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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Aloe Vera of America Inc., et al.,

No. CV-99-01794-PHX-JAT

10 Plaintiffs,

**ORDER**

11 v.

12 United States of America,

13 Defendant.

14 At the final pretrial conference held on June 25, 2014, the United States raised  
15 objections to certain of Plaintiffs' lay witnesses listed in the proposed final pretrial order.  
16 Specifically, the United States objected to certain proposed topics of testimony for six of  
17 Plaintiffs' witnesses on the grounds that the subjects of their testimony had not been  
18 timely disclosed: Arimoto, Ishida, Kobuna, Taniuchi, Mukaitani, and Fujikawa. Although  
19 Plaintiffs correctly classify the United States' objection as an oral motion in limine  
20 disallowed by this Court's prior order (Doc. 634 at 2), motions in limine can be  
21 particularly useful in determining the admissibility of a witness' testimony, and the Court  
22 makes a one-time exception to its prior order for the limited purpose of ruling on the  
23 admissibility of these witnesses' testimony.<sup>1</sup>

24 The Court has considered the Plaintiffs' memorandum filed in response to the  
25 United States' objections (Doc. 659) as well as the United States' responsive  
26 memorandum (Doc. 660), and rules as follows.

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28 <sup>1</sup> The parties should **not** construe this Order as an invitation to file motions in  
limine in violation of the Court's prior order. Such filings may result in sanctions.

1 **I. Background**

2 The United States originally objected to five topics of testimony by the lay  
3 witnesses, numbered 2, 4, 6, 7, and 8 and corresponding with the subjects of testimony  
4 numbered as such in the parties' proposed final pretrial order. Plaintiffs have since  
5 withdrawn topic 8 as a subject of testimony by the lay witnesses. (Doc. 660 at 2). The  
6 remaining topics, 2, 4, 6, and 7, are: "(2) information communicated to [the witness] by  
7 Rick Toma or any other FLPJ employee regarding the TRTB audit of FLPJ prior to the  
8 October 1997 media reports; . . . (4) [the witness's] knowledge of the information in the  
9 October 1997 media reports; . . . (6) was the witness the source of any of the media  
10 reports or was [the witness] aware of anyone in the company who was the source of the  
11 media reports; and . . . (7) [the witness's] lay opinion regarding the source of the media  
12 articles and the meaning in Japanese society of the word "kankeisha" in a media story  
13 regarding tax issues based on [the witness's] personal observation, prior experience,  
14 giving the basis for [the witness's] belief and the societal context for [the witness's]  
15 belief." (Doc. 656 at 103-06). *See also* (Doc. 669 at 102-05) (final pretrial order as  
16 adopted by the Court).

17 **II. Legal Standard**

18 **A. Rule 26(a)**

19 Federal Rule of Civil Procedure ("Rule") 26(a)(1)(A)(i) requires a party to  
20 disclose not only the identities of witnesses who are "likely to have discoverable  
21 information" but also the "subjects of that information." A party must supplement its  
22 disclosures in a timely manner "if the party learns that in some material respect the  
23 disclosure or response is incomplete or correct, and if the additional or corrective  
24 information has not otherwise been made known to the other parties during the discovery  
25 process or in writing." Fed. R. Civ. P. 26(e)(1)(A).

26 **B. Untimely Disclosure**

27 When a party fails to make a timely disclosure required by Rule 26(a), "the party  
28 is not allowed to use that information or witness to supply evidence on a motion, at a

1 hearing, or at a trial” unless it proves that its failure was “substantially justified or is  
2 harmless.” Fed. R. Civ. P. 37(c)(1); *Torres v. Los Angeles*, 548 F.3d 1197, 1213 (9th Cir.  
3 2008).

4 The Ninth Circuit Court of Appeals (“Court of Appeals”) has enumerated four  
5 factors in determining “whether a violation of a discovery deadline is justified or  
6 harmless: . . . (1) prejudice or surprise to the party against whom the evidence is offered;  
7 (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the  
8 trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence.”  
9 *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App’x 705, 713 (9th Cir. 2010) (citing *David v.*  
10 *Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).

11 If a court concludes that a discovery deadline violation is not substantially justified  
12 or harmless, it has “particularly wide latitude” in its discretion to “issue sanctions under  
13 Rule 37(c)(1).” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th  
14 Cir. 2001). Rule 37(c) is intended to provide a “self-executing,” “automatic sanction  
15 provid[ing] a strong inducement for disclosure of material,” Fed. R. Civ. P. 37 advisory  
16 committee’s note (1993). Thus, the rule provides for the automatic exclusion of the  
17 testimony of an untimely disclosed expert witness. *See* Fed. R. Civ. P. 37(c)(1); *Yeti by*  
18 *Molly*, 259 F.3d at 1106 (citing *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y*  
19 *Beneficiencia de Puerto Rico*, 248 F.3d 29, 35 (1st Cir. 2001)).

### 20 **III. Witnesses**

#### 21 **A. Arimoto**

22 Plaintiffs have withdrawn Mr. Arimoto as a proposed witness and he is not listed  
23 in the parties’ amended proposed final pretrial order. Accordingly, the United States’  
24 objections to his testimony are moot.

#### 25 **B. Ishida**

26 The United States initially objected to Mr. Ishida’s testimony in topics 2, 4, 6, and  
27 7. *See* (Doc. 660 at 1-2). Following Plaintiffs’ memorandum to which Plaintiffs attached  
28 a copy of a disclosure statement that disclosed subjects of Mr. Ishida’s testimony, the

1 United States has withdrawn its objection to topic 7. (*Id.* at 2). The Court finds that  
2 Plaintiffs properly disclosed topics 4 and 6 with respect to Mr. Ishida, but not topic 2. In  
3 Plaintiffs’ May 4, 2006 disclosure statement, Plaintiffs identified Mr. Ishida as a witness  
4 and listed his opinion testimony as being based upon “knowledge of the contents of the  
5 Publications and lack of pre-publication knowledge among FLP Japan employees  
6 regarding the contents of the Publications.” (Doc. 659-1 at 27). This adequately disclosed  
7 to the United States that Mr. Ishida would testify as to topic 4, “his knowledge of the  
8 information in the October 1997 media reports.” (Doc. 656 at 103). With respect to topic  
9 6, the disclosure statement stated that “[i]t is the further opinion of the witness that no  
10 employees or officers of FLP Japan were the source of the leaked information concerning  
11 the alleged tax fraud, alleged violation of Japanese law, assessments, audits, a joint  
12 U.S./Japan examination, penalties and other information.” (Doc. 659-1 at 27). This  
13 adequately disclosed to the United States that Mr. Ishida would testify as to topic 6,  
14 whether he was the source of the media reports or was aware of anyone in the company  
15 being the source of the media reports.

16 The Court has read all of the documents attached to Plaintiffs’ memorandum and  
17 has not identified any timely disclosures that contain information pertaining to topic 2.  
18 The only potential document implicating topic 2 is an affidavit of Mr. Ishida submitted in  
19 opposition to the United States’ motion for summary judgment. This affidavit, filed on  
20 October 24, 2006, includes a statement that Mr. Ishida had attended an FLPJ meeting  
21 prior to the media reports in which cursory information concerning an audit by the Tokyo  
22 Regional Tax Bureau (“TRTB”) was disseminated. (Doc. 501-2 at 20).

23 Plaintiffs contend that this affidavit constituted adequate disclosure to the United  
24 States that Mr. Ishida would testify at trial to the topics contained within. (Doc. 659 at 4).  
25 In support, Plaintiffs rely upon Rule 26(e)(1)(A)’s provision that a formal supplemental  
26 disclosure need not be made if “the additional or corrective information has not otherwise  
27 been made known to the other parties during the discovery process or in writing.” (*Id.*)  
28 Plaintiffs contend that because the United States’ reply in support of its motion for

1 summary judgment specifically addressed Mr. Ishida’s affidavit (as well as others), the  
2 United States had notice in writing of the subject of Mr. Ishida’s testimony. (Doc. 659 at  
3 5). Although the United States indeed specifically referenced Mr. Ishida’s affidavit in its  
4 reply, *see* (Doc. 514 at 10), this does not rise to the level of supplanting the formal  
5 disclosure requirements.

6 Plaintiffs primarily rely upon *Westefer v. Snyder*, 422 F.3d 570 (7th Cir. 2005), in  
7 which the Seventh Circuit Court of Appeals held that affidavits produced in response to a  
8 motion for summary judgment constituted adequate disclosure such that formal  
9 amendment of the non-movant’s answers to interrogatories was not required. In that case,  
10 the defendant had been slow to produce documents which it eventually attached to its  
11 motion for summary judgment. 422 F.3d at 582. In responding to the motion for  
12 summary judgment, the plaintiffs, who were inmates alleging they had been transferred to  
13 a particular prison for unlawful reasons, submitted affidavits in which they avowed that  
14 the documents produced by the defendants had been falsified. *Id.* Because the documents  
15 were the plaintiffs’ prison transfer records, the allegation that the records were falsified  
16 constituted a new theory in the case. *See id.* at 582-83. The defendants moved for Rule 37  
17 sanctions on the grounds that this theory had not been properly disclosed. *Id.* at 582. The  
18 court concluded that Rule 26’s “or otherwise” clause rendered the plaintiff’s response to  
19 the defendant’s summary judgment motion a valid disclosure that placed defendants “on  
20 written notice that the prisoners challenged the placement forms’ veracity.” *Id.* at 584.

21 In *Westefer*, however, the court explicitly relied upon the defendant’s delay in  
22 producing the documents to conclude that “[t]here was no unfair surprise in the prisoners’  
23 failure to amend their interrogatories.” *Id.* The Court is not persuaded that the Ninth  
24 Circuit Court of Appeals would reach the same conclusion in the present case. In  
25 *Westefer*, it was clear from the plaintiffs’ affidavits that the plaintiffs were asserting a  
26 new theory in the case. In the present case, although it was clear from Mr. Ishida’s  
27 affidavit that he had knowledge of information communicated to him concerning the  
28 TRTB audit prior to the media reports, it was not clear that he would offer such evidence

1 at trial. The Court has not found any Ninth Circuit Court of Appeals authority holding  
2 that the production of an affidavit in opposition to a motion for summary judgment makes  
3 it known to the movant that the non-movant intends to offer the affiant as a witness at  
4 trial on all topics contained in that affidavit.

5 The plain language of Rule 26(e) provides, as Plaintiffs correctly highlight, that  
6 supplementation is unnecessary when information has been “otherwise made known to  
7 the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A).  
8 But nothing in this case indicates that the information made known in Mr. Ishida’s  
9 affidavit was the fact that he would be testifying at trial as to the subject of his affidavit.  
10 This is not the case where, like *Westefer*, the information disclosed in writing is apparent  
11 as a new theory of the case. Nor was the information disclosed an admission or a  
12 previously-undisclosed document relevant to the action, the significance of which is  
13 intrinsically apparent.

14 When in response to a summary judgment motion the non-movant makes an  
15 admission, attaches a newly disclosed document, or states a new theory of the case, this  
16 information is itself sufficient to notify the movant of this information. But unlike these  
17 types of disclosures, statements contained within an affidavit do not intrinsically convey  
18 to the reader notice that these particular statements will be the subject of the affiant’s  
19 testimony at trial. The purpose of the disclosure requirements for witnesses is so the  
20 parties may know which of the often-voluminous evidence will be relevant to the trial  
21 proceedings. For this, the party offering the witness must inform the other parties in the  
22 case that it intends to use this witness to elicit testimony on such a subject. Mr. Ishida’s  
23 affidavit disclosed his opinions, but it did not disclose that he would testify at trial  
24 regarding those opinions.

25 In arguing that the mere disclosure of Mr. Ishida’s affidavit sufficiently notified  
26 the United States of his trial testimony, Plaintiffs cite several cases. *McKesson*  
27 *Information Solutions, Inc. v. Bridge Medical, Inc.*, 434 F. Supp. 2d 810, 813 (E.D. Cal.  
28 2007) is unpersuasive because the Court cannot ascertain with specificity the actual

1 extent of disclosure in that case. *See* 434 F. Supp. 2d at 813 (“ . . . all of the challenged  
2 witnesses were identified in documents produced. . .”). *BanxCorp v. Costco Wholesale*  
3 *Corp.*, 978 F. Supp. 2d 280, 323 (S.D.N.Y. 2013) is similarly noncontrolling and  
4 unpersuasive. There, the party moving to preclude the witnesses had admitted that it had  
5 adequate notice of the witnesses but “had no reason to engage in a fishing expedition and  
6 depose other employees of Defendants at random.” 978 F. Supp. 2d at 324. In the present  
7 case, the United States asserts that it did not receive adequate notice when the affidavit  
8 was buried in 156 exhibits offered in opposition to its motion for summary judgment.  
9 (Doc. 660 at 5). Finally, in *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1107 (N.D. Ind.  
10 1998), it was “uncontroverted that Keebler became fully aware of the identities of [the  
11 witnesses] at the latest during [another witness’s] deposition.” 997 F. Supp. at 1107. The  
12 Court finds these cases unpersuasive.

13         Accordingly, the Court concludes that Plaintiffs timely disclosed the subjects of  
14 Mr. Ishida’s testimony only with respect to topics 4 and 6.

15         **C. Kobuna**

16         The United States objects to Ms. Kobuna’s testimony with respect to topics 2, 4, 6,  
17 and 7. As with Mr. Ishida, Plaintiffs attached an affidavit of Ms. Kobuna in opposition to  
18 the United States’ 2006 motion for summary judgment. *See* (Doc. 501-2 at 18). Unlike  
19 Mr. Ishida, however, Plaintiffs never listed Ms. Kobuna as testifying to topics 4 and 6 in  
20 their May 4, 2006 disclosure statement. For the same reasons discussed with respect to  
21 Mr. Ishida, the Court concludes that Plaintiffs have not timely disclosed the subjects of  
22 Ms. Kobuna’s testimony with respect to topics 2, 4, 6, and 7.

23         **D. Taniuchi**

24         As with Mr. Ishida, the United States objected to topics 2, 4, 6, and 7 of Mr.  
25 Taniuchi’s testimony before withdrawing its objection to topic 7. Plaintiffs’ May 4, 2006  
26 disclosure statement listed the same opinions and bases for opinion for Mr. Taniuchi as it  
27 did for Mr. Ishida. Plaintiffs also attached Mr. Taniuchi’s affidavit in opposition of the  
28 United States’ 2006 motion for summary judgment. *See* (Doc. 501-2 at 22).

1 Consequently, the Court finds for the same reasons discussed concerning Mr. Ishida that  
2 Plaintiffs timely disclosed Mr. Taniuchi's testimony with respect to topics 4 and 6, but  
3 not 2.

4 **E. Mukaitani**

5 The United States objects to Mr. Mukaitani's testimony with respect to topics 2, 4,  
6 6, and 7. *See* (Doc. 660 at 2). Plaintiffs argue Mr. Mukaitani's testimony was properly  
7 disclosed, and rely upon a May 31, 2013 written disclosure of Mr. Mukaitani as a  
8 damages witness in which they stated that he will testify "similarly to the other FLPJ  
9 employees and distributors previously identified by Plaintiffs and deposed in Hawaii by  
10 Mr. Role. That is, he will testify, *inter alia*, as to the media reports about FLPJ in October  
11 1997, his opinion as to the source of the reports, his knowledge of the Simultaneous  
12 Examination prior to the media reports, the impact of the media reports on FLPJ in 1997  
13 through the present time, and the damages caused by the media reports." (Doc. 659-1 at  
14 48).

15 This disclosure placed the United States on notice of Mr. Mukaitani's proposed  
16 testimony with respect to topics 2, 4, 6, and 7 because each of these topics is fairly  
17 encompassed within Plaintiffs' disclosure.

18 **F. Fujikawa**

19 The United States objects to Ms. Fujikawa's testimony with respect to topics 2, 4,  
20 6, and 7. *See* (Doc. 660 at 2). As with Mr. Ishida, Plaintiffs attached her affidavit in  
21 opposition to the United States' 2006 motion for summary judgment. *See* (Doc. 501-3 at  
22 5). Unlike Mr. Ishida, however, Plaintiffs never listed Ms. Fujikawa as testifying to topics  
23 4 and 6 in their May 4, 2006 disclosure statement. For the same reasons discussed with  
24 respect to Mr. Ishida, the Court concludes that Plaintiffs have not timely disclosed the  
25 subjects of Ms. Fujikawa's testimony with respect to topics 2, 4, 6, and 7.

26 **IV. Remedy for Untimely Disclosure**

27 The remaining issue is the appropriate remedy for Plaintiffs' failure to timely  
28 disclose. Rule 37(c)(1) mandates exclusion of the witnesses unless the failure to disclose

1 was harmless. The Court concludes the failure was not harmless. Turning to the first  
2 factor enumerated in *Lanard Toys*, the Court finds Plaintiffs' non-disclosure created  
3 substantial prejudice to the United States because Plaintiffs have surprised the United  
4 States on the eve of trial with these witnesses, whom the United States had no reason to  
5 previously depose because it did not reasonably anticipate Plaintiffs would call them at  
6 trial.

7 As to the second factor, the ability of the United States to cure the prejudice, the  
8 Court finds this factor weighs strongly against Plaintiffs because the United States cannot  
9 cure its prejudice absent the Court resetting the trial date and reopening discovery, which  
10 the Court will not do at this late juncture. Thus, the United States would have no choice  
11 but to proceed to trial without having deposed these witnesses on the specific topics of  
12 testimony Plaintiff now proposes to offer. For these same reasons, the third factor, the  
13 likelihood of disruption of the trial, also favors the United States because proceeding to  
14 trial without having previously deposed these witnesses is likely to interfere with the  
15 smooth functioning of the trial process.

16 The fourth factor, bad faith or willfulness involved in the untimely disclosure,  
17 favors Plaintiffs because there is no evidence that they acted in bad faith or willfully  
18 failed to disclose the proposed subjects of testimony. The Court is mindful that in a case  
19 of this magnitude it is difficult to manage all of the moving parts, but also it is precisely  
20 for this reason that formal disclosures are even more important.

21 The Court concludes that exclusion of the subjects of testimony is the appropriate  
22 sanction for Plaintiffs' failure to disclose as required under Rule 26(a) and 26(e). *See* Fed.  
23 R. Civ. P. 37(c)(1); *cf. Quevado v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th  
24 Cir. 1998).

## 25 **V. Conclusion**

26 For the foregoing reasons,

27 **IT IS ORDERED** that Plaintiffs' witness Ishida may not testify at trial regarding  
28 proposed topic of testimony 2 (as listed in Doc. 669 at 103).

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**IT IS FURTHER ORDERED** that Plaintiffs' witness Kobuna may not testify at trial regarding proposed topics of testimony 2, 4, 6, and 7 (as listed in Doc. 669 at 104).

**IT IS FURTHER ORDERED** that Plaintiffs' witness Taniuchi may not testify at trial regarding proposed topic of testimony 2 (as listed in Doc. 669 at 102).

**IT IS FURTHER ORDERED** that Plaintiffs' witness Fujikawa may not testify at trial regarding proposed topics of testimony 2, 4, 6, and 7 (as listed in Doc. 669 at 105).

Dated this 11th day of July, 2014.

  
James A. Teilborg  
Senior United States District Judge