IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, et al., Defendants.	No. 1:96CV01285 (Judge Robertson)

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF RICHARD V. FITZGERALD

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Defendants respectfully move this Court for an order in limine excluding the expert report and testimony of Richard V. Fitzgerald.[1] Mr. Fitzgerald, who testified for three days during Trial 1.5, can offer nothing new for this hearing and, indeed, several of his opinions have been expressly rejected by the Court of Appeals. Defendants seek an order in limine for the reasons set forth below.

I. Portions of Mr. Fitzgerald's Expert Report and Proposed Testimony Are Not Relevant To Any Cognizable Issue Before the Court

"The purpose of a motion in limine is to 'procure a definitive ruling on the admissibility of evidence at the outset of the trial.'" Crocker v. Piedmont Aviation, Inc., 743 F. Supp. 1 (D.D.C. 1989) (quoting 21 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5037, at 194 (1977) and citing Koller v. Richardson-Merrell, 737 F.2d 1038, 1067 (D.C. Cir. 1984) (concurring opinion)). Further, the Supreme Court has specifically directed that when presented with questions regarding the relevance of proffered expert testimony, trial

[1] Plaintiffs' counsel has stated that Plaintiffs will oppose this motion.

judges should make a preliminary assessment, pursuant to Rule 104(a) of the Federal Rules of Evidence, regarding the admissibility of the expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 (1993).

In his August 24, 2007 expert report, Mr. Fitzgerald provides expert opinions on four topics. His opinions on three of these topics, and parts of the fourth, are outside the scope of the issues to be decided during the October 10 trial.

In describing the required accounting, he states that "in my opinion, completeness and accuracy may not be sacrificed." Expert Report of Richard V. Fitzgerald, dated August 24, 2007, at 4 (attached as Exhibit 4 to Plaintiffs' Notice of August 24, 2007 [Dkt. No. 3371]).[2] He also states that "it is my opinion that under traditional and accepted trust standards, it is reasonable to hold the trustee-delegates fully accountable for their conduct and that the trustee-delegates bear the full and necessary costs of a complete historical accounting back to the inception of the trust." Id. at 11. These two opinions are contrary to the law of this case.[3]

The Court of Appeals found that the 1994 Act's "general language doesn't support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost." Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005). "Congress's post-1994 appropriations fall equally short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite." Id. Appropriations

---

[2] Unfortunately, Mr. Fitzgerald's expert report is not paginated. The page numbers of his report identified here assume that the cover page of his report is page one.

[3] These opinions duplicate those of Plaintiffs' other expert, Mr. Homan. See Expert Report of Paul M. Homan, dated August 17, 2007, at 5 (attached as Exhibit 1 to Plaintiffs' Notice of August 17, 2007 [Dkt. No. 3369]) ("no statute that I know of limits the government's fiduciary accounting duty or otherwise authorizes Interior to sacrifice accuracy and completeness of the accounting due the Indian trust beneficiaries").

"unequivocally control what may be spent on historical accounting activities during the period of their applicability." Id. The Court of Appeals found that "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." Id. at 1076. Under these circumstances, "the district court owed substantial deference to Interior's plan." Id.

Mr. Fitzgerald also states in his report that "in my opinion, the Individual Indian Trust is not, in practice, managed in accordance with [traditional trust] principles and Interior avoids reference to those principles because they are inconsistent with, and do not support, its litigation position." Expert Report of Richard Fitzgerald at 4. This Court has already decided that claims about the management of the trust – and the appropriate principles that should guide trust management decisions – are no longer at issue in this case. See Cobell v. Norton, 226 F.R.D. 67, 77 (D.D.C. 2005) (Plaintiffs' "single 'live' cause of action seeks a remedy for [failure to provide an accounting]."). In any event, the upcoming trial is about the accounting – not trust management.[4]

In the section of his report that discusses the scope of the 2007 Plan – the only part of his expert report that arguably comes within the scope of the issues to be decided at the upcoming trial – Mr. Fitzgerald states that "[i]n my opinion, statistical sampling has no place in a fiduciary accounting." Expert Report of Richard Fitzgerald at 9. This opinion is contrary to the law of this case.

---

[4] Mr. Fitzgerald testified during Trial 1.5 in support of Plaintiffs' fiduciary compliance plan – an issue obviously not part of the October 10 trial. His opinion here on trust management issues appears to be simply an inappropriate vestigial remainder of his old testimony.

The Court of Appeals has expressly approved statistical sampling of transactions as a means to assess the accuracy of the Historical Statements of Account. In Cobell XVII, the Court of Appeals reviewed this Court's prior rejection of statistical sampling and Plaintiffs' preference for a complete, 100 percent "vouching" of all transactions:

> Under the circumstances presented here, neither beneficiaries' preferences nor the absence of precedent, nor the combination, could properly be deemed controlling. Where trade-offs are necessary because it is costly to increase accuracy, the preference of a party that will bear none of the monetary costs can't sweep the cost issue off the table.

