

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 4:05-cv-33 (TSL/LRA)
	)	
	)	
IKE BROWN, individually, and in his	)	
official capacities as Chairman of Noxubee	)	
County Democratic Executive Committee	)	
and Superintendent of Democratic Primary	)	
Elections; NOXUBEE COUNTY	)	
DEMOCRATIC EXECUTIVE	)	
COMMITTEE; CARL MICKENS,	)	
individually, and in his official capacities	)	
as the Circuit Clerk of Noxubee County,	)	
Superintendent of Elections, Administrator	)	
of absentee ballots and Registrar of voters;	)	
the NOXUBEE COUNTY ELECTION	)	
COMMISSION; NOXUBEE COUNTY,	)	
MISSISSIPPI; and those acting in concert,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM IN OPPOSITION OF THE UNITED STATES TO  
DEFENDANTS’ OBJECTION TO MAGISTRATE JUDGE’S ORDER AND  
MOTION FOR REVIEW BY DISTRICT JUDGE**

**I. Procedural History**

The Magistrate has twice stricken expert designations by the Defendants Ike Brown and the Noxubee County Democratic Executive Committee (“Defendants”). The original deadline for Defendants to designate an expert and provide the expert’s opinion pursuant to Fed. R. Civ. P. 26(a)(2) was April 16, 2006. On May 10, 2006, the Court,

with the consent of the Plaintiff, extended the deadline to May 20, 2006. The Defendants failed to designate an expert by the extended deadline. When the late designation was filed on May 23, 2006, it contained no opinion by the expert, other than his opinion that his report could not be complete until August 31, 2006. On July 10, 2006, the late designation was stricken. Defendants' motion to delay the trial in order to conduct more discovery on Section 11(b) claims was granted on September 8, 2006. Discovery on the narrow issue of Section 11(b) claims was reopened until October 10, 2006. Defendants conducted no discovery during the reopened period. Instead of conducting discovery, the same expert was re-designated by Defendants on October 2, 2006. Defendants never sought leave to make a late designation. The Plaintiffs did not receive the expert's opinion until October 12, 2006.

Discovery in this case, apart from Section 11(b) claims, closed on June 16, 2006. Trial is set for January 16, 2007.

## **II. Standard of Review**

Defendants rightly note that the standard of review is whether the Magistrate's striking of the late designation is "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a) states a modification or reversal may "set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." This is an extraordinarily high standard for Defendants to satisfy. "[T]o prevail, [movant] must show, not that the magistrate judge could have exercised his discretion and ruled in [movant's] favor, but rather that [movant] is entitled to a ruling in [movant's] favor as a matter of law." Barnett v. Tree House Café, Inc., 2006 WL 3083757, \*3 (S.D. Miss. 2006).

**III. The Magistrate's Order Should Not be Disturbed Because it is Not Contrary to Law and Was Properly Within the Discretion Vested Over Discovery Matters in the Magistrate.**

The Magistrate's discretion governed whether to strike twice the Defendants' untimely expert designations. It is undisputed and well-established that a Magistrate enjoys "broad discretion to preserve the integrity and purpose of the pretrial order." Hodges v. United States, 597 F.2d 1014, 1018 (5th Cir. 1979); see also Geiserman v. MacDonald, 893 F.2d 787, 790 (5th Cir. 1990). A late expert designation vests the Magistrate with discretion to strike the designation. See Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 883 (5th Cir. 2004). Moreover, the "history of the litigation," especially the Defendants' repeatedly missed deadlines and failure to comply with the sanctions orders of this Court, may be considered when deciding whether to strike a late designation. Santiago-Diaz v. Laboratorio Clinico 456 F.3d 272, 276-77 (1st Cir. 2006).

The Defendants, therefore, face a possibly insurmountable conundrum. The striking of the two expert designations was governed by a discretionary standard. Yet to disturb the Magistrate's ruling, the Defendants must demonstrate that an error of law occurred. The Defendants' motion cites no error of law by the Magistrate. As this Court noted in Barnett v. Tree House Café, Inc., Defendants must prove "as a matter of law" they were entitled for their expert designation not to be stricken. 2006 WL 3083757 at \*3.

Instead, the Defendants present a series of arguments that are more appropriately directed to a Magistrate where "discretion" governs the decision rather than a "contrary

to law” standard. “Both the statute and the procedural rule allowing district court review of a magistrate judge’s order dictate that the reviewing court defer to the magistrate judge’s discretion in refereeing discovery disputes.” Barnett, 2006 WL 3083757 at \*2. In Barnett, this Court refused to disturb the Magistrate’s refusal to extend discovery deadlines in the face of various excuses from counsel ranging from back surgery of a paralegal to schedule conflicts.<sup>1</sup> “A magistrate judge is far better situated to pass on discovery matters, than is the district judge. . . . A magistrate judge is afforded broad discretion with respect to discovery matters because no one factor controls discovery disputes.” Id. (citing Silver v. Wells, 1993 WL 378296 (S.D.N.Y. 1993) (holding the court's scope of review is “significantly limited” in discovery situations); Enzo Biochem, Inc. v. Johnson & Johnson, 1990 WL 135975 (S.D.N.Y. 1990) (noting magistrate judge's “broad discretion”)).

In denying a defendant’s motion to review the Magistrate’s denial of discovery in a criminal matter, the court noted that it was “aware of no other legal authority which would mandate discovery of any of the requested discovery materials as a matter of law, and [the defendant had] not proffered any such authority.” United States v. Cleveland, 1997 WL 208909, \*2 (E.D.La. 1997)(citing Fed. R. Civ. P. 72(a)).

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<sup>1</sup> “Being busy attending to other clients’ matters is not unique to the practice of law and cannot excuse an attorney's failure to timely submit necessary documents.” Barnett, 2006 WL 3083757 at \*2. Similarly, in this litigation, Defendants have employed a variety of excuses to justify missed deadlines ranging from hospital visits, pro bono status, motions going “unnoticed by Defendants’ counsel,” (Motion to Cont. Trial. ¶ 1), and “mistakenly overlook[ing]” the First Amended Complaint. (Def. Rep. to Resp. in Opp. to Set Aside Default J. at ¶ 2). Defendants also refer to their purported pro bono status, as they have on other occasions, as a reason to permit late discovery. Pro bono status does not exempt a party from complying with rules and orders. Foster v. Mydas Associates, Inc., 943 F.2d 139, 144 (1st Cir. 1991). See also Porter County Chapter of Izaak Walton League of Am. Inc. v. Train, 548 F.2d 1298, 1301 (7th Cir. 1977).

The Defendants cite no error of law in the Magistrate's decision to strike twice the untimely expert designation of Defendants. Nor do the Defendants cite any error of law in the Magistrate's ruling that the Defendants failed to seek leave to file a late designation. For all of the reasons articulated in memoranda supporting the Plaintiff's motion to strike these late designations, the Magistrate's order is not "contrary to law," but sound and justified by both voluminous case law and the plain language of the Federal Rules of Civil Procedure.

#### **IV. The Magistrate's Order Should Not Be Disturbed Because Nothing in the Magistrate's Order is Clearly Erroneous.**

None of the instances cited by the Defendants establish that the Magistrate's Order was "clearly erroneous." First, Defendants argue that striking the Defendants' expert is clearly erroneous because the United States did not establish sufficient prejudice. (Def's Obj'n to Mag. Jud. Mot. & Order p. 2.) Even if this were true, it is not enough to establish that the Magistrate's order is clearly erroneous. The Magistrate is best suited to weigh the prejudice to the Plaintiff caused by a five-month late expert designation. The Defendants also argue that the Plaintiff could have simply conducted a deposition of the late designated expert by the October 10, 2006 close of Section 11(b) discovery.<sup>2</sup> This assertion ignores the fact that the Plaintiff never received a copy of the expert's report until October 12, two days after the close of the discovery period. The late report of the expert goes far beyond the Plaintiff's Section 11(b) claims. Therefore,

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<sup>2</sup> Discovery was reopened for the narrow issue of Section 11(b) claims. It was not reopened for Section 2 claims. Nor did the reopening of discovery extend the deadlines for designating an expert. It is a misstatement of the procedural history of this case to say that discovery was reopened for all matters from September 9 to October 10, 2006.

the right to depose the expert on Section 2 matters extinguished June 16, 2006, almost four months before the report was received.

Next, Defendants then argue that “it would be detrimental . . . to the public’s perception of the fairness of this case if Defendants were denied their opportunity to designate an [e]xpert solely for the purpose of refuting” the Plaintiff’s expert. (Def’s Obj’n to Mag. Jud. Mot. & Order ¶ 2). The record in this case, however, demonstrates that the Defendants have received multiple extensions of time and opportunities to cure defects. Moreover, Defendants often failed to use these extensions once granted. The record in this case is replete with fairness to Defendants.

For example, the Defendants have sought and received extension of discovery. Defendants have sought and received a delay of the trial. Defendants have also sought and received a thirty-seven day extension to designate an expert.<sup>3</sup> The Plaintiff sought to strike Defendants’ late and noncompliant responses to requests for admissions. The motion was denied, and the Defendants were provided an opportunity to amend certain responses.<sup>4</sup> The record in this case evidences a repeating pattern of late or nonexistent compliance with deadlines by the Defendants. The record in this case also shows on numerous occasions the Defendants received relief when they missed deadlines or were unprepared for trial because they “mistakenly overlooked” the First Amended Complaint. (Def. Rep. to Resp. in Opp. to Set Aside Def. J. at ¶ 2). The Plaintiff has never missed a single deadline or sought a continuance. Were “public perception of the fairness of the

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<sup>3</sup> Yet Defendants conducted no discovery during the extended period and failed to designate an expert even with a thirty-seven day extension of the deadline.

<sup>4</sup> And most recently, despite an agreement that the Defendants would exchange their portion of the pretrial order and exhibits by November 28, as of the filing of this pleading, the Plaintiff still does not have notice of the Defendants’ witnesses or exhibits.

case” relevant to whether a ruling is clearly erroneous, which it is of course not, the record speaks for itself.

Finally, the Defendants argue again that their purported pro bono status justifies ignoring deadlines and therefore makes the Magistrate’s ruling “clearly erroneous.” See n.1, *supra*. This case is described as a metaphorical “David v. Goliath.” (Def’s Obj’n to Mag. Jud. Mot. & Order ¶ 4). But under the Voting Rights Act, the Attorney General is empowered to represent the United States and enforce the Act. The argument advanced by the Defendants should be rejected because any defendant in a case brought under the Act might raise it in the future. Congress has determined that the Attorney General has the power to bring a case on behalf of the United States. Were the Defendants’ argument accepted, the United States could face similar arguments in every case brought by the United States if the opposing party is represented pro bono. No such sanctuary should be offered to a defendant who does not comply with rules and deadlines.

Next, the Defendants argue that their obligation to procure an expert starts only after receiving the Plaintiff’s expert report and the Magistrate’s order overlooks this fact. After receiving the Plaintiff’s report, “the Defendants then knew it was paramount to their defense to come up with their own [e]xpert. . . .” Mot. for Rev. p. 6. The Defendants herein concede that they made no effort whatsoever in the in the fourteen months between the filing of this case and the receipt of the Plaintiff’s expert report in April 2006 to procure their own expert. This startling admission evidences delay and a lack of diligence during the pendency of this case that should not be rewarded. In any

event, the Magistrate was well suited to weigh these facts and his exercise of discretion in striking the late designation is not clearly erroneous.<sup>5</sup>

## V. Conclusion

The Defendants have failed to cite any case or legal authority which is contrary to the Magistrate's order striking the Defendants' late expert designation. To the contrary, well established authority and the plain language of the Rules permit a Magistrate to exercise discretion and make rulings relating to discovery deadlines. Striking a late expert designation is not contrary to any law. Furthermore, there are no facts in the record establishing that the striking of the late designation was clearly erroneous. The Defendants' motion merely restates arguments more germane to opposing a motion to strike a late designation. All of the arguments offered by the Defendants to establish the Magistrate's ruling was clearly erroneous were the sort of argument to be weighed by the Magistrate in the first instance. Indeed, they were so weighed, and rejected by, the Magistrate. Though the Defendants may not be pleased with the Magistrate's order striking the expert, nothing is clearly erroneous about the ruling and it should not be disturbed.

Respectfully Submitted,

DUNN O. LAMPTON

JOHN K. TANNER

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<sup>5</sup> The Defendants assert the Plaintiff "knew about the Defendants' [e]xpert and the substance of his report and testimony as far back as May, 2006." (Def's Obj'n to Mag. Jud. Mot. & Order, p. 7). This representation is manifestly incorrect. The United States did not receive any opinions of the Defendants' expert until October 12, 2006, save for his opinion that he would provide no opinions about the case until August 31, 2006. The latter opinion proved incorrect. It was not until October 12, 2006 that his opinions about the case became known to the Plaintiff.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2006 I electronically filed the foregoing Memorandum in Opposition to Objection to Magistrate Judge's Order and Motion for Review by District Judge using the Court's ECF system which sent notification of such filing to Wilbur O. Colom, Esq. and Edward L. Pleasants, III, of the Colom Law Firm, LLC, 200 6<sup>th</sup> Street, North, Suite 102, Columbus, Mississippi, 39701, Ellis Turnage, Esq., Post Office Box 216, 108 North Pearman Avenue, Cleveland, Mississippi, 38732, and, Christopher D. Hemphill, Esq., Dunn, Webb and Hemphill, P.A., 214 5<sup>th</sup> Street South, Columbus, Mississippi, 39701. With notice to be delivered by other means to:

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