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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, and STATE OF CALIFORNIA, et al. Plaintiffs, v. MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, et al., Defendants, AND RELATED COUNTER-CLAIMS, CROSS-CLAIMS AND THIRD-PARTY ACTIONS.	Case No. CV 90-3122 R REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' CONTINGENT VALUATION REPORT AND TESTIMONY BASED THEREON Date: April 10, 2000 Time: 10:00 A.M. Place: Courtroom 8 312 N. Spring Street

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INTRODUCTION

Plaintiffs' opposition ignores the basic issues raised by Defendants' motion to exclude their CV surveys, and instead is devoted to diversionary exercises. As we show, none of these arguments has merit.

Plaintiffs themselves implicitly recognize their CV surveys are hopelessly flawed. They disclose in the opposition that they secretly have been working for more than one year to replace the surveys. Having spent millions of dollars and having engaged more than one dozen experts to undertake the 1994 surveys, Plaintiffs now say they will repeat that effort and produce new CV survey results at the end of July 2000, long after the conclusion of discovery (and even longer after the time for disclosure of expert reports). Plaintiffs made no mention of this attempt to circumvent the Court's trial schedule at the February 14 status conference, and it should be rejected.

Plaintiffs' efforts to salvage their 1994 surveys also fail. We have shown that: (i) both 1994 surveys flatly misstated any purported injuries to the two fish and two bird species in question; (ii) the lead author of the surveys, Dr. Raymond Kopp, admitted they could not be used to determine a damages amount; and (iii) the fit requirement enunciated by the Ninth Circuit in Daubert on remand – requiring that the expert work "fit" the facts in the case – accordingly necessitates exclusion of the surveys. Even though Plaintiffs bear the burden of rebutting these points and convincing the Court that the surveys "speak[] clearly and directly to an issue in dispute," they offer no direct response to any of them.

Nowhere do Plaintiffs even attempt to claim the surveys' injury description was accurate. Indeed, by their recent actions, Plaintiffs have admitted that the injury description was grossly distorted. A document Plaintiffs only recently produced – relating to their effort to conduct further expert CV work – reveals that they admit three of the four animal species in the injury description are not injured. Thus, the injury description in their proposed new CV survey states:

> **"According to the scientists, the only animal population that is currently affected by this deposit is the Channel Island bald eagle population."**

Memo dated 2/15/00 (Simshauser supp. decl. ex. 15) (emphasis added). This of course contrasts starkly with the 1994 surveys' claim that three additional species were greatly impacted, and would be for fifty years or more.

Nor do Plaintiffs debate that the CV surveys cannot provide a basis for any "clear and direct" expert testimony about actual damages in this case. In light of Dr. Kopp's unrebutted testimony that additional work would be necessary, they cannot. Instead, they contend, based on a self-serving declaration from a non-testifying expert, that even if the surveys cannot be used for their original purpose of providing a dollar value of natural resource damages, they instead can provide a starting point for calculating a damages estimate. The Court should reject this effort to turn a sow's ear into a silk purse, however. The arguments advanced by Plaintiffs and their expert are precisely the sort of *ipse dixit* justifications condemned by the Supreme Court in General Electric Co. v. Joiner.

Plaintiffs do not even discuss the fit requirement of Daubert on remand. Their failure to do so is a tacit admission that the case is fatal to their attempt to use the surveys. Nowhere do they confront the Ninth Circuit's specific holding requiring exclusion of expert evidence like the CV surveys ("Federal judges must therefore exclude proffered scientific evidence [that does not meet the fit requirement]"). Instead, in one of their diversionary exercises, they advert to generalized maxims about the Court's discretion to weigh a witness' testimony. Such axioms have no application here, however, where the Ninth Circuit, following the Supreme Court's instructions, has specifically held that District Courts must exclude expert testimony if a plaintiff does not meet its burden of demonstrating the testimony actually fits the case.

For these reasons, the Court should sweep aside Plaintiffs' diversionary arguments and rule now that they cannot introduce the CV surveys or evidence based on them. Furthermore, the Court should peremptorily reject Plaintiffs' thinly-veiled request – offered for the first time in their opposition brief – to submit additional expert evidence long after the time for completing all discovery.