Cobell v. Norton, 428 F.3d 1070, 1078 (D.C. Cir. 2005) (internal citations omitted). The Court of Appeals concluded: "Because the district court's ban on statistical sampling reflected no deference to defendants' expertise or to their judgment regarding the allocation of scarce resources, the district court abused its discretion by including that provision in the injunction." Id. at 1078-79. Accordingly, statistical sampling of transactions is legally permissible as a means to assess the accuracy of the Historical Statements of Account and it is no longer permissible to present "expert" opinions to the contrary.

Under Fed. R. Evid. 401, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." To the extent that Mr. Fitzgerald has expressed opinions in his expert report that are outside the scope of the upcoming trial – either because they address issues already decided by the Court of Appeals or because they address issues unrelated to accounting matters – his expert report is not material to any issue "of consequence to the determination of the action" during the upcoming hearing.

Plaintiffs have represented that Mr. Fitzgerald's expert testimony will be limited to the subject matters discussed in his expert report. See Plaintiffs' Pretrial Statement, at 11 [Dkt. No. 3398]. To the extent that his expert report is not relevant to matters to be decided at the upcoming hearing, his proposed expert testimony on those matters is also not relevant to any justiciable issue.

Under Fed. R. Evid. 402, "[e]vidence which is not relevant is not admissible." To the extent that Mr. Fitzgerald's expert opinions are not relevant to any current issue before the Court, as discussed above, those portions of his expert report and expert testimony that address these irrelevant matters are inadmissible and should be excluded.

Plaintiffs have also represented that they intend to have Mr. Fitzgerald provide "factual" testimony in addition to expert testimony. See Plaintiffs' Pretrial Statement at 11. This "factual" testimony will supposedly relate to "policies concerning trust duties during his employment with Interior and the state of management of the IIM trust, the LSA, and facts stated and opinions expressed at trial." Id.

As discussed above, matters related to trust "duties" and "management of the IIM trust" are not within the scope of issues to be decided at the upcoming trial. Thus, any fact testimony from Mr. Fitzgerald should also be excluded under Rule 402.

II. Mr. Fitzgerald Is Unable to Provide Expert Opinions that Would Assist the Court

Pursuant to Rule 702 of the Federal Rules of Evidence, this Court may receive the testimony of a properly qualified expert "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The Supreme Court has confirmed the trial judge's responsibility to serve as a "gatekeeper" to ensure that expert testimony will be admitted only if it is both

relevant and reliable. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert, 509 U.S. at 589.

In Daubert, the Supreme Court stated:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

509 U.S. at 592-93 (footnotes omitted); see also Kumho Tire, 526 U.S. at 147 (confirming that Daubert principles apply to non-scientific experts).

Although Defendants do not concede that Mr. Fitzgerald is qualified as an expert, it is unnecessary for the Court to reach the issue of his qualifications.[5] Because, as discussed above, his expert opinions are not relevant to any matter to be decided at the upcoming hearing, Mr. Fitzgerald is unable to provide any information or knowledge that would "assist the trier of fact to understand the evidence or to determine a fact in issue." Thus, Plaintiffs cannot satisfy the standard under Rule 702 with regard to Mr. Fitzgerald's proposed expert opinions. His expert report and proposed expert testimony should be excluded.

III. Mr. Fitzgerald's Proposed Testimony Would Be Cumulative of Trial 1.5 Testimony

Rule 403 of the Federal Rules of Evidence provides that relevant evidence may be excluded if its probative value is outweighed "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Even if Plaintiffs are

---

[5] Over the objection of Defendants, Mr. Fitzgerald was permitted to testify during Trial 1.5. For the reasons expressed during Trial 1.5, see Tr. 32:10-33:3 (May 8, 2003 – Day 6, p.m session), Defendants continue to object to Mr. Fitzgerald's qualifications as an expert.

able to demonstrate that some portion of Mr. Fitzgerald's proposed testimony could be characterized as relevant to an issue currently before the Court, his August 24, 2007 expert report reveals that in many respects he is simply repeating opinions that he expressed during his Trial 1.5 testimony. Indeed, Plaintiffs have designated all of his Trial 1.5 testimony in their Pretrial Statement. See Exhibit 3 to Plaintiffs' Pretrial Statement, at 6. It would be a waste of time and needlessly cumulative to permit Mr. Fitzgerald to testify about the same matters again. The Court should exclude Mr. Fitzgerald's August 24, 2007 expert report and any further testimony from Mr. Fitzgerald under Rule 403.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants' motion in limine and exclude the expert report and testimony of Richard V. Fitzgerald.

Dated: September 21, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman
ROBERT E. KIRSCHMAN, JR.
D.C. Bar No. 406635
Deputy Director
PHILLIP M. SELIGMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 616-0328

CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2007 the foregoing *Defendants' Motion In Limine to Exclude the Expert Report and Testimony of Richard V. Fitzgerald* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96cv01285 (JR)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on *Defendants' Motion in Limine to Exclude the Expert Report and Testimony of Richard V. Fitzgerald* (Dkt. No.). Upon consideration of Defendants' Motion, any Opposition by Plaintiffs, Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is GRANTED;

IT IS FURTHER ORDERED that testimony from Richard V. Fitzgerald, and all expert reports prepared by Mr. Fitzgerald, will not be admitted at trial.

SO ORDERED.

_____
Hon. James Robertson
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____