**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| **SEQUOIA PACIFIC SOLAR I, LLC, and EIGER LEASE CO, LLC,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 13-139-C** |
| | ) | **(Senior Judge Bruggink)** |
| **THE UNITED STATES,** | ) | |
| **Defendant.** | ) | |

**DEFENDANT'S REQUEST FOR SCHEDULING CONFERENCE**

Defendant, the United States, respectfully submits this request for a scheduling conference in light of recent, unexpected events concerning the Government's sole expert witness in this case. Because trial is still more than seven months away, addressing the issues raised by these events now, rather than later, affords the parties an opportunity to maintain the trial dates without prejudice to either party.

What prompts us to file this motion is the disqualification of Dr. John Parsons, the Government's valuation expert in this case, in the trial of another Section 1603 case, *Alta Wind I Owner-Lessor C v. United States*, Nos. 13-402-T, 13-917-T, 13-972-T, 13-935-T, 14-174-T, 14-93-T, 14-175-T, 14-47-T (Fed. Cl.). Dr. Parsons, a financial economist at Massachusetts Institute of Technology (MIT)'s Sloan School of Management, was offered as an expert witness by the Government in that case to testify about the cost basis of the property at issue there -- much as we intend to do here.[1] Following a *voir dire* of Dr. Parsons, the Court issued a bench ruling granting

[1] The eligible cost basis of the property at issue is the central issue in both *Alta* and

plaintiffs' counsel's oral motion to exclude Dr. Parsons.

Plaintiffs' counsel in *Alta* also is counsel in this case. Thus we expect plaintiffs will move to exclude Dr. Parsons as an expert in this case, arguing the same or similar evidence and/or the fact that he was not permitted to offer his opinion in *Alta*. But, this is a motion plaintiffs can argue now. Although we would vigorously oppose any such motion, permitting plaintiffs to sit on their argument for the rest of the year, and then present it either as a pre-trial motion *in limine*[2] or mid-trial oral motion (as was done in *Alta*), would, if granted, have immediate scheduling consequences. Moreover, because the case turns largely on expert testimony, such a tactic would severely prejudice the Government's ability to defend itself and present its counterclaim. It is for this reason that we bring this issue to the Court's attention now.

Specifically, we do so -- far in advance of trial -- for two reasons. First, the Court has permitted plaintiffs the opportunity to take three fact witness depositions concerning our overpayment counterclaim, which is based upon Dr. Parsons' expert reports. Plaintiffs seek to take these depositions on July 11, 12 and 15. Because these depositions were requested and granted specifically to address information raised in Dr. Parsons' expert reports, however, if Dr. Parsons were to be excluded, plaintiffs would have no basis for going forward with these depositions, which would cost both parties wasted time and expense -- an expense we would expect plaintiffs to attempt to shift to the Government (which we would oppose). Second, if the Court were to grant any such motion to exclude Dr. Parsons, we would seek to find a replacement for Dr. Parsons

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*Sequoia*.

[2] The current schedule allows for the filing of such motions as late as December 19, 2016.

given the extreme prejudice the Government would otherwise suffer without an expert to testify in this case. Because trial is not scheduled until early 2017, there is adequate time to accommodate this option, but it would require action by both sides in the immediate future.

We summarize what occurred at the *Alta* trial and address our reasons for seeking this scheduling conference in more detail, below.

I. *Alta* Trial

In *Alta*, plaintiffs' counsel conducted a *voir dire* of Dr. Parsons focused on his past writings. In particular, plaintiffs' counsel argued that Dr. Parsons had made false statements in discussing his past writings. In support of his argument, on *voir dire*, plaintiffs' counsel introduced certain articles Dr. Parsons authored in the 1980s that he had not included in his current academic Curriculum Vitae (CV), which he had attached to his report. Among other things, plaintiffs' counsel claimed that these articles, which discussed socialism and capitalism, showed that Dr. Parsons "despise[d]" capitalism and thus that he was somehow not qualified to offer testimony on the question of the fair market value of the eligible properties in *Alta*.

The Court granted plaintiffs' motion to exclude, after denying the Government's request to conduct a redirect examination and/or to brief the matter prior to ruling. For the purpose of this motion, we need not address the arguments or the ruling -- other than to say that we respectfully, but strongly, disagree. At the Court's direction, however, we are prepared to elaborate in detail and provide a copy of the transcript.

II. Request For A Scheduling Conference

As we explain below, because we believe plaintiffs intend to seek to disqualify our expert

on grounds they already possess, we request the scheduling conference now, rather than waiting for these issues to be raised on the eve of or during trial, for two reasons.

A. Plaintiffs Likely Intend To Seek To Disqualify Our Expert On Grounds They Already Possess

As noted, we make the instant request because of the similarities between this case and *Alta*. Specifically, the issue in both *Alta* and *Sequoia* is the eligible cost basis of certain energy properties, Dr. Parsons was offered to testify in *Alta* about valuation of the properties at issue in that case (he would offer the same kind of testimony here), Dr. Parsons' CV is the same in both cases, and plaintiffs' counsel in *Alta* is counsel here. Accordingly, we expect plaintiffs to present the same or similar argument presented in *Alta* -- on the basis of testimony and documents already in their possession.

Plaintiffs' argument for exclusion in *Alta* drew the inference that Dr. Parsons made false statements because he indicated that the list of publications found in his CV was "accurate," even though it did not include certain articles he had authored during the 30-some year period covered by the CV. It also depended on the assertion that the omitted articles were somehow relevant to Dr. Parsons' qualifications to offer an expert opinion regarding fair market value. Plaintiffs will no doubt contend that there is fodder for that same argument in this case, including perhaps in the expert report and deposition in this case and/or in the disqualification of Dr. Parsons in *Alta*.

In this case, using language similar to what he used in the expert report in *Alta*, Dr. Parsons stated in his report: "A Curriculum Vitae is attached as Exhibit 1 which includes a list of my publications." In his deposition in this case, in authenticating his CV attached to his report, using language similar (but not identical) to language counsel cited in moving to exclude in *Alta*, Dr.

Parsons testified as follows:

> Q. And does your resume also list your research and publications?
> A. Yes, it does.
> Q. Is that an accurate listing of your research and publications going back to 1985?
> A. Yes. I am wondering if there might be something more recent, but I don't think so off the top of my head.

In addition, counsel in the *Alta voir dire* suggested that, in a case from approximately 20 years ago, Dr. Parsons' CV failed to satisfy RCFC 26(a)(2)(B)(iv)'s 10-year publications disclosure rule because his CV in that case did not include articles introduced during the *Alta voir dire*, which at that point (in 1997) had been authored within the last 10 years. Counsel in *Alta* also suggested that Dr. Parsons made a false statement by indicating in the deposition in *Alta* that the list from the 1997 case was "accurate."

As previously noted, plaintiffs already possess the evidence they rely upon for these arguments. Thus, there is no reason for plaintiffs to wait to present them here, if that is their intent. Establishing a deadline for bringing the motion now would allow the Court to hear both sides' arguments, hold an evidentiary hearing if appropriate, and resolve the matter well in advance of the scheduled trial.[3] Failure to present any such motion within that deadline should be deemed a

[3] Among other things, the Court would have to resolve what Dr. Parsons was referring to by agreeing that his CV was "accurate" and, to the extent the meaning of RCFC 26(a)(2)(B)(iv)'s 10-year "all publications" disclosure rule is at issue, resolving that question and its consequences. *See, e.g., Gillum v. United States*, 309 F. App'x 267, 270 (10th Cir. 2009) ("[T]he [district] court improperly focused on the fact that the inadequate report permanently deprived the United States of the opportunity to confront [the expert] 'flat-footed' at his deposition. This is not the type of prejudice that justifies the exclusion of an expert's testimony. *The parties to a litigation are not merely players in a game, trying to catch each other out. Rather, litigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits.*") (emphasis added).

waiver of that motion.

B. Plaintiffs Have Noticed Three Additional Fact Witness Depositions Regarding Defendant's Overpayment Counterclaim

A scheduling conference is also warranted because plaintiffs' three additional fact witness depositions to be conducted by July 22, 2016, relate to defendant's overpayment counterclaim, which is based on our expert's valuation work. Plaintiffs have noticed the first such deposition for July 11. We first briefly recite the procedural history of these depositions and our overpayment counterclaim.

To support their claim in this litigation, plaintiffs do not rely on valuations that they submitted to the Section 1603 Program during the administrative application process. Rather, they rely upon the work of an expert retained for litigation, who conducted entirely new valuations of the properties at issue. After fact discovery concluded, plaintiffs' expert served his expert and rebuttal valuation reports on the same days Dr. Parsons served his reports.[4]

Based on facts developed in fact discovery, which closed on October 9, 2015, Dr. Parsons conducted his valuation of plaintiffs' properties, which he set forth in an initial report and rebuttal report served on November 19, 2015, and February 3, 2016, respectively. Based on these expert valuations, we filed a motion to add an overpayment counterclaim on February 25, 2016. Plaintiffs deposed Dr. Parsons on April 6, 2016, the day expert discovery closed.

