SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JEVON GERALD, as lawful Successor of the ESTATE OF LUCIEN EVANS ENGLAND, SR., **Plaintiff,** **vs.** **R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,** **Defendant.**	**CASE NO. ST-10-CV-631**
CHRISTIAN BROWN, as the Executor of the ESTATE OF PATRICE HALE BROWN, **Plaintiff,** **vs.** **R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,** **Defendant.**	**CASE NO. ST-10-CV-692**

MEMORANDUM OPINION

Pending before the Court is Defendant's March 7, 2016, Motion to Strike Plaintiffs' Expert Designation of William Farone and to Preclude Any Use of Farone's Testimony from Prior Unrelated Cases and Plaintiffs' March 29, 2016, Motion to Admit Prior Testimony of William A. Farone, Ph.D. The Court will deny Defendant's Motion to Strike because Dr. Farone's former testimony satisfies the hearsay exception under Fed. R. Evid. 804(b)(1) and therefore does not constitute inadmissible hearsay, balancing under Fed. R. Evid. 403 does not warrant exclusion, admission will not violate due process, and Plaintiffs' failure to disclose an expert report in accordance with Fed. R. Civ. P. 26(a)(2) is harmless in this instance. However, since compliance with Fed. R. Civ. P. 26(b)(4)(A) appears reasonably feasible, Plaintiffs will be directed to take the necessary steps, within reason, to ensure that Reynolds is able to subpoena Dr. Farone for a deposition. The Court will direct Plaintiffs to designate the portions of Dr. Farone's former testimony they seek to admit, to which Defendant may respond by making counter-designations and objections, during which time Plaintiffs' Motion to Admit will be held in abeyance.

RELEVANT FACTUAL & PROCEDURAL HISTORY

This tobacco liability litigation arises from complaints filed by Lucien Evans England, Sr., and Patrice Hale Brown on November 10, 2010, and December 6, 2010, against Lorillard Tobacco Company, Lorillard, Inc. (collectively "Lorillard"), and other Defendants.[1] The original Plaintiffs having died during the course of litigation, their children now pursue their interests, namely, Jevon Gerald on behalf of Lucien Evans England, Sr. and Christian Brown on behalf of Patrice Hale Brown.[2] The interests of Lorillard are now represented by its successor by merger, Defendant R.J. Reynolds Tobacco Company ("Reynolds").[3]

The Complaints, as amended,[4] allege strict products liability (Count I), negligent performance of a voluntary undertaking (Count II), negligence (Count III), breach of implied

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[1] England filed a First Amended Complaint on December 6, 2010.

[2] *See* January 24, 2015, Order, *Gerald, et al v. R.J. Reynolds Tobacco Company, et al.*, Case No. ST-10-CV-631 (granting the motion of England's son and named executor, Jevon Gerald, to continue the litigation as England's personal representative); April 2, 2012, Order, *Brown, et al v. R.J. Reynolds Tobacco, et al.*, Case No. ST-10-CV-692 (granting the motion of Brown's son to substitute parties as the lawful successor of Brown's Estate).

[3] *See* Pls.' November 9, 2015, amended Complaints, as discussed *infra* n. 4 & 5.

[4] Most recently, on November 9, 2015, both Plaintiffs sought leave to amend their Complaints, which the Court granted by Order signed on November 10, 2015 and entered on November 16, 2015. Though challenged by Defendants, the Court declined to set aside that Order and accepted Plaintiffs' November 9, 2015, amended Complaints in a Memorandum Opinion entered on April 26, 2016. *See* Def.'s November 24, 2015, Emergency Motion to Vacate the

warranty of merchantability (Count IV), fraudulent concealment and misrepresentation (Count V), civil conspiracy (Count VI), wrongful death and/or survival claims (VII).[5] Reynolds has since moved to dismiss certain counts alleged in the amended Complaints[6] and Plaintiffs have moved to consolidate the cases for trial.[7] These motions, which remain pending before the Court, will be decided subsequently. Trials in these actions are scheduled to commence on August 1, 2017.[8]

On March 7, 2016, Reynolds filed a Motion to Strike Plaintiffs' Expert Designation of William Farone and to Preclude Any Use at Trial of Farone's Testimony from Prior Unrelated Cases. Plaintiffs filed a timely Opposition, as well as a Motion to Admit Prior Testimony of William A. Farone, Ph.D., on March 29, 2016.[9] Defendant filed a timely Reply and Opposition to Plaintiffs' Motion to Admit on April 19, 2016, to which Plaintiffs replied on May 2, 2016.[10]

Court's Orders Granting Plaintiffs' Motions for Leave to Amend Their Respective Complaints; December 21, 2015, Mem. Op. & Order; Def.'s December 30, 2015, Opp'n to Plaintiffs' Mots. for Leave to Amend their Complaints.

[5] *See* November 9, 2015, Second Amended Complaint for Wrongful Death and/or Survival Claims in *Gerald, et al v. R.J. Reynolds Tobacco Company, et al.*, Case No. ST-10-CV-631; November 9, 2015, Amended Wrongful Death and/or Survival Complaint in *Brown, et al v. R.J. Reynolds Tobacco, et al.*, Case No. ST-10-CV-692.

[6] *See* Def.'s June 3, 2016, Mots. to Dismiss.

[7] *See* Pls.' June 6, 2016, Mot. to Consolidate Cases for Trial.

[8] June 1, 2016, Order.

[9] *See* April 5, 2016, Order (granting the parties' Stipulation and Joint Motion to Enlarge Briefing Deadlines and directing Plaintiffs' to respond to Reynolds' Motion to Strike by May 29, 2016, to which Reynolds could reply by April 19, 2016). Plaintiffs also filed a Notice on March 30, 2016, attaching Exhibit F, a Memorandum Opinion issued by an Alaska trial court, which is referenced, but not attached, with their March 29, 2016, Opposition and Motion to Admit. The Court will consider Plaintiffs' Exhibit F since Reynolds has not objected to Plaintiffs' Exhibit as being untimely. *See Joseph v. People*, 60 V.I. 338, 347 n.7 (V.I. 2013) ("Although the Superior Court failed to provide an explanation for considering the defendant's untimely motion, the record reflects that the People did not move to strike Destin's motion as being untimely, and therefore it waived any objection to its timeliness") (citing *Fuller v. Browne*, 59 V.I. 948, 953 n.3 (V.I. 2013)).

[10] LRCi 7.3(e)(1), made applicable to Superior Court proceedings as a last resort through SUPER. CT. R. 7, provides that "[a] party shall file a respond within fourteen (14) days after service of the motion." *See In re Refinery Dust Claims*, 2016 V.I. LEXIS 48, *7-12 (V.I. Super. Ct. May 3, 2016) (citing LRCi 7.3(e)). Reynolds' Opposition to Plaintiffs' Motion to Admit is technically untimely since it was filed, without leave of Court, after the expiration of this fourteen day time limit under LRCi 7.3(e)(1). However, the Court will consider Reynolds' Opposition to Plaintiffs' Motion to Admit because Plaintiffs have not objected to its untimeliness. *supra* n. 9. Plaintiffs' Reply to Reynolds' Opposition to Plaintiffs' Motion to Admit is timely under LRCi 7.3(e)(2).

STANDARD

A. Hearsay Exception Regarding Former Testimony of an Unavailable Witness under Fed. R. Evid. 804(b)(1).

The admission of evidence in the Virgin Islands is governed by the Federal Rules of Evidence.[11] Fed. R. Evid. 801(c) defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[12] Hearsay is inadmissible unless one of the hearsay exceptions apply.[13] The hearsay exception regarding former testimony of an unavailable witness is set forth in Fed. R. Evid. 804(b)(1), which provides that "[t]estimony that . . . was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and . . . is now offered against a party who had— or, in a civil case, whose predecessor in interest had— an opportunity and similar motive to develop it by direct, cross-, or

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[11] 2010 V.I. Sess. Laws 50 (Act No. 7161, § 15(b)) (adopting the Federal Rules of Evidence to govern the admission of evidence in the Superior Court of the Virgin Islands); *Simmonds v. People of the Virgin Islands*, 59 V.I. 480, 500 (V.I. 2013) ("Act No. 7161 does not direct that the Federal Rules of Evidence simply fill the gap whenever local evidentiary rules are silent; by providing that title 5, chapter 67 is 'hereby repealed *and replaced with* the Federal Rules of Evidence,' the Legislature enacted each and every one of the Federal Rules of Evidence as the evidentiary rules for Virgin Islands local courts without qualification"); *but see Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, *26, 19-20 (V.I. 2016) ("[N]either th[e Supreme] Court [of the Virgin Islands] nor the Superior Court is required to follow the United States Supreme Court's interpretation of the Federal Rules of Evidence as binding precedent, since the interpretation of Virgin Islands evidentiary rules remains a question of Virgin Islands law even if the local rule that has been adopted is word-for-word identical to a federal rule . . . Both th[e Supreme Court of the Virgin Islands] . . . and the Superior Court have questioned whether the legislature may delegate its lawmaking authority to Congress and the United States Supreme Court in such a way[,] . . . Nevertheless, precedents from th[e Supreme] Court establishing judicial procedures are binding on the Superior Court") (internal and other citations omitted); *See also* SUPER. CT. R. 12.

[12] FED. R. EVID. 801(c); *See People of the Virgin Islands v. Fenton*, 59 V.I. 163, 173 (V.I. Super. Ct. 2013) (defining hearsay under FED. R. EVID. 801(c)) and *Stevens v. Gov't of the V.I.*, 2016 V.I. LEXIS 67, *9-10 (V.I. Super. Ct. May 20, 2016) (same) (citations omitted).

[13] FED. R. EVID. 802; *See Stevens*, 2016 V.I. LEXIS 67, at *10 (applying FED. R. EVID. 802) (citations omitted).

redirect examination[, is] . . . not excluded by the rule against hearsay if the declarant is unavailable as a witness[.]"[14]

B. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons Under Fed. R. Evid. 403.

Under Fed. R. Evid. 403, "[t]he [C]ourt may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[15] However,

> because all evidence is inherently prejudicial to the party against whom it is offered, Rule 403 does not bar all prejudicial evidence. Rule 403 only serves to bar the evidence that is so unfairly prejudicial as to outweigh its probative value. In weighing the evidence and evaluating the incremental probative value of the evidence, the trial court must assume that the evidence will be believed by the trier of fact.[16]

"A trial court has wide discretion in determining whether to exclude otherwise admissible evidence under Rule 403 of the Federal Rules of Evidence." "[A] trial court's Rule 403 ruling is afforded great deference."[17] The Supreme Court of the Virgin Islands "may not disturb the [Superior C]ourt's determination unless . . . [it] find[s] that the court acted arbitrarily or

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[14] FED. R. EVID. 804(b)(1); *supra* n. 11; *See Rawlins v. People of the Virgin Islands*, 61 V.I. 593, 606 n. 8 (V.I. 2014) (noting that the hearsay exception under FED. R. EVID. 804(b)(1) as "permit[s] the admission of an unavailable declarant's former testimony in a subsequent proceeding as an exception to the rule against hearsay[,]" but declining to "address whether the prior transcript testimony was admissible under an exception to the rule against hearsay under the Federal Rules of Evidence") (citations omitted).

[15] FED. R. EVID. 403; *Monelle v. People of the Virgin Islands*, 63 V.I. 757, 766-768 (V.I. 2015) and *Alexander v. People of the Virgin Islands*, 60 V.I. 486, 496 (V.I. 2014) (both applying FED. R. EVID. 403).

[16] *Alexander*, 60 V.I. at 496 (citing *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154-1155 (5th Cir. 1981)) (other internal citation omitted).

[17] *Tyson v. People of the Virgin Islands*, 59 V.I. 391, 423-424 (V.I. 2013).

irrationally."[18] "Similarly, the admission of expert testimony lies within the discretion of the trial court, and its judgment must not be reversed absent an abuse of discretion."[19]

C. Disclosure of Expert Testimony Under Fed. R. Civ. P. 26 and 37.

"Federal Rules of Civil Procedure 26 through 37 govern discovery in the Superior Court."[20] Specifically, Fed. R. Civ. P. 26(a)(2) governs the disclosure of expert testimony in Superior Court proceedings. Under Fed. R. Civ. P. 26(a)(2), "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."[21] "The report must contain:

> (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."[22]

If the witness is not required to provide a written report, Fed. R. Civ. P. 26(a)(2)(C) requires that the "disclosure must state: (i) the subject matter on which the witness is expected to present

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[18] *Alexander*, 60 V.I. at 494 (citing *Francis v. People*, 56 V.I. 370, 386 (V.I. 2012)).
[19] *Id.* (citing *Westcott v. Crinklaw*, 68 F.3d 1073, 1075 (8th Cir. 1995)).
[20] *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").
[21] FED. R. CIV. P. 26(a)(2)(A)-(B).
[22] FED. R. CIV. P. 26(a)(2)(B).

evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify."

In addition, Fed. R. Civ. P. 26(b)(4)(A) provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." "If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided."[23]

"[Fed. R. Civ. P.] 37 governs sanctions for Rule 26 violations."[24] Fed. R. Civ. P. 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.'"[25] 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.[26]

ANALYSIS

Reynolds moves to strike Plaintiffs' designation of William A. Farone, Ph.D., ("Dr. Farone") as an expert witness and Plaintiffs' disclosure of Dr. Farone's prior trial testimony in *Evans v. Lorillard Tobacco Co., et al.*, No. 2004-2840-B (Mass. Super. Ct.) ("*Evans*") in

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[23] FED. R. CIV. P. 26(b)(4)(A).
[24] *Davis*, 59 V.I. at 236.
[25] *Id.* (citing *Newman v. GHS Osteopathic, Inc. Parkview Hosp. Div.*, 60 F.3d 153, 156 (3d Cir. 1995)).
[26] 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 . . . .").

November of 2010[27] because the disclosure purportedly violates Fed. R. Civ. P. 26 and 37 and the prior testimony constitutes inadmissible hearsay. In contrast, Plaintiffs move to admit the prior testimony of Dr. Farone, arguing the prior testimony is admissible under Fed. R. Evid. 804(b)(1), the hearsay exception governing former testimony, because Dr. Farone is an unavailable witness, and that any technical violations of Fed. R. Civ. P. 26 and 37 are justified and harmless.

A. Admissibility of Dr. Farone's Prior Testimony.

a. Fed. R. Evid. 804(b)(1).

It is undisputed that Dr. Farone's prior testimony in *Evans* constitutes hearsay.[28] "In order for former testimony to be admissible as an exception to the hearsay rule [under Fed. R. Evid. 804(b)(1)]: (1) the declarant must be unavailable; (2) testimony must be taken at a hearing, deposition, or civil action or proceeding; and (3) the party against whom the testimony is now offered must have had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[29] At issue here are the first and third elements, since the parties do not dispute that Plaintiffs seek to introduce testimony given by Dr. Farone in open court during the civil trial in *Evans*.[30]

Plaintiffs argue Dr. Farone's prior testimony is admissible under Fed. R. Evid. 804(b)(1) because Dr. Farone is an unavailable witness since his attendance cannot be procured by process

[27] Initially, Reynolds also challenged Plaintiffs' disclosures regarding Dr. Farone's trial preservation deposition testimony taken in a group of "Engle progeny" cases from Florida, namely *In Re: Engle Progency Cases Tobacco Litigation*, Case No. H-CA-2008-3318 (Fla. 13th Cir. Ct.) and *In Re: Engle Progency Cases Tobacco Litigation, Pertains to All Cases*, Case No. 2008-CA-80000 (Fla. 1st Cir. Ct.). Def.'s Mot. to Strike, p. 4. However, Plaintiffs have since agreed "to rely solely on Dr. Farone's prior sworn expert testimony in *Evans*[,]" which Reynolds acknowledges in its Reply. *See* Pls.' Opp'n to Def.'s Mot. to Strike, p. 2 n. 2; Def.'s Reply in Support of its Mot. to Strike, p. 2 n. 1.

[28] Def.'s Mot. to Strike, p. 12; See Pls.' Opp'n to Def.'s Mot. to Strike, pp. 12-14.

[29] *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. Pa. 1995) (citing FED. R. EVID. 804(a)(5), (b)(1)).

[30] *See* Pls.' Opp'n to Def.'s Mot. to Strike, p. 2 n. 2; Def.'s Reply in Support of its Mot. to Strike, p. 2 n. 1.

or other reasonable means and Dr. Farone refuses to testify despite Plaintiffs' offer to compensate him.[31] Reynolds argues Dr. Farone's mere refusal to testify does not render him "unavailable" and admission of the prior testimony will deny Reynolds its right to expert discovery and cross-examination.[32] Plaintiffs counter that, as Lorillard's successor by merger, Reynolds right to cross-examination "has not been abridged" because Lorillard was a defendant in *Evans* and Lorillard's counsel cross-examined Dr. Farone "extensively" at the *Evans* trial.[33]

i. Unavailability of Dr. Farone.

In order for former testimony to be admissible as a hearsay exception under Fed. R. Evid. 804(b)(1), the declarant must be unavailable.[34] The "criteria for being unavailable" is set forth in Fed. R. Civ. P. 804(a). Relevant here is Fed. R. Civ. P. 804(a)(5), which provides that "[a] declarant is considered to be unavailable as a witness if the declarant . . . is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure . . . the declarant's attendance."[35] In general, the proponent of the statement bears the burden of proving the unavailability of the declarant.[36] "A determination of whether the witness is 'unavailable' rests within the sound discretion of the trial court."[37]

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[31] Pls.' Opp'n to Def.'s Mot. to Strike, p. 14.
[32] *See* Def.'s Mot. to Strike, pp. 12-20.
[33] Pls.' Opp'n to Def.'s Mot. to Strike, pp. 12, 17-20.
[34] FED. R. EVID. 804(b).
[35] FED. R. EVID. 804(a)(5)(A); *supra* n. 11.
[36] 30C Michael H. Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7072, at 375 (2011 Interim ed.) (footnotes omitted); *See also Kirk*, 61 F.3d at 165 (collecting cases); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1249 (E.D. Pa. 1980) (citing 11 Moore's Federal Practice § 804.02 at 239), *aff'd in part and rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983)).
[37] *Younger v. State*, 496 A.2d 546, 551 (Del. 1985) (citing *United States v. Faison*, 679 F.2d 292, 295 (3d Cir. N.J. 1982)); *See Duff v. Duff*, 2005 U.S. Dist. LEXIS 46111, *9 (E.D. Ky. Nov. 14, 2005) ("The Sixth Circuit has recognized it is within the sound discretion of the district courts to determine whether an unwilling expert's testimony should be excluded") (citing *Buchanan v. American Motors Corp.*, 697 F.2d 151, 152 (6th Cir. 1983) (citing *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976))).

The Supreme Court of the Virgin Islands has yet to interpret the requirement that the proponent "has not been able, by process or other reasonable means, to procure . . . the declarant's attendance" so as to render a witness "unavailable" under Fed. R. Evid. 804(a)(5), as it applies to the hearsay exception governing former testimony under Fed. R. Evid. 804(b)(1).[38] The Court looks to federal jurisprudence on the issue for guidance,[39] which reveals three interpretations.[40] First, some courts have held that "the declarants of former testimony are unavailable under [R]ule 804(a)(5) if they are outside the subpoena power of the court, even if the proponent of the former testimony has made no effort to take their depositions or to request their voluntary attendance at trial."[41] This reasoning is rejected by a second approach, followed by the United States Court of Appeals for the Third Circuit, which focuses on the "reasonable means" employed by the proponent, and requires the proponent prove that efforts were made to procure the witness' appearance.[42] Examples of these efforts include the proponent demonstrating that he or she

[38] In the context of the constitutional requirement of confrontation in criminal actions, the Supreme Court of the Virgin Islands has held that "[t]he basic test for unavailability is that 'a witness is not 'unavailable' ... unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" *Rawlins*, 61 V.I. at 608 (citing *Barber v. Page*, 390 U.S. 719, 724-725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)) (other citations omitted).

[39] Though only persuasive, the Court looks doctrines developed by federal courts with respect to the unavailability of witnesses under FED. R. EVID. 804(a)(5) for guidance since the Supreme Court of the Virgin Islands has yet to address the issue. *See Antilles*, 2016 V.I. Supreme LEXIS 7, at *26.

[40] Pl.'s Mot. to Admit, Exhibit F, *Hunter v. Philip Morris USA Inc.*, Case No. 4BE-06-407, slip. op. at 11-13 (AK Super. Ct. September 30, 2011).

[41] *Zenith*, 505 F. Supp. at 1251; *See Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.*, 2000 U.S. Dist. LEXIS 997, *15 & n. 24 (D. Del. Jan. 13, 2000) (collecting cases).

[42] *See Kirk*, 61 F.3d at 165; *See Caron v. General Motors Corp.*, 37 Mass. App. Ct. 744, 750 (Mass. App. Ct. 1994) ("[G]iven the latitude of choice in selecting experts and the general preference of the rules for testimony by live witnesses rather than depositions, . . . the judge [has] discretion to exclude the deposition of an expert witness where the judge is not satisfied that the party proponent has made a reasonable effort to secure the expert's presence at the trial") (internal citations omitted) (collecting cases).

attempted to contact the witness, offered the usual expert witness fee, and requested the witness' attendance at trial.[43] The Territorial Court of the Virgin Islands has applied this approach.[44]

The final approach, followed by the United States Court of Appeals for the Second Circuit, specifically considers the role of expert witnesses and requires the proponent to demonstrate that: (1) the expert witness is unavailable in that the proponent unsuccessfully attempted to secure the voluntary attendance of the expert witness; and (2) "no other expert of similar qualifications is available or that the unavailable expert has some unique testimony to contribute."[45] Additionally, though the burden of showing unavailability is generally upon the proponent of the statement,[46] this approach also considers whether the party seeking to exclude the evidence has shown that it will be prejudiced by the former testimony.[47]

Essentially, Reynolds urges the Court to follow the final approach by arguing Plaintiffs "failed to use reasonable means to obtain [Dr.] Farone's appearance at trial and . . . cannot demonstrate that [Dr.] Farone's opinions are irreplaceable."[48] On the other hand, Plaintiffs argue that their "counsel has done everything he can to secure Dr. Farone's presence" at trial, but have been unable to do so absent Reynolds waiving any objection to Dr. Farone's perceived conflict of interest in his work as a consultant to the United States Food and Drug Administration's ("FDA")

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[43] *Kirk*, 61 F.3d at 165.
[44] *Walters v. K-Mart Corporation*, 2000 V.I. LEXIS 25, *5 (V.I. Terr. Ct. Oct. 4, 2000) (concluding that a proponent's "hearsay testimony cannot be saved by the former testimony exception because she failed to establish the threshold requirement that the declarants were unavailable . . . [because the proponent] does not indicate what, if any, efforts were expended to attempt to secure the witnesses' testimony, but relies on a bald statement that one declarant now lives off-island and the other, while still a resident of St. Croix, probably would not have admitted her previous testimony") (citing FED. R. EVID. 804 (b), (a)(5)).
[45] *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536-537 (2d Cir. N.Y. 1972).
[46] *supra* n. 36.
[47] *Carter-Wallace*, 474 F.2d at 537.
[48] Def.'s Mot. to Strike, p. 14.

"Tobacco Products Scientific Advisory Committee relative to issues of cigarette design"[49] and that Dr. Farone's prior testimony in *Evans* is unique in that Dr. Farone is the only "former senior scientist from a major tobacco company with personal experience in designing safer cigarettes, who can testify based on that experience about available safer cigarette designs (among other topics) at the time [Plaintiffs] . . . smoked cigarettes."[50]

The Court finds that Plaintiffs have demonstrated that Dr. Farone is unavailable because Plaintiffs have not "been able, by process or other reasonable means, to procure" Dr. Farone's attendance at trial under all three aforementioned approaches. Plaintiffs submit a declaration under penalty of perjury executed by Dr. Farone, wherein Dr. Farone declares that he lives and works in California.[51] As a result, Plaintiffs cannot procure Dr. Farone's attendance at trial by legal process because Dr. Farone is outside the subpoena power of the Court, which is limited to the Court's territorial jurisdiction.[52]

Plaintiffs have also demonstrated that they have taken reasonable means to procure Dr. Farone's attendance at trial, but have been unable to do so. The declarations under penalty of perjury executed by Dr. Farone and Plaintiffs' counsel, Michael D. Weisman, Esq., indicate that Plaintiffs' counsel contacted Dr. Farone about the possibility of Dr. Farone serving as an expert witness in these actions and has offered to pay Dr. Farone's expert witness fees and expenses.[53]

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[49] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶¶ 6-8.
[50] Pls.' Opp'n to Def.'s Mot. to Strike, pp. 14-15.
[51] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 2.
[52] *People of the V.I. v. Steinhauer*, 2010 V.I. LEXIS 81, *4 (V.I. Super. Ct. Nov. 23, 2010) ("SUPER. CT. R. 11(d) limits the service of subpoenas to the territorial jurisdiction of this Court"); SUPER. CT. R. 11(d) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the territory").
[53] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 3 & Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 9; *See* Pls.' Opp'n to Def.'s Mot. to Strike, p. 14.

However, Dr. Farone refuses to be retained as an expert witness unless Reynolds waives any potential conflict of interest inherent in Dr. Farone testifying as an expert in this tobacco litigation while simultaneously working as a consultant for the FDA.[54] For various reasons, Reynolds will not waive the conflict.[55] These declarations demonstrate that Plaintiffs have not been successful in securing the voluntary attendance of Dr. Farone at trial.

Finally, the Court also finds that Plaintiffs have sufficiently demonstrated that Dr. Farone's testimony is unique. In assessing this element, courts have considered whether the purportedly unavailable expert has "provided any type of unique information in the affidavits tendered by" the proponent and whether the proponent has "claimed that there are no other witnesses who could provide the same information."[56] In *Carter-Wallace, Inc. v. Otte*,[57] the principal case delineating the final approach for determining the "unavailability" of an expert witness, the Second Circuit found the purportedly unavailable "expert, who had written on the subject at issue since his dissertation, had some unique testimony to contribute."[58]

Here, Dr. Farone's declaration indicates that Dr. Farone was the Director of Applied Research at Philip Morris for seven years from 1976 to 1984.[59] Prior to 2009, Dr. Farone "worked as a reviewer and consultant to the National Institutes of Health on smoking issues."[60] Since 2009, Dr. Farone has served as a consultant to the FDA's "Tobacco Products Scientific Advisory

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[54] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 3 & Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶¶ 6-9; Pls.' Opp'n to Def.'s Mot. to Strike, p. 14.
[55] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶¶ 10-11; *See* Def.'s Reply in Support of its Mot. to Strike, pp. 1-2.
[56] Duff, 2005 U.S. Dist. LEXIS 46111, at *9.
[57] 474 F.2d at 536-538.
[58] *In re NC Swine Farm Nuisance Litig.*, 2016 U.S. Dist. LEXIS 89074, *151 (E.D.N.C. July 7, 2016) (citing *Carter-Wallace*, 474 F.2d at 536-537).
[59] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 5.
[60] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 6.

Committee relative to issues of cigarette design."[61] Dr. Farone has also served as a consultant to a variety of other entities regarding tobacco products, including the United Nations World Health Organization, the National Cancer Institute, and the Scientific Advisory Board for the University of California at Irvine.[62] Plaintiffs' counsel declares that "[b]ecause of Dr. Farone's prior experience as a Senior Scientist for a major tobacco company in designing cigarettes, and the combination of his other experience, he has a unique perspective to bring to bear in the present cases on, among other topics, the issue of safer alternative cigarette designs."[63]

The Court agrees with Plaintiffs that Dr. Farone's testimony is unique in light of his ability to draw on his experience as a senior employee at a major tobacco company and subsequent experience as a consultant regarding tobacco products when giving his expert opinions. Indeed, in reviewing the judgment in *Evans* on appeal, the Massachusetts Supreme Court placed great weight on the testimony of Dr. Farone in concluding that "a reasonable jury could find from the evidence presented that a low tar, low nicotine cigarette constituted a safer reasonable alternative to Lorillard's Newport cigarettes."[64] Obviously, the law governing products liability in this jurisdiction and Massachusetts is not identical, and the jury in the cases *sub judice* will make their own findings of fact based on the law and evidence submitted at trial. However, the Massachusetts Supreme Court's review and summarization of Dr. Farone's testimony highlights the unique perspective offered by Dr. Farone in terms of tobacco products liability, including, *inter alia*, the design of Newport cigarettes and the availability of alternative designs at the time Plaintiffs began

[61] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 6.
[62] Pls.' Mot. to Admit, Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 6.
[63] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 4.
[64] *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 436, 428-436 (Mass. 2013).

smoking. As a result, the Court finds Dr. Farone's prior testimony in *Evans* is sufficiently unique under the final approach to warrant a finding of unavailability.

The Court is not persuaded by Reynolds' assertion that Dr. Farone's prior testimony in *Evans* must be excluded because "in cases across the country other plaintiffs have pursed actions against Reynolds and Lorillard where [Dr.] Farone was not an expert."[65] This does not negate the uniqueness of Dr. Farone's testimony, particularly when Plaintiffs allege that Dr. Farone's expert testimony in *Evans* involved a civil trial regarding tobacco litigation against Lorillard, Reynolds' predecessor in interest, with respect its sale of Newport cigarettes, the product complained of here, which the plaintiff in *Evans* began smoking during the same time period as the Plaintiffs here, "the early 1960s."[66] The Court is also not persuaded by Reynolds' argument that Dr. Farone's former testimony lacks the requisite uniqueness because Dr. Farone is not both a fact and expert witness.[67] The proponent's additional burden under the final approach of showing the former testimony is unique or that the expert is irreplaceable arises because the witness is testifying as an expert rather than a fact witness.[68] Any requirement that the declarant be both a fact and expert witness in order to contribute "unique" testimony negates the purpose of the proponent's additional burden under

[65] Def.'s Mot. to Strike, p. 14.

[66] *See* Pls.' Opp'n to Def.'s Mot. to Strike, pp. 5 & 11-12; Pls.' Mot. to Admit, Exhibit A2, England's Second Supplemental Answers to Interrog., Exhibit A3, Brown's Second Supplemental Answers to Interrog., Exhibit C, Mem. Op. in *Evans v. Lorillard Tobacco Co.*, 2011 Mass. Super. LEXIS 149 (Mass. Super. Ct. 2011).

[67] *See* Def.'s Reply in Support of its Mot. to Strike, p. 7. In his letter to defense counsel dated October 5, 2015, Plaintiffs' counsel contends that "Dr. Farone is both a fact and expert witness." Pls.' Mot. to Admit, Exhibit A6; Def.'s Mot. to Strike, Exhibit C. As Reynolds points out, it is unclear whether Dr. Farone can offer fact testimony when he "never worked for Lorillard" and Plaintiffs have not shown that Dr. Farone has unique knowledge of the facts of the cases *sub judice*. Def.'s Mot. to Strike, p. 16 & n. 6.

[68] *Carter-Wallace*, 474 F.2d at 536-537 ("When the ordinary witness is unavailable, his [or her] unique knowledge of the facts will be lost unless the use of his prior testimony is allowed. But the expert witness generally has no knowledge of the *facts* of the case").

the Second Circuit's approach and defies logic. The Court's finding that Dr. Farone's testimony is sufficiently unique satisfies Plaintiffs' additional burden under the final approach.

The final approach also requires the Court to consider whether Reynolds has shown it will be prejudiced by Dr. Farone's former testimony, which Reynolds frames in terms of its purported inability to cross-examine Dr. Farone on issues pertaining to the specific facts of the cases *sub judice* and "today's science."[69] The Court finds that the potential prejudice to Reynolds is not great because, as discussed at length below, Lorillard had an opportunity and similar motive to fully cross-examine Dr. Farone at the trial in *Evans*. The foregoing makes clear that Plaintiffs have established Dr. Farone's unavailability under all three approaches interpreting Fed. R. Evid. 804(a)(5).

Nevertheless, Reynolds contends that Dr. Farone is not "unavailable" for purposes of the hearsay exception governing former testimony because Plaintiffs "manufactured" Dr. Farone's unavailability since Plaintiffs could have retained "any number of other expert witnesses" without a purported conflict of interest.[70] The Court disagrees. The Court recognizes that a witness is not "unavailable" under Fed. R. Evid. 804(a) "if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying."[71] Courts have excluded the former testimony of an expert where the proponent fails to prove that he or she made efforts to secure the voluntary attendance of the expert at trial.[72]

[69] *See* Def.'s Mot. to Strike, pp. 16, 16-19.
[70] Def.'s Mot. to Strike, pp. 2-3, 16.
[71] FED. R. EVID. 804(a).
[72] *See Aubrey Rogers*, 2000 U.S. Dist. LEXIS 997, at *15 n. 26 (collecting cases); *Id.* at *19 (excluding the deposition testimony of an expert at trial because the proponent "'procured' th[e] expert's absence" by selecting an out-of-state expert that would be outside the subpoena power of the court unless the proponent made arrangements for the expert's

However, when satisfied that the proponent took efforts to secure the expert's attendance, but was unable to do so, courts have admitted the expert's former testimony.[73] Considerations with respect to the proponent's "efforts" are essentially the same as those considered under the second and final approaches and include, *inter alia*, whether the proponent offered to compensate the expert and coordinate the expert's appearance at trial.[74]

The Court has already found that Plaintiffs have demonstrated that they have taken the necessary efforts to secure the voluntary attendance of Dr. Farone at trial, but have been unable to do so. The declarations of Dr. Farone and Plaintiffs' counsel indicate that there has been no agreement on a fee for Dr. Farone's expert services, despite Plaintiffs offering "to pay [Dr. Farone's] usual fees and expenses."[75] Plaintiffs' efforts and the unavailability of Dr. Farone are not negated merely because Dr. Farone would willingly appear at trial if Reynolds waives a perceived conflict of interest or that Dr. Farone will appear for deposition, if subpoenaed.[76] However, the fact remains that Reynolds refuses to waive the conflict, and, therefore, Dr. Farone

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appearance at trial and it was apparent that the proponent made no effort to secure the expert's attendance at trial) (citations omitted); *See also Caron*, 37 Mass. App. Ct. at 750 (collecting cases).

[73] *C.f. Wildermuth v. Michelin N. Am.*, 1999 U.S. App. LEXIS 22522, *13-14 (6th Cir. Mich. Aug. 10, 1999) (unpublished) (affirming the district court's decision to admit the former testimony of an expert in a civil trial on the grounds that the expert was "unavailable" in the subsequent separate civil action, despite that the expert was under the subpoena power of the court, because "[t]he court explicitly determined that [the expert's] unwillingness to testify . . . was not the result of any lack of good faith on the plaintiff's part in attempting to retain th[e] expert" since the expert refused to testify or be compensated") with *supra n.* 72 & *infra n.* 74.

[74] *See Myers v. Estate of Alessi*, 560 A.2d 59, 66 (Md. Ct. Spec. App. 1989) (Prior testimony excluded where the proponent was responsible for selecting out-of-state expert and "[t]here was no testimony that . . . [the expert] would not have appeared had he been paid to do so"); *Thompson by Thompson v. Merrell Dow Pharmaceuticals, Inc.*, 551 A.2d 177, 189 (N.J. Super. Ct. App.Div. 1988) ("Since the expert is under the control of the offering litigant, due diligence must be used to secure attendance at trial").

[75] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 3 & Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶¶ 6-9.

[76] *See* Def.'s Reply in Support of its Mot. to Strike, p. 2.

refuses to testify at trial, though reasonable efforts have been made to secure his appearance.[77] For these reasons, the Court finds that Plaintiffs have not "procured" Dr. Farone's unavailability.

Consequently, Plaintiffs have sufficiently demonstrated that Dr. Farone is an unavailable witness under Fed. R. Evid. 804(a)(5) because Plaintiffs have been unable, "by process or other reasonable means, to procure" Dr. Farone's attendance at trial. Therefore, the requirement of the hearsay exception regarding former testimony under Fed. R. Evid. 804(b)(1) that Dr. Farone be an unavailable witness is satisfied.

ii. Lorillard's Opportunity to Examine Dr. Farone.

In order for Dr. Farone's former testimony in *Evans* to be admissible as a hearsay exception under Fed. R. Evid. 804(b)(1), Plaintiffs must also show that Reynolds or its predecessor in interest had "an opportunity and similar motive to develop . . . [the testimony] by direct, cross-, or redirect examination."[78] Reynolds contends that "neither Lorillard nor Reynolds had an opportunity to cross-examine [Dr. Farone] on issues specific to Patrice Brown's or Lucien England's smoking of Newport cigarettes or the state of the art concerning the alleged particular dangers of menthol as the science in that field exists today."[79] Plaintiffs argue that "[t]he subjects upon which Plaintiffs seek to present Dr. Farone's testimony in the present cases are exactly the same" as those addressed by Dr. Farone in *Evans*.[80] Further, Plaintiffs submit that "Dr. Farone has agreed to appear for [a] deposition, if subpoenaed," and that Dr. Farone has authorized Attorney Weisman, one of

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[77] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 3 & Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶¶ 6-9. *See* Def.'s Reply in Support of its Mot. to Strike, pp. 1-4.
[78] FED. R. EVID. 804(b)(1).
[79] Def.'s Mot. to Strike, p. 16.
[80] Pls.' Opp'n to Def.'s Mot. to Strike, pp. 11-12.

Plaintiffs' counsel, to accept service of the subpoena for his appearance at the deposition on his behalf.[81]

It is undisputed that the predecessor in interest requirement is met, as Reynolds is Lorillard's successor by merger.[82] It is also undisputed that Lorillard was a defendant in *Evans*, that Dr. Farone testified as an expert witness at the civil trial in *Evans*, and that Lorillard's counsel cross-examined Dr. Farone at the trial in *Evans*.[83] The question, then, is not whether Lorillard had the opportunity to cross-examine Dr. Farone in the *Evans* trial, but whether Lorillard's motive in developing Dr. Farone's testimony in *Evans* is similar to Reynolds' motive here and whether Lorillard was given adequate opportunity for this questioning in *Evans*.[84] "The similar-motive requirement assures that 'the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do . . . if the witness were available to be examined by that party.'"[85] Therefore, "[t]he way to determine whether or not motives are similar

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[81] Pls.' Mot. to Admit, Exhibit A, "Aff. of Michael D. Weisman, Esq.," ¶ 3 & Exhibit B, "Aff. of William A. Farone, Ph.D.," ¶ 10. However, Plaintiffs do not cite any authority in support of their contention that Attorney Weisman, who is admitted *pro hac vice* to participate in these actions and has an office in Missouri City, Texas, can accept service of a subpoena commanding the attendance of Dr. Farone, a non-party, at a deposition.

[82] *See* Pls.' Opp'n to Def.'s Mot. to Strike, p. 2; Def.'s Mot. to Strike, p. 19 (referring to Lorillard, as "Reynold's [sic] predecessor"). The term predecessor in interest in Fed. R. Evid. 804(b)(1)(B) is "consistent with the common law concept of privity" and has also been interpreted "to extend beyond privity to encompass parties sharing a 'community of interest.'" Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7073, at 390 (footnotes omitted); *See Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978) (The leading case on application of the predecessor-in-interest requirement, where the testimony of an unavailable witness, was admitted despite the fact that the opposing party had not been a party to the prior action or a predecessor in interest in the sense of privity because the court found a sufficient "community of interest" existed to satisfy the requirements of FED. R. EVID. 804(b)(1)). As Lorillard's successor by merger, Reynolds is Lorillard's predecessor in interest as contemplated under FED. R. EVID. 804(b)(1)(B).

[83] Def.'s Mot. to Strike, p. 19 (referring to Dr. "Farone's six-year-old *Evans* testimony and Lorillard's cross-examination there") (emphasis added); Pls.' Opp'n to Def.'s Mot. to Strike, p. 18; *See* Pls.' Mot. to Admit, Exhibit A1, Transcript of Dr. Farone's Testimony in *Evans*.

[84] *See Crowe Motor Policies at Lloyds v. Mojica*, 1990 V.I. LEXIS 21, *4-5 (V.I. Terr. Ct. 1990) ("The central question, however, is not whether the plaintiffs had the opportunity to actually participate in the first trial, but whether the government had a similar incentive to cross-examine about the same incident as do the plaintiffs now, and whether the government was given sufficient opportunity for such questioning") (citations omitted).

[85] *Haas v. 3M Co.*, 613 Fed. Appx. 191, 196 (3d Cir. N.J. 2015) (citing *Kirk*, 61 F.3d at 166)).

is to look at the similarity of the issues and the context in which the opportunity for examination previously arose."[86]

A similar motive would have existed at the *Evans* trial where the particular issue for which Dr. Farone's testimony was offered is substantially similar to the issue upon which the testimony is offered in the cases *sub judice*.[87] According to Plaintiffs, they seek to offer Dr. Farone's testimony on the issue of "the availability of a reasonable safer alternative design of Newport brand cigarettes"[88] and Dr. Farone's testimony was offered in *Evans* on this same issue in that Dr. Farone testified "it was possible to manufacture a cigarette with non-addictive levels of nicotine and greatly reduced levels of tar as of 1960 and since then."[89] Plaintiffs also submit that they are offering Dr. Farone's testimony on the following subjects, which are the same as those offered in *Evans*: "how a cigarette is made; how the nicotine in cigarettes causes addition; that Newport cigarettes were defective because they contained an addictive level of nicotine; that the smoke in Newport cigarettes contained cancer-causing ingredients; and that Newport cigarettes contained menthol which contributed to cause addition, particularly in new, immature smokers."[90] The Court agrees that the issues for which Dr. Farone's testimony was offered in *Evans* are substantially similar to those here, where, like the plaintiff in *Evans*, Plaintiffs allege they began smoking Newport cigarettes, sold by Lorillard, in the "early 1960s."[91]

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[86] *Kirk*, 61 F.3d at 166 (citing parenthetically 2 Steven A. Saltzburg & Michael M. Martin, FEDERAL RULES OF EVIDENCE MANUAL 400 (5th ed. 1990)).
[87] *See* Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7073, at 396-402 (footnotes omitted).
[88] Pls.' Opp'n to Def.'s Mot. to Strike, p. 11.
[89] Pls.' Opp'n to Def.'s Mot. to Strike, pp. 11-12.
[90] Pls.' Opp'n to Def.'s Mot. to Strike, p. 12.
[91] *See* Pls.' Opp'n to Def.'s Mot. to Strike, pp. 5 & 11-12; Pls.' Mot. to Admit, Exhibit A2, England's Second Supplemental Answers to Interrog., Exhibit A3, Brown's Second Supplemental Answers to Interrog., Exhibit C.

Reynolds argues that Lorillard did not have a similar motive or opportunity to develop Dr. Farone's testimony in *Evans* because Lorillard was unable to cross-examine Dr. Farone at the *Evans* trial on "today's science" and the particular "facts and circumstances" of the cases here. However, Reynolds fails to offer any distinctions between the facts relied upon by Dr. Farone in *Evans* and these cases "that would preclude similar motives of witness examination."[92] Lorillard and Reynolds' motives in cross-examining Dr. Farone are not dissimilar merely because science has purportedly advanced since the *Evans* trial in November of 2010. "The 'similar motive' requirement is inherently factual and depends, at least in part, on the operative facts and legal issues and on the context of the proceeding."[93] Since Dr. Farone's testimony was offered in *Evans* on facts and legal issues that are substantially similar to those at issue here, Lorillard had a similar motive in *Evans* to cross-examine Dr. Farone.

The Court also finds that the trial in *Evans* afforded Lorillard an adequate opportunity to fully cross-examine Dr. Farone with respect to his testimony and expert opinions. "[A]dequacy of opportunity to conduct meaningful cross-examination focuses primarily . . . upon the scope and

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[92] *See Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283 (4th Cir. N.C. 1993) ("[T]he party against whom the deposition is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"); *See Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 116 (D.D.C. 2007).

[93] *United States v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001); *See United States v. Salerno*, 505 U.S. 317, 326, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992) (Blackmun, J., concurring) ("Because 'similar motive' does not mean 'identical motive,' the similar-motive inquiry, in my view, is inherently a factual inquiry, depending in part on the similarity of the underlying issues and on the context of the . . . questioning"). The Court recognizes that the constitutional requirement of confrontation in a criminal matter does not apply in civil cases, such as here. However, because the Confrontation Clause of the Sixth Amendment and FED. R. EVID. 804(b)(1) "protect similar values[,]" case law interpreting the constitutional requirement of confrontation in criminal matters is instructive, particularly given that the values are construed more stringently in criminal matters. *Rawlins*, 61 V.I. at 606 n. 8 (citing *California v. Green*, 399 U.S. 149, 155-56, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). *Id.* at n. 9 ("The Sixth Amendment of the United States Constitution is applicable in the Virgin Islands pursuant to section 3 of the 1954 Revised Organic Act") (citing 48 U.S.C. § 1561).

nature of the opportunity for cross-examination permitted by the court."[94] In cross-examining Dr. Farone at the *Evans* trial, Lorillard was able to test Dr. Farone's answers and attack his credibility, and Reynolds has not claimed that the court in *Evans* significantly limited the scope of Lorillard's cross-examination of Dr. Farone.[95] While Reynolds will not have the chance to cross-examine Dr. Farone on "today's science," only six years have passed since the *Evans* trial, and Reynolds may refute or impeach Dr. Farone by introducing evidence or expert testimony regarding these alleged scientific developments.[96] The mere assertion that science has advanced since Dr. Farone's testimony was first offered, without more, is insufficient to vitiate Reynolds' and Lorillard's similar motive in cross-examining Dr. Farone and Lorillard's opportunity to do so at the *Evans* trial.[97] Consequently, the requirement of the hearsay exception regarding former testimony under Fed. R. Evid. 804(b)(1) that Reynolds have an adequate opportunity to cross-examine Dr. Farone is satisfied.

Accordingly, Plaintiffs having satisfied all of the requirements of Fed. R. Evid. 804(b)(1), Dr. Farone's former testimony in *Evans* does not constitute inadmissible hearsay.

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[94] Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7073, at 405 (footnotes omitted).

[95] *Accord Phillips Petroleum Co. v. U.S. Steel Corp.*, 673 F. Supp. 1278, 1330 n. 80 (D. Del. 1987) (Trial testimony of deceased expert in patent action is admissible in later patent proceedings where parties had motive and opportunity for cross-examination and were predecessors in interest), *aff'd*, (Fed. Cir. 1989), 865 F2d 1247.

[96] *See* FED. R. EVID. 806 (providing a process for impeaching absent hearsay declarants). This, of course, presumes that the evidence and expert testimony is admissible.

[97] *See United States v. Caramadre*, 882 F. Supp. 2d 295, 301 (D.R.I. 2012) ("[T]he test is not whether the defendant has been provided with an ideal cross-examination opportunity, one in which his or her attorney has complete knowledge of the evidence and clairvoyant understanding of how the trial will play out") (citing *United States v. Koon*, 34 F.3d 1416, 1427 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) ("The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine").

b. Fed. R. Evid. 403 and Due Process.

Even if the requirements of Fed. R. Evid. 804(b)(1) are satisfied, Reynolds argues Dr. Farone's former testimony must be excluded because its probative value is outweighed under Fed. R. Evid. 403 and its admission will violate Reynolds' Due Process rights since Reynolds will not be able to "examine [Dr. Farone] on new science or changed opinions."[98]

"A failure to cross-examine or to do so fully may under very unusual circumstances lead to exclusion on the grounds of misleading the jury or unfair prejudice under [Fed. R. Evid.] 403."[99] Only relevant evidence is subject to balancing under Fed. R. Evid. 403.[100] In determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, "unfair prejudice" "means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'"[101] "In essence, evidence which tends to lure the trier of fact to arrive at a conclusion on an improper, emotional or other basis is unfairly prejudicial."[102] Similarly, "[e]vidence considered to be of the type that confuses or misleads the jury [under Fed. R. Evid. 403] is evidence that may lure the jury to consider matters other than those in dispute at trial or factors that should not be considered."[103]

Though the issue of relevancy is not raised by Reynolds, the Court finds at the outset that Dr. Farone's former testimony in *Evans* is relevant and therefore subject to exclusion under Fed.

[98] Def.'s Mot. to Strike, pp.17-20.
[99] Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7073, at 410 (footnotes omitted).
[100] Irrelevant evidence is excluded under FED. R. EVID. 402. "Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if: '(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.'" *Castillo v. People of the Virgin Islands*, 59 V.I. 240, 279 (V.I. 2013). "Generally all relevant evidence is admissible and irrelevant evidence is inadmissible." *Id.* (citing FED. R. EVID. 402).
[101] *Alexander*, 60 V.I. at 496 (citing FED. R. EVID. 403, advisory committee's note).
[102] *Id.* (citing *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).
[103] *Id.* (citing *Gray v. Genlyte Group, Inc.*, 289 F.3d 128, 140 (1st Cir. 2002)) (other citations omitted).

R. Evid. 403.[104] According to Reynolds, Fed. R. Evid. 403 warrants the exclusion of Dr. Farone's former testimony because "the 'prejudice' to Reynolds and 'confusion' among the jury that would arise if Plaintiffs are permitted to introduce [Dr.] Farone's ancient opinions, unchecked by questioning or new science or his own evolving testimony, would be manifest."[105] The Court is not persuaded by this argument.

Dr. Farone's former testimony in *Evans* does not have "an undue tendency to suggest decision on an improper basis" merely because Reynolds is unable to cross-examine Dr. Farone with respect to purported scientific developments since the *Evans* trial. As previously discussed, cross-examination is not the only means by which Reynolds may impeach or refute Dr. Farone's former testimony or expert opinions with "today's science." Reynolds has retained expert witnesses, and, if Dr. Farone's former testimony is affected by these alleged scientific developments, Reynolds' experts can presumably offer testimony to contradict Dr. Farone on "today's science." Notably, Plaintiffs submit that Reynolds "has completed the deposition of eight of Plaintiffs' experts and has not asked any questions about post-2010 scientific information in any of these depositions."[106] Moreover, Reynolds and its experts also possess the transcript of Dr. Farone's former testimony and thus know "every single word of the expert testimony that Plaintiffs seek to offer."[107] As a result, Reynolds has been given a sufficient opportunity to prepare its defense and defend against Dr. Farone's former testimony. Indeed, Reynolds submits that

[104] Dr. Farone's former testimony in *Evans* is relevant, as it has a tendency to make "the availability of a reasonable safer alternative design of Newport brand cigarettes" more probable, an issue inherent in causes of action alleged by both Plaintiffs in their amended Complaints. *See* Pls.' Opp'n to Def.'s Mot. to Strike, p. 11.
[105] Def.'s Mot. to Strike, p. 17.
[106] Pls.' Opp'n to Def.'s Mot. to Strike, p. 3 n. 4.
[107] Pls.' Opp'n to Def.'s Mot. to Strike, p. 3 (emphasis omitted).

Plaintiffs first identified Dr. Farone as an expert witness and disclosed Dr. Farone's former testimony in *Evans* on September 18, 2015. Thus, by the time these actions come for trial on August 1, 2017, Reynolds will have possessed the entirety of Dr. Farone's testimony for almost two years.[108] While Reynolds will not be able to cross-examine Dr. Farone on "today's science" in the presence of the jury, Reynolds will have ample opportunity to bring "today's science" to the jury's attention and illuminate any inconsistencies in Dr. Farone's testimony through means other than cross-examination.[109]

Nevertheless, the Court recognizes that Reynolds may potentially be prejudiced by Dr. Farone not giving live testimony in these trials because this may affect the way in which the jury makes credibility determinations, weighs conflicting testimony, and draws factual inferences.[110] However, the probative value of Dr. Farone's testimony is great because his extensive experience in the tobacco industry will assist the jury to understand the production and sale of tobacco products, particularly with respect to the issue of the availability of a reasonably safer alternative design of Newport cigarettes. Further, as discussed at length above, the Court is convinced that

[108] Def.'s Mot. to Strike, p. 4; *See* Pls.' September 18, 2015, Notice of Service of Expert Reports on Defs.
[109] *Compare Alexander*, 60 V.I. at 497-498 ("At trial, the defense had every opportunity to discredit both witnesses by illuminating any inconsistencies in their testimonies. The determination of which version of the facts was more credible, Peets' or D.S.'s, was a function within the exclusive province of the jury") with *Joseph v. Terminix Int'l Co.*, 17 F.3d 1282, 1284-85 (10th Cir. 1994) (Trial court did not abuse its discretion in excluding "new evidence" plaintiff discovered over the last weekend of a trial, since it contradicted both plaintiff's prior testimony and was proffered after close of defendant's evidence and would have denied the defendant an opportunity to cross-examine and respond to expert testimony in a timely manner); *See* FED. R. EVID. 806.
[110] *Alexander*, 60 V.I. at 498 ("The law irrefutably declares that the jury, and not the court, determines the credibility of witnesses in a jury trial[, as] . . . 'it is the jury's special province to weigh conflicting testimony, determine credibility and draw factual inferences'") (citing *United States v. Montoya*, 827 F.2d 143, 155 (7th Cir. 1987)) (internal and other citations omitted). The Court recognizes that there is a preference that witnesses give oral testimony in trials in the Superior Court. *See* SUPER. CT. R. 12.

Dr. Farone has unique testimony to contribute and, as Plaintiffs claim, "there is no one [else] like him[,]"[111] which weighs in favor of admissibility.

Moreover, that science has purportedly advanced in the six years following the *Evans* trial does not, *ipso facto*, mean that Dr. Farone's former testimony is unreliable or based "on bad or old science" in violation of Fed. R. Evid. 702, 703, and the *Daubert* standard governing the admission of expert testimony in the Virgin Islands.[112] Considering Reynolds' arguments as a whole, it is unclear whether Reynolds actually intends to challenge Dr. Farone's qualifications as an expert.[113] If Reynolds seeks to challenge Dr. Farone's qualifications as an expert witness or the reliability of the reasoning and methodology employed by Dr. Farone in *Evans* in light of "today's science," Reynolds must do so by adequately briefing the issue under Rule 702 and the *Daubert* standard.[114] This is necessary, not only to ensure that Plaintiffs are afforded an adequate opportunity to respond, but so the Court may hold a *Daubert* hearing and itself have an "opportunity to consider, review, and address [the parties'] . . . argument[s]."[115] Additionally, the principles of judicial economy and

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[111] Pls.' Opp'n to Def.'s Mot. to Strike, p. 15. *People of the Virgin Islands v. Todmann*, 53 V.I. 431, 443-444 (V.I. 2010) ("[T]he availability of other means of proof is an appropriate factor to consider when making an undue prejudice determination") (citing *United States v. Sriyuth*, 98 F.3d 739, 747-48 (3d Cir. 1996) (stating that the appellate court should consider the "genuine need for the challenged evidence") (other citations omitted).

[112] Def.'s Reply to Pls.' Opp'n to Def.'s Mot. to Strike, p. 8; *See Antilles*, 2016 V.I. Supreme LEXIS 7, at *28-29 (adopting the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), as the standard for admitting expert testimony in the Virgin Islands when a witness' qualifications as an expert under FED. R. EVID. 702 are contested).

[113] *See* Def.'s Mot. to Strike, pp. 17-18; Def.'s Reply to Pls.' Opp'n to Def.'s Mot. to Strike, pp. 8-9.

[114] *See In re Catalyst Litig.*, 2015 V.I. LEXIS 145, *3-6 n. 12 (V.I. Super. Ct. 2015) ("The Supreme Court of the Virgin Islands has established that in order for a motion to be properly before the court, parties must support their arguments by citing the proper legal authority, statute or rule") (citing *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-346 (V.I. 2009)) (other citations omitted).

[115] *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument").

efficacy demand that the Court refrain from utilizing its valuable time and resources to address this time-consuming issue until it is properly brought before the Court by Reynolds.[116]

In light of the foregoing, the Court concludes that the probative value of Dr. Farone's former testimony is not substantially outweighed by unfair prejudice merely because Reynolds will not have the chance to cross-examine Dr. Farone on "today's science." Given that Reynolds may seek to introduce evidence of these purported scientific developments and call its own expert witnesses to testify thereon, Dr. Farone's former testimony does not have the potential to lure the jury into evaluating the evidence on an improper basis or through other impermissible considerations. For this same reason, and, because Plaintiffs seek to offer Dr. Farone's former testimony with respect to legal issues and facts that are similar to those in *Evans*, the Court also finds that the danger of Dr. Farone's former testimony luring the jury to consider matters other than those in dispute at trial or factors that should not be considered is not great.

Further, Plaintiffs submit that "if the Court finds Dr. Farone's prior testimony is admissible, the parties can engage in the regular process of designating and cross designating which portions of his prior testimony should be admitted . . . [where] Reynolds will have the opportunity to counter-designate and object to certain portions of Dr. Farone's testimony."[117] This process further diminishes the danger of Dr. Farone's former testimony unfairly prejudicing Reynolds or confusing or misleading the jury. Consequently, the Court finds that exclusion of Dr. Farone's former testimony in *Evans* is not warranted under Fed. R. Evid. 403.

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[116] *See Malloy v. Reyes*, 61 V.I. 163, 183 (V.I. 2014) (The Superior Court "is not obliged to look into the questions posed by [FED. R. EVID.] 702 when neither side either requests or assists") (citations omitted).
[117] Pls.' Reply in Support of Pls.' Mot. to Admit, p. 7.

The Court is also not persuaded by Reynolds' argument that its Due Process rights will be violated if Reynolds is not afforded the opportunity to cross-examine Dr. Farone on "today's science"[118] because "due process requires an opportunity to confront and cross-examine adverse witnesses."[119] The Court has already found that Reynolds, through its predecessor in interest, Lorillard, had the opportunity to fully cross-examine Dr. Farone at the time he testified in *Evans*. Moreover, Dr. Farone is willing to be deposed so that Reynolds can cross-examine him on "today's science."[120] These measures clearly satisfy that to which Reynolds is entitled under due process.

B. Disclosures Under Fed. R. Civ. P. 26 and 37.

Reynolds argues that Dr. Farone should be stricken as an expert witness as a sanction under Rule 37(c)(1) because Plaintiffs failed to provide a written report and make Dr. Farone available for a deposition as required under Rule 26.[121] On the other hand, Plaintiffs argue that they substantially complied with the purpose of Rule 26 by disclosing "every word of Dr. Farone's trial testimony" and any technical violations of Rule 26 are substantially justified and harmless.[122]

Failure to disclose in violation of Rule 26 is substantially justified when "there exists a genuine dispute concerning compliance."[123] "[I]n determining if a Rule 26 violation is harmless … [a] court should consider a number of factors: prejudice or surprise to the opposing party; the

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[118] Def.'s Mot. to Strike, p. 19.
[119] *Dennie v. Swanston*, 51 V.I. 163, 170 (V.I. 2009) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970)). The Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution are applicable to the Virgin Islands by virtue of section 3 of the Revised Organic Act. *See* 48 U.S.C. § 1561 ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States … the first to ninth amendments inclusive [and] the second sentence of section 1 of the fourteenth amendment").
[120] *supra* n. 81.
[121] Def.'s Mot. to Strike, pp. 6-9.
[122] Pls.' Opp'n to Def.'s Mot. to Strike, p. 9 (emphasis omitted); *Id.* at 7-11.
[123] *Davis*, 59 V.I. at 236 (internal quotation marks and citations omitted)

ability of the party to cure that prejudice; the likelihood of disruption at trial; and the bad faith or willfulness of the violating party."[124]

The Court finds that, while Plaintiffs have technically violated Rule 26 by failing to provide Reynolds with an expert report prepared by Dr. Farone, the violation is harmless. As evinced by the Court's Fed. R. Evid. 403 balancing above, any prejudice or surprise to Reynolds is not great because, by the time these actions come for trial, Reynolds will have possessed the entirety of Dr. Farone's former testimony for nearly two years. This diminishes the potential prejudice to Reynolds, as Reynolds has ample opportunity to prepare its defense to the expert opinions of Dr. Farone in *Evans*.[125] Additionally, the potential prejudice to Reynolds is further ameliorated because the Court will give the parties an opportunity to designate the portions of Dr. Farone's former testimony they seek to admit at trial, as well as lodge any objections thereto.

Since Reynolds will have plenty of time to prepare its defense with respect to Dr. Farone's former testimony, the Court cannot conceive of circumstances where the admittance of the transcript of Dr. Farone's testimony in *Evans* would disrupt the trials in these actions, nor have the parties suggested any. Lastly, the Court has also found that Plaintiffs did not procure Dr. Farone's unavailability, and for the same reasons underlying that conclusion, the Court is satisfied that Plaintiffs have not acted willfully or in bad faith in failing to disclose to Reynolds an expert report

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[124] *Id.* at 237 (citing *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)) (other citations omitted).

[125] *Accord id.* (Plaintiff was not prejudiced by defendant withholding records in violation of FED. R. CIV. P. 26 because plaintiff "was provided with notice of the existence of the records five days before trial and a copy of the medical records three days before trial . . . three days should have been sufficient time for Davis to re-familiarize herself with these records with the assistance of counsel"); *Hartzog v. United Corporation*, 2010 V.I. LEXIS 121, *5 (V.I. Super. Ct. July 30, 2010) ("In light of the time between the filing of the expert witnesses and the trial date being lengthy, the degree of prejudice against Defendant is not substantial").

prepared by Dr. Farone. Consequently, exclusion of Dr. Farone's former testimony as a discovery sanction against Plaintiffs under Fed. R. Civ. P. 37 is not warranted because Plaintiffs' technical violation of Rule 26(a)(2) is harmless.[126]

Notwithstanding this conclusion, the Court recognizes that, even if the Court does not require Plaintiffs to submit an expert report prepared by Dr. Farone, Reynolds arguably may be entitled to depose Dr. Farone under Rule 26(b)(4)(A). However, this interpretation appears at odds with Fed. R. Evid. 804(b)(1), since the expert must be "unavailable" in order for his or her former testimony to be admissible under this hearsay exception, and therefore, in most cases, the expert would also be "unavailable" for a discovery deposition.[127] The Court need not resolve this issue at this time, since Dr. Farone appears amenable to being deposed, so long as his attendance is compelled by a subpoena. Although Plaintiffs cite no authority to support their proposition that Attorney Weisman may accept service of the subpoena on Dr. Farone's behalf,[128] compliance with Rule 26(b)(4)(A) seems reasonably feasible here, particularly considering that "[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means."[129] Therefore, the Court will direct Plaintiffs to take the necessary steps,

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[126] *Accord Browne v. People of the Virgin Islands*, 56 V.I. 207, 233-234 (V.I. 2012) (noting in the criminal context that "a defendant's failure to comply with . . . a request . . . to disclose all potential witnesses prior to jury selection . . . does not automatically allow a court to impose a discovery sanction that entirely excludes the testimony of a material defense witness . . . [because w]hile a state's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of rules relating to the identification and presentation of evidence, those rules must not be inflexible") (citing *Taylor v. Illinois*, 484 U.S. 400, 409, 414-416, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).
[127] *See* Graham, FEDERAL PRACTICE AND PROCEDURE — EVIDENCE § 7072, at 362-364 ("The requirement of an attempt to obtain the testimony of the witness by deposition or otherwise as a prerequisite to a finding of unavailability imposed by Rule 804(a)(5) is not applicable to . . . Rule 804(b)(1), former testimony").
[128] *supra* n. 81.
[129] FED. R. CIV. P. 30(b)(4), made applicable to Superior Court proceedings through SUPER. CT. R. 39(a).

within reason, to ensure that Reynolds is able to subpoena Dr. Farone for a deposition under Rule 26(b)(4)(A) should Reynolds elect to depose Dr. Farone.

CONCLUSION

The Court finds that Dr. Farone's former testimony in *Evans* does not constitute inadmissible hearsay because the requirements of the hearsay exception under Fed. R. Evid. 804(b)(1) are satisfied. Neither the precepts of due process nor the balancing test under Fed. R. Evid. 403 warrant the exclusion of Dr. Farone's former testimony. Though Plaintiffs have technically violated Fed. R. Civ. P. 26(a)(2) by failing to disclose an expert report prepared by Dr. Farone, the violation is harmless, and the Court finds exclusion of Dr. Farone's former testimony as a discovery sanction against Plaintiffs under Fed. R. Civ. P. 37 is not warranted. However, since compliance with Fed. R. Civ. P. 26(b)(4)(A) appears reasonably feasible, Plaintiffs will be directed to take the necessary steps, within reason, to ensure that Reynolds is able to subpoena Dr. Farone for a deposition. The Court will also direct Plaintiffs to designate the portions of Dr. Farone's former testimony they seek to admit, to which Defendant may respond by making counter-designations and objections, during which time the Court will hold Plaintiffs' Motion to Admit in abeyance.

An Order consistent with this Memorandum Opinion shall follow.

Dated: September 23, 2016

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

ATTEST: Estrella George
Acting Clerk of Court ___/___/___

by: ______________________
Lori Boynes-Tyson
Court Clerk Supervisor 9/27/2016