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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

INTERIOR DEFENDANTS' MOTION IN LIMINE AS TO PLAINTIFFS' PROFFERED EXPERT "REBUTTAL" TESTIMONY AND OPINIONS

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Civil Rule 7.1, Interior Defendants respectfully move this Court for an order in limine prohibiting Plaintiff from introducing the testimony or the expert report of Mr. Paul M. Homan for any purpose in this case. Mr. Homan has been proffered solely as a rebuttal expert to comment upon and render an opinion in response to all opinions offered by all *five* experts for Defendants, regardless of the subject matter and expert bases for those opinions. Mr. Homan's testimony, as well as his report, should be excluded from the trial except, perhaps, insofar as it is strictly limited as a rebuttal of Defendant's expert on trust practices and standards, John Langbein. For all other purposes, Mr. Homan lacks the requisite expert qualifications, and he is not competent to serve as an expert witness in support of Plaintiffs' case in chief.[1]

[1] On April 28, 2003, Interior Defendants' counsel conferred with Plaintiffs' counsel regarding this motion, pursuant to Local Civil Rule 7.1(m), and Plaintiffs' counsel stated that Plaintiffs oppose this motion.

I. Mr. Homan Lacks The Qualifications Necessary To Opine On All The Diverse Expert Subjects For Which Plaintiffs Seek To Offer His Testimony

Plaintiffs have identified Paul Homan as one of two rebuttal experts. Plaintiffs' Disclosure of Rebuttal Expert Witnesses With Respect to Trial 1.5 (Mar. 31, 2003). His expert report describes two areas for his rebuttal opinion:

> 1. Review, analyze, and comment on the Expert Reports filed by the Defendant's [sic] testifying experts, including Edward Angel, John H. Langbein, David B. Lasater, Alan S. Newell and Joseph R. Rosenbaum as they relate to the historical accounting issues of the Individual Indian trust and the compliance plans mentioned above.[2]
>
> 2. Review, analyze, and comment on both the defendants' and plaintiffs' plans to bring the U.S. trustee-delegates into compliance with the fiduciary obligations that they owe to the IIM beneficiaries, including, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards.

Expert Report (Rebuttal) of Paul M. Homan In Trial 1.5 of Cobell v. Norton at 4 (signed Mar. 31, 2003)[3] ("Homan Rebuttal") (filed with Plaintiffs' Disclosure of Rebuttal Expert Witnesses With Respect to Trial 1.5 (filed Mar. 31, 2003)).

As to the first area, Mr. Homan has an opinion to offer criticizing each opinion tendered by Interior Defendants' diverse group of experts. As to the second area, although the description suggests Mr. Homan might offer general, "nonrebuttal" opinion testimony concerning

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[2] "Compliance plans" refers to the corresponding trust compliance submissions of the Department of the Interior and the Plaintiffs filed on January 6, 2003, pursuant to the Court's Order of September 17, 2002. See Homan Report at 4.

[3] Although the cover page of the Homan Report bears a date of March 30, 2003, Mr. Homan's signature at the end of the report is dated March 31, 2003.

"defendants' and plaintiffs' plans," he maintained during his deposition that his opinions concerning any submitted plans will be limited to rebuttal of Interior Defendants' expert opinions.[4] See, e.g., Homan Deposition ("Tr.") at 192. In a recent reply brief filed April 17, 2003, however, Plaintiffs seem to point to Mr. Homan as an expert for their affirmative case.[5]

In that brief, Mr. Homan surfaces as a potential source of information responsive to discovery sought by Interior Defendants concerning Plaintiffs' plans. For example, when Interior Defendants ask how much IIM funding would have to change to accomplish Plaintiffs' plan, Plaintiffs cite Mr. Homan as the appropriate expert.[6] Thus, to remove any doubt concerning Mr. Homan's role at trial, Interior Defendants request that any order entered concerning Mr. Homan include a provision barring him from offering any direct evidence at trial.

Mr. Homan's rebuttal is devoted to refuting the opinions of all of Interior Defendants' experts: Edward Angel, David Lasater, Alan S. Newell, Joseph R. Rosenbaum and John H. Langbein. Each brings different, complementary "scientific, technical, or other specialized

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[4] Q. Okay. So just so I am clear and understand your understanding of your opinion is you are not going to be at trial offered to give – opine on the preferability of plaintiff's plan submission versus the government's plan submission. Is that right?
A. That's correct. (Tr. at 192.)

[5] See Plaintiffs' Reply Motion for Order Requiring Defendants to Bear the Cost [sic] Responding to Interior Defendants' Request for Production of Documents, Dated February 21, 2003, and to Interior Defendants' Set of Interrogatories, Dated February 21, 2003, and to Grant Plaintiffs an Enlargement of Time Within Which to Respond Thereto, at 3-6 n.6 (Apr. 17, 2003) (hereinafter "Discovery Reply").

