

1 2011. (Doc. 65 and 66). Moreover, upon a review of the pleadings and the arguments presented at
2 the hearing, the Court GRANTS Defendant’s Motion to Strike Plaintiff’s expert disclosure of Mr.
3 George Kellgren.

4 **II. Plaintiff’s Disclosure of George Kellgren as a Non Retained Expert**

5 The sole issue remaining in this case is whether Plaintiff’s expert disclosure of George
6 Kellgren, the owner and Chief Engineer of Kel-Tech is proper. Defendant contends that this
7 designation is deficient because the disclosure was not in compliance with Fed. R. Civ. P.
8 26(a)(2)(C) which provides as follows :

9 *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered
10 by the court, if the witness is not required to provide a written report, this disclosure must
state:

- 11 (i) the subject matter on which the witness is expected to present evidence under
12 Federal Rule of Evidence 702, 203, or 705; and
- 13 (ii) a summary of the facts and opinions to which these witnesses are expected to
testify.

14 Plaintiff’s disclosure included the following:

15 George Kellgren

16 Subject Matter: Mr. Kellgren is expected to present evidence on the subject of the design
17 and operation of the Kel-Tec SU rifle. He is also expected to present evidence on the
subject of the explosion of the rifle being used by Mr. Sorrell and all aspects of Kel-Tec’s
18 investigation and analysis and the cause of the explosion.

19 Facts and opinions: Mr. Kellgren is expected to testify to the facts of how the SU-16 was
designed and manufactured, in particular, the unit being used by Mr. Sorrell that exploded.
20 As part of these facts, Mr. Kellgren is expected to testify about what Kel-Tec did with the
pieces of the exploded rifle that were returned to Kel-Tec. He is expected to testify
21 regarding Kel-Tec’s advertising and admonitions to users of the rifle regarding
ammunition to use/not use and the operation of the rifle. It is expected that he will give
22 opinions regarding the design, manufacture and operation of the rifle and opinions
regarding why it exploded in Mr. Sorrell’s face. Additional facts are expected to include
23 other instances of malfunctions and/or explosions involving the SU-16 rifle unit being
used by Mr. Sorrell that exploded.
24 (Doc. 46-1, pg. 8-9).

25 Defendant argues that this disclosure fails to disclose any opinions Mr. Kellgren is
26 expected to offer at trial. Specifically, although Plaintiff alleges that Mr Kellgren will testify
27 about the “design, manufacture, and operation” of the SU-16 rifle, no information regarding what
28 Mr. Kellgren is actually expected to testify about is provided. In fact, Defendant contends that

1 most of the subject matters identified in Plaintiff’s disclosure, such as “how the SU-16 was
2 designed and manufactured”; “what Kel Tec did with the pieces of the exploded rifled that were
3 returned to Kel-Tec,” and “Kel-Tec’s advertising and admonitions to users of the rifle regarding
4 ammunition to use/not use the operation of the rifle” were properly the subject of fact discovery
5 which Plaintiff elected to forego. Defendant argues that if Mr. Kellgren expects to offer opinions
6 as to why the subject rifle exploded, Rule 26 makes it incumbent upon Plaintiff to disclose what
7 that opinion is. Defendant suggests that the reason Plaintiff has not provided more information is
8 because he did not conduct the necessary non-expert discovery. Accordingly, Defendant contends
9 it would be improper and prejudicial to allow Plaintiff the opportunity to depose Mr. Kellgren as a
10 means of conducting fact discovery that should have been conducted several months ago as the
11 deadline for doing so as long since expired.

12 In response, Plaintiff contends that his disclosure is sufficient since he has adequately
13 advised Defendant of the subject matter of Mr. Kellgren’s testimony. Plaintiff concedes that he
14 has not yet deposed Mr. Kellgren so he is uncertain of what the testimony will be. However, he
15 asserts that Mr. Kellgren is an expert in the field and that prohibiting the deposition of this expert
16 will prejudice Plaintiff since he made a strategic decision to wait and depose Mr. Kellgren until
17 fact discovery ended. In support of these claims, Mr. Chandler relied on a Wikipedia excerpt
18 outlining Mr. Kellgren’s qualifications in court.

19 This Court is unpersuaded by Plaintiff’s arguments. First, relying on a Wikipedia
20 summary to bolster reliance on an expert’s opinion is unavailing. Moreover, expert disclosures
21 are meant to inform opposing counsel of an expert’s *opinions*. In this instance, the summary does
22 not contain opinions, but rather is a list of information that Plaintiff hopes to obtain during Mr.
23 Kellgren’s deposition. Defendant has indicated that it does not intend to call Mr. Kellgren as an
24 expert, and Plaintiff has conceded he does not know the extent of Mr. Kellgren’s involvement in
25 the case. This information should have been ascertained during the non-expert discovery period.
26 It would be improper to allow Plaintiff to use an expert disclosure as a means of obtaining fact
27 discovery that should have been completed several months ago. Accordingly, Plaintiff’s expert
28 disclosure is STRICKEN and Plaintiff shall not be permitted to depose Mr. Kellgren as an expert

1 witness or present his testimony at trial as an expert witness.

2 **III. Sanctions**

3 The Court has given serious consideration to the issuance of sanctions in this matter which
4 are deserved on both sides. It is apparent that the parties created these discovery disputes by
5 failing to have a meaningful meet and confer. However, given the current posture of the case and
6 the ability of counsel to resolve the disputes with the Court's guidance, sanctions will not be
7 imposed at this juncture. As such, the Order to Show Cause is VACATED. (Doc. 63).

8 Nevertheless, counsel are forewarned that they must make every effort to work through discovery
9 disputes with *meaningful* meet and confer sessions. Moreover, it is expected that the parties will
10 strictly adhere to the Federal Rules of Civil Procedure, as well as follow this Court's orders.

11 **IV. Conclusion**

12 Based on the above, **IT IS HEREBY ORDERED** that :

- 13 1) Plaintiff's expert disclosure of Mr. Kellgren is STRICKEN; and
14 2) The Order to Show Cause issued on July 28, 2011 is VACATED.

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IT IS SO ORDERED.

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Dated: August 2, 2011

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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