

subject areas, and cumulative and duplicative written discovery and deposition discovery.

The discovery schedule proposed by Plaintiff not only permits duplicative discovery of facts which Plaintiffs have had an ample opportunity to discover, but the proposed “limitations” on the scope of this discovery are, in reality, meaningless. Having already identified those factual issues and witnesses important to their case, Plaintiffs now propose to limit discovery to those facts and witnesses, in addition to expanding discovery by opening up an entirely new “battle of the experts” which is clearly not contemplated by the Eleventh Circuit decision. This Court should not permit this veiled effort to relitigate the case from the beginning.

The Plaintiffs’ argument in support of this extensive discovery is based, in part, on a tortured reading of the Eleventh Circuit opinion, and on the assertion that the factual issues which the Eleventh Circuit has indicated the Court should address were not discovered in the first round of discovery because neither the Court nor the parties recognized that they were important. Plaintiffs are mistaken on both counts.

I. ELEVENTH CIRCUIT MANDATE DOES NOT REQUIRE ANY ADDITIONAL DISCOVERY

Plaintiffs argue that the Eleventh Circuit opinion indicates that it expects extensive additional discovery would be allowed on remand. On the contrary, the Eleventh Circuit opinion explicitly leaves the procedural details of remand to this Court, including “whether to start with an entirely clean slate and a completely new trial or to supplement, clarify, and flesh out the evidence that it has heard in the four days of bench trial already conducted”. Selman v. Cobb County School District, 449 F. 3d 1320, 1334 (11th Cir. 2006). The Eleventh Circuit’s direction that this Court “should, of course, take into account any new evidence that is introduced into the record on remand” contemplates that the issue of the petition and other citizen communication will be clarified, but it is a far cry from a requirement to permit extensive additional discovery so that new evidence could be obtained.

A close reading of the Eleventh Circuit opinion makes it clear that the reason for the vacatur and remand was not that the record was not large enough, or that factual issues needed to be explored which were previously ignored, but rather that the findings of fact were not supported by the record as it existed, and the existing record needed to be clarified. The Eleventh Circuit opinion discusses at great

length the Court's finding that the sticker was prompted by a letter and petition from Marjorie Rogers, and whether the missing documents might have been part of the Docket Entry No. 99. 449 F. 3d at 1328-1333.

Everyone agrees that some evidence presented to the district court has been omitted from the record on appeal, but the attorneys have not been able to identify what was omitted. The problems presented by a record containing significant evidentiary gaps are compounded because at least some key findings of the district court are not supported by the evidence that is contained in the record. We have concluded that the unfilled gaps in the record, coupled with problematic nature of some of the district court's factfindings, prevent proper appellate review of the merits of the important constitutional issues raised in this case.

Id. at 1322.

The Eleventh Circuit expects this Court to fill in the gaps, not to dramatically expand the record with expert testimony and cumulative depositions. What Plaintiffs propose is clearly not part of the mandate in this case.

II. ISSUES OUTLINED BY ELEVENTH CIRCUIT HAVE ALREADY BEEN DEVELOPED IN DISCOVERY

Plaintiffs apparently recognize that it would be an abuse of discretion for this Court to allow additional discovery on subjects at to which Plaintiffs have already had an ample opportunity to discover information, or where such discovery would

be cumulative, as is the case with the bulk of the discovery they seek. Federal Rules of Civil Procedure 26(b)(2); Cornwell v. Electra Center Credit Union, 439 F.3d 1018 (9th Cir. 2006) (upholding district court’s refusal to allow additional discovery not obtained due to lack of diligence.)¹ Plaintiffs seek to avoid this result by arguing that the Eleventh Circuit opinion broadly expands the issues in this case to include facts which had never been considered by the Court or the parties. Plaintiff argues “the Eleventh Circuit identified a broad range of issues for which it concluded that dramatically expanded factual findings would 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’ Memorandum in Support of Motion for Discovery and Scheduling Order, pp. 1-2.

In point of fact, the Eleventh Circuit opinion addresses entirely and exclusively the factual outline established in the record before it, evidentiary gaps and all. The majority of factual issues which the Eleventh Circuit opinion lists deal with the Board’s deliberations and decision to insert the sticker, and any citizen

¹ Export-import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. (2005)) (denying request for second deposition of the deponent where party had already had ample opportunity to obtain the information sought); Pkfinans International Corp. v. IBJ Schroder Leasing Corp., 1996 U.S. Dist. LEXIS 15183*6 (S.D. N.Y. 1996).

communications (including any missing petition) which may have impacted that decision. 449 F. 3d at 1335-1337 (item nos. 1-12). These issues were fully explored in discovery and at trial. See, e.g., Curt Johnston deposition, pp. 7, 9, 22 (parent complaints), 8 (attorney asked to draft language), 18 (board deliberations), 21 (received many letters but no petition); Redden Depo., pp. 12, 18-19 (parent concerns), 20-22 (Tippins raised issue of sticker); Tippins Depo., pp. 27-28 (parent concerns), 30-31 (scientific materials considered), 33, 43-45 (receipt of emails, letters and communications), 51, 77 (asked attorney to draft sticker); Plenge Depo., pp. 14-17 (deliberations regarding sticker), 18-20 (citizen concerns); R6-188-191, 212-213, R7-393-394 (citizen communications), R6-191-192, 194 (legal counsel drafted statement).