ARGUMENT

I. THE COURT SHOULD PEREMPTORILY REJECT PLAINTIFFS' ATTEMPT TO REPLACE OR SUPPLEMENT THE 1994 CV SURVEYS.

Plaintiffs admit in their opposition that for more than one year, they secretly have been planning to revise their CV surveys. See Saurenman ex. 6 (Conner dec.) ("NOAA concluded that it was appropriate to conduct additional work to supplement its estimate of interim lost use value which was calculated using the contingent valuation methodology. The design of the supplemental work began during the Spring of 1999."). According to Plaintiffs, they have "taken steps to expedite completion of the supplemental work and will produce a supplemental expert report July 21, 2000." Id.

This announcement is a brazen attempt to flout the Court's pre-trial scheduling order. On February 14, 2000, at the parties' first appearance before this Court, it held a status conference to establish the final pre-trial and trial schedule. In advance of the conference, the parties held a series of meet-and-confer sessions to prepare a joint status conference statement. At no time before the status conference did Plaintiffs' counsel indicate they would attempt to supplement their expert work, which was supposed to have been completed in 1994. Moreover, at the status conference itself, Plaintiffs sat silent while the Court scheduled a firm discovery cut-off, for both expert and non-expert discovery, of May 31, 2000. The Court set April 15, 2000 as the date for Defendants to designate their experts, based on representations by the parties that all Plaintiffs' expert work had been completed and depositions of these experts taken.

If Plaintiffs had any intention of attempting to submit additional expert work, or even a suspicion that they might attempt to do so, it was incumbent on them to raise the subject at the status conference. They did not, even though they now admit they had been planning to modify their CV surveys for more than one year. Because Plaintiffs were not candid at the status conference, and further because their attempt to submit additional expert work would violate the Court's February 14 scheduling order, Plaintiffs are now barred from producing additional expert work (which would of course have to be analyzed, subjected to discovery and

then responded to) long after the discovery cut-off.

Accordingly, the Court should reject Plaintiffs' suggestion that they may attempt to rely at trial on additional CV survey work aimed at curing the flaws in their existing surveys.[1]

II. PLAINTIFFS' ATTEMPTS TO SALVAGE THE 1994 SURVEYS ARE GROUNDLESS.

A. The Opposition's Initial Arguments Are Irrelevant.

The opposition begins not by responding to Defendants' motion, but instead by presenting a one-sided treatise on the abstract notion that the contingent valuation methodology actually can measure natural resource damages. Opp. at 2:17-5:14. This is a non-issue, however. In our opening papers we explicitly said our motion does not attack the conceptual underpinnings of contingent valuation. Op. br. at 1:24-25 ("Defendants do not now present all the arguments against the use of contingent valuation ('CV') as a general matter."). Rather, in an effort to cut to the chase, our motion attempts to assist the Court by identifying a glaring flaw in Plaintiffs' CV surveys that as a matter of law precludes their introduction at trial. Ruling on this issue now will eliminate the need to address later in great detail the inherent unreliability of any CV survey, both as a general matter and as applied here.

B. Although The Opposition Attempts To Deny The Severe Errors In The CV Surveys' Injury Descriptions, Plaintiffs Independently Have Explicitly Admitted Their Survey's Inaccuracy.

Instead of owning up to the fatal errors in the injury description section of their CV surveys, Plaintiffs try to cover them up. Peregrine falcons are a case in point. In our

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[1] An additional example of Plaintiffs' failure to abide by proper pre-trial procedures is raised by their attempt to stake out a claim for damages they already have renounced any right to recover. In our opening papers, we explained that: (i) the two 1994 CV surveys calculated damages of $575 million and $305 million; and (ii) in their June 1997 damages interrogatory responses (which were relied on to justify Plaintiffs' $45.7 million settlement with LACSD), Plaintiffs said they were relying on the $305 million amount (Simshauser 3/6/00 dec. at ex. 5-441). Now, however, Plaintiffs ask the Court to admit into evidence and give weight to the $575 million amount. Furthermore, buried in a footnote of the opposition, Plaintiffs say for the first time they will claim additional damages at trial, purportedly for injuries that allegedly occurred before 1994. Opp. at 6:24-28 (n.7). Plaintiffs have relinquished any right to recover such damages, however. Having submitted interrogatory responses delimiting the scope of their damages claims, and having relied on these responses to justify their latest settlement with LACSD, Plaintiffs now are precluded from seeking additional damages.

opening brief, we showed that Plaintiffs' falcon experts, when asked to evaluate the CV surveys' exact statements, said they were inaccurate. Op. br. at 5:12-7:8. Plaintiffs now avoid this issue. They do not present any statements from these experts, or from anyone else, saying the surveys in fact were accurate. Instead, they attempt to muddy the record by referring to other portions of the experts' reports and deposition testimony in which they make statements Plaintiffs construe as favoring their case. Opp. at 10:22-12:13.[2]

The Court should disregard this further attempt at diversion, however. The issue is not whether Plaintiffs' biological experts believed there was or is some injury to the peregrine falcons or other species in the Southern California Bight. That issue will be the subject of separate reports by Defendants' experts, who in fact will show Plaintiffs' overall injury claims to be wildly exaggerated. As to falcons, for example, the uncontroverted record will show they currently live and breed on the Channel Islands at virtually historical levels. The issue now is different, though. It is whether the injuries described in the CV surveys to determine a damages value were an accurate reflection of reality. Defendants' showing that they were not stands unrebutted.

If Plaintiffs were candid in their opposition, they would be forced to admit that the surveys' injury description was seriously exaggerated. Although they do not level with the Court, documents recently produced in discovery independently show that Plaintiffs and their experts in fact concede that ecological conditions are significantly better than described in the 1994 surveys. These documents, which Plaintiffs failed to produce until only very recently, demonstrate that for more than one year, they have recognized their 1994 surveys to be fatally flawed and accordingly have been planning to undertake a new CV survey. See Simshauser

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[2] Plaintiffs assert, for example, that Defendants have overlooked the fact that "the only reason that peregrine falcon populations on the Channel Islands have increased at all is because [Plaintiffs' expert] Mr. Walton and his team performed extensive peregrine falcon restoration efforts. . . ." Opp. at 10:25-28. They thus quote Mr. Walton's report for the statement that "If not for the [restoration] activities described in this report, the number of active peregrine territories on the Channel Islands would probably be considerably lower at this time." Id. at 11:1-3. What Plaintiffs overlook, however, is that according to Mr. Walton, these same restoration efforts were used to enhance falcon populations everywhere in California, not just on the Channel Islands. E.g., Saurenman ex. 3 at 222, 228. Thus there is nothing unique about the Channel Islands in this respect.

supp. dec., ex. 14; Saurenman ex. dec. 6 (Conner dec.). As shown above, under no circumstances should Plaintiffs be allowed to use any evidence from the new survey in this case.

The new survey work dramatically highlights, however, the flaws in the 1994 CV surveys. An e-mail dated February 15, 2000, prepared and circulated by Plaintiffs' experts in connection with the new CV survey work, states the following:

> Gentlemen,
>
> Attached is the injury description from the injury team. . . . [:]
>
> "According to the scientists, the only animal population that is currently affected by this deposit is the Channel Island bald eagle population. This is because bald eagles are at the top of the food chain and accumulate more DDTs than many other birds, and because they are more sensitive to DDE than are many other birds. Birds lower in the food chain and birds that are less sensitive to DDT have recovered."

Simshauser supp. dec. ex. 15 (emphasis added). This is additional clear evidence that the 1994 surveys' injury descriptions were inaccurate.

In short, our opening papers demonstrated that the inaccuracy of the injury descriptions, relying on contradictory evidence from Plaintiffs' own witnesses. Plaintiffs have not rebutted this showing. To the contrary, documents recently produced by Plaintiffs fully corroborate Defendants' position.

C. The Inaccurate Injury Descriptions Require Exclusion Of The 1994 Surveys.

The surveys should be excluded because the injury descriptions did not "clearly and directly" fit the actual conditions of this case. In fact, Plaintiffs do not seriously dispute that the surveys cannot provide a basis for any meaningful expert testimony in this case. Despite carrying the burden of demonstrating admissibility, Plaintiffs have no response whatsoever to the "fit" requirement of Daubert on remand. As we have shown, there the Ninth Circuit clearly stated that in the circumstances present here, the Court must exclude proffered scientific testimony: "Federal judges must therefore exclude proffered scientific evidence

under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case. . . ." 43 F. 3d at 1321 n. 17. Plaintiffs attempt to avoid this result, but their efforts come up short.

