

EXHIBIT 23

Slip Copy, 2009 WL 649894 (D.Hawai'i)
(Cite as: 2009 WL 649894 (D.Hawai'i))

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United States District Court, D. Hawai'i.
MMI REALITY SERVICES, INC., Plaintiff,

v.

WESTCHESTER SURPLUS LINES INSURANCE
COMPANY, et al., Defendants.

Civ. No. 07-00466 BMK.

March 10, 2009.

Charles A. Price, James E.T. Koshiba, Lisa Anne
Gruebner, Koshiba Agena & Kubota, Honolulu, HI,
for Plaintiff.

Jeffrey A. Griswold, Stefan M. Reinke, Lyons
Brandt Cook & Hiramatsu, Honolulu, HI, for De-
fendants.

***ORDER DENYING DEFENDANT
WESTCHESTER SURPLUS LINES INSUR-
ANCE COMPANY'S MOTION TO EXCLUDE
THE TESTIMONY OF JAMES HOLLAND***

BARRY M. KURREN, United States Magistrate
Judge.

*1 Before the Court is Defendant Westchester Sur-
plus Lines Insurance Company's (Westchester) Mo-
tion to Exclude the Expert Testimony of James Hol-
land. The Court heard this motion on February 24,
2008. After careful consideration of the Motion, the
supporting and opposing memoranda and the argu-
ments of counsel, Westchester's Motion is
DENIED.

BACKGROUND

Pursuant to a Rule 16(a)(2) scheduling order,
Plaintiff MMI Realty Services (MMI) was required
to disclose by October 6, 2008 "the identity and
written report of any person who may be used at tri-

al to present evidence under [rules 702, 703, or 705
of the Federal Rules of Evidence.](#)" MMI has
offered the expert testimony of James Holland to
support its theory of the case but did not disclose
his identity as an expert until November 12, 2008.

In their timely reports, Westchester's experts, Dr.
Douglas Daugherty and Eric Morgan, opine that
MMI's clean up of the flood was excessive and in-
curred expenses that were unnecessary. In particu-
lar, they assert that work done to remove drywall
that had soaked up flood water was unnecessary.
Holland's report counters that, although Daugherty
and Morgan's expert reports do not discuss the cat-
egory of flood at issue, their assessment of the
clean up was based on a category 1 flood involving
uncontaminated water, whereas Holland believes
the flood was a category 3 involving contaminated
water. According to Holland, depending on whether
the flood is category 1 or 3, the clean up procedures
differ. He refers to Institution of Inspection, Clean-
ing and Restoration Certification (IICRC)
guidelines and industry standards requiring the re-
moval of drywall and other porous material in the
event of a category 3 flood. Based on the
guidelines, Holland opines that the flood clean up
was proper and not excessive for a category 3
flood.

DISCUSSION

Westchester claims that MMI's expert witness,
James Holland, should not be allowed to testify and
his expert report should be stricken because MMI's
disclosure of Holland as an expert witness was un-
timely. Westchester acknowledges that MMI's dis-
closure would be timely if Holland's report rebuts
its own expert's opinions, but argues that it is not
rebuttal evidence. Specifically, Westchester argues
that by discussing category 3 contaminated water
and IICRC guidelines governing clean up proced-
ures for a category 3 flood when neither of its ex-
perts raised these issues, Holland's report includes a

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separate and distinct analysis that cannot be considered rebuttal evidence. Westchester also contends it would be highly prejudicial to allow Holland to testify since its experts may not be fully qualified to respond to Holland's analysis concerning category 3 flood issues.

[Rule 26\(a\)\(2\)\(C\) of the Federal Rules of Civil Procedure](#) states that parties “must make [disclosures regarding expert testimony] at the times and in the sequence the court orders.” In a rescheduling conference held on August 5, 2008, the court ordered MMI to disclose its experts by October 6, 2008 and Westchester to disclose its experts by November 5, 2008. The court's standard pretrial order also allowed MMI a thirty day period following Westchester's expert disclosures to submit any rebuttal expert reports.

*2 MMI contends that Holland's report submitted on November 12, 2008 was timely because Holland's opinions rebut and undermine the opinions of Westchester's experts.

[Rule 26\(a\)\(2\)\(C\) \(ii\) of the Federal Rules of Civil Procedure](#) defines rebuttal evidence as “evidence [that] is intended solely to contradict or rebut evidence on the same subject matter identified by another party.” See also, [Lindner v. Meadow Gold Dairies, Inc.](#), 249 F.R.D. 625, 636 (D.Haw.2008) (noting that expert reports “are proper rebuttal reports if they contradict or rebut the subject matter of the [opposing party's expert report]”). Under this rule, Holland is free to support his opinions with evidence not cited in Westchester's reports so long as he rebuts the “same subject matter” identified in those reports. See, [Fed.R.Civ.P. 26\(a\)\(2\)\(C\)\(ii\)](#).

Holland does cite to flood categories and guidelines not mentioned in Westchester's expert reports, but his opinions refute the Daugherty-Morgan analysis which concluded that MMI's remediation efforts were excessive. Although the industry guidelines Holland refers to were not mentioned in the Daugherty-Morgan analysis, the discussion of those guidelines and category 3 flood issues is the basis

for Holland's rebuttal to Westchester's experts' conclusions.

CONCLUSION

For the foregoing reasons, Westchester's Motion is DENIED. However, since Westchester did not know of MMI's reliance on the category 3 flood issues at the time it was required to identify experts, and further since its experts may not be qualified to address those issues, Westchester is given leave to identify an additional expert to address the category 3 flood issues in light of MMI's rebuttal report.

IT IS SO ORDERED.

D.Hawai'i, 2009.

MMI Realty Services, Inc. v. Westchester Surplus Lines Ins. Co.

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