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A P P E A R A N C E S

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ALSO APPEARING:

TOBIN DALE  
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SEAN MCCORMICK

1 LOS ANGELES, CALIFORNIA; TUESDAY, JULY 16, 2024; 10:41 A.M.

2 ---

3 THE COURT: If you would be seated, please.

4 Calling the matter of Jeffrey Powers, et al., versus Denis  
5 McDonough, et al., into session at 22-08357.

6 Counsel, I know each of you by now well, but would  
7 you make your introduction on the record so I have a record.

8 MR. SILBERFELD: Good morning, Your Honor. Roman  
9 Silberfeld, RobinsKaplan, for the plaintiffs.

10 THE COURT: Pleasure.

11 MR. DU: Good morning, Your Honor. Tommy Du,  
12 RobinsKaplan, for plaintiffs.

13 THE COURT: Pleasure.

14 MR. ROSENBAUM: Good morning, Your Honor. Mark  
15 Rosenbaum from Public Counsel on behalf of plaintiffs.

16 THE COURT: Pleasure.

17 MS. LEE: Good morning, Your Honor. Yu Lee, Public  
18 Counsel, on behalf of plaintiffs.

19 THE COURT: Pleasure.

20 MS. PIAZZA: Good morning, Your Honor. Amelia  
21 Piazza also from Public Counsel on behalf of plaintiffs.

22 THE COURT: It's a pleasure, counsel.

23 MS. PETTY: Good morning, Your Honor. Agbeko Petty  
24 for the federal defendants.

25 THE COURT: It's a pleasure.

1 MR. ROSENBERG: Brad Rosenberg from the Department  
2 of Justice for the federal defendants. And I'll note that we  
3 probably need a bigger table because several of my colleagues  
4 are here as well.

5 THE COURT: I'm going to ask my law clerks. Would  
6 you be kind enough to go up in the jury box. And, folks, why  
7 don't you come forward so you're close in time and you can  
8 have a conversation with counsel at any moment.

9 MR. ROSENBERG: Thank you, Your Honor.

10 THE COURT: It's a pleasure.

11 MR. ROSENBERG: We do have Carlotta Wells --

12 THE COURT: Let them make their own appearances.  
13 It's an opportunity for them.

14 We need a microphone. Let's get you situated.  
15 There's no rush for just a moment. There should be a  
16 microphone on that table, and we've got a portable mic that  
17 probably doesn't work.

18 Would you introduce yourself.

19 MS. WELLS: I'm Carlotta Wells, Your Honor, on  
20 behalf of the federal defendants.

21 THE COURT: Thank you. It's nice seeing you.

22 MR. LOWENSTEIN: Jody Lowenstein, Department of  
23 Justice, for the federal defendants.

24 THE COURT: Pleasure, sir. It's nice seeing you.

25 MR. KNAPP: And Cody Knapp, Department of Justice.

1 THE COURT: Certainly. It's good seeing you again.

2 MS. PITZ: Taylor Pitz, Department of Justice.

3 THE COURT: Karlen, could you ask them to get that  
4 mic fixed. I appreciate it.

5 And then the gentleman, I don't know if you're  
6 involved.

7 MR. ROSENBERG: One more. We also have agency  
8 counsel from the VA here today.

9 THE COURT: Pleasure. Why don't you make your  
10 introduction, sir.

11 MR. DALE: Good morning, Your Honor. My name is  
12 Tobin Dale. I'm with the VA's Office of General Counsel.

13 THE COURT: It's a pleasure. Nice seeing you, sir.

14 Let me say to each of you, I issued the opinion on  
15 Sunday. It was actually --

16 MR. GUADIANA: Two more. Ernest Guadiana on behalf  
17 of Bridgeland Resources.

18 MR. MCCORMICK: Sean McCormick also on behalf of  
19 Bridgeland Resources.

20 THE COURT: You have my apologies. Welcome.

21 I actually finished the opinion at 11:00 on  
22 Saturday, and I'm not going to issue the opinion at 11:00. I  
23 issued it on Sunday for one reason. I didn't want you on the  
24 plane on Monday and you got off the plane. So that's why you  
25 got this Sunday filing. Okay. It was a courtesy. It wasn't

1 meant to hurt your Sunday or your weekend.

2 Counsel, first of all, this pretrial report or  
3 conference report is interesting, but now it may need a lot  
4 of modification. Second, you've got motions in limine to  
5 argue today. I want you to guide me about how you would like  
6 the day to be conducted. I'm at your disposal.

7 MR. SILBERFELD: Let me suggest, Your Honor, with  
8 respect to the pretrial conference order, we've identified --  
9 we have not had a chance to talk to counsel about this, but  
10 we've identified the areas that need modification in light of  
11 the Court's summary judgment order.

12 There's actually really only two places that  
13 regards claim 2 that's found on page 11, and claims 4 and 5  
14 that are -- begin on page 15.

15 What I would propose is sometime today we'll sit  
16 down with counsel, work out the language that adjusts the  
17 order. We'll revise it, resubmit it, and otherwise we would  
18 be prepared to move forward with the in-limine motions.

19 THE COURT: If that's acceptable, I could do two  
20 things. First of all, we can hear the in-limine motions  
21 first. And then if you two can work together in your  
22 offices, I'll recess for the day, no need to bring you back  
23 at 1:00.

