



scheduling order to allow this deposition and to allow additional time for HBPS to designate its experts. The Porters have timely responded, arguing that HBPS's actions have "alienated" Macannelli and requesting a scheduling order modification so that they may find a new expert. HBPS, in a second motion filed October 10, 2002, seeks an expedited ruling, because its deadline to designate experts is November 1, 2002. The Porters filed no response or objection to the second motion. District Judge Samuel H. Mays has referred both the motion to compel and the motion for expedited ruling to the United States Magistrate Judge for determination.

According to the parties' memoranda, Macannelli's deposition was first scheduled for September 5, 2002. It was canceled due to a scheduling conflict and re-scheduled for September 18, 2002. Prior to his September 18th deposition, Macannelli informed the parties that he would not attend the deposition without receiving a \$3,000 cashier's check for his services delivered in advance of his departure to his Illinois office. The \$3,000 was calculated as follows:

Deposition Time	\$150/hr. @ 8 hrs.	\$1,200.00
Preparation Time	\$150/hr. @ 4 hrs.	600.00
Travel Time	\$125/hr. @ 9 hrs.	1,125.00
Hotel Room		<u>75.00</u>
	TOTAL	\$3,000.00

After determining the basis for the fee, HBPS agreed to pay \$2,400 to Macannelli, with the understanding that the Porters would pay

the \$600 expert's "preparation time". Due to time constraints, HBPS was unable to obtain a cashier's check but agreed to make a company check available on the morning of the deposition. This apparently was unacceptable to Macannelli. On September 17, 2000, he notified the Porters' counsel that he would not appear for the deposition. The Porters' counsel then canceled the deposition. Macannelli then faxed a letter to the Porters' counsel in which he demanded a pre-paid sum of \$4,200 for any subsequent deposition, claiming that the increased amount was due to time wasted in connection with the canceled deposition, and in which he indicated that he could give a deposition on November 5-7, 2002.

The parties now clash over whether HBPS or the Porters are at fault for Macannelli's behavior. After considering all the statements set forth, it appears to this court that both parties have acted in good faith and that no sanctions are warranted. The Porters simply have had the misfortune to encounter a contumacious expert, who is now unwilling to proceed without receiving an ever-increasing sum for his services. It further appears that the problem here is not a refusal by HBPS to pay reasonable expert fees. Rather, the September 18 dispute and Macannelli's subsequent fee demands seem to turn on Macannelli's objection to a company check in lieu of a cashier check as payment for his services.

This court may compel the party seeking discovery to pay

reasonable fees associated with expert testimony, see FED. R. CIV. PRO. 26(b), but it cannot compel a party's retained expert to testify in a party's favor if he is unwilling. See FED R. CIV. P. 26(b)(4)(A) and Advisory Committee Notes for 1970 and 1993 amendments to Rule 26.

The Porters do not indicate whether they have terminated their relationship with Mccannelli. In light of Mccannelli's cavalier attitude toward the Porters' litigation needs, it is questionable whether Macannelli will testify on the Porters' behalf. The Porters, however, have already received at least one discovery deadline extension to allow them to obtain experts in this action.<sup>1</sup> Further, the Porters could have avoided this situation by procuring a cashier's check on September 17, and then seeking reimbursement from HBPS.

Accordingly, it appears that HBPS's motion is well-taken. It is therefore ordered that the deposition of Michael Macannelli is hereby set on Wednesday, November 6, 2002, at 9:30 a.m., in Butler,

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<sup>1</sup> The original scheduling order set a July 1, 2002 deadline for the plaintiffs to make their witnesses available. (Rule 16(b) Scheduling Order, *Porter v. Hamilton Beach*, Civil Case No. 01-CV-2970 (W.D. Tenn., Feb. 13, 2002).) On May 30, 2002, the plaintiffs sought additional time to obtain expert testimony. (Pl.'s Mot. and Notice of Mot. to Amend Sched. Order, *Porter v. Hamilton Beach*, Civil Case No. 01-CV-2970 (W.D. Tenn., May 30, 2002).) The Porters disclosed their experts on July 3, 2002. HBPS objected to the experts on July 19, 2002, and the objection was denied.

Illinois, at a location to be agreed upon by counsel, or, in the alternative on November 7, 2002, upon agreement of counsel, but no later than November 7, 2002. HBPS shall hand-deliver to the plaintiffs' counsel, on November 4, 2002, a check, drawn on HBPS's account or defense counsel's account, in the amount of \$1,050 (\$150 per hour @ seven hours) made payable to the Porters' counsel as a reasonable fee for Macannelli's deposition time. HBPS shall submit this amount regardless of whether the deposition actually requires the full seven hours.<sup>2</sup> Any other expenses, charges, or conditions for Macannelli's time and deposition are the responsibility of the Porters, including providing a cashier's check to Macannelli prior to the commencement of his deposition. If Mccannelli continues to refuse to be deposed in accordance with the terms of this order, he is barred from testifying in this action.

The scheduling order is amended and the deposition deadline is extended to November 7, 2002, for the sole purpose of deposing Macannelli. The scheduling order is also amended to allow the HBPS seven (7) days from the date of Macannelli's actual deposition to identify its experts. Because any other requests for changes to the scheduling order may impact the trial date, they shall be submitted to the District Judge by new motion. The Porters'

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<sup>2</sup> If Macannelli refuses to be deposed, the Porters' counsel shall return this fee to HBPS.

request to amend the scheduling order to allow time to find another expert is denied at this time.

IT IS SO ORDERED this 31st day of October, 2002.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE