IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Latasha Holloway, et al., *Plaintiffs,* v. City of Virginia Beach, et al., *Defendants.*	Civil Action No. 2:18-cv-0069

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE 20 WITNESSES DEFENDANTS FAILED TO DISCLOSE UNTIL AFTER THE CLOSE OF DISCOVERY

Three months before trial and eight months after the close of discovery, Defendants surprised Plaintiffs with the disclosure of 20 new potential witnesses. Defendants necessarily knew—and if not, should have known—of these witnesses from the outset of the case. Their belated disclosure of 20 witnesses does not merely violate Federal Rule of Civil Procedure 26, but also defeats its central purposes of ensuring orderly discovery and avoiding trial by ambush. In the process, it seriously prejudices Plaintiffs. Therefore, Plaintiffs ask this Court to exclude the testimony of, and evidence from, these 20 new witnesses on a motion or at trial.

BACKGROUND

Fact discovery in this case closed on September 3, 2019. Eight months later, on May 29, 2020, Defendants served their third supplement to their Rule 26 initial disclosures.[1] *See* ECF No. 89; Ex. 1. In the disclosure, Defendants identified 20 new witnesses whom they may use to support their claims or defenses, and disclosed the subjects on which those witnesses possessed knowledge.

[1] Defendants newly disclosed witnesses are numbered 106-126. *See* Ex. 1.

Defendants allege that the 20 new individuals include current and former city employees, elected officials, candidates for state and local offices, and community and business leaders. Given that many of these individuals were employed by Virginia Beach or served in its government, Defendants necessarily knew of them.

On June 8, 2020, Plaintiffs, through counsel, served Defendants with a meet and confer letter stating that this disclosure, coming eight months after the discovery deadline, was untimely. Ex. 2. Plaintiffs thus requested that Defendants agree to not call any of the 20 new individuals as witnesses at trial nor rely upon their testimony. On June 10, 2020, Defendants, through counsel, responded and stated that "there has been no discovery violation" and offered to not object if Plaintiffs sought to depose the 20 newly identified individuals during the three months before trial, in the middle of a pandemic. Ex. 3. On July 1, 2020, Plaintiffs responded to Defendants' letter reiterating that Defendants' supplement was out of time under the federal rules, that the proffered depositions would likewise be untimely, and that undertaking them within the remaining period before trial would be unduly burdensome. Plaintiffs stated that they therefore would seek relief from the Court. Ex. 4. On July 8, 2020, Defendants replied, stating that the disclosed witnesses "were either previously known to Plaintiffs, Plaintiffs' counsel, or Plaintiffs' witnesses, or their names and/or potential relevance were otherwise unknown to Defendants' counsel until *very recently*." Ex. 5 at 5 (emphasis added). On July 9, 2020 counsel representing the parties met and conferred by phone and were unable to reach an amicable resolution.[2]

Plaintiffs then filed this motion requesting that this Court strike Defendants' untimely disclosure.

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[2] The parties' phone conference on July 9, 2020 satisfies the meet and confer requirements in Local Civil Rule 37(E).

ARGUMENT

Federal Rule of Civil Procedure 26 requires a party to disclose "the name and, if known, the address and telephone number 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, unless the use would be solely for impeachment." Fed. R. Civ. Pro. 26(a)(1)(A)(i). Rule 26 required the initial disclosures early in the case, "without awaiting a discovery request," *id.,* and "within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order." *Id.* 26(a)(1)(C). That date was March 5, 2019. *See* ECF No. 71. As the Fourth Circuit has recognized, "[a] party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case." *Saudi v. Northrop Grumman Corp*., 427 F.3d 271, 278-79 (4th Cir. 2005); *see also Thibeault v. Square D Co*., 960 F.2d 239, 244 (1st Cir. 1992) ("Rule 26 promotes fairness both in the discovery process and at trial. For Rule 26 to play its proper part in this salutary scheme, discovery must not be allowed to degenerate into a game of cat and mouse.").

Fed. R. Civ. P. 37(c)(1) expressly mandates that a party who "fails to . . . identify a witness as required by Rule 26 . . . is not allowed to use that . . . witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Because Defendants unjustifiably failed to make these disclosures as required by Rule 26, or even before the close of discovery, and because Defendants' failure substantially harms Plaintiffs, Defendants may not call these individuals at trial.

As an initial matter, Defendants claim that they have not violated the discovery rules and that Plaintiffs' reliance on Rule 37 is thus premature. This is incorrect. This Court has held that

"[m]aking a supplemental disclosure of [] known fact witnesses a mere two days before the close of discovery," much less *eight months after* the close of discovery, "is not timely by any definition." *Reed v. Washington Area Metro. Transit Auth.*, No. 1:14CV65, 2014 WL 2967920, at *2 (E.D. Va. July 1, 2014). Providing a supplement of 20 new witnesses to the defendants' initial disclosures here after the close of discovery thus violates the discovery rules. *See, e.g.*, *EQT Gathering, LLC v. Marker*, No. 2:13-cv-08059, 2015 WL 9165960 (S.D.W. Va. Dec. 16, 2015) (finding plaintiff's supplemental disclosures untimely where they were served after the close of discovery and defendant filed a motion for summary judgment); *United States v. Whiterock*, No. 5:09-HC-2163-FL, 2012 WL 1825702, at *2 (E.D.N.C. May 18, 2012) (noting that "[s]upplementation to identify a witness for the first time after the close of discovery is manifestly not timely"); *Quesenberry v. Volvo Grp. N. Am., Inc.*, 267 F.R.D. 475, 479 (W.D. Va. 2010) (finding that the plaintiffs did not disclose the identity of "persons likely to have discoverable information" in a timely fashion where they disclosed the identities of these individuals four months after the discovery deadline and "nearly three months after the submission of summary judgment briefs.").[3]

The only issue under Rule 37 is whether the failure is substantially justified or harmless. In resolving that issue, this Court must consider: (1) the surprise to the Plaintiffs; (2) the ability of Plaintiffs to cure the surprise; (3) the extent to which allowing the testimony would disrupt the

[3] Defendants' third supplemental disclosures are not an ordinary, run-of-the mill supplementation of relevant information that was released or discovered only after the end of discovery. These disclosures include the identity of 20 new witnesses, who Defendants have known, or should have known about, for over eight months. Any attempt by Defendants to claim that disclosure of these individuals is now "necessary" or "required" despite "only [] speaking recently with one or more persons that Plaintiffs' identified as persons with information" and waiting until "May 2020" to conduct discovery is laughable. Ex. 5 at 4, 5. Rule 26 is not a mechanism for Defendants to cover for their lack of diligence within the allotted discovery period set by the court's scheduling order.

trial; (4) the explanation for Defendants failure to name the witnesses previously; and (5) the importance of the proposed testimony. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 329 (4th Cir. 2011). "Four of these factors . . . relate mainly to the harmlessness exception, while the remaining factor—explanation of the nondisclosure—relates primarily to the substantial justification exception." *S. States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003). The burden of establishing these factors lies with the non-disclosing party. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

The five factors weigh heavily in favor of excluding the testimony of the newly disclosed 20 individuals. First, the surprise to Plaintiffs is extreme. Plaintiffs had no opportunity to depose any of these witnesses during the discovery period, to use their testimony in examining other witnesses, or to pursue other leads the testimony might have generated. *See Reed v. Washington Area Metro. Transit Auth.*, No. 1:14CV65, 2014 WL 2967920, at *2 (E.D. Va. July 1, 2014) ("[Defendant's] failure is obviously not harmless. A party's ability to order its discovery and select its witnesses for deposition is prejudiced by another party's failure to make sufficient Rule 26(a)(1) disclosures."). Defendants allege there is no surprise to Plaintiffs because the names of their newly disclosed witnesses "were either previously known to Plaintiffs, Plaintiffs' counsel, or Plaintiffs' witnesses, or their names and/or potential relevance were otherwise unknown to Defendants' counsel until *very recently*." Ex. 5 at 5 (emphasis added). This position is not consistent with Rule 26. The issue is not whether Plaintiffs knew of these witnesses.[4] Even if "the opposing party may have known of the identity of a possible witness [that] is no substitute for compliance with Rule 26." *Reed*, 2014 WL 2967920, at *3. Rule 26(a)(1)(A)(i) requires a party to disclose discoverable

[4] In addition to being beside the point, Defendants' claim that Plaintiffs knew of the names or potential relevance of all of these new witnesses is simply false.

information "that the disclosing party *may use to support its claims or defenses.*" (Emphasis added.). The surprise lies in the fact that Defendants are just now disclosing that they may use these witnesses at trial. "A failure to disclose in the right form, *at the right time*, impedes discovery at the time of nondisclosure, such that later putting the opposing party on notice does not render the nondisclosure unsurprising or curable." *Vir2us, Inc. v. Invincea*, Inc., 235 F. Supp. 3d 766, 777 (E.D. Va. 2017) (emphasis added). The "right time" to disclose these individuals was at the outset of the case in 2018, and in any event, well before the close of discovery eight months ago. Nor is Defendants' new disclosure excusable as an isolated error. The disclosure involves *20 witnesses.* Not discovering them earlier suggests a lack of diligence, not an anomalous oversight or a solitary mistake.

Secondly, Plaintiffs cannot cure the surprise. Defendants' suggestion that Plaintiffs depose these witnesses is not at all practical given the trial date approximately three months away. It took more than two months for the parties to schedule depositions of the fourteen *named* Defendants and Defendants' experts with a continuation, and multiple cancellations and reschedulings needed.[5] It took Defendants more than two months to depose Plaintiffs' *two* experts after being served with Plaintiffs' supplemental reports. Twenty depositions of busy individuals, each with their own scheduling complications, in three months during a global pandemic with trial on the horizon is just unrealistic. Similarly, Defendants' offer "to not object to Plaintiffs' timely counter-identification of additional fact witnesses" is unworkable. Ex. 5 at 5. Requiring Plaintiffs to schedule twenty depositions, prepare to depose twenty witnesses, have the depositions occur, then reopen discovery to find additional fact witnesses to counter the information disclosed in the

[5] Another impediment to deposing 20 witnesses is that the parties agreed that Plaintiffs may not exceed the fourteen depositions they already conducted. *See* ECF No. 113. The addition of 20 new witnesses could also potentially impact the length of trial.

depositions and prepare those witnesses for trial is not a cure. Instead, this "cure" just further harms Plaintiffs by preventing them from being able to prepare for trial. Furthermore, there are several court-imposed deadlines between now and the scheduled trial date.[6] *See* ECF No. 142. And apart from the burden of deposing these individuals, Plaintiffs are further prejudiced because they cannot redo discovery they have already taken. Had these individuals been timely disclosed, Plaintiffs could have asked other witnesses about them, in addition to conducting other relevant discovery or taking their testimony into account in expert reports[7].

Third, the sheer number of additional witnesses interjected without notice shortly before trial would disrupt trial preparation and the trial itself. Plaintiffs will not know until 30 days before trial, if then, which of these witnesses Defendants intend to call. Plaintiffs therefore will have to prepare to cross-examine all of them without the benefit of knowing what they might say. Moreover, Plaintiffs have already formulated their approach to trial based on the evidence adduced during discovery. With the addition of these witnesses, Plaintiffs will have to re-think their strategy, including potentially adding witnesses.

Fourth, counsel for Defendants provided insufficient reason for the failure to timely list these witnesses in their initial disclosure or supplements. Defendants state that their supplement provided Plaintiffs with the required Rule 26(a) "information only *shortly* after [Defendants] obtain[ed] it." Ex. at 2 (emphasis added). But the witnesses included on that list are not obscure rank and file residents of Virginia Beach. Nor did they just recently move to town. They are Defendant Virginia Beach's own current and former employees. They are officials elected to serve

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[6] The parties are also working to reach agreement on several other deadlines, including briefing, in preparation for trial.

[7] Nor is postponing the trial an option. That both imposes the additional burden on Plaintiffs and delays the relief to which they are entitled.

in Defendant Virginia Beach's own government. They are candidates for office in Virginia Beach. And they are leaders in the Virginia Beach community. Defendants had to know that these 20 individuals had relevant information, but either failed diligently to undertake the required factual inquiries, or chose not to disclose the witnesses, or engaged in some combination of the two options. Whether it resulted from lethargy, negligence, or design, Defendants' failure to identify these witnesses earlier does not justify burdening Plaintiffs with preparing for any of the 20 new witnesses in the three months remaining before trial. *See United States v. Cochran*, No. 4:12-CV-220-FL, 2014 WL 347426, at *4 (E.D.N.C. Jan. 30, 2014) (a party's delay in identifying a witness "until after the close of discovery connotes, if anything, a lack of diligence on [that party's] part in conducting its factual inquiries") (internal citation omitted); *see also Miller v. United States*, No. 5:09-CV-534-F, 2011 WL 3440753, at *4 (E.D.N.C. Aug. 8, 2011) ("Put simply, Plaintiffs dragged their feet. . . . Information is gleaned during discovery which allows parties to 'change their calculus' with respect to the litigation. Having waited to glean vital information, Plaintiffs cannot transform what is at best a strategic misstep into substantial justification.").[8]

Fifth, the importance of the testimony from the 20 new witnesses "must be viewed from the perspective of both parties." *Rambus, Inc. v. Infineon Techs. AG*, 145 F. Supp. 2d 721, 734 (E.D. Va. 2001). Assuming that the testimony from the 20 new witnesses is important, it "is equally important that [Plaintiffs] be in a position to meet that testimony." *Id.* Defendants have deprived Plaintiffs of the opportunity to meaningfully prepare to cross-examine these witnesses at trial because deposing them before trial is impracticable.

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[8] Notably, since the May 15, 2020 Rule 16(b) conference, Defendants have had three additional attorneys appear on their behalf, *see* ECF Nos. 144, 146, and 148, and filed a Motion to Dismiss, ECF No. 149. This further indicates, if anything, that Defendants are just now engaging in additional factual inquiries. Defendants lack of diligence at *the right time*, *Vir2us, Inc.*, 235 F. Supp. 3d at 777, does not permit them to harm Plaintiffs so close to trial.

CONCLUSION

By identifying 20 new potential witnesses eight months after the close of discovery, Defendants violated Rule 26 [and this Court's scheduling order], with no substantial justification and with substantial harm to Plaintiffs. Plaintiffs therefore respectfully request that this Court exclude these 20 individuals as witnesses for trial and grant such further relief as the Court deems necessary and proper.

Respectfully submitted,

/s/ J. Gerald Hebert

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CERTIFICATE OF SERVICE

I hereby certify that on the July 9, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following:

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