

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	:	
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TW, Inc., f/k/a Cablevision Electronics	:	Case No. 03-10785 (MFW)
Investments, Inc.,	:	
Debtor.	:	(Jointly Administered)
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	:	
TW, Inc., f/k/a Cablevision Electronics	:	
Investments, Inc.,	:	
	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 05-50572 (PBL)
	:	
Vision Information Services, LLC,	:	Related Documents: 22, 23, 26, 28
	:	
Defendant.	:	
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**MEMORANDUM AND ORDER DENYING PLAINTIFF’S MOTION
TO STRIKE DEFENDANT’S EXPERT WITNESS BRIAN KLEMZ**¹

_____ This action was commenced by Plaintiff by filing, on March 11, 2005, its Complaint seeking to avoid and recover, under §§ 547 and 550 of the Bankruptcy Code² certain allegedly preferential transfers made by Debtor to Defendant during the 90-day “preference period” preceding the filing of Debtor’s petition under Chapter 11 of the Code. In its Answer to Plaintiff’s Complaint, Defendant asserted various defenses, including the affirmative defenses of the “ordinary course of business” and “new value” under §§ 547(c)(2) and 547(c)(4),

¹ This Memorandum constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

² 11 U.S.C. §§ 101 et seq. References herein to statutory provisions by section number only will be to the Bankruptcy Code unless the contrary clearly appears.

respectively.

On June 15, 2005, this Court entered its Scheduling Order (D.I. 9), which provides, in paragraph 5, as follows: “All expert discovery shall be completed, and discovery shall close, no later than 180 days after the first answer or other responsive pleading is filed. Expert reports on issues on which a party bears the burden of proof shall be served no later than 130 days after the first answer or other responsive pleading is filed.”

On August 16, 2005, the 130th day after the filing of Defendant’s answer, Defendant filed and served its Identification of Expert Witness. This document identifies one Brian Klemz as Defendant’s potential expert witness, and states that Mr. Klemz will not receive additional compensation beyond that which he is receiving as an employee of Defendant, and that he is not retained or specially employed outside the scope of his responsibilities to Defendant. The following constitutes Defendant’s “Description of Expert Testimony”, in its entirety:

Brian Klemz is Chief Financial Officer for Vision. Without limitation, Mr. Klemz may provide expert testimony as to the standard business terms and practices in the industry in which the Defendant and/or the Debtors engaged in business. Such testimony may include, but is not limited to: 1) the credit terms and payment practices, including terms, conditions, manner and method of payment, in this industry during the preference period; and 2) whether such terms and practices were consistent with the parties’ ordinary course of business before the preference period; and 3) that payments made during the preference period were made according to ordinary business terms.

(Defendant’s Identification of Expert Witness, at 2)

By letter dated September 8, 2005, counsel for Plaintiff requested that counsel for Defendant withdraw its Identification of Expert Witness, asserting that Fed. R. Civ. P. Rule

26(a)(2)³ and Plaintiff's interrogatories required more information than was provided, that under this Court's Scheduling Order, the deadline for filing expert reports had passed, and that Plaintiff is prejudiced by the lack of its production. On September 12, counsel for Plaintiff telephoned counsel for Defendant, who stated that the Identification would not be withdrawn, that no further disclosure was necessary and that Plaintiff could depose the proposed expert witness. On September 15, Plaintiff filed its Motion to Strike Defendant's Expert Witness Brian Klemz.

Plaintiff asserts that the provisions of Rule 26(a)(2) and this Court's Scheduling Order require the preparation and filing of a written report by Mr. Klemz. In the absence of such a report, Plaintiff contends that it is prejudiced in that it can not prepare its case or employ its own expert in opposition to Mr. Klemz, and that it was prohibited by Rule 26(b)(4) from deposing Mr. Klemz until after the report was filed and served. Plaintiff is mistaken.

Rule 26(a)(2) deals with the disclosure of expert testimony, and provides, in material part, in subparagraph (B), as follows:

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

11 U.S.C. § 26(a)(2)(B).

It appears clear to this Court that the requirement of preparation and filing of a written report was not intended to be imposed upon prospective witnesses who were not in the two categories specified in the rule, namely, those who are retained or specially employed to provide

³ Fed.R.Civ.P. 26 is made applicable to adversary proceedings by Fed.R.Bankr.P. 7026.

expert testimony in the case, and those whose duties as an employee of the party regularly involve giving expert testimony. *See, Connolly v. NEC America, Inc. (In re Tess Communications, Inc.)* 291 B.R. 535, 537 (Bankr.D.Co. 2003). To hold otherwise would render the inclusion of the two categories meaningless.

Defendant's Identification of Expert Witness makes it clear that Mr. Klemz fits in neither of the categories of persons who are required to prepare and file a written report under Rule 26(a)(2)(B). Thus, in this Court's view, Mr. Klemz was not required by Rule 26(a)(2)(B) to prepare and submit an expert witness report.

Similarly, it is this Court's view that the recitals contained in Defendant's Identification of Expert Witness provide sufficient information to satisfy Plaintiff's Interrogatories. Simply stated, in the context of this case and the issues to be litigated, Plaintiff was provided all the information needed to prepare for trial.

Finally, this Court views Plaintiff's reliance upon Rule 26(b)(4) to be disingenuous. That provision is to the effect that although a party may depose any person identified as a potential expert witness, if an expert report is required under Rule 26(a)(2)(B), no deposition may be conducted until after the report is provided. Plaintiff bootstraps this provision upon its erroneous conclusion that Mr. Klemz was required to provide an expert witness report as justification for its failure to depose Mr. Klemz, although counsel specifically made the witness available for deposition, and there was ample time for such an examination before the close of discovery under this Court's Scheduling Order. Plaintiff's failure to depose Mr. Klemz was apparently a strategic decision with which it must now live.

In *In re Cherrydale Farms, Inc.*, 2001 WL 1820323 (Bankr.D.Del. 2001), Judge Walsh of

this Court deemed testimony of the Chief Financial Officer of the debtor, with many years of experience with the debtor and in its industry, sufficient to establish evidence of an industry standard, noting that, “I cannot think of a better witness.” *Id.*, at *5. *See also, Troisio v. E. B. Eddy Forest Products Ltd. (In re Global Tissue, L.L.C.)*, 106 Fed. Appx. 99, * 103 (“[We] believe that the decision in Cherrydale supports the notion that testimony from employees of the parties involved in a preference payment dispute may be used to establish an industry standard, as long as the court determines that the employees are credible and have significant and relevant industry experience.”)

If Mr. Klemz proposes to offer expert testimony at the trial of this case, this Court will determine at that time his qualifications and credibility within the area or areas on which his expert opinion is to be offered. It appears from Defendant’s Identification of Expert Witness that Mr. Klemz’ testimony is expected to focus primarily upon Defendant’s asserted “ordinary course of business” defense under § 547(c)(2). This Court will be truly astounded if counsel for Plaintiff, which has extensive experience in preference litigation in this district, is in the least bit surprised by any aspect of Mr. Klemz’ testimony, or is in any way unprepared to address and/or counter it.

Based upon the foregoing, Plaintiff’s Motion to Strike Defendant’s Expert Witness Brian Klemz is **DENIED**.

IT IS SO ORDERED this 14th day of **October, 2005**.



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE