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FILED
JUL 18 2018
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *JLM* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSS-FIT, INC., a Delaware
corporation,

Plaintiff,

v.

NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION, a
Colorado corporation,

Defendant.

Case No.: 14cv1191-JLS(KSC)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO AMEND THE
SCHEDULING ORDER TO ALLOW
ADDITIONAL EXPERT
DISCOVERY**

[Doc. No. 215]

Before the Court are: (1) defendant's Motion to Amend the Scheduling Order [Doc. No. 215]; (2) plaintiff's Opposition thereto [Doc. No. 221]; and (3) defendant's Reply [Doc. No. 225].¹ In the Motion, defendant seeks an order: (1) re-opening expert discovery, so that it can address new allegations in plaintiff's Second Amended Complaint; and (2) re-opening expert discovery to allow for designation of a new expert, Dr. Itamar Simonson, to "counter" an initial expert report and a second or supplemental

¹ Plaintiff also filed an Ex Parte Application to File a Sur-Reply. [Doc. No. 235] Although the Court will file the proposed Sur-Reply for the record, it was unnecessary for the Court to make a determination on defendant's Motion.

1 expert report prepared by plaintiff's damages expert, Dr. Michael R. Solomon.
2 Alternatively, defendant seeks an order striking Dr. Solomon's second or supplemental
3 expert report as untimely.² [Doc. No. 215-1, at pp. 5-6.] For the reasons outlined more
4 fully below, the Court finds that defendant's Motion must be GRANTED in part and
5 DENIED in part.

6 **Factual and Procedural History**

7 Briefly, the allegations in the operative Second Amended Complaint are that
8 defendant engaged in unfair competition and false advertising. Both parties are involved
9 in the fitness industry. [Doc. No. 187, at pp. 2-5.] A key factual allegation is that
10 defendant published false and misleading injury data in an article referred to as the Devor
11 Study that caused harm to plaintiff's business by indicating plaintiff's fitness programs
12 are unsafe. [Doc. No. 187, at pp. 3-4.] Defendant later published an Erratum to address
13 the false and misleading injury data in the Devor Study. However, plaintiff alleges that
14 the Erratum also contains false and misleading statements. [Doc. No. 187, at pp. 25-26.]

15 The case has now been pending for more than four years since the original
16 Complaint was filed on May 12, 2014. [Doc. No. 1.] The original Scheduling Order was
17 entered on October 3, 2014. [Doc. No. 24.] Since then, the Scheduling Order has been
18 amended a number of times because of discovery disputes and other delays. In the
19 Second Amended Scheduling Order, the Court extended the time for expert designations
20 until November 30, 2015 with all expert discovery to be completed on or before March 1,
21 2016. [Doc. No. 62, at p. 3.] Pursuant to this Second Amended Scheduling Order,

22
23
24 ² Defendant's Motion also requests an order striking a second or supplemental
25 expert report by another one of plaintiff's experts, Dr. E. H. Morreim. [Doc. No. 215-1,
26 at pp. 8-9.] However, defendant's Motion does not include any justification for striking
27 this report other than the fact that it was served on December 29, 2016, after the deadline
28 for completing all expert discovery. Without more, it appears this report was properly
served as a supplemental report under Federal Rule of Civil Procedure 26(e). [Doc. No.
221, at p. 30.] Therefore, defendant's request for an order striking this expert report will
be denied without further comment or analysis.

1 plaintiff designated Dr. Solomon, a marketing professor, as its damages expert on
2 November 30, 2015. [Doc. No. 215-3, at p. 2; Doc. No. 215-6, at p. 2.] Defendant then
3 designated Constantine Boudikis, a forensic financial accountant, as a rebuttal expert on
4 the issue of plaintiff's claimed damages. [Doc. No. 215-3, at p. 2.]

5 In the Fourth Amended Scheduling Order, which was entered on February 10,
6 2016, the deadline for exchanging initial expert reports was extended to April 1, 2016,
7 and the exchange of rebuttal expert reports was re-scheduled for April 15, 2016. The
8 deadline for completing all expert discovery was extended until May 13, 2016. [Doc. No.
9 69, at pp. 1-2.] However, on April 12, 2016, the Fifth Amended Scheduling Order
10 extended the deadline for exchanging rebuttal expert reports to April 22, 2016, and
11 extended the deadline for completing all expert discovery to May 31, 2016. [Doc. No.
12 79, at p. 2.]

13 On or about April 1, 2016, plaintiff produced Dr. Solomon's initial expert report
14 on the issue of damages. [Doc. No. 215-6, at pp. 1-145.] On or about April 22, 2016,
15 defendant disclosed its rebuttal expert report on damages, which was prepared by
16 Mr. Boukidis. [Doc. No. 221-2, at pp. 3-11.] Defendant deposed Dr. Solomon on
17 May 25, 2018, and plaintiff deposed Mr. Boudikis on May 27, 2016. [Doc. No. 215-1, at
18 p. 8.]

19 On September 21, 2016, the District Court issued an Order Granting Plaintiff's
20 Motion for Partial Summary Judgment and Denying in Part Defendant's Motion for
21 Summary Judgment. [Doc. No. 121.] In this Order, the District Court granted partial
22 summary judgment to plaintiff on the issue of falsity, finding that plaintiff presented
23 evidence establishing that the injury data in the Devor Study were in fact false, regardless
24 of whether the authors knew it at the time. [Doc. No. 121, at p. 20.]

25 Shortly thereafter, on October 6, 2016, the District Court issued an Order granting
26 the parties' Joint Motion for Entry of an Amended Scheduling Order. At this time, the
27 final Pre-Trial Conference was continued from November 17, 2016 to March 23, 2017.
28 [Doc. Nos. 69, 123, 127, 129, at p. 2.] The deadline to comply with pre-trial disclosures

1 under Federal Rule of Civil Procedure 26(a)(3) was extended to February 17, 2017.

2 [Doc. No. 129, at p. 2.]

3 On or about December 29, 2016, long after the May 31, 2016 deadline for
4 completing all expert discovery, plaintiff produced a second or supplemental expert
5 report prepared by Dr. Solomon that is now challenged as untimely by defendant in the
6 instant Motion to Amend the Scheduling Order. [Doc. No. 79, at p. 2; Doc. No. 215-1, at
7 p. 8, citing Doc. No. 215-8, at pp. 1-26.] In the cover letter transmitting Dr. Solomon's
8 second expert report, plaintiff's counsel offered to make Dr. Solomon available once
9 again for deposition "regarding the content" of his second report. [Doc. No. 221, at p. 8;
10 Doc. No. 221-2, at p. 33; Doc. No. 215-1, at p. 9.] According to defendant, the parties
11 met and conferred about several discovery issues on January 9, 2017, including a dispute
12 over the timeliness of Dr. Solomon's second expert report, but the parties were unable to
13 reach an agreement on this issue. [Doc. No. 215-1, at p. 10.]

14 On February 2, 2017, plaintiff filed a Motion for Terminating Sanctions, or in the
15 Alternative, Issue, Evidentiary, and Monetary Sanctions, alleging that defendant engaged
16 in "inexcusable discovery misconduct." [Doc. No. 150, at pp. 1-5; Doc. No. 150-1, at
17 p. 6.] In the Motion for Terminating Sanctions, plaintiff represented that defendant
18 produced documents in a related state-court action that should have been produced in
19 response to discovery requests in this case. [Doc. No. 150-1, at p. 6.] At the same time,
20 plaintiff also filed an Ex Parte Request to Postpone the Pre-Trial Conference pending the
21 outcome of the Motion for Terminating Sanctions. [Doc. No. 153.] The District Court
22 granted the request to postpone the Pre-Trial Conference in an Order filed on February 9,
23 2017. [Doc. No. 155.] At this time, the Pre-Trial Conference was re-scheduled for
24 January 4, 2018. [Doc. No. 155, at p. 2.]

25 On May 26, 2017, the District Court issued an Order Granting in Part and Denying
26 in Part Plaintiff's Motion for Sanctions. [Doc. No. 176, at pp. 1-14.] Although plaintiff's
27 request for terminating sanctions was denied, the District Court did impose monetary
28 sanctions and a number of issue and evidentiary sanctions against defendant. In addition,

1 the District Court ordered a neutral forensic analysis of defendant's computer system and
2 re-opened fact and expert discovery as to plaintiff only "on all relevant claims." [Doc.
3 No. 176, at pp. 10-14.] Plaintiff was also granted leave to file an amended complaint to
4 add allegations related to discovery that was wrongfully withheld. [Doc. No. 176, at p.
5 13; Doc. No. 221, at pp. 17-19.] Although defendant filed a Motion for Reconsideration
6 on June 23, 2017, the District Court denied the Motion on October 19, 2017. [Doc. No.
7 212.] In sum, as a result of the sanctions Motion, the case was essentially stalled from
8 February 2, 2017, when the sanctions Motion was filed, until October 19, 2017, when the
9 District Court denied defendant's Motion for Reconsideration of the sanctions Order.

10 On October 24, 2017, shortly after defendant's Motion for Reconsideration was
11 denied, the parties requested a 12-month continuance of the final Pre-Trial Conference.
12 [Doc. No. 213, at p. 2.] The main reason for the request was that the parties estimated it
13 would take 12 months to comply with the District Court's sanctions Order. [Doc. No.
14 213, at pp. 2-5.] At this time, the District Court agreed to postpone the final Pre-Trial
15 Conference until January 23, 2019. [Doc. Nos. 214, at pp. 1-2; Doc. No. 213, at p. 7.]
16 As permitted by the District Court's Order imposing sanctions, plaintiff filed a Second
17 Amended Complaint on June 26, 2017. [Doc. No. 187.]

18 Defendant filed the instant Motion to Amend the Scheduling Order on February 1,
19 2018. [Doc. No. 215.] The Motion was originally scheduled to be heard by the District
20 Court but was later transferred to the undersigned Magistrate Judge for consideration.
21 [Doc. Nos. 215, 218, 222.]

22 Discussion

23 I. Defendant's Request to Re-Open Expert Discovery to Address the New Military 24 Allegations in the Second Amended Complaint.

25 "A schedule may be modified only for good cause and with the judge's consent."
26 Fed. R.Civ.P. 16(b)(4). [See also Doc. Nos. 24, at p. 5; Doc. No. 34, at p. 5; Doc. No. 62,
27 at p. 5; Doc. No. 69, at p. 4; Doc. No. 79, at p. 2 (indicating that the dates in the
28 Scheduling Order "will not be modified except for good cause shown").] "Rule 16(b)'s

1 'good cause' standard primarily considers the diligence of the party seeking the
2 amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).
3 Recently, the Ninth Circuit has instructed that the following factors should be considered
4 when ruling on a motion to amend a Rule 16 scheduling order to re-open discovery:
5 "1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-
6 moving party would be prejudiced, 4) whether the moving party was diligent in obtaining
7 discovery within the guidelines established by the court, 5) the foreseeability of the need
8 for additional discovery in light of the time allowed for discovery by the district court,
9 and 6) the likelihood that the discovery will lead to relevant evidence." *City of Pomona*
10 *v. SQMN. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017).

11 As noted above, defendant has requested that the Court re-open expert discovery to
12 address "new claims" in the Second Amended Complaint that defendant "made false
13 statements to the United States Military about plaintiff." [Doc. No. 215-1, at p. 6.]
14 According to defendant, plaintiff added "79 new paragraphs" to the Second Amended
15 Complaint regarding the military. [Doc. No. 225, at p. 3.] As a result, defendant wants
16 "to designate experts to address [and evaluate] these new issues." [Doc. No. 215-1, at
17 p. 14; Doc. No. 225, at p. 6.] In other words, defendant's request to re-open expert
18 discovery contemplates the designation of new experts, the preparation of new expert
19 reports and rebuttal reports, as well as another round of expert depositions. Defendant
20 believes this additional discovery is necessary, because the new allegations in the Second
21 Amended Complaint "dramatically changed the scope of this case" after the close of
22 expert discovery and will significantly increase plaintiff's claim for damages. [Doc. No.
23 225, at pp. 3, 5-6; Doc. No. 225, at p. 3.]

24 Defendant argues there is good cause to re-open expert discovery because the "new
25 claims" in the Second Amended Complaint were not added until June 2017, more than a
26 year after the close of expert discovery on May 31, 2016, and were not at issue when the
27 parties completed their initial expert discovery. [Doc. No. 215-1, at pp. 5-6.] If expert
28 discovery is re-opened, defendant asserts there will be no impact to the current schedule,

1 because the Pre-Trial Conference is now set for January 23, 2019. [Doc. No. 215-1, at p.
2 6.] If expert discovery is not re-opened to address these “new military claims,” defendant
3 argues that it “will be irreparably harmed,” because it will be unable to present a full
4 defense to plaintiff’s new allegations. [Doc. No. 215-1, at p. 14.]

5 In its Opposition to defendant’s Motion, plaintiff argues that the addition of the
6 new “military allegations” in the Second Amended Complaint does not justify re-opening
7 expert discovery for several reasons. [Doc. No. 221, at pp. 16-17.] First, plaintiff argues
8 that defendant should not be permitted to complete additional expert discovery on the
9 military allegations at this late date, because defendant’s efforts to harm plaintiff’s
10 business relationship with the military have been “at issue” in the case all along. [Doc.
11 No. 228, at p. 18.] As a result, it is plaintiff’s contention that defendant has already had
12 enough time to complete discovery on the military allegations. According to plaintiff, the
13 original Complaint and the First Amended Complaint both include allegations that
14 plaintiff earned revenue from the military; that defendant “took a lead role” in
15 disseminating “the false injury data in the Devor Article” to the military community; and
16 that plaintiff was harmed by the dissemination and re-publication of the false injury data.
17 [Doc. No. 228, at p. 18.]

