

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PEDRO LOZANO, <i>et al.</i> ,	:	CIVIL ACTION NO. 3:06-cv-01586-JMM
	:	(Hon. James M. Munley)
Plaintiffs,	:	
v.	:	
	:	
CITY OF HAZLETON,	:	
	:	
Defendant.	:	

**PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE
THE TESTIMONY OF DEFENDANT'S PROPOSED
EXPERTS GEORGE BORJAS AND JARED LEWIS**

For the reasons set forth herein, as well as in the accompanying Memorandum of Law, Plaintiffs hereby move this Court to preclude the testimony of Defendant City of Hazleton's proposed experts, George Borjas, Ph.D. and Jared Lewis, as untimely, unduly prejudicial and irrelevant under Fed.R.Civ.P. 26 and this Court's Scheduling Orders of November 3, 2006 and January 8, 2007, and in support thereof aver:

1. Plaintiffs commenced this action on August 15, 2006, seeking relief against the City of Hazleton on the basis of its enactment of several Ordinances allegedly intended to address the impact of illegal immigration. Based upon subsequent amendments to the Ordinances at issue, Plaintiffs amended their Complaint on October 30, 2006, and January 12, 2007.

2. On November 3, 2006, this Court entered a Case Management Stipulation and Order ("CMO"), setting forth the specific deadlines for the parties' designations of expert witnesses and exchange of reports contemplated by

Fed.R.Civ.P. 26(a)(2). The CMO called for Plaintiffs to identify expert witnesses and produce their reports by November 30, 2006, and required the City to do the same by December 8, 2006. The CMO originally required the parties to conduct any expert depositions by January 5, 2007. This last deadline was extended by the Court to February 6, 2007.

3. Plaintiffs served their expert disclosures and reports upon the City of Hazleton on November 30, 2006.

4. Prior to the City's disclosure deadline and well in advance of the close of discovery, Plaintiffs served a supplemental expert disclosure and report on December 4, 2006.

5. On December 8, 2006, the City served its expert disclosures and reports, identifying Steven Camarota and John J. Martin only. The City did not state that it intended to disclose or attempt to call additional experts.

6. At approximately 5 p.m. on Friday, February 2, 2007, two business days prior to the extended close of discovery, Hazleton faxed a copy of an expert report prepared by George Borjas, Ph.D., as well as Dr. Borjas' Curriculum Vitae to Plaintiffs' counsel.

7. Then on February 6, 2007 at 5 p.m., when discovery was scheduled to conclude, the Defendant identified Jared Lewis as an additional expert, and forwarded a copy of Mr. Lewis' report, without accompanying Mr. Lewis'

curriculum vitae, or a list of publications and prior engagements as an expert.

8. The Federal Rules of Civil Procedure place a mandatory obligation on parties to timely (a) disclose the identity of their expert witnesses and (b) produce copies of their detailed expert reports.

9. Rule 26(a)(2) is intended to insure minimal fairness by providing that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.

10. The ‘automatic and mandatory sanction’ for a violation of Rule 26(a) is preclusion, unless the party to be sanctioned can show that its violation of the Rule was either justified or harmless.

11. The CMO governing the deadline for submitting expert reports renders Hazleton’s disclosures nearly two months late.

12. Due to the scheduled closure of discovery on February 6, 2007, and the scheduled trial date of March 12, 2007, Plaintiffs cannot now reasonably undertake the tasks necessary to challenge the Borjas and Lewis reports in time for trial.

13. Hazleton’s correspondence offered no justification for its delay in producing expert reports until February of 2007.

14. Because the defendant has delayed identifying its experts and producing their reports without necessity, justification or valid excuse, Borjas and

Lewis should be precluded from testifying in this matter.

15. Moreover, the Borjas and Lewis reports fail to meet the necessary formal and substantive requirements to be admissible, as set forth in the Federal Rules of Civil Procedure.

16. Finally, as more fully set forth in Plaintiffs' supporting memorandum of Law, Messrs. Borjas and Lewis' reports do not meet the standard of Fed.R.Evid. 702, because they do not address the factual and legal issues in contention here, and thus will not assist the fact-finder in this case.

WHEREFORE, for all of the foregoing reasons, as well as those set forth in the accompanying Memorandum of Law, Plaintiffs respectfully request that this Honorable Court preclude the City of Hazleton from calling George Borjas, Ph.D. and Jared Lewis as expert witnesses at trial.

Dated: February 9, 2007

Respectfully submitted,

By: /s/ Thomas G. Wilkinson, Jr.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

PEDRO LOZANO, <i>et al.</i> ,	:	CIVIL ACTION NO. 3:06-cv-01586-JMM
	:	(Hon. James M. Munley)
Plaintiffs,	:	
v.	:	
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CITY OF HAZLETON,	:	
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Defendant.	:	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
IN LIMINE TO PRECLUDE THE TESTIMONY OF DEFENDANT'S
PROPOSED EXPERTS GEORGE BORJAS AND JARED LEWIS**

Plaintiffs hereby move this Court to preclude the testimony of Defendant City of Hazleton's proposed experts George Borjas, Ph.D. and Jared Lewis as untimely, unduly prejudicial and irrelevant under Fed.R.Civ.P. 26 and this Court's Scheduling Orders of November 3, 2006 and January 8, 2007.

1. SUMMARY OF PERTINENT FACTS

Plaintiffs commenced this action on August 15, 2006, seeking relief against the City of Hazleton on the basis of its enactment of several Ordinances allegedly intended to address the impact of illegal immigration. Based upon subsequent amendments to the Ordinances at issue, Plaintiffs amended their Complaint on October 30, 2006, and January 12, 2007.

On November 3, 2006, this Court entered a case management Stipulation and Order ("CMO"), setting forth the specific deadlines for the parties' designations of expert witnesses and exchange of reports contemplated by Fed.R.Civ.P. 26(a)(2). The CMO called for Plaintiffs to identify expert witnesses and produce their reports by November 30, 2006, and required the City to do the

same by December 8, 2006. The CMO originally required the parties to conduct any expert depositions by January 5, 2007. This last deadline was extended by the Court to February 6, 2007.

Plaintiffs served their expert disclosures and reports upon the City of Hazleton on November 30, 2006, identifying Stephen Yale-Loehr, Ph.D.; Leighton Ku, Ph.D.; and Marc R. Rosenblum. Prior to the City's disclosure deadline and well in advance of the close of discovery, Plaintiffs served a supplemental expert disclosure and report on December 4, 2006, identifying Rubén G. Rumbaut, Ph.D. Copies of Plaintiffs' original and Supplemental Expert Disclosure are attached as Exhibits "A" and "B" hereto, respectively. On December 8, 2006, the City served its expert disclosures and reports, identifying Steven Camarota and John J. Martin only.¹ The Defendant's Expert Disclosure is attached as Exhibit "C."

At approximately 5 p.m. on Friday, February 2, 2007, two business days prior to the close of discovery, Hazleton faxed a copy of an expert report prepared by George Borjas, Ph.D., as well as Dr. Borjas' Curriculum Vitae to Plaintiffs' counsel.² The February 2, 2007 fax is attached as Exhibit "D." Then on February 6, 2007 at 5 p.m., the very moment when discovery was scheduled to conclude, the Defendant identified Jared Lewis as an additional expert, and forwarded a copy of Mr. Lewis' report. Hazleton's February 6, 2007 correspondence is attached as Exhibit "E."

¹ For the purposes of this Motion, Plaintiffs do not take issue with the timeliness of the disclosures identifying Camarota and Martin.

² Notwithstanding the terms of the City of Hazleton's letter, the Plaintiffs have been unable to locate any pleading, discovery or correspondence identifying Dr. Borjas as a potential expert.

2. ARGUMENT

A. Exclusion of Messrs. Borjas and Lewis' Testimony is Appropriate Because Their Reports Were Untimely Under Rule 26(a)(2)(C)

The Federal Rules of Civil Procedure place a mandatory obligation on parties to timely (a) disclose the identity of their expert witnesses and (b) produce copies of their expert reports. Fed.R.Civ.P. 26(a)(2) requires a detailed written report with respect to any witness retained to give expert testimony “at the times and in the sequence directed by the court.” Fed. R. Civ. P. 26(a)(2)(C).

Rule 26(a)(2) is intended to insure that “opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.” Fed. R. Civ. P. 26(a)(2)(C) *Committee Note* (1993 amendments); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). Rule 26(a) thus seeks to prevent an ambush, resulting in surprise or prejudice, of undisclosed or late disclosed evidence. *Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992). Courts routinely hold that the “‘automatic sanction’ for a violation of Rule 26(a) is preclusion.” *See, e.g., Giladi v. Strauch*, 2001 U.S. Dist. LEXIS 4645, at *8-9 (S.D.N.Y. Apr. 16, 2001); *LaMarca v. United States*, 31 F. Supp. 2d 110, 122 (E.D.N.Y. 1998).

The exclusion of expert testimony is “automatic and mandatory . . . unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless.” *Finely v. Marathon Oil. Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). Indeed, Fed.R.Civ.P. 37(c)(1) calls for the exclusion of evidence not disclosed in accordance with Rule 26(a) unless: (1) the non-disclosing party’s delay is substantially justified, or (2) the delay is harmless. *Tolerico v. Home Depot*, 205 F.R.D. 169, 175 (M.D. Pa. 2002). Hazleton bears the burden of

proving that its dilatory conduct was either substantially justified or harmless. *Id.*

Here, the CMO governing the deadline for submitting expert reports renders Hazleton's disclosures two months late. Due to the scheduled closure of discovery on February 6, 2007, and the trial date of March 12, 2007, Plaintiffs cannot now reasonably undertake the tasks necessary to challenge the Borjas and Lewis reports in time. Hazleton's decision to wait until one month prior to the commencement of trial is, at best, a dilatory tactic, particularly when one of the reports, Mr. Lewis', is dated December 8, 2006. Hazleton's correspondence offered no justification for its delay in producing expert reports. Because the defendant has delayed identifying its experts and producing their reports without necessity, justification or valid excuse, Borjas and Lewis should be precluded from testifying in this matter.

B. The Borjas and Lewis Reports Fail To Disclose All Information Required By the Federal Rules of Civil Procedure

Every expert report must be in writing and signed by the expert,³ and must contain: (a) a complete statement of all the expert's opinions and the basis and reasons therefor; (b) the data and information considered by the expert, including documents provided by counsel; (c) any exhibits to be used as support for or a summary of the opinions; (d) the qualifications of the expert and all publications authored by the expert in the past 10 years; (e) the expert's compensation for his review and testimony; and (f) a list of all other cases in which the expert has testified at trial or at a deposition in the past 4 years. Fed.R.Civ.P. 26(a)(2)(B). The report itself must contain all of the required information with considerable detail, and does not satisfy Rule 26(a)(2)(B) by referencing extraneous documents. *Smith v. State Farm Fire and Casualty Co.*, 164 F.R.D. 49 (S.D.W.Va. 1995).

³ *Gust v. Jones*, 162 F.3d 587 (10th Cir. 1998).

The Borjas and Lewis reports fail to meet the necessary and even the most basic requirements to be admissible. Most glaringly, neither one of Hazleton's experts even signed their reports.

As to Mr. Lewis' report, first, it contains no information on its author's educational background. Second, although Mr. Lewis refers to his "numerous articles" on gang-related activity, his expert report fails to list even one such publication. Third, Mr. Lewis fails to cite any articles, data or statistics to support his conclusions. Fourth, Mr. Lewis' report makes no mention of its author's compensation. Fifth, Mr. Lewis does not state whether he has ever served as an expert witness in the past. Sixth, and perhaps most significantly, Mr. Lewis has altogether failed to identify the information he reviewed in order to prepare his report. *See* Exhibits "D" and "E." The City's incomplete disclosure of information on its expert reports prejudices the Plaintiffs' ability to cross-examine the witnesses on the stand. The experts should, therefore, be excluded.

