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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 AZ Holding, L.L.C., a North Dakota)
limited liability company,

No. CV-08-0276-PHX-LOA

10

Plaintiff,

ORDER

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vs.

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13 Thomas C. Frederick and Christine J.)
Cobb, husband and wife; RBW)
Consultants, Inc., an Arizona corporation;)
14 and Bumaro, L.L.C., an Arizona limited)
liability company,

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Defendants.

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17 Thomas C. Frederick and Christine J.)
Cobb, husband and wife; RBW)
18 Consultants, Inc., an Arizona corporation;)
Bumaro, L.L.C., an Arizona limited)
19 liability company,

20

Counterclaimants,

21

vs.

22 AZ Holding, L.L.C., a North Dakota)
limited liability company,

23

Counterdefendant.

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Pending for ruling is Plaintiff AZ Holding, L.L.C.'s ("Plaintiff") June 19, 2009

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Motion for Telephonic Conference, docket # 88, which the Court deemed a motion for an

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order precluding Defendants Thomas C. Frederick and Christine J. Cobb, RBW Consultants,

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Inc., and Bumaro, L.L.C.s' (collectively "Defendants") expert witness, Linda Decker, from

1 testifying at trial or in response to a dispositive motion due to her and her report's untimely
2 disclosure. For the reasons set forth herein, the Court concludes that Defendants violated the
3 March 17, 2009 scheduling order, Defendants' untimely expert disclosure was not
4 substantially justified, and Plaintiff has been sufficiently prejudiced by Defendants' violation
5 that sanctions will be imposed.

6 **BACKGROUND**

7 This hotly-contested commercial dispute was initially filed on February 12,
8 2008. (docket # 1) Between February and November, 2008, the parties stipulated to a
9 Temporary Restraining Order on Plaintiff's Application, to several continuances of the
10 preliminary injunction hearing, to a limited discovery schedule related to the requested
11 injunctive relief, and to a stay of this lawsuit to participate in a private mediation. (docket ##
12 12, 24, 28, 36 at 1-2) Private mediation was unsuccessful. After Plaintiff filed its Amended
13 Complaint on November 17, 2008, Defendants answered and counterclaimed. (docket ##
14 52, 73) Nearly a year after this lawsuit began, the parties expressly consented to magistrate-
15 judge jurisdiction pursuant to 28 U.S.C. §636(c) with the approval of the then-assigned
16 District Judge. (docket ## 63, 70) At the time the case was reassigned, the Rule 16
17 scheduling conference had not yet been held.

18 Shortly after denying Plaintiff's second Application for Preliminary Injunctive
19 Relief, docket ## 61-62, on February 26, 2009, the Court set the Rule 16 scheduling
20 conference for the following month. (docket ## 77-78) At the March 17, 2009 scheduling
21 conference, the Court stressed to all counsel that due to the 13-month delay since the filing
22 of this lawsuit, the deadlines in the Scheduling Order were real, firm, and, consistent with
23 the undersigned's responsibilities mandated by Congress in the Civil Justice Reform Act of
24 1990, 28 U.S.C. §471 *et seq.*,¹ would not be altered except "upon a showing of good cause

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26 ¹ Under the CJRA mandate, "[f]ederal trial courts are now required, by statute, to
27 implement techniques and strategies designed to dispose of cases in an efficient and
28 inexpensive manner." *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142
F.R.D. 420, 423 (D.Del. 1992). For example, section 473(a)(2) directs that federal judges
provide "early and ongoing control of the pretrial process . . . such that the trial is scheduled

1 and by leave of the assigned trial judge.” (docket # 81 at 2)

2 At the scheduling conference with the active, direct involvement of all counsel
3 to fashion an order for the fair disclosure of all experts and their anticipated opinions on the
4 various claims and counterclaims, the Court set three staggered deadlines for disclosure of
5 expert testimony and reports:

6 [P]laintiff’s and Counterclaimants’ disclosure of expert
7 testimony and reports required under Rule 26(a)(2)(B),
8 Fed.R.Civ.P., on their affirmative claims shall be made by
9 **Wednesday, April 15, 2009.** Defendants’ and
10 Counterdefendant’s disclosures of expert testimony and reports
11 required under Rule 26(a)(2)(B), Fed.R.Civ.P., on their
12 respective defenses shall be made by **Friday, May 15, 2009.**
13 Plaintiff’s and Counterclaimants’ disclosure of true rebuttal
14 expert testimony and reports solely to contradict or rebut
15 evidence as required under Rule 26(a)(2)(C), Fed.R.Civ.P., shall
16 be made by **Monday, June 15, 2009.**

17 (docket # 81 at 2-3) The scheduling order also mandates supplementation of all discovery
18 pursuant to Rule 26(e), Fed.R.Civ.P., by Friday, September 11, 2009, completion of all
19 discovery by Wednesday, October 14, 2009, and filing of dispositive motion(s) on or before
20 Friday, November 20, 2009. (*Id.* at 3-4) The scheduling order makes clear that the deadlines
21 are “to be taken seriously,” citing *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir.
22 1994). (*Id.* at 2) At the scheduling conference, defense counsel expressed neither objection
23 nor confusion that any defense expert to counter Plaintiff’s expert testimony must be
24 disclosed on or before Friday, May 15, 2009.

25 Plaintiff contends it timely disclosed its expert witness, Patricia J. Baldwin
26 (“Baldwin”), and her report containing her anticipated trial testimony on April 21, 2009, six
27 days after the April 15, 2009 deadline by prior agreement with opposing counsel. (docket #
28 88, n. 1) In the subject Motion, Plaintiff claims Defendants did not disclose an expert on
Defendants’ counterclaims by the April 15 deadline or by the May 15 deadline to contradict

to occur **within eighteen months** after the filing of the complaint . . .” 28 U.S.C. §473(a)(2)
(emphasis added) Because of the delay in this case before its reassignment, this goal can not
be achieved.

1 Plaintiff's expert disclosure of April 21, 2009. Rather, on **June 15, 2009**, Defendants
2 disclosed their so-called "rebuttal" expert witness, thirty days after the deadline for
3 responding to Plaintiff's expert disclosure. (docket # 87) Plaintiff contends that the June 15,
4 2009 deadline pertained only to "true rebuttal expert testimony and reports" for Plaintiff and
5 Counterclaimants to contradict or rebut evidence disclosed on or before the May 15
6 deadline. (docket # 81 at 2-3) Because Defendants failed to disclose an expert on their
7 counterclaims by the April 15, 2009 deadline, Plaintiff contends it did not disclose an expert
8 witness in response by the May 15, 2009 rebuttal deadline.² Further, Plaintiff argues it has
9 been prejudiced by Defendants' untimely disclosure because it cannot offer rebuttal
10 testimony to Defendants' disclosed and anticipated expert testimony.

11 On June 22, 2009, the Court ordered Defendants to show cause in writing why
12 the Court should not preclude Defendants' expert witness from testifying at trial due to
13 Defendants' failure to comply with the Rule 16 scheduling order. (docket # 90) Defendants
14 and Plaintiff filed timely Responses, docket ## 92, 94, on July 1 and July 10, 2009,
15 respectively. On July 21, 2009, Defendants filed their timely Reply to Plaintiff's Response.³

16 Defendants argue that their "expert disclosure did not contravene the Court's
17 Rule 16 Scheduling Order" and "was both proper and timely" because their disclosure of
18 Linda Decker ("Decker"), a Senior Branch Manager and Commercial Escrow Officer, was
19 "true rebuttal expert testimony . . . offered solely to contradict or rebut evidence offered by"
20 Plaintiff's expert, Baldwin, a Senior Escrow Officer.⁴ (docket # 92 at 1, 6-7) Defendants
21

22 ² Defendants acknowledge that they "did not disclose any expert testimony on [April
23 15, 2009] because they are not planning to offer any affirmative expert testimony on any of
24 their counterclaims." (docket # 92 at 10)

25 ³ On July 21, 2009, the Court granted the parties' written stipulation extending the
26 deadline for Defendants' Reply to July 21, 2009. (docket # 97)

27 ⁴ The Court has preliminary concerns whether either expert witness may properly
28 offer their opinions in evidence at the trial of this matter. This issue, however, will be
addressed prior to trial. *Nationwide Transport Finance v. Cass Information Systems, Inc.* 523
F.3d 1051, 1058 (9th Cir. 2008) ("[A]n expert witness cannot give an opinion as to her legal

1 contend that Decker’s report is a “classic example of a rebuttal report. The sole issues
2 addressed in Decker’s report are the ones that Baldwin addressed in her report, and all that
3 Decker has done is disagree with Baldwin and explain why. There are no new, or affirm-
4 ative, issues of any type raised in Decker’s rebuttal report.” (*Id.* at 8) Assuming their expert
5 disclosure was untimely, Defendants claim they “had substantial justification for making the
6 disclosure on the date that they did[.]” because their reading of the scheduling order was “a
7 reasonable reading of the Order[.]” and “Defendants’ June 15, 2009 disclosure of Decker’s
8 report can also be fairly characterized as ‘harmless.’” (*Id.* at 13)

9 Plaintiff responds that “Defendants’ position defies common sense[.]”
10 “distort[s] the plain language of this Court’s Scheduling Order[,] and “fails to demonstrate
11 substantial justification for their failure to comply with the Court’s Scheduling Order.”
12 (docket # 94 at 1-2) To demonstrate the disingenuousness of Defendants’ argument,
13 Plaintiff points to the parties’ proposed case management plan wherein the parties agreed to
14 disclose experts on any claims or counterclaims on one date, and **then 30 days later** disclose
15 experts opposing those claims and counterclaims. (docket # 79 at 14) Plaintiff correctly notes
16 “[t]he Court adopted the parties’ requested approach for disclosure of an expert and a
17 responding expert 30 days apart, but added a third subsequent date to allow for disclosure 30
18 days thereafter for any rebuttal expert – but only by Plaintiff (on its claims) and
19 Counterclaimants (on their counterclaims).” (*Id.* at 5) (“**Plaintiff’s and Counterclaimants’**
20 disclosure of true rebuttal expert testimony and reports solely to contradict or rebut evidence
21 as required under Rule 26(a)(2)(C), Fed.R.Civ.P.,”) (emphasis in Plaintiff’s original).
22 Plaintiff acknowledges the Court specifically discussed this third disclosure date with
23 counsel for the parties in chambers.

24 Plaintiff suggests that Defendants’ untimely expert disclosure was not a simple
25 mistaken interpretation of the scheduling order, but rather intentional legal strategy designed

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27 conclusion, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to
28 the applicable law is the distinct and exclusive province of the court.”) (quoting *Hangarter*
v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004))

1 to prevent Plaintiff from offering rebuttal opinions to Defendants' expert's opinions. Plaintiff
2 urges the Court to enter an order precluding Defendants' expert witness from testifying at
3 trial. (*Id.* at 2)

4 **RULE 16 SCHEDULING ORDER**

5 "Federal Rule of Civil Procedure 16 vests the district court with early
6 control over cases 'toward a process of judicial management that embraces the entire
7 pretrial phase, especially motions and discovery.'" *In re Arizona*, 528 F.3d 652, 657 (9th
8 Cir. 2009), *cert. denied*, ___ S.Ct. ___, 2009 WL 1738654 (2009) (quoting Fed. R. Civ. P.
9 16 advisory committee's note, 1983 Amendment). "Rule 16 further recognizes the
10 inherent power of the district court to enforce its pretrial orders through sanctions, Fed. R.
11 Civ. P. 16(f), and the discretion of the [trial] judge to apply an appropriate level of super-
12 vision as dictated by the issues raised by each individual case." *Id.* (citing, e.g., Fed. R.
13 Civ. P. 16(c)(2)). "Failure to comply with the scheduling order exposes a party to 'any
14 just orders,' as determined by the [trial] judge, including dismissal, entry of default or
15 contempt of court." *Id.* (citing Fed.R.Civ.P. 16(f), 37(b)(2)).

16 Because this Court directed the sequencing and dates of expert witness
17 disclosures, including the dates for exchange of expert reports, the alternative procedure
18 set forth by Rule 26(a)(C)(i) is inapplicable. Fed. R. Civ. P. 26(a)(2)(B) and (C)(i);
19 *Mendez v. Unum Life Ins. Co. of America*, 2005 WL 1865426, * 3 (N.D.Cal. 2005) ("Due
20 to Defendants' untimely disclosure of their non-retained experts and their failure to
21 petition this Court for relief from the Scheduling Order, this Court holds that Defendants
22 may not present their non-retained experts in support of their claims or defenses.") (citing
23 *Int'l Bus. Mach. Corp. v. Fasco Indus.*, 1995 WL 115421, at *2 (N.D.Cal. 1995) ("When
24 the court crafted its own schedule for expert disclosures, the mechanism set forth in Rule
25 26 was nullified, including the provision for supplemental disclosures").

26 As authorized by Rule 26(a)(2)(C), the scheduling order herein set the
27 timing and dates for expert disclosures and incorporated what Rule 26(a)(2)(B) requires
28 to be disclosed. Rule 26(a)(2)(C) ("A party must make these disclosures at the times and

1 in the sequence that the court orders. . . .”). Rule 26(a)(2)(B) mandates, *inter alia*, that an
2 expert witness’ disclosure “be accompanied by a written report - prepared and signed by
3 the witness . . . [and] must contain (i) a complete statement of all opinions the witness
4 will express and the basis and reasons for them; (ii) the data or other information
5 considered by the witness in forming them; . . . (v) a list of all other cases in which,
6 during the previous four years, the witness testified as an expert at trial or by deposition;
7 and (vi) a statement of the compensation to be paid for the study and testimony in the
8 case.” Rule 26(a)(2)(B), FED.R.CIV.P.

9 Additionally, Federal Rule of Civil Procedure 26(a)(2)(C)(ii) defines
10 rebuttal experts as those experts presenting “evidence [that] is intended solely to
11 contradict or rebut evidence on the same subject matter identified by another party under
12 Rule 26(a)(2)(B), within 30 days after the other party’s disclosure.” *See, Lindner v.*
13 *Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 635-636 (D.Haw. 2008) (sanctions request-
14 ed for untimely disclosure of expert report that was allegedly not proper rebuttal which
15 defendant claimed plaintiff should have produced by an earlier expert disclosure deadline)
16 (citing *Johnson v. Grays Harbor Cmty. Hosp.*, 2007 WL 4510313, at *1 (W.D.Wash.
17 2007) (“the Court will not exclude Plaintiff’s rebuttal experts from testifying solely
18 because Plaintiff designated only rebuttal experts”)).

19 “In these days of heavy caseloads, trial courts . . . set schedules and
20 establish deadlines to foster the efficient treatment and resolution of cases.” *Wong v.*
21 *Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). “As the torrent of civil
22 and criminal cases unleashed in recent years has threatened to inundate the federal courts,
23 deliverance has been sought in the use of calendar management techniques. Rule 16 is an
24 important component of those techniques.” *Johnson v. Mammoth Recreations, Inc.*, 975
25 F.2d 604, 611 (9th Cir. 1992). Thus, “federal courts strictly enforce the expert witness
26 disclosure requirements in Rule 26(a)(2)(B), and have the discretion to impose sanctions
27 for an untimely or inadequate expert disclosure including the exclusion of expert witness
28 testimony.” *Wilderness Development, LLC v. Hash*, 2009 WL 564224, * 3 (D.Mont.

1 2009) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
2 2001)). “Exclusion of expert testimony ‘is an appropriate remedy for failing to fulfill the
3 required disclosure requirements of Rule 26(a).’” *Id.*

4 Untimely expert disclosure implicates Federal Rule of Civil Procedure
5 37(c)(1). This Rule provides “[i]f a party fails to provide information or identify a witness
6 as required by Rule 26(a) or (e), the party is not allowed to use that information or
7 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
8 substantially justified or is harmless. . . .” Fed.R.Civ.P. 37(c)(1). Thus, a party may still
9 use that party’s expert witness evidence if the failure to timely disclose that evidence was
10 either “substantially justified” or “harmless.” *Yeti By Molly, Ltd*, 259 F.3d at 1106.
11 District courts are given “particularly wide latitude . . . to issue sanctions under Rule
12 37(c)(1).” *Id.* at 1106.

13 The Ninth Circuit, other judges from this District Court, including the
14 undersigned,⁵ and other district courts within the Ninth Circuit have consistently demon-
15 strated in writing and orally at scheduling conferences that Rule 16’s deadlines are firm,
16 real and are to be taken seriously by the parties and their counsel. *See, e.g., Janicki*, 42
17 F.3d at 566; *Hostnut.Com, Inc.v. Go Daddy Software, Inc.*, 2006 WL 2573201 * 3 (D.
18 Ariz. 2006) (evidence not disclosed until more than two months after the discovery dead-
19 line precluded at trial); *Schwartz v. Home Depot U.S.A., Inc.*, CV-06-2168-PHX-FJM
20 (party’s first request to extend expert witness disclosure deadline denied; defense expert
21 precluded) (docket # 83 at 2 in CV-06-2168-PHX-FJM); *Hazelwood v. United States*,
22 2006 WL 1599344, * 7 (D.Ariz. 2006) (“Plaintiff has presented no evidence she was
23 diligent in seeking to amend her complaint. Finding no good cause to modify the
24 Scheduling Order, Plaintiff’s Motion to Amend is untimely and will be denied.”); *U.S. ex*
25 *rel. O’Connell v. Chapman University*, 245 F.R.D. 652 (C.D.Cal.2007) (sanction of an

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27 ⁵ *Brooks v. Eclipse Recreational Vehicles, Inc.*, 2009 WL 1616017 (D.Ariz. 2009)
28 (good cause not shown to modify scheduling order, untimely request for leave to file
amended complaint denied).

1 award of attorney's fees in the amount of \$5,805.00 imposed under Rule 37(c) for
2 plaintiff's untimely expert disclosure and noncompliance with Rule 26(a)(2)(B)).

3 If, however, a district court is inclined to strike a party's expert witness as a
4 sanction due to the untimely disclosure of the expert or expert's report, the Ninth Circuit
5 instructs that district courts consider the following factors: "1) the public's interest in
6 expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of
7 prejudice to the defendants; 4) the public policy favoring disposition of cases on their
8 merits; 5) the availability of less drastic sanctions." *Lindner*, 249 F.R.D. at 642 (quoting
9 *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997)).

10 DISCUSSION

11 Here, Defendants' arguments for the timing of their expert's disclosure and
12 her report flies in the face of the purpose of the mandatory expert disclosure requirements
13 delineated in Rule 26(a)(2) and the plain, ordinary language of the March 17, 2009
14 scheduling order. Whether intentional strategy or not, Defendants' disclosure of their
15 expert on the last of the three dates ensured Plaintiff could not offer rebuttal opinions to
16 Defendants' expert at trial. Perhaps citing both Rule 26(a)(2)(B) and Rule 26(a)(2)(C)(ii)
17 with the May 15 expert deadline may have improved the order's clarity by stating the
18 obvious that Defendants' expert rebuttal must be disclosed by this date. Nevertheless, the
19 scheduling order makes plain that the word "**Defendants**" is only used in that portion of
20 the scheduling order addressing expert disclosures required by Friday, May 15, 2009.
21 (docket # 81 at 3) Considering that Defendants concede they do not intend to use expert
22 testimony to help prove their counterclaims, Defendants' requested proposal for the
23 disclosure of expert witnesses 30 days apart in their First Amended Joint Proposed Case
24 Management Plan, docket # 79, and the detailed discussions with both counsel about the
25 sequencing of expert disclosures at the Rule 16 scheduling conference, the Court
26 concludes Defendants violated the Court's scheduling order by disclosing Decker and her
27 report on June 15, 2009, instead of May 15, 2009. There is no substantial justification for
28 this violation and it certainly was not harmless to Plaintiff because, unless remedied,

1 Plaintiff cannot offer rebuttal opinions to Defendants' expert opinion testimony at trial.

2 Having found a violation of both the letter and spirit of the scheduling
3 order, the Court turns to the question of the appropriate remedy. After reviewing each of
4 the five *Wendt* factors: 1) the public's interest in expeditious resolution of litigation; 2)
5 the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the
6 public policy favoring disposition of cases on their merits; 5) the availability of less
7 drastic sanctions, the Court finds that total preclusion of Defendant's expert witness is
8 unduly harsh and unwarranted. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.
9 1997) Although the first two factors favor preclusion, the last three factors favor a lesser
10 sanction. Specifically, the prejudice to Plaintiff due to Defendants' untimely disclosure
11 can be ameliorated by the Court's orders entered herein without extending the remaining
12 deadlines in the scheduling order. Additionally, sanctions other than preclusion are
13 available and would be more just considering the gravity of the violation. Due to
14 Defendants' claim that expert witness Decker is solely a rebuttal witness, and following
15 the lead of the Magistrate Judge in *U.S. ex rel. O'Connell*, 245 F.R.D. at 656, the Court
16 will preclude Defendants' use of expert witness Decker in any capacity other than as a
17 rebuttal witness.

18 Accordingly,

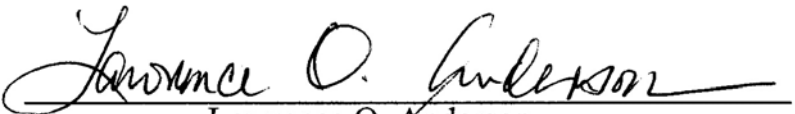
19 **IT IS ORDERED** that Plaintiff's motion for an order precluding
20 Defendants' use of Linda Decker as an expert witness is **DENIED**.

21 **IT IS FURTHER ORDERED** that Defendants' expert witness Linda
22 Decker may only testify as a rebuttal expert, *i.e.*, she cannot testify in Defendants'
23 case-in-chief if Plaintiff's expert does not testify in Plaintiff's case-in-chief. If Linda
24 Decker testifies at trial for Defendants, she may only offer testimony to contradict or
25 rebut the testimony of Plaintiff's expert on the same subject matter and may not offer
26 expert testimony on any other subject. In other words, Defendants' expert witness is not
27 permitted to offer any opinions independent of rebuttal testimony.

28 **IT IS FURTHER ORDERED** pursuant to Rule 37(c)(1)(A), FED.R.CIV.P.,

1 awarding to Plaintiff its reasonable attorneys' fees incurred in urging the subject motion.
2 Plaintiff shall timely file with the Clerk of the Court an Attorney's Fees Affidavit,
3 consistent with LRCiv 54.2(d)(4) and (e), by **Friday, September 18, 2009**. Defendants
4 may file Objections to Plaintiff's Affidavit by **Friday, October 9, 2009**. Plaintiff may
5 file a Reply by **Monday, October 19, 2009**. Absent good cause shown, the failure to
6 timely file the subject Affidavit or Objections may result in the summary denial or award
7 of the requested attorneys' fees.

8 Dated this 7th day of August, 2009.

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11 Lawrence O. Anderson
12 United States Magistrate Judge
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