| **Agora Gourmet Foods Inc. v Edge** |
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| 2021 NY Slip Op 32036(U) |
| April 6, 2021 |
| Supreme Court, Westchester County |
| Docket Number: 60365/2018 |
| Judge: Gretchen Walsh |
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

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AGORA GOURMET FOODS INC.,

Plaintiff,

- against -

KALLIE EDGE, DIMITRIOUS VITALIOTIS, and VASILIOS GARGEROS,

Defendants.

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Index No. 60365/2018
Motion Seq. Nos. 8 & 9
Motion Date: 2/5/2021
**DECISION & ORDER**

WALSH, J.

The following e-filed documents listed in NYSCEF by Document Numbers 333-366 and 380-383 were read on this motion by Defendants Kallie Edge ("Edge"), Dimitrious Vitaliotis ("Vitaliotis") and Vasilios Gargeros ("Gargeros") (collectively "Defendants") for an order pursuant to 22 NYCRR 100.3 disqualifying this Court from this matter and transferring this case to another part or judge for remaining pre-trial and trial matters, including the *in limine* branch of this motion, or, in the alternative, for an order pursuant to CPLR 3101(d) and Commercial Division Rule 13(c) (22 NYCRR 202.70) precluding Plaintiff Agora Gourmet Foods ("Plaintiff" or "Agora") from offering any expert testimony, reports and/or evidence at trial. Plaintiff opposes the motion. Upon the foregoing papers, and for the reasons set forth herein, the motion is granted in part and denied in part.

## FACTUAL AND PROCEDURAL HISTORY

The factual and procedural background of this case is set forth in this Court's Decision and Order dated October 20, 2020 (the "Jury Demand Decision"), which is incorporated herein by

reference, and which in turn incorporates this Court's Decision and Order dated August 28, 2020 (the "Summary Judgment Decision").

The Court initially set a trial date of November 9, 2020 but subsequently postponed the trial date to November 12, 2020 due to Plaintiff's trial counsel's childcare issue. In its Jury Demand Decision, the Court granted Agora the right to withdraw its demand for a trial by jury contained in its Note of Issue. On October 28, 2020, with their appeal of the Jury Demand Decision to the Appellate Division, Second Department, Defendants also moved for a stay of trial pending the appeal. The Second Department granted a temporary stay of the trial pending a determination of the underlying motion. Thereafter, on December 11, 2020, the Appellate Division issued an order denying Defendants' motion for a stay of the trial pending appeal (Affirmation in Opposition of Kate Roberts, Esq. in Opposition dated December 31, 2020 ["Roberts Opp. Aff."], Ex. C). On November 25, 2020, Defendants filed this motion.

## DISCUSSION

### *A. Defendants' Motion for Recusal*

In support of their motion, Defendants submit: (1) a combined affirmation of Carl L. Finger, Esq., David M. Dahan, Esq., and Jonathan S. Klein, Esq. dated November 25, 2020 ("Defs' Combined Aff."), together with its annexed exhibits; and (2) a memorandum of law dated November 25, 2020 ("Defs' Mem."). In opposition, Plaintiff submits: (1) the Roberts Opp. Aff., together with its annexed exhibits; and (2) a memorandum of law in opposition dated December 31, 2020 ("Plf's Opp. Mem."). In further support of Defendants' motion, Defendants submit a combined reply affirmation of Carl L. Finger, Esq., David M. Dahan, Esq., and Jonathan S. Klein, Esq. dated January 25, 2021, together with its annexed exhibits ("Defs' Combined Reply Aff."); and (2) a reply memorandum of law dated January 25, 2021 ("Reply Mem.").

In its motion, Defendants seek this Court's disqualification pursuant to 22 NYCRR 100.3(E)(1). Essentially Defendants contend that this Court should recuse itself because it "harbors an inherent bias against and antagonism towards Defendants" (Defs' Mem. at 3).

Section 100.3(E)(1) of the New York Codes, Rules and Regulations provides that "[a]

judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) (i) the judge has a personal bias or prejudice concerning a party ...." (22 NYCRR § 100.3[E][1]).

It is well settled that "[a]bsent a legal disqualification under Judiciary Law § 14,[1] the determination of a motion for recusal of the Justice presiding based on alleged impropriety, bias, or prejudice is within the discretion and personal conscience of the court" (*Nationstar Mtge., LLC v Balducci,* 165 AD3d 959, 960 [2d Dept 2018]; *see also Matter of Grucci v Villanti*, 108 AD3d 626, 627 [2d Dept 2013]; *People v Smith*, 63 NY2d 41, 68 [1984], *cert denied* 469 US 1227 [1985]). "'Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist' ... The denial of a recusal motion will constitute an improvident exercise of discretion only where the movant puts forth demonstrable proof of the judge's bias or prejudgment" (*City of Yonkers v Yonkers Fire Fighters, Local 628*, 175 AD3d 676, 678 [2d Dept 2019], *lv dismissed* 34 NY3d 1085 [2019]). "When there is no ground for recusal, recusal should not be ordered, especially when prejudice will result" (*Silber v Silber*, 84 AD3d 931 [2d Dept 2011]). In addition, "where ... a party inexplicitly withholds an allegation of bias until after the court adversely rules against it, denial of recusal motion is generally warranted and the courts' discretion in so ruling will not be disturbed" (*Glatzer v Bear, Stearns & Co.*, 95 AD3d 707, 707 [1st Dept 2012]). Based on the foregoing precedent, simply because Defendants disagree with the rulings of this Court does not give rise to a basis for disqualification (*see, e.g., Matter of Brooks v Greene*, 153 AD3d 1621 [4th Dept 2017]; *Board of Educ. of School Dist. of City of Buffalo v Pisa*, 55 AD2d 128, 135 [4th Dept 1976]). Moreover, the timing of this motion, following numerous decisions issued by this Court and on the eve of trial, is highly suspect.

In support of their contention that the Court is biased and prejudiced against Defendants, Defendants first argue that the Court improperly advised Plaintiff of the claims it should bring by

[1] Defendants concede that recusal in this instance is not based on Judiciary Law § 14 (Defs' Mem. at 2).

stating the following in a footnote in its Decision and Order dated May 2, 2019 (the "Motion to Dismiss Decision"), which granted in part and denied in part, Defendants' motion to dismiss:

> At present, based on the allegations set forth in the Amended Complaint and the Affidavit of George Paganis, Plaintiff appears to allege facts that might support a claim for fraudulent concealment as well as fraudulent misrepresentation. The Amended Complaint currently only contains a claim for fraudulent misrepresentation. If Plaintiff wishes to pursue a claim for fraudulent concealment, he may request a Commercial Division Rule 24 pre-motion conference and seek leave to amend the Amended Complaint.

(NYSCEF Doc. No. 335 [Motion to Dismiss Decision] at 18 n 3).

