

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the)
Interior, et al.,)
)
Defendants.)
_____)

Case No. 1:96CV01285
(Judge Lamberth)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR EXPEDITED CONSIDERATION OF
PLAINTIFFS' VARIOUS APPLICATIONS FOR FEES AND COSTS**

Defendants respectfully oppose Plaintiffs' Motion for Expedited Consideration of Plaintiffs' Various Applications for Fees and Costs (filed March 19, 2004) ("Plaintiffs' Motion"). Plaintiffs' Motion, which seeks expedited consideration with respect to six separate requests for recovery of fees and expenses, lacks any factual explanation as to why expedited treatment is necessary, as well as any legal argument showing that such treatment is warranted. Moreover, the various contexts in which Plaintiffs' counsel has made applications for fees and expenses do not support such an award. As detailed in the opposition briefs that have been filed with respect to each specific application, the underlying motions for which Plaintiffs seek expedited consideration are, in large part, facially deficient. Plaintiffs' motion should be denied.

DISCUSSION

I. Plaintiffs Have Provided No Legal Or Factual Basis For The Relief They Seek

Plaintiffs have offered nothing in support of their request that the Court give priority – out of over seventy-five motions now pending before the Court – to six applications by Plaintiffs' counsel for the payment to them of fees and expenses. They provide no factual evidence (or any explanation at all) as to why such expedition is necessary, and no legal authority providing support for the position they take. Instead, they offer the usual nonsubstantive rhetoric directed at the Department of the Interior ("Interior"), and make the cursory assertion, unsupported by citation to factual evidence, that trust beneficiaries are being denied the daily necessities of life as a result of conduct by Interior.¹ See Plaintiffs' Motion at 2 ("Necessities – including heat, food, clothing, medical attention, and shelter – are affected by each lost, destroyed, misappropriated, or delayed trust check . . ."). But even if such allegations were true,² they would be irrelevant to the motion now before the Court. Plaintiffs do not seek any relief that would alleviate any burden being faced by class members. Not a single trust beneficiary will receive any financial benefit if the motion before the Court is granted. Rather, Plaintiffs ask the Court to give

¹ Plaintiffs also mention that they have "expended more than \$10 million to date litigating this case," Plaintiffs' Motion at 2, but they provide neither evidentiary support for this statement, nor any explanation as to its relevance to their present motion.

² Plaintiffs' contentions are not consistent with the evidence in this case. The analysis performed by Ernst & Young with respect to the named Plaintiffs and their predecessors, who purport to be representative of the entire class, revealed that 60% of all trust transactions in those accounts were for less than \$10, Expert Report of Joseph R. Rosenbaum, Mar. 28, 2003, Defs.' Ex. 156 at 4, and that the total combined balance in all of those accounts, as of December 31, 2000, was less than \$3,000. Trial Tr., June 9, 2003, a.m., at 78. Moreover, approximately 96% of the 193,800 land-based accounts receive less than \$250 per year. Declaration of James E. Cason in Support of Motion for Stay Pending Appeal, executed Nov. 10, 2003, at 2.

precedence to applications that, if granted, would result only in the payment by the United States of fees and expenses to Plaintiffs' counsel. This groundless motion should be denied.

II. Plaintiffs' Fee Applications Do Not Warrant Expedited Consideration

The various contexts in which Plaintiffs have asked for fees and expenses also militate against providing the relief now sought. In seeking expedited consideration, Plaintiffs apparently assume an automatic obligation on the part of the taxpayers to pay their fees and expenses. Even a cursory review of their various applications, however, shows they are mistaken.³

A. The Vacated Contempt Rulings

Plaintiffs still claim they are entitled to a fee award arising from this Court's contempt rulings against Secretary Norton and former Assistant Secretary McCaleb. See Plaintiffs' Request for Award of Attorneys' Fees and Related Expenses Based Upon Findings Establishing Defendants' Litigation Misconduct (filed Nov. 26, 2003). As they know, however, the Court of Appeals vacated not only the contempt rulings but also this Court's award of fees and expenses to Plaintiffs. Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003) ("The *Contempt Order* is vacated insofar as it sanctions the defendants on specifications one through five and directs the payment of expenses and fees incurred by the plaintiffs."). Thus, Plaintiffs' request for a fee award in connection with the contempt ruling has, with indisputable finality, been resolved by the Court of Appeals, and no contrived theory advanced by Plaintiffs can breathe life back into it. See Defendants' Opposition to Plaintiffs' November 26, 2003 Request for Award of Attorney's Fees and Related Expenses (filed Dec. 10, 2003).

³ The deficiencies in the various fee applications filed by Plaintiffs have already been briefed in detail and will be only summarized here.

B. Expert Fees

Plaintiffs also seek expedited consideration of Plaintiffs' Motion for a Protective Order Requiring Defendants to Pay Plaintiffs' Expert Deposition Fees and Expenses (filed Oct. 10, 2003). But the bill for which Plaintiffs sought reimbursement, and to which Interior has justifiably objected, seeks nearly \$71,000 for fewer than 40 hours of depositions, and is replete with overt excesses and overcharges. For example, the bills submitted by Plaintiffs included charges of \$1,000 per hour for the testimony of one of Plaintiffs' experts; a \$1,000 hotel bill incurred for a one-day deposition; a meal charge of \$139; over \$100 of charges at a hotel lobby bar; and charges for one of Plaintiffs' experts to attend the deposition of another expert. See Defendants' Opposition to Plaintiffs' Motion for A Protective Order Requiring Defendants to Pay Plaintiffs' Expert Deposition Fees and Expenses (filed Oct. 24, 2003). Rather than address these blatantly improper charges, Plaintiffs opted for Court intervention, and now take issue with the speed of the Court's response. Their specious request should be denied.

C. Taxation of Costs

Plaintiffs also submitted an application seeking an immediate taxation of costs by the Clerk of the Court. See Plaintiffs' Bill of Cost [sic] (filed Dec. 15, 2003). This request, too, is improper on its face. The Court's rules provide for the filing by a prevailing party of a bill of costs "after entry of judgment terminating the case as to the party seeking costs," LCvR 54.1(a), and direct the clerk to tax costs "after the judgment has become final." LCvR 54.1(c). Plaintiffs' request for an immediate taxation of costs flies in the face of these clear rules. See Defendants' Opposition to "Plaintiffs' Bill of Cost" (filed Dec. 19, 2003).

D. The Court's March 11, 2003 Ruling

In its March 11, 2003 Memorandum and Order, the Court imposed sanctions on Defendants, pursuant to Federal Rule of Civil Procedure 56(g), after finding that a declaration executed by the former Director of the Indian Trust Accounting Division of the General Services Administration contained material misrepresentations of fact and was, therefore, submitted in bad faith. Because the Court's decision disregarded the sworn testimony of a government official with twenty-seven years of experience in the area of Indian trust accounting in favor of an unsworn and unsupported letter from an official of the General Accounting Office who admitted that his office had "no direct knowledge" concerning the facts at issue, Interior has moved for reconsideration of the Court's ruling insofar as it imposed sanctions. See Interior Defendants' Motion and Supporting Memorandum for Reconsideration of the Court's March 11, 2003 Memorandum and Order Insofar As It Granted Plaintiffs' Motion for Sanctions (filed Mar. 25, 2003). Given that the reconsideration motion remains pending, it is inappropriate for the Court to address Plaintiffs' request for fees in connection with the March 11, 2003 ruling at this time.

E. The Court's February 5, 2003 Ruling

On February 5, 2003, the Court issued a Memorandum and Order that, inter alia, granted Plaintiffs' motion to compel the deposition of former Acting Special Trustee Donna Erwin, and required certain defense counsel to reimburse to Plaintiffs all reasonable expenses, including attorneys' fees, incurred in filing the motion to compel and in re-deposing Ms. Erwin. Plaintiffs deposed Ms. Erwin again on February 12 and 13, 2003.

More than eight months later, however, Plaintiffs served yet another notice of deposition for Ms. Erwin. Interior objected and moved for a protective order in response to the notice.

Defendants' Motion for Protective Order (filed Nov. 19, 2003). On January 9, 2004, Plaintiffs filed an "omnibus" motion to compel the further deposition of Ms. Erwin, as well as the depositions of a number of other individuals. Those motions are presently pending before the Court and, until the issues presented by those motions are resolved, it would be inappropriate to address the fee issues that Plaintiffs have raised.⁴

F. Plaintiffs' Fee Request Under EAJA

On October 9, 2003, Plaintiffs filed a Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act ("EAJA"). As has been demonstrated in Interior's opposition to the request, Plaintiffs' application under EAJA is facially defective because it does not identify the amount of fees and expenses sought;⁵ does not demonstrate (or even allege) that Plaintiffs are eligible to recover fees; is premature because there has been no final judgment; and does not establish the requisite bad faith. See Defendants' Opposition to Plaintiffs' Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act (filed Oct. 23, 2003). Plaintiffs' failure to satisfy these core requirements is fatal to their EAJA application.

⁴ With respect to Ms. Erwin, Plaintiffs appear to be seeking expedited consideration of the protective order motion, rather than any fee application. See Plaintiffs' Motion at 5.

⁵ Subsequent to making their EAJA application, Plaintiffs filed a Motion for Enlargement of Time Within Which to File Supporting Attorney and Expert Witness Documentation re EAJA Fee Application (filed Nov. 14, 2003).

CONCLUSION

Plaintiffs have identified no legal or factual basis supporting their request that the Court expedite its consideration of their requests that the United States pay fees and expenses to Plaintiffs' counsel. For all of the foregoing reasons, Plaintiffs' Motion should be denied.

Dated: April 2, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 2, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Motion for Expedited Consideration of Plaintiffs' Various Applications for Fees and Costs* 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 the *Plaintiffs' Motion for Expedited Consideration of Plaintiffs' Various Applications for Fees and Costs* [2545]. Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, the applicable law and the entire record of this case, the Court finds the Plaintiffs' Motion should be, and is hereby, DENIED.

SO ORDERED.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

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