24 If you want to work over the lunch hour, then go to  
25 lunch, work on that, and come back at 1:00 or 1:30 if you

1 don't have a resolution. Then you can make your further  
2 arguments in that regard. So I'm at your disposal. Why  
3 don't we hear the motion in limine first. Would that be  
4 acceptable?

5 All right. Thank you. And once again, I certainly  
6 know who you are now, but if you'd reintroduce yourself to  
7 the record.

8 MS. PETTY: Good morning, Your Honor. May it  
9 please the Court, Agbeko Petty for the federal defendants.

10 Federal defendants seek to exclude plaintiffs'  
11 proffered expert witnesses Mr. Randy Johnson, Mr. Steve  
12 Soboroff, and Dr. Benjamin Henwood. Their reports are  
13 fraught with deficiencies, lack any foundational support, and  
14 present mere speculative conclusions as opposed to those  
15 derived from reliable principles and methods.

16 Now, these failures not only violate the stringent  
17 requirements of Federal Rule of Evidence 702, but they  
18 present a significant risk to the integrity of this trial.  
19 Moreover, and most importantly, these unreliable opinions  
20 will adversely affect veterans.

21 So to be admissible under Federal Rule of Evidence  
22 702, testimony must be both relevant and reliable. To be  
23 relevant, it must be helpful to the trier of fact. For  
24 testimony to be reliable, it must be based on sufficient  
25 facts or data, be the product of reliable principles and

1 methods, and the expert must reliably apply those principles  
2 and methods to the facts of this case.

3 Plaintiffs' experts in this case do not satisfy any  
4 of these requirements. But taking a step back first, who are  
5 these individuals? So Mr. Johnson and Mr. Soboroff are real  
6 estate developers who seek to opine on a thousand units of  
7 temporary supportive housing as well as 3,000 units of  
8 permanent supportive housing that could be placed on the West  
9 L.A. campus.

10 Now, Dr. Henwood seeks to opine --

11 THE COURT: Let me stop for just a moment.

12 On page 4, line 9 of your filing, Soboroff in his  
13 report suggests 1,000 temporary housing units and 4,000  
14 permanent supportive housing units. I total that to about  
15 5,000.

16 The other gentleman, Johnson, is on page -- and  
17 help me. You can turn to the brief as well. I'm doing this  
18 from memory, 2,940. What was that number, counsel? You'll  
19 see it in your briefing. And then he adds on a thousand.

20 There's a little disparity, as I read this, between  
21 the two. It appears that Soboroff is basically at 5,000 in  
22 round numbers and that Johnson is about 3,700 or 3,900.

23 MS. PETTY: I'll offer a little bit of  
24 clarification.

25 THE COURT: Please. Their experts differ to some

1 extent.

2 MS. PETTY: So they are essentially making the same  
3 argument, and that is that 1,000 temporary supportive housing  
4 units, so they're both saying 1,000 of those units as well as  
5 2,740 permanent supportive housing units on the West L.A.  
6 campus. So in total, roughly a little bit less than 4,000.

7 THE COURT: Right -- 3,740, about.

8 MS. PETTY: Correct, Your Honor.

9 THE COURT: Now, do both of their experts agree? I  
10 read Soboroff a little differently, and that is he seems to  
11 be more expansive in his opinion than Johnson.

12 MS. PETTY: So they both agree to the extent that  
13 they're saying that --

14 THE COURT: A thousand units.

15 MS. PETTY: And that this can actually be done on  
16 the West L.A. campus. And they reach these conclusions in a  
17 very inadequate way. I'll go on to explain --

18 THE COURT: Regardless of the numbers, for your  
19 argument it really doesn't matter.

20 MS. PETTY: Yeah.

21 THE COURT: Okay. Thank you.

22 MS. PETTY: So Dr. Henwood seeks to offer opinions  
23 on the definition target population, and benefits of  
24 permanent supportive housing. Now, looking at the first  
25 prong of the reliability analysis under Rule 702, that the

1 testimony be based on sufficient facts or data, these experts  
2 do not meet that in any way, shape, or form.

3 Starting with Mr. Johnson, for example, he states a  
4 timeline for temporary supportive housing units to be done in  
5 12 to 18 months. However, nowhere in his report does he  
6 actually offer any analysis that went into constructing that  
7 timeline. He merely states it and leaves it at that.

8 Furthermore, he talks about infrastructure  
9 capacity, and to this end he concludes that the VA's  
10 infrastructure can support these 1,000 units of temporary  
11 supportive housing.

12 However, again he doesn't base that on any  
13 supporting data. He simply just lists it in his expert  
14 report. Moreover, during the deposition he admitted to  
15 having no knowledge of the actual infrastructure system.

16 Another example --

17 THE COURT: We're going to slow down for just a  
18 moment and go back to my original -- it's a concern not  
19 related to your argument. Would you turn to page 16 of your  
20 brief, and would you turn to the opening line under:  
21 Mr. Soboroff fails to use any cognizable method to reach his  
22 conclusions. That line reads: The same goes for  
23 Mr. Soboroff's opinions while he recommends that 4,000  
24 permanent supportive housing units and 1,000 temporary  
25 supportive housing units should be located on the West L.A.

1 campus.

2 Now, go back one page. Go back to page 15 for just  
3 a moment, and go back to line 10 through 13. I'll simply  
4 read that: Nor does he define the items listed in the  
5 budget, further adding to the ambiguity and confusion  
6 regarding what the figures represent. In another instance  
7 Mr. Johnson concludes an additional 2,740 housing units,  
8 which I take to be permanent supportive.

9 And then he goes on in his opinion, when you turn  
10 back to it, to still have the opinion that there should be  
11 1,000 temporary, just as Soboroff does.

12 It makes no difference to your argument, but in  
13 going back and looking at the reports -- in fact, try to look  
14 at the entire record between the last argument and the time I  
15 published my opinion, going back to every document, it seems  
16 to me that we've got some disparity between these two experts  
17 from the plaintiff if they ever testify. Is that your  
18 reading of this also?

19 MS. PETTY: Are you saying --

20 THE COURT: Or is it 5,000 total units for  
21 Soboroff, as you believe, and 3,740, counting permanent and  
22 temporary, that Johnson -- I'll be with the plaintiffs in  
23 just a moment.

24 MS. PETTY: So I understand them to be arriving at  
25 the same number. In section 2 where it says --

1 THE COURT: What is that number, then? Is it 5,000  
2 or is it a little under 4,000?

3 MS. PETTY: A little under 4,000, Your Honor.

4 THE COURT: Then how do I explain Soboroff's  
5 recommendation where he recommends 4,000 permanent supportive  
6 housing units? He's very specific about that. And then he  
7 adds on, it appears, 1,000 temporary. I think that that may  
8 be just a mixup on his part --

9 MS. PETTY: Yeah.

10 THE COURT: -- or he meant 4,000 total --

11 MS. PETTY: Yes.

12 THE COURT: -- 1,000 and 3,000. But that's not the  
13 way it looks in the report.

14 MS. PETTY: Yes. And I will offer to shed some  
15 light on that, in his deposition Mr. Soboroff stated that he  
16 should not be relied upon for reaching any figure with  
17 respect to permanent supportive housing or temporary  
18 supportive housing because he's not aware of what the demand  
19 would be, nor has he conducted any type of demand analysis.

20 THE COURT: Just a little slower.

21 MS. PETTY: Yes. He himself admits that he  
22 shouldn't be relied upon for presenting any type of figure  
23 with respect to permanent supportive housing and temporary  
24 supportive housing because he said he has not done a demand  
25 analysis and he does not know whether the demand is actually

1 there to fill these units.

2 So he himself has already stated that he should not  
3 be listened to with respect to this figure. And that was  
4 said during his deposition, Your Honor.

5 There are several other examples of these experts  
6 not relying on sufficient facts or data. In one Mr. Johnson  
7 concludes that 1,000 temporary supportive housing units will  
8 not interfere with the long-range plans that the VA has for  
9 the property. Again, there's no supporting evidence in his  
10 report that he cites to.

11 Additionally, during his deposition he stated that  
12 he was unaware of what those long-range plans were. So there  
13 is a hole in his testimony. He stated that there is a hole  
14 with respect to what he states in his expert report.

15 Now, Mr. Soboroff suffers from the same  
16 deficiencies. He concludes that there are nine usable sites  
17 for these 1,000 temporary supportive housing units. Again,  
18 you can see in his expert report he just makes that  
19 conclusion without any specific analysis to support his  
20 reasoning for that conclusion.

21 Now, turning to Dr. Henwood. His conclusions are  
22 based on a very brief visit to the West L.A. campus. He  
23 spoke with about two veterans for a handful of minutes. He  
24 didn't conduct any type of study on his own or rely on any  
25 data to reach his conclusions.

1           None of these experts have used any methodology to  
2 arrive at their conclusions, and that's very evident when you  
3 look at all of their reports. They merely make assertions  
4 but do not present how they reached those conclusions.

5           An example, as we talked about, is there has been  
6 no demand analysis to determine the amount of housing units  
7 that are necessary that they've proposed. Although there is  
8 a budget that Mr. Johnson lists in his report, it's merely  
9 figures. He doesn't explain the data that he relied upon.  
10 He just states it outright.

11           Again, with Dr. Henwood the report jumps from  
12 literature to conclusion. Additionally, these experts also  
13 seek to offer testimony outside of their expert area -- to  
14 the extent you can call them experts.

15           Mr. Johnson states that VA should engage FEMA  
16 disaster relief like they did for Hurricane Katrina. He  
17 doesn't have any basis to make this claim, nor is he  
18 knowledgeable about FEMA. And this was demonstrated during  
19 the deposition.

20           Mr. Soboroff makes several recommendations about  
21 veteran treatment, and he says that veterans should be  
22 treated like they are at other VA facilities. During the  
23 deposition he admitted that this was only based on internet  
24 searches, and he could not recall a single facility that he  
25 viewed on the internet.

1 THE COURT: He also stated social media besides  
2 internet searches.

3 MS. PETTY: Correct, Your Honor, social media and  
4 the internet. In addition, he claimed to be a mental health  
5 expert despite having no formal training or educational  
6 training or practical experience. And he went so far as to  
7 say that he could diagnose someone with a serious mental  
8 illness by looking at their eyes and body movements.

