

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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

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

Defendants.

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' RULE 37
MOTIONS TO STRIKE PLAINTIFFS' SUPPLEMENTAL EXPERT WITNESS
REPORTS OF DRs. BUDGE AND SCHECHTER**

INTRODUCTION

In asking this Court to strike Plaintiffs' supplemental expert witness reports of Drs. Budge and Schechter, Defendants wrongly claim that Plaintiffs violated court deadlines when they responded to expert testimony relied on by Defendants in their summary judgment briefing by submitting expert testimony in the form of supplemental reports. (Dkt. ## 124, 138).¹ Defendants ask this Court for the extreme remedy of either striking Plaintiffs' supplemental statements, or allowing Defendants the opportunity to file an additional report and sur-reply brief. (*Id.*)² The Court

¹ Defendants moved separately to strike the statements of Drs. Budge and Schechter that were filed in response to Defendants' Motion for Summary Judgment (Dkt. # 124) and those statements filed in reply to support Plaintiffs' Motion for Partial Summary Judgment. (Dkt. # 138). Plaintiffs respond here to both motions, as Defendants raise common arguments in both, and Plaintiffs raise common arguments in opposition to those motions.

² Defendants have already filed a supplemental declaration by Dr. Lawrence Mayer in support of their summary judgment reply brief. (Dkt. # 129).

should deny these motions, because Plaintiffs have not violated this Court's deadlines, the testimony provided with Plaintiffs' experts' subsequent statements falls well within the scope of their original opinions timely disclosed by Plaintiffs' experts, and Defendants are not prejudiced by the disclosure of these opinions.

Defendants complain that they will not have had a meaningful opportunity to respond to the information contained in the supplemental reports, even though final pretrial disclosures are not due until September 7, 2018, and Defendants have to date not sought to depose either of Plaintiffs' experts. For the following reasons, this Court should deny Defendants' Motions to Strike.

RELEVANT FACTS

This Court's scheduling order required the parties to disclose their experts as follows: Plaintiffs: January 19, 2018; Defendants: March 16, 2018; Plaintiffs' Rebuttal: April 13, 2018. (Dkt. # 37 at 2). The order further provided, "Supplementation pursuant to Rule 26(e) is limited to matters raised in an expert's first report, must be in writing and must be served not later than five calendar days before the expert's deposition, or before the general discovery cutoff if no one deposes the expert." (*Id.*) On March 9, 2018, the parties stipulated to amend the disclosure deadlines as follows: Plaintiffs: February 19, 2018; Defendants: April 19, 2018; Plaintiffs' Rebuttal: May 18, 2018. (Dkt. # 50). The parties further stipulated to move the rebuttal disclosure deadline to May 31, 2018. (Dkt. # 61). The discovery deadline in this case is August 31, 2018, and the parties' Rule 26(a)(3) disclosures remain due on September 7, 2018. (Dkt. # 37 at 5).

Plaintiffs submitted their initial expert reports in compliance with this Court's scheduling order on February 19, 2018. (Dkt. # 50). Defendants disclosed their expert reports to Plaintiffs on April 19, 2018, and Plaintiffs disclosed two (2) rebuttal experts on May 31, 2018. On June 15, 2018, Plaintiffs took the depositions of both of State Defendants' experts, Dr. Lawrence Mayer and David Williams. (Dkt. ## 111, 112). These depositions took place while the parties were engaged in cross-motions for summary judgment, with Defendants having filed their motion for summary judgment on June 1, 2018. (Dkt. # 80). In Dr. Mayer's deposition, he greatly expanded his opinions beyond those stated in his short and conclusory expert report.

Both parties submitted the reports of their experts to support their summary judgment motions. (Dkt. ## 90, 91, 101, 102). Defendants offered the deposition testimony of Dr. Mayer to support their opposition to Plaintiffs' motion for summary judgment, and Plaintiffs offered the supplemental reports of their experts to respond to Dr. Mayer's testimony in opposing Defendants' motion. (Dkt. ## 112, 116, 117). Both parties offered expert testimony in the form of declarations or supplemental expert reports in support of their reply briefs. (Dkt. ## 129, 134, 135).

