UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNE HARDING, et al., Plaintiffs, v. COUNTY OF DALLAS, TEXAS, et al., Defendants,	§ § § § § § § § §	C.A. NO. 3:15-CV-00131-D

PLAINTIFFS' MOTION TO STRIKE EXPERTS' SUPPLEMENTAL OPINIONS

The plaintiffs in the above-captioned action (the "Plaintiffs") ask the Court (through this "Motion") to strike the supplemental expert reports produced by the defendants in this action (the "Defendants") to the Plaintiffs on March 17, 2018.

I. BACKGROUND

Much earlier in this case, the Court entered a Trial Setting Order, which required parties to "comply fully with the disclosure and objection requirements of Rule 26(a)(3)."[1] The Trial Setting Order expressly "required pretrial disclosures [to] be made at least 30 days before the date of the trial setting" for this litigation.[2] Subsequently, the Court set this case for trial on April 16, 2018.[3]

[1] Dkt. 57.
[2] *Id*. at ¶ 12.
[3] Dkt. 72.

The Court also entered a pair of orders, which required the parties to designate their experts and produce the last of their reports by October 13 2017,[4] with the exception of a single, narrow topic on which the Court authorized "supplementation" through January 12, 2018.[5]

As previously explained in the Plaintiffs' briefing of an untimely motion, since denied by the Court on the Defendants' representation (in their capacity as movants) that it had become moot (the "New Report Motion"),[6] in mid-December, the Plaintiffs pointed out to the Defendants that the narrow exception would be impracticable, as the Census Bureau had not yet actually released to the public, and would not release to the public before January 12, 2018, the data at issue. At that time, the Plaintiffs suggested that, if the parties were going to do something about this, they should promptly act to adjust the deadline. The Defendants ignored this proposal until the eve of the January 12th deadline, before suggesting that the parties negotiate alterations to the scheduling order far broader than that previously discussed, so allowing additional expert analysis of a pair of other matters. When the Plaintiffs rejected this proposal on January 11, 2018, the Defendants agreed to prepare and circulate a related motion to extend the deadline just for the contemplated update. But the Defendants did not circulate the proposed motion for more than a full month, during which the deadline under discussion came and went. When they provided that draft, it included precisely the same additional matters that the parties had agreed on January 11, 2018 *not* to seek alteration of the scheduling order to allow.

When the Plaintiffs flagged this difference (and the passage of the narrow supplementation deadline in the meantime) and expressed their opposition to the proposed changes, the Defendants

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[4] Dkt. 71 and Dkt. 74.

[5] This narrow exception allowed supplementation solely to "reflect American Community Survey data released by the U.S. Census Bureau[.]"

[6] Dkt. 109.

proceeded, on February 20, 2018, to file the New Report Motion anyway, seeking authorization to take the same actions.[7] The New Report Motion: (a) affirmatively represented to the Court that "the scheduling order does not envision this supplementation[;]" and (b) asked the Court to set March 16, 2018 as the new deadline for such "supplementation[,]" a deadline that they represented "will NOT affect the pending trial date."[8]

As the Plaintiffs pointed out in their objection to the New Report Motion, since the Defendants did not ask the Court for any kind of expedited consideration, their request could not possibly have been timely acted on. The Plaintiffs filed their objection to the New Report Motion early on March 5, 2018. The Defendants' reply was not due until March 19, 2018, *following* the requested deadline for the parties to produce additional, not-yet-authorized sets of expert reports. As expected, the Defendants did not reply to the Plaintiffs' objection until after the proposed March 16, 2018 deadline had come and gone. More, without full briefing of the New Report Motion before it, the Court did not rule on their proposal before that deadline.

However, allegedly relying on their mis-citation of this Court's order denying another groundless motion of the Defendants (the "Denial Order"), the Defendants proceeded to produce to the Plaintiffs on March 17, 2018 *exactly* the expert reports the Court *had not authorized* (the "New Reports").[9] According to the Defendants, the Denial Order silently granted the still-not-fully-briefed New Report Motion, even if they had admitted in it that they lacked the authority to "supplement" in this fashion under the Court's orders addressing when expert opinions must be

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[7] Dkt. 105.

[8] Emphasis in original.

