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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL MURRAY and DEBRA  
MURRAY,

Plaintiffs,

vs.

HMSHOST CORPORATION,

Defendant.

CASE NO. 07-CV-2056 H (BLM)

**ORDER**

**(1) ADOPTING REPORT AND  
RECOMMENDATION**

**(2) GRANTING DEFENDANT'S  
MOTION TO EXCLUDE  
EXPERT TESTIMONY AND  
REPORT OF AMY  
OPPENHEIMER**

On August 22, 2008, Defendant filed a motion to exclude from trial the report and testimony of Plaintiffs' expert Amy Oppenheimer. (Doc. No. 22.) On August 25, 2008, Plaintiffs filed their response in opposition to the motion to exclude. (Doc. No. 23.) Defendant filed its reply in support of the motion on August, 29, 2008. (Doc. No. 24.) The Court subsequently submitted and denied Plaintiff's motion without prejudice. (Doc. Nos. 35, 45.) Defendant subsequently renewed its motion to exclude and the Court referred the matter to the Magistrate Judge for Report and Recommendation. (Doc. No. 64.) The Magistrate Judge issued a Report and Recommendation on February 13, 2009. (Doc. No. 73.) On March 16, 2009, this motion came before the Court. David Miller, Patricia James and Todd Tappe appeared for the Plaintiffs. Kathy Bailey and Mohammed K. Ghods appeared for the Defendant. For the following reasons, the Court ADOPTS the Report and Recommendation

1 and GRANTS Defendant's motion to exclude from trial the expert report and testimony of  
2 Amy Oppenheimer.

### 3 **Background and Discussion**

4 On August 29, 2007, Plaintiffs Darryl and Debra Murray filed several claims against  
5 Mr. Murray's former employer, HMSHOST Corporation ("HOST"), in connection with the  
6 termination of Mr. Murray's employment. (Doc. No. 1.) On May 30, 2008, Plaintiffs served  
7 the Initial Expert Witness Report of Amy Oppenheimer ("the Report") on Defendant HOST.  
8 (Mot to Exclude Ex. 1 ["Report"].) The Report indicates that Ms. Oppenheimer is to "render  
9 an opinion of the defendants' investigation and response" to the sexual harassment complaint  
10 against Mr. Murray and "testify as to what is considered typical and acceptable human  
11 resource practice" in such situations. (Report at 1.)

12 At the time Ms. Oppenheimer prepared the Report, Plaintiffs had not conducted  
13 "significant discovery." (Report at 2.) The Report states that it is based on only the deposition  
14 of Plaintiff Darryl Murray and Plaintiff's personnel file which contains documentation of the  
15 investigation at issue. (Id.) Ms. Oppenheimer advises that she cannot provide a complete  
16 opinion without reviewing the testimony of the investigators and decision makes involved in  
17 Mr. Murray's termination. (Id.) Ms. Oppenheimer planned to amend the Report after  
18 discovery. (Id.)

19 Absent court order to the contrary, parties are required to supplement expert testimony  
20 disclosures, if necessary, at least 30 days before trial. Fed. R. Civ. P. 26(a)(2)(D); 26(e)(2);  
21 26(a)(3)(B). In this case, the Case Management Conference Order allowed the parties until  
22 September 29, 2008 to comply with the requirements of Rule 26(a)(3). (Doc. No. 11 ¶ 7.)  
23 Both the Report and Plaintiffs' opposition to Defendant's motion to exclude indicated  
24 Plaintiffs' intention to supplement the Report. (Report at 2; Pl.'s Opp. at 2, 3, 5, 7, 9-10.)  
25 When the deadline to supplement passed and Plaintiffs had not submitted an amended expert  
26 report of Ms. Oppenheimer, Defendant renewed its motion to exclude her testimony.

27 Defendant argues that the Report and accompanying testimony should be excluded at  
28 trial as incomplete under Federal Rule of Civil Procedure 26(a)(2)(B) and as irrelevant and

1 unreliable under Federal Rules of Evidence 401 and 702. (Mot. to Exclude 2.)

2 **I. Completeness Under Federal Rule of Civil Procedure 26(a)(2)(B)**

3 Federal Rule of Civil Procedure 26 governs discovery and the duty to disclose.  
4 Subsection (a)(2) governs disclosure of expert testimony. It states that each party must  
5 disclose to the opposition the identity of any expert witness. Fed R. Civ. P. 26(a)(2)(A). That  
6 disclosure must be accompanied by a written report containing, among other things, “a  
7 complete statement of all opinions the witness will express and the basis and reasons for them”  
8 as well as “the data considered by the witness in forming [those opinions].” Fed. R. Civ. P.  
9 26(a)(2)(B).

10 Here, the Court concludes that Ms. Oppenheimer’s Report does not satisfy Rule  
11 26(a)(2)(B). The Report indicates that Ms. Oppenheimer is to “render an opinion of the  
12 defendants’ investigation and response” to the sexual harassment complaint against Mr.  
13 Murray. (Report at 1.) However, the Report is based only on the deposition of Plaintiff Darryl  
14 Murray and Plaintiff’s personnel file and Ms. Oppenheimer advises that she cannot provide  
15 a complete opinion without reviewing the testimony of the investigators and decision makes  
16 involved in Mr. Murray’s termination. (Report at 2.)

17 Under Federal Rule of Civil Procedure 37(c), a party who fails to provide information  
18 required by Rule 26(a) “is not allowed to use that information or witness to supply evidence  
19 on a motion, at a hearing, or at a trial, unless the failure was substantially justified.” Fed. R.  
20 Civ. P. 37(c). Plaintiffs have provided no substantial justification for their failure to provide  
21 an expert report for Ms. Oppenheimer that complies with Rule 26. Accordingly, Plaintiffs may  
22 not rely on Ms Oppenheimer at trial.

23 **I. Reliability Under Federal Rule of Evidence 702**

24 Expert testimony must also meet the standards of Federal Rule of Evidence 702, which  
25 requires: (1) that the testimony is based on sufficient facts or data; (2) that the testimony is the  
26 product of reliable principles and methods; and (3) that the witness applied the principles and  
27 methods reliably to the facts of the case. Fed. R. Evid. 702.

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