

TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

CAROL VAN STELTON, VIRGIL VAN  
STELTON and ALVIN VAN  
STELTON,

Plaintiffs,

vs.

JERRY VAN STELTON, DONNA VAN  
STELTON, EUGENE VAN STELTON,  
GARY CHRISTIANS, DOUG WEBER,  
SCOTT GRIES, NATE KRIKKE,  
ROBERT E. HANSEN, DANIEL  
DEKOTER, OSCEOLA COUNTY,  
IOWA, AND OTHER UNIDENTIFIED  
PERSONS AND ENTITIES,

Defendants.

No. C11-4045-MWB

**ORDER**

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All of the defendants have filed motions (Doc. Nos. 91, 92 and 93) to strike plaintiffs' disclosure of expert witnesses in this case. The plaintiffs have filed a resistance (Doc. No. 94) and have requested oral argument. Having reviewed the parties' filings, I conclude that oral argument is not necessary and, further, that I need not await reply briefing from the defendants. *See* Local Rules 7(c), 7(g). For the reasons explained below, I will grant the motions to strike based on plaintiffs' blatant and unjustified noncompliance with Federal Rule of Civil Procedure 26.

***PROCEDURAL BACKGROUND***

Plaintiffs filed this case on May 11, 2011. Their original complaint (Doc. No. 1) was filed *pro se* and included the following counts: (a) a claim by all plaintiffs for relief

under 42 U.S.C. § 1983, (b) claims by plaintiff Virgil Van Stelton for false arrest, malicious prosecution and loss of consortium, (c) claims by Virgil Van Stelton and Alvin Van Stelton for intentional infliction of emotional distress, slander and “Interference with Right to Petition for Redress of Grievances.” The complaint’s factual allegations were somewhat convoluted but generally indicated that a family inheritance dispute forms the background for a series of events that culminated in Virgil Van Stelton’s arrest on May 11, 2009. In particular, plaintiffs Virgil Van Stelton and Alvin Van Stelton are brothers of defendants Jerry Van Stelton and Eugene Van Stelton and will sometimes be referred to collectively herein as the “Van Stelton brothers.” The Van Stelton brothers are engaged in separate litigation concerning their now-deceased father’s estate and/or trust.

Plaintiffs sought, and obtained, an extension of their deadline for serving the summons and complaint. They then filed an amended complaint (Doc. No. 6) on January 6, 2012. The amended complaint was similar to the original but added plaintiff Carol Van Stelton as a claimant with regard to the claims for intentional infliction of emotional distress, loss of consortium and slander (renamed to “Slander and Libel”).

The named defendants filed answers (Doc. Nos. 8, 9 and 14) and the parties then submitted a proposed scheduling order and discovery plan, which the court adopted and entered (Doc. No. 19) on March 12, 2012. Trial was scheduled to begin June 3, 2013 (Doc. No. 20).

In response to a motion by plaintiffs (Doc. No. 25) to extend deadlines, Judge Zoss entered an order (Doc. No. 26) setting a scheduling conference on July 30, 2012. Before the conference, two attorneys filed appearances (Doc. Nos. 27, 28) for plaintiffs. After the conference, I entered a new scheduling order and discovery plan (Doc. No. 32) that, among other things, established October 1, 2012, as the deadline for adding parties

and amending pleadings. Because of the new scheduling order, trial was rescheduled for September 23, 2013 (Doc. No. 33).

Plaintiffs, now acting through counsel, filed a motion (Doc. No. 41) for leave to file a second amended complaint on October 1, 2012. I granted that motion on November 9, 2012. The second amended complaint significantly expanded on the factual allegations contained in the prior complaints and added a new party (the City of Sibley, Iowa). The new complaint contained the following causes of action, with each count having a unique combination of plaintiffs and defendants:

1. Civil rights violations under 42 U.S.C. § 1983
2. Violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act
3. False arrest
4. Malicious prosecution
5. Slander and libel
6. Tortious interference with prospective economic advantage
7. Declaratory judgment and injunctive relief

Doc. No. 41-1. In very general terms, the second amended complaint alleged a conspiracy in which defendant Hansen, as the Osceola County Attorney, and defendant Weber, as the Osceola County Sheriff, abuse their powers and official positions to reward friends and punish adversaries. Plaintiffs allege that defendant DeKoter, an attorney in private practice, is part of the favored group and, therefore, is able to employ the alleged conspiracy to benefit himself and his clients. According to the plaintiffs, DeKoter's clients include, or have included, defendants Jerry Van Stelton and Eugene Van Stelton, as well as the trust established by the father of the Van Stelton brothers.

Plaintiffs further contend that DeKoter has used his relationship with the alleged Hansen-Weber conspiracy to cause actions that benefit the trust, and the Van Stelton defendants, while causing harm to the Van Stelton plaintiffs. For example, plaintiffs allege that DeKoter "encouraged the [Van Stelton defendants] to provoke incidents and

make false reports” to Weber that led to plaintiff Virgil Van Stelton’s arrest on May 11, 2009. Plaintiffs contend that Virgil Van Stelton was charged with Trespass and Assault Causing Bodily Injury but that all charges were later dismissed.

The second amended complaint also included sweeping allegations concerning the “Unified Law,” which is described as the mechanism through which Osceola County funds governmental operations. Plaintiffs allege that the defendants are involved in a conspiracy to provide a disproportionate level of funding to the City of Sibley and that this alleged scheme somehow benefits certain of the individual defendants. Plaintiffs contend that they associate with a citizen’s organization that opposes the alleged scheme and that this association provides additional motivation for the defendants to take illegal actions against them.

When I permitted plaintiffs to file the second amended complaint, I also granted their motion (Doc. No. 40) to extend pretrial deadlines. I vacated the existing scheduling order, continued the September 23, 2013, trial date, and ordered the parties to submit a proposed new scheduling order and discovery plan. I reviewed, approved and filed the scheduling order (Doc. No. 56) on November 26, 2012. Based on the new schedule, Judge Bennett then rescheduled trial for February 10, 2014.

Some defendants filed answers (Doc. Nos. 57 and 58) to the second amended complaint. Others filed motions (Doc. Nos. 59 and 60) to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Those motions are pending. Meanwhile, and in direct response to arguments raised in the motions to dismiss, plaintiffs filed a motion (Doc. No. 64) for leave to file a third amended complaint. The proposed third amended complaint sought to cure certain deficiencies described in the motions to dismiss. Although the motion to amend was resisted, I granted it on January 3, 2013, and directed the defendants with pending motions to dismiss to file supplemental briefing to address how, if at all, the revised allegations impact their arguments.

### ***THE CURRENT DISPUTE***

The November 26, 2012, scheduling order, adopted as jointly-proposed by the parties, included a deadline of February 1, 2013, for plaintiffs to disclose expert witnesses. Plaintiffs did not move to extend that deadline. Indeed, and in violation of this court's rules,<sup>1</sup> they filed a "disclosure of expert witnesses" (Doc. No. 79) on February 2, 2013. While defendants did not move to strike that document, they did file unresisted motions (Doc. Nos. 87, 88 and 89) to extend their expert disclosure deadline. The motions pointed out that plaintiffs' expert disclosure did not contain the information required by Federal Rule of Civil Procedure 26(a)(2), thus impairing defendants' ability to make decisions about their own experts. The motion further stated that "plaintiffs' counsel has assured the parties that this information will be provided as soon as it is available." *See* Doc. No. 87 at 1.<sup>2</sup>

On April 2, 2013, I entered an order (Doc. No. 90) extending defendants' expert disclosure deadline to June 3, 2013, and plaintiffs' rebuttal expert deadline to July 8, 2013. My order further stated:

In addition, based on statements made in the motion, the plaintiffs may not be in full compliance with Federal Rule of Civil Procedure 26(a)(2) concerning their expert disclosures. If plaintiffs have not already provided all of the information required by Rule 26(a)(2), they shall do so no later than **May 1, 2013**.

*See* Doc. No. 90 at 2 [emphasis in original]. In other words, while plaintiffs had been ordered to disclose all Rule 26(a)(2) information by February 1, 2013, and while they

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<sup>1</sup> Expert witness disclosures are not to be filed. *See* Local Rules 5.1(b) and 26(b).

<sup>2</sup> If I understand plaintiffs' current resistance correctly (and, as I will discuss further below, that is not exactly an easy task), plaintiffs' counsel disputes this statement. That is, she denies that she assured counsel for the defendants that expert reports would be provided. *See* Doc. No. 94 at ¶ 67.

had not asked for an extension of that deadline, I *sua sponte* provided a three-month extension upon learning (from defendants) that the plaintiffs were not in compliance.

Plaintiffs did not file a request to extend their new May 1 deadline. Instead, on that date they served a document entitled “Plaintiffs’ Disclosure of Expert Witnesses, Fact Witnesses and Proposed Rebuttal Expert Witnesses (All Rights Reserved).” That document (the “Disclosure”) begins with this introductory paragraph:

The Plaintiffs Van Stelton, by their attorney, attorneys, Wendy Alison Nora of ACCESS LEGAL SERVICES of Wisconsin and Minnesota, pro hac vice with Thomas Frerichs and FRERICHS LAW OFFICES of Iowa, make the following Expert Witness, Fact Witnesses and Proposed Rebuttal Expert Witness Disclosures, without prejudice to identify additional fact witnesses and add or change additional rebuttal expert witnesses as the case continues to develop. Furthermore, the Van Stelton plaintiffs state that they may seek leave to modify the scheduling order to designate their proposed rebuttal expert witnesses as expert witnesses to be called to testify in their case in chief and to name additional expert witnesses, depending on the decision of the United States District Court for the Northern District of Iowa on the pending motions to dismiss under FRCP 12(b)(6) brought by the “Official Defendants” and the “DeKoter Defendants.

*See* Doc. No. 91-2 at 1. The Disclosure proceeds to identify six “Iowa State Government Officials or their designees” as “Expert Witnesses.” *Id.* at 1-2. It then includes a paragraph entitled “Nature of Testimony” that, among other things, references (as plaintiffs’ “expert report”) a decision issued by the State Appeal Board of Iowa. *Id.* at 3.

The Disclosure then lists a “Selected Representative” from an accounting firm as another expert witness and states that the “expert reports” are documents that are in the possession of Osceola County Attorney. *Id.* Under a heading entitled “Fact Witnesses,” the Disclosure identifies four individuals and provides short, subject-matter descriptions of each person’s expected testimony. *Id.* at 3-4. Next, under a heading entitled “(Rebuttal) Expert Witnesses,” three additional potential experts are named,

with short summaries of the “nature of testimony.” *Id.* at 4-5. Finally, and apparently in case the introductory paragraph was not enough, the Disclosure concludes as follows:

Plaintiffs’ [sic] reserve the right to add additional expert witnesses or replace named expert witnesses, if leave of Court is granted for relief from the Scheduling Order providing this revised date as the final date for these disclosures for good cause shown upon discovery of necessary new evidence or to substitute expert witnesses for good cause.

*Id.* at 6.

Some defendants filed a motion (Doc. No. 91) to strike the Disclosure on May 8, 2013. The remaining defendants filed a separate motion (Doc. No. 92) and a joinder (Doc. No. 93). Plaintiffs filed their resistance (Doc. No. 94) on May 28, 2013.

## ***ANALYSIS***

### ***I. Rule 26(a)(2)***

Federal Rule of Civil Procedure 26(a)(2) establishes disclosure requirements for parties who intend to present expert testimony at trial. The requirements vary depending on the characteristics of the expert witness. Rule 26(a)(2)(B) applies to retained experts, *i.e.*, any expert “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B). Unless otherwise stipulated or ordered by the court, a party intending to call a retained expert at trial must disclose his or her identity and provide a report “prepared and signed by the witness.” Fed. R. Civ. P. 26(a)(2)(B). That report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;

- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

*Id.* A party's failure to provide the required report by the deadline for disclosing expert witnesses is a failure to comply with Rule 26(a)(2). *See, e.g., Firefighters' Inst. for Racial Equality v. City of St. Louis*, 220 F.3d 898, 902 (8th Cir. 2000) ("There is no question ... that the expert's report was untimely. ... FIRE named an expert on that date, but did not provide a report."); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1009 (8th Cir. 1998) ("Rule 26(a)(2) provides that an expert's report must accompany the disclosure."); *Benedict v. Zimmer, Inc.*, 232 F.R.D. 305, 315 (N.D. Iowa 2005) (expert witness report is due on the expert disclosure deadline).

If a witness who will provide expert testimony at trial is not a retained expert, then Rule 26(a)(2)(C) applies. It states:

Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

*See* Fed. R. Civ. P. 26(a)(2)(C).

## *II. Plaintiffs' Disclosures*

As noted above, plaintiffs had two chances to comply with Rule 26(a)(2). On their February 1, 2013, deadline, they served a document that identified six expert witnesses and contained a short summary of each witness's expected testimony. On May 1, 2013, after I gave them additional time based on information contained in motions filed by the defendants, they filed the Disclosure now at issue. The Disclosure obviously does not comply with Rule 26(a)(2)(B), as it contains no signed expert reports and does not provide the other information required by that rule. As such, there is no doubt that plaintiffs have failed to timely disclose any retained expert witnesses.

While the disclosure requirements for non-retained experts are not as exacting, a party intending to offer expert opinion testimony from such a witness must provide "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). The Disclosure fails this test, as well. For each witness, it provides a brief description entitled "Nature of Testimony" and, in some cases, refers to certain documents. However, the Disclosure does not advise the defendants, even by way of a "summary," of the facts and expert opinions that will be offered by any identified witness. For example, plaintiffs state that a witness identified as Gray Grave will testify about the "[m]arket value of rents on agricultural real estate in Osceola County and computation of damages." Doc. No. 91-2 at 4. However no facts are provided, even by way of summary, concerning this expected testimony. Nor are the actual opinions summarized. At best, this is a summary of general subject matter, as required by Rule 26(a)(2)(C)(i). It is not a summary of "facts and opinions," as further required by subsection (C)(ii). And, unfortunately for plaintiffs, the description of Gray Grave's expected testimony is about as detailed as the Disclosure gets with regard to any witness.

When a party merely states the name of the non-retained witness and describes the witness's connections to the case without producing a summary of the facts and opinions to which the witness is expected to testify, the party is not in compliance with Rule 26(a)(2)(C). See *Anderson v. Bristol, Inc.*, No. 4:11-cv-418, 2013 WL 1339372 at \* 13 (S.D. Iowa Mar. 25, 2013). As Judge Pratt noted in *Anderson*, courts have held that a mere citation to various records fails to satisfy the requirements of the rule. See *Lopez v. Keeshan*, No. 4:11CV3013, 2012 WL 2343415 at \*4 (D. Neb. June 20, 2012) (the “names and the connection” of the experts, without more, was insufficient to comply with 26(a)(2)(C)); *Ballinger v. Casey's Gen. Store, Inc.*, No. 1:10-cv-1439-JMS-TAB, 2012 WL 1099823 at \*4 (S.D. Ind. Mar. 29, 2012) (“[M]edical records alone do not comply with Rule 26(a)(2)(C).”); *Nicastle v. Adams Cnty. Sheriff's Office*, Civil No. 10-cv-00816-REB-KMT, 2011 WL 1674954 at \*1 (D. Colo. May 3, 2011) (a citation to 963 pages of personnel files was not an appropriate “summary” as required by 26(a)(2)(C)). Here, plaintiffs failed to comply with the requirements of Rule 26(a)(2)(C) with regard to any witness identified in the Disclosure. As such, and even if each of the identified witnesses is a non-retained expert, plaintiffs have not properly disclosed any of them.

### ***III. The Appropriate Relief***

Federal Rule of Civil Procedure 37 provides:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

- (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c)(1); see also LR 16(j) (evidence may be excluded as a sanction for a failure to disclose in a timely manner); *Firefighters' Inst.*, 220 F.3d at 902 (“Unless the failure to meet a deadline was either harmless or substantially justified, the court may sanction a party by excluding its evidence.” (citing *Trost*, 162 F.3d at 1008)).

Defendants seek exclusion of expert testimony. Given my finding that the plaintiffs have failed to disclose experts as required by Rule 26(a)(2), that sanction is warranted unless the failure was either substantially justified or harmless. In resisting the defendants' motions, plaintiffs have done themselves no favor. They filed a 23-page resistance<sup>3</sup> containing 88 numbered paragraphs. It is a rambling, disjointed and utterly useless document that addresses virtually every conceivable issue *except* those made relevant by the defendants' motions. It does not cite a single case concerning the obligations imposed by Rule 26(a)(2) or the appropriate sanctions for failure to comply with these obligations. Indeed, it does not cite a single case, period.

The resistance makes repeated reference to a decision filed by the State Appeal Board of Iowa on April 30, 2013, and argues that this decision is critical to this litigation. While that may be true, the defendants have not filed a motion in limine concerning the admissibility of the decision. Instead, they seek to strike plaintiffs' expert witness disclosures and preclude plaintiffs from offering expert opinions at trial. I need not, and do not, decide today whether the State Appeal Board decision is admissible evidence.

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<sup>3</sup> The resistance violates Local Rule 7(h) in that it is over 20 pages in length and was not accompanied by a motion for leave to exceed the 20-page limit. While I will allow the resistance, I direct plaintiffs' lead counsel, Ms. Nora, to become familiar with this court's local rules. I also direct plaintiffs' Iowa counsel, Mr. Frerichs, to undertake an active role in assuring compliance. If violations continue, both attorneys will be subject to sanctions.

Ultimately, plaintiffs have failed to show that their failure to comply with Rule 26(a)(2) is either harmless or substantially justifiable. It certainly is not harmless. Defendants' deadline for disclosing their own expert witnesses is today. I find that plaintiffs' failure to timely disclose expert witness information caused prejudice to defendants by impairing their ability to make timely and informed choices concerning the retention of experts. Indeed, plaintiffs' dual, noncomplying disclosures made the situation worse than if plaintiffs had simply failed to serve disclosures at all. Defendants were forced to interpret plaintiffs' disclosures, attempt to predict whether this court would deem them sufficient, and plan accordingly.

Plaintiffs have also failed to show substantial justification for noncompliance. Their rambling resistance attempts to shift blame to the defendants, especially defendant Osceola County for its alleged failure to produce audit reports, but plaintiffs have never filed a motion to compel discovery. Nor did they move for relief from either the February 1, 2013, disclosure deadline or the later, May 1 deadline that I established for their benefit, *sua sponte*. If the conduct of one or more defendants made compliance difficult, they had ample opportunities to request the court's intervention. Failing to comply (twice) and then making *post hoc* efforts to blame that noncompliance on others is not "substantial justification."

This case has been on file for over two years. The court has been extremely accommodating to plaintiffs, both before they had counsel and after counsel appeared. After counsel appeared and sought additional time, the trial date was continued two different times and I ultimately adopted a new scheduling order jointly prepared by all parties. When it became clear that plaintiffs had not complied with their expert-disclosure obligations, I referred them to the applicable requirements and gave them additional time to comply.

Plaintiffs' counsel appeared ten months ago. They have had more than enough time to get familiar with the case, make decisions about expert witnesses and comply with Rule 26(a)(2). Having carefully reviewed plaintiffs' resistance, I find that they have not come close to showing substantial justification for their noncompliance. As such, I find that exclusion of expert opinion testimony is the appropriate sanction.

#### ***IV. Scope Of The Ruling***

My ruling means plaintiffs may not, in their case-in-chief, offer expert opinion testimony from any witness, retained or non-retained. They have forfeited the option to do so by failing to comply with Rules 26(a)(2)(B) and 26(a)(2)(C).

My ruling does not mean plaintiffs cannot offer expert opinions at trial by way of rebuttal. Their deadline for disclosing rebuttal experts has not expired. If they timely, and properly, disclose rebuttal experts, they will have the option of providing rebuttal opinions at trial. Of course, "rebuttal" means just that. Plaintiffs should not assume they will be allowed to circumvent this ruling at trial by offering opinion testimony that is not, in fact, rebuttal testimony.

In addition, my ruling does not mean plaintiffs cannot offer otherwise-admissible lay opinion testimony at trial pursuant to Federal Rule of Evidence 701. Rule 26(a)(2) imposes disclosure requirements only with regard to expert opinions to be offered pursuant to Rules of Evidence 702, 703 or 705. *See* Fed. R. Civ. P. 26(a)(2)(A). Plaintiffs' failure to comply with those requirements has no bearing on the potential admissibility of evidence under Rule 701.

Finally, and as noted above, my ruling does not mean that the State Appeal Board decision is, or is not, admissible at trial. That issue is not before me.

***CONCLUSION***

For the reasons explained above, defendants' motions (Doc. Nos. 91, 92 and 93) to strike plaintiffs' disclosure of expert witnesses in this case are **granted**. Plaintiffs may not, in their case-in-chief, offer expert opinion testimony from any witness, retained or non-retained.

**IT IS SO ORDERED.**

**DATED** this 3rd day of June, 2013.



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**LEONARD T. STRAND**  
**UNITED STATES MAGISTRATE JUDGE**