

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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**DEFENDANTS' MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' WITNESSES  
WITH PROPOSED TESTIMONY OUTSIDE THE SCOPE OF MATTERS TO BE  
CONSIDERED AT THE JUNE 9, 2008 TRIAL**

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Defendants respectfully move this Court for an order in limine excluding all proposed testimony identified by Plaintiffs that is related to matters outside the scope of the June 9, 2008 trial.<sup>1</sup>

**BACKGROUND**

In the May 2, 2008 Pretrial Order, the Court identified the purpose and scope of the trial beginning on June 9, 2008. The purpose is to determine (1) “the dollar amount” of the “funds that were received in the IIM trust, do not appear to have been disbursed to beneficiaries, and are not explained by the government’s accounting efforts;” (2) “plus an amount that represents the benefit reaped by the government from the use of those funds.” Pretrial Order at 1. Evidence related to those issues is relevant; all other proposed testimony and evidence should be excluded.

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<sup>1/</sup> Defendant’s counsel conferred with Plaintiffs’ counsel on May 27, 2008, and Plaintiffs’ counsel has stated that Plaintiffs will oppose this motion.

On May 16, 2008, Plaintiffs identified thirty-four potential witnesses, along with general topics on which the identified witnesses are expected to testify. See Plaintiffs' May 16, 2008 Witness List [Dkt. No. 3529].<sup>2</sup> The anticipated testimony from eighteen of their identified witnesses is related to issues outside the scope of the trial. Plaintiffs' proposed irrelevant testimony can be placed into four categories: (1) trust mismanagement issues; (2) Information Technology (IT) security matters; (3) "expert" legal opinions; and (4) expert opinions related to Plaintiffs' abandoned revenue model. Testimony on these topics should be excluded.

## **ARGUMENT**

### **I. EXHIBITS AND TESTIMONY RELATED TO ASSET MANAGEMENT ISSUES SHOULD BE EXCLUDED**

In their Witness Lists, Plaintiffs identify witnesses from whom they propose to elicit testimony on matters related to the management of the assets held in trust. Asset management issues are not among those the Court identified for the upcoming trial. At a recent status conference, the Court reaffirmed that these management issues are not part of this case:

Well, there's no question, Mr. Kirschman, that there is a whole universe of issues that aren't even touched by this case. And they're the issues that we've come to call, I think, the management issues, and have to do with whether the sufficient monies were collected, you know, whether high enough prices were charged, how funds were managed once they were within the Treasury Department, and so forth.

And I think everybody agrees that those issues are not part of the case that is before us now.

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<sup>2</sup> The May 16, 2008 Witness List was revised on May 23, 2008 [Dkt. No. 3533]. Collectively, the May 16 list and the May 23 supplement will be referred to as the "Witness Lists."

March 5, 2008 hearing Tr. 14:14-22. Indeed, this Court has consistently held that “asset management is not part of this lawsuit.” Cobell v. Norton, 226 F.R.D. 67, 82 (D.D.C. 2005) (quoting Cobell v. Babbitt, 91 F. Supp. 2d 1, 18 (D.D.C. 1999)).

Because asset management issues are not within the scope of the upcoming trial, testimony regarding them is not relevant. Under Rule 402 of the Federal Rules of Evidence, “[e]vidence which is not relevant is not admissible.” Accordingly, all such “asset management” testimony should be excluded.

**Witnesses:** Ed Angel;<sup>3</sup> Carolyn Haase; Paul Homan; Don Pallais; Sharon Redthunder; Jeff Steinhoff; Ed Street; Ray Ziler.

## **II. EXHIBITS AND TESTIMONY RELATED TO INFORMATION TECHNOLOGY SECURITY SHOULD BE EXCLUDED**

In their Witness Lists, Plaintiffs identify several witnesses with anticipated testimony related to IT security. Plaintiffs’ recent filing of their “Notice Of Supplemental Authority In Support of Plaintiffs’ Testimony Regarding The Trustworthiness Of Defendants’ Information Technology Systems” [Dkt No. 3530] underscores their intention to litigate the issue of IT security at the June, 2008 trial.

The presentation of evidence on the adequacy of IT security would violate the guidelines established by the Court in its May 2, 2008 Pretrial Order [Dkt. No 3526], which makes no provision for this issue. For that reason, turning this trial into yet another IT security review would be prejudicial to Defendants.

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<sup>3</sup> Dr. Angel, an historian retained as an expert by Defendants, is qualified to testify about several matters relevant to the June trial, but Plaintiffs have listed the testimony which they expect to elicit from him as “The historical mismanagement of trust assets.” May 16, 2008 Witness List at 1; May 23, 2008 Witness List at 1.

Indeed, Plaintiffs have conceded that they are using government data to calculate their equitable restitution damage remedy. See, e.g., Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, at 28 (filed March 19, 2008) [Dkt. No. 3515] ("plaintiffs are relying on data sourced to Interior and Treasury for purposes of this restitution calculation"); April 28, 2008 Status Conference Tr. 62:12-13; 67:22-25; March 5, 2008 Status Conference Tr. 33:12-16; 34:5-6; 35:7-22; 37:10-11. It is thus difficult to understand how testimony regarding information security issues attacking the integrity or credibility of the very data that Plaintiffs have agreed to use is, or could be, relevant to the upcoming trial.<sup>4</sup>

As such, any testimony related to "IT Security" is not relevant and is thus inadmissible under Rule 402 of the Federal Rules of Evidence. Accordingly, it should be excluded.

**Witnesses:** Mona Infield; Joan Tyler; Rule 30(b)(6) witness on "Trustworthiness of defendants' electronic records and recordkeeping systems operation and controls pursuant to 36 CFR § 1234.10 and § 1234.26" (May 16, 2008 Witness List at 3; May 23, 2008 Revised Witness List at 4-5).<sup>5</sup>

### III. TESTIMONY OFFERING LEGAL OPINION SHOULD BE EXCLUDED

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<sup>4</sup> Moreover, issues about the integrity of Individual Indian trust data ("IITD") were exhaustively reviewed as part of the IT Security trial back in 2005, after which the Court of Appeals concluded that "[t]he class members have pointed to no evidence showing that anyone has already altered IITD by taking advantage of Interior's security flaws, nor that such actions are imminent." Cobell v. Kempthorne, 455 F.3d 301, 315 (D.C. Cir. 2006).

<sup>5</sup> To the extent that Plaintiffs intend to argue that no electronic evidence can be admitted without testimony about the "trustworthiness" of the systems on which the electronic records were kept, no such argument is appropriate. Defendants are aware of no authority applying NARA regulations such as 36 C.F.R. §§ 1234.10 & 1234.26 as an evidentiary bar, and the Court should not countenance one here. If Plaintiffs have objections to any specific electronic record, they are obviously free to object to the admissibility of that record – provided, of course, that they have some evidence to substantiate any challenge to the authenticity or integrity of that record. As discussed above, however, to date Plaintiffs have not produced any such evidence.

In their Witness Lists, Plaintiffs have identified two expert witnesses who are law professors proffered to testify about the law of remedies.<sup>6</sup> These witnesses obviously have no first-hand factual knowledge about any of the matters within the scope of the trial. Without expert reports, and given the vague description of the proposed testimony for these witnesses in Plaintiffs' Witness Lists, the matters about which they will testify is not clear. However, opinion testimony from them about legal issues surrounding the law of remedies and the bounds of restitution would not properly be within the scope of the June hearing. Legal opinions from these witnesses also are not admissible because they will not assist the Court, as trier of fact. Federal Rules of Evidence 702 (expert testimony admissible to assist the trier of fact "understand or determine fact in issue").

In the May 2, 2008 Pretrial Order, the Court indicated that at the upcoming trial Plaintiffs will have the burden of establishing the "fact and the amount" of any "benefit" to the government. May 2, 2008 Pretrial Order at 2. However, the Court was clear that "[t]he legal issue whether such a 'benefit,' if proven, is the functional equivalent of pre-judgment interest, which would be foreclosed by Library of Congress v. Shaw, 478 U.S. 310 (1986), remains for decision." May 2, 2008 Pretrial Order at 2. There was no indication that the Court desired or expected any testimony at the trial about purely legal matters. Rather, the Court expressly held

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<sup>6</sup> Professor Laycock is identified as a "will call" witness who Plaintiffs expect to testify for approximately four hours. He is a law professor at the University of Texas Law School, characterized on the school's website as a leading authority on "the law of remedies." See <http://www.utexas.edu/law/faculty/profile.php?id=dlaycock>.

As of January 2007, Professor Rendleman was the Huntley Professor of Law at the Washington and Lee University, where he teaches courses on Remedies. See Exhibit A, CV of Doug Rendleman. He also serves as an adviser for the American Law Institute's Restatement (Third) of Restitution and Unjust Enrichment. Id.

that “[f]urther legal argument as to . . . jurisdictional issues will not be germane.” *Id.* at 3; see also April 28, 2008 Status Conference Tr. 115:14-15 (“I don't expect that I'm going to want to hear a lot of legal argument at that point.”); Tr. 104:23-25 (“Well, I don't want any more briefs on the question. I think what I said had to be explored in depth was the factual basis of the plaintiffs' claim.”).<sup>7</sup>

As such, any testimony from Professors Laycock and Rendleman would not be relevant to any matter within the scope of the upcoming trial and is thus inadmissible under Rules 402 and 702 of the Federal Rules of Evidence. Accordingly, their testimony should be excluded.

**Witnesses:** Doug Laycock; Doug Rendleman.

#### **IV. EXHIBITS AND TESTIMONY RELATED TO PLAINTIFFS' OLD REVENUE MODEL SHOULD BE EXCLUDED**

In their Witness Lists, Plaintiffs have identified five expert witnesses who are qualified to testify only about Plaintiffs' abandoned revenue model.<sup>8</sup> These witnesses all testified at the Phase 1.5 trial in 2003 in support of that old model. One of these experts, Mr. Fasold, also testified in the October 2007 trial.

Plaintiffs provide no new or relevant basis for calling these witnesses. They are no longer relying on their old revenue model to support either the fact or the amount of their

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<sup>7</sup> Plaintiffs have already had the opportunity to provide the Court with almost 200 pages of briefing on the legal issues surrounding their claim for restitution. See Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement (filed March 19, 2008) [Dkt. No. 3515]; Plaintiffs' Reply In Support of Equitable Restitution and Disgorgement (filed April 2, 2008) [Dkt. No. 3523]. Plaintiffs should not be given further opportunity to provide legal citation in the guise of expert trial testimony.

<sup>8</sup> Plaintiffs' current analysis does not rely on the 2003 revenue model.

current claim for restitution.<sup>9</sup> In any event, any testimony from these experts regarding the abandoned revenue model would not be germane to any issue at the upcoming trial.

As such, any testimony from these experts is inadmissible under Rule 402 of the Federal Rules of Evidence. Accordingly, their testimony should be excluded.

**Witnesses:** Rick Fasold; Matt Gabriel; Alan McQuillan; Lanny [sic] Stinnett;<sup>10</sup> John Wright.

### CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants' motion in limine.

Dated: May 27, 2008

Respectfully submitted,

GREGORY G. KATSAS  
Acting Assistant Attorney General  
MICHAEL F. HERTZ  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director

/s/ Robert E. Kirschman, Jr.  
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<sup>9</sup> Indeed, because their old model only generated an estimate of revenues in the IIM system and had no estimate for disbursements, it has no utility in the current trial.

<sup>10</sup> Defendants presume that this was a typo in Plaintiffs' Witness Lists and that they are actually referring to Mr. Landy Stinnett, who testified in 2003 in support of Plaintiffs' old revenue model.

CERTIFICATE OF SERVICE

I hereby certify that, on May 27, 2008 the foregoing *Defendants' Motion in Limine to Exclude Plaintiffs' Witnesses with Proposed Testimony Outside the Scope of Matters to Be Considered at the June 9, 2008 Trial* 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  
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/s/ Kevin P. Kingston  
Kevin P. Kingston

## Doug Rendleman

January, 2007

Washington and Lee Law School  
Lexington, Virginia 24450  
540-458-8934  
rendlemand@wlu.edu

**Personal** Born, 1940; married, 1960; four adult children

**Education** LL.M. University of Michigan 1970 (Cook Fellow)  
J.D. University of Iowa 1968  
M.A. University of Iowa 1965  
B.A. University of Iowa 1963

### Professional Employment

Huntley Professor of Law,  
Washington and Lee University, 1988-  
Visiting Professor, Washington University, Summer 1992  
Director, Frances Lewis Law Center,  
Washington and Lee University, 1988-91  
College of William and Mary Law Faculty, 1973-88  
Godwin Professor of Law, William and Mary, 1981-88  
Frances Lewis Scholar in Residence,  
Washington and Lee Law School, Fall 1987  
Civil Procedure, University of Virginia, Spring 1976  
Visiting Professor, University of North Carolina, 1974-75  
Assistant Professor, University of Alabama, 1970-73

