UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMERICAN COUNCIL OF THE BLIND OF INDIANA, INDIANA PROTECTION AND ADVOCACY SERVICES COMMISSION, KRISTIN FLESCHNER, RITA KERSH, and WANDA TACKETT, Plaintiffs, v. INDIANA ELECTION COMMISSION; THE INDIVIDUAL MEMBERS of the INDIANA ELECTION COMMISSION, in their official capacities; INDIANA SECRETARY OF STATE, in her official capacity, THE INDIANA ELECTION DIVISION; and THE CO-DIRECTORS OF THE INDIANA ELECTION DIVISION, in their official capacities. Defendants.	Case No. 1:20-cv-3118-JMS-MJD

PLAINTIFFS' SURREPLY TO DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Southern District of Indiana Local Rule 56-1(d) provides:

> Surreply. A party opposing a summary judgment motion may file a surreply brief only if the movant cites new evidence in the reply or objects to the admissibility of the evidence cited in the response. The surreply must be filed within 7 days after the movant serves the reply and must be limited to the new evidence and objections.

Defendants' Reply in Support of Cross-Motion for Summary Judgment (Filing No. 150) relies on new evidence not cited in its original summary judgment filing (Filing No. 141) and objects to evidence relied on in Plaintiffs' combined summary judgment response/reply (Filing

No. 145). Specifically, Defendants' reply includes a new declaration from Bradley J. King and objects to Plaintiffs' declaration from Dr. Ted Selker. Therefore, Local Rule 56-1(d) permits Plaintiffs to file this surreply to respond to Defendants' new evidence and evidentiary objections.

ARGUMENT

A. Response to Declaration of J. Bradley King

Defendants' Reply relies on a new declaration from J. Bradley King. Filing No. 150-1. In this declaration, King discusses recent efforts by the Indiana Election Division and Secretary of State to explore an RAVBM program from Civix called eBallot. Filing No. 150-1 at 1-3 (King Dec. at ¶¶ 2-6). Defendants rely on this evidence to argue that they "continue to work toward implementing SEA 398" which, once fully implemented, "will provide print-disabled voters yet another option to vote privately and independently from home," and which they contend will defeat Plaintiffs' claims under the ADA and Section 504. Filing No. 150 at 8, 11-13.

Mr. King's testimony does not defeat Plaintiffs' claims. First, his testimony is nothing more than a general statement of intent to comply with the ADA/Section 504 in the future. "General assurances and good-faith intentions neither meet the [ADA] nor a patient's expectations. … [T]hey are simply insufficient guarantors in light of the hardship daily inflicted upon patients [by discriminatory practices]." *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 158 (3d Cir. 2005). *See also Crabtree v. Goetz*, No. CIV.A. 3:08-939, 2008 WL 5330506, at *29 (M.D. Tenn. Dec. 19, 2008).

Second, the plan that King discusses is too vague to guarantee that the eBallot proposal would satisfy the ADA/Section 504. King testifies that Defendants have received a proposal, but not that they have approved it or reached an agreement with Civix to implement it. Filing No. 150-1 at 2-3 (King Dec. at ¶ 6) ("[T]he Election Division has not been able to reach any sort of

formal agreement regarding this proposal."). King discusses the proposal as a pilot program for five counties but does not identify which counties would be included. Filing No. 150-1 at 1-2 (King Dec. at ¶ 3). Further, King states that statewide rollout would occur "later." *Id.* A proposal, which has not received required approval, that may only cover five unspecified counties, and which might be implemented statewide at an unspecified date, does not satisfy the ADA/Section 504. Many other questions about the accessibility of the proposed RAVBM remain. Primary among those are how accessibility will be tested, how users will access the program and return their ballots and other required documents (and thus, whether voters with print disabilities can use the system privately and independently), and whom it will be available to and when. Without answers to those questions, at minimum, Plaintiffs and the Court cannot determine whether this proposal satisfies the requirements of the ADA/Section 504.

Third, even the details that are provided show that the plan is insufficient to satisfy the ADA/Section 504. A pilot program that will be utilized in five undefined counties does not clearly—and beyond dispute—provide Plaintiffs with needed accommodations. There is no guarantee that the pilot will be available in the counties where the named Plaintiffs reside, nor that it will be available to the remaining members of ACBI or constituents of IPAS. Additionally, Mike Brown, the operations manager who oversees the eBallot program for Civix, testified in an April 2022 deposition that eBallot will not be WCAG compliant for the November 2022 general election. Filing No. 144-2 at 2, 9 (Deposition of Mike Brown on behalf of Civix at 8:10-23, 29:8-16, 30:3-21). King's declaration does not dispute Brown's testimony on this point. Needless to say, an inaccessible pilot program of five undefined counties will not comply with the ADA/Section 504.

