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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ZEST IP HOLDINGS, LLC,	)	Civil No.10-0541-GPC(WVG)
et al.,	)	
	)	ORDER GRANTING MOTION TO
Plaintiffs,	)	STRIKE THE JOINT EXPERT
v.	)	REPORT OF SCOTT D.
	)	HAMPTON AND BRUCE G.
IMPLANT DIRECT MFG., LLC,	)	SILVERMAN PURSUANT TO
et al.,	)	RULE 37(c)
	)	(Doc. No. 201)
Defendants.	)	
	)	
	)	

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Plaintiffs Zest IP Holdings ("Plaintiffs") have made a Motion To Strike The Joint Expert Report Of Scott D. Hampton And Bruce G. Silverman Pursuant To Rule 37(c) ("Motion"). Defendants Implant Direct Mfg. ("Defendants") have filed an Opposition to the Motion. Plaintiffs have filed a Reply to Defendants' Opposition. The Court, having reviewed the moving, opposition, reply papers, the record in this case, and GOOD CAUSE APPEARING, HEREBY GRANTS Plaintiff's Motion.

2 FACTUAL BACKGROUND

3 On February 9, 2011, the Court issued a Case Manage-  
4 ment Conference Order Regulating Discovery And Other  
5 Pretrial Proceedings ("Feb. 9, 2011 Order"). The Feb. 9,  
6 2011 Order states, *inter alia*:

7 On or before December 15, 2011, all parties  
8 shall exchange with all other parties a list  
9 of all expert witnesses expected to be called  
10 at trial... On or before December 29, 2011,  
11 any party may supplement its designation so  
12 long as that party has not previously retained  
13 an expert to testify on that subject.  
14 (Feb. 9, 2011 Order, at 7).

12 On December 15, 2011, Plaintiffs designated Susan  
13 McDonald. Ph.D. ("McDonald") to testify as an expert  
14 witness regarding their claims of trademark infringement  
15 in this case.

16 On December 29, 2011, Defendants designated Hal  
17 Poret ("Poret") to testify as an expert witness regarding  
18 Plaintiffs' claims of trademark infringement in this case.

19 On December 19, 2012, the Court issued a Sixth  
20 Amended Case Management Conference Order Regulating  
21 Discovery And Other Pretrial Proceedings ("Sixth Amd. CMC  
22 Order"), which states *inter alia*:

23 Each expert witness designated by a party  
24 shall prepare a written report to be provided  
25 to all other parties **no later than January 22,**  
**2013**, containing the information required by  
Fed. R. Civ. P. 26(a)(2)(A) and (B).

26 **... Any party that fails to make these disclo-**  
27 **sures shall not, absent substantial justifica-**  
28 **tion, be permitted to use evidence or testi-**  
**mony not disclosed at any hearing or at the**  
**time of trial. In addition, the Court may**  
**impose sanctions as permitted by Fed. R. Civ.**  
**P. 37(c).**

1 Any party... shall in accordance with Fed. R.  
2 Civ. P. 26(a)(2)(C) and Fed. R. Civ. P. 26(e),  
3 supplement any of its expert reports regarding  
4 evidence intended solely to contradict or  
5 rebut evidence on the same subject matter  
6 identified in an expert report submitted by  
7 another party. Any such supplemental reports  
8 are due on February 11, 2013. (Sixth Amended  
9 Case Management Conference Order Regulating  
10 Discovery And Other Pretrial Proceedings, at  
11 2)(emphasis in original).

12 On February 7 and 13, 2013, Defendants requested  
13 that Plaintiffs agree to extend the dates by which their  
14 supplemental expert reports regarding Plaintiffs' trade-  
15 mark infringement claims were due. Plaintiffs agreed to  
16 the requested extensions of the dates. Defendants *did not*  
17 *seek the Court's approval* of the extensions of dates about  
18 which Plaintiffs agreed

19 On February 21, 2013, Defendants requested for a  
20 third time that Plaintiffs agree to extend the date by  
21 which their supplemental expert reports regarding Plain-  
22 tiffs' trademark infringement claims were due. At this  
23 time, and for the first time, Defendants informed Plain-  
24 tiffs that Defendants were designating two new expert  
25 witnesses, Scott D. Hampton ("Hampton") and Bruce G.  
26 Silverman ("Silverman"). Defendants again *did not seek the*  
27 *Court's approval* for the requested extension of dates, *nor*  
28 *did they seek the Court's approval* to designate two new  
expert witnesses.

Also, at this time, Defendants acknowledged to  
Plaintiffs that Defendants decided to retain two new  
rebuttal experts regarding Plaintiffs' trademark infringe-  
ment claims in place of Poret, after they read Plaintiffs'

1 expert McDonald's expert report on Plaintiffs' trademark  
2 infringement claims. Defendants explained that they would  
3 not use Poret as an expert witness because: (1) McDonald's  
4 report did not rely on trademark surveys to support  
5 Plaintiffs' trademark infringement claims; and, (2) Poret  
6 could not opine on Plaintiffs' trademark infringement  
7 claims if the evidence upon which Plaintiffs rely to prove  
8 their trademark infringement claims is not trademark  
9 surveys.

10 Plaintiffs refused to grant Defendants' third  
11 request for extension of the date for when Defendants'  
12 supplemental expert report regarding Plaintiffs' trademark  
13 infringement claims were due. Defendants *did not seek the*  
14 *Court's assistance or intervention* to resolve the dispute.

15 On February 25, 2013, Defendants submitted to  
16 Plaintiffs the rebuttal expert report of Hampton and  
17 Silverman.

18 II

19 APPLICABLE STATUTORY LAW

20 Fed. R. Civ. P. 16 provides that the Court must  
21 issue a scheduling order. The scheduling order must limit  
22 the time to amend pleadings, complete discovery and file  
23 motions. Fed. R. Civ. P. 16(b)(1),(3)(A). The scheduling  
24 order may modify the timing of disclosures under Rule  
25 26(a) and 26(e)(1). Fed. R. Civ. P. 16(b)(3)(B)(i). A  
26 scheduling order may be modified only for good cause and  
27 with the judge's consent. Fed. R. Civ. P. 16(b)(4).

28

1 Fed. R. Civ. P. 26 provides that a party must  
2 disclose to other parties expert witnesses it may use at  
3 trial. Fed. R. Civ. P. 26(a)(2)(A). A party must make its  
4 expert witness disclosures **"at the times and in the**  
5 **sequence that the Court orders."** Fed. R. Civ. P.  
6 26(a)(2)(D) (emphasis added). **Absent a court order,** expert  
7 witness disclosures must be made at least 90 days before  
8 the date set for trial, or in the case of rebuttal expert  
9 witnesses, within 30 days after the other party's disclo-  
10 sure. Fed. R. Civ. P. 26(a)(2)(D)(i), (ii) (emphasis  
11 added).

12 Fed. R. Civ. P. 26(e) states in pertinent part: "For  
13 an expert whose report must be disclosed under Rule  
14 26(a)(2)(B), the party's duty to supplement extends both  
15 to information included in the report and to information  
16 given during the expert's deposition."

17 Fed. R. Civ. P. 37(c)(1) states:

18 If a party fails to provide information or identify  
19 a witness as required by Rule 26(a) or (e), the party is  
20 not allowed to supply evidence in a motion, at a hearing,  
21 or at trial, unless the failure was substantially justi-  
22 fied or is harmless...

23 District courts are given particularly wide latitude  
24 in their discretion to issue sanctions under Rule  
25 37(c)(1). Yeti By Molly, Ltd. v. Deckers Outdoor Corp.,  
26 259 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2001). Rule 37(c)(1) is  
27 recognized as broadening the court's sanctioning power.  
28 The rule is a "self-executing," "automatic" sanction to

1 "provide... a strong inducement for disclosure of mate-  
2 rial..." Yeti By Molly, supra, at 1106, citing Fed. R.  
3 Civ. P. 37 Advisory Committee Notes (1993). Exclusion of  
4 an expert witness report is an appropriate remedy for  
5 failing to fulfill the required disclosure requirements of  
6 Rule 26(a). Yeti By Molly, supra, at 1106.