Defendants' position is without merit. Defendants moved to dismiss, in part, pursuant to CPLR 3211(a)(7). The legal standards to be applied in evaluating such a motion are well-settled. Where, as in this case, the plaintiff submits evidentiary material in opposition to defendants' motion, the Court is *required* to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). The Court was obligated to evaluate the evidence submitted by Plaintiff, here the Amended Complaint along with its attached exhibits, as well as the Affidavit of George Paganis (Plaintiff's principal), which was submitted in opposition to Defendants' motion to dismiss. In so doing, the Court was merely determining, as it is obligated to do pursuant to CPLR 3211(a)(7), that "*[a]t present*, based on the allegations set forth in the Amended Complaint and the Affidavit of George Paganis, Plaintiff *appears* to allege facts that *might* support a claim for fraudulent concealment" and in no way has "obviously already evaluated" the merits of Plaintiff's claim (Defs' Mem. at 5).[2]

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[2] The lone authority cited by Defendants, *Matter of Carroll v Gammerman* (193 AD2d 202, 206 [1st Dept 1993]), is *inapposite* as it involved a court's attempt to compel testimony from witnesses that had not been deposed or called by the parties at trial, rather than in the context of examining evidence provided by a plaintiff in opposition to a motion to dismiss to determine if the plaintiff has a cause of action even though it may have not stated one.

Defendants next contend that the Court exhibited bias by failing to dismiss the case despite finding that the then-Plaintiff, George Paganis, lacked standing arguing that "[t]here was absolutely no legal basis not to dismiss the case at that juncture" rather than permitting the amendment of the complaint and substitution of Agora (Defs' Mem. at 6-10). In its October 28, 2019 Decision and Order (the "Amendment Decision"), however, the Court made clear that its decision that Agora had standing and that Plaintiff should be permitted to substitute Agora as Plaintiff was not made out of bias against Defendants, but rather was based on well-established legal principles (NYSCEF Doc. No. 336 [Amendment Decision] at 5-6; *see also* NYSCEF Doc. No. 335 [Motion to Dismiss Decision] at 16-17).[3] In contrast, Defendants offer no law to the contrary and merely rely on their own conclusory argument that the Court "kept the case 'alive' for Plaintiff's benefit and to the detriment of Defendants" (Defs' Mem. at 5).

Third, Defendants argue that the Court improperly: (1) defaulted Defendants "as retribution for not consenting to Plaintiff's Second Amended Complaint"; and (2) required Defendants to compensate Plaintiff's counsel for her time in appearing at the conference on December 11, 2019 (the "December 2019 conference") at which counsel for Edge and Gargeros failed to appear resulting in the default judgment against Edge and Gargeros pursuant to 22 NYCRR 202.27[4] (Defs'

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[3] "Turning to the propriety of substituting Agora for Paganis, courts may grant leave to amend to substitute parties who could have brought the claim to begin with as long as it does not result in surprise or prejudice to the non-moving party (*Fulgum* v *Town of Corllandt Manor,* 19 AD3d 444, 445-46 [2d Dept 2005]; *see also Catnap LLC* v *Cammeby's Mgt. Co., LLC,* 170 AD3d 1103, 1106 [2d Dept 2019]; *United Fairness, Inc.* v *Town of Woodbury,* 113 AD3d 754, 755 [2d Dept 2014])."'It is well settled that an amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense'" (*JCD Farms, Inc.,* v *Juul-Nielsen,* 300 AD2d 446, 446 [2d Dept 2002] [citations omitted]; *D'Angelo* v *Kujawski,* 164 AD3d 648 ,649 [2d Dept 2018]; *United Fairness, Inc.* v *Town of Woodbury,* 113 AD3d 754, 755 [2d Dept 2014]) (NYSCEF Doc. No. 336 [Amendment Decision] at 5).

[4] Pursuant to 22 NYCRR 202.27, "[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as

Mem. at 10-15). However, as documented in the record of the December 2019 conference (NYSCEF Doc. No. 339), even though this Court scheduled the conference for 9:30 a.m., the Court waited until after 11:00 a.m. to default Defendants Edge and Gargeros based on their counsel's failure to appear after numerous attempts were made to contact counsel to get them to timely appear.

While Defendants attempt to make excuses for counsel's failure to appear at a court-ordered conference, the fact remains that all Defendants were not present and they did not contact the Court for an adjournment prior to their failure to appear. The transcript of the proceedings reflects that it was counsel's failure to appear that was the basis for the Court's issuance of the default judgment:

> THE COURT: Good morning. This matter was for 9:30 this morning, pursuant to my trial readiness order, and I understand that the other two defendants' counsels saw fit not to appear this morning; right?
>
> MR. DAHAN: I do not believe that's accurate, Your Honor.
>
> THE COURT: How is it not accurate, Counsel?
>
> MR. DAHAN: They have other matters.
>
> THE COURT: Well, did they ask for an adjournment today?
>
> MR. DAHAN: Did they ask for an adjournment? Not to my knowledge.
>
> THE COURT: No, not to my knowledge.
>
> MR. DAHAN: Speaking for myself –
>
> THE COURT: Yes. You're fine. You're here. Not a problem. The other two are not. I haven't heard a peep out of them. Has anybody heard anything from them?
>
> MS. ROBERTS: We were speaking this morning, emailing back and forth about discovery. I reminded everybody, see you at 9:30 for the conference.
>
> THE COURT: Okay, and they saw fit not to show so, I see fit to grant a default to plaintiff, as to those two defendants, basically, because they did not appear at the

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follows: (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest."

conference that they were fully apprised of pursuant to my November 27, 2019 trial readiness order.

No note of issue was filed; correct?

MR. DAHAN: Correct (NYSCEF Doc. No. 339 at 2-3).

Moreover, contrary to Defendants' counsel's assertions, the Court did not require that Defendants Edge and Gargeros pay for Plaintiff's counsel's time in waiting for Defendants' counsel to appear at the December 2019 conference and in opposing Defendants' motion to vacate their default. Instead, as reflected on the record of the conference held on February 3, 2020, Defendants' and Plaintiff's counsel voluntarily entered into the stipulation to vacate the default, which was conditioned upon Defendants paying Plaintiff for that lost time (NYSCEF Doc. No. 340 at 14-19).[5]

Fourth, Defendants contend that the Court exhibited impartiality based on a "preoccupation with Defendants' filing methods" including its admonishment of Defendants for filing papers that exceeded the word count limits under Commercial Division Rule 17 (Defs' Mem. at 15-19). Specifically, Defendants point to a footnote in the Summary Judgment Decision in which the Court stated:

> Defendants filed a single motion for summary judgment (Motion Sequence No. 6) and in contravention of Commercial Division Rule 17, they filed a memorandum of law totaling 51 pages, significantly over the permitted word count (NYSCEF Doc. No. 234). The Court held a conference where Defendants were advised that their brief was too long and that they would need to resubmit a brief in accordance with Commercial Division Rule 17. Defendants proceeded to each submit a separate memorandum of law, each of which largely repeats the other Defendants' memoranda of law and unduly burdens the Court. In addition, as only one motion was filed, it was impermissible for each Defendant to file a separate memorandum of law (NYSCEF Doc. No. 264-266). Accordingly, although the original memorandum did not comply with Commercial Division Rule 17, the Court has

[5] The stipulation on the record resolved the motion to vacate by Defendants agreeing to pay Plaintiff's counsel $900 for the time expended at the December 11, 2019 conference and putting in an opposition to the motion to vacate so that Plaintiff's client would not bear these unnecessary costs (Defs' Combined Aff., Ex. 5 at 14).

> exercised its discretion and considered this memorandum of law, and not Defendants' three improper memoranda of law, in deciding this motion.

(NYSCEF Doc. No. 105 [Summary Judgment Decision] at 1 n 1).

As is plain from the language of the footnote, although the Court raised the issue of Defendants' failure to comply with Rule 17, it nevertheless considered their submission. Moreover, the Court similarly admonished Plaintiff for filing papers in violation of Rule 17, but nevertheless considered Plaintiff's papers (*id.* at 6 n 10).[6] It is axiomatic that a fundamental job of the Court is active case management, including reducing undue burden on the Court, litigants, and clients, as well as ensuring that litigants and their counsel comply with Court rules (including this Court's Part Rules and the Commercial Division Rules) (*Grisi v Shainswit*, 119 AD2d 418, 421 [1st Dept 1986] ["courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the courts of litigation before them"]; *see also Taks v Stern*, 14 AD2d 585 [2d Dept 1961]). The Court's reminder to counsel to comply with the Commercial Division Rules, particularly when clearly enforced equally against all parties, can hardly be considered evidence of a bias against Defendants.

Fifth, Defendants contend that the Court "predetermined" its ruling against Defendants on Plaintiff's motion to vacate the Note of Issue with Jury Demand because the Court "preferred" to preside over a bench trial to decide the case based on its "unyielding and manifest bias against Defendants" and that, in issuing its Jury Demand Decision the Court did not "correctly analyz[e] all of the legal and factual issues implicated" (Defs' Mem. at 19-22). Again, while Defendants might not agree with the Court's ruling, it was supported by significant legal and factual analysis, which will not be repeated here (NYSCEF Doc. No. 349 [Jury Demand Decision] at 7-12). Moreover, Defendants moved to stay the trial pending their appeal of this Court's Jury Demand Decision to the Appellate Division, Second Department and, while the Second Department granted

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[6] As Plaintiff points out, the Court has admonished Plaintiff for failing to follow the Court's rules at other points in the litigation, including by denying Plaintiff's Cross-Motion to Dismiss Defendants' Counter-Claims without prejudice for failure to follow Commercial Division Rule 24 (NYSECF Doc. No. 105 at 1 n 2 ["Because Plaintiff did not receive permission to file this cross motion pursuant to Commercial Division Rule 24, the Court has only considered the cross motion to the extent it provides opposition to Defendants' motion"]).

a TRO pending its determination on Defendant's motion to stay the trial, on December 11, 2020, the Appellate Division issued an order denying Defendants' underlying motion for a stay of trial pending appeal (Roberts Opp. Aff., Ex. C), further showing how Defendants' suggestion that this Court's rulings are without legal basis and instead are based on a bias against Defendants is entirely unfounded

Most tellingly, however, is the simple fact that in both substantive decisions in this case (*i.e.*, the Motion to Dismiss Decision and the Summary Judgment Decision), this Court granted Defendants' motions in part, resulting in the dismissal of certain of Plaintiff's claims. At this point in the case, on the eve of trial, recusal would result in undue delay and prejudice to Plaintiff (*see Silber*, 84 AD3d 931).

In sum, this Court holds no personal bias or prejudice against Defendants (22 NYCRR § 100.3[E][1]). It is within this Court's discretion and conscience to measure its ability to be fair and impartial and there is nothing in the facts, circumstances or law that would cause this Court to be anything other than fair and impartial (*Matter of Rodriguez v Liegey*, 132 AD3d 880, 881 [2d Dept 2015] [motion to recuse properly denied because movant "offered only conclusory allegations, beliefs, suspicions, and feelings of possible bias or the appearance of impropriety"]; *see also Matter of Shisgal v Abels*, 179 AD3d 1070 [2d Dept 2020]; *Matter of Bianco v Bruce-Ross*, 151 AD3d 716 [2d Dept 2017], *lv denied* 30 NY3d 908 [2018]; *Matter of Shaffer v Winslow*, 17 AD3d 766 [3d Dept 2005]).

Accordingly, the branch of Defendants motion seeking this Court's recusal shall be denied.

***B. Defendants' Motion in Limine to Preclude Testimony of Plaintiff's Expert Witnesses is Granted***

***Defendants' Contentions in Support of its Motion***

In their affirmation, Defendants' counsel set forth what they contend are the events relevant to this motion. This action was commenced by the filing of an initial Summons and Complaint on July 6, 2018. A preliminary conference was held on October 10, 2018 (Defs' Combined Aff. at ¶¶ 65-66). Defendants' counsel state that in or about December 2019, Plaintiff hired an expert, Hydro

Environmental Solutions, Inc. ("Hydro") to take borings in the building foundation which Plaintiff had excavated to build an addition to the Property (*id.* at ¶ 67). Defendants' counsel state that at the same time Plaintiff filed its Note of Issue certifying that all discovery was complete and the case was ready for trial (*i.e.*, December 20, 2019), Plaintiff's expert Hydro was simultaneously "boring holes, sampling soil, and working to compile a report, and Plaintiff did not reveal this to Defendants or the Court" (*id.* at ¶ 68). Defendants' counsel further state that "[a]t no time before or after filing the Note of Issue (Ex. 12) did Plaintiff's counsel confer with Defendants regarding scheduling expert disclosure as required by Commercial Division Rule 13[c]" (*id.* at ¶ 69). They argue that on January 24, 2020, Plaintiff sent a letter to Defendants' counsel stating it had sent a report drafted by Hydro "'to the New York State Department of Environmental Conservation as required by law'" and there was indication that this communication was intended to be a notice of disclosure regarding an expert (*id.* at ¶ 71). In addition, to the extent Plaintiff sent copies of the report directly to the individual defendants, Defendants' counsel argue that "attorneys are prohibited from communicating with parties represented by counsel … [and] it is clear that the documents were provided outside the context of the instant litigation, and were therefore not a discovery disclosure" (*id.* at ¶ 72). According to Defendants' counsel, "[t]he report has never been served as part of a document disclosure in this action" (*id.* at ¶ 74). Defendants' counsel assert that: (1) in its Summary Judgment Decision (page 23), this Court held that expert testimony and expert evidence would be precluded at trial; and (2) at a conference held on September 11, 2020, Plaintiff's counsel represented that no experts were expected to give testimony on behalf of Plaintiff at trial (*id.* at ¶¶ 74-75).

