

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**PEDRO LOZANO,
HUMBERTO HERNANDEZ,
ROSA LECHUGA,
JOSE LUIS LECHUGA,
JOHN DOE 1,
JOHN DOE 3,
JOHN DOE 7,
JANE DOE 5,
CASA DOMINICA OF HAZLETON,
INC.,
HAZLETON HISPANIC BUSINESS
ASSOCIATION, and
PENNSYLVANIA STATEWIDE
LATINO COALITION,
Plaintiffs**

**No. 3:06cv1586

(Judge Munley)**

v.

**CITY OF HAZLETON,
Defendant**

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ORDER
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Before the court for disposition is Defendant City of Hazleton’s “First Motion for Leave to Call Fact Witness, Michael Cutler” (Doc. 185). The parties have briefed their respective positions and the matter is ripe for disposition.¹

The defendant seeks to add Michael Cutler to its witness list. Cutler is a former INS Senior Special Agent. Defendant asserts the Cutler will testify regarding: the operation of the S.A.V.E. and the Basic Pilot Program systems; the manner in which the Law Enforcement Center operates; the capabilities and limits of the federal government’s immigration databases; the nature of the data contained in those databases; the manner in which an alien’s status is determined; the manner in which worksite enforcement occurs; and the ability of the databases to meet Hazleton’s verification

¹This order memorializes the court’s in-court ruling on this issue.

needs. (Doc. 185, at 2).

Defendant notes that they mentioned the possibility of calling this witness to the plaintiff in correspondence dated March 1, 2007 and that he will be available to the plaintiffs for deposition before his testimony as defendant will call him as its last witness.

Plaintiffs' position is that this witness is not a "fact witness" but rather is an expert witness. They argue that it is inappropriate for the defendant to offer an expert in the midst of trial and note that he has never provided an expert report. We agree with the plaintiffs that Cutler is an expert witness, however, we disagree that his testimony should be precluded.

Plaintiff asserts that this witness was identified late, and he should be precluded from testifying. While the defendant did disclose this witness late, we find no undue surprise on the part of the plaintiffs. The witness was identified by the defendant in a correspondence to the plaintiffs dated March 1, 2007. (Doc. 185, Ex. 1). The witness was also discussed in a telephone conference held by the court on March 2, 2007. Additionally, the witness appears on the defendant's March 9, 2007 witness list.

We do agree with the plaintiffs, however, that this witness's testimony is best regarded as expert testimony. The Federal Rules of Civil Procedures provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702

The evidence defendant seeks to submit through Cutler undoubtedly involves technical or specialized knowledge. We find that defendant presents Cutler as an expert witness.

Accordingly, defendant's motion is **GRANTED** to the extent that it may call Cutler. We disagree with the defendant that the witness is merely a fact witness. Thus, as ordered in court, the witness shall provide plaintiffs with an expert report and a resume by 4 o'clock p.m. March 17, 2007. The defendant is ordered to make the witness available to the plaintiffs for deposition. The defendant shall present this witness last, and the plaintiff will be allowed the opportunity to rebut Cutler's testimony with their expert if they so choose.

Date: March 16, 2007

BY THE COURT:

**s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court**