IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

THIS DOCUMENT RELATES TO CASE NO. 16-CV-8940

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO BAR DEFENDANTS' EXPERTS FITZGERALD AND HENEGHAN

Plaintiffs Ben Baker and Clarissa Glenn provide the following reply to the Defendants' Response in Opposition to Plaintiffs' Motion to Bar the Testimony of Michael Fitzgerald and John Heneghan. In the support of their motion, Plaintiffs state as follows:

INTRODUCTION

Plaintiffs moved to bar or limit the testimony of defense witnesses Michael Fitzgerald and John Heneghan after Defendants disclosed both witnesses as non-retained experts. Dkt. at 298. Defendants originally presented these witnesses, Michael Fitzgerald and John Heneghan, to provide Rule 30(b)(6) testimony on behalf of the City of Chicago. *Id.* In their role as 30(b)(6) witnesses, Fitzgerald and Heneghan testified about a variety of topics pertaining to CPD's practices and procedures.

Plaintiffs' motion to bar Fitzgerald and Heneghan from testifying as non-retained experts explained how Defendants did not properly disclose either witness as an expert. In particular, Defendants' expert disclosures do not describe the facts or opinions that Fitzgerald or Heneghan would discuss. Instead, the disclosures merely describe topics about which the witnesses may testify.

Defendants' response brief does not contest that their disclosures failed to identify any relevant opinions. Defendants nonetheless contend that the disclosures are sufficient because "Plaintiffs are obviously on notice of Lt. Fitzgerald and E.T. Heneghan's testimony: they drafted and issued the Rule 30(b)(6) notice, took the depositions, asked the questions at the depositions, and ordered the transcripts of the depositions." Dkt. at 341 at 3. Alternatively, Defendants argue that even if deficiencies in their disclosures did exist, "any such deficiencies are overcome by a lack of prejudice, surprise, or bad faith, rendering them harmless." *Id.* at 4. Defendants are incorrect on both arguments. Their Rule 26(a)(2)(C) disclosures are defective, and the deficiencies are neither harmless nor justified.

ARGUMENT

Fitzgerald and Heneghan should be precluded from testifying as experts because Defendants' disclosures were insufficient. The Seventh Circuit has consistently held that the formal disclosure requirements under Rule 26(a)(2) are necessary and may not be ignored. *See*, *e.g.*, *Musser v. Gentiva Health Services*, 356 F.3d 751, 757–58 (7th Cir. 2004) ("Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial."). Fitzgerald's and Heneghan's proposed expert testimony should be barred. Fed. R. Civ. P. 37(c)(1).

I. Defendants' disclosures under Rule 26(a)(2)(C) are deficient.

Plaintiffs moved to bar Fitzgerald's and Heneghan's expert testimony because their disclosures were "inadequate and legally insufficient" under Rule 26(a)(2). Dkt. at 298 at 4. Plaintiffs argued that Defendants' disclosures failed to identify the opinions that Fitzgerald or Heneghan would provide and failed to provide the requisite summary of the facts and opinions about which they would testify as experts. *Id*. Instead, the disclosures provided only "a list of topics that the Defendants want[ed] the witnesses to testify about." *Id.* Both Rule 26(a)(2) and

case law support the Plaintiffs' position. Fed. R. Civ. P. 26(a)(2)(C)*; see also Cripe v. Henkel Corp.*, 318 F.R.D. 356, 360 (N.D. Ind. 2017) (reference to group of documents "clearly does not constitute plaintiff's counsel's statement of the subject matter on which a particular witness is expected to present evidence, nor counsel's summary of facts and opinions as to which any particular expert witness is expected to testify. Not one of these five attachments to Dr. Robinson's report was prepared or signed by counsel, none of them was offered as a stand-alone expert witness disclosure, and none would satisfy the requirements of Rule 26(a)(2)(C)."), *aff'd*, 858 F.3d 1110 (7th Cir. 2017).

In response, Defendants assert that "Plaintiffs are obviously on notice of Lt. Fitzgerald and E.T. Heneghan's testimony." Dkt. at 341 at 3. It is Defendants' position that they provided Plaintiffs with notice by identifying Fitzgerald and Heneghan as Rule 30(b)(6) deponents and disclosing them as non-retained experts after Plaintiffs deposed them. *Id*. This is incorrect for at least two reasons.

First, courts have held that Rule 30(b)(6) depositions are not substitutes for Rule 26(a) disclosures. *Cf. Karum Holdings LLC v. Lowe's Companies, Inc.*, 895 F.3d 944, 951 (7th Cir. 2018) (holding the a Rule 30(b)(6) deposition was not an adequate substitute for a Rule 26(a)(2)(C) disclosure)[1]; *see also Gott v. Neuman & Esser USA, Inc.*, 1:19-CV-4, 2020 WL 7014222, at *5 (E.D. Tenn. Aug. 14, 2020) (holding that reference to entire deposition is not a "genuine attempt to comply with the disclosure requirements of Rule 26(a)(2)(C)); *CSX Transp., Inc. v. Gen. Mills, Inc.*, 1:14-CV-201-TWT, 2024 WL 3089652, at *5 (N.D. Ga. June 21, 2024) (striking expert witness where disclosure merely referred to topics in Rule 30(b)(6) deposition

[1] In *Karum*, the defendant never formally designated the witness as a non-retained expert, but the same rationale should apply to an inadequate disclosure that does not identify the facts or opinions that the witness may testify about as an expert.

because the reference to a deposition topic "cites neither facts nor opinions"). At bottom, Defendants' disclosures were deficient under Rule 26(a)(2)(C) and applicable case law, and Defendants' references to Fitzgerald's and Heneghan's Rule 30(b)(6) deposition testimony does not cure those deficiencies.

Second, courts in this district and elsewhere have refused to allow parties to substitute a broad citation to records for the required summary report. *See*, *e.g.*, *Sec. & Exch. Comm'n v. Nutmeg Group, LLC*, 09 C 1775, 2017 WL 4925503, at *5 (N.D. Ill. Oct. 31, 2017) ("a party should not have to hunt-and-peck through initial discovery disclosures or interrogatory responses, or a volume of documentary material, some relevant and some perhaps not, to try to piece together the opinions an expert witness will proffer at trial or the basis for those opinions, and then see if he guessed correctly during the expert's deposition"); *see also Brunswick v. Menard, Inc.*, 2:11 CV 247, 2013 WL 5291965, at *5 (N.D. Ind. Sept. 19, 2013) ("If the court only were to require that the information treating physicians intend to testify about to be present in the medical records, this would dispose of the summary report requirement mandated by Rule 26(a)(2)(c) and could result in abuse by inviting a party to dump a litany of medical records on the opposing party rather than preparing a summary of the expert's testimony."); *Tuft v. Indem. Ins. Co. of N. Am.,* No. 19-CV-01827-REB-KLM, 2021 WL 1759638, at *3 (D. Colo. Feb. 18, 2021) (a party's general references to material without specifying what opinions will be actually offered by a proposed expert does not satisfy Rule 26(a)(2)(C)); *Emerson Elec. Co. v. Suzhou Cleva Elec. Appliance Co.*, No. 4:13-CV-1043SPM, 2015 WL 8770712, at *2 (E.D. Mo. Dec. 15, 2015) (high-level references to the subject matter of the case, along with a statement that the testimony will be "consistent with" documents does not satisfy Rule (a)(2)(C)).

At bottom, the Federal Rules of Civil Procedure and federal courts reject this exact type of non-specific disclosure.

II. Defendants' deficient disclosures were not harmless.

Finally**,** Defendants briefly assert that the deficiencies were harmless. Dkt. at 341 at 4. The only support they offer for that position is a cursory cite to one case stating that a disclosure error was harmless because deposition testimony provided the defendant with the witness' opinions. Dkt. at 341 at 4-5 (citing *Gecker as Tr. for Collins v. Menard, Inc.*, 16 C 50153, 2019 WL 4166859 (N.D. Ill. Sept. 3, 2019)). The case they rely on is distinguishable because prior to the deposition of the plaintiff's medical witness the defendant knew the witness' relevant medical opinions, received all relevant reports and medical records, including the surgeon's curriculum vitae, and procured a rebuttal expert. *Menard*, 16 C 50153, 2019 WL 4166859, at *2. The court found the plaintiff's late Rule 26 disclosure did not cause prejudice because had an opportunity to disqualify the expert, retain a rebuttal expert, and depose the expert. *Id.*

In contrast to *Menard*, when Plaintiffs deposed Fitzgerald and Heneghan as Rule 30(b)(6) deponents in this case, they did not have all relevant records and materials regarding their expertise and did not know what expert opinions, if any, they would offer in this case. For that matter, Plaintiffs still do not know what expert opinions Heneghan or Fitzgerald plan to offer in this case. With summary judgment briefing starting in approximately one month and a trial date already set, it is too late for Defendants to reissue a proper disclosure and for Plaintiffs to then depose Heneghan or Fitzgerald about their opinions, followed by additional motion practice and possibly rebuttal experts. Under these circumstances, exclusion is the proper remedy. *See*, *e.g.*, *Sec. & Exch. Comm'n v. Nutmeg Group, LLC*, 09 C 1775, 2017 WL 4925503, at *8 (N.D. Ill. Oct. 31, 2017) ("[I]f the SEC were allowed to disclose Reidy as a testifying expert now, it would

require a material alteration to the pretrial and trial schedule set by the Court. The SEC would need time to prepare and serve a proper disclosure under Rule 26(a)(2), assuming it could do so. After that, Defendants may well request leave to depose Reidy again or conduct additional written discovery. At a minimum, Defendants would file a *Daubert* motion, the parties would brief it, and the Court would rule on it.").

CONCLUSION

For all the reasons stated above and in Plaintiffs' motion to bar their testimony, Lt. Michael Fitzgerald and John Heneghan should be barred from testifying as experts.

Respectfully submitted,

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