

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JEFFERY BROFFMAN, M.D.,

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT  
INSURANCE COMPANY, et al.,

Defendants.

Case No. [13-cv-04922-JD](#)

**ORDER RE LATE-DISCLOSED  
WITNESSES**

Re: Dkt. No. 88

At the December 30, 2014 hearing in this case, defendants informally raised, and the Court discussed with the parties, the issue of seven new witnesses whom plaintiff had just recently disclosed to defendants. The Court requested a declaration from plaintiff further explaining the circumstances of the late disclosure, which plaintiff submitted on January 4, 2015. Dkt. No. 88. Plaintiff has now informed the Court that he deems defendants to have made an oral motion to strike those witnesses, and he requests that the Court rule on that motion. Dkt. No. 93.

The Court has reviewed and considered plaintiff's declaration. Dkt. No. 88. It attaches as an exhibit plaintiff's supplemental disclosure of witnesses, dated December 23, 2014, which lists seven additional witnesses. *Id.*, Ex. D. It also attaches an e-mail in which plaintiff's counsel acknowledged to defendants' counsel that these seven witnesses "should have been disclosed" to plaintiff earlier. *Id.*, Ex. C. Counsel's declaration also recognizes that the failure to disclose these witnesses earlier was the result of errors, oversights and lapses.

While the Court acknowledges plaintiff's counsel's forthrightness, the Court is unable to find on the basis of the facts set forth in counsel's declaration that the failure to disclose these seven additional witnesses until the eve of the discovery cut-off was "substantially justified." Fed. R. Civ. P. 37(c)(1). As a result, plaintiff may not use these witnesses "to supply evidence on a

1 motion, at a hearing, or at a trial, unless” the failure to disclose was “harmless.” *Id.*

2 The Court will consequently permit plaintiff to present at trial only those of the seven  
3 witnesses, if any, whom defendants have already deposed as of the date of this order and as to  
4 whom defendants have no objection (at least on the basis of plaintiff’s late disclosure). To the  
5 extent that does not describe any of the seven witnesses at issue, the Court concludes that fairness  
6 dictates that those witnesses must be excluded from trial as provided by Federal Rule of Civil  
7 Procedure 37(c)(1).<sup>1</sup>

8 **IT IS SO ORDERED.**

9 Dated: February 20, 2015

10   
11 \_\_\_\_\_  
12 JAMES DONATO  
13 United States District Judge

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiff may, of course, nevertheless call these witnesses at trial if they are to be used “solely for  
impeachment,” *see* Fed. R. Civ. P. 26(a)(1)(A)(i), but the Court advises plaintiff to be mindful that  
“rebuttal” is not synonymous with “impeachment.” *See, e.g., Hagan v. California Forensic  
Medical Group*, No. CIV. S-07-1095 LKK, 2009 WL 689740 (E.D. Cal. Mar. 5, 2009).