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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Ronald L. Pronechen,	)	CV 06-01726 LEW
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER Re: Defendant's</b>
	)	<b>Motion in Limine No. 1</b>
	)	<b>[127], Defendant's</b>
	)	<b>Motion in Limine No. 2</b>
Secretary of U.S.	)	<b>[128], and Defendant's</b>
Department of Homeland	)	<b>Motion in Limine No. 3</b>
Security,	)	<b>[129]</b>
	)	
	)	
Defendant.	)	
	)	
_____	)	

Defendant's Motion *in Limine* No. 1 [127],  
Defendant's Motion *in Limine* No. 2 [128], and  
Defendant's Motion *in Limine* No. 3 [129] were set for  
hearing on December 20, 2010. Having taken the matters  
under submission on December 13, 2010, and having  
reviewed all papers submitted pertaining to these  
Motions, the Court **NOW FINDS AND RULES AS FOLLOWS:**

The Court **DENIES** Defendant's Motion *in Limine* No. 1  
to exclude evidence of Plaintiff's alleged damages.

1 I. Defendant's Motion in Limine No. 1 to Exclude  
2 Evidence of Plaintiff's Alleged Damages

3 A. Legal Standard

4 Federal Rule of Civil Procedure, Rule  
5 26(a)(1)(A)(iii) states, in relevant part:

6 [A] party must, without awaiting a discovery  
7 request, provide to the other parties: (iii) a  
8 computation of each category of damages claimed  
9 by the disclosing party--who must also make  
10 available for inspection and copying as under  
11 Rule 34 the documents or other evidentiary  
12 material, unless privileged or protected from  
13 disclosure, on which each computation is based,  
14 including materials bearing on the nature and  
15 extent of injuries suffered.

16 Fed. R. Civ. P. 26(a)(1)(A)(iii).

17 Federal Rule of Civil Procedure 37(c)(1) states  
18 that if a party fails to provide information or  
19 identify a witness as required by Rule 26(a), "the  
20 party is not allowed to use that information or witness  
21 to supply evidence ... at a trial, unless the failure  
22 was substantially justified or harmless." Fed. R. Civ.  
23 P. 37(c)(1). Under Rule 37, the party facing sanctions  
24 therefore has the burden of showing that a failure to  
25 comply with Federal Rule of Civil Procedure 26 was  
26 "substantially justified or harmless." Yeti by Molly,  
27 Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9th  
28 Cir. 2001). The District Courts have broad discretion

1 in imposing discovery sanctions under Federal Rule of  
2 Civil Procedure 37. Ritchie v. United States, 451 F.3d  
3 1019, 1026 (9th Cir. 2006).

4 B. Analysis

5 Defendant DHS argues that any introduction of  
6 evidence of Plaintiff's alleged damages at trial should  
7 be excluded because Plaintiff has failed to provide the  
8 Defendant with the required calculation of damages as  
9 required under Federal Rule of Civil Procedure, Rule  
10 26(a)(1)(A)(iii). The Court **DENIES** DHS's Motion *in*  
11 *Limine* No. 1 to exclude evidence of Plaintiff's alleged  
12 damages.

13 The Court finds that while Plaintiff failed to  
14 fully meet his disclosure requirements, Plaintiff has  
15 substantially justified this failure. The Court finds  
16 that Plaintiff substantially complied with his Rule 26  
17 disclosure obligations by identifying to the Defendant  
18 the formula he relied upon in calculating his loss and  
19 providing to Defendant DHS the data regarding his  
20 interim earnings.

21 Moreover, Plaintiff is not seeking monetary damages  
22 from Defendant DHS, rather, Plaintiff seeks equitable  
23 relief from the Court in the form of retroactive  
24 reinstatement in the event that he is successful in his  
25 age discrimination claim. Given that Plaintiff  
26 repeatedly requested from Defendant DHS data necessary  
27 to compute a portion of his financial loss  
28 calculations, that Defendant was on notice about

1 Plaintiff's damages theory, and that Plaintiff seeks no  
2 monetary damages but rather retroactive reinstatement,  
3 the Court finds that Plaintiff's untimely disclosure of  
4 his damages calculation was substantially justified.  
5 Accordingly, the Court **DENIES** DHS's Motion *in Limine*  
6 No. 1 to exclude evidence of Plaintiff's alleged  
7 damages on the basis of Rule 26.

8 However, the Court notes that the admission of this  
9 evidence is still subject to other evidentiary  
10 objections that may be raised by the Defendant DHS at  
11 trial.<sup>1</sup>

12 II. Defendant's Motion *in Limine* No. 2 to Exclude  
13 Cumulative Testimony Regarding Equitable Tolling

14 A. Legal Standard

15 Under Federal Rules of Evidence, Rule 403, relevant  
16 evidence may be excluded if its admission would result  
17 in needless presentation of cumulative evidence. Fed.  
18 R. Evid. 403.

19 B. Analysis

20 Plaintiff has identified as witnesses for trial  
21 Bryant Bickford, Ronald Brewster, Beverly Cullop,  
22 Catherine Hagler, Stephen Jones, Maria Juarbe, and  
23 Gerald Wilson. Defendant DHS argues that to the extent  
24 that these witnesses will be offered to only establish

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25  
26 <sup>1</sup> While Defendant DHS argues in its papers that  
27 Plaintiff's calculation of damages lacks foundation,  
28 Defendant does not adequately address this issue in its  
papers and therefore the Court will not consider this  
argument at this juncture.

1 that all of them attended the April 18, 2000 training  
2 and that none of them remember whether or not Ms.  
3 Allmon discussed the 45-day deadline, the Court should  
4 exclude these witnesses from testifying at trial  
5 because their testimony would be cumulative of the  
6 facts to which the parties already have stipulated to  
7 in the Joint Pretrial Statement.

8 The Court **GRANTS** Defendant DHS's Motion *in Limine*  
9 No. 2 to exclude cumulative testimony regarding  
10 equitable tolling. More specifically, the Court  
11 excludes as cumulative the trial testimony of Bryant  
12 Bickford, Ronald Brewster, Beverly Cullop, Catherine  
13 Hagler, Stephen Jones, Maria Juarbe, and Gerald Wilson  
14 to the extent that they are only being offered to  
15 establish that they attended the April 18, 2000  
16 training and do not remember whether or not Ms. Allmon  
17 discussed the 45-day deadline for contacting an EEO  
18 counselor.

19 The Court finds that testimony of witnesses  
20 regarding a fact in which the parties have stipulated  
21 to in the Joint Pretrial Statement would be cumulative  
22 and therefore subject to exclusion. Accordingly, the  
23 Court **GRANTS** DHS's Motion *in Limine* No. 2 to exclude  
24 cumulative testimony regarding equitable tolling.

25 III. Defendant's Motion *in Limine* No. 3 to Exclude  
26 Plaintiff's Exhibits 2E, 9, 10, and 11; Objections  
27 to New Exhibits 3, 5A, 7, 8, 12, and 13

28 A. Legal Standard

1 Federal Rule of Evidence 401 provides that relevant  
2 evidence is any "evidence having any tendency to make  
3 the existence of any fact that is of consequence to the  
4 determination of the action more probable or less  
5 probable that it would be without the evidence." Fed.  
6 R. Evid. 401. Federal Rule of Evidence 402 provides  
7 that all irrelevant evidence is not admissible. Fed. R.  
8 Evid. 402.

9 Federal Rule of Evidence 403 provides that relevant  
10 evidence may be excluded "if its probative value is  
11 substantially outweighed by the danger of unfair  
12 prejudice, confusion of the issues, or misleading the  
13 jury, or by considerations of undue delay, waste of  
14 time, or needless presentation of cumulative evidence."  
15 Fed. R. Evid. 403.

#### 16 B. Analysis

17 Defendant DHS argues that Plaintiff's Exhibits 2E,  
18 9, 10, and 11 should be excluded. DHS contends that  
19 each of these exhibits are irrelevant and therefore  
20 inadmissible. Furthermore, Defendant DHS also objects  
21 to Plaintiff's new Exhibits 3, 5A, 7, 8, 12, and 13.  
22 The Court **GRANTS IN PART AND DENIES IN PART** Defendant  
23 DHS's Motion *in Limine* No. 3 to exclude Plaintiff's  
24 Exhibits 2E, 9, 10, and 11.

#### 25 I. Exhibit 2E

26 Plaintiff has identified as Exhibit 2E emails  
27 exchanged by Arthur Clabby and Catherine Hagler dated  
28 November 17, 2003. The Court **GRANTS** Defendant DHS's

1 Motion *in Limine* No. 3 to exclude Exhibit 2E. The  
2 Court finds that this exhibit is not relevant to the  
3 job announcements at issue in this case.

4 ii. Exhibit 9

5 Plaintiff has identified as Exhibit 9 an email from  
6 Wendell Shingler dated May 27, 2004. The Court **DENIES**  
7 Defendant DHS's Motion *in Limine* No. 3 to exclude  
8 Plaintiff's Exhibit 9. The Court finds that this  
9 exhibit is relevant in proving the merits of  
10 Plaintiff's age discrimination claim. Moreover, the  
11 Court finds that Defendant's argument to exclude this  
12 exhibit on hearsay grounds is equally without merit.  
13 Under FRE 801(d)(2), a statement made by a party's  
14 agent or employee concerning a matter within the scope  
15 of employment, made during the relationship is  
16 considered a party admission and nonhearsay and  
17 therefore admissible. F.R.E. 801(d)(2). Accordingly,  
18 the Court **DENIES** Defendant DHS's Motion *in Limine* No. 3  
19 to exclude Plaintiff's Exhibit 9.

20 iii. Exhibits 10 and 11

21 Plaintiff has identified an email message from  
22 Joseph Loerzel to Kenneth Ehinger dated October 28,  
23 2005, and an email message from Paul Durette to Bruce  
24 Hori dated November 02, 2005 as Exhibits 10 and 11,  
25 respectively. Plaintiff has withdrawn both Exhibits 10  
26 and 11. Accordingly, the Court **DENIES AS MOOT** Defendant  
27 DHS's Motion *in Limine* No. 3 to exclude Plaintiff's  
28 Exhibits 10 and 11.

