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

OBESITY RESEARCH INSTITUTE,
LLC,

Plaintiff,

v.

FIBER RESEARCH
INTERNATIONAL, LLC, *et al.*,

Defendants.

Case No. 15-cv-595-BAS(MDD)

**ORDER OVERRULING ORI'S
OBJECTION TO MAGISTRATE
JUDGE'S JUNE 7, 2016 ORDER**

[ECF No. 282]

AND RELATED COUNTERCLAIM.

Presently before the Court is Plaintiff Obesity Research Institute, LLC's ("ORI") meritless objection to the magistrate judge's June 7, 2016 Order. (ECF No. 271.) In that order, the magistrate judge considered Defendant Fiber Research International, LLC's ("FRI") request to strike portions of the supplemental expert report of Neil J. Beaton, who is an expert witness ORI called to testify about damages. Paragraph 5(a) of Mr. Beaton's initial expert report, dated October 15, 2015, presented the following opinion: "FRI has produced no documents at this time that

1 would allow an analysis or calculation of any lost profits.” (Beaton Expert Report ¶
2 5(a), ECF No. 177-3.) In the following paragraph, Mr. Beaton added that he
3 “anticipates responding to any expert opinions on damages, should any be
4 submitted.” (*Id.* ¶ 6.)

5 ORI then sought to supplement the initial expert report with Mr. Beaton’s
6 supplemental expert report, dated March 7, 2016, where, in Paragraph 6(a), he
7 opined:

8 FRI has produced no evidence establishing a material,
9 causal nexus between the alleged false claims made by
10 ORI and any customer sales, *i.e.*, FRI has not shown that
11 the alleged false claims were material to any single
customer who purchased Lipozene. Therefore, FRI has not
established a basis for any economic damages.

12 (Beaton Suppl. Expert Report ¶ 6(a), ECF No. 177-2.) The magistrate judge
13 concluded that Paragraph 6(a) of the supplemental expert report “has nothing to do
14 with damages, instead opining regarding materiality.” (June 7, 2016 Order 6:14-18.)

15 With respect to Paragraphs 6(d)-(f), ORI does not dispute the magistrate
16 judge’s characterization of the paragraphs as “relat[ing] to a determination of ORI’s
17 profits potentially subject to recovery by FRI,” or using “financial information
18 provided by ORI” to determine ORI’s profits. (June 7, 2016 Order 6:19-7:7.) The
19 magistrate judge explained:

20 Regardless of the discovery dispute, ORI had to know that
21 if it wanted its damages expert, Mr. Beaton, to opine
22 regarding potential damages recoverable to FRI, it would
23 have to provide information to Mr. Beaton. ORI, however,
24 decided not to have Mr. Beaton opine regarding the extent
25 to which ORI’s profits may be recoverable by FRI in his
initial report. That decision, tactical at best, malevolent at
worst in attempting to later sandbag FRI, is at the heart of
this dispute.

26 If Mr. Beaton believed he ultimately was to provide an
27 opinion regarding ORI’s profits he could have said, as he
28 did regarding FRI, that he lacked the necessary
information to provide an opinion. As that information

1 was available to ORI and could have been provided to Mr.
2 Beaton, the Court must conclude that ORI either had no
3 intention of having Mr. Beaton opine regarding its profits
4 or intended to have him do so beyond the discovery
5 deadline in this case.

6 (*Id.* at 7:1-7.) Based on these observations, the magistrate judge ultimately concluded
7 that ORI’s supplementation was improper under Rule 26(e)(1). (*Id.* at 7:15-17.)

8 Having determined these paragraphs of Mr. Beaton’s supplemental expert
9 report to be improper under Rule 26(e), the magistrate judge proceeded to determine
10 whether the improper supplementation was substantially justified or harmless under
11 Rule 37(c)(1). He concluded they were not. With respect to substantial justification,
12 the magistrate judge explained that “ORI had to know that FRI was entitled to certain
13 financial discovery, including cost of goods, from ORI and could have avoided this
14 entire controversy, and others, by providing the information that it knew was subject
15 to disclosure.” (June 7, 2016 Order 9:4-8.) And with respect to harmlessness, the
16 magistrate judge explained:

17 This is not a “no harm, no foul” scenario. There has been
18 harm. FRI has been prejudiced by disclosure, just five days
19 prior to the close of discovery, of information exclusively
20 in the possession of ORI. FRI has been prejudiced by the
21 decision of ORI not to have its damages expert timely
22 provide an opinion on FRI’s damage theory—recovery of
23 ORI’s profits. FRI has been prejudiced by having to have
24 its damages expert provide a rebuttal opinion to new
25 opinions, not previously disclosed, in the short time period
26 ordered by the Court necessitated by ORI’s decision to
27 withhold information from its expert.

