

EXHIBIT A

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

CAMBRIDGE UNIVERSITY PRESS,
et al.,

Plaintiffs,

-v-

MARK P. BECKER, in his official
capacity as President of Georgia State
University, et al.,

Defendants.

Civil Action No.
1:08-CV-1425-ODE

**DEFENDANTS' MOTION IN LIMINE TO PREVENT PLAINTIFFS FROM
INTRODUCING IMPROPER EXPERT TESTIMONY AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants Mark P. Becker et al. hereby file this Motion *In Limine* To Exclude Improper Expert Testimony ("Motion"). Specifically, Plaintiffs' briefing this week indicates they intend to introduce evidence to prove market harm. Plaintiffs have not, however, listed the expert they identified to opine about market-harm, Debra Mariniello, as a witness who will or may testify at trial. Because such testimony is properly expert testimony, and Plaintiffs' witness list does not include a market-harm expert that has been properly identified as required

by this Court’s Scheduling Order Regarding Expert Discovery [Dkt. No. 123] and Federal Rule of Civil Procedure 26(a)(2), Defendants respectfully ask the Court to prevent Plaintiffs’ lay witnesses from providing expert testimony under Fed. R. Evid. 702, 703, or 705 concerning alleged market harm.

BACKGROUND

On September 14, 2009, the Court entered its Scheduling Order Regarding Expert Discovery (“Expert Discovery Order”). The Expert Discovery Order required Plaintiffs to submit expert reports “limited to responding to the Crews report.” (Expert Disc. Order at 1.) On October 14, 2009, Plaintiffs responded by identifying three experts—Robert Dewar, Debra Mariniello, and Steven Sheffrin—as individuals Plaintiffs may use at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. (Pls.’ Supl. Initial Disclosures [Dkt. No. 124] at 2-3.) Plaintiffs have not identified any additional experts.

Each of the experts Plaintiffs identified submitted an expert report. (*See* [Dkt. No. 124-1, -2, and -3].) In particular, Ms. Mariniello’s expert report addressed market harm allegedly caused by GSU and other institutions. (*See, e.g.*, Expert Report of Debra J. Mariniello at 2, 18-19 [Dkt. No. 124-2].) She specifically opined on the purported harm to the “market for the licensing of Plaintiffs’ – and other publishers’ – works,” and a “disturbing pattern” suggested

by “aggregate nationwide data.” (*Id.* at 18-19.) Defendants deposed Ms. Mariniello and the other experts.

None of these experts, including Plaintiffs’ putative market harm expert, Ms. Mariniello, appear on Plaintiffs’ witness list. (Pls.’ Witness List [Dkt. No. 278-4].) In their Pretrial Brief and in their Memorandum Of Law To Exclude Irrelevant Evidence In Accordance With Order Of September 30, 2010 [Dkt. No. 287] (“Opposition”), however, Plaintiffs indicate that they still intend to present evidence on the subject of Ms. Mariniello’s expert testimony.

Specifically, Plaintiffs claim that evidence relating to works not at issue here will be used to “bolster Plaintiffs’ demonstration of the *full extent of market harm that has occurred and that would be greatly magnified if GSU’s practices were to continue unabated and become widespread.*” (Opp. at 2-3. (emphasis added).) This, of course, is the subject of Ms. Mariniello’s expert report, yet Ms. Mariniello does not appear on Plaintiffs’ witness list. Apparently, Plaintiffs plan to present this evidence through a lay witness. Any such testimony, however, would be improper and should not be permitted.

ARGUMENT AND CITATION OF AUTHORITIES

The rules of civil procedure require that, in every circumstance, parties identify anyone who will provide opinion or fact testimony under Federal Rules of Evidence 702, 703, or 705. Fed. R. Civ. P. 26(a)(2)(A). Even under the more relaxed disclosure requirements of recently-amended Rule 26(a)(2),¹ experts still must be identified, and must submit either (i) a complete statement of their opinions and the basis thereof, or (ii) the subject matter on which the witness is expected to present evidence under Rules 702, 703, or 705, and a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(B) & (C).

Plaintiffs have neither (i) identified, nor (ii) submitted a report or summary of anticipated testimony under Rules 702, 703, or 705 for any potential market-harm experts other than Ms. Mariniello, whom Plaintiffs are not calling at trial. (Pls.' Witness List [Dkt. No. 278-4].) Accordingly, there is no one on Plaintiffs' witness list who may provide market-harm testimony under Rules 702, 703, or 705.

¹ Amended effective December 1, 2010.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Motion and prevent Plaintiffs from presenting expert testimony regarding market harm through lay witnesses.

Respectfully submitted, this 14th day of May, 2011.

SAMUEL S. OLENS
Georgia Bar No. 551540
Attorney General

R. O. LERER
Georgia Bar No. 446962
Deputy Attorney General

DENISE E. WHITING-PACK
Georgia Bar No. 558559
Senior Assistant Attorney General

MARY JO VOLKERT
Georgia Bar No. 728755
Assistant Attorney General

s/ Richard W. Miller
Katrina M. Quicker
Georgia Bar No. 590859
Richard W. Miller
Georgia Bar No. 065257
BALLARD SPAHR LLP
999 Peachtree Street, Suite 1000
Atlanta, GA 30309-3915
Telephone: (678) 420-9300
Facsimile: (678) 420-9301

Stephen M. Schaetzel
Georgia Bar No. 628653
KING & SPALDING LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

Anthony B. Askew
Special Assistant Attorney General
Georgia Bar No. 025300
211 Townsend Place
Atlanta, GA 30327
Telephone: (404) 262-7981

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1D of the Local Rules of the Northern District of Georgia, counsel for Defendants certifies that the foregoing **DEFENDANTS' MOTION IN LIMINE TO PREVENT PLAINTIFFS FROM INTRODUCING IMPROPER EXPERT TESTIMONY AND MEMORANDUM OF LAW IN SUPPORT THEREOF** was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1C.

/s/ Richard W. Miller

Richard W. Miller

**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 No.
1:08-CV-1425-ODE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of May, 2011, I have electronically filed the foregoing **DEFENDANTS' MOTION IN LIMINE TO PREVENT PLAINTIFFS FROM INTRODUCING IMPROPER EXPERT TESTIMONY AND MEMORANDUM OF LAW IN SUPPORT THEREOF** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
Corey F. Hirokawa
hirokawa@bmelaw.com
Georgia Bar No. 357087
John H. Rains IV
rains@bmelaw.com
Georgia Bar No. 556052

BONDURANT, MIXSON &
ELMORE, LLP
1201 West Peachtree Street N.W.
Suite 3900
Atlanta, GA 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

R. Bruce Rich
Jonathan Bloom
Randi Singer
Todd D. Larson

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

s/ Richard W. Miller
Richard W. Miller
Georgia Bar No. 065257
BALLARD SPAHR LLP
999 Peachtree Street, Suite 1000
Atlanta, GA 30309-3915
Telephone: (678) 420-9300
Facsimile: (678) 420-9301