IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

TOMMY RAY MAYS, II, *et al.*,	:	
	:	
Petitioners,	:	Case No. 2:18-cv-1376
	:	
v.	:	JUDGE WATSON
	:	
FRANK LAROSE, in his official capacity as Secretary of State of Ohio,	:	MAGISTRATE JUDGE VASCURA
	:	
	:	
Defendant.	:	

SECRETARY LAROSE'S REPLY IN SUPPORT OF HIS MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DR. MARK SALLING, PH.D.

I. INTRODUCTION

At trial, an expert witness is useful only if his opinion is an expert one. That is, his opinion must be his *own*, derived from his *own* specialized knowledge and experience and which is founded on data that he can reasonably attest on his *own* is accurate and probative. In other words, is an expert witness useful to the fact finder if he is fed manipulated data from unknown origins by a party's litigation counsel, only spot checks the data himself, and then spits out conclusions about that data that he is only confident enough to say are *relatively safe*? Or, in such a case, would the expert merely be a quintessential expert for hire – just acting as a mouthpiece for the party that employed him – and therefore would lack any indicia of reliability? Dr. Salling is just that. He is the Plaintiffs' expert for hire, having used very little of his independent and specialized expertise in data gathering and analysis in drafting his conclusions, and this Court should therefore disregard his testimony as unreliable and irrelevant.

This Court should also give no weight to the four declarations the Plaintiffs just recently offered in response to the Secretary's Motion in Limine to Exclude Dr. Salling's testimony (Doc. 53). Plaintiffs make a last minute attempt to demystify and legitimize the data included in Dr. Salling's reports by offering these four declarants whom they now identify, for the first time, as having played a significant role in the manipulation of that data. (Docs. 66-1 – 66.4). This Court should give no weight to these declarations because Plaintiffs failed to disclose them in violation of Fed. R. Civ. P. 26(e), and their failure is neither substantially justified nor harmless under Fed. R. Civ. P. 37(c).

Even if the Court chooses to weigh the declarations, they add no reliability to Dr. Salling's testimony for two reasons. First, there is no evidence that Dr. Salling relied on this information in drafting his Incarcerated Voter Report or that he analyzed the appropriateness of this newly disclosed data gathering and further data manipulation using his specialize knowledge and expertise. Indeed, throughout the entire process, Plaintiffs kept Dr. Salling in the dark about the origins of the data and how it was being manipulated. Second, and finally, these declarations only serve to further elucidate the torturous and suspiciously circuitous route the Plaintiffs' data took before landing at Dr. Salling's doorstep. For all of these reasons, Dr. Salling's testimony and the four declarations should be excluded from trial.

II. LEGAL ANALYSIS

A. Plaintiffs' Four New Declarations Deserve No Weight.

In an apparent eleventh hour attempt to concoct a legitimate pedigree for their data, Plaintiffs offer the following declarations of four individuals who handled and manipulated the data sets used in Dr. Salling's Incarcerated Voter Report: (1) Plaintiffs' Counsel Jonathan Diaz received the 13 county booking data from an organization called "All Voting is Local" and gave

the data to his employee, Moshe Pasternak to "combine" into a spreadsheet and then he sent the "combined" spreadsheet back to "All Voting is Local"[1] (Doc. 66-1); (2) Moshe Pasternak "combined" and "standardized" the 13 county booking data into a spreadsheet (Doc. 66-4); (3) Christopher Brill, a Senior Data Analyst for TargetSmart Communications LLC apparently ran Ohio voter data through the "Coding Accuracy Support System (CASS) software" claiming that it makes "matching" easier and he allegedly incorporated Ohio's data into a "National Voter Registration File" (Doc. 66-2); (4) Justin Burchard, Chief Technology Officer for The Movement Cooperative (TMC) claims that he took a data set purporting to be the 13 county booking data set from All Voting is Local and "matched" it using a "proprietary algorithm" with TargetSmart's "National Voter Registration File" to come up with the "match score" (Doc. 66-3). The Secretary had absolutely no knowledge of the four declarants and the information contained in their declarations until August 16, 2019, when the Plaintiffs attached them to their response to the Secretary's Motion to Exclude Dr. Salling's Expert Testimony.

1. Plaintiffs' failure to disclose the four declarants and the information contained in their declarations violated Fed. R. Civ. P. 26.

Fed. R. Civ. P. 26(a)(1)(A)(i) and (ii) states:

> (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

[1] The Secretary primarily attacks the admissibility of the four declarations as clearly violative of Fed. R. Civ. P. 26 and 37 and the admissibility of Dr. Salling's expert testimony as unreliable under Fed. R. Evid. 702. Alternatively, however, it appears that Attorney Diaz, and perhaps other lawyers for Plaintiffs have played significant, non-legal roles in developing Dr. Salling's expert testimony. To the extent Attorney Diaz and other lawyers may possess discoverable information and may be called as witnesses in this matter, their continued work as attorneys of record could present conflicts of interest moving forward. If the Court does give weight to these declarations, these individuals could be called as fact witnesses. *See* Ohio R. Prof. Con. 3.8.

> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

As to expert testimony, Fed. R. Civ. P. 26(a)(2)(B)(i) and (ii) requires the disclosure of an expert witness' written report, which must include, among other items, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Finally, Fed. R. Civ. P. 26(e)(1) and (2) require parties to timely supplement all disclosures made under that rule. Rule 26(e)(1) states, "A party who has made a disclosure under Rule 26(a)…must supplement or correct its disclosure or response: (A) 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 make known to the other parties during the discovery process or in writing; or (B) as ordered by the court." Finally, Fed. R. Civ. P. 26(e)(2) specifically provides that, "For an expert whose report must be disclosed under Rule 26(a)(2)(b), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due."

Dr. Salling's expert report including all of his opinions, the reasons for his opinions, and the facts and data considered by Dr. Salling was due on April 12, 2019. (Doc. 28,

PAGEID # 235). The Secretary received Dr. Salling's report on or around that time and it contained no mention of the four declarants, their roles or the information that they provided. On May 16, 2019, the Secretary took the deposition of Dr. Salling and demanded he produce "all materials, reports, or documents" that he "has reviewed, analyzed, or relied upon," and "all materials or documents that contain facts or data (he) considered in forming his opinions in this case" and "all material or documents that identify assumptions on which (he) relied informing his opinions." (Doc. 50-1, PAGEID # 512-513). The Secretary's demand specifically included "documents or materials provided by *any party or attorney* affiliated with this case." (Id. emphasis added). Dr. Salling did not disclose the four declarants, their roles or the information that they provided at the time of his deposition.

Dr. Salling was unable to answer the Secretary's questions about the data at his deposition under oath. The Secretary made many attempts to extract important information from Dr. Salling regarding the content and origins of the data that he allegedly used in his reports. Time and again, Dr. Salling testified inaccurately or simply did not know the answers to the Secretary's questions. For example, Dr. Salling testified that the booking spreadsheet came from "The Movement something, I believe." (Doc. 50-1 at 59); Dr. Salling didn't know how the 13 county booking data was obtained except through a public records request (Id. at 96-97); he didn't know much of the content of the booking data spreadsheet (Id. at 108); and, Dr. Salling testified that "The TMC folks" developed the matching algorithm but didn't know how it worked. (Id. at 112-113). At no time did Dr. Salling or Plaintiffs' counsel mention the four declarants or their roles in gathering and manipulating the data in his expert report.

Plaintiffs offer the four declarations as support for Dr. Salling's expert report. As such, Plaintiffs should have disclosed these actors initially with Dr. Salling's expert report on April 12, 2019 pursuant to Rule 26(a)(2)(B) and this Court's Preliminary Pretrial Order (Doc. 28). Plaintiffs again were obligated to disclose these actors and their roles upon the Secretary's demand at Dr. Salling's May 16, 2019 deposition. Plaintiffs failed to make those required disclosures too. Instead, Plaintiffs allowed Dr. Salling's deposition to proceed, knowing that they had not provided all of the demanded information. Finally, and perhaps most troubling of all, Plaintiffs' counsel failed to hand over these declarants in a timely manner either at Dr. Salling's deposition or shortly thereafter, which was specifically required under Rule 26(e)(2). Plaintiffs failed to do so even after watching Dr. Salling provide inaccurate, incomplete testimony under oath due in large part to their failure to disclose the information. Instead, Plaintiffs knowingly permitted Dr. Salling to testify inaccurately under oath and never corrected or supplemented their expert disclosures to the Secretary or upon Dr. Salling's deposition as required by Rule 26(e)(1)(A).

2. Fed. R. Civ. P. 37 also supports exclusion of the four declarations.

Fed. R. Civ. P. P 37(c)(1) requires that any party who fails to make required disclosures shall not, unless the error was substantially justified or harmless, use that information or witness to supply evidence on a motion, hearing, or at a trial. Fed. R. Civ. P. P. 37(c)(1) "is not merely a technical procedural rule. It is enforced for good reasons, among them that notice of possible witnesses is consistent with full and fair disclosure, and disclosure allows opposing parties the opportunity, or at least the option, to conduct its own deposition or other investigation of the potential witness's statements." *Quintanilla v. AK Tube LLC.,* 477 F.Supp.2d 828, 836 (N.D. Ohio 2007). Exclusion of undisclosed evidence "is automatic and mandatory under Rule

37(c)(1)" absent a showing that the non-disclosure was harmless or substantially justified. *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., P.C.,* 388 F.3d 976, 983 (6th Cir. 2003).