ARGUMENT

Plaintiffs have properly disclosed their experts in accordance with Fed. R. Civ. P. 26(a)(2), disclosing the opinions and topics upon which Plaintiffs' experts will opine. Defendants do not challenge the sufficiency of Plaintiffs' expert reports, nor do they dispute that Plaintiffs have an obligation to supplement disclosures, including expert disclosures, under the federal rules. Fed. R. Civ. P. 26(e). Instead, Defendants

argue that Plaintiffs violated this Court's scheduling order by offering additional testimony from the experts after the date their expert reports were due and that those opinions fall outside the scope of the experts' original disclosures. This argument, which focuses more on the form of the opinions rather than their substance, should be rejected. The parties' motions for summary judgment should be decided based on the merits rather than technicalities related to the form in which these responsive opinions were offered.

I. Plaintiffs' Supplemental Expert Reports Are Proper Under Rule 26(e).

Defendants seek to deny Plaintiffs' experts the opportunity to respond to the new opinions Dr. Mayer offered during his deposition because Plaintiffs failed to submit those opinions in the form of a rebuttal *report* by the time this Court ordered them to disclose their rebuttal *experts*. The problem with this argument is that Rule 26 does not preclude experts from offering testimony to respond to the testimony of an opposing expert, so long as it falls within the scope of the opinions previously disclosed by the expert. Nor does Rule 26 or this Court's scheduling order require those experts to offer this responsive testimony in the form of a rebuttal report as of the date for disclosure of rebuttal experts.

Experts may offer testimony in order to respond to the testimony of opposing experts, so long as it falls within the scope of their previously disclosed opinions. *See Ball v. Versar, Inc.*, 454 F. Supp. 2d 783, 798 fn. 9 (S.D. Ind. 2006) ("In the absence of a controlling order, Rule 26(a)(2)(C) permits a party to file an affidavit to contradict or rebut the arguments or opinions of other experts, provided that it is submitted

within thirty days after the other party's disclosure.”); *Builders Ass'n. of Greater Chicago v. City of Chicago*, No. 96 C 1122, 2003 WL 1786489, at *9 (N.D. Ill. Apr. 2, 2003) (rejecting motion to bar defendant’s additional report of expert created in response to plaintiffs’ experts even though it included new data “expand[ing] the scope of her original report rather than defending the opinions in it,” because “it is related to her original opinion.”); *Uncommon, LLC v. Spigen, Inc.*, 305 F. Supp. 3d 825, 844 (N.D. Ill. 2018) (refusing to strike supplemental report of defendant’s expert that “supplements [expert’s] original report, partly in response to Plaintiff’s expert material,” because it “sufficiently adheres to the scope of his initial report and to permissible rebuttal”); *Biomet Orthopedics, Inc. v. Tact Med. Instruments, Inc.*, No. 3:01 CV 895 PS, 2004 WL 5499504, at *2 (N.D. Ind. Apr. 7, 2004) (refusing to strike second report from expert “offering opinions to contradict or rebut those offered by” the opposing expert, because the reports’ “analysis and opinions flow directly from [the expert’s] preliminary opinions and criticisms of [the opposing expert’s] analysis”).

Defendant’s argument depends on showing *both* that the supplemental reports from Plaintiffs are rebuttal reports, *and* that the Court’s scheduling order required Plaintiffs to offer these supplemental reports at the same time they were required to disclose their rebuttal *experts*. Defendants fail on both counts. Neither Rule 26 nor this Court’s scheduling order required Plaintiffs’ experts to offer all responsive opinion testimony in the form of a rebuttal report as of the date for disclosure of rebuttal experts. Rule 26(a)(2)(D)(ii) requires disclosure of rebuttal expert reports to be provided 30 days after the other parties’ disclosure. To the extent that Rule 26

requires not only the disclosure of rebuttal experts, but also disclosure of rebuttal testimony by previously disclosed experts, Plaintiffs complied by submitting the supplemental reports responding to Dr. Mayer's opinions within 30 days of his deposition. *See Ball*, 454 F. Supp. 2d at 798 fn. 9 (expert affidavit complied with the rule because it was submitted within thirty days of the expert affidavit it was intended to rebut). Moreover, Plaintiffs complied with the Court's requirement that the parties supplement their expert opinions "not later than five calendar days before the expert's deposition, or before the general discovery cutoff if no one deposes the expert." (Dkt. # 37 at 2).

