

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILMA SHORE,

1:07-CV-01160 OWW SMS

Plaintiff,

MEMORANDUM DECISION RE
DEFENDANT UNITED STATES OF
AMERICA'S MOTION TO STRIKE
EXPERT DISCLOSURE OF DENNIS
BEAN (Doc. 48.)

v.

KEVIN M. BROWN, ACTING
COMMISSIONER OF INTERNAL
REVENUE SERVICE OF UNITED
STATES OF AMERICA, and DOES 1
through 10 inclusive

Defendant.

UNITED STATES OF AMERICA,
Counterclaimant,

v.

WILMA SHORE,
Counterclaim Defendant.

AND

GREGORY SHORE and BRENDA O.
REYNOLDS

Additional Counterclaim
Defendants.

///

///

///

1 **I. INTRODUCTION.**

2 Before the court for decision is the United States' "Motion to
3 Strike the Expert Disclosure of Mr. Dennis Bean," filed on June 5,
4 2009. (Doc. 48.) Plaintiff Wilma Shore has filed opposition, to
5 which the United States has replied. (Docs. 68, 71.)
6

7 **II. BACKGROUND.**

8 Dennis Bean is an expert witness for Plaintiff. Mr. Bean is
9 a Certified Public Accountant hired by Mrs. Shore to opine on her
10 culpability under 26 U.S.C. 6672. Mr. Bean also intends to offer
11 opinions concerning internal policies and procedures at the IRS.

12 On April 16, 2009, pursuant to a modified scheduling order,
13 the deadline for all expert disclosures was extended to May 6,
14 2009. (Doc. 47.) The order also extended the deadline for expert
15 rebuttal witnesses to June 8, 2009 and the expert discovery
16 deadline to June 29, 2009. The trial date is November 3, 2009.

17 On May 15, 2009, Plaintiff identified Dennis Bean as her
18 expert. However, Plaintiff's disclosure did not, as required by
19 Rule 26 of the Federal Rules of Civil Procedure, include Mr. Bean's
20 report nor did it include his proposed opinions.

21 On June 5, 2009, the United States moved to strike Plaintiff's
22 expert disclosure of Mr. Bean and to preclude Mr. Bean from
23 presenting trial testimony. The United States provides two grounds
24 to support its motion. First, the government argues that
25 Plaintiff's disclosure was untimely. Second, the untimely
26 disclosure did not include Mr. Bean's report or his opinions, i.e.,
27 the necessary information under Rule 26(a)(2) of Federal Rules of
28 Civil Procedure. According to the government, because Mr. Bean's

1 designation was incomplete and untimely, it was not able to obtain
2 a rebuttal expert by the expert deadlines. The government asserts
3 that Mr. Bean's designation was prejudicial.

4 On August 10, 2009, counsel for Plaintiff served on the United
5 States an unsigned report of Dennis Bean. The report was sent by
6 email and labeled "Draft."

7 On August 10, 2009, Plaintiff opposed the government's motion
8 to strike. (Doc. 68.) Plaintiff claims that the Mr. Bean's
9 designation was a mere nine days late and, in any event, Mrs. Shore
10 stipulates to allowing the government to disclose an expert any
11 time up to trial and will make Mr. Bean available to the government
12 for deposition by phone, internet, or in person. (Id.)

13 The United States filed its reply on August 13, 2009. (Doc.
14 71.) In its reply, the government elaborated on its frustration
15 concerning Plaintiff's incomplete and untimely expert designation:

16 [t]he report did not follow within days or even weeks
17 after the Plaintiff identified the expert. The United
18 States would not quibble over small or inconsequential
19 variations from the scheduling order in this case.
20 But Plaintiff has unfairly shortened the United
21 States' time to prepare for trial by a large margin.
22 The Court's deadlines afforded the parties six months
23 to prepare for expert testimony at trial. By first
24 providing an unsigned draft report less than three
25 months prior to trial, long after the close of expert
26 discovery, after the filing of a motion for summary
27 judgment by the United States that addressed the known
28 issues in the case, and a mere week prior to the
hearing on the motion to strike Mr. Bean, the
Plaintiff has crossed the line from mere untimeliness
into inexcusable neglect that prejudices the United
States. The Plaintiff has not provided any compelling
reason for this extreme untimeliness. Indeed, this
case was filed in August 2007, and the Plaintiff has
had more than ample time to procure an expert and have
a report prepared.

(Doc. 71, 5:10-5:19.)

At oral argument, Plaintiff's counsel candidly admitted he had

1 no cause for the late report except that the date it was submitted
2 was the date he received it from Mr. Bean.

3
4 **III. DISCUSSION.**

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

19 As authorized by Rule 26(a)(2)(C), the scheduling order set
20 the timing and dates for expert disclosures and incorporated what
21 Rule 26(a)(2)(B) requires to be disclosed. Rule 26(a)(2)(C) ("A
22 party must make these disclosures at the times and in the sequence
23 that the court orders...."). Rule 26(a)(2)(B) mandates that an
24 expert witness' disclosure "be accompanied by a written
25 report-prepared and signed by the witness ... [and] must contain
26 (i) a complete statement of all opinions the witness will express
27 and the basis and reasons for them; (ii) the data or other
28 information considered by the witness in forming them; ... (v) a

1 list of all other cases in which, during the previous four years,
2 the witness testified as an expert at trial or by deposition; and
3 (vi) a statement of the compensation to be paid for the study and
4 testimony in the case.”

5 “In these days of heavy caseloads, trial courts ... set
6 schedules and establish deadlines to foster the efficient treatment
7 and resolution of cases.” *Wong v. Regents of the Univ. of Cal.*,
8 410 F.3d 1052, 1060 (9th Cir. 2005). “As the torrent of civil and
9 criminal cases unleashed in recent years has threatened to inundate
10 the federal courts, deliverance has been sought in the use of
11 calendar management techniques. Rule 16 is an important component
12 of those techniques.” *Johnson v. Mammoth Recreations, Inc.*, 975
13 F.2d 604, 611 (9th Cir. 1992). “[F]ederal courts strictly enforce
14 the expert witness disclosure requirements in Rule 26(a)(2)(B), and
15 have the discretion to impose sanctions for an untimely or
16 inadequate expert disclosure including the exclusion of expert
17 witness testimony.” *Wilderness Development, LLC v. Hash*, 2009 WL
18 564224, * 3 (D. Mont. 2009) (citing *Yeti by Molly, Ltd. v. Deckers*
19 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). “Exclusion of
20 expert testimony ‘is an appropriate remedy for failing to fulfill
21 the required disclosure requirements of Rule 26(a).’” *Id.*

22 Untimely expert disclosure implicates Federal Rule of Civil
23 Procedure 37(c)(1). This Rule provides “[i]f a party fails to
24 provide information or identify a witness as required by Rule 26(a)
25 or (e), the party is not allowed to use that information or witness
26 to supply evidence on a motion, at a hearing, or at a trial, unless
27 the failure was substantially justified or is harmless....” Fed. R.
28 Civ. P. 37(c)(1). A party may still use that party's expert witness

1 evidence if the failure to timely disclose that evidence was either
2 "substantially justified" or "harmless." *Yeti By Molly, Ltd.*, 259
3 F.3d at 1106. District courts are given "particularly wide
4 latitude ... to issue sanctions under Rule 37(c)(1)." *Id.* at 1106.

5 The Ninth Circuit has consistently demonstrated that Rule 16's
6 deadlines are firm, real and are to be taken seriously by the
7 parties and their counsel. *See, e.g., Janicki*, 42 F.3d at 566;
8 *Hostnut.Com, Inc. v. Go Daddy Software, Inc.*, 2006 WL 2573201 * 3
9 (D. Ariz. 2006) (evidence not disclosed until more than two months
10 after the discovery deadline precluded at trial); *Schwartz v. Home*
11 *Depot U.S.A., Inc.*, CV-06-2168-PHX-FJM (party's first request to
12 extend expert witness disclosure deadline denied; defense expert
13 precluded); *U.S. ex rel. O'Connell v. Chapman University*, 245
14 F.R.D. 652 (C.D.Cal. 2007) (sanction of an award of attorney's fees
15 in the amount of \$5,805.00 imposed under Rule 37(c) for plaintiff's
16 untimely expert disclosure and noncompliance with Rule
17 26(a)(2)(B)).

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

28 In this case, Plaintiff's arguments for the timing and

1 completeness of her expert's disclosure and his report run afoul of
2 the purpose of the mandatory expert disclosure requirements of Rule
3 26(a)(2) and the plain, ordinary language of the April 16, 2009
4 modified scheduling order. Whether intentional strategy or not,
5 Plaintiff's disclosure of her expert ensured the United States
6 could not offer rebuttal opinions to Plaintiff's expert at trial.
7 Considering that the parties stipulated to move the expert
8 designation deadline from April 15, 2009 to May 6, 2009, her
9 untimely disclosure violated the scheduling order by disclosing her
10 expert on May 15, 2009, instead of May 6, 2009. Plaintiff has
11 failed to articulate good cause for this violation and Plaintiff's
12 errors are not harmless to the United States because, unless
13 remedied, the United States cannot offer rebuttal opinions to
14 Plaintiff's expert opinion testimony at trial.¹ Having found a
15 violation of the scheduling order, as well as a Rule 26(a)(2)
16 deficiency, the appropriate remedy is determined under the *Wendt*
17 factors.

