

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

No. 2:17-cv-00094-RAJ

Plaintiffs,

v.

ORDER

DONALD TRUMP, PRESIDENT OF THE  
UNITED STATES, *et al.*,

Defendants.

**I. INTRODUCTION**

This matter comes before the Court on Plaintiffs' Motion to Exclude Untimely Disclosed Witnesses. Dkt. # 397. For the reasons below, the motion is **DENIED in part** and **GRANTED in part**.

**II. DISCUSSION**

**A. Case Schedule and Modifications**

On October 24, 2019, the Court entered an order, continuing the trial date and revising the case schedule. Dkt. # 298. The order made the following modifications:

Deadline to Complete Discovery (other than expert discovery and all depositions), which extension does not authorize new written discovery requests (other than requests to admit) or subpoenas for document production is 11/29/2019, Deadline to File Discovery-Related Motions is 12/20/2019, Expert Witness Disclosures/Reports Under FRCP 26(a)(2) is 1/31/2020, Deadline for Depositions (other than of experts) is 2/14/2020, Responsive Expert Witness Disclosure/ Reports Under FRCP 26(a)(2) is 3/13/2020, Deadline to Complete Expert

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1 Discovery (including all expert depositions) is 4/6/2020, Deadline for filing  
2 dispositive motions is 5/11/2019 . . .

*Id.*

3 Later, the Court modified the case schedule again. Dkt. # 305. The Court  
4 extended the deadline to file discovery-related motions and the deadline to serve  
5 disclosures and reports of expert witnesses and responsive expert witnesses. *Id.* The  
6 deadline for serving expert witness disclosures was scheduled for February 28, 2020. *Id.*

7 As set forth in this scheduling order, the parties, in fact, served expert reports  
8 February 28, 2020. Dkt. # 398 at 2. Rebuttal expert reports were due a month later, but  
9 on March 26, 2020, given the challenges created by the COVID-19 pandemic, the Court  
10 adopted the parties' joint stipulated motion (Dkt. # 348) and temporarily suspended the  
11 case schedule. Dkt. # 349. In April of this year, Defendants notified Plaintiffs that they  
12 intended to respond to Plaintiff's expert reports with new factual evidence, and Plaintiffs  
13 objected because, they claimed, fact discovery had been completed. Dkt. # 359 at 4. In  
14 May of this year, Defendants revealed they had made errors in CARRP-related data,  
15 which required experts to review and revise their reports. Dkt. # 397 at 4. Plaintiffs  
16 provided revised expert reports on July 1, 2020, as agreed upon by the parties. *Id.* ¶ 8.

### 17 **B. Motion to Exclude Witnesses Disclosed on July 2, 2020**

18 On July 2, 2020, Defendants served their fifth set of supplement initial disclosures  
19 identifying new witnesses. Dkt. # 404 at 5. Plaintiffs objected to Defendants' disclosure  
20 of "multiple new fact witnesses, all of whom are employees of Defendants," (Dkt. # 398  
21 ¶ 10) arguing that such a disclosure was untimely because the November 29, 2019  
22 deadline for disclosing fact witnesses had passed (Dkt. # 397 at 8). Defendants do not  
23 dispute that their disclosed witnesses are indeed "fact witnesses," but they argue that they  
24 are not untimely because (1) they are "responsive" factual witnesses to Plaintiffs' "expert  
25 witnesses," whom Defendants allege are actually fact witnesses, and (2) "the significant  
26 discovery continues in this case, including fact discovery." Dkt. # 404 at 2.

27 Despite Defendants' claims that Plaintiffs withheld information about nine

1 witnesses until the “the last possible moment in the discovery process” and mislabeled  
2 them “expert witnesses” when they were fact witnesses, Defendants did not object to  
3 Plaintiffs’ characterization of these witnesses or to the timing of their disclosure on the  
4 February 28, 2020 deadline for disclosing expert witnesses. Instead, Defendants waited  
5 until July 2, 2020 to disclose potential factual witnesses to respond to Plaintiffs’ alleged  
6 expert witnesses.

7 Defendants’ position on discovery here is a stretch of the Court’s order, Dkt.  
8 # 298, but in the interest of fairness, the Court is not inclined to exclude responsive  
9 witnesses. Instead, the Court will grant Plaintiffs’ request in the alternative for leave to  
10 conduct four additional depositions. Dkt. # 397 at 13. As proposed by Plaintiffs, the  
11 opportunity to take additional depositions would be an adequate remedy for the manner  
12 in which Defendants’ witnesses were disclosed to ensure “that Plaintiffs are not  
13 ambushed at trial.” *Id.* Indeed, this remedy will mitigate harm and prejudice to Plaintiffs  
14 by allowing them to learn what information these witnesses intend to offer at trial and  
15 prepare accordingly.

### 16 III. CONCLUSION

17 For the foregoing reasons, the Court **DENIES** Plaintiffs’ motion to exclude  
18 untimely disclosed witnesses and **GRANTS** Plaintiffs’ request to conduct four additional  
19 depositions.

20 DATED this 27th day of August, 2020.

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23 The Honorable Richard A. Jones  
24 United States District Judge  
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