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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KARMEN SMILEY,
Plaintiff,
v.
HOLOGIC, INC.,
Defendant.

Case No.: 16-cv-0158-WQH-MDD

**ORDER GRANTING
DEFENDANT’S MOTION TO
DETERMINE TIMELINESS OF
PLAINTIFF’S SUPPLEMENTAL
DISCOVERY RESPONSES**

[ECF NO. 73]

Before the Court is Defendant’s Motion to Exclude Plaintiff’s Supplemental Discovery Responses as Untimely filed on August 31, 2017. (ECF No. 73). Plaintiff responded in opposition on September 13, 2017. (ECF No. 76). Defendant replied on September 22, 2017. (ECF No. 77). Defendant’s motion is **GRANTED**, as provided below.

LEGAL STANDARD

Rule 26(e)(1)(A), Fed. R. Civ. P., governs supplementation of disclosures

1 and responses. It provides:

2 A party who has made a disclosure under Rule 26(a) –
3 or who has responded to an interrogatory, request for
4 production, or request for admission – must
5 supplement or correct its disclosure or response . . . in a
6 timely manner if the party learns that in some
7 material respect the disclosure or response is
8 incomplete or incorrect, and if the additional or
9 corrective information has not otherwise been made
10 known to the other parties during the discovery process
11 or in writing....

9 Should a party fail to timely supplement a disclosure or response, Rule
10 37(c)(1), Fed. R. Civ. P., provides the available remedies, as follows:

11 If a party fails to provide information or identify a
12 witness as required by Rule 26(a) or (e), the party is
13 not allowed to use that information or witness to
14 supply evidence on a motion, at a hearing, or at a trial,
15 unless the failure was substantially justified or is
16 harmless.

15 Additional and alternative sanctions also are available, on motion with
16 opportunity to be heard, for failing timely to supplement a disclosure or
17 response. *See* Rule 37(c)(1)(A)-(C).

18 DISCUSSION

19 Discovery in this case closed on September 1, 2016. (ECF No. 10 ¶ 3).
20 In an earlier motion regarding supplementation of discovery responses, in
21 which Defendant sought permission to bring to the Court disputes regarding
22 the adequacy of Plaintiff's supplements, the Court stated:

23 Supplemental responses or disclosures are a one-way street: the burden
24 is placed upon the producing party to supplement responses or
25 disclosures in a timely manner upon finding that their initial responses
26 or disclosures are materially incomplete or inaccurate. *See* Rule
26(e)(1)(A). The receiving party cannot compel supplemental

1 disclosures or responses nor is there a procedural vehicle for the
2 receiving party to challenge the sufficiency of a supplemental
3 disclosure. The receiving party is limited to challenging supplemental
4 disclosures or responses as untimely. *See* Rule 37(c)(1). The producing
5 party carries the burden of convincing the Court that the supplemental
6 disclosures or responses are timely and, if not, the untimeliness is
7 substantially justified or harmless. *Id.*

8 (ECF No. 68 at 3). The Court also explained that:

9 The sufficiency of a supplemental response or disclosure only comes into
10 play if a party seeks to introduce evidence that the other party claims
11 was not previously disclosed in response to or in a supplement to a
12 previous discovery request. That is a matter for the district court to
13 determine in considering whether that evidence must be excluded under
14 Rule 37(c)(1).

15 (*Id.*). In that same Order, the Court authorized Defendant to bring before the
16 Court a motion regarding the timeliness of any supplemental disclosures or
17 responses by Plaintiff. (*Id.*). This motion followed.

18 This is a case of wrongful termination of employment. (*See* ECF No. 1).
19 Among other things, Plaintiff claims as damages lost wages and benefits.
20 (ECF No. 1-2 at 8). Defendant has claimed as an affirmative defense that
21 Plaintiff failed to mitigate her damages. (ECF No. 2 at 2). This
22 supplemental discovery dispute relates to evidence disclosed by Plaintiff on
23 June 30, 2017, disclosing mitigation efforts by Plaintiff from September 27,
24 2016 through May 31, 2017, and that Plaintiff received disability benefits
25 during the period of time that she also is claiming lost wages. (ECF No. 73 at
26 3). Defendant seeks exclusion of this evidence as untimely. In a separate
motion pending before the district court, Defendant has moved to strike
certain damages evidence by Plaintiff and, in the alternative, seeks

1 permission to add a vocational expert based upon these supplemental
2 responses. (ECF No. 72).

