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/JMR)
	)
	)
IKE BROWN, et al.,	)
	)
Defendants.	)
________________________________	)

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO STRIKE DEFENDANTS IKE BROWN'S AND THE NOXUBEE COUNTY DEMOCRATIC EXECUTIVE COMMITTEE'S RE-DESIGNATION OF EXPERT WITNESS

I. Procedural History

The United States seeks an order striking the Defendants Ike Brown's and the Noxubee County Democratic Executive Committee's Re-Designation of Expert Witness made on October 2, 2006 (hereinafter "re-designation").

The United States filed its Complaint on February 17, 2005. On July 20, 2005, this Court entered a Scheduling Order which set the deadline for Plaintiff's expert designation as March 16, 2006 and Defendants' expert designation on April 16, 2006. (Case Mgmt. Order, July 20, 2005). The United States timely made its expert witness designation on March 16, 2006, as required by Fed. R. Civ. P. 26(a)(2)(B) and Local Rule 26.1(a)(2), and provided Defendants a 179-page expert report.

On April 14, 2006, Defendants Ike Brown and the Noxubee County Democratic Executive Committee (hereinafter "Defendants") filed a Motion to Amend Scheduling Order

seeking to extend the time for exchanging their expert report to a date uncertain. (Defs.' Mot. to Am. Scheduling Order, Apr. 14, 2006). The United States objected to the extension requested by the Defendants; and on May 10, 2006, this Court denied the Defendants' request and set May 20, 2006 as the deadline to comply with Fed. R. Civ. P. 26(a)(2).[1] This extension gave the Defendants a total of ten months after the Court entered the Scheduling Order to designate an expert and produce a compliant report. The Defendants waited until May 23, 2006 (three days after the date ordered by this Court) to designate their expert, and even then the designation contained no opinions and stated that the expert would need until August 31, 2006 to produce a report. The United States then filed a motion to strike the designation. This Court granted the motion and ordered the expert designation stricken on July 10, 2006. (Order, July 10, 2006).[2]

The Defendants then filed on July 31, 2006 a motion to continue the October 16, 2006 trial. (Defs.' Mot. to Continue Trial, July 31, 2006). The solitary basis for the motion was that the "[d]efendants now need time to consider the new allegations in Plaintiff's Amended Complaint and prepare a defense prior to trial." (Defs.' Mot. to Continue Trial ¶ 6). The "new allegations" cited in the Defendants' motion were filed a year earlier in an Amended Complaint. (Pl.'s Mot. to Am. Compl., July 28, 2005). The "new allegations" contained a single new cause of action pertaining to voter intimidation under Section 11(b) of the Voting Rights Act. The Defendants claimed the Amended Complaint "went unnoticed" for one year. (Defs.' Mot. to Continue Trial ¶ 1). The United States vigorously opposed the continuation of trial and the reopening of discovery related to claims brought under Section

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[1] Because May 20 fell on a Saturday, the deadline became May 22, an effective addition of two extra days for the Defendants to comply. See Fed. R. Civ. P. 6(a).

[2] The designation stricken on July 10, 2006 and the designation filed October 2, 2006 designate the same person as an expert.

11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b). (Pl.'s Opp'n and Mem. in Resp. to Defs.' Mot. to Continue Trial, Aug. 7, 2006).

This Court granted the motion to continue the trial and amended the scheduling order to permit "discovery on the additional claims raised in the Amended Complaint." (Order, Sept. 8, 2006 at 2). The Order granting Defendants' motion to reopen discovery regarding Section 11(b) claims set October 10, 2006 as the Section 11(b) discovery deadline, and set October 17, 2006 as the final day for filing motions. The Defendants filed no paper discovery and took no depositions during the period of September 8, 2006 to October 10, 2006 regarding the claims in the Amended Complaint. The only litigation activity conducted by the Defendants during the additional discovery period was the re-designation of their expert, filed on October 2, 2006. The Defendants filed the re-designation without any accompanying motion asking for leave to re-designate an expert out-of-time. Further, this attempt at re-designation comes after the designation of this expert had previously been stricken by this Court.

A pretrial conference is set for December 11, 2006, and the trial is set for January 16, 2007.

II. Standard of Review

Fed. R. Civ. P. 37(b)(2)(C) authorizes the district court to strike a pleading or defense as a sanction for failure to comply with a discovery order. Whether to grant a motion to strike the designation of an expert is within the discretion of this Court. Sierra Club v. Cedar Point Oil Co., Inc., 73 F.3d 546, 589 (5th Cir. 1996); Scott v. Monsanto Co., 868 F.2d 786, 793 (5th Cir. 1989). The Court's "decision to exclude evidence as a means of enforcing a pretrial order must not be disturbed absent a clear abuse of discretion." Geiserman v.

MacDonald, 893 F.2d 787, 790 (5th Cir. 1990) (internal quotations omitted); see also Macklin v. City of New Orleans, 293 F.3d 237, 240 (5th Cir. 2002).

"[A] malefactor who has violated its discovery obligations" cannot expect a district court to accept untimely filings. Chilcutt v. United States, 4 F.3d 1313, 1324 (5th Cir. 1993) (citing Geiserman, 893 F.2d at 791-92). "Indeed, a party who ignores any case-management deadline does so at his own peril." Rushing v. Kansas City S. Ry. Co., 185 F.3d 496, 508 (5th Cir. 1999), abrogated on other grounds, Mathis v. Exxon Corp., 302 F.3d 448, 459 n.16 (5th Cir. 2002); cf. Chilcutt, 4 F.3d 1325 (quoting Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (finding that even if the offending party can demonstrate that it has learned its lesson and will not again ignore the rules of the court, sanctions are still justified since "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.").

III. Argument

The Defendants' October 2, 2006 re-designation should be stricken for four reasons. First, the Defendants made the re-designation after the expiration of the time to designate experts. Second, the Defendants never sought leave to make a late re-designation or amend the scheduling order. Third, the Defendants' motion to continue the trial and reopen discovery was made under false pretenses to this Court for the surreptitious purpose of trying to procure another opportunity to designate an expert before trial. Fourth, the United States is severely prejudiced by the late re-designation.

a. The Defendants' re-designation should be stricken because it was made nearly five months late.

The designation of experts "shall be made at the times and in the sequence directed by the court." Campbell v. McMillin, 83 F. Supp. 2d 761, 764 (S.D. Miss. 2000) (quoting Fed. R. Civ. P. 26(a)(2)(C)). The Fifth Circuit has held,

> The Civil Rules endow the trial judge with formidable case-management authority." Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998). Part of the authority includes establishing a case-management schedule that the court enters as an order. See Fed. R. Civ. P. 16(b); Uniform U.S. Dist. Ct. Rules D. Miss., Rule 6(d). Expert witnesses must be designated in accordance with that schedule. See id. rule 6(g); Uniform U.S. Dist. Ct. Rules D. Miss. Expense and Delay Reduction [P]lan, § 4(I)(A)(4).

Rushing, 185 F.3d at 508; cf. Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 883 (5th Cir. 2004) (citing Geiserman, 893 F.2d at 791) (holding that despite the importance of an expert report to the appellant's case, because the appellant did not timely designate the expert, the trial court was well-within its discretion to exclude the expert).[3]

The Defendants' original deadline to designate an expert was April 16, 2006. On May 10, 2006, this Court amended the scheduling order and set May 20, 2006 as the revised deadline to designate. The Court noted "Defendants should not be given an extension of time to an uncertain date . . . . However, a short extension of that deadline will be granted."

[3] As a consequence of being the movant on this motion to strike, the United States is unable to fully address the Hamburger factors. However, the United States does note that even if Defendants' expert were necessary to avoid judgment, such importance may not "singularly override the enforcement of local rules and scheduling orders." Hamburger, 361 F.3d at 883 (internal quotations omitted). Nor should a continuance be available. This Court already granted a continuance of designation deadlines to Defendants on May 10, 2006, and Defendants failed to timely designate. Another continuance would only "result[] in additional delay and increase[] the expense of defending the lawsuit . . . [and] would not deter future dilatory behavior, nor serve to enforce local rules or court imposed scheduling orders." Geiserman, 893 F.2d at 792. Worse, discovery on Section 2 claims closed June 16, 2006 and on Section 11(b) claims October 10, 2006, and the United States would suffer extraordinary prejudice by not being able to depose the Defendants' expert well before the close of discovery. See Hamburger, 361 F.3d at 883; Geiserman, 893 F.2d at 791. Hence, the close of discovery was originally scheduled two months after designation deadlines.

(Order, May 10, 2006, ¶ 2).[4] Nevertheless, Defendants did not file a designation or an expert report by the extended deadline. On July 10, 2006, this Court granted the United States' motion to strike the designation made three days late. This Court noted in the July 10, 2006 Order it had "already granted one extension of the designation deadline and moved it to May 20, noting that further delay was not justified by the fact that depositions were still being taken." (Order, July 10, 2006, ¶ 2). The Court made no subsequent modification of the May 10, 2006 Scheduling Order or the July 10, 2006 Order.

May 20, 2006 remains the deadline for the Defendants to have designated an expert. The reopening of discovery until October 10, 2006 for the narrow issue of Plaintiff's claim under Section 11(b) did not extend the May 20, 2006 deadline to designate. The Defendants have simply missed the court's deadline for designating their expert by approximately five months. This alone provides ample grounds to strike the re-designation.

b. The Defendants' re-designation should be stricken because the Defendants did not seek leave of Court to allow an out-of-time re-designation.

Under the Federal Rules, an expert designation "shall be made at the times and in the sequence directed by the court." Fed. R. Civ. P. 26(a)(2)(C). Furthermore, if a party desires to file a late expert designation, it is first required to seek and obtain leave of court to do so. Fed. R. Civ. P. 16(b).

In Rushing v. Kansas City Southern Railroad Company, the Fifth Circuit upheld the decision of a district court to exclude the designated expert of the appellants when they sought no leave of court to untimely file the designation. 185 F.3d 496, 508 (5th Cir. 1999). The court held that it was not an abuse of discretion for the trial court to strike the

[4] The Court specifically rejected the argument that the Defendants' pro bono status was relevant to the question of designation deadlines. (Order, May 10, 2006).

designation when the party proffering the designation had failed to either: (1) file on time; or (2) move to designate out-of-time prior to attempting to submit their expert affidavit. Id. The court explained that, despite the legitimate arguments from the appellant as to the necessity of the expert, the appellant had known well ahead of time that the expert would be necessary for a complete presentation of its case, and therefore, the court did not abuse its discretion in striking the expert for failure to timely designate. Id. at 509-10; see also Naerebout v. IBP, Inc., No. 91-2254-L, 1992 WL 754399, at *16-*17 (D. Kan. 1992) (sustaining a motion to strike the designating party's experts, noting that the designating party did not request an extension regarding designation of any of its individual expert witnesses, much less move for a general extension of the deadline for designating experts).

The deadline for designating experts passed approximately five months ago. Like the appellants in Rushing, the Defendants did not seek and obtain leave of court prior to the late filing of its expert re-designation. Therefore, the Defendants have no procedural footing on which to base their re-designation. They have simply attempted to file a re-designation approximately five months past the deadline set by this Court, and they have done so in spite of the fact that this Court has already declined to allow them file their designation out-of-time. This provides sufficient grounds for the Court to strike the re-designation.

c. The Defendants' re-designation should be stricken because the Defendants sought and received a trial continuance and reopening of Section 11(b) discovery for the specious purpose of attempting to re-designate a stricken expert.

The motion to strike the re-designation should be granted because the Defendants have materially misrepresented to this Court the basis for which they needed to continue the trial. The Defendants explained that they had "conducted discovery without knowledge of both the Amended Complaint and its claims and could not have possibly done so in a manner

to defend them." (Defs.' Reply to Pl.'s Mem. in Resp. to Defs.' Mot. to Continue Trial, Aug. 21, 2006, ¶ 5).[5] They allegedly needed the additional time to "prepare a full and adequate defense to Plaintiff's Amended Complaint." Id. ¶ 9. In response to the Defendants' plea for more time to conduct discovery regarding the Section 11(b) claims in the Amended Complaint, the Court reopened discovery until October 10 and continued the trial until January 15.

