FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: ASBESTOS, CATALYST, AND SILICA TOXIC DUST EXPOSURE LITIGATION.	)	**MASTER CASE NO. SX-15-CV-096**
This Opinion Pertains to All Cases Grouped Under the Master Case.	)	

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MEMORANDUM OPINION

MOLLOY, Judge.

BEFORE THE COURT is a motion filed by the Plaintiffs to strike the affirmation of Leslie A. Kelley, Esq. ("Attorney Kelley") and to preclude the Defendants, Hess Oil Virgin Islands Corporation ("HOVIC") and Hess Corporation ("Hess"), from using Attorney Kelley's affirmation as well as a deposition he gave in another case because Attorney Kelley subsequently passed away and the Plaintiffs cannot now cross-examine him at trial or otherwise test the averments in his affirmation. The Defendants oppose the Plaintiffs' motion for the same reason: because Attorney Kelley has passed away and his affirmation is now their only evidence and, moreover, because their expert relied on it in reaching his opinion. For the reasons stated below, the motion will be granted in part and denied in part.

I. BACKGROUND AND ARGUMENTS[1]

* Admitted *pro hac vice.*

[1] In 2013 and 2014 approximately 120 people sued HOVIC and Hess for compensatory and punitive damages related to their claimed exposure to asbestos from the oil refinery HOVIC owned and operated on St. Croix, U.S. Virgin Islands. The individual cases were grouped under this master case for pre-trial purposes. Twelve were selected as a bellwether for the larger group and one, *Wilfred St. Thor v. Hess Oil Virgin Islands Corporation, et al.*, will be the first to proceed to trial on May 7, 2018.

Attorney Kelley was employed by Virgin Islands Industrial Maintenance Corporation ("IMC") from 1991 to 1999, "first as Director of Human Resources then as General Counsel / Legal Counsel." (Affirmation of Leslie A. Kelley, Esq. ¶ 2 (Aug. 9, 2017) ("Affirmation"), *attached as* Exh. A to Pls.' Mot. in Limine to Strike Affirmation of Kelley, filed Dec. 29, 2017 ("Mot.").) IMC first contracted to provide services in the refinery in 1986. Attorney Kelley executed an affirmation on August 9, 2017 for the Defendants, which the Defendants produced to the Plaintiffs on August 15, 2017. Because the Defendants had not previously disclosed Attorney Kelley as someone with knowledge pertaining to this litigation, they supplemented their Rule 26 disclosures on August 28, 2017 to list Attorney Kelley as a former employee of IMC "who may have information pertaining to the Plaintiffs alleged asbestos exposures, company policy and procedures and work practices as well as equipment insulation and handling of same." (Defs.' Not. of Supp. Rule 26 Disc. ¶ 1 (Aug. 28, 2017), *attached as* Exh. B to Pls.' Mot.)

What then ensued is best explained by Plaintiffs in their own words:

> After being served with the Affirmation by Hess and HOVIC, Plaintiffs endeavored to set the deposition of Attorney Kelley by mutual agreement. But those efforts were fruitless, as Attorney Kelley did not respond to emails or phone calls. Plaintiffs then requested that Hess and HOVIC make Attorney Kelley available for deposition, but that effort was also fruitless. Despite Attorney Kelley working with the Defendants to craft an affidavit—an affidavit that any attorney would understand would be controversial, and most likely would result in a deposition—Defendants disclaimed the ability to make Attorney Kelley available for deposition.
>
> Instead, Defendants directed Plaintiffs to Attorney Kelley's law partner, George H. Logan, Esq. According to Defendants, Attorney Logan represented Attorney Kelley. After speaking with Attorney Logan, it became clear that he was not Attorney Kelley's legal counsel—just a friend and colleague—and was not authorized to accept legal process on his behalf. Attorney Logan would not disclose Attorney Kelley's location other than to say that he was "in Virginia."
>
> The greater concern, however, was that Attorney Logan informed Plaintiffs that Attorney Kelley was dying of cancer. Attorney Logan also noted that Attorney

