UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al., Defendants.	Civil Action No. 2:11-cv-01128 (LA)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE CERTAIN DEFENDANT EXHIBITS AND TESTIMONY AND TO PERMIT USE OF DEPOSITION TESTIMONY OF UNAVAILABLE WITNESSES

INTRODUCTION

Plaintiffs respectfully submit this motion *in limine* to exclude the following documents and testimony that Defendants expect to introduce at trial:

- A report prepared by a lay witness that is inadmissible hearsay under Federal Rules of Evidence ("FRE") 801-07 and that is apparently being used by Defendants to introduce a "back door" expert report so as to offer expert opinion testimony that is inadmissible under FRE 701-02 and not properly disclosed under Federal Rule of Civil Procedure 26(a)(2);
- Opinion testimony from lay witnesses about the State's interest in Act 23 of the 2011 Wisconsin State Legislature ("Act 23") and the impact of Act 23 on voter confidence and "election integrity," which constitutes expert opinion not properly disclosed under Fed. R. Civ. P. 26(a)(2) and which independently fails to satisfy the admissibility requirements under FRE 701-02;
- Documents not identified with any specificity in Defendants' exhibit list, which should be excluded under Fed. R. Civ. P. 16 and Local Civil Rule 16; and
- Documents on Defendants' exhibit list that Plaintiffs requested in discovery but Defendants have not produced, which should be excluded under Fed. R. Civ. P. 37(c).

Plaintiffs also respectfully request that the Court issue an order declaring that three of Plaintiffs' witnesses are unavailable to testify at trial and permitting use of their videotaped deposition testimony at trial in lieu of live testimony.

ARGUMENT

I. DEFENDANTS SHOULD BE PRECLUDED FROM USING LAY WITNESSES AND DOCUMENTS TO "BACK DOOR" EXPERT OPINION TESTIMONY

During the September 16, 2013, Status Conference, Plaintiffs expressed concerns to this Court about Defendants' efforts to introduce the opinions of lay witnesses, including former Milwaukee Police Department ("MPD") detective Michael Sandvick and certain clerks, on topics related to the State's interests in Act 23 and Act 23's impact on voter confidence and "election integrity." Testimony from these witnesses on these topics would constitute expert opinion testimony, and that testimony is inadmissible because (i) none of these witnesses were properly disclosed as experts under Fed. R. Civ. P. 26(a)(2); (ii) none of these witnesses provided an expert report as required under Fed. R. Civ. P. 26(a)(2);[1] and (iii) their testimony would not satisfy the reliability requirements for expert testimony under FRE 702. The documents and testimony set forth below should therefore be excluded.

A. The "Report of the Investigation Into the 2004 General Election in the City of Milwaukee" Is Inadmissible and Should Be Excluded.

On August 12, 2013, Defendants first disclosed that "Michael Sandvick, a member of the Milwaukee Police Department's Special Investigations Unit (retired), completed an examination of voter fraud in the 2004 Presidential election" and "may have discoverable information regarding investigations of voter fraud, which was documented in the Report of the Investigation into the November 2, 2004 General Election in the City of Milwaukee" (hereinafter, "Report").

[1] These procedural violations are not purely technical. Rather, Defendants' failure to properly disclose such expert opinion testimony prejudices Plaintiffs because Plaintiffs and their experts have not had an adequate opportunity to analyze the opinions and the underlying foundations of the opinions, or to prepare rebuttal testimony. *See Tribble v. Evangelides*, 670 F.3d 753, 760 (7th Cir. 2012).

(Ex. A to Falls Decl. 2-3.)[2] Defendants expect to call Sandvick to testify in the trial and plan to introduce his Report at trial. (*See* Dkt. No. 155 at 5, 9.) Defendants apparently seek to use Sandvick to provide opinion testimony on the impact of voter ID requirements on voter fraud and "election integrity." But having failed to provide an expert report for Sandvick, Defendants now seek to use the conclusions in the pre-existing Report as a convenient, last-minute substitute.

Sandvick's October 17 deposition, however, confirms that the Report is inadmissible on multiple grounds. The Report itself is hearsay not within any exception to the rule against hearsay, and the circumstances surrounding its preparation and release provide ample evidence of untrustworthiness. In addition, the Report is replete with unscientific and unqualified opinions and recommendations of its lay authors that are based on "group speak" brainstorming and not a process of reasoned analysis. Defendants therefore should not be permitted to use the Report as a back door to introduce an expert report that was not timely disclosed and that would fall well short of the reliability requirements for expert testimony under FRE 702. Accordingly, the Court should exclude the Report and prevent Sandvick from testifying about the conclusions in the Report as if it were a properly disclosed and admissible expert report.

The details of the Report are as follows. The Report was issued by the MPD's Special Investigations Unit ("SIU") in early 2008 and purports to contain an analysis of the 2004 elections in the City of Milwaukee along with the SIU's "opinions and recommendations." (Ex.

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[2] The Report was marked as Exhibit 199 in Sandvick's deposition. The relevant portions of the Report are attached as Ex. D to the Falls Declaration, October 23, 2013, and the full report is *available at:* http://media2.620wtmj.com/breakingnews/ElectionResults_2004_VoterFraudInvestigation_MPD-SIU-A2474926.pdf

D. to Falls Decl. 2.)[3] The Report itself, however, does not contain any investigation reports.[4] (*See id*.) It was signed only by the "SIU," and not by any named officer. Nor was it issued or endorsed by the police chief or any police officer in the command structure.[5] Further, even though the original investigation of the 2004 elections had been a joint effort of federal officials, the Milwaukee County District Attorneys' Office, and the MPD, the Report reflects only the views of the SIU. Indeed, the other task force participants specifically disclaimed the Report.[6]

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[3] Sandvick, who was later determined to have been involved in the preparation and issuance of the report, does not even recall which sections of the report he wrote or even what issues discussed in the report he personally investigated.

> Q. Did you personally investigate any of the allegations in this report?
> A. I said I don't remember if I personally did it, and I -- I was involved with -- with -- it wasn't as if I was, you know, sitting in a -- sitting in an office by myself and dictating orders out. We all worked together. There wasn't any -- I don't want to say -- official structure like that. I mean, we all worked together on everything, except for the absentees. And I don't remember if Mike had somebody helping him with that, because they were off site. We didn't have those.

(Sandvick Dep. 105:14-25, Oct. 17, 2013. (attached as Ex. C to Falls Decl.).)

[4] Even direct police reports are inadmissible if based on hearsay. *See Jordan v. Binns*, 712 F.3d 1123, 1133 (7th Cir. 2013) ("[p]olice reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer") (citations omitted) (internal quotation marks omitted). The SIU Report is another level removed because it is hearsay within hearsay. Because the Report does not show what the actual first-hand investigation reports contain, it is impossible to tell if even those reports are based on first hand observations or third party hearsay statements. There is thus no way to test the validity of even the factual statements in the Report.

[5] Although Sandvick coordinated and was the lead detective on the investigation, he was not a superior, commanding officer or supervisor of the other officers involved in the investigation or in the production of the report. (Sandvick Dep. 149:3-150:8.)

[6] Ex. D. to Falls Decl. 2 states as follows:

> **Disclaimers**
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> When the task force was formed, the United States Attorney's Office and Federal Bureau of Investigation limited their participation to the investigation of

Nor is the Report simply a compilation of factual issues observed or investigated by SIU officers. Rather, even though neither Sandvick nor the other officers involved in creating the Report were commanding officers or lobbyists for MPD, they wrote a report replete with opinions and recommendations for changes in state elections law, most notably a recommendation to require photo ID for voting. (Ex. D. to Falls Decl. 26.) Sandvick never conducted any research on such issues as election administration to develop those recommendations, and he is unaware of any of the other officers who wrote the report doing so. (Sandvick Dep. 152:13-19 (attached as Ex. C to Falls Decl.).) Instead, the recommendations were based on "group speak:[7]" SIU officers brainstorming about what the Report should contain.

> potential criminal violations. These agencies indicated that they would not be involved in any general evaluation of election procedures. As such, the recommendations and findings in this report are those of the Special Investigations Unit of the Milwaukee Police Department and do not reflect the views of the United States Department of Justice, the United States Attorney's Office, the Federal Bureau of Investigation, or any other member of the task force.
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> In 2004 the Milwaukee County District Attorney's Office, at the direction of District Attorney E. Michael McCann, participated with federal authorities and the Milwaukee Police Force in a Joint Task Force investigating possible voter fraud. Today's Report is issued by the Milwaukee Police Department's Special Investigations Unit, and contains that unit's investigative findings, opinions and recommendations, especially relating to the management of elections within the City of Milwaukee. The findings, opinions and recommendations expressed in this Report will be closely considered by District Attorney John Chisholm as relevant to the investigation of future allegations of election related misconduct, but this office did not participate in the preparation of the report and is not endorsing the findings, opinions or recommendations of the report at this time.

[7] "Q: Who did the initial drafting of the recommendations section? A. Oh, I don't know. I think it was group speak. Like I said, we all talked about it, we had to do this, and then it was written up." (Sandvick Dep. 103:3-7.)

Further, Sandvick's deposition testimony reveals that the Report may not have been authorized by his superiors at MPD and may have instead been motivated by Sandvick's personal political leanings. For example, although Sandvick claims that his superiors authorized the release of the report, he paid out of his own pocket to create bound copies for distribution. (*Id*. 83:12-16.) He also personally delivered the report to the Republican and Democratic party leaders, going so far as to drive the report to Madison.[8] (*Id*. 76:19-77:4, 82:10-21.) He asserts that these actions were authorized by the MPD's public information officer but also claims all these instructions were only provided orally. (*Id*. 83:19-23.) He also conceded that in his three decades in the MPD he was aware of no other report ever issued by a unit of the MPD, especially in the manner in which this Report was issued. (*Id.* 152:20-153:24.)[9] The credibility of his

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[8] This distribution process suggests a significant and inappropriate involvement with partisan entities.

[9] "Q Okay. You were in the police department -- what? --close to 30 years? 30 years?...
A Thirty and a half years.
Q Do you remember during your time there any other time when an unsigned report was issued from a subunit of the police department?
A I don't know if any reports like that were ever issued by the Milwaukee Police Department.
Q Why didn't you sign the report with your name?
A Because it was a group thing.
Q Why didn't you include the name of all the people in the group on it?
A Such as?
Q All the people who had -- were part of the special investigations unit. Why is there no individual's name attributed to this report?
A I don't know. That's how we put it out.
Q In your career in the police department, did you ever do anything else like that?
A Like this? No.
Q Ever put out a report or a document that didn't --that you had prepared that didn't include your name?
A No.
Q Ever put out a report or a document that had public policy implications that wasn't put out by the public information office?

claims about the propriety of the Report is also called into question by the fact that Sandvick admits that there was a lot of negative feedback about the recommendations, (*Id*. 109:12-14), and that he was removed from 2008 election day activities at polling sites, (*Id*. 110:16-111:23). Rather than staying in the communications office, he took the day off so he could challenge ballots. (*Id*. 110:16-112:21.) He also was told the SIU would be disbanded and believes that higher-ups in the MPD transferred him to another position in order to pressure him to retire because they did not like the recommendations. (*Id*. 106:10-108:16.)

Under these circumstances, the Report must be excluded. There is no question that the Report is hearsay. Nor can the Report fall within either the business or public records exceptions to the rule against hearsay, as the unprecedented action of making such a report was not a regular practice of the SIU or Sandvick within the meaning of FRE 803(6)(C). *See Pierce v. Atchison Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 444 (7th Cir. 1997) (suggesting that when a report or memorandum memorializes an unusual event, it may be excluded as not being a reliable business record). The host of opinions overlaid on the purported investigation, when those opinions did not naturally flow from the investigation but were rather cobbled together by "group speak," also render the Report something other than the "factual findings" of an investigation that might be admissible under FRE 803(8)(A)(iii).

Moreover, under FRE 803(6)(E) and (8)(B), the circumstances of the preparation and issuance of the Report, the disclaimer by federal officials and the County District Attorney, and the interjection of the Report into a partisan context, provide ample evidence of its untrustworthiness and thus grounds to exclude it. "When evaluating the trustworthiness of a

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A No."

factual report, we look to (a) the timeliness of the investigation, (b) the special skills or experience of the official, (c) whether a hearing was held and the level at which it was conducted, and (d) possible motivation problems." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000) (citing FRE 803(8)(C) advisory committee's note). Here, the Report was issued three years after the 2004 election and not long before the 2008 presidential election. While Sandvick and the others who prepared the Report may have been detectives and police officers, they had no special skill at all in research, public policy, or election administration. No hearing was held on the Report; to the contrary, once it was prepared, it was distributed outside normal police department channels to political parties and the media. "Motivation problems" conveying a lack of trustworthiness also can include preparation by persons who are not disinterested observers. *See, e.g.*, *Bracey v. Herringa*, 466 F.2d 702, 704-05 (7th Cir. 1972).[10] In addition, Reports, such as this one, issued without identification or attachments can be untrustworthy. *See, e.g.*, *Sullivan v. Dollar Tree Stores*, 623 F.3d 770, 778 (9th Cir. 2010) ("The district court acted within its discretion when it held that the DOL Report is not trustworthy. The Report is incomplete because its exhibits are not attached. Its author is unidentified and unknown, making it impossible to assess the author's skill or experience.")

[10] While Sandvick is not a defendant in the case, he joined the Republican Party of Wisconsin to advocate for voter ID, and he is now on its executive board, (Sandvick Dep. 122:22-123:6, 136:11-12; Dep. Ex. 201 at 5), and by the time he released the report, even his personal friend, Assistant District Attorney Bruce Landgraf, believed he was a conservative Republican, (Landgraf Dep. 83:4-6, Oct. 18, 2013 (attached as Ex. E to Falls Decl.) (explaining that Sandvick had "always been identified, in my mind, as being affiliated with conservative interests, Republican interests")). Although Sandvick claims that at the time he released the report he was unaware that voter ID was a political or partisan issue, this strains credulity: by the end of the 2005-06 legislative session – more than a year before the release of the report – voter ID had repeatedly been introduced in the Wisconsin legislature and vetoed at least three times by the Governor. (*See* Ex. H to Falls Decl.)

The Report also should be excluded as an improper effort to introduce an expert report on which Sandvick can offer expert opinion testimony. The Report is not, of course, admissible as an expert report. Neither Sandvick nor the SIU was disclosed as an expert, nor would they so qualify.[11] Testimony about the opinions and recommendations in the Report also cannot constitute "lay opinion" under FRE 701. Admissible lay opinion "'most often takes the form of a summary of firsthand sensory observations' and may not 'provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.'" *Tribble v. Evangelides*, 670 F.3d 753, 758 (7th Cir. 2012) (quoting *United States v. Conn*, 297 F.3d 548, 554 (7th Cir. 2002)). Here, the Report is replete with "recommendations" and "opinions" of its authors, members of the MPD's SIU, making it clear that testimony about these recommendations and opinions would not be lay opinion under FRE 701, but expert opinion that must meet the requirements of FRE 702. Further, the opinions in the Report did not flow naturally from the investigative findings, much less from firsthand sensory observations, but rather were ideas concocted through a process of "group speak" by police officers who have no background in election administration and did not even research the issue. The Report therefore must be excluded, and Sandvick should not be permitted to testify about the Report or its conclusions as if it were a properly disclosed and admissible expert report.

[11] Sandvick has only a two year degree in police science, and no background, much less a degree, related to research, election administration, or public policy. (Sandvick Dep. 138:9-139:4.) In addition, opinions based on "group speak" would clearly not be admissible expert testimony under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

B. Opinion Testimony About the State's Interest in Voter ID Law is Inadmissible and Should Be Excluded.

On August 13, 2013, Defendants also identified clerks Sue Ertmer and Jeannette Merten as witnesses with purported knowledge about the "State interests that support voter photo identification requirements, the incidence and threat of voter and/or election fraud at polling places, whether a voter photo identification requirement would improve the integrity of elections and instill confidence in voters, and whether a voter photo identification requirement would prevent or deter voter or election fraud." (Ex. A to Falls Decl. 1-2.) On September 30, 2013, Defendants first disclosed that clerk Dianne Hermann-Brown and Milwaukee Election Commissioner Robert F. Spindell, Jr., purportedly have knowledge of the "purposes, effects, and public reaction to voter photo identification requirements in Wisconsin[.]" (Ex. B to Falls Decl. 1-2.) Defendants assert they intend to call these witnesses at trial. (Dkt. No. 155.)

Again, Defendants are improperly seeking to use testimony from these and potentially other witnesses as a back door to provide expert opinions on election integrity, voter confidence, and State interests in voter ID. Opinion testimony on these topics would not constitute the kind of summary of sensory observations that constitutes admissible lay opinion testimony under FRE 701. Rather, to offer an opinion on the State's interests in Act 23 or the impact of Act 23 on election integrity or voter confidence would require the type of technical and specialized knowledge that converts lay testimony under FRE 701 to expert testimony under FRE 702. *See* Fed. R. Evid. 701(c) (excluding from admissible lay testimony any testimony based on scientific,

technical or specialized knowledge). Indeed, academic research and other expert analysis are routinely conducted on these topics.[12]

Expert opinion testimony is not admissible unless the expert and the expert's opinions are adequately disclosed in a written report under Fed. R. Civ. P. 26(a)(2) and, even if properly disclosed, the expert's testimony must also meet the reliability requirements of FRE 702. Defendants cannot avoid the disclosure and reliability requirements for expert opinion evidence by seeking to introduce it through lay witness opinions. *See Tribble*, 670 F.3d at 758 (ruling that district court erred in allowing state official to provide opinion testimony without meeting requirements for expert testimony); *see also* Fed. R. Evid. 701 advisory committee's note (explaining that "[Rule 701(c)] eliminate[s] the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing").

Here, Defendants' witnesses were never disclosed as experts as required under Fed. R. Civ. P. 26(a)(2). Nor would their opinions meet the reliability requirements for expert testimony under FRE 702 as Defendants' witnesses did not conduct any rigorous research or analysis that could support their opinions. Rather, excerpts from the October 10 depositions of Ms. Ertmer and Ms. Merten confirm that these witnesses' opinions on voter confidence, election integrity, or legislative motivation or interests in passing the voter ID law are based on nothing more than

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[12] *See, e.g.*, Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, Political Science & Politics (2003); Election Fraud-Detecting and Deterring Electoral Manipulation (R. Michael Alvarez et al. eds. 2008); The Electoral Integrity Project, *available at* http://www.electoralintegrityproject.com/ ("The Project is an independent academic study with a research team based at the Department of Government and International Relations at the University of Sydney and the John F. Kennedy School of Government at Harvard University.").

anecdotal evidence and personal beliefs. At best, as to these topics, these witnesses can only offer hearsay that is inadmissible under FRE 801-03 or uninformed and unexamined opinion testimony that is not sufficiently reliable under FRE 702. For example, Ms. Ertmer and Ms. Merten testified at their depositions as follows.

Q. Outside of your work here at the town, have you ever done any research related to elections in this state?
A. No.
Q. Have you ever done any research about voter behavior?
A. No.
Q. Any research related to voter fraud?
A. No.

(Merten Dep. 19:4-12, Oct. 10, 2013 (attached as Ex. F to Falls Decl.).)

Q. But do you think that the voter ID law deters fraud?
A. Deters fraud. Does it deter fraud? Yes, I do.
Q. And why do you think that.
A. If you truly want to be a criminal, you can always find a way around the system. But it will deter it.
Q. And that's just your opinion; right?
A. That's an opinion.
Q. You didn't conduct any study about this, did you?
A. No, I have not.
Q. Have you interviewed anyone about this?
A. No.
Q. Have you done any research about this?
A. No, I have not.
Q. And is it based on any particular story?
A. No.
Q. So it's just your opinion?
A. Yes, it is. Based on my experience, my life, me. My input that I get from various different people that are in my life.
Q. And when you say "input," it's stuff that you've heard; correct?
A. Sure. I listen.
Q. And it's only stuff that you've heard?
A. Not only.
Q. What do you mean by that?
A. Oh, people will tend to share information, knowing that you're in this process. Can I say that the fact is true? No, because I heard it. Okay? But I hear stories like, I know a person lives in the Milwaukee area. He was in line to vote. The

person in front of hi – I just gotta think here for a minute because I don't want to say it incorrectly. It was the name that that person – that the poll worker put him down as was not the name he originally gave, because the poll worker said, oh, that's close enough.

Q. And that's a story you've –
A. Yes. That is a story.
Q. And that's a story you've heard; correct?
A. Correct.

(Merten Dep. 85:23-87:15.)

Q. Ms. Ertmer, you said that it was your opinion that voter ID would improve the integrity of elections because voters should prove who they say they are.
A. Correct.
Q. And do you have any personal experience to base this on?
A. No.

(Ertmer Dep. 56:14-20, Oct. 10, 2013 (attached as Ex. G to Falls Decl.).)

Q. And do you think voter ID will instill confidence in voters?
A. In some voters probably.
Q. And why do you say that?
A. I think it's a matter of – I mean, I've heard people say that.
Q. Have you read it in the news?
A. I've probably heard it on different talk shows or, you know, talking with friends or acquaintances.
Q. But it's only based on what you've heard; correct?
A. Primarily, yes. Um-hum.

(Ertmer Dep. 55:9-19.)

Q. You also stated that it was your opinion that voter ID instills confidence in voters.
A. Um-hum. Yes.
Q. And is this based on any personal experience?
A. Just from comments that other people have told me, that they feel that it would improve or make – have more confidence if they knew the person ahead of them was really who they said they were and had to show identification.
Q. So only things that people have said to you?
A. Correct.
Q. And anything else?
A. No.

(Ertmer Dep. 56:21-57:8.)

Because Defendants are seeking to introduce "expert" opinion testimony under the guise of lay opinion that does not meet the reliability requirements of FRE 702 and is to a large degree based on hearsay, Plaintiffs request that this Court preclude Defendants from eliciting opinion testimony of lay witnesses on "voter confidence, "election integrity," or legislative motivation for passing a voter ID law.[13]

II. THE COURT SHOULD EXCLUDE ANY DOCUMENTS NOT IDENTIFIED WITH SPECIFICITY IN DEFENDANTS' EXHIBIT LIST

The exhibit list in Defendants' Pre-Trial Report is deficient in multiple respects. First, none of the exhibits in Defendants' exhibit list contain citations to the Bates labels used in the discovery record, leaving Plaintiffs to guess at which documents are referenced by Defendants' descriptions, whether those documents were or were not produced in discovery, and whether Plaintiffs are or are not in possession of the document. Second, instead of identifying individual documents, Defendants often identify only broad categories of documents, again leaving Plaintiffs to guess at which specific documents Defendants intend to introduce at trial. (*See* Dkt No. 155 at (E) 29, 30, 35, 36, 37, 38, 40, and 41.) Most egregious is Defendants' document category 38, which asserts that Defendants will seek to introduce at trial "Additional relevant documents produced in discovery by Plaintiffs or Defendants in *Frank* and *LULAC*." This "catch-all" category, which covers all of the approximately 175,000 pages of documents produced in discovery, provides Plaintiffs with absolutely no notice of what exhibits Defendants actually intend to use at trial.

[13] To be clear, Plaintiffs do not at this time seek to exclude any witnesses from testifying as to their personal knowledge on how Act 23 operates, how it was implemented at the polls, or their direct personal experience with any instances of improper voting.

The Seventh Circuit has "recognized that the pretrial conference and order are a vital part of the procedural scheme created by the Federal Rules of Civil Procedure." *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1443 (7th Cir. 1995). "The purpose of a pretrial conference, and the resulting order, is to aid the parties and the court in the preparation for and conduct of the trial." *Wilson v. Kelkhoff*, 86 F.3d 1438, 1442 n.6 (7th Cir. 1996) (citing *Erff v. MarkHon Indus., Inc.*, 781 F.2d 613, 617 (7th Cir. 1986)). The pretrial conference and order thus facilitate a "just, speedy, and inexpensive disposition of the case" as well as protect the trial proceedings from the risk of unfair surprise. *Quad/Graphics, Inc. v. One2One Commc'n's LLC*, 2012 U.S. Dist. LEXIS 11097, at *4-5 (E.D. Wis. Jan. 31, 2012).

For these reasons, a party's pretrial report is required to make a "full and fair disclosure . . . as to what the real issues of the trial will be." *Gorlikowski*, 52 F.3d at 1444 (quoting *Erff*, 781 F.2d at 617). Furthermore, in order to facilitate a full and fair disclosure of the issues, the Eastern District of Wisconsin requires specificity and orderliness in a party's pretrial report. *See* Civ. L. R. 16(c) (pretrial report must include "a list of exhibits to be offered at trial sequentially numbered according to General L. R. 26 where practicable"); *see also* Gen. L. R. 26 ("documents identified as exhibits during the course of . . . other pretrial proceedings . . . should be numbered sequentially").[14]

The open-ended and vague nature of the "catch-all" provision in Defendants' exhibit list undermines the fundamental purpose of pretrial procedures and creates a significant risk of unfair surprise. Plaintiffs requested on October 21 that Defendants immediately remedy the lack

[14] It is difficult to fathom how these particular Local Rules can be satisfied by identifying only categories of documents, which cannot possibly be sequentially numbered, much less a category of documents that includes every document in the discovery record.

of specificity in their exhibit list. (*See* Ex. I. to Falls Decl.) Defendants have not even responded, much less remedied the deficiency. With less than two weeks remaining before the start of trial, Defendants' inadequate disclosures prejudice Plaintiffs.

Therefore, this Court should prohibit Defendants from using at trial any exhibit not specifically and individually described in Defendants pretrial report, including excluding use of the unspecified documents in categories (E) 35, 36, 37, 38, 40, and 41 of Defendants' Pre-Trial Report. *See* Fed. R. Civ. P. 16 advisory committee's note (citing *Admiral Theatre Corp. v. Douglas Theatre,* 585 F.2d 877 (8th Cir.1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order)); *see also Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1148 (7th Cir. 1999) (appropriate sanction for problematic pretrial report would be "barring use of the offending exhibits").

III. THE COURT SHOULD EXCLUDE DOCUMENTS THAT DEFENDANTS FAILED TO PRODUCE IN RESPONSE TO PLAINTIFFS' DISCOVERY REQUESTS

In addition to a lack of specificity, three categories of documents in Defendants' exhibit list should be excluded for the independent reason that the documents appear to be responsive to Plaintiffs document requests but were not produced to Plaintiffs.

- "Uncertified copies of birth certificates of Plaintiffs and witnesses identified by Plaintiffs in *Frank* and *LULAC*." Category (E) 35;
- ""DOT-DMV driver record abstracts for Plaintiffs and witnesses identified by Plaintiffs." Category (E) 36;
- "Court records of election fraud prosecutions and convictions;" Category (E) 41;

These documents should be excluded pursuant to Fed. R. Civ. P. 37(c).

Category (E) 35 of Defendants' Pre-Trial Report identifies as exhibits for trial "Uncertified copies of birth certificates of Plaintiffs and witnesses identified by Plaintiffs in *Frank* and *LULAC*" and Category (E) 36 identifies "DOT-DMV driver record abstracts for Plaintiffs and witnesses identified by Plaintiffs in *Frank* and *LULAC*." (Dkt No. 155.) As of this date, Defendants have never provided these documents, even though more than a year ago Plaintiffs requested "[a]ll documents (including but not limited to letters, electronic mail, memoranda, and video and voice records) concerning Plaintiffs" in discovery. (*See* Ex. J to Falls Decl. 4.) Defendants responded that they had or were producing documents responsive to this request and that they would supplement the response if additional, non-privileged documents are retrieved. (*See id*.)

Similarly, Category (E) 41 of Defendants' Pre-Trial Report identifies as exhibits for trial "Court records of election fraud prosecutions and convictions," (Dkt No. 155), documents that Defendants have not provided to Plaintiffs even though Plaintiffs' requested well over a year ago "Documents . . . sufficient to identify all instances of actual or suspected voter identification fraud, actual or suspected voter impersonation fraud, and/or actual or suspected double voting in Wisconsin by the same person in the same election or actual or suspected voting by the same person in Wisconsin and another state in the same election, from 1980 to the present" and "Documents . . . sufficient to identify all instance of any form of unlawful voting and/or unlawful voter registration not included in the preceding request, from 1980 to the present." (*See* Ex. J to Falls Decl. 15.) Although Defendants asserted that responsive documents had been or would be produced and that Defendants would supplement their responses if additional, non-privileged documents were retrieved, (*see id*. at 15-16), they have failed to do so.

As discussed in Section II above, the Court should exclude *all* documents in Categories (E) 35, 36 and 41 of the Defendants' Pre-Trial Report for failure to identify the documents with any specificity. At the very least, for the reasons discussed in this Section, Court should exclude those documents in categories (E) 35, 36 and 41 that Defendants failed timely to produce to Plaintiffs.[15]

IV. THE COURT SHOULD DECLARE RUTHELLE FRANK, NANCY LEA WILDE AND RUTH ANN OBERMEYER UNAVAILABLE TO TESTIFY AT TRIAL AND PERMIT USE OF THEIR VIDEOTAPED DEPOSITION TESTIMONY.[16]

Fed. R. Civ. P. 32(a)(4) provides that "a party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: (A) that the witness is dead…[or] (C) that the witness cannot attend or testify because of age, illness, infirmity or imprisonment[.]" FRE 804(b)(1) provides that former testimony "given as a witness at a . . . lawful deposition, whether given during the current proceeding or a different one" is admissible, where the witness is "unavailable" and the opponent had an opportunity and similar motive to develop the testimony by cross examination. A witness is "unavailable" under FRE 804(a)(4) if she "cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness."

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[15] As discussed above, the lack of specificity and lack of citations to Bates numbers in Defendants' exhibit list makes it impossible for Plaintiffs to determine prior to the exchange of exhibits which documents are included categories (E) 35, 36, and 41 and which of those documents have or have not been produced to Plaintiffs' in discovery.

[16] Defendants have been on notice since September 4, 2013, that these three witnesses were likely to be unavailable for trial and have not thus far objected to use of their deposition testimony. (*See* Ex. A to Dupuis Decl. 6-7, Oct. 22, 2013.)

Ruthelle Frank was deposed in Wausau, near her home in Brokaw, Wisconsin, approximately 192 miles from Milwaukee, on April 12, 2012, in connection with *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, Case No. 11-CV-5492 (Dane County Circuit Court) ("*NAACP*"), a state lawsuit challenging Act 23's voter ID requirement as an excessive burden on the right to vote under the Wisconsin Constitution. She testified about the barriers she experienced in attempting to obtain a Wisconsin state ID card to use for purposes of voting. Counsel for Defendants conducted a thorough cross-examination of Ms. Frank concerning the steps she took and the obstacles she faced in attempting to obtain an ID, the same factual issues that are central to the constitutional claims in this case. Indeed, nearly 30 pages of the deposition transcript (*see* Dkt No. 149, Ex. A to Sean J. Young Decl. 14:5-43:21) consisted of cross-examination questions asked by Defendants' counsel. Ms. Frank was also asked questions about documents specifically prepared for this case, such as her written responses to Defendants' First Set of Interrogatories served *in this case*, (*see id.* at 17:18-24), as well as her reactions to a declaration prepared by Defendants in connection with this case, (*see id.* at 26:6-15). Ms. Frank's videotaped deposition testimony was admitted and played at trial in the *NAACP* case. (*See* Ex. B to Dupuis Decl. 42-44, 72-74.)

Ms. Frank is 86 years old. (*See* Frank Decl. ¶ 2, Oct. 20, 2013, filed with this motion). She suffers from a heart condition and high blood pressure, and has an artificial heart valve. (*Id.* at ¶ 3.) She takes medications for her cardiac conditions that cause severe dizziness. (*Id.*) Ms. Frank also has a congenital disorder that severely limits the use of the left side of her body and her mobility, limitations that were exacerbated by a fall this spring that caused extensive pain and bruising. (*Id.* at ¶¶ 4-5.) Ms. Frank is unable to travel the nearly 400 mile round trip to and

from Milwaukee. (*Id.* at ¶ 6.) She fears that the stress of such a trip and of testifying will adversely affect her heart condition. (*Id.*) Ms. Frank's physical therapist has opined that "due to this patient's multiple medical complications and comorbidities, traveling out of the Central Wisconsin area would be an excessive hardship." (Ex. C to Dupuis Decl.)[17]

Ruth Ann Obermeyer of Columbus, Wisconsin is also unavailable. At seventy-three years old, Ms. Obermeyer is homebound with "deteriorating" health problems, including heart issues, incontinency, arthritis, and obesity. (Oberymeyer Dep. 6:14–17, 7:15–20, Oct. 11, 2013 (attached as Ex. F to Dupuis Decl.).) To get around the house, she has to "go with a walker for a few steps here and there. . . . [She] can take a few steps, like, from one chair to the next and that's it." (*Id.* 8:4–9.) She has only been out of the house once in the last year when she went to the doctor for her annual physical. (*Id.* 8:13–14.) And she is only able to get out of the house "with help," which includes hired help and her daughter who have to get her into a wheel chair and into a medical van. (*Id.* 8:10–11; 8:17-9:7.) She does "not walk any distance." (*Id.* 9:6–7.) She was deposed on October 11, 2013, and was cross-examined by Defendants about issues relating to her ability to vote absentee without photo ID. (*Id*. 18:25-25:13, 27:13-29:4.)

Courts have readily found witnesses unavailable due to illness or infirmity in similar circumstances. In *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984), for example, the court of appeals held that the district court properly allowed the use at trial of videotaped depositions of two elderly witnesses, one 87 years old with a back condition that prevented him from

[17] One of Plaintiffs' attorneys also contacted the office of Ms. Frank's cardiologist, David Murdock, M.D., at Aspirus Cardiovascular Associates in Wausau, on October 16, 2013. However, Dr. Murdock is out of the country until October 28, 2013. (Dupuis Decl. ¶3, Oct. 23, 2013.) Counsel will file a statement from Dr. Murdock as soon as possible.

walking, and the other 83 years old with heart disease that confined her to her home, where the courthouse was 60 miles from the witnesses' home. *See also Sahagian v. Murphy*, 871 F.2d 714, 714-15 (7th Cir. 1989) (unavailable due to recovery from heart surgery two months prior to trial); *United States v. McGowan*, 590 F.3d 446, 450-54 (7th Cir. 2009) (54 years old unavailable due to diabetes, use of oxygen, biliary cirrhosis); *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002) (witness unavailable because 28 weeks pregnant).[18]

Nancy Lea Wilde was deposed in this case on July 30, 2012. She testified concerning her unsuccessful efforts to obtain her birth certificate and Photo ID. (*See* Wilde Dep. 9:17-27:13, July 30, 2012 (attached as Ex. D to Dupuis Decl.).) She was cross-examined by counsel for Defendants regarding these same efforts. (*See id.* 28:3-34:24, 42:11-43:3.) Ms. Wilde died on March 19, 2013 (*See* Ex. E. to Dupuis Decl.), and so is unavailable to testify at trial under Fed. R. Civ. P. 32(a)(4)(A) and F.R.E. 804(a)(4). *See Schimpf v. Gerald, Inc.*, 52 F. Supp. 2d 976, 980-82 (E.D. Wis. 1999) (holding that "under Federal Rule of Evidence 804(a)(4), [the deceased witness] [wa]s unquestionably an unavailable witness").

[18] Most of the cases involving use of deposition testimony of unavailable witnesses are criminal cases, where Confrontation Clause concerns make use of prior testimony more problematic. "In a civil case, or in a criminal case when it is the defendant who offers the hearsay statement, it is easier to find unavailability even when the disability is only temporary." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* §804.03(a)[01], at 804.03(5)[ii] (1993); *see also Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712-13 (9th Cir. 1992) (prior deposition admissible where witness available on first day of trial, but surgery on the second day of trial rendered him "indisposed" for one to two weeks).

CONCLUSION

For the foregoing reasons Plaintiffs respectfully request that the Court grant this motion and enter the attached Proposed Order.

Dated this 23rd day of October, 2013

Respectfully submitted,

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