7 "Two express exceptions ameliorate the harshness of  
8 Rule 37(c)(1): The information may be introduced if the  
9 parties' failure to disclose the required information is  
10 **substantially justified or harmless.**" Yeti By Molly,  
11 supra, at 1106. (emphasis added). The burden is on the  
12 party facing sanctions to prove harmlessness. Yeti By  
13 Molly, supra, at 1106-1107, Goodman v. Staples, 644 F.3d  
14 817 (9<sup>th</sup> Cir. 2011). There is no requirement that a court  
15 find that the failure to disclose (or delay in disclosing)  
16 was willful or in bad faith. Yeti By Molly, supra, at  
17 1107.

18 Numerous courts in the Ninth Circuit have followed  
19 the above-noted precepts. See Strong v. Valdez Fine Foods,  
20 2011 WL 455285 at \*4 (S.D. Cal. 2011), rev'd on other  
21 grounds 724 F.3d 1042 (2013)(exclusion of expert's decla-  
22 ration and rebuttal report as evidence to support motion  
23 for summary judgment appropriate due to late designation  
24 of expert), Corby v. American Express Co., 2011 WL 4625719  
25 at \*1, n.1 (C.D. Cal. 2011)(same), Wilson v. Tony M.  
26 Sanchez & Co, Inc., 2009 WL 173249 at \*3-4 (E.D. Cal.  
27 2009)(same), Mendez v. Unum Life Ins. Co. Of America, 2005  
28 WL 1865426 at \*3 (N.D. Cal. 2005)(granting in part and

1 denying in part motion to exclude expert testimony due to  
2 late disclosure of expert's report).

3 III

4 ANALYSIS

5 A. Defendants Were Not Substantially Justified In  
6 Designating New Expert Witnesses and Providing  
7 Expert Reports By Those Expert Witnesses

8 Plaintiffs argue that Defendants were not substan-  
9 tially justified in designating new expert witnesses  
10 regarding Plaintiffs' trademark infringement claims.  
11 Plaintiffs assert that Defendants should have anticipated  
12 that they would need a rebuttal trademark infringement  
13 expert that could analyze the trademark infringement  
14 claims in the absence of trademark surveys. Plaintiffs  
15 contend that Defendants knew as early as April 2012, and  
16 specifically in May 2012, that Plaintiffs had not con-  
17 ducted any trademark surveys, that no such surveys were in  
18 progress and that Plaintiffs were willing to produce a  
19 witness for deposition to confirm these facts. Despite  
20 Defendants' knowledge that Plaintiffs had not, and would  
21 not, conduct trademark surveys, Defendants did not attempt  
22 to inform the Court that it had designated an expert  
23 (Poret) who could not respond to Plaintiffs' expert's  
24 report. Nor did Defendants attempt to seek leave of court  
25 to amend the Feb. 9, 2011 Order or the Sixth Amd. CMC  
26 Order so that new dates for Hampton's and Silverman's  
27 designation and report deadlines could be established.

28 Defendants argue that they were substantially  
justified in designating new expert witnesses and provid-

1 ing their reports to Plaintiffs. Defendants assert that  
2 after they read Plaintiffs' expert's (McDonald's) report,  
3 they realized that Poret was not the appropriate person to  
4 rebut McDonald's report because Poret was a survey expert  
5 and McDonald's report did not rely on survey evidence.  
6 Defendants claim that at the time they designated Poret,  
7 they could not have known that McDonald would not rely on  
8 survey evidence. So, Defendants promptly retained Hampton  
9 and Silverman and identified them to Plaintiffs on Febru-  
10 ary 21, 2013 and provided their report to Plaintiffs on  
11 February 25, 2013. Further, Defendants argue that they  
12 were following the requirements of Fed. R. Civ. P.  
13 26(a)(2)(D)(i), which allows them to disclose their expert  
14 witnesses 90 days before the date set for trial or in the  
15 case of rebuttal experts, within 30 days after the other  
16 party's disclosure.

17 Defendants arguments are not well taken. First,  
18 since trademark infringement may be proven in many ways,  
19 with or without trademark survey evidence, Defendants'  
20 selection and retention of Poret, a trademark survey  
21 expert, was improvident. This is especially true since as  
22 early as May 2012, Defendants knew that Plaintiffs were  
23 not relying on trademark survey evidence to prove their  
24 trademark infringement claims because Plaintiffs told them  
25 so. While Poret was designated as an expert on December  
26 29, 2011, Defendants did nothing after they learned that  
27 Plaintiffs would not rely on trademark survey evidence, to  
28 seek leave of court to designate a new trademark infringe-



1 ment expert that would not rely on trademark survey  
2 evidence. Instead, Defendants waited until February 21,  
3 2013 to inform Plaintiffs (but not the Court) that Poret  
4 was not a suitable expert and that they were designating  
5 two new experts. Thereafter, they provided the new ex-  
6 perts' report to Plaintiffs. Defendants' actions in this  
7 regard clearly violated the Feb. 9, 2011 Order and the  
8 Sixth Amd. CMC Order.

9         Second, Defendants' reliance on the requirements of  
10 Fed. R. Civ. P. 26(a)(2)(D) is misplaced. Fed. R. Civ. P.  
11 16(b)(3)(B)(i) *clearly* states that a scheduling order  
12 issued by a court may modify the timing of disclosures  
13 under Rules 26(a) and 26(e)(1). Fed. R. Civ. P.  
14 26(a)(2)(D) *clearly* states that a party must make its  
15 expert witness disclosures at the times and in the se-  
16 quence that the Court orders. Fed R. Civ. P. 26(a)(2)(D)  
17 (i), (ii) *clearly* states that *absent a court order*, the  
18 parties are required to follow Rule 26(a)(2)(D)(i). Here,  
19 the Feb. 9, 2011 Order and the Sixth Amd. CMC Order are  
20 court orders which trumped the parties from the alterna-  
21 tive disclosure requirements of Fed. R. Civ. P.  
22 26(a)(2)(D)(i). Further, the Feb. 9, 2011 Order *clearly*  
23 states the date by which supplemental expert reports were  
24 due. Additionally, the Sixth Amd. CMC Order *clearly* states  
25 that any party shall supplement any of its expert reports  
26 regarding evidence *solely to contradict or rebut* evidence  
27 on the same subject matter identified in an expert report  
28 submitted by another party. Moreover, the Sixth Amd. CMC

1 Order *clearly* states that each expert witness shall  
2 prepare a written report to be provided to all parties no  
3 *later than* January 22, 2013. The Sixth Amd. CMC Order  
4 *clearly* warns that a party's failure to provide the  
5 expert's report shall not, absent substantial justifica-  
6 tion, be permitted to use evidence or testimony not  
7 disclosed, at any hearing or at the time of trial. Fi-  
8 nally, the Sixth Amd. CMC Order *clearly* notifies the  
9 parties, that in addition to the exclusion of evidence  
10 noted in the preceding sentence, the Court may impose the  
11 sanctions permitted by Fed. R. Civ. P. 37(c).

12 The Court concludes that Defendants' lack of dili-  
13 gence in failing to timely inform Plaintiffs and the Court  
14 that their designated trademark infringement expert was  
15 not suitable to rebut Plaintiffs' expert's report, their  
16 lack of diligence in seeking a remedy therefor, and their  
17 misplaced reliance on Fed. R. Civ. P. 26(a)(2)(D)(i), do  
18 not constitute substantial justification under Fed. R.  
19 Civ. P. 37(c)(1). Since Defendants chose to designate a  
20 trademark infringement expert that could only analyze  
21 Plaintiffs' trademark infringement claims using trademark  
22 surveys, and chose to not seek relief from the Court when  
23 their designated expert was determined to be unsuitable,  
24 it did so at its own peril. Yeti By Molly, 259 F.3d at  
25 1106-1107, Quevedo v. Trans-Pacific Shipping, Inc., 143  
26 F.3d 1255, 1258 (9<sup>th</sup> Cir. 1998). Mendez v. Unum, 2005 WL  
27 1865426 at \*3.

28

1            B. Defendants' Failure To Timely Identify Their New  
2            Experts Was Not Harmless

3            Plaintiffs argue that Defendants' untimely designa-  
4            tion of their trademark infringement experts is not  
5            harmless because it prejudices them. They assert that  
6            allowing Defendants to untimely designate new trademark  
7            infringement experts rewards Defendants' recalcitrant and  
8            improvident conduct. Specifically, Plaintiffs contend that  
9            the fact that *after Plaintiffs provided McDonald's expert*  
10           *report to Defendants*, Defendants sought extensions of time  
11           from them to provide their rebuttal expert report, while  
12           concealing from Plaintiffs, and the Court, that they  
13           intended to designate new experts and provide a report  
14           from the new experts. Therefore, Plaintiffs assert that  
15           Defendants' conduct was calculated to seek an improper  
16           tactical advantage over them.

17           Defendants argue that their late disclosure of the  
18           new expert witnesses is harmless. They contend that the  
19           depositions of expert witnesses have not commenced, all  
20           future deadlines in the case have been stayed, and no  
21           trial date has been set. Therefore, they assert that their  
22           late disclosures did not harm Plaintiffs.

23           In Wong v. Regents of the University of California,  
24           410 F.3d 1052, 1060 (9<sup>th</sup> Cir. 2005), the court stated:

25           In these days of heavy caseloads, trial  
26           courts... routinely set schedules and estab-  
27           lish deadlines to foster the efficient treat-  
28           ment and resolution of cases. Those efforts  
             will be successful only if the deadlines are  
             taken seriously by the parties, and the best  
             way to encourage that is to enforce the dead-  
             lines. Parties must understand that they will  
             pay a price for failure to comply strictly  
             with scheduling and other orders, and that

1 failure to do so may properly support severe  
2 sanctions and exclusion of evidence.

3 In Wong, the Ninth Circuit upheld a district court's  
4 ruling that the testimony of expert witnesses designated  
5 after the expert witness disclosure deadline had passed,  
6 was properly excluded from use in a motion for summary  
7 judgment. The court affirmed the district court's ruling  
8 that the late expert designation was not harmless, even  
9 though the trial date in the case was several months away.  
10 In doing so, the court stated:

11 If (Plaintiff) had been permitted to disregard  
12 the deadline for identifying expert witnesses,  
13 the rest of the schedule laid out by the court  
14 months in advance, and understood by the  
15 parties, would have to have been altered as  
16 well. *Disruption to the schedule of the court  
17 and other parties is not harmless.* Courts set  
such schedules to permit the court and the  
parties to deal with cases in a thorough and  
orderly manner, and they must be allowed to  
enforce them, unless there are good reasons  
not to.

17 Wong, supra, at 1062 (emphasis added).

18 See also 02 Micro Intern Ltd. v. Monolithic Power  
19 Systems, Inc., 467 F.3d 1355, 1368-1369 (9<sup>th</sup> Cir.  
20 2006)(exclusion of expert's report due to lack of dili-  
21 gence and lack of harmlessness in timely disclosure of  
22 expert's report), Paramount Pictures Corp. v. Interna-  
23 tional Media Films, Inc., 2013 WL 3215189 at \*9 (C.D. Cal.  
24 2013)(exclusion of expert's report due to lack of dili-  
25 gence and lack of harmlessness in timely disclosure of  
26 expert's testimony in motion for summary judgment), Nehara  
27 v. California, 2013 WL 1281618 at \*6-7 (E.D. Cal.  
28 2013)(exclusion of expert's report due to lack of dili-

1 gence and lack of harmlessness in timely disclosure of  
2 expert's report and willful disregard of court's schedul-  
3 ing order), Tamburri v. Sun Trust Mortgage, Inc., 2013 WL  
4 3152921 at \*2 (N.D. Cal. 2013)(exclusion of expert's  
5 report due to late disclosure of expert's report and non-  
6 compliance with previous order of the court).

7 Here, had Defendants timely sought relief to desig-  
8 nate new trademark infringement experts in, or shortly  
9 after, May 2012, it is possible that the Court's estab-  
10 lished schedule would not have been disrupted. However,  
11 Defendants fail to show that their late designation of  
12 trademark infringement experts and provision of those  
13 experts' reports to Plaintiffs were harmless. Defendants  
14 did not seek relief to designate new experts, and after  
15 reading Plaintiffs' expert's report, unilaterally, and  
16 without court approval, designated new trademark infringe-  
17 ment experts approximately one year and two months after  
18 their expert designation was due. The late designation of  
19 experts and the provision of those experts' reports to  
20 Plaintiffs was done approximately ten months after Defen-  
21 dants learned that Plaintiffs' trademark infringement  
22 expert would not rely on trademark survey evidence and  
23 that their own expert could only opine on trademark  
24 surveys. Such non-compliance with the deadlines set by the  
25 Court and Defendants' recalcitrance supports the finding  
26 that Defendants' late designation of new experts and late  
27 provision of the new experts' report was not harmless.

