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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

WILLIAM LEE JOHNSON, et al.,

Plaintiffs,

v.

NATURAL GAS FUEL SYSTEMS, INC.  
D.B.A. MOMENTUM FUEL  
TECHNOLOGY, et al.,

Defendants.

Case No. 1:19-cv-00105-SAB

**ORDER RE EXCLUSION OF MOMENTUM'S  
RETRIEVAL DAMAGES**

(ECF Nos. 280, 285)

**I.**

**INTRODUCTION**

Currently before the Court is Defendant Carleton Technologies, Inc.'s ("Cobham") request that the Court preclude evidence of damages incurred by Natural Gas Fuel Systems, Inc. d.b.a. Momentum Fuel Technology ("Momentum") relating to Momentum's recall of Cobham cylinders due to Momentum's failure to disclose such damages in its Rule 26 disclosures. Based upon the briefs submitted by the parties, as well as the Court's record, for the reasons explained herein, the Court finds Momentum's violation of Rule 26 warrants the sanction of precluding evidence at trial regarding the damages associated with Momentum's retrieval of Cobham's cylinders ("retrieval damages").<sup>1</sup>

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<sup>1</sup> This Court's ruling on Cobham's motion *in limine* number seven otherwise stands: A party may be able to introduce underlying facts of Momentum's retrieval of tanks only to the extent it is relevant to a claim or crossclaim in this action

1 Momentum brings crossclaims against Cobham for (1) express indemnity relating to the  
2 Supply Agreement between Momentum and Cobham, the terms of which provide that Cobham  
3 would indemnify and defend Momentum for Plaintiffs' claims; (2) breach of contract relating to  
4 the Supply Agreement between Momentum and Cobham for Cobham's failure to defend,  
5 indemnify and hold Momentum harmless for the claims brought by Plaintiffs; (3) total equitable  
6 indemnity against Cobham in the event Momentum is found liable to Plaintiffs, (4) contribution  
7 against Cobham in the event Momentum is found liable to Plaintiffs, and (5) declaratory relief  
8 regarding Cobham's alleged duty to indemnify and defend Momentum relating to Plaintiffs'  
9 lawsuit. (ECF No. 28.)

10 Momentum's Rule 26 disclosure, as it relates to damages, states "Momentum has filed a  
11 cross-claim against Carleton Technologies, Inc. alleging causes of action for express contractual  
12 indemnity, breach of contract . . . . Momentum has not yet calculated its damages, but they are  
13 based on Carleton Technologies, Inc.'s indemnification of any losses that Momentum sustains as a  
14 result of Plaintiff's First Amended Complaint against Momentum, including attorney's fees and  
15 costs." (ECF No. 285 at 3.) Cobham avers Momentum's initial disclosure focuses only on damages  
16 stemming from Plaintiffs' first amended complaint, not from damages related to any costs incurred  
17 from the recall of any cylinders not involved in Plaintiffs' complaint. Cobham argues Momentum  
18 failed to disclose such damages in conformance with Rule 26 and requests that any evidence related  
19 to Momentum's purported retrieval damages be excluded.

20 Momentum does not dispute that it failed to disclose a computation of damages related to  
21 the retrieval of Cobham tanks. (ECF No. 280.) Momentum concedes it did not supplement its Rule  
22 26 disclosure. Momentum avers, however, its nondisclosure was harmless because Cobham had  
23 sufficient notice of damages associated with the retrieval of the Cobham tanks. Alternatively,  
24 Momentum requests that if the Court declines to allow Momentum to present evidence of the  
25 specific amount of retrieval expenses as damages at trial, the jury should be allowed to determine  
26 whether Momentum is entitled to recover reimbursement for retrieval expenses.

27 \_\_\_\_\_  
28 and subject to other evidentiary objections. (ECF No. 206 at 8.)



1 damages. Momentum further argues Cobham was aware after the subject incident on December  
2 21, 2018 that the tanks in the field were a safety risk and therefore required retrieval and  
3 replacement. Momentum also contends that Cobham was put on notice of its purported retrieval  
4 damages when Momentum filed its crossclaim against Cobham for breach of contract.

5 The Court is unpersuaded that Cobham’s purported pre-litigation knowledge of the  
6 *potential* for retrieval damages renders Momentum’s failure to disclose “a computation of each  
7 category of damages *claimed* by the disclosing party” harmless. Fed. R. Civ. P. 26(a)(1)(A)(iii)  
8 (emphasis added). Holding such would allow parties to routinely circumvent disclosure under Rule  
9 26. Further, Momentum’s prayer for damages in its cross-complaint requests, in pertinent part, “[a]  
10 judicial determination that Cobham breached the Supply Agreement entered into by and between  
11 failing to provide Momentum with a defense and indemnity, and for all damages flowing  
12 therefrom.” (ECF No. 28 at 29.) The Court agrees with Cobham that neither the facts alleged in  
13 Momentum’s crossclaims nor its prayer for damages places Cobham on sufficient notice that “all  
14 damages flowing” from failing to provide Momentum with a defense and indemnity to Plaintiffs’  
15 claims included costs associated with Momentum’s retrieval of all Cobham tanks in the field  
16 following the subject incident on December 21, 2018. Momentum’s failure to disclose a  
17 computation of retrieval damages or otherwise provide notice of such costs did not provide Cobham  
18 sufficient notice that such damages were being sought.

19 Momentum’s nondisclosure of retrieval damages is not harmless, particularly given the  
20 procedural posture of this action. Cobham contends it was not afforded the opportunity over the  
21 past six years of litigation to conduct discovery on any claim for Momentum’s additional costs  
22 related to retrieving Cobham cylinders. Cobham avers it only learned of Momentum’s claim while  
23 the parties were drafting a proposed verdict form on the eve of trial. (ECF No. 285.) Indeed,  
24 Cobham’s instant request to exclude evidence comes mid-trial following Momentum’s attempt to  
25 elicit testimony regarding retrieval damages. Momentum’s nondisclosure until trial therefore  
26 prevented Cobham from being able to make an informed decision about settlement or adequately  
27 prepare a proportional defense for trial. See Boswell v. Costco Wholesale Corp., No. SA-CV-  
28 1600278-DOC-DFMX, 2017 WL 2727769, at \*1 (C.D. Cal. Jan. 19, 2017) (noting that the purpose

1 of Rule 26 is to accelerate the exchange of basic information necessary to prepare for trial or make  
2 an informed decision about settlement.). The Court finds Momentum's untimely claim of an  
3 unspecified amount of retrieval damages would prejudice Cobham by, in effect, adding a new  
4 breach of contract theory during trial. See Lanard Toys Ltd. v. Novelty, Inc., 375 F. App'x 705,  
5 713 (9th Cir. 2010) (noting factors courts use to determine justification or harmlessness include  
6 prejudice or surprise to the party against whom the evidence is offered and the likelihood of  
7 disruption of the trial). Such theory would disrupt and prolong the ongoing trial. The Court finds  
8 Momentum has failed to meet its burden to show its failure to comply with Rule 26 is neither  
9 substantially justified nor harmless.

10 Here, the harm from Momentum's disclosure cannot be easily remedied. Discovery has  
11 long closed, and trial is ongoing. The Court will not reopen discovery through witnesses providing  
12 live testimony. The Court determines no less drastic sanction than exclusion of evidence related to  
13 retrieval damages at trial will remedy the prejudice to Cobham caused by Momentum's failure to  
14 comply with its disclosure requirements. See Fed. R. Civ. P. 37(c)(1).

15 **III.**

16 **CONCLUSION AND ORDER**

17 Accordingly, it is HEREBY ORDERED that evidence related to the costs associated with  
18 Momentum's retrieval of Cobham's tanks is EXCLUDED.

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20 IT IS SO ORDERED.

21 Dated: January 28, 2025



22 STANLEY A. BOONE  
23 United States Magistrate Judge  
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