3 Plaintiff's response was not helpful. Plaintiff complains that she has
4 produced more evidence than Defendant, a matter entirely irrelevant to the
5 instant dispute. (ECF No. 76 at 2). Plaintiff also seems to misunderstand
6 the rule requiring supplementation of discovery responses. Plaintiff appears
7 to be asserting that because her responses were accurate at the time she
8 signed them, on May 27, 2016, and remained so through the close of discovery
9 on September 1, 2016, there is no duty to supplement because they were not
10 incomplete or inaccurate at the time. (*Id.* at 3). Plaintiff asserts that
11 Defendant's challenge to the timeliness of the supplements is "nonsense."
12 (*Id.*).

13 To correct Plaintiff's counsel's misunderstanding of the law, the duty to
14 supplement arises when counsel becomes aware that a previous response has
15 become incomplete or inaccurate, not that it was so at the time the response
16 was signed. *See Harper v. City of Dallas*, No. 3:14-cv-2647-M, 2017 WL
17 3674830 *16, (N.D. Tex. Aug. 25, 2017) ("[T]he court notes that ...`[u]nder
18 Rule 26(e), parties have an ongoing obligation to continuously supplement
19 their discovery responses. That obligation is in no way limited by the
20 discovery deadlines imposed by the Court's Scheduling Order pursuant to
21 Rule 16." quoting *United States v. State of La.*, No. CV 11-470-JWD-RLB,
22 2015 WL 5595630, at *1 (M.D. La. Sept. 21, 2015)). *See also Commentary to*
23 *Rule 26(e)* (1993). And, rather than being "nonsense," Defendant's claim that
24 the supplements were not timely is well-founded. Although counsel need not
25 make a supplemental disclosure whenever new information becomes known
26 to counsel or the client, the disclosures must be "timely." Here, Plaintiff has

1 done nothing to explain why counsel waited until June 30, 2017, nine months
2 after the close of discovery, to provide supplements.

3 Plaintiff has offered nothing in the way of substantial justification or
4 harmlessness, suggesting that Defendant may seek to exclude this evidence
5 *in limine*. (ECF No. 76 at 3). Instead, Plaintiff refers to Defendant’s motion
6 brought pursuant to Rule 26(e) as “meaningless paper-pushing.” (*Id.* at 3-4).
7 The Federal Rules of Civil Procedure “govern the procedure in all civil actions
8 and proceedings in the United States district courts....” Fed. R. Civ. P. 1.
9 This Court will administer the Rules, consistent with its duty under Rule 1,
10 notwithstanding counsel for Plaintiff’s apparent disdain for them.

11 The Court finds that Plaintiff has provided no basis for the Court to
12 conclude that the supplements were timely. The Court finds they were not.
13 Further, Plaintiff offers nothing by way of substantial justification for the
14 timing of the supplements and no basis for the Court to conclude that the
15 supplements are harmless. The Court finds credible Defendant’s assertions
16 of harm in terms of trial preparation and the inability to obtain further
17 discovery to challenge the information supplied nine months after the close of
18 discovery.

19 Trial is scheduled for January 3, 2018, some 3.5 months from now. If
20 there had been any justification offered by Plaintiff for the delay in producing
21 this information, the Court likely would have denied Defendant’s motion and
22 allowed for some limited additional discovery. The Court cannot, in good
23 conscience, on this record, countenance Plaintiff’s conduct. Having found the
24 supplements to be untimely, unjustified and not harmless, the question is the
25 extent of the sanction to be imposed.

26 Although the Court recognizes that it has the discretion to impose

1 alternative and additional sanctions, upon motion and opportunity to be
2 heard, the Court finds it appropriate to follow the direction of Rule 37(c)(1):
3 The supplemental responses provided by Plaintiff on June 30, 2017, may not
4 be used by Plaintiff to supply evidence on a motion, at a hearing, or at trial in
5 this case.

6 CONCLUSION

7 Defendant's Motion to Determine Timeliness of Plaintiff's Supplemental
8 Discovery is **GRANTED**. Plaintiff's supplemental responses are untimely
9 and the delay is not substantially justified. The late production is not
10 harmless. Accordingly, under Rule 37(c)(1), the supplemental responses
11 provided by Plaintiff on June 30, 2017, may not be used by Plaintiff to supply
12 evidence on a motion, at a hearing, or at trial in this case.

13 **IT IS SO ORDERED.**

14 Dated: September 25, 2017



15
16 Hon. Mitchell D. Dembin
United States Magistrate Judge