UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
Case No. 17-62255-CIV-COOKE/HUNT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

IBRAHIM ALMAGARBY, et al.,

Defendants.
_____/

OMNIBUS ORDER

This matter is before this Court on Defendants' Motion to Strike Declaration of The SEC's Expert Robert Lowry, ECF No. 124, and Defendants' Motion to Strike the Declaration of Joseph Darragh, ECF No. 129. The Honorable Marcia G. Cooke referred this case to the undersigned for all non-dispositive pretrial motions, fees, costs, and the specific Motions at issue. ECF Nos. 5, 136; *see also* 28 U.S.C. § 636; S.D. Fla. L.R., Mag. R. 1. Upon thorough and careful review of the record and the applicable law, Defendants' Motion to Strike Declaration of The SEC's Expert Robert Lowry, ECF No. 124, and Defendants' Motion to Strike the Declaration of Joseph Darragh, ECF No. 129, are both DENIED for the reasons set forth below.

I. Background

The United States Securities and Exchange Commission (the "SEC") brought this action against Ibrahim Almagarby ("Defendant Almagarby") and Microcap Equity Group ("MEG") (collectively "Defendants") for violations of Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") by allegedly acting as "dealers" without

registering with the SEC. ECF No.1. The SEC also asserted a claim against Defendant Almagarby for control person liability under Section 20 of the Exchange Act based on MEG's alleged violation of Section 15(a). *See* ECF No. 1. The SEC moved for summary judgment and Defendants filed a cross-motion for summary judgment. ECF Nos. 73, 74. The court granted the SEC's motion for summary judgment and denied Defendants' cross-motion for summary judgment. ECF No. 112.

The SEC moved for remedies against Defendants. ECF Nos. 120. Attached to the SEC's motion for remedies were three declarations, one of which is at issue. ECF No. 120-3. Defendants filed a response in opposition and the SEC filed a reply in support of its motion with an attached declaration, which is the second declaration at issue. ECF Nos. 125, 126, 126-2. Defendants have moved to strike the declarations of Robert Lowry and Joseph Darragh. ECF Nos. 120-3, 124, 126-2, 129. The SEC has filed responses in opposition to both motions and Defendants have filed replies in support of their motions. ECF Nos. 127, 128, 130, 131, 134. The Honorable Marcia G. Cooke has referred the Motions to strike for disposition to the undersigned United States Magistrate Judge. ECF No. 136.

II. Defendants' Motion to Strike Robert Lowry's Declaration (ECF No. 124)

A. Parties' Arguments

Defendants move to strike the expert declaration of Robert Lowry because Defendants allege that the SEC never identified Mr. Lowry as an expert to be used in its case-in-chief. Rather, Defendants contend that the SEC always maintained that Mr. Lowry was to be used a rebuttal expert. Further, Defendants contend that Mr. Lowry never provided the subjects for which he would provide an expert opinion. Defendants

argue that they deposed Mr. Lowry in December as a rebuttal expert on one specific issue; however, ten months later, the SEC identified new topics not covered by the scope of the previous deposition. Accordingly, Defendants ask this Court to strike his declaration and all mentions of or references to his declaration in the SEC's Motion for Judgment.

The SEC responds that most of Mr. Lowry's declaration consisted of lay testimony and data that mostly overlapped with his deposition testimony. Even so, the SEC argues that the whole purpose of the expert disclosure is to avoid surprise at trial and thus does not apply here as this is only the remedies portion of the case. The SEC then argues that even if the expert disclosure rule does apply, the SEC was substantially justified in omitting the remedies-related information because: the Supreme Court issued the opinion in *Liu v. SEC*, 140 S. Ct. 1936 (2020), nine months after the discovery deadline closed; the *Liu* decision requires the Court to evaluate additional information in its disgorgement analysis; the jury trial would have only decided liability; Mr. Lowry's declaration pertains only to remedies; and evidence relating only to remedies is irrelevant at the liability stage of litigation. Next, the SEC argues that Defendants responded and provided their own declarations in rebuttal to Mr. Lowry's declaration. If Mr. Lowry's declaration does not meet the exception, the SEC contends that the factual portions of Lowry's declaration should still be allowed. The SEC also mentions that during conferral, counsel for the SEC told Defendants that he was open to agreeing to additional time and to further allow them to depose Mr. Lowry but Defendants declined.

Defendants reply that discovery was never bifurcated between liability and remedies. Next, Defendants argue that the SEC did not show substantial justification

when failing to provide the disclosure. While the Supreme Court rendered the *Liu* decision in June 2020, Defendants claim that the *Liu* decision mainly reinforced what was already law regarding disgorgement and ill-gotten gains. Defendants further argue that simply because they were able to rebut and find flaws in the opinion does not make it any less harmful. Lastly, Defendants argue that the factual portions cannot remain because the SEC does not identify which portions are factual, and also because some "factual" portions are blatantly wrong and intertwined with opinion. Thus, Defendants argue that the entire declaration should be stricken.

B. **Discussion**

Federal Rule of Civil Procedure 26(a)(2) provides that "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "[T]he expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise." *Reese v. Herbert*, 527 F.3d 1253, 1266 (11th Cir. 2008) (citations omitted). "Excluding expert testimony is a severe sanction that is not appropriate where a party's actions were justified or do not result in prejudice to the opposing party." *SEC v. Huff*, No. 08-60315-CIV-ROSENBAUM, 2010 WL 228000, at *3 (S.D. Fla. Jan. 13, 2010). Allowing parties to exclude testimony without first taking less drastic actions allows parties "to play discovery 'gotcha.'" *Id.* at *2. "The court has broad discretion in determining whether a party's failure to disclose discovery materials is either

substantially justified or harmless." *Rodriguez v. Estero Fire Rescue*, No. 2:13-cv-452-FtM-29CM, 2014 WL 3908165, at *2 (M.D. Fla. Aug. 11, 2014).

Here, the undersigned finds Defendants' argument lacking on certain points. The discovery rules are designed to prevent surprise at trial and allow parties to adequately prepare their case. But liability has already been determined in this action. Disgorgement and civil penalties are left for the judge to decide. Even if the SEC failed to properly disclose Mr. Lowry, the undersigned finds that such failure is harmless. Defendants had an opportunity to respond to Mr. Lowry's declaration, which Defendants did with their own declarations, and Defendants declined the SEC's offer to produce Mr. Lowry for a further deposition. *See* ECF No. 130 at 5 n.3. Further, the undersigned finds that Rule 26 does not apply to disgorgement or civil penalties as neither are a damages penalty. *See SEC v. Montano*, No: 6:18-cv-1606-Orl-31GJK, 2019 WL 2254946, at *3 (M.D. Fla. Nov. 22, 2016). Therefore, the undersigned DENIES Defendants' Motion to Strike Mr. Lowry's declaration.

III. Defendants' Motion to Strike Joseph Darragh's Declaration (ECF No. 129)

A. Parties' Arguments

Defendants also move to strike Joseph Darragh's affidavit on the grounds that Mr. Darragh was never disclosed nor deposed.

The SEC responds that Mr. Darragh's declaration is being offered to rebut the arguments raised by Defendants in their Response. The SEC contends that Mr. Darragh is not being tendered as an expert and does not offer any opinion, and his testimony is not being offered at trial but to aid the court in formulating a remedy after liability has already been adjudged. The SEC argues that Mr. Darragh is simply being used as a

rebuttal fact witness to contest the claim asserted by Defendants that the SEC could not identify any counterparties to establish disgorgement. The SEC argues that even though Mr. Darragh may have special knowledge that could qualify him as an expert, this fact alone does not elevate his lay opinion to an expert opinion. The SEC contends that Mr. Darragh's declaration is based on facts he observed through his employment. Finally, the SEC argues that Defendants' argument that disgorgement equates to damages and is therefore governed by Federal Rule of Civil Procedure 26(a)(1)(iii) is flawed because courts within the Eleventh Circuit have specifically ruled so.

Defendants' reply shifts their argument from striking the declaration as an improper expert witness to striking it because the fact witness was never disclosed prior to the close of discovery. Defendants argue that characterizing Mr. Darragh as a rebuttal fact witness is inaccurate, and that even if this characterization were valid, the SEC still would have been required to disclose him.

B. Discussion

"Rule 26(a)(1)(A)(iii) does not apply to disgorgement or civil penalties, as neither are a damages remedy." *Montano*, 2019 WL 2254946, at *3.

The undersigned finds that the SEC had no duty under the Federal Rules of Civil Procedure to disclose Mr. Darragh. Further, the undersigned has reviewed Mr. Darragh's affidavit and finds that the affidavit is being used as rebuttal and that his testimony is based on facts which Mr. Darragh has personal knowledge and which he has observed through the course of his employment. Finally, Mr. Darragh's testimony is not based on special knowledge or expertise. Therefore, Defendants' Motion to Strike Mr. Darragh's declaration is DENIED

IV. Conclusion

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that Defendants' Motion to Strike Declaration of the SEC's Expert Robert Lowry, ECF No. 124, and Defendants' Motion to Strike the Declaration of Joseph Darragh, ECF No. 129, are both DENIED for the reasons set forth above.

DONE and ORDERED at Fort Lauderdale, Florida this 16th day of August 2021.

PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Marcia G. Cooke
All Counsel of Record