On a factual level, Plaintiffs offer two half-hearted attempts to justify the CV surveys. First, they attempt to muddy matters further by arguing that some environmental injuries existed at the time of the surveys, even if not the ones described by them. Opp. at 14:8-15:24. Second, they try to minimize the impact of the surveys' erroneous injury description, by arguing that some unrelated elements of the surveys were factually accurate (such as their background description). Id. at 9:15-10:11.

Neither argument has merit. It is self-evident that a report designed to measure the purported monetary value of a given injury lacks meaning if it does not correctly describe the injury being measured. No one will ever know – and no expert can testify – that the survey respondents would have placed the same value on different injuries. Indeed, one of the supposed hallmarks of the contingent valuation methodology touted by the government's experts is that it is supposed to result in different monetary values for different injuries (*i.e.*, contingent valuation purportedly does not simply measure a general desire to have a clean environment). It is equally obvious that the fatal flaws in the CV surveys are not avoided merely because the background discussion used to set up the injury description may have been accurate. Again, the purpose of the surveys was to value certain injuries. If the injuries were non-existent or not accurately described, it makes no difference that the background portion of the surveys was truthful.

As we showed in our opening brief, Dr. Kopp, the CV surveys' lead author, admitted they could not be used in their present form:

> A I can only tell you that if you change the scope of these injuries by reducing them, you will expect, all things being equal, the interim lost use calculations to decline. If you expand the injuries, it should increase.
>
> Q But they would decline in a way that you're not able to testify to, isn't that right?
>
> A Without doing another study, no.

Op. br. at 14:22-25.

Plaintiffs attempt to rebut Dr. Kopp – their own expert – by submitting a declaration from a Dr. Richard Carson, who Plaintiffs have not even designated as a testifying expert. See Saurenman dec. ex. 3. Conspicuously absent from Dr. Carson's self-serving statement is any claim that the damages amounts calculated by the CV surveys have any clear and direct application to this case. Instead, he simply tries to salvage surveys by arguing that their results possibly could be used as a starting point for performing some other estimate of damages. In other words, he effectively concedes that the existing surveys standing alone do not apply to this case. Dr. Carson's declaration is a transparent effort to salvage the surveys through nothing more than *ipse dixit*. As Defendants demonstrated in their opening brief, the Supreme Court in General Electric v. Joiner expressly stated that such self-serving, after-the-fact rationalizations must be rejected. 118 S. Ct. at 519 (endorsing exclusion of "opinion evidence which is connected to existing data only by the *ipse dixit* of the expert").

Plaintiffs' discussion of the controlling legal authority also fails. They do not even attempt to distinguish Daubert on remand. Nor do they address the later cases cited in our opening brief that rejected scientific testimony on fit grounds. E.g., General Electric Company v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L Ed. 2d 508 (1997); In re TMI Litig. Cases Consolidated II, 911 F. Supp. 775 (M.D. Pa. 1996). The only conclusion one can reasonably draw from Plaintiffs' obfuscation is that they implicitly recognize that the controlling law requires exclusion of the CV surveys. Moreover, Plaintiffs cite no cases decided after Daubert on remand where expert testimony that doesn't "clearly and directly" speak to the injuries at hand has nonetheless been admitted at trial. No such case exists.

True to their practice of avoiding the actual issues, Plaintiffs ignore the directly controlling Ninth Circuit precedent. Instead, they attempt to rely on a number of older cases, a few of which are from district courts in other circuits and involved the admissibility of public opinion surveys, where the courts have remarked generally on the discretion traditionally vested in district judges to exclude (or admit) evidence. Opp. at 7:27-9:12. These outdated hornbook standards have no application here, however, where the Ninth Circuit has specifically directed that in the circumstances presented in this case, district courts must exclude proffered

scientific testimony.

Accordingly, Plaintiffs have not met and cannot meet their burden of establishing that the CV surveys are admissible.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court exclude from evidence the CV surveys and any testimony related to them.

DATED: April 3, 2000

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 300 South Grand Avenue, Los Angeles, California 90071.

On **April 3, 2000**, I served the foregoing document(s) described as

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' CONTINGENT VALUATION REPORT AND TESTIMONY BASED THEREON

on Counsel in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

(SEE ATTACHED LIST)

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Executed on **April 3, 2000**, at Los Angeles, California.

Jennifer Solis

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