mr. Stinnett's deposition.

4. Paul M. Homan

Paul Homan appeared for deposition on April 9, 2003. His deposition commenced at 10:06 a.m. and concluded at 5:03 p.m., for a total duration of 7.2 hours, including all recesses. Plaintiffs, however, seek to recover expert fees for twenty-five hours. At a billable rate of $500 per hour, the total charge Plaintiffs seek to impose is $12,500 for less than one full eight-hour day of deposition. If approved, Plaintiffs' demand would ratchet Mr. Homan's effective rate up to more than $1,700 per hour of deposition. The amount they seek is patently unreasonable.

As noted above with respect to Mr. Stinnett's bill, it is not prudent to allow a party to charge its adversary for the expert's "preparation" in this case. Mr. Homan testified on April 9, a scant 10 days after he completed his expert report. The material, therefore, should have been completely fresh in his mind. Mr. Homan's deposition revealed also that much of the material in his "report" was merely a rehash of the strategic plan he submitted to Congress while Special Trustee, see generally Homan Deposition Tr. at 58-61(April 9, 2003) (attached at Exhibit 3),

along with some more current observations he had included in testimony to Congress. So, there was not much of anything "new" that Mr. Homan needed to review before his deposition. Only the fee for his actual time in deposition should be recoverable.[9]

5. Matthew Gabriel

Matthew Gabriel's only deposition, held on March 11, 2003, was brief – it lasted a mere three hours and twenty-three minutes; it was the second expert deposition that day, and ended at 4:58 p.m.. The bill presented by Plaintiffs totals $4,227.36. This bill reflects 21.6 hours of billable time: 2.3 hours of billable time for meeting with Plaintiffs' counsel for a "briefing on disposition [sic]," 12.4 hours of round-trip travel time, and 3.5 hours of time billed, not for Mr. Gabriel's own deposition, but for observing the McQuillan deposition earlier in the day. If Plaintiffs' counsel desire to confer with their expert to be "briefed" on his expected testimony, that is their prerogative, but it should not be at Defendants' expense.[10] Likewise, if an expert wants to watch another deposition, the time he devotes to that activity is not properly chargeable to his adversary; it is for his own benefit and for his own client's account.

Mr. Gabriel's invoice reflects expenses of $1,527.36, including $1,038 for airfare, $342.36 for hotels and $112.45 for cabs. While most of the charges appear reasonable, the hotel

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[9] Although Defendants will not here contest whether a fee of $500 per hour for Mr. Homan is reasonable, the rate is unquestionably expensive. His high price should be considered as a factor against allowing recovery for any preparation time. Defendants submit that his high hourly rate already reflects his "preparation" – years as a bank regulator and Special Trustee.

[10] The same arguments that militate against recovery of "preparation" time for Messrs. Stinnett and Homan, above, apply even more strongly here. The time billed was expressly for meeting with Plaintiffs' counsel, which should not be recoverable even if other "preparation" work were allowed.

charge appears excessive. As noted above, Defendants should not be required to pay more than $200 per night for lodging, so the expenses require an adjustment of $142.36.

6. Alan McQuillan

Professor McQuillan appeared for a brief deposition on the morning of March 11, 2003. The deposition commenced at 9:40 a.m. and concluded by 12:15 p.m., for a total elapsed time of two hours and thirty-five minutes. According to the text of Plaintiffs' motion, the fees and expenses relating to this brief deposition total $5,907.57. Not one piece of paper submitted with Plaintiffs' motion shows that these charges are reasonable.[11] Indeed, it is not even clear whether Plaintiffs mean to claim any fee or expenses for the professor. Their proposed order makes no mention of Professor McQuillan and proposes no recovery in connection with his deposition. Having failed to substantiate any charges relating to the McQuillan deposition or to propose an amount for them in their form of order, Plaintiffs are entitled to no reimbursement in connection with the McQuillan deposition.

7. Dwight J. Duncan

Dwight Duncan played two roles in discovery: he gave an expert report as an affirmative expert and a report as a rebuttal expert for Plaintiffs. In connection with his affirmative case role, Plaintiffs seek payment of $13,284.19, and for his rebuttal deposition, Plaintiffs demand $6,437.30. Plaintiffs agreed to produce Mr. Duncan for a day of deposition on March 19, 2003, at 9:30 a.m. When that day arrived, however, the witness advised that he had to leave by mid-afternoon in order to travel home. Defendants accommodated Mr. Duncan's personal schedule

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[11] Plaintiffs appear to rely entirely upon a summary memorandum sheet prepared by Plaintiffs' office assistant, but that sheet merely lists a total for Professor McQuillan.

by allowing Mr. Duncan to recess his deposition on March 19 and to complete it on March 25, 2003. Plaintiffs now seek to have Defendants pay for both of his trips, including double the amount of billable travel time (a total of twenty-four hours), or $6,000 just for travel fees. In addition, Plaintiffs want Defendants to foot the bill for all expenses in connection with Mr. Duncan's two trips for one day of deposition, including two round-trip airfare charges of $2,264 each and two hotel stays at more than $350 per night. These multiple charges for travel expenses are patently unreasonable, and each expense is excessive by itself.[12]

Defendants have similar objections concerning Mr. Duncan's travel expenses for his rebuttal deposition in April. That deposition was held on April 8, 2003, and was concluded in little more than ninety minutes. Mr. Duncan's fees and expenses, however, total $6,437.30. Again, there is an excessive $2,264 airfare, and this time, not one, but two hotel nights, at a cost of $659.96. By any standard of reasonableness, these expenses are plainly excessive, especially when the deposition was over before 11:00 a.m.. Defendants object to paying for more than one night of accommodations for each deposition round, and to paying hotel costs in excess of $200 per night. Likewise, his exorbitant airfare should be reduced by one-half, to bring it in line with what other experts charged.

8. Plaintiffs' Claimed Fees And Expenses Should Be Limited To $38,059

Defendants should not be made to bear the cost of lavish travel accommodations or extra costs associated with an expert's personal schedule or other interests. These costs, if actually

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[12] The airfare for each of Mr. Duncan's trips appears to be excessive on its face. Each ticket is more than twice that incurred by any of Plaintiffs' other experts. Plaintiffs did not provide a copy of any travel receipt for Mr. Duncan, so Defendants question whether Mr. Duncan traveled on first class tickets. If so, the charges are clearly excessive.

incurred, should be borne by Plaintiffs. Second, Plaintiffs are not entitled to be reimbursed for costs that they cannot substantiate by a receipt or similar transaction record. No compensation should be allowed for hours that are padded or fees that are excessive.

When excessive costs and fees are eliminated and unsubstantiated charges are ignored, the amount of reimbursement to which Plaintiffs are legitimately entitled is substantially less than the amount they seek. Table A represents a summary of Defendants' adjustments to Plaintiffs' claimed amounts. Plaintiffs' claim reimbursable fees and expenses of $70,990. After all of the adjustments set forth above are made, that number falls to $38,058.79. The analysis, however, cannot end there. Like Plaintiffs, Defendants also produced several experts for deposition at Plaintiffs' behest. Because Defendants are entitled to reimbursement of reasonable fees and expenses of these depositions under Rule 26, these amounts should be setoff against whatever amount the Court determines that Plaintiffs are entitled to recover. That final adjustment is addressed in the next section.

IV. Defendants Are Entitled To A Setoff As Reimbursement For Plaintiffs' Deposition Of Defendants' Experts

Plaintiffs took four discovery depositions of Defendants' experts. Edward Angel appeared on March 17, 2003 for 6.5 hours of examination. Alan Newell appeared for almost two days of deposition, on March 20, 2003 for 7.9 hours, and again on April 28, with 4.8 more hours of examination. Plaintiffs deposed Dr. David Lasater twice, once as an affirmative witness and later in his role as a rebuttal witness. Dr. Lasater appeared on March 12, 2003 for 7.2 hours of deposition and on April 8, 2003 for 5 hours of deposition.

Based on the contract rates at which each of these experts charges the government, the fees associated with each witness's testimony are simple to compute. Defendants are making no

claim for reimbursement of any fees relating to travel time. Defendants also submit that no fees should be charged by either side for so-called "preparation" time in this case, and so none is included here. Based on the deposition time noted by the court reporter and each expert's contract rate,[13] Defendants request reimbursement for expert fees in the following amounts:

Expert Witness	**Deposition Hours**	**Professional Rate**	**Total Cost**
Edward Angel	6.5	$105	$ 682.50
David Lasater	11.2	$500	$ 5,600.00
Alan Newell	12.7	$150	$ 1,905.00
		Grand Total (Fees):	$ 8,187.50

With respect to travel expenses, only Mr. Newell and Dr. Lasater reside outside the Washington area. The record of expenses relating to these witnesses' travel are attached at Exhibits 5 and 6, submitted herewith. The total expenses for Mr. Newell's travel (two separate days of deposition at Plaintiffs' request) are $ 2,704.23, and $ 1,386.40 for Dr. Lasater's two depositions.[14] Thus, the total amount of reimbursement due Defendants is $12,278.13.[15] This is the same amount that should be set off against the reasonable reimbursement due Plaintiffs. After all adjustments are made, Plaintiffs are due a payment of $25,780.66 from Defendants.

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[13]Documentation showing each expert's professional rates and, where applicable, related travel expenses are attached at Exhibits 4, 5 and 6.

[14]Note that some expenses documented for Defendants' experts may exceed the amount(s) for which reimbursement is sought here. The difference reflects an adjustment to conform charges to Defendants' position on reasonable reimbursement rates for lodging, meals and airfare.

[15] Should the Court determine, however, that "preparation" time should be recouped, Defendants would request additional reimbursement presently estimated at $13,500, for a total setoff of around $26, 278. See supra note 8.

CONCLUSION

For these reasons, Defendant's motion for a protective order concerning expert witness fees should be denied. Instead, the Court should order Defendants to pay, and Plaintiffs to accept, a payment of $25,780.66, representing the net amount due for fees and expenses of all expert depositions conducted by either side in connection with discovery during Phase 1.5.

Dated: October 24, 2003

Respectfully submitted,

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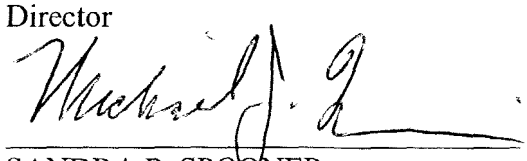

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiffs' Motion for a Protective Order Requiring Defendants to Pay Plaintiffs' Expert Deposition Fees and Expenses, Defendants' opposition thereto and request for setoff, and the entire record herein, it is hereby

ORDERED, that both Plaintiffs and Defendants are entitled to recover the reasonable expenses relating to the production of their respective experts for deposition during discovery for trial phase 1.5, and that after all such reasonable expenses are calculated, Plaintiffs are due a net sum of $25,780.66; and it is further

ORDERED, that Defendants' shall pay to Plaintiffs, within twenty (20) days of this order Twenty-five Thousand Seven Hundred Eighty dollars and Sixty-six cents ($25,780.66) to reimburse them for the reasonable costs of presenting their experts for deposition, net of all reasonable setoff to compensate Defendants' for their corresponding reasonable expenses of producing their experts for deposition during trial phase 1.5; and it is further

ORDERED that Plaintiffs motion for a protective order is denied as MOOT.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 24, 2003 I served the foregoing *Defendants' Opposition to Plaintiffs' Motion for a Protective Order Requiring Defendants to Pay Plaintiffs' Expert Deposition Fees and Expenses* 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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