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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ZANE HARDIN,

Plaintiff,

v.

WAL-MART STORES, INC., and DOES  
1-100, inclusive,

Defendants.

) 1:08-cv-00617 AWI GSA

) FINDINGS AND RECOMMENDATIONS  
) REGARDING DEFENDANT’S MOTION  
) TO PROHIBIT PLAINTIFF FROM  
) ELICITING EXPERT TESTIMONY FROM  
) IMPROPERLY DISCLOSED WITNESSES,  
) OR ALTERNATIVELY, TO COMPEL  
) PLAINTIFF’S PROPER EXPERT  
) DISCLOSURE AND ALLOW AN  
) ADDITIONAL FORTY-FIVE DAYS  
) WITHIN WHICH DEFENDANT MAY  
) COMPLETE EXPERT DISCOVERY

) (Document 55)

**RELEVANT PROCEDURAL BACKGROUND**

On June 9, 2010, Defendant Wal-Mart Stores, Inc. filed its Motion to Prohibit Plaintiff from Eliciting Expert Testimony from Improperly Disclosed Witnesses, or, Alternatively to Compel Plaintiff’s Proper Expert Disclosure and Allow Wal-Mart Forty-Five Days Thereafter to Complete Expert Discovery. The matter was originally calendared to be heard July 9, 2010. (Doc. 55-56.)

On June 16, 2010, this Court continued the hearing on the motion to July 23, 2010, due to its unavailability. (Doc. 57.)

1 On July 2, 2010, Plaintiff Zane Hardin filed his opposition to Defendant's motion. (Docs.  
2 58-59.) On July 16, 2010, Defendant filed its reply to Plaintiff's opposition. (Docs. 60-61.)

3 On July 20, 2010, this Court determined the motion was suitable for decision without oral  
4 argument; therefore, the July 23, 2010, hearing was taken off calendar and the matter was taken  
5 under submission pursuant to Local Rule 230(g).

## 6 DISCUSSION

### 7 A. *Defendant's Motion*

8 Defendant moves this Court for an order prohibiting Plaintiff from eliciting expert  
9 testimony from improperly disclosed witnesses, or alternatively, to compel Plaintiff to properly  
10 disclose experts and permit Defendant an additional forty-five days within which to complete  
11 expert discovery. More particularly, Defendant contends Plaintiff's expert disclosure: (1) was  
12 late and improperly served, (2) discloses individuals who are not experts, (3) attempts to  
13 designate experts from unrelated matters wherein Wal-Mart is a named defendant, and (4)  
14 improperly designates fact witnesses as non-retained expert witnesses. (Doc. 55 at 1-5.)

### 15 B. *Applicable Expert Disclosure Deadlines*

16 This Court's scheduling order issued November 5, 2009, provides as follows:

17 The parties have already exchanged initial disclosures. The parties are  
18 ordered to complete all discovery pertaining to non-experts on or before **April 15,**  
19 **2010.** The parties are directed to disclose all expert witnesses, in writing, on or  
20 before **April 30, 2010.** The parties also shall disclose all supplemental experts on  
21 or before **May 14, 2010.** The written designation of experts shall be made  
22 pursuant to Fed. R. Civ. P. Rule 26(a)(2), (A) and (B) and shall include all  
23 information required thereunder. Failure to designate experts in compliance with  
24 this order may result in the Court excluding the testimony or other evidence  
25 offered through such experts that are not disclosed pursuant to this order.

26 The parties are directed to complete all expert discovery on or **before**  
27 **June 11, 2010.** The provisions of Fed. R. Civ. P. 26(b)(4) and (5) shall apply to  
28 all discovery relating to experts and their opinions. Experts must be fully  
prepared to be examined on all subjects and opinions included in the designation.  
Failure to comply will result in the imposition of sanctions, which may include  
striking the expert designation and preclusion of expert testimony.

(Doc. 43, emphasis in original.)

