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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KRIS ROBINSON, an individual,  
Plaintiff,  
v.  
HD SUPPLY, INC., a  
corporation; and DOES 1  
through 50, inclusive,  
Defendants.

No. 2:12-cv-00604-GEB-AC

**ORDER ON MOTIONS IN LIMINE**

Defendant, in two motions in limine, seeks to exclude expert witness testimony of healthcare practitioners Douglas R. Wood, Ph.D., Robert Carr, R.N., Elizabeth Willerup, N.P., Cherie Coddington, C.S.W., and Brian Dahmen, Ph.D. under Federal Rules of Civil Procedure ("Rules") 26 and 37, arguing, inter alia, that Plaintiff's disclosure of these expert witnesses was deficient. (Def.'s Mot. in Limine ("MIL") No. 2 2:17-21, ECF No. 74; MIL No. 3 2:14-24, ECF No. 77.)

**I. BACKGROUND**

The status order in this case prescribes the following expert disclosure deadline: initial expert witnesses were to have been disclosed on or before February 15, 2013, and "contradictory and/or rebuttal expert disclosure" on or before March 15, 2013. (Status (Pretrial Scheduling) Order 2:14-18, ECF No. 17.)

1 On February 15, 2013, Plaintiff disclosed four non-  
2 retained expert witnesses: Ms. Willerup, Ms. Coddington, and Dr.  
3 Dahmen, and one additional expert since withdrawn. Plaintiff's  
4 disclosure provided the names, addresses, and phone numbers of  
5 each disclosed witness but did not provide further information.  
6 (See Decl. Brian S. Inamine Supp. MIL No. 2 ("Inamine Decl."),  
7 Ex. A 2:1-25, ECF No. 75.)

8 On May 10, 2013, in a supplemental disclosure of expert  
9 witnesses, Plaintiff disclosed two additional non-retained expert  
10 witnesses: Dr. Wood and Mr. Carr. At that time, Plaintiff also  
11 provided the following description of each of the five expert's  
12 anticipated testimony: "This witness is Plaintiff's medical  
13 provider and has knowledge as to Plaintiff's medical diagnosis  
14 and/or treatment." (Id., Ex. B 2:1-13.)

15 Defendant's counsel avers that his "office repeatedly  
16 advised [Plaintiff's counsel] that [Plaintiff's] expert  
17 designations did not include the subject matter and summary of  
18 facts and opinions of the designated experts," but Plaintiff's  
19 counsel "never amended the designations to remedy these defects."  
20 (Inamine Decl. ¶ 6.) The prescribed deadline for completion of  
21 discovery was July 23, 2013. (Status (Pretrial Scheduling) Order  
22 2:7.)

## 23 II. DISCUSSION

### 24 A. Exclusion of Expert Testimony Under Rule 37(c) (1)

25 In Motions in Limine 2 and 3, Defendant seeks orders  
26 "[p]recluding Plaintiff and his attorneys from introducing any  
27 written or oral testimony or opinions from the following" five  
28 non-retained experts: Dr. Wood, Mr. Carr, Ms. Willerup, Ms.

1 Coddington, and Dr. Dahmen. (MIL No. 2 2:17-21; MIL No. 3 2:20-  
2 24.) Defendant argues, inter alia, that Plaintiff's experts  
3 should be excluded because Plaintiff's expert witness disclosures  
4 "failed [to] state the 'subject matter' and 'a summary of facts  
5 and opinions' on which the witnesses are expected to testify, as  
6 required under Rule 26(a)(2)(C)." (MIL No. 2 8:19-22; see MIL No.  
7 3 5:13-14.)

8 Plaintiff rejoins that the aforementioned statement,<sup>1</sup>  
9 included next to each expert's name on Plaintiff's Supplemental  
10 Disclosure of Expert Witnesses, "[s]urely . . . put Defendant on  
11 reasonable notice of the subject matter of their anticipated  
12 testimony." (Pl.'s Opp'n to Def.'s MIL #2 ("Pl.'s Opp'n #2") 6:9-  
13 10, ECF No. 83.; Pl.'s Opp'n to Def.'s MIL #3 ("Pl.'s Opp'n #3")  
14 3:18-19, ECF No. 86.)

15 Rule 26(a)(2) "requires parties to disclose the  
16 identity of any expert witness." Goodman v. Staples The Office  
17 Superstore, LLC, 644 F.3d 817, 824 (9th Cir. 2011). Rule  
18 26(a)(2)(B) requires disclosure of a detailed, written expert  
19 report "if the witness is one retained or specially employed to  
20 provide expert testimony in the case." Fed. R. Civ. P.  
21 26(a)(2)(B). "[A] treating physician is only exempt from Rule  
22 26(a)(2)(B)'s written report requirement to the extent that his  
23 opinions were formed during the course of treatment." Goodman,  
24 644 F.3d at 826. Under Rule 26(a)(2)(C), even when a detailed,  
25 written expert report is not required, a party offering the  
26 expert's testimony must disclose: "(i) the subject matter on

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28 <sup>1</sup> See supra 2 ("This witness is Plaintiff's medical provider and has knowledge  
as to Plaintiff's medical diagnosis and/or treatment.").

1 which the witness is expected to present evidence under Federal  
2 Rule of Evidence 702, 703, or 705; and (ii) a summary of the  
3 facts and opinions to which the witness is expected to testify.”  
4 Fed. R. Civ. P. 26(a)(2)(C). The drafters of Rule 26(a)(2)(C)  
5 contemplated that that this more limited disclosure requirement  
6 would apply to “physicians or other health care professionals.”  
7 Fed. R. Civ. P. 26(a)(2)(C) advisory committee’s note (2010).

8 “Rule 37(c)(1) gives teeth to these requirements by  
9 forbidding the use at trial of any information required to be  
10 disclosed by Rule 26(a) that is not properly disclosed.” Yeti by  
11 Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th  
12 Cir. 2001). “The Advisory Committee Notes describe [Rule  
13 37(c)(1)] as a “self-executing,” “automatic” sanction to  
14 “provide[] a strong inducement for disclosure of material.” Id.  
15 (quoting Fed. R. Civ. P. 37(c) advisory committee’s notes  
16 (1993)).

17 Failure to provide an expert report under Rule 26(a)(2)  
18 is only excused if “the failure was substantially justified or is  
19 harmless.” Fed. R. Civ. P. 37(c)(1). “Among the factors that may  
20 properly guide a district court in determining whether a  
21 violation of a discovery deadline is justified or harmless are:  
22 (1) prejudice or surprise to the party against whom the evidence  
23 is offered; (2) the ability of that party to cure the prejudice;  
24 (3) the likelihood of disruption of the trial; and (4) bad faith  
25 or willfulness involved in not timely disclosing the evidence.”  
26 Lanard Toys, Ltd. v. Novelty, Inc., 375 Fed. App’x 705, 713 (9th  
27 Cir. 2010) (citing David v. Caterpillar, Inc., 324 F.3d 851, 857  
28 (7th Cir. 2003). “In determining whether” expert testimony should

1 be excluded, "the burden is on the party facing the sanction," in  
2 this case, Plaintiff, "to demonstrate that the failure to comply  
3 with Rule 26(a) is substantially justified or harmless." Torres  
4 v. City of L.A., 548 F.3d 1197, 1213 (9th Cir. 2008) (citing  
5 Yeti, 259 F.3d at 1107).

6 While Plaintiff was not required to file a detailed,  
7 written report under Rule 26(a)(2)(B) for his treating healthcare  
8 providers, to the extent he seeks to elicit expert opinion  
9 testimony from these individuals, he was required to disclose the  
10 expected "subject matter" of that testimony and "a summary of the  
11 facts and opinions to which the witness[es] [are] expected to  
12 testify." Fed. R. Civ. P. 26(a)(2)(C). "Courts must take care  
13 against requiring undue detail" in such disclosures, keeping in  
14 mind that these witnesses have not been specially retained and  
15 may not be as responsive to counsel as those who have." Id.  
16 advisory committee's note (2010). Nevertheless, Plaintiff's  
17 disclosures are insufficient under the rule. Plaintiff's  
18 disclosure that these witnesses are "medical provider[s] and have  
19 knowledge as to Plaintiff's medical diagnosis and/or treatment,"  
20 (Inamine Decl.), Ex. A 2:1-25), suggests the subject matter of  
21 these witnesses' testimony but fails to provide a "summary of the  
22 facts and opinions to which the witness[es] are expected to  
23 testify." Fed. R. Civ. P. 26(a)(2)(C). See Pineda v. Cnty. of  
24 S.F., 280 F.R.D. 517, 523 (N.D. Cal. 2012) (holding that a  
25 disclosure stating that non-retained treating physicians "will  
26 present factual and opinionon testimony on causation, diagnosis,  
27 prognosis, [and] extent of [plaintiff's] disability" based on a  
28 review of plaintiff's medical records insufficient under Rule

1 26(a)(2)(C)); see also Gorrell v. Sneath, No. 1:12-cv-0554-JLT,  
2 2013 WL 4517902, at \*3 (E.D. Cal. Aug. 26, 2013) (holding that  
3 identifying "the general topics to which [non-retained experts]  
4 would testify" does not satisfy Rule 26(a)(2)(C)).

5 Plaintiff suggests any deficiency in his expert  
6 disclosures was "substantially justified" because he "had no  
7 opportunity to consult with these non-retained experts to gauge  
8 their capacity to recall Plaintiff's specific diagnosis or  
9 treatment" and thus "it was largely impossible to offer a more  
10 specific summary of facts or opinions." (Pl.'s Opp'n #2 6:11-14;  
11 Pl.'s Opp'n #3 3:20-23.) This conclusory assertion does not  
12 satisfy Plaintiff's burden of demonstrating that he was  
13 substantially justified in failing to disclose a "summary of the  
14 facts and opinions" concerning the expected trial testimony of  
15 each of these witnesses. Fed. R. Civ. P. 26(a)(2)(C)(ii).

16 Plaintiff also contends the disclosures were harmless  
17 since "Defendant previously admitted to this Court that it was  
18 aware of the subject matter and summary of facts and opinions of  
19 Plaintiff's expert witness testimony" because in Defendant's  
20 Opposition to Plaintiff's Motion to Exclude Defendant's Rebuttal  
21 Expert, (ECF No. 57), Defendant argued that its rebuttal "expert  
22 report *directly* contradicts the same subject matter as that  
23 addressed by Plaintiff's experts." (Pl.'s Opp'n #2 6:15-16, 6:19-  
24 20; Pl.'s Opp'n #3 4:10-11, 4:14-15.) Defendant also stated in  
25 that filing:

26 Plaintiff's initial expert designation  
27 confirmed that Plaintiff would be relying  
28 upon his health care providers, but because  
the initial designation was silent as to the  
scope of the experts' opinions [Defendant]

1 and [the rebuttal expert] had to rely upon  
2 Plaintiff's medical records. These records  
3 showed that Plaintiff's experts treated him  
4 for [post-traumatic stress disorder ("PTSD")]  
5 and broadly detailed the experts' analysis of  
6 symptoms and the cause, origin and diagnosis  
7 of the PTSD. Plaintiff and his experts are  
8 attempting to attribute the PTSD, Plaintiff's  
9 mental and emotional problems and everything  
10 relating to PTSD to [Defendant] and  
11 Plaintiff's employment with [Defendant].

12 (Def.'s Opp'n Pl.'s Mot. to Exclude Def.'s Expert 9:26-10:5, ECF  
13 No. 57.) While Defendant has indicated that it has reviewed  
14 Plaintiff's medical records, Defendant has not admitted that it  
15 understands the "facts and opinions" concerning which Plaintiff's  
16 expert witnesses are expected to testify. Fed. R. Civ. P.  
17 26(a)(2)(C)(ii). Failure to disclose the scope of expected  
18 expert testimony may prejudice an opposing party in its ability  
19 to properly depose that witness, select a rebuttal expert  
20 witness, and prepare for trial. Therefore, Plaintiff has not  
21 sustained his burden of demonstrating harmlessness, and Dr. Wood,  
22 Mr. Carr, Ms. Willerup, Ms. Coddington, and Dr. Dahmen are  
23 excluded as experts. See BP W. Coast Prods, LLC v. Shalabi, No.  
24 11-cv-1341 MJP, 2013 WL 1694660, at \*2 (W.D. Wash. Apr. 18, 2013)  
25 (excluding witness as experts where the non-moving party failed  
26 "to provide more than a one sentence description" of expected  
27 expert testimony, leaving the moving party "no way of preparing  
28 to oppose the witnesses").

Defendant also seeks an order "[p]rohibiting Plaintiff,  
and his attorneys and witnesses[] from referring to []  
Plaintiff's non-retained experts in the presence of jurors or  
prospective jurors; and [d]irecting Plaintiff's attorneys to

1 immediately inform Plaintiff and Plaintiff's other witnesses of  
2 the terms of this Order *in limine*." (MIL No. 2 2:22-26; MIL No. 3  
3 2:25-3:3.) Plaintiff has not shown that the requested order is  
4 necessary in light of the above ruling. Therefore, it is denied.

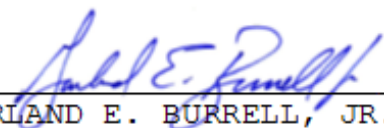
5 **B. Exclusion of Witnesses Under Rule 26(b) (2) (C) (i)**

6 In Motion in Limine 2, Defendant moves under Rule  
7 26(b) (2) (C) (i) to exclude testimony it anticipates Dr. Wood and  
8 Mr. Carr will give, arguing it would be "unreasonably cumulative  
9 or duplicative." (Pl.'s MIL #2 10:27-11:8.) However, the cited  
10 rule governs limitations on discovery and is not a basis for  
11 exclusion of the referenced testimony. Therefore, this request  
12 is denied.

13 **III. CONCLUSION**

14 For the stated reasons, Defendant's motions in limine  
15 are granted in part and denied in part. Dr. Wood, Mr. Carr, Ms.  
16 Willerup, Ms. Coddington, and Dr. Dahmen are excluded as expert  
17 witnesses.

18 Dated: October 28, 2013

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22 GARIAND E. BURRELL, JR.  
23 Senior United States District Judge  
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