9 Dr. Henwood in his report, he seeks to opine on  
10 constructing pre-fabricated housing units despite the fact  
11 that he admitted during his deposition that he has no  
12 knowledge in construction.

13 So all of these opinions that are contained in  
14 these expert reports are speculative and unreliable, and they  
15 will not be helpful to Your Honor in any way, shape, or form.

16 So federal defendants seek to exclude their  
17 testimony in the entirety.

18 THE COURT: Now, as a courtesy go over to your  
19 colleagues. Just have a conversation with them. Look at  
20 your notes again. See if there's anything you've missed.

21 And there will be two rounds, by the way. There  
22 will be a rebuttal. But take that moment. And, folks,  
23 you're more than welcome to participate.

24 (Counsel conferring)

25 MS. PETTY: I just wanted to offer a brief

1 clarification, Your Honor, at how you're arriving at that  
2 5,000 number. So that's because it's in addition to what the  
3 VA already has planned.

4 THE COURT: I see.

5 MS. PETTY: So the 1,260 plus the 3,000 permanent  
6 supportive housing and the 1,000 temporary supportive housing  
7 units.

8 THE COURT: And that's where he comes up with that  
9 number, then?

10 MS. PETTY: Yes.

11 THE COURT: Okay. Thank you very much, counsel.  
12 On behalf of intervenors?

13 MR. MCCORMICK: We don't have any argument, Your  
14 Honor.

15 THE COURT: All right. I didn't think you did, but  
16 just to be heard.

17 Counsel on behalf of the plaintiffs.

18 MR. DU: Good morning, Your Honor. Tommy Du on  
19 behalf of plaintiffs.

20 Federal defendants have identified no issues with  
21 the qualifications of Steve Soboroff, Randy Johnson, or  
22 Dr. Benjamin Henwood. All they've identified are issues that  
23 they can take up on cross-examination, all issues that go  
24 towards weight and not the admissibility of the testimony.

25 Now, Your Honor raised a point regarding Johnson

1 and Soboroff that I would just like to clarify for the Court.  
2 Both Mr. Johnson and Mr. Soboroff arrived at the number of  
3 permanent supportive housing units that are necessary for  
4 veterans. Johnson provides that based on the VA's own  
5 estimate of permanent supportive housing that they're  
6 planning to build, which is the number of 1,260, there's an  
7 additional need for 2,740. That adds up to 4,000 permanent  
8 supportive housing.

9 Mr. Soboroff comes to the same conclusion. He  
10 provides that --

11 THE COURT: The same conclusion as to the 1,000  
12 temporary?

13 MR. DU: Correct. They both have 1,000 temporary.

14 THE COURT: That's how we get 5,000 in one report.  
15 We get a lesser number, but it's really not a lesser number.

16 MR. DU: It's the same number, Your Honor.

17 THE COURT: Okay.

18 MR. DU: Mr. Soboroff has, based on his review,  
19 understood the VA plan for 1,200 permanent supportive housing  
20 units, plus or minus 60, and he estimates that there's a need  
21 for an additional 2,800 permanent supportive housing units.

22 In total, both Mr. Johnson and Mr. Soboroff believe  
23 that the number of permanent supportive housing units  
24 necessary on the campus is 4,000. However, the ultimate  
25 number, as both Mr. Johnson and Mr. Soboroff will testify to,

1 is dependent on this Court's factual finding as to the need  
2 and the number of unhoused veterans needing housing in that  
3 area.

4 However, based on the VA's own numbers, their use  
5 of a by-name list by both -- based on the VA's own estimate  
6 of the number of homeless individuals based on the by-name  
7 list of both the homeless data and the LAHSA data, there  
8 appears to be at least approximately 2,200 to 3,800 unhoused  
9 veterans that need housing; thus the need for 4,000  
10 supportive housing units, which is what Mr. Johnson and  
11 Mr. Soboroff based their reports on.

12 Both Mr. Johnson and Mr. Soboroff identify the  
13 bases for their conclusions in their report. They identified  
14 each document that they reviewed and each document that they  
15 based their opinion on.

16 They also identified the fact that they visited the  
17 site on numerous occasions to determine which sites are  
18 appropriate to build permanent supportive housing and  
19 temporary supportive housing on the site.

20 It was based on their review and their tour of the  
21 West L.A. campus that they were able to identify nine  
22 different sites to provide space for temporary supportive  
23 housing units of approximately a thousand units. These  
24 temporary sites do not interfere with any of the ongoing work  
25 that the federal defendants are currently planning for the

1 campus.

2 Federal defendants also take issue with the  
3 reliable principles and methods that plaintiffs' experts rely  
4 upon, but this Court in McCandless Group versus Coy  
5 Collective. The citation is 2024 Westlaw 3221742.

6 THE COURT: I'm well aware of the Coy case.

7 MR. DU: Your Honor, in that case this Court found  
8 that an expert's review of the case file and their experience  
9 is an acceptable methodology in providing expert opinion,  
10 which is exactly what Mr. Johnson, Mr. Soboroff, and  
11 Dr. Henwood do in this case.

12 In regards to Dr. Henwood, Dr. Henwood provides an  
13 expert opinion regarding the definition of permanent  
14 supportive housing. The target population that permanent  
15 supportive housing was designed to serve and the evidence  
16 base for permanent supportive housing as well as key elements  
17 for its effectiveness, all are necessary in this trial in  
18 understanding why permanent supportive housing is so  
19 important for our homeless veterans.