Five of the eighteen factual issues outlined by the Eleventh Circuit specifically address the missing petition, which is apparently the linchpin of Plaintiffs' proof. As the Eleventh Circuit noted, Plaintiffs' counsel represented that a document which it presented to Marjorie Rogers at trial was the (now missing) petition, containing 2300 signatures. Id. at 1336.

The remaining factual issues addressed in the Eleventh Circuit opinion concern whether the content of the sticker conflicts with information in the

textbook, and how the subject of evolution is taught. Id. at 1337-8. Both the sticker and the textbook were admitted into evidence (R4-Def. Exh. 4), and board members, George Stickel, Wes McCoy and Charmagne Quenan all testified regarding classroom instruction on the subject. Artistic Entertainment v. City of Warner Robins, 331 F. 3d 1196, 1203 (11th Cir. 2003)(decision not to reopen discovery affirmed where issues could have been raised earlier in litigation).

In short, there may be evidentiary gaps in the record, including the petition which Plaintiffs' counsel possessed at trial, but all of the factual issues outlined in and discussed in the Eleventh Circuit opinion were addressed at trial. Plaintiffs had an ample opportunity, and did in fact conduct discovery on all of these issues. Defendants have no objection to the Plaintiffs making efforts to come up with the petition at issue or otherwise clarifying testimony by Ms. Rogers. Even though Plaintiffs had every opportunity to depose the two board members they have not already deposed, Defendants have no objection to that testimony on a limited basis. However, Defendants strenuously object to Plaintiffs' remaining requests as an effort to force Defendants to incur the time and expense of beginning discovery anew as though discovery had never been conducted, four years into the litigation process.

III. NO EXPERT TESTIMONY OR DISCOVERY SHOULD BE ALLOWED

The Eleventh Circuit opinion intimated that Dr. Miller did not have the qualifications to testify as an expert on the popular meaning of the word “theory”. Id. at 1337. This suggestion related to the Court’s finding, based upon the testimony of Dr. Miller, that “the Sticker’s use of the term “theory” “plays on a colloquial or popular understanding of the term”. Selman v. Cobb County School District, 390 F. Supp. 2d 1286, 1310 (N.D.Ga. 2005). The opinion did not fault the finding itself, but rather whether basing this finding on Dr. Miller’s testimony was proper. The Court could have based this finding on a dictionary definition, rather than Dr. Miller’s testimony. Hancock v. American Steel, 203 F. 2d 737, 740 (1953) (“courts take judicial notice of the meaning of words”); Integrated Health Professionals, Inc. v. Pharmacists Mutual Insurance Co., 422 F. Supp. 2d 1223, 1228 (E.D.Wa. 2006). No expert testimony is necessary to fill this evidentiary gap.

However, Plaintiffs argue that the Eleventh Circuit’s mention of this factfinding mandates that all kinds of expert testimony and discovery is necessary. Given the detail in the guidance provided by the Eleventh Circuit on remand, one would think that the opinion would have specifically set out the requirement for

expert testimony regarding the meaning of “theory”, had that been the intention of the Court.

The case relied upon by the Plaintiffs for the proposition that the Court should permit an extensive new round of expert testimony is inapposite. In Bradley v. United States, 866 F. 2d 120 (5th Cir. 1989), the district court improperly allowed the testimony of two experts at trial, and the Fifth Circuit remanded to cure the prejudice which had been caused by permitting that testimony in violation of the federal rules. Bradley was a medical malpractice action in which the parties agreed that the expert testimony was central to the issues in the case, and without which it could not go forward. Bradley does not stand for the proposition that parties who violate the rules regarding expert disclosures automatically get a second bite at the apple upon remand, nor does it suggest that Plaintiffs should be afforded a broad opportunity to relitigate the case with experts this late in the game. The Eleventh Circuit opinion indicates that it wants the Court and the parties to flesh out the factual details, particularly with regard to communications which may have influenced the decision to implement the sticker, not that it expects a slew of new expert opinions.

V. CONCLUSION

There is absolutely no justification for the breadth of the discovery order which Plaintiffs propose. The Eleventh Circuit opinion raises no novel or factual issues which have not been explored on discovery, nor has the law changed in any significant respect during the appeal of this matter. Plaintiffs' order is merely an effort to revisit all discovery already conducted based upon its new counsel's criteria. Plaintiffs' proposal would also be extremely burdensome to the Defendants, requiring not only the expenditure of time and attorney's fees in preparing for and conducting this duplicative discovery, but also requiring board members - - - who have already testified at deposition and waited for days, at Plaintiffs' request, to testify at trial - - - to answer the same questions under oath again, subject only to limitations based on Plaintiffs' good faith.

This Court has indicated that it believes only limited discovery would be appropriate in this matter. Defendants believe that it would not be helpful to the Court to reopen discovery to allow a dramatic expansion of the discovery and record in this case. Any further discovery should be strictly limited to the narrow

issues of board communications and deliberations regarding the sticker, and allow only the depositions of Marjorie Rogers, board members Gordon O'Neill and Johnny Johnson.

Respectfully submitted this 10th day of August, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1D of the Local Rules for the Northern District of Georgia, the undersigned counsel of record for Defendants hereby certifies that this pleading has been composed in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I CERTIFY that I have this day served upon those persons listed below a true and correct copy of the within and foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY AND SCHEDULING ORDER** by electronic filing and by hand-depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon to ensure delivery to:

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This 10th day of August, 2006.

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