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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Jacob Amrani,
Plaintiff,
vs.
United States of America,
Defendant.

2:12-cv-2583 JWS
ORDER AND OPINION
[Re: Motion at Docket 249]

I. MOTION PRESENTED

Plaintiff Jacob Amrani (“Dr. Amrani”) filed his final witness list at docket 234. At docket 249 defendant United States of America (“United States”) filed objections to Dr. Amrani’s final witness list. Dr. Amrani responds at docket 251. United States replies at docket 253. Oral argument was not requested and would not assist the court.

II. BACKGROUND

Dr. Amrani is a board certified orthopedic surgeon who specialized in spine surgery. Dr. Amrani’s practice in Phoenix was conducted at his own clinic, the Deer Valley Spine Center. Because he is a veteran, Dr. Amrani is eligible to receive his own medical care from the Veteran’s Administration (“VA”). Some time after he suffered a

1 severe injury to his right shoulder while weightlifting, Dr. Amrani sought treatment at the
2 VA hospital in Phoenix. Dr. Amrani was placed under the care of Dr. Cranford, a board
3 certified orthopedic surgeon who performed right shoulder rotator cuff surgery on
4 Dr. Amrani. The surgery included excision of a soft tissue mass in the shoulder.
5 Dr. Amrani claims that as a result of the medical negligence of Dr. Cranford, he has
6 experienced a substantial loss of function in his right shoulder and right arm which has
7 negatively affected his ability to practice surgery and thus reduced his income. In this
8 lawsuit Dr. Amrani seeks more than \$6 million in damages.

9 Dr. Amrani's final witness list includes, among others, a Rule 30(b)(6) witness
10 whom Dr. Amrani intends to call to address any of the United States' concerns
11 regarding "the foundation or any aspect about procedure or technique in converting the
12 plaintiff's August 5, 2011 MRI . . . to [a] moving picture of frames of the images;"¹ Corrie
13 Yablon, M.D.; Sharon Helman; and Clifford Baker, M.D. The United States seeks an
14 order excluding some or all of these witnesses' testimony.

15 III. DISCUSSION

16 **A. Exhibit 174 and the Related Rule 30(b)(6) Witness**

17 At docket 241 the court admitted Exhibit 174 into evidence—which Dr. Amrani
18 describes in his First Amended Exhibit List as a "Video of MRI of Shoulder and Still
19 Images of MRI Performed at Anthem VA on 8/5/11"²—pursuant to the parties'
20 stipulation. The United States now objects to both Exhibit 174 and the Rule 30(b)(6)
21 witness that Dr. Amrani intends to call to testify about it. The United States asserts that
22 it "mistakenly agreed to the admission of the exhibit" without having seen it based on
23 the assumption that the exhibit would be comprised of "original, un-doctored MRI
24 images."³ Instead, the United States asserts that the exhibit is "a colorized rendition of

25
26 ¹Doc. 234 at 1.

27 ²Doc. 225 at 13.

28 ³Doc. 249 at 4.

1 the MRI, which has been made into a moving picture and includes annotations and
2 anatomical identifications made by unknown, unidentified persons.”⁴ The United States
3 asserts that it first became aware of the true nature of the exhibit during Dr. Yablon’s
4 trial deposition on January 5, 2015. It moves for an order excluding Exhibit 174 and
5 testimony from the witness that Dr. Amrani intends to call to testify about it pursuant to
6 Rule 37(c)(1) because Dr. Amrani did not disclose this evidence before the August 18,
7 2014 deadline for completion of discovery.⁵

8 Rule 37(c)(1) provides that “[i]f a party fails to provide information or identify a
9 witness as required by Rule 26(a) or (e), the party is not allowed to use that information
10 or witness to supply evidence . . . at a trial, unless the failure was substantially justified
11 or is harmless.” “In determining whether this sanction should be imposed, the burden is
12 on the party facing the sanction . . . to demonstrate that the failure to comply with
13 Rule 26(a) [or (e)] is substantially justified or harmless.”⁶ When Rule 37 was amended
14 in 1993 to add paragraph (1), the Advisory Committee noted that it “provides a strong
15 inducement for disclosure of material that the disclosing party would expect to use as
16 evidence” at trial.⁷ It is intended to “put teeth” into the mandatory disclosure
17 requirements of Rule 26(a) and (e).⁸ The district court’s discretion is given “particularly
18 wide latitude” regarding sanctions under Rule 37(c)(1).⁹

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23 ⁴Doc. 249 at 2.

24 ⁵Doc. 142.

25 ⁶*Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008).

26 ⁷Fed. R. Civ. P. 37 advisory committee’s note (1993 amend.).

27 ⁸*Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014).

28 ⁹*Id.* at 859.

1 The United States argues that there is no justification for Dr. Amrani’s failure to
2 comply with Rule 26 and that it will be prejudiced if this evidence is admitted for two
3 reasons: (1) “its experts have been deprived of a fair opportunity to review it,” and (2) its
4 lawyers were “deprived of the opportunity to fully prepare for Dr. Yablon’s trial
5 deposition.” In response, Dr. Amrani does not contend that he complied with Rule 26 or
6 that his failure was justified. Instead, he argues that the United States should be bound
7 by its purportedly-mistaken stipulation and that its “argument of prejudice is
8 unsupported” because it does not actually have a radiology expert to review the MRI.

9 Contrary to Dr. Amrani’s argument, the United States is under no burden to
10 prove it will be prejudiced—Dr. Amrani bears the burden to prove that his failure to
11 comply with Rule 26 is harmless.¹⁰ The court finds that Dr. Amrani’s failure to comply
12 with Rule 26 is not harmless because it deprived the United States the ability to
13 effectively cross-examine Dr. Yablon regarding Exhibit 174. Based on this prejudice,
14 Dr. Yablon’s testimony about that exhibit is inadmissible. Further, based on the
15 surprise caused by Dr. Amrani’s failure to timely disclose Exhibit 174, the United States’
16 stipulation to its admission is rescinded, and Exhibit 174 is no longer admitted into
17 evidence.¹¹ That being said, the United States’ prejudice is curable because its experts
18 and treating physicians have now reviewed the exhibit.¹² Accordingly, Dr. Amrani is not
19 precluded from attempting to use Exhibit 174 as demonstrative evidence at trial or from
20 calling a Rule 30(b)(6) witness in an attempt to lay any foundation necessary to the
21 exhibit’s use.

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23 ¹⁰See *Torres*, 548 F.3d at 1213 (“Plaintiffs were not required to articulate how they
24 would be prejudiced by Defendants’ failure to provide an expert report.”).

25 ¹¹*Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 862 (9th Cir. 2014) (“The
26 theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try
cases on the merits, not by surprise, and not by ambush.”).

27 ¹²Doc. 253 at 2. See *Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d
28 985, 993 (10th Cir. 1999) (holding that one of the factors courts should consider when analyzing
Rule 37 sanctions is “the ability of the [opposing] party to cure the prejudice.”).

1 **B. Dr. Yablon**

2 Dr. Amrani has named Dr. Yablon as an expert witness. She is a board-certified
3 radiologist with a subspecialty in “Musculoskeletal (MSK) Imaging.”¹³ Because she is
4 unavailable to testify at trial, Dr. Amrani took her videotaped trial deposition on
5 January 5, 2015. The court makes the following rulings on the United States’
6 objections to Dr. Yablon’s testimony:

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Citation	Ruling
13:18-25, 14:1	Rule 401 (typed as 402) objection OVERRULED
14:9-13	Rule 401 (typed as 402) objection OVERRULED
15:11-15	Rule 401 (typed as 402) objection OVERRULED
15:17-20	Rule 401 (typed as 402) objection OVERRULED
15:25-16:4	Rule 401 (typed as 402) objection OVERRULED
16:7-10	Rule 401 (typed as 402) objection OVERRULED
16:14	Rule 401 (typed as 402) objection OVERRULED
16:25-17:5	Rule 401 (typed as 402) objection OVERRULED
17:19-19:15	Objections are OVERRULED
18:5-19:20	Objections are OVERRULED
20:2-7	Objections are OVERRULED
21:9-18	Objections are OVERRULED
22:2-7	Rule 401 (typed as 402) objection OVERRULED
29:13-14	Objection based on Order at Docket 230 OVERRULED; other objections are WAIVED
29:17	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED
29:23-25; 30:1-2	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED
32:19- 33:1	Objections OVERRULED
33:24-34:5	Objections OVERRULED
35:22-36:1	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED

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28 ¹³Doc. 97-3 at 2.

1	36:4-8	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED
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3	36:10-13	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED
4	36:18-25	EXCLUDED by parties' agreement
5	37:2-9	EXCLUDED by parties' agreement
6	37:20-25	Objections OVERRULED
7	38:4-7	Rule 401 (typed as 402) objection OVERRULED
8	39:16-40:1	Objections OVERRULED
9	40:5-16	Rule 401 (typed as 402) objection OVERRULED
10	40:24-41:1	Rule 401 (typed as 402) objection OVERRULED
11	41:3-4	Rule 401 (typed as 402) objection OVERRULED
12	41:6-7	Rule 401 (typed as 402) objection OVERRULED
13	41:9-14	Rule 602 (lack of foundation) objection OVERRULED
14	42:7-13	Rule 602 (lack of foundation) objection OVERRULED
15	42:15	Rule 602 (lack of foundation) objection OVERRULED
16	42:17-24	Objections OVERRULED
17	43:23-44:1	Objections are WAIVED
18	44:8-15	Objections OVERRULED
19	44:23-45:3	Objections OVERRULED
20	48:16-17	Objection based on Order at Docket 230 OVERRULED
21	48:22-24	Objection based on Order at Docket 230 OVERRULED
22	50:10-15, 17-19	Rule 702 objection SUSTAINED; testimony is EXCLUDED
23	50:22-25; 51:2-3	Rule 702 objection SUSTAINED; testimony is EXCLUDED
24	51:5-6, 7, 9-15	Rule 702 objection OVERRULED
25	53:9-18, 21-23	Rule 702 objection OVERRULED
26	54:7-8	Objection based on Order at Docket 230 (typed as Docket 223) OVERRULED
27	54:13-14	Objection based on Order at Docket 230 (typed as Docket 223) OVERRULED
28	55:16 -56:15	Rule 37(c)(1) (lack of disclosure) objection SUSTAINED; testimony is EXCLUDED

72:22-73:6	Rule 611(a) (redirect beyond scope of cross) objection SUSTAINED; testimony is EXCLUDED
73:16-25; 74:1	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED
78:15-23	Objection based on Order at Docket 230 SUSTAINED; testimony is EXCLUDED

C. Sharon Helman

Sharon Helman is the Director of the Phoenix VA Medical Center (“Phoenix VA”). Dr. Amrani intends to call Ms. Helman to testify about, among other things, the following topics:

- Her duties as Director of the Phoenix VA;
- Day-to-day operations and procedures at the Phoenix VA;
- Her work on this case;
- Her “cost cutting procedures that jeopardized patient safety and lead to the injuries sustained by the plaintiff;” and
- A report issued by the Office of Inspector General (“OIG”) related to alleged mismanagement of Non-VA fee care funds in Fiscal Year 2011.

The United States objects to this testimony pursuant to Rules 401 (typed as 402) and 403. Dr. Amrani responds by arguing that Ms. Helman’s testimony is directly relevant to plaintiff’s claims in this case because she was “involved in” Dr. Amrani’s care.

Dr. Amrani does not explain how this is true other than by reference to a letter that Ms. Helman wrote to Senator John McCain in April 2012.¹⁴ Dr. Amrani has not shown that Ms. Helman’s testimony would be relevant. The United States’ objection will be sustained and her testimony excluded.

D. Dr. Baker

Dr. Baker is one of Dr. Amrani’s treating physicians. The United States objects to two lines of questioning that Dr. Amrani intends to pursue with Dr. Baker. First,

¹⁴Doc. 251-1 at 21.

1 Dr. Amrani states that he intends to ask Dr. Baker to “look at the raw data and
2 waveforms from the defendant’s EMG, if they become available, to compare to the
3 [EMGs] that Dr. Baker performed, should that become an issue.” Dr. Amrani responds
4 to this objection by stating that Dr. Baker will have no raw data to look at, and therefore
5 the United States’ objection is moot. Based on Dr. Amrani’s representation, the court
6 does not need to rule on this objection.

7 Second, Dr. Amrani states that Dr. Baker is expected to testify about the
8 “delicate nature of the motor skills” that Dr. Amrani “needed to safely treat his patients,”
9 and how his injury permanently impairs his ability to practice as a spine surgeon. The
10 United States objects to this testimony, stating that Dr. Baker is not qualified to testify
11 about the medical and surgical procedures that fall within the ambit of orthopedic spine
12 surgeons. The United States’ argument does not reference Rule 702, but this is the
13 authority upon which it relies. Rule 702 permits opinion testimony by an expert as long
14 as the witness is qualified and the witness’s opinion is relevant and reliable.¹⁵ Expert
15 opinion testimony is relevant “if the knowledge underlying it has a valid connection to
16 the pertinent inquiry” and it is reliable “if the knowledge underlying it has a reliable basis
17 in the knowledge and experience of the relevant discipline.”¹⁶ Under *Daubert v. Merrell*
18 *Dow Pharmaceuticals, Inc.*,¹⁷ and its progeny, “a district court’s inquiry into admissibility
19 is a flexible one.”¹⁸ The purpose of the district court’s inquiry is not to “exclude opinions
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24 ¹⁵See *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014), *cert.*
25 *denied sub nom. SQM N. Am. Corp. v. City of Pomona, Cal.*, No. 14-297, 2014 WL 4542540
(U.S. Dec. 15, 2014).

26 ¹⁶*Id.* at 1044 (citation and internal quotation marks omitted).

27 ¹⁷509 U.S. 579 (1993).

28 ¹⁸*Pomona*, 750 F.3d at 1043.

1 merely because they are impeachable,” but rather to “screen the jury from unreliable
2 nonsense opinions.”¹⁹

3 Dr. Amrani responds that “[a]s a treating physician who specializes in physiatry
4 and rehabilitation medicine, Dr. Baker is more than qualified to testify concerning this
5 issue. Determining what an injured patient can and cannot do is precisely what he does
6 on a daily basis.”²⁰ This mischaracterizes the testimony to which the United States
7 objects. Although Dr. Baker may very well be qualified to testify about the decline of
8 Dr. Amrani’s motor skills, he is not qualified to testify about the specific skills that spine
9 surgeons must possess or how a spine surgeon’s motor skills affect his practice. The
10 United States’ objection is sustained.

11 IV. CONCLUSION

12 For the reasons above, the motion at docket 249 is GRANTED IN PART and
13 DENIED IN PART as follows:

- 14 • The United States’ stipulation to the admission of Exhibit 174 is rescinded,
15 and Exhibit 174 is no longer admitted into evidence.
- 16 • Rulings on the United States’ objections to Dr. Yablon’s testimony are set
17 out above.
- 18 • The testimony of Sharon Helman is excluded.
- 19 • Dr. Baker may not testify about the specific skills that spine surgeons
20 must possess or how a spine surgeon’s motor skills affect his or her
21 practice.

22 DATED this 5th day of February 2015.

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24 /s/ JOHN W. SEDWICK
25 SENIOR UNITED STATES DISTRICT JUDGE

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27 ¹⁹*Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013).

28 ²⁰Doc. 251 at 5-6.