Cambridge University Press et al v. Patton et al Doc. 114 Att. 1

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

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

SURREPLY IN FURTHER SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT REPORT OF KENNETH D. CREWS

Plaintiffs argue for the first time in their reply brief (Dkt. No. 112) that Defendants retained Dr. Crews as a testifying expert in January 2009, and suggested that Defendants made a tactical decision to shield his identity from Plaintiffs in order to obtain an extension of the discovery period. Defendants file this surreply to address these new allegations.

Contrary to Plaintiffs' contentions, Defendants engaged Dr. Crews as a non-testifying, consulting expert in October 2008. Defendants then adopted revised copyright guidelines ("Guidelines") in February of 2009. After having the

Dockets.Justia.com

Guidelines implemented for a few months, Defendants asked Dr. Crews on April 22, 2009 to start preparing a report concerning his opinions about the appropriateness of those Guidelines in an educational setting and the application of those Guidelines by Georgia State University professors. The first draft of that report and opinion was provided to counsel for Defendants in mid-May. On May 19, and only after considering that draft report and opinion, Defendants decided to convert Dr. Crews' status as a non-testifying consulting expert to a testifying expert and to present his report to Plaintiffs as soon as it was completed. That same day, Defendants disclosed Dr. Crews' retention to Plaintiffs. His expert report was subsequently provided to Plaintiffs on June 1. *See* Askew Decl., Dkt. 110, Attach. 1 at ¶¶ 2-6.

Under the Federal Rule of Civil Procedure 26(a)(2)(B), there is no requirement that the identity of and a report concerning opinions of a non-testifying, consulting expert be disclosed and in fact, such information is generally shielded from discovery. Defendants thus were not required to disclose the identity or opinions of Dr. Crews until it was decided that he would be a testifying witness. Such decision was made on May 19, after a review of the draft report and opinion by Dr. Crews -- the Plaintiffs were immediately notified of such decision.

Under the Federal Rule of Civil Procedure 26(a)(2)(C), the parties must disclose the identity of their testifying expert witnesses and the expert's written report "at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures shall be made: (i) at least 90 days before the trial date or the date the case is to be ready for trial. . . [.]" FED.R.CIV.P. 26(a)(2)(C)(i). The Scheduling Order in this case does not specify a sequence for the parties to exchange expert reports or to take expert depositions. The purpose of Rule 26(a)(2) is to ensure opposing parties have a reasonable opportunity to prepare an effective cross examination and, if needed, retain their own expert. The Local Rules require parties to designate their experts sufficiently early "to permit the opposing party the opportunity to depose the expert witness sufficiently in advance of the close of discovery." LR. 26.2(C). Regardless of whether discovery closed on May 25 or June 30, both parties took and continue to take depositions after May 25, and June 30, and even after June 30.

Plaintiffs' complaint is that Dr. Crews was disclosed on May 19, one week before general discovery was scheduled to close and five weeks before deposition discovery was scheduled to expire. No bad faith exists; Dr. Crews was not disclosed earlier because he had not yet been retained as a testifying expert. Nevertheless, Plaintiffs' Motion and Reply failed to present any evidence to

demonstrate that they have been incurably prejudiced by Defendants' alleged failure to disclose their expert earlier. Unsupported claims of prejudice are not sufficient to justify the sanction of excluding evidence. Indeed, there are remedies which the Court can fashion which will mitigate any such prejudice.

Respectfully submitted this ____ day of _____, 2009.

THURBERT E. BAKER 033887
Attorney General

R. O. LERER 446962
Deputy Attorney General

DENISE E. WHITING-PACK 558559
Senior Assistant Attorney General

MARY JO VOLKERT
Georgia Bar No. 728755
Assistant Attorney General

_____
King & Spalding LLP
Anthony B. Askew
Georgia Bar No. 025300
Special Assistant Attorney General
Katrina M. Quicker
Georgia Bar No. 590859

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to L.R. 5.1B and 7.1D of the Northern District of Georgia, that the foregoing Surreply In Further Support Of Defendants' Opposition To Plaintiffs' Motion To Exclude The Expert Report Of Kenneth D. Crews Motion complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing pleading was prepared on a computer using 14-point Times New Roman font.

/s/ Katrina M. Quicker
Katrina M. Quicker
(Ga. Bar No. 590859)