IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS CENTRAL DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, et al., Plaintiffs, v. ASA HUTCHINSON, et al., Defendants.	Civil Case No. 4:19-cv-402-JM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE EVIDENCE AND INCORPORATED BRIEF

Plaintiffs, Christian Ministerial Alliance, Arkansas Community Institute, Marion Humphrey, and Kymara Hill Seals (collectively, "Plaintiffs"), by and through their attorneys, NAACP Legal Defense and Educational Fund, Shearman & Sterling LLP, Holwell Shuster & Goldberg LLP, and Mays, Byrd & Associates, PA, hereby oppose Defendants' Motion to Exclude Evidence for the reasons stated herein.

INTRODUCTION

Defendants' Motion to Exclude Evidence discusses only one specific exhibit: a letter from Judge Victor Hill discussing the redistricting of the Court of Appeals, which they argue should be excluded solely because Judge Hill testified at his deposition that he did not have a specific memory of writing it. As explained below, it would be improper to exclude that letter because there are multiple ways for Plaintiffs to authenticate the letter and elicit relevant testimony about it if it is offered into evidence. Otherwise, Defendants simply offer boilerplate objections to purportedly undisclosed exhibits—which exhibits, they do not say—irrelevant evidence, hearsay

testimony, and the like. These remaining portions of the motion are completely devoid of the specifics the Court would need to determine that any exhibit should be excluded before trial. And with respect to whatever unspecified exhibits "appear[] to" Defendants not to have been disclosed in discovery, Defendants will suffer no conceivable prejudice. Thus, Defendants' Motion to Exclude Evidence should be denied.

ANALYSIS

A. Judge Victor Hill's letter to the Court of Appeals Apportionment Commission should not be excluded.

Defendants wrongly seek to exclude a letter from Judge Victor Hill that expresses support for the creation of a majority Black district or sub-districts for the Court of Appeals and discusses discrimination against Black Arkansans and the need to elect judges who are sensitive to their experiences. *See* PTX 53 at 109-10 (AOC_0000109-10). In support of this request, Defendants argue that Judge Hill will be unable to authenticate his letter and selectively quote his deposition regarding his lack of memory concerning the letter.

Defendants fail to consider numerous ways Plaintiffs might succeed in establishing the authenticity of the letter and obtaining relevant testimony about it. To begin with, Judge Hill also stated during his deposition that the letter was on his letterhead and he had no reason to believe someone else drafted it. Hill Dep. at 74:1-11; 79:6-9; *see* Exhibit A. At trial, Plaintiffs will have the opportunity to ask Judge Hill further questions as to the authenticity of the letter, including about the letterhead, signature, date, fax number, subject matter, and surrounding circumstances. This additional testimony may establish a foundation to admit the letter. *See e.g., U.S. v. Turn*er, 718 F.3d 226, 233 (3d Cir. 2013) (holding court did not abuse its discretion in ruling that bank documents were adequately authenticated where documents had official appearance of bank records and bore insignia of foreign banks); *U.S. v. Maldonado-Rivera*, 922 F.2d 934, 957 (2d Cir.

1990) (holding that document's "appearance, contents, substance, timing, and provenance, together with other evidence" supported the authenticity of the document). Moreover, the Court will have the benefit of live testimony when determining whether to admit the letter into evidence.

Judge Hill's testimony that he did not recall the letter during his deposition is not a reason to exclude the document for lack of authenticity, particularly when it appears on his letterhead and appears to bear his signature. Courts frequently determine that a signed document has been authenticated even where the witness did not recall signing it. *See, e.g., Avtech Cap., LLC v. C & G Engines Corp.*, No. 219-CV-00541, 2021 WL 3774369, at *2 (D. Utah Aug. 25, 2021); *Comolli v. Huntington Learning Centers, Inc.*, 180 F. Supp. 3d 284, 290 (S.D.N.Y. 2016), *aff'd*, 683 F. App'x 27 (2d Cir. 2017); *Feeley v. SunTrust Bank*, No. CIV.A. 12-4522, 2013 WL 638881, at *4 (E.D. Pa. Feb. 20, 2013); *Torjagbo v. United States*, 285 Fed. App'x 615, 619 (11th Cir. 2008).

Moreover, though it would be an inefficient use of time and resources, Plaintiffs could call a witness from the Administrative Office of the Courts (AOC) to authenticate the letter. The AOC produced the letter as part of Appendix 4 to the 2003 Final Draft Report to the Court of Appeals Apportionment Commission, which Plaintiffs designated in their Pretrial Disclosures as PTX 53. *See* Plaintiffs' Pretrial Disclosures, Exhibit B – Exhibit List (ECF No. 122-2) at 4 ("Plaintiffs' Exhibit List"). The Report itself states that "All comments received from the public during this process are attached to the report as Appendix 4." PTX 53 at 10 (AOC_0000011).

Further, Defendants' argument challenging the reliability of the letter goes to its weight rather than its admissibility. *See, e.g., Jones v. Nat'l Am. Univ.,* 608 F.3d 1039, 1045 (8th Cir. 2010) (quoting 5 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 901.01 (J. McLaughlin ed., 2d ed. 2008)); *U.S. v. Tin Yat Chin*, 371 F.3d 31, 35–38 (2d Cir. 2004). Again, there is no reason to prejudge these issues until both sides fully develop the record at trial.

Finally, contrary to Defendants' argument, testimony by Judge Hill about the letter or his opinions represented therein would not be speculative. Judge Hill testified at his deposition that "[t]hose are my sentiments" expressed within the letter. Hill Dep. at 75:2-5. Therefore, Judge Hill would be able to testify about his opinions contained in the letter. Any argument Defendants have as to Judge Hill's memory of his expressed sentiments goes to the weight, not the admissibility, of such testimony.

For these reasons, Defendants' motion to exclude Judge Hill's letter and related testimony should be denied.

B. There is no basis to exclude any of Plaintiffs' evidence as untimely disclosed.

Defendants next contend that "it appears" to them that "a number" of unidentified exhibits on Plaintiffs' Exhibit List were identified for the first time in Plaintiffs' December 1, 2021, pretrial disclosures. Nowhere does their motion identify any particular exhibit or exhibits that they contend were not disclosed in discovery, nor do they explain why exclusion would be an appropriate remedy for evidence disclosed over a month and half before trial.

Defendants cite generally to Federal Rules of Civil Procedure 26 and 37 as support for excluding undisclosed evidence. Rules 26(a) and (e) prescribe a staged process for disclosure of evidence and witnesses through initial discovery, pretrial disclosures, and supplemental disclosures as circumstances may warrant. *See* Fed. R. Civ. P. 26(a), (e). Rule 37(c)(1) authorizes exclusion from trial as a possible sanction for failing to disclose evidence in some circumstances, but not if a nondisclosure "was substantially justified or is harmless." Fed. R. Civ. 37(c)(1).

Defendants' request should be denied for two independent reasons. *First*, Defendants' motion must be denied because it fails to provide even the most basic information this Court would need to perform a Rule 37 analysis. Defendants fail to specify a single specific exhibit on Plaintiffs' Exhibit List that was not disclosed to them previously. Nor do they even attempt to

explain why any late disclosures were unjustified or prejudicial. Defendants' total lack of specificity leaves Plaintiffs unable to address (among other fundamental issues) whether Defendants are mistaken about documents not having been disclosed sooner and whether any perceived delay was permissible or otherwise "substantially justified" under Rule 37.

Moreover, the Eighth Circuit has held that the appropriateness of excluding evidence turns on context-specific considerations such as: "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness." *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096-97 (8th Cir. 2012) (internal quotation marks omitted); *see also, e.g., Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008) (including "the reason for noncompliance" and "the importance of the information or testimony" in a similar list of "particular circumstances" that should be considered). At a minimum, the Court cannot possibly address any of these issues without more specificity from Defendants. And because this will be a bench trial, there is no reason why these determinations cannot be made on a case-by-case basis with a more developed record at trial.

Second, and in any event, Defendants' motion must be denied for the independent reason that Defendants cannot possibly have suffered prejudice from the claimed late disclosures. Adhering to Rule 26(a)(3) and this Court's scheduling order (ECF No. 97), Plaintiffs disclosed a detailed Exhibit List identifying all of their anticipated trial exhibits on December 1, 2021. *See* Plaintiffs' Exhibit List (ECF No. 122-2). That Exhibit List included detailed descriptions of each potential exhibit and information about where each potential exhibit could be found. In addition, Plaintiffs provided individual copies of each potential trial exhibit promptly when Defendants requested they do so at the January 3, 2022 pretrial conference. *See* Email from Ms. Mossman to

Ms. Merritt dated 10:04 a.m. 1/5/2022. Finally, the January 18, 2022, trial date has now been continued, at Defendants' request, until April 25, 2022. *See* Joint Report Pursuant to Administrative Order Nineteen (ECF No. 138) at ¶¶ 10-18; Order Continuing Bench Trial (ECF No. 141). Even without that continuance, Defendants had more than a month and a half to become acquainted with any supposedly undisclosed evidence and confer with Plaintiffs about any concerns.[1] And now that their requested continuance has been granted, Defendants will have an extraordinarily long time—nearly five months, if the trial date does not change—to carefully review Plaintiffs' potential trial exhibits. Under these circumstances, it is inconceivable that Defendants will suffer prejudice from the introduction at trial of *any* potential evidence that Plaintiffs disclosed in their December 1, 2021 Pretrial Disclosures. Excluding any such evidence on the basis of untimely disclosure would therefore necessarily contravene Rule 37(c)(1). *See Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir. 2007) ("[U]nder Federal Rule of Civil Procedure 37(c)(1), evidence not disclosed under Rule 26(a) is admissible if harmless."); *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006).

C. None of Defendants' remaining generic objections justify pretrial exclusion of any evidence.

[1] The lack of prejudice to Defendants is underscored by Defendants' own positions concerning exhibits. Throughout December, Plaintiffs repeatedly sought to confer with Defendants concerning their failure to provide an itemized exhibit list and to discuss any potential objections they might have to the exhibits Plaintiffs timely disclosed. *See* Email from Ms. Mossman to Ms. Merritt dated 2:44 p.m. 12/6/2021; Email from Ms. Mossman to Ms. Merritt dated 3:29 p.m. 12/9/2021; Email from Ms. Mossman to Ms. Merritt dated 12:54 p.m. 12/16/2021. Defendants flatly refused those requests, taking the position that their own "[e]xhibits/exhibit lists" were "not due until the day of trial" and that any objections to exhibits would therefore have to be identified, raised, and resolved in the midst of trial. Email from Ms. Merritt to Ms. Mossman dated 2:27 p.m. 12/10/2021; *see also* Email from Ms. Merritt to Ms. Mossman dated 6:02 a.m. 12/17/2021. Having taken that extraordinary position, Defendants cannot now argue with any credibility that they suffered any surprise or prejudice when they had advance notice of Plaintiffs' potential exhibits weeks and now months before trial.

Finally, Defendants include cursory arguments that irrelevant evidence, inadmissible hearsay evidence, and testimony that is not based on a witness's personal knowledge should be excluded from trial. Again, they do not identify any particular evidence that they expect will violate these general principles, despite having had detailed Pretrial Disclosures from Plaintiffs for over a month. Defendants' motion to exclude evidence on these grounds must be denied because Defendants have again failed to include even the most rudimentary details that would be necessary for Plaintiffs to meaningfully respond and for the Court to determine that any evidence should be excluded. And again, Defendants identify no reason why they cannot wait to raise specific objections to specific evidence at trial—nor is any reason apparent, especially given that this is a bench trial and the Court is already well acquainted with the record.[2]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Exclude Evidence be denied.

Dated: January 13, 2022

Respectfully submitted,

[2] Indeed, a number of Defendants' proposed exhibits are newspaper articles which are inadmissible hearsay. Plaintiffs intend to object to those exhibits in accordance with the Court's scheduling order.

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Exhibit A

Q Are you familiar with this document?

A No.

Q At the top of the page it says Victor L. Hill, Circuit Judge. Do you have any reason to believe that was not you?

A No.

Q So is it your understanding that this is your letterhead?

A Yes.

Q Is it your belief that you drafted this letter?

A Yes.

Q That would be October 2, 2002. Do you have any recollection of what would have prompted you to write this letter?

A Apparently I went to a meeting or something. I don't recall.

Q Well, let's go through some portions of the document to see if we can refresh your recollection. If we look first to the first paragraph around the third line down, I can have read it here, and please correct me if I misstate anything. "It seems to me now, as it did then, that the core issue is to what extent will some provision be made in the development of these districts to ensure that Black Arkansas will have the opportunity to elect to the Court people who are sensitive to their unique

experience."

Do you have any recollection of writing a letter or having sentiments along those lines?

A Those are my sentiments, but I don't remember the letter at all.

Q From your understanding or what would be reasonable based off your belief sets and sentiments, here you wrote people who are sensitive to their unique experience in that last clause. Do you know what you meant by Black Arkansans needing the opportunity to elect to the Court people who are "sensitive to their unique experience"?

MR. MOSLEY: Object to form. Lack of foundation.

A Yes.

Q (BY MS. WENGER) What did you mean by people who are sensitive to their unique experience?

A Who are aware that -- who are the products of slavery and its bitter aftermath, including Jim Crow laws, including lynching, including discrimination in every aspect of life since then.

Q Do you believe that Black Arkansans have had an opportunity to elect people who are sensitive to those unique experiences?

A No.

A The mid-'80s, early '90s.

Q Did you ever get a response to this letter from Mr. Ledbetter?

MR. MOSLEY: Object to form.

A I don't recall.

Q (BY MS. WENGER) Do you have any reason to believe that this was not a letter submitted by you to Mr. Ledbetter?

A It's my letter.

MS. WENGER: All right, I think that's all for me for now. I might just need a two-minute break to check my notes, but Mike, do you have any other questions?

MR. MOSLEY: I certainly do, Tori. You can check your notes.

MS. WENGER: All right, just give me three minutes, I'll pop back on screen.

MR. MOSLEY: Sure.

(BREAK FROM 11:01 TO 11:03)

MS. WENGER: I've got no further questions at this point, Judge Hill, but thank you so much for being here with us.

Mike, if you'd like to ask your follow-ups, please go ahead.

REDIRECT EXAMINATION

BY MR. MOSLEY: