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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

OBESITY RESEARCH  
INSTITUTE, LLC,  
  
Plaintiff,  
  
v.  
  
FIBER RESEARCH  
INTERNATIONAL, LLC,  
  
Defendant.

Case No.: 15-cv-0595-BAS-MDD

**ORDER ON JOINT MOTION TO  
DETERMINE DISCOVERY  
DISPUTE RE: WHETHER  
PORTIONS OF THE BEATON  
SUPPLEMENTAL REPORT  
SHOULD BE STRICKEN**

**[ECF NO. 177]**

BACKGROUND

Before the Court is the Joint Motion to Determine a Discovery Dispute, filed on March 25, 2016, regarding whether portions of the supplemental expert report of Neil J. Beaton, served by Obesity Research Institute, LLC (ORI), should be stricken as improper. (ECF No. 177). Like a gift that keeps on giving, actually, more like a stain that defies removal, this dispute stems from an earlier dispute regarding expert reports, and relates to a pending dispute regarding information produced by ORI regarding costs of goods sold.

1 (See ECF Nos. 80-81 and 174). In the earlier dispute regarding expert  
2 reports, ORI challenged the rebuttal report of Fiber Research International,  
3 LLC's (FRI) expert Rick Hoffman served in response to Mr. Beaton's initial  
4 report. (ECF No. 80). That dispute was characterized by this Court as "much  
5 ado about nothing." (ECF No. 81 \*1). The initial Beaton report expressed no  
6 opinion about anything. (*Id.*). In rebuttal, the Hoffman report, of necessity,  
7 also expressed no opinion. (*Id.*). In the end, among other things, the Court  
8 recognized the parties' right to supplement their expert reports as provided  
9 at Fed. R. Civ. P. 26(a)(2)(E) and 26(e)(2) and provided a hard deadline to do  
10 so. (*Id.* \*4-5). In the pending dispute regarding information produced by ORI  
11 regarding costs of goods sold, FRI is seeking to exclude that evidence based  
12 upon untimely production. (ECF No. 174).

13 ORI timely served the supplemental Beaton report and FRI timely  
14 served the supplemental Hoffman rebuttal report. Not surprisingly,  
15 considering that these parties have made a mockery of Fed. R. Civ. P. 1, these  
16 reports resulted in yet another discovery dispute between the parties. FRI  
17 objects to certain opinions expressed by Mr. Beaton in his supplemental  
18 report on the grounds that these opinions were not disclosed in the initial  
19 expert report and, consequently, are not subject to supplementation.

#### 20 LEGAL STANDARD

21 Fed. R. Civ. P. 26(a)(2) governs the disclosure requirements regarding  
22 experts a party may use at trial to present evidence under Federal Rule of  
23 Evidence 702, 703, or 705. Retained experts must provide a written report  
24 which "must contain . . . a complete statement of all opinions the witness will  
25 express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i).

26 A disclosure under this subsection must be supplemented "if the party

1 learns that in some material respect the disclosure . . . is incomplete or  
2 incorrect, and if the additional or corrective information has not otherwise  
3 been made known to the other parties during the discovery process or in  
4 writing.” Fed. R. Civ. P. 26(a)(2)(E) and 26(e)(1)(A). For retained experts,  
5 absent a contrary court order, this supplementation must occur prior to the  
6 time the party’s pretrial disclosures are due. Fed. R. Civ. P. 26(e)(2).

7 “The supplementation requirement of Rule 26(e)(1) is not intended,  
8 however, to permit parties to add new opinions to an expert report based on  
9 evidence that was available to them at the time the initial expert report was  
10 due.” *Toomey v. Nextel Communications, Inc.*, 2004 WL 5515967 \*4, No. C-  
11 03-2887 (N.D. Cal. Sept. 23, 2004). “Rather, [s]upplementation under the  
12 Rules means correcting inaccuracies, or filling the interstices of an  
13 incomplete report based on information that was not available at the time of  
14 the initial disclosure.” *Luke v. Family Care & Urgent Med. Clinics*, 323 F.  
15 Appx. 496, 500 (9th Cir. 2009) (citing *Keener v. United States*, 181 F.R.D. 639,  
16 640 (D. Mont. 1998)).

17 “[S]upplemental disclosures do not permit a party to introduce new  
18 opinions after the discovery deadline under the guise of a ‘supplement.’  
19 Although Rule 26(e) obliges a party to ‘supplement or correct’ its disclosures  
20 upon information later acquired, this ‘does not give license to sandbag one’s  
21 opponent with claims and issues which should have been included in the  
22 expert witness’ report. . . .” *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062  
23 (C.D. Cal. 2010)(citing *Beller v. United States*, 221 F.R.D. 696, 701 (D. N.M.  
24 2003)). “[A] supplemental expert report that states additional opinions . . . is  
25 beyond the scope of proper supplementation and subject to exclusion under  
26 Rule 37(c). *Id.*

1 A party who fails to provide information as required by Rule 26(a) or (e)  
2 “is not allowed to use that information . . . to supply evidence on a motion, at  
3 a hearing, or at a trial, unless the failure was substantially justified or  
4 harmless.” Fed. R. Civ. P. 37(c)(1). “The party who fails to make the  
5 requisite disclosures bears the burden of showing substantial justification for  
6 such failure or that its failure to disclose was harmless.” *Toomey*, 2004 WL  
7 5515967 \*4.

### 8 ANALYSIS

9 This Court will not be expressing a point of view regarding the  
10 relevance or admissibility of any proffered expert testimony nor the  
11 qualifications of the proffered expert. That is a matter for the district court  
12 upon proper motion. Here, the only question is whether the opinions  
13 expressed by Mr. Beaton and identified at paragraph 6, subparagraphs (a),  
14 and (d) through (f), should be stricken as improper supplementation.

15 FRI’s initial argument is that because Mr. Beaton did not express any  
16 opinion in his initial report, there is nothing to supplement. A non-opinion,  
17 in their view, is not an incomplete or incorrect opinion requiring  
18 supplementation. FRI further and more persuasively asserts that to the  
19 extent Mr. Beaton now provides an opinion regarding FRI’s damages based  
20 upon ORI’s profits, based upon ORI’s financial data, there is no reason that  
21 data could not and should not have been provided to Mr. Beaton earlier so  
22 that he could present his opinion in his initial report. (ECF No. 177 \*2-4 (the  
23 Court will refer to ECF pagination throughout)). On the other hand, ORI  
24 argues that there was a good faith dispute regarding the discovery of ORI’s  
25 financials which was not resolved by the Court until November 4, 2016, after  
26 the initial Beaton report was required to be served. (*Id.* \*7-8). In that

1 regard, FRI argues that ORI has been on notice at least since the filing of its  
2 First Amended Counterclaims, that FRI was seeking ORI's profits, among  
3 other things, as a remedy for the alleged causes of action. ORI responds that  
4 FRI, at least at the time, was also seeking other remedies.

5 In their expert witness disclosures, dated October 16, 2015, ORI  
6 disclosed that Mr. Beaton "is expected to testify regarding monetary damages  
7 and non-monetary damages, including but not limited to lost profits and  
8 actual damages." (ECF No. 75-2 ¶1). In his initial report, Mr. Beaton stated  
9 that his assignment was to "independently assess the economic damages, if  
10 any, that may have been incurred by [FRI] as a result of FRI's claims that  
11 ORI violated the Lanham Act . . . and California unfair competition and false  
12 advertising laws." (ECF No. 177-3 ¶3). The initial report was dated October  
13 15, 2015. Some 4.5 months earlier, on May 28, 2015, FRI filed its Answer  
14 and First Amended Counterclaims. (ECF No. 41). Paragraph 106 provides  
15 the prayer for relief. In subparagraph B, FRI seeks relief for false  
16 advertising, unfair competition and deceptive acts and practices "as  
17 measured by Shimizu's lost sales to [ORI] and by [ORI's] Lipozene profits."  
18 In subparagraph C, FRI specifically seeks "[j]udgment for an award of [ORI's]  
19 Lipozene profits attributable to its willful false advertising, unfair  
20 competition and deceptive acts or practices." Accordingly, ORI was on notice  
21 as of May 28, 2015, of FRI's intent to seek ORI's profits as a measure of  
22 damages.

23 The only opinion provided by Mr. Beaton in his initial report was that  
24 he was unable to opine regarding **FRI's** lost profits because **FRI** had not  
25 produced any documents that would allow for any analysis. (ECF No. 177-3  
26 ¶5(a)). Mr. Beaton did not mention ORI's Lipozene profits.

