

EXHIBIT 28

Not Reported in F.Supp., 1995 WL 115421 (N.D.Cal.)
(Cite as: **1995 WL 115421 (N.D.Cal.)**)



Only the Westlaw citation is currently available.

United States District Court, N.D. California
INTERNATIONAL BUSINESS MACHINES
CORPORATION, Plaintiff,

v.

FASCO INDUSTRIES, INC., Defendant.

C-93-20326 RPA.

Mar. 15, 1995.

ORDER GRANTING IN PART IBM'S MOTION
TO EXCLUDE FASCO'S "REBUTTAL" EX-
PERTS

AGUILAR, District Judge.

*1 International Business Machines Corporation ("IBM") moves to exclude from trial certain of Fasco Industries, Inc.'s ("Fasco") expert witnesses on the ground that Fasco failed to designate the witnesses by the deadline set forth in this court's scheduling order. The court has read the moving and responding papers and has heard the argument of counsel. For the reasons discussed below, IBM's motion is GRANTED in part.

BACKGROUND

IBM filed this breach of contract action in May 1993, alleging that Fasco supplied it with defective blowers used to cool the electronic components of an IBM data storage machine. Fasco filed a counterclaim which alleges that IBM prematurely terminated their contract.

In July 1994, this court issued a scheduling order establishing deadlines for fact discovery, expert witness disclosure and expert discovery. That order set the cut-off for expert discovery on December 6, 1994, and required the parties to simultaneously disclose their expert witnesses on November 30,

1994. Through a series of stipulations, expert discovery cut-off was extended to January 20, 1995, and the date for disclosing experts was extended to January 11, 1995.^{FN1}

On January 11, IBM designated three expert witnesses: engineers Iain Finnie and Robert F. Streidel, Jr., and economist Benjamin Klien. According to the expert witness reports, Finnie and Steidel will testify that Fasco's blowers were defective, while Klien will testify on the subject of lost profits suffered by IBM as a result of the allegedly defective blowers.

Fasco disclosed one expert on January 11-Brian W. Napper-who will testify about economic damages sought in connection with Fasco's counterclaim and will dispute the theories of IBM's economic damages expert. Fasco did not disclose any experts on the subject of the defectiveness of its blowers. Instead, Fasco told IBM that it would designate such experts thirty days later as "rebuttal" experts under [Federal Rule of Civil Procedure 26\(a\)\(2\)\(C\)](#). On February 10, 1995, Fasco disclosed six "rebuttal" expert witnesses: engineers Tardiff, Williams, Comfort and Clay, who plan to testify that the blowers were not defective; another engineer, McKnight, who will testify on the industry custom and practice regarding the testing of blowers; and Bourg, an economic damages expert.

IBM maintains that the "rebuttal" designations were untimely and that these experts should be precluded from testifying. Pending this court's ruling, however, IBM has begun deposing Fasco's "rebuttal" experts in the event they are permitted to testify.

ANALYSIS

IBM argues that Fasco violated the scheduling order and subsequent stipulations by designating experts after the January 11, 1995 expert witness disclosure deadline. As a sanction, IBM urges that

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Fasco's "rebuttal" experts named on February 11 be excluded from trial. Fasco counters that its disclosures were timely under [Fed.R.Civ.P. 26\(a\)\(2\)\(C\)](#), which it argues is controlling because the scheduling order does not mention "rebuttal" experts.

*2 Under amended [Fed.R.Civ.P. 26](#), which took effect December 1, 1993, all parties and the court should possess full information well in advance of trial on any proposed expert testimony. [Rule 26\(a\)\(2\)](#) now requires all parties to disclose to their adversaries the identity of any person who may testify at trial under [Federal Rules of Evidence 702](#), [703](#), or [705](#). [Rule 26\(a\)\(2\)\(C\)](#) dictates the timing of the disclosures:

These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

[Rule 26\(a\)\(2\)\(C\)](#) thus provides an alternative procedure for the disclosure of experts in the event a court does not give any guidance on the subject. In this case, however, the court gave explicit directions regarding the time for disclosing expert witnesses. The scheduling order directed the parties to simultaneously disclose their experts and the anticipated testimony on November 30, 1994. Three subsequent stipulations extended this date to January 11, 1995. Because this court assumed responsibility for setting disclosure dates, [Rule 26\(a\)\(2\)\(C\)](#)'s alternative procedure never kicked in.

Fasco argues that, notwithstanding the court's scheduling order, the [Rule 26\(a\)\(2\)\(C\)](#) deadline for rebuttal experts applies because the scheduling order and stipulations were silent as to rebuttal ex-

perts. The critical question, however, is whether the court has spoken on the subject of expert disclosures generally, not whether it has specifically substituted its own deadlines for those proposed in [Rule 26\(a\)\(2\)\(C\)](#). The scheduling order does not have to account for every deadline set forth in [Rule 26\(a\)\(2\)\(C\)](#). When the court crafted its own schedule for expert disclosures, the mechanism set forth in [Rule 26](#) was nullified, including the provision for supplemental disclosures. Fasco's argument mistakenly reads into [Rule 26\(a\)\(2\)\(C\)](#) a substantive right to supplement an initial witness disclosure with rebuttal experts. The rule merely provides alternative deadlines should the court neglect to set its own schedule. The language "[i]n the absence of other directions from the court" makes this clear. The scheduling order controls and does not allow for supplemental disclosures.

The expert discovery cut-off date further demonstrates that [Rule 26\(a\)\(2\)\(C\)](#)'s supplemental disclosure dates are inapplicable. The expert discovery cut-off date was January 20, 1995. If [Rule 26\(a\)\(2\)\(C\)](#)'s schedule applied, Fasco could have properly designated its rebuttal experts twenty-one days after the close of expert discovery, meaning that IBM would be entirely precluded from depositing Fasco's rebuttal experts. This anomalous result undermines Fasco's interpretation of the interplay between the court's scheduling order and [Rule 26\(a\)\(2\)\(C\)](#). Fasco's February 11 designations were untimely and violated the scheduling order. The only question is what the sanction should be.

*3 A district court has the authority to exclude the testimony of expert witnesses for a breach of a scheduling order or [Rule 26](#). *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (1980); *Jenkins v. Whittaker*, 785 F.2d 720, 728 (9th Cir.1986), cert. denied, 479 U.S. 918 (1986). Because Fasco followed the mechanism set forth in [Rule 26\(a\)\(2\)\(C\)](#), it makes sense to use that rule's limits on Fasco's rebuttal expert testimony as a benchmark for determining an appropriate sanction. Under [Rule 26\(a\)\(2\)\(C\)](#)'s disclosure mechanism, a party may

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designate additional experts thirty days after initial expert disclosures, with one caveat: the additional experts' testimony is limited to rebutting or contradicting the expert testimony initially designated by the opposing party. The supplemental or "rebuttal" experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts. In this respect, a party can control the scope of the testimony of its adversary's rebuttal experts by limiting its own experts' testimony to a given subject matter. A party who forgoes designating experts on the initial disclosure date will thus find itself in a purely reactive mode, greatly restricted in its ability to offer expert testimony.

Judging from the expert witness reports describing their expected testimony, four of Fasco's six experts disclosed on February 10 were properly designated as rebuttal experts. According to IBM's January 11 disclosure, IBM's engineering experts will opine that zinc was an improper material for use in blowers and that the steel and aluminum-backed impeller designs were inadequate. These experts will offer a theory regarding the "creep instability" of these materials. The reports accompanying the disclosure of four of Fasco's technical experts - Clay, Adams, Tardiff, and Comfort-indicate that these witnesses will confine their testimony to curtiquing the validity of the "creep instability theory" and other theories promulgated by IBM's experts. Given that this testimony is within the boundaries of [Rule 26\(a\)\(2\)\(C\)](#) rebuttal testimony, Fasco properly designated these four engineers as rebuttal witnesses.

On the other hand, two of Fasco's rebuttal experts should have been designated on the initial disclosure date because they plan to opine on subjects that IBM's experts will not address. James Samuel McKnight will testify on the industry custom and practice for testing blowers, industry standards for blowers and accelerated life testing. IBM has not designated an expert to opine on these issues, so McKnight will have nothing to rebut. Similarly,

Fasco's expert economist, John Bourg, plans to devote part of his testimony to subject matter outside the scope of IBM's experts' testimony; i.e., to out-of-pocket damages. Accordingly, Fasco improperly designated McKnight and Bourg. Under [Rule 26\(a\)\(2\)\(3\)](#), then, McKnight could not testify, period, and Bourg could not testify on out-of-pocket damages. With this in mind, the court turns to the question of an appropriate sanction.

***4** The enforcement of discovery deadlines is absolutely essential in promoting the just and efficient administration of justice. This court's practice of strictly enforcing scheduling deadlines is widely known. Fasco's failure to adhere to the scheduling order, while not done in bad faith, demonstrated poor judgment and created a burdensome distraction from IBM's pretrial preparation. Even conceding that Fasco's interpretation of [Rule 26\(a\)\(2\)\(C\)](#) is reasonable, the discrepancy between the discovery deadline and the Rule's disclosure schedule should have alerted Fasco that there might be a problem with its interpretation. It was presumptuous and reckless for Fasco not to seek guidance from the court at that time. "What we have here is failure to communicate." *Cool Hand Luke*, Warner Bros.-Seven Arts, Inc. (1967).

Nonetheless, while Fasco's behavior must be taken seriously, it would be draconian for this court to exclude all of Fasco's rebuttal experts. Given the importance of technical issues to this case, the trial would be over before it started. Instead, the court will limit Fasco to calling only two witnesses from the ranks of Clay, Tardiff, Adams and Comfort. In addition, McKnight is excluded, and Bourg's testimony as to out-of-pocket damages is excluded. As discussed above, this testimony would not be improper even under Fasco's interpretation of [Rule 26](#). Finally, needless to say, the testimony of Fasco's rebuttal experts will be strictly limited to poking holes in the theories of IBM's experts.

IT IS SO ORDERED.

[FN1](#). A further stipulation extended the ex-

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pert discovery cut-off date to January 27, 1995, “solely to allow time to complete expert witness depositions as to experts previously designated IBM and Fasco.”

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