IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE EXPERT REPORTAND TESTIMONY OF PAUL M. HOMAN

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 Paul M. Homan.[1] Mr. Homan, who testified for seven days during Trial 1.5, can offer nothing new for this hearing and, indeed, his key positions are either grossly outdated or have been expressly rejected by the Court of Appeals. Defendants seek an order in limine for the reasons set forth below.

I. Mr. Homan'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

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

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).

Mr. Homan provided his "expert" opinion in 2003 during his Trial 1.5 testimony that the only acceptable accounting here is a "transaction-by-transaction approach, which would directly verify through documentation ownership information, followed by accounts receivable and lease and contract information, followed by a deposit, proof of deposit information, proof of investment information, and finally proof of disbursement information." Tr. 8:7-14 (May 1, 2003 – Day 1, p.m. session). With his premise that an adequate accounting requires 100 percent vouching of every transaction, he then gave his "expert" opinion that insufficient documents exist for Interior to conduct this type of accounting. See, e.g., Tr. 70:3-11 (May 5, 2003 – Day 3, a.m. session).

Mr. Homan's August 17, 2007 expert report reveals that it is still his opinion that a 100 percent vouched transaction-by-transaction approach is required to conduct an adequate accounting under the 1994 Act. Expert Report of Paul M. Homan, dated August 17, 2007, at 2-3 (attached as Exhibit 1 to Plaintiffs' Notice of August 17, 2007 [Dkt. No. 3369]). Mr. Homan's premise about the nature of the required accounting is, however, contrary to the law of this case. Therefore, all of his expert opinions that rely upon this rejected premise are not relevant to any issue to be decided in the upcoming trial.

The Court of Appeals rejected the transaction-by-transaction premise in Cobell XVII when it expressly approved statistical sampling of transactions as a means assess the accuracy of the Historical Statements of Account. In that opinion, 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). 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 argue that 100 percent vouching of all transactions is required.

Mr. Homan also renders an expert opinion that the 2007 Plan is defective because it impermissibly considers the availability of appropriations funding for the accounting work. Expert Report of Paul Homan at 5 ("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"). This opinion too is contrary to the law of this case.

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, 428 F.3d at 1075. "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 "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.

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 the issue of whether 100 percent vouching is required to do an adequate accounting has already been answered – and the position proposed by Mr. Homan was rejected by the Court of Appeals – Mr. Homan's expert report is not material to any issue "of consequence to the determination of the action" during the upcoming hearing. In addition, Mr. Homan's "expert opinion" that funding considerations should play no role in the 2007 Plan is also irrelevant because it is contrary to established law of this case.

Plaintiffs have represented that Mr. Homan's expert testimony will be limited to the subject matters discussed in his expert report. See Plaintiffs' Pretrial Statement at 12 [Dkt. No. 3398]. Because his expert report is not relevant to any matter to be decided at the upcoming hearing, 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 Mr. Homan's expert opinions are not relevant to any current issue before the Court, his expert report and expert testimony are inadmissible and should be excluded.

Plaintiffs have also indicated that they intend to have Mr. Homan provide "lay" testimony in addition to expert testimony. See Plaintiffs' Pretrial Statement at 12. He served as Special Trustee from 1995 until 1999, and in his Trial 1.5 testimony, Mr. Homan often gave fact testimony – as opposed to expert opinion testimony. In particular, Mr. Homan testified about his personal knowledge on the issue of availability of documents within Interior to do an accounting. See, e.g., Tr. at 24-27 (May 5, 2003 – Day 3, a.m session). Mr. Homan's testimony on this issue from Trial 1.5 is unhelpful today because, as discussed above, his opinion that insufficient documents existed rested upon the faulty premise that a 100 percent vouching of all transactions was required.

In addition, his factual information – which was stale in 2003 – about the availability of documents within Interior to conduct an accounting, is not relevant to the question of what documents are currently available to conduct an accounting. He has no personal knowledge about the extensive efforts undertaken by Interior since 1999, to collect and preserve Indian trust records necessary to conduct an accounting and thus has no personal knowledge about the state of records availability today.

Therefore, to the extent that Plaintiffs propose to have Mr. Homan testify as a fact witness, he lacks the personal knowledge required by Rule 602 to testify about any relevant issue. Thus, any fact testimony from Mr. Homan should also be excluded under Rule 402.

Finally, both Mr. Homan's proposed expert testimony and his lay testimony appear aimed at supporting Plaintiffs' theory that the accounting required by the 1994 Act is impossible. Plaintiffs' Complaint, however, does not allege 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. Therefore, Mr. Homan's proposed

testimony on "impossibility" is not relevant to a justiciable issue in the case. As such, it should be excluded under Rule 402 for this additional reason.

II. Mr. Homan 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) (citing 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. Homan is qualified as an expert on anything other than certain banking matters not relevant here, it is unnecessary for the Court to reach the issue of his qualifications.[2] Because, as discussed above, his expert opinions are not

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[2] Over the objection of Defendants, Mr. Homan was permitted to testify during Trial 1.5. For the reasons expressed during that trial, see Tr. 88:5-24 (May 1, 2003 – Day 1, a.m. session), and in Interior Defendants' Motion in Limine as to Plaintiffs' Proffered Expert Rebuttal Testimony and Opinions, filed on April 28, 2003 (Dkt. No. 2023), Defendants continue to object to Mr. Homan's qualifications as an expert.

relevant to any matter to be decided at the upcoming hearing, Mr. Homan 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. Homan's proposed expert opinions. His expert report and proposed expert testimony should be excluded.

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

Even if Plaintiffs are able to demonstrate that some portion of Mr. Homan'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. Mr. Homan merely reiterates now the same points about his opinion on the nature of the required accounting and his understanding – based on now even more stale information – about the availability of documents on which he testified – for seven days – during Trial 1.5.

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. Homan's testimony from Trial 1.5 is relevant to the current proceeding, but assuming that Plaintiffs can convince the Court that Mr. Homan still has relevant opinions, 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 8-9. It would be a waste of time and needlessly cumulative to permit Mr. Homan to testify about the same matters again. The Court should exclude Mr. Homan's August 17, 2007 expert report and any further testimony from Mr. Homan 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 Paul M. Homan.

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 Paul M. Homan* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Defendants.	)	

ORDER

This matter comes before the Court on *Defendants' Motion in Limine to Exclude the Expert Report and Testimony of Paul M. Homan* (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 Paul M. Homan, and all expert reports prepared by Mr. Homan, 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:_____