

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
No. 95-498C

(Filed: March 17, 2006)

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AMERICAN FEDERAL BANK, F.S.B.,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES,	)
	)
Defendant.	)

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ORDER

Pending before the court is Defendant’s Motion *In Limine* to Exclude the Proposed Expert Testimony of John R. Jay, filed February 28, 2006. Plaintiff filed an opposition to this motion on March 14, 2006.

Defendant’s motion is DENIED. The points raised by defendant in its motion should be addressed at trial following *voir dire* of Mr. Jay.

In its motion, defendant raises two alternative requests. First, it requests that the court “issue an order requiring Am[erican] Fed[eral] to present Mr. Jay’s fact testimony separately from his expert testimony.” Mot. at 9. Defendant makes this request on the ground that Mr. Jay likely will be testifying both as a fact witness and as an expert witness. This alternative request is denied. The procedure urged by defendant would cause Mr. Jay’s testimony on direct and cross examination to be artificially broken up and disjointed, and would unnecessarily prolong the trial. *See* Fed. R. Evid. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”). In the trial that will begin within several weeks, and assuming that Mr. Jay in fact is qualified as an expert witness at trial, the court should have no difficulty distinguishing the areas in which Mr. Jay is testifying as a fact witness from those in which he is testifying as an expert witness.

Second, defendant requests that the court order production by plaintiff of a damage-related spreadsheet that was provided to Mr. Jay by counsel for plaintiff at an early stage of Mr. Jay’s work on his expert analysis. Mot. at 12. Plaintiff does not dispute that its counsel

provided a spreadsheet to Mr. Jay, but it contends that “all of the discoverable information contained in the spreadsheet has already been provided to the defendant.” Pl.’s Opp. at 15 n.67. Moreover, plaintiff argues that governing orders in this *Winstar*-related case do not require the disclosure of draft versions of reports or calculations. *Id.* The court concludes that the spreadsheet should be provided by plaintiff to defendant and orders that it be produced on or before March 24, 2006.<sup>1</sup> Based upon the factual materials available to the court, it appears that the spreadsheet constitutes information communicated by plaintiff to Mr. Jay as he was beginning his work and thus may well be “data or other information considered by the witness [Mr. Jay] in forming the opinions [to which he may testify at trial].” Rule 26(a)(2)(B) of the Rules of the Court of Federal Claims. Accordingly, disclosure of the spreadsheet is required. *See* Fed. R. Civ. P. 26 advisory committee’s note for the 1993 amendments to Subdivision (a), Paragraph (2) (“The report is to disclose the data and other information considered by the expert.”). And, although the spreadsheet may have contributed to Mr. Jay’s calculations or analysis, it would not itself be a draft of Mr. Jay’s report or calculations, and consequently it would not be protected from disclosure on the basis of the governing discovery orders in this *Winstar*-related case. Finally, plaintiff makes no claim that production of the spreadsheet is barred by privilege or other protection against disclosure.

It is so ORDERED.

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Charles F. Lettow  
Judge

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<sup>1</sup>*See* Fed. R. Civ. P. 26 advisory committee’s note for the 1993 amendments to Subdivision (a), Paragraph (2) (“This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination.”).