

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 20-cv-81205-RAR**

**SECURITIES AND EXCHANGE COMMISSION,**

**PLAINTIFF,**

**V.**

**COMPLETE BUSINESS SOLUTIONS GROUP,  
ET AL.,**

**DEFENDANTS.**

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**PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO STRIKE**

According to Defendants Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta, the Rules do not apply to them. As the Defendants would have it, parties can ignore initial disclosure and other disclosure obligations under Federal Rule of Civil Procedure 26 and the Court's Scheduling Orders, ignore the schedule for expert witness discovery, ignore the Court-ordered deadline for rebuttal expert witness reports, fail to produce a single document in a case under Rule 26 or otherwise, and then file a rebuttal expert witness report – by a previously undisclosed witness – more than one year after the deadline for doing so. To support their position, the Defendants make a series of arguments, each of which fails for the reasons that follow.

First, the Defendants argue that the Dunkelberger Report is proper because it is the substantively the same as the Receiver's Declaration the Commission filed with its Motion for Final Judgment. This is incorrect for at least two reasons:

- (a) As an initial matter, the identity of the Receiver was disclosed to Defendants at the outset of this case, and therefore the Receiver is not in the same posture as Dunkelberger, whose existence has never been disclosed by the Defendants in this case. The records the Receiver summarizes were produced to the Defendants during the litigation of this case; by contrast, the Defendants asserted the Fifth Amendment in response to all discovery requests and did not produce a single document (under Rule 26 initial disclosures or otherwise) relating to or relied upon by Dunkelberger other than his report.

- (b) The Receiver Declaration and Dunkelberger Report are not substantively similar. The Receiver's Declaration merely summarizes the figures stated in the Defendants' own Quickbooks records and nothing more. It is not an expert report and provides a summary and not an opinion. The Dunkelberger Report, on the other hand, provides opinions about the work done by the Defendants' former expert witness Joel Glick and the Commission's expert witness Melissa Davis.

Second, the Defendants argue that the Consent Judgments "specifically permit" them to file the expert report. This is incorrect. In truth, the Consent Judgments provide that the parties may file "affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence...." The unsworn Dunkelberger report is none of these things. It is, as the Defendants call it in their Notice accompanying the filing of the Dunkelberger report, a newly minted expert report from a never-disclosed witness. Nowhere in the Consent Judgments does the Court state that Rule 26 no longer applies.

Third, the Defendants argue that because Dunkelberger is not an expert retained to testify at *trial*, the Defendants did not ever have to disclose his existence or documents related to him because Rule 26(a)(2)(A) states that parties must disclose identities of experts they intend to use at *trial*. This argument fails for at least the following reasons:

- (a) Rule 26(a)(1)(A)(i) requires the disclosure of individuals likely to have discoverable information about claims and defenses unless offered solely for impeachment or explicitly exempted by Rule 26(a)(1)(B). Rule 26(a)(1)(B) sets forth a list of such proceedings where individuals need not be disclosed, and none are relevant to the situation presented here. The parties exchanged initial disclosures in August 2020 and the Commission has supplemented its disclosures since then. The Defendants have never disclosed Dunkelberger, at any time, in their initial disclosures or pursuant to their continuing duty to supplement initial disclosures pursuant to Rule 26(e).
- (b) Rule 26(a)(1)(A)(ii) requires a copy or description of all documents a party may use to support its claims or defenses. The Defendants not only failed to identify any such documents related to Dunkelberger but produced *no* Rule 26 documents in this case despite repeated requests for them during the litigation of this case.
- (c) Rule 26(a)(1)(D) provides that if expert witness is intended solely to contradict or rebut the other party's expert evidence, then it must be identified within 30 days after the

other party's disclosure. Dunkelberger's expert report includes opinions to rebut those of Melissa Davis, the Commission's expert, and states so explicitly. Dunkelberger's report is thus a rebuttal expert report offered nearly one year after the deadline for doing so. In addition to Rule 26(a)(1)(D), the Court ordered a schedule for rebuttal expert reports and they were due in 2021; in fact, the Defendants presented a rebuttal expert report at that time from their first expert witness Joel Glick. Now they offer a second one, one year after the deadline for rebuttal reports.

(d) Additionally, the Local Rules explicitly provide that the Court's scheduling order is of primary importance:

Regardless of whether the action is exempt pursuant to Federal Rule of Civil Procedure 26(a)(1)(B), the parties are required to comply with any pretrial orders by the Court and the requirements of this Local Rule including, but not limited to, orders setting pretrial conferences and establishing deadlines by which the parties' counsel must meet, prepare and submit pretrial stipulations, complete discovery, exchange reports of expert witnesses, and submit memoranda of law and proposed jury instructions. – Local Rule 16.1(b)(6).

(e) Here, the Court's scheduling-related Order set forth a schedule for exchanging "expert witness summaries or reports" last year. The Consent Judgments did not modify that and do not mention new expert reports in the list of discovery permitted to be filed. Nor would they have – because we had already completed this expert witness discovery, exchanged expert reports about ill-gotten gains, and deposed each other's expert witnesses about these issues during the time period for expert witness discovery. The Defendants now seek to add new rebuttal experts outside of the time the Court provides, and to use a new expert to vouch for their first expert.

Fourth, the Defendants rely on civil cases from New Mexico and Wisconsin to argue that they can present an expert witness without making expert witness disclosures. However, none of these cases involve the situation here where the Defendants never disclosed the identity of the expert witness or documents relating to him and offered the witness as a rebuttal expert witness long after the Court deadline for doing so.

Fifth, the Defendants combat the Commission's assertion that the Dunkelberger report is improper by ignoring two critical issues and misrepresenting another. They ignore the fact that the Dunkelberger report is a late-filed expert report that vouches for the Glick report filed by the Defendants and *rebutts* the Davis report filed the Commission despite the fact that all rebuttal

reports were due – pursuant to this Court’s Order – last year. They ignore the fact that the Commission sought in discovery documents and information relating to disgorgement and ill-gotten gains, and the Defendants either asserted the Fifth Amendment or produced no documents, and never supplemented their discovery responses upon receipt of the responsive Dunkelberger documents when they received them. They concealed this evidence and are now improperly attempting to gain from that conduct.

The Defendants misrepresent the Receiver’s declaration as “vouching” for the calculations in the Davis report. This is simply not true. The Receiver’s declaration does not nothing more that summarize the figures in the *Defendants’* own Quickbooks records showing how much was raised from investors and how much was paid to investors and agent funds. The face of the Receiver’s declaration states what figures he is summarizing and he does not vouch for Davis or her report. The Receiver’s declaration is not an expert witness opinion, and indeed Davis’ report does not give an expert opinion about these figures; instead, Davis merely states these figures in one paragraph within the lengthy expert report because these are the numbers that appear in the Defendants’ own business records.

Sixth, the Defendants ignore the arguments that they failed to respond to any discovery requests about disgorgement issues and failed to produce any documents – including but not limited to documents relating to Dunkelberger and his work. As set forth in the Motion and in the discovery requests filed by the Commission, the Defendants produced no Rule 26 documents despite numerous requests to do so, failed to make the Court-ordered sworn accountings about the investor funds received, and produced no documents requested in discovery.<sup>1</sup>

Expert witness discovery ended. Dunkelberger’s report covers the same things the parties’ expert witnesses opined on during the expert witness discovery phase of this case and in fact Dunkelberger merely vouches for the Defendant’s first expert report and rebuts the Commission’s expert report – one year after the deadline for such rebuttal reports. The Dunkelberger report will

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<sup>1</sup> In addition to emailing Defense counsel to request the documents identified in their Rule 26 disclosures, the Commission sought discovery including but not limited to all documents the Defendants had received in connection with this case that had not been produced to them by the Commission (ECF No 1213-14 #20), how much McElhone – directly and through Par Funding – hd received from investors in connection with the note offering (ECF No 1213-15 #8), the production of all documents/correspondence related to individuals identified in Rule 26 disclosures (ECF No 1213-17 #16), documents reflecting ill-gotten gains (ECF No 1213-17 #17).

essentially have the parties repeating the expert witness discovery conducted a year ago. It will require extensive resources because this case involves dense financial records, the re-retention of an expert witness by the Commission, discovery and a rebuttal report. If the Court permits the Defendants another round of expert discovery, then the Court should at a minimum strike the portion of Dunkelberger's expert report that is a rebuttal report of Davis' work. Expert rebuttal reports were due a year ago under the Court's scheduling order.

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Respectfully Submitted,  
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