In the period of time since this Court firmly directed the Defendants to complete the discovery they claimed to be necessary to "prepare a full and adequate defense to Plaintiff's Amended Complaint," the Defendants served no interrogatories, no requests for production of documents, no requests for admissions, no depositions upon written questions, and conducted no oral depositions. The Defendants did not seek to review any documents in the possession of the United States, and they did not supplement their Rule 26 initial disclosures with new documents or the names of new Section 11(b) witnesses. That is, there has been a complete absence of any discovery activity on the part of the Defendants. Instead, the only action that has been taken by the Defendants has been to attempt to re-designate the same expert witness that already has been stricken by the Court and whose report the United States did not receive in the undersigned's office until October 12, 2006. The Defendants'

[5] The veracity of this representation alone is highly questionable. The whole basis for Defendants' lack of knowledge of the First Amended Complaint has been their purported year-long failure to notice the Amended Complaint on the Court's docket. Yet after attempting to use the identical excuse to claim they were unaware of a motion for sanctions in February 2006, the Defendants apparently never undertook their responsibility to review the docket for other outstanding pleadings, including the First Amended Complaint. See Fox v. Am. Airlines, Inc., 389 F.3d 1291, 1294 (D.C. Cir. 2004) (blaming an ECF system does not excuse litigants from deadlines); In re Mayhew, 223 B.R. 849, 856 (D.R.I. 1998) (it is the attorney's duty to monitor the docket; an attorney may not simply sit back and rely on the court to keep him or her up to date). Instead, the Defendants represented to the Court that they first learned about the Amended Complaint when the United States sought a default judgment on June 26, 2006.

extraordinary failure to conduct discovery while yet again attempting to file an out-of-time re-designation obviates the purpose for which they derailed the entire trial schedule and caused unnecessary delay and expense. Simply put, this Court and the United States have been misled by the Defendants.[6]

In Emerick v. Fenick Industries, Inc., 539 F.2d 1379, 1380-81 (5th Cir. 1976), the Fifth Circuit reviewed a district court's decision to sanction a litigant by striking his pleadings and entering judgment in response to his ignoring discovery orders in an "unbelievably flagrant" manner. The Fifth Circuit upheld the district court's decision, stating, "[W]hen a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion." Id. at 1381. Hence, "the presence or lack of good faith is relevant to the orders which should be made from the bench and the severity of the sanctions imposed on a delinquent party." Familias Unidas v. Briscoe, 544 F.2d 182, 192 (5th Cir. 1976). The need for courts to apply sanctions stringently in cases of bad faith is based, in part, on the fact that courts "can ill afford to permit litigants to waste scarce court resources with disingenuous or frivolous arguments and motions asserted purely to hinder and delay the efficient operation of justice." Matter of United Mkts. Int'l, Inc., 24 F.3d 650, 655 (5th Cir. 1994) (citing McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1487 (5th Cir. 1990)).

In this case, the Defendants have not only shown a flagrant disregard for this Court's orders, they have convinced the Court to continue the trial for the factitious purpose of

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[6] Defendant Noxubee County Election Commission also represented to this Court that it "adopt[ed] by reference the facts and argument contained in defendants Noxubee County [Democratic] Executive Committee and Ike Brown's motion for continuance of trial." (Def. NCEC's Resp. to Defs.' Mot. to Continue Trial, Aug. 9, 2006 ¶ 2). The Defendant Noxubee County Election Commission also conducted no discovery whatsoever after the trial was continued.

conducting further discovery on issues raised in the United States' Amended Complaint. This has resulted in unnecessary costs for the United States and has disrupted the Court's trial schedule. And though, in the Fifth Circuit, harsher sanctions are certainly in order under these circumstances, the United States simply requests that the Court strike the Defendants' untimely, procedurally barred, and speciously filed expert re-designation.

d. The Defendants' re-designation should be stricken because of the prejudice to the United States that would otherwise result.

The discovery deadline was June 16, 2006. The local rules require that discovery regarding experts be completed within the discovery period. Local Rule 26.1(A)(2)(c).[7] Furthermore, Fed. R. Civ. P. 26(b)(4)(A) states, "If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided."

Material prejudice to a party may be considered in deciding whether to strike an expert report. Barrett v. Atlantic Richfield Co., 95 F.3d 375, 381 (5th Cir. 1996). However, when a court decides to strike an expert designation for failure to timely file, "prejudice is not a strict requirement[.]" Rushing, 185 F.3d at 509. Although prejudice is relevant to the type of sanction the court chooses to impose,

> a party need not always be prejudiced by its opponent's discovery abuses prior to the imposition of sanctions. After all, the goal of sanctioning is not to reward the complying party, but to punish the infracting party and to deter others who may be wont to engage in similar behavior.

