

1 coverage asserting it was a continuous seepage and slow escape of water which was not covered
2 by the policy. Plaintiffs seek damages for necessary repairs to the structure and expenses incurred
3 from the loss in excess of \$180,000.00. The plaintiffs assert claims for breach of contract; the
4 implied duty of good faith and fair dealing; and tortious bad faith claims handling.

5 The court's initial Discovery Plan and Scheduling Order (ECF No. 10) established a May
6 11, 2018 discovery cutoff and other deadlines consistent with the requirements of LR 26-1. The
7 court approved the parties' Stipulation (ECF No. 18) in an Order (ECF No. 19) which extended
8 the discovery cutoff from May 11, 2018, to July 11, 2018. The parties did not request, and the
9 court did not order any extension of the expert or rebuttal expert deadlines.

10 In the current motion, defendant seeks to strike the report of plaintiffs' expert, Charles M.
11 Miller. On March 12, 2018, plaintiffs disclosed a damages expert, M. Chris Gusick, but did not
12 disclose a bad faith expert. After defendant disclosed its bad faith expert, plaintiffs served what is
13 styled "An Expert Rebuttal Report of Charles M. Miller." Defendant argues that Mr. Miller's
14 opinions go beyond rebuttal of defendant's bad faith expert, Steve Plitt, and instead offers
15 independent bad faith theories. Defendant argues that Mr. Miller only directly discusses Plitt's
16 report in 5 paragraphs of his 80 paragraph, 46-page report. Plaintiffs have the burden of proof on
17 their bad faith claims, but did not disclose a bad faith expert by the initial expert deadline.
18 Defendant's expert, Plitt, offers opinions regarding whether American Family acted reasonably
19 and properly in processing plaintiffs' claims and whether denial was reasonable. American
20 Family's expert did not offer legal opinions as to whether there is coverage, but opinions that
21 decisions concerning coverage was reasonable. By contrast, Mr. Miller's rebuttal report offers
22 independent theories on both the interpretation of the policy, and reasonableness of American
23 Family's investigation that do not directly rebut Mr. Plitt's opinions. A rebuttal report cannot be
24 used to establish plaintiffs' case-in-chief, and a rebuttal expert may only testify after an opposing
25 expert has testified. The rebuttal opinion is not an opportunity to cure oversights in a party's case-
26 in-chief. Accordingly, the court should strike Mr. Miller's report in its entirety and preclude
27 plaintiffs from using it in motion practice, at hearing, or at trial.

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1 Plaintiffs oppose the motion arguing that expert testimony is not required to establish bad
2 faith or to show improper claims handling. Plaintiffs argue that the motion to strike is based on
3 the premise that expert testimony is required for plaintiffs to establish a bad faith claim. Plaintiffs
4 rely on *Tracy v. American Family*, 2010 WL 3724896 (D. Nev. 2010) in which the court held that,
5 unless a breach of contract involves unusually complex or esoteric matters beyond the ken of
6 ordinary jurors, expert testimony is not required to establish bad faith. Plaintiffs argue that this
7 case does not involve complex or esoteric issues, and therefore, no expert is required. However,
8 plaintiffs argue they can “bolster” their claim through expert testimony.

9 Plaintiffs represent that the need for rebuttal expert testimony only arose when American
10 Family disclosed Steve Plitt as its bad faith expert. Plaintiffs dispute that Mr. Miller’s rebuttal
11 report only rebuts 5 of 80 paragraphs of Mr. Plitt’s report. However, if the court determines that
12 an expert on bad faith is required for plaintiffs’ case-in-chief to establish their bad faith claim, then
13 exclusion would be case dispositive. In this instance, the court must apply the Ninth Circuit five
14 factor test. Less drastic sanctions are available. The defendant has time to depose Mr. Miller
15 before the existing discovery cutoff, and the prejudice or surprise to American Family will be
16 minimal.

17 American Family replies that it is not seeking a ruling from the court regarding whether
18 expert testimony is needed to establish a bad faith claim. This is an issue for the court to consider
19 on summary judgment. Rather, American Family wants an order striking some or all of Mr.
20 Miller’s report because it is not a true rebuttal report and can only be properly used to rebut Mr.
21 Plitt’s opinions. In this case, plaintiffs concede Miller’s report is only rebuttal, so the only issue
22 is whether it is a true rebuttal report, or whether all or portions of the report should be stricken,
23 and plaintiff should be precluded from relying on it at hearing, motion practice, or trial.

