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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAVE CONSULTING GROUP, INC.,
Plaintiff,
v.
OPTUMINSIGHT, INC.,
Defendant.

Case No. [15-cv-03424-JCS](#)

**ORDER REGARDING MOTION FOR
RECONSIDERATION, MOTION TO
PRECLUDE TESTIMONY, AND
MOTION FOR RELIEF FROM
SCHEDULING ORDER**

Re: Dkt. Nos. 373, 381, 384

I. INTRODUCTION

In this antitrust and malicious prosecution action arising from patent infringement claims asserted in previous litigation, Plaintiff Cave Consulting Group, Inc. (“CCGroup”) now moves for reconsideration of a previous order on summary judgment limiting its damages, and for relief from a scheduling order to allow CCGroup to present a new expert report on damages. Defendant OptumInsight, Inc. moves to preclude CCGroup from calling OptumInsight’s lead counsel as a witness at trial. In addition to the parties’ motions, the Court provided notice of its intent to consider entering summary judgment sua sponte under Rule 56(f) of the Federal Rules of Civil Procedure. The Court held a hearing on January 10, 2020. For the reasons discussed below, CCGroup’s motion for reconsideration is GRANTED, but the Court now grants summary judgment imposing a substantially similar limitation on damages sua sponte under Rule 56(f). The remaining motions are DENIED.¹

II. BACKGROUND

On August 28, 2019, the Court issued an order resolving the parties’ motions for summary judgment and *Daubert* motions to exclude expert testimony. *See* Order re Mots. for Summ. J. &

¹ The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1 Mots. to Exclude Expert Testimony (“MSJ Order,” dkt. 354 (sealed), 363 (public)).² This order
2 assumes the parties’ familiarity with the facts and history of the case, which are addressed in
3 greater detail in that summary judgment order.

4 OptumInsight had moved to exclude the opinions of CCGroup’s expert witness Dr. Ryan
5 Sullivan, including opinions regarding damages arising from CCGroup’s exclusion from the
6 market for standalone medical claim grouper software.³ Dr. Sullivan had offered a convoluted
7 analysis that first estimated, based on very little underlying data, the performance of certain
8 companies that he identified as comparable to CCGroup in the separate market for physician
9 efficiency software, and used a formula based on the estimated performance of those companies to
10 project CCGroup’s performance in the standalone grouper market. Among other rulings, the
11 Court excluded Dr. Sullivan’s opinions on the measure of CCGroup’s damages, although it
12 allowed opinions addressing more generally the fact of CCGroup’s purported injury. MSJ Order
13 at 11–21. Based on the exclusion of those opinions, the Court also granted summary judgment for
14 OptumInsight on the issue of whether CCGroup could show damages caused by its exclusion from
15 the grouper market. The Court allowed CCGroup to pursue antitrust damages based only on
16 expenses incurred in earlier litigation in which OptumInsight accused CCGroup of infringing
17 OptumInsight’s patents.

18 CCGroup sought leave to file a motion for reconsideration on the basis that the Court
19 improperly granted judgment sua sponte on an issue not raised in OptumInsight’s motion for
20 summary judgment, and the Court granted CCGroup leave to do so. In granting leave, the Court
21 also provided notice of its intent to consider granting judgment on the issue of damages sua sponte
22 under Rule 56(f) of the Federal Rules of Civil Procedure if CCGroup prevailed in showing error in
23 the earlier ruling. *See* Oct. 4, 2019 Order (dkt. 366). CCGroup has now filed its motion for
24 reconsideration, as well as a motion seeking relief from the expert discovery deadlines imposed by

25

26 ² *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 15-cv-03424-JCS, 2019 WL 4492802
27 (N.D. Cal. Aug. 28, 2019). Citations herein to the Court’s previous orders in this case refer to
page numbers of the versions filed in the Court’s ECF docket.

28 ³ This order uses the terms “grouper” and “standalone grouper” interchangeably to refer to the
products at issue in the relevant market for standalone medical claim grouping software. *See* MSJ
Order at 78–79.

1 the Court’s scheduling order, to allow CCGroup to offer a new report from Dr. Sullivan presenting
2 a different theory of damages.

3 Separately, OptumInsight has filed a motion seeking to preclude CCGroup from calling
4 OptumInsight’s lead trial counsel, Peter Lancaster, as a witness at trial.

5 **III. RECONSIDERATION AND SUA SPONTE SUMMARY JUDGMENT**

6 **A. Arguments**

7 **1. CCGroup’s Motion for Reconsideration**

8 CCGroup asks the Court to vacate the portion of its previous order on summary judgment
9 holding that CCGroup cannot recover damages based on its exclusion from the market for grouper
10 software. *See generally* Pl.’s Mot. for Reconsideration (“Reconsideration Mot.,” dkt. 373-5
11 (public), 373-6 (sealed)). CCGroup first argues that the Court erred in granting judgment on that
12 issue because OptumInsight did not assert a deficiency in proof of damages (as opposed to the
13 separate issue of antitrust injury) in its motion, but acknowledges that the Court has since provided
14 notice of intent to grant partial summary judgment sua sponte under Rule 56(f). *See id.* at 1–3.

15 CCGroup cites cases recognizing wide latitude in antitrust plaintiffs’ permissible means of
16 proving damages, including one district court decision from the Western District of Oklahoma
17 holding that the exclusion of expert testimony did not necessarily preclude the plaintiff from
18 recovering some form of damages. *Id.* at 4–5 (citing, *e.g.*, *Champagne Metals v. Ken-Mac Metals,*
19 *Inc.*, No. CIV-02-0528-HE, 2008 WL 5205204, at *14 (W.D. Okla. Dec. 11, 2008)). CCGroup
20 concedes that “a jury may not award purely speculative damages,” but contends that even without
21 Dr. Sullivan’s excluded opinions, it can offer sufficient evidence to present some reasonable basis
22 for an estimate of damages. *Id.* at 6. According to CCGroup, its showing of antitrust injury,
23 which the Court held sufficient, is enough for the jury to consider the question of damages,
24 particularly given the availability of nominal damages. *Id.* at 15–16.

25 CCGroup identifies the following categories of evidence as capable of supporting an award
26 of market damages: (1) evidence regarding the nature and scope of the standalone grouper market,
27 which shows that the market is nationwide and includes few actual competitors, *id.* at 7;
28 (2) evidence of OptumInsight’s revenue and profit from the sale of its grouper product, *id.* at 7–8;

1 (3) evidence of OptumInsight’s pricing of its grouper product, including OptumInsight’s purported
2 ability to maintain a higher profit margin on that product than on other products, *id.* at 8;
3 (4) evidence that CCGroup would have been capable of licensing its grouper product to customers
4 as early as 2003, establishing a temporal span for potential damages, *id.* at 8–9; (5) evidence that
5 OptumInsight’s conduct enforcing and threatening to enforce its patents limited CCGroup’s
6 participation in the market, *id.* at 9; (6) testimony from Dr. Sullivan—which the Court’s previous
7 order permitted—that OptumInsight’s patents enabled it to dominate the standalone grouper
8 market, among other evidence supporting the same conclusion, *id.* at 10–11; (7) testimony from
9 Dr. Sullivan and evidence from market participants that CCGroup’s grouper product was on its
10 merits a viable competitor to OptumInsight’s product, *id.* at 11–12; (8) the actual costs, pricing,
11 and profit margins of CCGroup’s product during the time period at issue, *id.* at 12–13;
12 (9) evidence of barriers to entry and limited participation in the market for standalone groupers, *id.*
13 at 13–14; and (10) the opinions of OptumInsight’s own damages expert Richard Bero, *id.* at 14–
14 15.

15 CCGroup noted at the time it filed its motion for reconsideration that it also intended to
16 seek leave to file an amended expert report, but did not argue that the potential amended report is
17 itself a basis for reconsideration of the Court’s summary judgment order. *See id.* at 16.

18 2. OptumInsight’s Opposition to Reconsideration

19 OptumInsight argues that the Court was correct to grant summary judgment on the issue of
20 market damages and should not reconsider that decision. *See generally* Def.’s Opp’n to Pl.’s Mot.
21 for Reconsideration (“Reconsideration Opp’n,” dks. 387-10 (public), 387-11 (sealed)). As a
22 procedural matter, OptumInsight argues that CCGroup has not shown circumstances warranting
23 reconsideration beyond mere disagreement with the Court’s previous decision, which is not
24 sufficient under this Court’s local rules and past practice. *Id.* at 2–3.

25 While OptumInsight disputes CCGroup’s characterization that the Court granted judgment
26 on the issue of damages “*sua sponte*,” *see id.* at 5, OptumInsight does not actually argue that it
27 moved for summary judgment on that issue or identify any such argument in its motion for
28 summary judgment. Instead, OptumInsight argues that CCGroup addressed the issue of damages

1 in both its summary judgment briefing and in its opposition to OptumInsight’s *Daubert* motion.
2 *Id.* at 3. According to OptumInsight, the parties’ arguments regarding potential exclusion of Dr.
3 Sullivan’s opinions and the Court’s reasoning in excluding those opinions put CCGroup on
4 sufficient notice of its purported lack of evidence of market damages. *Id.* at 3–5.

