THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' MOTION TO EXCLUDE UNTIMELY DISCLOSED WITNESSES

Note on Motion Calendar:
August 21, 2020

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I. INTRODUCTION

Seven months after the close of discovery, Defendants served a fifth set of supplemental initial disclosures identifying numerous new fact witnesses.[1] There is no justification for these grossly untimely disclosures, and the prejudice to Plaintiffs is significant. In hopes of avoiding additional motion practice, Plaintiffs proposed potential mitigation measures, which included Defendants agreeing to provide more information on the topics of these new witnesses' proposed testimony and to allow Plaintiffs to depose four of them (above the limit of ten depositions per side). But thus far, Defendants have said they would not agree to this proposal, and instead have offered only the unsatisfactory measure of allowing Plaintiffs one additional deposition—an offer conditioned on Plaintiffs agreeing (i) to meet certain conditions to Defendants' satisfaction, and (ii) to permit Defendants to take an additional deposition as well. While Defendants did provide more information on the topics of the witnesses' proposed testimony, that information only confirmed the prejudice Plaintiffs would suffer if these witnesses were allowed to testify without having been deposed before trial.

The parties are continuing to meet and confer, and Plaintiffs hope to withdraw this motion if a compromise can be reached. But given the timing of the disclosures and the fact that the discussions about them have dragged on, Plaintiffs felt compelled to file this motion. Plaintiffs thus move for an order excluding the untimely disclosed witnesses under Rule 37(c)(1). In the alternative, Plaintiffs request an order allowing Plaintiffs leave to conduct four additional depositions above the normal limit of ten.

[1] Defendants disclosed a total of eight additional witnesses, but Plaintiffs do not challenge the disclosure of Nadia R. Daud or Alexander N. Cook. Accordingly, only the remaining six witnesses—Anthony J. Negrut-Calinescu, Kristin E. Averill, Kelley L. Costello, Sandy K. Marckmann, Christopher P. Atienza, and Christina E. Salidzik—are at issue.

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II. PROCEDURAL HISTORY

A. Background

After nearly three years of litigation, fact discovery in this case closed on November 29, 2019. *See* Dkt. No. 298 at 1–2.[2] The parties have proceeded with depositions, expert discovery, and discovery-related motions since then. *Id.*[3]

Neither side has sought leave to take more than the limit of ten depositions. Thus, when depositions began, both sides had to evaluate what depositions to take based on the information then available. After considering the individuals Defendants had identified as potential witnesses in support of their litigation position, Plaintiffs elected to depose eight individual fact witnesses (all of which occurred months ago); to take one Rule 30(b)(6) deposition (which was noted within the time for fact depositions, but has not yet been taken due to lengthy negotiations to resolve objections as to the scope of the deposition); and to reserve one deposition for Defendants' expert witness. *See* Gellert Decl. ¶ 3.

Defendants have taken only three depositions to date (each of a named plaintiff). *See* Gellert Decl. ¶ 4. As the parties negotiated issues relating to individuals who responded to the class notice about this action, Defendants have insisted they are entitled to know the identities of *all* of Plaintiffs' potential witnesses before choosing their remaining seven deponents. *See* Gellert Decl. ¶ 9. Although Defendants have recently been provided information about the notice responders (per the agreement documented in Dkt. No. 371), and while they have told Plaintiffs most of the witnesses they would still like to depose with their seven remaining depositions,

[2] At *Defendants' request*, Plaintiffs filed a third set of supplemental disclosures in January of 2020 to clarify their prior disclosures. *See* Gellert Decl. ¶ 2. The updated disclosures, which included the requested clarifying information, also listed a set of publicly available documents. *Id.* Defendants never objected to Plaintiffs' third set of supplemental disclosures, and Defendants themselves produced a fourth set of initial disclosures on December 31, 2019. *Id.*

[3] Deadlines for depositions, expert discovery, and discovery-related motions were extended in later stipulations and orders. *See* Dkt. Nos. 305, 308, 322, 343, 347, 349, 359, 362.

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Defendants have yet to commit as to all of the depositions they want to take. *See* Gellert Decl. ¶ 19.

Defendants' belated identification of witnesses has denied Plaintiffs the same opportunity to have complete information as they decided how to proceed with depositions. Indeed, Plaintiffs would have made different choices if they had known the full slate of potential defense witnesses. *See* Gellert Decl. ¶ 3. They would have deposed some of those recently identified instead of some they actually took. *Id.* Or they may have sought leave *during* fact discovery—*i.e.*, months ago—to take more than ten depositions. *Id.*

The parties served initial expert reports on February 28, 2020. *See* Gellert Decl. ¶ 5. At that point, Defendants' rebuttal expert reports were due on March 28, 2020. *Id.* It was only on March 24, 2020, that the parties agreed to strike the trial date and case deadlines due to the pandemic. *Id.* ¶ 6. However, as part of that stipulation, Defendants committed to continue to work on the case, not stay all activity. *See id.*; Dkt. No. 348 at 3.

In negotiating a joint status report in April, Defendants signaled that they intended to respond to Plaintiffs' expert reports with new factual evidence. *See* Gellert Decl. ¶ 7. Plaintiffs promptly objected, noting that fact discovery was over. *Id.*

In May, Defendants revealed that they had made errors in CARRP-related data they had provided earlier. *See* Gellert Decl. ¶ 8. This necessitated experts to review or analyze new data from Defendants, and the parties therefore agreed to a new schedule for expert disclosures. *See* Dkt. No. 359 at 4–6. In accord with that agreement, Plaintiffs provided revised reports from some of their experts on July 1, 2020. *See* Gellert Decl. ¶ 8.

One day later, Defendants served their fifth set of supplemental initial disclosures identifying, among other things, multiple new fact witnesses, all of whom are employees of Defendants. *See* Gellert Decl. ¶ 10. Those witnesses include (1) Anthony J. Negrut-Calinescu, a senior immigration services officer in the Fort Myers Field Office; (2) Kristin E. Averill, a supervisory asylum officer in the Los Angeles Asylum Office; (3) Kelley L. Costello, a senior

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asylum officer in the Los Angeles Asylum Office; (4) Sandy K. Marckmann, an immigration officer in the Indianapolis Field Office; (5) Christopher P. Atienza, an immigration officer in the Seattle Field Office; and (6) Christina E. Salidzik, an adjudications officer in the Fraud Detection and National Security (FDNS) Branch of the Field Operations Directorate of the U.S. Citizenship and Immigration Service's (USCIS) Headquarters Office. *See* Gellert Decl. Ex. 2. Plaintiffs promptly objected to Defendants' untimely disclosures on July 6. *See* Gellert Decl. ¶ 11.

B. Conferral Process

Plaintiffs offered to forgo filing a motion to exclude the untimely disclosed witnesses if Defendants would provide additional information about the witnesses' proposed testimony and allow Plaintiffs to take four additional depositions—notwithstanding that such an accommodation would disrupt the already very tight case schedule. *See* Gellert Decl. ¶ 12. In an email dated July 16, Defendants wrote that they were willing to provide additional information regarding the topics the witnesses would address. *Id.* ¶ 13. But they would agree to only *one* additional deposition and only if, among other things, Plaintiffs would accept an additional deposition for Defendants and explain, to Defendants' satisfaction, why Plaintiffs

> could not have deposed [the deponent Plaintiffs select] prior to the close of fact witness depositions and why [Plaintiffs] cannot avoid prejudice by addressing [their] questions to the 30(b)(6) designee(s), or why [Plaintiffs] could not have foreseen the need to exceed the presumptive limit in FRCP 30(a)(2)(A)(i) and agreed to in this case[.]

Id.

Plaintiffs responded that Defendants' proposal was not acceptable, but Plaintiffs stated that they were "willing to withhold judgment on what additional arrangements should be made pending [Defendants'] provision of additional information about what the topics … the newly identified witnesses may address." *Id.* ¶ 14. Plaintiffs then waited more than a week for Defendants to send the additional information. On July 31, Plaintiffs asked Defendants to provide the information by August 3. *Id.* ¶ 15. Defendants finally provided the information on

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August 6 in the form of an amended fifth set of supplemental initial disclosures. *Id.* ¶ 18; *see also* Gellert Decl. Ex. 2.

The additional information only confirms that Plaintiffs would suffer severe prejudice if the six witnesses were permitted to testify at trial without having been deposed. The disclosures reveal that Defendants intend these witnesses to offer sweeping testimony on nearly every key issue in this case, from processing CARRP cases to coordination with law-enforcement agents. The breadth of topics belies the notion that these witnesses will offer targeted responses to factual assertions in Plaintiffs' expert reports. That breadth alone establishes that they should have been identified years ago, and certainly while fact discovery was still open. Further, it appears that Defendants may intend that some or all of these witnesses offer expert opinions, without regard for the deadline for identifying such witnesses or providing the reports/disclosures required of experts. *See* Fed. R. Civ. P. 26(a)(2)(B), (C). For instance, some of the witnesses purport to offer opinion testimony on the critical question "whether CARRP or any application processes/criteria are used in a discriminatory fashion." *See* Gellert Decl. Ex. 2 at 4.

Given the looming deadlines in this matter, Plaintiffs informed Defendants that they could wait no longer to file this motion. *See* Gellert Decl. ¶ 18. Plaintiffs informed Defendants that they were willing to continue conferring in an effort to reach a satisfactory resolution. *Id.*

III. LEGAL FRAMEWORK

Rule 26(a) requires each party to provide to other parties "the name ... of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A). And Rule 26(e) provides that "[a] party who has made a disclosure under Rule 26(a) ... must supplement or correct its disclosure" in a "*timely manner* if the party learns that in some material respect the disclosure ... is incomplete or incorrect, and if the additional or corrective information

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has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e) (emphasis added).

Failure to comply with these requirements warrants sanction under Rule 37(c)(1), which provides that a party who "fails to provide information or identify a witness as required by Rule 26(a) or (e) … 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." Fed. R. Civ. P. 37(c)(1). "Rule 37(c)(1) is intended to put teeth into the mandatory disclosure requirements of Rule 26(a) and (e)." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (cleaned up).

IV. ARGUMENT

A. The Court should exclude the untimely disclosed witnesses.

Defendants failed to disclose *in a timely manner* the witnesses listed in their fifth set of supplemental initial disclosures. This failure was neither substantially justified nor harmless. Defendants thus cannot use testimony from the belatedly disclosed witnesses to support their defenses.

1. Defendants' disclosures are untimely.

Supplemental disclosures under Rule 26(e) "should be made at appropriate intervals *during the discovery period*, and with special promptness as the trial date approaches." Rule 26(e), Advisory Committee Note, 1993 Amendments (emphasis added). Multiple courts have found disclosures untimely where, as here, they were made *after the discovery period*. In *Ollier*, for example, Plaintiffs identified proposed fact witnesses "15 months after the discovery cutoff and only ten months before trial." 768 F.3d at 861. The Ninth Circuit affirmed the district court's conclusion that the witnesses "were identified too late in the process." *Id.* Courts around the country have likewise concluded that disclosures made after the discovery deadline are untimely. *See, e.g.*, *EQT Gathering, LLC v. Marker*, No. 2:13-CV-08059, 2015 WL 9165960, at *7 (S.D. W. Va. Dec. 16, 2015) (holding that supplemental disclosures made after the close of fact

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discovery and after defendant's motion for summary judgment were untimely); *Branch v. Grannis*, No. 1:08-cv-01655-AWI-GSA-PC, 2014 WL 5819212, at *4 (E.D. Cal. Nov. 7, 2014) (finding that defendant's supplemental document production was untimely where the defendant served the documents "long after discovery had closed" and "only two weeks before [the defendants] filed their motion for summary judgment"); *Reed v. Wash. Area Metro. Transit Auth.*, No. 1:14cv65, 2014 WL 2967920, at *2 (E.D. Va. July 1, 2014) ("Making a supplemental disclosure of ... known fact witnesses a mere two days before the close of discovery ... is not timely by any definition.") (cleaned up); *United States v. Cochran*, No. 4:12-CV-220-FL, 2014 WL 347426, at *6 (E.D.N.C. Jan. 30, 2014) (finding that plaintiff's disclosure of individuals with discoverable information was not timely where plaintiff had trouble locating the individuals but never requested an extension of discovery and waited until after the close of discovery to identify the individuals); *United States v. Whiterock*, No. 5:09-HC-2163-FL, 2012 WL 1825702, at *2 (E.D.N.C. May 18, 2012) (observing that "[s]upplementation to identify a witness for the first time after the close of discovery is manifestly not timely").

Defendants' disclosure of additional fact witnesses seven months after the discovery deadline was manifestly untimely. Notably, the Court recently denied Plaintiffs' request to subpoena third agencies as untimely, observing that the "deadlines set by the Court have passed and it will not revisit that topic." Dkt. No. 392. If Plaintiffs cannot submit untimely subpoenas, Defendants cannot submit untimely disclosures.

2. Defendants' failure to disclose was not substantially justified.

There is no legitimate justification for Defendants' failure to disclose these additional witnesses well before the close of discovery. The witnesses are all Defendants' employees; as such, they have long been known and available to Defendants. In particular, Christopher P. Atienza is "one of the adjudicators who worked on named Plaintiff Mushtaq Abed Jihad's (a.k.a. Noah Adam Abraham) naturalization application." Gellert Decl. Ex. 2 at 8. Employees who were

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involved with named plaintiffs' applications should have been an obvious source of information to which Defendants had easy access.

That Plaintiffs may have generally been aware of some of these new witnesses is of no moment. "'[K]nowledge of the existence of a person is distinctly different from knowledge that the person will be relied on as a fact witness.'" *Downhole Stabilization Rockies Inc. v. Reliable Field Servs. LLC*, No. 15-CV-226-J, 2017 WL 3473213, at *2 (D. Wyo. Mar. 23, 2017) (quoting *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, No. 10–CV–02516–WJM–KLM, 2014 WL 2933189, at *2 (D. Colo. June 30, 2014)). The disclosure rules "exist to avoid forcing parties into guessing games, and so the parties have the opportunity to conduct meaningful discovery, including by deposing potential witnesses." *Godwin v. Wellstar Health Sys., Inc.*, No. 1:12-CV-3752-WSD, 2015 WL 7313399, at *2 (N.D. Ga. Nov. 19, 2015). "A party's identification of a person as knowledgeable about the facts in a case has unique import, allowing the parties to focus on those an opposing party and their counsel specifically identify in initial disclosures and interrogatories." *Id.* Defendants' failure to "specifically identify" the employees they intend to use as witnesses deprived Plaintiffs of the opportunity to focus on those individuals, resulting in "procedural and legal prejudice." *Id.*

Defendants have argued that their untimely disclosure is justified because the testimony the witnesses will offer is purportedly responsive to Plaintiffs' expert reports. But "Rule 26(e) creates a 'duty to supplement,' not a right." *Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009). "Rule 26(e) does not create a loophole through which a party who wishes to revise its initial disclosures can add to them to its advantage after the court's deadline for doing so has passed." *Dayton Valley Inv'rs, LLC v. Union Pac. R. Co.*, No. 2:08-CV-00127-ECR, 2010 WL 3829219, at *3 (D. Nev. Sept. 24, 2010) (cleaned up). Rather, supplementation is a procedure for correcting inaccuracies or omissions "based on information that was not available at the time of the initial disclosure." *Id.* (cleaned up).

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Defendants have given no indication that the belatedly listed witnesses will offer testimony necessary to correct inaccuracies or omissions based on information that was not previously available. Rather, it appears the witnesses will "impermissibly attempt[] to fix the weakness[es]" in Defendants' defense, which Defendants recognized only after Plaintiffs' filed their expert reports. *Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009). Defendants cannot skirt the rules to belatedly shore up their case this late in the game. *See, e.g., Hofstetter v. Chase Home Fin., LLC*, No. C 10-01313 WHA, 2010 WL 4392916, at *3 (N.D. Cal. Oct. 29, 2010) (precluding a defense witness from testifying where the witness was not disclosed until over a month after the initial disclosures deadline had passed, and where the defendants' claims that this was substantially justified by an unclear complaint was pretext to "avoid making initial disclosures"); *Kajitani v. Downey Sav. & Loan Ass'n*, No. CIV.07-07-00398 SOM-, 2008 WL 2751232, at *3 (D. Haw. July 15, 2008) (holding that plaintiffs' failure to make a timely expert disclosure was not substantially justified because they should have been aware of the need for expert testimony prior to the deadline, given that a declaration filed by Defendants gave them ample notice of the issues requiring an expert opinion).

Moreover, expert witnesses routinely introduce facts into a case.[4] *See* Fed. R. Civ. P. 26(a)(2)(B)(ii) (stating that an expert report must contain "the facts or data considered by the witness" in forming his opinion); Fed. R. Civ. P. 26(a)(2)(C) (stating that a witness not required to provide a written report must provide a disclosure containing "a summary of the facts and opinions to which the witness is expected to testify"). The proper procedure for responding to such facts is to submit a rebuttal expert report. *See* Fed. R. Civ. P. 26(a)(2)(D) (allowing 30 days to submit expert rebuttal evidence "intended to solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)"); *see also, e.g., In re Trasylol Prod. Liab. Litig.*, No. 1:09-MD-01928, 2010 WL 4065436, at *2 (S.D. Fla. Aug. 6,

[4] Any argument that Plaintiffs failed to comply with Rule 26 would thus be wholly without merit. Moreover, a party's failure to make required disclosures is not a "substantial justification" for the other party's nondisclosure. *See* 6 Moore's Federal Practice § 26.27 (collecting cases).

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2010) (disallowing rebuttal expert report that did not "address any new or additional material introduced by [the opposing party's experts]"). Were it otherwise, fact discovery deadlines would be meaningless; parties could simply disclose new information after the cut-off date to "respond" to expert reports.

Furthermore, the breadth of the witnesses' proposed testimony undermines any argument that the testimony is a targeted response to Plaintiffs' expert reports. For example, Defendants' amended disclosures state that Anthony J. Negrut-Calinescu likely has discoverable information based on his experience processing immigrations benefits applications, including:

> [T]he processing of applications in the Field Office Directorate and the Refugee, Asylum and International Operations Directorate; coordination with FDNS and law enforcement through FDNS; the use of open source information on applicants; processing times; interview procedures; an applicant's use of false testimony to obtain an immigration benefit and/or credibility determinations; the use of security checks; the relationship between TRIG and CARRP; the trainings, guidance, subject matter experts, and other resources available to USCIS officials when confronted by applications containing unfamiliar information regarding country conditions, organizations, groups, religious practices, or cultural practices; whether CARRP or any application processes/criteria are used in a discriminatory fashion; the accuracy of any non-USCIS personnel's predictors that an individual has been processed through CARRP; and applicants receiving assistance from attorney or non-attorneys.

Gellert Decl. Ex. 2 at 3–4. This proposed testimony covers nearly every aspect of the CARRP process. Defendants' capacious list of proposed topics makes clear, for the first time, that Defendants believe Mr. Negrut-Calinescu is an important witness with key insights about what CARRP is and how it works. He should thus have been disclosed at the very outset of this case.

Defendants' failure to disclose the additional witnesses at issue in this motion thus lacks substantial justification.

3. Defendants' failure to disclose is not harmless.

The Ninth Circuit has detailed the prejudice that may result from condoning violations of Rule 26:

> The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush.

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> After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

Ollier, 768 F.3d at 862–63.

All these harms would result if Defendants were permitted to use testimony from the untimely identified witnesses in dispositive motions and at trial. At this late stage, Plaintiffs cannot conduct follow-up discovery to explore the witnesses' proposed testimony. In particular, Plaintiffs have exhausted eight of their allotted ten depositions and have plans for how to use the remaining two; their selections were made as part of a carefully considered strategy based on the information they had at the time. Had Plaintiffs known about Defendants' additional witnesses earlier, they would have chosen to depose some of them instead of some of the witnesses they did depose. Alternatively, they might have requested leave to conduct more than ten depositions.

Permission to conduct further depositions would alleviate the prejudice Plaintiffs would suffer, at least to some extent. But the parties are already struggling to complete depositions on time, and adding extra depositions could necessitate the delay of other deadlines. Accordingly, the only remedy that would both avoid a trial "by ambush" and preserve the Court's ability to manage its docket is exclusion under Rule 37(c)(1). *See id.*

* * *

Plaintiffs thus request an order barring Defendants from using testimony from the late disclosed witnesses in any motion or at trial.

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B. In the alternative, the Court should at least allow Plaintiffs to conduct four additional depositions.

In the alternative, the Court should at least allow Plaintiffs leave to conduct four additional depositions. Permission to take further depositions would mitigate some of the prejudice resulting from Defendants' failure to disclose these witnesses before the discovery deadline; it would allow Plaintiffs to learn what information these witnesses intend to offer so that Plaintiffs are not ambushed at trial.

There is no reason to grant Defendants additional depositions as a sort of *quid pro quo*. Granting *Plaintiffs* additional depositions is a remedy for *Defendants'* discovery violations; Defendants should not benefit from their own mistakes or misconduct. Indeed, allowing Defendants to take extra depositions would exacerbate the harm caused by Defendants' dilatory conduct, by likely derailing the case schedule further (again) and adding to the cost of this already very expensive and time-consuming case.

V. CONCLUSION

The Court should exclude Defendants' untimely disclosed fact witnesses, or—in the alternative—grant Plaintiffs leave to conduct four additional depositions.

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Respectfully submitted,

DATED: August 6, 2020

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