IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**STATE DEFENDANTS' RULE 37 MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL EXPERT WITNESS REPORTS OF DRS. BUDGE AND SCHECHTER**

## INTRODUCTION

Well after the deadline this Court imposed for Plaintiffs' disclosure of either opening or reply expert reports, Plaintiffs filed two so-called "supplemental" expert reports—their third set of expert reports—along with their summary judgment opposition papers. (Dkt. 116; 119.) Neither report was previously disclosed to State Defendants, nor did Plaintiffs seek leave to ignore this Court's deadlines. Surely understanding that these reports are untimely, Plaintiffs sought to avoid this Court's scheduling order by calling them "supplemental" reports, presumably referencing Fed. R. Civ. P. 26(e). But because the belated expert reports contain opinions could have been disclosed in their initial expert reports and do not purport to reply to State

Defendants' timely opposition reports, Plaintiffs' new reports are not properly considered "supplemental."

These untimely reports should be stricken from the docket and not considered in this case, as a sanction under Federal Rule of Civil Procedure 37. In the alternative, State Defendants should be given leave to file (1) a sur-reply report responding to the new opinions disclosed in Plaintiffs' new expert reports,[1] (2) a short sur-reply brief in support of their summary judgment motion addressing those new opinions; and (3) an amended response to Plaintiffs' Supplemental Proposed Findings of Fact that rely on their "supplemental" expert opinions.

[1] Attached to the declaration accompanying this motion (Roth Decl. ISO Mot. to Strike ("Roth Decl.")) is a rough draft of a response report from Dr. Lawrence Mayer, State Defendants' medical expert. (Roth Decl. Ex. B.) Dr. Mayer intends to continue his work on this draft and will submit a finalized report to this Court, if given leave to do so. (Roth Decl. ¶ 8.) State Defendants do not waive the protections provided by Fed. R. Civ. P. 26(b)(4)(B) to any other of Dr. Mayer's draft reports—this draft is provided only to demonstrate that Dr. Mayer has been diligently working on a response to Plaintiffs' "supplemental" reports but has not yet had time to finalize it.

## BACKGROUND

Per this Court's scheduling orders and the parties' agreements for expert disclosures (Dkt. 50; 61; 62), Plaintiffs timely disclosed an opening expert report on February 19, 2018 (Dr. Stephanie Budge), Defendants timely disclosed two rebuttal experts report on April 19, 2018 (Dr. Mayer and David Williams), and Plaintiffs timely disclosed two reply/rebuttal expert reports on May 31, 2018 (Barrett & Corrough and Dr. Schechter). (Roth Decl. ¶¶ 3–5.) Plaintiffs did not submit a reply report from Dr. Budge. (Roth Decl. ¶ 5.)

State Defendants moved for summary judgment on June 1, 2018, and Plaintiffs moved for partial summary judgment on June 8, 2018. (Dkt. 80; 95.) On June 15, 2018, after submitting their reply reports, Plaintiffs chose to depose State Defendant's two expert witnesses, Dr. Lawrence Mayer and David Williams. (Roth Decl. ¶ 6.)

On June 26, 2018, as part of their opposition to State Defendants' summary judgment motion, Plaintiffs filed supplemental expert witness reports by Dr. Budge (Dkt. 119) and Dr. Schechter (Dkt. 116).

Dr. Budge's initial February 19, 2018, expert report opined on the following topics:

1) "an overview and discussion of gender identity";

2) "the psychological processes surrounding gender identity development for transgender individuals";

> 3) "the appropriate clinical standards for gender transition and treatment of gender dysphoria in transgender adults";
>
> 4) "the medical necessity of gender transition-related medical and psychological care for transgender individuals";
>
> 5) "reasons why blanket exclusions for transition-related care are not supported by research or policy"; and
>
> 6) "clinical assessments of Alina Boyden and Shannon Andrews."

(Dkt. 89:5–6.) And Dr. Budge's June 26, 2018, "supplemental" report addresses five new questions:

> 1) "[w]hether medical treatments to lessen gender dysphoria the same [sic] as treatments for cisgender persons seeking cosmetic surgery to change or enhance their bodies";
>
> 2) "[w]hether there is a difference between gender dysphoria and anxiety and mood disorders";
>
> 3) "[w]hether the methodology for conducting the research regarding hormone therapy and surgery indicates the treatments are safe and effective for gender dysphoria and if research is consistent with applicable scientific standards";
>
> 4) "[w]hether these medical interventions can save transgender people's lives"; and
>
> 5) "[w]hether there is any dispute in the medical/psychological community over whether persons' status as transgender can be changed."