5 As for the merits of whether CCGroup can show market damages, OptumInsight contends
6 that most of the evidence cited in CCGroup’s motion—for example, OptumInsight’s purported
7 market dominance, the purported viability of CCGroup’s product, and barriers to entry in the
8 grouper market—goes only to the qualitative fact of antitrust injury, without providing any basis
9 for the jury to award a non-speculative quantitative amount of damages. *Id.* at 1, 10–13.
10 OptumInsight argues that its own performance sheds no light on how CCGroup would have
11 performed but for OptumInsight’s patents, and that CCGroup has not actually identified evidence
12 showing the size of the grouper market as a whole. *Id.* at 10–11. OptumInsight distinguishes
13 cases that CCGroup cites as recognizing a liberal standard for antitrust damages on the grounds
14 that each of those cases presented a relatively straightforward comparison for the jury to calculate
15 damages—before and after the anticompetitive conduct at issue affected the market, or in one
16 case, performance in a noncompetitive geographic market versus a competitive geographic
17 market—that is not found in this case. *Id.* at 5–6. OptumInsight asserts that a before-and-after
18 comparison similar to those cases, demarcated here by CCGroup’s successful defense against
19 infringement claims in *Cave I*, would yield no damages, and that CCGroup may not base its
20 damages on OptumInsight’s performance in the grouper market rather than CCGroup’s own
21 performance. *Id.* at 7–8 & n.3.

22 While OptumInsight does not dispute that its own expert Richard Bero offered opinions
23 relating to damages, it argues that CCGroup is not entitled to call an opponent’s expert in its case
24 in chief, citing cases excluding such evidence as a matter of adversarial fairness. *Id.* at 13–14, 16–
25 17. OptumInsight also contends that Bero opined only on a *maximum* amount of damages, “an
26 amount *above which* any damages claim would be obviously overstated” rather than an opinion as
27 to the damages actually supported, and that he testified at his deposition that further work would
28 be necessary to reach a reliable opinion on actual damages. *Id.* at 14–16.

1 **3. CCGroup’s Reply Regarding Reconsideration**

2 CCGroup argues in its reply that the mere fact that arguments “touched on evidence
3 relevant to the damages inquiry” did not allow the Court to grant judgment with respect to an issue
4 on which OptumInsight did not move, and that CCGroup’s previous arguments regarding antitrust
5 injury and the admissibility of Dr. Sullivan’s opinions did not, and had no reason to, constitute a
6 full presentation of CCGroup’s evidence on the issue of damages. Pl.’s Reply in Support of Mot.
7 for Reconsideration (dks. 396-2 (sealed), 396-3 (public)) at 1–3 (citing *Hoard v. Hartman*, 904
8 F.3d 780, 792–93 (9th Cir. 2018) (reversing summary judgment granted sua sponte as to an issue
9 not raised in the defendant’s motion)).

10 With respect to the Court’s more recent notice of intent to consider granting partial
11 summary judgment sua sponte under Rule 56(f), CCGroup again argues that its evidence of
12 antitrust injury—which the Court previously recognized as sufficient to proceed to trial on that
13 issue—is also relevant to damages. *Id.* at 3–5 (“Evidence demonstrating that a party suffered
14 *some* harm is plainly relevant to quantifying the amount of that harm.”). CCGroup also once
15 again argues that the Court should not grant summary judgment on this issue because a jury could
16 award nominal damages if it determines that CCGroup has not presented sufficient evidence of a
17 particular amount of damages. *Id.* at 5. CCGroup further contends that a jury could determine its
18 damages by ““projecting the market share which the plaintiff would have attained absent the
19 anticompetitive activity, and then projecting the [sic⁴] plaintiff’s profits accordingly,”” among
20 other permissible methods, and suggests for the first time that the forthcoming supplemental report
21 it seeks to present from Dr. Sullivan supports denying summary judgment as to damages. *Id.* at 6–
22 7, 10 (quoting *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir.
23 1985)).

24 CCGroup argues that Bero not only responded to Dr. Sullivan’s opinions, but offered his
25 own affirmative opinions as to CCGroup’s lost profits if a jury were to determine that
26 anticompetitive conduct was the cause of OptumInsight increasing its market share during the
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28 ⁴ CCGroup slightly misquotes *Dolphin Tours* in that the word “the” does not appear before
“plaintiff’s” in the original source, but the error is not material.

1 period at issue. *Id.* at 8. CCGroup concedes that Bero based his opinions on an assumption that
2 CCGroup actually could have produced a competing product and that he characterized his
3 damages figure as a maximum, but CCGroup contends that the Court has already recognized that
4 there is evidence CCGroup could have competed in the standalone grouper market, and that a
5 maximum damages figure is relevant to the jury’s analysis. *Id.* According to CCGroup, the
6 circumstances here are not analogous to cases cited by OptumInsight where courts have declined
7 to allow a party to call an opponent’s expert, such as a case where the defense expert’s opinions
8 were based on the plaintiff’s expert’s methodology, which the defense expert had made clear he
9 did not believe was reliable. *Id.* at 9–10 (discussing, *e.g.*, *In re Taco Bell Wage & Hour Actions*,
10 No. 1:07-cv-01314-SAB, 2016 WL 815634, at *4–5 (E.D. Cal. Mar. 2, 2016)).

11 CCGroup contends that there is sufficient evidence for the jury to estimate damages based
12 on the revenue and profit that CCGroup would have obtained from lost sales, and that such an
13 approach “is not a benchmark model” and does not require evidence showing the size of the
14 market or participants’ relative market shares. *Id.* at 12–13. Even if such data were required,
15 CCGroup argues that the record contains more robust evidence of the nature of the standalone
16 grouper market than of the physician efficiency market on which Dr. Sullivan’s initial analysis
17 relied. *Id.* at 13–14. CCGroup argues that under the circumstances of this case, where CCGroup
18 claims that it was deterred from competing in the grouper market at all, it should not be required to
19 identify specific sales to specific customers that it would have made but for OptumInsight’s
20 conduct. *See id.* at 14–15.

21 **B. Reconsideration Is Warranted**

22 CCGroup requests reconsideration under the Court’s inherent authority and Civil Local
23 Rule 7-9(b)(3). Reconsideration Mot. at 1. That rule provides for reconsideration of an
24 interlocutory order to remedy a “manifest failure by the Court to consider material facts or
25 dispositive legal arguments which were presented to the Court before such interlocutory order.”
26 Civ. L.R. 7-9(b)(3). The rule does not fit the circumstances of this motion—CCGroup’s argument
27 for reconsideration is not that the Court disregarded arguments presented by the parties, but rather
28 that the Court acted *sua sponte* on an issue *not* raised by the parties. Nevertheless, although not

1 squarely addressed by Local Rule 7-9, the Court concludes that reconsideration is warranted if the
2 Court acted sua sponte without authority to do so and without notice to the parties that would have
3 allowed for a timely objection before such action was taken.

4 Rule 56(f) of the Federal Rules of Civil Procedure governs sua sponte action to grant
5 summary judgment:

6 (f) Judgment Independent of the Motion. After giving notice and a
7 reasonable time to respond, the court may:

8 (1) grant summary judgment for a nonmovant;

9 (2) grant the motion on grounds not raised by a party; or

10 (3) consider summary judgment on its own after identifying for the
parties material facts that may not be genuinely in dispute.

11 Fed. R. Civ. P. 56(f). “*Sua sponte* grants of summary judgment are only appropriate if the losing
12 party has ‘reasonable notice that the sufficiency of his or her claim will be in issue.’” *Greene v.*
13 *Solano Cty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (quoting *Buckingham v. United States*, 998
14 F.2d 735, 742 (9th Cir. 1993)).

15 OptumInsight did not move—and does not argue now that it moved—for summary
16 judgment on the issue of whether CCGroup could show a non-speculative amount of damages as a
17 result of being dissuaded from competing in the market for grouper software. *See* Reconsideration
18 Opp’n at 3–5 (failing to identify any part of OptumInsight’s motion for summary judgment
19 seeking a determination that CCGroup could not show damages). Although the Court expressed
20 skepticism at the summary judgment hearing as to whether Dr. Sullivan’s market damages
21 opinions rested on a sufficient factual foundation, the Court neither raised the issue of whether
22 CCGroup could show such damages without Dr. Sullivan’s testimony nor invited a response from
23 CCGroup on that issue. *See generally* Aug. 12, 2019 Hr’g Tr. (dkt. 371). The Court’s order
24 before the hearing identifying “a non-exhaustive list of topics that the parties should be prepared
25 to address” also did not raise this issue. *See* dkt. 352.

26 In the absence of such notice either from the Court or from OptumInsight’s motion,
27 CCGroup had no occasion to address the standard for a sufficient showing of damages in antitrust
28 cases, or whether the evidence available could meet that standard if Dr. Sullivan’s damages

1 opinions were excluded. Granting summary judgment on that issue without prior notice to
2 CCGroup was error, and would likely be reversible. *See Hoard*, 904 F.3d at 792–93; *Greene*, 513
3 F.3d at 990 (“[B]ecause Greene did not have notice and an opportunity to oppose summary
4 judgment on those claims, summary judgment on them was inappropriate.”). The Court
5 VACATES the portion of its August 28, 2019 holding that “CCGroup cannot recover damages
6 based on projections of its performance but for OptumInsight’s conduct in . . . the standalone
7 grouper market.” MSJ Order at 102; *see also id.* at 86–87.

8 **C. Sua Sponte Summary Judgment Under Rule 56(f)**

9 In granting CCGroup’s motion for leave to files its motion for reconsideration, the Court
10 also gave notice that if the motion for reconsideration were granted, the Court would consider
11 under Rule 56(f) whether to grant summary judgment sua sponte that CCGroup lacks sufficient
12 evidence to support an award of damages in the grouper market. *See* Oct. 4, 2019 Order. The
13 Court allowed CCGroup to revise its proposed motion for reconsideration to include arguments
14 and evidence opposing sua sponte judgment on that issue. *Id.* The Court now considers whether,
15 in light of the parties’ briefs and evidence filed after appropriate notice, the same outcome is
16 warranted. *See* Fed. R. Civ. P. 56(f) (“After giving notice and a reasonable time to respond, the
17 court may . . . consider summary judgment on its own after identifying for the parties material
18 facts that may not be genuinely in dispute.”).

19 **1. Legal Standard for Summary Judgment**

20 A party opposing summary judgment must identify “specific facts showing there is a
21 genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citation omitted); *see*
22 *also* Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact . . . is genuinely disputed must support
23 the assertion by . . . citing to particular parts of materials in the record . . .”). “[T]he inquiry
24 involved in a ruling on a motion for summary judgment . . . implicates the substantive evidentiary
25 standard of proof that would apply at the trial on the merits.” *Anderson v. Liberty Lobby Inc.*, 477
26 U.S. 242, 252 (1986). The party opposing summary judgment has the burden of identifying, with
27 reasonable particularity, the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d
28 1275, 1279 (9th Cir. 1996).

1 A party need not present evidence to support or oppose summary judgment in a *form* that
 2 would be admissible at trial, but the *contents* of the parties’ evidence must be amenable to
 3 presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir.
 4 2003). Neither conclusory, speculative testimony in affidavits nor arguments in moving papers
 5 are sufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co.,*
 6 *Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The court draws all reasonable factual
 7 inferences in favor of the party opposing summary judgment, *Scott v. Harris*, 550 U.S. 372, 378
 8 (2007), but where a rational trier of fact could not find for that party based on the record as a
 9 whole, there is no “genuine issue for trial” and summary judgment is appropriate. *Matsushita*
 10 *Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

11 **2. Evidence of Damages**

12 Courts have long recognized a relatively lenient standard for proving damages in antitrust
 13 cases, under which a “jury is allowed to act on probable and inferential proof in determining the
 14 amount of damages even though such an award may be an approximation.” *Dolphin Tours, Inc. v.*
 15 *Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985); *see also, e.g., Knutson v. Daily*
 16 *Review, Inc.*, 548 F.2d 795, 811–12 (9th Cir. 1976) (“A study of the adjudicated cases in this area
 17 readily dispels any impression that this question of damages is governed by an application of the
 18 common law rule of reasonable certainty. The cases have long since departed from this rule in
 19 antitrust litigation.” (quoting *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957))). That
 20 is particularly true where a defendant’s “wrongful conduct has rendered difficult the ascertainment
 21 of the precise damages suffered by the plaintiff.” *Eastman Kodak Co. of N.Y. v. S. Photo*
 22 *Materials Co.*, 273 U.S. 359, 379 (1927). But “even where the defendant by his own wrong has
 23 prevented a more precise computation, the jury may not render a verdict based on speculation or
 24 guesswork.” *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

25 CCGroup now argues that it can show damages for lost profits based on a projection of its
 26 performance but for OptumInsight’s conduct, rather than a comparison to a time period or a
 27 comparable business unaffected by the conduct. The Ninth Circuit addressed this method of proof
 28 in *Dolphin Tours*, a case on which CCGroup relies:

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Among the methods by which an antitrust plaintiff can establish lost profits are: (1) comparing the plaintiff's profits before or after the alleged anticompetitive activity with the profits made while the plaintiff was subjected to the anticompetitive activity; (2) examining the profits of a business comparable to the plaintiff's business which was not affected by the anticompetitive activity; or (3) projecting the market share which the plaintiff would have attained absent the anticompetitive activity, and then projecting plaintiff's profits accordingly. In this case Dolphin has attempted to establish its lost profits by projecting the market share that it would have attained absent the anticompetitive activity. In using this approach, Dolphin must presume the existence of rational economic behavior in the hypothetical free market. This includes a rational price differential between Dolphin's prices and defendants' prices based on all competitors attempts to maximize their own profits, and the potential entry of other competitors into the market.

There is some tension between the principle that difficulty in proving the amount of damage should not operate to benefit a defendant whose actions have made that proof difficult, and requiring an antitrust plaintiff to anticipate a hypothetical free market in establishing the amount of his injury. However, we conclude that the burden of anticipating this hypothetical market is appropriately placed on antitrust plaintiffs.⁵ In projecting free market profits, antitrust plaintiffs are not entitled to assume favorable aspects of an anticompetitive market such as an unnatural price differential between themselves and their competitors and limited competition from third parties because of the difficulty of entering the market. Such an approach would overestimate the profits an antitrust plaintiff would have made absent the anticompetitive activity and then under the antitrust laws treble this artificially high damage estimate.

Dolphin Tours, 773 F.2d at 1511–12 (footnote and citations omitted without ellipses).

In *Dolphin Tours*, the plaintiff sought to meet that standard by relying heavily on expert testimony and survey results. *Id.* at 1512. The Ninth Circuit held that evidence to be largely sufficient. *Id.* Although the plaintiff failed to account sufficiently for the potential entry of new competitors, the Ninth Circuit concluded that “[t]estimony by Dolphin’s owner and by [expert witness] Dr. Mak or other economic experts could provide the jury with this information at trial,” and while the plaintiff did not fully account for potential lower pricing, the Ninth Circuit determined that survey data already collected by the plaintiff provided sufficient evidence to resolve that deficiency. *Id.* at 1512–13.

⁵ At the hearing, CCGroup argued that it cannot be the plaintiff's burden to quantify damages based on hypothetical performance in a hypothetical competitive market. The Ninth Circuit has held that it is, despite recognizing the practical challenges to doing so.

1 In a case not cited by either party here, the Ninth Circuit has recognized that expert
2 testimony or similar evidence may in some circumstances be necessary to show antitrust damages,
3 and has affirmed summary judgment where a plaintiff's expert's opinions on damages were
4 excluded:

5 Some sort of study estimating the amount of damages was essential
6 to appellants' case. As this court said in *Dolphin Tours*, the plaintiffs
7 "must provide evidence such that the jury is not left to 'speculation or
8 guesswork' in determining the amount of damages to award." 773
9 F.2d at 1509–10. Summary judgment is appropriate where appellants
10 have no expert witnesses or designated documents providing
11 competent evidence from which a jury could fairly estimate damages.
12 *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449,
13 1452 (9th Cir. 1983) (antitrust case), *cert. denied*, 464 U.S. 994
14 (1983).

15 In the absence of another study besides those that the district court
16 had properly excluded, or the possibility that Don McGlinchy could
17 rehabilitate William McGlinchy's defective study, appellants could
18 make no showing about the amount of damages. By eliminating these
19 possibilities, Shell Oil defendants made their showing that the named
20 witnesses' possible testimony would raise no genuine issue of
21 material fact about the amount of damages appellants had sustained.
22 *Cf. Celotex*, 106 S. Ct. at 2555–56 (White, J., concurring).

23 Once Shell Oil defendants made this showing, the burden was on
24 appellants to come forward with specific facts showing there was a
25 genuine issue for trial. Fed. R. Civ. P. 56(e); *see Matsushita*, 475 U.S.
26 574. Appellants did not meet this burden; they produced no evidence
27 at all to contradict Shell Oil defendants' showing, or even to enable
28 contradictory inferences.

McGlinchy v. Shell Chem. Co., 845 F.2d 802, 808–09 (9th Cir. 1988) (format of citations altered).

29 The various forms of documentary evidence that CCGroup cites here, as well as the
30 opinions from Dr. Sullivan not excluded by the Court's previous order, go only to the fact of
31 injury; they do not allow the jury to determine a particular *amount* of damages beyond mere
32 speculation. OptumInsight's expert Richard Bero's report and testimony come somewhat closer,
33 offering an opinion that CCGroup's maximum lost profits in the standalone grouper market during
34 the period at issue were \$1.9 million. Bero Report (dkt. 307-7) at 70–72. Bero relies on
35 CCGroup's expert Dr. Sullivan's figures for OptumInsight's, CCGroup's, and Truven's real-world
36 shares of the standalone grouper market. *See id.* Scheds. 2.1, 5.0 (citing Sullivan Report (dkt.
37 290-13) Attach. C-2). For a portion of the time period at issue, his report includes a meaningful
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1 market share held by 3M, *see id.*, despite the Court’s definition of a relevant product market—in
2 reliance on Dr. Sullivan’s opinion—that does not include 3M’s grouper product, *see* MSJ Order at
3 81 n.35. While that discrepancy could probably be accounted for, and it is not clear that the
4 underlying evidence of relative real-world shares of the standalone grouper market is deficient (as
5 opposed to evidence regarding the physician efficiency market, the lack of which was an
6 important factor in excluding Dr. Sullivan’s initial damages opinions), the more significant flaw is
7 that neither Bero’s opinions nor any other evidence identified by CCGroup provides the jury with
8 any basis to tease out “favorable aspects of an anticompetitive market such as an unnatural price
9 differential between [CCGroup] and [its] competitors and limited competition from third parties
10 because of the difficulty of entering the market,” which the Ninth Circuit has held is a component
11 of an antitrust plaintiff’s burden in proving damages based on a projected market share. *See*
12 *Dolphin Tours*, 733 F.2d at 1512.

13 That deficiency in Bero’s report would not necessarily undermine the conclusion that he
14 actually presents—it is possible to reach a reliable *maximum bound* of CCGroup’s lost profits
15 without accounting for all of the factors that might *reduce* those profits if additional competitors
16 entered the market and prices dropped to a competitive equilibrium. Without such analysis,
17 however, CCGroup cannot reliably repurpose Bero’s opinions to show its actual damages rather
18 than an upper limit to those damages. Assuming for the sake of argument that a jury could and
19 would accept Bero’s maximum figure, the amount by which that maximum must be discounted to
20 estimate actual damages remains pure speculation. Even if it is possible for a jury to conduct such
21 analysis without the benefit of expert opinions directly addressing the issue—which is far from
22 clear—CCGroup has identified no factual evidence in this case that would enable the jury to do so.

23 In *Dolphin Tours*, despite identifying somewhat similar deficiencies in the plaintiff’s
24 expert report, the Ninth Circuit reversed the district court’s decision to grant summary judgment,
25 concluding that the plaintiff would likely be able to remedy those deficiencies at trial. 733 F.2d at
26 1512–13. This case differs from the circumstance presented by *Dolphin Tours* in at least two
27 ways. First, the record in that case included a survey on consumer preferences that the Ninth
28 Circuit determined would support analysis of consumer behavior at different price points, even

1 though the plaintiff had not yet presented such analysis. *See id.* No comparable data is available
2 here. Second, the Ninth Circuit’s analysis suggests that the district court had not yet considered
3 whether the expert testimony at issue met the standard for expert opinion evidence, such that
4 supplemental opinions could be presented at trial subject to a challenge under that standard. *See*
5 *id.* at 1513 (“If Dolphin is unable to establish the validity of the Report or qualify Dr. Mak as an
6 expert, then it may be unable to present sufficient evidence on the amount of its damages and a
7 directed verdict or judgment notwithstanding the verdict may be appropriate.”). Here, expert
8 discovery closed long ago, the deadline for *Daubert* motions has passed, and those motions have
9 been briefed and adjudicated. This Court does not read *Dolphin Tours* as divesting district courts
10 of authority to set a case schedule requiring challenges to expert opinion evidence to be resolved
11 before or in conjunction with motions for summary judgment.

12 As in *McGlinchy*, the Court concludes that to the extent CCGroup seeks damages for lost
13 profits based on a projection of its market share but for OptumInsight’s conduct, “[s]ome sort of
14 study estimating the amount of damages was essential to [CCGroup’s] case.” *McGlinchy*, 845
15 F.2d at 808.⁶ The record available after Dr. Sullivan’s damages opinions are excluded does not
16 provide a sufficient basis for the jury to reach a reasonable estimate, without relying on
17 speculation, of the market share and profits that CCGroup would have captured in a hypothetical
18 competitive market. The Court therefore GRANTS summary judgment sua sponte on this issue
19 pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. CCGroup may not recover lost
20 profits damages, although it may seek nominal damages if the jury determines that OptumInsight’s
21 wrongful conduct excluded CCGroup from the market for standalone grouper software.

22 **IV. MOTION FOR LEAVE TO AMEND THE SCHEDULING ORDER**

23 **A. Arguments**

24 **1. CCGroup’s Motion to Amend the Scheduling Order**

25 CCGroup moves to amend the Court’s scheduling order to allow CCGroup to serve an
26

27 ⁶ The Court declines to follow the Western District of Oklahoma’s decision denying summary
28 judgment on damages without analysis of whether any available evidence could show damages.
See Champagne Metals, 2008 WL 5205204, at *14.

1 amended expert report by Dr. Sullivan including a modified damages analysis that CCGroup
2 contends would satisfy the *Daubert* standard and this Court’s previous order excluding Dr.
3 Sullivan’s initial opinions. *See generally* Mot. for Relief from Case Mgmt. Schedule (dkt. 384).
4 CCGroup proposes an amended schedule in which CCGroup would serve its amended report by
5 January 24, 2020 or fourteen days after the Court grants the motion, OptumInsight would serve a
6 rebuttal report by February 24, 2020 or thirty days after service of CCGroup’s report, and the
7 parties would complete supplemental expert witness depositions limited to the new subject matter
8 of Dr. Sullivan’s amended report no later than March 9, 2020 or fourteen days after service of
9 OptumInsight’s rebuttal report. *Id.* at 1. CCGroup does not argue that the potential amended
10 report should itself be considered in the Court’s analysis of the motion for reconsideration of
11 whether to allow CCGroup to pursue market damages at all, and concedes that if the Court denies
12 the motion for reconsideration, Dr. Sullivan’s proposed amended opinions would not be relevant
13 at trial and the motion to amend the scheduling order would be moot. *Id.* at 8.

14 The amended report would be limited to CCGroup’s damages in the standalone grouper
15 market and would not address damages in the physician efficiency market. *Id.* at 4 & n.3. Dr.
16 Sullivan would base CCGroup’s but-for performance in the standalone grouper market on the
17 performance of non-party Truven—the only other participant in that market besides CCGroup and
18 OptumInsight, selling a product under license from OptumInsight—with adjustments to account
19 for differences between Truven and CCGroup. *Id.* at 4. In the apparent absence of direct evidence
20 of Truven’s performance, Dr. Sullivan would extrapolate the number of “covered lives” served by
21 Truven’s product from: (1) OptumInsight’s standalone grouper revenue; (2) OptumInsight’s
22 revenue per covered life; (3) OptumInsight’s market share; and (4) unspecified “other evidence of
23 [Truven’s product’s] market penetration during the damages period.” *Id.* Dr. Sullivan would then
24 use the estimated number of covered lives for Truven’s product to calculate CCGroup’s but-for
25 revenue. *Id.* CCGroup argues that this methodology would avoid reliance on estimates of
26 CCGroup’s performance in the physician efficiency market—one of the issues that led the Court
27 to exclude Dr. Sullivan’s initial opinions on damages—and that Dr. Sullivan can address the
28 Court’s concern that his earlier damages estimates showed no effect from the previous litigation in

1 which OptumInsight accused CCGroup of infringing its patents and CCGroup obtained a verdict
2 of non-infringement. *Id.* at 5 & n.5.

3 According to CCGroup, there is good cause to permit the amended report because “the jury
4 would certainly benefit from Dr. Sullivan’s proposed amended opinions in evaluating the evidence
5 and determining the appropriate quantum of damages,” permitting the amendment would “help
6 ensure that CCGroup receives full and adequate compensation for its private antitrust injury,” and
7 it would “also further the policy of deterring antitrust violations.” *Id.* at 2, 7. CCGroup argues
8 that courts have frequently allowed plaintiffs to amend expert reports to attempt to cure defects
9 that led to the exclusion of damages opinions. *Id.* at 2, 5–6 (citing *Finjan, Inc. v. Sophos, Inc.*, No.
10 3:14-cv-1197-WHO, 2016 WL 4268659, at *4 (N.D. Cal. Oct. 15, 2016); *Dig. Reg of Tex, LLC v.*
11 *Adobe Sys., Inc.*, No. 4:12-cv-01971-CW, 2014 WL 4090550, at *4 (N.D. Cal. Aug. 19, 2014);
12 *Golden Bridge Tech. v. Apple, Inc.* (“*Golden Bridge P*”), No. 5:12-cv-04882-PSG, 2014 WL
13 2194501, at *7 (N.D. Cal. May 18, 2014); and *Dynetix Design Sols., Inc. v. Synposys, Inc.*, No.
14 5:11-cv-5973-PSG, 2013 WL 4538210, at *5 (N.D. Cal. Aug. 22, 2013); as well as decisions from
15 other districts). CCGroup also notes that Dr. Sullivan would testify regardless of the outcome of
16 this motion, with his testimony limited, if the motion is not granted, to opinions regarding the
17 nature of the standalone grouper market, that OptumInsight dominated that market due to its
18 patents, and that CCGroup would have attained a greater share of the market but for OptumInsight
19 wielding its patents. *Id.* at 6–7.

20 CCGroup acknowledges that diligence is the key issue in considering a request to amend a
21 scheduling order, and contends that it acted diligently in filing this motion—which it filed on
22 November 11, 2019—in time to be heard on the same day as the motion for reconsideration. *Id.* at
23 3, 7–8. According to CCGroup, the proposed amended report only became potentially relevant
24 after October 4, 2019, when the Court granted CCGroup’s motion for leave to file its motion for
25 reconsideration, and thus indicated that damages for exclusion from the standalone grouper might
26 remain an issue in the case despite the August 28, 2019 summary judgment order. *Id.* at 8.
27 CCGroup also argues that OptumInsight would “not be materially prejudiced by the proposed
28 adjustment to the schedule” in light of the June 1, 2020 trial date, and that the default schedule set

1 by Rule 26 of the Federal Rules of Civil Procedure would permit expert disclosures up to March 1,
2 2020, ninety days before the start of trial. *Id.* at 3, 8.

3 **2. OptumInsight’s Opposition to Amending the Scheduling Order**

4 OptumInsight argues that CCGroup has not shown good cause to amend the scheduling
5 order because it has not shown diligence, either in attempting to meet the initial expert disclosure
6 deadline, or in filing its present motion within a reasonable time after the Court excluded Dr.
7 Sullivan’s damages opinions. Opp’n to Pl.’s Mot. for Relief from Case Mgmt. Schedule
8 (“Scheduling Opp’n,” dkt. 391) at 4–5. According to OptumInsight, CCGroup had all of the
9 information on which Dr. Sullivan now relies well before the January 22, 2018 extended expert
10 disclosure deadline and the May 30, 2018 extended expert discovery deadline. *Id.* at 1, 5.
11 OptumInsight notes the repeated discovery extensions in this case, and the fact that CCGroup took
12 no fact depositions until October 17, 2017, nearly two years after the Court first set a schedule in
13 2015, and only ten days before the then-operative fourth extended fact discovery deadline, which
14 was subsequently extended one more time to December 15, 2017. *Id.* at 5. OptumInsight also
15 contends that CCGroup failed to meet expert discovery deadlines—failures to which
16 OptumInsight did not object at the time. *Id.* at 6.

17 OptumInsight contends that CCGroup has failed to meet not only the “good cause” and
18 diligence standards of Rule 16 of the Federal Rules of Civil Procedure, but also Rule 37(c)(1)’s
19 requirement that allowing evidence not timely disclosed must be either “substantially justified” or
20 “harmless.” *Id.* at 3. OptumInsight argues that it would be prejudiced by incurring additional
21 attorneys’ fees and facing reduced time to prepare for trial if the motion were granted and an
22 additional round of *Daubert* motions were needed to address the supplemental report, which
23 OptumInsight has not yet seen, but which it believes would likely rely on underlying data and
24 methods similarly deficient to Dr. Sullivan’s original report. *Id.* at 12–14. According to
25 OptumInsight, the months remaining before trial do not negate that prejudice. *Id.* at 9 (citing
26 *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005)). OptumInsight notes
27 that the trial was continued to its current date to accommodate a schedule conflict of CCGroup’s
28 counsel, and argues that it would be unfair for such an accommodation to lead to additional

1 discovery and evidence for OptumInsight that would have been unavailable had the trial been set
 2 on a schedule similar to the one in place before the Court vacated the trial and hearing dates to
 3 consider the parties’ summary judgment motions, which had included only fourteen weeks
 4 between the summary judgment hearing and the trial. *Id.* at 9.

5 OptumInsight cites a number of cases in which similar requests were denied. *Id.* at 2–3, 7–
 6 9 (citing *Burnham v. United States*, 544 F. App’x 660, 660–61 (9th Cir. 2013); *ePlus, Inc. v.*
 7 *Lawson Software, Inc.*, 700 F.3d 509, 523 (Fed. Cir. 2012); *MicroStrategy Inc. v. Bus. Objects,*
 8 *S.A.*, 429 F.3d 1344, 1358 (Fed. Cir. 2005); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No.
 9 16-cv-01393, 2019 U.S. Dist. LEXIS 21976, at *10–15 (N.D. Cal. Feb. 6, 2019); *Unwired Planet,*
 10 *LLC v. Apple Inc.*, No. 13-cv-04134-VC, 2017 U.S. Dist. LEXIS 20928, at *3–4 (N.D. Cal. Feb.
 11 14, 2017); *Golden Bridge Tech. v. Apple Inc.* (“*Golden Bridge IP*”), No. 5:12-cv-04882-PSG, 2014
 12 U.S. Dist. LEXIS 76339, at *1–2 (N.D. Cal. June 1, 2014); *Network Prot. Scis., LLC v. Fortinet,*
 13 *Inc.*, No. C 12-01106 WHA, 2013 WL 5402089, 2013 U.S. Dist. LEXIS 138890, at *25–26 (N.D.
 14 Cal. Sept. 26, 2013); *Nat’l Union Fire Ins. Co. v. Elec. Transit, Inc.*, No. C 04-03435 JSW, 2007
 15 U.S. Dist. LEXIS 86949, at *9–12 (N.D. Cal. Nov. 14, 2007)). According to OptumInsight, all but
 16 one of the cases cited by CCGroup are distinguishable because they were patent infringement
 17 cases in which expert testimony was needed to determine the *minimum* damages, equivalent to a
 18 reasonable royalty, allowed by 35 U.S.C. § 284. *Id.* at 11. OptumInsight contends that CCGroup
 19 is not entitled to any similar minimum amount of damages on its antitrust claims here, and that
 20 CCGroup would not be left without a remedy without Dr. Sullivan’s supplemental report, because
 21 CCGroup could still recover treble its attorneys’ fees from the *Cave I* litigation if it prevails here.
 22 *Id.* at 11–12. OptumInsight distinguishes CCGroup’s only non-patent-infringement case on the
 23 basis that—according to OptumInsight—it involved an unsettled area of law and a controversial
 24 damages theory that had been accepted by some courts and rejected by others, while CCGroup
 25 failed to show that any court had ever accepted a theory comparable to Dr. Sullivan’s original
 26 opinions in this case and failed to “marshal[] necessary evidence and present[] a coherent damages
 27 calculation” to support an a theory of market damages using accepted methodology. *Id.* at 12
 28 (discussing *Fidelitad, Inc. v. Insitu, Inc.*, No. 2:13-cv-03128, 2016 WL 4265749 (E.D. Wash. Aug.

1 11, 2016)).

2 **3. CCGroup’s Reply Regarding Scheduling**

3 CCGroup argues in its reply that the Court’s *Daubert* order excluding Dr. Sullivan’s
4 original opinions presents good cause for allowing an amended report, and that failure to do so
5 would impose “unnecessarily draconian and punitive outcomes that would violate the strong
6 policy favoring decisions on the merits.” Reply in Support of Mot. for Relief from Case Mgmt.
7 Schedule (dkt. 394) at 2–3. CCGroup contends that Dr. Sullivan had no reason to present his new
8 opinions in his initial report because he believed that his initial opinions were sound, and
9 CCGroup had no reason to expect that the Court would reject those opinions until the order doing
10 so was issued. *Id.* at 3. Although CCGroup disagrees that Rule 37(c)(1) applies here—because if
11 the Court altered the scheduling order, there would be no untimely disclosure—CCGroup argues
12 that the same analysis it presents with respect to Rule 16 would also warrant excusing a late
13 disclosure under Rule 37. *Id.*

14 According to CCGroup, the patent infringement cases that OptumInsight seeks to
15 distinguish did not rely on the specific circumstances of minimum reasonable royalty damages in
16 their analysis, and CCGroup argues that its inability to present expert testimony on a permissible
17 theory of damages here would be analogous to those cases. *Id.* at 4. CCGroup also argues that
18 *Fidelitad* is not distinguishable, because the court in that case held that there was *no* substantial
19 ground for disagreement on whether the original opinions were permissible, and did not indicate
20 that any unsettled legal issue factored into its analysis. *Id.* at 4–5. CCGroup distinguishes the
21 cases cited by OptumInsight on the grounds that *Network Protection Sciences*, *Golden Bridge II*,
22 *ePlus*, and others involved requests to supplement expert reports on the eve of or during trial, and
23 the court in *Golden Bridge* had already granted one request to revise an expert report before
24 denying a subsequent request. *Id.* at 5–6. CCGroup contends that *National Union Fire* is
25 inapposite because it concerned a party seeking to add opinions regarding defenses wholly
26 unaddressed in the expert’s initial report, and that Dr. Sullivan’s initial report here did not
27 overreach in the same manner as report at issue in *Unwired Planet*. *Id.* at 6.

28 CCGroup argues that the months remaining before trial are sufficient to negate any

1 significant prejudice to OptumInsight, and that there would be sufficient time to brief and hear a
2 new *Daubert* motion. *Id.* at 7–8. CCGroup also suggests that “after reviewing Dr. Sullivan’s
3 amended report, even OptumInsight [might] agree that there is no legitimate basis to challenge his
4 revised opinions.” *Id.* at 8.

5 CCGroup’s reply includes the following brief response to OptumInsight’s arguments that
6 CCGroup did not diligently pursue discovery and required numerous extensions of discovery
7 deadlines:

8 Finally, OptumInsight devotes two pages of its Response to
9 calumnies aimed at biasing the Court against CCGroup. *See*
10 [Scheduling Opp’n] at 5–7. These misrepresentative statements
11 regarding CCGroup’s conduct throughout the litigation are irrelevant
12 and do not bear in any way on the issue now before the Court. Rather
13 than engage in the grueling exercise of correcting the record,
14 CCGroup requests that the Court simply disregard these aspersions as
15 an unfortunate byproduct of the parties’ heated litigation.

16 *Id.* at 4.

17 **B. Legal Standard for Relief from a Scheduling Order**

18 Deviations from scheduling orders are governed by Rule 16 of the Federal Rules of Civil
19 Procedure, which provides that such orders “may be modified only for good cause and with the
20 judge’s consent.” Fed. R. Civ. P. 16(b)(4). The Ninth Circuit has established a standard for such
21 modification that focuses on the diligence of the party seeking relief from a deadline:

22 Unlike Rule 15(a)’s liberal amendment policy . . . , Rule 16(b)’s
23 “good cause” standard primarily considers the diligence of the party
24 seeking the amendment. The district court may modify the pretrial
25 schedule “if it cannot reasonably be met despite the diligence of the
26 party seeking the extension.” Fed. R. Civ. P. 16 advisory committee’s
27 notes (1983 amendment). Moreover, carelessness is not compatible
28 with a finding of diligence and offers no reason for a grant of relief.
Although the existence or degree of prejudice to the party opposing
the modification might supply additional reasons to deny a motion,
the focus of the inquiry is upon the moving party’s reasons for seeking
modification. If that party was not diligent, the inquiry should end.

29 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citations omitted).

30 Courts look to a party’s diligence not only in complying with the scheduling order after it has been
31 issued, but also “in creating a workable Rule 16 scheduling order,” as well as “in seeking
32 amendment of the Rule 16 order, once it became apparent that [the party] could not comply with

1 the order.” *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999).⁷

2 **C. CCGroup Is Not Entitled to Relief from the Scheduling Order**

3 After a number of delays and extensions, expert discovery closed in this case on May 30,
4 2018, nearly three years after the case was filed. *See* May 3, 2018 Order on Stipulation (dkt. 276).
5 OptumInsight is correct that nothing prevented CCGroup from obtaining the new report it seeks to
6 offer from Dr. Sullivan before that deadline. The delay arises from CCGroup and Dr. Sullivan’s
7 decision to present a single initial theory of damages in the standalone grouper market, resting like
8 a house of cards on a convoluted analysis of how CCGroup might have performed in the physician
9 efficiency market that in turn relied on weak underlying data and assumptions, which the Court
10 ultimately determined was not sufficiently reliable to present to the jury. *See* MSJ Order at 11–17,
11 20–21. The decision to exclude those opinions was not a close call, and CCGroup does not argue
12 that Dr. Sullivan’s initial theory can be rehabilitated with minor changes. Instead, CCGroup
13 proposes to introduce an entirely new measure of damages based on a comparison to Truven’s
14 performance in the standalone grouper market, relying on data that was available when Dr.
15 Sullivan prepared his initial opinion.

16 While CCGroup is correct that other courts have in some instances allowed plaintiffs to
17 offer new expert reports after opinions on damages were excluded, at least some of those cases are
18 readily distinguishable. In *Finjan, Inc. v. Sophos, Inc.*, for example, Judge Orrick allowed leave to
19 amend a report, as part of the same order in which he precluded the report, where the means for
20 resolving its deficiencies were apparent, where Judge Orrick believed the amendments could be
21 completed within nine days from the date of his order, and where it appears that no more than an
22 abbreviated subsequent *Daubert* challenge was anticipated, given that trial was set to begin less
23 than two weeks after the amended report was due. 2016 WL 4268659, at *1, *4, *6. Similarly, in
24 *Digital Reg of Texas, LLC v. Adobe Systems, Inc.*, Judge Wilken anticipated that the plaintiff could
25

26 ⁷ The Court has addressed this standard previously in this case, striking evidence offered by
27 CCGroup from a fact witness not disclosed before the close of discovery. Order re Discovery
28 Dispute (dkt. 272) at 2–3, *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 15-cv-03424-
JCS, 2018 WL 1938555, at *1–2 (N.D. Cal. Apr. 25, 2018).

1 provide “a revised damages report curing only the problems identified in [Judge Wilken’s] order,”
2 by two days after the date of the order. 2014 WL 4090550, at *4. In contrast, no means of
3 remedying Dr. Sullivan’s damages opinions was apparent from his initial report, CCGroup’s
4 proposed supplemental report would introduce an entirely different theory of damages, and
5 OptumInsight has presented at least credible arguments that Dr. Sullivan’s proposed reliance on
6 *OptumInsight’s* financial data to estimate *Truven’s* financial performance—not to mention his as-
7 yet-unspecified methods of adjusting *Truven’s* estimated performance to account for differences
8 between *Truven* and CCGroup—will warrant a thorough rebuttal report and full briefing on a
9 *Daubert* motion.

10 In other cases, courts have denied such requests. Judge Alsup explained his reasons for
11 doing so as follows:

12 This leaves the follow-on question of whether [the plaintiff] should
13 be permitted an opportunity to have a second bite at the apple. Over
14 the course of many years and more than a dozen patent trials, the
15 undersigned judge has concluded that giving a second bite simply
16 encourages overreaching on the first bite (by both sides). A second
17 bite may be appropriate where the expert report can be salvaged with
18 minimal disruption to an orderly trial, but where the report is not even
19 close, there is a positive need to deny a second bite in order to
20 encourage candor in the first place. To this must be added the fact that
the trial date is only four days away and the parties and the Court have
built their calendars around that date. To start over with a new royalty
analysis would impose prejudice on the defense as well and disrupt
the Court’s calendar, which is burdened with other trials set far into
the future. Possibly, plaintiff can cobble together a royalty case based
on other disclosed witnesses and evidence. Possibly not. If not, it is a
problem clearly of plaintiff’s own overreaching and it will not be
allowed a second bite at the apple.

21 *Network Prot. Scis.*, 2013 WL 5402089, at *8.

22 Judge Alsup’s reasoning with respect to candor in parties’ initial expert reports is
23 persuasive. Moreover, even assuming that Dr. Sullivan believed his initial analysis to be well
24 founded and CCGroup’s attorneys believed that zealous representation called for pursuing such an
25 ambitious theory of damages, nothing prevented CCGroup from offering its newly proposed
26 approach—which Dr. Sullivan apparently also believes is well founded—as an alternative measure
27 of damages at the outset, in case the Court held Dr. Sullivan’s primary theory unreliable or the
28 jury found it unconvincing. Withholding this alternative method until the first theory was

1 excluded gives rise to concerns of fairness and candor, because had the initial theory *not* been
2 excluded, there would have been no indication to the jury, the Court, or OptumInsight that Dr.
3 Sullivan was also willing to endorse this wholly different approach to calculating damages—an
4 approach that, although not addressed in CCGroup’s briefs, likely results in a different total
5 amount.

6 CCGroup was not diligent in ensuring the expert opinions on damages that it timely
7 disclosed were well founded on reliable methods, or that the approach it now seeks to use instead
8 was disclosed as an alternative theory. As discussed at the summary judgment hearing, to the
9 extent that Dr. Sullivan intended to build a damages model based on the physician efficiency
10 market, CCGroup was not diligent in pursuing third party discovery—during the years that fact
11 discovery was open—to obtain the actual data needed to support such a model, or for that matter
12 to support a new theory based on Truven’s performance without needing to extrapolate from data
13 specific to OptumInsight, which controlled a far larger share of the market.⁸ CCGroup also was
14 not diligent in waiting to propose a new theory in its present motion seeking relief from the
15 scheduling order on November 11, 2019, two and a half months after the Court excluded Dr.
16 Sullivan’s initial damages opinions, three and half months after the Court indicated in a pre-
17 hearing order that it was considering doing so, and almost a year and half after OptumInsight filed
18 its *Daubert* motion raising serious issues as to the reliability of Dr. Sullivan’s initial report.
19 Because CCGroup “was not diligent, the inquiry should end.” *See Johnson*, 975 F.2d 604, 609.
20 The motion for relief from the scheduling order is therefore DENIED.

21 Even if the Court were to go beyond CCGroup’s diligence to consider the issue of
22 prejudice, that too supports denying the motion. The proposed new damages report would require
23 a rebuttal report from OptumInsight, new expert depositions by both sides, and a new round of
24

25 ⁸ *See, e.g.*, Aug. 12, 2019 Hr’g Tr. at 23:13–20 (“THE COURT: But why didn’t he use actual
26 numbers? MR. BROPHY: There are none. THE COURT: What do you mean, ‘there are none’?
27 MR. BROPHY: This is the most information that we can get about -- THE COURT: You couldn’t
28 get Truven’s sales? MR. BROPHY: We assume -- we could have gotten Truven’s sales
possibly.”); *id.* at 31:17–25 (“MR. BROPHY: . . . Verisk, there was evidence that Verisk was
smaller. We didn’t know how much smaller, admittedly. There was no data for Verisk. So we
averaged between CCGroup and -- THE COURT: And just to be clear, it’s because you didn’t try
to get that data, not because it’s not available? MR. BROPHY: That’s correct.”).

1 *Daubert* briefing on whether to exclude one or both party’s new expert opinions. CCGroup’s
2 proposed schedule would call for an exchange of reports and completion of depositions by March
3 9, 2020. If the parties were allowed eleven days from that deadline to file any new *Daubert*
4 motions on March 20, 2020, briefing and hearing those motions on the usual five-week track set
5 by the Court’s local rules would result in a hearing on April 10, 2020, less than a month before the
6 final pretrial conference in a case that will require complex trial preparation even without placing
7 the issue of damages in flux. While the Court does not doubt that the parties could meet such a
8 schedule if required to do so, and the prejudice is not so severe as in *Network Protection Sciences*
9 where trial was only four days away, the burden that proceeding with a new damages theory at this
10 stage would place on OptumInsight remains significant and weighs against granting CCGroup’s
11 motion.

12 OptumInsight argues that CCGroup must also meet Rule 37(c)(1)’s requirement that
13 evidence not timely disclosed can be allowed only where it is “substantially justified” or
14 “harmless.” *See* Scheduling Opp’n at 3. Because the Court concludes that CCGroup has not
15 shown diligence and is not entitled to relief under Rule 16—which is the only relief that CCGroup
16 seeks—the Court need not reach that alternative standard. Nevertheless, for the reasons discussed
17 above, the Court concludes that a belated offering of CCGroup’s alternative damages theory is not
18 substantially justified, and that filling the remaining time before trial with a new round of expert
19 discovery and *Daubert* briefing is not harmless.

20 **V. MOTION TO PRECLUDE TESTIMONY**

21 **A. Arguments**

22 **1. OptumInsight’s Motion to Preclude Lancaster’s Testimony**

23 OptumInsight argues that CCGroup should be precluded from calling OptumInsight’s lead
24 trial attorney Peter Lancaster as a witness, or otherwise referring to his participation in
25 OptumInsight’s purportedly anticompetitive conduct, because it has “failed to identify evidence of
26 Mr. Lancaster’s involvement in the actions about which it complains” and forcing OptumInsight
27 to either disqualify Lancaster or explain his dual role as a witness and advocate to the jury would
28 be prejudicial. *See* Mot. to Preclude Pl. from Calling Peter Lancaster (dks. 381-10 (sealed), 381

1 (public)) at 1–2. According to OptumInsight, Lancaster’s role in litigation between
2 OptumInsight’s predecessors Ingenix and Symmetry is irrelevant “[s]ince the Court has ruled that
3 OptumInsight must be assumed to have the knowledge of Symmetry for the purposes of
4 CCGroup’s *Walker Process* claim,”⁹ and regardless, “Lancaster naturally has no memory of a
5 single brief or a single statement by an opposing party in a case in which he served as local
6 counsel in 2001 and 2002.” *Id.* at 2.

7 OptumInsight contends that billing records, privilege logs, and deposition testimony from
8 other lawyers demonstrate that Lancaster had no involvement in the decision to file infringement
9 claims and counterclaims against CCGroup, with Lancaster only becoming involved after those
10 claims were filed and not taking part in the decision to dismiss claims based on the Dang patents.
11 *Id.* a 4–6. According to OptumInsight, CCGroup asked Lancaster few substantive questions at his
12 own deposition in this case in 2017, and Lancaster confirmed his lack of relevant involvement
13 both at that deposition and in a subsequent declaration. *Id.* at 6–7. OptumInsight notes that
14 CCGroup never amended its Rule 26 disclosures to identify Lancaster as a witness, and did not
15 otherwise indicate that it planned to call him as a witness until OptumInsight asked in October of
16 2019. *Id.* at 8.

17 OptumInsight argues that CCGroup has not met its burden to show compelling reasons to
18 call OptumInsight’s trial counsel as a witness, *id.* at 8–12, nor even a basic showing that Lancaster
19 can offer relevant testimony under Rule 402 of the Federal Rules of Evidence, *id.* at 15–17, noting
20 that neither CCGroup nor the Court referenced Lancaster’s purported involvement in the facts of
21 the case in the context of briefing and resolving the parties’ motions for summary judgment, *id.* at
22 16, 17. OptumInsight also contends that CCGroup has waived any right to call Lancaster as a
23 witness by failing to promptly move for his disqualification as counsel, *id.* at 12–15, and that
24 allowing CCGroup to call Lancaster as a witness would be unduly prejudicial under Rule 403, *id.*

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26 ⁹ This assertion, also repeated elsewhere in OptumInsight’s motion, misstates the Court’s holding.
27 Rather than holding that knowledge can be assumed, the Court has held that knowledge of fraud is
28 a necessary element of a *Walker Process* claim *only* where the defendant is a subsequent assignee
of the patent, and thus is not a necessary element of CCGroup’s claim here because
OptumInsight—standing in the shoes of Symmetry—is the same party that allegedly obtained
patents through fraud on the PTO. *See* MSJ Order at 88–95.

1 at 17–18. According to OptumInsight, “permitting CCGroup to make evidentiary references to
2 Mr. Lancaster” would be similarly prejudicial, and OptumInsight asks the Court to preclude
3 CCGroup from “(1) referencing Mr. Lancaster’s role in the underlying facts during its opening and
4 closing statements, (2) referencing Mr. Lancaster in its witness examination (or eliciting testimony
5 regarding Mr. Lancaster’s role), or (3) offering documents that include Mr. Lancaster’s name.” *Id.*
6 at 18–19. OptumInsight’s proposed order would, as an alternative to precluding such documents
7 entirely, require CCGroup to “redact his name from the document before it is offering [sic].” *See*
8 dkt. 381-5.

9 2. CCGroup’s Opposition to Precluding Lancaster’s Testimony

10 Relying on a statement by the Ninth Circuit that the “reasoning behind the advocate-
11 witness rule does not contemplate that a material witness will be able to exempt himself from the
12 rigours of the fact-finding process by electing to proceed as an advocate,” CCGroup contends that
13 Lancaster is a relevant witness because he represented Ingenix in its litigation against Symmetry
14 (both of which later merged to become OptumInsight), where he received briefs and attended
15 hearings addressing evidence that—according to CCGroup—indicates Dang conceived his
16 invention before the conception date that he represented to the PTO, and Lancaster is the only
17 lawyer who was involved in both that litigation and *Cave I*. Pl’s Opp’n to Def.’s Mot. to Preclude
18 (dkt. 385-2 (public), 385-3 (sealed)) at 1–2 (quoting *United States v. Prantil*, 764 F.2d 548, 554
19 (9th Cir. 1985)). CCGroup argues that the evidence of the earlier conception date establishes that
20 Dang’s patents are invalid, *id.* at 3–5, and that the jury must weigh Lancaster’s denials of relevant
21 participation and knowledge against the circumstances of his involvement. *Id.* at 2.

22 CCGroup does not dispute that Lancaster joined the *Cave I* litigation team after
23 OptumInsight’s infringement counterclaims had been filed, but argues that Lancaster’s
24 involvement in the case, beginning more than two years before OptumInsight agreed to dismiss
25 claims for infringement of the Dang patents, is nevertheless relevant. *Id.* at 6. CCGroup notes
26 that Lancaster had already entered his appearance in *Cave I* when OptumInsight served
27 interrogatory responses contradicting the conception date that Dang and Symmetry had asserted in
28 the earlier litigation between Symmetry and Ingenix. *Id.* at 7. CCGroup contends that Lancaster’s

1 purported knowledge of the earlier conception date—or even his receipt of such information, if a
2 jury credits his denial that he remembered it—is relevant to both the subjective and objective
3 prongs of CCGroup’s malicious prosecution and sham litigation claims, and might also be relevant
4 to CCGroup’s *Walker Process* claim if this Court’s ruling on the elements of such a claim is
5 reversed on appeal. *Id.* at 7–10.

6 In response to OptumInsight’s argument that Lancaster’s involvement in *Cave I* primary
7 concerned claim construction, CCGroup contends that OptumInsight’s claim construction
8 positions in that case contradicted Dang’s representations to the PTO and were consistent with the
9 information that that Lancaster obtained in the Symmetry litigation. *Id.* at 11.

10 CCGroup also argues that OptumInsight cannot claim undue prejudice because it “should
11 have recognized as soon as this case was filed—before Mr. Lancaster was retained—that he was
12 personally involved in events giving rise to CCGroup’s claims,” and OptumInsight acknowledged
13 the potential issue in a motion to dismiss filed early in the case. *Id.* at 2, 11–12. According to
14 CCGroup, OptumInsight’s knowledge at the outset that Lancaster would be a witness constitutes
15 extraordinary circumstances sufficient to allow his testimony, although CCGroup does not
16 concede that a standard of “extraordinary circumstances” or “compelling need,” as applied by the
17 Ninth Circuit in criminal cases, applies to this civil case. *Id.* at 11–13. Even if Lancaster’s
18 *testimony* is subject to such a standard, CCGroup contends that it would not apply to the
19 documentary evidence of Lancaster’s involvement that OptumInsight seeks to exclude. *Id.* at 13.

20 CCGroup asserts that OptumInsight did not object to CCGroup taking Lancaster’s
21 deposition, arguing that OptumInsight’s failure to seek a protective order at that time undermines
22 OptumInsight’s present argument that the “sanctity of the attorney-client relationship” would be
23 threatened by trial testimony. *Id.* at 2, 12–13.

24 According to CCGroup, there is no need for it to move to disqualify Lancaster because the
25 issue “will resolve itself”:

26 CCGroup has not moved to disqualify Peter Lancaster from acting as
27 OptumInsight’s trial counsel. CCGroup does not need to. In its
28 Motion, OptumInsight tacitly concedes—as it expressly conceded in
the parties’ meet-and-confer—that if the Court denies its request to
exclude all evidence regarding Mr. Lancaster from trial, then Mr.

1 Lancaster will not represent OptumInsight at trial. OptumInsight does
2 not argue that California Rule of Professional Conduct 3.7 permits
3 Mr. Lancaster to serve as both fact witness and advocate at trial, or
4 that OptumInsight desires him to do so. Thus, the question of Mr.
Lancaster’s ability to act as trial counsel will resolve itself once the
Court determines whether OptumInsight is entitled to have the
evidence at issue excluded from trial—an issue governed by Fed. R.
Evid. 401 and 403, not Rule 3.7.

5 *Id.* at 2; *see also id.* at 14–15.

6 **3. OptumInsight’s Reply Regarding Lancaster’s Testimony**

7 OptumInsight argues that CCGroup has no basis to dispute the heightened standard
8 applicable to calling an opponent’s attorney as a witness, asserting that the Ninth Circuit has
9 applied that standard in civil as well as criminal cases, and that courts have recognized a high bar
10 to not only calling an opposing attorney to testify at trial, but also to taking opposing counsel’s
11 deposition. Def.’s Reply Mem. in Supp. of Mot. to Preclude (dkt. 389) at 1–3. OptumInsight
12 contends that courts apply particularly strict scrutiny where a party seeks to disqualify an opposing
13 attorney by calling that attorney as a witness. *Id.* at 3–4.

14 According to OptumInsight, Lancaster’s testimony is not relevant in light of the Court’s
15 previous holding that employees’ knowledge can be imputed to an employer. *Id.* at 4–5.

16 OptumInsight argues that other attorneys who served as outside counsel to OptumInsight or its
17 predecessors have greater knowledge than Lancaster of the relevant facts—such as Kevin
18 McMahan, who was one of the lead attorneys in the Symmetry case and in the interference
19 proceeding between the Dang and Seare patents, among others—and that Lancaster therefore has
20 “no ‘necessary’ evidence that cannot be obtained from another source.” *Id.* at 5–6.

21 **B. Legal Standard for Calling Opposing Attorneys as Witnesses**

22 The parties dispute whether CCGroup has a heightened burden to justify calling Lancaster
23 as a witness due to his role as OptumInsight’s trial attorney. Much of the case law addressing
24 calling an advocate as a witness rests on rules of professional conduct barring an attorney from
25 serving in both roles for the same case, subject to narrow exceptions. *See, e.g., United States v.*
26 *Prantil*, 764 F.2d 548, 552–53 (9th Cir. 1985) (“The advocate-witness rule prohibits an attorney
27 from appearing as both a witness and an advocate in the same litigation.”); *Optyl Eyewear Fashion*
28 *Int’l Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1048–50 (9th Cir. 1985) (cited by

1 OptumInsight as addressing the standard for calling an attorney as a witness, but in fact addressing
2 the standard for disqualification). In California, that strict rule no longer exists: a trial attorney
3 may testify as a witness so long as the attorney’s client provides informed written consent to the
4 attorney serving in both roles. State Bar of Cal. Rule 3.7(a)(3).¹⁰ There are also special
5 considerations that support a heightened standard for allowing trial attorney testimony in criminal
6 cases that do not necessarily translate to the context of civil cases. *See Prantil*, 764 F.2d at 553
7 (discussing, for example, the risk of “the prestige and prominence of the prosecutor’s office . . .
8 being attributed to testimony by a testifying prosecutor”).

9 That being said, the Court recognizes that a lawyer serving in dual roles as both an
10 advocate and a witness risks some degree of distortion of the trial process and confusion for the
11 jury, even in a civil case. The California rule’s requirement for informed consent from the client
12 implicitly acknowledges that requiring a lawyer to testify as a witness can create some risk of
13 prejudice to the client’s case. When a party calls its opponent’s counsel as a witness, the party
14 forces the opponent to choose between, on one hand, the prejudice of replacing its attorney, and on
15 the other hand, whatever prejudice might result from the attorney wearing both of those hats at
16 trial. The standard for allowing a party to call its opponent’s trial attorney as a witness must
17 therefore be at least somewhat higher than the standard for other witnesses. The Court assumes
18 for the sake of argument that the “compelling need” standard that the Ninth Circuit has applied in
19 criminal cases applies equally to civil cases. *See e.g., United States v. Lorenzo*, 995 F.2d 1448,
20 1452 (9th Cir. 1993) (“A federal prosecutor may testify at a trial in which he is participating only
21 if there is a compelling need.” (citing *United States v. Tamura*, 694 F.2d 591, 601 (9th Cir. 1982)).

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¹⁰ In disqualifying attorneys likely to serve as witnesses, some courts have expressly disregarded the California rule’s allowance for client consent in favor of the narrower exceptions allowed by the corresponding ABA model rule, or held that consent can be overcome by a showing of prejudice to the opponent. *See Caluori v. One World Techs., Inc.*, No. CV 07-2035 CAS (VBKx), 2012 WL 2004173, at *5 & nn.3, 4 (C.D. Cal. June 4, 2012) (discussing California authority). Neither party here argues that Lancaster could not serve as both a witness and OptumInsight’s attorney if OptumInsight were to consent to him doing so. To the extent that such a dual role might prejudice CCGroup, CCGroup has waived any objection by failing to bring a timely motion to disqualify Lancaster as OptumInsight’s counsel.

1 **C. CCGroup May Call Lancaster as a Witness**

2 OptumInsight does not dispute that Lancaster was at least exposed to arguments or
3 evidence indicating an earlier conception date in the Symmetry litigation. Such exposure could
4 support an inference that Lancaster retained knowledge of the earlier date when he represented
5 OptumInsight in *Cave I*. Lancaster denies such knowledge or recall, but it is for the jury, and not
6 for this Court, to decide whether to credit his denial.¹¹ The question, then, is whether Lancaster’s
7 purported (and disputed) knowledge of the earlier conception date is sufficiently relevant to
8 CCGroup’s claims to allow CCGroup to call him as witness.

9 OptumInsight contends that the Court’s previous holdings render Lancaster’s testimony
10 irrelevant. With respect to CCGroup’s *Walker Process* claim, OptumInsight is correct, although
11 to be precise, the Court held that knowledge of fraud at the time of enforcement is not an element
12 of that claim, not that such knowledge was is imputed to OptumInsight from Symmetry. Because
13 CCGroup need not prove for this claim any knowledge of fraud by OptumInsight at the time of
14 *Cave I*, Lancaster’s testimony on the subject is not needed.

15 The relevance of Lancaster’s knowledge to CCGroup’s sham litigation and malicious
16 prosecution claims, however, remains in dispute. The Court previously addressed the standard for
17 imputing employees’ knowledge to their employer in a footnote of the summary judgment order,
18 after noting that programmer Dan Gardiner, who worked with Dang when he developed his
19 invention and remained an OptumInsight employee at all relevant times, could be expected to
20 know Dang’s conception date—whatever the true date might have been. *See* MSJ Order at 96 &
21 n.45. That footnote reads in full as follows:

22 The parties do not address in any detail the standard for imputing an
23 employee’s knowledge to a corporation in the context of a sham
24 litigation claim. As a general rule, an agent’s knowledge will be
25 imputed to the principal, so long as the knowledge is material to the
26 agent’s duties. Restatement (Third) of Agency § 5.03 (Am. Law Inst.
2006); *see, e.g., United States v. Pac. Gas & Elec. Co.*, No. 14-cr-
00175-TEH, 2015 WL 9460313, at *3 (N.D. Cal. Dec. 23, 2015)
(addressing case law applying a “collective knowledge” standard

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28 ¹¹ Evaluating Lancaster’s credibility as a witness is not the Court’s role, and nothing in this order
should be construed as impugning—or otherwise commenting on—Lancaster’s credibility either
as a potential witness or as an advocate.

1 based on the Restatement in the context of corporate criminal
2 liability). OptumInsight has not argued that any relevant knowledge
3 that [programmer Daniel] Gardiner might have had was immaterial to
4 his duties.

5 *Id.* at 96 n.45.

6 Lacking meaningful argument on the issue, and relying on an inference that a jury might or
7 might not draw from Gardiner’s working relationship with Dang, the Court applied that broad
8 standard to deny summary judgment on CCGroup’s sham litigation and malicious prosecution
9 claims. If OptumInsight now disputes the application of that rule, it may argue for a narrower
10 standard in crafting jury instructions, but Lancaster’s purported knowledge of Dang’s conception
11 date—allegedly while representing OptumInsight in *Cave I*—remains potentially highly relevant
12 to those claims.¹²

13 There is no evidence that Lancaster represented OptumInsight at the time that it *filed*
14 infringement claims and counterclaims against CCGroup. Assuming there remains an active
15 dispute as to whether OptumInsight can be deemed to have known Dang’s true conception date
16 from sources other than Lancaster, however, his testimony is relevant at least to CCGroup’s
17 malicious prosecution claim, which under California law can be based on the continued
18 prosecution of a baseless claim, and not only on the initial decision to bring such a claim. *See*
19 MSJ Order at 98 (citing *Zamos v. Stroud*, 32 Cal. 4th 958, 966–70 (2004)). Given Lancaster’s
20 status as apparently the only lawyer to represent OptumInsight in both the Symmetry litigation
21 (where evidence of an early conception date was offered) and *Cave I*, CCGroup would not be able
22 to present to the jury this purported vector of relevant from the Symmetry case to the *Cave I*
23 litigation team without Lancaster’s testimony. Such circumstances establish compelling reasons
24 to allow CCGroup to call Lancaster as a witness despite his status as OptumInsight’s attorney.

25 Such a holding does not resolve the question of whether Lancaster must be disqualified
26 from his role as trial counsel. Under the California Rules of Professional Conduct, which both
27 parties agree apply here despite Lancaster’s status as member of the Minnesota Bar, Lancaster

28 ¹² If OptumInsight were to stipulate that it can be deemed to have had knowledge during *Cave I* of
Dang’s true conception date—whatever the jury might determine that date to have been—
Lancaster’s testimony would likely be unnecessary and the Court might reconsider allowing
CCGroup to call him as a witness.

1 may continue to represent OptumInsight also despite testifying as witness so long as he “obtain[s]
2 written consent from the client.” State Bar of Cal. Rule 3.7(a)(3); *see also* Minn. Ct. Prof. Rule
3 8.5(b)(1) (stating that the rules of the jurisdiction in which a matter is pending govern an
4 attorneys’ conduct with respect to that matter). The Court therefore declines to construe
5 CCGroup’s opposition brief as a motion to disqualify Lancaster,¹³ and declines to apply standards
6 relevant to such a motion, because the outcome that CCGroup seeks—calling Lancaster as a
7 witness—would not require his disqualification. Whether Lancaster may continue to serve as trial
8 counsel despite his concurrent status as a witness is for Lancaster and OptumInsight to decide.

9 The Court recognizes that requiring OptumInsight to choose between, on one hand,
10 replacing its trial counsel, and on the other, having the same lawyer who presents its case to the
11 jury also appear as a witness, imposes some degree of prejudice. Nevertheless, under the
12 circumstances here, such prejudice is not sufficient to preclude Lancaster’s testimony either under
13 the standard for calling opposing counsel as witness or under Rule 403 of the Federal Rules of
14 Evidence. As discussed above, Lancaster served in a unique role as the only attorney to represent
15 OptumInsight in both the Symmetry case and *Cave I*. Precluding his testimony would effectively
16 prevent CCGroup from presenting its theory that matters disclosed in the Symmetry case placed
17 the *Cave I* trial team on notice of a conception date earlier than Dang disclosed to the PTO.
18 Moreover, Lancaster’s potential relevance to this case was clear from the early stages of this case.
19 Even before CCGroup expressly named Lancaster in an amended complaint, CCGroup based its
20 claims in large part on OptumInsight’s conduct in *Cave I*. OptumInsight nevertheless chose
21 Lancaster—one of the attorneys who represented OptumInsight in *Cave I*—as the lead attorney to
22 defend against those claims.

23 The Ninth Circuit has recognized that “the reasoning behind the advocate-witness rule does
24 not contemplate that a material witness will be able to exempt himself from the rigours of the fact-
25 finding process by electing to proceed as an advocate.” *Prantil*, 764 F.2d at 554. Precluding

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27 ¹³ OptumInsight is likely correct that at this late stage of the case, CCGroup has waived its ability
28 to seek Lancaster’s disqualification by failing to file such a motion. The Court therefore does not
reach the issue of whether allowing Lancaster to both represent OptumInsight and testify as a
witness might prejudice CCGroup.

1 testimony where a party knew, at the time that it chose its attorney, that the attorney might have
2 factual knowledge relevant to the case would allow parties to “deprive an adversary of the benefits
3 of [the attorney’s] testimony by electing to [retain the attorney] as an advocate and not as a
4 witness.” *See id.* In selecting Lancaster as its trial counsel, OptumInsight took on the risk that he
5 might be called to testify. Under the circumstances of this case, any prejudice to OptumInsight as
6 a result of that risk coming to fruition does not warrant denying CCGroup the right to call a
7 witness who played a unique role in the facts giving rise to its claims. OptumInsight’s motion is
8 therefore DENIED, and the Court declines to preclude either Lancaster’s testimony or the
9 introduction of evidence referencing his involvement.

10 **VI. CONCLUSION**

11 For the reasons discussed above, CCGroup’s motion for reconsideration is GRANTED,
12 and the Court vacates the portion of its previous summary judgment order precluding CCGroup
13 from recovering damages for its exclusion from the grouper market, on the basis that judgment on
14 that issue was entered sua sponte without sufficient notice. Nevertheless, having now given notice
15 and considered the parties’ arguments and evidence, the Court GRANTS summary judgment on
16 that issue sua sponte, except that CCGroup may recover nominal damages.

17 CCGroup’s motion for relief from the scheduling order and OptumInsight’s motion to
18 preclude CCGroup calling Peter Lancaster as a witness are DENIED.

19 **IT IS SO ORDERED.**

20 Dated: January 10, 2020

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23 JOSEPH C. SPERO
24 Chief Magistrate Judge
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