28 (*Id.* at 10:8-16.)

The magistrate judge ultimately concluded that the opinions proffered by Mr.
Beaton in his supplemental expert report in Paragraphs 6(a) and (d)-(f) were improper
supplements under Rule 26(e), and that ORI had failed to carry its burden that the
improper supplements were substantially justified or harmless under Rule 37(c)(a).

1 (June 7, 2016 Order 10:22-11:2.) He, accordingly, precluded the opinions presented
2 in the aforementioned paragraphs from use as evidence in motions, hearings, or at
3 trial. (*Id.*)

4 For the following reasons, the Court **OVERRULES** ORI's objection.

5
6 **I. LEGAL STANDARD**

7 A party may object to a non-dispositive pretrial order of a magistrate judge
8 within fourteen days after service of the order. *See* Fed. R. Civ. P. 72(a). The
9 magistrate judge's order will be upheld unless it is "clearly erroneous or contrary to
10 law." *Id.*; 28 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to
11 factual findings and discretionary decisions made in connection with non-dispositive
12 pretrial discovery matters. *F.D.I.C. v. Fid. & Deposit Co. of Md.*, 196 F.R.D. 375,
13 378 (S.D. Cal. 2000); *Joiner v. Hercules, Inc.*, 169 F.R.D. 695, 697 (S.D. Ga. 1996)
14 (reviewing magistrate judge's order addressing attorney-client issues in discovery for
15 clear error). Review under this standard is "significantly deferential, requiring a
16 definite and firm conviction that a mistake has been committed." *Concrete Pipe &*
17 *Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. of S. Cal.*, 508 U.S. 602, 623
18 (1993) (internal quotation marks omitted).

19 On the other hand, the "contrary to law" standard permits independent review
20 of purely legal determinations by a magistrate judge. *See, e.g., Haines v. Liggett Grp.,*
21 *Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) ("[T]he phrase 'contrary to law' indicates plenary
22 review as to matters of law."); *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio
23 1992), *aff'd*, 19 F.3d 1432 (6th Cir. 1994); 12 Charles A. Wright, et al., *Federal*
24 *Practice and Procedure* § 3069 (2d ed., 2010 update). "Thus, [the district court] must
25 exercise its independent judgment with respect to a magistrate judge's legal
26 conclusions." *Gandee*, 785 F. Supp. at 686. "A decision is contrary to law if it fails
27 to apply or misapplies relevant statutes, case law, or rules of procedure." *United*
28 *States v. Cathcart*, No. C 07-4762 PJH, 2009 WL 1764642, at *2 (N.D. Cal. June 18,

1 2009).

2 3 **II. ANALYSIS¹**

4 A party who has made a disclosure under Rule 26(a) “must supplement or
5 correct its disclosure or response . . . in a timely manner if the party learns that in
6 some material respect the disclosure or response is incomplete or incorrect, and if the
7 additional or corrective information has not otherwise been made known to the other
8 parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A). “The
9 supplementation requirement of Rule 26(e)(1) is not intended . . . to permit parties to
10 add new opinions to an expert report based on evidence that was available to them at
11 the time the initial expert report was due.” *Toomey v. Nextel Commc’ns, Inc.*, No. C-
12 03-2887 MMC, 2004 WL 5512967, at *4 (N.D. Cal. Sept. 23, 2004). “Rather,
13 ‘[s]upplmentation under the Rules means correcting inaccuracies, or filling the
14 interstices of an incomplete reported based on information that was not available at
15 the time of the initial disclosure.’” *Luke v. Family Care & Urgent Med. Clinics*, 323
16 F. App’x 496, 500 (9th Cir. 2009) (quoting *Keener v. United States*, 181 F.R.D. 639,
17 640 (D. Mont. 1998)).

