HONORABLE THOMAS O. RICE

Sarah A. Dunne, WSBA No. 34869
La Rond Baker, WSBA No. 43610
AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
Telephone: (206) 624-2184
Email: Dunne@aclu-wa.org
LBaker@aclu-wa.org

Kevin J. Hamilton, WSBA No.15648
Abha Khanna, WSBA No. 42612
William Stafford, WSBA No. 39849
Perkins Coie LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Email: KHamilton@perkinscoie.com
AKhanna@perkinscoie.com
WStafford@perkinscoie.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA,

Plaintiffs,

v.

CITY OF YAKIMA, MICAH CAWLEY, in his official capacity as Mayor of Yakima, and MAUREEN ADKISON, SARA BRISTOL, KATHY COFFEY, RICK ENSEY, DAVE ETTL, and BILL LOVER, in their official capacity as members of the Yakima City Council,

Defendants.

NO. 12-CV-3108 TOR

**PLAINTIFFS' REPLY RE: MOTION TO STRIKE SECOND SUPPLEMENTAL EXPERT REPORT OF PETER MORRISON**

NOTED FOR HEARING: August 13, 2014

WITHOUT ORAL ARGUMENT



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Plaintiffs submit that their Motion to Strike the Second Supplemental Report of Peter Morrison, Ph.D should be granted. Defendants' Opposition to Plaintiffs' Motion to Strike the Second Supplemental Report of Peter Morrison, Ph.D ("Defendants' Opposition") makes it clear that Defendants could have had Dr. Morrison draw up this new report before the expert disclosure deadline passed more than a year ago, prior to his deposition, or, at the very least, before the end of discovery. They offer no justification for why they waited not only until after the close of discovery, but for the filing of their summary judgment *reply brief*, before offering it to the Court for consideration. Nor do Defendants meet their burden of showing that Plaintiffs will suffer no harm if Defendants are allowed to disregard the Civil Rules and pursue summary judgment on the strength of a report Plaintiffs have never seen, to which they have had no opportunity to respond, and which was submitted a month before trial. Plaintiffs respectfully urge the Court to grant Plaintiffs' motion and strike the Second Supplemental Report.

**A. Defendants Could Have—and Did Not—Timely Disclose the Analysis Contained in the Second Supplemental Report**

This is not a case where Defendants submitted a new expert report to address newly-arisen facts or to rebut a new and unexpected argument from Plaintiffs. Rather, the Second Supplemental Report addresses demonstration districts created and disclosed by Plaintiffs' expert William Cooper in early 2013 in Mr. Cooper's initial and rebuttal reports, and about which Plaintiffs questioned Dr. Morrison at length in his deposition. Indeed, according to Defendants, the Second Supplemental Report "illustrates an attempt to achieve the balance that Dr. Morrison referred to *in his deposition*." Response Br. at 3 (emphasis added).



**Perkins Coie LLP**
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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Dr. Morrison was deposed in May 2013, fifteen months before he prepared his Second Supplemental Report. Defendants' Opposition is silent as to why this report was not produced prior to Dr. Morrison's deposition, immediately after his deposition, or—indeed—at any time prior to the close of discovery.

Even if the post-discovery production of this report could have been excused (a task Defendants do not even attempt), Defendants fail to offer the Court any explanation for serving the belated report with their summary judgment *reply* rather than with their opening motion. Defendants acknowledge, as they must, that the report does not respond to any point argued by Plaintiffs in opposition to Defendants' motion. Rather, according to Defendants, "Dr. Morrison's declaration is a concrete illustration of the premise underlying Defendants' summary judgment motion." Response Br. at 3. Defendants' failure to "illustrate" the "premise" of their summary judgment motion until five weeks after it was filed finds no justification in the Civil Rules.

**B. Defendants Cannot Meet Their Burden of Showing Their Untimely Disclosure of Dr. Morrison Is Substantially Justified or Harmless**

Plaintiffs have addressed at length in their submissions on summary judgment why Defendants' reliance on "electoral equality" is misguided on the merits. But the fact that Defendants rely on a misbegotten legal theory is not at issue here. Whatever expert evidence the Defendants choose to rely upon is governed by this Court's scheduling orders establishing the expert disclosure deadlines.

As Defendants recognize, the Court must exclude the Second Supplemental Report unless Defendants' untimely disclosure is either "substantially justified" or



**Perkins Coie** LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

"harmless." Fed. R. Civ. P. 37(c)(1). Defendants fail to make either showing and do not even attempt the task.

Instead, Defendants ask the Court to deny Plaintiffs' motion because, they claim, Plaintiffs "do not explain why the disclosure of Dr. Morrison's declaration will result in any meaningful prejudice." Response Br. at 3. But this has things exactly backward: it is *Defendants*' "burden to show the untimely disclosure is harmless." *Nw. Pipeline Corp. v. Ross*, C05-1605RSL, 2008 WL 1744617, at *9 (W.D. Wash. Apr. 11, 2008). It is *not* Plaintiffs' burden to demonstrate "meaningful prejudice," as Defendants suggest. *See id.* at *9, n.9 (finding improper the plaintiff's effort "to shift its burden to defendants by contending they have failed to show that they have been harmed by plaintiff's conduct" in failing to disclose timely expert testimony).

In any event, it is abundantly clear why Defendants' eleventh hour submission of new expert analysis is not "harmless." Contrary to Defendants' suggestion that there is no "unfair surprise" here because Dr. Morrison offered *some* criticisms related to electoral equality in his initial report and deposition testimony (Response Br. at 3), Plaintiffs did not expect to see a new expert report from Dr. Morrison 16 months after the disclosure deadline, two months after the close of discovery, and on reply to a dispositive motion.[1] Presumably, Defendants

[1] If the new report is so unsurprising, one wonders why Defendants did not submit it earlier. *See Nw. Pipeline Corp.*, 2008 WL 1744617, at *10 ("[P]laintiff argues, defendants should not be surprised by this testimony. . . . [I]t begs the question, if the subject of the Golder experts' testimony relates to an 'issue that existed from



**Perkins Coie** LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

believe this new report adds something new to the analysis, or they would not have submitted it. And on the strength of this new analysis, Defendants ask the Court to dismiss Plaintiffs' claims. Had Defendants timely submitted this analysis, Plaintiffs could have engaged their expert to review and respond to it, deposed Dr. Morrison about it, and addressed it in their summary judgment briefing. Defendants' untimely submission precluded Plaintiffs from doing any of that, and with the summary judgment hearing next week and trial a month away, there is no time available to do so.[2]

Courts routinely exclude expert opinions that are disclosed for the first time in conjunction with summary judgment briefing and/or shortly before trial. As one court held in excluding a "supplemental" report in similar circumstances:

> Unless Figliozzi's June 1, 2006, Supplemental Report is stricken, the timing of its production . . . will prejudice Deloitte in a way that can only be ameliorated by reopening expert discovery to allow Deloitte to depose Figliozzi for a third time, and to allow Deloitte's experts to issue rebuttal reports on the newly presented basis for Figliozzi's opinion. . . . If the court allows the June 1, 2006, Second Supplemental Report to be considered, the

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early in this case,' why did plaintiff wait until the last day of discovery and less than three months before trial to provide the Golder report?").

[2] Plaintiffs have already invested considerable time, money, and resources in trial preparation, and do not seek and would oppose continuing the pending dispositive motions or the existing trial date as a means of remedying Defendants' untimely disclosure.



**Perkins Coie** LLP
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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

> court will be compelled to reopen expert discovery and might be asked to allow additional briefing on the pending dispositive motions. Accordingly, the court concludes that Relator's failure to disclose the contents of Figliozzi's Second Supplemental Report before the deadlines for completing discovery and filing dispositive motions would not be harmless but would, instead, prejudice Deloitte.

*U.S. ex rel. Gudur v. Deloitte Consulting LLP*, CIV.A. H-00-1169, 2007 WL 4322433, at *8 (S.D. Tex. Mar. 5, 2007); *see also Mako v. Burlington N. & Santa Fe R.R.*, C07-5346FDB, 2009 WL 166872, at *1 (W.D. Wash. Jan. 22, 2009) (excluding expert report submitted after the close of discovery and two months before trial because "there is no opportunity for Defendants to engage in discovery or prepare a rebuttal of Mr. Moss's opinions"); *Shire Dev. LLC v. Watson Pharm., Inc.*, 932 F. Supp. 2d 1349, 1357 (S.D. Fla. 2013) (rejecting disclosing party's contention that previously undisclosed expert's findings were "'neither controversial nor prejudicial'" where disclosing party failed to provide a reason why the expert had not been timely disclosed "as required by the Federal Rules of Civil Procedure, the Court's scheduling orders, and the Parties' stipulations."); *Damiani v. Momme*, 2012 WL 1657920, at *3 (E.D. Pa. May 11, 2012) ("A supplemental report served on Defendants' counsel less than two weeks before trial leaves Defendants without sufficient time to respond. . . . [T]he Court sets dates for the close of discovery, but if the parties elect to ignore those dates, they run the risk that the clock will run out on their ability to complete discovery."); *White v. Gerardot*, 1:05-CV-382, 2008 WL 4238953, at *4 (N.D. Ind. Sept. 10, 2008) (where expert report was disclosed 17 months after deadline, a month after



**Perkins Coie** LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

discovery closed, and two months before trial "the prejudice resulting from the untimely disclosure is manifest"); *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 573 (5th Cir. 1996) (upholding district court's exclusion of expert testimony where initial expert reports failed to explain the basis of the expert's opinions, though the reports were "supplemented" after the disclosure deadline, because receiving reports two months instead of three months before trial "would have likely resulted in some prejudice to Sierra Club").

Adherence to the Civil Rules and the Court's scheduling orders provides for the orderly development and presentation of evidence. Defendants offer no justification for their gross deviation from the court-ordered expert disclosure deadline, and the resultant harm from that deviation is manifest.

## II. CONCLUSION

For the reasons stated above, and in Plaintiffs' motion, Plaintiffs respectfully request that the Court strike the Second Supplemental Report.



**Perkins Coie** LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED: August 11, 2014

*s/ Kevin J. Hamilton*
Kevin J. Hamilton, WSBA No. 15648
Abha Khanna, WSBA No. 42612
William B. Stafford, WSBA No. 39849
**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Fax: 206.359.9000
Email: KHamilton@perkinscoie.com
Email: AKhanna@perkinscoie.com
Email: WStafford@perkinscoie.com

*s/ Sarah A. Dunne*
Sarah A. Dunne, WSBA No. 34869
La Rond Baker, WSBA No. 43610
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
Telephone: (206) 624-2184
Email: dunne@aclu-wa.org
Email: lbaker@aclu-wa.org

*s/ Joaquin Avila*
Joaquin Avila (*pro hac vice*)
P.O. Box 33687
Seattle, WA 98133
Telephone: (206) 724-3731
Email: joaquineavila@hotmail.com

*s/ M. Laughlin McDonald*
M. Laughlin McDonald (*pro hac vice*)
ACLU Foundation
230 Peachtree Street, NW Suite 1440
Atlanta, Georgia 30303-1513
Telephone: (404) 523-2721
Email: lmcdonald@aclu.org

**Attorneys for Plaintiffs**

## CERTIFICATE OF SERVICE

I certify that on August 11, 2014, I electronically filed the foregoing Plaintiffs' Reply Regarding Motion to Strike Second Supplemental Expert Report of Peter Morrison with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorney(s) of record:

Francis S. Floyd WSBA 10642
John Safarli WSBA 44056
Floyd, Pflueger & Ringer, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119
(206) 441-4455
ffloyd@floyd-ringer.com
jsafarli@floyd-ringer.com

*Counsel for Defendants*

- ☒ VIA CM/ECF SYSTEM
- ☐ VIA FACSIMILE
- ☐ VIA MESSENGER
- ☐ VIA U.S. MAIL
- ☐ VIA EMAIL

I certify under penalty of perjury that the foregoing is true and correct.

DATED: August 11, 2014

**PERKINS COIE LLP**

s/Abha Khanna
Abha Khanna, WSBA No. 42612
AKhanna@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-6217

Attorney for Plaintiffs



**Perkins Coie LLP**
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000