18 A review of the original Complaint reveals allegations that plaintiff earned
19 significant revenue from the military since its business had grown to include
20 “approximately 300 military and law-enforcement affiliate boxes” or gyms. [Doc. No. 1,
21 at pp. 6, 8.] As examples of re-publication of the false injury data that allegedly caused
22 substantial harm to plaintiff’s business reputation with the military, the original
23 Complaint cites articles in four military publications. The original Complaint also
24 mentions an article that was cited in the Devor Study. The article was co-authored by
25 defendant’s editor-in-chief and allegedly includes speculation about the increased
26 potential for injuries in military conditioning programs associated with plaintiff. [Doc.
27 No. 1, at pp. 15, 11-12.]

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1 Although the Second Amended Complaint does not add any new causes of action,
2 it does include new, more specific allegations that defendant made “false” and
3 “disparaging” statements to members of the military about plaintiff’s business. Allegedly,
4 these “false” and “disparaging” statements were made in an effort to compete with
5 plaintiff by convincing members of the military that plaintiff’s fitness training programs
6 are unsafe. As a result of these “false” and “disparaging” statements, plaintiff claims that
7 its military revenue has decreased and that its business reputation “has been irreparably
8 tarnished.” [Doc. No. 187, at pp. 14-18.] However, based on a review of the original
9 Complaint, the First Amended Complaint, the Second Amended Complaint, and the
10 District Court’s May 26, 2017 sanctions Order [Doc. Nos. 1, 71-6, 176, 187], this Court
11 agrees with plaintiff’s contention that the new military allegations in the Second
12 Amended Complaint were “no surprise” to defendant. [Doc. No. 228, at p. 18.] To the
13 extent the new military allegations increase the scope of the case and the potential for
14 damages, it is the direct result of defendant’s willful failure to produce relevant,
15 responsive documents during discovery. Thus, any discovery related to these allegations
16 has been foreseeable since the beginning of the case. As a result, it is this Court’s view
17 that defendant has already had sufficient time to prepare its defense to the military
18 allegations in the Second Amended Complaint.

19 Second, plaintiff believes defendant’s request to re-open expert discovery for the
20 purpose of addressing the new, military-related allegations is an attempt to “side-step” or
21 “nullify” the District Court’s May 26, 2017 sanctions Order. [Doc. No. 221, at pp. 14,
22 16-17.] The District Court’s sanctions Order only allowed plaintiff to file the Second
23 Amended Complaint with these new allegations, because of defendant’s discovery abuses
24 (*i.e.*, lying about its efforts to compete with plaintiff and concealing numerous relevant
25 documents that should have been produced during discovery). As plaintiff contends, “the
26 military-related factual allegations in the [Second Amended Complaint] are only ‘new’
27 because [defendant] concealed its 2013 communications and lied under oath about [its]
28 efforts to compete with [plaintiff] in the military.” [Doc. No. 221, at p. 17 and

1 documents cited therein. *See also* Doc. No. 176, at pp. 4-5, 7-8.] Therefore, plaintiff
2 argues defendant would be benefiting from its own discovery abuses if the Court grants
3 defendant's request to re-open expert discovery on the new military allegations. [Doc.
4 No. 221, at p. 19.]

5 The District Court's May 26, 2017 sanctions Order not only granted plaintiff leave
6 to file the Second Amended Complaint to address the military-related allegations, it also
7 stated in the same paragraph that: ***[Plaintiff]—and only [plaintiff]—is GRANTED***
8 ***LEAVE to reopen fact and expert discovery on all relevant claims.*** [Doc. No. 176, at
9 p. 13 (emphasis added).] As this Court reads the sanctions Order, the District Court re-
10 opened fact and expert discovery "on all relevant claims" ***for plaintiff only***, because
11 defendant willfully and wrongfully withheld relevant, responsive documents from
12 disclosure. At least in part, the wrongfully withheld documents related to defendant's
13 efforts to compete with plaintiff, including documents revealing its efforts to compete
14 with plaintiff in the military community. [Doc. No. 176, at pp. 1-13.] Therefore, this
15 Court agrees with plaintiff that allowing defendant additional time for expert discovery to
16 address the new military allegations in the Second Amended Complaint would be
17 contrary to the District Court's sanctions Order and would permit defendant to side-step
18 or nullify a portion of this Order. [Doc. No. 221, at pp. 9-10.] Despite defendant's
19 argument to the contrary, the District Court's Order does not preclude defendant from
20 preparing or presenting an effective defense to the new military allegations at trial, it only
21 prevents defendant from obtaining additional discovery to do so.

22 Third, plaintiff argues that the Court should not grant defendant's request for
23 additional time to complete expert discovery on the new military allegations, because
24 defendant is unable to show good cause. According to plaintiff, defendant inexcusably
25 "sat silent for nearly two years" after the expiration of the deadline to complete expert
26 discovery before submitting its request to the Court. [Doc. No. 221, at p. 21.] The Court
27 notes that the deadline for completing all expert discovery was May 31, 2016. [Doc. No.
28 79.] Plaintiff filed the Second Amended Complaint on June 26, 2017. [Doc. No. 187.]

1 Defendant then waited until February 1, 2018, about seven (7) months after the filing of
2 the Second Amended Complaint, to request that the Court re-open expert discovery to
3 address the new military allegations. [Doc. No. 215.] The reason for this delay is
4 unclear. Defendant did indicate in its Reply that it has been inundated with additional
5 discovery requests from plaintiff since the May 26, 2017 sanctions Order was issued and
6 has been “diligently working” to respond to these discovery requests and “to complete
7 the forensic investigation.” [Doc. No. 225, at p. 10.] For example, in a supporting
8 Declaration, defendant’s counsel represented that plaintiff served 160 new discovery
9 requests after the District Court issued the sanctions Order on May 26, 2017. [Doc. No.
10 225-1, at pp. 1-4.]

11 Under other circumstances, having to complete a large volume of discovery under
12 difficult conditions would be enough to establish good cause for extending time to
13 complete discovery. “[G]ood cause’ means scheduling deadlines cannot be met despite
14 [a] party’s diligence.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d at 609. Here,
15 however, the large volume of discovery at hand is directly related to defendant’s
16 discovery abuses (*i.e.*, failure to produce relevant, responsive documents and information
17 during the extended periods of time that were allowed in this case under the various
18 Scheduling Orders). Therefore, defendant’s difficulties in complying with the discovery
19 required by the District Court’s sanctions Order cannot be used to excuse defendant’s
20 seven-month delay in requesting time to complete additional discovery on the new
21 allegations in the Second Amended Complaint.