> Kelley, due to his medication, was not mentally competent as Kelley only had limited periods of lucidity.
>
> Plaintiffs' research revealed that Attorney Kelley maintained a residence in Henrico, Virginia. Plaintiffs prepared a subpoena *duces tecum*, as well as a subpoena for deposition, both under the authority of this Court; domesticated the subpoenas with the appropriate district court under the Virginia Uniform Interstate Depositions and Discovery Act; and after the first two attempts at personal service failed, made lawful substitute service by posting the subpoenas to the front door of his house.
>
> The deadline to make production in response to the subpoena *duces tecum* came and went; no documents were produced or made available. And Attorney Kelley failed to appear for his deposition on October 24, 2017. He passed away three days later on October 27, 2017.
>
> In order to determine what exactly occurred, Plaintiffs served deposition subpoenas on Attorney Logan, the Nichols Newman law firm, and Carl Beckstedt, Esq., counsel for Hess. Faced with the possibility of his deposition, counsel for Hess revealed at the November 2017 status conference that the Kelley Affirmation was based on "confidential" depositions and arbitration transcripts. These documents had never been disclosed or produced. Hess finally produced the transcript of the Leslie Kelley deposition on December 18, 2017. Three days later, *ex post facto*, Hess served Rule 26 disclosures, naming Leslie Kelley, Esq., this time as a witness via portions of the arbitration transcript.

(Mot. 2-4 (paragraph break and footnotes).)

The reason (according to counsel for the Plaintiffs) why the Plaintiffs wanted to depose Attorney Kelley is because the Defendants' expert "John Henshaw relies on the Affirmation in his expert report to conclude that IMC employees never worked with asbestos because Attorney Kelley says so, *ipse dixit*." *Id.* at 2. Mr. Henshaw concludes, based on Attorney Kelley's affirmation, that "IMC was not authorized or involved with asbestos abatement or insulation removal and disposal at the refinery," and therefore Wilfred St. Thor (plaintiff in the first case slated for trial), who worked for IMC was "not authorized to perform asbestos-containing insulation work at IMC. Thus, it is not likely he was directly exposed to asbestos-containing insulation under these employers; his exposures to insulation, if they occurred, would have been in the capacity of a 'bystander.'" *Id.*

In response to the Plaintiffs' motion, the Defendants explain that they had previously disclosed IMC as a potential witness in 2015 and then supplemented their Rule 26 disclosures in 2017 shortly after they obtained Attorney Kelley's affirmation. Then, and after he passed away—and after obtaining consent from another attorney—they produced a confidential deposition Attorney Kelley had given during arbitration. Attorney Kelley had testified previously "as a corporate representative as to IMC's corporate knowledge during its existence at the HOVIC refinery," (Defs.' Opp'n to Pls.' Mot. 2, filed Jan. 26, 2018), and his testimony during the arbitration was "to substantially the same facts which he affirmed under penalty of perjury" in his Affirmation. *Id.* Therefore, since the "Affirmation tracked the prior testimony of IMC through Attorney Kelley in other asbestos cases," *id.* at 3, it should not be stricken or excluded. Defendants further state, "Plaintiff never deposed IMC. Indeed, one cannot be certain who IMC would have tendered as a witness or witnesses to testify as to its corporate knowledge and over the course of time various people have so testified. However, one such witness to testify on behalf of IMC in the past was Attorney Kelley and he has now passed away." *Id.* at 2.

Additionally, Defendants further argue Attorney Kelley's affirmation would be admissible as impeachment evidence—and need not have been disclosed. *See id.* at 6 ("Rule 26 does not require a party to disclose witnesses or documents which will be used solely for impeachment." (citing *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229 (V.I. 2013)). Further, because the Affirmation was based on Attorney Kelley's own personal knowledge as a former employee of IMC, it would also be admissible "to the extent he qualifies as a corporate representative of IMC." *Id.* at 16. "Attorney Kelley is clearly speaking on behalf of IMC in his affirmation." *Id.* at 77. Therefore, even if "he was not personally involved in the activities spoken about in his affirmation, the affirmation is still admissible as the testimony of IMC's corporate representative," Defendants argue. *Id.*

The Plaintiffs, in reply, say "[e]nough is enough" and "respectfully request that the Court strike the Kelley affidavit and preclude any use or reliance thereon (Pls.' Reply in Supp. of Pls.' Mot. 2, filed Feb. 23, 2018 ("Reply").[2]) They argue that

