

D.N.J. Sanctions Counsel for Serving Untimely Supplemental Expert Report

January 31, 2020

In a recent District of New Jersey order, Magistrate Judge Leda Dunn Wettre sanctioned parties **\$33,456.84** over their failure to timely supplement their expert's report and decision to instead spring a supplemental report on the opposing parties just minutes before that expert's deposition was to start. This order followed an earlier decision finding that the conduct was sanctionable and ordering the submission of a certification calculating fees and costs, and is a stark reminder that District of New Jersey judges will hold counsel to their discovery obligations as set forth in both the Federal Rules of Civil Procedure and Local Civil Rules, with violations met with significant consequences.

In Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp., 2019 U.S. Dist. LEXIS 23654 (D.N.J. Feb. 13, 2019), the Court considered the plaintiffs' applications to strike a supplemental expert report served by defendants pursuant to Federal Rule of Civil Procedure 26(e), or in the alternative, for sanctions pursuant to Rule 37(c). Plaintiffs' applications were made, in part, because in her supplemental report, defendants' expert no longer relied on certain operating expense information and changed the methodology she used. Plaintiffs sought reimbursement of their fees, costs, and expenses for investigating the information the defendants' expert later disavowed.

The Court determined that the supplemental report far exceeded the bounds of Rule 26(e), which only permits supplementation for the narrow purpose of correcting inaccuracies or adding newly discovered information. The Court found compelling that the expert, in her supplemental report, relied on information already known at the time of her initial report and changed a methodology she previously asserted was reliable, not because she now thought it was inaccurate but instead because the plaintiffs' expert had criticized it. The Court concluded that the report was not a mandatory supplementation under Rule 26(e) and even if it was, it was untimely because defendants waited until minutes before the scheduled deposition of their expert, and without any notice or leave by the Court, to hand plaintiffs a copy, and then insisted that plaintiffs proceed to depose the expert on the supplemental report.

Noting that Rule 37 provides a broad discretion to fashion appropriate sanctions, the Court reviewed several options available, including the preclusion of the supplemental report and the payment of reasonable attorneys' fees caused by the conduct. Analyzing the situation, Judge Wettre concluded that striking the supplemental report would be overly harsh and would complicate the case, and instead adopted a monetary sanction meant to recompense plaintiffs for the time they spent educating defendants about the weaknesses in the original report (and thus leading to its supplementation). As such, the Court indicated that defendants would compensate plaintiffs for: (1) attorneys' fees, expenses, and travel costs related to the deposition of defendant's accounting manager on the issue of operating costs, which had been rendered irrelevant by the supplemental report; and (2) attorneys' fees and costs related to the scheduled

deposition of defendants' expert, which plaintiffs abandoned after service of the supplemental report.

After plaintiffs submitted their certifications and supporting materials as directed by Judge Wettre, the Court awarded attorneys' fees in the amount of \$31,346.75 (about 50 hours at rates between \$630-\$656 per hour) and costs/expenses in the amount of \$2,110.09 (travel, lodging, court reporter, and videographer). See Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp., 2019 U.S. Dist. LEXIS 176582 (D.N.J. Oct. 10, 2019).

As reinforced by Judge Wettre's decisions, attorneys should be cautious of the restrictions of Rule 26(e). As the Court emphasized, the Rule does not grant experts a second bite at the apple to strengthen their existing opinions. Rather, it requires supplementation when a party learns information it provided to other parties during discovery is incomplete or incorrect. Importantly, the Rule requires supplementation "in a timely manner."

In order to avoid harsh consequences, such as sanctions, attorneys and experts should be careful to comply with Rule 26(e), including the following steps:

- As experts only have one opportunity to issue a report, counsel should work with experts to ensure that all material information available at the time of service is included therein. Any such material cannot later be deemed "new information" and used for supplementation. Similarly, experts cannot revise a report in response to criticism by another party's expert (although they are permitted to rebut such criticism in a responsive report, if otherwise permitted).
- All supplementations of reports should be served in a timely manner and as soon as possible after the party or expert learns of new information requiring supplementation. There is no reason to wait until the expert and attorneys are in the deposition room to serve a supplemental expert report.
- - Give notice to the other party when possible. If the other party is at least aware that a supplemental report is in the works, that party can cease expending resources examining and investigating the initial report.
- - Seek leave from the Court if supplementation is after the scheduling order's end date. It is always prudent to seek leave from the Court, rather than act first, and face the consequences later.
- - Postpone depositions, if necessary, to give the opposing party time to review the supplemented materials. A court is not likely to look favorably at a party which causes another party to incur unnecessary expenses that could have been avoided.