22 As noted above, the Ninth Circuit recently indicated that other factors besides
23 diligence should be considered when ruling on a motion to re-open discovery, such as
24 whether the trial is imminent. Here, these factors do not weigh in favor of defendant’s
25 request to re-open expert discovery. It is true that the trial in this case is not imminent as
26 the final Pre-Trial Conference is currently scheduled for January 23, 2019. [Doc. Nos.
27 213, 214.] The District Court continued the final Pre-Trial Conference for a full year
28 from January 4, 2018 to January 23, 2019 just to give the parties enough time to comply

1 with the sanctions Order. [Doc. Nos. 213, 214.] In their request for this continuance, the
2 parties explained they needed an additional year to comply with the sanctions Order for
3 several reasons. First, defendant needed more time because of the “volume of responsive
4 documents located.” [Doc. No. 213, at p. 2-4.] Second, plaintiff was unable to complete
5 discovery allowed under the sanctions Order, such as taking or re-taking depositions and
6 amending its expert reports, until the document production and forensic evaluation were
7 completed. [Doc. No. 213, at p. 4.] Third, the forensic expert indicated his evaluation
8 could not be completed until at least December 2017 “given the complexity and volume
9 of [defendant’s] servers, electronic devices and document custodians.” [Doc. No. 213, at
10 p. 5.] Finally, plaintiff represented that it had reason to believe the scope of defendant’s
11 discovery misconduct was “far greater than previously identified” and anticipated filing
12 another sanctions motion. [Doc. No. 213, at p. 4.]

13 Based on the foregoing, trial is not imminent only because the parties estimated it
14 would take a full year just to comply with the sanctions Order. Despite defendant’s
15 argument to the contrary, a new round of expert discovery at this late date in the
16 proceedings is likely to disrupt progression of the parties’ efforts to comply with the
17 District Court’s sanctions Order and result in a further, unreasonable delay of trial in a
18 case that has already been pending since 2014. “Prejudice from unreasonable delay is
19 presumed.” *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1236
20 (9th Cir. 2006).

21 Plaintiff filed a strong Opposition to defendant’s Motion that presents a number of
22 very convincing reasons why defendant should not be granted additional time to complete
23 new expert discovery on the military-related allegations. The record shows that
24 defendant not only failed to meet its discovery obligations in the case but also has not
25 been diligent in making its request for additional discovery. As noted above, defendant
26 waited about seven (7) months after the filing of the Second Amended Complaint to
27 make its request to re-open expert discovery to address these new allegations. Given the
28 allegations related to the military that have been in the case since the beginning and the

1 content of the documents defendant willfully withheld from discovery on this issue, the
2 type of discovery defendant is now seeking has long been foreseeable.

3 As noted above, the sanctions Order re-opened fact and expert discovery for
4 plaintiff only. Allowing defendant additional time to obtain discovery on the military
5 allegations would not only violate the District Court's sanctions Order but would allow
6 defendant to benefit from its discovery abuses. Therefore, the Court finds that
7 defendant's request for an order re-opening expert discovery to address the new, military
8 allegations in the Second Amended Complaint must be DENIED for failure to establish
9 good cause.

10 **II. Defendant's Request to Re-Open Expert Discovery to "Counter" Expert Reports**
11 **Prepared by Plaintiff's Damages Expert, Dr. Solomon.**

12 As summarized above, an initial expert report by Dr. Solomon on the issue of
13 damages was timely served on defendant on April 1, 2016. Defendant then served a
14 timely rebuttal expert report on plaintiff which was prepared by Mr. Boudikis. The
15 parties then completed timely depositions of both of these experts. Then, on
16 December 29, 2016, long after the May 31, 2016 deadline for completing all expert
17 discovery, plaintiff served defendant with a second expert report by Dr. Solomon.

18 In the Motion to Amend, defendant now seeks to name a new damages expert to
19 "counter" ***both*** of the reports prepared by Dr. Solomon. Although the parties' moving
20 and opposing papers conflate the issues, different rules and standards apply, so the Court
21 must separately consider whether defendant may: (1) "counter" Dr. Solomon's initial
22 expert report; (2) "counter" Dr. Solomon's second expert report; and (3) designate a new
23 damages expert.

24 **A. Defendant's Request to Re-Open Expert Discovery to "Counter"**
25 **Dr. Solomon's Initial Expert Report.**

26 In the Motion to Amend the Scheduling Order, defendant requests that the Court
27 "set new expert designation dates . . . ***due primarily to the new opinions set forth in***
28 ***Dr. Solomon's Supplemental Report.***" [Doc. No. 215-1, at p. 5 (emphasis added).]

1 Defendant's Motion also indicates that it seeks to re-open expert discovery so that it can
2 counter "*other improper opinions* stated by Dr. Solomon, which [it believes] are based
3 on a tainted, biased, leading, and manipulative market survey." [Doc. No. 215-1, at p. 5
4 (emphasis added).] In support of the Motion, defendant submitted a lengthy Declaration
5 signed by its proposed expert, Dr. Itamar Simonson. Dr. Simonson's Declaration reveals
6 that defendant not only seeks to "counter" Dr. Solomon's supplemental expert report of
7 December 29, 2016, it also wants to "counter" Dr. Solomon's initial expert report that
8 was completed prior to the May 31, 2016 deadline for completing expert discovery.
9 [Doc. No. 215-9.] Defendant seeks to "counter" Dr. Solomon's initial expert report even
10 though it has already had an opportunity to do so in a rebuttal report by its own expert,
11 Mr. Boukidis, and has already deposed Dr. Solomon about the contents of his initial
12 expert report. [Doc. No. 221, at p. 8; Doc. No. 79, at p. 2.]

13 To the extent defendant seeks to amend the Scheduling Order to re-open expert
14 discovery to "counter" Dr. Solomon's *initial expert report*, defendant must establish
15 good cause under Rule 16(b)(4), as explained in the preceding section of this Order.
16 Dr. Solomon's initial expert report was disclosed on or about April 1, 2016. [Doc. No.
17 221, at p. 8.] There appear to be two main reasons why defendant is seeking to re-open
18 expert discovery to "counter" Dr. Solomon's initial expert report. First, defendant's
19 Motion includes a conclusory statement that opinions in Dr. Solomon's initial expert
20 report are "improper," because they are "tainted, biased, leading, and manipulative."
21 [Doc. No. 215-1, at p. 5.] If that is the case, these deficiencies would have been apparent
22 on April 1, 2016, when the report was disclosed, and should have been addressed in the
23 rebuttal by Mr. Boukidis. Defendant's newly discovered dissatisfaction with the content
24 of Dr. Solomon's initial expert report does not justify a second chance for rebuttal.

25 Second, defendant has stated in its Reply that the new military allegations in the
26 Second Amended Complaint are likely to result in an increase in the amount of damages
27 set forth in Dr. Solomon's *initial* expert report, so it would be unfair to deny defendant's
28 request to designate a new expert to "counter" this report. [Doc. No. 225, at p. 3]

1 However, as this Court reads the District Court's sanctions Order, fact and expert
2 discovery were only re-opened for plaintiff because of defendant's discovery abuses.
3 These discovery abuses were, at least in part, directly related to defendant's failure to
4 produce relevant, responsive documents about its attempts to compete with plaintiff in
5 the military community. Thus, as outlined more fully in the preceding section, it appears
6 that this request is also an attempt to side-step or nullify the District Court's sanctions
7 Order. In addition, defendant cannot show diligence in seeking another chance to
8 "counter" Dr. Solomon's initial expert report, because it waited so long to do so after the
9 new allegations were added to the Second Amended Complaint. For these reasons, and
10 the reasons set forth in the preceding section, the Court finds that defendant's request for
11 an order re-opening expert discovery so that defendant can "counter" Dr. Solomon's
12 initial expert report must be DENIED.

13 **B. Defendant's Request to "Counter" Dr. Solomon's Second Expert Report.**

14 With respect to Dr. Solomon's second expert report, defendant contends that
15 plaintiff "seeks to make use of an untimely expert report" to increase its claimed damages
16 for corrective advertising by nearly \$15 million based in large part on "a single article"
17 that mentions the Devor Study. [Doc. No. 215-1, at p. 5.] According to defendant,
18 Dr. Solomon's second expert report is untimely, because it was served on December 29,
19 2016, long after the May 31, 2016 deadline for completing all expert discovery. [Doc.
20 No. 215-1, at pp. 8-9; Doc. No. 79, at p. 2.] As a result, defendant argues that "good
21 cause" and "considerations of fairness" weigh in favor of the Court permitting defendant
22 "to counter [plaintiff's] new and belated damages opinion." [Doc. No. 215-1, at pp. 5,
23 12-14 (emphasis added).] Alternatively, defendant requests that the Court "strike"
24 Dr. Solomon's second expert report as untimely under Federal Rule of Civil Procedure
25 37(c)(1). Resolution of this issue depends on whether Dr. Solomon's second expert
26 report is a timely supplement under Federal Rule of Civil Procedure 26(e) or an untimely
27 expert disclosure subject to exclusion under Federal Rule of Civil Procedure 37(c)(1).

28 ///

1 Federal Rule of Civil Procedure 26(a)(2)(E), provides that: “[T]he parties must
2 supplement [expert disclosures] when required under Rule 26(e).” Fed.R.Civ.P.
3 26(a)(2)(E). Federal Rule of Civil Procedure 26(e) states in part as follows: “A party
4 who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure
5 or response: (A) *in a timely manner if the party learns that in some material respect the*
6 *disclosure or response is incomplete or incorrect*, and if the additional or corrective
7 information has not otherwise been made known to the other parties during the discovery
8 process or in writing; or (B) as ordered by the court.” Fed.R.Civ.P. 26(e)(1)(A)&(B). In
9 addition, Federal Rule of Civil Procedure 26(e)(2) states as follows:

10 For an expert whose report must be disclosed under Rule 26(a)(2)(B), the
11 party’s duty to supplement extends both to information included in the report
12 and to information given during the expert’s deposition. *Any additions or*
13 *changes to this information must be disclosed by the time the party’s*
pretrial disclosures under Rule 26(a)(3) are due.

14 Fed.R.Civ. P 26(e)(2) (emphasis added).

15 In this case, the Scheduling Orders have not included a deadline to supplement an
16 expert report. The Scheduling Orders have only included deadlines for designating initial
17 and rebuttal experts; exchanging initial and rebuttal expert reports; and completing all
18 expert discovery. [Doc. Nos. 24, 34, 62, 65, 67, 69, 79.] Where there is no deadline in
19 the Scheduling Order, the time limits provided in the Federal Rules of Civil Procedure
20 apply. Therefore, the deadline for supplementing an expert report in this case is the same
21 as the deadline for the pretrial disclosures required under Rule 26(a)(3).

22 By the time plaintiff served defendant with Dr. Solomon’s second expert report on
23 or about December 29, 2016, the deadline for completing pre-trial disclosures under
24 Rule 26(a)(3) had been extended to February 17, 2017. [Doc. No. 129, at p. 2.]
25 Therefore, Dr. Solomon’s second expert report was timely when served if it meets the
26 general requirements of a “supplement” under Rule 26(e). If Dr. Solomon’s second
27 report does not meet the general requirements of a “supplement” under Rule 26(e), the
28 report is untimely and would be subject to exclusion under Rule 37(c)(1).

1 “Supplementation [under Rule 26(e)] means correcting inaccuracies, or filling the
2 interstices of an incomplete report **based on information that was not available at the**
3 **time of the initial disclosure.**” *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont.
4 1998) (emphasis added). The duty to supplement under Rule 26(e) “does not give license
5 to sandbag one’s opponent with claims and issues which should have been included in the
6 expert witness’ [original] report. [Citation omitted.]” *Reinsdorf v. Skechers U.S.A.*, 922
7 F. Supp. 2d 866, 880 (C.D. Cal. 2013).

8 Rule 26(e) is also not “a loophole through which a party who submits partial expert
9 witness disclosures, or who wishes to revise [its] disclosures in light of [its] opponent's
10 challenges to the analysis and conclusions therein, can add to them to [its] advantage
11 after the court’s deadline for doing so has passed.” *Luke v. Family Care & Urgent Med.*
12 *Clinics*, 323 F. App’x 496, 500 (9th Cir. 2009). Otherwise, Rule 26(e) “would essentially
13 allow for unlimited bolstering of expert opinions” which “would [wreak] havoc in docket
14 control and amount to unlimited expert opinion preparation.” *Akeva L.L.C. v. Mizuno*
15 *Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002). “Accordingly, a supplemental expert
16 report that states additional opinions or ‘seeks to ‘strengthen’ or ‘deepen’ opinions
17 expressed in the original expert report’ is beyond the scope of proper supplementation
18 and subject to exclusion under Rule 37(c).” *Plumley v. Mockett*, 836 F. Supp. 2d 1053,
19 1062 (C.D. Cal. 2010), quoting *Cohlma v. Ardent Health Servs., LLC*, 254 F.R.D. 426,
20 433 (N.D.Okla.2008).

21 In *Keener v. United States*, 181 F.R.D. 639, for example, an initial report by a
22 defense medical expert only included “a summary of his general opinions” which
23 consisted of “four sentences” that were “tantamount to a non-opinion.” *Id.* at 639-641.
24 Later, the defendant disclosed the expert’s “supplemental” report after the deadline for
25 exchanging rebuttal expert reports and after the expert was able to review all of the
26 opinions expressed by the plaintiff’s medical experts. *Id.* at 640. The defense expert’s
27 “supplemental” report was dramatically different from his initial report. In contrast to the
28 initial report, the “supplemental” report tracked the plaintiff’s medical history; included

1 “extensive responses” to the opinions expressed by the plaintiff’s experts; drew “specific
2 conclusions;” offered “precise reasons” as to the basis of his opinions; and provided
3 opinions “that go to the heart of the case.” *Id.* at 641. All of these opinions were based
4 on medical records in existence at the time of the expert’s initial report and therefore
5 could have been included in the initial report. *Id.* As a result, the District Court
6 concluded that the “supplemental” report was untimely and did not qualify as a
7 supplement under Rule 26(e)(1)(a). *Id.* at 640-642. The District Court excluded the
8 “supplemental” expert report as a sanction under Rule 37(c)(1) and limited the expert’s
9 testimony at trial to the undeveloped opinions expressed in the initial report. *Id.* at 642.

10 Rule 37(c)(1) states in part as follows: “If a party fails to provide information or
11 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that
12 information or witness to supply evidence on a motion, at a hearing, or at trial, unless the
13 failure was substantially justified or is harmless. . . .” Fed.R.Civ.P. 37(c)(1). “[T]he
14 burden is on the party facing sanctions to prove harmlessness.” *Yeti by Molly, Ltd. v.*
15 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). District Courts have
16 “particularly wide latitude . . . to issue sanctions under Rule 37(c)(1).” *Id.* “Courts have
17 upheld the use of the sanction even when a litigant’s entire cause of action or defense has
18 been precluded.” *Id.*

19 When sanctions for violating Rule 26 could, in effect, result in a dismissal or
20 default, the Ninth Circuit has indicated that District Courts should consider: “(1) the
21 public's interest in expeditious resolution of litigation; (2) the court's need to manage its
22 dockets; (3) the risk of prejudice to [the party seeking sanctions]; (4) the public policy
23 favoring disposition of cases on their merits; and (5) the availability of less drastic
24 sanctions.” *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990); *Wendt v. Host*
25 *Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (applying these factors where exclusion of
26 expert testimony was imposed as a sanction for violating Rule 26(a)).

27 In his initial expert report of April 1, 2016, Dr. Solomon applies a theory he calls
28 “The Ripple Effect of Publishing False Data” to opine that the false injury data in the

1 Devor Study spread to consumers and caused reputational and financial damage to
2 plaintiff. [Doc. No. 215-6, at p. 6-27.] Dr. Solomon’s initial expert report also includes
3 an online survey to assess the causal impact of the Devor Study. [Doc. No. 215-6, at
4 p. 47.] Based on the results of his survey, Dr. Solomon reached various conclusions. For
5 example, Dr. Solomon believes that respondents who were exposed to the false injury
6 data in the Devor Study were significantly more likely to rate plaintiff’s fitness programs
7 as dangerous and significantly less likely to want to purchase a membership. [Doc. No.
8 215-6, at pp. 47-48.] In addition, Dr. Solomon “conducted a detailed ‘web scrape’ of
9 articles on websites and posts on social media platforms” for the period 2004 through
10 2015 to assess “the magnitude and character of the ‘ripple effect’” caused by the false
11 injury data in the Devor Study. [Doc. No. 215-6, at p. 52.] Dr. Solomon’s initial expert
12 report includes a number of “key findings” based on the “web scrape.” [Doc. No. 215-6,
13 at pp. 52-53.] For example, Dr. Solomon concluded based on the “web scrape” that the
14 false injury data potentially reached about 199 million on-line readers and 7.5 million
15 hard copy readers. [Doc. No. 215-6, at p. 52.] In addition, Dr. Solomon’s initial expert
16 report concluded based on the “web scrape” that dissemination of the Erratum to the
17 Devor Study “was miniscule” in comparison to the attention given to the Devor Study.
18 [Doc. No. 215-6, at p. 53.]

19 Citing a theory known as the *Streisand Effect* (*i.e.*, that efforts to suppress
20 information sometimes has the opposite effect), Dr. Solomon further opined in his initial
21 expert report that the Erratum only served to draw more attention to the false injury data,
22 thereby causing an increase in misperceptions about the safety of plaintiff’s fitness
23 programs. [Doc. No. 215-6, at pp. 55-56.] It was Dr. Solomon’s view that the “ripple
24 effect” continued to impact plaintiff’s brand image up to and concluding April 1, 2016,
25 the date he completed his initial expert report. [Doc. No. 216-6, at pp. 57, 70.] In the
26 section of his initial expert report entitled “Summary of Damages,” Dr. Solomon
27 estimated that it would cost about \$3.5 million to conduct a corrective advertising
28 program to rectify the impact of the false injury data in the Devor Study. [Doc. No. 215-

1 6, at p. 68.] As noted above, defendant served plaintiff with a rebuttal report prepared by
2 Mr. Boukidis on April 22, 2016, and both of these experts were deposed prior to the
3 May 31, 2016 deadline for completing expert discovery. [Doc. No. 215-1, at p. 8.]

4 In his second expert report, Dr. Solomon mostly addressed information he says he
5 learned about after he prepared his initial expert report and this “prompted the question
6 of how the passage of time has affected the frequency of citation to the Devor Article. . . .
7 In other words, the question was whether the ripple effect was fading or increasing.”
8 [Doc. No. 215-8, at pp. 4, 17.] The title of the second report is: “Update: The Ripple
9 Effect Continues.” [Doc. No. 215-8, at p. 4.] Dr. Solomon states in his second expert
10 report that he believes based on newly discovered information that the ripple effect
11 continues to result in the spread of the false injury data from the Devor Study. As a
12 result, Dr. Solomon believes that plaintiff continues to be damaged by the spread of this
13 information. [Doc. No. 215-8, at p. 17.]

14 To prepare his second report, it is apparent that Dr. Solomon conducted a
15 significant amount of additional research. On December 7, 2016, Dr. Solomon searched
16 the website for defendant’s “wholly-owned journal” that published the Devor Study and
17 learned it is unlikely that researchers would discover the Erratum. As a result, it is
18 Dr. Solomon’s view that the false injury data “will continue to appear in subsequent
19 journal articles on this topic.” [Doc. No. 215-8, at p. 4.]

20 Defendant complains that this portion of Dr. Solomon’s second expert report is
21 based on information that could have been included in his initial expert report. [Doc. No.
22 215-1, at p. 18.] Since plaintiff alleges in the Second Amended Complaint that defendant
23 published the Erratum in September 2015, and Dr. Solomon’s initial expert report was
24 completed on April 1, 2016, it appears that defendant may be correct on this point. [Doc.
25 No. 187, at 25.]

26 On some unspecified date, Dr. Solomon also “caused a Google search” to be
27 completed for the Devor Study, and he states in his second report that the results of this
28 search continue to discuss the false injury data. [Doc. No. 215-8, at p. 4.] Dr. Solomon

1 further states in his second report that he learned in November 2016 about the “Iron Tribe
2 article,” which was “published ahead of print on October 19, 2016.” [Doc. No. 215-8, at
3 p. 4.] According to Dr. Solomon, the Iron Tribe article “reiterated the Devor Study’s
4 false injury data.” [Doc. No. 215-8, at p. 4.] Dr. Solomon believes that researchers are
5 “likely to discover [the Iron Tribe] article promulgating the Devor Study’s false injury
6 data,” because the abstract for the article includes the term “Crossfit” and was published
7 on websites that are considered credible sources. [Doc. No. 215-8, at p. 4-5.]

8 Finally, Dr. Solomon completed some “web scrapes” using “multiple
9 methodologies” to assess “whether the Iron Tribe article had an impact” since
10 October 19, 2016, when it became available online. [Doc. No. 215-8, at p. 7.] Based on
11 his new, updated research, Dr. Solomon concluded that the damage from the false injury
12 data “continues to spread” and that “the frequency of citation is increasing rather than
13 decreasing or disappearing.” [Doc. No. 215-8, at p. 17.] According to Dr. Solomon,
14 “[t]he ongoing ripple effect of the Devor Study, even to the present, reinforces the
15 assertion I made in my original Report that multiple exposures will be required to correct
16 the damage its false data caused and continues to cause.” [Doc. No. 215-8, at p. 18.] To
17 implement “a reasonable corrective advertising campaign in both print and digital media”
18 involving “multiple exposures,” Dr. Solomon estimates total corrective damages to be
19 \$18,018,413. [Doc. No. 215-8, at pp. 24-25.] This new estimate of total corrective
20 damages represents a significant increase. As noted above, Dr. Solomon estimated in his
21 original expert report that it would cost about \$3.5 million to conduct a corrective
22 advertising program to rectify the impact of the false injury data in the Devor Study.
23 [Doc. No. 215-6, at p. 68.]

24 Based on a review of both of Dr. Solomon’s expert reports, it is apparent that the
25 second report is, in part, a timely Rule 26(e) supplement and, in part, an untimely report
26 under Rule 37(c)(1). A side-by-side comparison reveals that the second expert report is a
27 new, different report that is more extensive than one would expect to see from a party
28 who is merely “correcting inaccuracies, or filling the interstices of an incomplete

1 report. . .” *Keener v. United States*, 181 F.R.D. at 640. In fact, it is quite apparent that
2 the purpose of the December 29, 2016 report is not merely to correct inaccuracies or fill
3 in small gaps that were incomplete. Dr. Solomon prepared a whole new, updated
4 addition to his initial report based on a significant amount of additional research after the
5 close of expert discovery. The sole purpose of his research appears to have been to
6 uncover additional evidence to bolster his initial opinion that the “ripple effect” of the
7 false injury data is continuing and far reaching. The new estimate of total corrective
8 damages is increased so dramatically based on this additional research that any party in
9 receipt of such a report after the close of expert discovery would understandably believe
10 it had been sandbagged with an untimely expert report. It is true that plaintiff offered to
11 make Dr. Solomon available for another deposition, but no party would consider that
12 adequate under the circumstances and would want the opportunity for a qualified expert
13 to review, analyze, and rebut a new expert report that could so dramatically increase a
14 party’s exposure in a case.

15 On the other hand, the second report does not raise any new damages theories and
16 it is primarily based on new information that was not available when Dr. Solomon
17 prepared his initial expert opinion. It is also understandable that damages may increase
18 and damages assessments may change over time, especially when a case experiences
19 lengthy delays such as those in this case. In addition, it could also be said that “in some
20 material respect” the new information uncovered by Dr. Solomon in November and
21 December of 2016 made his initial expert report “incomplete or incorrect,” and Rule
22 26(e)(1)(A) permits a party to supplement an expert report under these circumstances.
23 Fed.R.Civ.P. 26(e)(1)(A).

24 The Court, exercising its discretion, will assume that Dr. Solomon’s second expert
25 report is a “supplement” under Rule 26(e)(1)(A), as plaintiff asserts.³ Assuming this
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27
28 ³ From this point forward, however, any purported supplements to expert reports in
this case will be subject to exclusion under Rule 37(c)(1) if a side-by-side comparison

1 second report qualifies as a supplement, it was not only disclosed before the Rule
2 26(e)(2) deadline (*i.e.*, before the deadline for pretrial disclosures under Rule 26(a)(3)), it
3 was also disclosed in a “timely manner,” as required by Rule 26(e)(1)(A). Pursuant to
4 Rule 26(e)(1)(A), plaintiff produced the second report within a reasonable time after
5 discovering the initial report was incomplete or incorrect. Dr. Solomon states in his
6 second report that he learned in November 2016 about the new Iron Tribe article, which
7 was “published ahead of print on October 19, 2016.” [Doc. No. 215-8, at p. 4.] He also
8 completed additional research on December 7, 2016, after discovering the Iron Tribe
9 article. Plaintiff then served defendant with Dr. Solomon’s second expert report on
10 December 29, 2016. [Doc. No. 215-1, at p. 8.]

11 Assuming Dr. Solomon’s second expert report is a Rule 26(e)(1)(A) “supplement,”
12 it effectively renders the rebuttal report prepared by defendant’s expert, Mr. Boukidis,
13 “incomplete” or “incorrect.” Fed.R.Civ.P. 26(e)(1)(A). Mr. Boukidis did not have an
14 opportunity to address any of the new, updated material in Dr. Solomon’s second expert
15 report. As a result, it is this Court’s view that defendant would be entitled under
16 Rule 26(e)(2) to supplement the rebuttal report by Mr. Boukidis to address the new
17 material contained in Dr. Solomon’s supplemental report on or before December 11,
18 2018 (*i.e.*, the current deadline for completing Rule 26(a)(3) disclosures), ***without the***
19 ***need to re-open expert discovery.*** Fed.R.Civ.P. 26(e)(2). [Doc. No. 213, at p. 7; Doc.
20 No. 214.]

21 Plaintiff argues that defendant should not be permitted to “counter” Dr. Solomon’s
22 second expert report, because it waited too long to make the request and cannot establish
23 good cause. It is true that defendant could have addressed this matter sooner, as
24 Dr. Solomon’s second expert report was served on December 29, 2016, and defendant did
25 not file the instant Motion until February 1, 2018. However, the Scheduling Orders in
26 _____
27 _____
28 reveals a whole new report rather than minimal corrections and additions necessary to
make a prior report complete.

1 this case have not included a deadline for seeking sanctions under Rule 37(c)(1) and did
2 not alter the deadline in Rule 26(e)(2) for disclosing supplements to expert reports. Since
3 the Court construed Dr. Solomon's second expert report as a supplement under Rule
4 26(e)(1), it is this Court's view that defendant does not need a Scheduling Order
5 amendment to serve its own supplement to the rebuttal report of Dr. Boukadis. Unless
6 the Court orders otherwise, defendant's deadline for serving a Rule 26(e)(2) supplement
7 to the rebuttal report by Dr. Boukadis is December 11, 2018 (*i.e.*, the current deadline for
8 completing pre-trial disclosures under Fed.R.Civ.P. 26(e)(2)).

9 Plaintiff also contends that allowing defendant to counter Dr. Solomon's second
10 report would nullify portions of the District Court's issue sanctions. In support of this
11 argument, plaintiff cites a Declaration submitted by defendant's proposed expert,
12 Dr. Simonson, in support of the Motion to Amend the Scheduling Order. As plaintiff
13 contends, Dr. Simonson's Declaration does include statements that contradict at least two
14 of the District Court's issue sanctions. For example, paragraph 2 of Dr. Solomon's report
15 states that: "There is no evidence in the Solomon Reports that the Devor Study at issue
16 had a negative effect on the reputation of [plaintiff]." [Doc. No. 215-9, at p. 2.] The
17 District Court's May 26, 2017 sanctions order establishes that plaintiff was indeed
18 harmed by the false injury data in the Devor Study. [Doc. No. 176, at p. 12.] To the
19 extent any such statements are incorporated into an expert report to "counter"
20 Dr. Solomon's second expert report, plaintiff may seek to exclude them in a motion *in*
21 *limine* at the time of trial. In other words, these potential conflicts are not enough for the
22 Court to completely deny defendant's request for an opportunity to "counter"
23 Dr. Solomon's second expert report with a supplement by its own expert. [Doc. No. 215-
24 1, at p. 5.]

