IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CALLAWAY GOLF COMPANY, Plaintiff, v. DUNLOP SLAZENGER GROUP AMERICAS, INC., d/b/a MAXFLI, Defendant.	:	Civil Action No. 01-669-### (MPT)

ORDER

At Wilmington, this **14th** day of **August, 2002.**

This discovery dispute arose when Callaway advised Dunlop that it was withdrawing Dr. Mehta as its expert and its intent to use Dr. Smits as its testifying expert. This information was conveyed to Dunlop on July 22, 2002, a little over a week before the scheduled deposition of Dr. Mehta. As a result, Callaway recognized that it was required to provide an expert report from Dr. Smits and assumed that the deposition of Dr. Mehta would not proceed. Dunlop objects to this "substitution" on the basis that the identification and exchange of expert reports has long passed, that no expert report has been forthcoming from Dr. Smits and that such conduct is prejudicial to the defense. Dunlop also argues that it has the right to depose Dr. Mehta and inquire into clearly relevant and discoverable information. Callaway counters that since it recognizes its obligation to provide an expert report and will do so, there is no prejudice to Dunlop. Further, relying on Fed.R.Civ.P. 26(b)(4)(B) and case law interpreting this rule, Callaway argues that experts who are initially designated as testifying experts, but who are later withdrawn, may not be

deposed absent a showing of exceptional circumstances. *D.I. 180*.

During a telephonic conference on July 29, 2002, this matter (along with others) was addressed, with counsel arguing their respective positions. Pursuant to the court's instructions during the conference, counsel provided thereafter via fax any additional case law upon which they rely.[1]

The issue, therefore, is whether under the applicable civil rules of discovery may a party withdraw an expert who had been previously identified as a testifying expert and thereby, prevent the opposing party from deposing that expert? In essence, what Callaway is contending is that Dr. Mehta was converted from a Rule 26(b)(4)(A) expert (an expert to be relied upon at trial) to a Rule 26(b)(4)(B) expert (an expert specially retained, but not expected to testify at trial) and as a result, no discovery may be obtained from him unless there exists exceptional circumstances.[2]

As pointed out in the parties' submissions, the relationship between Rule 26(b)(4)(A) and (B) has been addressed in a number of cases. In *House v. Combined Ins. Co of Amer., 168 F.R.D. 236 (N.D. Iowa 1996)*, the issue was extensively discussed. In that matter, after examining the plaintiff, defendant's designated rebuttal expert, who was a physician, prepared a report and his deposition was noticed. In additional, plaintiff's counsel filed a motion to compel production of his report. Defendant opposed on the basis that he had decided not to call the doctor at trial. Defendant had not formally withdrawn the doctor as an expert and had included him in defendant's witness list in the pretrial

[1]Interestingly, counsel cited the same cases.

[2]The other provision under rule 26(b)(4)(B), that is, as provided under Rule 35, is not applicable to this situation.

order. In its analysis, the *House* court identified four interests weighing against allowing an opposing party to depose or call at trial a consultant, non-testifying expert witness.[3] In the opinion, the court analyzed the exceptional circumstances, balancing and entitlement standards, noting that the consulted-but-never-designated expert properly falls under the work product doctrine that protects matters prepared in anticipation of litigation. However, that court found that the "practical effect of a Rule 26 designation of an expert is to make an expert available for deposition by the opposing party," which enables preservation of the expert's testimony should the expert later become unavailable or may serve for impeachment purposes. *Id. at 245.* As a result, the court determined that the Rule 26 designation waived the "free consultation" privilege under subsection (b)(4)(B), even if the designation was subsequently withdrawn because the designation under subsection (b)(4)(A) eliminates or removes the "exceptional circumstances" category. *Id.* In reaching its conclusion, the court also relied on the nature and circumstances of the particular expert testimony sought, finding that by requiring a medical examination by a designated expert created a reliance or reasonable expectation that such an expert would be available. In applying the balancing concerns, the court determined that under that standard as well, the deposition was appropriate.[4] An influence on the court's decision was defendant's failure to appropriately and adequately prepare its expert testimony before the designation cut-off

