

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’ REPLY 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

Plaintiffs still refuse to provide this Court *any* explanation—reasonable or otherwise—for their egregious violation of this Court’s scheduling order: serving a second expert report of Dr. Matt A. Barreto more than two months too late, as Plaintiffs’ *only* evidence on a critical element of their New York Voting Rights Act (“NYVRA”) claim. Although Plaintiffs’ lengthy opposition cites inapposite case after inapposite case, they do not identify any authority supporting their core request that this Court should excuse Plaintiffs’ unexplained (and, apparently, inexplicable) decision to violate this Court’s expedited scheduling order by over two months. While such a willful violation of a court order is sufficient, standing alone, to justify preclusion, Plaintiffs also fail to rebut Defendants’ showing of prejudice resulting from Plaintiffs’ decision to spring this untimely report on Defendants on the eve of expert depositions, with a fast-approaching, expedited trial that this Court has ordered so this case and any subsequent appeals may be resolved before the election deadlines in early 2025.

While Plaintiffs assert that they were free to violate this Court’s scheduling order because Dr. Barreto’s untimely report was only providing “additional context” for his timely report, that is flatly false. Dr. Barreto’s initial, timely report did not even attempt to prove that a reasonable alternative election system would give the Town’s minority voters a greater opportunity to elect their preferred candidates than the Town’s current at-large system—a critical element of a vote-dilution claim that Plaintiffs concede by silence that they knew they had to establish. That is, of course, why Plaintiffs submitted Dr. Barreto’s second report, making the cynical calculation that violating this Court’s scheduling order was a better bet than attempting to litigate their case with absolutely no expert evidence on a conceded element of their only claim.

Defendants understand why Plaintiffs struggle so mightily to resist the consequences of their own litigation choices. After all, their case is over without Dr. Barreto’s untimely report and testimony arising from that report. *See* NYSCEF No.70 at 26 n.6; NYSCEF No.129 at 1–3. But it was Plaintiffs who decided to invoke their statutory right to expedited proceedings under the NYVRA, and it was Plaintiffs who then decided to violate this Court’s scheduling order by more than two months while refusing to provide any justification for their actions. Basic fairness to all parties requires that Plaintiffs must live with the consequences of their litigation decisions.

ARGUMENT

I. THIS COURT SHOULD PRECLUDE DR. BARRETO’S UNTIMELY EXPERT REPORT

A. As Defendants have explained, this Court can and should preclude Plaintiffs’ untimely expert report and related testimony. *See* NYSCEF No.126 (“Op.Br.”) at 4–10. Plaintiffs submitted that report over two months past the Court’s expert report deadline in these expedited proceedings, on the eve of expert depositions, and without providing any reason for the delay. Op.Br.3–10. Plaintiffs’ disregard for this Court’s scheduling order warrants the preclusion of their untimely

report. Op.Br.7–8. While Plaintiffs’ willful actions were sufficient, standing alone, to justify preclusion, those actions also prejudiced Defendants. *See* Op.Br.8–9. Plaintiffs’ untimely second expert report seeks to introduce an entirely new category of evidence on a critical element of Plaintiffs’ vote-dilution claim; namely, evidence comparing the Town’s current at-large system to a “reasonable alternative system.” Op.Br.3. Plaintiffs served their untimely expert report upon Defendants without any prior notice, mere days before the parties’ expert depositions were scheduled to occur. Op.Br.3–4, 8–9. To respond to this untimely and improper report, the Town would have needed to find an expert to analyze that report and prepare a new rebuttal on an emergency basis, all while the parties were in the midst of briefing summary judgment, deposing witnesses, and preparing for trial. Op.Br.8–9. Especially given the expedited nature of these proceedings that Plaintiffs themselves sought, Plaintiffs’ decision to serve an expert report detailing an entirely new category of evidence 68 days too late was clearly prejudicial.

B. Plaintiffs’ counterarguments are unpersuasive.

Plaintiffs do not dispute that the second Barreto report was untimely and that they were explicitly warned of the consequences associated with failing to comply with this Court’s scheduling order. *See* NYSCEF No.119, Exhibit F to the Affirmation of Bennet J. Moskowitz (“Moskowitz Aff.”) at 5. That order expressly states that “failure to comply with the terms of this order may result in sanctions” and that “no adjournments of any time directive above shall be had without the permission of the Court.” *Id.* Nevertheless, Plaintiffs *still* refuse to offer *any* excuse—let alone a reasonable excuse—for their failure to comply with that scheduling order (or even attempt to seek relief from that order). *See generally* NYSCEF No.134 (“Resp.Br.”) at 1–13. Under these circumstances, this Court should preclude Plaintiffs’ untimely expert report and any opinions or testimony related to that report. *See Huseinovic v. Lee Wilson Mgmt., LLC*, 230 A.D.3d

577, 579–80 (2d Dep’t 2024) (affirming order precluding plaintiff from using untimely evidence “at trial or in a dispositive motion” where the party “fail[ed] to timely exchange . . . photographs that were eventually produced months after the requests for them were made” and did not “provide a reasonable excuse for those failures”).

Rather than explain their delay, Plaintiffs argue that this Court lacks authority to preclude the second Barreto report absent a showing that Plaintiffs’ dilatory conduct prejudiced Defendants. Resp.Br.3–5. Plaintiffs are wrong on the law. As the Second Department has explained, the remedy of evidence preclusion is available where, as here, a party fails to comply with court-ordered deadlines and that failure was “willful and contumacious.” *Huseinovic*, 230 A.D.3d at 579–80; *see* CPLR 3126(2) (“[i]f any party . . . refuses to obey an order for disclosure,” a court may “prohibit[] the disobedient party . . . from producing in evidence designated things or items of testimony”). Although some courts have required a showing of prejudice where a party only fails to comply with CPLR 3101(d)(1), *see, e.g., Browne v. Smith*, 65 A.D.3d 996, 997 (2d Dep’t 2009), none of the cases that Plaintiffs cite address a situation like this one, where a party willfully (and egregiously) violates a court’s scheduling order.¹

Importantly, the *only* inference that can be drawn from the record here is that Plaintiffs willfully—rather than merely accidentally or negligently—disregarded this Court’s scheduling order, and Plaintiffs do not argue otherwise. *See* Resp.Br.1–12; *see also* Op.Br.3–4, 6–8; *Huseinovic*, 230 A.D.3d at 579–80. Plaintiffs do not dispute that their counsel knew that proving

¹ The cases that Plaintiffs rely upon are inapposite, as none address a party’s violation of a court’s scheduling order without seeking permission to do so and without providing any explanation, either to the other parties or to the court, for the party’s misconduct. *See Silverburg v. Comm. Gen. Hosp. of Sullivan Cnty.*, 290 A.D.2d 788, 788–89 (3d Dep’t 2002) (noting that “a trial court has discretion to preclude expert testimony for failure to reasonably comply with” CPLR 3101(d)(1)(i)); *Gayz v. Kirby*, 41 A.D.3d 782, 782–83 (2d Dep’t 2007) (addressing preclusion for failure to comply with CPLR 3101(d)); *Castellani v. Bagdasarian*, 286 A.D.2d 870, 871 (4th Dep’t 2001) (same); *Mazzurco v. Gordon*, 173 A.D.3d 1001, 1002 (2d Dep’t 2019) (same); *Tate-Mitros v. MTA N.Y.C. Transit*, 144 A.D.3d 454, 456–57 (1st Dep’t 2016) (same).

a “reasonable alternative system” is a critical element of a vote-dilution claim. *See* Op.Br.2–3. And Plaintiffs do not dispute that they knew about this Court’s scheduling order deadlines and that they have no excuse for failing to comply with those deadlines by waiting a substantial period of time—over two months beyond the Court’s deadline to submit expert reports, in expedited NYVRA litigation—to serve an untimely second expert report. Courts understandably do not hesitate to preclude evidence where parties violate court-ordered deadlines and refuse to provide any excuse for their actions. *See, e.g., Nationstar Mortg., LLC v. Jackson*, 192 A.D.3d 813, 816 (2d Dep’t 2021); *Huseinovic*, 230 A.D.3d at 579–80.

Even were a prejudice showing required when dealing with a willful, unexplained violation of a court order, Defendants have made such a showing here, contrary to Plaintiffs’ assertions. *See* Resp.Br.6–10. Plaintiffs surprised Defendants with a new expert report, attempting to address for the first time a critical element of their case, over two months after this Court’s deadline for serving such reports had passed and despite being well aware of—and, indeed, seeking—expedition of these proceedings. Op.Br.3–4. Plaintiffs did so without prior notice or explanation, just a few days before the parties’ experts were scheduled to be deposed and while the parties were preparing for summary judgment and for trial. Op.Br.8–9. The prejudicial nature of Plaintiffs’ conduct is not “conclusory, speculative, [or] unsubstantiated,” as Plaintiffs claim. *See* Resp.Br.6 (citation omitted).² Rather, Plaintiffs put Defendants in an unfair position, which would have forced Defendants to coordinate an unplanned rebuttal expert report (including potentially trying to find a new expert at the start of the academic year) on an emergency basis, mere days before expert

² The only case that Plaintiffs cite for this proposition is *Cruickshank v. Dukes*, 188 Misc. 2d 514, 516 (App. Term 2d Dep’t 2001), which is inapposite. *See* Resp.Br.6. Not only did that case involve a motion to amend a pleading, rather than a party’s failure to comply with a scheduling order, it offers no analysis at all for what renders prejudice “conclusory, speculative, and unsubstantiated,” and certainly does not suggest that the prejudice that Plaintiffs’ dilatory conduct has caused Defendants here is merely speculative. *See Cruickshank*, 188 Misc. 2d at 515–16.

depositions and after Plaintiffs themselves had taken 68 days past the expert report deadline to prepare and serve their untimely second expert report.

In arguing that Defendants did not sufficiently establish prejudice, Plaintiffs—the parties who violated this Court’s scheduling order—ask this Court to place the burden on *Defendants* to have undertaken extraordinary, emergency efforts to attempt to remedy Plaintiffs’ delay. Resp.Br.6–8. Apparently without irony, Plaintiffs argue that this Court should decline to hold that Defendants were prejudiced where Defendants do not show that they “attempted to rebut the Barreto Addendum but [were] unable to due to circumstances outside of [their] control,” Resp.Br.6, *while at the same time refusing to provide any explanation at all for Plaintiffs’ dilatory, willful violation of this Court’s scheduling order*. They further suggest—contrary to the terms of this Court’s scheduling order, *see* Moskowitz Aff., Exhibit F—that it was *Defendants’* burden to move this Court for additional time to respond to Plaintiffs’ untimely report. Resp.Br.7. In other words, even though it was Plaintiffs who egregiously violated this Court’s scheduling order, they argue that their violation cannot be prejudicial where Defendants could have asked this Court to move the trial date (and thus potentially undermine the ability to receive a decision on this case, including any appeals, before the 2025 election cycle begins). Resp.Br.7–8. No case that Plaintiffs cite stands for that remarkable and entirely unfair burden shifting.

While Plaintiffs claim that Defendants’ cases are not on point, *see* Resp.Br.8–9, Plaintiffs cannot find a single case where a court has declined to preclude evidence submitted in violation of the court’s scheduling order when, as here, the dilatory party fails to offer any explanation or justification for its conduct. Indeed, New York courts regularly preclude evidence and even strike entire pleadings where a party fails to provide any excuse for violating court-ordered deadlines. *See, e.g., Huseinovic*, 230 A.D.3d at 579–80; *Sparakis v. Gozzer Corp.*, 177 A.D.3d 1011, 1012–

13 (2d Dep't 2019). Moreover, while Plaintiffs contend that their over-two-month delay in submitting an additional expert report is less prejudicial than the conduct in other cases, *see* Resp.Br.8–9, that delay must be considered in the context of *this* case, where the parties (at Plaintiffs' request) are proceeding under an expedited discovery and trial schedule so this matter may be resolved prior to the 2025 elections. In this expedited litigation, Plaintiffs' over-two-month delay—which is over twice the amount of time that Defendants had to prepare their rebuttal expert report in the first instance, *see* Moskowitz Aff., Exhibit F—was particularly egregious. *See supra* pp.5–6.

Plaintiffs further argue that Dr. Barreto's untimely second report does not “introduce[] a novel theory,” Resp.Br.9–10, but that is incorrect. The second Barreto report is the *only* evidence that Plaintiffs have offered on a mandatory element of their vote-dilution claims: namely, that there is an alternative system that would give the Town's minority voters a greater chance to elect their preferred candidates as compared against the Town's current at-large system. *See* Op.Br.3; NYSCEF No.123, Moskowitz Aff., Exhibit J. No such evidence even arguably appears anywhere in Dr. Barreto's initial report. *See* NYSCEF No.121, Moskowitz Aff., Exhibit H. ***That initial report merely (briefly) discussed different electoral systems that are possible, as a general matter, and did not perform any analysis whatsoever that any of these alternative systems would give the Town's minority voters a greater opportunity to elect the candidates of their choosing than the Town's current at-large system does.*** *See id.* at 16–18; *see also* NYSCEF No.70 at 26 n.6; NYSCEF No.129 at 1–3. That Plaintiffs would later submit an untimely second expert report performing an entirely new analysis was in no way “apparent from [Plaintiffs'] prior expert disclosures.” *See LaFurge v. Cohen*, 61 A.D.3d 426, 426 (1st Dep't 2009); *see also Singh v. PGA Tour, Inc.*, 2017 WL 2152584, at *10 (N.Y. Sup. Ct. May 17, 2017) (explaining, in a commercial

division case, that a reply expert report “is not an opportunity for a party to ‘correct’ the deficiencies and omissions made in an initial expert report—including addition of new data and opinions, particularly when that data was available to the expert at the time the initial report was issued”). Indeed, it came as a complete surprise to Defendants, which is why they immediately responded that the additional expert report was “null and void” because the “expert report deadline has passed.” NYSCEF No.124, Moskowitz Aff., Exhibit K at 1. Plaintiffs’ untimely report does not provide “additional context” for Dr. Barreto’s initial report, as Plaintiffs claim, Resp.Br.2; rather, it seeks to perform for the first time a “reasonable alternative system” analysis that is necessary to prove an element of Plaintiffs’ vote-dilution claims and is found nowhere in Dr. Barreto’s initial report.

Finally, Plaintiffs argue, incorrectly, that even if this Court precludes the untimely second Barreto report, it should not preclude Dr. Barreto from testifying regarding the contents of that untimely report at trial. Resp.Br.11–12. Although Plaintiffs again cite to CPLR 3101, that gets them nowhere. That CPLR 3101 does not “require[] that an expert set forth the specific facts and opinions that will be encompassed in his or her testimony,” Resp.Br.12 (quoting *Velez v. Roy*, 191 A.D.3d 571, 571 (1st Dep’t 2021)), does not deprive this Court of its discretion to preclude evidence, and testimony derived from that evidence, where a party fails to comply with a court-ordered scheduling order without explanation, *see* CPLR 3126(2); *supra* pp.3–5. And while Plaintiffs suggest that Dr. Barreto’s initial report is not “so inadequate” as to preclude testimony on his untimely report, Resp.Br.12 (quoting *Gagliardotto v. Huntington Hosp.*, 25 A.D.3d 758, 758–59 (2d Dep’t 2006)), that is incorrect for the reasons explained immediately above. Dr. Barreto’s second report attempts to prove up an element of Plaintiffs’ vote-dilution claims, which his initial report did not attempt to do. *See* Moskowitz Aff., Exhibit J, at 1. Allowing Dr. Barreto

to testify on this subject at trial would be highly prejudicial to Defendants for all of the reasons that Dr. Barreto's untimely second expert report is highly prejudicial. *See supra* pp.5-7. And, of course, precluding the untimely second expert report would have no practical effect if Plaintiffs were simply allowed to introduce the substance of that untimely report at trial, effectively imposing no consequences for Plaintiffs' willful, unexplained violation of this Court's scheduling order.

CONCLUSION

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.

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October 25, 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 2,705 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