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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL MURRAY and DEBRA MURRAY,)	Civil No. 07cv2056-H(BLM)
)	
Plaintiffs,)	REPORT AND RECOMMENDATION FOR
)	ORDER GRANTING DEFENDANT'S
v.)	RENEWED MOTION IN LIMINE TO
)	EXCLUDE AMY OPPENHEIMER'S
HOST INTERNATIONAL, INC.,)	EXPERT REPORT AND TRIAL
)	TESTIMONY
Defendant.)	
_____)	

The instant motion was referred to this Court by United States District Marilyn L. Huff pursuant to 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(c). Having considered the briefing submitted and for the reasons set forth below, the Court hereby **RECOMMENDS** that Defendant's renewed Motion in Limine to Exclude Amy Oppenheimer's Expert Report and Trial Testimony ("Mot. to Exclude") [Doc. No. 22] be **GRANTED**.

BACKGROUND

Plaintiffs served the Preliminary Expert Witness Report of Amy Oppenheimer ("the Report") on Defendant on May 30, 2008. Mot. to Exclude, Ex. 1. In the Report, Ms. Oppenheimer explains that she was retained to "render an opinion of the defendants' investigation

1 and response to a complaint of workplace harassment and retaliation
2 [made against Plaintiff Darryl Murray], and to testify as to what is
3 considered typical and acceptable human resource practice in regard
4 to investigation of complaints of harassment and retaliation in the
5 workplace." Id. at 1. Ms. Oppenheimer states that she reviewed
6 only Mr. Murray's deposition and personnel file in forming her
7 opinion because, as of the date of the Report, there had not been
8 "significant discovery." Id. at 2. Plaintiffs had not deposed the
9 investigators or decisionmakers and Ms. Oppenheimer asserted that
10 she could not provide a complete opinion without reviewing testimony
11 from these individuals. Id. Accordingly, she described her report
12 as "preliminary" and expressed an intention to amend it after
13 discovery was complete. Id.

14 The discovery period closed in this case on July 18, 2008.
15 Doc. No. 11 (hereinafter "Scheduling Order"). On August 22, 2008,
16 Defendant filed the instant motion, arguing that the Report and
17 accompanying testimony should be excluded at trial as incomplete
18 under Federal Rule of Civil Procedure 26(a)(2)(B) and irrelevant and
19 unreliable under Federal Rules of Evidence 401 and 702. Mot. to
20 Exclude at 2. Plaintiffs opposed the motion on September 9, 2008
21 [Doc. No. 26], Defendant filed a reply on September 15, 2008 [Doc.
22 No. 32], and the District Judge took the matter under submission
23 [Doc. No. 35].

24 On October 1, 2008, the District Judge denied Defendant's
25 motion without prejudice, finding that the Report did not fail to
26 satisfy Rule 26(a)(2)(B) and was relevant under Federal Rule of
27 Evidence 401. Doc. No. 45 at 3-4. However, because Ms. Oppenheimer
28 indicated her intent to supplement her report, and because the

1 District Judge presumed she did so by the September 29, 2008
2 deadline established by the Scheduling Order, the District Judge
3 declined to evaluate the Report under Federal Rule of Evidence 702.

4 Id.

5 During a status conference with the District Judge on January
6 15, 2009, Defendant renewed its objection to the Report and Ms.
7 Oppenheimer's anticipated testimony in light of the fact that
8 Plaintiffs did not serve a supplemental report. See Doc. No. 64
9 (scheduling order following January 15, 2009 status conference).
10 The District Judge referred the matter to this Court and declined to
11 allow supplemental briefing on the motion. Id.

12 DISCUSSION

13 Because the District Judge already has determined that Ms.
14 Oppenheimer's testimony would be relevant under Federal Rule of
15 Evidence 401 (Doc. No. 45 at 4), this Court will examine only
16 Plaintiffs' compliance with Rule 26(a)(2)(B) and Federal Rule of
17 Evidence 702.

18 A. Exclusion for Failing to Satisfy Federal Rule of Civil 19 Procedure 26(a)(2)(B)

20 Defendant seeks exclusion of the Report and Ms. Oppenheimer's
21 testimony under Rule 37(c), arguing that Plaintiffs failed to comply
22 with Rule 26(a)(2)(B). Mot. to Exclude at 2.

23 1. Completeness Under Federal Rule of Civil Procedure 24 26(a)(2)(B)

25 Rule 26(a)(2) requires each party to disclose to the opposing
26 party the identity of any expert witness it may use at trial along
27 with a written report containing, among other things, "a complete
28 statement of all opinions the witness will express and the basis and

1 reasons for them," "the data or other information considered by the
2 witness in forming them," and "any exhibits that will be used to
3 summarize or support them." Fed. R. Civ. P. 26(a)(2)(A)-(B). The
4 Advisory Committee Notes following the rule indicate that the expert
5 disclosure requirements were intended to facilitate preparation for
6 trial without the need for formal discovery requests and were added
7 to improve upon the existing rules, under which answers to
8 interrogatories about the substance of expert testimony frequently
9 provided such "sketchy and vague" information that they "rarely
10 dispensed with the need to depose the expert and often [were] even
11 of little help in preparing for a deposition of the witness." Fed.
12 R. Civ. P. 26(a) advisory committee notes (1993 Amendments).

13 Because Plaintiffs never supplemented the Report, the
14 analysis of whether or not the Report satisfies Rule 26 has changed
15 dramatically since the District Judge's October ruling. In their
16 briefing, Plaintiffs repeatedly stated that Ms. Oppenheimer's report
17 was preliminary, that there was substantial relevant evidence she
18 had not yet reviewed and considered, and that she was going to
19 supplement her report after doing so. See, e.g., Pls.' Opp'n. at 2,
20 3, 5, 7, 9-10 ("Plaintiffs do expect to supplement their expert's
21 report soon. The new report is expected to reflect review of new
22 evidence from discovery produced near the end of the Court's
23 discovery period."). Even Ms. Oppenheimer admitted that her report
24 was "preliminary," that she could not render a "complete opinion"
25 without having reviewed the testimony of the "investigator(s) and
26 decisionmaker(s)," and that she intended to amend her report after
27 the completion of discovery. Mot. to Exclude, Ex. 1 at 2. As such,
28 neither Plaintiffs nor Ms. Oppenheimer considered her report

1 complete and final. Despite this joint opinion and the fact that
2 the Court provided Plaintiffs with an opportunity to amend the
3 expert report, Plaintiffs chose not to do. This Court, therefore,
4 must consider Ms. Oppenheimer's report as if it was a final report.

5 The first required element of an expert report is that it
6 contain "a complete statement of all opinions the witness will
7 express and the basis and reasons for them." Fed. R. Civ. P.
8 26(a)(2). As discussed above, both Plaintiffs and Ms. Oppenheimer
9 concede that this element is not satisfied. Moreover, a review of
10 Ms. Oppenheimer's report reveals its inadequacies. Ms. Oppenheimer
11 explained that she looks at three different components when
12 evaluating an investigation of a complaint of
13 harassment/retaliation. Mot. to Exclude, Ex. 1 at 2. As to the
14 first component, the appropriateness of the investigator, Ms.
15 Oppenheimer stated that she could not render an opinion at all
16 because she had not reviewed the investigator(s)' deposition(s).
17 Id., Ex. 1 at 3. As to the second element, the thoroughness of the
18 investigation, Ms. Oppenheimer states that it "appears" that the
19 "investigator [improperly] spoke to witnesses before interviewing
20 the respondent," that plaintiff was not informed about the
21 investigation and was not given an opportunity to respond, and that
22 the investigator's notes may be deficient. Id. at 4-5. However,
23 Ms. Oppenheimer makes these statements relying on Plaintiff's
24 statements and without considering the testimony of any of the
25 individuals involved in the investigation. Id. at 2, 4-5. As to
26 the third and final element, the consistency of the findings, Ms.
27 Oppenheimer again states that there "appears" to be a problem. Id.
28 at 5-6. However, her conclusion is short and lacks specific facts.

1 Id.

2 The second required element of an expert report is that it
3 detail "the data or other information considered by the witness in
4 forming [the opinions.]" Fed. R. Civ. P. 26(a)(2). The Report
5 properly states that Ms. Oppenheimer reviewed Plaintiff's deposition
6 and personnel file. Mot. to Exclude, Ex. 1 at 2. The Report also
7 discusses additional types of discovery Ms. Oppenheimer wants to
8 review because she believes such information would be critical to
9 her conclusions. Id. at 2-6. However, the Report does not identify
10 the additional information, if any, that Ms. Oppenheimer actually
11 reviewed, considered and relied on, nor how the new information
12 affected her opinions. Mot. to Exclude, Ex. 1. Similarly, while
13 she describes deficiencies that "appear" to exist in the
14 investigation, she does not delineate the actual facts establishing
15 or supporting specific deficiencies. Id. As such, the Report does
16 not sufficiently provide the factual bases for the resulting
17 opinions.

18 There is little question that Ms. Oppenheimer's opinions
19 would be expanded, if not altered, by a review of the discovery
20 subsequently obtained from the investigators. For instance, Ms.
21 Oppenheimer speculated based on the information available to her at
22 the time that the investigation did not follow the "usual practice"
23 because, instead of having one person interview all parties and
24 witnesses, the task seems to have been divided among several people.
25 Id. at 3. Defendant rebuts this assumption, attaching the
26 deposition transcript of Idalia Castro, which suggests that Ms.
27 Castro conducted the initial investigation before calling upon
28 others to help with a second round of interviews. Id. at 4 & Ex. 2.

1 Similarly, Plaintiffs state in their opposition, “[g]iven the
2 sometimes conflicting human resources testimony provided in seven
3 Defendant depositions, it is reasonable to expect Ms. Oppenheimer to
4 consider and comment on the human resources significance of certain
5 witness testimony discrepancies.” Pls.’ Opp’n at 7.

6 As such, Plaintiffs and Ms. Oppenheimer tacitly admit, and
7 the evidence clearly shows, that the Report does not include either
8 a complete statement of all of the opinions Plaintiffs intend to
9 solicit from Ms. Oppenheimer and the basis therefor or all of the
10 data considered by Ms. Oppenheimer in reaching those unstated
11 opinions. A report that does not contain details about expected
12 trial testimony is not sufficient to satisfy Rule 26(a)(2)(B)’s
13 report requirement. City of Grass Valley v. Newmont Min. Corp.,
14 2007 WL 210516, *1-*2 (E.D. Cal. Jan. 26, 2007) (striking expert
15 report as incomplete under Rule 26(a)(2)(B) and noting that allowing
16 the party to proceed with this expert would encourage parties to
17 evade the expert disclosure rules).

18 Finally, the third requirement of an expert report is the
19 inclusion or attachment of “any exhibits that will be used to
20 summarize or support [the opinions.]” Fed. R. Civ. P. 26(a)(2).
21 Defendant is correct that the Report fails to attach any such
22 exhibits. While Plaintiffs may not intent to use any exhibits, they
23 do not so indicate and, in their opposition, argue that they can
24 provide the exhibits at a later date (Pls.’ Opp’n at 5). Contrary
25 to Plaintiffs’ unsupported supposition, Rule 26(a)(2)(B)(iii)
26 requires the parties to serve such exhibits with their expert
27 reports. Plaintiffs’ failure to do so violates Rule 26.

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1 For the foregoing reasons, and based upon the fact that the
2 Plaintiffs failed to supplement Ms. Oppenheimer's report, the Court
3 finds that the Report does not satisfy Rule 26(a)(2)(B) because it
4 does not contain (1) a complete statement of all of the opinions Ms.
5 Oppenheimer is expected to express at trial and the bases and
6 reasons for them, (2) a complete statement of all of the data and
7 information she has considered (or will consider) in forming her
8 unstated opinions, or (3) any exhibits (or any statement confirming
9 that no exhibits will be used). Fed. R. Civ. P. 26(a)(2)(B).

10 **2. Exclusion Under Rule 37(c)**

11 Defendant moves to exclude the Report and Ms. Oppenheimer's
12 testimony pursuant to Rule 37 of the Federal Rules of Civil
13 Procedure. Rule 37(c) provides:

14 (c) Failure to Disclose, to Supplement an Earlier
15 Response, or to Admit.