(Dkt. 119:1–2.)

Dr. Schechter's original May 31, 2018, rebuttal/reply report provided his expert opinion on:

> 1) "the standards of care for treating individuals diagnosed with gender dysphoria";
>
> 2) "the safety and efficacy of gender confirming surgeries as treatment for gender dysphoria"; and
>
> 3) "the similarities between surgical techniques to treat gender dysphoria and surgical techniques to treat other medical conditions."

(Dkt. 106.) His June 26, 2018, "supplemental" report addresses four new questions:

> 1) ["w]hether cosmetic surgery is provided to treat depression";
>
> 2) "[w]hether insurance coverage is typically provided for medically necessary breast reduction surgery due to back pain and related problems as well as breast reconstruction after a mastectomy due to a condition, such as cancer";
>
> 3) "[w]hether breast reconstruction surgeries are provided to treat the underlying medical condition only or have additional purposes"; and
>
> 4) "[w]hether there are benefits of reconstructive surgeries to persons with gender dysphoria in addition to addressing the symptoms of gender dysphoria."

(Dkt. 116:1.)

State Defendants have submitted only one round of expert reports (on April 19), compared to three rounds for Plaintiffs (on February 19, May 31, and June 26).

## ARGUMENT

### I. Plaintiffs' "supplemental" expert reports are untimely because they are not "supplements" under Rule 26(e).

#### A. Legal standards for supplemental expert reports.

"Under Rule 26(a)(2), a party that intends to rely upon an expert witness's testimony is required to furnish by a date set by the district court a report containing, among other information, 'a complete statement of all opinions' the retained expert will provide, 'and the basis and reasons for them.'" *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008) (quoting Fed. R. Civ. P. 26(a)(2)(B)(i), (a)(2)(C)).

Under Rule 26(e), a party shall supplement an earlier disclosure when "the party learns that in some material respect the disclosure or response is incomplete or incorrect" and when "the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). This rule applies equally to expert reports. Fed. R. Civ. P. 26(e)(2). "If a party fails to provide information . . . 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." Fed. R. Civ. P. 37(c)(1).

This Court's preliminary pretrial conference order regarding the disclosure of experts states that all such disclosures "must comply with the requirements of Rule 26(a)(2)" and "[s]upplementation pursuant to Rule 26(e) is limited to matters raised in an expert's first report." (Dkt. 37:2.) This Court warned the parties: "Failure to comply with these deadlines and procedures could result in the court striking the testimony of a party's experts pursuant to Rule 37." (Dkt. 37:2.)

"The burden to show that the reports were supplements rather than new reports . . . is on the party who either missed the deadline or is seeking to supplement the report." *Stuhlmacher v. Home Depot USA, Inc.*, No. 2:10 cv 467, 2012 WL 5866297, at *2 (N.D. Ind. Nov. 19, 2012); *Finley v. Marathon Oil Co.,* 75 F.3d 1225, 1230 (7th Cir. 1996) (where a party fails to timely make its expert disclosures as required under Rule 26, exclusion of expert testimony is proper unless the party shows that its violation was either "justified or harmless").

Case law within this circuit explains the nature of a true "supplemental" expert report. In *First Years, Inc. v. Munchkin, Inc.*, 575 F. Supp. 2d 1002, 1008–1009 (W.D. Wis. 2008), the Court held that because a party's expert rebuttal report "reache[d] far beyond the statements found in his initial report," it was not mere "supplementation" under Rule 26(e)(1). Thus, the opinions in the rebuttal report should have been

timely submitted in that initial report. *Id.* at 1007–09. Another district court explained that "Rule 26(e) was intended to ensure prompt disclosure of new information, not to allow parties to spring late surprises on their opponents under the guise of a 'supplement' to earlier disclosures." *Barlow v. Gen. Motors Corp.,* 595 F. Supp. 2d 929, 935–36 (S.D. Ind. 2009). And another opined that Fed. R. Civ. P. 26(e) "does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report." *Allgood v. Gen. Motors Corp.,* No. 1:02 cv 1077–DFH–TAB, 2007 WL 647496, at *34 (S.D. Ind. Feb. 2, 2007). The court continued:

> To rule otherwise would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could "supplement" existing reports and modify opinions previously given. This practice would surely circumvent the full disclosure requirement implicit in Rule 26 and would interfere with the Court's ability to set case management deadlines, because new reports and opinions would warrant further consultation with one's own expert and virtually require new rounds of depositions.

*Id.* (quoting *Beller ex rel. Beller v. United States,* 221 F.R.D. 689, 695 (D. N.M. 2003)). *See also Carter v. Finely Hosp.,* No. 01 C 50468, 2003 WL 22232844, at *2 (N.D. Ill. Sept. 22, 2003) ("It is disingenuous to argue that the duty to supplement under Rule 26(e)(1) can be used as a vehicle to disclose entirely new opinions after the deadline established by the court under Rule 26(a)(2)(C).").

### B. Dr. Budge's so-called "supplemental" report is really just an untimely rebuttal report.

Nothing in Dr. Budge's new report can properly be considered "supplemental" because Plaintiffs did not learn that her original report was "incomplete or incorrect," under the meaning of Fed. R. Civ. P. 26(e). Rather, her new report raises new opinions on topics addressed in her initial report and new opinions on new topics that she could have addressed in either her initial report or in a timely rebuttal report.

First, Dr. Budge offers new opinions on three topics addressed in her initial report: "Whether the methodology for conducting the research regarding hormone therapy and surgery indicates the treatments are safe and effective for gender dysphoria and if the research is consistent with applicable scientific standards"; "[w]hether these medical interventions can save transgender people's lives"; and "[w]hether there is any dispute in the medical/psychological community over whether persons' status as transgender can be changed." (Dkt. 119:1–2.) Her complete opinions on these subjects should have been disclosed in her initial report, but they were not.

As for the other two topics—"[w]hether medical treatments to lessen gender dysphoria [are] the same as treatments for cisgender persons seeking cosmetic surgery to change or enhance their bodies," and "[w]hether there is a difference between gender dysphoria and anxiety and mood disorders" (Dkt. 119:1)—Plaintiffs will likely argue that Dr. Budge's new opinions

respond to the opinions of State Defendants' medical expert, Dr. Mayer. But the time to disclose rebuttal opinions expired on May 31, per this Court's scheduling order. (Dkt. 61–62.) Dr. Budge could have submitted a rebuttal report responding to Dr. Mayer's opinions, but Plaintiffs chose not to have her do so. Plaintiffs may now regret that decision, but that does not mean they can ignore the court-imposed deadlines and only now disclose an untimely reply report in the midst of summary judgment briefing.

Dr. Budge also states that she is responding to Dr. Mayer's deposition testimony. (Dkt. 119:4, 6–9.) But that is a proper subject for a rebuttal report, not a "supplemental" report under Rule 26(e). *See Aircraft Gear Corp. v. Marsh,* No. 02 C 50338, 2004 WL 1899982, at *5 (N.D. Ill. Aug. 12, 2004) ("[R]ebuttal disclosures are those that relate to evidence that is 'intended solely to contradict or rebut evidence on the same subject matter identified by another party' in its expert disclosures.") (quoting Fed. R. Civ. P. 26(a)(2)). Again, Plaintiffs did not disclose Dr. Budge as a rebuttal expert witness.

Plaintiffs may respond that Dr. Budge had no opportunity to respond to Dr. Mayer's deposition testimony, but their own litigation tactics created that dilemma. If Plaintiffs had wanted Dr. Budge to address Dr. Mayer's deposition testimony, Plaintiffs should have deposed Dr. Mayer *before* their rebuttal report deadline, not *after*. It was Plaintiffs' decision not to file a rebuttal report from Dr. Budge and then depose Dr. Mayer. Plaintiffs waited

until May 18, about a month after Dr. Mayer's report was disclosed, to ask to take his deposition, and even then they requested a deposition date of June 19, after their rebuttal report deadline. (Roth Decl. Ex. A.) Plaintiffs may now regret that tactical decision, but regret alone does not entitle them to ignore this Court's deadlines and file new rebuttal expert reports without even seeking leave to do so.

Alternatively, Plaintiffs may argue that they are responding to arguments advanced in State Defendants' summary judgment briefing. Again, even if true, that does not render Dr. Budge's new report "supplemental." If this Court had intended both parties to have another bite at the apple after seeing the other side's summary judgment briefing, it would have incorporated that into the scheduling order. But it did not.

### C. Dr. Schechter's so-called "supplemental" report raises new issues he could have addressed in his original report.

Dr. Schechter's so-called "supplemental" report is untimely for similar reasons. Three topics simply expand on opinions in his original report: "Whether insurance coverage is typically provided for medically necessary breast reduction surgery due to back pain and related problems as well as breast reconstruction after a mastectomy due to a condition, such as cancer"; "[w]hether breast reconstruction surgeries are provided to treat the underlying medical condition only or have additional purposes"; and

"[w]hether there are benefits of reconstructive surgeries to persons with gender dysphoria in addition to addressing the symptoms of gender dysphoria." (Dkt. 116:1.) These opinions should have been disclosed in his original report, and there is no reason Plaintiffs needed to wait until now to disclose them.

As for the last topic, "[w]hether cosmetic surgery is provided to treat depression" (Dkt. 116:1), this is effectively a sur-rebuttal that addresses both Dr. Mayer's deposition testimony and arguments in State Defendants' summary judgment briefing. Again, that is not the proper subject of a "supplemental" expert report under Rule 26(e). Like with Dr. Budge, Plaintiffs could have deposed Dr. Mayer *before* their rebuttal deadline and had Dr. Schechter address Dr. Mayer's testimony at the proper time. Plaintiffs' decision to wait to depose Dr. Mayer does not transform Dr. Schechter's untimely and improper sur-rebuttal report into a "supplemental" one. Likewise, Dr. Schechter's responses to arguments in State Defendants' summary judgment papers are also improper, in that the Court declined to structure the schedule to allow experts to respond to summary judgment arguments.

## II. Plaintiffs should be precluded from using these supplemental expert witness reports as evidence in this action under Rule 37(c).

The proper remedy for Plaintiffs' violation of Rule 26 is an order prohibiting them from using these expert supplemental reports in this action altogether. Rule 37(c)(1) expressly provides the remedy when a party untimely discloses expert witness testimony: "If a party fails to provide information . . . 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." Fed. R. Civ. P. 37(c)(1). Absent the party meeting either of these two exceptions, the Rule 37(c)(1) sanction is "automatic and mandatory." *Ciomber*, 527 F.3d at 641 *(*citation omitted).

This Court has previously excluded expert testimony under this rule. For example, in *First Years*, 575 F. Supp. 2d at 1008–1009, after rejecting the party's argument that the offending testimony was mere "supplementation" under Rule 26(e)(1), this Court ruled that the offending expert testimony submitted was "excluded from evidence." The remedy ought to be the same here. Plaintiffs should be precluded from using these two supplemental expert witness reports as evidence in summary judgment or at trial.

Plaintiffs may argue that this Court should not strike their new expert reports because their failure to timely disclose those opinions was

"substantially justified" or "harmless." Fed. R. Civ. P. 37(c)(1). But this argument would fail. "The following factors should guide the district court's discretion: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003).

First, Plaintiffs' decision to file these new opinions now is not "substantially justified." As for the topics Drs. Budge and Schechter addressed in both their opening and "supplemental" reports, there is no reason why the "supplemental" opinions could not have been timely disclosed in the original reports. And as for the "supplemental" opinions that respond to Dr. Mayer's deposition testimony, Plaintiffs created that issue for themselves by waiting to take Dr. Mayer's deposition until after submitting their rebuttal reports.

And these supplemental reports are not "harmless" to State Defendants. Plaintiffs disclosed these brand-new expert opinions a mere eight business days before State Defendants had to file their summary judgment reply materials. That was not enough time for State Defendants to adequately consult with their retained expert (whom Plaintiffs' "supplemental" reports attack), respond to Plaintiffs' supplemental findings of

fact that rely on their experts' "supplemental" opinions, and address in their reply brief Plaintiffs' arguments resting on those "supplemental" opinions. Once the summary judgment deadline passes, State Defendants will have missed their opportunity to respond and thus cannot cure the prejudice caused by Plaintiffs' untimely filing.

## CONCLUSION

State Defendants respectfully ask this Court pursuant to Fed. R. Civ. P. 37 to strike Plaintiffs' "supplemental" expert witness reports from the record and forbid them from being used in this case for any purpose.

Alternatively, if the Court declines to strike these reports, State Defendants' respectfully seek leave: (1) to file a supplemental rebuttal expert witness report limited to the topics addressed in Plaintiffs' supplemental reports, (2) to file a short sur-reply brief in support of their motion for summary judgment limited to the topics addressed in Plaintiffs' supplemental expert reports, and (3) and an amended response to Plaintiffs' Supplemental Proposed Findings of Fact that rely on their "supplemental" expert opinions.

*[Signature page follows]*

Dated this 9th day of July, 2018.

Respectfully submitted,

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