There is no sense to the notion that Plaintiffs' experts may not expand on their original opinions to respond to those offered by Dr. Mayer because they did not do so prior to the date of rebuttal expert disclosures. By that reasoning, Defendants should be precluded from offering any of Dr. Mayer's deposition testimony in support of their summary judgment motion and response to Plaintiffs' motion for partial summary judgment, since that testimony presented new opinions and explanations of Dr. Mayer's earlier opinions after his expert report was due. Dr. Mayer's report addressed the following issues:

1. Sex is a biological trait and gender is a cultural construct.
2. Gender develops over time.
3. There is no evidence that gender is innate, immutable, or present at birth.

4. Gender dysphoria is the distress associated with incongruence between sex and gender.
5. Gender dysphoria is a serious medical condition that deserves treatment.
6. Medical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria.

(Dkt. # 83-17, Mayer Expert Rep.).

Dr. Mayer's report provided some additional information beyond these statements in his report, but he expanded significantly on these opinions and attempted to explain the bases for them in his deposition. For example, in his report, Dr. Mayer's response to the studies supporting the medical necessity of hormone therapy and surgery to treat gender dysphoria was, "The evidence that these interventions are safe, effective, and optimal is minimal." (Dkt. # 90 at 8). In contrast, Dr. Mayer expanded significantly on this opinion in his deposition, and Defendants relied on Dr. Mayer's deposition, in addition to his report, to respond to Plaintiffs' motion for summary judgment. (Dkt. # 122 at 4-6, 14; dkt. # 121 at 2-10, 12).

In his deposition, Dr. Mayer did not simply expand on earlier opinions, but offered new ones. For example, nowhere in his report did Dr. Mayer critique the uniform recognition by major medical associations of the medical necessity of transition-related care, including surgery and hormone therapy, for improving the physical and mental health of transgender people, though Dr. Budge addressed this in her expert report. (Dkt. # 101.1 at 15-16, 19-20). However, he extensively critiqued

this medical consensus in his deposition. (Dkt. # 112 Mayer Dep. 41:16-19; 77:14-25; 97:21-98:1; 155:12-17). In turn, Defendants relied upon these additional opinions in their summary judgment briefing. (Dkt. # 122 at 15-16; dkt. # 121 at 12-13).

II. Plaintiffs' Supplemental Reports Offered Opinions Within the Scope Of Their Original Disclosures.

Defendants' argument that the supplemental reports filed by Drs. Schechter and Budge should be stricken because they offer opinions that could have been offered earlier must also be rejected. What is required is that the supplemental opinions "adhere[] to the scope of his initial report and to permissible rebuttal." *See, e.g., Ball*, 454 F. Supp. 2d at 798; *Uncommon, LLC*, 305 F. Supp. 3d at 844.

A. Dr. Budge's supplemental report falls within the scope of her original report as well as reasonable rebuttal to the opinions of Dr. Mayer.

Dr. Budge's initial report opined on the following topic areas: "[A]n overview and discussion of gender identity, the psychological processes surrounding gender identity development for transgender individuals, and the appropriate clinical standards for gender transition and treatment of gender dysphoria in transgender adults"; "[T]he medical necessity of gender transition-related medical and psychological care for transgender individuals, individuals, as informed by authoritative research, prevailing medical and psychological standards, and ethical standards for psychological practice with transgender clients"; The "reasons why blanket exclusions for transition-related care are not supported by research or policy and why transition-related care is cost-effective treatment"; and "[C]linical assessments of . . . the plaintiffs in the lawsuit" and her "professional opinion related

to their diagnoses of gender dysphoria and whether or not transition-related care would be considered a medical necessity for both plaintiffs.” (Dkt. # 101 at 1).

Her supplemental reports fall within the scope of those opinions and rebuts the opinions offered by Dr. Mayer in his deposition. For example, in her initial report, Dr. Budge addressed the fact that surgery to treat gender dysphoria is medically necessary and specifically pointed to the fact that surgery to treat transgender persons is not cosmetic. (Dkt. # 101 at 17, 20). In her supplemental report, Dr. Budge expanded on this opinion to specifically address Dr. Mayer’s claim that surgical treatments for gender dysphoria are the same as cosmetic surgery for cisgender persons. (*Compare* dkt. # 119 at 1-2 *with* dkt. # 112 Mayer Dep. 68:10-21, 146:10-147:16). Similarly, Dr. Budge’s initial report extensively discussed the meaning of “gender dysphoria” (dkt. # 101-1 at 12-14), while her supplemental report expanded on these opinions to respond to Dr. Mayer’s deposition testimony questioning the meaning of “gender dysphoria” and equating it to “dysphoria.” (*Compare* dkt. # 112 Mayer Dep. 40:1-6 *with* dkt. # 119 at 4-5). Dr. Budge’s supplemental report further addresses the methodology behind the research supporting the safety and efficacy of hormones and surgery to treat gender dysphoria as well as whether the “research is consistent with applicable scientific standards,” to address Dr. Mayer’s challenges to this research in his deposition. (*Id.*) Finally, she addresses whether “these medical interventions can save transgender people’s lives” and whether “there is any dispute over whether a persons’ status as transgender can be changed.” (Dkt. # 119 at 1-2). Defendants concede that Dr. Budge offers opinions on these final three topics raised

in her initial report, but claims that these “complete opinions . . . should have been disclosed in her initial report.” (Dkt. # 124 at 9).

Dr. Budge’s second supplemental report again addressed certain positions taken by Dr. Mayer in his papers and sources cited that Defendants relied on to support their response to Plaintiffs’ motion for summary judgment. (*See* Dkt. # 121 ¶¶ 150, 153, 119, 132, 134-136, 140; Dkt. # 122 ¶¶ 9, 23, 33). In this report, Dr. Budge addressed the following topics: scientific support in the literature for the efficacy of surgical and hormonal treatments for gender dysphoria, the assertion that “treatments aimed at aligning one’s gender identity with gender assigned at birth may be successful at ending gender dysphoria,” Dr. Mayer’s challenge to Dr. Budge’s statement that every major medical association recognizes the medical necessity of gender confirming procedures for gender dysphoria and the research underpinning this conclusion, and the “assertion that body dysmorphic disorders and gender dysphoria are similar, and therefore . . . that similar treatments should be used for the disorders,” such as therapy to try to talk them into accepting their birth-assigned gender. (Dkt. # 134, Second Supplemental Budge Rep.). Again, all of these opinions fall within the scope of Dr. Budge’s original report. (*Compare* dkt. # 134 *with* dkt. # 101-1 at 15-18, 20-21 (addressing the medical necessity of surgery and hormone therapy and citing studies supporting the efficacy and safety of those treatments), 19-20 (citing major medical associations positions regarding the harm caused by trying to change a person’s transgender identity so that they identify with their birth-assigned gender), 15 (her opinion that “every major expert medical association in the

United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people”)).

Defendants’ entire argument is premised on the notion that experts are bound by the testimony offered in their initial report and are unable to respond to the opinions offered by an opposing party’s expert. That simply is not the case. “The purpose of . . . [expert] reports is not to replicate every word that the expert might say on the stand. It is instead to convey the substance of the expert's opinion . . . so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary.” *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010) (citing *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009)). Experts are regularly allowed to offer testimony beyond the exact opinions offered in their original report, so long as it falls within the scope of the opinions previously disclosed. *See* cases cited *infra* Section I; *see also La Playita Cicero, Inc. v. Town of Cicero, Illinois*, No. 11-CV-1702, 2017 WL 1151066, at *5 (N.D. Ill. Mar. 28, 2017) (“[R]elevant case law suggests that sur-rebuttal reports are permissible, as long as they remain within the scope of proper rebuttal testimony, as is the case here.”) (citing *Ernst v. City of Chi.*, No. 08 C 4370, 2013 WL 4804837, at *1 (N.D. Ill. Sept. 9, 2013) (permitting use of sur-rebuttal expert report); *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2009 WL 1370997, at *6 (N.D. Ind. May 13, 2009) (same)).

“Where a party has disclosed new information, the opposing party's experts may supplement their reports,” since “forbid[ding] supplementation would produce an unwanted result: parties would be encouraged to hide potentially damaging facts

until after the first expert reports are submitted.” *Noffsinger v. Valspar Corp.*, No. 09-cv-916, 2012 WL 5948929, at *4 (N.D. Ill. Nov. 27, 2012). Even where experts rely on information they had prior to preparing their original report, courts have allowed experts to rely on it to supplement an earlier-filed report to, for example, respond to a challenge by the opposing party to the original report’s completeness, or to rebut opinions from another party’s expert. *See Talbert v. City of Chicago*, 236 F.R.D. 415, 421-22 (N.D. Ill. 2006); *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2009 WL 1370997, at *5 (N.D. Ind. May 13, 2009).

B. Dr. Schechter’s supplemental report also falls within the scope of his original report as well as reasonable rebuttal to the opinions of Dr. Mayer.

Similarly, Dr. Schechter’s initial report concerned his opinions on the standards of care for treating gender dysphoria, the safety and efficacy of gender confirmation surgeries as treatment for gender dysphoria and acceptance in the medical field of those treatments, and the similarities between surgeries treating gender dysphoria and those treating other medical conditions. (Dkt. # 106). His supplemental report addressed: “[w]hether cosmetic surgery is provided to treat depression,” “[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,” “[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 at 1).

All of these opinions fall within the scope of his original opinions, including his opinion that “professional medical consensus recognizes that these are appropriately categorized as reconstructive procedures,” rather than cosmetic. (Dkt. # 104 at 7-8). He also stated in his supplemental report his opinion that “surgeons regularly perform mastectomies and chest/breast reconstruction . . . to treat individuals with cancer, or a genetic predisposition” and providers may use the same CPT codes to bill insurers for a particular procedure “whether the procedure is performed on a transgender patient or a cisgender patient” and “[i]n general, the charge per CPT code would be the same.” (Dkt. # 104 at 11-12). Dr. Schechter further compares surgeries to treat transgender patients to those performed to treat cisgender patients, as well as the psycho-social and physical benefits of surgical treatments for gender dysphoria. (Dkt. # 104 at 6-12). These opinions address the various ways in which Defendants rely on Dr. Mayer’s opinions to suggest that cosmetic surgery may be offered to treat depression and is the same as surgery to treat gender dysphoria. (Dkt. # 121, ¶ 123 (citing Mayer deposition); dkt. 88, ¶¶ 80, 81). Dr. Schechter’s second supplemental report clarified the point made in his earlier testimony that the surgeries used to treat other medical conditions are similar to surgeries used to treat gender dysphoria. (Dkt. # 137). In sum, the supplemental reports provided by Drs. Budge and Schechter covered the same ground as their initial reports, written in

response to the statements made by Dr. Mayer in his deposition and used by Defendants to support their summary judgment motion.

Defendants concede that three of the points raised in Dr. Schechter's supplemental report did not introduce new opinions, but as with Dr. Budge they claim again that these opinions should have been disclosed in his initial report. (Dkt. # 143 at 11). But Rule 26 contemplates a duty to supplement when a disclosure is incomplete, not only if it is incorrect. *See, e.g., Talbert*, 236 F.R.D. at 421-22; *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2009 WL 1370997, at *5. Defendants further argue that Dr. Schechter's opinion on "whether cosmetic surgery is provided to treat depression" is "effectively a sur-rebuttal" of Mayer's deposition testimony and arguments Defendants advanced on summary judgment, but that is not a basis for excluding it. *Playita Cicero, Inc.*, 2017 WL 1151066, at *5.

C. The cases cited by Defendants are all distinguishable from the circumstances of the present case.

The cases cited by Defendants present very different facts, involving experts offering entirely new and different opinions, or new opinions offered on the eve of trial. In *Stuhlmacher v. Home Depot USA, Inc.*, for example, the expert offered an entirely new opinion about a third way in which a ladder was not built as designed, without any explanation for why this "new potential cause for the" ladder's failure was not disclosed earlier. No. 2:10 CV 467, 2012 WL 5866297 at *2 (N.D. Ind. Nov. 19, 2012). *Finley v. Marathon Oil Co.* is likewise distinguishable, since there the proposed rebuttal evidence was disclosed only a few days before the start of trial. 75 F.3d 1225, 1230 (7th Cir. 1996). In *Barlow v. Gen. Motors Corp.*, the plaintiffs held

“back their real damages theories and computations until nearly the eve of trial.” 595 F. Supp. 2d 929, 935 (S.D. Ind. 2009). The expert in *Allgood v. Gen. Motors Corp.* did not perform market value appraisals of plaintiffs' properties in preparing his initial report, but was later hired to do so in the form of a supplemental report. No. 1:02CV01077 DFHTAB, 2007 WL 647496 at *2 (S.D. Ind. Feb. 2, 2007). In *Carter v. Finely Hosp.*, defendants' experts offered one opinion in the initial reports and depositions regarding the cause of death of plaintiff's husband, and offered an entirely different opinion in supplemental reports, produced after the close of discovery, and based on previously available information. No. 01 C 50468, 2003 WL 22232844 at *1 (N.D. Ill. Sept. 22, 2003).

Plaintiffs have complied with their duty under Rule 26 to disclose expert opinions as discovery is ongoing. To deny Drs. Budge and Schechter the opportunity to address the new opinions offered by Dr. Mayer and Defendants' use of those opinions would deny Plaintiffs the opportunity afforded to Defendants, who supplemented Dr. Mayer's original opinions with his deposition testimony and offered additional testimony in the form of a declaration. Nor do the cases interpreting Rule 26 support Defendants' argument to strike these reports.

III. Defendants Are Not Prejudiced by Plaintiffs' Reports.

For the reasons set forth above, Plaintiffs have not violated Rule 26, but even if these supplemental reports are deemed to be filed outside of the dates set in the Court's scheduling order, Plaintiffs' use of them is “substantially justified” and “harmless.” Fed. R. Civ. P. 37(c)(1). In deciding whether Plaintiffs' submission of

these reports meets the requirement to impose sanctions requirements, the court may consider: (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).

Here, there is no surprise or prejudice to Defendants, who have ample time to review the reports provided by Drs. Budge and Schechter and take their depositions before the close of discovery. Nor is there any disruption to the October trial. If anything, providing Defendants with more information about the Plaintiffs' expert opinions makes their job in deposing these experts easier.

Nor is their indication of bad faith or willfulness involved in the timing of Plaintiffs' disclosure of these supplemental reports which were made promptly after Defendants' expert was deposed. *Cf. Bellinger v. Deere & Co.*, 881 F. Supp. 813, 817 (N.D.N.Y. 1995) (finding no evidence of bad faith in party's failure to disclose witness and testimony in response to interrogatories, since the party identified him shortly after interviewing him two weeks prior to trial); *see also Lane v. Walgreen Co.*, No. 1:12-CV-01180-SEB, 2014 WL 2881543, at *5 (S.D. Ind. June 24, 2014) (finding no bad faith after plaintiff submitted a second supplemental expert disclosure listing defense witnesses as her witnesses less than a week after deposing them, since there was "no evidence that she knew in advance that Defendant's fact witnesses would furnish what she viewed as favorable expert opinions"); *Larson v. Wis. Cent. Ltd.*, No. 10-C-446, 2012 WL 368379, at *4 (E.D. Wis. Feb. 3, 2012) (rejecting request to exclude

a late-filed rebuttal report as “too drastic a remedy,” absent a showing of prejudice). Defendants have ample time to investigate the Plaintiffs’ experts’ claims in preparation for trial. As such, Defendants’ requested sanctions are unwarranted.³

Defendants’ only argument, that Plaintiffs’ experts could have disclosed those opinions earlier, has been addressed in Section II. Plaintiffs deposed Dr. Mayer in a timely manner, especially in light of the preparation necessary to depose an expert as well as the timing of the briefing schedule for dispositive motions.

Defendants’ claim of prejudice because Plaintiffs submitted these supplemental reports in the course of summary judgment briefing ignores the fact that they have submitted extensive testimony from Dr. Mayer’s deposition to support their summary judgment arguments as well as a declaration from Dr. Mayer filed with their reply brief. It is unclear how Defendants have been disadvantaged, since they were free to depose Plaintiffs’ experts prior to the completion of the summary judgment briefing, and are free to do so now. Defendants have simply failed to explain why they should be advantaged by being allowed to submit a sur-reply brief as well as additional expert testimony, unless Plaintiffs are allowed to do the same.

CONCLUSION

For the reasons stated above, Plaintiffs request that this Court deny Defendants’ Motions to Strike.

³ The court’s ruling in *First Years, Inc. v. Munchkin, Inc.*, 575 F. Supp. 2d 1002 (W.D. Wis. 2008), is distinguishable. There, the defendant submitted a rebuttal report in a patent infringement case to address issues both of infringement and invalidity. The court struck the portions of the testimony addressing invalidity, since defendant had failed to offer expert testimony to address that topic in an initial expert report. *Id.* at 1008. Here, the supplemental testimony by Drs. Budge and Schechter falls within the scope of their initial expert reports. (*See infra* section II.A, B).

Dated this 23rd day of July, 2018.

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