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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SONJA GABALES individually,
and as Personal Representative
of the Estate of Philip
Gabales; L.C., a minor, by and
through her Guardian Ad Litem,
SONJA GABALES,

NO. CIV. S-07-1346 LKK/DAD

Plaintiffs,

v.

O R D E R

COUNTY OF SAN JOAQUIN, a
municipal corporation; ROBERT
HEIDLEBACH, in his capacity as
Sheriff for the COUNTY OF SAN
JOAQUIN; ROBERT FOPPIANO,
individually and in his capacity
as a deputy sheriff for the
COUNTY OF SAN JOAQUIN; WILLIAM
INSKIP, individually; MATTHEW
D'VALENTINE, individually, and
DOES 1-50, inclusive,

Defendants.

_____ /

Plaintiffs commenced this suit in July, 2007, asserting
various civil rights claims against defendants relating to the
death of their husband and father during his attempted arrest.
According to the court's Amended Scheduling Order, the deadline for

1 expert disclosures was February 2, 2009. Pending before the court
2 is plaintiffs' motion to strike the late-filed reports of purported
3 defense experts Stephen Karch and Craig Enos. The court resolves
4 the motion on the papers and for the reasons stated herein, grants
5 the motion in part.

6 **I. BACKGROUND**

7 This suit commenced in July, 2007 and the court issued a
8 Scheduling Order in December 2007. The order provides,

9 All discovery . . . shall be conducted as to be
10 completed by March 3, 2009. The word "completed" means
11 that all discovery shall have been conducted so that all
12 depositions have been taken and any disputes relative to
13 discovery shall have been resolved by appropriate order
14 if necessary [A]ll counsel are to designate in
15 writing and file with the court and serve upon all other
16 parties a final list of the names of all experts that
17 they propose to tender at trial not later than sixty
18 (60) days before the close of discovery herein
19 established. At the time of designation, all experts
20 shall submit a written report. . . . All experts so
designated are to be fully prepared to render an
informed opinion at the time of designation so that they
may fully participate in any deposition taken by the
opposing party. . . . An expert witness not appearing on
said lists will not be permitted to testify unless the
party offering the witness demonstrates: (a) that the
necessity of the witness could not have been reasonably
anticipated at the time the lists were exchanged; (b)
the court and opposing counsel were promptly notified
upon discovery of the witness; and (c) that the witness
was promptly proffered for deposition.

21 Order, Dec. 4, 2007 at 6-7. Discovery motions were to be brought
22 so as to be heard not later than February 3, 2009. Id. The
23 Scheduling Order was modified, per the parties' stipulation, on
24 December 12, 2008. The amended order provided that expert
25 designations and reports were to be exchanged not later than
26 February 2, 2009. Order, Dec. 12, 2008 at 1. Discovery closed on

1 June 2, 2009. The Pretrial Conference and trial dates were
2 continued to December 7, 2009 and March 9, 2010, respectively.

3 The parties filed their expert disclosures on February 2,
4 2009. Defendants identified, among others, Dr. Stephen Karch,
5 provided as an expert in toxicology and pathology, and Craig Enos,
6 identified as an expert on the value of plaintiffs' damages.
7 Defendants filed a report of Dr. Karch on that day. Defendants also
8 filed a declaration of Mr. Enos. In his declaration, Enos
9 identified himself as a rebuttal expert and stated that he could
10 not file a report until having reviewed the report of plaintiffs'
11 economic expert. See Decl. of Craig Enos at 2.

12 On March 31, 2009, defendants filed a supplemental expert
13 report by Dr. Karch. Defendants offered no explanation for the need
14 to supplement the earlier report. In the supplemental report, Dr.
15 Karch stated that in preparing his opinion he reviewed and relied
16 on the same material that formed the basis of his initial report.
17 See Decl. of Stephen Karch (Doc. No. 43) at 2; Revised Report (Doc.
18 No. 52) at 2. The revision contains four changes to the original
19 report, all of which are omissions of sentences that had been in
20 the original report. See id. Dr. Karch has declared that the
21 omitted sentences had been erroneously carried over from report
22 that he had written in another case. Decl. of Dr. Stephen Karch in
23 Opp'n to Mot. to Strike ("Karch Decl.") ¶¶ 4-5. Plaintiffs did not
24 depose Dr. Karch after the disclosure of the supplemental report,
25 although discovery remained open until June 2, 2009. Decl. of Mark
26 Berry In Opposition to Pls.' Mot. to Strike ("Berry Decl.") ¶ 6

1 On June 1, 2009, defendants filed a report by Enos. It
2 provides that it is intended to rebut the testimony of economic
3 damages offered by Robert Johnson. Johnson's expert report had been
4 filed by plaintiffs on February 2, 2009. Although defendants argue
5 that the June 1 Enos report was offered in rebuttal to a
6 supplemental report offered by Johnson at his deposition on May 26,
7 2009, see Defs.' Joint Opp'n to Pls.' Mot. to Strike at 6, they
8 have offered no evidence that Johnson produced a supplemental
9 report at his deposition. Enos' June 1 report does not reflect that
10 he relied on Johnson's deposition or supplemental report, if any;
11 instead, Enos indicated that he relied on Johnson's February 2
12 report. Supplemental Joint Defense Expert Witness Disclosure (Doc.
13 No. 53) Ex. 1 (Enos Report) at 6-7.

14 **II. ANALYSIS**

15 Federal Rule of Civil Procedure 26(a)(2)(C) provides that, in
16 the absence of a contrary court order, a party may disclose the
17 identity of an expert whose testimony is intended only to
18 contradict or rebut evidence offered by another party's expert
19 thirty days after disclosure of the other party's expert. The
20 court's Scheduling Order served to alter the deadline set forth by
21 Rule 26 by requiring that "all" experts be disclosed by a certain
22 date. "All" is not ambiguous and encompasses rebuttal experts. The
23 Scheduling Order also provides for a narrow exception to this
24 deadline, however, allowing that an expert may be disclosed beyond
25 the deadline if, *inter alia*, "the necessity of the witness could
26 not have been reasonably anticipated at the time the lists were

1 exchanged." Order, Dec. 4, 2007 at 6-7.

2 Plaintiffs contend that the supplemental report of Karch and
3 the report of Enos are untimely under the court's Scheduling Order
4 and the Federal Rules. Defendants argue that plaintiffs' motion is
5 procedurally improper, that the reports were appropriately filed
6 according to the Federal Rules, and that their filing did not
7 prejudice plaintiffs.

8 First, the motion is not procedurally improper so as to
9 warrant dismissal. Defendants direct the court to Local Rule 37-
10 251(b), which requires that any motion involving a discovery
11 dispute relating to Federal Rules of Civil Procedure 26 through 37
12 by brought only after the movant has attempted to informally
13 resolve the dispute with the other party. If that process does not
14 resolve the dispute, the parties must file a joint statement
15 setting forth their disagreement. Local Rule 37-251(b). No joint
16 statement has been filed concurrent with this motion and defendants
17 have tendered evidence that plaintiffs did not attempt to meet and
18 confer prior to filing the motion. Berry Decl. ¶¶ 3-5.

19 Notwithstanding this, denial of the motion is not the proper
20 remedy. According to the Local Rules, failure to file a joint
21 statement of a discovery dispute results in postponement of the
22 hearing on the motion, not its denial or sanctions, as defendants
23 also urge. See Local Rule 37-251(a). Here, given that Law and
24 Motion closes next week and the Pretrial Conference is scheduled
25 to occur in the subsequent months, postponement of the resolution
26 of the motion does not appear a helpful solution. Instead, the

1 court opts to resolve the motion on the merits.

2 With regards to Dr. Karch's supplemental report, the court
3 concludes that plaintiffs' motion should be denied. Pursuant to
4 Federal Rule of Civil Procedure 26(a)(2)(D) and 26(e)(1), parties
5 are required to supplement an initial disclosure when the party
6 learns that information contained in it was incorrect. Here, that
7 appears to have been plainly the case. The amendments to Dr.
8 Karch's report constituted omissions of references to facts that
9 appeared not to relate to this case. See Revised Report (Doc. No.
10 52). Dr. Karch confirmed that these references were erroneously
11 included from another report. Karch Decl. ¶¶ 4-5. This is the type
12 of materially incorrect expert disclosure that must be remedied per
13 Rule 26(e)(1)-(2). Accordingly, defendants did not act improperly
14 in offering Dr. Koch's supplemental report.

15 Moreover, Dr. Koch's supplemental report was filed and served
16 on March 31, 2009, approximately two months before the close of
17 discovery and not long after the disclosure of the initial report
18 in February 2009. As such, plaintiffs had an opportunity to depose
19 Dr. Koch or conduct other discovery as needed, in response to the
20 supplemental report. This mitigated any prejudice plaintiffs
21 suffered by the supplemental report.

22 Plaintiffs' motion must be granted, however, as to Enos'
23 supplemental report filed June 1, 2009. Defendants assert in their
24 opposition to plaintiffs' motion that this report was filed in
25 response to the deposition of plaintiffs' expert Robert Johnson on
26 May 26, 2009 and a report he assertedly produced at that time.

1 However, Enos' supplemental report does not state that either of
2 those sources were relied on in its drafting. See Supplemental
3 Joint Expert Disclosure (Doc. No. 53) at 6-7. Additionally, by
4 filing the supplemental report the day before discovery closed,
5 defendants undoubtedly prejudiced plaintiffs. Defendants never
6 sought leave to file an untimely report or to amend the Scheduling
7 Order nor is Enos's supplemental report the type of mandatory
8 amendment to an initial disclosure required under Rule 26(e). As
9 such, plaintiffs' motion is granted as to Enos's June 1, 2009
10 supplemental expert report.

11 **III. CONCLUSION**

12 For the reasons stated herein, plaintiffs' motion to strike
13 defendants' late-disclosed expert reports is GRANTED IN PART. The
14 supplemental report of Craig Enos (Doc. No. 53) is STRICKEN.

15 IT IS SO ORDERED.

16 DATED: August 28, 2009.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT