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

WILLIAM WHITFORD, *et al.*,

Plaintiffs,

v. Case No. 15-cv-421-bbc

GERALD C. NICHOL, *et al.*,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND DECLARATION OF PROFESSOR KENNETH MAYER

There is no basis to permit the plaintiffs to introduce a post-trial declaration of Professor Mayer into evidence. Professor Mayer could have provided this analysis in his original report or his rebuttal report, yet did not do so. Nor was this declaration "specifically requested at trial," as the plaintiffs contend. (Dkt. 154:1.) This is simply another attempt by the plaintiffs to introduce expert testimony that was never disclosed prior to trial.

I. Judge Griesbach requests to take judicial notice of publicly available documents.

The plaintiffs' motion is based on a misreading of Judge Griesbach's questions to Professor Goedert following the conclusion of Goedert's redirect examination. Judge Griesbach asked whether the data underlying Figure 1 of

Goedert's report "consists of the actual ward votes for the . . . 2012 election," to which Goedert agreed. (Dkt. 150:253, Line 2–6.) Judge Griesbach then asked whether the ward vote totals were publicly available, (Dkt. 150:253, Line 12–13), and asked counsel if they would "have any objection to our taking notice of them if they're publicly available?" (Dkt. 150:253, Line 22–23.)

Judge Griesbach explained that "you have these graphic descriptions of actual votes. It might be helpful us to see what the wards actually look like." (Dkt. 150:254, Line 8–10.) Judge Griesbach also said that "since the wards were redrawn, it might be helpful to see what they looked like before and after." (Dkt. 150:254, Line 15–16.)

II. The parties provided the documents that respond to Judge Griesbach's request.

The parties by stipulation have provided the Court with the information actually requested by Judge Griesbach. (Dkt. 152.) The parties submitted the data underlying Figure 1 of Professor Goedert's report, specifically a spreadsheet containing the ward-level election data produced by the Legislative Technology Services Bureau (LTSB). (Dkt. 152, Ex. 2.) To allow a comparison of the wards before they were redrawn, the parties also submitted the LTSB's ward-level vote totals for the 2008 presidential election (Dkt. 152, Ex. 1) and the Government Accountability Board's official vote

totals at the lowest reporting level for both the 2008 and 2012 presidential elections. (Dkt. 152, Exs. 3–4.) As the stipulation made clear, all of these documents are publicly available. (Dkt. 152 ¶¶ 2–10.)

Because Judge Griesbach thought "it might be helpful to see what [the wards] looked like before and after," (Dkt. 150:254, Line 15–16), the defendants also arranged for the LTSB to post a map of the wards as they looked after Act 43 and a map of how they looked in the last decade on the website used to host the electronic versions of maps used at trial. (Dkt. 152 ¶ 11.) These maps, like the vote totals, are publicly available records.

III. The plaintiffs have no ground to introduce new expert testimony after trial that was not requested by the Court.

There is no support for the proposition that the Court requested additional expert testimony from the plaintiffs. Judge Griesbach's request that the Court take judicial notice of publicly available documents was not a request for additional expert opinion from Professor Mayer. The defendants base their argument on what Judge Griesbach actually requested; in contrast, the plaintiffs base their motion on what they "interpret the heart of Judge Griesbach's line of questioning as seeking." (Dkt. 154 ¶ 10.)

As an initial matter, Judge Griesbach asked his questions of Professor Goedert, not Professor Mayer. If the Court had wanted additional opinions from Mayer, it would have asked for them from Mayer directly. Further,

Judge Griesbach did not ask Goedert (let alone Mayer) to produce a graph based on the election results in a different year like the one the plaintiffs are attempting to introduce through Mayer's second declaration.

The plaintiffs incorrectly claim that Judge Griesbach asked "questions about the vote distribution in Wisconsin's wards." (Dkt. 154 ¶ 8.) In fact, Judge Griesbach requested taking judicial notice of publicly available documents, (Dkt. 150:253, Line 2–13), with the goal of "see[ing] what the wards actually look like." (Dkt. 150:254, Line 10.) Judge Griesbach specifically contrasted what he was requesting with the "graphic descriptions" of votes that Mayer offers in his proposed Second Declaration. (Dkt. 150:254, Line 8–9; Dkt. 154-1 ¶ 9.)

The plaintiffs' attempt to equate Mayer's new expert testimony with the ward maps is unpersuasive. First, the ward maps are public records, not post-trial expert testimony. Second, the ward-level maps are responsive to Judge Griesbach's request—they are publicly available documents from which it can be seen "what [the wards] looked like before and after." (Dkt. 150:254, Line 15–16.) If the Court finds that the ward maps are not responsive to its request, the Court need not consider them.

This is just another attempt by the plaintiffs to introduce expert testimony that was never disclosed in written reports as required by Rule 26 of the Federal Rules of Civil Procedure. Professor Mayer could have

conducted an analysis of the 2008 wards in either one of his reports; he chose not to do so. The plaintiffs are merely using Judge Griesbach's questions as an excuse to offer post-trial expert testimony that could have been provided in Mayer's expert reports.

The plaintiffs' post-trial brief shows they used a similar tactic at trial. The plaintiffs claim that Professor Jackman conducted a sensitivity analysis of Wisconsin "[a]t the Court's request." (Dkt. 155:15 (citing Dkt. 149:220–23).) When one reads the cited transcript, however, the Court never asked Jackman to conduct a sensitivity analysis. (Dkt. 149:220–23.) Instead, the plaintiffs' counsel indicated that Jackman had already conducted a new sensitivity analysis that was not in either of his reports, apparently with clairvoyance that the Court would "request" it at a later time. (Dkt. 149:223–24.) The plaintiffs merely used the Court's question about the application of Jackman's work to Wisconsin as an excuse to introduce new expert testimony at trial in violation of the federal rules. The Court should not allow the plaintiffs to employ a similar tactic after trial has ended.

CONCLUSION

For the foregoing reasons, the Court should deny the plaintiffs' Motion for Leave to File a Second Declaration of Professor Kenneth Mayer.

Dated this 23rd day of June, 2016.

Respectfully submitted,

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