20 Now, Dr. Henwood bases his opinion on his visit to  
21 the West L.A. campus as well as his review of the case file  
22 and based on his decades of experience working with homeless  
23 individuals.

24 Again, Your Honor, there are no issues with the  
25 experts of plaintiffs. What they have issues with are issues

1 that go towards weight, not admissibility. And particularly  
2 because this is a bench trial, there is no risk of trying to  
3 unring the bell in the jury. There is no risk and prejudice.  
4 Your Honor can determine whether or not an expert is  
5 qualified and whether or not an expert deserves more or less  
6 weight.

7 Unless Your Honor has any questions ...

8 THE COURT: If you would step over, though, to your  
9 colleagues and just have a conference. Make certain that  
10 there isn't some other point that you may have forgotten or  
11 anything that you'd like to restate.

12 (Counsel conferring)

13 MR. DU: Nothing further at this point, Your Honor.

14 THE COURT: Thank you. Okay. Then, rebuttal.

15 And before you make the rebuttal -- you've heard  
16 that argument, so if you want to have any kind of conference  
17 beforehand, so be it. If not, you can make your argument and  
18 then talk to your colleagues as well afterwards if you've  
19 forgotten anything.

20 MS. PETTY: Thank you, Your Honor. Just a few  
21 things to clarify here. Opposing counsel talked about how  
22 these experts can rely on their experience and cited some  
23 case law. I do want to emphasize that while experience-based  
24 testimony is permissible, it still must be reliably applied  
25 to the facts of the case.

1           So take, for example, you have a narcotics agent  
2 who is familiar with looking into different types of language  
3 that individuals use when they're engaging in a drug  
4 transaction. They're called upon to testify as a witness in  
5 a case, and they use their information and knowledge that  
6 they have and the experience that they have working as a  
7 narcotics agent to offer testimony with respect to what  
8 defendants are saying based on terms they've already heard  
9 before. So they're applying that specific experience to the  
10 facts of the case.

11           In this example that is not the case here. Again,  
12 Mr. Johnson and Mr. Soboroff have conducted no analysis of  
13 the site. They have conducted no demand analysis, and this  
14 is not behavior that they would otherwise do in their normal  
15 profession.

16           One of the things that experts need to bring to the  
17 table when they're relying on their experience is they apply  
18 the same level of rigor that they would in their profession.

19           I also want to address the concerns that opposing  
20 counsel brought up about weight versus credibility. The  
21 credibility issues pertain to whether or not these experts  
22 are using reliable principles and methodologies to arrive at  
23 their conclusion.

24           That's very relevant for the Court to determine at  
25 the outset because the Supreme Court has stated that expert

1 testimony is very powerful. When they are cloaks as an  
2 expert, it comes with speaking with force and what they say  
3 is seen as reliable. So the District Courts must act as  
4 gatekeepers to make sure that that testimony is admissible in  
5 the first instance.

6 Counsel also spoke about the fact that this is a  
7 bench trial, we should be a bit more lax in letting these  
8 experts in. I just want to emphasize that if this unreliable  
9 testimony is permitted, the Court will be making a judicial  
10 decision based on what is presented, and these unsupported  
11 conclusions threaten the outcome of the trial being based on  
12 reliable facts.

13 With respect to opposing counsel's argument about  
14 cross-examination, the Supreme Court in Daubert stated that  
15 cross-examination doesn't present sufficient safeguards for  
16 unreliable expert testimony. Cross-examination can't rectify  
17 foundational flaws in an expert's report.

18 That will be all, Your Honor, unless you have any  
19 questions.

20 THE COURT: Check with your colleagues for just a  
21 moment. Looks like everybody is giving you a positive nod.

22 All right. Counsel on behalf of plaintiffs.

23 MR. DU: Mr. Soboroff, Mr. Johnson, and Dr. Henwood  
24 each have provided their expert opinion and their testimony  
25 and deposition in an attempt to address a problem that

1 federal defendants have been unable to resolve -- the issue  
2 of homeless veterans in West Los Angeles.

3 Mr. Soboroff and Mr. Johnson, their experience is  
4 unquestioned. They built Playa Vista over the span of three  
5 years, providing for approximately 6,000 units. Federal  
6 defendants haven't identified a case where an expert is  
7 excluded on the basis that they seek to exclude Mr. Soboroff,  
8 Mr. Johnson, or Dr. Henwood.

9 They also haven't identified any prejudice that  
10 they have suffered from the expert reports of Johnson,  
11 Soboroff, or Dr. Henwood. Each witness was deposed. Each  
12 witness was willing to provide their expert testimony, and  
13 each witness was prepared to testify.

14 Your Honor, this is simply an issue of weight, not  
15 admissibility.

16 THE COURT: Check with your colleagues once again  
17 as a courtesy.

18 (Counsel conferring)

19 MR. DU: Nothing further, Your Honor.

20 THE COURT: So you have a positive nod also.

21 All right. Counsel, I'll take this under  
22 submission. I'll give you a time estimate. I'll go back  
23 through the reports one more time, and I would think by  
24 Friday or Saturday. I probably won't send it out to you this  
25 time over the weekend. That was just a courtesy so you had

1 it and you weren't on the plane coming out. So hopefully by  
2 Friday, okay?