C. The Borjas and Lewis Reports Are Irrelevant to this Case

In addition to the deficiencies listed above, Messrs. Borjas and Lewis' reports do not meet the standard of Fed.R.Evid. 702, because they will not assist the Court in understanding the relevant issues in this case. Initially, the City's new experts are not identified as rebuttal witnesses, and neither reviewed the Plaintiffs' expert reports. The Borjas report in particular only addresses the potential employment effects of the disputed Ordinances. His analysis, however, is without reference to the questions in dispute here, *i.e.*, whether "illegal immigration" brings about the social ills described in the disputed Ordinances, and whether the Ordinances are constitutional. In fact Borjas readily admits that he has never even

reviewed any Hazleton-specific information (Page 5).

Mr. Lewis' report is also irrelevant, as Hazleton is not a rural area, the disputed Ordinances make no reference to gangs in their preface or findings, and there was no gang-related testimony before City Council prior to their adoption. Further, the City has never been able to determine the degree of involvement of "illegal aliens" in local gangs.⁴ Not surprisingly, Mr. Lewis' discussion does not focus on Hazleton. Mr. Lewis' statements concerning gangs' efforts to pursue young individuals in search of a "sense of belonging" (pages 8-10), or claiming that investigations throughout the country, including Pennsylvania, have resulted in successful prosecution of gang members (page 9), are of no import to the legality and constitutionality of the disputed Ordinances. Indeed, Mr. Lewis says nothing about registration of tenants, business permits, Code Enforcement, etc. In sum, because Messrs. Borjas and Lewis provide no relevant information to the dispute at hand, they should be precluded from testifying at trial.

3. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Honorable Court preclude the City of Hazleton from calling George Borjas, Ph.D. and Jared Lewis as expert witnesses at trial.

Dated: February 9, 2007

Respectfully submitted,

By: /s/ Thomas G. Wilkinson, Jr.

⁴ See December 14, 2006 Deposition of Louis Barletta, Exhibit "F," at 202:1-24, 205:3-11; December 12, 2006 Deposition of Robert Ferdinand, Exhibit "G," at 109:12-110:15, 110:21-111:7, 111:17-112:1, 112:21-113:1. While the City suggested it could produce such data, 206:9-207:11, it failed to do so in discovery. See Wilkinson 12/19/06 letter to Adair, attached at Exhibit "H."

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CERTIFICATE OF SERVICE

I, Thomas G. Wilkinson, Jr., counsel for Plaintiffs, hereby certify that I did cause a true and correct copy of Plaintiffs' Motion in Limine to Preclude the Testimony of Defendant's Proposed Experts, George Borjas and Jared Lewis, and the Memorandum of Law in support thereof, to be served U.S. Mail, postage prepaid, to counsel addressed as follows:

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Dated: February 9, 2007

BY: /s/ Thomas G. Wilkinson, Jr.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

PEDRO LOZANO, <i>et al.</i> ,	:	CIVIL ACTION NO. 3:06-cv-01586-JMM
	:	(Hon. James M. Munley)
Plaintiffs,	:	
v.	:	
	:	
CITY OF HAZLETON,	:	
	:	
Defendant.	:	

ORDER

On this _____ day of _____, 2007, upon consideration of Plaintiffs' Motion in Limine to Preclude the Testimony of Defendant's Proposed Experts, George Borjas and Jared Lewis, and the Defendant's Opposition thereto, it is hereby **ORDERED** that said Motion is **GRANTED**, and that the City of Hazleton is hereby precluded from calling George Borjas, Ph.D. and Jared Lewis as expert witnesses at trial.

JAMES M. MUNLEY, J.