Sixth Circuit courts have excluded witnesses in cases where a party has failed to disclose them in accordance with the rules and the failure was neither substantially justified nor harmless. *See e.g., Sommer v. Davis,* 317 F.3d 686, 692 (6th Cir. 2003) (affirming lower court's decision to exclude expert testimony where failure to disclose expert in a timely manner was not an honest mistake). Courts also disallow the use of declarations where a party has failed to timely disclose the declaration. *See Gipson v. Vought Aircraft Indus. Inc.,* 387 Fed.Appx 548, 554 (6th Cir. 2010) (striking affidavit where evidence existed months before the close of discovery but was not submitted until the summary judgment stage and failure to disclose was neither substantially justified nor harmless); *Murray v. Ohio Dep't of Corr.,* 2019 U.S. Dist. LEXIS 20244 (S.D. Ohio, 2019) (affidavits excluded for failure to disclose); *Nava-Perez v. Jefferson Cty. Stone Co.,* 2012 U.S. Dist. LEXIS 132165, *11-12 (W.D. Ky. 2012) (same); *Johnson v. UPS,* 236 F.R.D. 376, 377-78 (E.D. Tenn. 2006) (granting party's motion to exclude undisclosed evidence and finding late disclosure not harmless).

Finally, parties who fail to timely supplement disclosures also face exclusion of their proffered evidence as a sanction under Fed. R. Civ. P. 37. *Hoffman v. Caterpiller*, 368 F.3d 709, 714 (7th Cir. 2004) (expert testimony excluded for failure to supplement disclosure with a videotape relied upon by the expert). *See also Abrams v. Mendsen,* 218 F.R.D. 539 (E.D. Mich. 2003) (failure to supplement expert's deposition testimony with equations that were used in computer program that expert used for his opinion excluded from trial).

Without a doubt, Plaintiffs failed to make the required disclosures. Thus, the question for this Court is whether the error was substantially justified or harmless. *Sommer,* 317

F.3d at 692. *See also Roberts v. Galen of Va., Inc.,* 325 F.3d 776, 782 (6th Cir. 2003) (Rule 37(c)(1) requires absolute compliance with Rule 26(a)). In order for the error to be harmless, it needs to involve an honest mistake coupled with sufficient knowledge on the part of the opposing party. *Sommer* at 692. The burden is on the potentially sanctioned party to prove harmlessness. *Roberts, supra.* Plaintiffs meet neither of these requirements. Prior to the Plaintiffs filing their response to the Secretary's Motion in Limine to Exclude Dr. Salling's Testimony on August 16, 2019, the Secretary had no knowledge of these declarants and had no opportunity to cross-examine them during discovery. Additionally, the Secretary's search for the information was open and obvious. The Secretary repeatedly asked for the information on numerous occasions both in writing and from Dr. Salling at his deposition. Despite these repeated requests, Plaintiffs sat on the information until the last minute – when they believed it most benefited them. Considering these repeated failures to disclose this information at every step along the way in discovery, even when faced with the Secretary's repeated questions regarding the origins of the data and Dr. Salling's inaccurate and incomplete testimony, Plaintiffs cannot reasonably claim that it was just an honest mistake. Plaintiffs' deliberate refusal to disclose this information was not substantially justified or harmless. Thus, the declarations should be excluded.

B. Plaintiffs Still Cannot Prove That Dr. Salling's Expert Testimony is Reliable.

In their response, Plaintiffs merely offer only unsupported, self-serving statements that Dr. Salling's expert testimony is reliable. For example, Plaintiffs assert, without any support, that the newly disclosed data organizations that they have "relationships" with such as the TMC organization and TargetSmart are "well respected" agencies that specialize in data processing and are "recognized experts" in their fields. (Doc. 66, PAGEID # 4202, 4207, 4209). Plaintiffs

concede that Dr. Salling did not "participate in the selection of the counties in the sample" because there were "time and resource constraints." (Id. at PAGEID# 4211). Even so, Plaintiffs claim that Dr. Salling is "reasonably familiar" with the facts and data contained in his report. (Id. at PAGEID # 4208-4209). Again, these bald assertions lend no support to Plaintiffs' burden to establish that Dr. Salling's testimony is reliable and should be disregarded.

Plaintiffs further attempt to obfuscate Dr. Salling's negligible role in his own Incarcerated Voter Report by claiming that the data contained therein is "not reasonably in doubt" and is "unrefuted" because the Secretary simply chose not to conduct his own tests on the data. (Id. at PAGEID # 4209-4210). Plaintiffs' assertions again miss the mark. First, the burden remains on the Plaintiffs to prove that Dr. Salling's report is reliable. Second, even if the Secretary had an affirmative duty to test the Plaintiffs' data, he could not possibly have done this because the Plaintiffs have withheld several critical pieces of the data – the most glaring example being the mystery "black box" algorithm used to create the alleged matching scores used in Dr. Salling's conclusions. This alone supports exclusion of Dr. Salling as an expert witness.

Courts have excluded expert testimony where parties fail to disclose critical pieces of information and analytical processes such as algorithms and computer programs used by experts. In *Abrams,* 218 F.R.D. at 540-541, a party moved to exclude the testimony of an accident reconstruction expert who utilized an algorithm to conduct his expert analysis on the speed and velocity rates of the cars involved in the accident. The *Abrams* expert did not produce the algorithm and he could not explain how it worked. *Id.* The court excluded the expert's testimony pursuant to Fed. R. Civ. P 37 and explained, "Allowing (the expert) to testify regarding his calculations as to the speed/energy dissipated at the time of the motor vehicle accident without providing the equations within a reasonable time before trial is unfair to the (opposing party)."

Id. at 541. *See also United States v. Batchelor-Robjohns,* 2005 U.S. Dist. LEXIS 13552 (S.D. Fla. 2005) (Where plaintiff's expert refused to disclose allegedly proprietary computer models and information used in expert report causing inability of the opposing party and court to determine reliability of the expert opinion warranted exclusion of expert testimony). Like in *Abrams,* Dr. Salling's conclusions are all based on the "black box" algorithm, and therefore it would be unfair to permit him to testify at trial having failed to provide the algorithm to the Secretary for validation.[2] Accordingly, for this reason alone, Dr. Salling is unreliable as an expert and his testimony and that of the declarants should be excluded.

1. Dr. Salling's testimony is unreliable to this Court because he is merely the Plaintiffs' mouthpiece.

There is no doubt that Dr. Salling was telling the truth when he repeatedly professed ignorance of the data contained in his reports. To the extent the new declarations are given any amount of weight, they actually confirm that Dr. Salling was not at all engaged in the vast majority of the data gathering and manipulation of the data sets contained in his Incarcerated Voter Report. For example, we now know by piecing together Dr. Salling's testimony and information from the four declarations that virtually all of the crucial data sets that make up the foundation of Dr. Salling's conclusions were manipulated and passed around by multiple individuals and organizations who are wholly unknown in this litigation. These outfits ran the data through multiple software programs – again wholly unknown in this litigation and to Dr. Salling. And, at the end of this long, suspiciously circuitous journey sits Dr. Salling – Plaintiffs'

[2] This is true for every piece of the Incarcerated Voter Report as well. Plaintiffs assert that Figure 6 of the Incarcerated Voter Report alone establishes the "burden" on late jailed voters in this case. (Doc. 66, PAGEID # 4211). Dr. Salling's Incarcerated Voter Report suffers from these deficiencies as a whole and no individual component can be cured of the infection.

alleged data expert in *this* case. Dr. Salling simply cannot not provide independent, reliable and probative conclusions about the number of late jailed voters who may be impacted by Ohio's elections laws because he is just the Plaintiffs' mouthpiece in this litigation – nothing more. Accordingly, his testimony should be excluded.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Secretary's Motion in Limine to Exclude the Expert Testimony of Dr. Mark Salling, PH.D, the Secretary respectfully requests this Court exclude Dr. Salling's testimony and the four declarations submitted by the Plaintiffs in their response to the Secretary's Motion in Limine.

Respectfully submitted,
DAVE YOST
Ohio Attorney General

s/ Julie M. Pfeiffer

JULIE M. PFEIFFER (0069762) *
* *Trial Attorney*
ANN YACKSHAW (0090623)
JEFFREY J. BOUCHER (0092374)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: (614) 466-2872; Fax: (614) 728-7592
Julie.Pfeiffer@OhioAttorneyGeneral.gov
Ann.Yackshaw@OhioAttorneyGeneral.gov
Jeffrey.Boucher@OhioAttorneyGeneral.gov
Counsel for Defendant Ohio Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on August 30, 2019, and served upon all parties of record via the court's electronic filing system.

s/ Julie M. Pfeiffer
JULIE M. PFEIFFER (0069762)
Assistant Attorney General