

**BLOGS**

Discovery

New York Federal Court Strikes One Untimely Expert Report, but Allows Another

A federal court in New York recently granted a motion to exclude one expert report as untimely filed, but denied a motion to exclude another equally untimely report. *Rekor Sys., Inc. v. Loughlin*, 2022 WL 2063857 (S.D.N.Y. June 8, 2022).

A federal court in New York recently granted a motion to exclude one expert report as untimely filed, but denied a motion to exclude another equally untimely report. *Rekor Sys., Inc. v. Loughlin*, 2022 WL 2063857 (S.D.N.Y. June 8, 2022). Rekor Systems alleged it was defrauded by the three defendants in its purchase of two franchised businesses. Before the close of discovery, Rekor made disclosures related to a damages expert and a forensic accountant. But after the scheduling order's deadline for discovery, the defendants disclosed a damages expert and a franchising expert as "rebuttal" experts. Rekor moved the court to exclude the testimony of each.

The court excluded the franchising expert's report but permitted that of the damages expert. The court first rejected defendants' argument that the disclosure was timely under the Rules of Civil Procedure, holding the scheduling order setting a deadline for expert discovery to prevail over the default period established by Fed. R. Civ. P. 26(a)(2). That rule provides that a party must disclose expert rebuttal witnesses within 30 days of the disclosure of the expert they will rebut—but also permits a court to modify the schedule. Fed. R. Civ. P. 37(c) requires that an expert whose testimony is not timely disclosed must be excluded unless the failure to timely disclose was substantially justified or harmless. The court found that the franchising expert's testimony was largely irrelevant and failed to provide a rebuttal, but also that Rekor would be prejudiced by the belated disclosure were the franchising expert permitted to testify. Although the court recognized that Rekor would also be prejudiced by the admission of the damages expert's testimony, it found this testimony to be sufficiently important to the case, and therefore reopened discovery on a limited basis to permit additional depositions of the expert and two fact witnesses upon whose declarations the damages expert's report was based.

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