[6] See Discovery Reply at 4 n.6 (carryover). Mr. Homan surfaces as the "expert" by means of an odd disclosure. The cited reply brief quotes at length in note 6 from purported interrogatory responses from Plaintiffs that do not exist; Defendants, at least, have never been served with them.

knowledge" that will assist the Court to "understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Mr. Angel and Mr. Newell are both accomplished and experienced historians, with specific experience in researching Indian land records and related archival materials.[7] Dr. Lasater, a partner in the firm of KPMG L.L.P., is a C.P.A., and a degreed and highly trained expert in statistics and statistical sampling.[8] Mr. Rosenbaum, a partner in the firm of Ernst & Young L.L.P., is a C.P.A. with twenty years experience in providing audit and consulting services, including seventeen years specializing in investigations, dispute resolution and litigation consulting.[9] John Langbein is an experienced trust consultant and professor of law at Yale University, who has published texts on trust standards and has served as an advisor and consultant on fiduciary practice and investment matters for over twenty years.[10]

Despite the disparate fields in which each expert practices, Plaintiffs propose to have Mr. Homan serve as their "utility fielder" in all these different ballparks. According to his rebuttal report, for example, Mr. Homan intends to opine that:

1. Mr. Angel's report on historical documentation supposedly supports Plaintiffs' view that an historical accounting cannot be done with "verifiable support documents." Homan Rebuttal at 7.

2. Mr. Newell's assertion, based upon three years of research work, that a vast

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[7] See Expert Report of Edward Angel (Feb. 28, 2003) (attached curriculum vitae) ; Expert Report of Alan S. Newell (Feb. 28, 2003) (attached curriculum vitae).

[8] See Expert Report of David B. Lasater at 1 (Feb. 28, 2003).

[9] See Expert Report of Joseph R. Rosenbaum at 3-4 (Mar. 28, 2003).

[10] See Expert Report of John H. Langbein at 1-2 (Feb. 27, 2003).

quantity of historic federal data on Indian resource use and IIM accounting exists that OHTA can use in an effort to reconcile IIM accounts is "largely unsupported" and based upon "mythology" in the Interior's Historical Accounting Plan. Id. at 14.

3. Mr. Rosenbaum's "expert opinion is worthless as a document in support of an accurate historical accounting," id. at 10, in part, because his opinions are based on a "limited, incomplete and invalid sample," id. at 11.

4. Dr. Lasater's opinions are "patently wrong" because his research refers to the Rosenbaum sample study (mentioned above) and a 1995 study by Arthur Andersen in connection with a "Tribal Reconciliation Project" as forming a "'body of knowledge about the high degree of accuracy of recorded transactions in the Indian Trust Fund accounting systems.'" Id. at 11-12 (quoting Expert Report of David Lasater at 2).

5. Professor Langbein's opinions are a "legal position" that Mr. Homan, "[a]s a nonlawyer," will not rebut, Homan Rebuttal at 19, but as a "practical (non-legal) rebuttal," Mr. Homan challenges Professor Langbein's view that competing statutory obligations necessarily alter the way any trust standard can be applied when a governmental agency is trustee. Id. at 21. Mr. Homan is concerned "about the practical application of a policy that places one legal standard as primary over another. . . ." Id.

The fundamental problem is that Mr. Homan, as a "jack of all trades," is a master of none. He has no experience, education, training or other expert knowledge whatsoever in any of the specialized fields that qualifies him to analyze, comment upon or critique the opinions of Interior Defendants' experts.

II. Mr. Homan Is Not Qualified As An Expert Outside The Trust Area

A court's acceptance of a witness as an expert is governed largely by Rule 702 of the Federal Rules of Evidence. In this circuit, it is a fundamental prerequisite that a proffered testifying expert be both (1) qualified and (2) capable of assisting the trier of fact.

> To evaluate expert testimony, the Federal Rules of Evidence provide that "[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, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Interpreting this provision, we apply a two-part test for determining the admissibility of expert testimony: the witness (1) must be qualified, and (2) must be capable of assisting the trier of fact.

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1211 (D.C. Cir. 1997) (citing Exum v. General Electric Co., 819 F.2d 1158, 1163 (D.C. Cir. 1987)) (emphasis added) (brackets in original). Outside the subject of trust standards and practices, Mr. Homan simply lacks the experience, training and study to qualify as an expert witness.

Mr. Homan is not sufficiently qualified to offer opinions rebutting the testimony, research and findings to be offered by any of Interior Defendants' experts, except perhaps Professor Langbein. Mr. Homan's education is almost exclusively limited to the field of economics, including a master's degree in 1966 from the University of Nebraska. Homan Rebuttal at 78. Aside from his master's degree, Mr. Homan holds no advanced degree in any field. Id. His professional career has concentrated almost entirely within the field of banking and related regulation of national banks. See id. at 74-77. Mr. Homan worked as a bank supervisor (including senior supervisory positions) for the Comptroller of the Currency. He has also held

executive positions for several national banks and has served as a banking consultant to both the government and private interests. Id.

Mr. Homan did serve, from September 1995 to January 1999, as the first Special Trustee for American Indians with the Department of the Interior. See, e.g., id. at 75. That position, however, neither required nor conferred any expertise in the fields of accounting, statistics or historical research.

