IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF RICHARD E. FASOLD

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 E. Fasold.[1] Mr. Fasold, who testified at length during Trial 1.5, and has expressly stated in his expert report that he has no new opinions to offer, would only provide the Court cumulative testimony about Plaintiffs' alternative damages model – an issue unrelated to throughput or any other topic identified by the Court for the October 10 trial. Defendants seek an order in limine for the reasons set forth below.

I. Mr. Fasold'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

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

(D.C. Cir. 1984) (concurring opinion), vacated on other grounds, 472 U.S. 424 (1985)). Further, the Supreme Court has specifically directed that when presented with questions regarding the relevance of proffered expert testimony, trial 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).

As part of the Trial 1.5 proceedings, and at the invitation of the Court, on January 6, 2003, Plaintiffs filed their Plan for Determining Accurate Balances in the Individual Indian Trust [Dkt. No. 1714] ("Plaintiffs' Plan"). Plaintiffs' Plan was premised on the assumption that individual accountings are impossible. Cobell v. Norton, 283 F. Supp. 2d 66, 207 (D.D.C. 2003), vacated in part, 392 F.3d 461 (D.C. Cir. 2004). Rather than using actual financial records to review transactional activity in IIM accounts, Plaintiffs' Plan used a model to estimate aggregate historical revenues and required Defendants to prove proper distribution of the revenues to members of the Plaintiff class. Id. at 208.

The architect of the revenue-estimating model was Mr. Fasold. He provided an expert report and expert testimony in support of his model and Plaintiffs' Plan during Trial 1.5. On August 17, 2007, Mr. Fasold filed another expert report which merely incorporates his prior opinions from 2003. See Expert Report of Richard E. Fasold, dated August 17, 2007, at 1 (attached as Exhibit 3 to Plaintiffs' Notice of August 17, 2007 [Dkt. No. 3369]). In their Pretrial Statement, Plaintiffs also identify their Plan as an exhibit (PPX 511).

In contrast to Trial 1.5, for the upcoming trial the Court did not invite Plaintiffs to file their own accounting – or alternative-to-an-accounting – plan. Indeed, the Court of Appeals has made it plain that the Court cannot require Interior to adopt a specific plan to conduct the

accounting, finding that this Court erred when it made the "ill-founded assumption that the 1994 Act gave it the freedom of a private-law chancellor to exercise its judgment." Cobell v. Norton, 428 F.3d 1070, 1077 (D.C. Cir. 2005). It also ruled that the 1994 Act has no language "in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee." Id. at 1075. To the contrary, the Court's equitable powers are "limited at one end of the spectrum by the court's inability to order broad, programmatic reforms," Cobell v. Kempthorne, 455 F.3d 301, 307 (D.C. Cir. 2006), and "limited at the opposite direction by an inability to require the agency to follow a detailed plan of action," id. "The court generally may not prescribe specific tasks for Interior to complete; it must allow Interior to exercise its discretion and utilize its expertise in complying with broad statutory mandates." Id. (citing Cobell v. Norton, 240 F.3d 1081, 1099, 1106 (D.C. Cir. 2001); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004)).

The Court has also established that "'plaintiffs' substantive rights are created by – and therefore governed by – statute. Thus, to the extent plaintiffs seek relief beyond that provided by statute, their claims must be denied.'" Cobell v. Norton, 226 F.R.D. 67, 75 (D.D.C. 2005) (quoting Cobell v. Babbitt, 91 F. Supp. 2d 1, 29 (D.D.C. 1999)). Plaintiffs' Plan calls for an alternative to the accounting required by the 1994 Act and it is not grounded in any other statute. In addition, although Plaintiffs' Plan is premised on the theory that an accounting is impossible, Plaintiffs' Complaint does not allege, in the alternative, that the accounting is impossible, seeks no alternative relief in the form of a declaration that the accounting is impossible, and alleges no jurisdictional basis to afford such relief. For these reasons, as a matter of law the Court cannot adopt Plaintiffs' Plan.

Moreover, Plaintiffs' Plan is merely a mechanism for calculating damages and this Court has already clearly indicated that the upcoming trial will not be about damages. See, e.g., Tr. 80:10-11 (June 18, 2007). Also, more broadly, for the reasons set forth in Defendants' Responding Brief Regarding the Scope of the October 10, 2007 Hearing, filed June 13, 2007 [Dkt. 3341], monetary relief may not, in any event, be awarded to Plaintiffs in this lawsuit.

Perhaps in recognition of the difficulty they face in presenting their Plan, Plaintiffs have recently indicated that they believe that Mr. Fasold's alternative model for calculating damages is somehow related to "throughput" issues. See Plaintiffs' Motion in Limine to Preclude Testimony, Documents, And Other Information Regarding Throughput at 1-2 (September 19, 2007) [Dkt. No. 3401]. Throughput, by definition, refers to money that actually went into, and out of, the IIM trust system. Mr. Fasold's model uses novel – and suspect – techniques to estimate money that he believes should have gone into the IIM trust system. See id. He has no opinions about what actually went into the IIM trust systems.

Because Mr. Fasold's opinions relate to the calculation of damages (i.e. the difference between Plaintiffs' claims as to what should have gone through the system and what actually went through the system), Mr. Fasold's opinions are not related to throughput or any other issue the Court has identified for the upcoming trial.

Under Rule 401 of the Federal Rules of Evidence, 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." Because Plaintiffs' Plan is a damages model and the upcoming trial is not about damages, and because as a matter of law the Court cannot adopt Plaintiffs' Plan, that Plan is not relevant to any justiciable issue. Because Mr. Fasold's expert reports are limited to a

discussion of Plaintiffs' Plan and his revenue model, and Plaintiffs have disclosed that Mr. Fasold will only testify about his expert reports, see Plaintiffs' Pretrial Statement at 12 [Dkt. No. 3398], his proposed expert testimony is also not relevant to any justiciable issue.

Under Rule 402 of the Federal Rules of Evidence, "[e]vidence which is not relevant is not admissible." Because Plaintiffs' Plan and Mr. Fasold's expert reports and proposed testimony in support of that Plan are not relevant to the upcoming hearing, the Plan (identified as Plaintiffs' Pretrial Exhibit PPX 511)[2] and Mr. Fasold's expert reports (identified as Plaintiffs' Pretrial Exhibits PPX 495 & 4208) and proposed testimony in support of the Plan, are inadmissible and should be excluded.

II. Mr. Fasold 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

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[2] Plaintiffs filed two plans on January 6, 2003, as part of Trial 1.5, a fiduciary "Compliance Action Plan," and Plaintiffs' alternative accounting plan discussed above. These plans have been inexplicably conjoined into one exhibit in PPX 511.

> 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. Fasold is qualified as an expert, it is unnecessary for the Court to reach the issue of his qualifications.[3] Because, as discussed above, his expert opinions are unrelated to any issue before the Court, Mr. Fasold 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. Fasold's proposed expert opinions. His expert reports and proposed expert testimony should be excluded.

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

Even if Plaintiffs were able to demonstrate that some portion of Mr. Fasold's proposed testimony could be characterized as relevant to an issue currently before the Court, his August 17, 2007 expert report reveals that he has nothing new to add to his Trial 1.5 testimony. Indeed, Mr. Fasold expressly states that for reasons of economy, Mr. Fasold is not updating his revenue-estimating model from 2003. See Expert Report of Richard E. Fasold, dated August 17, 2007, at 1 (attached as Exhibit 3 to Plaintiffs' Notice of August 17, 2007 [Dkt. No. 3369]). Mr. Fasold's proposed testimony would thus duplicate his Trial 1.5 testimony.

3/ Over the objection of Defendants, Mr. Fasold was permitted to testify during Trial 1.5. For the reasons expressed during that trial, see Tr. 24:13-25:11 (May 14, 2003 – Day 10, p.m session), and in Defendants' Motion in limine to exclude Mr. Fasold's testimony, filed on April 18, 2003 (Dkt. No. 1996), Defendants continue to object to Mr. Fasold's qualifications as an expert.

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. Defendants do not concede that any of Mr. Fasold's testimony from Trial 1.5 is relevant to the current proceeding, but, assuming that it is, his testimony from Trial 1.5 is sufficient. Indeed, Plaintiffs have designated all of his Trial 1.5 testimony in their Pretrial Statement. See Exhibit 3 to Plaintiffs' Pretrial Statement at 5-6. It would be a waste of time and needlessly cumulative to permit Mr. Fasold to testify about the same matters again. The Court should exclude Mr. Fasold's August 17, 2007 expert report and any further testimony from Mr. Fasold under Rule 403.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants' motion in limine and exclude the expert reports and testimony of Richard E. Fasold.

Dated: September 21, 2007

Respectfully submitted,
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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 E. Fasold* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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

ORDER

This matter comes before the Court on *Defendants' Motion in Limine to Exclude the Expert Report and Testimony of Richard E. Fasold* (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 E. Fasold, and all expert reports prepared by Mr. Fasold, will not be admitted at trial.

SO ORDERED.

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

Date:______________