Jaromin, Michelle

From: Ehrich, Delmar R. [DEhrich@faegre.com]

Sent: Monday, March 23, 2009 5:09 PM

To: Xidis, Claire

Cc: Jorgensen, Jay T.; George, Robert; John Elrod; John Tucker; Theresa Noble Hill; Louis Bullock; David Page; David Riggs; Woody Bassett; James Graves; rsanders@youngwilliams.com; Deihl, Colin C.; Triplett, Eric J.; Jones, Tim

Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire--

However much the plaintiff may wish it otherwise, these schedule and disclosure issues are linked.

The plaintiff's disclosures as to its damages reports are plainly deficient under Rule 26 because the plaintiff has not disclosed the opinions of each expert the plaintiff may call to testify at trial. Even the list you sent to me today of "lead authors" is insufficient because it does not disclose the opinions about which each will testify. Some chapters list as many as six "lead authors." By my count, at least five are listed as lead authors for the key last chapter on the estimation of the natural resource damages claimed by plaintiff. If plaintiff intends to call each to testify as to the whole chapter, or the entire report, any expert after the first will be excluded as duplicative. Because this outcome can be so easily foreseen, I conclude that the plaintiff, instead, wants to call each expert to testify to a portion of the report, a building block approach, if you will. The report itself, and your list, fail to disclose the specific, limited opinions to which each might, in his or her turn, testify.

In short, plaintiff is engage in a "hide the testifying expert" game.

Applicable precedent make clear that a defective Rule 26(a) expert disclosure can not be cured by offering the purported experts for their depositions.

Plaintiff's offering these seven purported testifying experts for their depositions does not cure the defective disclosure. The plaintiff is trying to put the defendants in the position of having to take seven depositions, not all of which may need to have been taken, if plaintiff had made the proper disclosures.

That the parties now find themselves trying to schedule depositions before April 16 is entirely a function of plaintiff's lack of regard for Rule 26.

In short, we will bring move the court to strike the plaintiff's damages report or, in the alternative, for a complete disclosure, followed by such depositions as may be necessary. We will seek to have the motion heard on an expedited basis prior to the first deposition (Chapman, on April 6)

We accept the offered deposition dates, therefore, for Chapman (4/6), Tourangeau (4/8), Morey (4/10), Haneman (4/15) and Kanninen (4/16).

As to Bishop and Krosnick, I ask that you find dates after April 16, if necessary. We are down to the discovery wire because plaintiff has failed to make the proper disclosures. Further, I have indicated to you that we can accommodate any work day between April1 and 16. I recognize that your experts are busy people, but it is their schedules, not mine, that cause these last two depositions to need to be scheduled out of time.

I think the Magistrate Judge will be sympathetic to our application to do so, if plaintiff refuses.

Finally, we our agreeable to plaintiff's taking out of time the depositions of the experts disclosed by defendant on March 31. We suggest a deadline of May 15, but could likely accommodate earlier dates.

I suspect the Magistrate Judge will note the lack of comity on the part of the plaintiff.

EXHIBIT

7

If you have any questions, please contact me.

Del

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Monday, March 23, 2009 13:17
To: Ehrich, Delmar R.
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

As I explained during our conversation on Friday, we must untie these issues from each other and figure out where we stand on each of them today.

Issue #1 - Free of conditions and contingencies, do Defendants agree to an extension to May 15, 2009 for the State to take the depositions of the Defendants' damages experts disclosed on March 31st? I need a simple yes or no on this by 5 pm Eastern today. After 5 pm, we will either file an opposed or unopposed motion on this issue depending on your response.

Issue #2 - Are Defendants accepting or declining the offered deposition dates as follows? I need a simple yes or no today, as I had requested a final answer days ago.

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

Issue #3 - To the extent Defendants are now requesting an extension of time to take the depositions of Krosnick and Bishop to May 15th, the State cannot make this agreement. To quote your colleague, John Elrod: "Suck it up and work on a Saturday." The State recently agreed to send a lawyer to Baton Rouge to take a Saturday deposition in order to get it done before the discovery cut-off. It is crunch time to get discovery done. I can't see any reason why you would not go ahead and take Bishop on the 11th since you will be in Tulsa anyway on the 10th. By the time we get to the discovery cut-off, Defendants will have had three and a half months to get these depos done, and multiple offers of dates. We just can't keep stringing this out. As for Krosnick, his availability is extremely limited, so if you want to depose him, I strongly recommend you take his deposition as offered on March 27th.

I am at my desk if you want to discuss this further.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Monday, March 23, 2009 12:10 PM
To: Xidis, Claire
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire, I have a brief meeting at 11. To move things along, I agree on behalf of the defendants that the plaintiff may take the depositions out of time of any damages expert disclosed on March 3. In exchange, and subject to our working out an appropriate disclosure, we will accept five of the seven deposition dates offered, and the other

two (Bishop and Krosnick) if taken, may be taken out of time. (We accept Chapman on the 6th.) We'd like until April 30 to take the latter two depositions. Defendants are agreeable to plaintiff's completing the damages depositions by May 15.

Let's talk further about the list, Claire. It is a good start, but I there is still no representation about which witness will testify as to what if called at trial. An example: are you really going to call five witnesses at trial as to Chapter 7. If so, they are duplicative.

I can likely call you in about 30 minutes.

Del

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Monday, March 23, 2009 10:30
To: Ehrich, Delmar R.
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

I am running late too. 11:00 Central would be better for me.

During our conversation on Friday evening, you agreed that you would let me know by noon EST today whether Defendants agree to the 29-day extension for the depositions of Defendants' damages experts that are disclosed on March 31st, and also whether Defendants accept the most recent set of deposition dates that have been offered for the Stratus authors. Please let me know Defendants' position on these issues either via email or when we talk at 11:00 Central.

In an effort to help the parties get past our current disagreement, I am attaching a chart which lists the "lead authors" for the various sections of the Stratus report.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Monday, March 23, 2009 11:02 AM
To: Xidis, Claire
Subject: Re: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire, I'm running late. May I call you around 10:30 CT?

From: Xidis, Claire <cxidis@motleyrice.com>
To: Ehrich, Delmar R.
Cc: Jorgensen, Jay T. <jjorgensen@sidley.com>; George, Robert <Robert.George@tyson.com>; John Elrod <jelrod@cwlaw.com>; rsanders@youngwilliams.com <rsanders@youngwilliams.com>; Theresa Noble Hill <THill@rhodesokla.com>; Walker, Todd P.; Dolan, Christopher H.; Scott McDaniel <smcdaniel@mhla-law.com>; James Graves <jgraves@bassettlawfirm.com>; Louis Bullock <lbullock@bullock-blakemore.com>; Richard Garren <RGarren@riggsabney.com>; Mark_Quayle@cargill.com <Mark_Quayle@cargill.com>; Baker, Fred <fbaker@motleyrice.com>; Kelly.Burch@oag.ok.gov <Kelly.Burch@oag.ok.gov>; Moll, Ingrid <imoll@motleyrice.com>; David Page <dpage@riggsabney.com>; Richard Garren <RGarren@riggsabney.com>; Louis Bullock <lbullock@bullock-blakemore.com>; bblakemore@bullock-blakemore.com <bblakemore@bullock-blakemore.com>; Ward, Liza <lward@motleyrice.com>; David Riggs <DRiggs@riggsabney.com>;

Daniel.Lennington@oag.ok.gov <Daniel.Lennington@oag.ok.gov>; Trevor Hammons <thammons@oag.state.ok.us>
Sent: Fri Mar 20 17:37:23 2009
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Delmar -

What is Defendants' position on the third set of deposition dates we have offered for the Stratus authors? I asked that you let me know today whether Defendants accepted these dates but have not heard from you on this issue. Obviously, there are logistics involved in bringing these witnesses to Tulsa for their depositions and they have very busy schedules. The longer you wait to nail down these dates the more difficult it becomes to make these witnesses available.

I did not get a copy of the 30(b)(6) notice you reference below. Could you please make sure I am on your service list and send me a copy.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Friday, March 20, 2009 6:09 PM
To: Xidis, Claire
Cc: Jorgensen, Jay T.; George, Robert; John Elrod; rsanders@youngwilliams.com; Theresa Noble Hill; Walker, Todd P.; Dolan, Christopher H.; Scott McDaniel; James Graves; Louis Bullock; Richard Garren; Mark_Quayle@cargill.com
Subject: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

Claire--

In your March 16, 2009 email, you request clarification as to the Cargill Turkey Production requests for production cited in the third paragraph of my March 13, 2009 communication to you and Mr. Garren. As you surmised, there is a typographical error in this paragraph. The correct citation is to Cargill Turkey Production, LLC's (CTP's) Requests for Production Nos. 29, 32, 37, 38, 39, 44, and 48, served on Plaintiffs on August 22, 2006 in CTP's Amended First Set of Interrogatories and Requests for Production. The narrative description of each request as stated the same paragraph of my March 13, 2009 letter is correct. Moreover, these requests for production are merely examples of areas where Plaintiffs need to supplement their responses in light of their damages/response costs allegations. The supplementation of the same information is warranted under the umbrella CTP Request for Production No. 4, as quoted in my letter, which specifically addresses damages.

In addition, I note that supplementation as to agency response costs is also warranted in response to Cargill, Inc.'s Interrogatory No. 10, which requests: "[S]tate with particularity the factual and legal basis for the allegation contained in Counts 1 and 2 of Your Amended Complaint that any Cargill entity violated CERCLA and identify every witness upon whom you will rely to establish each fact." Since the factual basis for Plaintiffs' CERCLA claim includes their alleged response costs, supplementation of this interrogatory is necessary to

disclose those response cost facts.

I will also note that Bruce Jones, in a letter dated October 17, 2008, to David Page and Richard Garren made a general demand that plaintiff supplement its earlier discovery responses, clearly encompassing the requests listed above. The plaintiff made no supplementation.

Accordingly, I renew my demand that the state supplement its responses to the discovery requests listed above relative to the state's claim for agency response costs. Please provide all supplemental responses, including responsive documents, no later than April 1.

Today we have served a Rule 30(b)(6) deposition notice on the state relative to the state's agency response cost claim. The notice is returnable on April 7.

Contact me if you have any comments or questions.

Del Ehrich

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