STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

O.P. INVESTMENT GROUP, LLC,

Plaintiff,

Case No. 23-200970-CB
v **Hon. Michael Warren**

ALPHA FLOW TRANSITIONAL MORTGAGE TRUST 2021 – WL1,

Defendant.
_____/

OPINION & ORDER GRANTING
ALPHA FLOW TRANSISTIONAL MORTGAGE TRUST 2021 WL1'S
MOTION IN LIMINE TO EXCLUDE PLAINTIFF/COUNTER-DEFENDANT
FROM CALLING AN EXPERT WITNESS

At a session of said Court, held in the
County of Oakland, State of Michigan
On April Fool's Day (April 1), 2025

PRESENT: HON. MICHAEL WARREN
_____/

OPINION

I
Overview

The instant matter is before the Court in connection with Alpha Flow Transitional Mortgage WL1's Motion in Limine to Exclude Plaintiff/Counter-Defendant from Calling an Expert Witness. Having reviewed the Motion, Concurrence, and Response, and

otherwise being fully informed in the premises, the Court dispenses with oral argument as it would not materially assist the Court. MCR 2.119(E)(3).

At stake is whether O.P. Investment Group, LLC (the "Plaintiff") is entitled to present an untimely disclosed expert witness? Because the totality of factors under the governing jurisprudence favors striking the witness, the answer is "no" and the Motion is granted.

II
Procedural Posture

This case was filed on June 23, 2023, i.e., almost two years ago. The original Scheduling Order which was issued after a Case Management Conference with the parties, provides that expert witness lists were to be filed no later than December 2, 2024 and expert discovery was to be completed by March 10, 2025. Apparently, the parties agreed to extend the deadline for naming experts until December 9, 2024 (although there is no order to this effect). The Plaintiff failed to comply with this adjourned date, and instead it belatedly filed a motion to adjourn several dates, including the deadline for naming expert witnesses. This Court denied that motion pursuant to an order dated January 23, 2025. Undaunted, the Plaintiff listed an expert for the first time on March 5, 2025.

III
The Arguments

There is no question that the Plaintiff failed to timely disclose a witness and, in violation of this Court's Scheduling Order, did not list the expert at issue until March 5, 2025, i.e., five days before the close of discovery on March 10, 2025. Nevertheless, the Plaintiff takes great umbrage at Alpha Flow Transitional Mortgage WL1's ("Alpha Flow") pointing this fact out, because the Plaintiff argues that it actually disclosed the expert a couple weeks earlier (February 19, 2025, two days before the expert was even hired). In other words, the disclosure was only untimely by more than 10 weeks instead of more than 12 weeks. The Plaintiff argues that striking its untimely disclosed witness is an extreme remedy not warranted under case law.

IV
The Law

Michigan's constitutional system of government vests the judicial power in one court of justice. Mich Const 1963, art 6, § 1. With regard to the judiciary, "'[t]he primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto.'" *Johnson v Kramer Freight Lines, Inc*, 357 Mich 254, 258 (1959), quoting 16 CJS, Constitutional Law § 144, p 687. Thus, as Justice Campbell explained, Michigan jurisprudence has long recognized that "[[b]y the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation." *Daniels v People*, 6 Mich 381, 388 (1859). See also

Underwood v McDuffee, 15 Mich 361, 368 (1884); *Johnson,* 357 Mich at 258, quoting *Risser v Hoyt*, 53 Mich 185, 193 (1884) (finding that judicial power "'is the authority to hear and decide controversies, and to make binding orders and judgments respecting them'"). Intertwined with the substantive power to decide cases and controversies is the authority of the courts to establish general rules to control the "practice and procedure" of the courts. Mich Const 1963, art 6, § 5. Thus, inherent within the power judicial is the authority of "the court to control its docket." *United States v Reaves*, 636 F Supp 1575, 1578 (ED Ky, 1986). Indeed, "[o]ptimum service to the public, to victims, witnesses, jurors, litigants, and to counsel mandates that trial judges have the authority and discretion to manage dockets." *People v Grove*, 455 Mich 439, 470 (1997). Thus, "[i]t is fundamental that a court has the power and duty to manage its docket and the individual cases before it . . . ." *Id*.

To ensure that public interest in justice is met, the Michigan Supreme Court has established the Michigan Rules of Court to "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105. Essential to ensuring the effective administration of justice is the ability of the trial courts to establish scheduling orders. MCR 2.401(B)(2). Indeed, scheduling orders, and the ability of courts to enforce them, are critical instruments to ensure the public interest is protected. *Grove*, 455 Mich at 465 ("[t]he court rules provide for and encourage the use of scheduling orders to promote the efficient processing of civil and criminal cases"). A trial court's insistence that the parties

adhere to such orders is justified to "'enhance[] its docket control, [and] eliminate[] unjustifiable expense and delay . . . .'" *Id.*, quoting *People v Grove*, 209 Mich App 567 (1995). Moreover, the Michigan Rules of Court "implicitly confer the discretion to decline to entertain actions beyond the agreed time frame. Were the rules not so construed, scheduling orders would quickly become meaningless." *Id*. at 469. Thus, Michigan jurisprudence has long "recognized the inherent power of a court to control the movement of cases on its docket by a variety of sanctions including dismissal, discontinuance or involuntary nonsuit even when requests for continuances are timely made and, lacking persuasive merit, are denied." *Banta v Serban*, 370 Mich 367, 368 (1963) (affirming a trial court's dismissal of a case for the failure of the plaintiff to appear at trial). Simply put, enforcement of scheduling orders is an indispensable tool to ensuring a vibrant, effective, fair, and efficient administration of justice. The failure to establish and enforce meaningful scheduling orders is the surest path to ensuring dilatory, lengthy, uneconomical, inefficient, time-consuming, and unproductive litigation that undermines the fair administration of justice. This path leads to chaos and the undoing of justice. This is a path this Court will not follow.

V
Analysis

Under MCR 2.401(I)(1) all witness lists are to be filed and served no later than the date set by this Court. In fact, the Michigan Rules of Court clearly provide that this Court may order that any witness not listed in accordance with MCR 2.401(I) "be prohibited

from testifying at trial except upon good cause shown." MCR 2.401(I)(2). See also *Waknin v Chamberlain*, 467 Mich 329, 331 n 1 (2002) (per curiam) ("The trial court may, pursuant to MCR 2.401(I)(2), preclude any witnesses not named in a witness list from testifying"); *Jernigan v General Motors Corp*, 180 Mich App 575, 584-585 (1989) (holding that witnesses attempted to be added a month prior to trial were properly excluded when the moving party failed to show good cause for the delay); *Wilson v General Motors Corporation,* 183 Mich App 21, 28-29 (1990) (holding that a rebuttal witness was properly excluded when no good cause was shown as required by a local rule of evidence paralleling MCR 2.401(I)); *Pannell v Hawasli*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2008 (Docket No. 279582), p 3 ("plaintiff never offered any good cause for not timely filing the witness list. Thus, the trial court properly precluded plaintiff from calling any witnesses. MCR 2.401(I)(2)"). Thus, a trial court's decision to strike or reject proposed new witnesses is generally well within its discretion. See, e.g., *Hayes-Albion v Kuberski,* 421 Mich 170, 188 (1984) (affirming a trial court's refusal to admit an unlisted witness as it was an issue "for the trial court to decide in the exercise of discretion"); *Waknin*, 467 Mich at 331 n 1 (affirming the Court of Appeals' holding that the trial court acted well within its discretion in striking witnesses who were never disclosed on a witness list while not striking those who were duly disclosed pursuant to discovery); *Herrera v Levine,* 176 Mich App 350, 355-356 (1989) (per curiam) (affirming a trial court's refusal to permit an unlisted expert to testify after a case was placed on standby status for trial); *Carmack v Macomb County Community College*, 199 Mich App 544, 546 (1993) ("This Court will not disturb a trial court's decision regarding whether to

permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion"); *Todd v Steiner,* unpublished per curiam opinion of the Court of Appeals, issued April 24, 2003 (Docket No. 234007), p 4 ("The enforcement of a pretrial scheduling order and whether to allow a party to add expert witnesses not properly identified in a final pretrial order is a matter left to the sound discretion of the trial judge"). Thus, a court may strike a proposed witness even when such proposed witness is listed on the opposing party's witness list. See, e.g., *Jones v Pere Marquette R Co*, 168 Mich 1, 15 (1911) (holding that the adverse party statute does not allow a party to call as their own witnesses the witnesses of the adverse party); *City of Detroit v Porath,* 271 Mich 42, 75 (1935) (holding that the adverse party statute does not "give the right to make . . . witnesses of the adversary the party calling them"); *Todd*, unpub op (affirming the trial court's striking of a plaintiff's proposed expert witness who was not listed on the plaintiff's witness list but who was listed on the defendant's witness list). Indeed, the trial court in its discretion may even prohibit a party from calling the adverse party if that party is not listed on the witness list. See, e.g., *Beattie v Firnschild*, 152 Mich App 785, 794 (1986). In other words, the fact that the party's undisclosed witness is the party itself does not relieve the moving party of the requirement of showing good cause for failing to list the party on a witness list, and such witnesses may be struck within the sound discretion of the trial court. See e.g., *Id.*

Thus, a trial court acts well within its discretion by striking witnesses not properly identified until after the conclusion of discovery, see, e.g., *Family Independence Agency v*

Miller, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2000 (Docket No. 220706) (affirming trial court's order prohibiting the respondent from calling witnesses in a child protective proceeding in which his parental rights were terminated when the respondent filed the witness list two months late without good cause); *Kapp v Evenhouse,* unpublished per curiam opinion of the Court of Appeals, issued March 6, 2001 (Docket No. 216020) (affirming the trial court's order striking the plaintiff's expert witnesses when they were not disclosed until after a motion to strike the witnesses was filed, nearly 3 months after the original filing deadline and holding that the plaintiff's desire to wait until after the deposition of the defendant did not constitute good cause excusing the failure to file the list); *Porcelli v Kirchne*r, unpublished per curiam opinion of the Court of Appeals, issued January 24, 2003 (Docket No. 236822) (affirming the trial court's order striking the plaintiff's expert who had not been disclosed until 6 months after the filing deadline for the witness list, was never disclosed during discovery, and who was only listed after the filing of a motion to dismiss for failure to file a witness list); or attempted to be added just before trial, see, e.g., *Eddings v Fleming*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 2001 (Docket No. 214987) (affirming the trial court's order refusing to allow the amendment of a witness list just prior to trial when the moving party failed to show good cause for failing to include the witness on the original witness list); *Sound Around, Inc v Midwest Electronics, Inc,* unpublished per curiam opinion of the Court of Appeals, issued April 27, 2001 (Docket No. 219295) (affirming the striking of the sole defendant's expert who was only named two weeks prior to trial, months after the close of discovery and after a first adjournment

of trial, even though the proposed expert was from the Plante Moran accounting firm and the witness list had identified an unspecified representative from such firm because the defendant had not shown good cause for the delay in naming the expert); *In re Brown*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2005 (Docket No. 258968) (finding that striking of all of the respondent's witnesses would have been justified because a witness list was not filed as required by the scheduling order even though the respondent had verbally informed at least one of the opposing parties of his intention of calling a witness).

In fact, summary disposition may be granted months prior to trial even in the face of a proposed new witness by the non-moving party, which witness will support the non-moving party's case, in the event that such proposed witness has not been timely and properly listed on the witness list – even when the proposed witness is an opposing party. *Beattie*, 152 Mich App at 795 ("We find no abuse in the trial court's determination that plaintiffs could not call the defendant as an expert witness. Defendant was entitled to some notice that he was to be called as an expert to testify against himself and establish a standard of care"); *Moy v Detroit Receiving Hospital*, 169 Mich App 600, 607 (1988) ("Plaintiff also responds that he could have established his prima facie case of medical malpractice through the testimony of the parties alone, including the individual defendants. However, plaintiff has no right to call Drs. Stanley or Levine as expert witnesses during his presentation of the case, since neither physician had been named in a timely filed witness list." (citation omitted)). Similarly, the involuntary dismissal of a

case based on the failure to comply with the appropriate scheduling order of the court, including witness list deadlines, is appropriate. See, e.g., *Stevens v Equity Investments Management, LLC,* unpublished memorandum of the Court of Appeals, issued November 12, 2002 (Docket No. 235201) (affirming the involuntary dismissal of the action when the plaintiff's counsel repeatedly ignored the scheduling order including the appropriate filing of witness lists); *Comerica Bank v Alkhafaji,* unpublished per curiam opinion of the Court of Appeals, issued August 18, 2005 (Docket No. 252472) (affirming this Court's involuntary dismissal of an action because the plaintiff had failed to file a witness and exhibit list prior to the day of trial).

Moreover, a litigant cannot avoid the requirement of naming witnesses by relying on "catchall" categories. Michigan law has long held that witness lists which set forth simply a "general description of a category" of witnesses "when the party is able to give specific names fairly easily" are insufficient and may not be used to permit the non-disclosing the party the right to introduce witnesses at trial. *Stepp v Dept of Natural Resources,* 157 Mich App 774, 778 (1987). This is so because to place the burden of obtaining additional details regarding the witnesses "would encourage intransigence and delay with the ultimate effect of further burdening the lower courts." *Id.* Thus, a trial court errs when it finds that a party must move to require a more specific witness list. *Id.* at 799. This is so because MCR 2.401(I)(1)(a) specifically provides that a witness list must include "the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the

admission of records may be identified generally . . . ." As general rules of statutory construction dictate, the listing of a specific exemption for having to list the name of record custodian, reveals that no such exception exists for any other category of witnesses.

Indeed, allowing a witness to testify who was not listed on a properly and timely filed exhibit list at the time of trial can constitute an abuse of discretion. See, e.g., *Pollum v Borman's, Inc,* 149 Mich App 57, 62 (1986) (per curiam) (holding that admission of an unlisted expert witness "fundamentally impaired the defendants' ability to present their side of the issue. The pursuit of truth on the issue of plaintiff's future damages resulting from her fall was fundamentally impaired when the court allowed Dr. Newman to testify without being listed or otherwise disclosed as a witness" even though the opposing party knew of the witness 'expert report two months prior to trial); *Stepp*, 157 Mich App at 779. Such an abuse can especially occur in the event such undisclosed witnesses are used to virtually build the entire case of the non-disclosing party. *Id.* When this occurs, the result becomes "exactly what discovery is intended to avoid, trial by surprise." *Id.* Further, when the striking of a witness list occurs as a discovery sanction, the Court may also bar the testimony of undisclosed rebuttal witnesses, since to hold otherwise would "negate the sanction imposed." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 630 (1993).

In short, this jurisprudence all supports strking the expert.

In addition, the factors set forth in *Dean v Tucker*, 182 Mich App 27, 32-33 (1990) (ignored by the parties) also support barring the expert. The factors that should be considered in determining the appropriate sanction for the untimely disclosure of witnesses are: (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to Alpha Flow, (4) actual notice to Alpha Flow of the witness and the length of time prior to trial that Alpha Flow received such actual notice, (5) whether there exists a history of the Plaintiff engaging in deliberate delay, (6) the degree of compliance by the Plaintiff with other provisions of the court's order, (7) an attempt by the Plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. With regard to these factors:

1. *Whether the violation was willful or accidental.* The failure to disclose the expert was obviously purposeful - or at least due to the culpable negligence of the Plaintiff. Despite an adjournment, the Plaintiff missed the deadline to disclose the expert, and did not even hire him until February 21, 2025. The Scheduling Order was developed with the full participation of the parties. It was entered on July 19, 2024. The Plaintiff complains it could not procure an expert because of the complicated nature of the case. This excuse rings hollow. Is that not the whole point of expert witnesses, to explain complicated things? The opposing parties were able to conjure an expert on a timely basis.

2. *The party's history of refusing to comply with discovery requests (or refusal to disclose witnesses).* Neither party bothers to address this factor.

3. *Prejudice.* The Plaintiff suggests there is no prejudice because it gave the opposing parties notice of the expert before the close of discovery, i.e., on February 19, 2025. Even if this is true, it is months late, and discovery has now closed. The whole point of requiring an earlier disclosure is to allow the parties time to assess an expert witness in a calm and professional fashion, using whatever discovery mechanisms exist. The Plaintiff, however, believes it is entitled to hatch an untimely disclosure and require the opposing parties to undergo a "fire drill" to placate the Plaintiff's demands. That the fire drill could be completed before discovery was closed is a highly dubious proposition. Even if discovery began once the expert was actually hired (February 21), discovery closed on March 10. That it could be completed after the March 5, 2025 disclosure, with a whole 5 days of discovery left, is an impracticability under the notice and response requirements under the Rules of Court. Discovery is untimely unless its response is due within the discovery period. In any event, this is not a case in which the Court put the parties on a fast track. The case has been slow walked for nearly two years, and now the Plaintiff demands that opposing parties, all of whom have complied with the Scheduling Order, be at its beck and call because of its untimely disclosure.

4. *Actual notice to Alpha Flow of the witness and the length of time prior to trial that Alpha Flow received such actual notice.* Actual notice of the expert was not

provided until (at the best) on February 19, 2025, on the eve of the close of discovery. Trial is set for November 10, 2025. That seems like a large time period, but that is because it accounts for a summary disposition filing deadline and facilitation, plus trial preparation. Because of the huge backlog blessing this Court's summary disposition docket, there is a substantial delay from the filing deadline date of April 10, 2025 and the trial date. That timeframe is provided to allow the parties to obtain a written decision from the Court and to prepare for trial. It is not intended to be a "bonus" discovery period for parties who violate the Court's scheduling order and fail to timely procure and disclose their experts by months. A contrary ruling would all but render the scheduling order meaningless. It would wreak havoc on the Court's ability to efficiently, fairly, and effectively manage its docket, as it would mean that discovery would be conducted at the summary disposition filing deadline, creating new excuses to file belated motions for summary disposition, which would then push out the trial date – which would then give the parties the opportunity to make more untimely disclosures - all in a never ending fashion.

5. *Whether there exists a history of the Plaintiff engaging in deliberate delay.* Factors 1-4 address this factor in connection with the expert witness. However, the Court is unaware of any additional delays from the Plaintiff.
6. *The degree of compliance by the Plaintiff with other provisions of the court's order.* The Court is unaware of any additional degree of noncompliance.

7. *An attempt by the Plaintiff to timely cure the defect.* The Plaintiff attempted to cure by submitting notice no earlier than February 19, 2025 and by filing an untimely witness disclosure in violation of the Court's prior ruling on the request to adjourn on March 5, 2025.
8. *Whether a lesser sanction would better serve the interests of justice.* The only potential appropriate lesser sanction in the instant case would be to reopen expert discovery and its scope, adjourn facilitation, and the dispositive motion filing deadline for an extended period of time, and adjourn the trial. This would lead to the dilatory and uneconomical determination of the action because it, in essence, would add many months of delay and expense to the case without necessarily any corresponding improvement of the substantial rights of the parties. It would also encourage parties to flaunt the scheduling orders of the Court with no concomitant sanction. Why not wait until the last minute and force an adjournment? As noted above, this could very well be a never ending, repeating cycle. And this is why the Court is entitled to enforce its Scheduling Order and need not reward such egregious behavior.

The Plaintiff also argues that because it is still planning on taking the deposition of Defendant RAI's expert witness, the opposing parties should be fine taking the deposition of the Plaintiff's untimely disclosed witness. To make this clear, the Plaintiff filed a deposition notice of RAI's expert witness to be held on the very last day of discovery. RAI's expert (or counsel) apparently had a conflict, so it is apparently going to

be rescheduled. In other words, the Plaintiff waited until the very last minute to take discovery of an opposing expert, and now it is using its own delay as an excuse to even further delay the proceedings in its favor. The Plaintiff is using a combination of self-inflicted wounds (untimely procuring and disclosing its own expert) and dilatory conducting of discovery (by noticing at the last-minute deposition of RAI's witness) to create, voila, cause to further adjourn the scheduling order. This is not good cause, but the opposite. It also has the potential for a never ending adjournment cycle.

Other factors to be considered are that the deadline for expert witnesses was made pursuant to the agreement of the parties and has been adjourned with their agreement, the age of the case, and the fact that the Plaintiff previously sought an adjournment for unpersuasive reasons and sought to add the expert in defiance of the Court's prior order. The Plaintiff did not file a motion for reconsideration regarding the previous denial of the adjournment. All of this favors granting the Motion.

ORDER

In light of the forgoing Opinion, Alpha Flow Transitional Mortgage WL1's Motion in Limine to Exclude Plaintiff/Counter-Defendant from Calling an Expert Witness is GRANTED.

/s/ Michael Warren

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HON. MICHAEL WARREN
CIRCUIT COURT JUDGE