IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY MICHAEL SELMAN, KATHLEEN CHAPMAN, JEFF SILVER, PAUL MASON, and TERRY JACKSON,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO. 1:02-CV-2325-CC
v.	)	
COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF EDUCATION, JOSEPH REDDEN, superintendent,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY AND SCHEDULING ORDER

As this Court recognized at the July 31 status conference, a full retrial with some additional discovery is necessary in order to satisfy the letter and spirit of the Eleventh Circuit's opinion vacating and remanding this Court's judgment after the original trial. Because the Eleventh Circuit identified a broad range of issues for which it concluded that dramatically expanded factual findings will be necessary on remand — issues that were never contemplated by the parties and hence were not the

subjects of adequate discovery before the original trial — plaintiffs offer the accompanying motion proposing additional discovery and a timeline for the additional-discovery period and other pretrial proceedings.

Lest there be any question, this Court has absolute discretion to reopen discovery on remand and to allow whatever discovery it deems appropriate to facilitate retrial on the terms that will be most helpful to this Court and most likely to produce factual findings and legal conclusions that the Eleventh Circuit will regard as adequately supported in the record and appropriate to permit appellate review.[1] And indeed, the Eleventh Circuit's opinion specifically contemplates this Court's allowing new evidence,[2] as well as any discovery or proceedings necessary to produce and present that evidence,[3] so that this Court will be able adequately to answer the questions that the Court of Appeals posed in its nonexclusive list.[4]

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[1] *See, e.g.*, *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 827 n.1 (11th Cir. 2001) ("the district court on remand always has the ability to reopen discovery on the motion of either party").

[2] The Eleventh Circuit specifically directed that this Court "court should, of course, take into account any new evidence that is introduced into the record on remand." *Selman v. Cobb County School Dist.*, 449 F.3d 1320, 1338 (11th Cir. 2006).

[3] *Id.* at 1334.

[4] *See id.* at 1334-1338.

That being said, Plaintiffs are also sensitive to this Court's admonition that the parties would not be permitted to re-litigate the case from "square one." Accordingly, Plaintiffs have prepared a request for additional discovery that is limited in scope and focused on uncovering only the additional evidence that will answer the questions posed by the Eleventh Circuit in its opinion. As explained in the accompanying motion, plaintiffs will act in good faith to seek only additional evidence; to the extent that plaintiffs are requesting to depose any witnesses who gave depositions or trial testimony in the original proceedings, plaintiffs will revisit issues already addressed in the original testimony only as appropriate to meet the Eleventh Circuit's demands in supplementing the record; and we will strive to avoid unnecessary duplication.

ARGUMENT

Most of the items in the Eleventh Circuit's nonexclusive list of concerns can be condensed into three general categories of additional evidence: (1) expert testimony relating to the meaning of the disclaimer sticker's language, the message communicated to students by the sticker, and the sticker's effect on the teaching process; (2) evidence relating to the timeline for the events leading up to the Board's adoption of the disclaimer sticker and the various influences that affected the Board's decision; and (3) evidence clarifying the sources for the sticker's actual language,

including evidence regarding who and what played a role in the choice of that language. As this Court is aware, there was no expert testimony in the first trial. And as for the other two categories, the parties developed and presented evidence in what was at best only piecemeal fashion — in large part, we think, because neither the parties nor this Court conceived of the critical issues in the case the way that the Eleventh Circuit does; and hence no one thought that the additional evidence was necessary to support this Court's ruling. Under these circumstances, this Court not only has the authority to permit the additional discovery and introduction of additional evidence that plaintiffs seek, but also has an obligation to do so: Anything less would be an abuse of discretion.[5]

What follows is a brief explanation of the discovery items set forth in Plaintiffs' proposed discovery plan, including Plaintiffs' primary reasons for seeking each item of additional discovery and a statement of how the item relates to the categories of additional evidence that the Eleventh Circuit expects. Plaintiffs are prepared to

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[5] *See, e.g.*, *Yashon v. Gregory*, 737 F.2d 547, 555-56 (6th Cir. 1984) (holding that district court abused its discretion in refusing, on remand, to reopen the record and permit discovery on a " fact that neither the parties nor the district court thought . . . was an issue" originally, and on which "very little record ha[d] been made").

provide, at the Court's request, additional briefing regarding any of the additional discovery requests.

I. Expert Testimony, and Hence Expert Discovery, Is Necessary and Appropriate to Explain the Meaning of the Disclaimer Sticker's Language and the Effect of the Disclaimer on Teachers and Students.

