

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GENERAL MILL SUPPLY CO.,
Individually and on behalf of a
Class of similarly situated
persons and entities,

Case No. 18-011569-CZ
Hon. Charles Hegarty

Plaintiff,

v.

THE GREAT LAKES WATER AUTHORITY,
an incorporated municipal authority,

HEARING DATE:
June 17, 2022

and

CITY OF DETROIT, a municipal corporation,
by and through its WATER AND SEWERAGE
DEPARTMENT,

Defendants.

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**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR EXTENSION OF
DISPOSITIVE MOTION FILING DEADLINE AND FOR LEAVE TO CONDUCT
LIMITED EXPERT AND SUPPLEMENTAL DISCOVERY**

I. INTRODUCTION

As this case approaches its fourth anniversary, Defendants want unlimited leeway from the Court. As described in detail below, they want a **sixth** chance to name a testifying expert witness. They want more time to digest Plaintiff's timely produced expert report (the "Heid Report"), even though Defendants had the vast majority of the report in November 2021, in the form of Plaintiff's mediation summary. They also had permission to show the mediation summary to their consulting expert Bill Stannard (whom Defendants would now call as a testifying expert), but apparently sat on their hands. *See* Hanley Email 11/18/21, Exhibit 1 hereto. If Defendants had started working last November when they got the mediation summary, or in April 2021 when Plaintiff served interrogatory responses containing many of the calculations set forth in the Heid Report, then Defendants would not be in their alleged position of having to absorb all of the material so quickly. They would at least have had a head start. But Defendants apparently did nothing with the information about Plaintiff's theory of the case in the seven months since they got the mediation summary or the 14 months since they got Plaintiff's interrogatory responses. So now Defendants want the Court to adjourn dates once again, including adjourning a mediation at the end of June that has been scheduled since March 2, 2022.

The Court's latest scheduling order dated May 1, 2022 was carefully crafted to have discovery be completed by June 10, 2022 and to have dispositive motions on file by June 17, 2022, so that those motions would be pending when the parties attended the long-scheduled mediation sessions with mediator Paula Manis on June 29 and 30, 2022. However, at no point prior to June 10, 2022 did Defendants' counsel indicate to Plaintiff's counsel that Defendants could not comply with the scheduling order dates. In fact, Defendants' counsel did not communicate at all with Plaintiff's counsel between April 27, 2022 and June 10, 2022.

But Plaintiff can only speculate about what really happened and why Defendants' counsel

has failed to keep abreast of this case. The Court would be justified in denying Defendants' motion out of hand based on the repeated, lengthy extensions the Court has already granted at Defendants' request, and also based on Defendants' failure to both (a) supplement Plaintiff's expert witness interrogatories, which Plaintiff served in May 2019 and which Defendants first answered in September 2019, or (b) name a testifying expert at any time prior to filing their present motion on June 10, 2022, despite **FIVE** scheduling orders setting later and later deadlines for identifying witnesses. However, if the Court is inclined to entertain Defendants' motion, it should ask Defendants' counsel some probing questions about their discovery and expert witness activities to date, as set forth in detail below. To give just two examples: When did Defendants retain Bill Stannard as a testifying expert? Why didn't Defendants supplement their expert interrogatory responses after they retained Stannard?

Just as importantly, Defendants exaggerate the scale of the "new" material in the Heid Report. The report does have 2,998 pages, 2,054 of which were produced by GLWA member municipalities in response to Plaintiff's subpoenas, and most of those were produced to Defendants on February 10, 2022. *See* Kickham Email 2/10/22, Exhibit 2 hereto. The small remainder of the non-party subpoena responses were produced on May 11, 2022. *See* Kickham Email 5/11/22, Exhibit 3 hereto.

Of the remaining 944 pages, 430 pages were attached to Plaintiff's November 2021 mediation summary, and 514 pages were **not** attached to Plaintiff's mediation summary, as described in detail below. The vast majority of the "new" 514 pages were cost of services studies that were prepared by Defendants' consultant, Bart Foster, and produced **by Defendants to Plaintiff in September 2020**. Again, Defendants themselves created or authored almost all of the underlying documents; Plaintiff merely packaged and analyzed those documents in its mediation summary and the Heid Report. When Defendants suggest that Plaintiff gave them "thousands of pages" of **new**

material to review at the very last minute, they are being misleading at best.

Defendants also try to mislead the Court about when they “requested” Plaintiff’s expert report. Def. Mot., ¶ 22. Defendants served expert interrogatories in January 2021. Plaintiff did not have a report to produced at that time, and Mr. Heid had not finished formulating his opinions. Defendants act as if Plaintiff took 16 months to produce materials that were in existence, when the truth is that Plaintiff spent that time trying to extract from Defendants the documents Mr. Heid needed for his expert report.

Plaintiff’s requested relief – the denial of Defendants’ present motion and an order precluding them from calling any testifying expert witness – is fully justified under the circumstances. The Court has been very patient and understanding about Defendants’ counsel’s various personal difficulties and his requests for additional time. So have Plaintiff and its counsel, who represent a class of about 47,000 persons and entities who are collectively owed many millions of dollars in refunds. The time has come to move this case forward, even if that means Defendants will suffer some consequences for their counsel’s inattention and inaction.

II. BACKGROUND

A. The History of Witness List Exchange Deadlines

This case has been pending for almost four years.¹ The following timeline sets forth the history of the Court’s deadlines for witness lists.

5/14/19	Plaintiff serves its First Interrogatories, Exhibit 4 hereto, which include expert interrogatories (Int. No. 15, 16, 17, and 18).
8/19/19	Court enters initial Status Conference Scheduling Order, Exhibit 5 hereto, setting a witness list deadline of September 19, 2019.
9/6/19	Defendants serve answers to Plaintiff’s First Interrogatories, Exhibit 6

¹ Some of that time is attributable to Defendants’ attempt to remove the case to federal court. Plaintiff filed its complaint on September 10, 2018. Defendants removed the case to the Eastern District of Michigan on October 24, 2018 (*see* Exhibit 23 hereto) and the case was remanded to this Court on May 6, 2019 (*see* Exhibit 24 hereto).

	hereto. In response to Plaintiff's expert interrogatories, Defendants say: "Defendants have not determined the expert witnesses they intend to call at trial to testify in this matter. Defendants will supplement their response to this Interrogatory per the Michigan Court Rules." <i>Id.</i> , Responses to Int. 15, 16, 17, and 18. Defendants never supplemented their response to the First Interrogatories.
10/3/19	Defendants file their Witness List, Exhibit 7 hereto, which is the only Witness List Defendants filed in this case. Defendants' Witness List does not disclose an expert witness. The Witness List identifies Bart Foster, who is a fact witness in this case and who often serves as an expert witness in litigation, but does not identify Mr. Foster as an expert witness in this case. The Witness List does not identify Bill Stannard, Defendant's proposed testifying expert.
10/4/19	Plaintiff files its Preliminary Witness List, Exhibit 8 hereto, which is the only Witness List Plaintiff filed in this case. Plaintiff names Kerry Heid of Heid Rate & Regulatory Services and John Damico of Environmental Rate Consultants as potential expert witnesses in this case.
1/4/21	Defendants serve their First Interrogatories, Exhibit 9 hereto, which include expert witness interrogatories.
3/30/21	At the parties' joint request, the Court enters its Stipulated Order to Adjourn Dates and for Facilitation, Exhibit 10 hereto, which sets a witness list deadline of May 21, 2021.
4/27/21	Plaintiff serves its responses to Defendant's First Interrogatories, Exhibit 11 hereto. Plaintiff identifies Kerry Heid as its testifying expert, and promises to produce Mr. Heid's report once it is finished. Plaintiff also presents substantial analysis of its claims, sourced to specific discovery documents. <i>See Id.</i> , Ans. to Int. No. 13 (generally identifying documents on which Plaintiff intended to rely, as of the date of the responses); Ans. to Int. No. 14 (providing detailed refund calculations sourced to specific documents).
5/24/21	At Defendants' request, the Court enters its Order to Adjourn Dates, Exhibit 12 hereto, which sets a witness list deadline of August 1, 2021.
8/23/21	At Defendants' request, the Court enters its Order to Adjourn Dates, Exhibit 13 hereto, which sets a witness list deadline of October 31, 2021.
2/13/22	At Defendants' request, the Court adjourns certain scheduling order dates. <i>See</i> Stipulated Order to Adjourn Scheduling Order Dates, Compel Defendants' Responses to Fifth and Sixth Requests for Production, etc.,

	Exhibit 14 hereto. This order does not address witness lists.
5/1/22	At the parties' joint request, the Court adjourns the mediation deadline along with certain scheduling order dates, including setting a witness list deadline of May 23, 2022 . See Order for Adjournment of Scheduling Order Dates dated 5/1/22, Exhibit 15 hereto. ²
5/23/22	Plaintiff produces the Heid Report.
6/1/22	Plaintiff serves supplemental responses to Defendants' First Interrogatories, Exhibit 16 hereto. In response to the expert interrogatories, Plaintiff refers to and incorporates the Heid Report. Plaintiff also amends its responses to certain other interrogatories to rely on the Heid Report in place of Plaintiff's initial answers from 2021.
6/10/22	Discovery closes in this matter in accordance with the Court's 5/1/22 scheduling order (Exhibit 15 hereto). Defendants file their present motion to adjourn dates.

As the Court can see, Defendants and their counsel had **FIVE** chances over two and a half years to file a witness list naming a testifying expert. Before filing this motion on June 10, 2022, Defendants had referred generally to Bill Stannard as their "expert," but had not expressly said that Mr. Stannard was a testifying expert. See Email Exchange dated 11/18/21, Exhibit 1 hereto (Mr. Frescoln: "As we discussed this morning, I would like to share your Mediation Summary with our expert, Bill Stannard."). Defendants never supplemented their responses to the expert interrogatories Plaintiff served in **May 2019**; they stood by their September 2019 statement that they **had no testifying expert witness** even after they mentioned Mr. Stannard in an email in November 2021. And Defendants understood the importance of timely witness lists, because Mr. Frescoln asked for an extension of time to file his witness list on at least one occasion. See Frescoln Email 10/29/21, Exhibit 17 hereto (Mr. Frescoln: "Are you amenable to pushing updated witness lists to next Friday?").

² This order refers to a "prior date" for witness lists of May 1, 2021. Presumably this is because the parties were mistaken and missed the Court's 8/23/21 order when they were preparing the proposed order.

At best, Defendants tacitly allowed Plaintiff to believe for more than six months that Mr. Stannard was merely a consulting expert. At worst, Defendants actively misled Plaintiff about their plans for Mr. Stannard until a strategically convenient moment. Unfortunately, the worse scenario is more likely, given that Defendants had failed to disclose an expert before the October 31, 2021 witness list deadline, which was less than three weeks before the date when they asked Plaintiff for permission to show Mr. Stannard Plaintiff's mediation summary. Defendants also failed to identify an expert witness by the May 23, 2022 deadline, which the Court set on May 1, 2022, more than **five months after** Mr. Frescoln mentioned Mr. Stannard in his email. In other words, even if Defendants hired Mr. Stannard on November 18, 2021, the day they asked for permission to give him Plaintiff's mediation summary, they had another chance to name him as a testifying expert on or before May 23, 2022 – not to mention the ongoing duty to supplement their expert interrogatory responses. Instead, they sat back and did nothing. Mr. Frescoln did not communicate with Plaintiff's counsel at all between his email on April 27, 2022 confirming the parties' mediation dates (Exhibit 18 hereto) and his request for concurrence on June 10, 2022. Only then did Mr. Frescoln pop up and seek extra time to absorb and respond to the information he received in November 2021 and May 2022. This behavior is sometimes called “sandbagging.”

B. Plaintiff's Discovery Responses, Mediation Summary, and Expert Witness Report

Plaintiff has been explaining its theory of the case to Defendants for several years, beginning with Plaintiff's highly detailed Complaint dated September 10, 2018 and its First Amended Complaint dated September 27, 2019. Between those dates, Plaintiff expanded on its theory of the case in briefs supporting its Motion to Remand in the Eastern District of Michigan. After remand, Plaintiff filed a Motion for Class Certification on September 20, 2019 that further explained its theories. Plaintiff also served extensive discovery requests to develop the factual record supporting its claims.

During the same period of time, Defendants did practically nothing to find out more about Plaintiff's theory of the case. They finally served interrogatories in January 2021, and apparently did not pay close attention to the responses Plaintiff served in April 2021, which included detailed refund calculations sourced to specific documents. But Defendants' real inattention did not begin until November 2021, when Plaintiff produced its mediation summary and gave defendants permission to produce the summary to Mr. Stannard. Plaintiff's mediation summary contained 53 pages of narrative and 430 pages of exhibits.

Exhibits A through GG are identical between the November 2021 mediation summary and the Heid Report. Of the remaining exhibits to the Heid Report, GG through ZZ, only **four** were "new" to Defendants on May 23, 2022: (1) Kerry Heid's list of documents he relied upon, (2) Mr. Heid's CV, (3) the total meter calculations Plaintiff performed based on the subpoenaed documents, and (4) a list of meter counts Plaintiff prepared based on publicly available information. The exhibits to Plaintiff's mediation summary and the Heid Report were as follows:

Ex. Ltr.	Plaintiff's Mediation Summary	Heid Report
A	GLWA Bond Issue Document	GLWA Bond Issue Document
B	GLWA IWC Brochure	GLWA IWC Brochure
C	GLWA Rules	GLWA Rules
D	Defendants First Supplemental Answers to Plaintiff's Third Requests for Admission	Defendants First Supplemental Answers to Plaintiff's Third Requests for Admission
E	Kuplicki Deposition	Kuplicki Deposition
F	IWC Program Review by DWSD	IWC Program Review by DWSD
G	Kuplicki Email	Kuplicki Email
H	DWSD Information Statement	DWSD Information Statement
I	IWC Observations	IWC Observations
J	Jordan Deposition	Jordan Deposition
K	City of Birmingham W&S FAQ	City of Birmingham W&S FAQ
L	St. Clair Shores City Council Meeting Minutes	St. Clair Shores City Council Meeting Minutes
M	GLWA Regulatory Program Rules & Regulations 2016	GLWA Regulatory Program Rules & Regulations 2016
N	GLWA Wastewater Operating Services User Guidance	GLWA Wastewater Operating Services User Guidance
O	Kuplicki Affidavit	Kuplicki Affidavit

