

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

**HARVEY M. HOFFMAN & JANICE E.
HOFFMAN as Trustees of the
HARVEY M. HOFFMAN & JANICE
E. HOFFMAN Revocable Trust
u/a/d Nov. 15, 2019,**

Plaintiffs,

v.

**HAMMERHEAD CONSTRUCTION LLC,
STEPHEN RIVERA, and
JENNIFER FIRESTONE,**

Defendants.

3:21-cv-00046-RAM-EAH

**TO: A. Jeffrey Weiss, Esq.
Ryan C. Meade, Esq.**

ORDER

THIS MATTER comes before the Court on “Plaintiffs’ Motion to Strike Defendant Jennifer Firestone’s Untimely Expert Witness Disclosure and to Preclude Her from Calling Richard G. Taylor as an Expert Witness,” filed on December 17, 2023 by Plaintiffs Harvey M. Hoffman and Janice E. Hoffman, as Trustees of the Harvey M. Hoffman & Janice E. Hoffman Revocable Trust. Dkt. No. 215. In their Motion, Plaintiffs seek to preclude Defendant Jennifer Firestone from calling Richard G. Taylor as an expert witness at trial, given that the November 17, 2023 expert disclosure was made after the time to disclose experts had closed. In addition, Plaintiffs viewed the disclosure as an “end-run” around various Court Orders in October and December 2022 that had denied Defendants Hammerhead and Rivera’s motion to serve expert disclosures (including that of Mr. Taylor) out of time, and Chief Judge Robert

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A. Molloy's September 2023 Order that overruled Defendants' objections to those Orders. *Id.* Plaintiffs contend that Mr. Taylor's proposed expert opinion does not relate to any fact or issue in the claims against Firestone. *Id.* In the alternative, if the Court permitted the untimely expert disclosure, Plaintiffs request that the Court reopen expert discovery to permit Plaintiffs sufficient time to depose Mr. Taylor. *Id.*

Defendants Hammerhead Construction LLC, Stephen Rivera, and Jennifer Firestone did not file a response to the motion, and the December 31, 2023 deadline to do so has passed. For the reasons that follow, the Court will grant the unopposed motion.

BACKGROUND

Plaintiffs originally filed their Complaint in May 2021, alleging twelve causes of action against Defendants Hammerhead Construction LLC and Stephen Rivera based upon construction defects and incomplete repair and renovation work at property owned by the Hoffman Trust on St. Thomas, U.S. Virgin Islands. Dkt. No. 1.

Defendants answered and, in September 2021, the Court entered a trial management order that set various deadlines: May 16, 2022 for fact discovery; June 17 and August 19, 2022 for the party with the burden of proof to identify experts and the other party to identify experts, respectively; November 7, 2022 for "all" discovery. Dkt. No. 15. On September 12, 2022, the Court amended the trial management order, permitting Plaintiffs to file a motion to amend by September 16, 2022 and Defendants to identify their experts no later than October 1, 2022. Dkt. No. 74.

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Having received an extension, Plaintiffs filed their motion to amend on September 26, 2022 in which they sought, inter alia, to add the Hoffmans as individual Plaintiffs (as opposed to Trustees) and to add Jennifer Firestone (wife of Defendant Rivera) as a Defendant. Dkt. No. 80. The Court denied in part the motion to the extent Plaintiffs sought to add Firestone and the Hoffmans as individuals, but granted it to the extent Plaintiffs sought to make other amendments. Dkt. No. 102. Plaintiffs filed a First Amended Complaint in January 2023. Dkt. No. 114. Plaintiffs also objected to the Order granting in part and denying in part the motion to amend. Dkt. No. 109.¹

On September 28, 2022, Defendants filed a motion for an extension of time to disclose their expert reports, given that their “expert(s)” were “unable to inspect, measure, or test most, if not all of the items identified in the complaint.” No. 81. The Court granted the motion, permitting them an extension until October 17, 2022, but warned that “no further extensions will be granted.” Dkt. No. 85. Nevertheless, Defendants filed a second motion for an extension on October 17, stating, inter alia, that “the expert analysis of the roof structure has taken longer than expected.” Dkt. No. 87. The Court denied the motion because Defendants failed to show good cause. Dkt. No. 89. Defendants filed a motion for leave to serve expert disclosures out of time, Dkt. No. 92, served the expert reports (including the expert report of Mr. Taylor) on Plaintiffs on November 1, 2022, Dkt. No. 93, and objected to the Order denying

¹ In September 2023, the District Judge overruled part of that Order, and permitted Plaintiffs to file a Second Amended Complaint adding Firestone, Dkt. No. 173, which they filed in October 2023, Dkt. No. 179.

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their second request for an extension, Dkt. No. 94. The Court denied Defendants' motion for leave to serve expert disclosures out of time on December 1, 2022. Dkt. No. 101. In September 2023, the District Judge overruled the Defendants' objections to the Orders denying the motion for a second extension of time to serve their expert discovery report as well as their motion for leave to serve expert disclosures out of time. Dkt. No. 175.

