

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

EMANI LOVE, et al.

Plaintiffs,

v.

RUTH JOHNSON, in her official capacity as
the Secretary of State of Michigan,

Defendant.

Case No. 15-cv-11834

Hon. Nancy G. Edmunds

Mag. Elizabeth A. Stafford

PLAINTIFFS' MOTION TO BAR DEFENDANT'S EXPERT(S)

Plaintiffs, by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure 26(a)(2) and 37(c)(1), respectfully submit this motion (the "Motion") to bar the Defendant from presenting expert testimony, whether for purposes of dispositive motions or at trial, or for an order that Defendant immediately disclose and produce a report from her expert. In support of this Motion, Plaintiffs respectfully state as follows:

1. This Court ruled that witness lists were due to be filed by the parties on or before February 22, 2016. *See* Dkt. No. 44.
2. In accordance with the Court's order, Plaintiffs disclosed the names of their experts in their witness list (Dkt. No. 45) and submitted their expert reports to Defendant's counsel on February 22, 2016.

3. The Defendant failed to disclose any experts or provide Plaintiffs with any expert reports. Instead, the Defendant simply provided Plaintiffs with a witness list stating that the Defendant may present an “expert on law enforcement policies and practices *to be named*.” (Emphasis added.)

4. It is well settled that when a party fails to disclose information in compliance with Rule 26(a)(2), Rule 37(c)(1) “automatically disallows that party from using such expert evidence at trial unless there was a substantial justification for the noncompliance or unless the noncompliance was harmless.” *In re John Richards Home Building Co. LLC*, 312 BR. 849, 863 (E.D. Mich. 2004) (citations omitted).

5. The Defendant cannot demonstrate a substantial justification for failing to comply with this Court’s order and the clear provisions of Rule 26(a)(2) concerning the disclosure of expert witness testimony.

6. Furthermore, the Defendant’s noncompliance with her disclosure obligations is not harmless. Because Plaintiffs have not been informed of Defendant’s purported expert, they have been unable to evaluate the expert or her opinions. Further, if an expert report is not disclosed soon, Plaintiffs will be unable to depose the expert before the close of discovery, which is a month and a half away.

7. Plaintiffs complied with the Federal Rules and this Court's order by providing the Defendant with the name of the expert witnesses who will give expert testimony on their behalf, along with their expert reports. Thus, the Defendant is in a position to analyze these expert witnesses and their opinions while preventing the Plaintiffs from making any expert assessments whatsoever. This violates the Court's scheduling order and is prohibited by the Federal Rules.

8. Pursuant to Local Rule 7.1(a), Plaintiffs sought concurrence in the relief requested in this motion on March 1, 2016. Concurrence was not provided.

9. Accordingly, the Plaintiffs respectfully request that the Court bar the Defendant from offering any expert testimony in this case; or, in the alternative, require the Defendant to immediately disclose its "expert on law enforcement policies and practices," along with an expert report, as required by Rule 26(a)(2)(B).

Dated: March 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record.

Dated: March 1, 2016

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**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION TO
BAR DEFENDANT'S EXPERT(S)**

Introduction

On February 22, 2016, with the close of discovery a month and a half away, the Plaintiffs timely disclosed their expert witnesses and provided their expert reports to the Defendant. However, the Defendant has not disclosed any expert to the Court or to the Plaintiffs. Instead, in the witness list she provided to Plaintiffs, Defendant vaguely alluded to an “expert on law enforcement policies and practices to be named.” This conduct has put the Plaintiffs in the untenable position of being unable to depose this “to be named” witness or in any way analyze the witness’s research, reputation, or qualifications. In contrast, the Defendant received the names of Plaintiffs’ experts, as well as their expert reports, a week ago. Thus, the

Defendant has had a prejudicial head start on reviewing the opinions, experience, research and qualifications of Plaintiffs' experts.

Rule 37(c)(1) explicitly provides 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 on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Defendant's failure to disclose her expert(s) is neither harmless nor substantially justified, as set forth below. As such, this Court should prevent the Defendant from introducing expert testimony in this case. In the alternative, the Court should order Defendant to immediately disclose its purported expert on law enforcement policies and practices and provide a corresponding expert report forthwith.

Background

On December 16, 2015, this Court held a telephonic scheduling conference with the parties, after which it entered an agreed scheduling order (Dkt. No. 41) providing that the parties' witness lists must be filed by February 15, 2016. It is the understanding of Plaintiffs' counsel that the scheduling order required the parties to exchange expert reports along with their disclosures. That same scheduling order set the close of discovery for April 15, 2016, and the deadline to file dispositive motions for May 16, 2016. On February 11, 2016, by stipulation of

the parties, this Court extended the deadline for the filing of witness lists to February 22, 2016. *See* Dkt. No. 44.

On January 26, 2016, counsel for the Plaintiffs, Michael Derksen, confirmed by telephone with Erik Grill, counsel for Defendant, that the parties understood the scheduling order to require the disclosure of expert witnesses. *See* Decl. of Michael F. Derksen, Ex. 1 hereto, at ¶¶ 2-3.

Plaintiffs disclosed the names of their experts, Randi Ettner, PhD and Rebecca Stotzer, PhD, in their witness list, as ordered by this Court and as required by the Federal Rules. (Dkt. No. 45.) Additionally, they submitted Dr. Ettner and Dr. Stotzer’s expert reports to Defendant’s counsel on February 22, 2016. The Defendant, however, simply provided Plaintiffs with a witness list stating that the Defendant may present an “expert on law enforcement policies and practices *to be named.*” *See* Derksen Decl. at ¶ 4. The Defendant has provided no explanation for its failure to identify her expert. *Id.* at ¶ 5.

Argument

The Defendant should be prevented from providing any expert testimony in this case, as she did not timely disclose her expert witness. Rule 26 provides that “a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705” and that “this disclosure *must* be accompanied by a written report—prepared and signed by

the witness—if the witness is one retained or specially employed to provide expert testimony in the case....” (Emphasis added.)

In this case, the Court ordered that the witness lists be filed on February 22, 2016. *See* Dkt. No. 44. Furthermore, Judge Edmunds’ Practice Guidelines on Scheduling Orders makes clear that “[t]he deadline for exchange of witness lists refers to **all witnesses, lay and expert.**” (Emphasis added.) However, on February 22, 2016, the Defendant did not name an expert (and has failed to do so since) and instead, made a vague reference to “[a]n expert on law enforcement policies and practices to be named.” *See* Derksen Decl. at ¶ 3.

It is well settled that when a party fails to disclose information in compliance with Rule 26(a)(2), Rule 37(c)(1) “**automatically disallows** that party from using such expert evidence at trial unless there was a **substantial justification** for the noncompliance or unless the noncompliance was **harmless.**” *In re John Richards Home Building Co. LLC*, 312 BR. 849, 863 (E.D. Mich. 2004) (emphasis added) (citing *Sexton v. Uniroyal Chem. Co., Inc.*, 62 F. App’x 615, 616 n. 1 (6th Cir. 2003) (“This circuit has established that Rule 37(c)(1) mandates that a trial court sanction a party for discovery violations in connection with Rule 26(a) unless the violations were harmless or were substantially justified.”); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004) (“The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure

was justified or harmless.”)). As the Sixth Circuit has made clear, the test for exclusion of evidence as a discovery sanction is “very simple: the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless.” *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transport*, 596 F.3d 357, 370 (6th Cir. 2010) (quoting *Vance ex rel Hammons v. United States*, 182 F.3d 920 (6th Cir. 1999)). Here, the Defendant has not offered Plaintiffs or the Court any explanation for why she failed to comply with Rule 26.

Thus, the preclusion of expert witnesses, including the ill-described “expert on law enforcement policies and practices to be named” by Defendant at a later date, is the appropriate sanction. The Defendant cannot demonstrate any good cause for failing to comply with the clear provisions of Rule 26(a)(2) concerning the disclosure of expert witness testimony. Notably, the Defendant could hardly complain that she did not have sufficient time for such an expert to be named, as the scheduling order was entered into two and a half months ago, and the Defendant agreed to the deadline.

Moreover, the Defendant’s failure to comply with her disclosure obligations is inherently prejudicial. The disclosure of the name of an expert provides insight as to the individual’s depth of knowledge and, thus, the likely subject matters about which she is expected to testify. Having not even been informed of this expert’s

identity, Plaintiffs have been unable to conduct research about the unnamed expert's expertise, experience, and positions taken in other cases, let alone the purported expert's opinion(s), which are supposed to be contained in an expert report. Nor have Plaintiffs been able to ask their own experts to review the opinions of Defendant's expert or to decide whether to hire a rebuttal expert. Thus, with a month and a half remaining in discovery, the lack of disclosure has materially impeded Plaintiffs' ability to assess and respond to the expert in any way; the Plaintiffs simply have no way to evaluate an unnamed person to be disclosed at an unnamed time. Further, if an expert report is not disclosed soon, Plaintiffs will be unable to depose the expert before the close of discovery.

Plaintiffs complied with the Federal Rules and this Court's orders as well as its Practice Guidelines on Scheduling Orders, by providing the Defendant with the name of the expert witnesses who will give expert testimony on their behalf, as well as providing their expert reports. Thus, the Defendant is in a position to analyze these expert witnesses and their opinions while preventing the Plaintiffs from making any expert assessments whatsoever. The failure to disclose an expert violates this Court's scheduling order and is prohibited by the Federal Rules.

Conclusion

Accordingly, the Plaintiffs respectfully request that the Court bar the Defendant from offering any expert testimony in this case; or, in the alternative,

require the Defendant to immediately disclose its “expert on law enforcement policies and practices,” along with an expert report, as required by Rule 26(a)(2).

Dated: March 1, 2016

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record.

Dated: March 1, 2016

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Hon. Nancy G. Edmunds

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**DECLARATION OF MICHAEL F. DERKSEN IN SUPPORT OF
PLAINTIFFS' MOTION TO BAR DEFENDANT'S EXPERT(S)**

I, Michael F. Derksen, declare as follows:

1. I am an attorney with the law firm Proskauer Rose LLP and serve as counsel for Plaintiffs in this case. I make this declaration, based on my personal knowledge, in support of Plaintiffs' Motion to Bar Defendant's Expert(s). I am over 18 years of age and if called to testify, I could and would testify competently to the facts stated herein.

2. On January 26, 2016, I had a telephonic conversation with Erik Grill, counsel for Defendant, during which I asked him about Defendant's understanding as to what was required by the witness list ordered to be filed by the Court.

Specifically, I asked him whether he thought that expert witnesses were required to

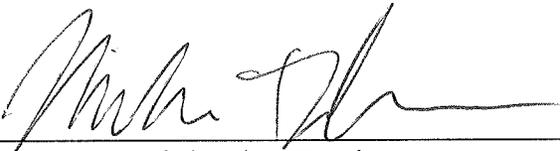
be disclosed in the witness list. He confirmed that expert witnesses must be disclosed.

3. On February 22, 2016, I received an email from Defendant's counsel, attaching Defendant's witness list. *See* Defendant's Witness List, Ex. A. The witness list does not list any expert witnesses, other than stating "expert on law enforcement policies and practices *to be named.*" *Id.* (Emphasis added.)

4. I have not yet received an explanation from the Defendant as to why her witness list did not name any experts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2016 at Chicago, Illinois.



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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

EMANI LOVE, *et al.*,

Plaintiff,

v

RUTH JOHNSON,

Defendant.

NO. 2:15-cv-11834

HON. NANCY EDMUNDS

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DEFENDANT'S WITNESS LIST

Defendant Ruth Johnson, by and through her attorneys, Attorney General Bill Schuette and Assistant Attorney General Erik A. Grill, list the following witnesses who may be called to testify at the trial of the above-entitled action:

1. Michael Wartella.
2. Grace Ueberroth.
3. Tina Densmore.
4. Susan Westerlund.
5. All named Plaintiffs.
6. Any and all persons necessary to authenticate documents or to lay foundation for their admission into evidence.
7. Any and all persons listed on Plaintiffs' Witness List(s).
8. Any and all persons necessary for rebuttal testimony.
9. An expert on law enforcement policies and practices to be named.

Respectfully submitted,

BILL SCHUETTE
Attorney General

/s/Erik A. Grill

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Dated: February 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, I emailed the foregoing Witness List to all counsel of record.

/s/Erik A. Grill

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