Defendants' counsel assert that on October 23, 2020, Plaintiff served trial subpoenas on Charles Schwartz of Eastern Analytical Services, Inc. ("Schwartz"), Patrick Fitzgerald of Asbestos Corporation of America ("Fitzgerald"), and Metro Analytical Laboratories ("Metro") (the "Trial Subpoenas") (*id.* at ¶¶ 77-79). Finally, Defendants' counsel state that "[o]n November 5, 2020, Plaintiff served documents in a litigation back denominated as 'Plaintiff's Supplemental Expert Witness Designation,' though it was the first and only expert designation served by Defendants and was a mere week prior to trial. Absent therefrom was any signed expert report" (*id.* at ¶ 80).

As their legal argument, Defendants contend that, although CPLR 3101(d) governs expert discovery in New York's courts generally, Commercial Division Rule 13(c) ("Rule 13[c]") governs expert discovery in the Commercial Division and was modeled after the Federal Rules (Defs' Mem. at 4). In short, Defendants argue that "Plaintiff seeks to introduce expert testimony at trial though it cynically schemed to flout Commercial Division Rule 13(c)" (*id.*). In support, Defendants point to the fact that Plaintiff hired an expert who began taking soil samples prior December 20, 2019, the date Plaintiff certified that discovery was complete by filing its Note of Issue, and only a month later "revealed that its expert had analyzed samples and covertly compiled a report and served it" (*id.*). Defendants contend that the Court has already ruled in its Summary Judgment Decision that the failure to comply with Rule 13(c) prohibits expert disclosure after the filing of the Note of Issue and that Plaintiff's counsel at a conference held on September 4, 2020 acknowledged that this was the Court's ruling and agreed that Plaintiff would not be calling any experts to testify (*id.*). Defendants contend that Plaintiff "utterly failed to satisfy the requirements of expert disclosure" under Rule 13(c) and its failure to do so was knowing, purposeful and willful (*id.* at 5). Defendants contend that Plaintiff knew prior to filing its Note of Issue that it intended to offer expert testimony at trial yet refused to confer with the other parties or disclose that an expert discovery schedule was necessary, thereby denying Defendants the opportunity to seek additional time to complete expert disclosure and contravening Rule 13(c), which requires a minimum of four months for expert disclosure and provides that the failure to comply precludes expert testimony at trial (*id.* at 7-9). They argue that "Plaintiff elected to file a note of issue to close discovery, then created and served expert evidence, then assured the Court and Defendants that it did not intend to provide expert testimony, and now on the eve of trial proposes exactly that which has been precluded by the Court" in contravention of Rule 13(c) (*id.* at 9).

Defendants contend that Plaintiff also violated Rule 13(c) by, among other things, failing to "disclose … a signed report with (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the data and other information considered by the witness in forming the opinion; (3) all the bases and reasons on which the signed reports were based, (4) the data on which the opinion was based, (5) a statement of financial compensation" (*id.*). Based on the foregoing transgressions, Defendants assert that the "only remedy is to prohibit

Plaintiff from offering expert testimony at trial, including any documents and data served after the filing of the note of issue" (*id.* at 9-10).

Defendants next contend that the law of the case doctrine precludes Plaintiff's experts because this Court "previously made a finding and determined that the Plaintiff is precluded from offering expert testimony for failing to comply with Commercial Division Rule 13(c)" (*id.* at 10). It is Defendants' contention that because the Summary Judgment Decision was a determination resolved on the merits, the doctrine requires that the Court preclude Plaintiff from offering any expert testimony at trial (*id.* at 10).

Defendants assert that Plaintiff has failed to provide any reason for its untimely expert disclosure violative of Rule 13(c), despite having "sought out a Commercial Division part in which to prosecute its case rather than a regular Supreme Court part which does not have the Commercial Division Part Rules" (*id.* at 13). Specifically, Defendants argue that Plaintiff violated Rule 13(c) by failing "to provide signed reports from the claimed experts other than Hydro, and has failed to provide the disclosure required for each expert as required" by Rule 13(c) (*id.* at 13). Defendants point out that "there is not even *curriculum vitae* for each of the claimed experts," which they contend is required even under CPLR 3101 (*id.*).[7] It is Defendants' position that "Plaintiff continues to flout Commercial Division Rule 13 (c) by newly serving expert disclosure dated October 23, 2020 in a case scheduled for trial on November 12, 2020 (See the Disclosure for Charles Schwarz and Eastern Analytical Services, Inc; Disclosure for Metro Analytical Laboratories, Patrick Fitzgerald and Asbestos Corporation of America, collectively Exhibit 14)[8] is late, insufficient, and does not comply with Commercial Division Rule 13[c]" (*id.*). Defendants contend that Plaintiff has the burden of demonstrating good cause for failing to comply with Rule 13(c) and that it cannot do so (*id.* at 14).

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[7] Defendants are incorrect. Plaintiff provided Balog's and Canavan's CVs in its CPLR 3101(d) disclosure (NYSCEF Doc. Nos. 348, 358).

[8] Although Defendants cite to Exhibit 14, the document filed on NYSECF is actually entitled "Plaintiff's Supplemental Expert Witness Designation" and purports to disclose William Canavan as an expert witness.

According to Defendants, the adoption of Rule 13(c), which is a departure from the CPLR, was intended to align disclosure in the Commercial Division with the federal courts, and that, unlike CPLR 3101, Rule 13(c), like the Federal Rules, calls for "early and broad disclosure of expert information," and "a party, like the Plaintiff in this action, who fails to timely disclosure expert information, [sh]ould be barred from introducing expert testimony at trial" (*id.* at 14-16). Defendants note that CPLR 3101(d) does not set forth a deadline by which expert disclosure must be provided, nor does it set forth the consequences for failing to provide adequate expert disclosure, although it does explicitly state that a party will not be precluded from providing expert testimony if the failure to comply with Section 3101(d) is for a "good cause" (*id.* at 16). According to Defendants, the case law and commentary "vary greatly with respect to when disclosure is due and the appropriate penalty for failing to provide adequate disclosures" (*id.* at 16). Defendants reiterate their argument that Plaintiff "is attempting trial by ambush by seeking to proffer expert testimony though it failed to confer with Defendants as to an expert disclosure schedule, failed to disclose expert discovery prior to filing the note of issue though it had already hired an expert, Hydro Environmental Solutions Inc. ('Hydro') at the time, and failed to allow Defendants four months to complete expert discovery, all in violation of Rule 13(c)" (*id.* at 17-18).

According to Defendants, Rule 13(c) allows the party seeking to proffer expert testimony to initially confer up to thirty days prior to the end of fact discovery, but the Rule cannot require the parties to do so at the preliminary conference (*id.* at 18). Defendants contend that Plaintiff failed to timely confer with the other parties as to expert disclosure (*id.*). Defendants further contend that the absence of an expert disclosure schedule in the Preliminary Conference Order does not render Rule 13(c) moot or unenforceable, nor does it "signal or require a retreat to CPLR 3101" (*id.* at 19). According to Defendants, they are greatly prejudiced by the late announcement of experts, as they are denied the full four months prior to the end of discovery to read, review, and digest expert reports, depose experts, obtain their own experts, and allow their own experts to be deposed[9] (*id.* at 20).

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[9] It is important to note that because the expert depositions are not permitted by the CPLR in most civil cases, and because the Uniform Trial Court Rules, of which the Commercial Division Rules is incorporated, explicitly provide that to the extent the Rules fail to comport with the

***Plaintiff's Contentions in Opposition***

In Plaintiff's counsel's opposition affirmation, counsel attaches emails from October 20, 2020 and October 22, 2020 in which she contends she attempted to secure an agreement "regarding a date by which the parties would exchange witness lists, expert reports, and exhibit lists" (Roberts Opp. Aff. at ¶ 22). She contends that after she did not hear a response from Defendants' counsel, "Plaintiff served its witness list, exhibit list, and expert disclosure for Robert Balog ('Balog') … on November 2, 2020" (*id.* at ¶ 23). Counsel affirms that the exhibit list (attached as Exhibit G) contained "several fact witnesses [to which] Defendants appear to baselessly object … in their Motion" (*id.* at ¶ 24). Counsel states that based on emails dated November 2, 2020 (attached as Exhibit E), Defendants objected to Plaintiff's expert designation, which counsel attaches as Exhibit F (*id.* at ¶ 23).

In support of Plaintiff's contention that Defendants will suffer no prejudice if Plaintiff's experts are permitted to testify, counsel asserts that given that: (1) Balog's damages calculations set forth in a letter he wrote on July 24, 2017 were annexed as an exhibit to Plaintiff's Complaint filed at the inception of this action; and (2) Plaintiff designated Balog as a witness as early as February 13, 2019 in responses (Exhibits H, I, J, K) to Defendants' discovery demands; and (3) Defendants deposed Balog and questioned him on his qualifications as an expert and the methodologies used in his 2017 letter, "[t]he service of the Expert Witness Designation was, in all practicality, a mere formality," and Defendants have had years to retain a rebuttal damages expert and no new trial date has even been set (*id.* at ¶¶ 26-31). By contrast, Plaintiff points out that it would suffer extreme prejudice of Balog's testimony were precluded because it would not be able to prove the very damages that have been at the heart of this proceeding since its inception (*id.*).

Regarding Plaintiff's other expert, William Canavan of Hydro, counsel asserts that given the allegations of the Complaint, Defendants were on notice since the inception of this case that Plaintiff alleged a petroleum contamination "so the receipt and content of the testing results –

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CPLR, the CPLR controls (22 NYCRR 202.1[d]), the right to take expert depositions is based on the parties stipulating to taking such depositions, and the Court is without authority to order a party to agree to expert depositions.

which were provided long before trial was even scheduled – should have not been surprising" (*id.* at ¶ 34). According to counsel, at the time Plaintiff served its expert designation for Canavan, Defendants knew that the trial date was getting postponed because of the TRO issued by the Second Department. In addition, counsel points out that Defendants have had the Canavan Report for over a year and they have had months since Plaintiff's expert designation to obtain a rebuttal expert (*id.* at ¶ 37).

In its opposition memorandum, Plaintiff contends that Defendants' objections to experts is not supported by CPLR 3101 or the Commercial Division Rules (Plf's Opp. Mem. at 9). It argues that "[a]s this Court acknowledged in the Decision & Order relating to Defendants' Motion for Summary Judgement, the 'parties failed to set forth a schedule for expert discovery in the PC Order. When this occurs, the Court defaults to the CPLR in terms of expert disclosure requirements'" (*id.* at 9, *citing* NYSCEF Doc. No. 277 at 23). Plaintiff argues that, in contravention of Rule 13(c), the parties must confer on an expert disclosure schedule no less than 30 days before the close of fact discovery, and are to complete expert discovery no more than four months after the conclusion of fact discovery (*id.*). It argues that the parties did not confer on an expert schedule to be included in the Preliminary Conference Order nor did they include a date to complete expert discovery in that order, and "[w]ith no schedule for expert disclosure stipulated to in the Preliminary Conference Order, as this Court has previously held, the N.Y. C.P.L.R. controls" (*id.* at 9-10).

Plaintiff states that CPLR 3101 "does not mandate *when* expert disclosure must be provided" and that, "even if Plaintiff's disclosure was considered to be late, which is was not, unless Defendants can demonstrate prejudice from a willful or intentional failure to timely disclose, the expert testimony should be permitted" (*id.* at 10). Plaintiff contends that it disclosed Balog as an expert witness in February 2019 and that he was deposed in June 2019. They argue that the subject matter of Balog's deposition included his expert qualifications as well as his 2017 Report relating to damages, giving Defendants sufficient notice prior to the commencement of trial of Plaintiff's intention to call Balog as an expert witness at trial, as well as the substance of his testimony (*id.* at 11). Plaintiff contends that the "only thing that has changed is that Balog intends to update his calculations prior to trial to reflect the passage of time between his 2017 Report and

trial" (*id.*). Plaintiff also argues that it disclosed Canavan as an expert witness in its Supplemental Expert Disclosure on November 5, 2020 and that Defendants have had his report since January of 2020 (*id.*). They further contend that, even assuming that Plaintiff has not provided sufficient notice, CPLR 3101 expressly does not preclude either experts' testimony because Defendants "have had Canavan's report since January of 2020, and have had Balog's 2017 Report since, at least, 2018 when the Complaint was filed" (*id.* at 12). In any event, Plaintiff contends, it has shown "good cause" in accordance with Rule 13(c) (*id.*).

Plaintiff argues that Defendants "have known for years that Plaintiff is alleging damages amounting to the overpayment of rent for inability to use the second floor and basement of the building located at the subject premises due to hazardous environmental conditions, and that the claim would be supported at trial by expert testimony – specifically, by Balog" (*id.*). Plaintiff argues that Defendants "were on notice that Plaintiff intended to proffer the expert evidence to which Balog would testify and had sufficient time to either obtain their own expert witness or prepare to cross-examine Balog" (*id.* at 13). It contends that the "fact that Plaintiff disclosed Balog as a witness, and Defendants actually deposed Balog on June 27, 2019 on the subject matter of the 2017 Report, demonstrates that the timing of the disclosure of Balog as an *expert* witness is not prejudicial to Defendants" (*id.*). According to Plaintiff, it served expert disclosure on November 2, 2020 "to clarify that Balog was an expert witness" as "simply a formality" (*id.*). Plaintiff contends that "Defendants will not be prejudiced by Plaintiff proffering the expert testimony of Balog regarding the calculation of Plaintiff's damages, particularly in light of the fact that Defendants have had months since Balog was designated as an expert to prepare for a trial that has not even been re-calendared yet" (*id.*). Moreover, Plaintiff points out that it designated Balog as a witness "as early as February 13, 2019 in response to Defendants' discovery demands" and that, "during trial preparation it designated Balog as an expert witness with regard to Plaintiff's damages for inability to use the second floor of the Property" (*id.* at 14). Specifically, Plaintiff contends, it advised Defendants of the Expert Witness Designation on November 2, 2020, "eleven (11) days prior to the date trial was initially scheduled to begin" (*id.* at 14). In response, Plaintiff states, Defendants informed Plaintiff that they were "rejecting" Plaintiff's Expert Witness Designation of

Balog, because they claimed it was "untimely pursuant to the CPLR, the commercial part rules, and precluded by Jud[g]e Walsh's order" (*id.*).

In addition, Plaintiff argues that "Defendants have unclean hands" because they did not disclose their witness list or pre-trial disclosures on November 2, 2020, and still have not done so (*id.* at 15). Plaintiff contends that Defendants "have had sufficient time to prepare their defense for trial, including as a result of their filing of an Appeal seeking to Stay Trial, made only a few days in advance of the scheduled trial" (*id.*). According to Plaintiff, it put Defendants on notice that Canavan might be an expert witness over a year ago and, as such, Defendants are not prejudiced by Plaintiff's service of its Supplemental Expert Disclosure related to him eight days before trial, as the "trial has been delayed for months and still has not been rescheduled" (*id* at 16). Plaintiff argues that Defendants had Canavan's Report prior to filing their summary judgment motion, which it contends further demonstrates that Defendants had enough time since receiving his report that they are not prejudiced, and that it "promptly disclosed to Defendants Canavan's January 21, 2020 report on January 24, 2020, in accordance with Plaintiff's ongoing duty to disclose" (*id.*). Plaintiff further contends that "even ignoring the year that [Defendants] have had since receiving the report to retain a rebuttal witness, trial is now not even scheduled" and that Plaintiff "suspect[s] the trial will not be scheduled the day after any Order on this Motion is issued, providing even more time to Defendants" (*id.*). Finally, Plaintiff argues that it has demonstrated good cause under Rule 13(c) for the same reasons that Plaintiff's designated expert witnesses should not be precluded under the CPLR as "Defendants have been on notice of Plaintiff's two experts for a substantial amount of time" and "have had Balog's expert report since the outset of this litigation, and have had Canavan's report for a year" (*id.* at 17). In conclusion, Plaintiff argues that if Defendants' motion were granted, it will be "severely prejudiced by preclusion of its experts, particularly under these factual circumstances" and that this prejudice "far outweighs any possible prejudice to Defendants" (*id.*).

***Defendants' Contentions in Further Support of Their Motion***

In further support of their motion, Defendants argue that "Plaintiff failed to meet *any* of the deadlines and indeed, failed to make *any* expert disclosures, and thus, under the Commercial

Rules, Plaintiff is automatically and presumptively prohibited from offering expert testimony at trial" (Reply Mem. at 3). Defendants further contend that "Plaintiff's opposition papers failed to provide case law from a Commercial Division part to support its request to proffer expert witnesses at trial after having ignored the expert disclosure rules throughout discovery" (Reply Mem. at 3). Defendants argue that each of the cases cited and relied upon by Plaintiff are *inapposite* because they were decided under CPLR 3101(d), which does not require substantial expert disclosure and does not set a certain date to provide the disclosure, and most of the cases involve expert testimony in the summary judgment context rather than trial testimony (*id.* at 4). Defendants argue that CPLR 3212(b), which Defendants state makes expert affidavits admissible on a motion for summary judgment even if not timely disclosed, does not apply to trial testimony, and that, under 22 NYCRR 202.70 it is the Plaintiff's burden to show good cause, not Defendants (*id.*).

Defendants reiterate that the "failure to comply with Rule 13[c] requires *automatic* sanctions, including a *presumption of preclusion* of expert testimony when the disclosure is not timely and fully made" given that it was modeled after Federal Rule of Civil Procedure 37(C )(1) which calls for the automatic exclusion upon failure to timely disclose such a witness (*id.* at 4-5). Defendants repeat their argument that Rule 13(c) requires the party which intends to introduce expert testimony at trial to notify the other parties that it intends to do so and requires that party establish an expert disclosure schedule (*id.* at 5). They contend that, since "Plaintiff did not serve its purported expert disclosure prior to filing the note of issue, its proposed expert disclosure is presumptively precluded" and since Plaintiff's counsel stated "in open court that no expert testimony was to be offered at trial … [Plaintiff] should be estopped from changing positions to the detriment of Defendants" (*id.*). They argue that "Plaintiff has not offered any valid reasons for failing to timely designate either Balog, Hydro, or others as experts during the time period established by the Commercial Division Rules for expert disclosure" and that Plaintiff further compounded its bad faith and willfulness by filing "the note of issue after it had hired Hydro to drill for samples of the earth under the restaurant" (*id.* at 7). Defendants again state that, unlike practice under CPLR 3101(d), Defendants have no duty to demonstrate prejudice, but argue that "prejudice has been overwhelmingly demonstrated by Defendants in the instant matter" (*id.* at 8). They contend that Plaintiff "knowingly and willfully filed the note of issue, cutting off the

possibility of extending the time to complete expert and fact discovery" and "has failed to come forward with any credible non-willful explanation for its conduct" or provide any unusual or extenuating circumstances for its failure to timely designate experts and exchange witness and opinion information per Rule 13(c); therefore, its proposed experts should be precluded (*id.* at 8-9).

According to Defendants, since July 24, 2017, Plaintiff possessed the Balog letter but failed to "designate Balog, or anyone else, as an expert and has not made any claim of 'good cause' to avoid the plain language of Rule 13(c), which, in accord with the Federal Rules, presumes that testimony is excluded" (*id.* at 9). Defendants further contend that on December 31, 2020, Plaintiff uploaded papers to NYSECF that were purported to be "Plaintiff's Expert Witness Designation" but failed to include a copy of the Balog letter dated July 24, 2017 and that, to date, Defendants have not received any expert disclosure from Plaintiff concerning the Balog letter (*id.*). Defendants contend that "Plaintiff['s] [argument] that this Court and thus the Commercial Division should adopt a rule that the mere fact that another party saw or was aware of the existence of a particular document, obviates the expert disclosure responsibilities of the other party" is "nonsensical" (*id.* at 10). Defendants also point out that the Balog letter was unsigned, indicating that it could not be used as an expert report, and that in any event it was incomplete in accordance with Rule 13 because, *inter alia*, it "fails to express any opinions which the witness is expected to testify to," no exhibits or summaries are provided, and there is no statement that Balog's position as an assessor is valid because there is no statement that he is licensed and in good standing (*id.* at 10-12). Defendants argue that "Plaintiff's conduct indicates it never considered Balog to be an expert witness" and that, although Balog was deposed by Defendants, it was done as a fact witness (*id*). Defendants reiterate their arguments that the Hydro Report was sent improperly directly to Defendants themselves as a courtesy, which does not constitute an expert disclosure (*id.* at 13-16). Finally, Defendants argue that Plaintiff has delayed the case through filing multiple amended pleadings but "never availed itself of the additional time to file the required expert disclosure" (*id* at 16).

**DISCUSSION**

"[T]he function of a motion *in limine* is to permit a party to obtain a preliminary order before or during *trial* excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use" (*State v Metz*, 241 AD2d 192, 198 [1st Dept 1998] [emphasis in original]). The proper focus of a motion *in limine* is whether evidence that a party anticipates offering is admissible (*see Matter of PCK Dev. Co., LLC v Assessor of Town of Ulster*, 43 AD3d 539, 540 [3d Dept 2007]). It is well settled that "expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v Erie County*, 60 NY2d 296, 307 [1983]; *see also Fortunato v Dover Union Free School Dist.*, 224 AD2d 658 [2d Dept 1996]).

CPLR 3101(d)(1) provides:

> (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert in an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just ....

The Commercial Division Rule 13 addresses expert disclosure in the Commercial Division. That rule provides, in pertinent part

> If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on the schedule for expert disclosure – including the identification of experts, exchange of reports, and depositions of testifying experts ... Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness ... The report must contain:
>
> (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
> (B) the data or other information considered by the witness in forming the opinion(s);

(C) any exhibits that will be used to summarize or support the opinion(s);
(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and
(F) a statement of the compensation to be paid to the witness for the study and testimony in the case ....

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

While Commercial Division Rule 13 does not trump the legislature's enactment of CPLR 3101(d) or CPLR 3212(b), the Rule formalizes the informal practice regarding expert discovery that occurred in the Commercial Division before the enactment of the Rule. However, pursuant to Rule 13(c), in the Commercial Division, "[t]he scope of expert witness disclosure has traditionally been significantly narrower in New York practice than that permitted under the Federal Rules" (3 N.Y. Prac., Com. Litig. in New York State Courts § 11:18 [5th ed]). Courts in the Commercial Division "have recognized that '[t]he Commercial Division also looks for guidance on [expert disclosure] issue[s] to the Federal Rules of Civil Procedure'" (*Singh v PGA Tour, Inc.*, 2017 NY Slip Op 31078[U], 2017 WL 2152584 at *3 [Sup Ct, NY County 2017]). With regard to Plaintiff's attempt to designate Hydro's Canavan as an expert on the eve of trial even though it had hired Hydro (Canavan) prior to filing its Note of Issue,[10] the Court fails to see how Plaintiff has established good cause to permit Canavan to testify as an expert at the trial. Accordingly, Plaintiff

[10] At the same time Plaintiff was filing its Note of Issue certifying that all discovery was complete, Plaintiff had hired Hydro to take soil borings. On the eve of trial, Plaintiff served Defendant with its CPLR 3101(d) disclosure for Hydro's Canavan. By waiting until after the filing of the Note of Issue, Plaintiff cut Defendants off from the right to seek Canavan's deposition. Although Plaintiff contends that Defendants have had ample time since receipt of the Canavan Report in _____ to hire their own expert, Defendants were justified in not hiring an expert until there was a ruling from the Court regarding whether Plaintiff has established good cause for its late disclosure. Plaintiff's delivery of a copy of the Canavan Report that had been sent to the New York Department of Environmental Conservation to Defendants and their counsel as a courtesy after the close of discovery does not satisfy the good cause requirement for this late disclosure.

is precluding from offering Hydro's testimony as an expert at trial (*1861 Capital Master Fund LP v Wachovia Capital Markets, LLC*, 95 AD3d 620 [1st Dept 2012]; *Nexbank v Soffer*, 2018 WL 2282884 at *5 [Sup Ct, NY County 2018]; *Keyspan Gas East Corp. v Munich Reinsurance Am. Inc.*, 2016 WL 1258500 [Sup Ct, NY County 2016]).

However, the Court views the timeliness and sufficiency of Plaintiff's identification of Balog as an expert differently. As an initial matter, the Court does not agree with Defendants that Plaintiff's counsel represented that she did not intend to have any experts at trial at a conference before this Court on September 11, 2020. Instead, a review of the transcript of that conference (NYSCEF Doc. 344 at 7-8) reveals that in response to the Court's inquiry as to whether any experts were expected to testify, Plaintiff's counsel responded that she was working remotely and did not have her papers in front of her but that while Plaintiff wished to call Canavan as an expert, she interpreted the Court's Summary Judgment Decision as precluding Canavan from testifying. Defendants' counsel likewise interprets the Court's Summary Judgment Decision as precluding Canavan from testifying at trial. However, as gleaned from this Court's Summary Judgment Decision, the Court did not make such a finding. Instead, it considered the Canavan Report for the Summary Judgment motion and simply refuted Defendants' reliance on Commercial Division Rule 13 in support of their argument that it should not be considered by distinguishing that rule as being limited to an expert's trial testimony.[11] As such, Defendants have no basis to argue that they were prejudiced by Plaintiff's counsel's inaccurate understanding of this Court's ruling.

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[11] In the Summary Judgment Decision, the Court held that "When [the parties fail to set forth a schedule for expert discovery in the Preliminary Conference Order], the Court defaults to the CPLR in terms of expert disclosure requirements. CPLR 3212(b) provides that '[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d)(1)(i)] was not furnished prior to the submission of the affidavit.' It is well settled that a court may consider expert evidence in opposition to a motion for summary judgment where the expert was not timely disclosed (*Washington v Trustees of the M.E. Church of Livingston Manor*, 162 AD3d 1368 [3d Dept 2018]; *Moreland v Huck*, 156 AD3d 1396 [4th Dept 2017]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]) and given that Commercial Division Rule 13(c) is expressly limited to the inability to use an expert at trial if the expert was not timely disclosed absent good cause shown, the Court sees no basis to conclude that the Commercial Division Rule somehow trumps the legislature's enactment of CPLR 3212(b). Accordingly, the HES Report

The Court shall not preclude Balog from testifying as an expert regarding Plaintiff's damages as Plaintiff has established good cause to permit Balog's expert testimony. In its response to Defendants' interrogatories seeking the identification of the experts Plaintiff intends to call at trial dated February 13, 2018,[12] Plaintiff referred Defendants to its Response to the witness demands (NYSCEF Doc. No. 361 at 13-14; NYSCEF Doc. 362 at 13-14). In Plaintiff's Response to the witness demands dated February 13, 2018,[13] Plaintiff identified Robert W. Balog, Balog Consulting as Plaintiff's expert as stated in Plaintiff's response to the interrogatories (NSCEF Doc. No. 363 at 3-4; NYSCEF Doc. No. 364 at 3-4). Thereafter, on June 27, 2019, Defendants had the opportunity to depose Balog (NYSCEF Doc. No. 365). At his deposition, Balog testified that although he had only been deposed a couple of times before, he had "testified numerous [20] times as an expert witness" in real estate valuation (*id.* at 5-6). Defendants were able to ask Balog about his credentials (education, degrees, and experience, including his extensive review of rental leases for tax assessment purposes and that 99.5% of his evaluations involve commercial properties) (*id.* at 9, 43-46). Notably, although he does not hold any professional license, Balog confirmed that a court had never declined to qualify him as an expert (*id.* at 11).[14] Balog further identified cases in

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shall be considered. The Court further agrees with Defendants that the unsworn HES Report is technically inadmissible (*Frees v Frank & Walter Eberhart, L.P. No. 1*, 71 AD3d 491 [1st Dept 2010]), but the Court has nevertheless considered it since it is not the sole evidence in support of the existence of a petroleum oil leak given the testimony provided by Paganis concerning the Department of Health's issue with the basement's use as well as Plaintiff's discontinuance of various uses previously put to the basement due to the suspected oil leak (*Merriman v Integrated Bldg. Controls, Inc.*, 84 AD3d 897 [2d Dept 2011]). In any event, as it is Defendants' burden to establish the absence of a triable issue of fact, it is not Plaintiff's burden to establish that petroleum leak exists; it is Defendants' burden on their motion to establish, prima facie, the absence of the petroleum leak, which they failed to do" (NYSCEF Doc. No. 105 [Summary Judgment Decision] at 23).

[12] Although the disclosure is dated February 2018, the date is a typographical error and is read to be February 2019 since the action had not even been commenced as of February 2018.

[13] Although the disclosure is dated February 2018, the date is a typographical error and is read to be February 2019 since the action had not even been commenced as of February 2018.

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which he testified as an expert involving his evaluations of restaurants in Westchester (*id.* at 13). In addition, Balog authenticated his letter,[15] which he explained was not an appraisal; instead, it constituted his analysis of the Property's rental characteristics (*id.* at 14). Defendants questioned Balog extensively about his investigation and his conclusions as well as what information he reviewed and did not review in connection with his analysis (*id.* at 56-57). He also explained why he decided to deduct the two additions Plaintiff constructed to yield the first floor square footage of 1,771 on which he relied in his analysis (*i.e.*, Plaintiff's lease was not based on those leasehold improvements) (*id.* at 24-25). Defendants even had the opportunity to pose hypotheticals to Balog to see whether his methodology would change (*e.g.*, Would his calculations change if Plaintiff told him that it had been using the second floor?) (*id.* at 31, 35, 41-42, 58-61). He also explained why with restaurant leases, there is never a rental assigned to unfinished basement storage space, like the basement at the Property (*id.* at 36-37). Defendants have known since this case's inception that Plaintiff was using Balog to provide an opinion on Plaintiff's damages since his report was annexed to Plaintiff's initial Complaint. Plaintiff identified Balog as its expert in its above referenced disclosures on February 13, 2019. Indeed, at the Balog deposition, Edge's counsel referred to Balog as an expert in the field of real estate (NYSCEF Doc. No. 365 at 34). Plaintiff has established good cause for its late CPLR 3101(d) disclosure regarding Balog – namely, that it viewed it as a mere formality since Defendants have known all along that Balog was Plaintiff's damages expert and Defendants have suffered no prejudice because they have had ample time since the taking of Balog's deposition (or even earlier) to hire a rebuttal expert (*Mone v Karambiri*, 2019 WL 2179448 [Sup Ct, NY County 2019]). Although Balog's letter does not set forth all the information required under Rule 13, given that Defendants obtained this information during

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[15] While Defendants are correct that the Balog letter annexed to Plaintiff's Complaint is inadmissible since it is unsigned (*30-32 W. 31st LLC v Heena Hotel LLC*, 2019 NY Slip Op 32016[U], 2 [N.Y. Sup Ct, New York County 2019], *citing Diaz v Almodovar*, 147 AD3d 654, 654 (1st Dept 2017) ["unsigned [expert] report ... was inadmissible"]; *Accardo v Metro North R.R.*, 103 AD3d 589, 589 [1st Dept 2013]; *Shah v. 20 East 64th Street LLC*, 2017 NY Slip Op 32028[U] [Sup Ct, New York County 2017]), Balog sufficiently authenticated the letter at his deposition. In any event, the lack of a signature may be easily rectified by Balog signing his report.

Balog's deposition, they have not been prejudiced by the absence of this information in his letter. Regarding Plaintiff's intention to amend Balog's letter to include Balog's updated damage calculations resulting from the passage of time, the Court will permit Plaintiff to provide the updated letter within seven days of this Decision and Order (*AMBAC Assurance Corp. v Countrywide Home Loans, Inc.*, 2020 WL 261628 [Sup Ct, NY County 2020]). However, Balog may not alter his opinions or methodology set forth in that letter to which he testified at his deposition. Finally, in response to Defendants' suggestion that Balog is unqualified because there is no evidence that his is a licensed appraiser or that his license is in good standing, the Court will not address this argument at this time. Instead, the Court will determine whether Balog is qualified to testify as an expert at trial.

Turning to Defendants' argument that "Plaintiff continues to flout Commercial Division Rule 13(c) by newly serving expert disclosure dated October 23, 2020 in a case scheduled for trial on November 12, 2020 (See the Disclosure for Charles Schwartz and Eastern Analytical Services, Inc; Disclosure for Metro Analytical Laboratories, Patrick Fitzgerald and Asbestos Corporation of America, collectively Exhibit 14) …." (Defs' Mem. at 13), Plaintiff's counsel responds by stating that "disputed fact witnesses" were identified on Plaintiff's witness list because Plaintiff intends to call them to authenticate documents provided by Defendants during discovery, rather than offering them as expert witnesses (Roberts Opp. Aff. at ¶¶ 39-41). The Court has no reason to doubt counsel's representation and as such, these witnesses shall not be precluded from testifying but they will be precluded from testifying as experts.

## CONCLUSION

Based on the foregoing, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendants for this Court to recuse itself from presiding over this action and transfer the case to another part/judge is denied; and it is further

ORDERED that the branch of Defendants' motion seeking the preclusion of Plaintiff's experts from testifying is granted only to the extent that William Canavan of Hydro Environmental Solutions, Inc. is precluded from testifying at trial as an expert, but in all other respects, this branch of Defendants' motion is denied; and it is further

ORDERED that counsel are to appear for a conference by Teams on April 12, 2021 at 11 a.m. to schedule the trial in this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 6, 2021

ENTER:

HON. GRETCHEN WALSH, J.S.C.

**APPEARANCES**

ZARIN & STEINMETZ
By: Kate Roberts, Esq.
Attorneys for Plaintiff
81 Main Street, Suite 415
White Plains, New York 10601

FINGER & FINGER, A PROFESSIONAL CORPORATION
By: Carl L. Finger, Esq.
Attorneys for Defendant Kallie Edge
158 Grand Street
White Plains, New York 10601

LAW OFFICE OF JONATHAN SAMUEL KLEIN
By: Jonathan S. Klein, Esq.
Attorneys for Defendant Vasilios Gargeros
41 Montrose Road
Scarsdale, New York 10583

DAHAN PAMPALONE LLP
By: David M. Dahan, Esq.
Attorneys for Defendant Dimitrious Vitaliotis
158 Grand Street
White Plains, New York 10601