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

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL DISCLOSURES

The Wisconsin Election Commission Defendants' and the State Assembly's (collectively, "Defendants") motion to strike is frivolous and should be denied because Defendants have long known that the disclosed individuals are relevant to this case. Plaintiffs supplemented their disclosures as a courtesy to Defendants—they were under no obligation to do so under the Federal Rules of Civil Procedure, which require supplementation only "if 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) (emphasis added). All four individuals were repeatedly identified as relevant to this case during discovery—in fact, in discovery taken by Defendants themselves. The notion that Defendants were the victims of "sandbagging" or "subterfuge" is preposterous. Wisconsin Election Commission Defendants & Wisconsin State Assembly's Joint Motion to Strike Plaintiffs' Supplemental Disclosures, dkt. 282, at 2, 7 ("Mot.").

If Defendants have "sat idly by," *id.* at 7, and not prepared to defend against the potential trial testimony of witnesses whose identities have long been known to them, that is hardly Plaintiffs' fault. The motion to strike has no basis in law or fact and should be denied.

I. Plaintiffs Had No Obligation to Supplement Their Disclosures to Identify Witnesses Already Known to Defendants.

Plaintiffs' supplemental disclosures cannot be improper because they had no obligation even to provide them—they were extended as a courtesy to Defendants prior to the upcoming pretrial witness disclosure deadline on June 14. Under the Rules, a party must supplement an initial disclosure "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, *and if 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) (emphasis added). As the Advisory Committee's Notes make clear, "[t]here is . . . no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition" Fed. R. Civ. P. 26 advisory committee's notes to 1993 amendment. Accordingly, courts in this Circuit have long held that a party is not required to supplement disclosures when relevant information or witnesses are identified during the deposition of another witness. *See Gutierrez v. AT&T Broadband, L.L.C.*, 382 F.3d 725, 733 (7th Cir. 2004) (affirming decision to permit witness to testify because there was no duty to supplement: "[h]ere, the plaintiffs knew of [the witness] and the fact she possessed information relevant to this case through . . . depositions" taken in the case); *Se-Kure Controls, Inc. v. Vanguard Prods. Grp., Inc.*, No. 02 C 3767, 2007 WL 781253, at *7-8 (N.D. Ill. Mar. 7, 2007) (citing cases); *see also* 8A Charles Alan Wright *et al.*, Federal Practice & Procedure § 2049.1 (3d ed. 2019)

("[T]here is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery.").

There were no surprises here. On May 15, Plaintiffs amended their initial disclosures to identify four additional individuals likely to possess information relevant to this case: Sandy Pasch, Amy Sue Vruwink, Brittany Keyes, and Peter Barca. *See* Plaintiffs' Amended Disclosures, May 15, 2019, dkt. 284-1, at 4. But that supplementation was not even required under Rule 26(e), because the identities of these individuals, along with the fact that they might possess information relevant to the case, had long been disclosed to Defendants through discovery. Ms. Pasch, Ms. Vruwink, and Mr. Barca (currently the State of Wisconsin's Secretary of Revenue) are former Democratic members of the Assembly, and Ms. Keyes is a former Democratic candidate for the Assembly. Ms. Pasch, Ms. Vruwink, and Ms. Keyes were identified in multiple Plaintiffs' interrogatory responses from November 2018.[1] Ms. Vruwink's election was discussed in an expert report disclosed by *Defendants* in December 2018.[2] And to the extent Defendants failed to pay attention to discovery up to that point, all four individuals were again brought up in Plaintiffs' depositions, starting in January 2019. Various Plaintiffs named the individuals and explained their