During 2023, the Court adjudicated numerous discovery requests and disputes in this case. It, inter alia, extended fact discovery to permit Plaintiffs to conduct certain remaining depositions, Dkt. No. 149, and extended fact discovery so Defendants could conduct discovery on the claims asserted in the First Amended Complaint, Dkt. No. 150. In August 2023, the Court also granted Plaintiffs' motion to reopen the time to provide an accounting expert's report and opinion. Dkt. No. 165. That Order provided an October 20, 2023 deadline for Defendants to name their accounting expert, and a November 21, 2023 deadline for all expert depositions, stating that "no rebuttal reports are allowed without leave of Court." *Id.* In a subsequent Order, the Court granted Plaintiffs' motion for an extension of their expert deadline, and extended the deadlines from the prior Order by two weeks. Dkt. No. 183. On November 10, Plaintiffs filed a motion to strike and preclude Defendants' accounting expert, given that Defendants had not filed an expert report, Dkt. No. 191; the Court denied the motion without prejudice, Dkt. No. 200.

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On November 17, 2023, Defendants filed a motion to dismiss, Dkt. Nos. 193, 194, as well as an Answer to the Second Amended Complaint served in October 2023 that added Firestone as a Defendant, Dkt. No. 195.

On December 7, 2023, the Court held a conference to address Plaintiffs' Emergency Motion to Quash and for a Protective Order, Dkt. No. 201, based on issues related to scheduling the depositions of Plaintiffs' experts and Defendants' payment of those experts in advance for their deposition time. The Court denied the motion. Dkt. No. 213.

On December 17, 2023, Plaintiffs filed the instant motion to strike and preclude Firestone's expert witness, Mr. Taylor. Dkt. No. 215. Plaintiffs state that Defendants served a number of untimely responses to discovery and other motions on them on November 17, 2023. Dkt. No. 215-1 at 5. Among the documents was Firestone's untimely notice of expert witness disclosure, designating Mr. Taylor as her expert witness. *Id.*, Dkt. No. 215-2. Plaintiffs' counsel explained that the one-month gap between being served with the untimely notice of expert witness on November 17 and filing the instant motion to strike on December 17, 2023 was due to his contracting COVID and two-week illness. Dkt. No. 215-1 at 5-6. Counsel noted that Firestone never moved to extend the time to provide her expert disclosures or seek leave to file her expert disclosures out of time. *Id.* at 6.

Plaintiffs further point out that the Court granted Defendants an extension until October 17, 2022, to file their expert disclosure of Mr. Taylor, and denied their second motion for an extension. *Id.* at 3. The Court also denied Defendants leave to file Mr. Taylor's expert

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report out of time in December 2022, Dkt. No. 110, and the District Judge upheld these Orders in September 2023, Dkt. No. 175. The expert report Firestone seeks to file now is the same report the Court ruled was untimely and denied leave to file in October and December 2022. Dkt. No. 215-1 at 7-8. The time for Defendants to have provided their expert disclosures expired on October 17, 2022²; they now seek to circumvent that deadline by filing a notice of Mr. Taylor as Firestone's expert on November 17, 2023. *Id.* at 7. Defendants cannot claim due diligence, or that they were unaware of the need to reopen expert discovery following Plaintiffs being permitted to add Firestone as a Defendant, as they filed multiple motions to extend discovery throughout the case. Nor could they claim that they were unaware of the need to obtain leave before filing an untimely expert disclosure. *Id.* Defendants were attempting to get this report in "through the back door which [they are] unable to get by the front door, and without any claim that [they have] been diligent[.]" *Id.* at 7-8.

Plaintiffs also contend that Mr. Taylor's opinion does not meet the "fit" or "helpfulness" requirements for expert testimony, as it is not relevant to their claims against Firestone. *Id.* at 8-12. Mr. Taylor's report, dated October 26, 2022, concerns only the methods used to calculate wind loads used by another expert and opines which building codes were applicable in this case. *Id.* at 9. But those opinions do not address any fact or issue in dispute regarding the claims against Firestone (four of the eleven counts), which involve her alleged

² Plaintiffs point out that additional expert discovery allowed by the Court was limited to the accounting expert. Dkt. No. 215-1 at 3.

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participation in a scheme to defraud Plaintiffs based on filing a notice of claim of construction lien and overbilling, as well as defamation, and Mr. Taylor's expert report does not discuss those matters. *Id.* at 10-11. Defendants were offering Mr. Taylor's report to rebut evidence related to Rivera and Hammerhead, not Firestone, so it should be stricken. *Id.* at 11.

In the alternative, Plaintiffs argue that, since the purpose of Rule 26(a)(2)(C) is to promote fairness, if the Court denies their motion, it should reopen expert discovery and allow them a reasonable time to depose Mr. Taylor and if necessary to identify and provide a rebuttal expert. *Id.* at 12-13.

