

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

Patricia Surbella, *et al.*,

Plaintiffs,

v.

Mark Foley, *et al.*,

Defendants.

Case No. 2:05cv758

Judge Michael H. Watson

**OPINION AND ORDER**

The Court has for consideration Plaintiffs' August 21, 2006 Objections (Doc. 54) to the August 10, 2006 Magistrate Judge's Order (hereinafter "Order") (Doc. 53). Defendant filed a Memorandum Contra on September 5, 2006 (Doc. 55).

This matter is now ripe for review. For the reasons set forth below, the Court **ADOPTS** the Order.

**I. STANDARD OF REVIEW**

The district court has the authority to refer certain pre-trial matters to a magistrate judge for resolution. 28 U.S.C. § 636(b); *Callier v. Gray*, 167 F.3d 977, 980 (6th Cir. 1999). The district court has appellate jurisdiction over any decisions the magistrate judge issues pursuant to such a referral. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72. The standard of review that is applied by the district court depends upon the nature of the matter considered by the magistrate judge. If the magistrate judge issues a non-dispositive pretrial order, the district court should defer to that order unless it is "found to be clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *Massey v. City of Fermdale*, 7 F.3d 506, 509 (6th Cir. 1993).

“A judicial finding is deemed to be clearly erroneous when it leaves the reviewing court ‘with a definite and firm conviction that a mistake has been committed.’” *Heights Cmty. Cong. V. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985), cited in *Tri-Star Airlines, Inc. v. Willis Careen Corp. of Los Angeles*, 75 F. Supp. 2d 835 (W.D. Tenn. 1999). “Under the clearly erroneous standard, a court reviewing a magistrate judge’s order should not ask whether the finding is the best or only conclusion that can be drawn from the evidence.” *Id.* “Further, this standard does not permit the reviewing court to substitute its own conclusion for that of the magistrate judge.” *Id.* “Rather, the clearly erroneous standard only requires the reviewing court to determine if there is any evidence to support the magistrate judge’s finding and that the finding was reasonable.” *Id.*

## II. ANALYSIS

In the instant case, Plaintiffs object to the Magistrate Judge’s findings that

- (1) Defendants were not under a duty to disclose the identity of the APPL software in timely filed mandatory Fed. R. Civ. P. 26(a)(1) disclosures;
- (2) Plaintiffs did not make a diligent effort to identify an expert before March 1, 2006;
- (3) Plaintiffs could have met the March 1, 2006 expert disclosure deadline, and;

- (4) a proper request for the APPL software had not yet been made by the Plaintiffs at the time the Order was entered.

The Court will address each objection in turn.

**A. The Magistrate Judge's Finding That Defendants Were Not Under a Duty to Disclose the Identity of The APPL Software in Timely-Filed Mandatory Fed. R. Civ. P. 26(a)(1) Disclosures Was Not Clearly Erroneous Or Contrary to The Law.**

The parties conducted their Rule 26(f) conference on November 29, 2005(hereinafter "Rule 26(f) Conference") (Doc. 53). Within fourteen days thereafter, each party was required to disclose to the other

[a] copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody or control of the party and that the disclosing party *may* use in support of its claims or defenses . . .

Fed. R. Civ. P. 26(a); Fed. R. Civ. P. 26(a)(1)(B) (emphasis added). Plaintiffs argue, within fourteen days after the Rule 26(f) conference, Defendants "clearly intend[ed] to use APPL in support of [its] defense to Count One of the Complaint." Therefore, Plaintiffs contend such knowledge by Defendants obligated them to disclose the APPL software during that time.

In the August 10, 2006 Order, the Magistrate Judge conceded the Rule 26(f) Conference "triggered the obligation to provide Rule 26(a)(1) disclosures." Thus, Defendants were under a duty to comply with Fed. R. Civ. P. 26(a) and (a)(1)(B). Nonetheless, the Magistrate Judge, in concluding the disclosures were not required, found "it is not clear to the Court that [D]efendants would use the software at trial as an exhibit." Additionally, the Magistrate Judge determined, "[D]efendants may not have decided what documents to be used at trial." Plaintiffs fail to provide any evidence to

contradict the Magistrate Judge's findings. Plaintiffs do not support their assertion that Defendants, within fourteen days of the Rule 26(f) Conference, clearly intended to use the APPL software as a defense. Further, nothing in the record supports Plaintiffs' assertions.

Accordingly, the Magistrate Judge's finding is not clearly erroneous or contrary to the law and Plaintiffs' objection is **DENIED**.

**I. The Magistrate Judge's Conclusion of Law that Plaintiffs Did Not Make a Diligent Effort to Identify an Expert Prior to March 1, 2006 and the Magistrate Judge's Finding that Plaintiffs Could Have Met the March 1, 2006 Expert Disclosure Deadline Was Not Clearly Erroneous or Contrary to the Law.**

A "party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghan v. Wal-Mart Stores*, 904 F. Supp. 1218, 1221 (D. Kan. 1995). Of course, "[c]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Dilmer Oil Co. v. Federated Mut. Ins. Co.*, 986 F. Supp. 959, 980 (D.S.C. 1997).

In the August 10, 2006 Order, the Magistrate Judge found

[d]ue diligence would have consisted of making a document request for the software promptly after the Rule 26(f) Conference; asking the Court to compel Rule 26(a)(1) disclosures from Defendants if Plaintiffs believed that such disclosures would result in their obtaining a copy of the software; or filing a motion for an extension of the expert disclosure date well prior to March 1, 2006 in order to allow Plaintiffs to make a document request, obtain the software, and obtain the expert analysis which would then be disclosed in their expert reports. Not only did [Plaintiffs] do none of these things, they delayed in filing any discovery request directed to the software until June 20, 2006, and any motion to extend the deadline until July 17, 2006, without any explanation of why these delays occurred.

Currently, Plaintiffs argue the Magistrate Judge's conclusion was clearly erroneous because Plaintiffs could not have been more diligent in attempting to meet

the March 1, 2006 deadline. However, Plaintiffs fail to prove to the Court any effort, let alone a diligent one, in identifying an expert witness by March 1, 2006. Such cursory arguments do not provide sufficient justification to establish the August 10, 2006 Order was clearly erroneous or contrary to the law. Therefore, as Plaintiffs did not exercise due diligence, the Magistrate Judge's finding that Plaintiffs could have met the March 1, 2006 expert disclosure deadline was not clearly erroneous or contrary to the law.

Accordingly, Plaintiffs' objection is **DENIED**.

**II. The Magistrate Judge's Finding that a Proper Request for the APPL Software Had Not Been Made by Plaintiffs at the Time the Order Was Entered Was Not Clearly Erroneous or Contrary to the Law.**

Plaintiffs argue that since Defendants, in response to their June 20, 2006 general discovery requests, provided a copy of the APPL software, the Magistrate's finding that a proper request had not been made was erroneous. Upon consideration, the Court concludes this conclusion is not clearly erroneous as there is evidence to support the finding, which was reasonable.

In discussing whether Plaintiffs had properly requested the APPL software, the Magistrate Judge states, "the Court is not persuaded that plaintiffs have yet made a proper request for the software. It seems unusual that if the software plays a central role in this case, plaintiffs' document request would not ask for the software specifically other than in a generic request for trial exhibits." The fact that Defendants provided the APPL software does not result in the conclusion a proper request was made for it. Instead, as discussed by the Magistrate Judge, Plaintiffs made *general* discovery requests. This is insufficient to conclude Plaintiffs made a specific request for the APPL software.

Moreover, even if the Magistrate Judge's conclusion is erroneous, it fails to alter the conclusion that the Magistrate Judge did not err in denying Plaintiffs request to extend the expert disclosure deadline. As stated by the Magistrate Judge, "the fact that Plaintiffs may have belatedly requested production of the software on June 20, 2006 is irrelevant to the question of whether they exercised the appropriate measure of diligence in meeting the March 1, 2006 deadline." Instead, the test is whether Plaintiffs can show that despite due diligence they could not have reasonably met the scheduled deadline of March 1, 2006. *Deghan v. Wal-Mart Stores*, 904 F. Supp. 1218, 1221 (D. Kan. 1995). As previously discussed, Plaintiffs fail to meet this test. Accordingly, the Magistrate Judge's holding was not clearly erroneous or contrary to the law and Plaintiffs objection is **DENIED**.

### **III. CONCLUSION**

For the reasons set forth above, the Court concludes no justification exists for reversing the August 10, 2006 Order. Plaintiffs fail to establish

- (1) Defendants clearly intended to use the APPL software to support their defense;
- (2) Plaintiffs made a diligent effort to identify an expert before March 1, 2006;  
and
- (3) Plaintiffs could not have met the March 1, 2006 expert disclosure deadline.

Accordingly, the Court hereby **ADOPTS** the Magistrate Judge's August 10, 2006 Order (Doc. 54) and the July 17, 2006 Motion of Plaintiffs for Extension of Time (Doc. 43) is hereby **DENIED**.

**IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "Michael H. Watson", written in a cursive style.

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**MICHAEL H. WATSON, JUDGE  
UNITED STATES DISTRICT COURT**