P	Defendants' Supplemental Brief in Opposition to Class Certification	Defendants' Supplemental Brief in Opposition to Class Certification
Q	United States Code excerpts	United States Code excerpts
R	EPA Guidance Manual for POTW	EPA Guidance Manual for POTW
S	US Code excerpts	US Code excerpts
T	EPA Regulations	EPA Regulations
U	Kuplicki Deposition 2019	Kuplicki Deposition 2019
V	DWSD Presentation – What is IWC?	DWSD Presentation – What is IWC?
W	DWSD Retail Accounts Receivable Aging Report	DWSD Retail Accounts Receivable Aging Report
X	Eastern Dist. Mich. Order	Eastern Dist. Mich. Order
Y	Foster Deposition January 2021	Foster Deposition January 2021
Z	Savistkie Deposition June 2021	Savistkie Deposition June 2021
AA	GLWA IWC Comparative Analysis by Foster Group	GLWA IWC Comparative Analysis by Foster Group
BB	Defendants' Answers to Plaintiff's First Interrogatories	Defendants' Answers to Plaintiff's First Interrogatories
CC	Opinion and Order Granting Plaintiff's Motion to Remand to State Court	Opinion and Order Granting Plaintiff's Motion to Remand to State Court
DD	Detroit City Code Sections	Detroit City Code Sections
EE	Binns/DAART Supreme Court Oral Argument Transcript October 2020	Binns/DAART Supreme Court Oral Argument Transcript October 2020
FF	Binns/DAART Order December 2020	Binns/DAART Order December 2020
GG	Defendants' Supplemental Answers to Second Interrogatories	Defendants' Supplemental Answers to Second Interrogatories
HH		Foster Cost of Service Study excerpt Defendants already had – 1 page
II		Foster COSS excerpt – 2 pages
JJ		IWC Program Review by DWSD - 18 pages (they already had)
KK		IWC Budget - 7 pages (they already had)
LL		IWC Cost Analysis - 2 pages (they already had)
MM		Foster 2017 COSS they already had – 17 pages
NN		Foster 2018 COSS they already had – 37 pages
OO		Foster 2019 COSS they already had – 49 pages
PP		Foster 2020 COSS they already had – 82 pages
QQ		Foster 2021 rates they already had – 18 pages
RR		Foster 2022 COSS they already had – 85 pages
SS		Internal GLWA emails they already had –

		22 pages
TT		Internal GLWA analysis they already had – 7 pages
UU		Lab budget docs they already had – 4 pages
VV		Total meter subpoena responses and calculations. 2,054 pages of subpoena responses that Defendants already had; 96 other pages, including many Defendants already had. 35 pages of new material created by Plaintiff based on the subpoena documents.
WW		IWC meter counts – 44 pages. Created by Plaintiff.
XX		Foster’s second dep transcript they already had – 12 pages
YY		List of documents Heid relied upon – 1 page
ZZ		Heid’s CV – 10 pages

The Court will see that the overwhelming majority of the material attached to the Heid Report was either generated by Defendants or already in their possession months or years before Plaintiff produced the Heid Report. The Heid Report in fact very closely tracks Plaintiff’s mediation summary from November 2021.

C. The Parties’ Communications About Discovery

On May 14, 2022, Plaintiff’s counsel emailed Mr. Frescoln, told him Plaintiff intended to produce its expert report by May 23, 2022, and asked Mr. Frescoln to propose dates for Mr. Heid’s deposition. *See* Hanley Email 5/14/22, Exhibit 19 hereto. Plaintiff received **no** communication from Mr. Frescoln between May 14 and Mr. Frescoln’s request for concurrence in this motion on June 10, 2022. And Mr. Frescoln still has not proposed any deposition dates. Mr. Frescoln acknowledges receiving the Heid Report on May 23, 2022. Def. Mot., ¶ 6.

The procedure Defendants describe in ¶¶ 7-10 of their motion is standard procedure. Experts routinely produce their reports late in the discovery phase. This is because experts base

their reports in part (and in this case, almost entirely) on materials acquired through discovery. Here, Defendants dragged their feet in discovery and caused Plaintiff to file multiple motions to compel and this Court to enter multiple orders compelling discovery, as the Court will recall. That is why Plaintiff could not provide Mr. Heid's final opinions until May 2022.

III. ARGUMENT

A. The Court Should Deny Defendants' Motion Out of Hand

1. *The Court Should Preclude Defendants From Calling a Testifying Expert*

First, Defendants' entire motion is founded on the assumption that they are entitled to call a testifying expert. They are not. Defendants missed **FIVE** chances to file a witness list naming a testifying expert, and they spent **TWO YEARS AND NINE MONTHS** between serving their discovery responses stating that they had not retained a testifying expert and their attempt to identify one – Bill Stannard – on June 10, 2022. Although Defendants' counsel identified Mr. Stannard as an expert in November 2021, Plaintiff's counsel justifiably believed that Defendants' failure to supplement Plaintiff's expert interrogatories and comply with the Court's orders to name **testifying** experts meant that Defendants had retained Mr. Stannard only as a consulting expert or that Mr. Stannard had indicated that he could not in good faith support Defendants' defenses in this case.

“[T]rial judges have the authority and discretion to manage dockets.” *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997), *rev'd on other grounds by People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012). “The trial court has discretion in admitting expert testimony and its decision will not be reversed absent a clear abuse . . .” *Haisenleder v. Reeder*, 114 Mich. App. 258, 264, 318 N.W.2d 634, 637 (1982) (citation omitted). In *La Croix v. Clemco Indus. Corp.*, No. 235456, 2002 Mich. App. LEXIS 2310 *12-13 (Dec. 27, 2002) (Exhibit 20 hereto), the court reasoned as follows:

Defendant Clemco also argues that the trial court abused its discretion in striking its expert witness. We disagree. Unlike plaintiffs, defendant Clemco did not timely disclose the identity of its expert. Defendant Clemco's expert witness was not named in either its original witness list or its amended witness list. Additionally,

defendant Clemco never responded to plaintiffs' expert witness interrogatories that were outstanding for over one year. There was no effort made to timely cure the failure to provide the identity of the witness or the substance of his proposed testimony. Plaintiffs' first notice of the identity and anticipated testimony of defendant Clemco's proposed expert was in defendant Clemco's trial brief submitted shortly before trial. Based on this untimely notice, plaintiffs would be prejudiced if the expert was permitted to testify. On this record, we cannot say that the trial court abused its discretion by striking defendant Clemco's expert witness.

The following discussion from *Mayes v. Mount Clemens Gen. Hosp., Inc.*, No. 195082, 1997 Mich. App. LEXIS 916 *2-3 (June 27, 1997) (Exhibit 21 hereto), which cites to published authority, is also helpful:

The decision whether to allow a party to add an expert witness is within the discretion of the trial court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992); *Levinson v Sklar*, 181 Mich App 693, 699; 449 NW2d 682 (1989), after remand sub nom *Levinson v Trotsky*, 199 Mich App 110; 500 NW2d 762 (1993). In determining whether the trial court abused its discretion, this Court considers whether the party seeking to add an expert has adequately explained its reason for delay, and whether the opposing party would be prejudiced. *Tisbury, supra* at 21; *Levinson, supra* at 699. In determining prejudice, this Court considers a number of factors, including: (1) whether the original expert witness has already been deposed, (2) whether the addition of an expert would affect any mediation evaluation, **(3) whether the party seeking to add the expert has caused repeated delays because of a lack of diligence**, and (4) whether the failure to allow the addition of an expert will deny a party a determination on the merits of their claim. *Tisbury, supra* at 21; *Levinson, supra* at 699. [emphasis added.]

See also Kapp v. Mark A. Evenhouse, MD, No. 216020, 2001 Mich. App. LEXIS 1571 *8 (Mar. 6, 2001) (Exhibit 22 hereto) (“The trial court was also justified in determining plaintiff lacked good cause for failing to comply with the disclosure standards set forth in the order. Plaintiff acknowledged below that she did not disclose the expert information as required by the order because she was waiting to hear defendant Evenhouse's testimony before selecting her experts. As expressed by the trial court, such delay was not warranted given plaintiff's obligation to prove her case. Given plaintiff's explanation for her failure to comply with the scheduling order, we are not convinced that the trial court erred in determining plaintiff lacked good cause for the delay. Under these circumstances, we conclude that the trial court did not abuse its discretion in prohibiting plaintiff's experts from

testifying at trial.”).

Here, the Court managed its docket by setting repeated, recurring, and generous witness list deadlines, which Defendants ignored. Defendants made no effort to timely cure their failure to identify an expert. The Court is well aware of the “repeated delays due to lack of diligence” on the part of Defendants in this case. Meanwhile, Plaintiff identified its expert witness in October 2019 and produced his report as soon as it was available. And the Heid Report took as long as it did only because Plaintiff had to wait to receive key documents from Defendants. The Court would be well within its discretion to preclude Defendants from calling any testifying expert in this case.