As plaintiffs' counsel explained at the July 31 status conference, the Eleventh Circuit insisted on additional evidence that will shed further light on (a) what the disclaimer sticker's language actually means; (b) whether that language is "generally consistent" with the description of evolution, the materials on evolution, and the approach to teaching evolution contained in the students' textbook; (c) how students will view the language; and (d) how the language will affect teaching and learning in Cobb County science classrooms.[6] The court of appeals expressed dissatisfaction with the original record and this Court's original findings; Plaintiffs do not believe that this Court could even begin to formulate findings with respect to these issues that would satisfy the court of appeals without allowing expert testimony. And that assessment of the logical necessity for expert testimony finds further support in the Eleventh Circuit's specific directive to inquire into Dr. Kenneth Miller's qualifications as an

[6] *Id*. at 1337.

expert — a directive that clearly contemplates opening the retrial to expert testimony not permitted in the first trial.[7]

Although this Court barred Plaintiffs during the first trial from taking expert discovery and presenting expert testimony because of nondisclosure of experts before the deadline, that fact does not in any way preclude the Court from authorizing such discovery and testimony on remand. Quite the contrary; if expert testimony will be necessary or useful to this Court or to the court of appeals, expert discovery is entirely proper. In *Bradley v. United States*,[8] for example, the Fifth Circuit vacated and remanded for retrial a medical-malpractice case, holding that the district court had abused its discretion in allowing the testimony of two expert witnesses designated only one week before trial. But although the Fifth Circuit concluded that the expert testimony should have been procedurally barred at the original trial, the court did ***not*** remand for a new trial without that evidence. Instead, the court held that, on remand, the district court should "put the parties into the position in which they would have been had the government complied with the rules and seasonably notified the [plaintiffs] of its intention to call [the experts]. . . . Before the new trial is begun, of

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[7] *Id*.

[8] 866 F.2d 120 (5th Cir. 1989).

course, the district court should consider any further appropriate discovery and should allow the parties to prepare the presentation of their cases in light of the two experts' expected testimony."[9]

That result is entirely consistent with the logic for excluding experts from the first trial here as well as in *Bradley*. Plaintiffs having failed to disclose their experts to Defendants at the proper time, we acknowledge that Defendants might have been prejudiced by having inadequate opportunity to prepare to cross-examine the experts and to present rebuttal experts at the first trial. But the prejudice would ***not*** have been in the bare fact that Defendants would have had to face expert testimony. Rather, it would have been in the fact that Defendants might not have had adequate time to prepare to respond to that testimony. Because this Court is setting a new discovery schedule for the additional discovery that the retrial demands, and hence the Court can ensure that Defendants have adequate time to depose Plaintiffs' experts and to offer

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[9] *Id.* at 127; *see also, e.g.*, *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996 (5th Cir. 1998) (vacating and remanding wrongful-death case where district court abused its discretion in permitting testimony of defense expert designated only seven weeks before trial and eight months after deadline in scheduling order, and ordering new trial with appropriate expert discovery for both parties); *Brown v. Wright*, 588 F.2d 708, 709 (9th Cir. 1978) (affirming results of retrial at which two defense witnesses testified, notwithstanding that they had been properly excluded from testifying at original trial because of defendants' failure to include their names on witness list).

any rebuttal experts, there can be no prejudice. And for that reason, allowing experts and expert discovery here is just as proper as it was after remand in *Bradley*.

II. Additional Depositions of Defendants and Other Fact Witnesses Are Critical to Establish the Factors That Affected the Board's Adoption of the Disclaimer Sticker, as Well as to Reveal the Sources for the Sticker's Language.

Beyond expert testimony, plaintiffs seek to depose or redepose the following defendants and third-party fact witnesses, for the following reasons:

1. Joseph Redden and the Cobb County Board of Education.

Plaintiff seek to depose (or redepose) the superintendent and members of the school board for Cobb County as of March 2002 — when the Board approved the disclaimer sticker. The superintendent at that time was Joseph Redden, and Plaintiffs believe that the Board at that time consisted of Curtis Johnston (the then-chairperson), Lindsey Tippins, Teresa Plenge, Betty Gray, Gordon O'Neil, Laura Searcy, and Johnny Johnson. The superintendent's and the board members' testimony is particularly important in light of the Eleventh Circuit's specifically articulated interests in (a) the timeline of events leading up to the Board's decision to adopt the disclaimer sticker; (b) the various influences that affected the Board's decision; and (c) the sources of the disclaimer sticker's language.

O'Neil and Johnny Johnson were never deposed and did not testify at trial. According to their proposed discovery plan, Defendants thus have no objection to Plaintiffs deposing these individuals. Although Gray and Searcy did testify at trial, they were never deposed; and because examination of an opposing party at trial is not a factfinding endeavor designed to ferret out evidence the way that discovery is, Plaintiffs believe that depositions of these board members is critical to permit Plaintiffs to prepare and ultimately present their case.

As for Redden, Tippins, Plenge, and Curtis Johnston, limited depositions are appropriate to permit Plaintiffs to develop the detailed evidence that the Eleventh Circuit demands — evidence that the original depositions did not focus on or seek to elicit. To take just one example, Tippins in his original deposition briefly addressed the fact that the Board asked its attorney to draft language for the disclaimer sticker;[10] but Tippins did not explain what the Board asked the attorney to do, whether the Board made the request in response to Marjorie Rogers' petition or any other outside pressure, or whether the "language c[a]me from the Board's attorney" or from some other source.[11] Yet the Eleventh Circuit specifically asked for findings focusing on

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[10] Tippins Dep. 77:8-78:12.

[11] *Selman*, 449 F.3d at 1335.

each of these issues. Board members' testimony about their personal knowledge and recollections with respect to many of the other factual issues that the Eleventh Circuit identified will be equally central in the retrial. If this Court were to deny Plaintiffs the opportunity to redepose these individuals, Plaintiffs would be forced to conduct a wide-ranging examination of them at trial — a type of examination that might well be entirely unfruitful, and surely would be unnecessary and a waste of this Court's time when a simple, short deposition could allow the parties to focus the examination of each witness at trial on the evidence that the witness actually has the knowledge to provide.

The proposed depositions and redepositions will not be unduly burdensome to Defendants. With respect to the redepositions, Plaintiffs note that the original depositions were all extremely brief: Even including all breaks, Tippins' original deposition lasted two hours; Plenge's, less than an hour; Johnston's, 45 minutes; and Redden's, less than half an hour. And Plaintiffs have no desire to prolong the questioning now. Thus, we have proposed limiting the depositions of each of the board members and that of Redden to three hours, and to focus on adducing new evidence rather than merely replowing old ground. To the extent that Plaintiffs are

able to use less than the requested three-hour allotment for each deponent, we will do so.

2. Fred Sanderson.

Sanderson, the new superintendent for the Cobb County School District, was the district's Chief Academic Officer during the 2001-2002 academic year, when the Board approved the disclaimer sticker. Sanderson was not deposed and did not testify in the original proceedings. As chief academic officer, Sanderson had supervisory authority, Plaintiffs believe, over the school district's curricula and instruction, and also likely had a role in reviewing, selecting, or approving new textbooks. Plaintiffs believe that Sanderson may have been directly involved in either formulating or selecting the sticker language. Sanderson's personal knowledge regarding the textbook-selection process and the decision to place the disclaimer sticker on the students' textbooks will be critical to developing the complete, detailed record that the Eleventh Circuit expects.

3. Defendants' Attorneys Who Drafted the Sticker Language.

Plaintiffs seek to depose any individuals who can testify about the development of the disclaimer sticker's language and the factors that influenced the selection of that language. Because Defendants have made clear that, as counsel put it at the July 31

hearing, the sticker language came from defense counsel's "office," Plaintiffs seek to depose the persons in that office who participated in formulating, drafting, or approving the disclaimer's language. Plaintiffs believe that the depositions and trial testimony of these individuals will be critical to answer the Eleventh Circuit's explicit inquiries concerning the sticker's language, including: "Who formulated the wording of the sticker? Did the board ask its attorney to draft the language of the sticker in response to a petition? Did the language come from the Board's attorney? Did the attorney draw that language from any petition or letter? If so, what? Did anyone propose that language for a religious purpose?"[12]

Plaintiffs are, of course, sensitive to issues of attorney-client privilege and do not have any wish to intrude unnecessarily on matters that fall within the scope of that privilege. But the best and likely the only people who can provide testimony to answer the Eleventh Circuit's direct questions about the drafting process are the ones who actually participated in the drafting. Unless Plaintiffs are permitted to examine those who did so, be they lawyers or not, the sources for the language and the influences on the drafters will remain forever shrouded in mystery — a result that cannot be squared with the Eleventh Circuit's mandate. Insofar as counsel selected,

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[12] *Id.* at 1335.

drafted, or approved the disclaimer stickers' language, they are ordinary fact witnesses who participated in, and hence have direct, discoverable information about, the formulation of the challenged policy. Indeed, because the Board is obliged by state law to make policy in an open, public fashion, Plaintiffs believe that the Board would be forbidden to shield its decisions from public scrutiny by assigning the policymaking function to a lawyer and then claiming attorney-client privilege over what went into the policy choice. Attorney-client privilege attaches to the giving of legal advice, not to any activity undertaken at a party's request by somebody who happens to have a law license.

Plaintiffs are prepared to brief this issue in more detail if the Court wishes to receive additional argument.

4. Marjorie Rogers.

Rogers submitted the 2300-name petition that was the subject of so much controversy for the Eleventh Circuit. The Court of Appeals wishes the record to include detailed evidence about the petition, including its language, how many people signed it, and whether and when it was presented to the Board.[13] Defendants in their proposed discovery plan do not oppose Plaintiffs' request to take Rogers' deposition

[13] *Id.* at 1335.

or our intention to seek documents from her; but they wish to place severe restrictions on the topics that Plaintiffs can explore with Rogers. Given Rogers' critical role in lobbying the Board — not just through the petition but also through individual correspondence and other means of communicating her demands, expectations, and wishes regarding the school district's science curriculum — and the importance of exploring Rogers' efforts as part of the purpose inquiry under the *Lemon* test, Plaintiffs believe that Defendants' proposed restrictions are unreasonable and would prevent the parties and the Court from developing the complete, detailed factual record that the court of appeals expects to see in a new appeal.

5. Leon L. Combs.

In his original deposition board-member Tippins stated that he had consulted Combs — an ordained Baptist deacon and chemistry professor at Kennesaw State University (since retired, according to his faculty web page, and now principally exploring his interest in "web-assisted education and theology")[14] — before voting on

[14] *See* http://science.kennesaw.edu/~lcombs/; http://science.kennesaw.edu/~lcombs/PersonalInfo.htm.

the disclaimer sticker.[15] Tippins called Combs a "personal acquaintance,"[16] noting that Combs and he attended the same church.[17] According to Tippins, Combs told him that "there's a controversy in the scientific community of evolution, macroevolution, from a proof standpoint."[18] Tippins neglected to mention that Combs is associated with the intelligent-design movement generally and with the Discovery Institute in particular. So far as Plaintiffs have yet been able to determine, Combs is the only "science expert" that any of the board members ever consulted before deciding to adopt the disclaimer stickers. So Combs' views on creationism and evolution, and their influence on Tippins or other board members, are critical evidence for satisfying the Eleventh Circuit's mandate to fill out the record with more detail regarding the specific influences on the Board in adopting the sticker. Combs was never deposed and did not testify at trial, so Plaintiffs should be permitted to question him now rather than having to wait until trial to explore his role in the Board's decisionmaking.

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15 Tippins Dep. 47:16-21.

16 *Id.* at 48:4.

17 *Id.* at 48:6-12.

18 *Id.* at 48:13-17.

III. Additional Written Discovery Is Warranted to Ensure a Complete Record.

In order to ensure that the record is complete on appeal and to address fully the questions that the Eleventh Circuit posed, Plaintiffs also need to conduct written discovery specifically targeted at the areas of inquiry that the court of appeals identified. As with the proposed Rogers deposition, Defendants do not contest Plaintiffs' request for written discovery; but they seek to limit its scope to something far narrower than what would be required to satisfy the Eleventh Circuit's mandate.

During the original trial, Plaintiffs had access only to those records provided by the school district in response to an open-records request in the days immediately preceding the trial. But the district has not yet provided even all the materials that the state open-records law makes available — much less the broader set of materials contemplated by the federal discovery rules. For example, the school district never provided Plaintiffs a copy of the petition submitted by Marjorie Rogers; indeed, in a letter to the court of appeals, defense counsel suggested that the petition never even existed — notwithstanding what Plaintiffs view as extensive testimony about it at the original trial. Plaintiffs have specifically targeted their written-discovery requests to ferret out the evidence that the Eleventh Circuit plainly expects to see in any subsequent appeal. Without that discovery, Plaintiffs believe, this Court will have

difficulty making the detailed factual findings and the parties will have difficulty presenting the complete record that the court of appeals will require in order to review the decision.

CONCLUSION

Plaintiffs seek discovery appropriate to obtain the detailed evidence contemplated by the Eleventh Circuit — no more, but also no less. Plaintiffs are mindful of this Court's ruling that the additional discovery will be limited. And we have no more desire than this Court to duplicate earlier efforts. But this case involves the constitutional rights of students and citizens throughout Cobb County and, indeed, across the country. This Court should therefore exercise its discretion to ensure that the parties may present on retrial all the evidence relating to issues that the Eleventh Circuit identified as important to deciding the case. No one would benefit from an incomplete record leading to a second remand and a third trial. Plaintiffs believe, therefore, that the parties and this Court will be ill served if Plaintiffs are not permitted the carefully crafted, limited discovery that they now seek in order to present a complete and orderly case at trial — a presentation that will be helpful to this Court in preparing the detailed factual findings and legal conclusions necessary to satisfy the Eleventh Circuit.

Respectfully submitted,

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