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

CHARLES MATTHEW ERHART,

Plaintiff,

v.

BOFI HOLDING, INC.,

Defendant.

Case No. 15-cv-02287-BAS-NLS
consolidated with
15-cv-02353-BAS-NLS

**ORDER GRANTING IN PART
MOTION IN LIMINE NO. 5 TO
EXCLUDE EVIDENCE OF ANY
DAMAGES THAT REQUIRE
COMPUTATION (ECF No. 221)**

And Consolidated Case

Presently before the Court is Bofi Holding, Inc. (“Bofi” or “Bank”)’s Motion in Limine No. 5 to Exclude Evidence of Any Damages that Require Computation. (Mot., ECF No. 221.) Charles Matthew Erhart opposes. (Opp’n, ECF No. 223.) The Court heard argument on the motion. (ECF No. 230; *see also* Hr’g Tr., ECF No. 234.) For the following reasons, the Court **GRANTS IN PART** Bofi’s Motion in Limine No. 5.

I. BACKGROUND

The Court and the parties are familiar with the story behind these consolidated cases. After extensive discovery and motion practice, the cases now await trial. Erhart is a former employee of the Bank who reported believed wrongdoing to the

1 government. He brings claims for, among other things, whistleblower retaliation in
2 violation of the Sarbanes-Oxley Act, whistleblower retaliation in violation of the
3 Dodd-Frank Act, and defamation under California state law. Erhart’s Complaint
4 seeks relief in the form of “compensatory damages, including lost wages, medical
5 benefits and other employment benefits,” “double back pay with interest,” “general,
6 mental and emotional distress damages,” and “punitive damages.” (Second Am.
7 Compl. 38–39, ECF No. 124.)

8 Bofl’s Motion in Limine No. 5 relies on a fact that seems incredulous: Erhart
9 has not once throughout these cases ever provided an estimate of his damages.
10 (Mot. 3:1–15.) The Bank therefore seeks to preclude Erhart from presenting
11 evidence of any damages that require computation at trial. (*Id.* 4:21–5:2.)

12 To support its request, the Bank points to Erhart’s Rule 26 Initial Disclosures.
13 (Initial Disclosures, Katz Decl. ¶ 3, Ex. 1, ECF No. 221-3.) In disclosing the
14 “computation of each category of damages claimed,” *see* Fed. R. Civ. P. 26(a)(1)(iii),
15 Erhart stated:

16 Plaintiff seeks all actual, consequential and incidental financial losses,
17 including lost future wages, lost employment benefits, bonuses, overtime,
18 vacation benefits, medical bills, mental and emotional distress, attorneys’
19 fees and costs, and other special and general damages according to proof.
Discovery is ongoing.

20 (*Id.* 12:21–26.)

21 Bofl later propounded written discovery to Erhart. The Bank’s Interrogatories,
22 Set Two, consisted of four questions regarding damages:

23 INTERROGATORY NO. 14: State the BASIS for any and all
24 compensatory damages YOU seek in YOUR COMPLAINT.

25 INTERROGATORY NO. 15: State the BASIS for any and all general
26 damages YOU seek in YOUR COMPLAINT.

27 INTERROGATORY NO. 16: State the BASIS for any and all emotional
28 distress damages YOU seek in YOUR COMPLAINT.

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INTERROGATORY NO. 17: State the BASIS for any and all punitive damages YOU seek in YOUR COMPLAINT.

(Boff’s Interrogatories, Set Two 2:2–13, Katz. Decl. ¶ 4, Ex. 2, ECF No. 221-4.) “BASIS” meant providing “the alleged connection between Boff’s conduct and YOUR alleged damages, and a calculation of each damage.” (*Id.* 1:24–26.) After raising objections, Erhart responded to the question about compensatory damages with:

Plaintiff seeks all damages allowable by law on his claims, including without limitation past and future lost wages and benefits, penalties, liquidated damages, attorneys fees and costs, and emotional distress damages. All damages were proximately caused by Defendants’ acts as alleged in the First Amended Complaint. Calculations of such damages shall be done in accordance with acceptable practices for determining such damages. *See* Erhart000001-000504.

(Resp. to Interrogatories 7:20–26, Katz. Decl. ¶ 5, Ex. 3, ECF No. 221-5.) He provided a comparable response to the other interrogatories—he stated his damages will be determined “in accordance with acceptable practices” for doing so and provided a blanket citation to “Erhart000001-000504.” (*Id.* 8:16–24; 9:16–24; 11:6–10.)

Further, the Bank met and conferred with Erhart unsuccessfully on the damages issue, including before filing its motion in limine. (Katz Decl. ¶ 7; *see also* Hr’g Tr. 47:6–9 (noting the Bank met and conferred with Erhart “two-plus years ago and several occasions since”).)

Erhart briefly responds to the Bank’s motion. (Opp’n 11:16–12:14.) He does not submit any evidence or discovery materials with his response. Instead, he argues “the jury, not Mr. Erhart, will compute the damages to which he is entitled.” (*Id.* 13:2–3.) Hence, Erhart argues he “was ‘substantially justified’ in not providing any computation” of his damages to the Bank. (*Id.* 13:4–5.)

Given this lackluster response, the Court at oral argument said it was inclined to mostly grant the Bank’s motion and pressed Erhart’s counsel to explain why Erhart

1 never disclosed his damages. (Hr’g Tr. 43:12–50:19.) Counsel first responded, “I
2 guess we are unaccustomed to feeling like we have to put on an expert for simple
3 computation damages.” (*Id.* 43:25–44:26.) Yet, the Court highlighted the issue is
4 not one of needing expert testimony, but rather that Erhart never provided any
5 statement of his claimed damages in discovery. (*Id.* 43:25–44:7.) Erhart’s counsel
6 next responded that Erhart did enough because “[w]e showed them all the records of
7 what his earnings were post-termination.” (*Id.* 44:8–11; *but see* Initial Disclosures
8 12:21–26 (seeking “all actual, consequential and incidental financial losses,
9 including lost future wages, lost employment benefits, bonuses, overtime, vacation
10 benefits, medical bills, mental and emotional distress, attorneys’ fees and costs, and
11 other special and general damages according to proof”).)

12 When pressed further about Erhart’s failure to provide any of his claimed
13 damages in response to the Bank’s written discovery, counsel responded that the
14 Bank “seem[ed] to have no trouble hiring an expert to make those exact computations
15 with the evidence that we turned over to them.” (Hr’g Tr. 44:12–24.) Ultimately,
16 having not received a straightforward response to its questions, the Court inquired
17 about specific categories of damages and again asked why Erhart did not “provide
18 any estimate of his damages whatsoever,” to which counsel responded:

19 I have to say I’m sorry. I am sorry. My associate was there handling this.
20 They – we had income – I thought that all the meet-and-confers we did
21 were so inconclusive, and then they got dropped, and no one picked up
22 on them for these couple years.

23 So my bad if I didn’t sufficiently get involved and see that, oops, we
24 should have done something we didn’t do.

(*Id.* 49:24–50:5.) The Court took the motion under submission.

25 II. ANALYSIS

26 A. Compliance with Rule 26

27 Federal Rule of Civil Procedure 26 requires that a party’s initial disclosures
28 provide a “computation of each category of damages claimed by the disclosing

1 party.” Fed. R. Civ. P. 26(a)(1)(A)(iii). The purpose of Rule 26’s initial disclosures
2 is to enable defendants to understand their potential exposure and make informed
3 decisions as to settlement and discovery. *City & Cty. of San Francisco v. Tutor-*
4 *Saliba Corp.*, 218 F.R.D. 219, 221 (N.D. Cal. 2003); *see also Hewlett Packard Co.*
5 *v. Factory Mut. Ins. Co.*, No. Civ. 04-2791 TPG DF, 2006 WL 1788946, at *14
6 (S.D.N.Y. June 28, 2006) (“[E]arly disclosure of a party’s damages computation
7 provide[s] [the] opposing party with an early understanding of the basis and amount
8 of any damages claim it is facing, so that it may conduct meaningful discovery as to
9 the underpinning of such a claim.”).

10 “A computation of damages may not need to be detailed early in the case
11 before all relevant documents or evidence has been obtained by the plaintiff. As
12 discovery proceeds, however, the plaintiff is required to supplement its initial
13 damages computation to reflect the information obtained through discovery.” *LT*
14 *Game Int’l Ltd. v. Shuffle Master, Inc.*, No. 2:12-cv-01216-GMN, 2013 WL 321659,
15 at *6 (D. Nev. Jan. 28, 2013); *see also* Fed. R. Civ. P. 26(e). Moreover,
16 “[c]omputation of each category of damages,” as used in Rule 26, “contemplates
17 some analysis beyond merely setting forth a lump sum amount for a claimed element
18 of damages.” *Silver State Broad., LLC v. Beasley FM Acquisition*, No. 2:11-CV-
19 01789-APG-CWH, 2016 WL 320110, at *2 (D. Nev. Jan. 25, 2016) (citing *Tutor-*
20 *Saliba Corp.*, 218 F.R.D. at 221), *aff’d*, 705 F. App’x 640 (9th Cir. 2017); *see also*
21 *Grouse River Outfitters, Ltd. v. Oracle Corp.*, 848 F. App’x 238, 244 (9th Cir. 2021)
22 (“Rule 26(a)(1)(A)(iii) contemplates damages computation analysis and
23 explanation.”).

24 Accordingly, a plaintiff “cannot shift to the defendant the burden of attempting
25 to determine the amount of the plaintiff’s alleged damages.” *Jackson v. United*
26 *Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593–94 (D. Nev. 2011). “The
27 Defendants are not required to compute damages, Rule 26 requires plaintiffs to do
28 so.” *Villagomes v. Lab. Corp. of Am.*, 783 F. Supp. 2d 1121, 1129 (D. Nev. 2011).

1 Here, Erhart failed to comply with Rule 26’s disclosure requirement. He did
2 not even provide a lump sum for each category of damages, let alone a computation
3 and analysis. And Erhart’s argument that he provided the relevant documents for
4 Bofl to figure out his damages is not well taken. Rule 26(1)(A)(iii) plainly requires
5 Erhart to provide “a computation of each category of damages” in addition to
6 “mak[ing] available for inspection and copying . . . the documents . . . on which each
7 computation is based.” Fed. R. Civ. P. 26(1)(A)(iii); *see also, e.g., Design Strategy,*
8 *Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (reasoning that Rule 26 “by its very
9 terms” requires more than providing documents without any explanation); *Agence*
10 *France Presse v. Morel*, 293 F.R.D. 682, 685 (S.D. N.Y. 2013) (“Put simply,
11 damages computations and the documents supporting those computations are two
12 different things, and Rule 26 obliges parties to disclose and update the former as well
13 as the latter.”). For example, to assess his claim for future damages and “front pay”
14 (*see Hr’g Tr.* 48:4), Bofl would need to know items like how long Erhart expected to
15 work at Bofl, what his expected salary with a new employer would be, and other
16 matters. *Cf. Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493,
17 511–13 (9th Cir. 2000) (reviewing damages award for front pay in Title VII and
18 Washington anti-discrimination law case that was based on expected retirement age,
19 salary at a different employer, potential promotion path, expected cash and stock
20 bonuses, and a position the plaintiff believed she was qualified to hold). The Bank
21 is likewise entitled to a calculation for Erhart’s claim for medical expenses. Erhart
22 “cannot shift” to Bofl “the burden of attempting to determine the amount of [his]
23 alleged damages.” *See Jackson*, 278 F.R.D. at 593–94.

24 Hence, the Court concludes Erhart violated Rule 26 for any categories of
25 damages that can be computed. From his Initial Disclosures, these categories include
26 lost future earnings and wages, “lost employment benefits, bonuses, overtime,
27 vacation benefits, [and] medical bills.” (Initial Disclosures 12:21–26.) The same is
28 true for any claim for back pay. (Second Am. Compl. 38:15–18.)

1 Whether Erhart violated Rule 26 for his more nebulous categories of damages
2 is a closer call. Erhart is seeking emotional distress damages, punitive damages, and
3 reputational damages. (Initial Disclosures 12:21–26; *see also* Second Am. Compl. ¶
4 149 (alleging defamatory publications injured Erhart’s “personal, business, and
5 professional reputation”).) Some courts have reasoned a computation is not required
6 for these types of damages because they are “difficult to quantify” and are “typically
7 considered a fact issue for the jury.” *See E.E.O.C. v. Wal-Mart Stores, Inc.*, 276
8 F.R.D. 637, 639 (E.D. Wash. 2011) (collecting cases); *see also, e.g., Williams v.*
9 *Trader Publ’g, Co.*, 218 F.3d 481, 486 n.3 (5th Cir. 2000) (“Since compensatory
10 damages for emotional distress are necessarily vague and are generally considered a
11 fact issue for the jury, they may not be amenable to the kind of calculation disclosure
12 contemplated by Rule 26(a)(1)(C).”). Given the facts here, the Court finds those
13 opinions are persuasive. It would be difficult to quantify Erhart’s expected emotional
14 distress, punitive, and reputational damages.

15 Overall, the Court concludes Erhart violated his disclosure obligations for
16 those categories of damages that can be calculated, but did not violate his disclosure
17 obligations for his more nebulous categories of damages.

18 **B. Exclusion under Rule 37**

19 The Court turns to the consequence of Erhart not disclosing any of his damages
20 that can be estimated. Rule 26(e)(1)(A) requires disclosing parties to supplement
21 their prior disclosures “in a timely manner” when the prior response is “incomplete
22 or incorrect.” Fed. R. Civ. P. 26(e)(1)(A). Rule 37(c)(1) provides for exclusion of
23 any evidence or information that a party fails to disclose in a timely manner, unless
24 the violation was harmless or substantially justified. *Id.* 37(c)(1); *see also Hoffman*
25 *v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008); *Yeti by Molly,*
26 *Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

27 Rule 37(c)(1) is an “automatic” sanction that prohibits the use of improperly
28 disclosed evidence. *Yeti*, 259 F.3d at 1106. Litigants can escape the “harshness” of

1 exclusion only if they prove that the discovery violations were substantially justified
2 or harmless. *Id.* (citing Fed. R. Civ. P. 37(c)(1)). The Ninth Circuit further explained:

3 The automatic nature of the rule’s application does not mean that a district
4 court *must* exclude evidence that runs afoul of Rule 26(a) or (e)—
5 Rule 37(c)(1) authorizes appropriate sanctions “[i]n addition to or instead
6 of [exclusion].” Fed. R. Civ. P. 37(c)(1). Rather, the rule is automatic in
7 the sense that a district court *may* properly impose an exclusion sanction
8 where a noncompliant party has failed to show that the discovery
9 violation was either substantially justified or harmless.

10 *Merch. v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021) (alterations in
11 original).

12 Accordingly, where a failure to provide a computation of damages was not
13 substantially justified or harmless, courts have granted motions in limine to preclude
14 evidence of those damages under Rule 37(c)(1)’s automatic sanction. *See, e.g.*,
15 *Hoffman*, 541 F.3d at 1179–80 (holding district court did not abuse its discretion in
16 excluding evidence of damages under the Fair Labor Standards Act and California
17 Labor Code provisions where damage calculations were not disclosed); *Grouse River*
18 *Outfitters*, 848 F. App’x at 244 (concluding district court did not abuse its discretion
19 in excluding evidence of damages where plaintiff did not adequately disclose
20 damages computation and explanation).

21 Erhart does not meet his burden to avoid Rule 37(c)(1)’s sanction. His
22 counsel’s justifications, including that BofI could figure out his damages with an
23 expert and that a junior attorney is to blame, are unacceptable. *See Atari Interactive,*
24 *Inc. v. Redbubble, Inc.*, No. 18-CV-03451-JST, 2021 WL 2766893, at *4 (N.D. Cal.
25 June 29, 2021) (“Atari has offered no justification for its failure to disclose damages
26 calculations or evidence other than its incorrect assertion that no disclosure was
27 required.”); *cf. Liew v. Breen*, 640 F.2d 1046, 1050 (9th Cir. 1981) (reasoning a “good
28 faith dispute concerning a discovery question might, in the proper case, constitute
‘substantial justification’”).

1 Nor does Erhart prove the violation was harmless. He attaches no evidence to
2 his response to the Bank’s motion. The Court will not assume the Bank had all the
3 information it needed to surmise Erhart’s various damages. And even if BofI did,
4 the violation still deprived the Bank of the “damages computation analysis and
5 explanation” that it was entitled to at the outset of discovery, not on the doorstep of
6 trial. *See Grouse River Outfitters*, 848 F. App’x at 244. Hence, BofI has not had the
7 opportunity to fully assess and investigate Erhart’s claimed damages. *See Tutor-*
8 *Saliba Corp.*, 218 F.R.D. at 221; *see also Hewlett Packard Co.*, 2006 WL 1788946,
9 at *14 (explaining early disclosure of a party’s damages computation allows the
10 opposing party to “conduct meaningful discovery as to the underpinning of such a
11 claim”). So, on this record, which is blank, the Court cannot conclude Erhart meets
12 his burden.

13 The question, then, is whether the Court should order Erhart to disclose his
14 calculable damages at the eleventh hour, instead of excluding the evidence, and
15 consider imposing other sanctions. *See Merch.*, 993 F.3d at 740 (explaining Rule
16 37(c)(1) authorizes appropriate sanctions “[i]n addition to or instead of [exclusion]”).
17 The Court finds the default sanction—exclusion—is the appropriate consequence
18 here. By the time the Bank brought this motion in limine, discovery had long been
19 closed. Further, BofI argues prejudice exists because it may need to reopen Erhart’s
20 deposition, subpoena his current employer or historical employers, or have an expert
21 do a supplemental report to respond to the belated disclosures. (Hr’g Tr. 46:24–
22 47:17.) The Court agrees. “Where late disclosure of damages would likely require
23 the Court ‘to create a new briefing schedule and perhaps re-open discovery, rather
24 than simply set a trial date,’ a failure to disclose is not harmless.” *Fed. Trade*
25 *Comm’n v. Cardiff*, No. ED CV 18-2104-DMG (PLAx), 2021 WL 3616071, at *5
26 (C.D. Cal. June 29, 2021) (quoting *Hoffman*, 541 F.3d at 1180); *see also, e.g., Yeti*
27 *by Molly*, 259 F.3d at 1107 (finding harm to party that would have had to depose and
28 prepare to question late-disclosed expert witness one month before trial); *Jacked Up*,

1 *LLC v. Sara Lee Corp.*, No. 3:11-CV-3296-L, 2019 WL 1098992, at *9 (N.D. Tex.
 2 Mar. 8, 2019) (reasoning “it would be fundamentally unfair to subject [defendant] to
 3 a continuance under these circumstances, especially given [plaintiff’s] failure to offer
 4 any explanation for its failure to disclose [its] damages calculations years earlier in
 5 compliance with Rule 26”).


6 In sum, Erhart violated Rule 26 by failing to provide any estimate of his
 7 calculable damages throughout these cases. He does not meet his burden to show
 8 this violation was substantially justified or harmless. Therefore, the Court grants the
 9 Bank’s request to exclude evidence of those damages under Rule 37(c)(1).¹

10 **III. CONCLUSION**

11 For the foregoing reasons, the Court **GRANTS IN PART** Boff’s Motion in
 12 Limine No. 5 to Exclude Evidence of Any Damages that Require Computation.
 13 (ECF No. 220.) The Court excludes evidence of those categories of damages that are
 14 computable: Erhart’s claims for future wages and earnings, lost employment benefits,
 15 bonuses, overtime, vacation benefits, medical expenses, and back pay. The Court
 16 declines to exclude evidence of those categories of damages that are difficult to
 17 quantity: Erhart’s claims for emotional distress damages, reputational damages, and
 18 punitive damages.

19 **IT IS SO ORDERED.**

20
 21 **DATED: January 13, 2022**


 22 **Hon. Cynthia Bashant**
 23 **United States District Judge**

24
 25 ¹ As the Ninth Circuit noted, there is “some support” for the argument that the Court
 26 “should consider factors traditionally considered in evaluating dismissal sanctions under Rule
 27 37(b)(2)(A)(v)” when excluding “case-dispositive evidence.” *Merch.*, 993 F.3d at 740; *see also R*
 28 *& R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1242 (9th Cir. 2012) (reasoning sanction amounted
 to dismissal of a claim where the exclusion of evidence of damages led to summary judgment on
 the claim). Although Erhart did not raise this argument, the potentially relevant authority is
 distinguishable. Excluding some but not all of Erhart’s categories of damages does not deal “a fatal
 blow” to his claims. *See Merch.*, 993 F.3d at 740.