

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

COMMITTEE FOR A FAIR AND BALANCED	)	
MAP, <i>et al.</i> ,	)	
	)	Case No. 11-C-5065
Plaintiffs,	)	
	)	Hon. John D. Tinder
v.	)	Hon. Joan H. Lefkow
	)	Hon. Robert L. Miller, Jr.
ILLINOIS STATE BOARD OF ELECTIONS,	)	(3-judge court convened
<i>et al.</i> ,	)	pursuant to 28 U.S.C. § 2284)
	)	
Defendants.	)	

**MOTION IN LIMINE #2 TO BAR TESTIMONY AND EXHIBITS AND
MOTION TO STRIKE PORTIONS OF MARSHALL’S AFFIDAVIT AND EXHIBITS**

NOW COME the Defendants, the ILLINOIS STATE BOARD OF ELECTIONS, *ET AL.*, by their attorneys, and, pursuant to Federal Rules of Evidence (“FRE”) 402 and 702 and Federal Rule of Civil Procedure (“FRCP”) 26, respectfully move this Court for an order to strike portions of the Affidavit of Edward D. Marshall, along with supporting exhibits, and to limit Marshall’s testimony at the hearing. In support of this motion, the Defendants state as follows:

INTRODUCTION

On Friday, November 4, 2011, the Plaintiffs filed a Motion for Permanent Injunction, in which they alleged that Public Act 97-14, which instituted a new Congressional district map pursuant to the recent U.S. census (the “2011 Congressional districting map”), violated §2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and was an unconstitutional racial and partisan gerrymander. Attached to this Motion was the Affidavit of Edward D. Marshall, who was identified by the Plaintiffs in the Pre-Hearing Order as a “may call” fact witness.¹ The

¹ In their responses to the Defendants’ First Set of Interrogatories, the Plaintiffs also identified Marshall as an Independent Contractor. The Defendants chose not to depose Marshall only after confirming with the Plaintiffs’ counsel in a letter dated September 22, 2011 that Marshall had provided the Plaintiffs solely with technical map consulting services.

Defendants have simultaneously filed a Motion to Strike and Motion in *Limine* seeking to bar, in part, testimony in Marshall's affidavit or exhibits that are related to the Partisan Voting Index. Defendants file this additional Motion in *Limine* regarding other subjects in Marshall's affidavit that are either an improper attempt under FRE 701 to have a lay witness opine about expert analysis or are testimony about exhibits to the affidavit that were never previously disclosed. Therefore, the Defendants respectfully request this Court to strike those portions of Marshall's affidavit and accompanying exhibits that offer expert testimony or are untimely disclosures and to bar his testimony with regard to those same materials at the hearing on the Plaintiffs' Motion for Permanent Injunction.

ARGUMENT

I. The Portions of Marshall's Affidavit that Offer Expert Testimony or which are Untimely Should be Stricken.

This Court should strike those segments of Marshall's Affidavit and accompanying exhibits that proffer opinion testimony or are untimely and, therefore, objectionable.

A. Marshall, as a Fact Witness, Cannot Proffer Opinion Testimony or Supporting Evidence.

When it came time to disclose their expert witnesses, the Plaintiffs never identified Marshall. Instead, they listed him in their discovery responses as an Independent Contractor, and then confirmed that statement in a subsequent letter with the Defendants' counsel and again in the Pre-Hearing Order. Yet, now, the Plaintiffs are offering him up to provide, essentially, expert opinions.

Fact witnesses may speak to those facts that are in the witness's first-hand knowledge. *U.S. v. York*, 572 F.3d 415, 420 (7th Cir. 2009); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2006 WL 6505615 (N.D. Ill. 2006), *quoting U.S. v. Conn*, 297 F.3d 548, 553-54 (7th Cir. 2002); *see*

also *Ancho v. Pentek Corp.*, 157 F.3d 512, 515 and 519 (7th Cir. 1998). However, an expert, using his/her “scientific, technological, or other specialized knowledge,” may speak to opinions or inferences that are drawn from facts outside of his/her first-hand knowledge. *Id.*; FRE 702. Such opinions are not admissible as lay testimony from a fact witness. *York*, 572 F.3d at 420; FRE 701(c). Furthermore, a party seeking to use an expert must timely disclose him/her, along with a written summary of his/her opinion, prior to trial. *York*, 572 F.3d at 420; FRCP 26(a)(2)(D).

While Marshall, as an employee of Illinois House Republican leader Tom Cross, has access to census and demographic data, he is neither capable nor qualified to offer his opinion on the meaning of such data. Marshall acknowledges that he has provided technical support and technology consulting services in this and other redistricting matters, but nowhere does he indicate that he has the educational or employment background to analyze the data he is processing. See Marshall Affidavit, ¶ 2 – 4. Moreover, the Plaintiffs have never disclosed Marshall as an expert in analyzing geographic, demographic, census, or election data, let alone prior to the expert disclosure date set by the Court in its September 29, 2011 Agreed Order. In addition, Marshall’s Affidavit and supporting materials are the first written report that the Plaintiffs have submitted to the Defendants in which he summarizes his opinion. Thus, none of Marshall’s opinions and conclusions have been tested or allowed to be assessed and possibly refuted by the Defendants’ experts.² Marshall’s opinion testimony is, therefore, untimely and constitutes an unfair surprise to the Defendants.

² Even though this Motion *in Limine* focuses on the untimely and expert-oriented nature of Marshall’s Affidavit and supporting exhibits, the Plaintiffs’ late disclosure also prejudices the Defendants in another way: namely, that the accuracy of the facts in the Affidavit cannot be verified. See, e.g., Marshall Affidavit, ¶ 37.

- i. *Since Marshall Does Not Qualify as an Expert, Those Opinions Based on Information Outside of his First-Hand Knowledge Must be Stricken from his Affidavit and Barred from Use at the Hearing.*

The Plaintiffs have offered no foundation to qualify Marshall as an expert in analyzing redistricting plans. Rather, all that the Plaintiffs have offered are conclusory statements from an individual who has processed data on their behalf. Because Marshall's Affidavit seeks to admit facts that are beyond his first-hand knowledge, the Defendants seek to strike, in particular, the following paragraphs of expert testimony:

Starting with ¶¶ 14 and 15 of the Affidavit, Marshall inexplicably decides against adopting the Court's description of the area connecting the two ends of Congressional District 4. In *King*, the Court determined that the area started and ended at Central Avenue. *King v. St. Bd. of Elec.*, 979 F.Supp. 582, 609, fn. 49 (N.D. Ill. 1996). However, in ¶¶ 14 and 15, Marshall has unilaterally limited the area to reflect just a small portion of the area along I-294 and a bit further south. This re-drawing of that connecting area constitutes undisclosed and unsubstantiated expert opinion.

Marshall also attempts to introduce analysis of the concentrations of Latino voting age population ("VAP") in Congressional Districts 3, 4 and 5 under the 2001 and 2011 Congressional districting maps. Marshall Affidavit, ¶¶ 39 – 44. The Plaintiffs never produced these analytic maps during fact discovery, and certainly not as materials relied upon by their retained—and previously identified—experts Richard Engstrom and Peter Morrison. In fact, the Plaintiffs initially disclosed Dr. Morrison as their expert to opine on the changes to the Latino VAP in the 2011 Congressional Map and the Plaintiffs' proposed Congressional districting maps. Now, on the eve of the hearing, Plaintiffs are attempting to produce additional expert analysis through a lay witness. The Plaintiffs have not shown that Marshall is qualified to assess

population concentrations, determine population cut-offs, or portray such analytical maps in proper perspective. Moreover, the Plaintiffs have not provided the Defendants with the data that supports Marshall's Latino VAP analysis. Paragraphs ¶¶ 39 – 44, along with the analysis found in ¶¶ 14 – 15, offer improper expert opinions and should be stricken from the Affidavit.

- ii. *Since Marshall Does Not Qualify as an Expert, Those Exhibits that Support Unsubstantiated Expert Testimony Must be Stricken from his Affidavit and Barred from Use at the Hearing.*

Several exhibits are used as evidence to substantiate the opinions Marshall articulates within his Affidavit. However, Marshall has been identified only as a lay witness, so he may speak to no more than those facts within his first-hand knowledge. As such, the Defendants seek to strike, in particular, the following exhibits from the Affidavit and to bar Plaintiffs from using or referencing these exhibits at the hearing.

First, Exhibits B11 and B12 (the Plaintiffs' hearing exhibits P-71 and P-72, respectively) should be stricken as supporting improper expert opinion. These maps are not accurate representations of the area that connects the two core areas of Congressional District 4. As noted above, rather than adopting the geographic description authorized by the Court in *King*, Marshall has limited the area based on his own analysis. This re-drawing of the connecting area constitutes undisclosed and unsubstantiated expert opinion.

In addition, Exhibits B28 – B33 (the Plaintiffs' hearing exhibits P-88 – P-93) must be stricken as expert material. As noted in the discussion of ¶¶ 39 – 44, *supra*, the Plaintiffs never previously disclosed these analytic maps of the Latino VAP. Now, the Plaintiffs are using Marshall as a means to introduce evidence that was previously lacking from their expert's argument. However, Marshall was never disclosed as an expert and has not been shown as qualified to draw such maps or determine population concentrations or cut-offs. Ultimately,

Marshall is not eligible to opine on matters outside of his first-hand knowledge, and those exhibits that support his unqualified opinions, such as Exhibits B11 – B12 and B28 – B33, should be stricken as improper.

B. The Exhibits Attached to Marshall's Affidavit Were Not Timely Disclosed.

Not only are several paragraphs of, and exhibits attached to, Marshall's Affidavit objectionable because they elicit expert testimony from a lay witness, but all of the exhibits are also untimely disclosed. The Plaintiffs filed their Motion for Permanent Injunction on November 4, 2011, which was the first time that they disclosed the Marshall Affidavit and its supporting exhibits to the Defendants. This is a clear violation of the standard rules of discovery—and this Court's Agreed Order of September 29, 2011—and the Plaintiffs should be barred from relying upon such evidence at the hearing.

II. Marshall's Testimony at the Hearing Should be Limited to His First-Hand Knowledge.

While striking the opinion and untimely testimony from Marshall's Affidavit and supporting exhibits will ensure that the Defendants are not prejudiced by late and unsubstantiated expert testimony and supporting materials, the Defendants request that this Court also limit Marshall's testimony at trial to only those matters of which he has first-hand knowledge. The Defendants do not challenge the authenticity of the Plaintiffs' documents. Also, the Defendants do not object to the Plaintiffs calling Marshall as a fact witness. However, Marshall had not been previously proffered as an expert who, using his "scientific, technical, or other specialized knowledge," can testify to the implications and uses of such census and demographic data. FRE 701(c); FRE 702. It would be improper for the Plaintiffs to now elicit his testimony on such expert opinion at trial.

CONCLUSION

WHEREFORE, the Defendants respectfully request this Court to strike the portions of Marshall's Affidavit that offer expert testimony as well as bar Marshall, a fact witness, from offering testimony on those matters. Specifically, the Defendants seek to strike the following expert testimony from Marshall's Affidavit:

- ¶¶ 14 – 15
- ¶ 37
- ¶¶ 39 – 44

Additionally, the Defendants seek to strike the following exhibits from Marshall's Affidavit as unsubstantiated expert material, and to bar these exhibits' use at the hearing:

- B11 – B 12 (the Plaintiffs' hearing exhibits P-71 – P-72)
- B28 – B33 (the Plaintiffs' hearing exhibits P-88 – P-93)

Likewise, the Defendants seek to strike all of the exhibits due to the Plaintiffs' untimely disclosure of those materials. Furthermore, the Defendants request that this Court bar Marshall from testifying on all of the above identified matters and materials and limit his testimony to just those facts of which he has first-hand knowledge.

Dated: November 10, 2011

Respectfully submitted,

THE ILLINOIS STATE BOARD OF ELECTIONS, ET AL.

/s/ Brent Stratton

Attorney for Defendants

Brent D. Stratton
Carl Bergetz
Jon Rosenblatt
Jennifer Zlotow
Office of the Illinois Attorney General
100 West Randolph
Chicago, Illinois 60601
(312) 814-3000