UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 15-08359 BRO (AFMx)** Date: **March 20, 2017**

Title **Commercial Ventures, Inc. v. Scottsdale Insurance Company**

Present: The Honorable: ALEXANDER F. MacKINNON, U.S. Magistrate Judge

Ilene Bernal	Recorded on Courtsmart
Deputy Clerk	Court Reporter / Recorder

Attorney Present for Plaintiff:	Attorneys Present for Defendant:
N/A	N/A

Proceedings (In Chambers): Defendant's Motion to Strike Commercial Ventures, Inc.'s Expert Disclosure (Filed February 2, 2017; ECF No. 70)

Defendant has moved to strike the expert report of plaintiff's expert (Tina M. Lazaroff, CPA) for failure to comply with the disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B). This report was provided by plaintiff on December 27, 2016 and has not been supplemented. The report purports to disclose opinions of Ms. Lazaroff on two issues: (1) unauthorized personal expenses of plaintiff's former CEO (Richard Guido), and (2) possible revenue manipulation by Mr. Guido. The Court held a hearing on the motion on March 7, 2017. Based on the papers filed by the parties and the arguments of counsel, the Court GRANTS the motion to strike but DENIES defendant's request for fees and costs, for the reasons set forth below:

Rule 26(a)(2)(B) sets out the requirements for disclosure of expert testimony in a written report. As the rule and case law provide, an expert report must be detailed and complete. *See* Fed. R. Civ. P. 26(a)(2)(B) ("The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them . . . ."); *Salgado v. General Motors Corp.*, 150 F.3d 735, 741, n.2 (7th Cir. 1998). The report should include the substance of what the expert is expected to testify to on direct examination. *See* Fed. R. Civ. P. 26 Advisory Committee Note (1993 Amend.) ("the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness . . . ." The purpose of this disclosure is to eliminate surprise, avoid unnecessary depositions and reduce costs. *See Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996). Reports must include how and why the expert reached the conclusions and must not be sketchy, vague or preliminary in nature. *See Salgado*, 150 F.3d at 741, n.2.

The sufficiency of an expert report is measured by its content and specificity. For example, in *Alvarado v. FedEx Corp.*, 2006 WL 1761276 at *3 (N.D. Cal. 2006), the court struck an expert report because it was "so general and lacking in detail that it does not provide a meaningful basis for determining the substance of [the] expert opinions . . . ." Similarly, the court in *City of Grass Valley v. Newmont Min. Corp.*, 2007 WL 210516 at*1 (E.D. Cal. 2007), struck an expert report that "appears to be merely a preliminary report and does not contain details about his expected trial testimony." The court further stated that an expert report may not be used as "placeholder" to spring other opinions at the last minute. *Id.* at *2. And in *Smith v. State Farm Fire and Casualty Co.*, 164 F.R.D. 49, 53-54 (S.D.W.Va. 1995), expert reports were struck because they were very brief (only a page or two) and simply incorporated interrogatory answers prepared by attorneys. The reports in that case referred to documents in vague terms, with few specific references and no exhibits attached. An expert report that fails to comply with Rule 26(a) should be struck unless it is shown that such failure is either substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1); *City of Grass Valley*, 2007 WL 210516 at*2. Applying these principles to the present issue, the Court finds that the challenged report does not comply with Rule 26 because it is preliminary; does not offer a final opinion; expresses opinions in sketchy and brief fashion; and purports to reserve the right to review many more documents and perform additional analysis before reaching final conclusions.

The report at issue concerns the work and opinions of Ms. Lazaroff, who is an expert in forensic accounting. By its own wording, the report discusses opinions and work that are in progress but not completed. To start, the document's title is "Preliminary Expert Report," which indicates that it is a placeholder and not final. Ms. Lazaroff confirms this on page 3, when she repeatedly states that her work is only preliminary: "I conducted a preliminary forensic accounting analysis related to the above-referenced matter." "I examined and analyzed the following in a preliminary capacity due to extreme time constraints." "It appears, from my preliminary analysis . . . ." The report then identifies expenses that "look personal in nature," but goes on to say that accounting records, underlying bank statements, invoices and other records still need to be reviewed by Ms. Lazaroff. The same is true with regard to the opinion regarding "possible revenue manipulation by Guido." After noting that income did not follow a discernable pattern, the report states this "suggests" there was "possible" revenue manipulation. This preliminary opinion is again subject to Ms. Lazaroff's review of important categories of documents, specifically "bank statements and accounting records, including sales invoices and documents to determine the accuracy of the gross income . . . during the period under review." Finally, in her conclusion, Ms. Lazaroff makes clear that none of the opinions expressed in the report is final: "In order to definitively conclude on these

assertions, I need the following documents: [listing categories of bank statements, general ledgers, vendor invoices, sales invoices, various forms and subsequent agreements and amendments]."

The substance of the report is also very brief. After the cover page, qualifications and background information, the preliminary opinions and analysis total just 2½ pages (including a half-page conclusion). There is one attachment, the expert's CV. Although the report generally refers to Ms. Lazaroff's work for other apparel companies, none is specified in the CV. The report also mentions information Ms. Lazaroff received from plaintiff, but there is no identification of who provided this information or who spoke with Ms. Lazaroff.

In terms of methodology, the report offers little specificity. In "My methodology" on page 2, the report refers to a list of documents that were preliminarily reviewed and then gives a general statement of what Ms. Lazaroff did: "I relied upon my business knowledge of similar operating apparel companies, my assessment of the facts and filings in this matter, and similar employee theft investigations I have been involved with over the course of my career." As to her opinion on unauthorized personal expenses, the report merely states that certain transactions on a schedule "appear to be personal in nature and would not be seen in the normal course of business in a wholesale apparel company." Some additional detail is provided on the methodology for identifying possible revenue manipulation, but still no final opinion is disclosed because of the need to review additional documents.

In opposition to the motion to strike, plaintiff attempts to justify the the preliminary nature of the report by pointing out that fact discovery (which the expert needs to consider) was not yet complete when the report was provided. (Opp. at 2-3.) That argument is not well taken. Plaintiff twice sought and obtained extensions of the due date for expert disclosures. (*See* ECF Nos. 37, 57). For months, plaintiff knew that expert reports were due in December 2016. Plaintiff had the responsibility to obtain fact discovery in a timely fashion so that its expert could prepare a report with final opinions. Moreover, nearly three months have passed since the Lazaroff report was prepared, yet plaintiff has not supplemented the report with final opinions and a complete analysis ─ and has given no indication that it intends to do so. Plaintiff also repeatedly points to a report prepared by defendant's expert (Stacy Kinsel) and argues that the Kinsel report is just as preliminary as the Lazaroff report. However, there is no motion to strike the Kinsel report, and deficiencies in that report do not justify the failure of the Lazaroff report to comply with Rule 26. In addition, plaintiff contends that defendant is not harmed by Ms. Lazaroff's preliminary report because any missing information can be learned when defendant takes the Lazaroff deposition. The Court rejects

this theory of harmlessness because it is contrary to a key goal of Rule 26(a)(2)(B) – to reduce the need for lengthy expert depositions and to provide sufficient information for efficient deposition preparation. *See* Fed. R. Civ. P. 26 Advisory Committee Note (1993 Amend.) (disclosure under former rule "rarely dispensed with the need to depose the expert and often was of little help in preparing for a deposition of the witness").

Accordingly, the Court concludes that the Lazaroff report fails to meet the expert disclosure requirements of Rule 26(a)(2)(B), and that this failure is not substantially justified or harmless. Defendant's motion to strike that report is therefore granted.

The Court, however, denies defendant's request for fees and costs under Fed. R. Civ. P. 37(c)(1)(A). The Rule states that as an additional sanction, the Court "may" award reasonable expenses caused by the inadequate disclosure, thereby indicating that this is a discretionary award. Here, the Court does not see evidence of bad faith by plaintiff, and the striking of the Lazaroff report is a substantial sanction on its own. In these circumstances, the Court concludes that a further sanction of an award of fees and costs is not justified and would not be in the interests of justice.

IT IS SO ORDERED.

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