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[1] *See* Declaration of Mark P. Gaber ("Gaber Decl."), Ex. 1 (Switzenbaum Interrogatory Responses), at 4, 19-20 (November 27, 2018) (disclosing that Mr. Switzenbaum voted for and contributed to Ms. Pasch's campaigns); *id*., Ex. 2 (Lentini Interrogatory Responses), at 4, 10, 34, 47 (November 27, 2018) (disclosing that Ms. Lentini voted for Ms. Pasch and has not contributed to a Democratic candidate for District 23 since Pasch was her representative, that Pasch decided not to run for re-election because of the redistricting); *id*., Ex. 3 (Stevning-Roe Interrogatory Responses), at 4, 9 (November 27, 2018) (disclosing that Ms. Stevning-Roe consistently voted for Ms. Vruwink prior to the redistricting, at which point Ms. Vruwink's district was cracked for partisan political advantage); *id*., Ex. 4 (Dieterich Interrogatory Responses), at 4-5, 8 (November 28, 2018) (disclosing that Mr. Dieterich consistently voted for Ms. Vruwink); *id*., Ex. 5 (Anclam Interrogatory Responses), at 4, 6, 11 (November 28, 2018) (disclosing that Mr. Anclam voted for and donated to Ms. Keyes).

[2] *See* Gaber Decl., Ex. 6 (Sean P. Trende Expert Report), at 15 (December 17, 2018).

ties to the issues in this case—most in response to questions asked *by* Defendants during depositions taken *by* Defendants.

For example, Plaintiff Daniel Dieterich testified that he supported Ms. Vruwink when she was in the Assembly, distributed her literature, thought she was a good and responsive representative, and that she lost reelection because of Act 43. *See* Dieterich Deposition, dkt. 288, at 47:25-48:18 (April 9, 2019) (Q: "[D]o you think that the drawing of [Vruwink's] district lines as a result of Act 43 was the cause . . . for her loss?" A: "Yes. Yes, I do." Q: "Was there any sort of scandal or other newsworthy story negative about Amy Sue Vruwink during the course of the 2014 campaign that might have contributed?" A: "No." Q: "Anything else that you can think of that caused her to lose?" A: "No, I can't think of anything other than . . . Act 43 that caused her to lose."); *see generally id.* 46:25-49:20. That Ms. Vruwink might have testimony about the effect of Act 43 on her district and supporters cannot possibly surprise Defendants.

Defendants' counsel asked a substantial number of questions about Ms. Pasch during depositions. *See, e.g.*, Patel Deposition, dkt. 255-4, at 105:7-16 (January 16, 2019) (Q: "[Y]ou say in part that your old district, AD22, was cracked, in part to get back at assemblywoman Sandy Pasch for running against senator Alberta Darling in the recall election. You see that?" A: "Yes." Q: "And your claim is that the Wisconsin State Assembly intentionally cracked district 22 to get back at assemblywoman Sandy Pasch, correct?" A: "In part, yes."). When Deborah Patel testified that she had discussed the matter, and Ms. Pasch's participation in an amicus brief in the Supreme Court for *Whitford I*, with Ms. Pasch, Defendants' counsel said: "Tell me everything Sandy Pasch told you about those comments." *Id.* at 107:2-3; *id.* 107:7 (Defendants' counsel asking: "Sandy Pasch told you that … happened?"); *id.* 107:12-13 (Defendants' counsel asking: "What exactly did Sandy Pasch tell you . . . ."); *id.* 107:16-17 (Defendants' counsel asking: "Did Sandy Pasch

tell you who the senate Republican was?"); *id.* 107:19-20 (Defendants' counsel asking: "So Sandy Pasch told you a senate Republican told her something?"); *see generally id.* 105:7-108:12. Defendants now claim to be "sandbagged" by Ms. Pasch's relevance to this case, despite having repeatedly inquired about Ms. Pasch's exact words in a conversation with a Plaintiff.

Plaintiff Roger Anclam testified multiple times about Ms. Keyes, including his support for and work on behalf of her campaign, her "vibrant" campaign, her chances of victory, and the effects of Act 43 on her district. *See, e.g.*, Anclam Deposition, dkt. 289, at 89:16-19, 90:17-19 (February 8, 2019) (testifying that he "liked Brittany as a candidate," that she was "full of energy, vibrant," and that he "didn't think [there] was a great chance" she could win, but he had "some hope"); *id.* at 88:14-25 (testifying that he supported Ms. Keyes for election in the 31st district "[a]fter the district was redistricted"); *id.* at 60:16-61:7 (Q: "Do you believe that Democrats could be elected in your current district?" A: "In the 31st, no." Q: "Correct. No? What's your factual basis for that opinion?" . . . A: "I'm very familiar with the redesign of the district and the area that was taken in. The area – the area that was taken in going so far east, it is, and has historically been, extremely Republican. I. . . So I just, you know, believe that by having redesigned it that way there's just . . . no chance for a Democrat to get elected there."). That Ms. Keyes has information about her district, its gerrymander, and the effect of Act 43 on her as a candidate and her supporters cannot plausibly catch Defendants by surprise.