[9] Dkt. 112, p.1 (wrongly asserting that Dkt. 108, fn. 1 authorized such action). Nowhere did the cited order authorize the "supplementation" of expert reports with new analysis of new data. Instead, at pages 4-5, the Court stated that, to the extent any party learned that "in some material respect the disclosure [of information on which its expert relied] is incomplete or incorrect[,]" such failing could be cured by production of such information "by the time the party's pretrial disclosures under Rule 26(a)(3) are due."

produced and disclosed. So on March 17, 2018, they forwarded to the Plaintiffs the New Reports, analyzing new materials (including the results of Dallas County's March 2018 primary elections and the Census Bureau's purportedly newly released ACS data) and announcing new conclusions.[10]

II. ARGUMENT

A. NEW REPORTS' UNTIMELY DISCLOSURE

1. NEW REPORTS ARE NOT "SUPPLEMENTATION"

The New Reports are not a "supplementation" of the Defendants' experts' prior reports or disclosures, as contemplated by the Court in the Denial Order. "The purpose of supplementary disclosures is just that – to supplement. Such disclosures are not intended to provide an extension of the expert designation and report production deadline."[11] No, reports presenting "analysis and opinions" that are "largely new rather than supplementary" of previous analysis, cannot shelter under Rule 26(e).[12] Accordingly, the New Reports, analyzing information not even purportedly available at the expert designation deadline, cannot be deemed timely produced as "supplements" months after that deadline's passage.

2. ACTUAL, MISSED PRE-TRIAL DISCLOSURE DEADLINE

They also cannot be deemed timely, because the Defendants produced them to the Plaintiffs *after* the Court's pre-trial disclosures deadline.

This matter is set for trial on April 16, 2018. The Court ordered the parties to make their pre-trial disclosures "at least 30 days before the date of the trial setting[.]" Federal Rules of Civil Procedure 6(a)(1) and (5) govern how to interpret the deadline so established.

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[10] The Defendants' also filed and shared with the Plaintiffs their Pre-Trial Disclosures on March 17, 2018. Dkt. 111.
[11] *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998).
[12] *Bean Meridian, L.L.C. v. Suzuki Motor Corp.*, 841 F.3d 365, 372 (5th Cir. 2016).

Under FRCP 6(a)(1), since the deadline is defined in days, it should be interpreted by: "(A) exclud[ing] the day of the event that triggers the period; (B) count[ing] every day, including intermediate Saturdays, Sundays, and legal holidays; and (C) includ[ing] the last day of the period, but if the last day is a Saturday … the period continues to run until the end of the next day that is not a Saturday…." The 30th calendar day before this case's trial setting fell on Saturday, March 17, 2018; therefore, "the period" for making pre-trial disclosures ran "until the end of the next day that is not a Saturday."

FRCP 6(a)(5) explains what that last phrase means in this context. "The 'next day' is determined by continuing to count … backward when measured before an event." The Advisory Committee Notes accompanying the current version of FRCP 6(a)(5) at its enactment clarified:

> If, for example, a filing is due within 30 days after an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due [30] days before an event, and the [thirtieth] day falls on Saturday, September 1, then the filing is due on Friday, August 31.

The Court's ordered deadline for timely pre-trial disclosures was Friday, March 16, 2018. The Defendants did not disclose the opinions of their experts through the New Reports until *after* that deadline had come and gone.[13] Their disclosure was not timely under any available interpretation of the Federal Rules.

[13] The Plaintiffs highlight that this means that *all* of the Defendants' pre-trial disclosures were made untimely and that, arguably, FRCP 37(c)(1) requires the Court to bar the Defendants from using at trial *any* documentary or testamentary evidence, until and unless the Defendants prove that their failure to abide by the Court-ordered deadline was substantially justified or harmless. This Motion addresses only the failure of the Defendants' untimely production of the New Reports to qualify as either substantially justified or harmless.

B. FACTORS GOVERNING STRIKING OF UNDISCLOSED EXPERT OPINIONS

Federal Rule of Civil Procedure 37(c)(1) establishes that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence … at a trial, unless the failure was substantially justified or is harmless." While the Defendants' failure comply with their disclosure obligations was neither justified, nor harmless, Rule 37(c)(1) *does* allow the Court to impose alternative sanctions. In picking a sanction, the Court has traditionally considered four (4) factors: "(1) the explanation for making the supplemental disclosure at the time it is made; (2) the importance of the supplemental information to the proposed testimony of the expert…; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice."

1. EXPLANATION OF FAILURE TO TIMELY DISCLOSE

The Defendants only seeming explanation of their failure to disclose the New Reports before the relevant deadlines long-ago established by the Court was that they address data that did not exist at all when the relevant deadlines passed. This is not a justification for allowing untimely expert analysis into the trial. Furthermore, they have offered *no* explanation at all of either: (a) their failure to abide by the deadline *they proposed;* or (b) their failure to disclose the New Reports before the passage of the actual pre-trial-disclosure deadline.

2. IMPORTANCE OF NEW OPINIONS TO CASE

The Defendants have never claimed that the opinions in the New Reports are necessary to their ability to litigate this matter. And they cannot. Their experts had previously submitted thorough reports totaling 206 pages (not counting exhibits or supporting information). The Defendants asked this Court to grant them full summary judgment on all the Plaintiffs' claims, without relying on the New Reports. All they even mustered in the (since withdrawn) New Report Motion was an assertion that the information contained in the New Reports "are relevant" and that

the Court "should have the benefit" of such additional information. Such suggestions fall far shy of even a contention of "importance" to the case.

3. POTENTIAL PREJUDICE TO THE PLAINTIFFS

The Plaintiffs have already been prejudiced by the Defendants' untimely production of the New Reports. Time the Plaintiffs should have been able to devote to trial preparation has been consumed briefing the impropriety of the New Reports twice: first, through the Plaintiffs' objection to the untimely filed New Report Motion; and now, again, through this Motion.

The Plaintiffs would be *more* prejudiced by the Defendants' use of the New Reports at trial, should the Court decline to strike them. Through the New Report Motion, the Defendants told this Court and the Plaintiffs that they understood the Court's previous orders not to "envision this supplementation." The Plaintiffs relied on their agreement with the Defendants to that effect in declining to have their own experts undertake parallel analysis.

It would be entirely unfair for the Defendants' production of new analysis of new data, after the pre-trial disclosure deadline and after making this representation to the Court and the Plaintiffs, to allow their experts to be the *only* ones to present conclusions concerning that new data at trial.

4. PROPRIETY OF CONTINUANCE AS CURE

This Court has recognized in other cases that "[g]ranting a continuance can also cause undue prejudice to the opposing party, who itself may have fully complied with the rules and is ready for its day in court."[14] These are our facts.

This case has been pending for more than three (3) years. The map at issue has already been used in general elections to the Commissioners Court in 2012, 2014, and 2016, as well as in

[14] *Jacobs v. Tapscott*, 2006 U.S. Dist. LEXIS 68619, *42 (N.D. Tex. 2006)

the March 2018 primary. In each, it denied the Plaintiffs' minority-group the chance to fairly participate in the electoral process. The Plaintiffs are ready to try their case. They recognize the near certainty of an appeal by the Defendants, should the Plaintiffs prevail at trial. And they see the clock ticking toward the next decennial census, which will moot the issues at stake here at the beginning of the 2020 election cycle, unless a ruling by the Court has become final.

Under these circumstances, a continuance would serve only the interests of the Defendants. And the Defendants' conduct concerning the New Reports seems to suggest that this has been their real interest all along. Remember that the *Plaintiffs*, not the Defendants, raised the potential need for changes to the Court's scheduling order in December 2017. The *Defendants* are the ones who sat on the ball until late February before raising these issues, and then did so through a New Report Motion that asked for a deadline that they knew could not be timely ordered or met. And since producing the New Reports (after the deadline they represented would allow their production to "NOT affect the pending trial date"), the Defendants have even inquired concerning the Plaintiffs' interest in continuing the current trial setting.

Their motive is transparent. The Court should not continue trial, even with a shifting of fees to the Defendants for the Plaintiffs' conducting of new depositions of the relevant experts and for the Plaintiffs' production of their own supplemental reports, because doing so would be manifestly prejudicial to the Plaintiffs and their community.

III. CONCLUSION

The New Reports were not timely disclosed. The Defendants have no legitimate explanation for their untimely production or argument that the opinions they offer are important to this case. Their submission has already worked (and will continue to work) prejudice on the Plaintiffs and their community until the Court strikes them. And continuance is not a workable

fix, given the realities of the calendar and the Defendants' clear, dilatory intent in creating this situation.

IV. PRAYER

Therefore, the Plaintiffs ask the Court to grant the Motion, strike the New Reports, and exclude from evidence at trial any consideration of their subject matter.

Dated April 2, 2018.

Respectfully submitted,

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COUNSEL TO THE PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on April 2, 2018, I served a copy of this Motion on all other counsel of record by electronic filing through the Court's CM/ECF system.

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CERTIFICATE OF CONFERENCE

I certify that on April 2, 2018, I conferred on the subject-matter of this Motion with Chad Dunn, the lead counsel to the Defendants, by phone. The Defendants are opposed to the proposed relief.