

**IN THE CIRCUIT COURT OF JACKSON COUNTY,  
MISSOURI AT KANSAS CITY**

	)	
FIRST CLUB MARKETING LLC;	)	
	)	
Plaintiff/Counterclaim Defendant;	)	
	)	
v.	)	Case No. 1916-CV32558
	)	
KANSAS CITY BARBEQUE SOCIETY	)	Division: 11
	)	
Defendant/Counterclaim Plaintiff/ Third Party Plaintiff/Counterclaim Defendant;	)	
	)	
v.	)	
	)	
RANDALL BOWMAN	)	
	)	
Third Party Defendant/Counterclaim Plaintiff	)	

**FIRST CLUB MARKETING AND RANDALL BOWMAN’S SUGGESTIONS IN  
OPPOSITION TO KANSAS CITY BARBEQUE SOCIETY’S MOTION TO STRIKE OR  
IN THE ALTERNATIVE PERMISSION TO DISCLOSE THEIR REBUTTAL EXPERT  
OUT OF TIME**

The Kansas City Barbeque Society (“KCBS”) has asked this Court to strike First Club Marketing LLC and Randall Bowman’s (collectively “Plaintiff”) rebuttal expert, David Oliver. For the reasons set forth herein, the Court should deny KCBS’s Motion.

**I. LEGAL STANDARD**

“The trial court has broad discretion to control discovery [and] [t]his discretion extends to the trial court’s choice of remedies in response to the non-disclosure of evidence or witnesses during discovery.” *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997). “This discretion should be aimed at achieving fundamental fairness and avoiding unfair disadvantage.”

*Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 719 (Mo. App. E.D. 2014). Similarly, Missouri Supreme Court Rule 44.01(b) provide the court the ability to permit late filings when there is good cause or excusable neglect. See Missouri Sup. Ct. R. 44.01(b). Plaintiff satisfies any of these standards.

The trial court’s decision on a motion to strike is reviewed by the appellate court under an “abuse of discretion” standard. *Scheck Indus. Corp.*, 435 S.W.3d at 717. “A trial court abuses its discretion when its ‘ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.’” *Id.* (quoting *Blake v. Irwin*, 913 S.W.2d 923, 931 (Mo. Apo. W.D. 1996)). “No abuse of discretion occurs where ‘reasonable persons can differ about the propriety of the action taken by the trial court ...’” *Id.*

## II. BACKGROUND

This Court issued an Amended Scheduling Order on September 9, 2020. That order required Plaintiff to disclose its “expert” by November 2, 2020, and for KCBS to disclose its “expert” by December 2, 2020. At the time the scheduling order was entered, Plaintiff anticipated that the only expert testimony in this breach of contract case would go to the issue of reasonableness of the contract - and only then would this testimony be required if this straightforward case could not be determined on summary judgment. On December 2, 2020, KCBS disclosed three “experts.” One of those experts is KCBS’s current President, Rick Wagner. Mr. Wagner, a CPA, was disclosed to testify on the issue of *damages*. Specifically, KCBS’s disclosure for Mr. Wagner provided:

Mr. Wagner is the current Treasurer of KCBS, 2519 Madison Ave, Kansas City, MO 64108. Mr. Wagner is qualified by his knowledge, experience, training, and education, including decades as a certified public accountant. Though Mr. Wagner is a non-retained fact witness, KCBS anticipates that he will testify regarding the

financial impact of First Club Marketing LLC's contract with KCBS and that this testimony may include the use of certain accounting principles and methods that are considered "scientific, technical, or [] specialized knowledge" under Missouri Rule of Civil Procedure 56.

*See e.g.*, Exhibit A, KCBS' Expert Witness Designation at ¶ 2. Nowhere does this disclosure mention that Mr. Wagner would be a purported nonprofit expert. On December 22, 2020, three weeks after this disclosure, Plaintiff took Mr. Wagner's deposition and received the transcript on or around January 7, 2021.

### III. ARGUMENT

#### a. **The scheduling order does not set a deadline for the disclosure of a rebuttal witness.**

Plaintiff's designation of David Oliver as a rebuttal witness is not untimely because the scheduling order did not set out a deadline for rebuttal witnesses. In the absence of such a deadline, the Court's discretion applies. In Missouri, experts can be designated days or weeks before trial. *See e.g.*, *Gantt v. Baldwin*, 927 S.W.2d 957, 960 (Mo. App. W.D. 1996) (permitting expert to testify who had been disclosed 4 days before trial affirmed where opposing party took expert's deposition the night before trial began); *Clark v. Clark*, 805 S.W.2d 290, 296-97 (Mo. App. E.D. 1991) (the defendant's disclosure of witness 9 days before trial was not prejudicial where plaintiff declined offer to depose witness before trial); *Dane By Dane v. Cozean*, 636 S.W.2d 87, 90 (Mo. App. E.D. 1982) (permitting witness to testify who was first disclosed during trial affirmed where opposing party took overnight deposition of witness during trial). Here, trial will not occur until at least October – giving KCBS over 6 months to depose Mr. Oliver if it wishes.

- b. Plaintiff had no reason to believe it needed a nonprofit expert because Mr. Wagner was not disclosed as one. As a result, Plaintiff's designation of David Oliver as a rebuttal expert is appropriate.**

Even if the disclosure of Mr. Oliver were considered untimely, Missouri Supreme Court Rule 44.01(b) provides that a court may allow submissions outside of the scheduling order if cause exists and any delay is the result of excusable neglect. Here, cause exists and there is no excusable neglect on the part of Plaintiff because Plaintiff did not delay in designating a rebuttal expert. In fact, Plaintiff had no intention of designating a rebuttal expert until Mr. Wagner testified outside the scope of his expert designation during his deposition as discussed more fully below. Once Plaintiff took Mr. Wagner's deposition and received Mr. Wagner's deposition transcript, Plaintiff acted without delay in notifying KCBS that Plaintiff intended to designate a rebuttal expert and researched, contacted, and retained such expert within approximately one month.

Mr. Wagner was designated as a non-retained fact witness to testify "regarding the financial impact of First Club Marketing LLC's contract with KCBS ...". *See e.g.*, Exhibit A, at ¶ 2. Yet at his deposition, Mr. Wagner based his opinions on his so-called nonprofit expertise. It was not until Mr. Wagner held himself out as a nonprofit expert that Plaintiff determined it would need to find a nonprofit expert to rebut Wagner's testimony on these issues. To be clear, Plaintiff will file a motion to strike Mr. Wagner's testimony for numerous reasons - including the bylaws speak for themselves, lack of personal knowledge, lack of expertise, the testimony invades the province of the jury on ultimate issues, and the testimony is wholly speculative and unsupported by evidence or nonprofit principles. But if Mr. Wagner is permitted to testify, then Plaintiff needs a nonprofit expert to rebut Mr. Wagner's testimony. Of course, if the Court refuses to allow Mr. Wagner to testify at trial, Plaintiff will refrain from presenting any testimony from Mr. Oliver.

Mr. Wagner holds himself out as a nonprofit expert and makes unsupported and incendiary statements that Plaintiff's expert will rebut about the appropriateness of the board voting in a contract for First Club Marketing:

- "I'm using my experience for the last 40 years of working with nonprofits." (Ex. B, Richard Wagner Depo., at 13:11-12);
- "I believe I'm testifying as an expert on behalf of KCBS, based on my 40 years of experience with a nonprofit." (Ex. B, Richard Wagner Depo., at 17:5-6);
- Testifying that the contract is unfair based on "40 years of experience with nonprofits." (Ex. B, Richard Wagner Depo., at 41:8-9); (*id.*, at 41:25-42:1) (same); (*id.*, at 45:17-18) (same); (*id.*, at 46:4-6) (same);
- "Based on my working with nonprofits for the last 40 years, I've never seen board members that account for this much of the payments . . ." (Ex. B, Richard Wagner Depo., at 135:2-5);
- Basing opinion on "the fact after 40 years of experience with a nonprofit . . ." (Ex. B, Richard Wagner Depo., at 153:25-154:1);
- Testifying about his experience with board members who have contracts with nonprofits. (Ex. B, Richard Wagner Depo., at 161:7-23);
- Testifying about KCBS bylaws and the appropriateness of the contract with a board member's company. (Ex. B, Richard Wagner Depo., at 162:4-16); (*id.*, at 163:20-164:11) (same);
- Testifying, "I just don't think the contract is enforceable." (Ex. B, Richard Wagner Depo., at 174:17-18);
- Speculating under the guise of his expertise with nonprofits that no legal advice was given to KCBS because of legal advice regarding the contract had been given "there would be a report or letter if there was a review of this contract. . ." (Ex. B, Richard Wagner Depo., at 178:10-19); (*id.*, at 179:12-180:4) (same); and
- Testifying based upon his experience with nonprofits about how Bowman should have handled the contract vis-a-vis the board and KCBS bylaws. (Ex. B, Richard Wagner Depo., at 181:3-182:20).

If Mr. Wagner is permitted to testify about anything other than damages calculations (as he was disclosed for), then due process dictates that Plaintiff be permitted to bring in a nonprofit expert to address Mr. Wagner's testimony. This is especially true given the over-reaching nature

of his potential testimony that supposedly relies on nonprofit expertise.<sup>1</sup> Plaintiff's rebuttal expert, David Oliver, has years of expertise in advising nonprofit boards regarding bylaws, contracting, and governance. His testimony will squarely respond to testimony of Mr. Wagner. As such, it would cause great prejudice to Plaintiff if Mr. Wagner is permitted to testify about nonprofit issues (despite not being disclosed as a nonprofit expert) and Mr. Oliver is not permitted to testify. Accordingly, good cause exists because Plaintiff acted expeditiously in designating Mr. Oliver as a rebuttal expert after Mr. Wagner's deposition.

**c. No Prejudice**

KCBS suffers no prejudice from the designation of Mr. Oliver. KCBS may certainly take the deposition of Mr. Oliver if it would like. Indeed, KCBS took the deposition of Plaintiff's other expert, Sue McClure, after the close of discovery. And because KCBS has asked the court to postpone the May trial date, KCBS will have plenty of time to take a deposition. Moreover, prior to briefing summary judgment, Plaintiff's counsel told KCBS's counsel that Plaintiff anticipated designating a rebuttal expert and that if KCBS wanted to discuss its impact on the summary

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<sup>1</sup> See e.g.,

- Ex. B, Richard Wagner Depo., at 41:8-15 (“I, personally, have over – right at 40 years of experience with nonprofits, and I’ve never seen such an obvious case of private inurement for so much money for such a small organization as I’ve seen on this. In fact, I would probably go as far to say that we may need to consider getting the U.S. Attorney involved as an actual criminal case.”);
- *Id.*, at 50:18-52:1 (“This is the most obvious case of private inurement on such a small organization I’ve ever seen. I believe it beached itself the day it was signed as illegal. It was funneling money to the president, the then president of the board. I’ve never seen the president of a nonprofit obtain their own contract for such a large amount for such a small organization.”).

judgment deadlines, he would be happy to do so.<sup>2</sup> Plaintiff designated Mr. Oliver as soon as practicable after receiving the transcript of Mr. Wagner's deposition.<sup>3</sup>

Furthermore, KCBS does not cite a single case where a court has excluded an expert under similar circumstances. To the contrary, courts have routinely permitted "late" disclosures. *See e.g.*, *Jo Ann Howard & Assocs., P.C. v. Cassity*, Case No. 4:09-cv-01252-ERW, 2018 WL 6064859, at \*1 (E.D. Mo. Nov. 20, 2018) (allowing party to designate expert witness out of time to provide rebuttal testimony); *Orthoarm, Inc. v. Forestadent USA, Inc.*, 682 F. Supp. 2d 978, 983-84 (E.D. Mo. 2008) (allowing expert to be disclosed out of time where plaintiff had time to cure any prejudice); *Gantt*, 927 S.W.2d at 960 (permitting expert to testify who had been disclosed 4 days before trial affirmed where opposing party took expert's deposition the night before trial began); *Clark*, 805 S.W.2d at 296-97 (the defendant's disclosure of witness 9 days before trial was seasonable and not prejudicial where plaintiff declined offer to depose witness before trial); *Dane by Dane*, 636 S.W.2d at 90 (permitting witness to testify who was first disclosed during trial affirmed where opposing party took overnight deposition of witness during trial).

Here, where Mr. Oliver's disclosure was necessitated by KCBS's failure to disclose Mr. Wagner as a nonprofit expert, fairness dictates that Mr. Oliver be permitted to testify.

#### IV. CONCLUSION

Accordingly, and for the reasons set forth herein, First Club Marketing LLC and Randall Bowman respectfully request this Court deny Kansas City Barbeque Society's Motion to Strike. In the alternative, Plaintiff seeks leave to amend the schedule to permit disclosure of a nonprofit

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<sup>2</sup> See KCBS Exhibit A to KCBS' Motion to Strike.

<sup>3</sup> Plaintiff received Mr. Wagner's deposition on or around January 7, 2021, told KCBS that Plaintiff intended to file a rebuttal expert on January 19, 2021, and filed its designation February 10, 2021.

expert given that KCBS did not disclose a nonprofit expert and Plaintiff acted diligently to designate a rebuttal expert once Plaintiff learned of KCBS's proffered testimony.

DATED: March 8, 2021

Respectfully Submitted,

**WILLIAMS DIRKS DAMERON, LLC**

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***Attorneys for First Club Marketing LLC and  
Randall Bowman***

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of March, 2021, a true and correct copy of the foregoing filed with the Clerk of the Court using the electronic filing system, which will send notice of electronic filing to all counsel of record for this case.

/s/ Eric L. Dirks

Eric L. Dirks