IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

HASSAN ABDALLAH, Plaintiff, v. **HASAN ABDEL-RAHMAN, MALEA KIBLAN RAHMAN, ABDUL SAMAD, FOAD SAMAD, and AYMAN ABDEL-SAMAD,** Defendants. **HASAN ABDEL-RAHMAN, MALEA KIBLAN RAHMAN, ABDUL SAMAD, FOAD SAMAD, AYMAN ABDEL-SAMAD, and FALAHEEN ENTERPRISES, INC.,** Counter-Plaintiffs, v. **HASSAN ABDALLAH, AHMAD ABDALLAH, PETROLEUM BROKERS, LLC, GIANT MARKET, LLC, and DOCKSIDE CONVENIENCE, LLC, (nominal)** Counter-Defendants.	**CASE NO. ST-13-CV-227**

MEMORANDUM OPINION

Pending before the Court is Defendants/Counter-Plaintiffs' July 11, 2016, Motion to Preclude Non-Compliant Expert Report.[1] For the following reasons, Defendants/Counter-Plaintiffs' motion will be granted in part and denied in part.

[1] Plaintiff responded on July 29, 2016, and Defendants/Counter-Plaintiffs replied on August 12, 2016.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On May 16, 2013, Plaintiff Hassan Abdallah filed an action against Defendants Hassan Abdel-Rahman, Malea Kiblan Rahman, Abdul Samad, Foad Samad and Ayman Abdel-Samad seeking an accounting and asserting causes of action for debt, breach of contract, and fraud. The parties' main dispute concerns control over a service station, convenience store, and undeveloped property located at Parcels Nos. 6&9 Remainder Estate Thomas. Later, Falaheen Enterprises, Inc., ("Falaheen"), Dockside Convenience, LLC, ("Dockside"), and Giant Market, LLC, ("Giant Market") were all added as required parties and Petroleum Brokers, LLC, ("Petroleum Brokers") was added as a permissive party. On May 6, 2015, Plaintiff served his expert disclosures[2] and expert report of Louis Ortiz, CPA, CBA, CFP,[3] under Fed. R. Civ. P. 26(a)(2). In response to Mr. Ortiz's expert report, Defendants' served a rebuttal report prepared by Raymond J. Zomerfeld, CPA, CVA.

STANDARD

"Federal Rules of Civil Procedure 26 through 37 govern discovery in the Superior Court."[4] Specifically, Fed. R. Civ. P. 26(a)(2) governs the disclosure of expert testimony in Superior Court proceedings. Rule 26(a)(2) provides, in pertinent part: Fed. R. Civ. P. 26(a)(2)(B) requires that "a party must disclose to the other parties the identity of any witness it may use at trial . . . and this disclosure must be accompanied by a written report . . . if the witness is one retained or specially employed to provide expert testimony." "The report must contain:

---

[2] Pl.'s July 29, 2016, Opp., Ex. 1, Pl.'s Expert Disclosure.
[3] *Id.* at Ex. 2, Expert Report.
[4] *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 233 (V.I. 2013) (citing SUPER. CT. R. 39(a)) ("Depositions and discovery shall be had in the Superior Court of the Virgin Islands, pursuant to the provisions of Rules 26 to 37, inclusive of the Federal Rules of Civil Procedure. All references in the aforesaid Rules 26 to 37, inclusive to 'Court', 'District Court', or 'U.S. District Court' shall be deemed a reference under this rule to the Superior Court of the Virgin Islands").

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case."[5]

After a report is disclosed a party may challenge the validity of an expert opinion and its admissibility under Federal Rule of Evidence 702 and the *Daubert* standard.[6]

"[Fed. R. Civ. P.] 37 governs sanctions for Rule 26 violations."[7] Rule 37(c)(1) provides that "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." "The 'imposition of sanctions for abuse of discovery under [Rule] 37 is a matter within the discretion of the trial court.'"[8] Exclusion of evidence is not required for violations of Rule 26, as Rule 37(c)(1) explicitly states that "[i]n addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard" may impose other, less extreme, sanctions.[9]

---

[5] FED. R. CIV. P. 26(a)(2)(B).
[6] *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 416 (V.I. 2016) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Alexander v. People*, 60 V.I. 486, 507 (V.I. 2014) (quoting Fed. R. Evid. 702)).
[7] *Davis*, 59 V.I. at 236.
[8] *Id.* (citing *Newman v. GHS Osteopathic, Inc. Parkview Hosp. Div.*, 60 F.3d 153, 156 (3d Cir. 1995)).
[9] FED. R. CIV. P. 37(c)(1) ("In addition to or instead of this sanction, the court . . . may order payment of the reasonable expenses, including attorney's fees, caused by the failure; . . . inform the jury of the party's failure; and . . . impose other appropriate sanctions . . . .").

ANALYSIS

Defendants/Counter-Plaintiffs argue Mr. Ortiz's expert report and opinion testimony should be precluded because Plaintiff failed to provide a written report that complies with the disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B) and his opinion is therefore not admissible under Fed. R. Evid. 702. Plaintiff asserts that Mr. Ortiz's report substantially complies with the requirements according to Fed. R. Civ. P. 26(a)(2)(B), and, rather than have the report precluded, Mr. Ortiz should be allowed to supplement his report.

Defendants allege that the Ortiz Report fails to provide any analysis for the one sentence conclusion that "Mr. Abdallah and his related entities have contributed $1,839,819.16 to the Giant Gas Project."[10] Attached to the report was a sheet with a list of payments with the amount totaling $1, 839, 819.16, as well as 72 pages of receipts, checks, invoices, and summaries. Specifically Defendants argue that Mr. Ortiz has provided no explanation for his belief that the documents referred to in the list are in fact evidence of capital contributions by Hassan Abdallah to the development of a specific business or even defined the term capital contribution for the context of this case. Defendants claim that, based on the one sentence report, they are unable to prepare deposition questions about the methodology or expertise (if any) Mr. Ortiz employed to reach his conclusion. Further, Defendants rely on their rebuttal report to further identify the deficiencies in methodology, asserting that the conclusion is deficient on its face and inconsistent with accepted accounting principles and that the report fails to satisfy Fed. R. Civ. P. 26(a)(2)(B) and Fed. R. Evid. 702.

---

[10] Defs.' July 14, 2016, Mot. To Preclude, Ex. A, Expert Report.

Plaintiff maintains that the report complies with the requirements of Fed. R. Civ. P. 26(a)(2)(B), but, rather than preclude Mr. Ortiz as an expert, Plaintiff believes any error with the report is harmless and asks the Court to allow Mr. Ortiz to supplement his conclusion. It is undisputed that Mr. Ortiz has met the following requirements under Fed. R. Civ. P. 26(a)(2)(B): (iv) the witness's qualifications, including publications; (v) a list of other cases in which the witness has testified; and (vi) a statement of compensation. At issue remains whether the report contains: (i) a complete statement of all opinions; (ii) the facts or data considered by the witness; and (iii) any exhibits used to summarize or support them.[11] Plaintiff contends that the report contains the opinion Mr. Ortiz intends to offer at trial and that implicit within his opinion is his forty-eight (48) years of experience as an accountant, a summary of his calculations, and the 70 (seventy) pages of the actual documentation upon which he relied. Further, Plaintiff conducts an analysis of the *Pennypack* factors to support his argument that the Ortiz report should not be excluded as a sanction under Fed. R. Civ. P. 37(c).[12]

In order for the Court to accurately determine the admissibility of expert testimony the Court must hold a *Daubert* hearing and provide Plaintiff an opportunity to defend the admission of the evidence including the expert's qualification, reliability, and fit for the facts of the case. In their reply, Defendants assert that they are not seeking to exclude the Ortiz report as a discovery sanction and are not requesting a *Daubert* hearing. Therefore, it is premature for the Court to determine if discovery sanctions are appropriate under a *Pennypack* analysis or to schedule a

---

[11] FED. R. CIV. P. 26(a)(2)(B).
[12] The *Pennypack* factors come from a four element test utilized by the Third Circuit. *See Brown v. Lorillard Tobacco Co.*, 2013 V.I. LEXIS 39, *2 (V.I. Super. Ct., June 14, 2013) (quoting *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir.1977), overruled on other grounds, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) aff'd, 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987)).

Daubert hearing at this time. Instead Defendants only challenge the admissibility of Mr. Ortiz's testimony because of his failure to submit a report with an opinion including facts, methodology, and procedures, rather than merely a conclusion, but maintain that the mere fact that they served a Rebuttal Report does not mean that the Ortiz report is sufficient. Here, the Court agrees that although a certain level of expertise is implicit from experience, the Ortiz report lacks a complete explanation of the basis and reasons for the opinion and the facts considered to satisfy the requirements of Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii). Because the expert discovery deadline was recently extended until December 5, 2016,[13] and since Defendants are not contending that Mr. Ortiz lacks the general qualifications to possibly be accepted as an expert in accounting with the proper report, the Court will grant Plaintiff and Mr. Ortiz leave to supplement the report.

CONCLUSION

For the foregoing reasons, Defendants/Counter-Plaintiffs' July 11, 2016, Motion to Preclude Non-Compliant Expert Report is granted in part and denied in part. An Order consistent with this Memorandum Opinion shall follow.

Dated: October 11, 2016

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Acting Clerk of Court ____/ /____/____

By: 10/14/16
Lori Boynes-Tyson
Court Clerk Supervisor ____/____/____

[13] Order dated September 15, 2016.

CERTIFIED A TRUE COPY
DATE: 10-13-16
ESTRELLA H. GEORGE
Acting Clerk of the Court
By: ________
Cameil A. Clarke
Court Clerk II