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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

GLAS-WELD SYSTEMS, INC., an Oregon corporation,

Plaintiff,

v.

MICHAEL P. BOYLE, dba SURFACE DYNAMIX; and CHRISTOPHER M. BOYLE

Defendants.

Case No. 6:12-cv-02273-AA

**PLAINTIFF GLAS-WELD INC.'S
RESPONSE TO DAVID MADDEN'S
MOTION TO TERMINATE *PRO BONO*
APPOINTMENT AND WITHDRAW AS
COUNSEL**

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Plaintiff Glas-Weld Systems, Inc., (“Glas-Weld”), submits the following as its response to David Madden’s Motion to Terminate *Pro Bono* Appointment and Withdraw as Counsel for Michael Boyle (“Motion”) (Doc. No. 125).

I. INTRODUCTION

The Court has recognized that appointment of new *pro bono* counsel for Michael Boyle would cause undue delay in this matter. Mr. Madden’s withdrawal, if permitted, should not be allowed to create the same effect. Glas-Weld is cognizant that Mr. Madden accepted this *pro bono* appointment as a public service, and that the Court may be inclined to grant Mr. Madden’s Motion rather than force him to continue his representation of Michael Boyle. Glas-Weld is further sympathetic to the difficulties related to dealing with Mr. Madden’s client. However, Glas-Weld should not be prejudiced by related delays, especially in light of Defendants’ ongoing strategy of delay.

Accordingly, Glas-Weld takes no position with respect to the Motion. Instead, Glas-Weld submits this response in order to bring these concerns to the Court’s attention, and to ask that the Court hold Defendants to the deadlines it set in its Order of June 2, 2014 regardless of whether Michael Boyle obtains new counsel or not.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Madden’s Motion to Withdraw

The Motion was filed on June 6, 2014, less than one week after this Court’s June 2, 2014 Order (Doc. No. 124) denying Michael Boyle’s *in camera* communications requesting the appointment of “additional *pro bono* counsel” because it would unduly delay this case. The Motion and Mr. Madden’s accompanying declaration provide only a nebulous description of the alleged conflict of interest, which does not make clear the nature of the conflict. Accordingly, Glas-Weld cannot evaluate whether a conflict exists

that would preclude Mr. Madden from continuing his representation of Michael Boyle, and leaves that issue to the Court.

However, some of the representations set forth in Mr. Madden's Motion are factually inaccurate in view of the Court's Order of June 2, 2014. (Doc. No. 124). Specifically, Mr. Madden states that "discovery is completed and *Markman* and summary judgment briefings have been completed and taken under submission." Motion, at p. 3. That statement is not correct. With respect to discovery, expert discovery is ongoing, closing July 18, 2014, and Mr. Madden's last communication to Glas-Weld's counsel requested that all expert report deadlines be further postponed until after the Court's ruling on claim construction. Ex. A.

Moreover, the Court's June 2, 2014 Order also effectively re-opens fact discovery as it (1) compels Defendants to provide complete responses to Glas-Weld's discovery by July 2, 2014 (a deadline that Defendants will likely ignore absent Mr. Madden's representation of Michael Boyle), and (2) orders that the parties confer and agree to a reasonable deposition schedule following the Court's upcoming ruling on claim construction. (Doc. No. 125, at 2-3). *Markman* briefing is also not complete, as the Court's June 2, 2014 Order allows for Christopher Boyle to submit expert testimony to address Defendants' expert declarations regarding claim construction. *Id.* at 2. Finally, summary judgment is stayed, and the Court's June 2, 2014 Order allows the Parties to supplement their summary judgment briefing after the Court issues its ruling on claim construction. *Id.*

Additionally, despite Mr. Madden's representation at paragraph 10 of his declaration, no other attorney has entered an appearance on behalf of Michael Boyle in this matter. Accordingly, if Mr. Madden is allowed to withdraw, that withdrawal will prejudice Glas-Weld by causing yet more delay **unless** defendants are required to adhere to deadlines, including those set forth in the Court's June 2, 2014 Order.

B. Reasonable Leeway and Defendants' Pattern of Delay and Obstinacy

Glas-Weld filed this action against Michael Boyle on December 17, 2012 and sought leave to add Christopher Boyle on May 29, 2013. Throughout this case, Glas-Weld has given Defendants reasonable leeway in discovery deadlines only to have defendants then subsequently ignore their obligations.

After Christopher Boyle entered this case, the Court granted Christopher Boyle's Motion to reset the schedule, and adopted a schedule similar to that proposed by the Defendants. (Doc. Nos. 83 & 89). Nevertheless, when Glas-Weld has sought to make reasonable accommodation to the new discovery deadlines, Defendants have not been cooperative.

As detailed in the briefs relating to Christopher Boyle's Motion to compel, Glas-Weld offered Christopher an extension of the discovery deadline to accommodate workable deposition dates. Instead, Christopher Boyle demanded an extension for unrelated briefing as a condition for accepting Glas-Weld's proposal. When Glas-Weld rejected that request, Christopher Boyle moved to compel depositions on dates which he knew were unworkable. After all the briefing was done, Christopher Boyle did not bother to notice any depositions of Glas-Weld or its personnel on the dates when everyone was available, and allowed fact discovery to close without further action. It appears Christopher Boyle was only interested in putting Glas-Weld through the expense of briefing the issue.

More recently, Mr. Madden requested an extension of the expert discovery deadlines until after the Court rules on Claim Construction. Ex. A. Glas-Weld acquiesced, and asked Mr. Madden to prepare a draft motion to present this request to the Court. To date, neither Mr. Madden nor Defendants have responded to inquires relating to this unopposed motion. Yet the expert discovery deadline (July 18, 2014) continues to approach.

Defendants' discovery responses have also been a consistent source of delay and frustration. Indeed, as detailed in the summary judgment briefing, Glas-Weld tried to work with Michael Boyle for almost two months before filing its motion to compel on July 22, 2013 for discovery that was served on May 2 & 3, 2013. The Court's September 6, 2013 Order (Doc. No. 67) on Glas-Weld's Motion to Compel not only granted Michael Boyle an additional 45 days to respond to Glas-Weld's discovery, but also granted Michael Boyle's request for *pro bono* counsel, leading to Mr. Madden's entry to this case. Nevertheless, Michael Boyle's attempt to comply with this order – prepared with the assistance of counsel – was replete with deficient and evasive responses.

Glas-Weld contacted Mr. Madden numerous times regarding these various deficiencies, and each time Mr. Madden indicated that he would bring the issue to Michael Boyle's attention. Ultimately, Michael Boyle never supplemented his responses and over a year after Glas-Weld served its initial discovery requests on Michael Boyle, his production and responses remain deficient. Glas-Weld has little confidence that either Defendant will comply with the Court's June 2 Order to provide complete responses by July 2, 2014, regardless of whether Mr. Madden is allowed to withdraw. Christopher Boyle, in turn, has ignored every request from Glas-Weld thus far, that he supplement his discovery responses or produce responsive documents that have been overdue for months.

III. ARGUMENT

The Court has recognized that appointment of new *pro bono* counsel for Michael Boyle would cause undue delay in this matter. (Doc. No. 124). Mr. Madden's withdrawal, if permitted, should not be allowed to create the same effect. While Glas-Weld understands that the Court may be inclined to grant Mr. Madden's motion in view of his circumstances as a *pro bono* attorney, Glas-Weld should not be prejudiced by

such a withdrawal. Specifically, in view of the pending issues relating to the partial reopening of fact discovery, and the pendency of expert discovery and *Markman* and summary judgment briefing supplementation, Mr. Madden's potential withdrawal and the substitution of new counsel – if such substitution ever occurs – should not be allowed to prejudice Glas-Weld by causing undue delay in the administration of justice in this matter. And Glas-Weld should not be prejudiced by having to address future requests to delay and re-litigate closed issues, whether raised by Defendants or any new counsel, and including further requests for delays in providing complete responses to Glas-Weld's discovery requests.

Accordingly, if the Court is inclined to grant Mr. Madden's Motion, Glas-Weld requests that regardless of whether Michael Boyle obtains new counsel or proceeds *pro se*, the Court hold Defendants to same rules that apply to all other litigants, and enforce its order compelling complete responses to Glas-Weld's discovery by July 2, 2014.

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IV. CONCLUSION

For the foregoing reasons, Glas-Weld submits this response to Mr. Madden's Motion to Terminate Pro Bono Appointment and Withdraw as Counsel.

DATED: June 11, 2014

COSGRAVE VERGEER KESTER LLP

/s/ Paul A. C. Berg

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **PLAINTIFF GLAS-WELD INC.'S RESPONSE TO DAVID MADDEN'S MOTION TO TERMINATE PRO BONO APPOINTMENT AND WITHDRAW AS COUNSEL** on the date indicated below by:

- mail with postage prepaid, deposited in the US mail at Portland, Oregon,
- hand delivery,
- facsimile transmission,
- email
- electronic filing notification.

I further certify that said copy was delivered as indicated above and addressed to said attorneys and defendant at the addresses listed below:

James A. Gale, Esq. **(ELECTRONIC FILING NOTIFICATION)**
Javier Sobrado
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243 NW Broadway Street
Bend, OR 97701
Defendant Pro Se

DATED: June 11, 2014

/s/ Paul A. C. Berg
Robert E. Barton
Paul A. C. Berg

Javier Sobrado

From: Javier Sobrado
Sent: Wednesday, May 21, 2014 3:41 PM
To: 'David Madden'; Chris Boyle
Cc: James A. Gale, Esq.; Paul Berg; Robert Barton
Subject: RE: Glas-Weld v. Boyle -- Expert reports

Mr. Madden:

Glas-Weld is amenable to your proposal of delaying the expert report deadlines until the weeks following the Court's ruling on claim construction and summary judgment. Please circulate a proposed motion to extend the expert discovery deadlines pending the Court's rulings on these issues for our review and comment.

Regards,
-Javier

-----Original Message-----

From: David Madden [<mailto:dhm@mersenne.com>]
Sent: Friday, May 16, 2014 12:51 PM
To: Javier Sobrado; Chris Boyle
Cc: James A. Gale, Esq.; Paul Berg; Robert Barton
Subject: Re: Glas-Weld v. Boyle -- Expert reports

On 5/8/14, 4:33 PM, Javier Sobrado wrote:

> Following up to my email of March 26, 2016, the Court set the close of
> expert discovery on July 18, 2014, but did not expressly set dates for
> when the expert reports were due. Will Defendants stipulate to having
> opening expert reports (for the party bearing the burden of
> proof) due May 23, 2014, and rebuttal expert reports due June 20,
> 2014?

Hi Javier.

Following up on my response of May 12, it appears that in the normal course of a patent case, expert-report activity would depend on the outcome of the Markman proceedings. Since we do not yet have that information, it seems to me that it would be premature to decide on these dates.

I propose delaying these decisions until the Markman ruling issues.

Regards,

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