No. 143, Original

IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,

Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE AND MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene E. Siler, Jr.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY

INTRODUCTION

This Court is using an evidentiary hearing to gather facts to determine whether the water at issue is legally "interstate" by nature. As presented by the Special Master this determination will have specific legal implications. Knowing this, Defendants specifically instructed their experts to answer this legal question for the Court. Simply stated, Defendants retained their experts to support Defendants' own self-serving definitions of "interstate resource," and opine that the groundwater at issue meets their definitions.[1] This is backwards. Defendants started with defining a term, interstate, that is the Court's job to define. Then Defendants cherry-picked what them deem as favorable "facts" that would support these self-serving definitions. It was a self-fulfilling prophecy.

The Court should reject Defendants efforts. The Federal Rules of Evidence and federal courts uniformly forbid experts from self-defining legal conclusions and the criteria to supposedly support them; this testimony is not helpful; and Defendants' argument that their expert reports contain other information does not cure this core component around which their testimony is fashioned.

[1] For example, water residence time (a very important issue as this Court knows) is completely ignored as irrelevant under Defendants' definition of interstate resource.

ARGUMENT

A. Rule 704 Does Not License Experts To Offer Legal Opinions.

Defendants rely on Fed. R. Evidence 704 allowing expert opinions embracing an ultimate factual issue in the case. This is not, however, what Defendants' experts have done, which simply flouts clear Sixth Circuit precedent that "prohibits expert witnesses from reaching legal conclusions," or telling the finder of fact what results to reach on ultimate issues in a case." *Crabbs v. Pitts*, 2:16-CV-0387, 2018 WL 5262397, at *6 (S.D. Ohio Oct. 23, 2018). *See also, Hyland v. HomeServices of Am., Inc*., 771 F.3d 310, 322 (6th Cir. 2014) (holding, in no uncertain terms, "a witness may not testify to a legal conclusion."); *Neal v. Second Sole of Youngstown, Inc*., No. 1:17-CV-1625, 2018 WL 1740140, at *4 (N.D. Ohio Apr. 11, 2018) ("Simply put, although an expert opinion is not objectionable merely 'because it embraces an ultimate issue,' a witness may not testify to a legal conclusion.").

To argue their experts are indeed authorized to offer legal conclusions, Defendants take liberties with the content and holdings in the cases they cite to the Court. For example, Defendants cite to *Woods v. Lecureux*, 110 F.3d 1215 (6th Circuit 1997) as support in footnote 1. But the district court in *Woods* actually excluded the exact type of testimony that Defendants are attempting to admit here, *i.e*., an expert's own definition of a legal term offered for the court's use. The Sixth Circuit held that exclusion of the testimony was not abuse of discretion. *Id*. at 1219-

1220. To be sure, determination of the legal meaning and ultimate effect of the words "interstate" or "interstate commerce" in this dispute between sovereign states is a *legal* question. *United States v. Lamont*, 330 F.3d 1249, 1254 (9th Cir. 2003); *United States v. Pierce*, 70 M.J. 391, 394 (C.A.A.F 2011) (determining whether the internet is a facility or means of interstate commerce "is a question of law, to be answered by the ... judge"); *Hodell-Natco Indus., Inc. v. SAP Am., Inc.*, No. 1:08 CV 02755, 2015 WL 350360, at *4 (N.D. Ohio Jan. 26, 2015) (expert could not testify as to the legal significance of the term "business partner").

B. Defendants' Experts Cannot Define "Interstate Aquifer" or "Interstate Resource" Then Offer Cherry-Picked Facts To Support These Definitions.

In tacit recognition of the impropriety of their experts' declarations, Defendants argue that under Rule 704 their proposed expert testimony will be helpful, thus admissible, because "[t]he *vast majority* of their testimony will consist of opinions on underlying hydrogeological facts about the Aquifer." Dkt. No. 89 at 4 (emphasis added).[2] But this is not why Defendants hired their experts—each was retained specifically: (1) to provide definitions of "interstate aquifer" or "interstate resource"; and (2) to opine that the groundwater at issue meets the expert's own

[2] Defendants cite to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), but that was a patent infringement case which the Second Circuit later stated does not extend to non-patent cases. *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 124 (2d Cir. 1998).

definition.[3] This testimony is not about assisting the trier of fact—it's about invading the province of the Court.

In their Response to Mississippi's Motion, Defendants simply ignore the fact that their experts created their own self-serving definitions of "interstate aquifer" or "interstate resource." Courts routinely reject such testimony because experts "may not define legal terms." *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 593 (6th Cir. 2014). In *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), as here, an expert offered their own definition of a legal term and testified that the facts met that definition. *Id.* at 1353. The Sixth Circuit reversed, holding that "[i]t is the responsibility of the court, not testifying witnesses, to define legal terms." *Id. See also Turner v. Hill*, No. 5:12-CV-00195-TBR, 2014 WL 12726541, at *2 (W.D. Ky. Feb. 13, 2014) ("The Sixth Circuit has long held that an expert's opinion must stop short of embracing the 'legal terminology' that frames the ultimate conclusion [for the finder of fact in the case]."); *Summerland v. Cty. of Livingston*, 240 Fed.Appx. 70, 81 (6th Cir. 2007) (affirming exclusion of expert opinion that "reasonable" force was not used as inadmissible legal conclusion). Even *Woods v. Lecureux* relied upon by Defendants noted that "*Berry* teaches us that a district court abuses its discretion

[3] *See* Dkt. No. 76-1, Langseth Rept. at 1, 15; Dkt. No. 76-2, Waldron Rept. at 1-2; Dkt. No. 76-3, Waldron Dep. Tr. at 89; Dkt. No. 76-4, Larson Rept. at 1-2; Dkt. No. 76-5, Larson Dep. Tr. at 101-02.

when it allows a witness to define legal terms." 110 F.3d at 1220. This Court should do the same.

Defendants also spill much ink explaining their experts' "scientific testimony." *See* Dkt. No. 89 at 3-7. Defendants ignore, however, that these experts were not asked to provide opinions on geological and hydrogeological facts. Instead, all of Defendants' experts were retained for the sole purpose of offering the legal conclusion that the groundwater at issue is "interstate" in nature. Defendants then declared the factors to support their specified conclusions—shaping all their testimony to this end. Such testimony is not helpful to the trier of fact, or to the Court's determination of legal issues raised under the Constitution of the United States.

CONCLUSION

For the reasons explained above (and in Plaintiff's opening brief) the Court should grant Plaintiff's Motion and enter an Order excluding Defendants' experts.

Dated: December 7, 2018.

Respectfully submitted,

THE STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this the 7th day of December, 2018.

/s/ C. Michael Ellingburg
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