

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

**CHELSEY NELSON PHOTOGRAPHY
LLC and CHELSEY NELSON,**

Plaintiffs,

v.

**LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, et al.,**

Defendants.

Case No. 3:19-cv-851-BJB-CHL

**REPLY IN SUPPORT OF
DEFENDANTS’ MOTION TO LIMIT TESTIMONY BY
PLAINTIFFS’ REBUTTAL EXPERT, GEORGE YANCEY**

Defendants Louisville/Jefferson County Metro Government (“Louisville Metro”), Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy, Verná Goatley, in her official capacity as Executive Director of the HRC, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, “Defendants”), by counsel, hereby file this reply brief in further support of their motion for an order partially excluding or limiting expert testimony offered by George Yancey, Ph.D., an expert witness disclosed by Plaintiffs Chelsey Nelson Photography and Chelsey Nelson (collectively, “Chelsey” or “Plaintiffs”) as rebuttal to the opinion offered by Defendants’ expert, Professor Netta Barak-Corren (the “Motion”).

Plaintiffs’ response brief does not directly confront, much less answer, the arguments set forth in Defendants’ Motion. Instead, Plaintiffs resort to circular arguments (e.g., Professor Yancey’s testimony is within the proper scope of rebuttal because Chelsey does not use it in her

case-in-chief) or conclusory arguments based on outright misrepresentations (e.g. Louisville never challenges the reliability of Professor Yancey's conclusions, therefore the conclusions are reliable). In fact, Defendants have and do challenge the reliability of Professor Yancey's opinions as having no empirical or evidentiary basis.

Defendants' Motion identified three distinct reasons why the second part of Professor Yancey's report and any related testimony must be excluded: (1) the opinions are outside the proper scope of rebuttal; (2) the opinions are not helpful or relevant; and (3) the opinions are not reliable because they are based on pure speculation. Plaintiffs apparently agree with Defendants' second argument, as Plaintiffs have not cited Professor Yancey's report a single time in either of their summary judgment briefs or even in their motion to exclude testimony by Defendants' expert, Professor Barak-Corren, other than to note that a rebuttal report was disclosed. If Plaintiffs do not attempt to introduce evidence from Professor Yancey, the Court need not take up Defendants' Motion to limit his testimony. If, however, Plaintiffs attempt to introduce Professor Yancey's opinions, his testimony must be limited as set forth in the Motion.

I. Professor Yancey's Part Two Opinions Must Be Excluded as Outside the Scope of Rebuttal.

Plaintiffs mischaracterize Professor Barak-Corren's opinion as broadly addressing all aspects of constitutional review such that any expert offering opinions relevant to Louisville Metro's governmental interest in enforcing its antidiscrimination law or denying Chelsey a religious exemption could be considered proper rebuttal. But "stat[ing] an affirmative opinion on the same general subject matter discussed by [an initial expert] alone is not enough to transform [an] opinion into rebuttal." *Bentley v. Highlands Hospital Corp.*, 2016 WL 5867496, at *8 (E.D. Ky. Oct. 6, 2016) (excluding opinions that did not directly contradict or rebut the actual contents of the prior report as outside the scope of rebuttal).

The Court need look no further than Professor Yancey's report itself for a demonstration of what constitutes proper rebuttal and what exceeds the scope of rebuttal testimony. Part One (Paragraphs 10-33) of Professor Yancey's report—while presenting opinions and critiques with which Defendants and Professor Barak-Corren strongly disagree—unquestionably is within the proper scope of rebuttal. These opinions analyze and critique various aspects of Professor Barak-Corren's methodology and conclusions. Part Two of Professor Yancey's report goes further to offer opinions on matters admittedly “not consider[ed]” by Professor Barak-Corren. *See* Rebuttal Report, ¶ 34. These opinions are outside the scope of rebuttal and must be excluded.

Plaintiffs' argument that Professor Yancey's opinions are “real rebuttal” because Plaintiffs do not cite Dr. Yancey's opinions in their case-in-chief is entirely circular. In determining whether an opinion is proper rebuttal or an initial disclosure of affirmative expert opinion, “substance triumphs over form.” *Bentley*, 2016 WL 5867496, at *5.

II. Professor Yancey's Part Two Opinions Are Not Helpful to the Trier of Fact.

Plaintiffs have effectively conceded that Professor Yancey's opinions are not relevant or helpful to the trier of fact by not citing Professor Yancey's opinions in their summary judgment briefing. *See* Doc. 92-1 (Plaintiffs' Brief in Support of Their Summary Judgment Motion); Doc. 104 (Plaintiffs' Combined Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Summary Judgment Motion).

III. Professor Yancey's Part Two Opinions Are Not Reliable and Instead Constitute Pure Speculation.

Defendants' Motion pointed out numerous flaws, inferential leaps, and pure speculation that warrants excluding Professor Yancey's Part Two Opinions as unreliable. *See* Motion (Doc. 91), pp. 9-12. Instead of offering any substantive response to these arguments, Plaintiffs repeatedly and falsely assert that Defendants do not challenge Professor Yancey's conclusions,

and argue that his conclusions are therefore reliable. Plaintiffs’ argument is both conclusory and based on a false premise.

Plaintiffs also attempt to buttress Professor Yancey’s opinions with alleged facts that are not cited in his report. *See* Response (Doc. 100), p. 10 (describing “potential million-dollar-attorney-fee payments,” business closures, death threats, and a \$135,000 fine as alleged consequences of enforcement of antidiscrimination laws against wedding vendors in other states). These allegations are irrelevant to the Court’s evaluation of the reliability of Professor Yancey’s opinions because he did not consider this information. Moreover, these allegations—even if true—are also irrelevant to the Court’s analysis of Chelsey’s claims because Chelsey has never been the subject of any enforcement action. Chelsey is not paying any legal fees. She instituted this pre-enforcement challenge even though she has never been asked to provide services for a same sex wedding. The civil servants tasked with enforcing Louisville Metro’s antidiscrimination law had never even heard of Chelsey before she filed this lawsuit.

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For the foregoing reasons and those set forth in the Motion, Paragraphs 34-45 of Professor Yancey’s rebuttal expert report and any related testimony should be excluded.

/s/ Casey L. Hinkle

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2021, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/ Casey L. Hinkle _____
Counsel for Defendants