King's declaration does, however, highlight two important facts. First, Defendants do not appear to take the position that an RAVBM that allows return of completed ballots by email is a fundamental alteration of Indiana's absentee voting program. Filing No. 150-1 at 2-3 (King Dec. ¶ 6). *See also* Filing No. 150 at 19 ("Defendants, however, do not take the position that use of an RAVBM tool with return via mail, email, or fax would necessarily constitute a fundamental alteration of Indiana's absentee-voting program."). Second, the fact that Defendants are investigating and planning to implement a new RAVBM program at this late date—the details of which have not been fully worked out—undercuts their argument that it is too late for the Court to order them to implement an RAVBM. The Supreme Court has repeatedly held that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," because otherwise, the defendant would be "free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708, 145 L. Ed. 2d 610 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10, 102 S.Ct. 1070(1982)). *See also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (patient with mental disability's challenge to confinement in segregated institution not mooted by later transfer to community-based program given the possibility of subsequent transfer back to segregated institution). The foregoing continues to support Plaintiffs' request for a permanent, or alternatively preliminary, injunction requiring Defendants to implement a statewide RAVBM system, which can include an option for email return of completed ballots. *See* Filing No. 145 at 24-25 and n.10.

B. Response to Objection to Declaration of Dr. Ted Selker

Defendants dedicate approximately five pages of their Reply to objecting to the Declaration of Dr. Ted Selker (Filing No. 144-3). Filing No. 150 at 19-24. Defendants contend

that Dr. Selker's testimony is inadmissible because he was not previously disclosed as an expert. *Id.* Contrary to Defendants' contention, Dr. Selker's testimony can be considered on the parties' cross-motions for summary judgment.

It is true that Dr. Selker offers expert testimony, and that Plaintiffs did not previously include Dr. Selker in their expert disclosures. However, that does not render his declaration inadmissible. Dr. Selker is offered as a *rebuttal* expert to Defendants' non-disclosed expert testimony. Specifically, Defendants rely on expert evidence from MIT and the federal government but did not disclose either source as an expert prior to their summary judgment filing. Filing No. 141 at 14-15; Filing No. 140-2. Because Defendants did not timely disclose their experts, and relied on them only in their summary judgment briefing, Plaintiffs have not failed to properly disclose Dr. Selker as an expert. Alternatively, any failure to previously disclose Dr. Selker as an expert is justified or harmless.

In support of their cross-motion for summary judgment and response to Plaintiffs' motion for summary judgment, Defendants cite to a report from individuals associated with MIT (Michael A. Specter & J. Alex Halderman, *Security Analysis of the Democracy Live Online Voting System* (June 7, 2020), https://internetpolicy.mit.edu/wp-content/uploads/2020/06/OmniBallot.pdf) and to the federal government (Filing No. 140-2). Filing No. 141 at 14-15. Both of these sources provide expert opinions concerning the cybersecurity of RAVBM systems, which Defendants used to support their core arguments that the equities, and the *Purcell* principle, weigh against the injunctive relief that Plaintiffs desire, and that such relief is a fundamental alteration to Indiana's voting system. *Id.* The reports clearly contain conclusions based on "scientific, technical, or other specialized knowledge" that may "help the trier of fact to understand the evidence or to determine a fact in issue," and so constitute expert opinions. Fed.

R. Ev. 702. In order to rely on this evidence, Defendants were required to submit expert disclosures. Fed. R. Civ. P. 26(a)(2); *Tribble v. Evangelides*, 670 F.3d 753, 759-60 (7th Cir. 2012). Defendants, however, have not done so. Accordingly, Defendants' complaint that Plaintiffs' failure to disclose Dr. Selker's opinion deprived them of the opportunity to retain their own computer science expert, Filing No. 150 at 22, rings hollow.

The fact that Defendants brought these opinions in through publications, as opposed to an expert witness, does not excuse the failure to disclose. Defendants cannot bring in undisclosed expert testimony through the backdoor. That would defeat the purpose of expert disclosures. As the Seventh Circuit has explained, expert disclosures are required to give the opposing party the "opportunity to disqualify the expert, retain rebuttal experts, or hold depositions for an expert not required to provide a report." *Tribble*, 670 F.3d at 759-60 (citing *Musser v. Gentiva Health Serv's*, 356 F.3d 751, 758 (7th Cir. 2004). Defendants' failure to serve expert disclosures earlier deprived Plaintiffs of these opportunities, including making earlier rebuttal expert disclosures.

Because Defendants did not previously serve expert disclosures, Plaintiffs' deadline to make rebuttal expert disclosures has not been triggered. Pursuant to Rule 26(a)(2)(D)(ii), Plaintiffs' deadline to disclose rebuttal experts is 30 days after Defendants serve their expert disclosure.[1] Because Defendants rely on expert opinions but have not provided the required 26(a)(2) disclosure, that 30-day clock has not started.

Dr. Selker's testimony is a response to the security concerns raised by Defendants' expert opinions. Therefore, he is properly considered a rebuttal expert. *See Mendez v. City of Chicago*, No. 18-cv-5560, 2021 WL 3487328, at *2 (N.D. Ill. Aug. 9, 2021) ("For a rebuttal to be admissible, it must be intended solely to contradict or rebut evidence on the same subject matter

[1] The Court did not set a deadline for serving rebuttal expert disclosures, so Rule 26(a)(2)(D)(ii) controls.

identified in the other party's expert reports.") (internal quotation omitted). Because the deadline for his disclosure had not passed at the time of Plaintiffs' filing, Defendants' objection to Dr. Selker's declaration fails.

However, even assuming *arguendo* that Plaintiffs needed to serve a disclosure for Dr. Selker before relying on his testimony, Defendants' motion to strike should still be denied. Exclusion of undisclosed expert testimony is not required when the failure to disclose is either justified or harmless. Fed. R. Civ. P. 37(c)(1); *Musser*, 356 F.3d at 758. Even though Dr. Selker's testimony would be allowed if the failure to disclose were *either* justified or harmless, both are satisfied here.

Plaintiffs' reliance on Dr. Selker's testimony is justified by Defendants' reliance on non-disclosed expert opinion. Defendants attempted to get expert testimony in through the backdoor by relying on publications rather than expert witnesses. Because Defendants rely on the cited publications solely for the purpose of introducing expert opinion, they should have been disclosed earlier to give Plaintiffs the opportunity to disclose a rebuttal expert. Rather than object to Defendants' non-disclosed expert opinion in their combined response/reply, Plaintiffs submitted rebuttal expert testimony. Defendants' failure to properly disclose the expert opinion on which they relied justifies Plaintiffs' reliance on rebuttal expert testimony that was not previously disclosed. *Cf. Perry v. Staton*, 2021 WL 269239, *2 (S.D. Ind. Jan. 27, 2021) (Magnus-Stinson, J.) (denying motion to strike defendants' cross-summary judgment exhibit where defendants did not learn plaintiff intended to rely on exhibit's subject matter until plaintiff's summary judgment motion).

The non-disclosure of Dr. Selker's opinion is also harmless. Defendants opened the door to Dr. Selker's testimony by relying on undisclosed expert opinion on the security issues

concerning RAVBM systems with electronic return. Defendants cannot claim surprise, and cannot be harmed by testimony for which they opened the door. "[W]here the proponent's inadmissible evidence advances his case or undercuts that of his adversary … then in fairness the adversary should be allowed to try to neutralize the effect of this evidence or cure any resulting prejudice by introducing otherwise-inadmissible rebuttal evidence [.]" *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993) (quoting 1 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 11, at 49 (1977)) (cleaned up). Neither can Defendants show that an earlier disclosure of Dr. Selker's testimony would have enabled them to "more efficiently resist" Plaintiffs' motion for summary judgment, *see Jenkins v. Med. Lab'ys of E. Iowa*, 880 F. Supp. 2d 946, 956 (N.D. Iowa 2012), since they already cited the cybersecurity evidence they deemed necessary to support their cross-motion. Last, because Defendants did not serve disclosures for their expert opinions, including the information required by Fed. R. Civ. P. 26(a)(2), the clock for Plaintiffs' rebuttal disclosure did not start. Because there is no late disclosure, there is no harm in Plaintiffs' reliance on Dr. Selker's testimony.

What's good for the goose is good for the gander. Defendants relied on expert testimony without serving expert disclosures. Plaintiffs are therefore owed the opportunity to rebut those expert opinions even though they did not previously disclose Dr. Selker as an expert witness. Defendants' objection to Dr. Selker's declaration should therefore be overruled.

CONCLUSION

For these reasons, and for the reasons set forth in Plaintiffs' previous briefing, the Court should grant Plaintiffs' motion for summary judgment and entry of a permanent and/or preliminary injunction.

Respectfully submitted,

/s/ Jelena Kolic
Jelena Kolic*
jkolic@dralegal.org
DISABILITY RIGHTS ADVOCATES
10 South LaSalle Street, 18th Floor
Chicago, IL 60613

Sam Adams (No. 28437-49)
Thomas E. Crishon (No. 28513-49)
samadams@indianadisabilityrights.org
tcrishon@indianadisabilityrights.org
INDIANA DISABILITY RIGHTS
4755 Kingsway Drive, Suite 100
Indianapolis, Indiana 46205
Tel: (317) 722-5555
Fax: (317) 722-5564

Stuart Seaborn*
Rosa Lee Bichell*
sseaborn@dralegal.org
rbichell@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, 4th Floor
Berkeley, CA 94704
Phone: (510) 665-8644
Fax: (510) 665-8511

Attorneys for Plaintiffs

*Admitted *pro hac vice*