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19
20 ¹ “Non-dispositive matters include ‘evidentiary rulings, pretrial discovery matters, and the
21 imposition of sanctions for discovery abuses.’” *Estakhrian v. Obenstine*, No. CV 11-03480
22 GAC(CWx), 2012 WL 12884889, at *3 (C.D. Cal. Nov. 9, 2012) (quoting *Kounelis v. Sherrer*, 529
23 F. Supp. 2d 503, 518 (D.N.J. 2008)); *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414 (9th
24 Cir. 1991) (“Nondispositive issues include discovery sanctions”); *Grimes v. City & Cnty. of San*
25 *Francisco*, 951 F.2d 236, 240 (9th Cir. 1991) (discovery sanctions are non-dispositive pretrial
26 matters that are reviewed for clear error under Rule 72(a)); *Hoar v. Sara Lee Corp.*, 900 F.2d 522,
27 525 (2d Cir. 1990) (“Matters concerning discovery generally are considered ‘nondispositive’ of the
28 litigation”); *F.D.I.C. v. Fid. & Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D. Cal. 2000) (Whelan,
J.) (“The ‘clearly erroneous’ standard applies to factual findings and discretionary decisions made
in connection with non-dispositive pretrial discovery matters[.]”). There is no doubt that the dispute
currently before the Court involves a pretrial-discovery matter because it is based on ORI’s
noncompliance with pretrial-disclosure and supplementation requirements governed by Rules 26
and 37. *See* Fed. R. Civ. P. 72(a). Thus, the Court rejects ORI’s contention that the magistrate
judge’s June 7, 2016 Order should be reviewed *de novo*.

1 Rule 26(e)(2) extends the duty to supplement to expert reports and expert
2 deposition testimony. “[A] supplemental expert report that states additional opinions
3 or seeks to ‘strengthen’ or ‘deepen’ opinions expressed in the original expert report
4 is beyond the scope of proper supplementation and subject to exclusion under Rule
5 37(c).” *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (citing
6 *Cohlma v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 433 (N.D. Okla. 2008)).

7 Rule 37(c)(1) “gives teeth” to Rule 26(a) and (e)’s requirements “by forbidding
8 the use at trial of any information required to be disclosed by Rule 26(a) that is not
9 properly disclosed.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,
10 1106 (9th Cir. 2001). To avoid sanction, a party must show the failure to disclose
11 information was either “substantially justified” or “harmless.” *Id.* A district court has
12 “particularly wide latitude” to determine whether a failure to disclose is
13 “substantially justified” or “harmless.” *Hoffman v. Constr. Protective Servs., Inc.*,
14 541 F.3d 1175, 1180 (9th Cir. 2008).

15 In reviewing the magistrate judge’s June 7, 2016 Order, the Court addresses
16 whether the following conclusions were either contrary to law or clearly erroneous:
17 (1) Paragraphs 6(a) and (d)-(f) of Mr. Beaton’s supplemental expert report were
18 improper supplementations under Rule 26(e); and (2) the supplementations sought
19 were neither substantially justified nor harmless under Rule 37. *See* Fed. R. Civ. P.
20 72(a).

21
22 **A. Supplementation Under Rules 26(e)**

23 **1. Paragraph 6(a)**

24 “In general, an expert may only testify as to ‘scientific, technical, or other
25 specialized knowledge [that] will assist the trier of fact to understand the evidence or
26 determine a fact in issue[.]’” *United States v. Tamman*, 782 F.3d 543, 553-54 (9th
27 Cir. 2015) (citing Fed. R. Evid. 702(a); *Aguilar v. Int’l Longshoremen’s Union Local*
28 *No. 10*, 966 F.2d 443, 447 (9th Cir. 1992)). “An opinion is not objectionable just

1 because it embraces an ultimate issue.” Fed. R. Evid. 704(a). “That said, an expert
2 witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an
3 ultimate issue of law.” *Nationwide Transpo. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d
4 1051, 1058 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*,
5 373 F.3d 998, 1016 (9th Cir. 2004)); *see also Solid 21, Inc. v. Hublot of Am.*, — F.
6 App’x —, 2017 WL 1101102, at *1 (9th Cir. 2017) (applying *Nationwide’s*
7 proposition regarding expert witnesses and legal conclusions following the 2011
8 Amendment to Federal Rule of Evidence 704); *Tamman*, 782 F.3d at 553-54 (“[A]n
9 expert cannot testify to a matter of law amounting to a legal conclusion.”).

10 Here, Mr. Beaton’s initial opinion went from “FRI has produced no documents
11 at this time that would allow an analysis or calculation of any lost profits” and “I
12 anticipate responding to any expert opinions on damages, should any be submitted”
13 (Beaton Expert Report ¶¶ 5-6) to the following opinion:

14 FRI has produced no evidence establishing a material,
15 causal nexus between the alleged false claims made by
16 ORI and any customer sales, *i.e.*, FRI has not shown that
17 the alleged false claims were material to any single
customer who purchased Lipozene. Therefore, FRI has not
established a basis for any economic damages.

18 (Beaton Suppl. Expert Report ¶ 6(a)). There is no doubt that the crux of the opinion
19 in Paragraph 6(a) of Mr. Beaton’s supplemental expert report is about materiality,
20 which, by ORI’s own recognition, is an element of the substantive Section 43(a)
21 claim for false advertising. *See Skydrive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105,
22 1110 (9th Cir. 2012) (One of the elements of a Section 43(a) claim for false
23 advertising is that “the deception is material, in that it is likely to influence the
24 purchasing decision.”). And though the opinion does mention damages in the
25 concluding sentence, that conclusion derives solely from his *legal* opinion about
26 materiality.

27 As the magistrate judge concluded, Mr. Beaton’s opinion in Paragraph 6(a)
28 “has nothing to do with damages, instead opining regarding materiality.” (June 7

1 2016 Order 6:14-18.) Furthermore, just as the magistrate judge reasoned, any opinion
2 about materiality is outside the scope of Mr. Beaton’s expert testimony because there
3 was no indication in the initial report that he would testify about materiality. As an
4 added layer impropriety, Mr. Beaton’s opinion regarding materiality, at least insofar
5 as the way it is presented, is an opinion regarding a legal conclusion that is wholly
6 inappropriate, especially for an expert witness called to testify about damages.² See
7 *Nationwide Transpo. Fin.*, 523 F.3d at 1058.

8 Needless to say, the Court agrees with the magistrate judge’s conclusion that
9 Paragraph 6(a) of Mr. Beaton’s supplemental expert report is improper under Rule
10 26. Mr. Beaton’s opinion is not only outside the scope of the initial expert report, but
11 is also an improper legal conclusion provided by an expert witness called to calculate
12 damages.

13 14 **2. Paragraphs 6(d)-(f)**

15 As the Court previously emphasized, ORI does not dispute the magistrate
16 judge’s characterization of Paragraphs 6(d)-(f) of Mr. Beaton’s supplemental expert
17 report that these paragraphs “relate to a determination of ORI’s profits potentially
18 subject to recovery by FRI.” (June 7, 2016 Order 6:19-22.) ORI also does not dispute
19 that the information used to determine ORI’s profits is financial information provided
20 by ORI and that this information was available to ORI prior to the completion of Mr.
21 Beaton’s initial expert report. (*Id.*)

22 ORI reargues the point that “the parties were still engaged in a discovery
23 dispute as to whether such [financial] information was discoverable[,]” and that
24 “[t]here is nothing improper about refusing to surrender sensitive, private financial
25 information until . . . the Court had trimmed the breadth of Fiber’s overbroad
26

27 ² Had the Court reviewed the propriety of Mr. Beaton’s supplemental expert report *de novo*,
28 as ORI requested, it may have been inclined to strike all statements or opinions regarding
materiality from the report. Because review here is not *de novo*, the Court limits its review to the
contrary-to-law or clearly-erroneous standards under Rule 72(a).

1 demands[.]” (ORI’s Obj. 12:9-23.) The magistrate judge previously rejected ORI’s
2 argument that its discovery obligations were somehow halted by a “good faith
3 discovery dispute regarding the discoverability of its finances.” (June 7, 2016 Order
4 6:19-7:7.) He further explained that despite the ongoing discovery dispute, ORI knew
5 since March 2015 that ORI’s profits would be a measure for damages, and even
6 setting aside the dispute, “ORI had to know that if it wanted its damages expert, Mr.
7 Beaton, to opine regarding potential damages recoverable to FRI, it would have to
8 provide information to Mr. Beaton.” (*Id.*) Ultimately, the magistrate judge concluded
9 that, “[a]s that [financial] information was available to ORI and could have been
10 provided to Mr. Beaton . . . ORI either had no intention of having Mr. Beaton opine
11 regarding its profits or intended to have him do so beyond the discovery deadline in
12 this case.” (*Id.* at 7:8-14.)

13 ORI does not add any new relevant information in attacking the magistrate
14 judge’s determination other than to say in a conclusory manner that it disagrees with
15 his conclusion. From the Court’s review of the docket, there does not appear to have
16 been a stay imposed on the parties’ discovery obligations pending the resolution of
17 the discovery dispute. Nor has ORI identified an order or any applicable rule staying
18 discovery.

