

**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

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION
TO EXCLUDE TESTIMONY AND EVIDENTIARY PROFFERS IN
DECLARATIONS OF GEORGIA STATE UNIVERSITY PROFESSORS**

NOW COME defendants MARK P. BECKER, in his official capacity as Georgia State University President, *et al.* (collectively, "Defendants"), and file this memorandum in opposition to Plaintiffs' Motion to Exclude Testimony and Evidentiary Proffers in Declarations of Georgia State University Professors ("Motion").

BACKGROUND

When Plaintiffs began noticing depositions in April 2009, the University System of Georgia's new Policy on the Use of Copyrighted Works in Education

and Research (“the Policy”) was just over six weeks old and its implementation in the ERes environment was just beginning. (*See* Dkt. 62 (indicating first deposition notice was served on April 6, 2010); Ex. A (indicating Policy became effective February 17, 2009).) Because professor testimony at that time necessarily would have limited relevance to ongoing and continuous practices at Georgia State University (“GSU”) pursuant to the Policy (since only implementation efforts were underway at that time and there had been only six weeks of ongoing and continuous practices at GSU pursuant to the Policy), Defendants proposed a stay of the litigation. (*See* Ex. A at 1; Ex. B at 2.) Plaintiffs refused and proceeded with depositions and other forms of discovery in the case. (*See* Ex. C at 2.)

After deposing two members of the Committee that developed and approved the Policy in March 2009, Plaintiffs noticed an additional 12 depositions (for a total of 14). (*See* Dkt. 88 at 5.). Seven of the noticed depositions were for professors. (*Id.*) On or around that time, Plaintiffs requested that Defendants agree to a total of 25 depositions—15 more than the 10 permitted by Federal Rule of Civil Procedure 30(a)(2)(A). (*Id.*) In response, Defendants proposed that Plaintiffs take 10 depositions—the amount allotted by the Rule—and then the parties could revisit the issue to see if further depositions were necessary. (*Id.* at

6.) Plaintiffs refused and moved the Court for leave to take 20 depositions. (Dkt. 78 at 3.)

Thus, Defendants’ objection to the number of requested depositions was not based solely on Plaintiffs’ request to take seven professor depositions, but on their request to take 20 total depositions—double the amount permitted by the Rules—at a time when Plaintiffs had taken only two depositions and Defendants’ motion to limit discovery to ongoing and continuous practices was still pending. (Dkt. 88 at 5-6.) Defendants’ objection also arose out of the fact that when Plaintiffs requested the depositions, the majority of professors would have had *no* experience with the Policy at the time of their depositions. (*See id.* at 1-2 (explaining that the depositions requested at that time would be reflective of past practices and procedures under the former guidelines).) Thus, their testimony would be “similar and unreasonably cumulative.” (*See id.* at 11.) While Defendants indicated in their opposition to Plaintiffs’ motion to take 20 depositions in May 2009 that deposition testimony of less than seven professors would have been sufficient to gain professors’ understanding of practices and procedure prior to the Policy, Defendants *never* suggested that professor deposition testimony taken only three months after the Policy was enacted somehow would be “representative” of

professors' use of the system today, as argued by Plaintiffs. (*See* Pls.' Br. (Dkt. 207-2) at 5.)

Plaintiffs also fail to mention that the parties ultimately reached an agreement that Plaintiffs could take 14 depositions, including the seven professor depositions they had previously noticed. (*See* Dkt. 94; *see also* Ex. D.) Yet, Plaintiffs *elected* to take only three professor depositions. (*See* Pls.' Br. at 4.) Now, Plaintiffs say that, in doing so, they relied on some unspecified representation by Defendants that three depositions would be "sufficient" to prove their case. (*Id.* at 4.) Defendants made no such representation.

During the discovery period, Defendants provided Plaintiffs with live access to ERes and its reporting capabilities. (Ex. E at 1; Ex. F at 2.) Despite Plaintiffs' statements to the contrary, Defendants then continued to produce ERes reports after the deadline for such discovery passed on May 25, 2009. (*See* Dkt. 83 at 4.) On June 16, 2009, Defendants produced an updated Maymester ERes report. (Ex. G.) On July 1, 2009, Defendants produced a Summer 2009 report. (Ex. H.) On September 10, 2009, Plaintiffs requested yet more ERes reports. (Ex. I.) In response, Defendants stated that Defendants' production was not materially incomplete under Rule 26(e), and thus Defendants did not believe they had a continuing obligation to produce ERes reports, with no end in sight. (Pls.' Br. Ex.

D-2.) However, even though supplementation of their discovery was not required, Defendants nevertheless *agreed to produce, and produced, the requested Fall 2009 ERes report*, a fact that Plaintiffs avoid in their Motion. (*See id.*) The Fall 2009 report was produced on September 22, 2009. (*Id.*) Defendants also produced the Spring 2010 ERes report, which did show a remarkable change in ERes usage, on February 26, 2010. (Ex. J.) At Plaintiffs' request, Defendants additionally produced an updated Spring 2010 report on April 23, 2009, another fact Plaintiffs avoid. (Ex. K.) Plaintiffs fail to address the substance of Defendants' valid objections to the repeated requests for additional reports after the close of discovery, characterizing them in their Motion (without explanation) as "gamesmanship." (*See Pls.' Br. at 5.*) More importantly, Defendants produced *all* requested ERes reports; thus, Plaintiffs' complaints about Defendants' objections to producing such reports are "much ado about nothing."

Plaintiffs also contend that Defendants failed to produce fair use checklists, as completed by all professors, and that somehow warrants exclusion of the professor declarations submitted in connection with Defendants' Response to Plaintiffs' Motion for Summary Judgment. These checklists were "requested" by Plaintiffs after the close of discovery via e-mail as follows: "I will appreciate your advising us whether Defendants also will produce by way of updated discovery

such other documentation (for example, Fall 2009 fair use checklists) as may exist *reflecting ongoing implementation* of the February 2009 policy.” (See Pls.’ Br. Ex. D-2 (emphasis added).) Defendants objected to that request—made several months after discovery had closed—as “vague, ambiguous, and untimely.” (*Id.* Ex. D-1.) To the extent Plaintiffs sought every fair use checklist created since the Policy’s effective date or the close of discovery, responding to Plaintiffs’ request would have required Defendants to go to every professor who posted on ERes to obtain their checklists, regardless of whether those professors had posted excerpts from any of the “works at issue”—or any of Plaintiffs’ works. Thus, given that there are almost 2,000 professors at GSU, Defendants also objected that the request was remarkably burdensome. (*Id.*)

Plaintiffs never responded to Defendants’ stated objections to the form or content of Plaintiffs’ untimely request. Plaintiffs never gave any further indication of an intention to pursue additional documents and never moved to compel the production of such documents. Defendants reasonably understood their production of the requested ERes reports was an acceptable compromise position to the production of any additional documents by Defendants. Plaintiffs’ contentions regarding the validity of Defendants’ objections to Plaintiffs’ request for “such other documentation . . . reflecting ongoing implementation” nearly seven months

after the objections were made are unfounded and untimely, as the period for filing a motion to compel has long passed. (See LR 37B, NDGa (“Unless otherwise ordered by the court, a motion to compel a disclosure or discovery must be filed within the time remaining *prior to the close of discovery or*, if longer, *within fourteen (14) days after service of the disclosure or discovery response upon which the objection is based.*”))

ARGUMENT AND AUTHORITIES

I. Plaintiffs’ Characterizations of This Evidence As Hidden, a Surprise Attack, or Somehow Orchestrated to Prejudice Them Is Unfounded.

Plaintiffs’ accusation that Defendants’ “decision to wait to introduce this evidence until their opposition to Plaintiffs’ summary judgment motion was plainly calculated and intended to surprise Plaintiffs” is false. (See Pls.’ Br. at 13.) This evidence was collected in connection with Defendants’ response to Plaintiffs’ Motion for Summary Judgment. The declarations represent professors’ experience using the ERes system under the Policy, including their experience and “thinking” reflecting substantially reduced ERes usage in the Spring 2010 semester. By definition, such evidence did not even *exist* until shortly before it was produced in connection with the response to the motion for summary judgment.

Also contrary to Plaintiffs’ suggestion, Plaintiffs had the opportunity to collect such evidence, but declined. Plaintiffs could have agreed to postpone the

case to allow professors time to use the Policy over several semesters. If Plaintiffs had done so, they could have obtained such discovery and questioned professors on “how these epiphanies came about or exactly how their ‘thinking’ has changed.” (Pls.’ Br. at 9.) Instead, Plaintiffs elected to proceed with the depositions of only three professors, two of whom had not even *used* the Policy at the time of their depositions. (See Defs’ Opp. to Pls.’ SOF (Dkt. 187) ¶¶ 222-23.)

Plaintiffs never responded to Defendants’ stated objections to the form or content of Plaintiffs’ request for “such other documentation (including . . . checklists) reflecting ongoing implementation [of the Policy].” To now dispute Defendants’ objections to Plaintiffs’ broad and ambiguous e-mail request for “such other documentation . . . as may exist,” in the absence of any follow-up at the time of the request, is unreasonable and untimely under the Local Rules, which require a motion to compel a response to discovery requests to be filed within 14 days of the response. (See LR 37B, NDGa; Pls.’ Br. Ex. D-2.)

The fact that practices at GSU have changed after professors have had a chance to use the new fair use checklist over several semesters and have participated in continuing educational efforts concerning the Policy is no surprise to Plaintiffs. Indeed, Defendants repeatedly have stated their position that practices will and have changed as the Policy has been implemented. (See, e.g.,

Dkt. 160-2 at 16; Dkt. 87 at 2; Ex. B at 2; Ex. A.) And Plaintiffs have recognized that the Policy was adopted, in part, purportedly to ensure that if any unfair uses of Plaintiffs' works had occurred under the old policy, they would not continue in the future. (Ex. C at 2.) Plaintiffs cannot now seek to have Defendants penalized for Plaintiffs' own decision to proceed with the case on the current record. Contrary to Plaintiffs' assertion, Defendants never "staked out a position that the then-existing record was a sufficient one to permit this case to proceed to a merits disposition." (Pls.' Br. at 13.) In fact, Defendants have always taken the position that behaviors at GSU would change as a result of the Policy; thus, the record as it existed only three months following adoption of the Policy, notwithstanding the fact that only 3 professors were deposed, was incomplete with respect to ongoing and continuous practices under the Policy. (*See, e.g.*, Ex. B; Ex. A.)

Plaintiffs' real complaint is that the record reflects a change at GSU. Rather than acknowledge that change, Plaintiffs seek to have the Court ignore the true state of affairs—reduced ERes usage due to more informed, calculated fair use decisions based on the Policy checklist and the tenants of that Policy. That change is damaging to Plaintiffs' case. Regardless, Defendants' proper and forthright actions in discovery (even after it closed) provide no basis for excluding the truth of how the Policy is being implemented.

II. None of Plaintiffs' Cited Authority Supports Exclusion of the Professor Declarations in This Case.

Plaintiffs' motion is founded on a single e-mail request for “*such other documentation . . . as may exist reflecting ongoing implementation*” (Pls.' Br. Ex. D-2 (emphasis added)) and professor depositions it had the right to take, but chose not to. During discovery, Defendants promptly and directly responded to Plaintiffs' e-mail request for “such other documentation” by objecting to it as “vague, ambiguous, . . . untimely,” and “burdensome.” (*Id.* Ex. D-1.) Plaintiffs made no response. Then, as Plaintiffs made additional requests for ERes reports, Defendants continued to supplement their production with the requested reports. Even though Defendants did not believe supplementation was required by the Federal Rules, they complied with the requests and provided the documents requested by Plaintiffs. (*See id.* Ex. D-2 (stating that an additional requested ERes report would be provided “in the spirit of cooperation”); Exs. G-L (demonstrating transmission of updated ERes reports).)

The court's analysis in *United States ex rel. Bane v. Breathe Easy Pulmonary Services, Inc.*, No. 8:06-cv-40-T-33MAP, 2009 WL 92826 (M.D. Fla. Jan. 14, 2009), cited by Plaintiffs, is indicative of the thoughtful and measured analysis that cases like this one warrant. In *Breathe Easy*, the court stated that the following five factors can guide a court in deciding whether a failure to disclose is

substantially justified or harmless: “(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party’s explanation for its failure to disclose the evidence.” No. 8:06-cv-40-T-33MAP, 2009 WL 92826, at *3 (citation omitted). The court then walked through the factors and found that the error was harmless and the “drastic sanction” of exclusion was unwarranted. *Id.* at *5.

Like the party in *Breathe Easy*, Plaintiffs have *not* established that they were surprised by the content of the disclosures or that the disclosures in any way would disrupt the impending trial. Nor have Plaintiffs addressed the real facts that underlie Defendants’ alleged failure to disclose: ***most of the information disclosed did not exist at the time Plaintiffs claim that they requested the information.*** Plaintiffs did not respond to Defendants’ prompt and thorough objections to their singular and vague e-mail request. Plaintiffs also failed to call all of the professors whom they were allowed to depose. Thus, not only do Plaintiffs fail to establish any of the factors that tend to demonstrate a violation of discovery rules that may, in the court’s discretion, warrant exclusion, they also misrepresent the facts in order to argue that the nondisclosure was not justified and is not harmless.