24 **DISCUSSION**

25 Rule 37(c) authorizes sanctions for a party’s failure to make disclosures or cooperate in
26 discovery:

27 If a party fails to provide information or identify a witness as required by Rule 26(a)
28 or (e), the party is not allowed to use that information or witness to supply evidence

1 on a motion, at a hearing, or at a trial, unless the failure was substantially justified
or is harmless.

2 Fed. R. Civ. P. 37(c)(1). Rule 37 gives “teeth” to Rule 26’s mandatory disclosure requirements
3 by forbidding the use at trial of any information that is not properly disclosed. *Ollier v. Sweetwater*
4 *Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014). Rule 37(c)(1) is a “self-executing,
5 automatic” sanction designed to provide a strong inducement for disclosure. *Goodman v. Staples,*
6 *The Office Superstore*, 644 F.3d 817, 827 (9th Cir. 2011). Rule 37(a)(4) explicitly provides that
7 an evasive or incomplete disclosure, answer, or response to a discovery obligation “is to be treated
8 as a failure to disclose, answer, or respond.”

9 A “district court has wide discretion in controlling discovery.” *Ollier*, 768 F.3d at 862
10 (citing *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir. 2011)). The Ninth Circuit “gives particularly
11 wide latitude to the district court’s discretion to issue sanctions under Rule 37(c)(1),” which is “a
12 recognized broadening of the sanctioning power.” *Ollier*, 768 F.3d at 859 (citing *Yeti by Molly,*
13 *Ltd. v. Deckers Outdoor Corp.*, 259 F. 3d 1101, 1106 (9th Cir. 2001)). The burden is on the party
14 facing discovery sanctions under Rule 37(c)(1) to prove harmlessness. *Torres v. City of Los*
15 *Angeles*, 548 F.3d 1197, 12123 (9th Cir. 2008) (citing *Yeti by Molly*, 259 F.3d at 1107). Exclusion
16 of an expert’s testimony for failure to comply with the requirements of Rule 26(a) is a sanction
17 available to the district court even in the absence of showing a bad faith or willfulness. *Yeti by*
18 *Molly*, 259 F.3d at 1106. Therefore, if full compliance with Rule 26(a) is not made, Rule 37(c)(1)
19 mandates some sanction, “the degree and severity of which” are within the court’s discretion.
20 *Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998).

21 The district court also has discretion to exclude expert witnesses who have not been timely
22 disclosed in compliance with the court’s scheduling order. *Wong v. Regents of Univ. of California,*
23 410 F.3d 1052, 1062 (9th Cir. 2005).

24 The purpose of rebuttal testimony is to “explain, repel, counteract or disprove evidence of
25 an adverse party . . . “ *United States v. Lamoreaux*, 422 F.3d 750, 755 (8th Cir. 2005) (internal
26 quotations omitted). Or stated a bit differently, “[t]he proper function of rebuttal evidence is to
27 contradict, impeach or diffuse the impact of evidence offered by an adverse party.” *Peals v. Terre*
28 *Haute Police Department*, 535 F.3d 621, 630 (7th Cir. 2008). Rebuttal evidence may be introduced

1 to challenge the evidence or theory of an opponent, but may not be used to establish a case-in-
2 chief. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006).

3 A rebuttal expert witness may only testify after the opposing party's initial expert witness
4 testifies. *Linder v. MeadowGold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. 2008). The Eighth
5 Circuit has recognized that "the fact that testimony would have been more proper for the case-in-
6 chief does not preclude the testimony if it is proper both in the case-in-chief and in rebuttal."
7 *United States v. Luschen*, 614 F.2d 1164, 1170 (8th Cir. 1980). However, rebuttal testimony is not
8 an opportunity to cure oversights in a party's case-in-chief. *Crowley v. Chait*, 322 F.Supp 2d 530,
9 551 (D.N.J. 2004).

10 Here, American Family timely designated its bad faith expert. Mr. Plitt's 10-page report
11 outlines his qualification, documents he reviewed, and his review of the claims file in this case on
12 pages 1 – 7. The last 2 ½ pages of report consist of the following five opinions.

- 13 1. American Family reasonably processed the Danganan water loss claim submission.
- 14 2. American Family's coverage determination was reasonable given the facts presented.
- 15 3. American Family's processing of the Danganan water loss claim submission was
16 consistent with the insurance policy's covenant of good faith and fair dealing.
- 17 4. American Family's processing of the Danganan water loss claim submission was
18 consistent with Nevada's Unfair Claims Practices Act.
- 19 5. American Family's processing of the Danganan water loss claim submission was
20 consistent with industry standard, custom, and practice.

21 Plaintiffs served what was designated as a rebuttal expert report of Charles M. Miller by
22 the deadline for disclosing rebuttal experts. Mr. Miller's report is attached as Exhibit B4 to
23 American Family's motion to strike. The first page of the report is captioned as a rebuttal expert
24 report. However, after the Table of Contents, the first page of the report entitled "Introduction"
25 indicates that Mr. Miller was "retained by Robert and Myrna Danganan . . . to provide my expert
26 opinion on whether American Family Mutual Insurance Company . . . complied with the practices
27 and standard in the insurance industry for claims handling in its handling of Danganan's claim,
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1 which is the subject of this action.” He goes on to state that he has been asked to address the
2 opinions of Mr. Steven Plitt in his March 5, 2018 report.

3 Mr. Miller’s 46-page report opines that American Family failed to comply with insurance
4 industry claims handling standard in its handling of the plaintiffs’ claims. He opines that American
5 Family ignored facts which would have supported coverage for the claim; repeatedly interpreted
6 the insurance policy’s seeping and leakage exclusion contrary to the accepted standards in the
7 insurance industry; failed to investigate whether the water leak was mere seepage or leakage as
8 required by exclusion and properly relied upon an unidentified employee of a water remediation
9 company to deny the claim; failed to consider its claim decision in accordance with industry claims
10 handling standards; and failed to investigate and evaluate possible humidity damage to the
11 plaintiffs’ residence which was not excluded in the policy. He also criticizes Mr. Plitt’s report for
12 failing to address whether the leak was mere seepage and leakage, indicating it appears to assume
13 the because the leak may have gone on for some time that the policy exclusion applied to this
14 claim. Mr. Miller states that numerous facts supported the conclusion that the leak was much more
15 than seepage and leakage which Mr. Plitt ignored. According to Mr. Miller, Mr. Plitt erroneously
16 concluded that it was reasonable for American Family to rely upon an unidentified water
17 remediation employee to deny the claim when the qualifications of the employee were not known,
18 and that overall, Mr. Plitt’s opinions “are not supported by the facts of the claim, the language of
19 the seepage and leakage exclusion, or the insurance industry claims handling standards.”

20 The court will deny American Family’s Motion to Strike, but will preclude plaintiffs from
21 calling Mr. Miller in their case in chief. Plaintiffs’ counsel affirmatively represented that she did
22 not believe an expert was necessary to prove a bad faith claims and that she did not intend to call
23 a bad faith expert during plaintiffs’ case in chief. Rather, she represented she only designated Mr.
24 Miller as a rebuttal expert to contradict or refute Mr. Plitt’s report and testimony. Mr. Miller will
25 only be allowed to testify if Mr. Plitt testifies. The scope of Mr. Miller’s rebuttal testimony, if
26 any, is an issue more appropriately reserved for the trial court after Mr. Plitt testifies. The trial
27 court will be in a much better position to assess what opinions are appropriately admitted in rebuttal
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1 after Mr. Plitt testifies in defendant's case in chief, and if Mr. Plitt does not testify Mr. Miller will
2 have no opinions to offer.

3 For these reasons

4 **IT IS ORDERED** that the Motion to Strike Plaintiffs' Rebuttal Expert Report of Charles
5 M. Miller (ECF No. 20) is **granted in part and denied in part**. Mr. Miller is precluded from
6 testifying in plaintiff's case in chief. The scope, if any, of his rebuttal opinions will be determined
7 by the trial judge if Mr. Plitt testifies in defendant's case in chief.

8 DATED this 2nd day of August, 2018.

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PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE