UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS, OXFORD UNIVERSITY PRESS, INC., and SAGE PUBLICATIONS, INC., Plaintiffs, - *v.* - MARK P. BECKER, in his official capacity as Georgia State University President, et al., Defendants.	Civil Action No. 1:08-CV-1425-ODE

REPLY DECLARATION OF TODD D. LARSON

I, Todd D. Larson, declare as follows:

1. I am an associate of the law firm Weil, Gotshal & Manges LLP, counsel to Plaintiffs in this action. I submit this reply declaration in support of Plaintiffs' Motion to Exclude the Expert Report of Kenneth D. Crews.

2. I make this declaration under penalty of perjury based upon my own knowledge and that of my firm.

3. The Court entered a scheduling order in this case on July 31, 2008 (Dkt. No. 23), providing for an eight-month discovery period concluding on March 24, 2009.

4. On February 24, 2009, at the joint request of the parties, the Court ordered an extension of the close of discovery to May 25, 2009. Dkt. No. 52.

5. On April 21, 2009, Plaintiffs moved the Court for leave to take more than ten depositions. Dkt. No. 78. Plaintiffs simultaneously initiated discussions with Defendants as to the possibility of extending the schedule for the taking of depositions beyond May 25 in the event the Court granted Plaintiffs' motion. In a phone call with Edward Krugman, counsel for Plaintiffs, Defendants indicated that they favored such an extension regardless of how the Court ruled on Plaintiffs' motion. Mr. Krugman conveyed the substance of that phone call to me that same day.

6. In response, Mr. Krugman's associate, John Rains, also counsel for Plaintiffs, sent an email to Kristen Swift, counsel for Defendants, informing her that Plaintiffs agreed to an extension of time "for the limited purpose of scheduling and taking depositions" and clarifying that "All other discovery deadlines would remain the same." Exhibit [A] hereto is a true and correct copy of that email, which was forwarded to me on April 21, 2009, by Mr. Rains.

7. In accordance with the understanding reflected in his email, Mr. Rains also drafted a joint motion and draft court order, which likewise explicitly limited the extension to scheduling and taking depositions and provided that "all

other discovery" was to be completed by May 25, 2009. The Court signed the order on April 22, 2009 (Dkt. No. 82) – the same day, according to Defendants, that Dr. Crews was asked to begin preparing his expert report.

8. To the best of my knowledge, at no time during the above-described discussion surrounding this deadline extension did Defendants reveal to Plaintiffs that they were planning to retain Dr. Crews as a testifying expert or that they wished to extend the discovery period to allow for expert discovery. To the contrary, Ms. Swift wrote to Mr. Rains in an April 21, 2009 email, "we have no objection to the proposed order and have no additional suggestions regarding the wording. You have my permission to attach my electronic signature to the revised joint motion." Exhibit [B] hereto is a true and correct copy of Ms. Swift's email, which was forwarded to me by Mr. Rains on the same day.

9. Defendants served their Third Request for the Production of Documents and Second Set of Interrogatories to Plaintiffs on April 27, 2009, less than 30 days before the May 25, 2009 close of discovery. On April 29, 2009, Ms. Swift sent a letter to Edward Krugman, counsel for Plaintiffs, acknowledging the untimeliness of the discovery requests and asking Plaintiffs whether they nevertheless intended to respond to the requests "given that the discovery period has been extended until June 30, 2009, for the purpose of taking depositions."

Exhibit [C] hereto is a true and correct copy of that letter to Mr. Krugman, which was copied to me as well.

10. On May 7, 2009, Ms. Swift wrote once again to Mr. Krugman (copying all counsel) suggesting that since the period for taking depositions had been extended to June 30, 2009, "other case deadlines" should be extended "proportionally." Ms. Swift's letter gave as an example that the deadline for summary judgment motions should be July 20, 2009 (rather than 20 days after the May 25, 2009 close of discovery). She also proposed that the "close of discovery" for purposes of the Local Rules be considered June 30, 2009. Ms. Swift's letter, did not indicate that Defendants had instructed Dr. Crews to prepare a report more than two weeks earlier or that they would need to extend the discovery period to timely file an expert report. Exhibit [D] hereto is a true and correct copy of this letter.

11. On May 8, 2009, over nine months into the discovery period, Defendants noticed their first depositions of Plaintiffs' witnesses. Dkt. Nos. 89-91.

12. On May 13, 2009, Bruce Rich, counsel for Plaintiffs, informed me that he had tentatively agreed with Anthony Askew, counsel for Defendants, that Defendants would consent to our taking as many as 14 depositions and that Plaintiffs, in exchange, would respond to Defendants' untimely discovery requests.

13. On May 14, 2009, I emailed Ms. Swift and Ms. Gary a letter agreement describing the above-described compromise and sought Ms. Swift's countersignature. A true and correct copy of this email and letter is attached as Exhibit [E] hereto. Receiving no response, I left Ms. Gary a voicemail and sent a follow-up email inquiring whether we in fact had an agreement. A true and correct copy of this second email is appended as Exhibit [F] hereto. To the best of my knowledge, Ms. Gary did not respond to either my two emails or to my voicemail.

14. Because the deadline for Plaintiffs' reply brief on the motion for additional depositions was imminent, Mr. Rich and I called Mr. Askew on the morning of Friday, May 15. When told that Mr. Askew was not in, we called Ms. Swift. Ms. Swift confirmed Defendants' assent to granting Plaintiffs additional depositions in exchange for receiving responses to Defendants' untimely discovery requests. She also indicated Defendants' view that the agreement, and any corresponding filing with the Court, should be expanded to address a possible extension of the deadline for summary judgment briefing.

15. On the same call, Mr. Rich and I reached a tentative agreement with Ms. Swift that the deadline for summary judgment briefing, should the Court agree, be extended to July 30, 2009. Ms. Swift volunteered that her firm would revise the draft letter agreement to address this additional topic. Although this

conversation took place a mere ten days before close of discovery, at no time did Ms. Swift reveal Defendants' retention of, or intentions with respect to, Dr. Crews.

16. Later that same day (May 15, 2009), Ms. Gary sent me a revised draft of the letter agreement. The revised draft, appended as Exhibit [B] to Ms. Gary's declaration, contained the same two clauses as my initial draft (memorializing the exchange of additional depositions for responses to untimely discovery requests), as well as a clause extending the deadline for summary judgment motions to 30 days from the close of discovery (rather than the 20 days dictated by the Local Rules). Ms. Gary's draft also included a paragraph stating that "For purposes of the Scheduling Order and any applicable Local Rules, the 'close of discovery' shall be June 30, 2009." Although we had not discussed such a clause with Defendants, I understood it to be a necessary clarification for purposes of calculating the agreed-upon extension of the summary judgment deadline – *i.e.*, to make clear that the deadline would be 30 days after the June 30 conclusion of depositions, not 30 days after the May 25 close of discovery.

17. My edits of Ms. Gary's draft (appended as Exhibit C to her declaration) reflected this understanding. I added a second sentence to the "close of discovery" clause: "For purposes of the Scheduling Order and any applicable Local Rules, the 'close of discovery' shall be June 30, 2009. This date, however, shall not extend the May 25, 2009 deadline for completing discovery or be

construed to allow either party to serve additional discovery requests, subject only to Paragraph (1) above and the Court's order extending the time for completing depositions to June 30, 2009."

18. Ms. Gary's subsequent draft (appended as Exhibit D to her declaration) edited the same clause yet again to read: "For purposes of the Scheduling Order and any applicable Local Rules, the 'close of discovery' shall be June 30, 2009. This date, however, shall not be construed to allow either Party to serve additional discovery requests *after May 25, 2009*, subject only to Paragraph (1) above and the Court's order extending the time for completing depositions to June 30, 2009" (emphasis added). The edit appeared to me to suggest that Defendants could serve yet more discovery requests so long as they did so prior to May 25, 2009.

19. I thereafter called Ms. Gary and asked whether Defendants intended by their edits to allow for the service of additional discovery requests. When she indicated that they did not, I suggested that we simply edit the clause to say so more plainly: "This date, however, shall not be construed to allow either Party to serve additional discovery requests." Ms. Gary agreed to my suggested edit, and the letter agreement (appended to Ms. Gary's Declaration as Exhibit E) was executed later on the afternoon of May 15, 2009.

20. In my exchange with Ms. Gary, she never stated that Defendants' purpose in introducing this clause – or in accepting the final edit I proposed – was to permit the submission of a report by Dr. Crews or to support the argument that such a submission would be allowed because it wasn't explicitly prohibited, as were "additional discovery requests." Indeed, Ms. Gary did not mention Dr. Crews or reveal that he had been retained by Defendants.

21. To the contrary, the tenor of our discussions reflected that the letter agreement was meant not to set the outer bounds of allowable discovery but simply to memorialize the parties' good-faith compromise on a specific discovery dispute and their agreement to extend the deadline for filing summary judgment motions – nothing more, nothing less.

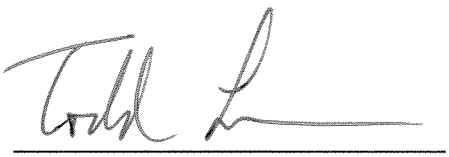
22. To that end, Mr. Rains' draft motion and order to the Court sent to Ms. Gary for review on May 18, 2009, did not even mention the parties' agreement with respect to the close of the discovery period; it simply asked the Court to set the deadline for summary judgment motions at July 30, 2009. True and correct copies of those drafts, on which I was copied, are attached as Exhibit [G] hereto.

23. Rather than giving their consent to Mr. Rains to file this motion and order (the effect of which would have been to maintain the deadline for the close of discovery at May 25, 2009), Defendants instead called the next day (May

19, 2009) to reveal that they had retained Dr. Crews and intended to submit his expert report in early June.

24. On June 24, 2009, I participated in a phone call with Mr. Askew, Ms. Swift, and Ms. Gary, during which we discussed several matters related to discovery in the case, including Defendants' production of documents related to the Crews report. On that call, counsel for Defendants represented that they had not searched the files of Dr. Crews or his research assistant for documents responsive to Plaintiffs' June 4, 2009 letter, a true and correct copy of which is attached hereto as Exhibit [H], which sought documents concerning Dr. Crews' retention, research, and report. They likewise indicated that their production of documents on June 18, 2009, contained only documents gathered from files of King & Spalding.

Dated: New York, NY
June 24, 2009



Todd D. Larson