Omission of the content of the later professor declarations from earlier discovery was both justified *and* harmless: (1) justified because the information did not exist until just before the information was produced, as the content represents professors' understanding of, and compliance with, the Policy only *after* they had the opportunity to work with the Policy over several semesters; the declarations and checklists were collated solely for the purpose of responding to Plaintiffs' arguments in their summary judgment briefing; and Plaintiffs did not appropriately renew their request for the information that did exist during the discovery period; and (2) harmless because Plaintiffs repeatedly have stated their position that behaviors have changed as a result of the Policy. Plaintiffs should not be heard to complain that they are surprised by this position. Thus, entirely *unlike* the defendant in *Goodman-Gable-Gould Co. v. Tiara Condominium Association, Inc.*, 595 F.3d 1203, 1210-11 (11th Cir. 2010), who sprung new theories on the other side without raising them in counterclaims or in response to interrogatories that asked the defendant "to list with particularity how [the other side] failed in their contractual obligations," Defendants have not failed to provide Plaintiffs with *anything*. They have not withheld information properly requested, and have not hidden their theory of the case. There is no "trial by ambush" when Plaintiffs have long known the underlying basis of Defendants' positions. *See Tishcon Corp. v.*

Soundview Commc'ns, Inc., No. 1:04-CV-524-JEC, 2005 WL 6038743, at *8 (N.D. Ga. Feb. 15, 2005).

Nor is this a case of “inaccurate disclosures” that may “mislead the Plaintiffs and the Court as to what issues would be disputed [and] what questions to ask during depositions,” as Plaintiffs imply. (See Pls.’ Br. at 12 (quoting *Go Med. Indus. Pty., Ltd. v. Inmed Corp.*, 300 F. Supp. 2d 1297, 1308-09 (N.D. Ga. 2003).) The information in the professor declarations did not even exist when Plaintiffs were taking depositions. The content of the professor declarations is based on professors’ activities and impressions formed over the period beginning in February 2009 (adoption of the Policy) and continuing to the time of the Spring 2010 semester. Furthermore, to the extent Plaintiffs wanted to capture some portion of these professors’ impressions and experience (“thinking”), they were free to depose them during the time for depositions.

Also, once Defendants objected to the breadth of Plaintiffs’ September 16, 2009 e-mail request for additional information, Plaintiffs were free to narrow their request or to provide more clarity. Plaintiffs did neither. Nor have Plaintiffs indicated that Defendants so refused to provide this information that they needed to seek the help of the Court to obtain the information. Plaintiffs thus have not established that they were surprised by the content of the professor declarations.

They knew that fair use checklists were part of the Policy, were being completed by professors in compliance with the Policy, and had evidence in the ERes reports that behaviors were, in aggregate, changing. As demonstrated by their September 23, 2009 e-mail request, Plaintiffs knew that there would be fair use checklists to correspond to the ERes reports. (*See* Pls.’ Br. Ex. D-1.) Thus, there was no surprise when Plaintiffs were provided with specific professors’ analyses of how their individualized use had changed and with the fair use checklists supporting their decisions to post materials on ERes. *See Breathe Easy*, 2009 WL 92826 at *3 (finding that there was no surprise where the record demonstrated that the complaining party was aware of requests for the information at issue and had been copied on letters pertaining to the very issue of producing that information).

Nothing in Plaintiffs’ motion or brief demonstrates how the proffered evidence would disrupt trial. Plaintiffs had the opportunity to question the professors who submitted declarations (but elected not to in the case of Professors Esposito, Meyers, Dixon, and Kruger) and had the opportunity to question those professors they elected to depose regarding their use under the Policy and their completion of fair use checklists. (*See* Pls.’ Br. at 4.) Thus, Plaintiffs were not prejudiced in the development of their case. Any “prejudice” Plaintiffs have suffered was the result of their choice to proceed with the case on a limited,

premature record. Accordingly, Plaintiffs have failed to establish any failure to disclose by Defendants that would warrant exclusion of professors declarations; and any alleged failure was, at most, justified and harmless.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully ask that this Court deny Plaintiffs' Motion to Exclude Testimony and Evidentiary Proffers in Declarations of Georgia State University Professors.

Respectfully submitted this 13th day of May, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Local Rule 7.1D, that the foregoing memorandum has been prepared using 14 point Times New Roman font.

/s/ Kristen A. Swift
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 13th day of May, 2010, I have electronically filed the foregoing **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY AND EVIDENTIARY PROFFERS IN DECLARATIONS OF GEORGIA STATE UNIVERSITY PROFESSORS** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorney of record:

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