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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE WITNESSES

COME NOW the Defendants, and in opposition to Plaintiff's Motion to Exclude Witnesses (ECF 153), state as follows:

Introduction

Defendants supplemented their initial disclosures on May 29, 2020, over four months before trial, to identify 21 additional fact witnesses. These witnesses consist of public officials as well as voters and leaders in Virginia Beach's Asian-American, Hispanic/Latino, and Black communities—the very communities Plaintiffs purport to represent in this action. Plaintiffs now seek to exclude 20 of these witnesses, claiming unfair surprise, even though the vast majority of the witnesses were identified during discovery or known to Plaintiffs, and the last, Felipe "Pepe" Cabacoy, is a leader in the Filipino-American community whom Plaintiffs solicited in 2018 to support the goal of this suit of imposing a ward system but failed to disclose to Defendants. The formal identification of these fact witnesses via the May 29, 2020, supplemental disclosure was both substantially justified under the circumstances and without material prejudice to the Plaintiffs. For the reasons set forth below, these witnesses' voices need to be heard at trial, and neither the law nor the facts of this case justifies the sanction of excluding their testimony. The

Motion should be denied.

Procedural Background

Pursuant to the Scheduling Order in this matter, general fact discovery for this case closed on September 3, 2019. ECF No. 89. This trial date was stricken by the Court on September 17, 2019, *sua sponte*, following an agreed amendment to the Scheduling Order to accommodate additional discovery by both Plaintiffs and the Defendants. ECF No. 113. Discovery of expert witnesses, with the exception of depositions, ended on September 9, 2019. ECF No. 89. The deposition cutoff date was later extended by agreement to October 15, 2020. *Id.* All of these deadlines and extensions anticipated a trial date of January 14, 2020 rather than the current trial date of October 6, 2020.

During the course of discovery, Plaintiffs deposed fourteen witnesses (exceeding, by consent of Defendants' counsel, the 10-deposition limit imposed by Fed. R. Civ. P. 30(a)(2).) Plaintiffs did not depose any non-party fact witness, despite Defendants' initial disclosures identifying over 100 persons with potential factual knowledge. Shortly after the close of discovery, on October 22, 2019, Defendants moved for summary judgment relating primarily to Plaintiffs' apparent inability to establish the necessary *Gingles* preconditions. ECF No. 114.

On February 26, 2020, the Honorable Raymond A. Jackson was reassigned this case and, thereafter, the Court denied Defendants' summary judgment motion by March 11, 2020 Order. ECF No. 126. This Order advised that the Court would hold a new 16(b) Scheduling conference to re-set the trial date. *Id.* At the Rule 16(b) Scheduling Conference held on May 15, 2020, the Court set this case for trial on October 6, 2020. ECF No. 142. Defendants' third supplementation of its Rule 26 initial disclosures – about which Plaintiffs complain – occurred on May 29, 2020, exactly *130 days* before trial. ECF No. 154, Exhibit 1.

Plaintiff's objected to Defendants' supplementation by letter dated June 8, 2020, and the Defendants responded on June 10, 2020. ECF No. 154, Exhibits 2 and 3. In response to Plaintiffs' complaint about unfair surprise, Defendants offered to facilitate additional depositions of any witnesses formally identified via the supplementation, even though (1) Plaintiffs had already exceeded their deposition limit and (2) Plaintiffs had never before expressed any interest in deposing any non-party fact witnesses while discovery was "open." Plaintiffs waited until July 1, 2020, to respond to Defendants' June 10 letter, and in their response, Plaintiffs raised a host of unrelated issues and demanded a response the very next day. ECF No. 154, Exhibit 4. Because Plaintiffs' demand provided too little time for response, the Defendants agreed to provide a comprehensive response by July 8, 2020. ECF No. 145, Exhibit 5.

In the Defendants' letter dated July 8, 2020, Defendants renewed the offer to allow depositions of these additional witnesses and included an added good-faith offer to Plaintiffs to counter-designate (without Defendants' objection) any witnesses they deemed necessary following their own inquiry, provided that Defendants also would be afforded the opportunity to depose any of Plaintiffs' counter-designated witnesses. Plaintiffs again rejected these offers from Defendants. In fact, during the 'meet and confer' that occurred on July 13, 2020, counsel for Plaintiffs advised they did not intend to depose any of these fact witnesses, even with a reservation of rights in the event the Court denies their motion to exclude the witnesses. Defendants also suggested the parties might mutually agree to "stand-down" on their respective disputes over each party's recent supplementations. This suggestion also was refused by Plaintiffs. This motion followed.

The Third Supplement & New Witnesses

Defendants' Third Supplement to their Initial Disclosures formalized the identification of

witnesses who were identified on the initial disclosures from No. 106-126.[1] ECF No. 154, Exhibit 1. In the supplemental disclosure, Defendants provided Plaintiffs with correctly spelled names and contact information for these individuals – many of whom had been previously identified in some form or fashion during depositions taken by Plaintiffs or in documents produced by Defendants in discovery – along with a summary of the subject matter of the witnesses' potential testimony. ECF No. 145, Exhibit 5. In Defendants' letter dated July 8, 2020, Defendants offered categories of explanations for why the various individuals had been included in the supplemental disclosure. For sake of clarity and convenience for the Court, Defendants have expanded upon and organized the witness name, the subject matter of their personal knowledge, and the explanation for inclusion in the supplementation in a chart that is identified as **TABLE 1**, attached as Exhibit 1 hereto, and incorporated by reference.

Plaintiffs argue that Defendants' formal supplementation of these witnesses' names, contact information and summary of relevant knowledge is inappropriate under the Federal Rules, and that 20 listed witnesses should be excluded from testifying at trial. ECF No. 154 at 1 ("Plaintiffs ask this Court to exclude the testimony of, and evidence from, these 20 new witnesses on a motion or at trial"). But Plaintiffs' motion simply lumps all the witnesses together, without individually considering the circumstances of each witness as Defendants have set out to do *supra* with **TABLE 1**.

[1] Plaintiffs motion seeks to exclude 20 witnesses. However, Defendants' Third Supplement added 21 witnesses, not 20. One of the witnesses, Dr. Amelia Ross-Hammond, was identified on Plaintiffs' initial disclosures, Plaintiffs' discovery responses, and in Plaintiffs' expert reports. Defendants assume that Plaintiffs are not contesting the supplementation of Dr. Ross-Hammond as a potential person with knowledge regarding the claims and defenses in this case.

Legal Standard

Plaintiffs seek the imposition of discovery sanctions under Rule 37 in the form of an exclusion of 20 fact witnesses from trial. When ruling on such a motion, this Court's analysis proceeds in two primary steps. The first step is to "determin[e] that a violation of a discovery order or one of the Federal Rules of Civil Procedure occurred". *See Samsung Elecs. Co., Ltd. v. NVIDIA Corp.*, 314 F.R.D. 190, 195-96 (E.D. Va. 2016). Here, Defendants are obligated to supplement their disclosures made pursuant to Rule 26(a)(1)(A)(i) when new or additional information becomes available to a party or their counsel. Fed. R. Civ. P. 26(e). ("A party who has made a disclosure under Rule 26(a)…must supplement or correct its disclosure or response… in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing"). Importantly, the duty to supplement discovery responses under Rule 26(e)(1) "does not end at the close of discovery; rather, parties are required to supplement their responses as new, responsive material is created." *Weare v. Bennett Bros. Yachts*, No. 7:17-CV-155-FL, 2019 U.S. Dist. LEXIS 98558, at *7-8 (E.D.N.C. June 12, 2019); *see also Cook v. Lewis*, No. 5:12-CT-3219-D, 2014 U.S. Dist. LEXIS 87901, 2014 WL 2894999, at *2 (E.D.N.C. June 25, 2014) ("Defendants are reminded of the continuing obligation to supplement discovery responses pursuant to Rule 26(e) should additional responsive material come to light."); *High Voltage Beverages, LLC v. Coca-Cola Co.*, No. 3:08-CV-367, 2010 U.S. Dist. LEXIS 106942, 2010 WL 3788288, at *2 (W.D.N.C. Sept. 22, 2010) ("The close of discovery is not, however, the end-of-the-road under Rule 26. While the parties are initially obligated to produce discoverable information when requested, they have a continuing obligation to supplement such information

under Rule 26(e)(1)"). Accordingly, the supplementation of information after the passing of the discovery deadline does not mean that a violation occurred, as Plaintiffs contend.

The second step in this analysis is to determine whether the alleged violation, assuming one is found to have occurred, was harmless or substantially justified, by reference to factors enumerated in *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003). Those factors are:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence.

The first four of these factors relate primarily to the harmlessness exception. *Id.* The remaining factor relates primarily to the substantial justification exception. *Id.* The burden of establishing these factors lies with the non-disclosing party. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014); *Southern States*, 318 F.3d at 596. If the failure to disclose was either or both "substantially justified" and/or "harmless," then no sanction may result.

Argument

Plaintiffs' general characterization of this supplementation as adding "20 new witnesses" materially misstates the facts about these witnesses and the timing of their identification. Defendants are permitted—indeed, obligated—to supplement their disclosures made pursuant to Rule 26(a)(1)(A)(i) when Defendants "learn[ed] that in some material respect the disclosure or response is incomplete or incorrect." *Id.* The supplementation in this instance was necessary, timely, substantially justified and ultimately harmless.

I. Defendants are not obligated to supplement Rule 26 disclosures with information Plaintiffs already obtained through discovery.

With their current Motion, Plaintiffs seek to impose a discovery sanction on Defendants

pursuant to Rule 37 when the Defendants have actually done *more* than the Rules require. Parties are under no obligation to formally designate or provide supplemental or corrective information that has been otherwise made known to the parties during the discovery process. *See* Fed. R. Civ. P. 26(e)(1)(A). Plaintiffs have themselves repeatedly relied upon the ability to informally provide information without making formal disclosure, including by supplementing discovery responses and disclosures after the applicable discovery cutoff. *See, e.g.*, Exhibit 12 (Plaintiffs' supplemental discovery responses dated September 14, 2019, wherein Plaintiffs repeatedly stated "Plaintiff retains the right to rely on all facts witnesses, documents and evidence that have 'otherwise been made known to [Defendants] during the discovery process or in writing,' Fed. R. Civ. P. 26(e), regardless of whether they are disclosed herein or in a supplement hereto.") Furthermore, Plaintiffs' claim that these 20 witnesses come at "extreme" surprise to them is demonstrably false. ECF No. 154 at p 5 ("[T]he surprise to Plaintiffs is extreme"). At least 11 of these 21 witnesses were identified during discovery, either in response to Plaintiffs' discovery requests or during depositions. The supplementation of formal contact information or other newly discovered information relating to witnesses already in the record is proper under the Rules. Contrary to Plaintiffs' allegations, Defendants have fully complied with Rule 26(e).

a. Witnesses identified in deposition testimony

At least seven of these witnesses – Harshad Barot, Petula Moy, Nonato "Nony" Abrajano, Alberto "Bert" Dayao, Dr. Cynthia Romero, Naomi Estaris, and Lyndon Remias – were identified during discovery depositions in response to Plaintiffs' counsels' own questions, but often with incomplete or incorrect names or spellings and no contact information. *See* Exhibit 1 (TABLE 1), Exhibit 3 (Deposition excerpt of Councilman James Wood), Exhibit 5 (Deposition excerpt of Councilwoman Rosemary Wilson), Exhibit 6 (Deposition excerpt of Councilwoman Sabrina

Wooten), Exhibit 7 (Deposition excerpt of Councilwoman Jessica Abbot). Via their supplementation, Defendants simply identified the correct names, spellings, and contact information for witnesses identified during depositions and provided those to Plaintiffs, even though Defendants were not obligated to do so. *See* Advisory Committee Note to the 1993 Amendments to Rule 37(e) ("There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition.") When Defendants, by counsel, learned of the more complete and/or accurate names and spellings and contact information for these individuals, they supplemented their initial disclosures accordingly.

As private citizens, Mr. Barot, Ms. Moy, Mr. Abrajano, Mr. Dayao, Dr. Romero and Ms. Estaris were all made known to Plaintiffs to the same extent they were made known to Defendants in response to Plaintiffs' own deposition questions. Plaintiffs had equal opportunity to seek out more information about these individuals. Applying a Rule 37 sanction against Defendants for supplementing the information Plaintiffs already had with more information about the same individuals would be improper. Plaintiffs' request to exclude testimony and evidence from these seven individuals should be denied.

b. Other witnesses identified in documentary discovery and/or by reference

Documents and information exchanged during discovery identified an additional four of these witnesses – Andrew Friedman, Dr. Amelia Ross-Hammond, Delceno Miles and George Alcaraz (as well as Harshad Barot and Lyndon Remias who were also identified during depositions), all of whom are current or former City employees or members of City boards and commissions. Defendants have no independent obligation to re-identify these individuals where

they were already known to the Plaintiffs through prior discovery responses. Instead, the duty to timely supplement arose, if at all, when the Defendants learned new or additional information that confirmed information that Plaintiffs already had was "incomplete or incorrect."

As indicated in **TABLE 1**, Mr. Friedman, Mr. Remias, Mr. Barot, Dr. Ross-Hammond, Ms. Miles and Mr. Alcaraz were all identified in the documents produced during discovery, and Dr. Ross-Hammond was herself identified by Plaintiffs as a potential witness. As such, Plaintiffs were on notice of their existence well in advance of the discovery cutoff. Defendants' supplementation is appropriate inasmuch as Defendants obtained new or additional information about these individuals in May 2020. Because Defendants learned additional information about these individuals, supplementation was at the very least allowed by Rule 26(e). As a result, Plaintiffs' claim of unfair surprise as to these six witnesses who were identified in documentary discovery or by reference (and for the other seven witnesses listed in § (a)), *supra*, rings hollow, and their request to exclude these witnesses should be denied.

c. Witnesses first made known to Defendants in May 2020

Another six witnesses – Manolita Holadia, Dr. Juan Montero, Felipe "Pepe" Cabacoy, Roy Estares, Gary Mah and Naveen Kumar – became known to Defendants' counsel in late May 2020. These individuals were identified to Defendants' counsel in their discussions with other Asian-American community and business leaders, including some of the 11 individuals named above as being provided during depositions and documentary discovery. Most importantly, Felipe "Pepe" Cabacoy was wholly unknown to Defendants' counsel until May 20, 2020. It was Mr. Cabacoy who provided Dr. Montero's name and contact information as well as correct names, spellings, contact information, and/or other information for Ms. Moy, Mr. Abrajano, Mr. Dayao, Dr. Romero, and Ms. Delceno Miles. *See* Exhibit 7 (Affidavit of Felipe "Pepe"

Cabacoy). And while Mr. Cabacoy was unknown to Defendants' counsel, he was known to Plaintiffs. Plaintiff Georgia Allen, it was discovered, contacted Mr. Cabacoy in 2018 to solicit his support for the specific remedy she seeks in this litigation: a ward system of voting for the City of Virginia Beach. *Id.* at ¶ 4. On November 13, 2018, Plaintiff Allen joined this case as a named Plaintiff with the filing of the Amended Complaint. ECF No. 62. Yet neither Plaintiffs nor their counsel ever provided Mr. Cabacoy's name or any information regarding the highly relevant prior contact their client had with him in their discovery responses and disclosures, notwithstanding specific requests from Defendants for this exact type of information.

On August 14, 2019, Plaintiff Allen failed to provide the name of Mr. Cabacoy in her responses to the Third Set of Interrogatories requesting that she "[d]escribe in detail, and identify all witnesses and documents supporting or evidencing, all efforts made by the Plaintiffs Georgia Allen and Latasha Holloway prior to or during this litigation to contact members of the Asian community for support of and/or to participate in the Plaintiffs' lawsuit." *See* Exhibit 9 (Plaintiff Allen's Responses to Third Set of Interrogatories dated August 14, 2019). On September 12, 2019, when asked during her deposition if she had personally reached out to any Asian American individuals in anticipation of this lawsuit, she replied "No, I did not." *See* Exhibit 10 (Excerpt from deposition of Plaintiff Allen on September 12, 2019). For Plaintiffs to seek to exclude the testimony of a witness whose identity they concealed from Defendants during discovery is improper.

Defendants also included Jay Bernas in their supplemental disclosure in May 2020. Mr. Bernas is a former City employee in the Public Works Department. He worked as a professional engineer and project manager for the City of Virginia Beach in Building Two at the Municipal Center (where the mass shooting occurred) and is a member of a minority group. Mr. Bernas is

also a former member of the Planning Commission. Plaintiffs' included in their fifth supplement to their initial disclosures on November 19, 2019 (more than a month after the close of discovery) a reference to the independent review of the mass shooting of May 31, 2019 that was prepared by Hillard Heintze. *See* Exhibit 11 (Plaintiffs' Fifth Supplement to Initial Disclosures dated November 19, 2019). In May 2020, Defendants learned of information about Mr. Bernas as someone with a minority background who worked where the mass shooting occurred and can speak from personal knowledge as to historical working conditions for minority employees of the City of Virginia Beach in response to the Hillard Heintze report and Plaintiffs' claims and statements of Plaintiffs' identified witnesses relating to it. Upon obtaining this information, Defendants' timely supplemented.

The remaining three witnesses – Ben Loyola, Honorable Jason Miyares, and Honorable Tina Sinnen – are public figures known equally to Plaintiffs and Defendants. What was unknown to Defendants' counsel prior to May 2020 was the extent to which Messrs. Loyola and Miyares, both Republicans and Cuban-Americans seeking or holding electoral office representing Virginia Beach, received substantial support by Filipino-American community and business leaders, likely contravening Plaintiffs' proffered theory that Asian-American and Hispanic/Latino voters are politically cohesive with Black voters in Virginia Beach. Ms. Sinnen, the only current Filipino-American elected official in Virginia Beach and also a Republican, further undermines Plaintiffs' theory of the case.

II. Defendants' supplementation was timely, harmless and substantially justified.

For the reasons set forth above, Defendants' Third Supplement did not violate Rule 26(e). But even if it had, the Court must then analyze *Southern States* factors to determine if the severe sanction of excluding these witnesses from trial is warranted. Plaintiffs' memorandum fell far

short of the mark; their case law is readily distinguishable, and their argument proceeds from the apparent assumption that it is sufficient just to repeat over and over "20 new witnesses" without any factual context. The *Southern States* analysis must be conducted on a witness by witness basis, rather than the "one size fits all," broad-brush painting that Plaintiffs advocate.

Plaintiffs cited a series of cases to support their position that Rule 26(e) has been violated and that the supplement is neither harmless nor substantially justified. Those cases are all materially different from the discrete facts of this case. Plaintiffs' brief appears to borrow numerous partial, out-of-context quotations from *EQT Gathering LLC v. Marker,* No. 2:13-cv-08059, 2015 WL 9165960 (S.D.W. Va. Dec 16, 2015), in support of their argument. In *EQT Gathering LLC v. Marker*, a central issue in the case was a Chain-of-Title Gap relating to a right of way purportedly held by the plaintiff for purposes of operating a gas line. In that case, the plaintiff served a second supplemental disclosure that provided an entirely new theory regarding the Chain-of-Title Gap on the defendant six months after defendant's first discovery request for information pertaining to the chain of title for the Right of Way, following a prior supplement offering a different explanation for the Chain-of-Title Gap, after defendant already took a Rule 30(b)(6) deposition of Plaintiff's representative on that same issue but did not offer the new explanation, and one week after defendant filed a motion for summary judgment based, in part, on the issue of the Chain-of-Title Gap. Indeed, in most cases Plaintiffs cite, the untimely disclosure was made on the eve of trial or it was offered in opposition to a pending motion for summary judgment. *See, e.g.*, *Hoyle v. Freightliner, LLC*, 650 F.3d 321 (4th Cir. 2011) (striking a declaration of a material witness filed by plaintiff in response to defendant's summary judgment motion where witness was not previously identified as a possible witness by plaintiff); *Virtus, Inc. v. Invincea, Inc*., 235 F. Supp. 3d 766, (E.D. Va. 2017) (less than two weeks before

trial, Defendants added one hundred eighteen previously undisclosed exhibits on the day of the pretrial conference and nineteen more exhibits two days prior to trial); *Reed v. Washington Area Metro. Transit Auth*., No. 1:14CV65, 2014 WL 2967920 (E.D. Va. July 1, 2014) (identifying three individuals as fact witnesses three days after close of discovery when the Court previously rejected the defendant's effort to name those same witnesses as experts late in the discovery period); *United States v. Cochran*, No. 4:12-CV-220-FL, 2014 WL 347426 (E.D.N.C. Jan. 30, 2014) (denying plaintiff leave to add six of the eight additional "aggrieved persons" for which they would seek damages at trial after defendants already filed for summary judgment); *United States v. Whiterock*, No. 5:09-HC-2163-FL, 2012 WL 1825702 (E.D.N.C. May 18, 2012) (allowing limited testimony of an untimely disclosed fact witness where curative action in the form of a deposition was available and hearing not scheduled for over two months); *Quesenberry v. Volvo Group N. Am., Inc.*, 267 F.R.D. 475, (W.D. Va. 2010) (Defendants moved to exclude twenty nine previously undisclosed witnesses identified 28 days before trial); *Rambus, Inc. v. Infineon Techs. AG*, 145 F. Supp. 2d 721, (E.D. Va. 2001) (limiting testimony of an expert witness who submitted a supplemental report a week before trial). Plaintiffs' cases, most importantly of all, do not excuse Plaintiffs from conducting the fact-specific analysis required by *Southern States* – an analysis that, in this case, shows that Defendants' supplementation was both harmless and substantially justified.

a. Defendants' supplementation was appropriate under the five-factor *Southern States* test.

The first *Southern States* factor – surprise to the party against whom the evidence would be offered – plainly supports Defendants' position. Plaintiffs cannot credibly have been surprised by the formal identification of the first 11witnesses analyzed above (Harshad Barot, Petula Moy, Nonato "Nony" Abrajano, Alberto "Bert" Dayao, Dr. Cynthia Romero, Naomi

Estaris, Andrew Friedman, Lyndon Remias, Dr. Amelia Ross-Hammond, Delceno Miles and George Alcaraz) because they were all previously identified in discovery. Moreover, Felipe "Pepe" Cabacoy's relevant knowledge as to this case was specifically known to Plaintiff Georgia Allen *two years prior* to Defendants' counsel ever learning his name. *See* Exhibit 7 at ¶ 4 (Affidavit of Felipe "Pepe" Cabacoy). Specifically, as explained Mr. Cabacoy's affidavit, Plaintiff Georgia Allen reached out to him to solicit his support for a ward system in Virginia Beach as a leader of the Asian-American community in Hampton Roads in 2018. *Id.* Mr. Cabacoy declined Ms. Allen's invitation, advising her that he did not agree with her position, but referring her to other Asian-American community leaders including Mr. Abrajano and Mr. Dayao. *Id.* at ¶ 5. Mr. Cabacoy heard nothing further regarding Ms. Allen's efforts until the Defendants' counsel, through its own efforts, identified Mr. Cabacoy in May 2020, contacted him, met with him, and promptly supplemented their witness disclosures. *Id.* at ¶¶ 5-6. Importantly, Plaintiff Allen affirmatively denied any such recruitment efforts in her response to interrogatories and in deposition under oath.[2] Both as to Mr. Cabacoy as a witness, and as to the information provided by Mr. Cabacoy about Dr. Montero (who first became known to the Defendants when identified by Mr. Cabacoy in May 2020), Ms. Moy, Mr. Abrajano, Mr, Dayao, Dr. Romero, and Ms. Miles, Plaintiffs' own failure to comply with their discovery obligations moots any claim of unfair surprise. Accordingly, Plaintiffs cannot credibly claim any level of surprise as to these 13 individuals.

Defendants also included Mr. Jay Bernas in their supplemental disclosure in May 2020.

[2] *See* Exhibit 9 (Plaintiff Allen's discovery responses failing to identify Mr. Cabacoy in response to an interrogatory requesting this exact type of information) and Exhibit 10 (Deposition testimony of Plaintiff Allen responding "No, I did not." to a question regarding her effort to gain support from members of the Asian community in Virginia Beach in anticipation of this lawsuit).

To extent there is some surprise as to Mr. Bernas, Plaintiffs' surprise is lessened where Plaintiffs' included in their fifth supplement to their initial disclosures on November 19, 2019 reference to the independent review of the mass shooting of May 31, 2019 that was prepared by Hillard Heintze for the apparent purpose of using it as evidence in this case in support of their claims. Exhibit 11 (Plaintiffs' Fifth Supplement to Initial Disclosures). Mr. Bernas' personal knowledge as to historical working conditions for minority employees of the City of Virginia Beach in response to the Hillard Heintze report and certain allegations made by Plaintiffs and their listed witnesses is relevant to this case and it is unsurprising Defendants would seek to introduce such evidence to rebut or otherwise respond to Plaintiffs' disclosure of November 19, 2019.

Three other witnesses – Ben Loyola, Hon. Jason Miyares, and Hon. Tina Sinnen – are all minority public figures who stood for election for state and Federal positions representing Virginia Beach. Each of the three individuals is known equally to Plaintiffs and Defendants and their potential to be called as witnesses at trial would not be a surprise.

The remaining four witnesses – Manolita Holadia, Roy Estares, Gary Mah, Naveen Kumar – were unknown to Defendants' counsel until May 2020. Motivated at least in part by the discovery that Mr. Cabacoy was contacted by Plaintiff Allen but not included in Plaintiff Allen's later discovery responses, Defendants made multiple additional inquiries to learn about other leaders within the Asian-American, Hispanic/Latino and Black communities with potentially relevant information. Discussions with recently identified individuals as set forth above led Defendants further down a trail of identifying Ms. Holadia, Mr. Estaris, Mr. Mah and Mr. Kumar as potential witnesses.

To the extent any of the final four witnesses – Ms. Holadia, Mr. Estaris, Mr, Mah and Mr.

Kumar – represent any level of surprise to Plaintiffs, the impact of such surprise is minimal. Plaintiffs and their counsel purport to represent the interests of the minority groups to which these individuals belong. The idea that the very minority community and business leaders that Plaintiffs purport to represent may have relevant testimony should come as no surprise to Plaintiffs or their counsel. This factor also weighs against the exclusion of these witnesses.

Regarding the second *Southern States* factor – the ability of that party to cure the surprise – Plaintiffs have refused to make any efforts, much less good-faith efforts, to mitigate the impact of any surprise that may exist. Plaintiffs declined the opportunity to depose these individuals. Especially where the supplemental disclosure was made more than four months before trial, and before depositions had concluded in this matter,[3] Plaintiffs had full opportunity to cure any surprise that they allege.

Simply put, Plaintiffs cannot fairly rely on their inaction as supporting their argument in favor of Rule 37 sanctions. During the meet and confer on July 9, 2020, Defendants suggested two additional alternatives to Plaintiffs' filing. First, Defendants proposed that the parties mutually waive their respective objections to the opposing parties' recent supplementations (i.e., Defendants' objections to Plaintiffs' supplementation of expert reports, and Plaintiffs' objections to the fact witness disclosures here). Plaintiffs' counsel rejected this request. Second, Defendants proposed to reopen discovery to allow Plaintiffs to both depose Defendants' witnesses and to permit Plaintiffs to counter-designate fact witnesses, provided that depositions of the counter-designated witnesses would also be permitted. Plaintiffs' counsel rejected this proposal as well. Plaintiffs made clear that they were unwilling to discuss any resolution short of the complete withdrawal of the supplementation.

[3] Plaintiffs' supplemental expert disclosures necessitated additional depositions in June 2020.

Plaintiffs have offered no meaningful suggestions or efforts to mitigate the impact of any surprise they can demonstrate. The Court can and should consider the ability (and willingness) of the Plaintiffs to cure the alleged surprise of these witnesses. *See Fullen v. 3M Co.*, No. GJH-17-207, 2019 U.S. Dist. LEXIS 177984 (D. Md. Oct. 15, 2019) (finding that the opportunity to depose newly identified witnesses cured surprise caused by late disclosure); *United States v. Whiterock*, No. 5:09-HC-2163-FL, 2012 WL 1825702 (E.D.N.C. May 18, 2012) (allowing limited testimony of an untimely disclosed fact witness where curative action in the form of a deposition was available and hearing not scheduled for over two months). Plaintiffs claim prejudice but they had months before trial to mitigate or cure such alleged prejudice, and Defendants were willing to work with them to that end. Notably, when Plaintiffs recently and untimely supplemented their expert reports, Plaintiffs' counsel immediately offered supplemental depositions as a way of mitigating the prejudice they had caused Defendants. Yet, when Defendants offered the same form of mitigation, Plaintiffs dismiss the proposal as flatly unacceptable. This is not the basis on which to exclude these witnesses from trial and this second *Southern States* factor weighs strongly in Defendants' favor.

The third *Southern States* factor – the extent to which allowing the evidence would disrupt the trial – the addition of multiple fact witnesses in a multi-week trial is not materially disruptive. This Court is well-equipped to accommodate additional witnesses and evidence relating directly to a factual dispute that is at the crux of the litigation already: whether Black, Hispanic/Latino and Asian-American voters in Virginia Beach are politically cohesive. Further, Plaintiffs assume incorrectly that Defendants intend to call every one of these witnesses at trial. This ignores the fact that these witnesses were identified under Rule 26(e) as individuals who may have knowledge relevant to the case and therefore *may* testify at trial. Neither party has

suggested that a continuance is necessary, that the final pre-trial deadlines need to be altered, or that the manner in which evidence will be presented in this case will be materially altered by testimony from one or more of these witnesses.[4]

Plaintiffs' suggestion that trial is negatively impacted because "had these individuals been timely disclosures, Plaintiffs could have asked other witnesses about them, in addition to conducting other relevant discovery or taking their testimony into account in expert reports" and Plaintiffs' counsel now "will have to prepare to cross-examine all of [the witnesses] without the benefit of what they might say" is unsupported. ECF No. 154 at 7-8. Plaintiffs in fact *did* ask about many of these individuals generally and specifically during written discovery and depositions. Plaintiffs can contact these witnesses (except for the two City control group witnesses) and inquire about their likely testimony and prepare cross-examination accordingly. Deposition transcripts make clear that Plaintiffs routinely inquired about leaders in the Asian and Hispanic communities during their deposition of Defendants' party witnesses. Further, these twenty witnesses are no differently situated from the other witnesses on Defendants' disclosures, none of whom Plaintiffs deposed either prior to disclosing any of their three sets of expert reports. In fact, Plaintiffs had no issue deposing the Defendants themselves after issuing their own initial expert reports. In short, trial will not be negatively impacted by the disclosure of these witnesses, and Plaintiffs have failed to demonstrate otherwise.

The fourth factor – the importance of the evidence – militates strongly in Defendants' favor. Plaintiffs purport to represent a coalition of three distinct minority communities in

[4] It should also be noted that many of these witnesses would remain properly available to the Defendants as impeachment witnesses regardless of the outcome of the Plaintiffs' Motion. *See* Rule 26(a)(1)(A) (exempting witnesses who "would be solely for impeachment" from disclosure requirements).

Virginia Beach. There can be no doubt that actual minority community leaders in Virginia Beach could offer the Court valuable insight and perspective about their personal experiences and the political proclivities of their respective communities. That information is important to the pivotal question in this case about the alleged political cohesiveness of Black, Hispanic/Latino, and Asian-American voters in Virginia Beach. Plaintiffs themselves propose to offer testimony from identified and unidentified members of these communities.[5] Plaintiffs effectively concede this point, asserting that they "assum[e] that the testimony from the 20 new witnesses is important." ECF No. 154 at 8.

Plaintiffs also express concern about their ability to "meet this evidence" at trial because of the alleged difficulty of deposing these individuals in the four-plus months prior to trial. But Plaintiffs have anywhere from 8-10 attorneys with active appearances in this case at any point in time, and Plaintiffs have made no effort whatsoever in the last six weeks to try and "meet this evidence" by way of agreed depositions or simple witness interviews. Plaintiffs again rely upon their own inaction to bolster their arguments.

Another crucially important point regarding the import of this evidence is that Plaintiffs purport to represent the interests of Black, Hispanic and Asian voters in Virginia Beach. Despite Plaintiffs own admissions in their correspondence that many of these witnesses are identified as leaders in the various minority communities, Plaintiffs' Motion, if granted, effectively would suppress all testimony and evidence from these minority communities. This factor too weighs heavily in Defendants' favor.

The fifth and final factor – the non-disclosing party's explanation for its failure to

[5] *See* Exhibit 12 (Plaintiffs' supplemental discovery response dated September 14, 2019 supplemental response to discovery by Plaintiffs indicating reliance on minority community witnesses but applying the caveat of "including (but not limited to)" in every listing.)

disclose the evidence – has been discussed at length above. In summary, Defendants already disclosed a majority of these witnesses through the written discovery process in depositions, and the remaining witnesses were promptly disclosed by Defendants shortly after learning of their relevant personal knowledge. The detailed explanation for each witness' supplemental designation is found in **TABLE 1**, attached hereto as Exhibit 1.

Plaintiffs' failure to identify their prior conversation with Mr. Cabacoy in their discovery responses provides important context for the timing and scope of the May 29, 2020, supplemental disclosures. Simply put, Defendants should not be punished for Plaintiffs' discovery omissions.

These actions explain the domino effect that resulted, in large part, from Plaintiffs' own failure, and created a situation where this disclosure by Defendants of additional witnesses after the close of discovery was necessary. Indeed, direct answers from Plaintiff Allen in her discovery responses or her own deposition may have avoided much of this issue altogether. This supplemental disclosure was appropriate and reasonable given the circumstances and the supplemental information was provided in the same month as it was obtained.

Conclusion

Accordingly, for each potential witness formally identified in the May disclosures, their names 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. Supplementation was required by rule, and it was provided, including correct spellings of names that Defendants' counsel did not earlier have available to them, contact addresses and phone numbers that were not previously available to Defendants' counsel, and/or a description of their potentially relevant knowledge that was not previously known to Defendants' counsel.

Defendants were neither dilatory nor engaged in unfair surprise. Furthermore, much of Plaintiffs' allege surprise could have been avoided by accurate discovery responses from Plaintiff Allen.

For all the reasons set forth in this opposition, the Court should deny the Motion and permit these witnesses to offer relevant, important evidence to the trial court in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July 2020, I will file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of the filing to:

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