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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., et al.,

No. 2:13-cv-02095-KJM-DB

Plaintiffs,

v.

ORDER

UNITED STATES ARMY CORPS OF
ENGINEERS, et al.,

Defendants.

On June 10, 2016, this court found Duarte violated the Clean Water Act (CWA) by discharging pollutants into “waters of the United States” without a permit or statutory exemption. Order at 24–35, ECF No. 195. After finding the CWA to be a strict liability statute, the court scheduled a bench trial to determine the issue of injunctive relief and civil penalties. ECF No. 268; *see also* 33 U.S.C. § 1319(b) (providing for injunctive relief); 33 U.S.C. § 1319(d) (providing for civil penalties).

On June 16, 2017, the court held a final pretrial conference and heard the parties’ arguments on several pending motions *in limine* (MILs). *See* ECF No. 286. The court adjudicated several motions from the bench, ECF No. 286, and now addresses the balance.

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1 I. SUMMARY OF REMAINING MOTIONS IN LIMINE

2 The court briefly summarizes the remaining MILs, all of which the United States
3 filed. Two motions seek (1) to admit several business records without the need for a live witness,
4 ECF No. 231-1 (MIL No. 2); and (2) to preclude Duarte from raising certain affirmative defenses,
5 ECF No. 235-1 (MIL No. 3). Additional motions seek to exclude several documents produced
6 after the close of discovery: (3) various exhibits comprising declaration and deposition testimony
7 the government filed in prior trials of separate cases, ECF No. 230-1 (MIL No. 4); (5)
8 supplemental reports of Duarte’s experts Thomas Skordal, Diane Moore and David Kelley, ECF
9 No. 228-1 (MIL No. 1); (6) “second supplemental” expert reports of Skordal and Moore and
10 pictures attached to those reports, ECF No. 280 (second addendum to MIL No. 1); and (7)
11 Duarte’s financial records, ECF Nos. 230-1 (MIL No. 4), 238 (first addendum to MIL No. 4), and
12 281 (second addendum to MIL No. 4). In total, the United States requests the court exclude
13 thirty-six of Duarte’s exhibits.

14 II. BUSINESS RECORDS WITHOUT LIVE TESTIMONY (MIL NO. 2)

15 The United States seeks to admit twelve business records from North State
16 Resources, Inc. (North State) and NorthStar Environmental (NorthStar) filed with Len
17 Lindstrand’s and James Stevens’s declarations, without qualifying the proponents of the records
18 as experts and making them available for cross-examination. ECF No. 231-1 at 2, 10 (United
19 States trial exhibits 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 50). The records include, in part,
20 draft delineations of waters of the United States (exhibits 18, 19, 20), and NorthStar’s “scope of
21 work” contracts with Duarte (exhibits 13 and 14). No party disputes these documents were made
22 and kept in the regular course of business. *See* ECF 231-1 at 2 (“The parties agree that these
23 documents are authentic.”); *see also* ECF No. 241 (omitting any rebuttal on this point). But
24 Duarte contends the United States cannot use the expert opinions contained within these
25 documents without making a qualified expert witness available for cross-examination. ECF No.
26 241 at 6. Alternatively, Duarte contends the documents are too unreliable to qualify for the
27 business records exception because they were “never verified” and are based on dated laws and
28 standards, and “even the Government’s experts in this case dispute [their veracity].” *Id.* at 8.

1 Under Rule 902(11), a party may authenticate a “domestic” or business record
2 through certification in lieu of live witness testimony. Doing so requires satisfying Rule
3 803(6)(A)–(C), regarding records of a regularly conducted activity. Rule 803 requires that (A)
4 the record was “made at or near the time” of the conduct it describes or that the information
5 contained within the record was transmitted by “someone with knowledge”; (B) the record was
6 “kept in the course of a regularly conducted activity” of the organization; and (C) “making the
7 record was a regular practice of that activity.” Fed. R. Evid. 803(6)(A)–(C). Rule 902(ii) also
8 requires giving the adverse party “reasonable written notice of the intent to offer the record”
9 before hearing or trial, “making the record and certification available for inspection,” and
10 providing the adverse party a “fair opportunity to challenge” the document’s admissibility. Fed.
11 R. Evid. 902 (11).

12 Duarte’s first contention, that the records contain inadmissible expert opinions
13 unless supported by a sponsoring witness, is unpersuasive. Business records can include, among
14 other things, “condition[s], opinion[s], or diagnos[e]s.” Fed. R. Evid. 803(6). Indeed, “portions
15 of investigatory reports otherwise admissible under [the public records exception] are not
16 inadmissible merely because they state a conclusion or opinion.” *Beech Aircraft Corp. v. Rainey*,
17 488 U.S. 153, 170 (1988); *United States v. Licavoli*, 604 F.2d 613, 622–23 (9th Cir. 1979) (“We
18 see no reason to adopt an inflexible rule that every case requires the proponent of a business
19 record containing expert opinion . . .”). “Rule 803(6) expressly provides for the exclusion of a
20 business record if the source of information indicates a lack of trustworthiness,” *Licavoli*, 604
21 F.2d at 622, so “[a]s long as the [opinion in the business record] is based on a factual
22 investigation and satisfies the Rule’s trustworthiness requirement, it should be admissible . . .”
23 *Beech Aircraft*, 488 U.S. at 170.

24 Here, Duarte concedes the exhibits are business records prepared as a matter of
25 “routine,” “incident to and contemporaneous with” jurisdictional delineations made with respect
26 to Duarte’s property. *See* Linstrand Decl., ECF No. 231-3; Stevens Decl., ECF No. 231-4. As
27 such, the opinions within these records are “based on a factual investigation and satisf[y] the
28 Rule’s trustworthiness requirement.” *Beech Aircraft*, 488 U.S. at 170. That such documents

1 contain opinions informed by some expertise does not preclude their admission. *Licavoli*, 604
2 F.2d at 622 (finding trial judge did not abuse discretion in admitting business record containing
3 expert opinions without requiring live testimony). And to the extent Duarte challenges the
4 trustworthiness of the opinions in the exhibits, his challenge goes to the documents' weight, not
5 their admissibility. *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988) (admitting
6 business records over objection that they were "inaccurate and therefore untrustworthy.").

7 United States exhibits 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 50 are
8 admissible without a live witness. United States MIL No. 2 is GRANTED.

9 III. MOTION TO EXCLUDE AFFIRMATIVE DEFENSES (MIL NO. 3)

10 At hearing, Duarte asserted it intends to rely on two affirmative defenses at trial:
11 estoppel and unclean hands. The United States argues Duarte waived both defenses by omitting
12 them from his summary judgment opposition. ECF No. 235-1 at 6.

13 The Ninth Circuit has not determined if an affirmative defense that is timely
14 asserted in an answer, but then omitted in a summary judgment opposition where liability is
15 determined, may then be presented at trial. The court finds here that allowing these two defenses
16 to lay dormant and then resurface at trial, after liability has been determined, would undermine
17 judicial economy, efficiency, and fairness to the opposing party.

18 The court recognizes, however, that case law on this point is not as clear-cut as the
19 United States would have it. Duarte correctly contends a non-controlling case, upon which the
20 United States relies, *United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469,
21 479 (D.C. Cir. 1993), does not state that an affirmative defense must be raised in response to a
22 summary judgment motion or it is waived at trial. ECF No. 231-1 at 7. The defendant in
23 *Pittston*, as a sister court has observed, "waived its defenses from the beginning, having never
24 asserted them in any pleading or motion in the district court." *Daingerfield Island Protective Soc.*
25 *v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994). *Pittston's* thus assessed whether affirmative
26 defenses that were waived all along could be raised on appeal for the first time to challenge the
27 trial court's finding of liability on summary judgment. *Id.* at 479. *Pittston* did not consider
28 whether an affirmative defense that is properly raised in an answer, but then omitted at summary

1 judgment where liability is decided, can be considered in a trial. *See Pittston Co*, 40 F.3d at 442.
2 Indeed, the D.C. Circuit later distinguished *Pittston* on a similar basis. *Long v. Howard Univ.*,
3 550 F.3d 21, 24–25 (D.C. Cir. 2008) (“[T]here is no requirement that a party assert a statute-of-
4 limitations defense in opposition to a summary-judgment motion in order to assert it at trial. On
5 the contrary, the defense can be raised at trial so long as it was properly asserted in the answer
6 and not thereafter affirmatively waived.”). Thus, *Pittston* and its prodigy are unpersuasive here.
7 *See, e.g., In re Commercial Acceptance Corp.*, 5 F.3d 535 (9th Cir. 1993) (Boochever, J.
8 concurring) (citing *Pittston* to explain “[t]he failure to raise an affirmative defense in opposition
9 to a motion for summary judgment constitutes an abandonment of the defense.”); *Diversey Lever,*
10 *Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1353 (Fed. Cir. 1999) (same); *Williams v. Univ. Med. Ctr. of*
11 *S. Nev.*, No. 2:09-CV-00554-PMP, 2010 WL 3001707, at *2 (D. Nev. July 28, 2010) (same).

12 The district court’s reasoning in *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F.
13 Supp. 1164, 1167 (S.D. Ind. 1992), is more persuasive. The court in *Pantry* addressed a scenario
14 analogous to that before this court. There the court deemed any unasserted affirmative defenses
15 waived, once omitted from a summary judgment on liability, “the non-movant is thereby placed
16 on notice that *all* arguments and evidence opposing a finding of liability must be presented to
17 properly resolve that issue.” *Id.* (original emphasis). To hold otherwise would keep the court and
18 parties in “limbo” and allow unargued affirmative defenses to lie dormant, waiting to unravel the
19 court’s prior dispositive liability decisions. *Id.* at 1168.

20 Here, Duarte did not raise either estoppel or unclean hands as a possible defense in
21 opposition to summary judgment. The court determined liability in its summary judgment. Now,
22 after having received an unfavorable result, and after the court has already denied Duarte’s
23 motion to reconsider the summary judgment order, Duarte tries again to circumvent that liability
24 ruling by asserting these affirmative defenses at trial. He should have raised them in response to
25 the motion for summary judgment, but he did not. Duarte therefore waived them.

26 The United States’ motion to preclude Duarte’s reliance on the affirmative
27 defenses of estoppel and unclean hands at trial is GRANTED. With the balance of the United
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1 States' MIL No. 3 previously granted, *see* ECF No. 286, the United States' MIL No. 3 is
2 GRANTED IN FULL.

3 IV. MOTION TO EXCLUDE GOVERNMENTAL RECORDS (MIL NO. 4)

4 The United States seeks to exclude four exhibits, BO, CJ, CK and EB, which
5 include declaration and deposition testimony the United States' experts gave in cases involving
6 different parties and facts, in some instances more than 10 years ago. ECF No. 230-1 at 5. The
7 United States asserts these exhibits are hearsay, irrelevant and would waste the court's time to
8 review. *Id.* Duarte contends, because the past testimony was provided by the same experts the
9 government retained for this case, the testimony is relevant. ECF No. 243 at 4.

10 Federal Rules of Evidence 401 and 402 provide that only relevant evidence is
11 admissible and that evidence is relevant only where "(a) it has any tendency to make a fact more
12 or less probable than it would be without the evidence; and (b) the fact is of consequence in
13 determining the action." Fed. R. Evid. 401, 402. Rule 403 also excludes evidence where the
14 minimal probative value is outweighed by prejudice, such as adding confusion or undue delay. Fed.
15 R. Evid. 403.

16 In this case, all that is left to decide is whether to award civil penalties under 33
17 U.S.C. § 1319(d) and injunctive relief under § 1319(b). *See* ECF No. 195. Having carefully
18 reviewed the four exhibits, the court finds they are irrelevant to these remaining issues. The
19 remedy phase should focus only on the remedies that are appropriate to offset the loss of functioning
20 of waters of the United States and a civil penalty to deter Duarte and others from committing future
21 violations. Duarte has not explained how deposition testimony that Hernandez and Arredondo gave
22 in factually distinguishable cases years ago is relevant to assessing the civil penalties and injunctive
23 relief here. Any tangential benefit of the testimony is far outweighed by the likelihood that the
24 testimony will simply waste the court's time. The court therefore excludes exhibits BO, CJ, CK and
25 EB from the record, under Rule 403. That said, it may be the deposition testimony may be used for
26 impeachment, should the situation arise.

1 V. MOTION TO EXCLUDE DUARTE’S EXPERT REPORTS (MIL NOS. 1 AND 4)

2 The United States seeks to exclude reports identified as “supplemental” from
3 Duarte’s expert witnesses Thomas Skordal, Diane Moore and David Kelley; these are identified
4 as Duarte’s “trial exhibits E, J and M.”¹ ECF No. 228-1 at 2. The United States contends these
5 reports, to the extent they are relevant to the remedies phase of the bench trial, are untimely, are
6 unfairly prejudicial and are not actually supplemental. ECF No. 236 at 2–3. The United States
7 also seeks to exclude Diane Moore’s and Thomas Skordal’s “second supplemental” reports and
8 three new photographs associated with these reports, identified as Duarte trial exhibits KV, KW,
9 LQ, LR and LS, respectively. ECF No. 280 at 2, 6; ECF No. 281 at 5.

10 Duarte contends the first three reports identified as “supplemental” were timely
11 disclosed on or before the August 5, 2016 pretrial disclosure deadline; if they were not, the error
12 was substantially justified and harmless. ECF No. 240 at 7, 20. Regarding the “second
13 supplemental” reports of Skordal and Moore and the associated photographs, Duarte contends
14 these documents are “within the scope of the initial reports” filed before the discovery deadline
15 and are thus timely. ECF No. 283 at 10–11. Alternatively, Duarte contends their admission also
16 is substantially justified and harmless. *Id.*

17 A. Background

18 On May 14, 2015, this court ordered all discovery be completed by October 2,
19 2015. Am. Scheduling Order at 2, ECF No. 73. The court also set deadlines for expert reports.
20 *Id.* at 4. Except economic benefit and impact reports, initial reports were due June 5, 2015, with
21 rebuttal reports due July 23, 2015, “all discovery” was to be completed by October 2, 2015. *Id.* at
22 2.

23 In June 2015, the parties disclosed initial expert reports. ECF No. 240 at 11; *see*
24 ECF Nos. 132-1 (Moore Initial Report), 150-5 (Skordal Initial Report), 150-8 (Kelley Initial
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26
27 ¹ David Kelley is no relation to Matthew Kelley, the Army Corps employee who
28 discovered Duarte’s tillage activities. *See* ECF No. 240 at 7 n.4.

1 Report). In July 2015, Duarte disclosed rebuttal reports. *See* ECF Nos. 132-2 (Moore Rebuttal
2 Report), 150-6 (Skordal Rebuttal Report), 150-9 (Kelley Rebuttal Report).

3 On June 21, 2016, well after the court imposed discovery cutoff date, Duarte
4 disclosed Skordal's supplemental report. *See* ECF No. 244-8 (Skordal Supplemental Report); *see*
5 *also* ECF No. 280 at 2 (detailing this timeline). On August 5, 2016, Duarte disclosed Moore's
6 and Kelley's supplemental reports. ECF No. 280 at 2; *see also* ECF Nos. 244-3 (Moore Suppl.
7 Report), 244-7 (Kelley Suppl. Report).

8 On March 30, 2017, the court ordered that "the parties may file an updated joint
9 pretrial statement no later than 5/26/2017." Minute Order, ECF No. 268.² Just three days before
10 this deadline, Duarte emailed the United States a copy of Skordal's second supplemental report.
11 ECF No. 280 at 3. Duarte then emailed the United States a copy of Moore's second supplemental
12 report on Friday, May 26, 2017, after the parties had already filed their Amended Joint Pretrial
13 Statement. *Id.* The first time Duarte told the United States these two supplemental reports
14 existed was in an email sent on May 21, 2017. *See id.* at 3. The United States does not specify
15 when, if at all, Duarte emailed the associated photographs. *See generally id.*

16 1. Reports of Skordal and Moore

17 Skordal's initial and rebuttal reports extensively discuss wetland hydrology, the
18 various phases of wetland vegetation, and the relative effects of tillage versus drought on wetland
19 vegetation. Skordal Initial Report at 7–11; Skordal Rebuttal Report at 5. Skordal hypothesized
20 but had not established that a wetter year would positively affect wetland vegetation. Skordal
21 Initial Report at 7–11; Skordal Rebuttal Report at 5. Similarly, Moore's initial report explained
22 that, at the time, California's extended drought may have masked wetland indicators; Moore
23 hypothesized without showing these wetland indicators could return during a wetter season.

24
25 _____
26 ² The court gave the parties this additional opportunity to update their final pretrial
27 statement given the time lapse occasioned by Duarte's appeal, reconsideration motion and motion
28 to stay. *See* ECF No. 268. That opportunity for supplementation, however, does not alter the
pretrial disclosure date of August 5, 2016, that the court and parties use here to assess timeliness
of the expert reports. *See* Minute Order, ECF No. 222 (setting relevant pretrial disclosure dates).

1 Moore Report at 6–9. In her rebuttal report, Moore observed that the vegetation in tilled wetlands
2 was similar to the vegetation in untilled wetlands on Duarte’s property. Moore Rebuttal at 5.

3 After the close of discovery, in April 2016, Moore and Skordal further investigated
4 the Duarte property and used their new findings to support the supplemental reports challenged
5 by the United States’ MIL. ECF No. 240 at 16; Prows Decl. Ex. 3 at 5, ECF No. 244-3. The new
6 investigation followed a “normal” rainfall season, which occurred after several years of drought.
7 Prows Decl. Ex. 8 at 3, ECF No. 244-8. The supplemental reports discuss Skordal’s and Moore’s
8 newly discovered evidence, which they say proves their hypothesis that normal rainfall positively
9 affects wetland vegetation on Duarte’s property. Skordal Suppl. Report at 3; Moore Suppl.
10 Report at 14.

11 A year later, in May 2017, Skordal and Moore filed second supplemental reports
12 based on a new study of plants conducted the same month. *See* Spence Decl. ¶¶ 13, 16 (listing
13 receipt dates for second supplemental reports), ECF No. 280-1. Moore and Skordal say they
14 conducted additional studies because the rainfall in the winter of 2016 and spring of 2017 was
15 heavier than normal and thus allowed them to further test their opinions. *See* ECF No. 280-1 at 1-
16 3 (Skordal Second Suppl. Report attached as Ex. A to Spence Decl.); ECF No. 280-1 at 9-26
17 (Moore Second Suppl. Report attached as Ex. B to Spence Decl.).

18 2. Kelley’s Reports

19 Kelley’s initial and rebuttal reports critique the “reference” sites, located northwest
20 of the Duarte property, used by the government’s experts to assess the supposed impacts caused
21 by Duarte’s tillage. Kelley Initial Report at 10; Kelley Rebuttal Report at 11–12. Specifically,
22 Kelley opines the government’s “reference” sites are fundamentally flawed, in part because they
23 are not on the same landform as the Duarte property. Kelley Rebuttal Report at 11–12. “A
24 reference site is a stream or wetland with relatively few human impacts that serves as a model for
25 a particular ecoregion.” 17 P. Ann Pickett, *Natural Resources & Environment* 42 (American Bar
26 Association 2002). A land form is “a specific geomorphic feature on the surface of the earth,
27 ranging from large-scale features such as plains, plateaus, and mountains to minor features such
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1 as hills, valleys, and alluvial fans.” *Dictionary.com Unabridged*, Random House, Inc. (Aug. 9,
2 2017), <http://www.dictionary.com/browse/landform>.

3 Kelley’s supplemental report addresses new information he says he received about
4 the unusual soil profiles near the government’s chosen reference sites. *See* Kelley Suppl. Report
5 at 4. As Duarte explains, this “new information” includes photographs a government soil scientist
6 sent Kelley in April 2016, showing “soil pits” he had dug up a week earlier quite near the off-site
7 reference sites the government’s experts’ in this case had used. ECF No. 280 at 9. Soon afterwards,
8 Duarte asked the government to supplement its previous responses to Duarte’s document requests
9 with any new information related to this area encapsulating the reference sites, as it might be relevant
10 to “supplemental expert disclosures ... under Rule 26(e)(2).” *Id.* at 9–10. The government responded
11 on August 1, 2016, with documents related not only to the April 2016 soil pits, but also to visits in
12 January, February and July 2016. *Id.* at 10; *see also* Kelley Suppl. Report at 4 (explaining that
13 “[s]ince writing the earlier reports,” he received new information and photos regarding the soils and
14 landforms on the reference sites the federal team used “for their hydrogeomorphic assessment of the
15 status and conditions of wetlands on the Duarte property[.]”). This information reaffirmed Kelley’s
16 conclusion in the initial and rebuttal reports; he concludes “[t]hat the nature of the restrictive
17 layers in the landscape positions near the reference sites are different from those on the Duarte
18 property [and] supports [his] prior observations that the reference sites chosen by the federal team
19 are different from the Duarte site and inappropriate for use as reference sites for
20 hydrogeomorphic assessment of the Duarte site.” *Id.*

21 B. Legal Standards - Expert Disclosure Requirements and Supplemental Reports

22 Under Rule 26(a)(2), a party must disclose to the other parties the identity of any
23 witness it may use at trial to present evidence. Fed. R. Civ. P. 26(a)(2). Experts who are
24 “retained or specially employed to provide expert testimony in the case,” must prepare and sign a
25 written report. Fed. R. Civ. P. 26(a)(2)(B). Under Rule 26(e), a party must supplement or correct
26 its disclosure or response in a timely manner if the party learns that in some material respect the
27 disclosure or response is incomplete or incorrect, and if the additional or corrective information
28

1 has not otherwise been made known to the other parties during the discovery process or in
2 writing. Fed. R. Civ. P. 26(e)(1)(A).

3 For expert witnesses, the party's duty to supplement extends both to information
4 included in the report and to information given during the expert's deposition. Fed. R. Civ. P.
5 26(e)(2). Any additions or changes to this information must be disclosed by the time the party's
6 Rule 26(a)(3) pretrial witness disclosures are due. *Id.*; *Sherwin-Williams Co. v. JB Collision*
7 *Servs., Inc.*, No. 13-1946, 2015 WL 1119406, at *6 (S.D. Cal. Mar. 11, 2015). The relevant
8 pretrial disclosures date in this case was August 5, 2016. Min. Order, ECF No. 222.

9 Supplementing an expert report under Rule 26 means "correcting inaccuracies, or
10 filling the interstices of an incomplete report based on information that was not available at the
11 time of the initial disclosure." *Gerawan Farming, Inc. v. Rehrig Pacific Co.*, 2013 WL 1982797,
12 at *5 (E.D. Cal. May 13, 2013) (citing *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont.
13 1998)). "Although [Rule] 26(e) requires a party to 'supplement or correct' a disclosure upon
14 information later acquired, that provision does not give license to sandbag one's opponent with
15 claims and issues which should have been included in the expert witness' report. . . ." *Lindner v.*
16 *Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 639 (D. Haw. 2008) (quoting *Beller ex rel. Beller v.*
17 *United States*, 221 F.R.D. 689, 695 (D.N.M. 2003) (internal citation omitted)). "For example,
18 courts have rejected supplemental expert reports that: 1) were significantly different from the
19 expert's original report and effectively altered the expert's theories; 2) or attempted to deepen and
20 strengthen the experts' prior reports." *Id.* (citation and internal quotation marks omitted).
21 Moreover, supplementation "does not cover failures of omission because the expert did an
22 inadequate or incomplete preparation To construe supplementation to apply whenever a
23 party wants to bolster or submit additional expert opinions would wreak havoc in docket control
24 and amount to unlimited expert opinion preparation." *Akeva LLC v. Mizuno Corp.*, 212 F.R.D.
25 306, 310 (M.D.N.C. 2002) (internal citations omitted).

1 C. Discussion and Conclusion

2 1. Supplementation

3 The “supplemental” and “second supplemental” reports of Moore and Skordal are
4 not actually supplemental. These relatively recent reports present new information to affirm a
5 hypothesis which, at the time the rebuttal report was disclosed, could not be proven or disproven,
6 namely the effect of normal or greater rainfall on wetland vegetation. Accordingly, the reports
7 present entirely new information, constitute an attempt to “deepen and strengthen the experts’
8 prior reports,” and “bolster or submit additional expert opinions.” *See id.* Their reports, if
9 accepted, could significantly alter the calculation of civil penalties because the effects of Duarte’s
10 CWA violation could drastically differ from those indicated in documents filed before the
11 discovery cutoff. *See Gerawan Farming*, 2013 WL 1982797, at *5 (declining to designate report
12 as “supplemental” where expert’s new opinion would result in a “significantly different
13 calculation of damages”). Accordingly, the reports are properly characterized as new rather than
14 supplemental. As such, they should have been filed before the October 2, 2015 discovery cutoff
15 date. ECF No. 73 at 2. Thus, they are untimely and will be excluded unless the untimely
16 disclosure was substantially justified or harmless under Rule 37, as discussed below.

17 Kelley’s report, however, qualifies as supplemental. In his timely rebuttal report,
18 Kelley opined the government’s reference sites were “very different from the Duarte parcel.”
19 Kelley Rebuttal at 12. The supplemental report reiterates that same opinion and notes the
20 information that was not available to Kelley at the time rebuttal reports were due. Since the
21 rebuttal report was disclosed before the August 5, 2016 final pretrial disclosures due date, and the
22 court has no information that indicates Kelley obtained this new information nefariously or earlier
23 than his report indicates, his supplemental report is timely. *See Fed. R. Civ. P. 26(e)(2)* (“Any
24 additions or changes [expert reports] must be disclosed by the time the party’s pretrial disclosures
25 under Rule 26(a)(3) are due.”).

