

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRAINSTORM INTERACTIVE, INC.,

Plaintiff,

v.

SCHOOL SPECIALTY, INC.,

Defendant.

ORDER

14-cv-50-wmc

The court is in receipt of plaintiff Brainstorm Interactive, Inc.'s letter to the court and motion to clarify order (dkt. #88), which the court will grant in part and deny in part.

The court will grant plaintiff's request that defendant make its best effort to allocate its reasonable attorneys' fees and costs incurred to the following categories: (1) motion to strike; (2) general expert deposition preparation and costs; and (3) preparation and costs attributable to specific experts. No later than seven days after the electronic filing of this information, plaintiff may modify its decision to pay the fees and costs associated with all or specific experts' fees and costs, and limit its expert list accordingly.

The court will deny plaintiff's request that defendant "represent whether or not it would have taken the [expert's] deposition even if there had been [] expert reports." (Pl.'s Mot. (dkt. #88) 2.) This request, apparently inspired by a comment in the court's opinion granting defendant's relief from plaintiff's failure to comply fully with Rule 26(a)(2), misses the full impact of its failure. Not only has defendant been denied an opportunity to avoid deposition costs, but also to take depositions targeted solely on the specific opinions and their basis as disclosed in advance with respect to their expert. In

any event, plaintiff is neither entitled to require defendant to speculate as to its conduct had plaintiff met its obligations, nor to shift fees and costs imposed as a sanction back on defendant. Plaintiff took on the risk of those costs (or alternatively, striking of untimely disclosed experts) when it chose to ignore the straightforward requirements of Rule 26(a).

Accordingly,

ORDER

IT IS ORDERED that plaintiff Brainstorm Interactive Inc.'s letter to the court and motion to clarify order (dkt. #88) is GRANTED IN PART AND DENIED IN PART as described above.

Entered this 19th day of November, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge