

United States District Court  
For the Northern District of California

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**\*E-FILED 04-29-2011\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

VLAHO MILETAK, an individual on his own behalf and on behalf of all other automobile insureds of Allstate Insurance Company,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY and ALLSTATE INDEMNITY COMPANY,

Defendants.

No. C06-03778 HRL

**CONDITIONAL ORDER GRANTING DEFENDANTS' MOTION TO COMPEL A FED. R. CIV. P. 26 COMPLIANT EXPERT DISCLOSURE**

**ALTERNATIVE REPORT AND RECOMMENDATION RE EVIDENTIARY SANCTIONS**

**[Re: Docket No. 263]**

In this class action, plaintiff alleges that defendants used misleading bills to obtain payment of insurance premiums before the renewal date of their insureds' policies. Plaintiff has retained Gerald Udinsky, Ph.D to testify about restitution allegedly owed to class members and Geoffrey Nunberg, Ph.D, a purported linguistics expert, to testify about the allegedly misleading nature of defendants' bills.

Defendants now move this court for an order compelling plaintiff to serve expert disclosures that comply with Fed. R. Civ. P. 26. Alternatively, they request an order precluding plaintiff from presenting any expert testimony. Plaintiff opposes the motion. The matter is deemed suitable for determination without oral argument, and the May 3, 2011 hearing is vacated. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, this court

1 conditionally grants defendants’ motion to compel and issues an alternative report and  
 2 recommendation as to defendants’ request for evidentiary sanctions.

3 The gist of defendants’ motion is that plaintiff failed to serve written reports as part of  
 4 his expert disclosures<sup>1</sup> and instead served a pleading containing 3 sentences:

5 Plaintiff reincorporates his January 28, 2008 Rule 26 Expert Disclosure of  
 6 Gerald Udinsky and Geoffrey Nunberg as Plaintiffs’ experts. Plaintiff also  
 7 incorporates the expert depositions of Mr. Nunberg and Mr. Udinsky taken  
 8 by Defendants on November 18, 2009 and November 20, 2009 respectively.  
 Plaintiffs’ experts will supplement their opinions and reports when Allstate  
 Defendants supplement and provide or are compelled to provide to Plaintiff,  
 in readable form, class identity and premium payment information.

9 (Athanasio Decl., Ex. A). Rule 26 of the Federal Rules of Civil Procedure indisputably  
 10 require expert disclosures to be accompanied by a written report prepared and signed by the  
 11 witness. FED. R. CIV. P. 26(a)(2)(B). Plaintiff does not deny that he did not provide written  
 12 expert reports, but contends that he essentially provided the information required by Fed. R.  
 13 Civ. P. 26(a)(2)(B) through a prior January 2008 disclosure, as well as 2009 declarations and  
 14 deposition testimony of Udinsky and Nunberg. Defendants say that they never received the  
 15 January 2008 disclosure until after the March 21, 2011 expert disclosure deadline. (Kingsley  
 16 Reply Decl. ¶ 4). In any event, this court does not find the prior disclosures and deposition  
 17 testimony, provided years ago, to be reasonable compliance with the requirements of Fed. R.  
 18 Civ. P. 26(a)(2)(B).

19 There is palpable prejudice to defendants. The deadline for serving rebuttal expert  
 20 reports has passed. And, all discovery will close in a few weeks.

21 Plaintiff’s failure to provide sufficient expert disclosures is not substantially justified.  
 22 Here, plaintiff says that Udinsky could not provide a written report because defendants have  
 23 not yet produced their billing data in readable or usable form. Defendants disagree with the  
 24 assertion that their billing data is somehow deficient, but point out that plaintiff nevertheless  
 25 did not request an extension of the expert disclosure deadline or move to compel the

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26  
 27 <sup>1</sup> Defendants also initially argued that plaintiff’s expert reports were untimely  
 28 because they were faxed on March 22, 2011, one day after the court-ordered deadline.  
 However, the record indicates that plaintiff served his disclosures on March 21 by mail and  
 then provided defense counsel with a courtesy fax copy on March 22. (See Opp. at 6).

1 information he now claims Udinsky needs. Moreover, any supposed issue with defendants'  
2 billing data would not explain why plaintiff failed to provide a written report from his  
3 linguistics expert Nunberg.

4 Based on the foregoing, this court finds that plaintiff is required to serve expert  
5 disclosures, including written reports prepared and signed by the witnesses, that comply with  
6 Fed. R. Civ. P. 26(a)(2)(B), and plaintiff is ordered to do so. The order is conditioned,  
7 however, on the presiding judge's determination that the present case schedule should be  
8 modified to allow additional time for defendants to serve any rebuttal expert reports and to  
9 conduct expert discovery.

10 Alternatively, if the presiding judge decides that modification of the scheduling order  
11 is not warranted, then this court recommends that he consider precluding plaintiff from  
12 offering expert testimony from Udinsky and Nunberg. FED. R. CIV. P. 37(c)(1).

13 SO ORDERED.

14 Dated: April 29, 2011

  
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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

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