3 All right. Now, instead of bringing you back, can  
4 you two either resolve and have that informal conference and  
5 I can turn you loose?

6 MR. ROSENBERG: Before we do that, Your Honor,  
7 there is actually one substantive issue and then maybe a  
8 couple of procedural issues I'd like to raise with the Court.

9 THE COURT: Sure. Please. And while you're  
10 getting to the substantive issues, I want you to meet  
11 informally in person or by phone. It doesn't matter.

12 Tell me the hours you want to keep. I start my  
13 court at 7:30, but I only do that because of the private bar  
14 and the criminal bar, so they can get in and practice so  
15 they're not trapped in federal court and state court judges,  
16 you know, bearing down on them.

17 We don't have to start at 7:30. Tell me what's  
18 comfortable for you, if you want to start at 8:00 or 8:30.  
19 You govern the Court.

20 At the end of the evening hour, though, I would  
21 appreciate the following. If we have a witness and we can  
22 complete that witness, bear with me and let's see if we can  
23 go to 5:00 or 6:00 or whatever, especially if they're an  
24 expert and either side is paying that person. That way I can  
25 hear the testimony with continuity, and you're not paying for

1 that expert to come back the next day. But you'll govern me.

2 Number three, during the trial I will reach out to  
3 you and occasionally ask informally: How are you doing?  
4 That doesn't mean how are you doing with the case. That  
5 means how are you holding up to the pressures of litigation.  
6 This is tough. Okay?

7 Therefore, if we're going too fast, slow it down.  
8 I've designated the month, basically all of August with the  
9 exception of those three days, as litigation time. So  
10 there's no time limits on any of you.

11 So help me help you make the best presentation by  
12 not pressing too hard because sometimes I forget and I press  
13 hard. You've got the hard job. You govern me. You tell me  
14 what works, what time you want to keep.

15 If you want an hour and 15 minutes for lunch,  
16 that's fine, instead of an hour. If you need an hour and a  
17 half, that's fine. But give me full and complete days and  
18 consecutive days. Fair enough?

19 Okay. Now, counsel, my apologies. Please.

20 MR. ROSENBERG: Thank you. Brad Rosenberg from the  
21 Department of Justice.

22 Your Honor, I'd first like to thank the Court for  
23 issuing an opinion over the weekend. It gave us a little bit  
24 of time to digest that opinion before we appeared today.

25 THE COURT: Let me -- I didn't intend to. I didn't

1 want to break into your Sunday, but I knew you were on the  
2 plane either Sunday night or Monday, and I wanted each of you  
3 to have it one more day just to absorb that so it didn't get  
4 to either of you on a Monday.

5 MR. ROSENBERG: This is an important case, and we  
6 do appreciate the Court's issuing of the opinion as quickly  
7 as it could.

8 I am here out of an abundance of caution regarding  
9 the AMI claim on which the Court granted summary judgment to  
10 the plaintiffs. In granting summary judgment to the  
11 plaintiffs, the Court explicitly stated that it will hold an  
12 evidentiary hearing later, after which --

13 THE COURT: No, I didn't say that. What I said  
14 basically was it's your choice. In other words, in finding  
15 facial discrimination, that doesn't resolve the issue of a  
16 remedy, if any. I'm giving you the choice.

17 If you want to have a witness come and make that  
18 presentation which would lead to the consideration of  
19 injunctive relief in that narrow area, you're welcome to do  
20 that when the witness is here and not bring them back later.

21 Or you can bring them back later. And I'm giving  
22 that to each of you to decide once again how you want to  
23 conduct that. I would recommend that when your witness is  
24 out here, that you talk about that injunctive relief, whether  
25 it's burdensome or not or what can be done, at the time the

1 witness is here so you don't fly them back. But I'm leaving  
2 that to each of you. Your choice.

3 MR. ROSENBERG: Well, thank you for that. That was  
4 actually one of the two reasons that I'm standing here today.  
5 We would anticipate that we would want to present evidence on  
6 that issue during the trial itself.

7 THE COURT: That's fine. Just tell the other side  
8 so if they want to rebut in that close period of time, they  
9 can.

10 MR. ROSENBERG: Right.

11 THE COURT: Okay. Govern yourselves before I  
12 govern you. Fair enough? You conduct the trial that's  
13 comfortable for you with the best presentation of evidence,  
14 and I will bend to your wishes. Anytime you both say yes,  
15 I'll probably say yes.

16 MR. ROSENBERG: The other issue -- we appreciate  
17 that.

18 The other issue that I want to raise with the Court  
19 is that the government interprets the Court's summary  
20 judgment opinion as an opinion that does not require any  
21 affirmative action on behalf of the government at this point  
22 in time.

23 THE COURT: That's correct.

24 MR. ROSENBERG: Okay.

25 THE COURT: Let me make that absolutely clear. I

1 found facial discrimination. If we get to injunctive relief,  
2 that is a fact intensive. That is an equitable proceeding.  
3 And there, many of the issues that you wanted to raise that  
4 are precluded because the Court first needs to determine if  
5 there's facial discrimination or not, you may be raising at  
6 that time. In other words, equitably we're seeking some  
7 remedy.

8 MR. ROSENBERG: I understand. I just want to make  
9 sure because one of my obligations is to ensure that my  
10 clients comply with any orders that the Court issues. And I  
11 wanted to be clear as to our interpretation that it does not  
12 require any action at this time.

13 THE COURT: I -- in that area where I've already  
14 rendered summary judgment, I don't see how a Court can then  
15 impose injunctive relief meaningfully without hearing  
16 evidence. When and how that evidence is presented, I'm  
17 leaving it to both of you. You tell me.

18 MR. ROSENBERG: Thank you, Your Honor.

19 THE COURT: Why don't you step over and talk to  
20 them. Over there. Just walk over there. They're right  
21 there.

22 MR. ROSENBERG: I don't think there's anything  
23 else. I'll just flag --

24 THE COURT: No. Just walk over and talk to them  
25 and ask them what they want to do. It will save a lot of

1 paperwork. In other words, if you want to have a separate  
2 proceeding afterwards and fly people back, fine. If you want  
3 to have it during the trial, which I would recommend, fine.

4 (Counsel conferring)

5 MR. ROSENBERG: Your Honor, just a couple of small  
6 housekeeping matters, then. The parties have conferred.  
7 There are still a few outstanding deadlines in advance of the  
8 trial.

9 For example, the parties pursuant to the Court's  
10 local rules are supposed to exchange demonstratives I believe  
11 11 days before trial. We are likely to negotiate internally  
12 a different date that's closer to trial.

13 THE COURT: If you both move for a new date, I'm  
14 going to agree to that. Go in good faith, okay?

15 MR. ROSENBERG: Do we need a Court order on that?  
16 I don't think we do because it's just an exchange.

17 THE COURT: Well, just step over and ask what date  
18 you'd like to now exchange demonstratives. It will save a  
19 whole lot of paperwork. Just go over there and get a date.

20 (Counsel conferring).

21 MR. ROSENBERG: July 30th.

22 THE COURT: There we go. July 30th. Granted.

23 MR. ROSENBERG: Okay. The local rules also require  
24 or allow for the parties to file trial briefs in addition to  
25 proposed findings of fact. We're not sure -- the Court

1 already has a lot paper from us. We don't anticipate --

2 THE COURT: If you waive that local rule, counsel,  
3 I'm happy to waive that local rule. I have a lot of  
4 documents from you.

5 MR. ROSENBERG: We'll waive that local rule. I  
6 think we would still file the proposed findings of fact.

7 THE COURT: And that local rule is waived by the  
8 Court. I think it's unduly consumptive of your time and it  
9 interferes with your preparation.

10 MR. ROSENBERG: We also, as the Court is aware, are  
11 taking the deposition of Dr. Sharon.

12 THE COURT: July 18th.

13 MR. ROSENBERG: Yes -- Thursday of this week.

14 THE COURT: You're reserving the right to bring  
15 additional in-limine motions concerning Dr. Sharon?

16 MR. ROSENBERG: Right. We would anticipate -- I  
17 don't know the exact timing of that motion. If we were to  
18 file a motion, we have to obviously take the deposition  
19 first.

20 THE COURT: By the way, I may not be available to  
21 you in the time. I'm sitting by designation in Saipan right  
22 before your trial, so I won't be here physically. I may have  
23 to take that up literally on August 6th, okay?

24 MR. ROSENBERG: That would be what we would  
25 anticipate. We haven't spoken about the exact date. We had

1 actually discussed the timing of witnesses, but I would  
2 imagine their expert testimony --

3 THE COURT: I can either decide that on the papers,  
4 or if you want an in-person hearing with the Court, it may be  
5 August 6th.

6 MR. ROSENBERG: Okay. That works for us.

7 And then are there any other logistical issues that  
8 the Court would ask of us? I will note one of my colleagues  
9 was out earlier, Noah O'Connor. He's going to be assisting  
10 us at trial with the technology because I'm a bit of a  
11 Luddite, but I know that he has spoken with some of your  
12 colleagues on the technology side to make sure everything is  
13 set up.

14 THE COURT: I'll work with you in terms of your  
15 tech. Don't worry. We'll get you set up. The case has  
16 attracted some public interest. So you see the way that the  
17 screens are positioned now? I'll want the public, if they're  
18 interested, to be able to see the documents you're showing at  
19 that time. I'll have my MIS people work with you.

20 Also, we'll need realtime, not CourtSmart, because  
21 I can't get a readback from CourtSmart. So hopefully you'll  
22 be the court reporter with us.

23 Other than that, in a nonjury trial it's much more  
24 relaxed, quite frankly. I don't mean you're not on your best  
25 behavior and vice versa. What I mean by that is a lot of

1 issues can get resolved without prejudice to a jury because a  
2 Court sorts out those prejudicial issues and excludes them.  
3 I'd like to get you as relaxed as possible.

4 (Off-the-record discussion)

5 THE COURT: Now we're back on the record.

6 MR. ROSENBERG: Can I consult with my colleague for  
7 just one moment, and then we're done.

8 THE COURT: Okay. And watch the time, counsel.  
9 I'm a workaholic. My days run into each other. Okay? So  
10 you need to slow me down. I'm saying that courteously.  
11 You'll see me go to 6:00 at night and I'm -- no problem. You  
12 need to stop me.