Chilcutt, 4 F.3d at 1324 n.30; see also Johnson v. Hathcock Truck Lines, No. 97-6315, 1998 WL 717273, at *2 (10th Cir. Oct. 14, 1998) (holding, in response to argument that there was ample time to conduct an expert deposition after a late designation, "The conduct of the

[7] The limited discovery period for Section 11(b) claims closed on October 10, 2006.

plaintiff and plaintiff's counsel in this case undoubtedly contributed to these delays . . . . We refuse to reward such behavior by using it as an excuse to extend the deadline for other discovery purposes."); Qualls v. State Farm Lloyds, 226 F.R.D. 551, 554 (N.D. Tex. 2005) (noting that refusal to allow designation was justified by the fact that: (1) doing so would result in additional expenses to the opposing party; and (2) the court had already continued the trial as a consequence of the movant's actions).

The United States is materially prejudiced by an expert re-designation made nearly four months after the close of discovery. First, even if the United States had the right to take the deposition of the Defendants' expert at this point, which it does not, it cannot conduct any other discovery regarding the expert's opinions. Second, if the Court were to require the United States to conduct a deposition at this late stage of the litigation, the United States would have to do so in the short period of time remaining prior to trial. During the eight-month period in which the Defendants have possessed the United States' expert report, the Defendants have been afforded the opportunity, through supplementary discovery activities, to attack the foundations of the expert's opinion, the materials relied upon by the expert, and find other facts which aid in rebutting the expert's opinion. Allowing the Defendants' untimely re-designation would put the United States in the contrary position of having little more than a possible eleventh-hour deposition with which to effectively prosecute this aspect of the case. To add to this imposition, the United States' expert would also then be placed in the very difficult position of hurriedly preparing a rebuttal to the Defendants' expert report. This would effectively result in giving the Defendants an unfair advantage for their failure to comply with the rules of this Court -- an advantage that cannot be cured, and indeed, will

only be worsened by forcing the United States to conduct a deposition in the short time remaining before trial.[8]

Defendants' dilatory tactics and repeatedly missed deadlines are the singular cause of this trial's delay. To permit the Defendants to submit an untimely, procedurally barred, and speciously-filed re-designation would effectively result in an extremely harsh punishment for the United States (which has complied with all of this Court's orders) and a reward to the Defendants, who have repeatedly flouted the Court's orders, and would be encouraged to continue doing so if the Court were to make such an allowance. In light of the extreme prejudice that will result if the Court does not strike the Defendants' expert re-designation, the United States requests that the Court order the re-designation stricken.

IV. Conclusion

The United States respectfully requests that, at the very least, the Court strike the Defendants' expert re-designation. First, the Defendants have filed their re-designation approximately five months past the deadline set by this Court. Second, the Defendants did not seek leave of Court to allow an out-of-time re-designation, and the deadline for making any such motion has passed. Third, the Defendants sought and received a trial continuance and reopening of Section 11(b) discovery for the surreptitious purpose of attempting to re-designate a stricken expert. And fourth, the United States will be severely prejudiced if the Defendants are again allowed to ignore court rules and designate an expert just weeks prior to trial.

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[8] Another continuance would not cure the problem either. As the Fifth Circuit has noted, another continuance would only "result[] in additional delay and increase[] the expense of defending the lawsuit . . . [and] would not deter future dilatory behavior, nor serve to enforce local rules or court imposed scheduling orders." Geiserman, 893 F.2d at 792.

This Court has been exceedingly lenient in its treatment of the Defendants, and the Defendants have abused the Court's generosity. The United States respectfully submits that it is time for the Defendants to come to terms with the fact that federal "[c]ourts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender." United Mkts., 24 F.3d at 656 (citing Waffenschmidt v. Mackay, 763 F.2d 711, 716 (5th Cir. 1985)).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2006, I electronically filed the foregoing Memorandum of the United States in Support of Plaintiff's Second Motion to Strike Defendants' Ike Brown's and the Noxubee County Democratic Executive Committee's Re-Designation Of Expert Witness using the Court's ECF system which sent notification of such filing to Wilbur O. Colom and Edward L. Pleasants, III of the Colom Law Firm, LLC, 200 Sixth Street, North, Suite 102, Columbus, Mississippi, 39701, Ellis Turnage, Post Office Box 216, 108 North Pearman Avenue, Cleveland, Mississippi, 38732, and, Christopher D. Hemphill, Esq., Dunn, Webb and Hemphill, P.A., 214 Fifth Street South, Columbus, Mississippi, 39701.

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