

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**JOHN DOE, et al.,**

**Case No. 02:08 CV 575**

**Plaintiffs,**

**JUDGE GREGORY L. FROST**

**v.**

**Magistrate Judge NORAH MCCANN KING**

**MOUNT VERNON CITY SCHOOL  
DISTRICT BOARD OF EDUCATION,  
et al.,**

**Defendants.**

**REPLY TO DOCUMENT 96 - REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION FOR CONTINUANCE AND MOTION FOR SANCTIONS FOR DEFENDANT'S  
FAILURE TO COMPLY WITH THIS COURT'S DISCOVERY ORDERS.**

On behalf of Defendant John Freshwater, the undersigned counsel for the dismissed claims of the Counterclaimant/Defendant John Freshwater, provides this REPLY to Plaintiff's Response to Defendant John Freshwater's motion to this Court for a continuance of the trial date.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Counterclaimant/Defendant John Freshwater

**REPLY**

**I. INTRODUCTION**

For the reasons set forth below, this Court should grant Defendant John Freshwater's motion for a continuance and deny any request for sanctions against Defendant John Freshwater or the undersigned.

**II. ARGUMENT**

**A. Defendant John Freshwater's Motion for Continuance Should Be Granted.**

The undersigned counsel has only been legal counsel for Defendant John Freshwater as it relates to John Freshwater's state administrative hearing, Mr. Freshwater's counterclaims in the instant action and as Mr. Freshwater's legal counsel in another case titled, *Freshwater v. Mount Vernon City School Dist. B.O.E., et al*, Case No. 2:09cv464, which is a case to be heard by this Court.

At all times prior to April 28, 2010, whereupon this Court's Order (Doc. 90), permitted Defendant John Freshwater's trial counsel, Attorney's Jason Deschler and Robert Stoffers, to withdraw as Defendant Freshwater's trial counsel, the undersigned counsel did not have any regular contact with Plaintiff's Counsel Douglas Mansfield. The undersigned did not participate in settlement discussions, did not attend all depositions scheduled by Attorney Deschler and did not have any duty, role or responsibility to **defend** Defendant Freshwater in his personal or professional capacity. The undersigned represented Counterclaimant/Defendant John Freshwater and filed documents with this Court in the capacity as counsel for "Counterclaimant/Defendant John Freshwater". In the first of multiple such mischaracterizations and disingenuous representations to this Court, Plaintiff's counsel erroneously proposes the undersigned acted as "defense" counsel by citation to "Defendant/Counterclaimant's John Freshwater's Response to Plaintiff's First Set of Interrogatories" (Doc 96-2, Exhibit A). In Document 96-2, Exhibit A,

cited by Plaintiff's counsel, each of the six (6) objections acknowledged by the undersigned are stated as objections by "Defendant/Counterclaimant" not merely as "Defendant" as Plaintiff's counsel asserts. Defendant John Freshwater was first a Defendant in this action and then a "counterclaimant". Attorneys Deschler and Stoffers would not file counterclaims on behalf of John Freshwater so Mr. Freshwater engaged the undersigned to serve as counsel for Mr. Freshwater's counterclaims. Accordingly, if John Freshwater did not have any counterclaims, the undersigned would not have been permitted to represent Mr. Freshwater. Once a claim is dismissed, as was John Freshwater's counterclaims, former trial counsel for issues ultimately dismissed does not need to seek permission to withdraw from representation of claims already dismissed as the Court's summary judgment dismissal of the once pending counterclaims effectively does the same.

Defendant John Freshwater encountered a contentious rift with Attorneys Deschler and Stoffers whereafter they requested Mr. Freshwater to sign a *Waiver of Conflict*. (Exhibit 1) Mr. Freshwater refused to sign the *Waiver of Conflict* proffered by his former defense counsel. If this Court had made further inquiry of the matter the Court would have learned that the representations made by both Attorney Deschler and Attorney Stoffers in their motions that "Defendant Freshwater continues to be represented by R. Kelly Hamilton" were inexact and misleading in relation to this case. The undersigned never represented Defendant John Freshwater in the manner and for the issues assigned to Attorneys Deschler and Stoffers. If the undersigned had represented Defendant John Freshwater for the issues assigned to Attorneys Deschler and Stoffers then what would be the reason for the duplicitous representation? In short, Attorneys Deschler and Stoffers did not precisely assert for this Court - "How?" - the undersigned represents Mr. Freshwater. Regrettably, Attorneys Deschler and Stoffers purported

to this Court characterizations that were inaccurate as the undersigned only has, and continues to, represent John Freshwater in his state administrative hearing, Case No. 2:09cv464, and Mr. Freshwater's former counterclaims.

**B. John Freshwater Is NOT in Violation of Any Discovery Order Nor Is the Undersigned.**

Plaintiff's counsel has made continued mischaracterizations and innuendos that are not true. The fact is John Freshwater and the undersigned have performed exactly as required. As averred by the undersigned in the attached Exhibit 2 (Affidavit of R. Kelly Hamilton, May 10, 2010), every document possessed by and required to be delivered to Plaintiff's counsel has been accomplished. Additionally, the affidavits required to ensure completeness were delivered.

Pursuant to this Court's Order mandated via the telephone conference held on April 21, 2010, John Freshwater was first directed by the undersigned to make another inspection of his personal belongings and then articulate his position regarding the items alleged by Plaintiff's counsel to be withheld from discovery. John Freshwater performed as requested and tendered the attached affidavit identified in Exhibit 3 as Pages 20-21. John Freshwater's affidavit was originally intended to be delivered during Plaintiff Steve Dennis' deposition previously scheduled by Attorneys Deschler and Stoffers for April 27, 2010, a date and time the undersigned did not schedule nor intend to attend due to preparations required in John Freshwater's state administrative hearing. However, as Plaintiff Dennis' deposition was canceled by Attorneys Deschler and Stoffers on April 27, 2010, the undersigned, on April 30, 2010, after the state administrative hearing on that date, provided to Plaintiff's counsel John Freshwater's affidavit attached to and in conjunction with the delivery of Employee Exhibit 161 from the state administrative hearing. (Exhibit 3, Pages 1-19) Additionally attached to

Employee Exhibit 161 was the undersigned's affidavit. (Exhibit 3, Pages 22-23) Both affidavits, that of John Freshwater and the undersigned, were required as a result of this Court's teleconference Order from April 21, 2010.

During the week of May 3-7, 2010, the undersigned and Plaintiff's counsel exchanged at least four (4) emails. Not once in any of the communications between the undersigned and Plaintiff's counsel did Plaintiff's counsel assert he had not received any of the requested documents. Similarly, not once did the undersigned nor John Freshwater assert the deposition scheduled of John Freshwater for May 7, 2010, would not take place because John Freshwater would not appear.

As documented in the email dated May 4, 2010, (Exhibit 4) from the undersigned to Douglas Mansfield, the undersigned asked:

“..how do you propose resolving the conflict of having John Freshwater deposed as he is without trial counsel to advise/defend him in the deposition? Please advise and I will pass the information on to John Freshwater. Do note I did not and do not intend to advise/defend John Freshwater at the deposition as I was removed as trial counsel when John Freshwater's counterclaims were dismissed.”

As soon as the undersigned learned Plaintiff's counsel had left a voicemail on May 6, 2010, the undersigned responded both by telephone and email dated May 6, 2010. (Email dated May 6, 2010, 4:10PM from affiant to Douglas Mansfield (Exhibit 5). Subsequent to a telephone call between the undersigned and Plaintiff's counsel, the undersigned documented Plaintiff's counsel's request to deliver the “George Bush Poster” to counsel's office after learning the latest attempt at a legible copy was claimed to be unacceptable (Exhibit 6, Email dated May 6, 2010, 5:10PM from affiant to Douglas Mansfield) Examination of the “George Bush Poster” was made by the undersigned both before and after delivery to Plaintiff's counsel and the document appears legible. (Exhibit 7) Even on the day of John Freshwater's anticipated deposition, Mr.

Freshwater telephoned the undersigned to alert Plaintiff's counsel of car troubles but that Mr. Freshwater was available even if without counsel. The undersigned relayed this fact to Plaintiff's counsel (Exhibit 8, Email dated May 7, 2010, from affiant to Douglas Mansfield).

Plaintiff's counsel repeatedly mischaracterizes John Freshwater's position and testimony. An example is contained in Plaintiff's Exhibit G (Doc. 96-8) which intentionally misrepresents John Freshwater's testimony by providing only a portion of Mr. Freshwater's answer in response to a question regarding the 10 Commandment bookcovers. The clarifying questions asked and answered by John Freshwater are as follows from the following page, Page 4420, of Plaintiff's Exhibit G:

Q. Does this look like one of the book covers that was in your room?

A. Yes.

Q. When you took the book covers down from your room, do you have any of those anymore?

A. No.

Q. And do you even know where this one came from?

A. No.

Q. Does this look like one of those that was in the glass portion of your door?

A. Yes.

Q. We will go ahead and submit this. I mean, this isn't yours, right?

A. No.

Q. So you don't care if we put --

A. No.

The clarifying questions demonstrate John Freshwater does not know where the introduced bookcover came from nor is it one of the copies that was in the glass by his classroom door.

Plaintiff's counsel attempts to portray words as those of Defendant John Freshwater with language such as,

1. "...Freshwater also produced a few bates-stamped photocopied materials" (Page 9, Line 1, Doc. 96);
2. "...Freshwater..testified..he possesses or copied a host of other materials" (Page 9, Line 3-4, Doc. 96);

3. "This copying resulted in "multiple" trips to cart materials back-and-forth.." (Page 9, Line 14, Doc. 96);
4. "..Freshwater's repeated references to this vast quantity of materials" (Page 9, Line 21, Doc. 96);

The above four (4) selections are not the words of John Freshwater. The word "multiple" was not a word chosen by John Freshwater during his testimony but rather Mr. Freshwater was answering a questions that contained the word "multiple" (Plaintiff's Exhibit F, Doc. 96-7, Transcript Page 4893) whereby the cross-examiner used the word "multiple" to characterize Mr. Freshwater's actions. The undersigned provided the exact contents of the materials received by John Freshwater from Superintendent Steve Short (Exhibit 9). The above characterizations and assertions by Plaintiff's counsel's are speculative and more proper the subject of a deposition of Defendant John Freshwater so that illumination of Plaintiff's counsel's understanding can take place. Plaintiff's counsel has had since December 11, 2009, to depose Defendant John Freshwater regarding any new information learned as a result of Mr. Freshwater's testimony in the state administrative hearing.

Defendant John Freshwater has satisfied his requirement to be truthful and has disclosed all discoverable documents in his possession. Defendant John Freshwater's affidavit addresses:

1. Any "billing statements" for the entire calendar year of 2008. (Exhibit 3, Page 20, Paragraph 3, Lines 4-9).
2. Any handwritten notes made by John Freshwater (Exhibit 3, Page 20, Paragraph 3, Lines 1, and Pages 20-21, Paragraph 4).
3. Religious posters and other religious materials (Exhibit 3, Page 20, Paragraph 3, Lines 1, and Lines 15-17).
4. Materials removed from John Freshwater's classroom (Exhibit 3, Page 20, Paragraph 3, Lines 1, and Page 21, Paragraph 5).
5. Textbooks/Books (Exhibit 3, Page 20, Paragraph 3, Lines 1, and Page 21, Paragraph 5).

### **III. CONCLUSION**

The undersigned was not and is not Defendant John Freshwater's trial counsel for the issues remaining in this case. The undersigned would be committing legal malpractice if now he were forced to defend a case he never contemplated defending and had no notice to prepare but for the two weeks remaining before trial.

Defendant John Freshwater and the undersigned have complied with the Orders of this Court to produce those items in their control. Defendant John Freshwater nor the undersigned can produce what they do not have.

WHEREFORE, the undersigned counsel for former Counterclaimant/Defendant John Freshwater respectfully requests this Court permit Defendant Freshwater to obtain the appointment of new counsel as asserted is possible by Claim Analyst Moore.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Counterclaimant/Defendant John Freshwater

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ R. Kelly Hamilton

The Law Office of R. Kelly Hamilton (0066403)