SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs,

Index No.: EF002460-2024

v.

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants.

DEFENDANTS TOWN OF NEWBURGH AND TOWN BOARD OF THE TOWN OF NEWBURGH'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE THE PURPORTED "ADDENDUM" OF DR. MATT A. BARRETO AND ANY TESTIMONY AND/OR OPINIONS REGARDING THE SAME

INTRODUCTION

1. On January 26, 2024, Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, "Plaintiffs") sent a letter to the Newburgh Town Clerk, alleging that the Town of Newburgh's (collectively with the Town Board of the Town of Newburgh, the "Town") current method of electing Town Board Members through at-large elections violates the John R. Lewis Voting Rights Act of New York ("NYVRA"). The letter stated that Plaintiffs intended to commence an action "under the NYVRA to compel the Town to elect Council Members by district, cumulative voting, ranked choice voting, or other alternative voting systems." *See* Exhibit A to the Affirmation of Bennet J. Moskowitz ("Moskowitz Aff.").

2. On March 15, 2024, the Town passed a Resolution affirming its intent to address any potential NYVRA violation. Moskowitz Aff., Exhibit B.

3. On March 26, 2024, Plaintiffs filed a Complaint alleging that the Town's at-large election method violates Section 17-206(2) of the NYVRA. *See* Moskowitz Aff., Exhibit C.

4. On April 16, 2024, the Town filed a motion to dismiss this lawsuit, arguing that Plaintiffs prematurely filed in violation of the NYVRA's mandatory safe-harbor provision. *See* Moskowitz Aff., Exhibit D. On May 17, 2024, this Court denied that motion. *See* Moskowitz Aff., Exhibit E.

5. Following the denial of the Town's motion to dismiss, the parties engaged in expedited discovery pursuant to this Court's scheduling order entered on May 9, 2024 (the "Preliminary Scheduling Order"). Moskowitz Aff., Exhibit F. Opening expert reports were due on June 28, 2024, rebuttal expert reports were due on July 26, 2024, and discovery was set to conclude on August 16, 2024. *Id.*

6. Consistent with the Preliminary Scheduling Order, Plaintiffs served the expert report of Matt A. Barreto, PhD, and the expert report of A. K. Sandoval-Strausz, PhD, on June 28, 2024, and the Town served the rebuttal expert reports of Brad Lockerbie, PhD, and Donald T. Critchlow, PhD, shortly thereafter.

7. Meanwhile, in separate NYVRA litigation that Plaintiffs' counsel are currently litigating against the Town of Mount Pleasant, New York, *see Sergio Serrato v. Town of Mount Pleasant et al.*, No.55442/2024 (N.Y. Sup. Ct. Westchester Cnty.), Plaintiffs' counsel expressly acknowledged that proving the existence of an alternative voting scheme that would give a town's minority voters a greater chance to elect their preferred candidates is an essential element of a plaintiff's vote-dilution claim, and pointed to timely-submitted expert evidence to argue that the *Serrato* plaintiffs had met this burden. *See* Moskowitz Aff., Exhibit G at 12 (acknowledging that a vote-dilution plaintiff must "show that the existing system 'ha[s] the effect of' impairing their

political influence, which they can do by comparing their ability to elect a candidate of their choice under the current at-large system to a reasonable alternative system").

8. In the present case, Dr. Barreto's June 28, 2024, expert report did not purport to provide any evidence as to the existence of an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates. *See* Moskowitz Aff., Exhibit H. Rather, Dr. Barreto's expert report merely described four different election systems generally, without providing evidence or analysis showing that any of these different election methods would offer the Town's minority electors a greater opportunity to elect candidates of their choosing than the Town's current at-large election method. *Id.* at 16–18. Dr. Sandoval-Strausz's expert report did not analyze alternative election methods at all. *See generally* Moskowitz Aff., Exhibit I.

9. On September 4, 2024—over two months after the time for serving expert reports had expired and mere days before the Town's expert, Dr. Lockerbie, and Plaintiffs' expert, Dr. Barreto, were scheduled to be deposed—Plaintiffs purported to serve on the Town a so-called "addendum" to Dr. Barreto's report, which document was dedicated solely to trying to establish an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates. Moskowitz Aff., Exhibit J; Moskowitz Aff., Exhibit K. This new expert report was dated September 3, 2024, *see* Ex. J, and was plainly untimely under this Court's Preliminary Scheduling Order, *see* Moskowitz Aff., Exhibit F.

10. Plaintiffs did not provide any justification or explanation for their attempt to add an additional expert report over two months after this Court's order date, and well after the Town's deadline to submit rebuttal expert reports had lapsed. Moskowitz Aff., Exhibit K. Although the Town immediately objected to the purported "addendum" as untimely and improper by email to Plaintiffs' counsel, ***Plaintiffs failed to offer any reason for the belated submission***. *See id.* To

this day, Plaintiffs have never provided any explanation whatsoever for disregarding this Court's Preliminary Scheduling Order and serving an untimely expert report. *See* Moskowitz Aff., Exhibit L at 24–26.

11. Trial in this matter is scheduled to begin on October 31, 2024.

LEGAL STANDARDS

12. The expert disclosure requirements of CPLR 3101(d) are "intended to provide timely provision of expert witness information between parties so that parties c[an] adequately and thoroughly prepare for trial." *Bauernfeind v. Albany Med. Ctr. Hosp.*, 195 A.D.2d 819, 820 (3d Dep't 1993).

13. New York courts possess broad discretion to preclude untimely motions or expert disclosures. When a trial court has set express deadlines for expert disclosure, it has the discretion under CPLR 3126 to impose appropriate sanctions if a party fails to comply with the court-ordered discovery deadlines. CPLR 3126; *Theroux v. Resnicow*, 148 N.Y.S.3d 885, 889 (Sup. Ct., N.Y. Cty. 2021). By way of example, courts have held that preclusion of expert testimony is warranted when parties fail to timely disclose witnesses under CPLR 3101(d), *Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257, 257, 604 (2d Dep't 1993), and that late summary judgment motions filed without a good cause explanation for the delay should be denied, *Brill v. City of New York*, 814 N.E.2d 431 (2004).

ARGUMENT

I. THIS COURT HAS BROAD DISCRETION TO EXCLUDE DR. BARRETO'S UNTIMELY EXPERT REPORT

14. Under New York law, this Court may exclude untimely expert evidence and testimony when a party fails to "provide an adequate explanation for the delay." *LaFurge v. Cohen*, 61 A.D.3d 426, 426 (1st Dep't 2009). Following court orders to ensure the timely

disclosure of experts allows "the parties to adequately prepare for trial." *Meyer v. Zeichner*, 263 A.D.2d 597, 598 (3d Dep't 1999).

15. Parties may not "ignore court orders with impunity." *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 1099 (3d Dep't 2018). In *Colucci*, the plaintiffs failed to comply with the court's scheduling order, without requesting an extension or providing any viable excuse for the delay. *Id*. Consequently, the court precluded the expert affidavits and opinions of the plaintiffs' experts in opposition to the defendant's motion and at trial. *Id*. As the *Colucci* court explained, the plaintiffs were not entitled to ignore court orders regarding expert witness disclosures. *Id*.

16. Similarly, here, this Court should exclude the purported "addendum" report of Plaintiffs' expert Dr. Matt A. Barreto as untimely. *See LaFurge*, 61 A.D.3d at 426–27; *Colucci*, 157 A.D.3d at 1099–1100; *Meyer*, 263 A.D.2d at 598–99.

17. As noted, per this Court's Preliminary Scheduling Order, service of Dr. Barreto's "addendum" occurred approximately ***68 days past the expert report deadline***. *See supra* ¶ 9; Moskowitz Aff., Exhibit F. Indeed, Plaintiffs' failure to adhere to this Court's schedule was egregious, missing the expert deadline by more than two months without any explanation.

18. Plaintiffs cannot simply disregard this Court's Preliminary Scheduling Order, which explicitly outlines clear and binding deadlines for expert disclosure.

19. Plaintiffs were, moreover, fully aware of their obligation to demonstrate a "reasonable alternative voting practice" to provide minority voters with a greater opportunity to elect their preferred candidates—which is the entire point of their untimely "addendum," *see* Moskowitz Aff., Exhibit J—well before their deadline for submitting expert reports in this case expired. As noted, Plaintiffs' counsel in this case is also counsel for the plaintiffs in similar NYVRA vote-dilution litigation involving the Town of Mount Pleasant, New York. *Supra* ¶ 7. In

that case, Plaintiffs' counsel expressly acknowledged the plaintiffs' burden of demonstrating a reasonable alternative voting system and pointed to timely submitted expert evidence to argue that they had met this burden. *Supra* ¶ 7. And yet Plaintiffs in this case failed to provide the Town with their purported "addendum" until September 4, 2024.

20. Plaintiffs have never provided any explanation at all for their delay, nor would such an explanation be possible. When notified that their proposed additional expert report was "null and void" due to the expiration of the court-ordered expert report deadline, Plaintiffs did not respond. *See* Moskowitz Aff., Exhibit K. To this day, Plaintiffs have not offered any justification for their delay. *See* Moskowitz Aff., Exhibit L at 24–26. Indeed, no explanation is possible given that Plaintiffs' counsel presented such evidence in a timely manner in another case many months ago, and so clearly understood Plaintiffs' burden in substantiating their vote-dilution claims. *See supra* ¶¶ 7.

21. Implicitly acknowledging that they have no justification for failing to timely submit Dr. Barreto's second expert report, Plaintiffs instead raise various legal arguments in their opposition to the Town's motion for summary judgment for why they were not required to comply with this Court's Preliminary Scheduling Order. *See* Moskowitz Aff., Exhibit L at 24–25. All of these arguments are meritless.

22. Plaintiffs contend that CPLR 3101 "do[es] not impose time limits on expert disclosures," *see* Moskowitz Aff., Exhibit L at 25, but the fact that CPLR 3101 does not set forth specific time limits for exchanging expert reports does not give Plaintiffs license to "ignore" this Court's Preliminary Scheduling Order "with impunity." *See Colucci*, 157 A.D.3d at 1099 (citation omitted); *Schwartzberg v. Kingsbridge Hgts. Care Ctr., Inc.*, 28 A.D.3d 463, 464 (2d Dep't 2006) ("Although CPLR 3101(d)(1)(i) does not establish a specific time frame for expert witness

disclosure, a trial court has the discretion to preclude expert testimony for the failure to reasonably comply with the statute."). Rather, courts have required the offending party to "request an extension for the disclosure" or offer some "viable excuse or good cause for failing to comply," *Colucci*, 157 A.D.3d at 1099, which Plaintiffs did not do here and could not possibly do, as explained immediately above. Not only did Plaintiffs not seek this Court's leave to serve an untimely expert report, nowhere in their response to the Town's motion for summary judgment do Plaintiffs even attempt to explain why they violated this Court's discovery deadline by over two months. *See generally* Moskowitz Aff., Exhibit L. That is because they have no "viable excuse" for their conduct, and their untimely expert report should be precluded. *Colucci*, 157 A.D.3d at 1099; *Schwartzberg*, 28 A.D.3d at 464–65 (precluding expert testimony where "defendants did not offer any explanation for their inordinate delay" in expert disclosures).

23. Plaintiffs' reliance on *Krimkevitch v. Imperiale*, 104 A.D.3d 649 (2d Dep't 2013), also does not help them. Moskowitz Aff., Exhibit L at 25. In *Krimkevitch*, the court found that the trial court "improvidently exercised its discretion in permitting [the expert] to testify" because the defendant failed to demonstrate "good cause for [ ] failure to timely comply with CPLR 3101(d)." 104 A.D.3d at 650. Plaintiffs here have similarly failed to offer any "good cause" at all for their refusal to comply with this Court's Preliminary Scheduling Order.

24. Although Plaintiffs suggest that "the timing of" the second Barreto report did not involve sufficient fault or prejudice to justify exclusion, Moskowitz Aff., Exhibit L at 25, that is wrong. Again, Plaintiffs egregiously violated this Court's Preliminary Scheduling Order by more than two months, while refusing to offer *any* explanation at all for their egregiously untimely expert report. *Supra* ¶ 9. That is especially egregious given that Plaintiffs' counsel has long been on notice of the requirement that a vote-dilution plaintiff show a "reasonable alternative system" that

would give minority voters a greater opportunity to elect their preferred candidate than the Town's current at-large system. *Supra* ¶ 7.

25. Plaintiffs' failure to comply with this Court's scheduling order was also prejudicial, even though no showing of prejudice is necessary when there is an unexplained and unjustified violation of a court scheduling order. *See, e.g., Colucci,* 157 A.D.3d at 1099 (affirming trial court's decision to preclude expert affidavits without addressing prejudice). Plaintiffs served their untimely expert report upon the Town without any prior notice, mere days before the parties' expert depositions were scheduled to occur. *Supra* ¶ 9. If the Town had to respond to this over-two-month-delayed expert report, it would have needed to first evaluate whether one of its current experts had the time to prepare a new report to rebut Dr. Barreto's belated claims or whether it needed to retain an additional expert to perform this function on the emergency schedule created by Plaintiffs' inexplicable and inordinate delay. Then, the relevant expert—if the Town could have even found one on just a few days' notice, at the start of the academic year when many professors that are the most natural candidates to respond to Dr. Baretto's belated report are not available to take on unplanned, emergency-timing work—would have needed to perform this analysis, including potentially considering multiple voting system options, and then draft, revise, vet, and finalize the report. All of this would have had to occur days before the expert depositions, while the Town was preparing its summary judgment brief and getting ready for the swiftly approaching trial, and while the Town's attorneys were handling multiple other matters with court deadlines that they could not move, including ongoing discovery and an expedited appeal in a separate NYVRA case with an upcoming trial date. *See Coads v. Nassau County*, Nos.2024-07766, 2024-07814, 2024-08410 (2d Dep't); *Coads v. Nassau County*, Index No.611872/2023, NYSCEF No.91 (Mar. 12, 2024) (scheduling order). Plaintiffs' effort to jam the Town in this

manner without even attempting to offer any explanation for their over-two-month delay is unquestionably prejudicial. *See Atkinson v. Golub Corp.*, 278 A.D.2d 905, 906 (4th Dep't 2000) ("The court properly exercised its discretion in precluding the testimony of defendant's medical expert based upon the prejudice and surprise to plaintiffs resulting from defendant's untimely disclosure.").

26. Finally, while Plaintiffs suggest that this Court should evaluate the untimely addendum under CPLR 3212(b), *see* Moskowitz Aff., Exhibit L at 25, that provision does not override this Court's discretion under CPLR 3101 and 3126 to preclude Plaintiffs' untimely expert report. *See Theroux*, 148 N.Y.S.3d at 889. As the court in *Theroux* explained, CPLR 3212(b) was aimed at "appellate decisions that limited a party's ability to rely on an expert at summary judgment merely because the expert had not been disclosed during pretrial discovery." *Id.* But that rule says nothing at all "about whether it would be appropriate (or inappropriate) for a court instead to preclude a party from introducing expert evidence at summary judgment because the party had flouted a specific *court-ordered* disclosure deadline." *Id.* And so, because the *Theroux* plaintiff failed to serve his expert disclosure in accordance with the court's scheduling order, the court precluded the plaintiff from relying on the expert's affidavit in opposing the defendant's motion for summary judgment. *Id.* at 889–90. The same result should obtain here, where Plaintiffs flouted this Court's Preliminary Scheduling Order by serving the so-called addendum over two months after the time for doing so expired, without any explanation at all for their dilatory conduct.

27. Given all the reasons outlined above, this Court should preclude the untimely proposed "addendum" of Dr. Barreto and any testimony and/or opinions regarding the same. Plaintiffs' failure to adhere to this Court's deadlines and their lack of *any* explanation for the

egregious delay warrant an order excluding the untimely report from consideration, both for purposes of evaluating the Town's motion for summary judgment and at trial.

CONCLUSION

28. This Court should grant Defendants' motion in limine and preclude the purported expert report "addendum" of Dr. Matt A. Barreto dated September 3, 2024, and any testimony and/or opinions regarding the same.

Dated: New York, New York
October 16, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Memorandum uses Times New Roman 12-point typeface and contains 2,683 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

By: 
Bennet J. Moskowitz