IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GLENN IHDE,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 4:15-CV-00585-CAN
	§	
v.	§	
	§	
HME, INC.,	§	
	§	
Defendant.		

MEMORANDUM ORDER AND OPINION

Pending before the Court are Defendant HME, Inc.'s ("Defendant") Supplemental Motion to Strike and Exclude Testimony of Plaintiff's Expert Kerri Olsen [Dkt. 41] and Motion to Strike and Exclude Rebuttal Testimony of Plaintiff's Expert Kerri Olsen [Dkt. 48] (collectively the "Motions"). On April 12, 2017, the undersigned conducted a hearing and heard oral argument from both Plaintiff Glenn Ihde ("Plaintiff") and Defendant on the Motions [Dkt. 58]. After considering the Motions, all relevant filings and evidence, as well as the oral argument of counsel at hearing, the Court finds that Defendant's Supplemental Motion to Strike and Exclude Testimony of Plaintiff's Expert Kerri Olsen [Dkt. 41] is **DENIED**, and that Defendant's Motion to Strike and Exclude Rebuttal Testimony of Plaintiff's Expert Kerri Olsen [Dkt. 48] is **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

Plaintiff filed the instant lawsuit seeking damages for breach of contract, quantum meruit recovery of the market value of services rendered, and attorneys' fees and costs [Dkts. 1; 31]. Plaintiff's claims arise out of Defendant's alleged failure to pay Plaintiff for "steel detailing services" he provided. Defendant is alleged to have caused significant delays throughout the

project and often changed deadlines: Plaintiff in essence alleges that performance under the contract became a moving target. Plaintiff asserts Defendant paid only $28,710.00 of Plaintiff's first bill (for $31,300.00) and has yet to pay Plaintiff's second bill (for $27,710.00). Plaintiff claims $126,280.00 remains unpaid.[1] Plaintiff proffers Kerri Olsen's expert report (the "Olsen Expert Report") [Dkt. 41, Ex. A] in support of his allegations that Plaintiff substantially performed under the contract and the value of Plaintiff's services. Plaintiff also proffers Olsen's rebuttal report ("Rebuttal Report") [Dkt. 48, Ex. A] (collectively, "Olsen's Reports") directed at each of Defendant's seven experts, namely Lyle Charles, Don Grigg, Bobbi Fletchall, Dan Canda, Brian Aubert, Kevin Rake, and John Haas.

Defendant moved to strike Olsen's Expert Report on December 12, 2016 [Dkt. 41] ("Motion to Strike Expert Report"). Plaintiff filed a Response on December 22, 2016 [Dkt. 44], and Defendant a reply on March 31, 2017 [Dkt. 52].

On February 16, 2017, Defendant also moved to strike Olsen's Rebuttal Report [Dkt. 48] ("Motion to Strike Rebuttal Report"). Plaintiff filed a Response on March 6, 2017 [Dkt. 51], and on March 13, 2017, Defendant filed a Reply [Dkt. 52]. Thereafter, on March 31, 2017, Plaintiff filed a Surreply [Dkt. 55].

On March 30, 2017, Defendant requested a hearing on the Motions [*see* Dkt. 53]. The Court held the hearing ("Hearing") on April 12, 2017, at which each Party proffered additional arguments and/or evidence [Dkt. 58].[2] Olsen testified at Hearing regarding her methodology in compiling the Expert Report and Rebuttal Report.

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[1] Plaintiff amended his Complaint to add a claim for $5,850.00 related to a separate project. This added claim has no bearing on the Court's analysis herein.

[2] Specifically, Plaintiff proffered a binder containing copies of the materials Olsen considered in compiling her Expert Report, which Plaintiff also timely provided to Defendant alongside Olsen's Expert Report [Dkt. 58, Plaintiff's Exs. 1-2], and Defendant proffered indices to its motion and case law binders that Defendant provided to the Court at Hearing [Dkt. 58, Ex. 1].

Defendant seeks to strike each of Olsen's Expert Report and her Rebuttal Report in their entirety as well as any testimony she may give at trial, arguing the Reports do not comply with Federal Rule of Civil Procedure 26 and that, even if they did, the Court should strike the Reports because Olsen's opinions do not pass muster under Federal Rule of Evidence 702. Defendant argues Olsen's Reports and potential testimony lack basis in evidence, are conclusory and speculative, and provide no rationale based on any identifiable methodology. Defendant also asserts the evidence on which Olsen does rely, namely three depositions, does not support her conclusions, and that she improperly attempts to opine as to subjects for which she has no expertise. Plaintiff contends in response that Olsen bases her reports and potential testimony on her review of the contract documents produced. Plaintiff further asserts Olsen's curriculum vitae demonstrates her qualifications to opine on questions of document control and/or project management in steel detailing and fabricating cases, given her years of experience and scholarship in those fields. Plaintiff claims Olsen's Reports suffice to permit her to opine as to (1) whether Plaintiff substantially performed under the contracts at issue and (2) the value of Plaintiff's services as rendered. Defendant counters that, even if Olsen's Reports were limited to these two issues, Olsen still fails to sufficiently connect the dots between her purported methodology, the facts, and her conclusions.

LEGAL STANDARD

The Federal Rules of Civil Procedure set forth the procedures litigants must follow in designating expert witnesses. Rule 26(a)(2)(B) provides in pertinent part:

> *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case . . . The report must contain:
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;

> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

In the Fifth Circuit, an expert report must be "detailed and complete" when submitted under Rule 26(a)(2)(B) to "avoid the disclosure of 'sketchy and vague' expert information." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996). Expert reports that do not provide the basis and reasons for the stated opinions, or that refer to the basis for the opinions only in vague terms, are insufficient under Rule 26(a)(2)(B). *See id.* "To satisfy Federal Rule of Civil Procedure 26(a)(2)(B), the report must provide the substantive rationale in detail with respect to the basis and reasons for the proffered opinions. It must explain factually why and how the witness has reached them." *Hilt v. SFC Inc.*, 170 F.R.D. 182, 185 (D. Kan. 1997), *cited favorably in Broxterman v. State Farm Lloyds*, No. 4:14-CV-661, 2015 WL 11072132, at *2 (E.D. Tex. Oct. 19, 2015) (Mazzant, J.). This requirement allows parties to prepare effectively for cross examination of expert witnesses and, if necessary, to arrange for testimony by additional expert witnesses. FED. R. CIV. P. 26(a)(2)(B) advisory committee's note to 1993 amendments.

Under Rule 37(c), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial unless the failure was substantially justified or harmless." *See Torres v. City of San Antonio*, No. SA:14-CV-555-DAE, 2014 WL 7339122, at *1 (W.D. Tex. Dec. 23, 2014). Indeed, the "sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Id.* *But see* FED. R. CIV. P. 37(c)(1) (providing the district court authority to order alternative sanctions

in addition to or instead of exclusion, such as costs or attorney's fees). "The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court." *Id.* When evaluating whether a violation of Rule 26 is harmless for purposes of Rule 37(c)(1), the court looks to four factors: (1) the explanation for the failure to disclose; (2) the importance of the testimony or evidence; (3) potential prejudice to the opposing party in allowing the testimony or evidence; and (4) the possibility of a continuance to cure such prejudice. *Id.*; *see also Hamburger v. State Farm Mut. Auto Ins. Co.*, 361 F.3d 875, 883 (5th Cir. 2004). In conducting this analysis, the Court remains mindful that Rule 26 exists "to prevent unfair surprise at trial and to permit the opposing party to prepare for rebuttal reports, to depose the expert in advance of trial, and to prepare for cross-examination." *Payne v. Brayton*, No. 4:15-CV-809, 2017 WL 194210, at *3 (E.D. Tex. Jan. 18, 2017).

Even if a Court determines an expert's report meets the Rule 26(a) requirements, the Court has an obligation to act as "gatekeeper" to ensure testimony from a qualified expert is both reliable and relevant. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002). The proponent must establish relevance, by "demonstrat[ing] that the expert's reasoning or methodology can be properly applied to the facts in issue[,]" and reliability, by showing the "expert opinion . . . [is] more than unsupported speculation or subjective belief." *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012). The proponent must make this showing by preponderance of the evidence. *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). A "lack of reliable support may render [expert opinion] more prejudicial than probative" in certain circumstances. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (citing *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1035 (5th Cir. 1984)). Importantly, however, the Court shall not judge the expert's credibility, as

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