

**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

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION FOR LEAVE
TO SUPPLEMENT THE DETAILED REQUEST FOR ATTORNEYS’ FEES
AND OTHER COSTS**

Plaintiffs Cambridge University Press, Oxford University Press, Inc., and SAGE Publications, Inc. (collectively, “Plaintiffs”) submit this opposition to Defendants’ Motion for Leave to Supplement the Detailed Request for Attorneys’ Fees and Other Costs, Doc. No. 455 (Sept. 17, 2012).

BACKGROUND

Defendants were directed to file a detailed request for an award of attorneys’ fees and other costs no later than August 24, 2012. *See* Order, Doc. No. 441 at 14 (Aug. 10, 2012). Defendants did so. *See* Defendants’ Memorandum in Support of

Defendants' Detailed Request for an Award of Attorneys' Fees and Other Costs, Doc. No. 444 (Aug. 24, 2012). Defendants' submission included a bill for the period preceding March 2009. *Id.* at Exhibit 1. That bill did not indicate the time spent on or the amount billed for each time entry. *Id.* The parties met and conferred concerning Plaintiffs' objections on September 5, 2012, but did not reach agreement except as to fees incurred in connection with Defendants' sovereign immunity defense, with respect to which Defendants withdrew their fee request. *See* Defendants' Second Supplemental Statement to Defendants' Detailed Request for an Award of Attorneys' Fees and Other Costs, Doc. No. 448 at 2 (Sep. 7, 2012). After the meet and confer, without objection from the Plaintiffs, Defendants twice supplemented their Detailed Request for an Award of Attorneys' Fees and Other Costs on September 6, 2012, Doc. No. 446, and September 7, 2012, Doc. No. 448. Neither supplement included a detailed bill indicating the time spent on or the amount billed for each time entry prior to March 2009. *See* Doc. Nos. 446 and 448.

Plaintiffs timely submitted their objections to Defendants' Request for Attorneys' Fees and Costs on September 10, 2012. *See* Plaintiffs' Objections to Defendants' Request for Attorneys' Fees and Costs, Doc. No. 451 ("Plaintiffs' Objections") (Sep. 10, 2012). In their objections – as they had done during the

meet and confer – Plaintiffs argued that Defendants are not entitled to recover fees or costs incurred prior to February 17, 2009, the date on which Georgia State University announced the new copyright policy that was the subject of the trial in this action. *Id.* at 6-7. Plaintiffs’ objections highlighted Defendants’ failure to provide a detailed bill for the period prior to March 2009. *Id.* That failure has meant Plaintiffs have been unable to discern what time or amount billed if any prior to February 17, 2009 is relevant to the Defendants’ request for fees. Plaintiffs, therefore, calculated the appropriate fee reduction by determining the percentage of the time period covered by the bill represented by the period up to February 17, 2009 (82.9%) and applied that percentage to the total amount billed. *Id.*

The day after the Court’s deadline for Plaintiffs’ objections, September 11, 2012, Defendants without objection from the Plaintiffs supplemented their Detailed Request for an Award of Attorneys’ Fees and Other Costs for the third time. *See* Doc. No. 453 (Sep. 11, 2012). This third supplement responded to issues raised in Plaintiffs’ objections, but again failed to include a detailed bill indicating the time spent on or the amount billed for each time entry prior to March 2009. *Id.*

At the September 14, 2012 hearing on Defendants' fee application, Defendants initially represented to the Court that they had submitted a bill showing the amount billed for each time entry prior to March 2009. Transcript of Proceedings ("9/14 Tr.") at 21:9 (Sept. 14, 2012). Only when Plaintiffs highlighted that even after four filings, bill had not been submitted by Defendants that included the time spent on or the amount billed for each entry, *id.* at 21:13-23, did Defendants acknowledge that they had submitted the wrong bill for the period prior to March 2009. *Id.* at 29:23-29:1. In response to Defendants' request to supplement its bill yet again, the Court requested that Defendants submit a motion to supplement their fee application for the fourth time to include the missing detail as to each time entry. *Id.* at 37:10-25. On September 17, 2012, Defendants did so. *See* Doc. No. 455 (Sep. 17, 2012).

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANTS' MOTION FOR LEAVE TO SUPPLEMENT THE DETAILED REQUEST FOR ATTORNEYS' FEES AND OTHER COSTS

Defendants' conduct in filing their Request for Attorneys' Fees and Costs and their three subsequent supplements – four strikes, rather than the customary three – falls well outside the limits of acceptable conduct in this case. Throughout this litigation, Defendants have, at various times and for various reasons, attempted

to preclude Plaintiffs from introducing evidence – including for the reason that Plaintiffs’ proposed evidence was untimely. For example, Defendants argued that Plaintiffs should be precluded from introducing evidence related to certain copyright infringements because “[d]espite ample opportunity to do so, Plaintiffs [had] not provided” various copyright registration certificates. *See* Defendants’ Motion in Limine to Exclude Evidence of Alleged Infringement of Improperly-Asserted Copyrights and Memorandum of Law in Support Thereof, Doc. No. 277 at 5 (Apr. 29, 2011). The Court agreed, granting Defendants’ motion and excluding the copyright registration certificates that Plaintiffs had allegedly failed to provide in a timely manner. *See* Order, Doc. No. 310 at 3 (May 12, 2011).

Similarly, when Plaintiffs sought to amend their trial exhibit list to add several documents concerning ownership or licensing of the works at issue in response to issues raised by Defendants’ motion in limine, Defendants argued that it was too late for Plaintiffs to add exhibits, especially given that “Plaintiffs or Plaintiffs’ affiliates at all times had the relevant documents and ... failed to produce them.” *See* Defendants’ Brief in Opposition to Plaintiffs’ Motion to Amend Their Trial Exhibit List, Doc. No. 309 at 6 (May 12, 2011). The Court agreed, noting that “Plaintiffs may not amend their trial exhibit list to add any of

the other documents Plaintiffs seek to add.” Order, Doc. No. 311 at 2 (May 13, 2011).

Defendants should be held to their own standard for timeliness. The bill that they seek to file now has always been in Defendants’ possession, and Defendants can point to no reason other than their own “mistake” for not supplying the bill to the Court and the Plaintiffs in any of their four filings to date. 9/14 Tr. at 29:25. In fact, despite the need for finality on this matter, Defendants have already supplemented three times on the issue of fees without objection from Plaintiffs – including *after* Plaintiffs had already filed a response to Defendants’ Detailed Request for an Award of Attorneys’ Fees and Other Costs highlighting Defendants’ failure to provide a detailed bill including all time spent or amount billed for the period prior to March 2009. *See* Plaintiffs’ Objections at 6-7. Defendants’ third supplement responded to other issues raised in Plaintiffs’ Objections, but again did not include a detailed bill.

As the Court noted during the September 14, 2012 hearing on fees, “to the extent possible, [the Court has tried to be] pretty strict with ... [its] rulings.” 9/14 Tr. at 37:14-15. Unlike the genuine dispute over what constituted alternative proof of the existence of a valid copyright, here Defendants have no justification for their actions other than their own “mistake.” *Id.* at 29:25. Granting Defendants’ Motion

for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs would be inconsistent with the Court's previous strict rulings. Accordingly, Defendants' conduct should not be excused and their Motion for Leave should be denied.

II. DEFENDANTS FAILED TO MEET THEIR BURDEN THEREFORE FEES AND COSTS FOR THE PERIOD PRIOR TO MARCH 2009 SHOULD BE DENIED

Defendants have failed to meet their burden in producing evidence of their attorneys' fees and other costs incurred prior to March 2009. In this Circuit, "[t]he party seeking attorney's fees bears the burden of producing satisfactory evidence that the requested rate is in line with prevailing market rates. By satisfactory evidence ... [the court meant] more than the affidavit of the attorney performing the work." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (internal citations omitted). Defendants' request for fees falls woefully short of producing such satisfactory evidence for period prior to March 2009. Defendants' March 2009 bill, covering the period August 2008 – March 2009, is devoid of the most critical information (*e.g.*, whether the task relates to the pre-2009 GSU copyright policy), and accordingly, does not allow the Court or the Plaintiffs to ascertain what (if any) time billed before the end of March 2009 should even be considered in the Defendants' request for fees. By not supplying a detailed bill with their

request, or any one of the three supplements already submitted, Defendants have failed to meet their burden.

Defendants have failed on four occasions to produce sufficient evidence to meet their burden on the issue of fees for the period prior to March 2009, and thus, their request for attorneys' fees for the period prior to March 2009 should be denied.

III. PLAINTIFFS MAINTAIN THEIR OBJECTION TO THE RECOVERY OF FEES AND COSTS INCURRED PRIOR TO FEBRUARY 17, 2009

Even if the Court were to grant Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs, Plaintiffs maintain their objection to inclusion of any fees or costs incurred prior to February 17, 2009, the date on which Georgia State University announced the new copyright policy that was the subject of the trial in this action. For reasons stated in Plaintiffs' September 10 submission: Defendants are not prevailing parties in relation to a policy they abandoned during the litigation and that was not at issue at trial. *See* Plaintiffs' Objections at 6-7. Defendants have offered no response to this argument.

At the September 14, 2012 hearing on fees, Defendants' only basis for the inclusion of fees and costs incurred prior to February 17, 2009 "is because that

work flowed through the entire lawsuit.” 9/14 Tr. at 8:4-7. Defendants miss the point. As the Court stated in its August 10, 2012 order “the only precondition to the award of attorney’s fees is that the party be a prevailing one.” *See* Order, Doc. No. 441 at 13 (Aug. 10, 2012) (citing *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 822 F.2d 1031, 1034 (11th Cir. 1987)). As the Court found, Plaintiffs prevailed to the extent that “Georgia State’s changes in its copyright policy were triggered primarily by the filing of the instant lawsuit.” *Id.* at 12.

It follows that Defendants are not the prevailing party at least as to events preceding February 17, 2009, and are not entitled to an award of fees or costs for work undertaken prior to February 17, 2009. Therefore, should the Court allow Defendants to supplement their request for the fourth time, all fees and costs incurred prior to February 17, 2009 should be excluded from any award.

CONCLUSION

For the foregoing reasons Plaintiffs respectfully submit that Defendants’ Motion for Leave to Supplement the Detailed Request for Attorneys’ Fees and Other Costs should be denied. In the alternative, even if the Court grants Defendants’ motion Plaintiffs respectfully request Defendants’ fee application be reduced by \$333,519.09.

Respectfully submitted this 27th day of September, 2012.

/s/ John H. Rains IV

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS’
OPPOSITION TO DEFENDANTS’ MOTION FOR LEAVE TO
SUPPLEMENT THE DETAILED REQUEST FOR ATTORNEYS’ FEES
AND OTHER COSTS** with the Clerk of Court using the CM/ECF filing system
which will send e-mail notification of such filing to opposing counsel as follows:

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This 27th day of September, 2012.

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