Jaromin, Michelle

From: Xidis, Claire
Sent: Thursday, March 19, 2009 3:48 PM
To: 'Ehrich, Delmar R.'
Cc: 'George, Robert'; 'Jorgensen, Jay T.'; 'Jones, Tim'; 'Scott McDaniel'; 'John Elrod'; 'jtucker@rhodesokla.com'; 'Mark_Quayle@cargill.com'; 'Triplett, Eric J.'; 'Robert Sanders'; 'James Graves'; 'Deihl, Colin C.'; 'Mark_Quayle@cargill.com'; Moll, Ingrid; Baker, Fred; 'Kelly.Burch@oag.ok.gov'; 'David Page'; 'David Riggs'; 'Richard Garren'; 'Bob Nance'; 'Louis Bullock'; 'bblakemore@bullock-blakemore.com'; Ward, Liza; 'Daniel.Lennington@oag.ok.gov'; 'Trevor.Hammons@oag.ok.gov'; 'Deihl, Colin C.'; 'Jones, Bruce'; 'Herber, Daniel J.'
Subject: RE: Stratus Damages reports/depositions

Delmar -

While awaiting a response from Defendants to my March 16 email below, I've checked with the Stratus authors about their availability for depositions the first weeks in April. Below are the dates we can make them available:

Chapman - March 31
Bishop - April 6
Tourangeau - April 8
Hanemann - April 10
Morey - April 15
Kanninen - April 16

The only date that we can make Jon Krosnick available for deposition before April 16 is March 27.

Please let me know as soon as possible whether you accept these dates. If I do not hear from you by noon on Friday I will need to release these dates.

I have left you a voicemail regarding the State's outstanding request for a 29-day extension of the discovery period to take Defendants' damages experts' depositions to ensure that we have met our meet and confer obligations on this issue. Please give me a call back about this when you have a moment.

Thank you,

Claire Xidis | Attorney at Law | Motley Rice LLC
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From: Xidis, Claire
Sent: Monday, March 16, 2009 5:59 PM
To: 'Ehrich, Delmar R.'
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Deihl, Colin C.; Jones, Bruce; Herber, Daniel J.
Subject: RE: Stratus Damages reports/depositions

Delmar -

It appears from your proposal that Defendants are now requesting a list of which Stratus team members were the primary authors on which portions of the CV report. If Defendants will agree that the provision of such a list will resolve Defendants' latest claim regarding purported non-compliance with Rule 26, the State will provide Defendants with a list of which authors took lead roles on each of the chapters of the report, with the caveat that the report was a collaborative project among the authors and although an author may not have been a "lead" author on a particular chapter, that author may have provided input to that chapter. As we have explained previously, David Chapman was the project manager and can provide you with details about individual authors' roles.

In regard to your proposal that the parties agree to extend damages discovery to June 15, Defendants have already received a 29-day extension on their deadline for expert reports on damages, and will have had three and a half months to take the depositions of the State's damages experts (which have been offered in two separate sets of dates and rejected). Extending the deadline further to June 15 is unwarranted for the Stratus experts' depositions. As far as the numerous other discovery tasks Defendants want to attempt in the next 30 days, Defendants have had plenty of time to complete these tasks, and the State sees no valid justification for extending the discovery deadline two additional months for discovery matters Defendants could have pursued earlier.

In light of the Court's order issued on Friday, the situation with David Payne is different from that of the Stratus authors. Per Friday's Order, the State is entitled to additional documents from certain Defendants regarding financial discovery. Thus, it probably makes sense to extend the deadline for Mr. Payne's deposition, but June 15 is an excessive extension. Assuming that Defendants produce the complete audited and most recent balance sheets in a timely manner per the directive in the Order, the State would be willing to agree to a 30-day extension for Mr. Payne's deposition, which, if granted, would extend the deadline for completing that deposition to May 16, 2009.

In regard to the State's request for an extension for taking Defendants' damages experts' depositions (29 days from the discovery cut-off, which mirrors the 29-day extension Defendants received for filing their reports), this is something the State is clearly entitled to as the 2-week period for the State to review the reports and take depositions created by Defendants' extension is unworkable, especially in light of the fact that Defendants now to want to take the Stratus authors' depositions during the first two weeks of April. Please advise whether Defendants will agree to this extension for the deposition of the Defendants' damages experts - if we cannot reach an agreement, the State will seek such an extension from the Court. There is no reason this particular extension needs to be tied to the numerous other discovery matters Defendants raised Friday afternoon.

Finally, in regard to the discovery requests that you discuss in your March 13, 2009 letter, other than CTP's RFP #4, the other RFPs you refer to in the third paragraph of your letter ("Requests for Production 4-10") are not about the agency response cost issues you reference in the text of your letter (they request materials such as documents pertaining to eminent domain, depictions of the watershed, etc.). Perhaps this is a typographical error? If there are specific discovery responses other than CTP's RFP #4 (which you quote in your letter) that you would like the State to revisit, please specifically provide the date the discovery was served and the specific numbers of the requests.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Friday, March 13, 2009 6:06 PM
To: Xidis, Claire
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Deihl, Colin C.; Jones, Bruce; Herber, Daniel J.
Subject: RE: Stratus Damages reports/depositions

Claire--I very much appreciate your prompt responses. I look forward to hearing from you.

Del

EXHIBIT
5

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Friday, March 13, 2009 16:58
To: Ehrich, Delmar R.
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Deihl, Colin C.; Jones, Bruce; Herber, Daniel J.
Subject: RE: Stratus Damages reports/depositions

Delmar –

On Tuesday, you requested deposition dates for the Stratus experts before March 30th, and we provided those to you the following day. In any event, in light of your email, we will release the second set of proposed deposition dates for the Stratus experts and will respond to your email more fully once we have had an opportunity to consider the various aspects of your proposal.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Friday, March 13, 2009 4:50 PM
To: Xidis, Claire
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Deihl, Colin C.; Jones, Bruce; Herber, Daniel J.
Subject: RE: Stratus Damages reports/depositions

Claire – I have several times stated my belief that Rule 26(a) requires the plaintiff to disclose the opinions and bases therefor for each expert it intends to call at trial. The Stratus reports do not do so. Nor did the state make a separate Rule 26(a) disclosure for each testifying expert disclosed on January 5, 2009. I also make this practical observation: Judge Frizzell is exceedingly unlikely, in my view, to allow the plaintiff to put on seven experts to testify as to the plaintiff's alleged damages. So, from the defendants' perspective, how are we to determine what anywhere from one to seven experts might say at trial about his or her opinions as to plaintiff's alleged damages.

The state's continued refusal to supplement its disclosure furnishes the defendants the basis to move to strike the Stratus expert report.

Taking my conversation with Rick Garren last night as part of the meet and confer process, however, I suggested that we and the plaintiff might engage in a discussion aimed at resolving the issue, and suggested we might talk about which Status author wrote which portions of the report. In short, it was a practical suggestion to try to work out what disclosure might mitigate the prejudice the defendants currently are suffering. I am still willing to engage in such a discussion.

As I said in my voice mail to you last night, I understood Mr. Garren to suggest that plaintiff was seeking an additional 29 days from April 16 in which to review the reports of the defendants' damages experts and to take their depositions. What I added was the suggestion to you that defendants and plaintiff agree to take damages depositions out of time, that is, after April 16, and up to June 15.

As further context for this suggestion, let me add now what I didn't add to my voice mail last night: the remaining damages discovery includes not just the defendants' depositions of the Stratus authors and the plaintiff's depositions of the defendants' damages experts, but also additional discovery responses and other depositions. First, the defendants need dates for the deposition of David Payne, which is likely to be a multi-day affair given that he has authored a report as to each named defendant.

Second, the plaintiff also owes the defendants supplementation of its responses to the defendants' various damages interrogatories and document requests as to the government agency response cost claim. I will send you a letter today providing the specific Cargill discovery requests which require the state's supplementation. I also expect to serve a notice shortly for a Rule 30(b)(6) deposition of the state as to that claim. Depending on how that deposition goes, we may also take the depositions of some or all of the 12 agency response cost witnesses listed in the states' February 19 witness list.

Now, this is a lot to accomplish by April 16, and the defendants are certainly prepared to march through these depositions by April 16. However, it seemed to me that a more orderly approach would be to work hard at scheduling these depositions in April and May, which would accommodate the plaintiff's request for additional time to consider the defendants' damages expert report. The deadline for that report would remain March 31. If we can reach an agreement on further disclosure of the opinions of the separate Stratus authors, we would be pleased to take those depositions during the first two weeks or so of April (the key variable being, of course, the availability of the plaintiff's experts.) I suggest that we start with Dr. Chapman to get the road map, as you suggest, and follow his deposition about a week later with depositions of the plaintiff's experts produced in the order in which plaintiff expects to call them at trial.

Further, as part of this proposal, we would be pleased to provide dates for the defendants damages experts in late April or May.

If this framework is acceptable, we can also work to schedule David Payne's deposition and the deposition of the State's designee on agency response costs and the 12 factual witnesses on agency costs (if they remain necessary after the Rule 30(b)(6) deposition on agency response costs.) As to the scheduling of all these depositions, we are willing to use the first two weeks of June if that becomes necessary to accommodate schedules.

There is precedent in this case for taking some depositions out of time. I understand that David Page and James Graves have agreed that defendants will take Jack Jones' deposition on May 19th in Tulsa, and plaintiff will take Jim Chadwick's on June 17-18 in Tulsa. I understand counsel for defendants and plaintiff are working on dates for the depositions of Merritt and Cummins in June. The objective is to make one application to the Court once the parties we have agreed dates for these depositions.

I would be pleased to discuss this proposal with you, Rick or anyone else on the plaintiff's side.

Regards,

Del

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Friday, March 13, 2009 10:33
To: Ehrich, Delmar R.
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov
Subject: RE: Stratus Damages reports/depositions

Delmar -

I have received your voicemail and below email message. You misunderstand, and misstate, the State's request. By Defendants receiving an extension until March 31 to disclose their damages experts and reports, the State's time period to depose such experts was significantly shortened from 45 days to 15 days. The State simply needs the same amount of time that it had before - 45 days - to review the reports and considered materials, and complete the depositions. If the Defendants are unwilling to agree to an extension of 29 days from the close of discovery, which is April 16, for the State to take depositions of the damages experts, we need you to provide dates for Dr. Raussers' deposition on his injury report to Rick Garren as soon as possible, and the State will be filing a motion seeking this extension.

With respect to the Defendants' request for more time to take depositions of the Stratus experts, Defendants have until April 16th (although you requested deposition dates prior to March 30th, which have been provided). By April 16th, Defendants will have had three and a half months to depose the State's damages experts. Thus, the State is not willing to agree to an

extension of this deadline for the Defendants, or to any extension for the deadline for the Defendants' expert reports on damages.

With regard to deposition scheduling for the Stratus authors, I had written you on Wednesday that I would need to hear from you by the close of business yesterday as to whether Defendants accepted any of the dates we offered for the Stratus experts. I did not hear from you until after 7:00 last night, and you still have not committed to any of the proposed dates. I need to hear from you today with a final yes or no on these dates. This runaround is not productive.

It is my understanding that in your conversation with Rick Garren, you asked that the State inform you as to which authors wrote which chapters of the report. This is a different request than what you set forth in your Feb. 12 and March 10th emails. As you know, David Chapman was the project manager for Stratus for this report. He is the first person we have offered for deposition, and he will be able to explain the framework in which the report and underlying work were done. I suggest you take his deposition, and if you determine you do not need the depositions of other authors that we have offered, you can cancel those depositions.

I am available today if we need to set up a time to discuss these issues further.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Thursday, March 12, 2009 7:16 PM
To: Xidis, Claire
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov
Subject: RE: Stratus Damages reports/depositions

Claire, I spoke with Rick Garren late this afternoon regarding plaintiff's request for an extension of 29 days after defendants submit their damage expert reports on March 31 in which to complete the depositions of the defense damage experts. I followed that with a voice mail message to you suggesting that you, Rick and I discuss that request, as well as the issues about which you and I have been communicating. I am generally available tomorrow for such a call. Would you let me know what works for you?

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Wednesday, March 11, 2009 14:49
To: Ehrich, Delmar R.
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov
Subject: RE: Stratus Damages reports/depositions

Delmar -

The suggestion that the State has been trying to delay Defendants' depositions of the Stratus experts is ridiculous. On Feb. 3, 2009, having heard nothing from Defendants on this issue, the State offered dates for these experts' depositions, and Defendants never substantively responded to that offer and have not subsequently attempted, until your email yesterday, to schedule these depositions. Furthermore, after your inquiry about the authors' opinions and materials on Feb. 12, 2009, I made the State's position on that issue clear to you on Feb. 13, 2009. The fact Defendants are now claiming this impairs their deposition preparation, after sitting on this issue for almost a month, and after having the disclosure and materials since January 5, 2009, places any delay efforts squarely on Defendants' shoulders.

Because Defendants waited so long to schedule depositions, there is very little if any flexibility in the schedules of these experts and counsel between now and March 30th. Below are the dates that the State can make the Stratus authors available for deposition in Tulsa. We will make each of them available at the Riggs Abney Tulsa office, starting at 8:30 am.

Chapman - March 18
Morey - March 20
Bishop - March 23
Tourangeau - March 25
Kanninen - March 26 for
Krosnick - March 27
Hanemann - March 29

I need to know by the close of business tomorrow whether Defendants accept these dates.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Tuesday, March 10, 2009 6:51 PM
To: Xidis, Claire
Cc: George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark_Quayle@cargill.com
Subject: Stratus Damages reports/depositions

Ms. Xidis, we previously exchanged email concerning the seven authors of the Stratus damages reports. The defendants' position is that if plaintiff indeed intends to call all seven authors to testify at trial, then Rule 26(a) obligates plaintiff to disclose for each witness his opinions and bases therefor, as well as the considered materials for each such witness, appropriately marked as such. You have maintained that plaintiff has no such obligation.

It seems unlikely that each listed author will testify to exactly the same things. Moreover, if each did so, the court would likely exclude any witness after the first as cumulative. The plaintiff's position, therefore, appears designed to delay the defendants in their efforts to depose those CV authors whom the plaintiff expects to testify at trial and to complete the defendants' experts' rebuttal damages report, which is presently due March 30. Accordingly, I ask that you identify which authors plaintiff intends to call to testify, make the required Rule 26(a) disclosure as to each, and provide me with dates for their depositions on or prior to March 30.

Thank you.

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