### Courses Taught

<u>Courses</u>	<u>Times taught</u>
Remedies	(10+)
Injunctions	(10+)
Civil Procedure	(10+)
Debtor-Creditor	(10+)
Conflicts of Laws	(5)
Advanced Contracts-Disrupted Transactions	(5)
Torts, Advanced Torts	(5)
Property	(5)
Patent-Copyright-Trademark	(3)
Secured Transactions/Commercial Law II	(1)
Products Liability	(1)
Seminars on Contempt and Punitive Damages	

**Professional Activities**

**Association of American Law Schools**

Remedies Section

Chair, (2002, 1987, 1981)

Executive Committee, (2006- , 1999-2003, 1987-88, 1978-82)

Civil Procedure Section

Chair, (1999)

Executive Committee, (1998-2000)

Courts Committee, (1983-87)

Chair, (1985)

Representative, Coordinating Council of National Court Organizations, (1985-88)

Government Relations Committee, (1982)

**American Law Institute**

Advisor: Restatement (Third) of Restitution and Unjust Enrichment, (1998- )

Members Consultative Group: Principles of the Law of Aggregate Litigation

**American Association of University Professors**

National Committee on Government Relations, (1980-89)

Chair, (1985-89)

Virginia Conference

President, (1978-79)

Executive Committee, (1978-1981)

Academic Freedom and Tenure Committee, (1997- )

William and Mary Chapter

President, (1982)

Treasurer for three years

Vice President, (1982-88)

**Virginia and Iowa Bars**, Associate, Inactive Member

## **Publications**

Remedies, Seventh Edition, West Group, 2006. Teacher's Manual for Remedies, Seventh (2007)

Remedies, Sixth Edition, West Group, 1999. Revised Teacher's Manual for Remedies, Sixth (2000). Teacher's Manual for Remedies, Sixth (1999)

Remedies, Fifth Edition, (co-editor with York & Bauman), West Publishing Co., 1992. Teacher's Manual for Remedies, Fifth (co-author with York & Bauman)

Remedies, Fourth Edition, (co-editor with York & Bauman), West Publishing Co., 1985. Teacher's Manual for Remedies, Fourth (co-author with York & Bauman)

Injunctions, Second Edition, (co-editor with Fiss), Foundation Press, 1984

Enforcement of Judgments and Liens in Virginia, Second Edition, Lexis-Michie, 1994. Annual supplements First edition 1982. Michie

A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform, 39 Akron L.Rev. (forthcoming) (Symposium)

*Brown II's* "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?, 41 San Diego L.Rev 1575 (2004) (Symposium)

When Is Enrichment Unjust?: Restitution Visits an Onyx Bathroom, 36 Loy.L.A. L.Rev. 991 (2003) (Symposium)

Irreparability Resurrected: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?, 59 Wash. & Lee L.Rev. 1343 (2002) (Symposium)

Academic Freedom in Urofsky's Wake: Post-September 11 Remarks on "Who Owns Academic Freedom?", 59 Wash. & Lee L.Rev. 361 (2002), reprinted in the National Association of College and University Attorneys publication, "Academic Freedom and Tenure," (2006, Steven Olswang & Cheryl Cameron editors)

Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?, 79 Tex.L.Rev. 2055 (2001) (Symposium), reprinted in 18 Legal Handbook for Architects, Engineers and Contractors: Issues in Construction and Technology 2001/2002 (2002, Albert Dib, editor)

**Publications continued**

Simplification - A Civil Procedure Perspective, 105  
Dick.L.Rev. 241 (2001) (Symposium)

Remedies - The Law School Course, 39 Brandeis L.J. 535  
(2001) (Symposium)

Common Law Restitution in the Mississippi Tobacco  
Settlement: Did the Smoke Get in Their Eyes?, 33 Ga.L.Rev.  
847 (1999) (Symposium)

A Dedication to Randall P. Bezanson, 52 Wash. & Lee L.Rev.  
761 (1995)

Comment on Judge Joseph F. Weis, Jr., Service By Mail-Is the  
Stamp of Approval From the Hague Convention Always Enough?,  
57 Law and Contemp. Probs. 179 (1994) (Symposium)

Irreparability Irreparably Damaged, 90 Mich.L.Rev. 1642  
(1992) (Review)

Disobedience and Coercive Contempt Confinement: The  
Terminally Stubborn Contemnor, 48 Wash. & Lee L.Rev. 185  
1991) (Symposium)

Commentary: Enough is Enough: Set Dr. Morgan Free, Legal  
Times, September 12, 1988, p. 19

Perspective: Reflections on Student Aid, Academe, November -  
December 1986, p. 40

Chapter 10: Conflicts (coauthor). Edited and republished in  
Family Law and Practice in Virginia (1993 R. Balnave editor)  
by Virginia Continuing Legal Education

Review of J. Lieberman ed., The Role of Courts in American  
Society: The Final Report of the Council on the Role of  
Courts, 27 Wm. & Mary L.Rev. 443 (1986)

How to Enforce an Injunction, 10 Litig. 23 (Fall 1983)

The Inadequate Remedy at Law Prerequisite for an Injunction,  
33 U.Fla.L.Rev. 346 (1981)

Compensatory Contempt: Plaintiff's Remedy When Defendant  
Violates an Injunction, 1980 U.Ill.L.F. 971

McMillan v. McMillan: Choice of Law in a Sinkhole, 67  
Va.L.Rev. 315 (1981) (Annual Developments)

**Publications continued**

Compensatory Contempt to Collect Money, 41 Ohio St.L.J. 625  
(1980)

The Bankruptcy Discharge: Toward a Fresher Start, 58  
N.C.L.Rev. 723 (1980) (Symposium)

Review of Owen Fiss, The Civil Rights Injunction, 47  
U.Chi.L.Rev. 199 (1979)

Liquidation Bankruptcy Under the '78 Code, 21 Wm. & Mary  
L.Rev. 575 (1980), (Symposium) reprinted in Bankruptcy Law  
Review Annual 1982

Free Press-Fair Trial: Restrictive Orders After Nebraska  
Press, 67 Ky.L.J. 867 (1979) (Symposium)

Civilizing Pornography: The Case for an Exclusive Obscenity  
Nuisance Statute, 44 U.Chi.L.Rev. 509 (1977)

Chapters of the Civil Jury, 65 Ky.L.J. 769 (1977)

Prospective Remedies in Constitutional Adjudication, 78  
W.Va.L.Rev. 155 (1976)

Beyond Contempt: Obligors to Injunctions, 53 Tex.L.Rev. 873  
(1975)

The New Due Process: Rights and Remedies, 63 Ky.L.J. 531  
(1975)

Bankruptcy Revision: Process and Procedure, 53 N.C.L.Rev.  
1197 (1975) (Symposium)

Analyzing the Debtor's Due Process Interest, 17 Wm. & Mary  
L.Rev. 35 (1975)

Toward Due Process in Injunction Procedure, 1973 U.Ill.L.F.  
221.

Free Press - Fair Trial: Review of Silence Orders, 52  
N.C.L.Rev. 127 (1973)

More on Void Orders, 7 Ga.L.Rev. 246 (1973)

The Scope of Review in Criminal Appeals, 22 Drake L.Rev. 477  
(1973)

Legal Anatomy of an Air Pollution Emergency, 2 Env'tl.Aff. 90  
(1972)

**Publications Continued**

Parens Patriae: From Chancery to the Juvenile Court, 23 S.C. L.Rev. 205 (1971), reprinted in Juvenile Justice Philosophy (1974, Fredric Faust & Paul Branlingham editors)

More on Procedural Reform, 33 Ala.Law. 37 (1972)

Juvenile Court Jurisdiction, 48 J.Urb.L. 89 (1970)

Appellate Procedure and Practice (co-author), 19 Drake L.Rev. 74 (1969)

Absolute Conveyance As a Mortgage in Iowa, 18 Drake L.Rev. 197 (1969)

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**ORDER**

This matter comes before the Court on *Defendants' Motion in Limine to Exclude Plaintiffs' Witnesses with Proposed Testimony Outside the Scope of Matters to Be Considered at the June 9, 2008 Trial* (Dkt. No. ). Upon consideration of Defendants' Motion, any Opposition by Plaintiffs, and the entire record of this case, it is hereby

ORDERED that the Motion is GRANTED.

SO ORDERED.

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

Date: \_\_\_\_\_