

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

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

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

Defendants.

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

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Yet again, Plaintiffs have circumvented this Court's scheduling order by filing a second round of so-called "supplemental" expert reports, this time accompanying their summary judgment reply papers. (Dkt. 134; 135; 136; 137.<sup>1</sup>) This marks Plaintiffs' *fourth* round of expert reports, two more than this Court allowed them to submit and three more than State Defendants have submitted. For the same reasons as in State Defendants' first Motion to Strike Plaintiffs' Supplemental Expert Reports (Dkt. 124), Plaintiffs' second set of "supplemental" expert reports should be stricken pursuant to Fed. R. Civ. P. 37.

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<sup>1</sup> Plaintiffs' filed two versions of these second "supplemental" reports, one with references and the other without.

This time, Plaintiffs' experts expressly admit that they are merely responding to arguments advanced in State Defendants' summary judgment papers. (Dkt. 136:1 (Budge was "asked to review the Defendants' Responses to Plaintiffs' Proposed Findings of Fact . . . and Defendants' Additional Proposed Findings of Fact . . . and to respond to certain factual assertions" therein); Dkt. 137:1 (Schechter was "asked to address one addition issue raised by Defendants' brief in opposition to Plaintiffs' motion for summary judgment").) That is blatantly inappropriate under Fed. R. Civ. P. 26(e), which only allows supplements to address "incomplete or incorrect" disclosures. Fed. R. Civ. P. 26(e)(1)(A). It is also inappropriate under this Court's preliminary pretrial conference order, which limits supplementation to "matters raised in an expert's first report." (Dkt. 37:2.)

Indeed, Plaintiffs' tactic here—continually submitting new expert reports as this case proceeds—embodies the escalating expert report "arms race" that Fed. R. Civ. P. 26 and scheduling orders are meant to prevent:

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.

*Beller ex rel. Beller v. United States*, 221 F.R.D. 689, 695 (D.N.M. 2003) (striking so-called “supplemental” reports). And, again, this sandbagging tactic deprives State Defendants of a full and fair opportunity to respond to Plaintiffs’ multiple rounds of expert reports with expert testimony of their own.

State Defendants thus respectfully ask this Court pursuant to Fed. R. Civ. P. 37 to strike Plaintiffs’ second “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, and (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.

Dated this 10th day of July, 2018.

Respectfully submitted,

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