16 (1) Failure to Disclose or Supplement. If a
17 party fails to provide information or
18 identify a witness as required by Rule
19 26(a) or (e), **the party is not allowed to
20 use that information or witness to supply
21 evidence on a motion, at a hearing, or at a
22 trial, unless the failure was substantially
23 justified or is harmless.** In addition to or
24 instead of this sanction, the court, on
25 motion and after giving an opportunity to
26 be heard:

27 (A) may order payment of the
28 reasonable expenses, including
attorney's fees, caused by the
failure;

(B) may inform the jury of the
party's failure; and

(C) may impose other appropriate
sanctions, including any of the
orders listed in Rule
37(b)(2)(A)(i)-(vi).

28 Fed. R. Civ. P. 37(c)(1) (emphasis added). The Advisory Committee

1 Notes describe Rule 37(c) as providing a "self-executing,"
2 "automatic" sanction, which "provides a strong inducement for
3 disclosure of material that the disclosing party would expect to use
4 as evidence." Fed. R. Civ. P. 37 advisory committee note (1993
5 Amendment). As the District Judge correctly stated, the issue of
6 expert testimony admissibility is left to the trial judge and
7 reversed only for abuse of discretion. See Gen. Elec. Co. v.
8 Joiner, 522 U.S. 136, 141 (1997). In fact, courts have even upheld
9 the use of the exclusion sanction "when a litigant's entire cause of
10 action or defense has been precluded." Yeti by Molly, Ltd. v.
11 Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

12 As an initial matter, Plaintiffs object that Defendant did
13 not meet and confer with Plaintiffs or move to compel a supplemental
14 report before seeking to exclude the Report. Pls.' Opp'n at 2-3,
15 10. Plaintiffs did not, however, provide law supporting their
16 argument that Defendant was required to move to compel first (and
17 the meet and confer argument, even if it had merit, is a moot point
18 since Plaintiffs had notice of the motion to exclude prior to the
19 deadline for supplementing the Report and still failed to
20 supplement). Moreover, because sanctions under Rule 37(c)(1) are
21 "self-executing" and "automatic," they are appropriate even where
22 the offending party "never violated an explicit court order." Yeti
23 by Molly, 259 F.3d at 1106. Thus, Defendant was not required to
24 file a motion to compel an adequate expert disclosure before seeking
25 to exclude Ms. Oppenheimer's expert testimony.

26 Defendant argues that Plaintiffs have no substantial
27 justification for failing to supplement the incomplete Report and
28 that allowing Ms. Oppenheimer to testify at trial would be

1 prejudicial to Defendant. Mot. to Exclude at 5. As to the first
2 prong, Plaintiffs have not offered any justification for their
3 failure to supplement the Report. At the time the parties briefed
4 this motion, Plaintiffs emphasized repeatedly their intent to
5 supplement the Report after completing discovery. Pls.' Opp'n at 2,
6 3, 5, 9; see also Mot. to Exclude, Ex. 1 at 2. Plaintiffs also
7 admit or imply in their Opposition that the Report needs to be
8 supplemented in order to be comprehensive. Pls.' Opp'n at 5, 7, 9-
9 10. Further, Plaintiffs cannot argue now that they were unaware of
10 the asserted deficiencies nor of the deadline for supplementing
11 because the parties briefed the alleged deficiencies and the
12 District Judge addressed both issues in her October 1, 2008 Order.
13 Doc. No. 45. The Court, therefore, finds no substantial
14 justification for Plaintiffs' failure to supplement the Report.

15 With regard to the second prong under Rule 37, the burden of
16 proving harmlessness falls on the party facing sanctions - in this
17 case, Plaintiffs. Yeti by Molly, 259 F.3d at 1107. Plaintiffs have
18 not argued that their failure to supplement the Report is harmless
19 and their statements in their briefs and Ms. Oppenheimer's
20 statements in her Report belie any harmlessness argument Plaintiffs
21 could present. For example, Plaintiffs repeatedly stated that they
22 intend(ed) to supplement the Report, Ms. Oppenheimer stated that she
23 needed to review additional discovery, including the depositions of
24 the investigators, before she could opine on various aspects of the
25 investigation, and Plaintiffs stated that while they "expected [Ms.
26 Oppenheimer's opinions] to remain essentially unchanged" by the new
27 discovery, Ms. Oppenheimer would want to consider the "sometimes
28 conflicting human resources testimony provided in seven Defendant

1 depositions" and the Host Human Resource Manual before "reasonably
2 supplementing her report." Pls.' Opp'n at 2, 5, 7-10. Plaintiffs'
3 statements clearly establish that there is a significant amount of
4 relevant information Ms. Oppenheimer had not reviewed when she
5 issued her Report, that she needed to review the new information and
6 it may change her opinions and definitely would be incorporated into
7 her conclusions, and that Plaintiffs expected her to present all of
8 the new evidence, opinions, and conclusions during her trial
9 testimony. Id. at 2-10. If Defendant is required to learn Ms.
10 Oppenheimer's opinions and conclusions, and the bases for them, for
11 the first time on direct examination and cross-examine her blind,
12 Defendant will be subjected to the very type of ambush that Rule
13 26(a)(2)(B) is designed to prevent. Defendant should not be
14 subjected to such prejudice, nor should Plaintiffs' counsel be
15 rewarded for failing to comply with the clear requirements of the
16 Federal Rules and the Court's Scheduling Order and for failing to
17 take advantage of the additional opportunity to supplement afforded
18 by the District Judge.

19 Finally, to the extent Plaintiffs claim that any harm to
20 Defendant was self-imposed because Defendant never attempted to
21 depose Ms. Oppenheimer, Pls.' Opp'n at 7-9, Plaintiffs' argument is
22 unavailing. As an initial matter, the Court agrees with Defendant
23 that the 1993 amendments to Rules 26 and 37 were intended to lessen
24 the need for formal discovery, like depositions, decrease discovery
25 costs, and provide harsher, automatic sanctions for failure to
26 comply. See Fed. R. Civ. P. 26(a) & 37 advisory committee notes
27 (1993 Amendments). Plaintiffs' argument thus runs contrary to the
28 spirit of the rules. Furthermore, Rule 26(b)(4)(A) provides that

1 while a party may depose any person identified as an expert whose
2 opinions may be presented at trial, "[i]f a report from the expert
3 is required under subdivision (a)(2)(B), the deposition shall not be
4 conducted until after the report is provided." It would be contrary
5 to reason and the Federal Rules' policy of reducing discovery time
6 and expense, see generally Fed. R. Civ. P. 26 advisory committee
7 notes (1993 Amendments), to expect Defendant to depose Ms.
8 Oppenheimer after being served with her initial bare-bones report
9 and then again after a supplemental report. Moreover, as this Court
10 recognized during its September 5, 2008 hearing on Plaintiffs'
11 motion to compel, Plaintiffs waited until just days before the July
12 18, 2008 discovery cutoff date to conduct any deposition discovery
13 (including the depositions of the investigators and decisionmakers)
14 and, in fact, conducted several depositions after the close of
15 discovery without first obtaining the Court's approval to extend the
16 discovery cutoff. See Doc. Nos. 27 & 52; Doc. No. 70 ("Hearing
17 Transcript") at 12. Under these circumstances, Defendant did not
18 have a reasonable opportunity to depose Ms. Oppenheimer within the
19 discovery period regarding how her opinions may have been altered by
20 this new information and did not contribute to the resulting harm by
21 declining to do so.

22 In sum, the Court finds that Plaintiffs have not demonstrated
23 any justification for their failure to supplement and further
24 concludes that to require Defendant to explore Ms. Oppenheimer's
25 current views for the first time at trial would be highly
26 prejudicial to Defendant. See Fed. R. Civ. P. 37(c)(1).

27 The question, then, is the appropriate sanction. Plaintiffs
28 ask that the Court impose a less harsh sanction than exclusion of

1 the Report and Ms. Oppenheimer's testimony. Pls.' Opp'n at 10. As
2 discussed above, Rule 37 authorizes the Court to exclude the
3 evidence or impose any other appropriate sanction, including payment
4 of Defendant's reasonable expenses, informing the jury of
5 Plaintiffs' failure, or staying further proceedings until the
6 Scheduling Order is obeyed. Fed. R. Civ. P. 37(c)(1).¹ In this
7 case, requiring Plaintiffs to pay Defendant's expenses or informing
8 the jury that Plaintiffs failed to supplement the Report will do
9 little to redress Defendant's inability to anticipate and prepare
10 for Ms. Oppenheimer's trial testimony. Likewise, staying further
11 proceedings until Plaintiffs provide a supplemental report and
12 Defendant has an opportunity to depose Ms. Oppenheimer is not a
13 viable solution. Plaintiffs knowingly delayed conducting any
14 discovery in this case until just before (and shortly after) the
15 deadline. See Hearing Transcript at 1-13, 47-51. Plaintiffs then
16 provided the bare-bones Report, which even Ms. Oppenheimer
17 acknowledged was "preliminary," and repeatedly told the District
18 Judge that they intended to supplement. The District Judge accepted
19 their representations and afforded Plaintiffs yet another
20 opportunity to produce a comprehensive expert report (see Order
21 Denying Without Prejudice Motion to Exclude at 4), but Plaintiffs
22 chose not to utilize that opportunity. Allowing Plaintiffs another
23 delay at this late stage in the case would reward Plaintiffs'
24 continued dilatory behavior while also resulting in undue expense to

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27 ¹ To the extent Plaintiffs argue that exclusion is only appropriate in
28 extreme circumstances, see Pls.' Opp'n at 3 (citing David v. Caterpillar, Inc.,
324 F.3d 851, 857 (7th Cir. 2003)), Plaintiffs are incorrect. Nowhere in David
does the court establish this holding and this conclusion is contrary to Rule 37
and the Ninth Circuit authority explained above.

1 Defendant and interference with the District Judge's calendar.
2 Therefore, this Court finds that exclusion of the Report and Ms.
3 Oppenheimer's testimony is the most appropriate sanction under the
4 circumstances.²

5 For these reasons, this Court concludes that Plaintiffs'
6 failure to supplement the Report was not substantially justified,
7 Defendant will suffer harm as a result, and sanctions short of
8 exclusion will not ameliorate the harm. The Court, therefore,
9 **RECOMMENDS** that the Report and Ms. Oppenheimer's testimony be
10 excluded at trial pursuant to Rule 37(c).

11 **B. Reliability Under Federal Rule of Evidence 702**

12 As the District Judge correctly stated, expert testimony also
13 must meet the standards of Federal Rule of Evidence 702. Evidence
14 is admissible under Rule 702 if "(1) the testimony is based upon
15 sufficient facts or data, (2) the testimony is the product of
16 reliable principles and methods, and (3) the witness has applied the
17 principles and methods reliably to the facts of the case." Fed. R.
18 Evid. 702. "Rule 702 requires that expert testimony relate to
19 scientific, technical, or other specialized knowledge, which does
20 not include unsupported speculation and subjective beliefs."
21 Guidroz-Brault v. Missouri Pac. R. Co., 254 F.3d 825, 829 (9th Cir.

22
23 ² On a final note, based on the current record, this Court does not
24 believe Ms. Oppenheimer's testimony is amenable to a limiting instruction. Even
25 with an appropriate instruction, it would be misleading to the jury and
26 prejudicial to Defendant for Ms. Oppenheimer to testify as to her opinions on
27 "the defendants' investigation and response to a complaint [against Mr. Murray]
28 of workplace harassment and retaliation" (Mot. to Exclude, Ex. 1 at 1) based
solely on her review of Plaintiffs' deposition and personnel file. Similarly,
permitting Ms. Oppenheimer to testify as "to what is considered typical and
acceptable human resource practice in regard to investigation of complaints of
harassment and retaliation in the work place" without tying it to the facts of
this case provides little, if any, assistance to the trier of fact and Plaintiffs
have not presented contrary evidence or argument. See discussion in Section B.

1 2001). In applying Rule 702, the trial judge must act as a
2 gatekeeper to ensure that the expert's testimony "rests on a
3 reliable foundation and is relevant to the task at hand." Daubert
4 v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993); Stilwell v.
5 Smith & Nephew, Inc., 482 F.3d 1187, 1192 (9th Cir. 2007) (under
6 Rule 702, a court may exclude testimony if it is not reliable or
7 relevant); see also Kumho Tire Co., Ltd. v. Carmichael, 526 U.S.
8 137, 147 (1999) (clarifying that this gatekeeper function applies to
9 all expert testimony, not just testimony based in science).

10 Defendant argues that the primary shortcoming of the Report
11 is that it is *not* "based upon sufficient facts or data." Mot. to
12 Exclude at 8. As discussed in Section A, *supra*, Ms. Oppenheimer
13 herself acknowledges that her opinion is based solely on her review
14 of Mr. Murray's deposition and personnel file. Id., Ex. 1 at 2.
15 She further explains that she cannot render "a complete opinion"
16 without also reviewing "the testimony of the investigator(s) and
17 decision maker(s)." Id. Further, both Plaintiffs' and Defendant's
18 briefs make clear that at least seven other key witnesses have been
19 deposed and other fact discovery has been exchanged (see Mot. to
20 Exclude at 4-5 and Pls.' Opp'n at 7, 9-10), so it is clear that a
21 substantial body of relevant discovery exists, which the Report does
22 not take into account. Thus, the Court finds that the Report itself
23 fails to satisfy the first prong of Rule 702 because the proffered
24 opinions are not "based upon sufficient facts or data." Similarly,
25 the third prong requires that principles and methods be applied
26 "reliably" to the facts of the case. The Report does not satisfy
27 the third prong by reliably applying the principles to the facts
28 because there are not sufficient facts in the Report to do so.

1 While Plaintiffs may have provided the Manual and additional
2 depositions and documents to Ms. Oppenheimer and Ms. Oppenheimer may
3 have reviewed and considered them, no such evidence has been
4 presented to this Court. In fact, as discussed above, Plaintiffs
5 knowingly and voluntarily chose not to supplement Ms. Oppenheimer's
6 Report to provide such information. Plaintiffs' decision leaves
7 this Court with no basis for determining whether Ms. Oppenheimer's
8 new opinions, whatever they may be, are sufficiently grounded in
9 fact. Likewise, even presuming Ms. Oppenheimer employs reliable
10 principles and methods, without knowing what discovery she has
11 reviewed, the Court has no way of discerning whether Ms. Oppenheimer
12 will "appl[y] the principles and methods reliably to the facts of
13 the case." Fed. R. Evid. 702(3). The Report offers no hint on this
14 front as it addressed so few facts and instead provides only Ms.
15 Oppenheimer's anticipated opinions if the facts turned out to be
16 exactly what Mr. Murray said they were. Such unsupported
17 speculation is insufficient to satisfy the rigors of Rule 702,
18 Guidroz-Brault, 254 F.3d at 829, and does not convince this Court
19 that the Report and Ms. Oppenheimer's anticipated testimony rest
20 upon "a reliable foundation," Daubert, 509 U.S. at 597.

21 For these reasons, this Court **RECOMMENDS** that the Report and
22 Ms. Oppenheimer's testimony be excluded as inadmissible under
23 Federal Rule of Evidence 702. See Jackson v. U.S., 2007 WL 4532223,
24 *5 (N.D. Cal. Dec. 19, 2007) (finding it appropriate to exclude
25 expert testimony even though plaintiff was left with no expert
26 witness where, despite being given repeated chances to cure
27 deficiencies, the plaintiff failed to procure "expert whose
28 testimony would be sufficient to satisfy the Daubert standards").

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CONCLUSION AND RECOMMENDATION

For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Judge issue an Order approving and adopting this Report and Recommendation and granting Defendant's renewed motion in limine to exclude Amy Oppenheimer's expert report and trial testimony.

Any objections to the Report and Recommendation shall be filed no later than fourteen days after the date of this Report and Recommendation, per the District Judge's Order dated January 15, 2009 [Doc. No. 64].

DATED: February 13, 2009



BARBARA L. MAJOR
United States Magistrate Judge