> [i]t is hard to imagine a more blatant example of discovery abuse deserving of censure than what Defendants have attempt to do here. Defendants have known that Attorney Kelley purported to have evidence relevant to this dispute for at least 15 years, dating from when he was deposed in the 2002 *Manbodh* litigation. In fact, Defendants called Attorney Kelley as a witness in a confidential arbitration only three years ago to provide similar testimony.
>
> Despite their undeniable knowledge that the witness purported to have relevant information, Defendants failed to disclose Attorney Kelley under Rule 26(a)(1)(A). Defendants failed to produce his deposition testimony from the 2002 *Manbodh* litigation. Defendants failed to disclose the existence of the 2014 arbitration or a transcript of Attorney Kelley's testimony therein. Defendants secretly obtained his affidavit during the final months of Attorney Kelley's life, during a period in which his partner suggested that Attorney Kelley was no longer of sound mind. And Defendants did not disclose Attorney Kelley until they produced a copy of his affidavit to underpin the expert report of Defendants' industrial hygienist, John Henshaw.
>
> Attorney Kelley has passed away. There will be no opportunity to explore or challenge his testimony on this earth. There will be no opportunity to hear from Attorney Kelley whether he was competent to give the testimony he purported to give. There will be no opportunity to hear Attorney Kelley describe the circumstances under which he gave his affidavit as he struggled for life. Put simply—Defendants' have worked extreme prejudice on Plaintiffs, foreclosing their ability to challenge Attorney Kelley's testimony and impermissibly using that testimony to gird their expert's opinions. And there can be no debate over the fact that Defendants have made a mockery of the litigation process and this Court's rules. . . . Defendants underlying actions and response to this motion reveal a complete disregard for this Court's rules and a fair discovery process. Plaintiffs suggest that sanctions are appropriate in these circumstances and among other relief request that Defendants' expert, John Henshaw, be precluded from providing testimony in the Wilfred St. Thor and Thomas Charles trials.

Id. at 1-2 (last paragraph break omitted).

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[2] All spellings of "Kelly" changed to "Kelley" when quoted from the Plaintiffs' Reply.

II. DISCUSSION

"'Wisely employed cross-examination is perhaps the most powerful weapon in the arsenal of the lawyer in pursuit of the whole truth.'" *Id.* at 3 (brackets omitted) (quoting *Treharne v. Callahan*, 426 F.2d 58, 62 (3d Cir. 1970). But "the loss of plaintiff's right of cross-examination in our case must be weighed against the loss of defendant's day in court." *Trehane*, 426 F.2d at 62, *superseded on other grounds as stated in Botkin ex rel. Banes v. Metro Life Ins. Co.*, 907 A.2d 641, 646 (Pa. Super. Ct. 2006). And just as the punishment should match the crime, the sanction should match the violation.

Defendants note that "Plaintiffs acknowledge that Attorney Kelley was employed by IMC," but Plaintiffs also "ignore . . . the fact that Defendants disclosed IMC as a corporate witness (together with a number of other corporate witnesses) in their November 3, 2015 Initial Disclosures and specifically included the corporation through its 'miscellaneous representatives or employees.'" (Opp'n 6.) "This disclosure," Defendants contend, "was sufficient to put Plaintiffs on notice that they may rely upon the testimony of key representatives or employees of IMC such as Attorney Kelley." *Id.* In sum,

> Defendants disclosed "representatives and employees of IMC" in its initial disclosures on November 3, 2015, affording Plaintiffs over two years to direct discovery to IMC and its key employees. Plaintiffs clearly had incentive to direct discovery to IMC because, as admitted in their motion, they knew certain plaintiffs had been employed by IMC. Defendants then specifically disclosed Attorney Kelley and his sworn affirmation at least two months prior to the close of fact discovery. Thereafter, defendants disclosed Attorney Kelley as a potential witness on August 28, 2017. Finally, on December 18, 2017, defendants formally disclosed the sworn confidential testimony of Attorney Kelley upon which the affirmation is based.

Id. at 8. So, Plaintiffs' motion should be denied, Defendants argue, because their supplemental disclosures were not late, but rather were timely. Defendants may be correct that their disclosure and the production of Attorney Kelley's Affirmation were not late. But Defendants are not correct that either was proper.

The Defendants' position rest on a faulty premise: that they "have the right to designate a corporate representative for a non-party." (Reply 3.) They "do not." *Id.* "IMC has given <u>zero</u> indication that Attorney Kelley speaks *on its behalf* in this litigation. Similarly, Attorney Kelley in his Affirmation gave <u>zero</u> indication that he was speaking *on behalf of* IMC." *Id.* The Plaintiffs correctly point out that Attorney Kelley, in his Affirmation, "does not aver that his testimony is given as IMC's corporate designee, that he is speaking to corporate knowledge, or that the Affirmation is made pursuant to a Rule 30(b)(6)-style designation." *Id.* at 4. This is troubling to the Court, that Hess and HOVIC "ask this Court to read into the Affirmation a declaration by Attorney Kelley that he is speaking to IMC's knowledge and, indeed has the *authority to bind* IMC." *Id.* (hyphen omitted).

Attorney Kelley's Affirmation was not given as impeachment evidence because, as Plaintiffs explain, "Mr. Henshaw relies upon that testimony *as substantive evidence* of what IMC did at the refinery, its safety protocols, and its handling (or non-handling) of asbestos-containing materials." *Id.* at 7. "He does not opine that Mr. St. Thor is wrong, or that Plaintiffs' experts are wrong," as Plaintiffs note. *Id.* Additionally, Attorney Kelley did not sate in his Affirmation that "he reviewed any testimony in this case, that he reviewed any expert report, or that he is expressing an opinion on the truth or veracity of any claim made by any Plaintiff or their experts." *Id.* It "begs the question" the Plaintiffs ask, "who or what exactly would Attorney Kelley *impeach*?" *Id.*

But more important than the timeliness of Attorney Kelley's Affirmation is how it was obtained. Attorney Kelley's Affirmation opens with the following statement: "I, Leslie A. Kelley, Esq., pursuant to 5 V.I.C. § 699 and V.I. R. Civ. P. Rule 84(b), declare under penalty of perjury under the laws of the United States Virgin Islands that the foregoing is true and correct." (Kelley Affirmation 1.) Clearly, Attorney Kelley was providing sworn testimony. Section 696 of title 5 of the Virgin Islands Code provides that "an affidavit may be used . . . to obtain the examination of a witness" or as "expressly provided for by law or rules of court." 5 V.I.C. § 696(a)(3), (6). Section 699 of title 5 further provides that

> [t]he statement of an attorney authorized by law and admitted to practice in the Courts of the Virgin Islands, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in an action in lieu of and with the same force and effect as an affidavit duly notarized.

5 V.I.C. § 699. Presumably, Hess and HOVIC obtained an affirmation from Attorney Kelley—and not an affidavit—because section 699 authorizes affirmations by attorneys and Attorney Kelley was admitted to practice in the Virgin Islands and was not a party to these cases. The Court finds no fault in the use of an affirmation over an affidavit in this instance. Rule 43 of the Virgin Islands Code permits "a solemn affirmation" in lieu of "an oath" when required by the rules. V.I. R. Civ. P. 43(b). But if an affirmation can substitute for an affidavit (at least for an attorney licensed to practice law in the Virgin Islands), it follows that Hess and HOVIC obtained from Attorney Kelley deposition testimony, presumably by written question as permitted by Virgin Islands Rule of Civil Procedure 31. *See* V.I. R. Civ. P. 31(a)(1) ("A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2).").

However, if an affirmation can substitute for an affidavit, and if an affidavit is one way in which written testimony is obtained in civil litigation, it follows then that Attorney Kelley's Affirmation was testimony, but obtained without notice to the Plaintiffs. Before testimony is taken in civil litigation (whether written or oral), notice must be given to all parties. *See* V.I. R. Civ. P. 31(a)(3) ("A party who wants to depose a person by written questions must serve them *on every* *other party*, with a notice stating, if known, the deponent's name and address." (emphasis added)); *see also* V.I. R. Civ. P. 30(b)(1) ("A party who wants to depose a person by oral questions must give reasonable written *notice to every other party*." (emphasis added)).

Defendants admit that Attorney Kelley gave "testimony"—testimony they "could have" obtained by way of "affidavit, affirmation, interview, prior deposition, or a case deposition." They chose to obtain Attorney Kelley's testimony by affirmation. That is permissible. *See* 5 V.I.C. § 699. But it was not permissible to obtain his testimony *ex parte*. *Cf. Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 492 (Tex. Ct. App. 1987) ("When other parties are not given notice of the deposition, an 'ex parte' deposition is not admissible." (citations omitted)); *see also BASF Corp. v. Old World Trading Co.*, No. 86 C 5602, 1992 U.S. Dist. LEXIS 1111, *2-3 (N.D. Ill. Feb. 4, 1992) (taking counsel at his word that subpoenas were not served ex parte but reserving ruling) ("[T]he court will take BASF at its word—that it did not serve [*ex parte*] subpoenas or notices of deposition to obtain the documents referenced in exhibits 206 through 210. However, should evidence surface that subpoenas or notices of deposition were issued by BASF without notice to all parties, the court will entertain a motion to bar the introduction of any and all documents falling within the scope of subpoenas or notices of deposition so served.").

To be sure, the rules of professional responsibility were not violated here. *Contra. Zachair, Ltg. v. Driggs*, 965 F. Supp. 741, 753-54 (D. Md. 1997) (*ex parte* contact with party's former counsel). That is not the concern. Rather, the concern is that Defendants admitted in their Opposition that they obtained Attorney Kelley's Affirmation ***for*** their expert but produced the Affirmation ***after*** it was signed and relied on:

> In preparing for expert disclosures, information related to IMC's work at the HOVIC refinery was needed for Defendants' expert John Henshaw. This testimony could have

> been provided through any myriad of means such as Affidavit, Affirmation, interview, prior deposition or a case deposition. Defendants sought and obtained an Affirmation from Attorney Kelley as to IMC's knowledge. Defendants produced Dr. Henshaw's report on August 11, 2017. Defendants produced Attorney Kelley's Affirmation on August 15, 2017 (four days later).

(Opp'n 2-3 (parenthetical citation omitted).) This is not how discovery should proceed.

The Court takes Defendants' counsel at their word that the "suggestion by Plaintiffs that Defendants intentionally waited to disclose Attorney Kelley and his affirmation until 'he was at the height of his mental and physical decline' is merely surmise and conjecture, and is, frankly, offensive." *Id.* at 11. The Court also appreciates that Defendants needed "information related to IMC's work at the HOVIC refinery . . . for John Henshaw," *id.* at 2, and presumably sought to "close the gap" with testimony from Attorney Kelley. The Court previously chided Hess and HOVIC, not their counsel, for not sufficiently staffing these cases. *See In re: Asbestos, Catalyst, and Silica Toxic Dust Exposure Litig.*, 67 V.I. 544, 557 (Super. Ct. 2017) ("The Court cannot reward Defendants for insufficiently staffing these cases or not dedicating appropriate resources to ensure that the parties met court-issued deadlines."). While Hess and HOVIC heeded the Court's warning and retained additional counsel to assist, the Court is still troubled that Defendants obtained sworn testimony from Attorney Kelley on an *ex parte* basis and produced that testimony after it was relied on by their expert in preparing his report. As Plaintiffs point out, "[t]he sad fact of this matter is that it could have been avoided had Defendants simply followed the rules or at least given Plaintiffs some notice of the situation." (Reply 9.) "In the Summer of 2018, Defendants might have disclosed to Plaintiffs that they intended to seek testimony from a witness with significant health problems, and Plaintiffs would have done everything they could to accommodate the witness. That is how the system is supposed to work." *Id.* The Court agrees. But the Court cannot agree that "barring the testimony of

Defendants' expert" is the only appropriate sanction here. *Id.*

Plaintiffs filed this motion within the master case, which means it pertains to all of the cases grouped under the master case. Barring the Defendants from relying on Mr. Henshaw's report in each of the over 120 cases grouped under this master case is not warranted. Discovery has not closed for the remaining cases in Group B and trial dates have not been set for the other bellwether cases in Group A. IMC's corporate deposition can still be taken for the other case and the Defendants' expert can revise his report if appropriate. It is appropriate, however—for the four cases that are scheduled for trial—to preclude any testimony (directly, indirectly through their expert, or as impeachment evidence) concerning Attorney Kelley's Affirmation. Requiring Defendants (not their attorneys) to pay the costs and attorney's fees incurred by the Plaintiffs' counsel in filing this motion is also appropriate. *See* V.I. R. Civ. P. 37(c) ("If a party fails to . . . identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that . . . witness to supply evidence . . . at a trial . . . . In addition . . . the court . . . may order payment of the reasonable expenses, including attorney's fees, caused by the failure."); *accord Admiral Ins. Co. v. Ginader, Jones & Co., LLP*, No. 3:01-cv-0973, 2003 U.S. Dist. LEXIS 15838, *21 (M.D. Pa. Sep. 9, 2003) (awarding sanctions but denying motion to dismiss when depositions were repeatedly cancelled and defendant unexpectedly died) ("[A]n appropriate sanction at this point is to order the plaintiff to pay the costs and attorneys' fees incurred by the movants."). The Court will direct Plaintiffs' counsel to submit a bill of costs. Plaintiffs' motion *in limine* will be granted in part. The motion to strike will be denied, however, as Attorney Kelley's Affirmation was never filed, except as an attachment to these motion papers. *Cf. Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 126-27 (Super. Ct. 2016) (papers placed on file with the court as part of the record can be stricken).

III. CONCLUSION

For the reasons stated above, the Court will grant in part and deny in part Plaintiffs' motion *in limine* and to strike the affirmation of Attorney Kelley. An appropriate order follows.

Dated: April 23, 2018.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ______________
Court Clerk Supervisor II
Dated: 4/23/18