1 2006 WL 2433796 (E.D. Cal. Aug. 21, 2006). Duarte provides no reason for not pursuing that
2 avenue.

3 The belated disclosures also would significantly prejudice the United States if the
4 reports are admitted. At hearing, Duarte contended it could cure the prejudice by allowing the
5 United States to now conduct follow-up investigations on Duarte’s property. But to accurately
6 assess the “actual condition of the wetlands on the Duarte property,” the additional discovery
7 would have had to be carried out in April 2016, the same period covered by the supplemental
8 reports. ECF No. 240 at 16. Indeed, Duarte contends that more-than-normal rainfall during the
9 winter of 2016 to 2017 justified the additional studies in May 2017, because the “court should not
10 be willfully kept in the dark about the current condition of the wetlands on the property.” ECF
11 No. 283 at 11; Skordal Second Suppl. Report at 7, Moore Second Suppl. Report at 12. The court
12 has no desire to be kept in the dark but what plays out in the daylight of a public courtroom must
13 take place on a level playing field. There is no way now for the United States’ experts to gather
14 information in the same time frame, and present any informed competing conclusions.

15 The parties are in the final stages of trial preparation with trial on remedies set to
16 begin August 15. The clock has run on any time to cure. Duarte’s failure to disclose was not
17 substantially justified.

18 For the same reasons, Duarte’s delay in disclosing was not harmless. The only
19 possible imperfect way to offset the prejudice the United States would endure, should the
20 supplemental reports come in, would be for this court to delay the proceedings until equivalent
21 “optimal conditions” arise again. Such a delay would lead to significant cost, prevent an efficient
22 resolution now that the issues are framed and frustrate the court’s ability to manage its docket in
23 this long-running case.

24 The United States’ MIL No. 1 is thereby GRANTED IN PART and DENIED IN
25 PART.

26 VI. EXCLUSION OF FINANCIAL DOCUMENTS (MIL NO. 4)

27 The United States has made three separate requests, all as part of its fourth motion
28 in limine, to exclude twenty-three financial documents Duarte produced after the close of

1 discovery. In its first request, the United States seeks to exclude eleven financial documents:
2 KB, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KR. *See* MIL No. 4, ECF No. 230-1. In its second
3 request, the United States seeks to exclude exhibit KT. *See* ECF No. 238 (first addendum to MIL
4 No. 4). In its third request, the United States seeks to exclude eleven more documents: KY, KZ,
5 LA, LB, LC, LD, LE, LF, LM, LN, LO. ECF No. 281 (second addendum to MIL No. 4).
6 Regarding the first and second request, Duarte contends its productions were timely because: (1)
7 the documents, all of which were created after the close of discovery, were supplemental, and (2)
8 if not supplemental, their admission is substantially justified or harmless. *See* ECF No. 243.
9 Regarding the United States' third request, Duarte simply contends because these documents are
10 relevant to the remedies phase, they should be admitted. *See* ECF No. 285.

11 A. First and Second Motions

12 The first set of eleven documents was produced after the October 2, 2015
13 discovery cut-off date. *See* ECF No. 73; *see also* Summary Table *infra* pages 17–18.
14 Specifically, these documents were created between January and July, 2016, after the October 2,
15 2015 discovery cutoff but before the August 5, 2016 deadline for joint pretrial statements set in
16 the court's first final pretrial order. *See Table; see also* ECF No. 222. Exhibit KT, however, was
17 created in December 2014, before the discovery deadline, but not produced until August 5, 2016,
18 the day joint pretrial statements were due.

19 The United States does not dispute all of these documents are supplemental. *See*
20 ECF No. 243.³ Instead the United States contends the documents were not “timely produced”
21 under Rule 26(e). ECF No. 252. If documents are not timely produced under Rule 26(a) (initial
22 disclosures) or Rule 26(e) (supplemental disclosures), their admission must be substantially
23 justified or harmless. Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify

24
25 ³ The United States asserts these documents are “mere continuations or updates of
26 documents that existed in discovery, were requested in discovery, but were withheld by Duarte
27 during discovery,” ECF No. 252, but cites to no supporting evidence. The court need not approve
28 the United States' assertion that “[o]f course there were prior versions of these documents,” but
rather relies on its assertion that the documents were not timely produced under Rule 26(e), which
governs supplemental or corrected disclosures.

1 a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
2 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
3 substantially justified or is harmless.”); Fed. R. Civ. P. 26(e)(1) (After making an initial
4 disclosure under Rule 26(a), a party must supplement its disclosure “(A) in a timely manner” if
5 the party learns the disclosure is incomplete or incorrect and the new information is not known to
6 the other parties; or “(B) as ordered by the court”).

7 Because admission of these documents is harmless, the court DENIES the United
8 States’ motion. It has been over a year since the United States moved to preclude the first set of
9 documents, *see* ECF No. 230 (filed Aug. 5, 2016), and it could have sought to cure whatever
10 prejudice it felt arose from Duarte’s late disclosure. At hearing, the United States conceded it has
11 evaluated the documents to determine their meaning, if any, to the remedies phase. Moreover,
12 that the United States now plans to rely on several of the documents it previously sought to
13 exclude further supports a finding that their admission would not be unfairly prejudicial.
14 Accordingly, there will be no “unfair surprise” should these documents be admitted. *Hoffman*,
15 541 F.3d at 1180.

16 As to its first and second motions to exclude documents, the United States’ motion
17 is DENIED.

18 B. Third Motion

19 Regarding the third set of documents, Duarte does not contend these documents
20 supplement those produced during discovery. *See generally* ECF No. 285. Accordingly, because
21 these documents were not timely produced with the initial disclosures under Rule 26(a), they are
22 admissible only if the delay in producing them was substantially justified or harmless. Fed. R.
23 Civ. P. 37(c)(1); *see also* Rule 26(a). Duarte merely argues these documents are relevant to the
24 remedies phase generally and to Duarte’s specific assertion that it “does not have the ability to
25 pay any significant civil penalty.” ECF No. 285 at 6. Relevancy is not the only touchstone of
26 admission. *See Hoffman*, 541 F.3d at 1180. In the absence of any other assertion or information
27 supporting the “substantially justified or harmless” standard, the United States’ third request to
28 exclude Duarte’s financial documents is GRANTED without prejudice.

1 VII. SUMMARY TABLES

2 For ease of reference, the following tables identify each exhibit covered by the
 3 United States' motions and the court's conclusions.

4 **Plaintiffs' Exhibits the United States Seeks to Exclude**

5 <u>Exhibit</u>	6 <u>Title/Description</u>	7 <u>Date on Document</u>	8 <u>Date Disclosed</u>	9 <u>MIL No./ Brief Description</u>	10 <u>Court's Conclusion</u>
11 1. BO	12 Deposition of W. Nutter in <i>USA v. Adam Bros. Farming</i>	13 09/27/2004	14 08/02/16— Before First JPTS	15 4: Irrelevant and hearsay.	16 Granted
17 2. CJ	18 Declaration of P. Stokeley in <i>USA v. Lipar</i>	19 03/24/2011	20 08/02/16— Before First JPTS	21 4: Irrelevant and hearsay	22 Granted
23 3. CK	24 Supplemental Declaration of P. Stokeley in <i>USA v. Lipar</i>	25 03/24/2011	26 08/02/16— Before First JPTS	27 4: Irrelevant and hearsay.	28 Granted
4. EB	Declaration of J. Meyer in <i>Pebble Ltd. v. EPA</i>	08/18/2014	08/02/16— Before First JPTS	4: Irrelevant and hearsay	Granted
5. E	Supplemental Report of Diane S Moore	08/2016	08/05/16—Day of First JPTS	1: Untimely	Granted
6. J	Supplemental Report of Thomas Skordal	5/2016	08/05/16—Day of First JPTS	1: Untimely	Granted
7. M	Supplemental Report of David B Kelley	8/5/2016	08/05/16—Day of First JPTS	1: Untimely	Denied
8. KV	Second Supplemental Report of Diane S. Moore	05/2017	5/23/17— Before the Amended JPTS	Second Suppl. MIL 1: Untimely	Granted
9. KW	Second Supplemental Report of Thomas Skordal	05/2017	5/26/17—Day of Amended JPTS	Second Adden. MIL 1: Untimely	Granted
10. LQ	Photo of Assessment Location 9	5/11/2017	05/22/17-- Before Amended JPTS	Second Suppl. MIL 1: Untimely	Granted

<u>Exhibit</u>	<u>Title/Description</u>	<u>Date on Document</u>	<u>Date Disclosed</u>	<u>MIL No./ Brief Description</u>	<u>Court's Conclusion</u>
				Second Adden. MIL 4: Untimely	
11. LR	Photo of Assessment Location 11	5/11/2017	05/22/17-- Before Amended JPTS	Second Suppl. MIL 1: Untimely Second Adden. MIL 4: Untimely	Granted
12. LS	Photo of Assessment Location 19	5/11/2017	05/22/17-- Before Amended JPTS	Second Suppl. MIL 1: Untimely Second Adden. MIL 4: Untimely	Granted
13. KB	Letter from W. de Bruyn (Bank of the West) to John Duarte re: Obligations Owed by Duarte Nursery, Inc.	01/12/2016	06/21/16— Before First JPTS	4: Untimely	Denied
14. KD	Distribution of Sales	N/A	07/25/16— Before First JPTS	4: Untimely	Denied
15. KE	Duarte Nursery, Inc. Balance Sheets	03/2016	06/21/16— Before First JPTS	4: Untimely	Denied
16. KF	Duarte Nursery, Inc. Balance Sheets Profit and Loss Statement	03/2016	06/21/16— Before First JPTS	4: Untimely	Denied
17. KG	Duarte Nursery Pasture, An Appraisal for Bank of the West	03/03/2016	07/25/16— Before First JPTS	4: Untimely	Denied
18. KH	Duarte Nursery Inc., Property Information	N/A	07/25/16— Before First JPTS	4: Untimely	Denied

