UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

AUBURN UNIVERSITY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 3:09-cv-694-MEF**
	§	
INTERNATIONAL BUSINESS MACHINES CORPORATION,	§	
	§	
Defendant.	§	
	§	

IBM'S MOTION TO COMPEL AUBURN TO COMPLY WITH RULE 26(F) REPORT REGARDING THE DEPOSITION OF DR. F. JOEL FERGUSON

IBM seeks an order from the Court directing Auburn to make Auburn's expert witness Dr. F. Joel Ferguson available for an additional day of deposition testimony so that IBM has an adequate opportunity to examine Dr. Ferguson regarding the three distinct topics -- infringement, inventorship, and validity -- on which he intends to provide technical expert opinions at trial. IBM's request is pursuant to the parties' agreement nearly two years ago in the Rule 26(f) Report that expert witnesses would be made available for one deposition day "per topic" in their expert reports.

In accordance with Federal Rule of Civil Procedure 26(f) and the Court's Order dated September 29, 2009 (Docket No. 34), the parties jointly filed their Report of the Parties' Planning Meeting on October 20, 2009 ("Rule 26(f) Report," Docket No. 41). The Rule 26(f) Report specifically provides: "The parties agree that expert witnesses may be deposed for up to 7 hours ***per topic*** per expert report." *See* Docket No. 41 at 8 (emphasis added).

On August 26, 2011, Auburn served the Initial Expert Report of Dr. F. Joel Ferguson, which contains Dr. Ferguson's opinions on two different topics: (1) infringement of the Auburn

patents; and (2) inventorship of the IBM patents.[1] Subsequently, Auburn has confirmed that Dr. Ferguson will provide on September 23, 2011, another report containing additional opinions on a third, different topic: (3) the validity of the Auburn patents. Dr. Ferguson therefore is rendering expert opinions in this case on ***three topics*** over two reports.

The parties are currently engaged in scheduling expert depositions. IBM, relying upon the explicit language of the Rule 26(f) Report that "expert witnesses may be deposed for up to 7 hours per topic per expert report," has requested that Dr. Ferguson be made available for three days of deposition testimony to cover the three topics on which he will offer opinions. Auburn has refused, and has offered to make Dr. Ferguson available for only two days. The parties held a telephonic meet-and-confer on this issue on September 15, 2011, during which Auburn confirmed that it would not make Dr. Ferguson available for a third deposition day despite the express language of the Rule 26(f) Report.[2]

IBM therefore seeks an order from the Court compelling Auburn to make Dr. Ferguson available for a third day of deposition testimony.

As the Court's Amended Scheduling Order (Docket No. 207) directs that expert depositions be completed by October 14, 2011, IBM respectfully requests that the Court give this Motion expedited consideration.

[1] Dr. Ferguson's "Initial Expert Report" is over 80 pages long, and he attaches 15 supporting exhibits totaling another 271 pages.

[2] Although the Rule 26(f) Report has been on file for almost two years, since October 20, 2009, Auburn now claims that it did not consent to the language regarding the parties' agreement to expert depositions "for up to 7 hours per topic per expert report." To the contrary, Auburn's counsel G. Lane Knight expressly apologized to IBM's counsel for initially filing an incorrect version of the Rule 26(f) Report that did not include this language (and other changes made by IBM), and then Mr. Knight gave his authority in writing for the filing of the Rule 26(f) Report at Docket No. 41. *See* attached correspondence at Exhibit A.

DATED this 15th day of September, 2011

/s/ Brent P. Ray
John A. Marlott (admitted *pro hac vice*)
Illinois State Bar No. 6230613
jamarlott@jonesday.com
Brent P. Ray (admitted *pro hac vice*)
Illinois State Bar No. 6291911
bpray@jonesday.com
JONES DAY
77 West Wacker Drive
Chicago, Illinois 60601-1692
Telephone: 312-782-3939
Facsimile: 312-782-8585

Kenneth R. Adamo (admitted *pro hac vice*)
Illinois State Bar No. 0010405
kradamo@kirkland.com
KIRKLAND & ELLIS LLP
300 N. La Salle Dr.
Chicago, Illinois 60654-3406
Telephone: 312-862-2671
Facsimile: 312-862-2200

Mike Brock
Alabama State Bar No. 5280-b61r
mbrock@cov.com
F. Chadwick Morriss
Alabama State Bar No. 8504-s75f
cmorriss@cov.com
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: 202-662-6000
Facsimile: 202-662-6291

Attorneys for Defendant, IBM Corporation

CERTIFICATE OF SERVICE

The undersigned certifies that on September 15, 2011, I filed the foregoing with the Court's CM/ECF system, causing this filing to be served electronically on all parties registered with the Court's electronic filing system.

/s/ Brent P. Ray

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