18 Here, allowing Mr. Bean's untimely and incomplete report would
19 delay the case and prejudice the United States, as well as impose
20 on the management of the Court's docket. See *Wong*, 410 F.3d at
21 1060 ("In these days of heavy caseloads, trial courts ... set
22 schedules and establish deadlines to foster the efficient treatment
23 and resolution of cases."); *Mammoth Recreations, Inc.*, 975 F.2d at
24 610 ("Disregard[ing] the [scheduling] order would undermine the
25 court's ability to control its docket, disrupt the agreed-upon
26

27 ¹ Plaintiff also did not move under Rule 60(b) to be relieved
28 of this failure.

1 course of the litigation, and reward the indolent and the
2 cavalier.") The first three factors weigh in favor of exclusion.

3 As to the fourth factor, it is neutral because exclusion in
4 this case would not be tantamount to dismissal. The only factor
5 that weighs against exclusion is the availability of less drastic
6 sanctions. However, Plaintiff did not suggest an alternative, less
7 drastic sanction in her opposition brief or at oral argument.
8 After reviewing each of the five *Wendt* factors, the majority of the
9 factors weigh in favor of excluding Mr. Bean's incomplete and
10 untimely report. The United States' motion to strike is GRANTED.

11 The United States' motion to strike is granted for another
12 independent reason, namely that Plaintiff's expert offers only
13 legal conclusions. For example, in his declaration opposing the
14 government's summary judgment motion, Mr. Bean, a purported IRS and
15 accounting expert, questions whether IRS Agents followed internal
16 procedures and concludes that Mrs. Shore is neither a "responsible
17 person" nor acted "willfully" under § 6672. (Doc. 75.) Bean
18 states that "I have also reviewed the record to determine if Wilma
19 Shore meets the requirements of 26 U.S.C. section § 6672 as a
20 person responsible for the collection and payment of withholding
21 taxes and secondly whether or not she was willful in non-compliance
22 with the payroll tax collection and reporting requirements. If
23 either of these elements are not present, she is not liable for the
24 penalty assessed." (Doc. 75, ¶ 13.)

25 Mr. Bean offers two legal conclusions concerning 26 U.S.C. §
26 6672:

27 As to responsibility, I note that there must be
28 evidence of the ability to exercise independent
judgment with respect to the financial affairs of the

1 company. The record in this matter is devoid of any
2 such knowledge or involvement on the part of Mrs.
3 Shore during the period of time 1996 through 1999 when
4 she resigned. The evidence shows that her involvement
5 was limited to working on a part time basis wherein
6 she balanced the company checking account and as
7 needed signed checks. There is no evidence of
8 significant control over company finances.

9 As to the willfulness on the part of Mrs. Shore, I
10 find nothing in the record to demonstrate that she was
11 knowledgeable of the fact that the company was behind
12 in the payment of employment taxes for the second,
13 third and fourth quarters of 1997 and for the four (4)
14 quarters of 1998 and 1999 during the time period that
15 she was an officer of the corporation. Further, all of
16 the information in the record shows that the decision
17 making power over the payment of creditors rested with
18 Greg Shore and not Wilma Shore. As such, it is my
19 opinion she was not willful within the meaning of
20 Internal Revenue Code section 6672 for the assessment
21 of the penalty for the taxpayer trust fund recovery.

22 (Doc. 75, ¶ 16, 17.)

23 Mr. Bean did not limit his opinions to accounting procedures
24 or bookkeeping issues at CMS and INCON during the relevant tax
25 periods; rather, Bean opined as to the legal standards to hold Mrs.
26 Shore liable for CMS and INCON's tax delinquencies. Bean offered
27 legal opinions concerning whether Mrs. Shore was a "responsible
28 party" or "acted willfully" under § 6672. Such testimony offering
29 legal conclusions is inappropriate matter for expert testimony.
30 See *U.S. v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (excluding
31 expert testimony offering a legal conclusion); *Aguilar v.*
32 *International Longshoremen's Union*, 966 F.2d 443, 447 (9th Cir.
33 1992) (noting matters of law are for the court's determination, not
34 that of an expert witness); see also *Snap-Drape, Inc. v. C.I.R.*, 98
35 F.3d 194, 198 (5th Cir. 1996) (expert testimony consisting of legal
36 conclusions inadmissible).

37 Bean inappropriately expressed legal conclusions on the issue

1 of responsibility and willfulness under 26 U.S.C. 6672. His legal
2 opinions are inadmissible.

3

4

IV. CONCLUSION.

5

6

For the reasons set forth above, the United States "Motion to
Strike the Expert Disclosure of Dennis Bean" is GRANTED.

7

8

IT IS SO ORDERED.

9

Dated: October 9, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28