25 In sum, for the reasons outlined above, the Court finds that defendant's request for
26 an opportunity to "counter" Dr. Solomon's second expert report must be GRANTED.
27 Defendant may serve plaintiff with an expert report that rebuts the arguments and

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1 evidence in Dr. Solomon's second expert report.⁴ Under Federal Rule of Civil Procedure
2 26(a)(2)(D)(ii), the scope of a rebuttal expert report is limited. An expert report qualifies
3 as a rebuttal report if it "is intended solely to contradict or rebut evidence on the same
4 subject matter" that is identified in another party's expert report. Fed.R.Civ.P.
5 26(a)(2)(D)(ii). A rebuttal report may not be used to advance "new arguments" that are
6 outside the scope of the opposing expert's report. *Blake v. Securitas Sec. Servs., Inc.*, 292
7 F.R.D. 15, 17 (D.D.C. 2013). However, "[a] rebuttal expert may cite new evidence and
8 data so long as the new evidence and data is offered to directly contradict or rebut the
9 opposing party's expert." *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit*
10 *Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 290 F.R.D. 11, 16 (D. Mass. 2013).

11 **C. Defendant's Request to Designate a New Damages Expert.**

12 Courts have applied the "good cause" standard in Rule 16(b) to a party's request to
13 designate a new expert after the deadline in the Scheduling Order has expired. *Fid. Nat.*
14 *Fin., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 308 F.R.D. 649, 652 (S.D. Cal.
15 2015). In the Motion to Amend the Scheduling Order, defendant seeks an order allowing
16 it to designate a new expert, Dr. Itamar Simonson, to "address the new opinions" set forth
17 in Dr. Solomon's second expert report. [Doc. No. 215-1, at p. 5.] Defendant also wants
18 Dr. Solomon to address opinions included in Dr. Solomon's initial expert report.
19 However, for the reasons outlined above, the Court found that defendant has not
20 established good cause to "counter" opinions expressed by Dr. Solomon in his initial
21 report of April 1, 2016. As a result, the Court also finds that defendant cannot designate
22 a new expert to "counter" opinions in Dr. Solomon's initial expert report.

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26 ⁴ If Dr. Solomon's second expert report is an untimely disclosure subject to
27 exclusion under Rule 37(c)(1), the Court would reach the same result. The Court would
28 find that the untimely disclosure was not harmless to defendant and look to the
availability of lesser sanctions. To prevent prejudice, the Court would allow defendant
sufficient time to "counter" the second expert report.

1 Defendant's request to designate a new expert, Dr. Simonson, to "counter"
2 Dr. Solomon's second expert report is a separate issue. Dr. Solomon's second expert
3 report was timely served as a "supplement" under Rules 26(e)(1) and (e)(2). As outlined
4 above, the Scheduling Orders in this case have not included a deadline for disclosing
5 supplements, so the deadline for serving a supplemental expert report is the same as the
6 deadline for completing pre-trial disclosures under Rule 26(a)(3). Fed.R.Civ.P. 26(e)(2).
7 Therefore, unless the Court orders otherwise, defendant's deadline for serving a
8 supplement to the rebuttal report by Dr. Boukadis is December 11, 2018 (*i.e.*, the current
9 deadline for completing pre-trial disclosures under Rule 26(e)(2)).

10 Under these circumstances, it is this Court's view that defendant should be
11 permitted to designate a new expert to prepare a supplemental expert report under
12 Rules 26(e)(1) and (e)(2) upon a showing of good cause. In this context, a showing of
13 good cause means a plausible reason that would not prejudice an opposing party.
14 Essentially, defendant wants to designate Dr. Simonson to "counter" Dr. Solomon's
15 second expert report, because Dr. Solomon "significantly changed his opinion regarding
16 corrective advertising damages" and "[t]his almost \$15 million increase in corrective
17 advertising damages completely changes the case from a damages perspective." [Doc.
18 No. 215-1, at p. 19; Doc. No. 225, at p. 4.] Defendant represents that Dr. Simonson is
19 better qualified "to defend an \$18 million case." [Doc. No. 225, at p. 4.] Plaintiff does
20 not dispute these representations.

21 Based on defendant's representations, the Court finds there is good cause to allow
22 the designation of Dr. Simonson to "counter" Dr. Solomon's second expert report in
23 place of Dr. Boukidas. The facts and circumstances indicate justice would be better
24 served if defendant is able to designate its preferred expert for this particular purpose.
25 However, plaintiff must be afforded an opportunity to depose Dr. Simonson prior to trial.
26 In sum, the Court finds there is good cause to permit defendant to designate
27 Dr. Simonson as an expert in this case for the sole purpose of rebutting Dr. Solomon's
28 second expert report. Accordingly, the Court finds that defendant's Motion must be

1 GRANTED to the extent it seeks to designate Dr. Simonson to rebut Dr. Solomon's
2 second expert report on the issue of damages.

3 **Conclusion**

4 Based on the foregoing, IT IS HEREBY ORDERED that defendant's Motion to
5 Amend the Scheduling Order [Doc. No. 215] is GRANTED in part and DENIED in part
6 as follows:

7 1. Defendant's request to "counter" or "strike" the second expert report of
8 Dr. E. H. Morreim is DENIED.

9 2. Defendant's request to re-open expert discovery to address the new military
10 allegations in the Second Amended Complaint is DENIED for failure to establish good
11 cause. In addition, the District Court's May 26, 2017 sanctions Order re-opens fact and
12 expert discovery for plaintiff only, and re-opening expert discovery for defendant on
13 these issues would be contrary to the District Court's Order and would permit defendant
14 to benefit from its discovery abuses. [Doc. No. 176, at p. 13.]

15 3. Defendant's request to re-open discovery to "counter" Dr. Solomon's initial
16 expert report is DENIED for failure to establish good cause.

17 4. Defendant's request to serve plaintiff with an expert report that "counters"
18 (*i.e.*, rebuts) Dr. Solomon's second expert report is GRANTED. **No later than**
19 **August 17, 2018**, defendant may depose Dr. Solomon about the content of his second
20 expert report. Defendant may serve plaintiff with an expert report that rebuts
21 Dr. Solomon's second expert report **no later than September 17, 2018**.

22 5. Defendant's alternative request to exclude or "strike" Dr. Solomon's second
23 expert report under Rule 37(c)(1) is DENIED as moot.

24 5. Defendant's request to designate a new expert, Dr. Itamar Simonson, to
25 prepare an expert report to "counter" (*i.e.*, rebut) Dr. Solomon's second expert report is

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1 GRANTED. No later than October 17, 2018, plaintiff may also depose Dr. Simonson
2 about the content of his rebuttal report.

3 IT IS SO ORDERED.

4 Dated: July 18, 2018



Hon. Karen S. Crawford
United States Magistrate Judge

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