

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange located at 285 Main Street,
Goshen, New York 10924 on the 9th day of May 2025

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

DECISION & ORDER

Index No.: EF002460-2024

Motion date: 5/12/2025

Motion in Limine - Seq. 8

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Plaintiffs to preclude testimony as to “legal requirements” by expert Dr. Brad Lockerbie and for such other relief as the Court finds just and proper:

Notice of Motion/Affirmation/Ex. I.....	1-3
Opposition Memorandum.....	4

Summary of Decision

Plaintiffs failed to establish intentional conduct by Defendants that would support preclusion at trial of the “response report” of Dr. Lockerbie (“Lockerbie Response”) and any testimony that is based upon it. The date for disclosure of the Lockerbie Response was agreed by the parties. The Lockerbie Response is a direct refutation of the second report disclosed by Plaintiff’s expert, Dr. Barretto (“the Barretto Addendum”) in September 2024. Thus, Plaintiffs failed to establish prejudice, a sine qua non for expert preclusion.

While the Lockerbie Response refers to the law of New York as it concerns electoral mapping, it generally does not impinge on the Court's authority to decide matters of law because the expert does not try to define the law. Dr. Lockerbie addressed what Plaintiffs have repeatedly maintained (and the Second Department has held) is an essential element of their case, to wit, whether they offer a reasonable alternative to the current at-large system in the Town. The Town is therefore well within its rights to defend against the Complaint by trying to refute at trial whether a reasonable alternative plan has been presented by Plaintiffs' expert, Dr. Barretto.

For these many reasons, the motion is DENIED.

Procedural History

Plaintiff filed a Complaint that pleads violations of the John Lewis Voting Rights Act of NY ("NYVRA" or "the Act"). The underlying facts are set forth in the Court's Decision and Order on Motion Seq. #1, dated May 17, 2024. Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The first cause of action asserts that "racial polarization" creates vote dilution. The second cause of action asserts that under the totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice is impaired. Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. After Motion Seq. #1 was denied, Defendants filed an Answer on May 28, 2024.

The Act requires that "actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference". NY Election Law 17-216. In light of those requirements, the Court ordered the parties to appear on May 29, 2024 and implemented an expedited Preliminary Conference Order on May 10, 2024. The Order

required Plaintiffs to disclose experts reports by June 28, 2024 and Defendants to do so by July 2, 2024.

Plaintiff disclosed a report of Dr. Barreto by the June 28 deadline that opined as to racially polarized voting (“RPV”) in the Town.¹ Plaintiff also disclosed a report of Dr. A.K. Sandoval-Strausz dated June 28, 2024 whose opinions are directed to the second cause of action, the totality of circumstances theory of vote dilution. Defendants disclosed a report by Dr. Lockerbie on July 9, 2024 that, inter alia, addressed the initial report of Dr. Barreto. Defendants disclosed a report by Dr. Donald Critchlow on or about July 26, 2024 that, inter alia, responded to the opinions of Dr. Sandoval-Strausz. Plaintiffs then disclosed the Barreto Addendum on September 4, 2024, in direct contravention of the expert cutoff date in the Preliminary Conference Order, a date that Plaintiffs had themselves proposed. That very late disclosure by Plaintiffs caused the adjournment of the October 31, 2024 trial date.

The Barreto Addendum was the first instance where either of the experts for Plaintiffs set forth a single member district voting system as an example of what might replace the current at-large system. Such a proposed and viable alternative is an essential part of the Plaintiff’s burden of proof for both of their causes of action. *Clarke v Town of Newburgh*, 226 NYS3d 310, 330 (2d Dept. 2025) (“in order to obtain a remedy under the NYVRA, a plaintiff still must show that “vote dilution” has occurred (Election Law § 17–206[2][a]), and that **there is an alternative practice that would allow the minority group to “have equitable access to fully participate in the electoral process”**) (emphasis added).

¹ It is not clear from the party submissions on the instant motion (and in response to the Pretrial Order) whether any document titled as “CPLR 3101 Expert Disclosure” was served for any of the four experts or if the parties simply agreed to accept a report and curriculum vitae as satisfying the statutory disclosure.

Defendants sent an email to Plaintiffs on September 4, 2024 rejecting the Barreto Addendum as untimely. Dr. Barreto was deposed on September 13, 2024 by Defendants but they explicitly declined to question him on the content of the Barreto Addendum when the witness mentioned it. Ex. N to Motion Seq. #5 at pp. 9-10.

Defendants filed a motion for summary judgment on October 10, 2024 (Seq. #5). Defendants filed a motion (Seq. #7) to exclude the Barreto Addendum and any opinions within it at trial. The Court issued a Decision and Order on October 25, 2024 that i) denied the relief of preclusion, ii) allowed Defendants to amend the reports of their two experts as to the facts, issues and opinions in the Barreto Addendum, and iii) allowed Defendants a further deposition of Dr. Barreto limited to the Addendum.

The Court issued a Decision and Order on November 8, 2024 that granted summary judgment to Defendants (Seq. #5). Plaintiff filed a notice of appeal on November 11, 2024. The Second Department issued its Opinion and Order on January 30, 2025 that denied judgment for Defendants.

For reasons that are not clear, Defendants received the Barreto Addendum on September 4, 2024 but waited to serve any discovery demands related to that report. Defendants did not move to preclude the Barreto Addendum (Seq. #7) until October 16, 2024 and even then apparently assumed, incorrectly, that their motion (Seq. #7) would be granted. Thus, from September 4 until November 8, 2024 (when summary judgment was granted), Defendants did absolutely nothing to seek the data underlying the Barreto Addendum. Defendants did not serve discovery demands for that data until February 10, 2025. Plaintiffs produced some data on March 5 and more data on March 18, 2025.

For reasons that also remain unclear to this Court, the parties both repeatedly adjourned

and failed to conduct the second Barretto deposition until April 30, 2025. The parties appeared before this Court on numerous occasions after the remand, starting on February 4, 2025. At each such conference the Court inquired as to the status of the second Barretto deposition. While both parties continued to delay the second Barretto deposition, the Manley deposition and the Lockerbie Response, Plaintiffs nonetheless repeatedly demanded an earlier trial date -- with discovery not complete. Trial was set for May 12-16, 2025, the earliest possible date available to the parties following the completion of the second Barretto deposition and the trial deposition of Town Board member Scott Manley on May 7, 2025.

The Instant Motion

The parties agreed among themselves that Dr. Lockerbie would issue a responsive report to the Barretto Addendum by April 30, 2025. The Lockerbie Response comprises his opinions as to the single member districts proposed in the Barretto Addendum. Dr. Lockerbie cites various legal authority that concern districting for elections (Par. 1); cites various parts of the NY Municipal Home Rule Law (Par. 2-7); opines as to whether Dr. Barretto has considered those parts of the statutory scheme (Par. 8-16); opines that Dr. Barretto did not consider other sources of law on district voting (Par. 17); and comments on other “methodological flaws” in the Barretto Addendum (Par. 18-78). He provides a four paragraph conclusion:

Plaintiffs now move in Seq. #8 to exclude any “legal requirements” addressed in the Lockerbie Response on the basis that i) no CPLR 3101 disclosure was served, ii) the witness is not qualified as a legal expert, and iii) the interpretation of a statute is purely a legal question and beyond the bounds of permissible expert testimony. Plaintiffs assert that the offending paragraphs in the Lockerbie response are 1-8, 10, 14-19, and Conclusion No. 1. See Affirmation

in Support, fn. 1. Defendants have opposed the motion. The Court reviews each basis for preclusion in turn.

Preclusion of Evidence

With regard to disclosure generally, a party aggrieved by the failure of another party to comply with discovery demands or orders concerning the demands can seek relief pursuant to CPLR 3124. The Court has discretion to impose discovery sanctions, including the striking of a pleading or the preclusion of evidence, where a party refuses to obey a discovery order or willfully fails to disclose information that ought to have been disclosed. CPLR 3126, *Galarza v. 25 Hope Street Assoc.*, 209 AD3d 984 (2d Dept 2022). The nature and degree of the penalty lies within the sound discretion of the Court. *Id.*

A. Untimely Expert Disclosure

As to the first ground for Plaintiff's relief, allegedly untimely disclosure, "CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." *Aversa v. Taubes*, 194 AD2d 580 (2d Dept 1993). The exclusion of an expert at trial based on late disclosure is consequently rarely imposed as a form of relief.

Plaintiffs' summary of the law on the instant motion as to CPLR 3101 expert disclosure has evolved dramatically from when they opposed Seq. #7. Just a few months ago, Plaintiffs asserted that expert preclusion is "a drastic remedy," "only appropriate after repeated discovery disagreements among the parties," not mandated "merely because of noncompliance with the statute," and an abuse of discretion unless the movant establishes prejudice. Plaintiffs'

Opposition to Seq. #7 at p. 3-4. Plaintiffs previously asserted that case law limits preclusion to instances where an expert's identity and topics of testimony are not known until the eve of trial or they belatedly introduce a novel theory. *Id.* at pp. 8-9. Plaintiffs went as far as asserting on Seq. #7 that their late disclosure of the Barretto Addendum actually "*helped*" (emphasis in original) Defendants by providing additional details about Dr. Barretto's opinions.

In *Rowan v Cross-Country Ski and Skate*, 42 AD3d 563 (2d Dept 2007), the court denied a motion to exclude an expert where "disclosure of the expert information was not made on the eve of trial since the plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin" and "potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial." *Compare Krimkevitch v Imperiale*, 104 AD3d 649 (2d Dept 2013) (expert report exchanged "immediately before trial" justified exclusion of expert testimony because opposing party had "no opportunity" to prepare or rebut the report).

Here, the Lockerbie Response was served 12 days before trial, approximately the same time that the Second Department held in *Rowan* was sufficient. Plaintiffs cannot show prejudice, which they correctly note is essential, because i) they agreed to the disclosure date and ii) the Lockerbie Response tries to refute the opinions of Plaintiff's own expert that date back to September 2024. The text of the NY Municipal Home Rule Law quoted by Dr. Lockerbie is public information that Dr. Barretto was free to review and discuss to the extent he believed that law or any other law has application to the viability of the district maps that he proposed. Plaintiffs themselves have been asserting as early as October 10, 2024 that they have the burden to prove "a reasonable policy or system" exists to replace the at-large system of the Town that they assert violates the NYVRA. Memorandum in Opposition to Seq. #5 at pp. 11-12. Thus, it should have come as no surprise to Plaintiffs that an expert for Defendants would assess whether

Dr. Barretto's proposed district maps are "reasonable", i.e., districts with attributes that would be viable under current law. Moreover, the Lockerbie Response arguably may *help* Plaintiffs by providing a potential roadmap for Defendants' cross-examination of Dr. Barretto at trial.

For these many reasons, the Court exercises its discretion to deny any preclusion based on timeliness of the Lockerbie Response, as no surprise and no prejudice has been found.

B. Lack of Qualifications

Plaintiffs challenge the credentials of Dr. Lockerbie to opine on issues of law. This basis for preclusion has an underlying premise, that the Lockerbie Response contains opinions about electoral law. When reviewed in detail, the Lockerbie Response contains no such opinions. Plaintiffs cite few specifics in their motion apart from Par. 16-17, where they assert that Dr. Lockerbie opined that Dr. Barretto ignored certain statutory elements for district mapping. Where a reasonable district plan is an essential element of Plaintiffs' case, the Court cannot preclude Defendants' expert from noting that, in his view, Plaintiffs have not offered such a plan.

Looking in detail, Dr. Lockerbie quotes five criteria from the NY Municipal Home Rule Law. Lockerbie Response at Par. 3-7. Dr. Lockerbie, however, never offers any opinion as to what was the intent of that legislation, as Plaintiffs suggest in their motion (interpretation is responsibility of the Court "especially where legislative intent is called into question"). *See* Affirmation in Support at Par. 29. For example, he does not try to define the first element of "nearly equal" population among districts. He does not offer any opinion on what degree of difference between population in districts is acceptable in the eyes of the Legislature and/or the courts. Likewise, Dr. Lockerbie does not try to define what the Legislature and the courts have decided is the permissible size and shape of a district pursuant to the requirement that the district be "as compact in form as practicable".

Instead, Dr. Lockerbie reviewed the Barretto Addendum and discusses whether and how Dr. Barretto took into account those five elements. For example, as to compactness, Dr. Lockerbie uses a “Roock score” when examining Dr. Baretto’s district plan, but Dr. Lockerbie does not assert that the Roock method of population assessment is legally required. Dr. Lockerbie states it is *his* chosen method and allegedly a reliable and accepted one to assess population distribution. To the extent compactness or any other legal elements cited in the Lockerbie Response are actually applicable to proposed districts for the Town, *which the Court need not and therefore does not decide at this time*, this Court will ultimately decide what the Legislature and the courts intended by those words based on the Court’s review of legislative history and case precedent.

C. Expert Opinions as to Legal Conclusions

This third basis for precluding the Lockerbie Response relies on the same mistaken premise as the second basis and is largely redundant of it. Dr. Lockerbie has not opined on pure questions of law, for all the aforementioned reasons. Therefore, there is no transgression by him into an area reserved for the Court.

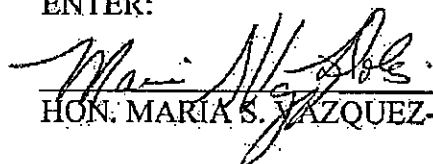
Upon the foregoing, it is hereby

ORDERED that Plaintiff’s motion is **DENIED**.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 9, 2025
Goshen, New York

ENTER:



HON. MARIA S. YAZQUEZ-DOLES, J.S.C.