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April 24, 2012

By Facsimile

Honorable Shira A. Scheindlin, U.S.D.J.
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007
Fax: (212) 805-7920

The pre-motion conference requirement is waived. Plaintiff may make its motion to strike by May 30, 2012.

*April 30
2012*

So Ordered!

Shira A. Scheindlin
U.S.D.J.

Re: Software Freedom Conservancy v. Best Buy, 1:09-cv-10155-SAS

Dear Judge Scheindlin:

On behalf of Plaintiffs Software Freedom Conservancy, Inc. and Erik Andersen in this action for copyright infringement, I write to request a pre-motion conference regarding a motion to strike the lone remaining defendant Phoebe Micro Inc.'s ("Phoebe") designation of Arnijn Hemel and Professor Stu Green as expert witnesses and to preclude them from testifying at trial.

The Court's Second Revised Scheduling Order provided for the exchange of initial expert reports by April 20, 2012. Dkt. 233. Rather than provide a report, however, Defendant Phoebe merely provided a letter (attached hereto) containing a statement of the subject matter on which Mr. Hemel and Prof. Green are expected to present evidence.

Rule 26(a)(2)(B) states that an expert witness must provide a written report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Plaintiffs do not believe either Mr. Hemel or Prof. Green are employees of Phoebe. Rather, they are both open source software consultants retained by Phoebe to assist them with this matter and, now it appears, to proffer expert testimony.

Plaintiffs believe Mr. Hemel is the founder of Tjaldur Software Governance Solutions ("TSGS"), "a company specializing in consultancy in the field of software governance and license compliance engineering." See <http://www.tjaldur.nl/en/content/show/about>. On the TSGS website, Mr. Hemel is described as "Armijn Hemel, MSc, an internationally recognized expert in the field of GPL license compliance engineering." *Id.* GPL License compliance is precisely the issue at the heart of this litigation and a topic on which Phoebe wishes to use Mr. Hemel to testify. See attached letter ("Armijn Hemel to testify as to ... compliance of the code with generally accepted open source licensing requirements").

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Professor Stuart Green, to Plaintiffs' understanding, is Associate Professor of Computer Science at the University of Texas McCombs School of Business and routinely provides open source license compliance consulting services. Again, Phoebe wishes to use Prof. Green as an expert on such issues in this matter. *Id.* ("Professor Stu Green to testify as to ... the compliance of the code with generally accepted open source licensing requirements").

Because both Mr. Hemel and Prof. Green have been retained by Phoebe to provide expert testimony, they are subject to Rule 26(a)(2)(B)'s Written Report requirement. Phoebe's failure to provide such written reports by the April 20, 2012 deadline justifies striking their designation as experts and precluding them from testifying at trial.

Regards,



Daniel B. Ravicher

attachment

cc: Counsel for Phoebe (by email, as agreed by the parties)

The Law Offices of Nena W. Wong
6080 Center Drive, Suite 600
Los Angeles, California 90045
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April 20, 2012

Via Email

Dan Ravicher, Esq.
The Law Offices of Dan B. Ravicher, Esq.
1375 Broadway, Ste. 600
New York, NY 10018

Re: Software Freedom Conservancy v. Best Buy Co., et al. 1:09-cv-10155-SAS

Mr. Ravicher:

Pursuant to Fed. R. Civ. P. 26(a)(2)(C), Phoebe Micro Inc. discloses that it may call the following witnesses at trial or to rebut any report of plaintiffs' experts:

- Armijn Hemel to testify as to the compilation of code produced by Phoebe to plaintiffs and the compliance of the code with generally accepted open source licensing requirements, and the procedures used in the development of free and open source software generally.
- Professor Stu Green to testify as to the compilation of code produced by Phoebe to plaintiffs and the compliance of the code with generally accepted open source licensing requirements, and the procedures used in the development of free and open source software generally.

Very truly yours,



Nena W. Wong