Mr. Homan readily acknowledges that he lacks the following expertise:

- "I'm no historian," tr. at 176; "But again, I'm not a historian on this," tr. at 178;
- He has never pursued nor obtained any degree in history, tr. at 40;
- He has never pursued a doctorate in economics, nor a masters in business administration, tr. at 38.
- He has never sat for the C.P.A. exam, tr. at 39, and is not a licensed accountant, tr. at 25;
- He is not an actuary, tr. at 26;
- He holds no degree in statistics, tr. at 41;
- He is not licensed to practice law in any state, tr. at 26; and
- His curriculum vitae reveals no authorship of any articles or texts in *any* fields. See Homan Rebuttal, Appendix B, 73-78.
- He lacks any education or study in the field of Native American customs, culture or background, tr. at 55.

In short, Mr. Homan has extensive banking experience but little expertise that is relevant to the issues before the Court that Plaintiffs desire to have him address.

Lacking any indicia of expertise that would be useful to the Court or that would qualify him to rebut the testimony of Defendants' experts, his testimony ought not be heard. See, e.g.,

Greater Washington D.C. Area Council of Senior Citizens v. District of Columbia, 406 F. Supp. 768 (D.D.C. 1975) (lawyer not qualified to opine on statistical study). Except, perhaps, as a rebuttal witness to Professor Langbein, Mr. Homan lacks the training, experience or study that would qualify him to render a rebuttal opinion as to Defendants' other experts. His role, if any, should be strictly and clearly limited to rebuttal of Professor Langbein.

III. Plaintiffs Should Also Be Barred From Tendering Mr. Homan As An Expert In Their Case-In-Chief

"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, 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)). Despite representations made during Mr. Homan's deposition that he is no more than a rebuttal expert, Plaintiffs' vague references in other contexts renew concern that Mr. Homan may nevertheless be proffered as part of Plaintiffs' affirmative evidence. The Court should prohibit such use.

In the Court's scheduling order entered last October, the parties were required to identify all testifying expert witnesses and to make their required expert disclosures by February 28, 2003. Phase 1.5 Trial Discovery Schedule Order at 1 (Oct. 17, 2002). Any expert retained to rebut such testimony did not need to be disclosed until March 31, 2003. Id. Mr. Homan was not identified as an expert until March 31, 2003, when Plaintiffs disclosed him as a "rebuttal" expert. Therefore, even if Plaintiffs now wished to offer Mr. Homan as an expert in their case in chief, that option is not available because Plaintiffs did not make the requisite disclosures pursuant to

FED R. CIV. P. 26(a)(2) within the time allowed by the Court's Order.

To permit Plaintiffs to use Mr. Homan as an affirmative, as opposed to rebuttal expert, would work a severe prejudice upon Defendants. Had Mr. Homan been identified as an affirmative expert, his opinions would not only have been discovered sooner, but Defendants would have had a full opportunity to retain an expert to rebut any, and still unknown, affirmative opinions Plaintiffs might now desire that Mr. Homan to offer in support of their case in chief.

Conclusion

For the foregoing reasons, Interior Defendants respectfully move this Court for an order in limine barring Plaintiffs from introducing the testimony and report of Mr. Paul M. Homan for any purpose at trial except, if at all, in rebuttal to the testimony of Defendants' expert, John Langbein.

Respectfully submitted,

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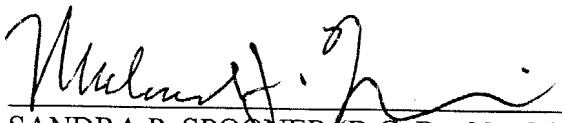

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April 28, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Interior Defendants' Motion in Limine as to Plaintiffs' Proffered Expert "Rebuttal" Testimony and Opinions Interior Defendants' Motion ("Interior Defendants' Motion in Limine"). After considering that motion, any responses thereto, and the record of the case, the Court finds that Interior Defendants' Motion in Limine should be, and hereby is, GRANTED. It is further

ORDERED that the proffered expert testimony of Mr. Paul Homan, including his expert report, shall be limited to rebuttal of the opinions of Defendants' expert, John Langbein; and it is further

ORDERED that if the expert report of Paul Homan is offered at trial and is otherwise determined to be admissible, the Court shall admit into evidence only pages 18 to the end of the first full paragraph on page 23 of said expert report.

SO ORDERED this ___ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 28, 2003 I served the foregoing *Interior Defendants' Motion In Limine as to Plaintiffs' Proffered Expert "Rebuttal" Testimony and Opinions* by facsimile in accordance with their written request of October 31, 2001.

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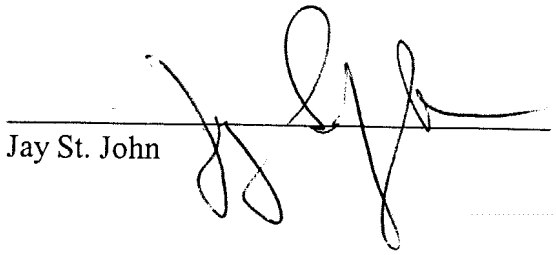

Jay St. John