13 You need to say: Judge, you know, it's 5:00. I'm  
14 tired. My best presentation isn't taking place, so can we  
15 leave at 3:45 or 4:15, because the next person is an expert  
16 on one of the sides. We really didn't want to pay him for  
17 that day.

18 We've got enough time to be courteous to people.  
19 We don't have to press through in a continuous fashion as we  
20 do with a jury.

21 MR. ROSENBERG: Your Honor, I just want to circle  
22 back to the clarification that I sought at the beginning.  
23 Part of the reason that I'm seeking that clarification -- and  
24 I think the Court is clear on this, but again it's just out  
25 of an abundance of caution, to make sure we're on the same

1 page.

2 As the Court is aware and as it acknowledged in its  
3 tentative decision, the VA enters into enhanced use leases  
4 with many third parties. Some of those leases involve  
5 housing that has already been constructed. Some of those  
6 leases involve housing that will literally open during the  
7 trial. I just want to make sure that no changes need take  
8 place regarding that.

9 THE COURT: No deterrence or change that your  
10 present providers need to undertake. In other words, our  
11 goal here, if any, is to either keep or enhance what is  
12 occurring. It's not to interfere with the present construct  
13 that's already in place. You can't undo that.

14 The remedy has to wait, if there is any further  
15 remedy, and that's subject to a lot of discussion for the  
16 equity of injunctive relief. And we could never get there  
17 before the Court made the determination of whether this was  
18 facially discriminatory.

19 One of the things that took so long to get out  
20 another opinion was going back through the complete record  
21 and me asking the question constantly of myself: Is there  
22 anything else that can be developed on this record at trial?  
23 And I can't find, regardless of your position, anything other  
24 on this record that would lead to the initial decision of  
25 whether there's facial discrimination.

1           That's far different --

2           MR. ROSENBERG: Okay.

3           THE COURT: -- than the remedy, if there is one.  
4           Is that clear to everybody? Is that clear? If not, please  
5           ask questions so we make it clear.

6           VA, is that clear to you?

7           MR. DALE: Yes, Your Honor. It's crystal clear,  
8           Your Honor.

9           THE COURT: Okay. I just want to make sure,  
10          because -- it's good to have you here, by the way.

11          Mr. VA, state your name again.

12          MR. DALE: You bet. My first name is Tobin,  
13          spelled T-o-b-i-n. Last name is Dale, D-a-l-e.

14          THE COURT: It's a pleasure. Thank you.  
15          Is that clear also to the plaintiffs?

16          MR. SILBERFELD: Yes, Your Honor.

17          THE COURT: Okay. All right.

18          MR. ROSENBERG: And I believe now we should confer.

19          THE COURT: Now, do you want me to bring you back  
20          at 1:00? It's amazing. I trust my attorneys. Isn't that  
21          refreshing? I think you can work this out, and I don't need  
22          to keep you. Otherwise I'll bring you back at 1:00. Have a  
23          nice lunch.

24          MR. ROSENBERG: 1:00 works, but I think we can also  
25          probably meet a little bit earlier even.

1 THE COURT: Tell me the time.

2 MR. SILBERFELD: Thirty minutes, Your Honor?

3 THE COURT: Thirty minutes. I'll see you at five  
4 minutes to, but I want my staff to have lunch. Fair enough?

5 MR. ROSENBERG: Just so we can confer, do you want  
6 to say 12:30?

7 (Court and clerk conferring).

8 THE COURT: Let's make it 12:30. That way you can  
9 go down and have lunch, come back at 12:30. If we have any  
10 difficulties, we can resolve them quickly. And if you can  
11 catch planes back home, I want you to be able to do that.

12 (Off-the-record discussion)

13 THE COURT: Back on the record. All counsel are  
14 still present. Counsel and the parties are present.

15 Counsel, you just approached me with an  
16 accommodation that you'd like to make for both sides.

17 MR. SILBERFELD: If we could submit a revised  
18 pretrial conference order tomorrow?

19 MR. ROSENBERG: That's acceptable to the  
20 government.

21 THE COURT: Okay. It's both of your requests, then  
22 submit it by 5:00 tomorrow. Is that acceptable?

23 MR. ROSENBERG: Sure.

24 THE COURT: No reason, then, to reconvene or bring  
25 you back at 1:00 or 12:30. Then go have a good day.

1 MR. MCCORMICK: Your Honor, for the intervenor, we  
2 just have a question about the order of proof. I've  
3 conferred with counsel. Since our intervenor issues were  
4 technically aligned with the plaintiff but substantively  
5 we're more aligned with the defense party, we'd prefer to go  
6 last with all of our intervenor proof and rebuttal, et  
7 cetera. I've conferred with counsel and --

8 THE COURT: Agreeable by the plaintiffs?  
9 Government? Agreeable?

10 MR. SILBERFELD: Agree.

11 MR. ROSENBERG: Agree.

12 MR. MCCORMICK: Thank you, Your Honor.

13 THE COURT: Thank you very much. Have a good day,  
14 all.

15 (Proceedings concluded at 11:29 a.m.)

16 CERTIFICATE

17 I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
18 TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN  
19 THE ABOVE MATTER.

20 FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE  
21 REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE  
22 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

23  
24 /s/ Miriam V. Baird

07/19/2024

25 MIRIAM V. BAIRD  
OFFICIAL REPORTER

DATE