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' CIVIL L. R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO EXCLUDE FOUR OF DEFENDANTS' RECENTLY DISCLOSED WITNESSES

Plaintiffs respectfully submit this motion under Rules 26 and 37 of the Federal Rules of Civil Procedure and under Local Rules 7(h) and 37 to strike four witnesses – Michael Sandvick, Sue Ertmer, Jeanette Merten, and Bruce Landgraf – listed on Defendants' August 12, 2013 Supplemental Disclosures[1] and exclude them from testifying at trial. Pursuant to this Court's Scheduling Orders dated March 7 and May 3, 2012, Defendants were required to make initial disclosures by March 7, 2012 and disclose all expert witnesses by July 1, 2012, and all fact discovery was to be completed by August 1, 2012. (Dkt. ## 36, 74.) On August 12, 2013, more than one year after these deadlines and less than three months before trial, Defendants have served Plaintiffs with Supplemental Disclosures listing previously undisclosed witnesses of whom Defendants unquestionably had notice since the filing of the Complaint and through whom Defendants essentially seek to submit untimely and improper expert opinions. On Tuesday, Aug. 20, 2013, the parties met and conferred telephonically about this issue, and on Wednesday and Thursday, Aug. 21 and 22 had an email exchange, but were unable to resolve their disputes.[2] Because of the prejudice that these untimely and improper disclosures cause Plaintiffs, this Court should strike these witnesses and exclude them from testifying at trial.

Rule 26 requires parties to disclose the name and contact information for each individual "likely to have discoverable information that the party may use to support its claims or defenses," to disclose their experts, and to provide expert reports. *See* Fed. R. Civ. P. 26. And

[1] *See* Ex. A to the Declaration of Karyn L. Rotker, filed herewith. As Plaintiffs informed Defendants in seeking to resolve this matter, they do not object to two of the witnesses, Janet Turja and Edgar Rosado.

[2] This motion to exclude The parties continue to meet and confer as to other discovery issues, but agreed that we have reached an impasse on this issue. Therefore, it is necessary to bring this matter to the Court's attention now given the upcoming trial date. In light of the potential that additional discovery disputes may require the Court's intervention, we respectfully submit that it would be appropriate to schedule an in-person conference at the Court's convenience in early September.

Rule 26(e) requires parties to supplement their disclosures "in a timely manner" once they learn their disclosures are "incomplete or incorrect" unless such information "has . . . otherwise been made known to the other parties during the discovery process." *See id.* If a party fails to comply, Rule 37 provides for the sanction of exclusion: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at trial . . . any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). The Seventh Circuit has repeatedly held that "the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *See, e.g.*, *David v. Caterpillar Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (quoting *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998)); *accord Stewart Title Guaranty Co. v. Residential Title Servs., Inc.*, 607 F. Supp. 2d 959, 964 (E.D. Wis. 2000).

Here, Defendants have not, because they cannot, provide any good reason – much less any substantial justification – for their failure to disclose these witnesses in compliance with Rule 26, either in their mandatory initial disclosures of witnesses, in the course of discovery, or in any timely supplemental disclosure. Rather, as Plaintiffs reminded Defendants during the meet and confer session, the information about which these witness could provide discoverable information – including the implementation of photo ID in Wisconsin and supposed allegations of voter fraud in the 2004 Presidential election – was reasonably available to Defendants long before their August 2013 disclosure. Moreover, Defendants' belated disclosure is highly prejudicial to Plaintiffs. Although Defendants claimed that their belated disclosure is harmless because Plaintiffs can take last-minute discovery or depositions, they are incorrect. Had

Defendants timely disclosed their intent to use these new witnesses in their case in chief, and had Plaintiffs been able to depose them over a year ago during the discovery period, these depositions could have allowed Plaintiffs to conduct additional fact discovery, and may have provided additional information for Plaintiffs' experts to consider and for Plaintiffs to question Defendants' experts on during depositions. Defendants' strategic decision to wait to disclose them only after a trial date was set cannot be remedied simply by taking a few additional depositions now. Thus, these witnesses should be stricken. *See Salgado*, 150 F.3d at 742.

Moreover, much of the testimony Defendants seek to elicit would constitute unqualified (and untimely) purported expert opinions in disguise. For example, the 2004 report that Defendants reference in identifying Mr. Sandvick contains "investigative findings, *opinions and recommendations* . . ."[3] Since the report does not even mention Mr. Sandvick by name, much less describe his "first hand sensory observations" required to constitute lay opinion evidence under Federal Rule of Evidence 701, it – and testimony based on it – would clearly constitute improper opinion evidence. *See Tribble v. Evangelides*, 670 F.3d 753, 758 (7th Cir. 2012). Ms. Merten's and Ms. Ertmer's information on "the State interests that support voter photo identification requirements" and "whether a voter photo identification requirement would improve the integrity of elections and instill confidence in voters," *see* Defs. Supplemental Disclosures at 1-2, is similarly opinion evidence not based on first hand sensory observations.

[3] *See* Special Investigation Unit, Milwaukee Police Department, *Report of the Investigation into the November 2, 2004 General Election in the City of Milwaukee* 2 (June 27, 2005) (emphasis added) ("Report"), *available at* http://media2.620wtmj.com/breakingnews/ElectionResults_2004_VoterFraudInvestigation_MPD-SIU-A2474926.pdf; *see also* Defs. Supplemental Disclosures at 2-3 (citing Report).

Dated this 23rd day of August, 2013

Respectfully submitted,
/s/Karyn L. Rotker_____

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