[3]Those concerns include: 1) the desire to allow counsel to obtain necessary expert advice without fear that the adversary may obtain such information; 2) the unfairness of allowing an opposing party to reap the benefits from another party's efforts and expense; 3) the fear of discouraging experts from serving as consultants if their testimony could be compelled; and 4) the risk of prejudice because of the prior retention of an expert by an opposing party. *Id. at 241.*

[4]In the balancing analysis, the court relied upon the following considerations: 1) the interest in presenting relevant, probative information to the jury; 2) the court's interest in a proper resolution of the issues; and 3) plaintiff's reasonable reliance on being able to use the expert because she had been ask to consent to an examination.

date. Regarding any possible prejudice to defendant before the jury that the expert had been original hired by the defendant, the court felt that issue could be reduced or eliminated by excluding such evidence. As a result, plaintiff's counsel was allowed to depose defendant's expert. *Id. at 248.*

In the earlier case of *Ross v. Burlington N.R. Co., 136 F.R.D. 638 (N.D. Ill. 1991)*, the plaintiff had designated his expert and revealed the subject matter of his testimony. After the plaintiff withdrew the designation, the defendant sought to depose the expert. In denying defendant's motion to compel, the court held, "[s]ince plaintiff changed his mind before any expert testimony was given in this case, the witness never actually acted as a testifying expert witness." However, the *Ross* court did not address the more thornier issue of the relationship between the two subsections of Rule 26 *after* the redesignated expert's facts and opinions have been disclosed.

The *Dayton-Phoenix Group v. General Motors Corp., 1997 WL 1764760 (S.D. Ohio 1997)* addressed the defendant's motion for a protective order to prevent the plaintiff from deposing an expert that defendant had designated and then subsequently withdrew and the dueling provisions of Rule 26(b)(4). Defendant argued that the provisions of 26(b)(4)(B) were applicable, while the plaintiff contended that since the defendant had designed the expert, Rule 26(b)(4)(A) applied. The *Dayton-Phoenix Group* court considered the differing results of both *House* and *Ross* and relied on the following to support its conclusion: the Advisory Committee Notes to Rule 26(b)(4)(B) limit discovery to trial witnesses; the primary purpose of Rule 26(b)(4)(B) is to allow a party to prepare adequately for cross-examination at trial, and its purpose is to promote fairness, which would not be accomplished by allowing access to the other's party's trial preparation. As

a result, in the absence of exceptional circumstances, the court granted defendant's motion in part, thereby preventing plaintiff from discovering facts acquired and opinions held by defendant's expert as a result of being retained in anticipation of the litigation. However, in an added wrinkle, the court recognized that a party may discover those facts and opinions held by another's consulting expert which were developed before the expert was retained for the particular litigation, but not those developed through the expert's employment with the opposing party in anticipation of the underlying litigation. Before allowing the deposition to proceed as so limited, the district court required the plaintiff to articulate the purpose for such a deposition, providing "a practical, trial based reason."[5]

In *Mantolete v. Bolger, 96 F.R.D. 179 (D. Ariz. 1982)*, the plaintiff moved to compel the deposition of the defense expert, who had been previously designated as an expert for trial, then subsequently withdrawn. In finding that rule 26(b0(4)(B) applied and that the plaintiff failed to show exception circumstances the court denied plaintiff's motion. *Id. at 181-182*. In reaching its conclusion, the court held:

> The reason for this rule is that while pretrial exchange of discovery regarding experts to be used as witnesses aids in narrowing the issues, preparation of cross examination and the elimination of surprise at trial, there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course the litigation should take.

Again, it was not clear whether prior to the redesignation of defendant's expert there had been any disclosure regarding that expert's opinions.

In re Shell Oil Refinery, 132 F.R.D. 437 (E.D. La. 1990) dealt with the

[5]The opinion did not clearly indicate whether the opinion of the defense expert had been disclosed.

plaintiff's request to depose both designated and non-designated experts. On a motion for reconsideration, plaintiff, PLC sought the results of tests conducted by defendant, Shell on relevant material and leave to depose the authors of the preliminary expert reports. Shell argued that it had not decided which test results and experts it intended to use at trial and specifically represented that it did not intend to use two in-house experts (Nordstrom and Nelson) involved in the testing nor their preliminary reports. All the preliminary expert reports, including those of the two non-designated experts, had been provided to PLC prior to the filing of its motion. Relying on the Advisory Committee Notes to then Rule 26(b)(4)(A), the court determined that discovery was limited to trial experts, which information may only be obtained at a time when the parties know who their respective experts will be and found that, in light of the scheduling order cut-off dates, PLC's request was premature. Regarding the two experts defendant had consulted, but were not designated for trial, the court determined that despite receiving their preliminary reports, which was pursuant to a court-ordered deadline, their investigation and study was in anticipation of litigation. It also found that the Rule 26(b)(4)(B) provision of "specially employed" was applicable to non-testifying in-house experts, but not unlimited. When such experts are not so retained or employed, but their work was in anticipation of litigation, the discovery analysis is made under the work product doctrine, Rule 26(b)(3). However, since the court determined that those experts had been retained or specially employed, then the "exceptional circumstances" standard applied, placing a heavy burden on the moving party. Since PLC could obtain the substantial equivalent by having their own experts conduct testing, in essence finding no exceptional circumstances existed, the court denied plaintiff's motion for reconsideration.

Another extensive analysis of the relationship between Rule 26(b)(4)(A) and (B) occurred in *FMC Corporation v. Vendo Company, 196 F. Supp. 2d 1023 (E.D. Cal. 2002)*. There, defendant moved to quash a third-party defendant's subpoenas of the plaintiff's experts, after a settlement was reached between the plaintiff and that defendant. After discussing the rationale of a number of the cases previously mentioned herein, the court granted defendant's motion to quash, relying primarily on the absence of meeting the exceptional circumstances requirement under Rule 26(B)(4)(B). *FMC Corporation* dealt with experts who had been previously designated, then withdrawn *after* their reports and opinions had been provided.

A common theme is apparent throughout the cases reviewed from various jurisdictions – the conversion of an expert designated for trial purposes under Rule 26(b)(4)(A), to a consulting expert, under Rule 26(b)(4)(B) is allowed and results in insulating that expert from discovery, absent the showing of exceptional circumstances. Although some of the cases identified herein by the parties did not indicate whether disclosure of the opinions had occurred before the change in designation, in those cases where such disclosure had clearly occurred, *In re Shell Oil Refinery* and *FMC Corporation*, the analysis was consistent between those two cases, as well as with the non-disclosure cases. Divulging the expert opinions did not alter the analysis. The only exception was *House*, where that plaintiff had undergone a medical examination by defendant's expert, one of the exceptions under 26(b)(4)(B).

Despite Dunlop's arguments to the contrary, the court is not convinced that Dr. Mehta's deposition would promote objectives of Rule 26. Moreover, the only "prejudice" asserted by defendant is expense and time related concerns, that is, having its experts

address the findings and conclusions of Dr. Mehta, which may be solved by allowing Dunlop the opportunity to review Dr. Smits's report and supplement its expert reports. However, it is not clear, at this stage, whether Dr. Mehta possessed relevant facts and opinions that relate to the aerodynamics of Callaway's patent infringement claim and that were developed *before* he was retained as an expert by plaintiff. Before completely closing the door on his deposition, Dunlop will be allowed to present information regarding the purpose of his deposition, as limited herein, and shall also provide to the court the practical, trial based reasons for his limited deposition . Further, should the court allow the limited deposition of Dr. Mehta to proceed, that fact will not be determinative of his testimony being admissible at trial. Even if such information is relevant, this court will analyzed his testimony based on the standards of Fed.R.Evid. 403 and if cumulative, especially of evidence provided by Dunlop's experts, it will not be allowed.

IT IS ORDERED that:

Should Dunlop wish to proceed with a deposition of Dr. Mehta as limited in this Order, on or before **Thursday, August 22, 2002**, Dunlop shall provide to the Court by letter, no longer than **three (3) pages, 12 point font,** the information required pursuant to this Order, including a brief description of Dr. Mehta's relationship to the parties, if any, independent of his position as a consulting expert. On or before **Wednesday, August 28, 2002**, Callaway may file a no more than a **three (3) page response, 12 point font**. A courtesy copy **only** of these submissions may be provided to chambers.

Mary Pat Thynge
U.S. Magistrate Judge