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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIANE GOINS; WESLEY RENTFROW,
Plaintiffs,

v.

COUNTY OF MERCED; MERCED
COUNTY DISTRICT ATTORNEY; MERLE
WAYNE HUTTON,
Defendants.

Case No. 1:13-cv-01245-AWI-SKO

**ORDER GRANTING DEFENDANT’S
MOTION FOR EXCLUSION OF
EVIDENCE AS SANCTIONS AND
DENYING PLAINTIFFS’ REQUEST FOR
A SIX MONTH EXTENSION OF TIME**

(Doc. 51)

I. INTRODUCTION

On May 29, 2015, Defendants County of Merced and Merced County District Attorney’s Office (“Merced Defendants”) filed a motion for exclusion of evidence as a sanction against Plaintiffs Diane Goins and Wesley Rentfrow. (Doc. 51.) Defendant Merle Wayne Hutton joined in the Merced Defendants’ motion on June 16, 2015. (Doc. 52.) Plaintiffs’ counsel requested and was granted an extension of time to file an opposition by June 22, 2015. (Doc. 54.) At close of business on June 22, 2015, the Court received an email communication from Plaintiffs’ counsel¹ informing the Court he was unable to respond to Defendants’ motion and requesting a six-month extension of time to respond.

¹ This email was copied to defense counsel as well as the Court.

1 The Court reviewed the motion and supporting documentation and determined that the
2 matter was suitable for decision without oral argument pursuant to Local Rule 230(g); as such, the
3 hearing on the motion is vacated.

4 For the reasons set forth below, Defendants' motion for a sanction in the form of exclusion
5 of evidence is GRANTED and Plaintiffs' request for an extension of time is DENIED.

6 II. BACKGROUND

7 A. Factual Background²

8 Plaintiffs were employed by Merced County's Office of the District Attorney at the time of
9 the incidents alleged in the Complaint. Plaintiff Goins alleges she was sexually harassed by a
10 supervisor in the Office of the District Attorney, Defendant Hutton, who had some supervisory
11 duties over her and Plaintiff Rentfrow. Plaintiffs contend they and another female employee
12 complained about inappropriate comments made by Defendant Hutton. An investigation into the
13 complaint against Defendant Hutton was undertaken by the County of Merced, and as part of the
14 investigation, Plaintiff Rentfrow testified at an administrative disciplinary proceeding. After the
15 investigation was completed in December of 2010, the hearing officer determined the allegations
16 were unfounded and the suspension was unwarranted.

17 While the investigation was pending, Plaintiff Goins filed an EEOC "Charge of
18 Discrimination" in September of 2009, alleging harassment and discrimination on the basis of sex
19 and retaliation for reporting and opposing harassment and discrimination. Plaintiff Rentfrow filed
20 an EEOC Charge of Discrimination in March of 2011, alleging retaliation for reporting and
21 opposing harassment and discrimination. Both Plaintiffs were issued "right-to-sue" letters by the
22 Department of Fair Employment and Housing. Subsequently, Plaintiff Goins was laid off from
23 her position in June of 2011 and Plaintiff Rentfrow was laid off from his position in March of
24 2012. Both Plaintiffs were told they were laid off due to budgetary constraints, but contend they
25 were terminated in retaliation for testifying and reporting or complaining about sexual harassment.
26 Plaintiffs contend they were given poor evaluations and reassigned in retaliation for testifying and
27

28 ² This background is taken both from the Complaint (Doc. 1) and from the parties' Joint Status Report filed on
August 21, 2014 (Doc. 35.)

1 for reporting or complaining about sexual harassment. Defendants deny the allegations.

2 Plaintiffs allege that as a proximate result of the Defendants' acts of harassment and retaliation,
3 they have suffered and continue to suffer substantial economic losses and interest thereon, including
4 lost wages and deferred compensation, as well as "both physical and non-physical injuries, including
5 emotional distress, humiliation, embarrassment and mental anguish[.]" (Compl., p. 9; Doc. 35, p. 8.)
6 Plaintiffs demand as relief back pay and employment benefits, front pay to compensate Plaintiffs for
7 future losses, emotional distress damages, punitive damages, and attorneys' fees and costs. (Compl.,
8 p. 10.)

9 **B. Discovery and Procedural Background**

10 **1. Plaintiffs' Initial Disclosures**

11 In Plaintiff Goins' initial disclosure to the Merced Defendants pursuant to Fed. R. Civ. Pro.
12 Rule 26(a)(1)(A)(iii), she did not disclose any physical injuries suffered as a result of the incidents
13 alleged in the Complaint, did not list any treating medical providers, did not list any medical
14 providers as individuals likely to have discoverable information that she might use to support her
15 claims, and did not identify any medical records as documents she might use to support her
16 claims. (Docs. 51, p. 2; 51-2, Exh. A ("Plaintiffs' Rule 26 Disclosures").)

17 **2. Merced Defendants' Special Interrogatories and Request for Production**

18 In Plaintiff Goins' responses to the Merced Defendants' special interrogatories, set one,
19 request for production of documents, set one, and supplemental and amended responses to special
20 interrogatories, set one, she did not disclose any specific physical injuries suffered as a result of
21 the incidents alleged in the Complaint, did not list any treating medical providers, did not list any
22 medical providers as individuals likely to have discoverable information that she might use to
23 support her claims, and did not identify any medical records as documents she might use to
24 support her claims. (Doc. 51-1, pp. 3-4. *See also* Docs. 51-3, Exh. B, No. 18 (Plaintiff Goins'
25 Response to Defendant County of Merced's Special Interrogatories); 51-4, Exh. C, No. 18
26 (Plaintiff Goins' Supplemental and Amended Response to Defendant County of Merced's Special
27 Interrogatories); 51-5, Exh. D, No. 18 (Plaintiff Goins' Second Supplemental Response to
28 Defendant County of Merced's Special Interrogatories) (responding that the incidents of the

1 Complaint had caused her “great embarrassment, humiliation, shame, mental distress, mental
2 anguish, and [] both physical and non-physical injuries” and referring the propounding party to
3 the EEOC file to locate supporting facts and documentation); 51-6, Exh. E, No. 27 (Plaintiff
4 Goins’ Response to Defendant County of Merced’s Request for Production of Documents)
5 (responding that she has “no exhibits in support of” a request for any writing or recording
6 supporting Plaintiff’s allegations of physical and non-physical injuries.)

7 Similarly, Plaintiff Goins’ responses to Defendant Hutton’s request for production of
8 documents, set one, and special interrogatories, set one, failed to indicate “that Ms. Goins had
9 sought medical treatment or that she had suffered stomach problems or ulcers” as a result of the
10 incidents alleged in the Complaint. (Doc. 52, p. 1; *see* Doc. 56, Exhs. A, Nos. 8; 11; 12 (Plaintiff
11 Goins’ Responses to Defendant Hutton’s Request for Production of Documents) (directing
12 Defendant Hutton to refer to the EEOC file for any documents relating to Plaintiff’s allegations of
13 emotional distress or mental anguish and objecting to Defendant Hutton’s request for documents
14 listed in her Rule 26 Disclosures) and B, No. 5 (Plaintiff Goins’ Responses to Defendant Hutton’s
15 Special Interrogatories) (identifying Plaintiff Rentfrow as the sole witness with knowledge of
16 Plaintiff Goins’ allegations of emotional distress or mental anguish.)

17 **3. Court Orders Plaintiffs to Supplement Responses to Written Discovery and**
18 **Extending Discovery Cutoff**

19 The parties appeared for an informal discovery dispute conference in chambers and off the
20 record on April 1, 2015, to resolve a dispute regarding the sufficiency of Plaintiffs’ responses to
21 the Merced Defendants’ special interrogatories, set one. (Docs. 44; 45.) Plaintiffs agreed to
22 provide supplemental responses and were ordered to “provide all facts, including specific dates,
23 names, and other identifying information, in support of their contentions and state whether those
24 facts are based on specific documents” and to “identify all writings supporting their
25 contentions[.]” (Doc. 45, pp. 1-2.)

26 “Due to delay in getting proper written discovery responses from plaintiffs, and so the
27 parties could mediate,” a further telephonic conference was held in chambers and off the record on
28 April 14, 2015, to discuss an extension of discovery deadlines. (*See* Doc. 48 (Minute Order dated

1 April 15, 2015).) The parties agreed to provide the Court with a joint stipulation setting forth an
2 amended discovery schedule, non-dispositive motion deadline, and mediation schedule. (*See*
3 Doc. 48.) The parties stipulated to extend the discovery cutoff by thirty days; non-expert
4 discovery was reset to June 1, 2015, expert discovery was reset to August 31, 2015, and the non-
5 dispositive motion filing deadline was reset to September 18, 2015. (Docs. 49; 50.) The
6 settlement conference date was also vacated (Docs. 49; 50), and the parties went to private
7 mediation on May 6, 2015 (Doc. 51, p. 2). The case did not settle at mediation, and depositions
8 were scheduled. (Doc. 51, p. 2.)

9 **4. Plaintiff Goins' Deposition**

10 On May 15, 2015, for the first time, Plaintiff Goins formally claimed to have suffered
11 stomach problems and ulcers as a result of the incidents of the Complaint and identified her
12 medical provider. (Docs. 51-1, pp. 4-5; 51-8, Exh. F (“Goins Deposition Transcript”).) During
13 the deposition, Plaintiff stated that while she did not seek counseling for the incidents alleged in
14 the Complaint, she did seek treatment with her primary care physician Dr. Maria Hinesley for
15 “stomach problems and ulcers.” (Goins Depo. Tr. at 94:19-24, 95:8-15; 95:21-23.) Plaintiff told
16 Dr. Hinesley that she “was having problems sleeping, [] stomach issues, [and] stress.” (Goins
17 Depo. Tr. at 96:1-4.) The following exchange occurred at the deposition:

18 MR. MATZKIND: Counsel, we’re not going to be finished with this
19 today, and there’s going to be a motion to the court. Do you intend to assert this
20 at trial?

21 MR. SMITH: I don’t know anything about it. This is news to me. I
22 didn’t know about that fact that I hadn’t given it to you or whatever. I will try to
23 get –

24 MR. MATZKIND: She specifically said she never saw anybody
25 regarding this in her sworn interrogatory answers.

26 MR. SMITH: Well, I don’t know. I’d have to look at the answers.

27 (Goins Depo. Tr. at 96:5-17.) Defense counsel then asked

28 Q. Okay. You didn’t mention having stomach problems in any of your
discovery responses, the initial disclosures, your answers to interrogatories or
your first or second supplementals. Why is that?

A. I don’t know. The information was provided to my attorney in regards to
my doctor.

1 (Goins Depo. Tr. at 205:2-8.)

2 Defendants contend that as a result of this late disclosure at Plaintiff Goins' deposition,
3 only 16 calendar days before the close of non-expert discovery, Defendants "were unable to
4 subpoena her medical records, depose her medical provider, or schedule an Independent Medical
5 Examiner" before the July 1, 2015, deadline. (Doc. 51, pp. 3-5; *see also* Docs. 52, p. 1; 52-1, pp.
6 1-2.) Defendants would have done so, had they been provided with timely notice (Docs. 51-7, ¶ 9
7 (Declaration of Roger S. Matzkind, Counsel for the Merced Defendants); 52-1, pp. 1-2
8 (Declaration of Laurie B. Schrum, Counsel for Defendant Hutton), and allege that they have been
9 "subjected to unfair and prejudicial surprise" as a result of Plaintiff Goins' failure to disclose these
10 alleged physical injuries and medical records (Doc. 51-1, p. 5.)

11 III. LEGAL STANDARD

12 Rule 26(a)(1) requires the parties disclose the identity of "each individual likely to have
13 discoverable information – along with the subjects of that information – that the disclosing party
14 may use to support its claims or defenses . . ." Rule 26(a) also requires the parties to disclose "a
15 copy – or a description by category and location – of all documents . . . that the disclosing party
16 has in its possession, custody, or control and may use to support its claims or defenses . . ." This
17 disclosure must occur at least 14 days before the scheduling conference or as ordered by the court.
18 Fed. R. Civ. P. Rule 26(a).

19 The parties have a continuing duty to supplement these initial disclosures under Rule 26(e)
20 if they learn in some material respect the disclosure is incomplete or incorrect, "and if the
21 additional or corrective information has not otherwise been made known to the other parties
22 during the discovery process or in writing." Fed. R. Civ. P. Rule 26(e). As such, the proffering
23 party may be absolved of its duty to serve a supplemental disclosure under Rule 26(e) to identify a
24 certain person if the other parties have learned through other means that the person might have
25 discoverable information regarding the proffering party's claims or defenses.

26 "Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any
27 information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly,*
28 *Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Two express exceptions

1 ameliorate the harshness of Rule 37(c)(1): the information may be introduced if the party's failure
2 to disclose the required information is 1) substantially justified or 2) harmless. Fed. R. Civ. P.
3 Rule 37(c)(1). The party facing sanctions bears the burden of proving that its failure to disclose
4 the required information was substantially justified. *R & R Sails, Inc. v. Insurance Co. of*
5 *Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012).

6 To determine whether the introduction of evidence should be precluded pursuant to Rule
7 37, the Court considers: "(1) the surprise to the party against whom the evidence would be offered;
8 (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence
9 would disrupt trial; (4) the importance of the evidence; and (5) the nondisclosing party's
10 explanation for it[s] failure to disclose the evidence." *Goold v. Hilton Worldwide*, 1:13-CV-
11 00438-JLT, 2014 WL 4629083 (E.D. Cal. Sept. 15, 2014) (quoting *San Francisco Baykeeper v.*
12 *West Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 733 (N.D. Cal. 2011)).

13 IV. DISCUSSION

14 A. The Parties' Arguments

15 Defendants contend that Plaintiff Goins' failure to disclose her claims of physical injuries
16 and/or medical treatment for such injuries until her deposition on May 15, 2015 – only two weeks
17 before the non-expert discovery cutoff – has severely prejudiced Defendants' ability to adequately
18 defend their case. Defendants were "unable to subpoena [Plaintiff Goins'] medical records,
19 depose her medical provider, and schedule an Independent Medical Examination" prior to the June
20 1, 2015, deadline. (Docs. 51-1, p. 5; 52, p. 1 ("The arguments set forth in the County's motion
21 apply with equal force to [D]efendant Hutton".)) Had they been given timely notice, Defendants
22 would have taken steps to subpoena Plaintiff Goins' medical records, taken her medical provider's
23 deposition, and/or scheduled an Independent Medical Examination. (Docs. 51-1, p. 5; 51-7, ¶ 10;
24 52, p. 1, 52-1, p. 2.) As a result of Plaintiff Goins' failure to disclose her claims of physical
25 injuries and/or medical treatment for such injuries, "Plaintiffs have subjected [D]efendants to
26 unfair and prejudicial surprise, and have frustrated the intent and purpose of the Federal Rules."
27 (Doc. 51, p. 5.)

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1 **B. Plaintiff Goins Failed to Meet Her Obligation to Disclose Any Individuals with**
2 **Knowledge of or Documents in Support of Her Allegations of Physical Injury in Her**
3 **Rule 26 Initial Disclosures or At Any Time Thereafter**

4 It is uncontested that Plaintiff Goins did not identify any medical provider in Plaintiffs'
5 joint Initial Rule 26 Disclosures. (*See* Doc. 51-2, Exh. A, § A, Nos. 1-31.) It is also uncontested
6 that Plaintiff Goins did not provide a copy of or description of any medical record or
7 documentation in Plaintiffs' joint Initial Rule 26 Disclosures. (*See* Doc. 51-2, Exh. A, § B,
8 Nos. 1-21.) When asked for a computation of any category of damages, it is uncontested that
9 Plaintiff Goins did not list, identify, or reference damages for stomach problems or ulcers. (*See*
10 Doc. 51-2, Exh. A, § C (identifying damages for "Front pay, Emotional Distress, attorney fees and
11 costs".))

12 It is also undisputed that Plaintiff Goins did not identify "stomach problems" or "ulcers" as
13 a physical injury sustained as a result of the incidents of the Complaint in any written response,
14 amended written response, or supplemental written response to discovery propounded on her by
15 any Defendant. (*See* Docs. 51-3, Exh. Exh. B; 51-4, Exh. C; 51-5, Exh. D; 51-6, Exh. E.)

16 **1. Plaintiff Goins' Responses to Defendant County of Merced's Discovery**

17 In Plaintiff Goins' Verified Response to Defendant County of Merced's Special
18 Interrogatories, Set One, in response to Special Interrogatory No. 18, Plaintiff Goins stated that the
19 events of the Complaint "ha[ve] caused me great embarrassment, mental distress, mental anguish,
20 and I have suffered both physical and non-physical injuries as a result." (Doc. 51-3, Exh. B, p.
21 20.) She identified co-Plaintiff Rentfrow as the only witness "with knowledge of such facts," and
22 stated that there were no writing supporting her contentions. (Doc. 51-3, Exh. B, p. 20.) Plaintiff
23 further referenced the "Summary of Facts" listed in response to Special Interrogatory No. 1, which
24 does not include any reference to specific or general physical injuries suffered as a result of the
25 incidents alleged in the Complaint, does not list any treating medical providers, and did not
26 identify any medical records as documents she might use to support her claims. (*See* Doc. 51-3,
27 Exh. B, pp. 3-12.)

28 Plaintiff supplemented and amended her response to "incorporate" the contents of the
EEOC file created as a result of her harassment claim (*see* Doc. 51-4, Exh. C, p. 7), and after the

1 Court ordered her to supplement her response with specific names, identifying information, and
2 citations within the EEOC file, Plaintiff again supplemented her response (*see* Doc. 52-5, Exh. D,
3 pp. 8-9). Plaintiff alleged that she “believe[s] this has caused [her] great embarrassment,
4 humiliation, and shame, mental distress, mental anguish, and [she] h[as] suffered both physical
5 and non-physical injuries as a result.” (Doc. 52-5, Exh. D, p. 9.) She again refers to the same,
6 unaltered Summary of Facts, as well as specific documents within the EEOC file. (Doc. 52-5,
7 Exh. D, pp. 9; 14-16.) Then, in Plaintiff Goins’ Response to Defendant County of Merced’s
8 Request for Production of Documents, Set One, in response to the request for any writing or
9 recording supporting her allegations of “physical and non-physical injuries, including emotional
10 distress, humiliation, embarrassment and mental anguish,” Plaintiff unambiguously responded that
11 she had “no exhibits in support of this request.” (Doc. 51-6, Exh. E, p. 11.)

12 **2. Plaintiff Goins’ Responses to Defendant Hutton’s Discovery**

13 Plaintiff Goins’ responses to Defendant Hutton’s request for production of documents, set
14 one, and special interrogatories, set one, failed to indicate “that Ms. Goins had sought medical
15 treatment or that she had suffered stomach problems or ulcers” as a result of the incidents alleged
16 in the Complaint. (Doc. 52, p. 1; *see* Doc. 56, Exhs. A (Plaintiff Goins’ Responses to Defendant
17 Hutton’s Request for Production of Documents) and B (Plaintiff Goins’ Responses to Defendant
18 Hutton’s Special Interrogatories).)

19 When asked to identify any individual with knowledge supporting her allegation that she
20 “suffered emotional distress, humiliation, embarrassment, or mental anguish” as a result of the
21 incidents of the Complaint, Plaintiff Goins *only* identified her co-plaintiff, Plaintiff Rentfrow – no
22 medical professional or treating physician was identified. (Doc. 56, Exh. B, No. 5.)

23 When asked to identify and produce all documents relating to her allegations that she
24 “suffered emotional distress, humiliation, embarrassment, or mental anguish” as a result of the
25 incidents of the Complaint, Plaintiff Goins unequivocally referred Defendant Hutton to her EEOC
26 file – no medical records were identified. (Doc. 56, Exh. A, No. 8.) When asked to produce all
27 documents she “listed in [her] Rule 26 Disclosure as documents” in support of her claims or that
28 she intended to use for impeachment, Plaintiff objected to the question as violating attorney-client

1 privilege and the work-product doctrine – no medical records were identified or produced. (Doc.
2 56, Exh. A, Nos. 11; 12.)

3 **3. Plaintiff Goins’ Failure to Disclose Discoverable Information in Support of**
4 **Her Alleged Physical Injuries Was in Violation of the Requirements of Rule 26**

5 Rule 26(a) imposes on the parties a duty to disclose the identities of each person
6 possessing discoverable information that the disclosing party intends to use *or may use* to support
7 its claims. Fed. R. Civ. P. 26(a)(1)(A)(i). Rule 26(a) also requires the parties to disclose either a
8 copy or a description by category and location of all documents that the disclosing party has in its
9 possession and intends to use *or may use* to support its claims. Fed. R. Civ. P. Rule
10 26(a)(1)(A)(ii). Even if Plaintiff Goins were unsure she would ultimately use any medical
11 evidence in support of her claims of stomach problems and ulcers, the Rules *required* that she
12 disclose such information. However, Plaintiff Goins did not identify any individuals or copy or
13 describe any documents or writings in support of her claims of physical injuries as a result of the
14 incidents of the Complaint, until May 15, 2015, during the course of her deposition. *See, infra.*

15 Even if Plaintiff Goins lacked such information at the time of her Rule 26(a) initial
16 disclosures, on September 24, 2014 (*see* Doc. 51-2), she had several opportunities to supplement
17 these initial disclosures prior to the June 1, 2015, non-expert discovery cutoff. It is uncontested
18 that Plaintiff at no point supplemented her initial disclosures to identify any treating medical
19 provider or medical records, despite being required to do so under the Federal Rules. Further,
20 Plaintiff answered Defendants’ written discovery requests – even supplementing multiple times to
21 include more detailed facts and identifying information – and never identified any treating medical
22 provider or medical records.

23 Rule 26(e) imposes on the parties a continuing duty to supplement these initial disclosures
24 if they learn in some material respect the disclosure is incomplete or incorrect, “and if the
25 additional or corrective information has not otherwise been made known to the other parties
26 during the discovery process or in writing.” Fed. R. Civ. P. Rule 26(e). By not disclosing her
27 medical providers or medical records in her initial disclosures – or at any time thereafter – Plaintiff
28 Goins violated Rule 26(a). Further, though the responding party may be absolved of its duty to

1 serve a supplemental initial disclosure under Rule 26(e) if the other parties have learned through
2 other means the identities of individuals with discoverable information, that did not occur in this
3 case.

4 **C. Plaintiff's Failure to Disclose or Identify Any Individuals with Knowledge of or**
5 **Documents in Support of Her Allegations of Physical injury Was Not Substantially**
6 **Justified or Harmless**

7 Defendants contend that Plaintiff Goins' failure to disclose her claims of physical injuries
8 and/or medical treatment for such injuries until her deposition on May 15, 2015 – only two weeks
9 before the non-expert discovery cutoff – has severely harmed their ability to fully investigate her
10 claims and adequately defend their case. (*See* Docs. 51-1, p. 5; 52, p. 1.) Had Defendants been
11 given timely notice, they would have taken steps to subpoena Plaintiff Goins' medical records,
12 taken her medical provider's deposition, and/or scheduled an Independent Medical Examination.
13 (Docs. 51-1, p. 5; 51-7, ¶ 10; 52, p. 1, 52-1, p. 2.) Defendants contend that they have been
14 subjected to unfair and prejudicial surprise, and that Plaintiff Goins' failure to disclose this
15 information is neither justified nor harmless. (Doc. 51, p. 5.)

16 “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any
17 information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Deckers*
18 *Outdoor Corp.*, 259 F.3d at 1106. If the party's failure to disclose the required information is
19 substantially justified or harmless, however, the information may still be introduced. Fed. R. Civ.
20 P. 37(c)(1). The party facing sanctions bears the burden of proving that its failure to disclose the
21 required information was substantially justified. *R & R Sails, Inc.*, 673 F.3d at 1246.

22 The failure to disclose the identity of any individual in possession of discoverable
23 information regarding Plaintiff Goins' physical injuries or to describe in any way writings or
24 documents in support of her claims of physical injuries – namely, her treating physician of nearly
25 a decade, as revealed during her deposition – is not substantially justified. During her deposition,
26 Plaintiff Goins stated that she saw her treating physician of around ten years, Dr. Marie Hinesly, at
27 the time of the incidents of the Complaint and after, and testified that she sought treatment with
28 Dr. Hinesly “in regards to the problems [she] was having . . . stomach problems and ulcers” as a
result of stress caused by the incidents of the Complaint. (Goins Depo. Tr. at 94:16-24; 95:8-23.)

1 Plaintiff specifically testified that this “information was provided to [her] attorney in regards to
2 [her] doctor.” (Goins Depo. Tr. at 205:2-8.) It is unclear why this information, passed on to her
3 attorney, was then never included in her initial disclosures or in any sworn discovery response. At
4 the very least, Defendants should have been informed of Plaintiff’s allegations of “stomach
5 problems” and “ulcers” prior to her deposition, so that they could have had the opportunity to
6 investigate her claims prior to deposing her.

7 The only justification proffered by Plaintiff Goins is that her counsel has been ill for an
8 extended amount of time.³ That does not excuse or justify the omission. “Mutual knowledge of
9 all the relevant facts gathered by both parties is essential to proper litigation.” *Hickman v. Taylor*,
10 329 U.S. 495, 506-07 (1947). The federal rules of discovery “are designed to narrow and clarify
11 the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing
12 surprise.” *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) (citing *Hickman*, 329
13 U.S. at 507). The failure to reveal Plaintiff Goins’ claims of stomach problems and ulcers –
14 physical injuries suffered as a result of the incidents of the Complaint – goes to the question of
15 damages. A disregard for the federal discovery rules creates the exact “trial by ambush” which
16 those rules are designed to prevent. *Shelak*, 581 F.2d at 1159.

17 Nor has Plaintiff Goins shown that the failure to disclose was harmless. *Yeti by Molly*, 259
18 F.3d at 1107 (“Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove
19 harmlessness”). Plaintiff Goins’ revelation during her deposition gave Defendants only fourteen
20 calendar days to subpoena her medical records, subpoena her treating physical for a deposition,
21 and to schedule an Independent Medical Evaluation. Significantly, this disclosure at the eleventh
22 hour prevented Defendants from adequately investigating the extent and veracity of Plaintiff
23 Goins’ claims of physical injuries *prior* to her deposition, thereby denying Defendants the
24 opportunity to question her about these injuries or her medical records during her deposition.
25 With such limited ability to fully investigate Plaintiff Goins’ claims of “stomach problems” and
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27
28 ³ Plaintiff’s counsel represented at the informal discovery dispute conferences on April 22 and June 17, 2015, and in his letter to the Court on June 22, 2015, that his health concerns are ongoing, serious, and recurrent.

1 “ulcers,” Defendants’ ability to fully defend themselves against these specific damages has
2 undoubtedly been prejudiced.

3 For all these reasons, Plaintiff Goins’ failure to disclose her alleged physical injuries or
4 medical records was neither substantially justified nor harmless.

5 **D. Sanctions in the Form of Exclusion of Evidence of Plaintiff Goins’ Alleged Physical**
6 **Injuries Is Warranted**

7 To determine whether the introduction of evidence should be precluded pursuant to
8 Rule 37, the Court considers: “(1) the surprise to the party against whom the evidence would be
9 offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the
10 evidence would disrupt trial; (4) the importance of the evidence; and (5) the nondisclosing party’s
11 explanation for it[s] failure to disclose the evidence.” *Goold v. Hilton Worldwide*, 1:13-CV-
12 00438-JLT, 2014 WL 4629083 at *2 (E.D. Cal., Sept. 15, 2014) (quoting *San Francisco*
13 *Baykeeper v. West Bay Sanitary Dist.*, 791 F.Supp.2d 719, 733 (N.D. Cal. 2011)).

14 As discussed above, prior to testifying she had suffered “stomach problems” and “ulcers”
15 as a result of the events of the Complaint during her deposition on May 15, 2015, Plaintiff Goins
16 repeatedly failed to apprise Defendants that she had sustained any sort of physical injury, failed to
17 identify any medical personnel or treating physician with knowledge of these injuries, and failed
18 to identify or produce any medical records in support of her claims of these injuries in either her
19 Rule 26 Initial Disclosures or in any response to Defendants’ written discovery. Defendants were
20 thereby deprived of the ability to even partially investigate Plaintiff Goins’ claims of physical
21 injuries prior to her deposition and prior to the cutoff of non-expert discovery.

22 Further, Plaintiff Goins’ failure to disclose information regarding her alleged “stomach
23 problems” and “ulcers,” deprived Defendants of the opportunity to subpoena Plaintiff Goins’
24 medical records prior to her deposition to question her regarding these specific alleged injuries,
25 take her medical provider’s deposition, schedule an Independent Medical Examination, and retain
26 an expert to render an opinion and testify on the extent and veracity of these specific alleged
27 injuries.

28 //

1 Plaintiff Goins' allegations of physical injuries are relevant to her damages, and
2 Defendants have been deprived of the opportunity to adequately mount a defense at trial. Even
3 giving Plaintiff Goins the benefit of the doubt and extending her counsel wide latitude due to his
4 ongoing health concerns, Plaintiff Goins failed to meet her obligation of candid disclosure without
5 substantial justification. Exclusion of evidence regarding Plaintiff Goins' allegations of physical
6 injuries of "stomach problems" and "ulcers" is warranted by the circumstances of the case, and
7 such sanction is within this Court's discretion to grant to remedy the harm to Defendants' case.
8 *See Goold*, 2014 WL 4629083 at *2-4.

9 **E. Plaintiffs' Request for a Six-Month Extension of Time Is Denied**

10 Counsel submitted a letter on June 22, 2015, detailing his ongoing health concerns and
11 seeking a six-month extension of the schedule discovery and trial schedule. The discovery
12 schedule, however, has already been modified to accommodate Plaintiffs and Plaintiffs' counsel's
13 recurrent health issues, and the Court is mindful that trial in this matter remains set for February of
14 2016. (*See Docs. 37 (Scheduling Order); 39 (Stipulation and Order Extending Non-Expert*
15 *Discovery Cut-Off); 50 (Stipulation and Order Extending Discovery Cut-Off); 55 (Amended*
16 *Order Extending Discovery Cut-Off).)*

17 Plaintiffs' counsel was advised in the informal discovery dispute conference on June 17,
18 2015, that an additional extension of time of six months would not be entertained and to retain
19 replacement counsel if he was unable to litigate this matter in a timely manner due to his ongoing
20 health concerns. (Doc. 54.) Plaintiffs' counsel represented that he understood this admonition.
21 However, Plaintiff has since contacted the Court by email to request an additional six month
22 extension of time in all matters.

23 The Court notes that the Complaint was filed nearly two years ago on August 9, 2013.
24 (Doc. 1.) Plaintiffs' counsel's request for a six month stay of proceedings to resolve his ongoing
25 health issues places the Court in the same position as his prior request – there is no guarantee that,
26 in six months' time, Plaintiffs' counsel will be able to litigate the case. If replacement counsel is
27 sought in the immediate future, new counsel will have ample time to review the case and prepare
28 for trial. However, if the Court were to grant Plaintiffs' counsel's request for a six month stay,

1 and replacement counsel were then retained, the case would be subject to further delays to allow
2 replacement counsel adequate time to review the case and prepare for trial.

3 If Plaintiffs' counsel truly "is unable to respond to, read, or review" the pleadings,
4 arguments, and evidence necessary to litigate this case, replacement counsel is necessary to keep
5 this case on track for timely litigation and resolution. As such, Plaintiffs' request for a six-month
6 extension of time and stay of proceedings is DENIED.

7 **V. CONCLUSION**

8 For the reasons stated above, IT IS ORDERED that Defendant County of Merced's Motion
9 for Exclusion of Evidence as Sanctions is GRANTED. No evidence or testimony regarding
10 Plaintiff Goins' allegations of stomach problems or ulcers will be introduced in any future
11 discovery motion, motion for summary judgment, or at trial.

12 Further, Plaintiffs' request for a six-month extension of time and stay of proceedings is
13 DENIED.

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15 IT IS SO ORDERED.

16 Dated: June 29, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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