In the briefing concerning our motion to add an overpayment counterclaim, plaintiffs

[4] Plaintiffs' litigation expert report differed from what was submitted to the Section 1603 Program both as to its determination of fair market value and in its approach to valuation. Nonetheless, we deposed plaintiffs' expert on March 18, 2016, and did not seek leave to depose any fact witnesses regarding the discrepancies between their original claims and their expert witness's conclusions.

asserted they would have asked additional questions of our fact witnesses had they known defendant was asserting an overpayment counterclaim. On May 2, 2016, the Court granted our motion to add an overpayment counterclaim. In that same order, the Court granted plaintiffs leave to conduct three additional fact depositions regarding our counterclaim, by July 22, 2016. The problem, however, is that these depositions concern Dr. Parsons' valuation analysis. And, if his expert testimony were to be excluded, the effort, time, resources, and witness and/or attorney travel involved in preparing for and defending those depositions will have been wasted.

Plaintiffs have since noticed three fact depositions for July 11, 12, and 15. All three witnesses have already been deposed in this case. One, Judson Jaffe, is a Treasury economist who lives in Massachusetts. Already, he has traveled twice to Washington, D.C. for two fact depositions (the second deposition was with defendant's consent) and would do so again for this, his third deposition in this case. The other two deponents, Edward Settle and Jason Coughlin, are National Renewable Energy Laboratory personnel who live in Colorado. Both have already been deposed once in this case (Mr. Settle traveled to Washington, D.C. from Colorado for his deposition). The additional burden (and counsel and/or witness travel) associated with these witnesses' noticed depositions make it all the more important that any motion from plaintiffs regarding Dr. Parsons be addressed immediately.

The potential deponents and attorneys must begin to make travel plans shortly if the noticed depositions are to proceed. However, if plaintiffs intend to move to exclude Dr. Parsons based on evidence that they have in their possession, they should do so now -- in advance of those depositions -- and we will oppose now, or else plaintiffs should waive that challenge. Otherwise,

the witnesses and/or counsel will be forced to incur potentially unnecessary burdens and costs.

C. If Necessary, And With Leave Of Court, The Government Would Seek To Retain Another Expert Without Change To The Trial Start Date

We do not believe Dr. Parsons should be excluded on the grounds on which he was excluded in *Alta*, and we would oppose any such motion to exclude him. However, should this happen, we note that there is ample time for the Government -- with leave of Court -- to substitute for our only expert because trial does not start until early 2017. If the Government is forced to wait until shortly before or during trial to confront an expert disqualification motion, and if it is successful, the Government would be left without the ability to present *any* expert testimony in this expert-intensive case. This is prejudice in the extreme. Further, were discovery reopened to alleviate that prejudice, the trial would be delayed, which, by this motion, we seek to avoid.

If, however, the schedule is modified so as to resolve the question of Dr. Parsons' qualifications soon, were we required to retain another expert, we believe we could do so without any change to the trial start date because trial does not start until January 30, 2017. Moreover, good cause to reopen expert discovery for that purpose would exist.[5] *See Sys. Fuels, Inc. v. United States*, 111 Fed. Cl. 381, 383 (2013) (noting that the Federal Circuit has not interpreted RCFC 16(b)(4) and explaining that "[t]he United States Court of Appeals for the Fifth Circuit has held that four factors should be considered by a trial court in determining whether 'good cause' exists to modify a schedule under Fed. R. Civ. P. 16 to accommodate the designation of an additional expert

[5] In addition to the good cause that would exist for reopening expert discovery, we note that fact discovery is already open for the limited purposes of allowing plaintiffs to take three additional depositions regarding defendant's counterclaim.

witness: (1) the reasons for the moving party's failure to designate the witness in compliance with an existing schedule; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a cure for any prejudice") (citing *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1288 (5th Cir. 1991)). In sum, the Government would suffer extreme prejudice without the ability to present *any* expert testimony in this expert-intensive case, and any prejudice to plaintiffs by reopening expert discovery would be curable.

**CONCLUSION**

For the reasons stated above, defendant respectfully requests a scheduling conference to consider recent events in *Alta* that potentially implicate scheduling considerations in *Sequoia* -- the upcoming fact witness depositions and the time available to retain another expert, if necessary -- and to adjust the schedule accordingly.

Respectfully submitted,

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