

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

2311 RACING LLC d/b/a 23XI RACING, and
FRONT ROW MOTORSPORTS, INC.,

Plaintiffs,

v.

NATIONAL ASSOCIATION FOR STOCK
CAR AUTO RACING, LLC, NASCAR
HOLDINGS, LLC, NASCAR EVENT
MANAGEMENT, LLC, and JAMES FRANCE,

Defendants.

No. 3:24-cv-886-KDB-SCR

**RESPONSE TO HENDRICK MOTORSPORTS, LLC, HMS HOLDINGS, LLC, RICK
HENDRICK, PENSKE RACING SOUTH, INC. AND ROGER PENSKE'S JOINT
MOTION FOR PROTECTIVE ORDER**

INTRODUCTION

The jury should hear two “well-known figures in the professional racing industry,” Rick Hendrick and Roger Penske (“Movants”), testify about the Cup Series and the Charter system that was created at the request of teams in 2016. Doc. 414-1, Joint Mot. for Prot. Order at 2. Team Penske began racing in NASCAR in 1972 and has been a fixture in NASCAR’s Cup Series since 1991. Yates Decl. Ex. 6, Penske Decl. (“Penske Decl.”) at 1. Hendrick Motorsports has competed in NASCAR races for over forty years. Yates Decl. Ex. 5, Hendrick Decl. (“Hendrick Decl.”) at 1. Mr. Hendrick’s and Mr. Penske’s declarations provide an invaluable perspective about the origins of the Charter system, the benefits and “value of the NASCAR Charter system,” the implementation of a similar system in IndyCar, the contributions the France family made to the “growth and success of NASCAR,” and the benefits of the Next Gen car introduction (including that “costs have been reduced”). *Id.* at 2; Penske Decl. at 1. Mr. Hendrick’s declaration also affirms his public statement that the 2025 Charter reflects “a fair deal” that includes “a reasonable revenue increase.” Hendrick Decl. at 2.

NASCAR’s trial examinations of Mr. Penske and Mr. Hendrick will be limited to the scope of their respective declarations. Accordingly, NASCAR does not oppose Movants’ request to put “guardrails on their testimony” at trial “limiting such testimony to the high-level subject matter of their Declarations.” Doc. 414-1, Joint Mot. for Prot. Order at 8. Further, if the Court determines that Messrs. Penske and Hendrick should be deposed, NASCAR does not oppose Movants’ request to limit “each deposition in time and scope to the high-level contents of their respective Declarations and allowing them to appear via Zoom or some other form of videoconferencing.” *Id.* at 6. NASCAR is available to participate in a deposition at any time, including during trial, if necessary, to accommodate Messrs. Penske and Hendrick.

Importantly, Mr. Penske and Mr. Hendrick do not seek an order precluding their testimony at trial. And NASCAR would oppose an effort by Plaintiffs to preclude their trial testimony, regardless of whether a deposition occurs. Contrary to Plaintiffs' assertions and inaccurate representation of NASCAR's position (Doc. 380, Mot. for Leave to Depose),¹ NASCAR properly disclosed Mr. Hendrick and Mr. Penske under Rule 26, as those team owners' perspectives on the Charter system have "always been disclosed in this case, and [are] apparent from the document production, deposition testimony, and public information always available to Plaintiffs." *Khadim v. Lab'y Corp. of Am.*, 838 F. Supp. 2d 448, 464 (W.D. Va. 2011) (denying motion to strike). On January 10, 2025, Plaintiffs included "Owners of NASCAR Cup Series race teams" in their initial disclosures. Yates Decl. Ex. 1, 23XI's Initial Disclosures at 6. Messrs. Hendrick and Penske, though not mentioned by name, are owners of NASCAR Cup Series race teams. Further, on March 24, 2025, NASCAR identified Team Penske and Hendrick Motorsports on NASCAR's Amended Initial Disclosures as having information that NASCAR may use to support its defenses. Yates Decl. Ex. 4, NASCAR's Initial Amended Disclosures at 9, 10. NASCAR timely identified Messrs. Hendrick and Penske by name on its Fourth Amended Initial Disclosures with at least 20 days remaining in the discovery period (and while depositions were still underway). Yates Decl. Ex. 3, NASCAR's Fourth Amended Disclosures at 15, 16. Plaintiffs also know the exact subject of their likely testimony, as their views were already set out in their declarations.² Moreover, Plaintiffs

¹ NASCAR wrote to Plaintiffs that "we disagree with your claim that Mr. Hendrick and Mr. Penske were not adequately disclosed," Yates Decl. Ex. 2, Oct. 27, 2025 Email at 1.

² The Court's original scheduling order set June 30, 2025 as the cutoff date for "fact discovery necessary for the preparation of expert reports," but discovery continued through September 19, 2025 (which was subsequently extended to September 30, 2025 by agreement of the parties). Doc. 84, Case Mgmt. Plan at 8; Doc. 213, Order. Further, the Parties were ordered to supplement their Rule 26(a) disclosures pursuant to Rule 26(e) "within thirty days after obtaining applicable information." *Id.* NASCAR timely disclosed these witnesses after the motion to compel productions from the teams was resolved.

spoke directly with Messrs. Hendrick and Penske throughout the relevant period. *See* Docs. 249-20, 23X1 0016053 at -053 (Polk: “I have personally spoke with Roger Penske”); 249-35, 23X1_0251899 at -899 (Polk: “I had to get on the phone w Mr. H[endrick].”). And Movants’ counsel has agreed to make Messrs. Hendrick and Penske available to Plaintiffs’ counsel for informal interviews in advance of their testimony.

Plaintiffs should not be permitted to derail the testimony of Messrs. Hendrick and Penske based on eleventh-hour demands for new information. Plaintiffs have repeatedly touted both in this litigation and publicly that the declarations of Messrs. Penske and Hendrick supported *Plaintiffs’ case*. *See infra* at 5-6 & n.4. So, Plaintiffs have no basis to complain about the admission of that testimony at trial. And Plaintiffs never moved the Court to require Team Penske, Hendrick Motorsports, or any other team to produce the detailed financial information that Plaintiffs apparently seek to extract from these witnesses in deposition and at trial. In fact, when NASCAR moved to obtain non-party Team financial information, Plaintiffs wrote that they “take no position on the relevance of the specific financial information that NASCAR is seeking from the non-party racing teams.” Doc. 167, Pls.’ Resp. at 1. Plaintiffs’ unfounded insistence on seeking financial information regarding their teams is an effort to dissuade Messrs. Penske and Hendrick from testifying by threatening to disclose their confidential information. Plaintiffs’ approach is irreconcilable with their prior “no position” stance on other Teams’ financials, and their repeated claim that they are bringing this lawsuit for the “benefit of the teams.” Doc. 392-2, Adam Stern, *23XI, FRM further details lawsuit against NASCAR*, Sports Business Journal (Oct. 2, 2024).

NASCAR'S RESPONSE

I. NASCAR DOES NOT OPPOSE APPLYING "GUARDRAILS" ON MESSRS. HENDRICK AND PENSKE'S TESTIMONY AT DEPOSITION AND TRIAL

One form of relief that Movants seek is that the Court "limit[] each deposition in time and scope to the high-level contents of [Mr. Hendrick's and Mr. Penske's] respective Declarations and allowing them to appear via Zoom or some other form of videoconferencing." Doc. 414-1, Joint Mot. for Prot. Order at 6. NASCAR does not oppose this requested relief. As Movants note, "NASCAR had agreed to limit the scope of trial testimony to the Declarations." *Id.* at 3. There is no need for deposition testimony to exceed that scope. Consistent with NASCAR's representations about the scope of Mr. Hendrick's and Mr. Penske's trial testimony, Movants agree that "so long as Plaintiffs limited their questioning to that narrow lane of questioning, a compromise could be reached allowing for the depositions to occur without objection." *Id.* The only obstacle to this reasonable approach is Plaintiffs' attempt to radically expand the scope of their deposition questioning to Movants' "highly confidential business and financial records," and other topics that Movants consider "highly confidential." *Id.*³

Plaintiffs cannot justify this late-breaking insistence on exceeding the scope of the Penske and Hendrick declarations. Plaintiffs did not include Mr. Hendrick or Mr. Penske on their potential witness lists, so they cannot claim that any of their testimony is essential to Plaintiffs' case. Nor could Plaintiffs claim that they *must* have access to additional financial information from Team Penske or Hendrick Motorsports, because Plaintiffs never sought that information during discovery. Plaintiffs strategically took "no position on the relevance of the specific financial

³ During a conference between counsel for the parties and Movants, counsel for Plaintiffs agreed to limit the length of their deposition questioning to no more than two-and-a-half hours. NASCAR would only require the ability to examine Plaintiffs consistent with the Federal Rules. No side objected to the taking of a deposition remotely via video conference.

information” of non-party teams during discovery. Doc. 167, Pls.’ Resp. at 1. So, Plaintiffs cannot *now* claim that this information is relevant, let alone essential, to their case. NASCAR, on the other hand, laid the groundwork for Messrs. Hendrick and Penske’s limited testimony. And it intends to stick within the boundaries of their declarations. NASCAR’s questioning will not seek information regarding the teams’ income, expenses, profitability, employee salaries, or payments to drivers.

Plaintiffs cannot claim prejudice from this limited testimony, the subject matter of which was “voluntarily” disclosed more than a month ago under penalty of perjury and pursuant to the declarants’ “own free will.” Hendrick Decl. at 2; Penske Decl. at 2; *see also* Hendrick Decl. at 2 (declaration made “without bias toward either party”). Movants reiterated in their joint motion for a protective order that, consistent with their declarations, neither Mr. Hendrick nor Mr. Penske intend to “take sides” in this case. Doc. 414-1, Joint Mot. for Prot. Order at 3.

It would be disingenuous for Plaintiffs to claim that testimony about the subjects of the declarations would unfairly harm them, as they have repeatedly said the opposite. When NASCAR attached the declarations to its summary judgment briefing on October 3, 2025, Plaintiffs took to the press to tout that the declarations supported *Plaintiffs’ case*. Similarly, 23XI co-owner Denny Hamlin has boasted that the declarations were “more helpful” to Plaintiffs than to NASCAR. Deb Williams, *Denny Hamlin Has Thoughts on the Declarations Filed in Lawsuit*, Autoweek (Oct. 4, 2025), <https://www.autoweek.com/racing/nascar/a68830644/denny-hamlin-thoughts-on-the-declarations-filed-in-lawsuit>. Along those lines, Plaintiffs’ counsel undertook a campaign of telling reporters that “[t]he goals my clients have raised are clear, and the teams have affirmed

them in their own declarations,” among other similar statements.⁴ Plaintiffs’ counsel has taken the same position in this Court at a recent hearing, relying repeatedly on the team declarations. *See* Hr’g Tr. at 7:7-11, 17:25-18:3, 54:4-6, 65:22-24, Oct. 23, 2025 (statements of J. Kessler). And Plaintiffs have repeatedly cited the Hendrick and Penske declarations in their own briefing. *See* Doc. 255, Pls.’ MSJ Reply, at 17 n.14; Doc. 261, Pls.’ Reply Mot. to Exclude Hubbard, at 2, 5, 8; Doc. 352, Pls.’ Opp’n to NASCAR’s Motion in Limine (Doc. 304) at 1.

In short, NASCAR does not oppose Movants’ requested limitation on the scope of deposition questioning for Mr. Hendrick and Mr. Penske. Such a limitation would not prejudice Plaintiffs.

II. NASCAR OPPOSES ANY EFFORT TO PRECLUDE MR. HENDRICK AND MR. PENSKE FROM TESTIFYING

Movants did not request that the Court prevent Messrs. Hendrick and Penske from testifying at trial within the scope of their declarations. And the Court should not do so, regardless of whether a deposition occurs.

A deposition in advance of trial is not strictly necessary for Messrs. Hendrick and Penske for multiple reasons. First, the scope of their limited testimony is known because it is disclosed in their declarations, thus obviating the need for Plaintiffs to explore the contours of Mr. Hendrick’s and Mr. Penske’s likely trial testimony.

⁴ *See* Jenna Fryer, Associated Press, *NASCAR and teams to meet in court to try to resolve yearlong feud over charter system* (Oct. 8, 2025), <https://apnews.com/article/nascar-antitrust-lawsuit-jordan-cd3fd7391280604b4518e64a3295f43e>; *see also* Jenna Fryer, Associated Press, *NASCAR teams urge settlement as trial looms for Michael Jordan’s antitrust suit against series* (Oct. 6, 2025), <https://apnews.com/article/nascar-lawsuit-antitrust-jordan-mediation-7cf3a3181da8bd3aceaf1327bbaf23b7> (“The declarations from team owners and executives acknowledge this same economic reality.”).

Second, Plaintiffs can prepare for Movants' trial testimony without a deposition. Movants' counsel agreed in a conference between all parties on November 5, 2025 (after Plaintiffs filed their Motion for Leave to Depose, Doc. 380) to make Mr. Hendrick and Mr. Penske available for interviews by Plaintiffs' counsel (and NASCAR's counsel) in *lieu* of depositions. Thus, Plaintiffs will be fully capable of preparing for trial testimony even if a deposition does not occur.⁵

Third, Plaintiffs' claim of prejudice is based entirely on their own delay, not on the timing of NASCAR's disclosure. When moving for depositions, Plaintiffs wrote that "NASCAR has indicated it takes no position on this motion." Doc. 380, Mot. for Leave to Depose at 1. That was incorrect. Counsel for NASCAR wrote to Plaintiffs that "we disagree with your claim that Mr. Hendrick and Mr. Penske were not adequately disclosed." Yates Decl. Ex. 2, Oct. 27, 2025 Email at 1. Plaintiffs excluded that disagreement from their representation to the Court. The reality is, Plaintiffs have long known about the relevance and likelihood of testimony from Mr. Hendrick and Mr. Penske.

Plaintiffs' first disclosure in this case in January 2025 identified the "Owners of NASCAR Cup Series race teams" as likely to have relevant information. Yates Decl. Ex. 1, 23XI's Initial Disclosures at 6. NASCAR then disclosed Hendrick Motorsports and Team Penske as likely to have relevant materials that NASCAR would rely upon. *See* Yates Decl. Ex. 4, NASCAR's Initial Amended Disclosures at 9, 10. Plaintiffs' own initial disclosures and NASCAR's amended disclosures in March—months before the close of fact disclosure—were more than adequate notice

⁵ Movant's counsel has not stated that Mr. Hendrick and Mr. Penske are unavailable for deposition. To the contrary, Movants write that "if their depositions must proceed, both men will work in good faith with all counsel to find appropriate blocks of time to provide the requested testimony," and that "so long as Plaintiffs limited their questioning to the narrow lane of questioning, a compromise could be reached allowing for the depositions to occur without objection." Doc. 414-1, Joint Mot. for Prot. Order at 3, 6.

and time for Plaintiffs to depose Movants. *Dixon Lumber Co., Inc. v. Austinville Limestone Co., Inc.*, 256 F. Supp. 3d 658, 669 (W.D. Va. 2017) (Since [moving party] identified [the witness] as a person likely to have knowledge . . . in its own initial disclosures, it was obviously aware from the beginning that he had discoverable information.”); *S.E.C. v. Alar*, 2022 WL 21302161, at *2-3 (N.D. Ga. Sept. 30, 2022) (denying motion to exclude witnesses where nonmoving party’s initial disclosure “identified the employer of these witnesses” and the moving party was on notice).

Rule 26(e) states that a party need only supplement its initial disclosures “if the additional or corrective information *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), and a supplement is not required “when a witness not previously disclosed is identified during the taking of a deposition,” *id.* at advisory committee note (1993). Courts routinely hold that initial disclosures are not the only way to disclose witnesses. *See, e.g., Mitre Sports Int’l v. Home Box Off.*, 304 F.R.D. 369, 377-79 (S.D.N.Y. 2015) (denying motion to preclude where challenged witness was disclosed in discovery and moving party failed to depose); *Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 727 (S.D.N.Y. 2011) (“Because [plaintiff] became aware of [witnesses] at . . . depositions, [defendants] did not have a duty to supplement”).

There can be no doubt that Plaintiffs were aware of Mr. Hendrick and Mr. Penske and the relevance of their experiences with the Charter system both before and during discovery. Beginning with the pre-discovery period, Mr. Polk communicated with both Messrs. Hendrick and Penske during the 2025 Charter Agreement negotiations. Doc. 249-20, 23XI_0016053 at -053 (Mr. Polk states that he “personally spoke[] with Roger Penske [] and received a positive response from [him].”); Doc. 249-35, 23XI_0251899 at -899 (Mr. Polk states “I got all 16 owners to vote for our recommended approach (even Penske)”); *id.* (Mr. Polk states “I had to get on the phone

w[ith] Mr. H[endrick].”). Plaintiffs also repeatedly elicited deposition testimony about Messrs. Hendrick and Penske to help *Plaintiffs* tell their story in this litigation, including during the questioning of Jim France and NASCAR’s Commissioner Steve Phelps. In light of the numerous and repeated disclosures of these witnesses and their relevance, supplementing NASCAR’s initial disclosures was not required under Rule 26(e). *Mostofi v. Experian Info. Solutions, Inc.* 2014 WL 12929431, at *9 (D. Md. Mar. 5, 2014) (holding that under Rule 26(e), “Defendants were not required to supplement their initial disclosures” where “Plaintiff was put on notice at [a] deposition”) (internal citations omitted); *see also W.C. English, Inc. v. Rummel, Klepper & Kahl, LLP*, 2020 WL 534532, at *5 (W.D. Va., Feb. 3, 2020) (finding that a witness was properly disclosed because “he was made known to Defendants at several points during the discovery process throughout multiple witness depositions”).

NASCAR’s Rule 26(e) disclosure was timely in any event. NASCAR’s September 10, 2025 amended disclosures included both Mr. Hendrick and Mr. Penske, leaving nearly three weeks for Plaintiffs to depose them under the Case Management Plan. Doc. 84, Case Mgmt. Plan at 9 (“The parties may consent to extensions of the discovery completion deadline so long as any such extension expires not later than thirty days prior to the scheduled trial setting.”); Doc. 213, Order at 2 (extending discovery deadline to September 30, 2025). Plaintiffs never asked for a deposition. Nor did they object to the timing of NASCAR’s amended disclosure. Nor did they move to strike. Instead, they strategically chose to sit on their hands and wait until less than four weeks before trial. Had they moved or said *anything* at the time of the disclosure, there would have been ample time to take the depositions within the discovery period. *Reetz v. Lowe’s Companies, Inc.*, 2021 WL 674016, at *3 (W.D.N.C. Feb. 22, 2021) (no harm from alleged untimely disclosures because

the witnesses could “easily be deposed long before the scheduled trial” and “allowing the evidence [would] not disrupt the trial”).

Finally, Plaintiffs have claimed throughout this litigation that they are suing “on behalf of other teams.” It is telling that at the same time they ask the Court to let them tell the jury they are suing to benefit other teams, they are trying to prevent testimony from Mr. Hendrick and Mr. Penske—owners of two of the longest-standing NASCAR Cup Series teams.

CONCLUSION

The Court should permit Messrs. Hendrick and Penske to testify within the scope of their declarations at trial, regardless of whether a deposition occurs.

Dated: November 10, 2025

Respectfully submitted,

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ARTIFICIAL INTELLIGENCE (AI) CERTIFICATION

I hereby certify the following:

1. No artificial intelligence was employed in doing the research for the preparation of this document, with the exception of such artificial intelligence embedded in the standard on-line legal research sources Westlaw, Lexis, FastCase and Bloomberg;

2. Every statement and every citation to an authority contained in this document has been checked by an attorney in this case and/or a paralegal working at his/her direction as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

This the 10th day of November, 2025.

/s/ Lawrence E. Buterman
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CERTIFICATE OF SERVICE

I certify that on November 10, 2025, a true and correct copy of the foregoing was served via Email on the below counsel of record for Plaintiffs 2311 Racing LLC d/b/a 23XI Racing and Front Row Motorsports, Inc. and Counter-Defendant Curtis Polk.

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