Defendants' counsel asked a number of questions of Plaintiff Guy Costello about Mr. Barca's efforts to recruit him to run for the assembly after Act 43 was enacted, and Mr. Costello testified repeatedly about how he told Mr. Barca the race could not be won. *See* Costello Deposition, dkt. 290, at 150:11-16 (January 31, 2019) (Q: "Why did you not run for state assembly in 2013 when you were approached by Peter Barca?" A: "Again, I'll say there were several reasons.

One of them was clearly this feeling of why do this if I cannot – if this race cannot be won."); *id.* at 42:3-22 (Mr. Costello noting "I was outside doing recess duty, and Peter Barca, the minority leader, showed up at my door and said we want you to run for state rep in a special race. And I took a number of things into consideration, but one of them, and a very strong one, was I feel I could go out and bust my hump for six weeks . . . and there was very little hope of me winning . . . [j]ust by the map. And the [effect] that the map has on money you can bring to a race."). Defendants' counsel explored at depth the content of Mr. Costello's conversations with Mr. Barca. *See id.* at 41:20-42:22, 51:13-24, 150:11-153:5, 156:23-157:10. Mr. Barca served as the Wisconsin Assembly Democratic Leader from 2011 until mid-2017, during the time that the Plaintiffs allege their associational injuries have occurred, and, of course, he testified as a witness for the plaintiffs challenging Act 43 at the *Baldus v. Brennan* trial in 2012. Defendants' claim to be unaware that Mr. Barca may have information relevant to this case is not credible.

These are just a few examples: these and other Plaintiffs' depositions revealed extensive testimony about these four witnesses and their relevance to this case.[3] In other words, Defendants placed *themselves* on notice many months before Plaintiffs' courtesy disclosure supplementation

[3] *See* Switzenbaum Deposition, dkt. 291, at 23:5-19, 34:1-20 (January 15, 2019) (discussing being represented by Ms. Pasch and voting for her); Patel Deposition, dkt. 255-4, at 49:1-23, 105:5-108:12, 141:25-143:10 (January 16, 2019) (discussing how Act 43 affected Ms. Pasch's candidacy); Sundstrom Deposition, dkt. 292, at 118:7-120:12 (January 18, 2019) (discussing Ms. Sundstrom's reasons for contributing to Ms. Pasch's campaign); Lentini Deposition, dkt. 255-2, at 7:21-25, 29:3-32:9, 49:25-50:9, 52:9-19, 54:21-56:7, 81:13-25 (January 18, 2019) (discussing Ms. Lentini's support of Ms. Pasch and the effect of Act 43 on Ms. Pasch); Stevning-Roe Deposition, dkt. 293, at 21:1-16, 42:12-43:18, 74:2-19 (January 23, 2019) (discussing Ms. Stevning-Roe's support for Ms. Vruwink); Dieterich Deposition, dkt. 288, at 24:9-25:16, 31:14-32:2, 34:22-35:3, 44:2-5, 46:25-48:14 (April 9, 2019) (discussing Ms. Vruwink as Mr. Dieterich's representative before the redistricting); Anclam Deposition, dkt. 289, at 32:11-21, 81:5-16, 88:14-90:24, 119:9-13 (February 8, 2019) (discussing Mr. Anclam's support for Ms. Keyes); Costello Deposition, dkt. 290, at 41:20-42:25, 51:13-24, 150:11-153:3, 156:23-157:20 (January 31, 2019) (explaining Mr. Costello's conversations with Mr. Barca about not running for office in the wake of Act 43).

that Ms. Pasch, Ms. Vruwink, Ms. Keyes, and Mr. Barca could be relevant to the claims and defenses in this case, and Plaintiffs repeatedly disclosed in their written discovery responses and in their deposition testimony that these four individuals were relevant to this case. Defendants are now attempting to mischaracterize the history of this case by claiming that they had no idea that these individuals might have relevant information. But these contrivances do not hold up.

Plaintiffs' supplemental disclosures complied with the plain text of Rule 26(e) and the governing case law. Because the additional information had already "been made known to the other parties during the discovery process," Fed. R. Civ. P. 26(e)(1), the supplemental disclosures were no more than a litigation courtesy. By no means did Plaintiffs violate Rule 26 by optionally disclosing information already known to Defendants, and striking the disclosures would be entirely unwarranted.

II. Defendants' Request to Bar the Witnesses from Testifying at Trial Is Meritless.

Defendants' invitation for the Court to prevent the witnesses from testifying at trial should be rejected. Under Rule 37, a party who "fails to provide information or identify a witness *as required* by Rule 26(a) or (e)" may only use that information or witness at trial if the failure to comply with Rule 26 "was substantially justified or . . . harmless." Fed. R. Civ. P. 37(c) (emphasis added). By its terms, this rule only comes to bear when a *required* supplementation has not been made. As explained above, Plaintiffs were not required to supplement their disclosures for these four witnesses to testify at trial because their identities were disclosed during the course of discovery. There was no violation of Rule 26, so Defendants' invocation of Rule 37 is unfounded. Moreover, a supplementation—though not required—*was* provided, and sixty days prior to trial is more than adequate time for Defendants to conduct four depositions, if they wish to do so. Even if

Rule 37 applied here, Defendants' motion would still be without merit because Defendants suffer no cognizable harm from the presentation of testimony from these witnesses.

First, Defendants cannot be harmed by learning that individuals identified throughout the discovery process may testify at trial. Defendants contend that "discovery would have looked entirely different" and that "[t]he Assembly would not have sat idly by," Mot. at 7, had an earlier supplementation been provided. But pretrial witness disclosures are not due until June 14, and Defendants have long known that these four individuals possess relevant information. If the Assembly regrets that it "sat idly by" and did not prepare for the possibility that witnesses identified in discovery might actually testify at trial, then their quarrel is with themselves alone.

Second, Defendants' contention that "discovery would have looked entirely different" is contradicted by their own motion. Defendants contend that "evidence from these politicians could have been countered with evidence from others in closely matched races in other districts, or with Assembly candidates who significantly underperformed other Democrats running in Wisconsin." *Id.* Defendants cite an analysis of their own expert on the very issue, highlighting 19 districts won by U.S. Senator Tammy Baldwin but lost, or uncontested, by Democratic Assembly candidates. *Id.* at 7 n.3. Defendants also cite to election results from victorious Democrats they would have presented in response to testimony from Ms. Keyes. *Id.* at 11. It is not clear how Defendants have been harmed if they have already conducted the analysis they say they would have pursued. If Defendants think those election results help their case, they can present them at trial. And if Defendants thought their expert's analysis of other election contests was insufficiently robust and required more fact development, they had every opportunity to remedy that during discovery. That Defendants instead directed their attention primarily to Plaintiffs' social media posts was their own

strategic choice. But Defendants can hardly claim surprise that Plaintiffs would proffer testimony from some of the candidates they sought to elect to represent them.

Defendants have no basis for seeking the exclusion of these witnesses under Rule 37, and in any event, identify no cognizable harm from the presentation of their testimony at trial.

* * *

Defendants' motion is riddled with hyperbolic accusations of "sandbagging," "subterfuge," "misdirection," and a "May surprise." Mot. at 2, 7, 8. Defendants' claim to be caught unaware that witnesses *they asked about* during deposition, who were identified in interrogatory responses, and who were described as important during deposition testimony, possess relevant information and may testify falls flat.

Since intervention was granted, the Assembly has done its best to entirely stymie preparation for trial at nearly every turn. Just this Friday, in response to an inquiry from Plaintiffs' counsel to coordinate exhibit numbering and exchange of proposed stipulations, the Assembly's counsel responded: "The more we can push into July the better! Maybe we won't have to do any of it! Like the Vos deposition! Have a great weekend!!!" Gaber Decl., Ex. 7. Now, rather than put its time and energy into taking depositions of these four witnesses, the Assembly—once again—seeks to prevent, rather than promote, the presentation of evidence to this Court.

Defendants' motion is without merit and should be denied.

Dated: June 10, 2019.

Respectfully submitted,

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