

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

UNITED STARS INDUSTRIES, INC.,

Plaintiff and Counterclaim Plaintiff,

v.

PLASTECH ENGINEERED PRODUCTS, INC.,

Defendant and Counterclaim Defendant.

ORDER

06-C-349-C

Plaintiff has filed two discovery-based motions, the first to compel more complete disclosures (dkt. 44), the second to preclude defendant from using expert witnesses at trial (dkt. 46). As for the motion to compel, I am requiring an in camera submission of the withheld document and I am denying the rest of the motion as moot. I am declining to grant the second motion in the fashion in which plaintiff has framed it, but I am providing guidance to the parties about what needs to happen next if a dispute remains after the witness is deposed.

In its motion to compel, plaintiff seeks all documents responsive to its second set of requests for production of documents, and all documents being withheld on purported grounds of privilege. Defendant responds that, although it views the requested documents as irrelevant and inadmissible, it has provided them anyway. *See* Dkt. 45 at 2-3. Therefore, there is nothing left to order produced.

As for the disputed privilege log, only one document has been withheld. Plaintiff claims that the log's description of this document does not meet the requirements of Rule 26(b)(5). Although I agree with plaintiff that the headline-style description in the privilege log is not very

helpful, I predict that any additional descriptors will be equally unenlightening and equally subject to challenge. So, the court will cut to the chase: Not later than April 4, 2007, defendant must submit a copy of the withheld document to the court *ex parte* for *in camera* review.

In its second motion, plaintiff seeks to exclude any testimony from Maria Haughton, whom defendant disclosed as a possible “fact witness” at trial who will provide “opinion testimony under [Rule] 701 or . . . expert testimony under [Rule] 702.” Plaintiff views this announcement as an attempt to circumvent the expert disclosure rules under Rule 26(a)(2). Plaintiff further observes that under any measure, disclosure of an expert witness is untimely in this case. Defendant responds that plaintiff’s motion to exclude is premature: Haughton’s deposition won’t even occur until March 29, 2007, and it may be that she offers no usable opinions, or that whatever opinions she offers would fall under Rule 701, not Rule 702.

In a brief proffer, defendant reports that a critical question in this lawsuit is the calculation of the weight of the goods at issue, with plaintiff’s case founded on its claim that the calculated weight of the goods was 0.5918 pounds per foot, while defendant maintains the calculated weight was 0.5291 pounds per foot. Defendant anticipates

that Ms. Haughton will testify regarding how the weight of these goods is calculated and what that weight is. Such testimony may well be a matter of simple geometry and not “opinion” or “expertise” within the meaning of Fed. R. Civ. P. 26(a)(1).

Brief in Opposition, Dkt. 47 at 2.

This may turn out to be a dispute over nothing, but the court will provide some guidance: It is too late for either side to disclose an expert witness. At the August 15, 2006 telephonic

preliminary pretrial conference, the parties agreed to work out expert disclosure deadlines between themselves. In light of this, the court set no deadlines, noting simply that disclosure of experts was to be decided by the parties. Dkt. 19 at 2. But thereafter, the parties never agreed on dates. As a result, the 90 day default deadline set in Rule 26(a)(2)(C) applies, and experts had to be named not later than January 30, 2007. Therefore, Haughton cannot offer any expert opinions under Rule 702.

So the operative question is whether Haughton's testimony is governed by Rule 701 or 702. As defendant observes, the court cannot answer this question until it has reviewed Haughton's testimony. If such a review becomes necessary, the court will be guided by the Advisory Committee Notes accompanying the 2000 amendments to Rule 701, as well as *United States v. Conn*, 297 F.3d 548 (7th Cir. 2002).

Assuming that Haughton's deposition goes forward as scheduled, then plaintiff may have until April 5, 2007 within which to file a written motion to strike any portions of her testimony based on Rules 701 and 702. Defendant may have until April 11 to respond, with any reply due by April 13, 2007. Same-day service of all submissions is required.

Each side will bear its own costs on these motions.

Entered this 28th day of March, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge