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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003737 07/25/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

TRANSPACIFIC DEVELOPMENT COMPANY, et al. MICHAEL J PONZO

v.

LEXINGTON INSURANCE COMPANY, et al. TIMOTHY M STRONG

BRET S SHAW
DAVID WARD
10077 GRAGAN'S MILL ROAD
SUITE 540
THE WOODLANDS TX 77380
MICHAEL N POLI
BENNETT EVAN COOPER
JEFFERSON KLOCKE
STEVEN G MESAROS
THOMAS P BURKE II
JUDGE KILEY

UNDER ADVISEMENT RULING

Plaintiffs Transpacific Development Company *et al*. (the "Plaintiffs") assert a claim for Aiding and Abetting against Defendants Rimkus Consulting Group, Inc. ("Rimkus") and Heidi M. Watton ("Watton") (Rimkus and Watton collectively, the "Rimkus Defendants"). Complaint at ¶¶ 76-80. This claim is based on the Plaintiffs' contention that the Rimkus Defendants "substantially assisted" Defendant Lexington Insurance Company ("Lexington") "in a tortious breach of Lexington's duties owed to the Plaintiffs" when they "undertook a course of conduct that grossly under-reported the extent of" the Plaintiffs' damages and the cost to repair them. *Id.*

at ¶¶ 22, 78. The Complaint alleges that the Rimkus Defendants, who were "unqualified" to perform the work for which they were retained, assisted Lexington's tortious conduct in part "by submitting an incompetent and/or biased report" in which they "repeatedly focused on issues that are totally irrelevant to coverage under" the terms of the applicable insurance policy." *Id*. at ¶¶ 22, 78, 79. Additionally, the Complaint alleges, Watton "purported to assess the hail impact damages" to the Plaintiffs' properties even though "she had never received any training or education in the assessment of hail damage to roof coverings." *Id*. at ¶ 79.

Because the claim against the Rimkus Defendants is based at least in part on the Plaintiffs' allegations about the "unqualified" Rimkus Defendants' purported "incompeten[ce]" and lack of "training or education" to perform the work for which they were retained, the Court long ago held that, pursuant to A.R.S. § 12-2602, the Plaintiffs were required to serve a preliminary expert opinion affidavit. *See* Minute Entry of August 16, 2016 at p. 3. The Plaintiff subsequently produced a preliminary expert opinion affidavit dated August 31, 2016 (the "PEOA") of Dilip Khatri, Ph.D., S.E. ("Khatri"). *See* PEOA, attached as part of Exhibit 7 to Defendants Rimkus Consulting Group, Inc. and Heidi Watton's Second Motion to Dismiss for Plaintiffs' Failure to Comply With A.R.S. § 12-2602(D) ("Motion to Dismiss").

The deadline for the Plaintiffs to disclose the identity and opinions of their experts was September 7, 2017. *See* Amended Scheduling Order issued June 23, 2017 at p. 1. The deadline for completion of expert depositions, and all other discovery, was June 6, 2018. *See* Fourth Amended Scheduling Order issued April 19, 2018 at p. 1.

On June 6th, the Rimkus Defendants took Khatri 's deposition. At his deposition, Khatri disavowed his PEOA. Specifically, he testified that he had based his PEOA in part on his understanding that Watton was under investigation by the Arizona Board of Technical Registration (the "Board") based on an allegation that she had mispresented the purpose for her presence at a site inspection of the Plaintiffs' properties on May 23, 2013. He further testified that he was under the impression, when he signed the PEOA, that the Board had not yet resolved that complaint. Undated Transcript of Deposition of Dilip Khatri ("Khatri Deposition Transcript") at pp. 101-02, 106-07, attached as Exhibit 4 to Motion to Dismiss. *See also* September 4, 2013 Letter from Jeremy Skipton of Skipton & Associates to the Board alleging that Watton violated applicable rules of professional conduct, attached as part of Exhibit 2 to Motion to Dismiss. In fact, on November 19, 2013 - - over two years before this case was even filed - - the Board had dismissed the complaint against Watton, finding "no apparent violations of the Board's statutes or rules." November 19, 2013 letter from the Board to Watton, attached as part of Exhibit 2 to Motion to Dismiss. Khatri testified that he was unaware that the Board had dismissed the complaint against Watton until his deposition, when opposing counsel showed him, for the first time, the Board's letter dismissing the complaint against Watton. Khatri Deposition Transcript at pp. 108-09. Khatri testified that, had he known that the Board had

dismissed the complaint against Watton, he "would not have signed" the PEOA. *Id*. at p. 110. He later reiterated that if he "had been given" a copy of the Board's letter dismissing the complaint against Watton, "then I would not have signed the affidavit." *Id*. at p. 112. When asked to confirm that he no longer stands behind his PEOA, he replied, "There's nothing to stand behind," adding, "I don't see any merit to stand behind on that." *Id*. at p. 110.

The Rimkus Defendants now seek dismissal of the Plaintiffs' claim against them. *See* Motion to Dismiss. In support of their request, they assert that the Plaintiffs have "fail[ed] to secure an expert opinion that meets the requirements of A.R.S. § 12-2602." *Id*. at p. 13.

Rimkus's request for dismissal is supported by A.R.S. § 12-2602(F), which provides that "[t]he court, on its motion or the motion of the licensed professional, shall dismiss the claim against the licensed professional without prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after…the court has ordered the claimant to file and serve an affidavit." A.R.S. § 12-2602(F).

In response, the Plaintiffs do not dispute that, at his deposition on June 6th, Khatri "effectively disavowed his preliminary expert opinion." Plaintiffs' Response to Rimkus Consulting Group and Heidi Watton's Second Motion to Dismiss for Plaintiffs' Failure to Comply With A.R.S. § 12-2602(D) ("Response to Motion to Dismiss") at p. 3. They nonetheless assert that the Rimkus Defendants are not entitled to the relief they request, asserting that "a preliminary opinion pursuant to A.R.S. § 12-2602(D) that is subsequently withdrawn or even disavowed by the plaintiff or the respective expert is not a basis for dismissing the underlying claims. *Id*. at pp. 1-2.

In support of their position, the Plaintiffs argue, first, that A.R.S. § 12-2602 applies only at the pleading stage of a case, and once a preliminary expert opinion affidavit has been served pursuant to A.R.S. § 12-2602, "the statute is of no further consequence or relevance to the respective claim or claims." Response to Motion to Dismiss at p. 7.

The Court does not agree. The purpose of a preliminary expert opinion affidavit is to ensure that a claim for professional negligence has merit. *See Jilly v. Rayes*, 221 Ariz. 40, 43, 209 P.3d 176, 179 (App. 2009). Such an affidavit serves to ensure that the plaintiff's allegations have been subjected to meaningful scrutiny by a knowledgeable expert. *See Gorney v. Meaney*, 214 Ariz. 226, 231, 150 P.3d 799, 804 (App. 2007) ("To effectively evaluate the merits of a lawsuit, an expert must be fully aware of the facts alleged by the plaintiff…[Otherwise,] meritorious and frivolous cases alike could be prosecuted without passing any meaningful scrutiny by an expert."). In a case in which a preliminary expert opinion affidavit is required, one must be provided before the defendant can be forced to expend significant amounts of time and money responding to the plaintiff's claim. *See* A.R.S. § 12-2602(E) (in case of dispute over the

necessity of a preliminary expert opinion affidavit, "[t]he court shall stay all other proceedings and applicable time periods concerning the claim pending" the resolution of the dispute). A.R.S. § 12-2602's goal of weeding out frivolous claims would be defeated if a plaintiff could satisfy the statute by providing an affidavit from an expert who is operating under an incorrect understanding of the facts the expert considers relevant. The Court finds that, because Khatri testified that he never would have signed the PEOA had he known the truth of the status about the complaint against Watton - - *i.e.*, that it had already been dismissed - - the PEOA is, and has been from the outset, of no effect. The Court therefore finds that the Plaintiffs have never complied with A.R.S. § 12-2602 because, as case law from other jurisdictions recognizes, the "failure to file a proper certificate [of merit] is tantamount to not having filed a certificate at all." *Breslin v. Powell*, 26 A.3d 878, 894 (Md. 2011) (citation and internal quotations omitted).

In support of their position that A.R.S. § 12-2602 establishes an initial procedural hurdle which, once cleared by a plaintiff, "is of no further consequence," the Plaintiffs argue that preliminary expert opinion affidavits are "subject to change or even withdrawal in light of…additional, new or revised information, which is typical of all expert opinions." Response to Motion to Dismiss at p. 7.

While it is certainly true that new information uncovered over the course of discovery may properly lead an expert who previously signed a preliminary expert opinion affidavit to modify or even withdraw his or her original opinion, that is not the situation presented here. As the Rimkus Defendants point out and the Plaintiffs do not dispute, the Plaintiffs have never disclosed any other opinions, from Khatri or anyone else, about the Rimkus Defendants. *See* Defendants Rimkus Consulting Group, Inc. and Heidi Watton's Reply in Support of Their Second Motion to Dismiss for Plaintiffs' Failure to Comply with A.R.S. § 12-2602(D) ("Reply") at p. 3. The PEOA does not, therefore, reflect Khatri's *preliminary* opinion that was subsequently changed based on new information. The PEOA is the *only* expert opinion regarding the Rimkus Defendants that the Plaintiffs have disclosed in this case.

More important is the fact that Khatri's deposition testimony makes clear that he disavowed his PEOA not because of newly-developed information, but because of information in existence when he signed the PEOA of which he was unaware. Khatri testified that, had he been aware of the status of the complaint against Watton at the time he signed the PEOA, he never would have signed it. The PEOA thus failed to satisfy A.R.S. § 12-2602(D) because, as Khatri himself explained, he signed it under a misunderstanding of the facts on which the PEOA was based. The PEOA was therefore invalid from the outset.

In support of their argument that the PEOA satisfies A.R.S. § 12-2602 notwithstanding Khatri's deposition testimony disavowing the PEOA, the Plaintiffs cite a Maryland case in which the court held that the trial court erred in dismissing a medical malpractice case after the

plaintiff's expert witness testified at a deposition in a manner that was not consistent with the certificate of merit she had previously provided. Response to Motion to Dismiss at p. 8, *citing Debbas v. Nelson*, 885 A.2d 802, 814 (Md.App. 2005). *Debbas* "stands for the…proposition that an original certificate that was proper when filed does not become defective retroactively when the certifying expert later gives testimony that is inconsistent with it." *Retina Grp. of Wash. v. Crosetto*, 183 A.3d 873, 885 (Md.App. 2018). As case law construing *Debbas* has held, the *Debbas* court's recognition that a plaintiff is not "bound by his or her original certificate that was filed before discovery ensued" is based on the fact that "discovery may reveal information that was unknown to the plaintiff when the original certificate was filed." *Crosetto*, 183 A.3d at 885 (citation and internal quotations omitted). This principle is inapplicable here. As noted above, the PEOA was invalid from the outset because, as Khatri testified, he would not have signed the PEOA in the first place had he not been under a misapprehension about certain facts he considered relevant in forming his opinion.

In support of their opposition to the Rimkus Defendants' request for the dismissal of the Plaintiffs' claim, the Plaintiffs ask that they "be permitted to substitute the preliminary expert opinion of" another expert in place of Khatri. Response to Motion to Dismiss at p. 11. In making this request, they fault the Rimkus Defendants for failing to "diligently challenge the validity of [Khatri's] preliminary opinion," asserting that, had it "been determined earlier that [Khatri] was not going to stand by his preliminary opinion, Plaintiffs would plainly have been entitled to seek another expert." *Id*. at p. 10.

The Court finds that the Rimkus Defendants cannot fairly be faulted for not taking Khatri's deposition sooner than they did. A defendant has no obligation to challenge the qualifications and opinions of the plaintiff's expert prior to the close of discovery. *See Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160, 164, 403 P.3d 572, 576 (2017) (after close of expert discovery, defendant filed motion for summary judgment challenging qualifications of plaintiff's expert; court held that challenging an expert's preliminary opinion affidavit "is not a prerequisite for filing a summary judgment motion for lack of requisite expert qualifications…").

Further, nothing in A.R.S. § 12-2602 authorizes the Court to grant the Plaintiffs' request for an opportunity to substitute a new preliminary expert opinion affidavit in place of the invalid PEOA at this point in the case. *See* A.R.S. § 12-2602(F) ("The court…shall dismiss the claim against the licensed professional without prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after…the court has ordered the claimant to file and serve an affidavit," without providing for an opportunity to "cure" a deficient or invalid affidavit with a new affidavit). The absence of a "cure" provision in A.R.S. § 12-2602 is no mere oversight, since the statute's counterpart in medical negligence cases, A.R.S. § 12-2603, does in fact contain a "cure" provision. *See* A.R.S. § 12-2603(F) ("The court…shall dismiss the claim against the health care professional…without prejudice if the claimant…fails to file and serve a

preliminary expert opinion affidavit after…the court has ordered the claimant…to file and serve an affidavit. Upon any allegation of insufficiency in the affidavit, *the court shall allow any party a reasonable time to cure any affidavit, if necessary*.") (emphasis added). Because the Legislature included a "cure" provision in A.R.S. § 12-2603 but not in A.R.S. § 12-2602, the Court must assume that the Legislature did not intend to grant courts authority to grant plaintiffs who were ordered to serve preliminary expert opinion affidavits pursuant to A.R.S. § 12-2602 time to cure defects in those affidavits. *See County of Cochise v. Faria*, 221 Ariz. 619, 622, 212 P.3d 957, 960 (App. 2009) ("When statutes relate to the same subject and are thus *in pari materia*, they should be construed together with other related statutes as though they constituted one law.") (citation and internal quotations omitted); *P.F. West, Inc. v. Superior Court*, 139 Ariz. 31, 34, 676 P.2d 665, 668 (App. 1984) (holding that, because A.R.S. §§ 11-807(C), -807(D), and -808(D) "were enacted together, we must assume that the legislature intended different consequences to flow from the use of different language in these three subsections").

Even assuming that the Court has discretion to grant the Plaintiffs leave to substitute a new preliminary expert opinion affidavit from a different expert at this stage of the proceedings, the Court finds that, under the circumstances presented here, the Plaintiffs should not be permitted to do so.

As noted above, Khatri testified at his deposition that he was under the impression, when he signed the PEOA, that the complaint against Watton was still pending. Khatri Deposition Transcript at pp. 106-07. He testified that he was aware that it was an agent of the Plaintiffs', David Skipton of the public adjuster firm of Skipton & Associates ("Skipton"), who had filed the complaint with the Board. *Id*. at p. 104. When asked if he "ever ask[ed] Mr. Skipton what the outcome of that complaint was," he replied that he asked Skipton "if there was any resolution on this," and "was told that there was not." *Id*. at pp. 104, 108.

Clearly, Skipton knew or should have known, at the time Khatri was retained, that the Board had already dismissed the complaint against Watton. Before dismissing the complaint, the Board sent Skipton a letter stating that "[t]he Board will be considering the staff recommendation for a dismissal of the allegation" at the next Board meeting on November 19, 2013. November 4, 2013 letter from the Board to Skipton & Associates, attached as part of Exhibit 5 to Motion to Dismiss. While there is no evidence in the record to establish that Skipton's firm was given notice after the complaint was dismissed, Skipton was certainly on notice in November 2013 that the Board would be considering a staff recommendation that the complaint be dismissed. Because Skipton was on notice in November 2013 that the Board would be meeting to consider a staff recommendation that the complaint be dismissed, it was disingenuous, to say the least, for Skipton to tell Khatri in mid-2016 that the complaint against Watton remained unresolved. And because it is undisputed that Skipton acted as the Plaintiffs' agent in this matter, this lack of candor is properly attributable to the Plaintiffs.

The Plaintiffs' own responsibility for failing to adequately inform Khatri of the relevant facts concerning the complaint against Watton is further shown by the exhibits attached to the Plaintiffs' Response to Motion to Dismiss. Attached as Exhibit B to the Plaintiffs' Response to Motion to Dismiss is a copy of the documents provided to Khatri in June 2016 for his consideration in preparing and signing the PEOA. *See* Exhibit B to Response to Motion to Dismiss. These documents were sent to Khatri with the notation, "Attached are documents relevant to the claim" against the Rimkus Defendants. June 27, 2016 Email to Khatri from Plaintiffs' counsel's firm and accompanying documents, attached as Exhibit B to Response to Motion to Dismiss. These documents include the complaint that Skipton filed against Watton with the Board in September 2013, but do not include the November 2013 letter that the Board sent to Skipton's firm about the pending dismissal of that complaint, nor do these documents include any other information that would put Khatri on notice that the complaint had been already dismissed. *See* Exhibit B to Response to Motion to Dismiss.

In their response to the Motion to Dismiss, the Plaintiffs acknowledge that they provided "a copy of the professional complaint against [Watton] that was lodged by [the] Plaintiffs' public adjuster" to Khatri "before he submitted his original affidavit of merit." Response to Motion to Dismiss at p. 4, n. 2. They then assert that they have "not located any record of [Khatri] asking about the outcome of that complaint," *id*., as though Khatri's ignorance of the Board's dismissal of the complaint can be blamed on Khatri's failure to ask enough questions. The Court finds that Khatri's ignorance of the Board's dismissal of the complaint is a result not of Khatri's lack of inquisitiveness, but of the Plaintiffs' failure to inform their expert, completely and accurately, of the relevant facts. Because the Plaintiffs are at fault for failing to properly inform their expert of the relevant facts, there is nothing unfair about denying the Plaintiffs' request to substitute a new expert for Khatri after the close of expert discovery.[1] *See Leibel v. NCL (Bahamas) Ltd*., 185

[1] At Oral Argument on July 13, 2018, the Plaintiffs offered to put Skipton on the witness stand to respond to Khatri's deposition testimony about whether Khatri had been told about the dismissal of the complaint against Watton. The Court stated that it would not accept additional evidence at that point. Not to be deterred, after Oral Argument the Plaintiffs submitted an affidavit from Skipton alleging that his "recollection" is that, at his initial meeting with Khatri, he verbally told Khatri about the Board's dismissal of the complaint, and that his "belief" is that Khatri's testimony to the contrary is "mistaken." Plaintiffs' Notice of Filing Affidavits Under Oath filed July 18, 2018, Exhibit C. Because Skipton's affidavit was not provided until after the Oral Argument in this matter, and because the Court expressly told the parties at Oral Argument that it would not accept additional evidence, the Court will not consider Skipton's affidavit.

Along with Skipton's affidavit, the Plaintiffs submitted affidavits from two of their attorneys, Michael N. Poli ("Poli") and Lawrence Moon ("Moon"). *See* Plaintiffs' Notice of Filing Affidavits

F.Supp.3d 1354, 1355, 1357 (S.D.Fla. 2016) (denying plaintiff's motion to substitute experts, where expert testified that he was unable to provide medical opinion as to cause of plaintiff's injury because "he had not been provided with sufficient information to form a medical opinion"; court found that plaintiff was at fault for failing to "prepare her expert to present an admissible expert medical opinion").

The Plaintiffs suggest that the Board's dismissal of the complaint against Watton is not an important or relevant fact, and describe Khatri's disavowal of his PEOA upon learning of the Board's dismissal of the complaint as "perplexing." Response to Motion to Dismiss at p. 10, n. 4. This argument is, itself, perplexing. If the Plaintiffs do not consider the complaint against Watton to be relevant to Khatri's opinion, why did they provide Khatri with a copy of that complaint for his consideration in preparing the PEOA? And why did they send Khatri a copy of that complaint, along with other documents, with the notation, "Attached are documents relevant to the claim"? *See* June 27, 2016 Email to Khatri from Plaintiffs' counsel's firm and accompanying documents, attached as Exhibit B to Response to Motion to Dismiss.

In any event, the important question is not whether *the Plaintiffs* consider the Board's dismissal of the complaint against Watton to be relevant to Khatri's opinion, but whether *Khatri* considers the Board's dismissal of the complaint to be relevant to his opinion. Clearly, Khatri *does* consider the Board's dismissal of the complaint to be relevant to his opinion; he wouldn't have asked Skipton about the status of the complaint if he didn't consider it to be relevant. Because the Plaintiffs and their agent told Khatri that a complaint had been filed against Watton without telling him that the complaint had already been dismissed, and because, as Khatri testified, the Plaintiffs' agent did not accurately inform Khatri when Khatri directly asked about the status of the complaint, the Court finds that the Plaintiffs have failed to establish good cause for their request to substitute expert witnesses at this stage of the case.

In support of their request for leave to substitute another expert in Khatri's place, the Plaintiffs assert that "[a] motion to substitute an expert witness should be granted where there is a showing of good cause." Plaintiff's Motion to Substitute Expert Robert Wright in Place of Dilip Khatri at p. 3. While this is, of course, true as a proposition of law, the Court finds no good cause here. Khatri disavowed his PEOA because, as he testified at his deposition, he was given inaccurate information by the Plaintiffs and their agent concerning the status of the complaint against Watton.

Under Oath, Exhibits A, B. In their affidavits, Poli and Moon affirm that they never misled, or withheld information from, Khatri. *Id.* Because Khatri never testified that Poli or Moon misled him or withheld information from him, the Court finds nothing particularly relevant or informative in the affidavits of Poli and Moon affirming that they did not do something that no one ever claimed they did. In any event, the Court will not consider these affidavits.

At Oral Argument on July 13, 2018, the Plaintiffs pointed out that, on June 22, 2018, over two weeks after the close of expert discovery, they filed a preliminary expert opinion affidavit from a new expert, Robert L. Wright, P.E. ("Wright"). *See* Plaintiffs' Notice of Lodging Preliminary Expert Opinion of Robert L. Wright, P.E., Pursuant to A.R.S. § 12-2602(B). They further argued that any prejudice that the Rimkus Defendants might suffer as a result of allowing the Plaintiffs to substitute Wright in place of Khatri could be alleviated by awarding the Rimkus Defendants the attorney fees and costs they incurred in taking Khatri's deposition and/or the fees and costs that they will incur in taking Wright's deposition.

The Court does not agree. The Plaintiffs' request to substitute Wright in place of Khatri, made only after the close of expert discovery, comes too late. *See St. George v. Plimpton*, 241 Ariz. 163, 168-69, 384 P.3d 1243, 1248-49 (App. 2016) (affirming trial court's refusal to allow plaintiffs to substitute a new expert, in part because plaintiffs did not make this request until after close of expert disclosure deadline). Indeed, allowing the Plaintiffs to substitute another expert to provide a new preliminary expert opinion affidavit at this stage of the case would bring expert discovery back to where it was in September 2017, when the Plaintiffs' initial expert disclosures were due. If the Plaintiffs were allowed to substitute Wright in place of Khatri, the Rimkus Defendants would be required to present Wright's preliminary expert opinion affidavit to their own expert(s) to evaluate and formulate a response. The time and expense that the Rimkus Defendants would incur as a result of the Plaintiffs' substitution of a new expert constitutes prejudice of the kind that must be taken into account in determining whether to grant a request to substitute one expert for another. *See Medpace, Inc. v. Biothera, Inc*., 2014 WL 1045960 at *4 (S.D. Ohio, Mar. 17, 2014) (finding that defendant "would be unfairly prejudiced if forced to incur the significant costs required to evaluate and respond to an entirely new expert report" by substitute expert for plaintiff).

Moreover, as the Rimkus Defendants point out, they have "developed substantial cross-examination material" that they could have used at trial to impeach Khatri's testimony. Motion to Dismiss at p. 13, n.8. Specifically, the Rimkus Defendants have gathered evidence showing that Khatri's California-issued professional license is on probationary status. *See id*. The fact that the Plaintiffs did not seek to replace Khatri with another expert until after the Rimkus Defendants gathered evidence that they could use to impeach Khatri's testimony weighs against permitting the Plaintiffs to change experts now. *See, e.g., E.E.O.C. v. BL Dev. C*orp., 2010 WL 1403848 at *1 (N.D.Miss., Apr. 6, 2010) (affirming magistrate judge's denial of motion to substitute expert on eve of discovery cut-off; magistrate judge had held "that simply discovering a 'better' witness…is insufficient to justify the further delay that would be occasioned by allowing a new expert two business days before the discovery deadline"); *Commonwealth Scientific and Indust. Rsrch. Org. v. Buffalo Tech*., 2009 WL 260953 *2 (E.D.Tex., Feb. 3, 2009) (denying party's motion to substitute another expert in place of Bagby, the previously-designated

expert, in part because Bagby had "made a number of admissions in his deposition" which opposing party "intend[ed] to rely on to impeach his expected testimony at trial"); *Sithon Maritime Co. v. Holiday Mansion*, 1998 WL 433931 at *1 (D.Kan., July 30, 1998) (party should not be allowed "to substitute an expert merely to overcome the criticism of an opposing expert witness," a process which, if allowed, "could go on endlessly, each party by successive substitutions seeking to finesse the criticism of the other."). This is particularly true where, as here, the request to substitute experts did not come until after the close of expert discovery.

At Oral Argument on July 13, 2018, the Plaintiffs, for the first time, cited *Aguirre v. Robert Forrest, P.A.*, 186 Ariz. 393, 923 P.2d 859 (App. 1996) and *Perguson v. Tamis*, 188 Ariz. 425, 937 P.2d 347 (App. 1996) in support of their request to substitute Wright in place of Khatri at this stage in the case. In *Aguirre*, the Court of Appeals affirmed the trial court's order permitting the plaintiffs to substitute one "standard of care" expert for another. 186 Ariz. at 396, 923 P.2d at 862. In *Perguson,* the Court of Appeals held that the trial court erred when it barred the plaintiffs, who had timely disclosed Dr. Hill and Dr. Goodwin as their experts, from calling Dr. Goodwin on the grounds that his testimony "would be duplicative and/or cumulative to" Dr. Hill's, and then granted summary judgment against the plaintiffs on the grounds that Dr. Hill was not qualified to testify as an expert against the defendant health care professionals. 188 Ariz. at 426-27, 937 P.2d at 348-49.

Aguirre and *Perguson* are of no help to the Plaintiffs here, for several reasons. First, neither case construed or interpreted A.R.S. § 12-2602(F), the statute on which the Rimkus Defendants rely in support of their request for dismissal of the Plaintiffs' claim against them. Second, *Aguirre* emphasizes that "it is the better and preferred practice for trial courts to…require the offending party to show 'extraordinary circumstances' to justify use of an untimely disclosed expert witness." 186 Ariz. at 397, 923 P.2d at 863. Here, the Plaintiffs have shown no "extraordinary circumstances" to justify replacing Khatri with Wright; their request is based on their own failure to fully apprise Khatri of the status of the complaint against Watton. Finally, both *Aguirre* and *Perguson* emphasize that trial courts have "discretion" and "flexibility" in "determining [the] admissibility of an untimely-disclosed expert witness's testimony…" *Aguirre*, 186 Ariz. at 396, 923 P.2d at 862. *See also Perguson,* 188 Ariz. at 428, 937 P.2d at 350 ("Witness disclosure issues must be decided on a case by case basis."). In holding that the trial court abused its discretion in denying the Plaintiffs' request to present the expert testimony of Dr. Goodwin on the grounds that his testimony would be duplicative of Dr. Hill's, the *Perguson* court found that the defendants shared blame for any confusion or uncertainty over the intended subject matter of the testimony of Dr. Goodwin and Dr. Hill by failing to seek "clarification" of that issue. 188 Ariz. at 429, 937 P.2d at 351. Here, by contrast, the Court does not find that the Rimkus Defendants can be criticized for the predicament in which the Plaintiffs find themselves, *i.e.*, seeking to substitute experts after the close of expert discovery in the wake of Khatri's disavowal of his own PEOA upon learning, at his deposition last month, that the complaint against Watton had been dismissed back in 2013.

Because the PEOA provided by the Plaintiffs two years ago is, and has been from the outset, of no effect, and because the Plaintiffs are responsible for their own failure to accurately and fully inform Khatri of the relevant facts, the Court finds that A.R.S. § 12-2602(F) requires that the Plaintiffs' claim against the Rimkus Defendants be dismissed, and that the Plaintiffs cannot fairly be permitted to substitute a new expert in Khatri's place at this point in the proceedings. Accordingly,

IT IS ORDERED granting Defendants Rimkus Consulting Group, Inc. and Heidi Watton's Second Motion to Dismiss for Plaintiffs' Failure to Comply With A.R.S. § 12-2602(D).

On June 22, 2018, the Plaintiffs filed and served a preliminary expert opinion affidavit from Robert Wright, the expert whom they intended to substitute in Khatri's place. *See* Plaintiffs' Notice of Lodging Preliminary Expert Opinion of Robert L. Wright, P.E., Pursuant to A.R.S. § 12-2602(B). The Rimkus Defendants have moved to strike this filing. *See* Defendants Rimkus Consulting Group and Heidi Watton's Motion to Strike Plaintiffs' Notice of Lodging Preliminary Expert Opinion of Robert L. Wright and Affidavit of Robert L. Wright. They have also moved to strike the new affidavits that the Plaintiffs filed after Oral Argument. Defendants Rimkus Consulting Group and Heidi Watton's Motion to Strike Plaintiffs' Notice and Amended Notice of Filing Affidavits Under Oath and Affidavits Attached Thereto. In view of the ruling dismissing the claim against the Rimkus Defendants, the Court sees no need to grant further relief on this issue. Accordingly,

IT IS ORDERED denying as moot Defendants Rimkus Consulting Group and Heidi Watton's Motion to Strike Plaintiffs' Notice of Lodging Preliminary Expert Opinion of Robert L. Wright and Affidavit of Robert L. Wright.

IT IS FURTHER ORDERED denying as moot Defendants Rimkus Consulting Group and Heidi Watton's Motion to Strike Plaintiffs' Notice and Amended Notice of Filing Affidavits Under Oath and Affidavits Attached Thereto.

Lexington seeks leave to amend its Answer to assert a "statute of limitations" defense, a request the Plaintiffs oppose. *See generally* Defendant Lexington Insurance Company's Motion for Leave to Amend Answer ("Motion to Amend I"); Plaintiffs' Response to Defendant Lexington Insurance Company's Motion for Leave to Amend Answer ("Response to Motion to Amend I").

In opposing Lexington's request, the Plaintiffs assert, first, that "there has been a clear waiver" of the limitations defense in light of "Lexington's extremely belated" request for leave to amend. Response to Motion to Amend I at p. 2. The Plaintiffs' assertion on this point is not

consistent with case law, which recognizes that "[t]he statute of limitations defense is waived *only* if it is not asserted prior to judgment." *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 165, 933 P.2d 1227, 1233 (App. 1996) (emphasis added). Although the Plaintiffs asserted, at Oral Argument on July 13th, that the "no-waiver-prior-to-judgment" principle applies only if the defendant establishes that its failure to assert a limitations defense in its original answer was due to inadvertence, case law does not support this assertion. Arizona courts have repeatedly recognized that an answer may be amended to assert a limitations defense prior to judgment, without indicating that inadvertence must first be shown. In *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 701 P.2d 851 (App. 1985), for example, the Court of Appeals affirmed a trial court order allowing the defendants to amend their answer to assert a limitations defense after the case had been tried, appealed, and then remanded for a new trial. In so holding, the *Trout* court observed that, "[g]enerally, it is held that the statute of limitations defense is waived only if it is not asserted prior to judgment," without indicating in any manner that the application of this principle is limited to cases in which a limitations defense is omitted from the original answer as a result of inadvertence. *Id*. at 358, 701 P.2d at 854. *See also Trujillo v. Brasfield*, 119 Ariz. 8, 10, 579 P.2d 46, 48 (App. 1978) (reversing trial court order denying leave to amend answer to assert a limitations defense, without indicating that it found inadvertence on the part of the defendants).

The Plaintiffs assert, next, that Lexington has waived its limitations defense by its conduct in engaging in "two years of active litigation in this case," including by spending "enormous money and time…litigating two separate summary judgment motions filed by Lexington." Response to Motion to Amend I at p. 13. The Court finds this argument inconsistent with *Trout*. If, as in *Trout*, a limitations defense is not waived by failing to raise it until after the case was tried, appealed, and remanded, 145 Ariz. at 358, 701 P.2d at 854, the Court finds that Lexington did not waive a limitations defense by litigating this case over the past two years.

The Plaintiffs assert, next, that, even if Lexington has not waived its limitations defense, the Court should exercise its discretion to deny Lexington's request due to Lexington's purported "undue delay" in seeking leave to amend, coupled with the purported "undue prejudice" that the Plaintiffs would suffer if leave to amend were granted. Response to Motion to Amend I at pp. 3-4.

"Delay alone is not usually cause to deny a request to amend." *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 303, 981 P.2d 1081, 1084 (App. 1999) (rejecting argument that trial court abused its discretion in permitting defendant to amend its answer to assert limitations defense). The Plaintiffs have identified no prejudice that would result from the proposed amendment other than that additional discovery may be required. While taking additional discovery would cause the parties to incur some additional fees and costs, Arizona case law holds that this kind of prejudice should be ameliorated in ways other than by denying leave to amend. *See id*. at 303, 981 P.2d at

1084 ("While it is true that the failure to assert a limitations defense at an early stage can result in costly unnecessary discovery, the trial court can ameliorate that problem by compensating the party who opposes a late amendment for such expense."). Further, although the Plaintiffs cite *Bishop v. State*, 172 Ariz. 472, 837 P.2d 1207 (App. 1992) in support of their position, *see* Response to Motion to Amend I at p. 4, *Bishop* is distinguishable. In *Bishop*, the Court affirmed the trial court's denial of the plaintiff's request for leave to amend her complaint in part because the request was made "only a few months before the date set for trial." 172 Ariz. at 475, 837 P.2d at 1210. Here, by contrast, no trial date is set. The Court finds no undue prejudice to the Plaintiffs that would result from granting Lexington's request.

The Plaintiffs assert, next, that the proposed amendment would be futile because the limitations period prescribed in the Federal Arbitration Act ("FAA") does not apply in this case anyway. Response to Motion to Amend I at pp. 5-6. In support of their position, they cite *Chapman v. The Westerner*, 220 Ariz. 52, 202 P.3d 517 (App. 2008) for the proposition that arbitration statutes are not "applied on a wholesale basis to insurance policy appraisals." Response to Motion to Amend I at p. 10, *citing Chapman*, 220 Ariz. at 54, 202 P.3d at 519 (finding "nothing" in case law relied upon by defendant to "suggest[] that the court intended to engraft the law of arbitration in its entirety onto every agreement to value the property by appraisal").

As Lexington correctly notes, however, *Chapman* "did not involve an insurance appraisal." Defendant Lexington Insurance Company's Reply in Support of Motion for Leave to Amend Answer ("Reply in Support of Motion to Amend I") at p. 8. Indeed, the *Chapman* court distinguished "Arizona cases…that have applied principles of arbitration law to appraisals" on the basis that those cases did so "only in the context of appraisal clauses in insurance contracts…" 220 Ariz. at 54 n. 2, 202 P.3d at 519 n. 2. Because the Plaintiffs' case, unlike *Chapman*, does in fact involve an appraisal conducted pursuant to an insurance policy, *Chapman*'s discussion of the extent to which arbitration law applies to appraisals that are unrelated to insurance policies is not controlling here.

Both sides cite case law in support of their respective positions about whether the FAA's limitations period applies in this case. *Compare* Motion to Amend I at p. 4, *citing Karo v. Nau Country Ins. Co.*, 901 N.W.2d 689, 702 (Neb. 2017) ("Under the FAA…Congress has placed strict limitations on judicial review of the arbitration award by placing temporal limits on when a court is authorized to review an award…") *and* Reply in Support of Motion to Amend I at p. 7, *citing San Souci Apts. v. Nat'l Surety Corp*., 2013 WL 428091 *1 (D.Ariz., Feb. 4, 2013) ("The FAA applies to appraisal provisions in insurance policies.") *with* Response to Motion to Dismiss I at p. 7, *citing Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 694 (6th Cir. 2012) (appraisal provision pursuant to which the parties "agreed…to submit the determination of the

amount of loss and the value of the [real property] to appraisal" does "not constitute arbitration for purposes of the FAA").

At this stage of the proceedings, however, the Court need not determine whether the FAA's limitations provision applies in this case. Under the liberal standard governing amendment of pleadings, leave to amend should not be denied on grounds of futility "if the underlying facts or circumstances relied upon *may be* a proper subject of relief." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 471, 160 P.3d 1216, 1229 (App. 2007) (emphasis added, citation, internal quotations, and internal punctuation omitted). In other words, "[i]f a proposed amendment is not clearly futile, then denial of leave to amend is improper." 6 Wright, Miller & Kane, *Federal Practice & Practice and Procedure* § 1487 (2nd ed. 1990). *See also Pharmaceutical Sales & Consulting Corp. v. J.W.S. Delavau Co.*, 106 F.Supp.2d 761, 764 (D.N.J. 2000) ("A determination as to futility does not require a conclusive determination on the merits of a claim or defense; rather, the futility of an amendment may only serve as a basis for denial of leave to amend when the proposed amendment is frivolous or advances a claim that is legally insufficient on its face."); *Saxholm AS v. Dynal, Inc.*, 938 F.Supp. 120, 124 (E.D.N.Y. 1996) ("[A] proposed claim is futile only if it is clearly frivolous or legally insufficient on its face."). Because the Court cannot say that Lexington's proposed amendment is frivolous or legally insufficient on its face, the Court cannot find that granting Lexington's proposed amendment would be futile. *See, e.g., SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 764 F.3d 1327, 1344 (11th Cir. 2014) ("[W]hen a court denies the plaintiff leave to amend a complaint due to futility, the court is making the legal conclusion that the complaint, as amended, would necessarily fail."). Accordingly,

IT IS ORDERED granting Defendant Lexington Insurance Company's Motion for Leave to Amend Answer.

Lexington also seeks leave to amend its Answer to assert additional defenses, *i.e.*, defenses "that should bar [the Plaintiffs] from challenging the appraisal award, including unclean hands and breach of the duty of good faith and fair dealing." Defendant Lexington Insurance Company's Motion for Leave to Amend Answer to Assert Defenses Barring Challenge to Appraisal Award ("Motion to Amend II") at p. 3. Again, the Plaintiffs oppose Lexington's request. *See generally* Plaintiffs' Response to Defendant Lexington's Second Motion to Amend Answer to Assert Defenses Barring Challenge to Appraisal Award ("Response to Motion to Amend II").

Lexington asserts that the proposed affirmative defenses are based on the Plaintiffs' alleged conduct in "repeatedly and deceitfully act[ing] to manipulate the appraisal process in order to inflate the final appraisal award." Defendant Lexington Insurance Company's Reply in Support of Motion for Leave to Amend Answer to Assert Defenses Barring Challenge to

Appraisal Award ("Reply in Support of Motion to Dismiss II") at p. 4. The Plaintiffs' wrongful acts, Lexington alleges, include retaining an appraiser, David Fix ("Fix"), who was not "impartial" as required by the terms of the appraisal provision of the policy, and who improperly allowed the Plaintiffs to review and edit his draft conclusions before Fix shared them with the other members of the appraisal panel; attempting to discredit Watton and her report in the eyes of the appraiser selected by Lexington by telling him, falsely, that Watton had been "fired by Rimkus shortly after she authored her report"; and by improperly limiting the scope of the umpire's site inspection. Motion to Dismiss II at pp. 5, 6, 7-8. Lexington asserts that it was unaware of the evidence establishing the factual basis for the new affirmative defenses until April 2018, when the Plaintiffs "disclosed thousands of pages of new emails and other documents that should have been produced under Rule 26.1…" *Id*. at p. 2, n. 1.

In opposing Lexington's Motion to Amend II, the Plaintiffs assert that Lexington has unduly delayed in requesting leave to amend. Response to Motion to Amend II at p. 15. Since it is undisputed that Lexington's request is based on the contents of emails and other documents that the Plaintiffs did not disclose until April of this year or later, the Court sees no basis for the Plaintiffs' attempt to blame Lexington for the timing of this request. Presumably, Lexington would have made this request long ago had the Plaintiffs disclosed these documents long ago, as they should have. *See* Ariz.R.Civ.P. 26.1.

In opposing Lexington's request, the Plaintiffs also assert that the proposed amendment would be futile. Response to Motion to Amend II at p. 15. In support of this assertion, they contend that Fix engaged in no improper conduct, and that case law recognizes that appraisers need not be "impartial" or "disinterested" in the manner of a judge. *Id*. at pp. 6, 7, 10. In communicating with the Plaintiffs during the process, they contend, Fix engaged in conduct that is comparable to the communications between Lexington and the appraiser it selected. *Id*. at p. 12. Indeed, the Plaintiffs assert that Lexington's appraiser himself engaged in improper conduct by advocating for "an elastomeric coating" on the hail-damages roofs even though he admitted in an email to Lexington that "the coating would not duplicate the existing roof system's life expectancy" as required by the terms of the Plaintiffs' policy. *Id*. at p. 4. The Plaintiffs further assert that, even if Fix engaged in improper conduct, Lexington can identify no prejudice because the panel's umpire was "persuade[d]" by Lexington's appraiser to go "along with Lexington's desired repair protocol," meaning that, notwithstanding any improper conduct by Fix, the Plaintiffs "lost the core issue in the appraisal." *Id*. at pp. 2, 5.

The Court cannot resolve, based on the current record, the merits of the factual allegations that the parties make against each other, nor should the Court attempt to do so. As noted above, leave to amend should not be denied on grounds of futility "if the underlying facts or circumstances relied upon *may be* a proper subject of relief." *Yes on Prop 200*, 215 Ariz. at 471, 160 P.3d at 1229 (emphasis added, citation, internal quotations, and internal punctuation

omitted). As Lexington argues and the Plaintiffs do not dispute, the Plaintiffs' challenge to the panel's award is "equitable in nature," and is subject to equitable defenses. Motion to Amend II at p. 12, *citing Conant v. O'Meara*, 117 A.3d 692, 697 (N.H. 2015) ("[W]e review the trial court's decision to grant equitable relief - - in the form of setting aside the arbitrators' award - - for an unsustainable exercise of discretion."). Lexington's proposed affirmative defenses to the Plaintiffs' claims "may be a proper subject of relief," *Yes on Prop 200*, because the applicability of such defenses to claims arising out of appraisals and disputes over appraisal provisions is well-established. *See, e.g., Olga Despotis Trust v. Cincinnati Ins. Co.*, 2014 WL 5320260 at *7 (E.D.Mo., Oct. 17, 2014) (rejecting argument that defendant's "fail[ure] to name an appraiser" within time period prescribed in policy established "unclean hands" barring defendant from enforcing appraisal provision; "The Court finds no inequity and that application of the appraisal provision would not be barred by unclean hands."). *Cf. St. Charles Parish Hosp. Service Dist. No. 1. v. United Fire & Cas. Co.*, 681 F.Supp.2d 748, 765 (E.D.La. 2010) (without using term "unclean hands," the court noted that a party should not be permitted "to circumvent the binding appraisal process" based on "the conduct of *its own appraiser*") (emphasis added). Because the Court cannot say that Lexington's proposed affirmative defenses would be frivolous or legally insufficient, *Pharmaceutical Sales*, 106 F.Supp.2d at 764, the Court cannot find that granting Lexington's proposed amendment would be futile.

Finally, the Plaintiffs further assert that permitting the proposed amendment would allow Lexington to "cloud the simple issue that lies at the heart of this lawsuit - - namely whether it was appropriate to value this loss using a far less expensive roof coating, when such was directly contrary to the LKQ language in Lexington's insurance policy." Response to Motion to Amend II at p. 2. One party is not, however, permitted to unilaterally define the issues to be litigated, nor may it deny the opposing party the opportunity to assert and develop its defenses. *See, e.g., Sentis Group, Inc. v. Shell Oil Co.*, 763 F.3d 919, 926 (8th Cir. 2014) ("[E]ach side is entitled to pursue intelligible theories of the case and Plaintiffs cannot, by their sole insistence, declare evidence undiscoverable and irrelevant merely because it does not fit into their own theory of the case."); *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 183 (N.D. Iowa 2017) (discovery is "not one-sided," and disclosure rules do not "give any party the unilateral ability to dictate the scope of discovery based on their own view" of the case) (citation and internal quotations omitted). Because the affirmative defenses Lexington seeks to allege may entitle Lexington to relief, Lexington's proposed amendment is not futile. Accordingly,

IT IS ORDERED granting Defendant Lexington Insurance Company's Motion for Leave to Amend Answer to Assert Defenses Barring Challenge to Appraisal Award.