19 Furthermore, returning to Mr. Beaton’s initial opinion—“FRI has produced no
20 documents at this time that would allow an analysis or calculation of any lost profits”
21 and “I anticipate responding to any expert opinions on damages, should any be
22 submitted” (Beaton Expert Report ¶¶ 5-6)—it is suggested that Mr. Beaton’s expert
23 opinion is conditioned upon FRI presenting its own damages expert or “lost profit”
24 evidence. ORI fails to provide any information that either of these conditions were
25 satisfied to permit Mr. Beaton to give his opinion. Rather, Mr. Beaton’s
26 “supplemental” expert report effectively is an affirmative opinion rather than a
27 responsive one. In giving an affirmative expert opinion based on information that has
28 been in ORI’s possession from the onset of this litigation, it is disingenuous to later

1 contend that any delay on ORI's part was the result of a discovery dispute. If ORI
2 planned to put forth affirmative expert testimony all while possessing the information
3 to do so, it should have timely done produced its expert report instead of attempting
4 to surreptitiously present the new opinions as a supplement.

5 With respect to Paragraphs 6(d)-(f), the Court agrees with the magistrate
6 judge's conclusion that the supplementation is improper.

7
8 **B. Substantial Justification and Harmlessness under Rule 37**

9 Even though the magistrate judge concluded that ORI's supplementation is not
10 substantially justified, and ORI attempts to now argue to the contrary, it is clear that
11 ORI failed to meet its burden to demonstrate substantial justification. This is evident
12 from the fact that ORI did not argue in the underlying briefing that it was substantially
13 justified in supplementing Mr. Beaton's initial expert report. (*See* March 25, 2016
14 Joint Brief 6:1-11:1, ECF No. 177.) Unsurprisingly, this Court finds no defect in the
15 magistrate judge's conclusion that ORI failed to carry its burden to demonstrate that
16 the inclusion of paragraphs at issues in Mr. Beaton's supplemental expert report was
17 substantially justified.

18 Relying exclusively on *Cedar Petrochemicals, Inc. v. Dongbu Hannong*
19 *Chemical Co., Ltd.*, 769 F. Supp. 2d 269 (S.D.N.Y. 2011), which is non-binding
20 persuasive legal authority, ORI argues that its supplementation was harmless
21 because: (1) "Mr. Beaton's reports have been exchanged in a timely manner on the
22 ordered deadlines"; (2) "Mr. Beaton's opinion analyzing ORI's profits is extremely
23 important"; (3) "neither prejudice nor harm to Fiber exists in refusing to strike Mr.
24 Beaton's opinions regarding ORI's profits"; and (4) "there is no need for a
25 continuance[.]" (ORI's Obj. 13:9-15:2.) None of these arguments presented by ORI
26 directly address the magistrate judge's reasoning in reaching his conclusion that the
27 supplementation was not harmless. Moreover, even if the Court considered *Cedar*
28 *Petrochemicals* to determine whether the sanction imposed unwarranted, the case is

1 distinguishable because *Cedar Petrochemicals* addressed whether precluding an
2 *entire* expert report was warranted. *See Cedar Petrochemicals*, 769 F. Supp. 2d at
3 277-79. This case involves striking only four paragraphs from a supplemental expert
4 report. (*See* June 17, 2016 10:17-20 (“The opinions of Mr. Beaton, presented for the
5 first time in his supplemental report at ¶ 6(a)(d-f), however are stricken.”)).

6 In sum, ORI fails to persuade this Court that there was any error in the
7 magistrate judge’s conclusion that the inclusion of Paragraphs 6(a) and (d)-(f) in Mr.
8 Beaton’s supplemental expert report was neither substantially justified nor harmless.

9
10 **III. CONCLUSION & ORDER**

11 ORI presents numerous arguments attempting to justify the propriety of Mr.
12 Beaton’s supplemental expert report. Clearly, ORI has chosen quantity over quality.
13 Many of these remaining arguments blatantly lack merit, and as such, the Court need
14 not discuss them any further. On a final note, and in response to ORI’s hyperbolic
15 representations about the severe impact of striking the four paragraphs from the
16 supplemental expert report, the Court reminds ORI that it is not prohibited from
17 presenting evidence in mitigation on any damages theory presented by FRI.

18 In light of the foregoing, the Court finds that ORI fails to demonstrate the
19 magistrate judge’s June 7, 2016 Order was either contrary to law or clearly erroneous.
20 *See* Fed. R. Civ. P. 72(a). Accordingly, the Court **OVERRULES** ORI’s objection to
21 the magistrate judge’s June 7, 2016 Order in its entirety. (ECF No. 282.)

22 **IT IS SO ORDERED.**

23
24 **DATED: August 4, 2017**

25 
26 **Hon. Cynthia Bashant**
27 **United States District Judge**