Defendants did not respond to this motion by the two-week deadline provided in the Rules, *see* LRCi, 6.1(b)(5), nor did they file a motion to extend the deadline.

DISCUSSION

As an initial matter, the Court notes that Plaintiffs' motion did not comply with LRCi 7.1(f) that requires counsel to seek concurrence from opposing counsel when filing a non-dispositive motion. The Court will exercise its discretion to address this motion on the merits. However, it warns both counsel that this is the last time it will do so, either in this case or in *Hammerhead v. Hoffman*, 3:23-cv-0014. *If either attorney files additional motions without seeking concurrence of opposing counsel under the Local Rule in either case, the Court will reject such filings out of hand.*

Plaintiff cites Fed. R. Civ. P. 16(b)(4), governing modification of scheduling orders for good cause and with the judge's consent, where a proponent has to show due diligence in

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seeking such relief, as the governing standard for this motion. Dkt. No. 215-1 at 6-7. While that Rule would apply if Defendants had actually filed such a motion to extend their expert disclosure deadline before serving the expert report on Firestone, Defendants did no such thing. Rather, they included their notice of Mr. Taylor’s expert report along with numerous documents served on Plaintiffs in November 2023. But this was the same October 2022 expert report that the Court had already ruled that Defendants could not have an extension to file, and denied them leave to file the untimely report—rulings which were upheld by the District Judge over Defendants’ objections. Dkt. Nos. 89, 101, 175. Defendants did not make even a feeble attempt to revise the report to try make it applicable to the accounting and defamation claims against Firestone, which are significantly different from those against Hammerhead and Rivera concerning the quality of the repair and renovation on the Plaintiffs’ home, which the expert report addresses. Defendants simply re-served the same October 2022 report—created before Firestone was even a Defendant in the case—over a year after their expert deadline expired. Perhaps Defendants realized their blatant overstepping and thus declined to file an opposition to Plaintiff’s instant motion, in what could only have been an attempt to justify the unjustifiable.

Pursuant to Fed. R. Civ. P. 12(f), a court may “strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f); *see also Collura v. City of Philadelphia*, 590 F. App’x 180, 185 (3d Cir. 2014). Immaterial matter has been defined as “that which has no essential or important relationship to the

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claim for relief.” *Donnelly v. Commonwealth Fin. Sys.*, No. 07-cv-1881, 2008 WL 762085, at * 4 (M.D. Pa. Mar. 20, 2008) (quoting *Delaware Health Care v. MCD Holding Co.*, 893 F. Supp. 1279, 1291–92 (D. Del.1995)). “Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.” *Id.* Scandalous matter “improperly casts a derogatory light on someone, most typically on a party to the action.” *Id.* at * 4 (internal quotation marks omitted). A court has “considerable discretion” in deciding a motion to strike under Rule 12(f). *Carter v. Newman*, No. 13-cv-5139, 2015 WL 858876, at * 1 (D.N.J. Feb. 27, 2015).

Black’s Law Dictionary (11th ed. 2019) defines pleading as “[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. In federal civil procedure, the main pleadings are the plaintiff’s complaint and the defendant’s answer.” Thus, while an expert report does not constitute a pleading per se that would qualify under Rule 12(f) to be stricken, courts in this Circuit have stricken expert reports, generally as a sanction for discovery violations. *See, e.g., TQ Delta LLC v. Comcast Cable Commc’ns LLC*, No. 15-cv-611, 612, 615, 616, 2023 WL 7920930 (D. Del. Nov. 16, 2023). As explained above, the Court has already stricken Mr. Taylor’s expert report as violating the Rule 16 Scheduling Order, and has denied Defendants leave to file the report, Dkt. Nos. 89 and 101—rulings which have been upheld by the District Judge, Dkt. No. 175. There is no basis for it to be introduced now, long after the expert discovery deadline has passed, where Firestone made no attempt to file a motion for leave to file this report, and did

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not even oppose the motion to strike. The resolution of this issue is settled and will not be relitigated here. *See, e.g., Peak v. Colvin*, No. 12-cv-1224, 2014 WL 888494, at *3 (M.D. Pa. Mar. 6, 2014) (describing law of the case doctrine as “once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. The purpose of this doctrine is to promote the judicial system's interest in finality and in efficient administration.”) (internal quotation marks omitted) (further quoting *In re Pharm. Benefit Managers Antitrust Litig.*, 582 F.3d 432, 439 (3d Cir. 2009)).

For these reasons, the Court will grant Plaintiff's unopposed motion. Further, because discovery and expert discovery have concluded, the Court will not adopt Plaintiffs' alternative resolution to reopen expert discovery to allow them time to depose Mr. Taylor.

Accordingly, it is hereby **ORDERED** that ““Plaintiffs' Motion to Strike Defendant Jennifer Firestone's Untimely Expert Witness Disclosure and to Preclude Her from Calling Richard G. Taylor as an Expert Witness,” Dkt. No. 215, is **GRANTED**.

ENTER:

Dated: January 9, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE