IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; Panther Valley School District; The School District of Lancaster; Greater Johnstown School District; Wilkes-Barre Area School District; Shenandoah Valley School District; Jamella and Bryant Miller, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
	:	Argued: August 9, 2021
Pennsylvania Department of Education; Jake Corman, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Bryan Cutler, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Tom W. Wolf, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Pedro Rivera, in his official capacity as the Acting Secretary of Education, Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER **FILED: August 11, 2021**

Before the Court is a motion *in limine* (Motion) filed by Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate, seeking to "preclude[] Petitioners from introducing at trial any information that they have not provided to Respondents and that . . . is inconsistent with or expands upon the responses that they provided to the discovery requests that were directed to them in this matter." (Motion at 1.) Petitioners respond that they have complied with the Pennsylvania Rules of Civil Procedure regarding supplementation of discovery and, therefore, the Motion should be denied. Upon consideration of the parties' arguments, the Court grants the Motion in part, as set forth more fully below.

I. SENATOR CORMAN'S MOTION

In his Motion, Senator Corman argues that based upon Petitioners' pretrial memorandum, it appears that Petitioners intend to introduce evidence that was not disclosed during discovery despite repeated requests from Respondents for Petitioners to update their discovery responses and, as a result, Petitioners should be precluded from presenting such evidence at trial. Senator Corman argues the purpose of discovery is to avoid unfair surprise and prejudice, and Rule 4007.4 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4007.4, helps achieve this end by requiring parties to supplement discovery responses when new information is obtained that renders prior responses inaccurate. According to Senator Corman, fact discovery in this matter closed more than a year ago and, aside from some recent supplemental production of documents, Petitioners have not supplemented their discovery responses with more recent developments, which Petitioners identified in their pretrial memorandum as potential trial evidence. As an example, Senator Corman points to Petitioners' discussion of the relationship

between COVID-19 and Petitioner School Districts' access to technology resources. Senator Corman explains that Respondents explored, during discovery, what instrumentalities of learning or technology resources the Petitioner School Districts felt were lacking, but "Petitioners did ***not*** address why, in light of the pandemic, they believed that they needed enhanced access to technology resources." (Senator Corman's Brief (Br.) at 5 (emphasis in original).) Senator Corman further explains that "when Respondents posed the questions, the pandemic had not yet materialized or, in some cases, had only recently materialized." (*Id.*) Senator Corman provides, as a second example, an apparent discrepancy between written discovery responses by Petitioner Panther Valley School District claiming it "has a small amount of computers in a lab that students can use" and news articles indicating that all students within the Panther Valley School District were provided laptops during the 2020-21 school year to use in the event of school closures due to COVID-19. (*Id.* at 5-6 (quoting Panther Valley School District's Responses to then-Speaker of the Pennsylvania House of Representative Michael C. Turzai's[1] Second Set of Discovery Requests, appended to the Motion as Exhibit C, and citing Danielle Derrickson, *Panther Valley unveils school plan*, TIMES NEWS ONLINE (Lehighton, Pa.), July 16, 2020, appended to the Motion as Exhibit E).) According to Senator Corman, these two examples illustrate the problem with Petitioners' outdated discovery responses: they are "inaccurate and incomplete." (Senator Corman's Br. at 6.)

Senator Corman maintains that he requested Petitioners to supplement their discovery responses beginning in March 2021, and the parties were successful, at

[1] Speaker Bryan Cutler was elected as the new Speaker on June 22, 2020, and was substituted as a respondent for former Speaker Turzai pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

least in part, having "generally reached an agreement related to supplemental document productions." (*Id.* at 2-3.) However, Senator Corman asserts that "Petitioners offered to provide only limited updates to interrogatory responses, while refusing to provide any updates to deposition testimony or any supplemental depositions." (*Id.* at 3.) This constitutes a violation of Rule 4007.4, Senator Corman contends, and "the variance between Petitioners' planned trial presentation and discovery responses would be significant if, at trial, they are permitted to introduce new information without having supplemented their discovery responses to account for that information." (*Id.* at 6.) Senator Corman cites *Gregury v. Greguras*, 196 A.3d 619 (Pa. Super. 2018),[2] for support. In that case, a defendant asserted attorney-client privilege during discovery but at trial waived the privilege. Despite objections from plaintiffs' counsel, the trial court permitted the testimony. On appeal, the Superior Court reversed and remanded for a new trial, holding the plaintiffs were prejudiced because "[w]ithout the benefit of discovery, [the plaintiffs] were not prepared to challenge [the defendant's] credibility and ability to recall discussions that had occurred [15] years before." *Id.* at 631. Senator Corman also cites *Sabol v. Allstate Property and Casualty Insurance Co.*, 309 F.R.D. 282, 286 (M.D. Pa. 2015),[3] in which the federal district court granted a motion *in limine* and precluded plaintiffs from presenting certain evidence related to causation and damages when the plaintiffs failed to supplement their initial

[2] While not binding, Superior Court decisions may be cited for their persuasive value, particularly where they address analogous issues. *Lerch v. Unemployment Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018).

[3] Similar to Superior Court opinions, decisions from the federal district courts, while not binding, may be cited for their persuasive value. *Edinger v. Borough of Portland*, 119 A.3d 1111, 1115 (Pa. Cmwlth. 2015).

disclosures concerning the claim as provided in Federal Rule of Civil Procedure 26(e), Fed.R.Civ.P. 26(e),[4] upon which Rule 4007.4 is based.[5]

Senator Corman argues Respondents would be prejudiced similar to the plaintiff in *Gregury* and the defendant in *Sabol*, particularly in light of Petitioners' refusal to amend their Petition for Review (Petition) to update the averments therein.[6] According to Senator Corman:

> when viewed in conjunction with Petitioners' position that, at trial, they may introduce evidence that is disconnected from the allegations in their Petition . . . , Petitioners' refusal to update their discovery responses means that, in their view, they can present information at

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[4] Rule 26(a) of the Federal Rules of Civil Procedure requires a party to initially disclose certain information, "without awaiting a discovery request." Fed.R.Civ.P. 26(a). Pursuant to Rule 26(e)(1):

> [a] party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:
>
> > (A) 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; or
> >
> > (B) as ordered by the court.

Fed.R.Civ.P. 26(e)(1). As a sanction for failure to comply with Rule 26(a) or (e), Rule 37(c)(1) of the Federal Rules of Civil Procedure provides "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1).

[5] The district court also granted the motion *in limine* on the basis it was unopposed under the federal rules, but separately addressed the merits as an alternative basis for granting it. *Sabol*, 309 F.R.D. at 285.

[6] Senator Corman filed a separate motion *in limine* seeking to preclude Petitioners from presenting evidence that fails to correspond to the allegations of their Petition. On July 23, 2021, the Court denied that motion *in limine*, without prejudice, however, for Senator Corman to challenge specific evidence at trial that he alleges does not conform to the allegations of the Petition and is inconsistent with the Court's opinion and order on that motion.

> trial that not only fails to correspond with what is contained in their Petition, but that also is inconsistent with or expands upon their discovery responses – information that, at the same time, was never even provided to Respondents beforehand. Simply put, Petitioners believe that, until the time of trial, they need not disclose to anyone the allegations or information that they plan to use in an effort to prevail on their claims. This approach would render Pennsylvania's rules of pleading and discovery meaningless.

(Senator Corman's Br. at 8-9.)

Senator Corman further asserts that "[t]his situation is exacerbated by Petitioners' position . . . 'that the unique nature of this case requires that Petitioners be permitted to introduce the most recent evidence available.'" (*Id.* at 9 (quoting Petitioners' Response to Senator Corman's Motion *in Limine* Regarding Evidence that Fails to Correspond with Allegations in Petition at 24) (emphasis omitted).) Senator Corman explains "that *the most recent evidence available* is only available to Petitioners, not Senator Corman," and Senator Corman cannot specifically identify every response that requires updating, as Petitioners have requested, because "this information is exclusively in Petitioners' control." (*Id.* at 9 (emphasis in original).) Without supplemental responses, Senator Corman contends that Respondents will hear for the first time at trial what some of Petitioners' evidence is and Respondents will be left without a means to readily respond to it, and this unfair surprise results in prejudice.

Senator Corman explained at argument that, contrary to Petitioners' assertions, he is not asking the Court to impose an obligation on Petitioners to constantly review their discovery responses, but simply requested in March of this year that Petitioners review their discovery responses one time to determine if they remain accurate and, if not, to supplement them under Rule 4007.4(2). Senator Corman acknowledges Petitioners have been supplementing document requests but

argues that Senator Corman should not be forced to sift through thousands of pages of documents to determine how Petitioners' responses to interrogatories and deposition questions may have changed when Petitioners have an obligation under Rule 4007.4(2) to supplement responses that are inaccurate. Senator Corman also argues that even if the document production was sufficient under the Rules, it is still inadequate because the documents may not reveal all of the inaccuracies in the deposition responses. Senator Corman explains that some of the information for which supplemental responses is sought involves personal observations that are not otherwise documented. In addition, as to Petitioners' offer to stipulate that they would not present evidence that post-dates the 2019-20 school year, when fact discovery closed, provided Senator Corman does the same, Senator Corman explains that he is under no obligation to limit the scope of his evidence as there is no allegation that he has not complied with the Rules.

Senator Corman argues that, because Petitioners have refused to supplement their discovery responses as required by Rule 4007.4 to update responses that are inaccurate, the Court should utilize Rule 4019 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4019, to impose a sanction on Petitioners for violating the discovery rules. That sanction, according to Senator Corman, should be an order granting his Motion and precluding Petitioners from introducing at trial any evidence that has not been provided to Respondents or is inconsistent with or expands upon Petitioners' discovery responses.[7]

[7] Executive Respondents – Governor Tom Wolf, the Secretary of Education, and the Pennsylvania Department of Education – take no position on the Motion, as does Respondent Pennsylvania State Board of Education. Respondent Bryan Cutler, Speaker of the Pennsylvania House of Representatives, did not file a formal response but indicated at oral argument that he supports the Motion.

II. PETITIONERS' RESPONSE

Petitioners respond that they have complied with their discovery obligations and actually produced more than was required of them under the Rules. Petitioners argue they have updated responses of Individual Petitioners, which were inaccurate due to the passage of time, and have produced documents related to a variety of subjects of which Senator Corman seeks updating, such as COVID-19 and technology. Petitioners claim Senator Corman's interpretation of Rule 4007.4 is too broad and "would swallow the Rule's general prohibition whole—a rule that says there is 'no duty to supplement [a] response to include information thereafter acquired.'" (Petitioners' Answer at 8 (quoting Pa.R.C.P. No. 4007.4).) They argue "the Rule and its comments, state caselaw, and particularly federal caselaw interpreting Rule 26(e) of the Federal Rules of Civil Procedure," upon which Rule 4007.4 is based, "make clear that there is no duty to update discovery responses unless[:]" (1) "a party [] know[s] that a specific prior response is no longer correct[;]" (2) "the updated information [is] 'material' to the dispute, not otherwise available to the opposing party, and likely to substantially affect the opposing party's trial preparation and ability to mount a defense[; and]" (3) "the failure to provide or disclose the information would result in clear prejudice to the opposing party." (Petitioners' Answer at 9.) According to Petitioners, Senator Corman has not shown any of the above.

First, Petitioners argue Rule 4007.4 requires supplementation only if a party is aware that a witness's prior responses are incorrect or no longer true. (*Id.*) Petitioners assert there is no duty to regularly reexamine discovery responses. Furthermore, Petitioners contend that common sense dictates that deponents are under no obligation to "continuously review [their] testimony in order to review

[their] answers as a result of subsequently occurring events." (*Id.* at 10-11 (quoting *Intermedics, Inc. v. Cardiac Pacemakers, Inc.* (D.Minn., No. 4-95-716 (JRT/RLE), filed April 10, 1998), 1998 WL 35253493, at *2).) Second, Petitioners claim Senator Corman has not shown the information that he seeks to be updated is material and otherwise unknown. For support, they cite Federal Rule of Civil Procedure 26(e)(1)(A). Third, Petitioners assert that Senator Corman has not shown any prejudice from the lack of additional supplementation. For instance, in response to Senator Corman's example about lacking updated information as to technology in the Petitioner School Districts, Petitioners argue that the lack of adequate resources "is the very point of this lawsuit," such that there can be no prejudice. (Petitioners' Answer at 16.) Petitioners also point out that they have now supplemented their discovery in this regard, despite the rules not requiring it.

In addition, Petitioners argue that the relief Senator Corman seeks is too broad. Not only does he seek to preclude documents that were not produced during discovery, which Petitioners claim will not occur as all documents they intend to offer have been produced, but Senator Corman also seeks to bar Petitioners "from answering questions they were never asked." (*Id.* at 18.) They argue such relief is not warranted given Petitioners have complied with their obligations under the Rules, no bad faith is alleged, and no prejudice has been shown.

Finally, Petitioners distinguish the cases upon which Senator Corman relies, noting the prejudice in those cases was evident, whereas here "there can be no assertion . . . that Senator Corman lacks an understanding of Petitioners' position or the basis of Petitioners' claims." (*Id.* at 22.) According to Petitioners, "Senator

Corman has had ample opportunity to explore the evidentiary basis of Petitioners' claims during the course of discovery[,] as well as through the wide range of publicly available documents at his disposal." (*Id.*) Petitioners point out that this Court found no evidence of prejudice previously when ruling on a separate motion *in limine* filed by Senator Corman related to whether the proposed evidence constituted a variance from the factual averments in the Petition, at least in the context of updated test scores, statistics, and data.

"In sum," Petitioners argue, "Senator Corman's broad request for relief directly contravenes the limited exception of Rule 4007.4, his claims of non-compliance with that Rule are unsubstantiated and factually incorrect, and there is no legal authority supporting his request for sanctions under Rule 4019." (*Id.* at 23.) Therefore, Petitioners request that the Court deny the Motion.

III. DISCUSSION

Rule 4007.4 of the Pennsylvania Rules of Civil Procedure governs supplementation of discovery responses. It provides:

> A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial, the subject matter on which each person is expected to testify and the substance of each person's testimony as provided in Rule 4003.5(a)(1) [of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4003.5(a)(1)].

> (2) A party or an expert witness is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she knows that
>
> > (a) the response was incorrect when made, or
> >
> > (b) the response though correct when made is no longer true.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests to supplement prior responses.

Pa.R.C.P. No. 4007.4.

The Explanatory Comment to Rule 4007.4 explains that it is "adapted from" Rule 26(e) of the Federal Rules of Civil Procedure, but Federal Rule 26(e) was not "adopted verbatim." Pa.R.C.P. No. 4007.4, Explanatory Comment. Federal Rule 26(e)(1) provides:

> [a] party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:
>
> > (A) 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; or
> >
> > (B) as ordered by the court.

Fed.R.Civ.P. 26(e)(1).

Similar to Federal Rule 26(e), Rule 4007.4(2) requires a party to **automatically** supplement discovery responses in two limited circumstances, when: "(a) the response was incorrect when made, or (b) the response though

correct when made is no longer true."[8] Pa.R.C.P. No. 4007.4(2). Here, Senator Corman does not contend that the discovery responses were incorrect when made, which would fall under Rule 4007.4(2)(a), but that, with the passage of time, the response "is no longer true," which falls under Rule 4007.4(2)(b). Whether a response is no longer true, which requires supplementation, or is incomplete, which does not necessarily require supplementation, or a combination of both is a point of contention between Senator Corman and Petitioners. There is a dearth of case law related to the duty to supplement responses to interrogatories or deposition testimony under Rule 4007.4. In *Yamialkowski v. Berry* (Pa. Super., No. 2280 EDA 2015, filed January 24, 2017), the Superior Court examined whether a defendant-physician was under an obligation to supplement discovery responses and deposition testimony after the defendant-physician stated he could not recall the plaintiff's treatment but then testified at trial that he did. There, the Superior Court focused on whether the defendant-physician "obtain[ed] information" that rendered the response inaccurate. *Id.*, slip op. at 7. It "concluded that [the defendant-physician]'s refreshed or changed recollection [wa]s not 'obtain[ed] information,' and therefore d[id] not fall under the ambit of Rule 4007.4." *Id.*, slip op. at 8 (quoting Pa.R.C.P. No. 4007.4(2)(b)). In doing so, the Superior Court distinguished its decision in *Leahy v. McClain*, 732 A.2d 619 (Pa.

[8] Rule 4007.4 also requires supplementation when ordered by a court, which is likewise a requirement found in Federal Rule 26(e), but also if agreed upon by the parties or requested by one of the parties, which is not in the federal rule. Pa.R.C.P. No. 4007.4(3). At argument on this Motion, Senator Corman indicated he was **not** proceeding under that paragraph. Nor is there any allegation that Petitioners have not supplemented a response related to "the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial." Pa.R.C.P. No. 4007.4(1). Therefore, the Court limits its discussion to whether Petitioners violated the automatic duty to supplement under paragraph (2) of the Rule.

Super. 1999), on the basis that, there, the party came into possession of new material that was not part of the prior response. *Yamialkowski*, slip op. at 8 n.3. In *Leahy*, the plaintiff was involved in a motor vehicle accident. At trial, the plaintiff attempted to introduce photographs of the accident scene, to which the defendant objected on the basis the photographs were not produced during discovery. *Leahy*, 732 A.2d at 624. The trial court excluded such evidence and on appeal, the Superior Court affirmed, citing the duty under Rule 4007.4 to amend a response if the party obtains information that made the prior response no longer true. *Id.* Because the defendant served interrogatories and requests for production of documents, which specifically sought information about and production of photographs and trial exhibits," and the plaintiff did not comply with these requests that "were continuing in nature," by amending the responses when she came into possession of the new material, the Superior Court held the trial court properly excluded the photographs. *Id.*

While useful in determining the parameters of a party's obligation to supplement discovery responses, neither *Yamialkowski* nor *Leahy* deal directly with what it means for a response to be "no longer true" as provided for in Rule 4007.4(2). A court "may consult the explanatory comment of the committee which worked on a rule in determining the proper construction and application thereof." *Commonwealth v. Harth*, 252 A.3d 600, 617 (Pa. 2021). The Explanatory Comment explains that "[t]he test in [] Rule 4007.4 is whether the party . . . knows that the response was incorrect or **is no longer correct** in the light of intervening events of which [the party] has knowledge." Rule 4007.4, Explanatory Comment (emphasis added). When interpreting rules of court, the Court is also guided by the rules of statutory construction. *Harth*, 252 A.3d at 617. Under Section 1903(a) of

the Statutory Construction Act of 1972, "[w]ords and phrases shall be construed according to the rules of grammar and according to their common and approved usage." 1 Pa.C.S. § 1903(a). A court may look at how dictionaries define a term to find its common and approved usage. *Vetri Navy Yard, LLC v. Dep't of Cmty. & Econ. Dev.*, 189 A.3d 1137, 1146 (Pa. Cmwlth. 2018). Merriam-Webster Dictionary defines the term "true," in relevant part, as "being in accordance with the actual state of affairs," "conformable to a standard or pattern: accurate," "in accordance with fact or reality," and "the quality or state of being accurate."[9] "Accurate," in turn, means: "free from error especially as the result of care" or "conforming exactly to truth or to a standard."[10] "Incomplete" is defined as "not complete" or "unfinished: such as . . . lacking a usually necessary part, element, or step."[11] Whether an incomplete response is also inaccurate, such that supplementation is required, will depend on how the specific request or question was worded, and how the initial response was phrased. Therefore, the Court cannot, in the abstract, determine whether Petitioners have an obligation to supplement a particular response to a particular interrogatory or deposition question. However, to the extent that a party or expert has obtained information such that the response is no longer true, meaning it is not "accurate" or "free from error" or "conforming exactly to truth or to a standard," Petitioners are, under Rule 4007.4(2), to supplement those responses. This applies not just to requests for the production of documents, but also interrogatories and/or deposition questions

[9] *True*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/true (last visited Aug. 11, 2021).

[10] *Accurate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/accurate (last visited Aug. 11, 2021).

[11] *Incomplete*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/incomplete (last visited Aug. 11, 2021).

served upon parties and/or their experts.[12] While Petitioners assert there is no basis to extend this obligation to depositions, the Court finds guidance to the contrary in the Explanatory Comment to Rule 4007.4, which states that "the prior Rules contained no provisions imposing any continuing obligation on an answering party to supplement [its] responses to **interrogatories or oral depositions** if [the party] becomes aware of subsequent facts which make [its] prior answers incorrect when made or no longer true in light of new circumstances" and that "the inquirer may, at any time, force a review of prior responses by **filing supplementary interrogatories or noticing a supplementary oral examination** to discovery whether the respondent has become aware of any information which requires an amendment of any prior response." Pa.R.C.P. No. 4007.4, Explanatory Comment (emphasis added).

Although Petitioners argue that supplementation is only needed if the response is material, unlike Federal Rule 26(e)(1), which specifies that supplementation is required only if the prior response has changed in "some material respect," Fed.R.Civ.P. 26(e)(1)(A), Rule 4007.4 requires supplementation if "the response was incorrect when made" or "the response though correct when made is no longer true." Pa.R.C.P. No. 4007.4(2). The explanatory comment states simply that

> [t]he test in [] Rule 4007.4 is whether the party or the expert witness knows that the response was incorrect or is no longer correct in the light of intervening events of which he has knowledge. If he knows this, he must correct the response. If he does not know it, he need do nothing.

Pa.R.C.P. No. 4007.4, Explanatory Comment.

[12] At oral argument, Senator Corman agreed this duty would not extend to non-parties.

There is no mention that the correction must be material. Instead, the issue of whether a correction is material appears to be important when considering the appropriate sanction to impose on a party for nondisclosure as materiality goes to prejudice. A fact that is not material to a party's claims is unlikely to prejudice the opposing party's ability to present a defense, such that any sanction would not be warranted. As a result, whether Respondents are in any manner prejudiced by Petitioners' lack of supplementing a prior discovery response will be fact dependent, similar to the determination of whether a response is rendered "no longer true," and thus requires supplementation.

Petitioners rely on the Superior Court's decision in *Fish v. Gosnell*, 463 A.2d 1042 (Pa. Super. 1983), for the proposition that there can be no prejudice when the evidence is otherwise available. In *Fish*, the defendant claimed the trial court erred by admitting the testimony of a witness who was not identified in interrogatories as a witness. The Superior Court found any error was harmless. First, it noted that the testimony of the witness was "rather innocuous" because the substance of the witness's testimony was already of evidence based upon other witnesses' testimony. *Id.* at 1046. Therefore "[a]ny prejudice from surprise was minimal." *Id.* In addition, the Superior Court noted that the plaintiff did identify an "employment specialist" as a witness, and "[a]lthough [the plaintiff] never disclosed the precise identity of this witness as he should have" under Rule 4007.4, "that the witness was a coworker rather than the promised specialist did not appreciably burden [the defendant]." *Id.* The Superior Court also explained there was "no indication of bad faith or attempt to mislead in presentation of th[e] witness." *Id.* The Superior Court concluded that "[e]ven under a strict reading of the procedural rules, holding that the presentation of a non-disclosed witness was

per se error under Pa.R.C[].P. 4019(i), a new trial would not be warranted." *Fish*, 463 A.2d at 1046. This was because "the particular facts [the evidence] tended to prove were clearly established by other competent evidence," were undisputed, or resulted in no prejudice. *Id.*

To the extent that Petitioners argue that there would be no surprise because all this evidence was exchanged during discovery as part of their document production, the Court is not persuaded that production of such evidence, alone, is always sufficient. Discovery in this matter spanned at least 18 months. More than 70 depositions have been taken. Petitioners have identified nearly 4,500 exhibits they intend to present at trial. Undoubtedly, the amount of discovery exchanged between the parties during the course of this litigation far exceeds that. In addition, Petitioners indicated they recently supplemented their document production with more than 8,700 pages, just while this Motion was pending, and at least one more supplemental production of documents is anticipated.

Moreover, the Court is cognizant that discovery in Pennsylvania is liberal, and "[t]he rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence." *Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc.*, 904 A.2d 986, 994 (Pa. Cmwlth. 2006). "[T]he Pennsylvania rules do not limit discovery to admissible trial information, but rather, allow for the discovery of information inadmissible at trial, provided that the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954, 959 (Pa. Super. 1989) (quoting Rule 4003.1(b) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4003.1(b)). In addition, fact discovery closed more than a year ago.

Furthermore, Senator Corman argues that not all of the updated information is documented, as much of the information is predicated on first-hand observations of the witnesses, which can only be gathered through other means. At argument, Senator Corman gave an example that resonates with the Court and illustrates the importance of supplemental discovery responses in a case such as this. Senator Corman explained that Bryan Cutler, Speaker of the Pennsylvania House of Representatives, another Respondent, served Petitioners with interrogatories asking Petitioners to identify the material facts upon which Petitioners' witnesses would testify, to which Petitioners replied that responding to the interrogatory was too burdensome and Respondents would have to depose those witnesses to determine that information, which they did.

Therefore, although Petitioners may have produced additional documents that may provide **some** of the information Senator Corman seeks, the Court agrees with Senator Corman that Respondents should not be left to guess what facts contained within the thousands of documents exchanged render a prior response to an interrogatory or deposition question incorrect or no longer true, when Rule 4007.4 requires a party to update such responses. Nor should Respondents be confronted, for the first time at trial, with events or facts that have transpired since fact discovery has closed. This is particularly so given that Petitioners have declined to update their Petition and the Court has not ordered them to do so.

Accordingly, pursuant to Rule 4007.4(3), the Court directs Petitioners to supplement their responses to interrogatories, including expert interrogatories, if any, and Petitioners' responses to deposition questions to the extent their prior responses either were "incorrect when made" or "though correct when made [are] no longer true." Pa.R.C.P. No. 4007.4(2). Should Petitioners fail to supplement

such responses, Respondents may challenge the evidence at trial, and Petitioners risk that such evidence may be excluded, provided Respondents can show the evidence is material and prejudicial to their ability to present a defense.

The Court is aware that Senator Corman requested that the Court order the information to be excluded instead of ordering Petitioners to supplement discovery. Rule 4019(a)(1) provides that a court may impose sanctions for discovery violations.[13] Sanctions may be imposed where a party does not comply with the

[13] Rule 4019(a)(1) provides, in relevant part, as follows:

(a)(1) The court may, on motion, make an appropriate order if

> (i) a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005 [of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4005];
>
> (ii) a corporation or other entity fails to make a designation under Rule 4004(a)(2) or 4007.1(e) [of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. Nos. 4004(a)(2), 4007.1(e)];
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> (iii) a person, including a person designated under Rule 4004(a)(2) to be examined, fails to answer, answer sufficiently or object to written interrogatories under Rule 4004;
>
> (iv) a party or an officer, or managing agent of a party or a person designated under Rule 4007.1(e) to be examined, after notice under Rule 4007.1, fails to appear before the person who is to take the deposition;
>
> (v) a party or deponent, or an officer or managing agent of a party or deponent, induces a witness not to appear;
>
> (vi) a party or an officer, or managing agent of a party refuses or induces a person to refuse to obey an order of court made under subdivision (b) of this rule requiring such party or person to be sworn or to answer designated questions or an order of court made under Rule 4010 [of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4010];

Rules of Civil Procedure related to discovery or disregards a discovery order. *Linker v. Churnetski Transp., Inc.*, 520 A.2d 502, 505 (Pa. Super. 1987). Among the sanctions available to a court is issuing:

> (1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> **(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition;**
>
> (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;
>
> (4) an order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;
>
> **(5) such order with regard to the failure to make discovery as is just.**

Pa.R.C.P. No. 4019(c) (emphasis added).

> (vii) a party, in response to a request for production or inspection made under Rule 4009 [of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4009], fails to respond that inspection will be permitted as requested or fails to permit inspection as requested;
>
> (viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

Pa.R.C.P. No. 4019(a)(1).

Generally, orders regarding discovery matters, including the imposition of sanctions, are subject to the discretion of the trial court. *Hill v. Kilgallen*, 108 A.3d 934, 941 (Pa. Cmwlth. 2015). "[T]he purpose of discovery sanctions is to secure compliance with our discovery rules and court orders in order to move the case forward and protect the substantive rights of the parties, while holding those who violate such rules and orders accountable." *Rohm & Haas Co. v. Lin*, 992 A.2d 132, 147 (Pa. Super. 2010). When a court imposes a discovery sanction, "the sanction must be appropriate when compared to the violation of the discovery rules." *Reilly v. Ernst & Young, LLP*, 929 A.2d 1193, 1200 (Pa. Super. 2007) (citation omitted). There are several factors that a court should consider when imposing a discovery sanction:

> Specifically, [the court] must "first examine the party's failure in light of the prejudice caused to the opposing party and whether the prejudice can be cured." . . . Second, [the court] must determine the "defaulting party's willfulness or bad faith in failing to comply with the discovery order." [] Third, [the court] must "consider the number of discovery violations," and finally, "the importance of the precluded evidence in light of the failure must be considered."

Id. (quoting *Steinfurth v. LaManna,* 590 A.2d 1286, 1288-89 (Pa. Super. 1991)). "In the absence of bad faith or willful disobedience of the rule, the most significant considerations are the importance of the [evidence] and the prejudice, if any, to the party against whom the [evidence] will [be presented]." *Feingold v. Se. Pa. Transp. Auth.*, 488 A.2d 284, 288 (Pa. Super. 1985).

Here, the prejudice that may result if the information is not disclosed can be cured, or at least ameliorated, by a court order directing disclosure. Furthermore, the Court finds no evidence that Petitioners acted willfully or in bad faith in not supplementing the discovery responses, nor does Senator Corman point to any such evidence. Instead, it appears the parties have differing interpretations of what

is required under Rule 4007.4. Finally, the parties appear to have conducted themselves professionally in this matter as there have not been any other discovery violations presented to the Court.

While "Rule 4019 does not require the imposition of an order compelling discovery as a prerequisite to the trial court's authority to impose an appropriate sanction," the Superior Court concluded that failure to issue an order compelling discovery before excluding the evidence was an abuse of discretion in *Griffin v. Tedesco*, 513 A.2d 1020, 1023 (Pa. Super. 1986). The Superior Court held that "given the severity of the sanction imposed . . . and the fact that [the] appellant's counsel had tendered but one refusal to comply with [the] appellees' discovery request, the trial court should have first entered an order compelling compliance with the request." *Id.* The Superior Court further explained that "the order compelling [discovery] would serve as a warning that if there is future non-compliance, sanctions will be imposed." *Id.* at 1024.

Here, under the circumstances, including the parties' apparent differing but reasonable interpretations of Rule 4007.4, the Court declines to impose a sanction excluding information without first affording Petitioners the opportunity to supplement their discovery responses as set forth above. The prejudice to Respondents could be lessened, if not cured, if Petitioners supplement their responses.

IV. CONCLUSION

Based upon the foregoing, Senator Corman's Motion is granted to the extent the Court finds Petitioners are obligated to supplement their discovery responses that were "incorrect when made" or "though correct when made [are] no longer true." Pa.R.C.P. No. 4007.4(2). However, the Court will not exclude the information and instead directs Petitioners to provide any supplemental responses that have not already been made forthwith. This duty to supplement applies to Petitioners' responses to interrogatories and/or Petitioners' responses to deposition questions. As trial in this matter is scheduled to commence in less than one month, Petitioners shall serve any further supplemental responses within seven days of the Court's Order. Failure to comply with the Court's directive could lead to exclusion of that evidence at trial if Respondents can demonstrate the response should have been supplemented under Rule 4007.4(2), the information is material, and Respondents have suffered prejudice as a result of its nondisclosure.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Penn School District; Panther Valley School District; The School District of Lancaster; Greater Johnstown School District; Wilkes-Barre Area School District; Shenandoah Valley School District; Jamella and Bryant Miller, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
Pennsylvania Department of Education; Jake Corman, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Bryan Cutler, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Tom W. Wolf, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Pedro Rivera, in his official capacity as the Acting Secretary of Education, Respondents	:	

O R D E R

NOW, August 11, 2021, the Motion *in Limine* (Motion) filed by Senator Jake Corman, President *Pro Tempore* of the Pennsylvania Senate, seeking to preclude Petitioners from presenting information at trial that has not been provided to Respondents or is inconsistent with or expands upon Petitioners' discovery responses, is **GRANTED IN PART**. Within seven days, Petitioners are directed to supplement any of Petitioners' responses to interrogatories or Petitioners' responses to deposition questions that were "incorrect when made" or "though correct when made [are] no longer true." Rule 4007.4(2) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4007.4(2). Failure to do so may result in the exclusion of such evidence at trial provided that Respondents can demonstrate the response should have been supplemented under Rule 4007.4(2), the evidence is material, and Respondents have suffered prejudice as a result of its nondisclosure.

Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, Judge

Order Exit
08/11/2021