1 In the supplemental report here at issue, Mr. Beaton now expresses six  
2 opinions, located at paragraph 6(a-f). (ECF No. 177-2 ¶6). FRI challenges  
3 paragraphs 6(a) and (d-f). Paragraph 6(a) refers to the lack of information  
4 provided by FRI but the opinion has nothing to do with determining  
5 damages. Instead, it is an opinion regarding materiality of allegedly false  
6 statements. Paragraph 6(d) provides an opinion regarding the amount ORI  
7 may have been unjustly enriched, if liable, considering that its cost of goods  
8 would have been higher if the raw materials had been purchased from  
9 Shimizu/FRI. This section appears to be based upon information provided  
10 primarily, if not exclusively, by ORI. (*See id.* ¶14-29). Paragraphs 6(e) and  
11 (f) provide alternate calculations of damages based upon varying damages  
12 periods and are based on the same data.

### 13 Propriety of Supplementation

14 Paragraphs 6(a) and (d-f) of the Beaton supplemental expert report are  
15 not proper. Paragraph 6(a) has nothing to do with damages, instead opining  
16 regarding materiality. Neither in ORI's initial disclosures nor in Mr.  
17 Beaton's initial report was there any indication that Mr. Beaton was expected  
18 to testify regarding materiality.

19 Paragraphs 6(d-f) relate to a determination of ORI's profits potentially  
20 subject to recovery by FRI. The information used to determine ORI's profits  
21 is financial information provided by ORI. This information certainly was  
22 available to ORI prior to Mr. Beaton's initial report. ORI's argument that  
23 there was a good faith discovery dispute regarding the discoverability of its  
24 finances is unavailing. While there was a dispute regarding the scope of that  
25 discovery, FRI has been claiming ORI's profits as a measure of damages since  
26 March 2015. There is no question that ORI's profits are on the table,

1 assuming liability is established. Regardless of the discovery dispute, ORI  
2 had to know that if it wanted its damages expert, Mr. Beaton, to opine  
3 regarding potential damages recoverable to FRI, it would have to provide  
4 information to Mr. Beaton. ORI, however, decided not to have Mr. Beaton  
5 opine regarding the extent to which ORI's profits may be recoverable by FRI  
6 in his initial report. That decision, tactical at best, malevolent at worst in  
7 attempting to later sandbag FRI, is at the heart of this dispute.

8 If Mr. Beaton believed he ultimately was to provide an opinion  
9 regarding ORI's profits he could have said, as he did regarding FRI, that he  
10 lacked the necessary information to provide an opinion. As that information  
11 was available to ORI and could have been provided to Mr. Beaton, the Court  
12 must conclude that ORI either had no intention of having Mr. Beaton opine  
13 regarding its profits or intended to have him do so beyond the discovery  
14 deadline in this case.

15 Accordingly, having found the challenged supplementation improper,  
16 the analysis moves to Rule 37 for a consideration of substantial justification  
17 or harmlessness.

### 18 Substantial Justification

19 As provided above, the Court finds that there was no substantial  
20 justification for ORI withholding information from its own damages expert to  
21 opine regarding a measure of damages, ORI's profits, clearly sought by FRI.  
22 There was a discovery dispute regarding the scope of discovery regarding  
23 ORI's finances but the dispute did not concern cost of goods. (ECF No. 60).  
24 In its Request for Production No. 11, served in June 2015, FRI called for the  
25 production of any documents "that support any claim you may have to reduce  
26 or minimize the damages claimed by [FRI]". (See ECF No. 177 \*2). ORI's

1 assertion that this RFP is vague is unavailing. There was a discovery dispute  
2 regarding certain interrogatories and requests for production from that  
3 period but FRI did not move to compel regarding RFP #11 when it moved to  
4 enforce a number of RFP's from the same era. (See ECF No. 60). The learned  
5 counsel of ORI had to know that FRI was entitled to certain financial  
6 discovery, including cost of goods, from ORI and could have avoided this  
7 entire controversy, and others, by providing the information that it knew was  
8 subject to disclosure.

9 Harmlessness

10 ORI has the burden of establishing harmlessness. ORI claims that FRI  
11 had ample time to prepare its rebuttal report, pursuant to the Court's earlier  
12 Order, and ORI has offered Mr. Beaton for further deposition. In the earlier  
13 discovery dispute regarding expert reports, the Court provided a schedule for  
14 proper supplementation requiring a two-week lag between disclosure of a  
15 supplemental Beaton report and a supplemental rebuttal report from Mr.  
16 Hoffman. Although ORI is correct that the schedule was met, the schedule  
17 was predicated upon the service of a supplemental report complying with  
18 Rule 26(e). The only proper supplementation would have been an opinion  
19 regarding FRI's profits based upon information provided by FRI after the  
20 initial report was served. Instead, as discussed above, the Beaton  
21 supplemental report went well beyond those parameters.

22 The analysis of harm in this case is complicated by the history of  
23 discovery shenanigans and disputes by the parties in this case. This is not a  
24 clean slate. Not including motion practice before the district judge, there  
25 have been 14 discovery motions presented to this Court. (ECF Nos. 60, 61,  
26 62, 75, 80, 106, 113, 119, 123, 134, 147, 171, 174 and 177). Of those, five



1 relate to expert discovery. (ECF Nos. 75, 80, 106, 119 and 177).

2 The Court granted FRI's motion to strike ORI's non-retained witness  
3 disclosures and, finding ORI's position frivolous, invited FRI to seek recovery  
4 of its fees and costs. (ECF Nos. 75, 76). The Court ultimately sanctioned ORI  
5 in connection with this motion. (ECF No. 219). ORI challenged the rebuttal  
6 expert report of Mr. Hoffman in the precursor dispute to the instant dispute.  
7 (ECF No. 80). The Court did strike the portion of Mr. Hoffman's rebuttal  
8 expert report providing a methodology he would use to analyze financial  
9 information because the initial report of Mr. Beaton provided no opinion and  
10 no methodology. (ECF No. 81). As provided herein, however, ORI was in the  
11 wrong in not providing to Mr. Beaton information he could use to opine  
12 regarding ORI's profits. FRI later challenged the revised non-retained expert  
13 designations by ORI. (ECF No. 106). The Court found those disclosures  
14 legally adequate leaving to the district judge any issues to be raised  
15 regarding relevance, qualifications and admissibility. (ECF No. 107). In a  
16 related motion, the Court denied ORI's motion to strike the rebuttal expert  
17 report of Dr. Fahey to the non-retained expert disclosures. (ECF No. 119).  
18 The Court noted that the disclosures for the three non-retained experts  
19 provided 10 identical summaries of facts and opinions for all three, plus 4  
20 additional identical summary facts and opinions for two of the three. (ECF  
21 No. 133).

22 FRI chose not to compel information responsive to its RFP #11 as  
23 discussed above. It appears that responsive information was not provided by  
24 ORI until February 24, 2016, consisting of information relied upon by Mr.  
25 Beaton in forming his new opinions. (ECF No. 174 \*6, 177 \*2 n.3, \*9). So, we  
26 have ORI choosing not to respond in a timely fashion to an RFP calling for

1 the production of clearly relevant information regarding costs; FRI choosing  
2 not to seek to enforce compliance; ORI failing to provide its own damages  
3 expert with information to provide an opinion regarding FRI's damage  
4 theory; ORI disclosing information regarding costs just five days prior to the  
5 close of discovery; and ORI having its expert improperly supplement his  
6 initial report with new opinions regarding costs based upon the information  
7 disclosed very late in the game.

8 This is not a "no harm, no foul" scenario. There has been harm. FRI  
9 has been prejudiced by disclosure, just five days prior to the close of  
10 discovery, of information exclusively in the possession of ORI. FRI has been  
11 prejudiced by the decision of ORI not to have its damages expert timely  
12 provide an opinion on FRI's damage theory – recovery of ORI's profits. FRI  
13 has been prejudiced by having to have its damages expert provide a rebuttal  
14 opinion to new opinions, not previously disclosed, in the short time period  
15 ordered by the Court necessitated by ORI's decision to withhold information  
16 from its expert.

17 This Order does not prohibit ORI from presenting evidence in  
18 mitigation on the damage theory presented by FRI. The opinions of Mr.  
19 Beaton, presented for the first time in his supplemental report at ¶6(a)(d-f),  
20 however, are stricken.


### 21 CONCLUSION

22 The opinions proffered by Neil Beaton, in his supplemental expert  
23 report, identified in his summary of opinions in ¶6(a) and (d-f) are improper  
24 supplements under Rule 26(e). ORI has failed to sustain its burden that the  
25 improper supplements are substantially justified or harmless under Rule  
26 37(c)(1). Accordingly, ORI is precluded from having Mr. Beaton supply

1 evidence regarding those opinions on a motion, at a hearing, or at a trial as  
2 provided under Rule 37(c)(1).

3 **IT IS SO ORDERED:**

4  
5 Dated: June 7, 2016

6   
7 Hon. Mitchell D. Dembin  
8 United States Magistrate Judge  
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