1           **C.     *Analysis***

2                   **1.     Timeliness & Service Issues**

3           Defendant contends Plaintiff’s expert disclosure was both untimely and improperly  
4 served. More particularly, Defendant argues Plaintiff’s disclosure was late because it was sent  
5 via email on May 1, 2010, rather than via regular mail on April 30, 2010. Additionally, the  
6 disclosure document was defective because it was unsigned. (Doc. 55 at 5.) In reply, Plaintiff  
7 argues that his expert disclosure “was early” because it was e-mailed on May 1, 2010, and  
8 therefore was received earlier than if it had been sent via regular mail on April 30, 2010. (Doc.  
9 58 at 2-3 & Doc. 59, ¶ 7.)

10           A review of the pleadings demonstrates that Plaintiff failed to comply with the expert  
11 disclosure deadline as outlined in this Court’s scheduling order. Plaintiff missed the “on or  
12 before April 30, 2010,” deadline. Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure  
13 provides that “[a] party must make these disclosures at the times and in the sequence that the  
14 court orders.” Plaintiff did not disclose experts “at the times and in the sequence” as provided  
15 for in the November 5, 2009, scheduling order. Rather, Plaintiff sent an undated and unsigned  
16 expert disclosure, via email on Saturday, May 1, 2010, at 5:38 p.m. (*See* Doc. 56, Ex. B.)<sup>1</sup>

17           Rule 26(g)(1) requires that every disclosure document “must be signed,” and further, the  
18 signature acts as a certification that the document is complete and correct to the best of the  
19 signor’s belief. Plaintiff failed to sign the expert disclosure document. Plaintiff merely states  
20 that because his disclosure was an attachment to an email “it could not be signed.” (Doc. 58 at  
21 2.) This assertion is unpersuasive. This Court’s Local Rules provide for electronic signatures  
22 and the Court cannot conceive of a reason why an electronic signature could not appear on  
23 Plaintiff’s expert disclosure even as an attachment to an email. *See* Local Rule 131.

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25           <sup>1</sup>Plaintiff’s counsel’s declaration also indicates that the hard copy mailed May 1, 2010,  
26 was directed to defense counsel’s prior address in error, and therefore, the document was  
27 returned (presumably by the postal service) and subsequently forwarded to counsel at the proper  
28 address. (*See* Doc. 59, ¶¶ 8-9.)

1                                   **2. Compliance with Rule 26**

2                   Defendant further claims Plaintiff’s expert disclosure is inadequate because it designates  
3 fact witnesses as expert witnesses, designates unidentified persons in other, unrelated matters  
4 involving Wal-Mart as non-retained experts, and otherwise circumvents the requirements of Rule  
5 26. (Doc. 55 at 5.)

6                   Rule 26(a)(2) of the Federal Rules of Civil Procedure provides, in relevant part:

7                   (A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a  
8 party must disclose to the other parties the identity of any witness it may use at  
9 trial to present evidence under Federal Rule of Evidence 702, 703, or 705.<sup>[2]</sup>

10                   (B) *Written Report.* Unless otherwise stipulated or ordered by the court,  
11 this disclosure must be accompanied by a written report - prepared and signed by  
12 the witness - if the witness is one retained or specially employed to provide expert  
13 testimony in the case or one whose duties as the party’s employee regularly  
14 involve giving expert testimony. The report must contain:

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

26                                   **i. Other Wal-Mart Experts**

27                   Defendant argues that Plaintiff attempts to list experts used in other cases against Wal-  
28 Mart improperly. (Doc. 55 at 6.) For example, Plaintiff’s expert disclosure at number eleven  
states as follows:

Plaintiff also identifies the expert witnesses identified in the cases of  
Dukes v. Wal-Mart or Crowell v. Wal-Mart, Inc. and *EEOC v. Wal-Mart Stores,  
Incorporated, dba Sam’s Club, et al*, Case No. 09-CV-008004 and *EEOC v. Wal-  
Mart*, Civil Action No.: 1:10-cv-00075, and in the suits brought by Steve Bradly,

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<sup>2</sup>Rule 702 concerns the testimony of experts; rule 703 pertains to the bases of opinion  
testimony by experts; rule 704 concerns opinions on ultimate issues.

1 Pam Huber, Patrick Brady, Jeremy Fass, William Darnell and John Runza; and  
2 *Daryal Nelson and Tommy Armstrong v. Wal-Mart, Inc.*

3 (Doc. 56, Ex. B at 2-3, emphasis in original.)

4 As a preliminary matter, the parties are reminded that hearsay evidence is not admissible  
5 subject to few exceptions. Fed. R. Evid. 802. Moreover, those exceptions do not appear  
6 applicable here. *See* Fed. R. Evid. 803.

7 Plaintiff's disclosure fails to comply the requirements of Rule 26. It appears that Plaintiff  
8 is attempting to use experts named in other cases against Wal-Mart as experts in this case. First,  
9 Plaintiff fails to provide names for those persons he references as expert witnesses from the other  
10 cases. Merely referring the opposing party to unidentified experts that third parties have retained  
11 in other litigation is clearly not sufficient. Further, the Court is unpersuaded by Plaintiff's  
12 argument that he does not have to provide the information because Wal-Mart must have it. Rule  
13 26 does not provide a mechanism whereby Plaintiff can simply avoid discovery obligations by  
14 pointing opposing counsel to other cases for information. Second, Rule 26 does not provide that  
15 if information is allegedly available to opposing counsel, such availability waives the opposing  
16 party's obligation to provide the information in the first instance. Plaintiff's position in this  
17 regard is completely contrary to the spirit of discovery. Third, as noted above, Plaintiff's  
18 disclosure totally ignores the basic evidentiary principle of hearsay.

19 Finally, a number of points need to be made with regard to Plaintiff's assertion that the  
20 unidentified "experts in other Wal-Mart cases" are non-retained, and thus a report is not required.  
21 (Doc. 58 at 8-9.) A clear distinction exists "between the 'retained' class of experts and the  
22 unretained class of experts. While all experts must be disclosed under Rule 26(a)(2)(A), only  
23 'retained' experts must provide Rule 26(a)(2)(B) reports." *Sprague v. Liberty Mutual Insurance*  
24 *Co.*, 177 F.R.D. 78, 81 (D. N.H. 1998). As the Advisory Committee's Notes to Rule 26(a)(2)  
25 reflect, the principle purpose of the rule is to permit a "reasonable opportunity to prepare for  
26 effective cross examination and . . . arrange for expert testimony from other witnesses. Fed. R.

1 Civ. P. 26(a)(2), 1993 amendment, ¶ (2). As noted in *Sprague*:

2           The unretained experts, who formed opinions from pre-litigation  
3 observation, invariably have files from which any competent trial attorney can  
4 effectively cross-examine. The retained expert, who under the former  
5 interrogatory rule frequently provided sketchy and vague answers, has no such  
6 files and is thus required to provide the report to enable effective cross-  
7 examination. This reading puts unretained experts, because of their historical file,  
8 and retained experts, because of the required report, on equal footing for cross-  
9 examination purposes.

10 *Sprague v. Liberty Mutual Insurance Co.*, 177 F.R.D. at 81.

11           It is not a party's label assigned to a witness, e.g., non-retained, that controls. Rather, the  
12 testimony to be offered controls the retention designation. Plaintiff's designation of these  
13 witnesses as non-retained does not provide Defendant with a reasonable opportunity for cross  
14 examination. Here, because Plaintiff has failed to identify the witnesses with specificity, nor has  
15 he adequately supported his contention that these witnesses are non-retained experts, this Court  
16 will recommend that Plaintiff's unidentified experts, involving this defendant in other unrelated  
17 litigation, be prohibited from offering expert testimony in this matter.

18                           **ii. Greg Maul**

19           Next, Defendant contends that Plaintiff's disclosure of Greg Maul as a non-retained  
20 expert does not comply with the requirements of Rule 26. (Doc. 55 at 7.) Plaintiff's opposition  
21 references Mr. Maul as "a recent former employee" who "can testify that in his opinion Zane was  
22 qualified for manger [*sic*] position, that Zane was great with customers, [and] about how others  
23 were promoted and Zane was not." (Doc. 58 at 6 & Doc. 59, ¶ 23.)

24           A fact witness is not an expert witness. If Mr. Maul's testimony will involve "scientific,  
25 technical, or other specialized knowledge," then he must be identified as an expert witness and  
26 any report should have been produced. Fed. R. Evid. 702; *see also United States v. Figueroa-*  
27 *Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (holding that opinion by lay witness on observations  
28 that were not "common" but required demonstrable expertise was improper). Where employees  
have no connection to specific events involved in an action, or the employees have reviewed

1 information or documents in preparation of litigation, expert reports must be produced. *Prieto v.*  
2 *Malgor*, 361 F.3d 1313, 1318-19 (11th Cir. 2004) (requiring police officer to produce an expert  
3 report before testifying on the appropriateness of level of force exhibited by officers when his  
4 testimony was based exclusively on his review of police reports and depositions); *McCulloch v.*  
5 *Hartford Life and Acc. Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004) (finding that testimony  
6 regarding the adequacy of performance requires an expert report); *Funai Elec. Co. v. Daewoo*  
7 *Elec. Corp.*, 2007 WL 108972 at \*5 (N.D. Cal. Apr. 11, 2007) (concluding that technical  
8 evaluations based on documents reviewed solely for litigation purposes require production of an  
9 expert report).

10 Plaintiff indicated Mr. Gaul would testify that Plaintiff was qualified to hold the position  
11 of manager. Because demonstrable expertise would be required for such an opinion - and no  
12 report has been provided - this Court will recommend against permitting Mr. Gaul's expert  
13 testimony. Mr. Gaul however would be permitted to testify as a lay witness regarding his  
14 personal observations of Plaintiff's performance.

15 **iii. Susan K. Thompson**

16 Defendant argues Plaintiff cannot avoid the requirements of Rule 26(a)(2)(B) by referring  
17 to Susan K. Thompson, a certified public accountant, as non-retained. Defendant argues that if  
18 Plaintiff intends to offer the testimony of Ms. Thompson, described by Plaintiff "as a 'court  
19 certified expert on valuing the loss in employment benefits', then Ms. Thompson would "clearly  
20 be a retained expert thereby obligating Plaintiff to comply with Rule 26(a)(2)'s disclosure  
21 requirements." (Doc. 55 at 7-8.) In his opposition to Defendant's motion, Plaintiff indicates that  
22 Ms. Thompson "is another nonretained expert, that can provide expert testimony about how to  
23 calculate employment financial loss." (Doc. 58 at 9.) In counsel's declaration in support of  
24 Plaintiff's opposition, Mr. Shephardson declares as follows:

25 SUSAN K. THOMPSON, CPA, CFF - She is another nonretained expert,  
26 and has not been specially employed, as is true with all the other experts listed.  
27 She has expertise in calculating employment financial losses, and has indicated a

1 willingness (although there is no obligation to) to provide[] her opinions in this  
2 case.

3 (Doc. 59, ¶ 19.) Finally, Plaintiff's Supplemental Expert Disclosure states that "it is anticipated  
4 [Ms. Thompson's] testimony may be necessary for proving up the amount of Plaintiff's needless  
5 financial loss caused by Wal-Mart's wrongful actions." (Doc. 56, Ex. I.)

6 Plaintiff cannot have it both ways. Either an expert will testify and provide a report, or  
7 will act as a consultant to counsel and not testify at trial. "The mere percipience of a witness to  
8 the facts on which he wishes to tender an opinion does not trump Rule 702." *U.S. v. Figueroa-*  
9 *Lopez*, 125 F.3d at 1246. "The reason for requiring expert reports is 'the elimination of unfair  
10 surprise to the opposing party and the conservation of resources.'" *Elgas v. Colorado Belle*  
11 *Corp.*, 179 F.R.D. 296, 2999 (D. Nev. 1998). It appears Ms. Thompson's testimony will concern  
12 her opinion regarding valuation of Plaintiff's "employment financial loss," thus, a report is  
13 required. A report has not been provided in compliance with Rule 26(a)(2)(B), and thus, this  
14 Court will recommend Ms. Thompson not be permitted to testify as an expert in this matter.

15 **iv. Dr. Bielby**

16 Plaintiff has identified William Bielby as a non-retained expert. (Doc. 56, Exs. B & I.)  
17 Defendant contends Plaintiff's disclosure of Dr. Bielby as a non-retained expert is improper  
18 because it does not comply with Rule 26(a)(1) regarding the intended subject of testimony, and  
19 the report Plaintiff provided is hearsay. (Doc. 55 at 7.) In opposition, Plaintiff states that

20 previous to this suit [Dr. Bielby] authored a public report in *Dukes v. Wal-Mart*  
21 (Largest class action in history). He already has opinions regarding Wal-Mart's  
22 Business structure, and how it fosters discrimination, not merely gender  
23 discrimination. Moreover, his opinions are relevant to a pattern and practice of  
24 discrimination that supports Plaintiff's causes of action[], and claim for punitive  
25 damages. Wal-Mart is well aware of his report, and it is posted on the Internet at:  
walmart.walmartclass.com/websys94.pl?wsi=0&websys\_screen=all\_report  
[citation]. Plaintiff has provided Wal-Mart's counsel with a Copy of the Bielby  
Report [citation] with the May 14, 2010, Supplemental Disclosure. Contrary to  
Wal-Mart's assertion, Dr. Beilby [*sic*] need not be retained.

26 (Doc. 58 at 6-7.) Plaintiff asserts that the report contains a number of "admissions by Wal-Mart  
27  
28

1 about its processes” and thereafter identified nine ways in which Dr. Bielby’s opinion is relevant  
2 to the instant matter. (Doc. 58 at 7-8.)

3 Dr. Bielby’s report in the Dukes v. Wal Mart class action litigation is hearsay and cannot  
4 be used at trial as a substitute for live testimony. Fed. R. Evid. 802.

5 As previously noted, opinions or reports of experts retained in other cases involving the  
6 same defendant are not relevant to *this* action. If Dr. Bielby’s testimony is to be offered in an  
7 expert witness capacity, a written report generated for purposes of *this* litigation rather than some  
8 other litigation should have been provided. The plain language of Rule 26(a)(2)(B) includes the  
9 following: “a written report - prepared and signed by the witness . . . to provide expert testimony  
10 *in the case . . .*” The rule does not state “in a case” or “in any case.”

11 Notably too, the report that was provided, having been generated during the course of  
12 unrelated other litigation, does not allow for the effective cross-examination of witnesses because  
13 it is not fact specific to this matter. Permitting Dr. Bielby’s testimony as an expert would not  
14 allow Defendant a reasonable opportunity to prepare for cross-examination. *Sprague v. Liberty*  
15 *Mutual Insurance Co.*, 177 F.R.D. at 81. For all of the foregoing reasons, it will be  
16 recommended that Dr. Bielby’s testimony as an expert witness be precluded.

#### 17 v. Fact Witnesses

18 Defendant contends a number of persons identified as Plaintiff’s experts are not in fact  
19 experts because they “do not fit the evidence code’s definition of expertise.” This includes  
20 Plaintiff’s references to the persons most knowledgeable from Wal-Mart in eight separate areas,  
21 as well as Plaintiff himself, Tom Young, Eleno Bernal, Don Wallis, Mike Gilliam, and “Mr.  
22 Smoot.” (Doc. 55 at 7-8.)

23 Plaintiff characterizes these witnesses as fact witnesses, yet indicates that he, Young, and  
24 Bernal will testify “on store policies and procedures, and violations thereof, *the discrimination*  
25  
26 *and harassment* [Plaintiff] *has been subjected to, and his financial losses caused by Wal-Mart’s*  
27

1 *wrongful conduct.*” (Doc. 56, Exs. B & I.)

2 Rule 702 of the Federal Rules of Evidence provides:

3 If scientific, technical, or other specialized knowledge will assist the trier  
4 of fact to understand the evidence or to determine a fact in issue, a witness  
5 qualified as an expert by knowledge, skill, experience, training or education, may  
6 testify thereto in the form of an opinion or otherwise, if (1) the testimony is based  
upon sufficient facts or data; (2) the testimony is the product of reliable principles  
and methods, and (3) the witness has applied the principles and methods reliably  
to the facts of the case.

7 Expert testimony is testimony based on scientific, technical, or other specialized knowledge that  
8 will assist the trier of fact in reaching a decision on an issue. *United States v. Dorsey*, 45 F.3d  
9 809, 813 (4th Cir. 1995). Plaintiff, Young and Bernal - all Wal-Mart employees or former  
10 employees - do not have scientific, technical or specialized knowledge that would permit them to  
11 testify as experts regarding discrimination and harassment, or Plaintiff’s purported financial  
12 losses. Additionally, were this Court to find Plaintiff, Young and Bernal could testify as expert  
13 witnesses, reports would be required:

14 [T]he majority of courts take the broader view that whenever an employee  
15 of a party gives expert testimony, even if outside the normal scope of his or her  
16 employment, the producing party must provide an expert report. [Citations.]  
17 Courts broadly interpreting Rule 26 emphasize that it is inconsistent with the  
spirit of the rule to exclude a category of expert trial witnesses from having to  
produce reports. [Citations.]

18 *National Railroad Passenger Corporation v. Railway Express, LLC*, \_\_\_ F.R.D. \_\_\_, 2010 WL  
19 724016 (D. Md. Feb. 24, 2010).

20 Additionally, the Court notes neither Plaintiff’s original, untimely disclosure nor his  
21 supplemental disclosure provide any information beyond a name for Mr. Wallis, Mr. Smoot and  
22 Mr. Gilliam. The disclosure is incomplete. *See* Fed. R. Civ. P. 26(a)(1)(i).

23 To the degree Plaintiff intends any of the aforementioned witnesses to testify as experts,  
24 he has failed to provide a report or otherwise comply with the applicable Rule 26 disclosures for  
25 such witnesses. Therefore, this Court will recommend that these witnesses not be permitted to  
26 testify as expert witnesses but only be allowed to testify as to facts they personally observed as

1 percipient witnesses to Plaintiff's employment.

2 **vi. Treating Physicians**

3 Defendant asserts that Plaintiff has named his treating physicians as non-retained experts  
4 by "simply list[ing] their names." Defendant contends "the subject of the witness's testimony" is  
5 required by Rule 26(a)(2). (Doc. 55 at 8.) In his opposition to Defendant's motion, Plaintiff  
6 simply states that "Wal-Mart already has the contact information for them as Zane's medical  
7 records from them have been subpoenaed and produced." (Doc. 58 at 6.)

8 Plaintiff has failed to indicate the subject matter of the testimony to be offered by his  
9 treating physicians, and the disclosure does not speak to the content of his treating physicians'  
10 testimony. (See Doc. 56, Exs B & I.) "Rule 26(a)(1) disclosures are not in lieu of Rule  
11 26(a)(2)(A) disclosure" (*Vigilant Insurance v. East Greenwich Oil Co.*, 234 F.R.D. 20, 22 (D.  
12 R.I. 2006)) and vice versa.

13 Nevertheless, it will be recommended that Plaintiff's treating physicians be permitted to  
14 testify as experts. See *Sprague v. Liberty Mutual Insurance Co.*, 177 F.R.D. at 81 (the majority  
15 of courts have concluded that Rule 26(a)(2)(b) reports are not required of a treating physician  
16 expressing an opinion as to causation, diagnosis, prognosis and extent of disability based upon  
17 treatment).

18 **3. Request for Sanctions**

19 As a result of the aforementioned violations, Defendant requests Plaintiff be prohibited  
20 from using these witnesses' testimony as expert testimony at trial. (Doc. 55.)

21 Rule 37(c)(1) provides in relevant part:

22 If a party fails to provide information or identify a witness as required by Rule  
23 26(a) or (e), the party is not allowed to use that information or witness to supply  
24 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
justified or is harmless.

25 "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information  
26 required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd. v.*

1 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

2 In these days of heavy caseloads, trial courts in both the federal and state  
3 systems routinely set schedules and establish deadlines to foster the efficient  
4 treatment and resolution of cases. Those efforts will be successful only if the  
5 deadlines are taken seriously by the parties, and the best way to encourage that is  
6 to enforce the deadlines. Parties must understand that they will pay a price for  
7 failure to comply strictly with scheduling and other orders, and that failure to do  
8 so may properly support severe sanctions and exclusions of evidence.

9 *Wong v. Regents of University of California*, 410 F.3d 1052, 1060 (9th Cir. 2005).

10 As noted earlier, a party who fails to properly disclose its experts and their reports may be  
11 barred from using any of the expert's direct testimony unless there was "substantial justification"  
12 for the failure to disclose or the failure was "harmless." Fed. R.Civ.Proc. 37(c)(1). In  
13 determining whether this action should be imposed, the burden is on the party facing the sanction  
14 to prove harmlessness. *Torres v. City of Los Angeles*, 548 F. 3d 1197 (9th Cir. 2008) (quoting,  
15 *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d at 1107). The Ninth Circuit Court of  
16 Appeals gives wide latitude to a district court's exercise of discretion to issue sanctions for failure  
17 to disclose an expert. *Yeti*, 259 F. 3d at 1106. Exclusionary sanction based on discovery  
18 violations are generally improper absent undue prejudice to the opposing side. *Amersham*  
19 *Pharmacia Biotech, Inc., v. Perkin*, 190 F.R.D. 644, 648-49. (N. D. Cal. 2000).

20 Some courts have held that when considering whether to exclude the expert testimony,  
21 the court should examine: (1) the explanation, if any, for the failure to disclose; (2) prejudice to  
22 the opposing party; (3) the potential for curing the breach by granting a continuance; and (4) the  
23 importance of the testimony. See *Barett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir.  
24 1996); *Sierra Club Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F. 3d 546, 572 (5th Cir.  
25 1996), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57 (1996).

26 Here, Plaintiff does not offer any explanation for his failure to disclose experts as  
27 required in the scheduling order. Rather, he offers excuses or simply asserts he has complied  
28 with the rule. Thus, there is nothing for the Court to consider and Plaintiff's failure to properly  
disclose his experts is not substantially justified, nor is it harmless. Second, despite Plaintiff's

1 assertion to the contrary, Defendant is prejudiced where the pretrial conference in this matter is  
2 set for September 9, 2010, and the jury trial is scheduled to commence October 26, 2010. Third,  
3 this Court is not inclined to modify its scheduling order at this late date. Finally, the Court has  
4 considered the importance of the expert testimony disclosed by Plaintiff. Plaintiff has identified  
5 persons as potential experts yet qualifies them as “nonretained” or would have this Court permit  
6 expert testimony to be offered in the absence of a written report generated for purposes of this  
7 litigation. It seems clear that if the testimony were important to Plaintiff’s case, he would have  
8 been mindful of this Court’s scheduling order, as well as the specific requirements of Rule 26.  
9 Moreover, despite technical deficiencies in some areas, it will be recommend that expert  
10 testimony be permitted by Plaintiff’s treating physicians due to its importance.

### 11 **CONCLUSION AND RECOMMENDATIONS**

12 Plaintiff’s expert disclosure was untimely and incomplete. Based on the foregoing, this  
13 Court recommends as follows:

- 14 1. Plaintiff be prohibited from offering the expert testimony of “other” Wal-Mart  
15 experts, or experts designated in other unrelated litigation involving this defendant, such as those  
16 referenced in Plaintiff’s untimely May 1, 2010, disclosure (*see* subheading 2i, *ante*);
- 17 2. Plaintiff be prohibited from offering the expert testimony of Mike Gaul;
- 18 3. Plaintiff be prohibited from offering the expert testimony of Susan K. Thompson;
- 19 4. Plaintiff be prohibited from offering the expert testimony of William Bielby; and
- 20 5. Plaintiff be prohibited from offering the expert testimony of unidentified persons  
21 most knowledgeable from Wal-Mart, himself, Tom Young, Eleno Bernal, Don  
22 Wallis, Mike Gilliam or Mr. Smoot. It is noted that to the degree Plaintiff,  
23 Young, Bernal, Wallis, Gilliam and/or Smoot may testify as to matters personally  
24 observed, such lay testimony would not be precluded;

25 It is additionally recommended that Plaintiff be permitted to offer the expert testimony of  
26 his treating physicians.

