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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

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11 PharMerica Mountain LLC,  
12 Plaintiff,

13 v.

14 Arizona Rehab Campus LLC,  
15 Defendant.

No. CV-20-00493-TUC-RM

**ORDER**

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17 Pending before the Court is Plaintiff's Motion to Strike Defendant's Supplemental  
18 Expert Disclosure. (Doc. 57.)<sup>1</sup> Defendant responded in opposition (Doc. 71) and Plaintiff  
19 replied (Doc. 72). For the following reasons the Motion to Strike will be granted.

20 **I. Background**

21 This action alleging breach of contract and related claims arises out of Defendant  
22 Arizona Rehab Campus's ("Defendant" or "Arizona Rehab Campus") alleged failure to  
23 pay Plaintiff PharMerica Mountain LLC ("Plaintiff" or "PharMerica") for pharmacy  
24 goods and services acquired pursuant to a Pharmacy Services Agreement. (*See* Doc. 1.)  
25 Plaintiff alleges that Defendant owes approximately \$775,000 in outstanding payments,  
26 as well as approximately \$83,000 for pharmacy goods and services that it acquired  
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28 <sup>1</sup> Also pending are the parties' Motions for Partial Summary Judgment (Docs. 58, 60),  
which will be resolved separately.

1 without intending to pay for them. (*See id.*) Defendant filed a counterclaim for  
2 approximately \$60,000. (*See* Doc. 6.)

3 The instant dispute involves a supplemental expert report that Defendant disclosed  
4 on November 12, 2021, the date that discovery closed. (*See* Docs. 57, 71.) Defendant  
5 timely disclosed Glassman’s original expert report on August 23, 2021. (Doc. 35; Doc.  
6 57 at 2.) Plaintiff timely served its rebuttal expert disclosure on September 23, 2021.  
7 (Doc. 47; Doc. 57 at 2.) On October 25, 2021, the Court denied Plaintiff’s Motion to  
8 Exclude Glassman Testimony, stating that the Motion was premature as discovery had  
9 not yet concluded and Glassman had not been deposed. (Doc. 53.) Plaintiff deposed  
10 Glassman on November 10, 2021. (Doc. 57 at 3.) Defendant produced Glassman’s  
11 supplemental expert report that is the subject of this dispute on November 12, 2021. (*Id.*)

12 The supplemental report analyzes additional documents that Glassman received on  
13 November 11, 2021. (*Id.*; *see also* Doc. 57-1.) The supplemental report states that  
14 Glassman’s review of the additional documents “confirms the accuracy” of Glassman’s  
15 original August 23, 2021 report and that the additional documents reviewed for the  
16 supplemental report “have no impact whatsoever” on the findings in the original report.  
17 (Doc. 57-1.) However, the supplemental report contains at least six new opinions not  
18 contained in the original report. (*See* Doc. 57 at 8-9; Doc. 57-1.) Furthermore, the “new”  
19 information Glassman reviews in the supplemental report was available to Defendant  
20 either before or shortly after Glassman prepared her original report and was available  
21 prior to Glassman’s deposition. (*See* Doc. 57 at 6, Doc. 71 at 4-7.) The only two exhibits  
22 Glassman reviews in the supplemental report that Plaintiff did not produce to Defendant  
23 before Glassman’s original report are (1) PharMerica’s contract with MedImpact,  
24 produced on October 21, 2021, and (2) PharMerica’s point-of-sale data for every  
25 prescription drug ordered by Arizona Rehab, including which payor(s) a claim was  
26 submitted to, dates of submission, and the result of same (the “POS Data”), produced on  
27 September 17, 2021. (Doc. 57 at 2, 7-8.)

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1 Plaintiff argues that the supplemental expert report should be excluded because (1)  
2 it is untimely; (2) it is not a “supplemental” report within the meaning of Fed. R. Civ. P.  
3 26(e); and (3) the untimely expert disclosure is not substantially justified or harmless.  
4 (Doc. 57.) First, Plaintiff argues that the supplemental report is untimely because it was  
5 disclosed over two months after the expiration of the expert disclosure deadline of  
6 August 23, 2021 and after Plaintiff deposed Glassman. (*Id.* at 5.) Second, Plaintiff argues  
7 that the supplemental report is not actually “supplemental” within the meaning of Rule  
8 26(e) because (1) it refers to material and documents that Glassman’s original report did  
9 not consider but that were available to Defendant at the time of Glassman’s original  
10 report and (2) the supplemental report merely strengthens or deepens the original report.  
11 (*Id.* at 5-9.) Plaintiff admits that the supplemental report reviews a few documents that  
12 Plaintiff produced after Glassman prepared her original report; however, those documents  
13 were produced prior to Glassman’s deposition and Defendant has offered no explanation  
14 for why it did not provide Glassman with the documents before her deposition to enable  
15 her to produce the supplemental report sooner. (*Id.* at 6-8.) Plaintiff argues that the  
16 disclosure of the supplemental report after Glassman’s deposition leaves Plaintiff no  
17 opportunity to question her about the findings in the supplemental report. (*Id.* at 6-8.)  
18 Lastly, Plaintiff argues that the untimely expert disclosure is not substantially justified or  
19 harmless because (1) the late disclosure prejudices Plaintiff and (2) Defendant could  
20 have, but did not, produce the supplemental report earlier and has provided no reason  
21 why it did not. (*Id.* at 10-13.)

22 In response, Defendant argues that (1) it made a good-faith effort to obtain all  
23 documents during discovery and therefore it should not be faulted for any delays in doing  
24 so; (2) its decision to provide Glassman with data and documents subsequent to her  
25 deposition was the result of Defendant’s ignorance regarding what was contained within  
26 certain files and was informed by “clues” that came to light during Glassman’s  
27 deposition; (3) delays in the discovery process are the result of Defendant’s comparative  
28 lack of understanding of the pharmaceutical industry and its lack of awareness that

1 certain documents would have been useful for Glassman to review earlier; and (4)  
2 applicable law permits the disclosure of the supplemental expert report at this stage of the  
3 case. (Doc. 71.) Defendant asks that a determination of the admissibility of the  
4 supplemental expert report be deferred until a *Daubert*<sup>2</sup> hearing.

5 In reply, Plaintiff contends first that the Motion is ripe for decision and need not  
6 be delayed until a *Daubert* hearing. (Doc. 72.) Next, it argues that Defendant's claimed  
7 ignorance does not justify its lack of diligence in the discovery process, specifically its  
8 failure to seek, identify, or provide information in a timely manner. (*Id.* at 2-6.) Plaintiff  
9 argues that Defendant is now improperly attempting to shift the blame for its failure to  
10 properly request, identify, and review the documents it needed onto Plaintiff. (*Id.* at 3-6.)

## 11 II. Applicable Law

12 A party must disclose a written report for any witness who will provide expert  
13 testimony. The report must contain:

- 14 (i) a complete statement of all opinions the witness will  
15 express and the basis and reasons for them;
- 16 (ii) the facts or data considered by the witness in forming  
17 them;
- 18 (iii) any exhibits that will be used to summarize or support  
19 them;
- 20 (iv) the witness's qualifications, including a list of all  
21 publications authored in the previous 10 years;
- 22 (v) a list of all other cases in which, during the previous 4  
23 years, the witness testified as an expert at trial or by  
24 deposition; and
- 25 (vi) a statement of the compensation to be paid for the study  
26 and testimony in the case.

23 Fed. R. Civ. P. 26(a)(2)(B). Additionally, parties have a duty to supplement reports and  
24 disclosures under Fed. R. Civ. P. 26(e). That rule states:

- 25 (1) In General. A party who has made a disclosure under Rule  
26 26(a)—or who has responded to an interrogatory, request for  
27 production, or request for admission—must supplement or  
28 correct its disclosure or response:

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<sup>2</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

1 (A) in a timely manner if the party learns that in some  
2 material respect the disclosure or response is  
3 incomplete or incorrect, and if the additional or  
4 corrective information has not otherwise been made  
known to the other parties during the discovery  
process or in writing; or

5 (B) as ordered by the court.

6 (2) Expert Witness. For an expert whose report must be  
disclosed under Rule 26(a)(2)(B), the party's duty to  
7 supplement extends both to information included in the report  
and to information given during the expert's deposition. Any  
8 additions or changes to this information must be disclosed by  
9 the time the party's pretrial disclosures under Rule 26(a)(3)  
are due.

10 Fed. R. Civ. P. 26(e). If a party fails to provide the information required by Rule 26(a) or  
11 (e) in connection with expert testimony, the party is "not allowed to use that information  
12 or witness to supply evidence" unless the failure to disclose is "substantially justified or  
13 harmless." Fed. R. Civ. P. 37(c).

14 "[S]upplementation under the Rules means correcting inaccuracies, or filling the  
15 interstices of an incomplete report based on information that was not available at the time  
16 of the initial disclosure." *Luke v. Fam. Care & Urgent Med. Clinics*, 323 F. App'x 496,  
17 500 (9th Cir. 2009) (mem.) (internal quotation marks omitted). Rule 26(e) "creates a duty  
18 to supplement, not a right[,]" and does not "create a loophole through which a party who  
19 submits partial expert witness disclosures, or who wishes to revise her disclosures in light  
20 of her opponent's challenges to the analysis and conclusions therein, can add to them to  
21 her advantage after the court's deadline for doing so has passed." *Id.* at 500.

22 "Supplementary disclosures do not permit a party to introduce new opinions after  
23 the disclosure deadline under the guise of a supplement." *Krause v. Cty. of Mohave*, 459  
24 F. Supp. 3d 1258, 1269 (D. Ariz. 2020) (internal citation and quotation omitted). Even if  
25 the opinions contained in a supplementary disclosure are new, they cannot be considered  
26 supplemental if they are not based on new information. *Id.* (internal citation omitted). "A  
27 supplemental expert report that states additional opinions or seeks to strengthen or deepen  
28 opinions expressed in the original expert report is beyond the scope of proper

1 supplementation and subject to exclusion under Rule 37(c).” *Id.* (citing *Plumley v.*  
2 *Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010)).

3 “Parties must make [] expert disclosures at the times and in the sequence that the  
4 Court orders.” *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827 (9th  
5 Cir. 2011) (citing Fed. R. Civ. P. 26(a)(2)(D)). It is the disclosing party’s burden to  
6 provide timely, accurate, and sufficient Rule 26(a)(2)(B) disclosures. *Krause*, 459 F.  
7 Supp. 3d at 1269. Where a party misses the deadline for disclosing expert reports, Rule  
8 37(c) acts as a “self-executing” and “automatic” sanction to “provide a strong inducement  
9 for disclosure of material[.]” *Id.* (citing Fed. R. Civ. P. 37, Advisory Committee’s Note  
10 (1993)).

11 To determine whether a failure to properly disclose evidence is “substantially  
12 justified or harmless, Courts consider the following factors, among others: (1) prejudice  
13 or surprise to the party against whom the evidence is offered; (2) the ability of that party  
14 to cure the prejudice; (3) the likelihood of disruption at trial; and (4) bad faith or  
15 willfulness involved in not timely disclosing the evidence.” *Krause*, 459 F. Supp. 3d at  
16 1270 (internal citation omitted). Where late disclosure of a supplemental expert opinion  
17 deprives a party of the opportunity to rebut the expert’s new opinions with expert  
18 testimony of its own or to meaningfully depose the expert on her new opinions, courts  
19 have found that the late disclosure is not substantially justified or harmless. *See id.* at  
20 1270. Where a late disclosure occurs immediately before the close of discovery and  
21 months after the initial expert disclosure deadline, and where the new opinions were  
22 formed based on evidence the party already possessed, those facts further weigh against  
23 finding a late disclosure substantially justified or harmless. *See id.*

### 24 **III. Analysis**

25 Unless Glassman’s expert report disclosed on November 12, 2021 properly  
26 qualifies as a supplement under Rule 26(e), it is an untimely expert report. Initial expert  
27 disclosures were due on August 23, 2021 (Doc. 33), and rebuttal expert disclosures were  
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1 due on September 23, 2021 (Doc. 44), but Glassman’s second report was not disclosed  
2 until November 12, 2021.

3 The Court finds that Glassman’s second report is not a “supplemental” report  
4 within the meaning of Federal Rule of Civil Procedure 26(e). The duty to supplement  
5 arises when a party learns that “in some material respect [a] disclosure [] is incomplete or  
6 incorrect.” Fed. R. Civ. P. 26(e)(1)(A). Defendant does not explain why the supplemental  
7 report is necessary to fulfill Defendant’s duty to supplement under Rule 26, and there is  
8 no indication that Glassman’s original report was “incomplete or incorrect” or that the  
9 supplemental report is intended to remedy such errors or incompleteness. In fact, the  
10 supplemental report states that its findings “further confirm the accuracy” of and “have  
11 no impact whatsoever” on the findings in Glassman’s original report. Thus, by its own  
12 admission, the supplemental report serves to strengthen or shore up Glassman’s original  
13 report and therefore is beyond the scope of proper supplementation. Furthermore,  
14 although the supplemental report does consider documents that Glassman did not receive  
15 until November 11, 2021, the delay in Glassman receiving those documents is properly  
16 attributable to Defendant, not Plaintiff.<sup>3</sup> Defendant seeks to justify its late disclosure of  
17 the supplemental report by stating that it was not aware that it should have provided  
18 Glassman with certain “new” information reviewed in the supplemental report until after  
19 Glassman’s deposition, but such averments are not sufficient to support a finding that the  
20 report is “supplemental” within the meaning of Rule 26(e).

21 The late disclosure of Glassman’s supplemental report is not substantially justified  
22 or harmless. Clear prejudice to Plaintiff would result from permitting the supplemental  
23 report to be used as evidence moving forward in this litigation. As the supplemental  
24 report was disclosed after the rebuttal expert disclosure deadline, and on the very last day  
25 of discovery, Plaintiff’s expert had no opportunity to address Glassman’s supplemental  
26 report. The report was also disclosed after Glassman’s deposition, giving Plaintiff no  
27 opportunity to depose Glassman regarding it. Defendant’s averments regarding the timing

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28 <sup>3</sup> See Doc. 71 at 6-7.

1 of the disclosure of the report do not support a finding that the delay was substantially  
2 justified. Defendant's arguments rest on its assertions that it made a good-faith effort to  
3 timely provide Glassman with relevant materials and that its failure to do so was due to  
4 its ignorance or lack of awareness of the contents of the materials that Plaintiff had  
5 produced. While these arguments may show a lack of bad faith or willfulness on  
6 Defendant's part, the prejudice to Plaintiff, and Plaintiff's inability to cure the prejudice  
7 at this stage of the litigation, still support a finding that the late disclosure is not  
8 substantially justified or harmless.


9 Lastly, Defendant's argument that the Court's determination of the admissibility  
10 of the supplemental report should be deferred until a *Daubert* hearing is not supported by  
11 mandatory authority, and the Court declines to exercise its discretion to defer its decision.

12 Accordingly,

13 **IT IS ORDERED** that Plaintiff's Motion to Strike Defendant's Supplemental  
14 Expert Disclosure (Doc. 57) is **granted**. The supplemental expert report authored by  
15 Rochelle C. Glassman is **excluded**.

16 Dated this 26th day of May, 2022.

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Honorable Rosemary Márquez  
United States District Judge