

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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

**DECLARATION OF NICHOLAS  
GELLERT IN SUPPORT OF  
PLAINTIFFS’ MOTION TO EXCLUDE  
UNTIMELY DISCLOSED WITNESSES**

I, Nicholas Gellert, hereby declare:

1. I have personal knowledge of the facts stated below and am competent to testify regarding the same. I am one of the attorneys for Plaintiffs in this matter, *Wagafe v. Trump*, No. 17-cv-00094 RAJ.

2. Except as specifically otherwise agreed and ordered, fact discovery in this case closed on November 29, 2019. *See* Dkt. # 298 at 1–2. At Defendants’ request, Plaintiffs provided a third set of supplemental disclosures in January of 2020 to clarify their prior disclosures. The updated disclosures, which included the requested clarifying information, also listed a set of publicly available documents. Defendants never objected to Plaintiffs’ third set of supplemental disclosures, and Defendants themselves produced a fourth set of initial disclosures on December 31, 2019.

1           3.       Plaintiffs have taken eight depositions and are scheduled to take their remaining  
2 two depositions soon. Plaintiffs decided whom they would depose based on the witnesses  
3 Defendants had disclosed during fact discovery. Had we known the full slate of potential defense  
4 witnesses, Plaintiffs would have made different choices. We would have deposed some of the  
5 recently identified witnesses instead of the earlier identified witnesses, or we would have sought  
6 leave to take more than ten depositions during fact discovery.

7           4.       Defendants have taken three depositions, each of a named plaintiff.

8           5.       The parties served expert reports on February 28, 2020. When those reports were  
9 served, rebuttal expert reports were due on March 28, 2020.

10          6.       Due to the pandemic, the parties agreed to strike the trial date and pending  
11 deadlines in the case on March 24, 2020. *See* Dkt. # 348; *see also* Dkt. # 349 (court order). It  
12 was understood and agreed that the case was not fully stayed, and that the parties would continue  
13 to work diligently on matters to the extent they could under the distant working environment  
14 presented by the pandemic.

15          7.       In negotiating a joint status report in April, Defendants signaled that they intended  
16 to respond to Plaintiffs' expert reports with new factual evidence. Plaintiffs promptly objected,  
17 noting that fact discovery was over.

18          8.       Because of errors in Defendants' data that was disclosed on May 15, some of the  
19 parties' experts had to revise their reports. *See* Dkt. # 359. Plaintiffs served revised non-  
20 statistical expert reports on July 1. *Id.* Revised statistical expert reports were exchanged on July  
21 17. *Id.*

22          9.       During negotiations regarding the notice responders, Defendants stated that they  
23 needed to know the identities of all of Plaintiffs' proposed witnesses before deciding whom to  
24 depose.

1           10.     On July 2, Defendants served their fifth set of supplemental initial disclosures  
2 identifying, among other things, multiple new fact witnesses, all of whom are employees of  
3 Defendants.

4           11.     By email dated July 6, 2020, Plaintiffs objected to Defendants' untimely  
5 disclosures. Exhibit 1 includes a true and correct copy of Plaintiffs' July 6 email.

6           12.     By email dated July 14, 2020, Plaintiffs offered to forgo filing a motion to  
7 exclude the untimely disclosed witnesses if Defendants would provide additional information  
8 about the witnesses' proposed testimony and allow Plaintiffs to take four additional depositions.  
9 Exhibit 1 includes a true and correct copy of Plaintiffs' July 14 email.

10          13.     By email dated July 16, 2020, Defendants wrote that they were willing to provide  
11 additional information regarding the topics the witnesses would address. But they would agree to  
12 only "one additional deposition, under the following terms:"

13           (1) You limit the deposition to one of the people disclosed in our 5th Supplement; (2)  
14 You identify the proposed deponent to us within two weeks of receiving our  
15 supplemental descriptions and coordinate the timing of the deposition in a manner that  
16 accommodates reasonable unavailability issues, including the pending USCIS furloughs;  
17 (3) You explain, in light of the supplemental descriptions, why you could not have  
18 deposed this person prior to the close of fact witness depositions and why you cannot  
19 avoid prejudice by addressing your questions to the 30(b)(6) designee(s), or why you  
20 could not have foreseen the need to exceed the presumptive limit in FRCP 30(a)(2)(A)(i)  
21 and agreed to in this case; and (4) You accept a corresponding additional deposition for  
22 the Defendants to depose any notice responder identified as a potential witness for  
23 Plaintiffs, recognizing that not even the pool of ten potential witness were identified to  
24 Defendant until this week.

25 Exhibit 1 includes a true and correct copy of Defendants' July 16 email.

26          14.     By email dated July 20, 2020, Plaintiffs responded that Defendants' proposal was  
not acceptable, but that Plaintiffs were "willing to withhold judgment on what additional  
arrangements should be made pending [Defendants'] provision of additional information about  
what the topics that the newly identified witnesses may address and how [Defendants] only  
identified the need for this information upon receipt of [Plaintiffs'] expert's reports in February."

Exhibit 1 includes a true and correct copy of Plaintiffs' July 20 email.

