

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES D. STEIN : CIVIL ACTION  
 :  
v. :  
 :  
FOAMEX INTERNATIONAL, :  
INC., et al. : No. 00-2356

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**AUGUST , 2001**

Presently before the Court are a Motion to Strike and a Motion to Preclude, both of which were filed by the Defendants, Foamex International, Inc., Foamex L.P., Foamex Carpet Cushion, Inc., Trace International Holdings, Inc., General Felt Industries, Inc., GFI-Foamex and Marshall S. Cogan (collectively referred to as the "Defendants"). In this case, the Plaintiff, Charles D. Stein ("Stein"), filed suit against the Defendants, alleging violations of several environmental statutes. Stein served an Expert Report in support of his claims. The Defendants subsequently filed a Motion for Partial Summary Judgment. The Defendants assert that, in order to survive the Motion for Summary Judgment, Stein's expert filed an Affidavit that clearly contradicts the opinions expressed in his Expert Report. The Defendants have therefore filed the instant Motions. For the following reasons, those Motions are granted.

## I. BACKGROUND

Stein is the owner of a twenty-two acre industrial property located in Philadelphia. The Defendants or their predecessors had leased that property from Stein for forty years. As part of their operations, the Defendants installed several underground storage tanks on the property. Stein alleges that, at some time in 1996 while the Defendants were occupying his property, it became contaminated. Stein filed his Complaint against the Defendants, alleging, among other state law claims, violations of several federal environmental statutes. Stein seeks compensation for the damages allegedly caused to his property, as well as his investigative, remedial and legal fees.

Stein had originally hired Sadat Associates ("Sadat") to perform environmental investigations on his property. Sadat prepared a May 1999 Site Characterization Report, which concluded that some vinyl chloride had been released on Stein's property. By Order of this Court, Stein had to serve any expert reports in this case no later than December 1, 2000. Stein ultimately chose Gary Brown ("Brown"), not Sadat, as his expert. Stein served Brown's Expert Report in a timely manner. Stein did not supplement that Expert Report before December 1. The Defendants deposed Brown on February 28, 2001.

Brown's Expert Report identified five areas of concern on Stein's property. See Brown Expert Report at 3. Brown

summarized the first area of concern as "soils and groundwater impacted by releases of petroleum from the Fuel Oil Tanks and/or Outside Parrafin Tanks." Id. Describing this area of concern, Brown's Expert Report mentions only parrafin oil releases near the Outside Parrafin Oil Tank. Id. at 2, 4, 8. The Expert Report stated that "the foregoing areas of concern constitute releases or threatened releases of hazardous substances or petroleum." Id. at 13. Brown's Expert Report also concluded that the alleged "parrafin oil free product release at this site constitutes a substantial endangerment to human health and/or the environment . . . ." Id. When read in conjunction, these different sections of Brown's Expert Report clearly opine that parrafin oil on the property constitutes a release or threatened release that was a substantial endangerment to human health or the environment.

Importantly, nowhere does the Expert Report mention vinyl chloride as an area of concern. Although Sadat's Site Characterization Report mentioned the presence of vinyl chloride, and Brown's Expert Report mentioned the Site Characterization Report as a reference, the Expert Report neither adopted those particular findings nor vouched for their reliability. Indeed, the Expert Report does not expressly refer to that particular conclusion at all. Rather, the Expert Report simply mentions that Sadat had performed work for Stein.

The Defendants filed a Motion for Partial Summary Judgment on March 14, 2001. Briefly stated, the Defendants argued that Stein's federal statutory claims must fail because he had not presented evidence of a threshold amount of proscribed contamination. Specifically, the Defendants argued that, in order to recover, Stein would have to prove that there was an imminent and substantial environmental endangerment, and that the costs of Stein's environmental investigation work were necessary to address the release or threatened release of hazardous substances. See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(4)(B) (1994); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B) (1994).

The Court granted several extensions of time in this case. Finally, on March 22, 2001, pursuant to a stipulation of the parties, the Court ordered that the case would be placed in the trial pool on May 6, 2001.

Stein then filed a Brief in Opposition to the Defendants' Motion for Partial Summary Judgment on April 6, 2001. Attached to that Brief was an Affidavit of Brown. This Affidavit asserted that: (1) there has been a release or threatened release of vinyl chloride on Stein's property; (2) the release constituted "an actual and significant threat to human health and the environment"; (3) the Defendants caused the release; and (4)

certain monitoring and investigative activities on Stein's property, performed by Sadat and later by Brown, were necessary to address the release and threatened release of hazardous substances. See Brown Aff. ¶¶ 7-9, 13, 24-25.

The Defendants believe that Brown's Affidavit contradicts his Expert Report and deposition testimony, and was filed for the sole purpose of allowing Stein to survive the Defendants' Motion for Partial Summary Judgment. They therefore ask the Court to strike the Affidavit and preclude Brown from testifying about opinions not originally expressed in his first Expert Report.

## **II. STANDARDS OF REVIEW**

### **A. The Defendants' Motion to Preclude**

Federal Rule of Civil Procedure 26 requires that parties disclose the identity of any expert witness who may be used at trial. Fed. R. Civ. P. 26(a)(2)(A). That disclosure must also be accompanied by a "written report prepared and signed by the witness." Id. (a)(2)(B). The expert report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor," as well as "the data or other information considered by the witness in forming the opinions . . . ." Id. Assuming the court establishes a schedule for such disclosures, parties must disclose their expert reports "at the times and in the sequences directed by the court." Id. (a)(2)(C).

Rule 26 also imposes a duty to supplement expert reports. Id. ("The parties shall supplement these disclosures when required under subdivision (e)(1)."). Specifically, Rule 26(e)(1) provides that:

[a] party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete . . . . With respect to testimony of an expert from whom a report is required . . . the duty extends both to information contained in the report and to information provided through a deposition of the expert . . . .

Id. (e)(1). Any additions or changes to the information contained in an expert report "shall be disclosed by the time the parties disclosures under Rule 26(a)(3) are due." Id. Disclosures pursuant to Rule 26(a)(3) shall be made, unless otherwise directed by the court, at least thirty days before trial. Id. (a)(3).

Failure to properly disclose or supplement information in accordance with Rule 26 can result in sanctions pursuant to Federal Rule of Civil Procedure 37(c)(1). See Fed. R. Civ. P. 37(c)(1). Rule 37 provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed." Id. Rule 37 provides for other sanctions as well, and the determination of which

sanction to impose is within the sound discretion of the trial court. Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995).

Discretion notwithstanding, "[t]he exclusion of critical evidence is an extreme sanction." Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977). Indeed, the United States Court of Appeals for the Third Circuit requires more than a literal violation of Rule 26; before a court precludes a party from presenting certain evidence at trial, it must first find that the party: (1) revealed previously undisclosed evidence when trial was either imminent or in progress; or (2) acted in bad faith, which is more than a mere lack of diligence. See, e.g., In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 791-93 (3d Cir. 1994); In re TMI Litig. Cases Consol. II, 922 F. Supp. 997, 1004 (M.D. Pa. 1996). When making those determinations, courts should consider: (1) the prejudice or surprise in fact of the party against whom the excluded evidence would have been offered; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the Rule 37 sanctions would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness of the party failing to make a required disclosure. Id.; In re Paoli, 35 F.3d at 791; Pennypack, 559 F.2d at 905.

B. The Defendants' Motion to Strike

Federal Rule of Civil Procedure 56 permits parties bringing a motion for summary judgment to accompany that motion with supporting affidavits. Fed. R. Civ. P. 56(a). A party defending a motion for summary judgment may also employ supporting affidavits. Id. (b). Supporting affidavits are subject to several requirements.

First, supporting affidavits must be "made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Id. (e). Second, supporting affidavits must be brought in good faith; if a litigant offers a supporting affidavit in bad faith or solely for the purpose of delay, "the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt." Id. (g).

Finally, supporting affidavits may not clearly contradict prior sworn testimony. To allow parties to file supporting affidavits that contradicted prior testimony would be to allow them to subvert the purpose of motions for summary judgment. Courts may therefore disregard such affidavits. For a court to

disregard and strike an affidavit, however, the contradiction must be clear; an affidavit that explains rather than contradicts prior testimony should not be disregarded. Compare Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (affidavit conflicted with prior testimony), and Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 705 (3d Cir. 1988) (same), and Hyde Athletic Indus. Inc. v. Continental Cas. Co., 969 F. Supp. 289, 298 (E.D. Pa. 1997) (same), with Giancristoforo v. Mission Gas & Oil Prods., Inc., 776 F. Supp. 1037, 1043 (E.D. Pa. 1991) (affidavit clarified prior testimony). Generally, courts will only disregard an affidavit if the contradiction relates to questions actually posed to the witness. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 284 (3d Cir. 2000); Videon Chevrolet, Inc. v. General Motors Corp., 992 F.2d 482, 488 (3d Cir. 1993). Nevertheless, courts may disregard an affidavit even if the witness was not explicitly examined on an issue, if allowing the affidavit to stand would change the "flavor and theory" of the case by introducing new causes of action or entirely new theories of recovery not previously disclosed. See Pellegrino v. McMillen Lumber Prods. Corp., 16 F. Supp. 2d 574, 583 (W.D. Pa. 1996) (concluding that counsel could not reasonably be held accountable for failing to uncover information through discovery because it greatly differed from nature of case as stated in complaint). Finally, even if an affidavit does

conflict with prior testimony, courts should not strike it if it satisfactorily explains the contradiction in terms of a mistake made while previously testifying. See Martin, 851 F.2d at 705.

### III. DISCUSSION

#### A. The Defendants' Motion to Preclude

##### 1. Whether Stein Violated Rule 26

The Court must first determine whether Stein violated Rule 26, a condition precedent to the imposition of sanctions under Rule 37 that the Defendants assume and Stein apparently conceded without inquiry. It is clear that Stein timely disclosed the identity of Brown as his expert witness, and that Brown's Expert Report was timely served before the date set by the Court. Accordingly, Brown may testify at trial and may express all opinions clearly expressed in his Expert Report.<sup>1</sup>

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<sup>1</sup> The Court notes that the Expert Report does violate Rule 26 in that its disclosures were incomplete when made and were not, and have yet to be, formally supplemented by Stein. Specifically, expert reports should contain "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Fed. R. Civ. P. 26(a)(2)(B). At the hearing on these Motions, it became clear that Brown has withheld the name of at least one such case because it was purportedly "confidential." Tr. of Hr'g at 41. Even if Brown has not testified in that matter, but instead simply prepared an expert report, Stein has still violated Rule 26(e)(2) by failing to supplement Brown's answers to interrogatories on the issue of his involvement in similar environmental cases. As the Court has already remedied this failure by ordering additional discovery and directing Stein to pay the Defendants' costs associated with a related Motion to Compel, the Court will not discuss this violation further.

Whether Brown may testify concerning opinions expressed for the first time in his Affidavit, however, is another matter. The Affidavit was filed after the date set for the serving of expert reports. The Affidavit therefore does not qualify as an original expert report that could have been served in accordance with the Court's Scheduling Order. Nor could Stein have filed the Affidavit later than that time under Rule 26(a)(2)(c), which allows later filing for reports that are offered "solely to contradict or rebut evidence on the same subject matter identified" by the Defendants. See Fed. R. Civ. P. 26 (a)(2)(C). This provision would have allowed Stein to present new theories or opinions at a later date. Stein has not argued that he offered Brown's Affidavit as a rebuttal opinion. Indeed, that argument is unavailable to Stein, as it would be internally inconsistent with his only argument thus far, namely that the Affidavit does not offer new opinions, but rather clarifies opinions already contained in the Expert Report.

Because the Affidavit cannot be considered an original expert report, the question therefore becomes whether it is an effective supplement to Brown's Expert Report. Despite Rule 26's requirement that expert reports provide a "complete statement of all opinions to be expressed," the Rule also allows parties to supplement the opinions expressed in their experts' reports, so long as such changes are made in accordance with the Rule. See

Fed. R. Civ. P. 26(e)(1).<sup>2</sup> The Court finds that Brown's Affidavit was not filed in accordance with Rule 26.

First, supplementation of expert reports "shall be disclosed by the time the parties disclosures under Rule 26(a)(3) are due." Id. Disclosures pursuant to Rule 26(a)(3) shall be made, unless otherwise directed by the court, at least thirty days before trial. Id. (a)(3). Given that Stein's Pretrial Memorandum was to be filed with the Court on February 12, 2001, Brown's Affidavit, which Stein filed on April 6, was not timely filed as a supplement to his Expert Report. Moreover, even if the Affidavit had been timely served,<sup>3</sup> Stein would be unable to

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<sup>2</sup> Interestingly, Rule 26 requires that expert reports contain "a complete statement of all opinions to be expressed" and "the data or other information considered by the witness in forming the opinions," while it only provides for the supplementation of "information" contained in an expert report. Fed. R. Civ. P. 26(a)(2)(B), (e)(1). When read in conjunction, these provisions might lead one to believe that the Rule allows only for the supplementation of information on which opinions are based, but not the opinions themselves. The Advisory Committee Notes state, however, that the Rule's duty to supplement "requires disclosure of any material changes made in the opinions of an expert from whom a report is required . . . ." Fed. R. Civ. P. 26 advisory committee's note (1993); see also Fed. R. Civ. P. 26(a)(2)(c) (providing for supplementation of all Rule 26(a)(2) "disclosures," not just "information" as stated in Rule 26(e)(1)).

<sup>3</sup> Were it not for the fact that the Court set a date for pretrial disclosures, Stein would have been permitted to supplement Brown's Expert Report until thirty days before the instant case was to be called to trial. Id. (a)(3). By Order of March 22, the case's trial pool date was postponed until May 6, 2001. Brown's Affidavit, filed on April 6, would therefore have been filed, albeit fortuitously, as on the last permissible day.

afford himself of Rule 26(e)(1), as he has argued throughout these proceedings that the Affidavit does not contradict Brown's Expert Report in any material respect. See id. (e)(1) (allowing supplementation of information in expert reports that is "incomplete or incorrect").

Second, Brown's Affidavit violates Rule 26 because Brown played no apparent role in preparing it. Rule 26 requires that expert reports be "prepared and signed by the witness . . . ." Id. (a)(2)(B). The Advisory Committee Notes to Rule 26 state that the Rule "does not preclude counsel from providing assistance to experts in preparing the reports . . . ." Fed. R. Civ. P. 26 advisory committee's notes (1993). Nevertheless, Rule 26(a)(2)(B) "does not contemplate blanket adoption of reports prepared by counsel or others . . . ." 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.23[4] (3d ed. 2000). In the instant case, Stein's counsel provided more than assistance in preparing Brown's Affidavit. Indeed, at the hearing on this matter, Brown conceded that Stein's counsel, not he, prepared the Affidavit. Tr. of Hr'g at 76. Brown never claimed to have played any substantial role in its preparation, other than signing it. Although Brown implicitly referred to the existence of a second draft of the Affidavit, he gave no testimony regarding the extent of his involvement in the preparation of that draft. Moreover, the Affidavit was only filed in response

to the Defendants' Motion for Partial Summary Judgment, and would not have been filed otherwise. While the language of the Affidavit explicitly mirrors the language of the federal statutes implicated in this case, Brown repeatedly testified that he was unfamiliar with the applicable legal standards under those statutes. See, e.g., id. at 45. Finally, Stein, although afforded ample opportunity to do so, offered no evidence that Brown prepared the Affidavit in any meaningful way. Accordingly, the Court finds that Brown's Affidavit violates Rule 26.

2. The Appropriate Remedy Under Rule 37

The Court has discretion in selecting the appropriate sanction for violations of Rule 26. In order to preclude a party from presenting evidence, however, the Third Circuit requires that the offending party must have: (1) revealed previously undisclosed evidence when trial was either imminent or in progress; or (2) acted in bad faith, which is more than a mere lack of diligence. See, e.g., In re Paoli, 35 F.3d at 793; In re TMI Litig., 922 F. Supp. at 1004. The Court finds that preclusion of this evidence is appropriate because the Affidavit was filed in bad faith and the Defendants have been prejudiced by its late filing.<sup>4</sup>

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<sup>4</sup> Although the Affidavit was filed after this case was placed in the trial pool, the Court had yet to rule on two still-pending Cross-Motions for Partial Summary Judgment. Accordingly,

In essence, Stein would have the Court allow him to file preliminary expert reports and then freely supplement them with information and opinions that should have been disclosed in the initial report. That result would effectively circumvent the requirement for the disclosure of a timely and complete expert report. See, e.g., Keener v. United States, 181 F.R.D. 639, 642 (D. Mont. 1998). The concept of preliminary expert reports is contrary to the policies underlying Rule 26. See In re TMI Litig., 922 F. Supp. 1005 n.9; Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 53-54 (S.D. W. Va. 1995). Allowing preliminary expert reports as a matter of course would afford litigants an opportunity to "mold their expert reports to meet [their opponent's] legal challenges." In re TMI Litig., 997 F. Supp. 1005 n.10. Such was the case here. Brown's Affidavit was only filed in response to the Defendants' Motion for Partial Summary Judgment, and was carefully tailored, by Stein's counsel, to dovetail with the statutory requirements the Defendants claimed Stein had failed to prove.

Although given the chance to do so, Stein offered no persuasive justification for the filing of Brown's Affidavit. Moreover, as is discussed at fuller length below, the opinions expressed in the Affidavit contradict those expressed in Brown's Expert Report. Finally, instead of supplementing Brown's expert

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Stein did not file the Affidavit when trial was imminent.

opinions formally through an amended or supplemented expert report, Stein filed the Affidavit as an attachment to Stein's opposition to the Defendants' Motion for Partial Summary Judgment. Those facts, coupled with Stein's other Rule 26 violations and his inability to meet Court-imposed deadlines, demonstrate bad faith.<sup>5</sup> Simply stated, the work of Brown and Stein's counsel exceeds a mere lack of diligence. Id.

The Court finds that precluding this evidence is the most appropriate remedy for Stein's bad faith. Importantly, this ruling will not prevent all of Stein's claims from being heard by a jury; Stein may still rely on the opinions expressed by Brown in his Expert Report and, because the Defendants have only filed a Motion for Partial Summary Judgment, several of his claims will remain intact even assuming this ruling affects Stein's statutory claims. Accordingly, the Court will preclude Stein from relying on Brown's newly disclosed opinions at trial or in support of any motions filed with this Court.

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<sup>5</sup> As noted above, Brown's Expert Report, and the attempted supplement thereto, neglected to disclose certain information because it was purportedly confidential. Tr. of Hr'g at 41. Moreover, Stein filed his Pretrial Memorandum on March 8, 2001, despite the Court's unambiguous Order that it be filed no later than February 12.

B. The Defendants' Motion to Strike

Although the issue of the Defendants' Motion to Strike has largely been rendered moot by the Court's decision that Stein filed his Affidavit in bad faith,<sup>6</sup> the Court further finds that the Affidavit should be stricken from the record because it contradicts Brown's Expert Report, adding so many new opinions that it changes the flavor of the case from the one presented solely by Brown's Expert Report and depositions.

In his Expert Report, Brown offered, among other opinions, an expert opinion that parrafin oil on Stein's property constituted a release or threatened release that substantially endangered human health or the environment. Nowhere does Brown's Expert Report mention the existence of a release or threatened release of vinyl chloride as an area of concern. The Defendants, based on Brown's Expert Report and deposition testimony,<sup>7</sup> could not have been on notice that Stein planned to base their liability on the existence, or threatened existence, of vinyl

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<sup>6</sup> See Fed. R. Civ. P. 56(g) (making filing of affidavit in bad faith sanctionable act that justifies holding party or attorney in contempt). The Court notes that the Defendants have not asked the Court to impose these particular sanctions.

<sup>7</sup> For example, at his deposition, Brown stated that Stein's environmental investigations had not complied with CERCLA requirements because "[t]he National Contingency Plan in something that deals with releases. When you investigate things and there isn't anything there by definition there isn't a release or threatened release . . . . [T]his is not a federal . . . context like that." Brown Dep. at 239.

chloride. By contrast, Brown's Affidavit, which was filed after the Defendants filed their Motion for Partial Summary Judgment, offers many opinions concerning the presence of vinyl chloride and its associated health risks. Specifically, Brown's Affidavit opines that: (1) there has been a release or threatened release of vinyl chloride on Stein's property; (2) the release constituted "an actual and significant threat to human health and the environment"; (3) the Defendants caused the release; and (4) certain monitoring and investigative activities on Stein's property were necessary to address the release and threatened release of hazardous substances including, ostensibly, vinyl chloride. See Brown Aff. ¶¶ 7-9, 13, 24-25. None of these opinions appeared explicitly in Brown's Expert Report.<sup>8</sup>

Of course, Brown's Expert Report does refer to Sadat's Site Characterization Report, which mentions the existence of vinyl chloride on Stein's property. But Brown's Expert Report did not refer to that particular finding by Sadat, much less adopt it or vouch for its credibility. Indeed, Sadat's Site Characterization Report is twenty-eight pages long; simply referring to the document in its entirety could not have put the Defendants on notice that Brown intended to express that particular opinion at

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<sup>8</sup> While Brown's Expert Report stated that the nature and cost of the work on Stein's property were reasonable, Brown Expert Report at 13, it did not opine that such work was necessary in response to a release or threatened release of vinyl chloride.

trial. The filing of Brown's Affidavit altered the nature of these proceedings in a way that the Defendants, based on Brown's Expert Report and deposition, could not have anticipated. While the Affidavit may not conflict with Sadat's Site Characterization Report, it certainly conflicts with Brown's Expert Report. Brown never adopted Sadat's findings, and the mere mentioning of Sadat's Site Characterization Report as a reference document does not allow Brown, at this late juncture, to materially alter his intended expert testimony at trial.

Brown's Affidavit contradicts his Expert Report and deposition, and does not explain the contradiction in terms of a mistake in Brown's reducing his Expert Report to writing. Allowing Stein to file this contradictory Affidavit would allow him to undermine the purpose of motions for summary judgment. The Court will therefore strike the Affidavit from the record in this case. See Hackman, 932 F.2d at 241; Pellegrino, 16 F. Supp. 2d at 583.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES D. STEIN	:	CIVIL ACTION
	:	
v.	:	
	:	
FOAMEX INTERNATIONAL,	:	
INC., et al.	:	No. 00-2356

**O R D E R**

**AND NOW**, this            day of August, 2001, in consideration of the Motion In Limine To Preclude Expert Opinions Not Expressed in the November 30, 2000 Expert Report of Gary Brown, filed by the Defendants, Foamex International, Inc., Foamex L.P., Foamex Carpet Cushion, Inc., Trace International Holdings, Inc., General Felt Industries, Inc., GFI-Foamex and Marshall S. Cogan (collectively referred to as the "Defendants") (Doc. No. 29), the Response of the Plaintiff, Charles D. Stein ("Stein"), and the Reply thereto, and in consideration of the Defendants' Motion to Strike the April 4, 2001 Affidavit of Gary Brown (Doc. No. 27), the Response of Stein and the Reply of the Defendants, as well as arguments and evidence presented at a Hearing held before this Court on July 18, 2001, it is **ORDERED** that:

1. The Defendants' Motion to Preclude is **GRANTED**. Stein is precluded from presenting expert testimony regarding matters or opinions not specifically and expressly contained in Brown's Expert Report, and from relying on such matters or opinions in support or defense of any motion before this Court.

2. The Defendants' Motion to Strike is **GRANTED**. The Affidavit of Gary Brown, filed as an attachment to Stein's Brief in Opposition to the Defendants' Motion for Partial Summary Judgment, shall be stricken from the record of this case.
3. Stein and the Defendants may, no later than fifteen (15) days after the date of this Order, submit a memorandum to the Court explaining the party's position on the effects of this Order on the Cross-Motions for Partial Summary Judgment still pending before this Court.

BY THE COURT:

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JAMES MCGIRR KELLY, J.