IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SAINT LOUIS UNIVERSITY, a Missouri benevolent corporation,	)	
Plaintiff,	)	
v.	)	Case No. 4:07-cv-01733
AVIS MEYER,	)	
Defendant.	)	

MEMORANDUM IN REPLY TO PLAINTIFF'S MEMORANDUM REGARDING SUPPLEMENTAL AUTHORITY (d/e 51)

I. INTRODUCTION

COMES NOW, Defendant, Avis Meyer ("Meyer" or "Defendant"), by and through his attorneys of record, and replies to the Memorandum to the Court Regarding Supplemental Authority ("SLU'S Memo)(d/e 51) of Plaintiff, Saint Louis University ("SLU" or "Plaintiff"). Although Meyer appreciates this Court's admonishment to both parties at the conclusion of the hearing of August 20, 2008, Meyer must respond to the SLU's Memo (d/e 51) because it contains misstatements of law and patently false statements of fact that are untimely, improper, and unfairly prejudicial.

SLU's Memo dedicates four-pages to a non-precedential case that was decided over four months before SLU filed its original Motion for Sanctions (d/e 36). Even worse than the tardiness of SLU's citation to *Conner v. Sun Trust Bank*, 546 Supp.2d 1360 (N.D. Ga. 2008), is its misrepresentation of the holding, which relies on non-precedential Eleventh Circuit and Georgia State law. *Id.* at 1375-76. SLU declares that, "The Conner court specifically stated that

EXHIBIT 1

a finding of 'malice' was not required" to impose sanctions. However, SLU fails to mention that the holding in *Conner* relies on Eleventh Circuit and Georgia state law and cites as its authority *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 946 (11th Cir. 2005), which states, "With regard to the fourth factor, ***Georgia law*** does not require a showing of malice in order to find bad faith." (emphasis added). *Flury* further explains that, "Applicability of federal law notwithstanding, our opinion is also informed by Georgia law. Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in Georgia law....Georgia law provides some guidance and was relied upon by the district court and the parties." *Id.* at 944.

The holding in *Conner* does not bind this Court and is also contrary to current Eighth Circuit law. As previously discussed in Defendant's Opposition (d/e 42), to impose sanctions for spoliation of evidence Eighth Circuit rulings require a court to find: 1) intentional destruction with fraudulent intent and a desire to suppress the truth; and 2) prejudice to the opposing party. *See Menz v. New Holland North America, Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006). Clearly, the holding in *Conner* does not supplant Eighth Circuit law as suggested by SLU. Nevertheless, whether or not Meyer acted with "malice" as defined by Eleventh Circuit and Georgia state law, SLU still has failed to provide any evidence that Meyer destroyed evidence with a culpable state of mind as required by the Eighth Circuit. If Meyer had intended to destroy relevant emails, he certainly would not have testified to deleting emails in his deposition. As shown in Meyer's deposition, Meyer clearly did not believe that any deleted emails were relevant to the issues in this case. *See* Exhibit A, Meyer Depo. at p. 199, ll. 4-24, attached hereto and incorporated by reference herein. All things considered, SLU's sudden reliance on *Conner* in contradiction to its previous arguments is disingenuous.

Moreover, SLU has failed to present any evidence that even suggests that SLU has been harmed by any alleged destruction of evidence. The allegedly destroyed private communications would not prove or disprove "use in commerce" of SLU's trademarks, because by definition *private* communications do not constitute *public* use in commerce of a trademark. Simply put, Meyer's email communications are not evidence that Meyer used SLU's trademarks in commerce as the name of a newspaper. Even if the email communications had discussed an offering of newspapers in commerce under SLU's trademarks, there would be independent evidence of such an offering because there is no such thing as a "secret" newspaper. Therefore, any alleged destruction of email communications would cause no harm to SLU because there would be independent evidence of an alleged "use in commerce" of SLU's trademarks."

Separate from SLU's misstatements of law, SLU's Memo (d/e 51) also makes patently false statements of fact, including that Meyer "wiped his hard drive clean numerous times" without any basis whatsoever. In fact, SLU alleges in its Reply (d/e 45) that it has never even accessed Meyer's computer to verify the existence of email communications because of its own "University's Information Technology Appropriate Use Policy."[1] *See* SLU's Memo (d/e 51) at p. 3. Indeed, Meyer has never used or testified to using any program to "wipe" his computer hard drive or otherwise render the electronic communications unrecoverable. *See* Exhibit B, Affidavit of Avis Meyer, ¶¶ 3-4, attached hereto and incorporated by reference herein. Meyer has only deleted emails he believed to have no bearing or relevance to the substance of the present litigation in a conventional manner through his email program. *See* Exhibit B, ¶5

[1] *Id.* at 3. "[The University's Information Technology Appropriate Use] Policy prevents Plaintiff from accessing its employees' email accounts except under special circumstances. Those circumstances have not been met in this case..."

WHEREFORE, Defendant respectfully moves this Honorable Court to grant its motion and strike SLU'S Memo (d/e 51) and grant Meyer all such other and further relief as this Court deems just under the circumstances.

Respectfully Submitted,

POLSTER, LIEDER, WOODRUFF & LUCCHESI, L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2008 the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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s/Brian J. Gill

IN THE MATTER OF:

St. Louis University, etc.,
vs.
Avis Meyer

Cause No. 04:07CV1733 CEJ

Deposition of Avis Meyer
6/4/2008

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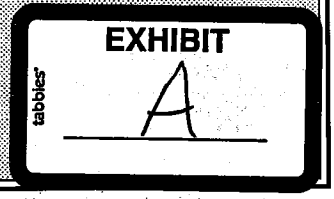
Full GLOSSARY included with this DepoScript



In the United States District Court
Eastern District of Missouri
Eastern Division

ST. LOUIS UNIVERSITY, etc.,

PLAINTIFF,

vs. Cause No. 4:07CV1733 CEJ

AVIS MEYER,

DEFENDANT.

Deposition of AVIS MEYER
On behalf of THE PLAINTIFF
JUNE 4, 2007

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Eastern District of Missouri
Eastern Division

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PLAINTIFF,

vs. Cause No. 4:07CV1733 CEJ

AVIS MEYER,

DEFENDANT.

Deposition of AVIS MEYER, taken on behalf of the PLAINTIFF, at the law offices of Lewis, Rice & Fingersh, 500 North Broadway - Suite 2000, St. Louis, Missouri, on JUNE 4, 2007, before Robert D. Perry, Missouri CCR #904, Illinois C.C.R. No. 084-003742, and Notary Public within and for the State of Missouri.

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A: No, not at all.
Q: Previously you testified with respect to the paper, for the paperwork for the Articles of Incorporation, that you went down to the St. Louis office of the Secretary of State, correct?
A: Correct.
Q: And the personnel there assisted you in filling out the forms?
A: They did.
Q: That action of filling out those forms, did you consider that a formation of a corporation?
A: I considered it registering a name. I never thought about anything else.
Q: Previously you testified for, regarding Exhibit 6, which is the August 30, 2007, letter, which states "St. Louis University requires a statement by you that the phrase 'The University News, a student voice serving St. Louis University since 1921' was not used by you in any manner other than registration of the Non-Profit Corporation". I'm sorry. Is that correct?
A: It is correct.
Q: Today, would you make that statement?
A: Yes, and I really thought I sent that letter to Frank, as I said in the U. News, I thought I sent

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it. I don't know what happened, but I thought I sent it.
Q: And would you have made that statement on August 30 of 2007?
A: Yes. I mean, I've never used it in any way, yes. It was a registration of a name that was largely selfless. I did this for the students and the paper, not for myself at all. It was for them.
Q: And just to make the testimony clear, you're testifying that it was not used by you in any manner other than registration of a Non-Profit Corporation. However, you would use it with respect to your capacities as advisor to the St. Louis -- I'm sorry -- to the U. News?
A: You mean the name as it stands now, correct?
Q: Correct.
A: The name as it stands is acceptable except for one word and that was a coincidence or an oversight on my behalf, and it's still being used, because the students decided to stick with this charter for at least a year.
Q: And you testified that you have no intention of ever using the name that you filed for Articles of Incorporation for?
A: Never any plan, it was never my idea. One

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guy floated the idea. I mentioned it to him in passing. Nothing ever came of it. There was never any such plan, ever.
Q: Previously you testified with respect to e-mails, correspondence to alumni, to and from alumni, to your work computer and possibly your home computer relating to which was characterized during this testimony as circumstances underlying the case, correct?
A: Correct.
Q: Did you -- what was the content of those e-mails?
A: Almost without exception they were wondering how the school paper was doing and how I'm doing. It never occurred to me that this had anything to do with the registration of the name except to save it for the students' paper. That's what they asked about.
Q: Did you consider these e-mails relevant to the lawsuit at issue?
A: No. It didn't seem that serious at the time, it just didn't.
Q: If you would have considered them as relevant, would you have saved those e-mails and --
A: Of course, of course.
Q: And would you have produced those?

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A: Of course. I didn't know. If you -- it's possible you told me and I didn't remember. It just didn't seem that important then. It does now.
Q: With respect to the e-mail correspondence to Lisa Watson, did you consider that relevant to this case?
A: No, it's just communication between me and one of my former students. They are concerned about the newspaper, they are concerned about me. They are not thinking about being a new paper, "are we going to have a new paper". We're just talking.
Q: So would it be fair to say that these e-mails with respect to the alumni news and Lisa Watson --
MR. FLEISCHMANN: I'm going to object. I've been listening to you testify for your client now for about three or four minutes. I'm going to object on the grounds that you're leading the witness. If you have a question, I would ask that you ask the question.
Q: (By Mr. Gill) Previously you testified regarding exhibits relating to the University News article.
A: Yes.
MR. GILL: And in that article, what was the -- bear with me -- well, strike that. I have no

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AFFIDAVIT OF AVIS MEYER

COMES NOW, Avis Meyer and having been duly sworn, states as follows:

1. I have reviewed Plaintiff's Memorandum To The Court Regarding Supplemental Authority Applicable To Plaintiff's Motion For Sanctions For Spoliation Of Evidence (d/e #51).

2. In that Memorandum (d/e #51), Plaintiff states that I "personally deleted the emails and wiped [my] hard drive clean numerous times during this litigation."

3. At no time during this litigation, or in my life, have I used any program to wipe my computer hard drive in order to purposely render documents or emails unrecoverable.

4. At no time have I ever stated or testified that I have used a program to wipe documents or emails from my computer hard drive.

5. The only act taken by me to delete emails was to delete emails in the conventional manner through my email program. At no time when I deleted these personal emails did I believe that these emails had any bearing or relevance to the substance of the present litigation.

FURTHER THE AFFIANT SAYETH NOT

Avis Meyer

EXHIBIT
B

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

Subscribed and sworn to me ~~this 28th~~ day of August, 2008.

Dawn M. Conrad

Notary Public

My Commission Expires:
11-18-2010

NOTARY PUBLIC STATE OF MISSOURI NOTARY SEAL

DAWN M. CONRAD
My Commission Expires
November 18, 2010
St. Louis County
Commission #06392380