

# In the United States Court of Federal Claims

No. 15-1549C

(E-Filed: August 4, 2020)

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UNIVERSITY OF SOUTH FLORIDA,  
BOARD OF TRUSTEES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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## ORDER

On July 13, 2020, plaintiff filed a motion to compel the deposition of defendant's damages expert witness, Mr. Jeffrey Klenk. See ECF No. 154. Therein, plaintiff argues that it should be permitted, pursuant to Rules 26(b)(4)(A) and 37(a) of the Rules of the United States Court of Federal Claims (RCFC), to take the deposition of defendant's damages expert, Mr. Klenk, prior to serving its responsive expert report. See id. at 3. Defendant filed a response in opposition on July 27, 2020, ECF No. 157, and plaintiff filed its reply on July 30, 2020, ECF No. 158. For the following reasons, plaintiff's motion to compel the deposition of Mr. Jeffrey Klenk, ECF No. 154, is **GRANTED**.

In its motion, plaintiff argues that "it is both routine and good trial practice to take the deposition of an expert following submission of his or her expert report, so as to best prepare a responsive report." ECF No. 154 at 3. Therefore, after it received defendant's expert's report, on June 23, 2020, plaintiff noticed an in-person deposition of Mr. Klenk for July 8, 2020. Id. at 1. At that point, plaintiff asserts, defendant notified plaintiff that it was awaiting plaintiff's expert's reply report, which was due on July 31, 2020, and would not make Mr. Klenk available until after all reports were submitted because it expected that a sur-reply report may be necessary. See id. at 2. Plaintiff opened the deposition "pursuant to Notice" on July 8 because "no proper basis for declining the deposition of the government's expert had been advanced by the government." Id. at 3.

Plaintiff argues that, pursuant to RCFC 26(b)(4)(A) and RCFC 30(a), “there is no basis for deferring or delaying the deposition of [Mr.] Klenk” because Mr. Klenk will not be providing any further reports under the current discovery schedule, and “following submission of the expert report, and absent concerns of undue burden ‘a party may, by oral questions, depose any person’ including the expert.” Id. at 3-6 (quoting RCFC 30(a)(1)). Further, plaintiff argues, defendant’s attempt to delay the deposition on the basis that Mr. Klenk may need to provide a sur-reply report is unavailing because no such report is provided for in the current schedule and defendant has not made any motion to that end. Id. at 4.

Defendant responds that it has “agreed to produce Mr. Klenk for deposition during the expert discovery period” and, therefore, plaintiff’s motion is moot. ECF No. 157 at 3, 10. Defendant alleges that, contrary to plaintiff’s assertions, it “repeatedly informed [plaintiff] that neither it nor Mr. Klenk was available on July 8,” but offered to provide his availability later in the expert discovery period. Id. at 7-8. Further, defendant asserts, it “raised the ‘distinct likelihood’ that Mr. Klenk would need to submit a sur-reply” given defendant’s position that plaintiff’s expert report is “riddled with legal and factual deficiencies.” Id. at 6-8. Defendant therefore proposed that Mr. Klenk be deposed by video deposition on July 30 and the reply report deadline be moved to August 31, “provided that [plaintiff] would not seek to depose Mr. Klenk again if the Court allowed the sur-reply.” Id. at 9 (emphasis in original). Defendant alleges that plaintiff “rejected the Government’s proposed compromise . . . [and] flatly refused to consider a video deposition.” Id.

Defendant argues that plaintiff’s position is “untenable,” while its position is “consistent with the court’s prior ruling with respect to Dr. Hyman.” Id. at 9, 11 (citing ECF No. 150, the court’s order regarding the deposition of defendant’s technical expert). To depose Mr. Klenk prior to all expert reports being submitted, defendant asserts, is a significant burden and expense in contravention of RCFC 1. Id. at 14. “Requiring the Government to prepare its witness for deposition while simultaneously preparing expert reports is disruptive, wasteful, and not contemplated by the schedule.” Id. at 12. Defendant adds that plaintiff’s purported “good litigation practice” of deposing an expert before preparing a reply report, is not a “routine practice” and none of plaintiff’s “cited law [] support[s] its theory.” Id. at 12-13.

Plaintiff replies that “once an expert has submitted an expert report, and has no other reports scheduled or contemplated, the party receiving that expert report may take that expert’s deposition” pursuant to RCFC 26(b)(4)(A). ECF No. 158 at 1. Given that there is no sur-reply report provided for on the schedule in this case, plaintiff argues that “expert reports to come, that are not provided for, cannot serve as a basis for failing to respond to a properly noticed deposition.” Id. at 2. Plaintiff further asserts that it is entitled to know why Mr. Klenk “chose NOT to respond to [plaintiff’s expert’s] selected

model of damages” before it “explains all the reasons why [Mr.] Klenk’s opinion is both non-responsive and deficient.” Id. at 4.

The court agrees with plaintiff that it is entitled to depose Mr. Klenk prior to submitting its expert’s reply report. RCFC 26(b)(4)(A) only limits the timing of an expert deposition to “after the report is provided.” RCFC 26(b)(4)(A). Unlike the situation with Dr. Hyman, here, defendant’s argument that it may move for leave to file a sur-reply report, thus producing multiple reports and requiring the deposition to be postponed, is contemplated but not currently included in the discovery schedule. The court will not prevent plaintiff from deposing defendant’s expert on the basis of an act that is contemplated but not scheduled. The court reminds the parties, however, that RCFC 30(a)(2)(B) limits depositions to one per witness without leave of the court, and RCFC 30(d)(2) explicitly provides for “one day of seven hours” to depose each witness. Thus, if plaintiff chooses to depose Mr. Klenk prior to filing its expert reply report, it will not be permitted to notice another deposition without leave of court and a showing of good cause beyond the act of defendant filing a sur-reply, should that act occur.

The court also agrees with defendant that a video deposition is warranted should defendant’s counsel and expert so desire. Defendant argues that the coronavirus pandemic makes a remote deposition “the safest way to proceed.” ECF No. 157 at 14. The court will not order defendant to produce its expert witness in a manner that makes counsel or the witness unsafe during a public health emergency.

Accordingly, plaintiff’s motion to compel the deposition of defendant’s damages expert witness, Mr. Jeffrey Klenk, ECF No. 154, is **GRANTED**.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith  
PATRICIA E. CAMPBELL-SMITH  
Judge