<u>Exhibit</u>	<u>Title/Description</u>	<u>Date on Document</u>	<u>Date Disclosed</u>	<u>MIL No./ Brief Description</u>	<u>Court's Conclusion</u>
19. KI	Letter from W. de Bruyn (Bank of the West) to John Duarte re: Obligations Owed by Duarte Nursery, Inc.	04/03/2016	06/21/16— Before First JPTS	4: Untimely	Denied
20. KJ	Letter from T. Reimers to John Duarte	03/07/2016	07/25/16— Before First JPTS	4: Untimely	Denied
21. KK	Booked Sales vs Actual Comparison	N/A	07/25/16— Before First JPTS	4: Untimely	Denied
22. KL	Letter from W. de Bruyn (Bank of the West) to John Duarte re: Obligations Owed by Duarte Nursery, Inc.	06/13/2016	6/21/16— Before First JPTS	4: Untimely	Denied
23. KR	Report of Inventory Subject to Security Interest	7/25/2016	07/25/16— Before First JPTS	4: Untimely	Denied
24. KT	John and Alexandra Duarte - Personal Financial Statements	12/2014	8/5/2016—The day the first JPTS was due	First Adden. MIL 4: Untimely	Denied
25. KY	Duarte Nursery, Inc. Balance sheet for period ending December 2016	12/2016	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
26. KZ	Duarte Nursery Profit & Loss Statement for period ending March 2017	03/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
27. LA	Duarte Nursery Profit & Loss Statement for period ending March 2017	03/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
28. LB	Duarte Nursery, Inc. Balance sheet for	03/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted

<u>Exhibit</u>	<u>Title/Description</u>	<u>Date on Document</u>	<u>Date Disclosed</u>	<u>MIL No./ Brief Description</u>	<u>Court's Conclusion</u>
	period ending March 2017				
29. LC	Third Amendment to Forbearance Agreement	1/11/2016	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
30. LD	Collateral Release And Reaffirmation Agreement	2/21/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
31. LE	Chicago Title Company, Seller Final Closing Statement Duarte 50%	2/22/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
32. LF	Chicago Title Company, Seller Final Closing Statement Master Statement	2/22/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
33. LM	Fourth Amendment to Forbearance Agreement	03/17/2017	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
34. LN	Duarte Nursery, Inc. Financial Statements December 31, 2015 and 2014	9/07/2016	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
35. LO	Duarte Nursey, Inc. 2015 S Corporation tax return	9/12/2016	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Granted
36. LP ⁴	John S. and Alexandra Duarte Statement of Financial Condition	12/31/2015	05/22/17-- Before Amended JPTS	Second Adden. MIL 4: Untimely	Moot

⁴ Since the hearing on *motions in limine*, the United States has withdrawn its request to exclude exhibit LP. See ECF No. 287. Thirty-five documents thus remain.

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Exhibits the United States Seeks to Pre-Admit

<u>Exhibit</u>	<u>Title/Description</u>	<u>MIL No./ Brief Description</u>	<u>Court's Conclusion</u>
8	Corps Verified Delineation For The 1,900 Acre Property in Tehama County, California	2: Business Records	Granted
11	NorthStar Letter to Corps about Property	2: Business Records	Granted
12	Letter to Jim. Duarte from J. Stevens, of NorthStar Environmental	2: Business Records	Granted
13	NorthStar Environmental Scope of Work, Signed by Jim Duarte	2: Business Records	Granted
14	NorthStar Additional Scope of Work, Signed by Jim Duarte	2: Business Records	Granted
15	Letter Withdrawing Certification Request from Natural Resources Conservation Service (NRCS)	2: Business Records	Granted
16	Letter to B. Munson from NorthStar regarding Draft Delineation of Waters of the U.S. For the Rawson Road North and South Properties	2: Business Records	Granted
17	Draft Delineation of Waters of the United States, Rawson Road 1950	2: Business Records	Granted
18	Draft Delineation of Waters of the United States, Rawson Road 1950	2: Business Records	Granted
19	Draft Delineation of Waters of the United States, Rawson Road South	2: Business Records	Granted
20	Draft Delineation of Waters of the United States, Rawson Road South	2: Business Records	Granted
50	Vernal Pool Fairy & Tadpole Shrimp Reports Referenced in Declaration of Len Lindstrand	2: Business Records	Granted

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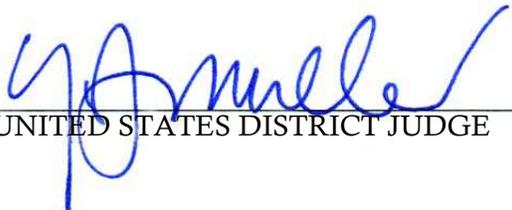
VIII. CONCLUSION

In sum, the court resolves the United States motions *in limine* as follows: (1) MIL No. 1 is GRANTED IN FULL; (2) MIL No. 2 is GRANTED IN FULL; (3) MIL No. 3 is GRANTED IN FULL; (4) MIL No. 4 is GRANTED IN PART and DENIED IN PART. As with all motions *in limine*, each ruling is made without prejudice and is subject to proper renewal, in whole or in part, during trial. If a party wishes to contest a pretrial ruling, it must do so through a proper motion or objection, or otherwise forfeit appeal on such grounds. *See* Fed. R. Evid. 103(a); *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001).

This order resolves ECF Nos. 228-1, 230-1, 231-1, and 235-1.

IT IS SO ORDERED.

DATED: August 10, 2017.


UNITED STATES DISTRICT JUDGE