The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TIM and PENNY PATERSON, husband and wife and the marital community thereof, Plaintiffs, v. LITTLE, BROWN AND COMPANY, a Massachusetts state corporation, TIME WARNER BOOK GROUP, a Delaware state corporation, HAROLD EVANS ASSOCIATES LLC, a New York state limited liability company, HAROLD EVANS, and DAVID LEFER, Defendants.	No. 05-CV-01719-TSZ RESPONSE TO MOTION TO EXCLUDE DEFENDANT'S EXPERT WITNESS REPORT AND TESTIMONY

I. INTRODUCTION

Plaintiffs' motion to exclude the Report and Testimony of Gary J. Nutt ignores both the applicable case law in this District and defendants' admitted good faith, and instead urges this Court to take extreme action based on **no showing** of actual prejudice, and without even the slightest consideration of less drastic remedies. Amid their clamor for the harshest of sanctions, however, plaintiffs do not dispute that within two days of

disclosing their own expert's opinions, they were – via defendants' April 18th disclosure[1] – promptly advised of defendants' intent to offer an expert witness to rebut plaintiffs' expert Mr. Hollaar; supplied with the identity of the designated defense expert (Mr. Nutt); provided with Mr. Nutt's *curriculum vitae*; alerted to the focus of the rebuttal report; and told to expect a detailed report from Mr. Nutt as soon as it became available. Indeed, when the Nutt report was available, defendants promptly furnished it to plaintiffs' counsel.

Where defendants' actions were in good faith and substantially complied with the April 18, 2007 deadline and where the timing of their more detailed rebuttal report did not prejudice plaintiffs in any way, defendants respectfully request that plaintiffs' motion to exclude be denied. Insofar as there is any possibility that plaintiffs may claim to be prejudiced by not having had the opportunity to depose Mr. Nutt, defendants further request that the Court grant the parties a modest extension of the expert discovery deadline for this limited purpose.[2]

II. ARGUMENT

A motion to exclude expert testimony and report based on timing of disclosure is improper when such timing is substantially justified, or harmless. Fed. R. Civ. P. 37(c)(1).[3] Here defendants' additional, more detailed, disclosure after the April 18th notice to plaintiffs is both substantially justified and harmless; as well, plaintiffs can adduce no set of facts showing prejudice so severe as to warrant such drastic remedy as complete exclusion. Indeed, given these factors, such a complete forfeiture would hardly serve the

[1] Thus, the disclosure substantially complied with the April 18, 2007, deadline set by the parties' stipulation entered by the Court on March 23, 2007.

[2] If plaintiffs are granted permission to conduct a deposition of Prof. Nutt, defendants would also respectfully request the opportunity to conduct a similar deposition of plaintiffs' expert.

[3] Note that this standard is stated in the disjunctive and defendants need only establish one. *See Galentine v. Holland America Line--Westours, Inc.*, 333 F.Supp.2d 991 (W.D. Wash 2004) (Pechman, J.). ("Case law is clear that Rule 37(c)(1) establishes an either/or standard in determining admissibility of reports").

interests of justice or "secure the just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P. 1.

(a) Stipulated Deadline Does Not Contemplate 2-day Turnaround for Rebuttal Report, Thus Defendants' Timing is Justified.

The parties agree that per the terms of their stipulation relating to disclousre deadlines, expert reports were to be disclosed by April 18th 2007. *See* Exhibit A to Plaintiffs' Motion to Exclude ("Pl. Mot."). Defendants disagree with plaintiffs, however, that the stipulated agreement contemplated that their rebuttal expert report could and should have been drafted and served within two days after receiving plaintiffs' April 16th disclosure. Indeed, even the Federal Rules governing disclosure of rebuttal expert reports allow 30 days for filing of a rebuttal report. *See* Fed. R. Civ. P. 26(a)(2)(C).

Because a two-day turnaround for a rebuttal report could not have been contemplated by the stipulation, defendants' respectfully submit that they acted in good faith in 1) timely alerting the plaintiffs that Mr. Nutt would rebut and respond to Mr. Hollaar's testimony, 2) providing Mr. Nutt's *curriculum vitae* and the focus of his testimony and report, and 3) promising to furnish the report when it became available. *See* Defendants' Rule 26(a)(2) Disclosure at 1-2, attached as Exhibit B to Pl. Mot. Under the circumstances, then, defendants' course of action was justified, and as shown below, the notice it provided warded off any prejudice that could have accrued to plaintiffs.

(b) Plaintiffs Cannot Establish Harm/Prejudice

Whether an alleged untimely disclosure of an expert report is harmless depends on whether the delay in disclosure prejudices the moving party. *Yetti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). Additionally, in the Ninth Circuit, courts will also consider: whether any less drastic remedy is available; the public

policy favoring disposition of cases on the merits; the public's interest in expeditious resolution of litigation; and the Court's need to manage its docket. *Wendt. v. Host International, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997).

Considering the most relevant of these factors, plaintiffs cannot establish prejudice sufficient to warrant the complete exclusion of Mr. Nutt's expert report. Nor can plaintiffs show that a less drastic remedy is unavailable in the circumstances presented here. Indeed, plaintiffs do not bother to consider such ready remedies.

a. Plaintiffs' Claim of Prejudice is "Not so Severe as to Warrant Exclusion"

Plaintiffs' sole evidence of prejudice is a vague assertion that there is little opportunity to depose Mr. Nutt because of "summer schedules," the closure of discovery, and the existence of a trial date more than three months away. Pl. Mot. at 6. And plaintiffs' chief case support is *Yetti by Molly*, where the district court found harm because the plaintiff disclosed its expert report **two and a half (2 ½) years** after the due date, and **just 28 days** prior to trial. 259 F.3d at 1107. Here, even if the Court were to apply the Federal Rules' default timing for rebuttal expert reports,[4] the Nutt report was 2-plus weeks overdue, and was disclosed over three months before trial; thus, in no way are the facts presented here similar to the egregious delay in *Yeti by Molly*.

In fact, this District Court has distinguished *Yeti by Molly* for this exact reason. *See Galentine v. Holland America Line--Westours, Inc.*, 333 F.Supp.2d 991 (W.D. Wash 2004) (Pechman, J.). In *Galentine*, the Court rejected the movant's reliance on *Yeti by Molly*, stating that the *Yeti by Molly* delay was not comparable to the case before it, in which the

[4] This may be the proper approach since the agreed stipulation to deadlines did not specifically address/contemplate rebuttal expert reports.

report was produced within only a couple weeks of the elapsed deadline. *Id*. at 994. Further ameliorating prejudice, the Court noted, was the fact that (as here) the movant knew the identity of the expert by the disclosure deadline. *Id*. Here, as stated above, plaintiffs not only knew Mr. Nutt's identity, but were also told the focus of his report and his testimony, furnished with his CV, and advised that the report would be provided as soon as it was ready. Thus, even if defendants were to concede the chance of some prejudice to plaintiffs caused by the 2-plus week delay in receiving the more detailed rebuttal report, such prejudice, as in *Galentine*, "is not so severe as to warrant exclusion." *Id*. at 994.

It is noteworthy that, although plaintiffs knew – through defendants' prompt and timely April 18, 2007 disclosures – of defendants' intent to rebut and respond to their own expert Mr. Hollaar with Mr. Nutt's expert testimony, plaintiffs nonetheless allowed the May 21, 2007 discovery deadline to lapse without attempting to schedule Mr. Nutt's deposition, or in any way seeking and requesting additional information from defendants. Whether this tactic is mere gamesmanship or not, their decision not to seek such information when it was available strongly suggests that plaintiffs did not value the opportunity to depose Mr. Nutt, and thus could not have been prejudiced when that opportunity passed.

In any event, as discussed below, if plaintiffs wish any additional discovery regarding Mr. Nutt, defendants are amenable – and indeed respectfully request – that the Court extend the expert discovery deadline to afford plaintiffs the opportunity to depose Mr. Nutt, and in the spirit of continued cooperation, would also request that the Court allow defendants a similar opportunity to depose Mr. Holaar.

b. Less Drastic Alternatives to Exclusion are Available and Appropriate

The courts are clear that exclusion of testimony is a severe sanction, and as such, is **not proper** where less drastic remedies are available. *See Wendt.*, 125 F.3d at 814 (requiring courts to consider availability of less drastic remedies); *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)(same); *Yetti by Molly*, 259 F.3d at 1106 (recognizing the "harshness" of any automatic application of the rule).

Defendants submit that in the complete absence of any bad faith,[5] the clear alternative to exclusion here is simply to extend the discovery deadline for the limited purpose of allowing plaintiffs to take Mr. Nutt's deposition, should plaintiffs choose to do so. *See, e.g., Galentine*, 333 F.Supp.2d at 991 (finding preclusion inappropriate where any asserted prejudice could be ameliorated); *see also Houlihan v. Invacare Corp., No. CV 2004-4286(NGG)(MDG), 2006 U.S. Dist. LEXIS 32980, at *3 (E.D.N.Y. May 24, 2006)* (finding a modest extension to the discovery deadline the easy remedy, affording the movant the opportunity to depose expert). If the discovery deadline is extended to enable Mr. Nutt's deposition, defendants respectfully request the opportunity to depose Mr. Hollaar as well..

[5] While plaintiffs downplay the evident absence of bad faith here, courts have found it significant in deciding whether to preclude expert reports. *See, e.g., Galentine*, 333 F.Supp.2d at 994 (finding it significant that "there [was] no evidence that plaintiff's failure to provide [its] report by the deadline was done in bad faith."); *see also Babcock v. Rezak*, No. 96 Civ. 0394, 2002 WL 31654995, at *1 (W.D.N.Y. Nov. 6, 2002) (noting that the preclusion of expert testimony is " 'a drastic remedy and should only be applied in those rare cases where the party's conduct represents bad faith and callous disregard of the Federal Rules of Civil Procedure' ") (quotations omitted).

III. CONCLUSION

Because defendants' more detailed disclosure – after timely and proper notice to plaintiffs – was substantially justified and harmless, defendants respectfully request that the Court deny plaintiffs' motion to exclude the expert report and testimony of Mr. Nutt.

DATED this 25th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

D. Michael Tomkins
Dietrich Biemiller

/s/ Nigel P. Avilez
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