28

1           In 1993, Rule 37(c)(1), in its present form, was  
2 added to Rule 37. Rule 37(c)(1) is written using the  
3 disjunctive "or," not the conjunctive "and," in outlining  
4 two circumstances where failure to disclose may be ex-  
5 cused. Therefore, it would seem that one or the other  
6 bases may let the offending party off the hook. The  
7 language of the Advisory Committee Notes, when the amend-  
8 ment was added, bear this interpretation out:

9           "Limiting the automatic sanction to violations  
10 'without substantial justification' *coupled with* the  
11 exception for violations that are 'harmless,' is needed to  
12 avoid unduly harsh penalties in a variety of situa-  
13 tions..." Fed. R. Civ. P. 37 Advisory Committee Notes  
14 (1993)(emphasis added).

15           In other words, a party that is unable to demon-  
16 strate substantial justification for its delay or failure  
17 to disclose or supplement may avoid sanctions if the  
18 opposing party is not harmed or prejudiced by the delay or  
19 failure. None of the examples justifying excusal contained  
20 in the 1993 Advisory Committee Notes are present here.  
21 Tellingly, the Advisory Committee Notes indicate that  
22 exclusion of a witness or evidence is appropriate when a  
23 *pro se* litigant is informed by the court of the require-  
24 ment for disclosure and does not make the disclosure  
25 despite being so informed.

26           In this case, counsel for Defendants are highly  
27 experienced attorneys, not naive and inexperienced *pro se*  
28 litigants. Moreover, Defendants were well aware of the

1 requirements to disclose experts and experts' reports, and  
2 the timing of those disclosures.

3 Defendants' failure to demonstrate substantial  
4 justification for the delay in disclosing Hampton and  
5 Silverman, by itself would have been sufficient to grant  
6 Plaintiffs' Motion. However, as noted above, Defendants  
7 also failed to show that Plaintiffs were not harmed by the  
8 substantial delay. Accordingly, given that both exceptions  
9 to Rule 37(c)(1) and the Yeti By Molly analysis have not  
10 been met, ample reason exists to grant Plaintiff's Motion.

### 11 C. Conclusion

12 As a result of the foregoing, the Court finds that  
13 the application of Fed. R. Civ. P. 37(c)(1) to Defendants'  
14 conduct is particularly apt. Since Defendants failed to  
15 timely disclose Hampton and Silverman as expert witnesses  
16 in rebuttal to Plaintiffs' trademark infringement expert  
17 and failed to seek permission from the Court to designate  
18 new trademark infringement experts, Defendants are disal-  
19 lowed from supplying evidence in the form of Hampton's and  
20 Silverman's report and/or testimony at any hearing or at  
21 trial.<sup>1/</sup>

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22  
23 <sup>1/</sup>The Court recognizes that the dispute discussed in this Order arose on  
24 February 25, 2013, when Hampton and Silverman's report was provided to Plaintiffs.  
25 Plaintiff filed their Motion on April 8, 2013. The time period between February  
26 25, 2013 and April 8, 2013 is 41 days, which is 11 days past the date Plaintiffs  
27 should have filed their Motion, pursuant to the Court's Case Management Conference  
28 Orders issued in this case. The Court also recognizes that Plaintiffs have urged  
the Court to enforce the terms of its Case Management Conference Orders when  
Defendants have filed untimely motions. However, due to the seriousness of  
Defendants' conduct as discussed in this Order, and Defendants' repeated  
recalcitrant conduct exhibited throughout the proceedings in this case, the Court  
has chosen to relieve Plaintiffs of the requirements for filing papers for  
discovery disputes for the 11-day late filing of their Motion. Such leniency may  
not be extended again to Plaintiffs should they file untimely motions in the  
future. Plaintiffs are hereby given adequate notice that the adage "live by the  
sword, die by the sword," advocated by Defendants, is not entirely without merit.

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Plaintiffs' Motion To Strike The Joint Expert Report  
of Scott D. Hampton and Bruce G. Silverman Pursuant to  
Rule 37(c) is GRANTED.

DATED: December 17, 2013

  
\_\_\_\_\_  
Hon. William V. Gallo  
U.S. Magistrate Judge