Plaintiff expects Defendants to make a last-ditch argument that Mr. Stannard is a rebuttal expert. That cannot possibly be true. Mr. Stannard had access to all of the Defendants’ data – which Plaintiffs interpreted and repackaged in their mediation summary and the Heid Report – and he could have come to his opinions at any time, independent of any review of the Heid Report.

2. Any Injury Defendants Might Suffer From a Time Crunch Is Self-Inflicted

If the Court does allow Defendants to call a testifying expert, it should not grant them the vastly extended deadlines they seek. In their Motion, ¶ 16, Defendants say it is “impossible” for their counsel and purported expert to review and assimilate the Heid Report “within a mere one month’s time between May 23, 2022 and June 22, 2022.” But what is the basis for that statement? Mr. Frescoln (and possibly Mr. Stannard) had virtually all of the underlying documents and data in their possession in November 2021. They have apparently done nothing since then, or since Plaintiff produced its expert report on May 23, 2022. Defendants complain about the “volume of information” their expert has to review (Def. Mot., ¶ 17), but either Mr. Stannard has been reviewing the information all along or he has been doing nothing. If he has been reviewing it since November 2021, he ought to be ready to offer his opinion. If he has not been reviewing the information, then Defendants have shot themselves in the foot in light of the clear scheduling order

deadlines in this case. If the Court sees fit to grant any additional time, that time should be minimal and under no circumstances should the Court adjourn the deadline for completing mediation. As the Court knows, all parties believe that Ms. Manis is the best mediator for this case, given her involvement in the one mediation session that has already occurred and her familiarity with these kinds of municipal utility cases. Her availability has been extremely limited and, if the mediation does not go forward on the long-scheduled June 29 and June 30 dates, the likelihood of rescheduling those dates anytime in the next several months is low.

B. If the Court Is Inclined to Consider Defendants' Motion, It Should Ask Defendants' Counsel Some Questions

At a bare minimum, the Court should demand that Defendants or their counsel answer the following questions, preferably under oath:

1. When was Mr. Stannard retained?
2. When did Mr. Frescoln first provide Mr. Stannard with any background docs?
3. What were the materials that were provided to Mr. Stannard?
4. When did Mr. Frescoln provide Mr. Stannard with the materials Greg Hanley authorized him to provide in November 2021?
5. Why didn't Mr. Frescoln respond to Mr. Hanley's May 13 email prior to June 10?
6. Why didn't Mr. Frescoln depose Kerry Heid prior to June 10, or even propose dates for the deposition?
7. Why didn't Mr. Frescoln raise the issue of extending the schedule until the last day of discovery?
8. Why didn't Mr. Frescoln ever name a testifying expert even though he and Defendants' prior counsel collectively had at least six separate opportunities to do so?
9. What has Mr. Stannard done since Plaintiff produced the Heid Report on May 23?
10. Why was Mr. Stannard unable to do anything until he received the Heid Report?

The answers will help the Court determine the extent of Defendants' lack of diligence and the appropriate response to that lack of diligence.

IV. CONCLUSION

The Court should exercise its discretion to deny Defendants' request to name a testifying expert at this late hour, in light of Defendants' repeated failures to do so in a witness list or supplemental discovery responses and further deny Defendants' motion in its entirety. If the Court

decides to allow Defendants to call a testifying expert and/or to grant any of the relief requested in Defendants' motion, it should grant only the shortest possible adjournment of dates and not adjourn the mediation completion deadline. Otherwise, the Court will only reward Defendants for their inattention and inaction.

KICKHAM HANLEY PLLC

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Date: June 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2022, I served the foregoing document on all counsel of record using the court's electronic filing system.

/s/ Kim Plets

Kim Plets