

1 “Rule 26 does not elaborate on the level of specificity required in the initial damages
2 computation.” *Allstate Ins. Co. v. Nassiri*, 2011 WL 2977127, *4 (D. Nev. July 21, 2011). “A
3 computation of damages may not need to be detailed early in the case before all relevant documents or
4 evidence has been obtained by the plaintiff.” *LT Game Int’l Ltd. v. Shuffle Master, Inc.*, 2013 WL
5 321659, *6 (D. Nev. Jan. 28, 2013). Nonetheless, the word “computation” contemplates some analysis
6 beyond merely setting forth a lump sum amount for a claimed element of damages. *Allstate Ins*, 2011
7 WL 2977127, at *4. A plaintiff should disclose the basic method or formula by which it contends its
8 damages should or will be calculated even if it cannot identify the specific dollar amount of damages
9 pending further discovery. *Id.* “A party must make its initial disclosures based on the information then
10 reasonably available to it.” Fed. R. Civ. P. 26(a)(1)(E). “While a party may not have all of the
11 information necessary to provide a computation of damages early in the case, it has a duty to diligently
12 obtain the necessary information and prepare and provide its damages computation within the discovery
13 period.” *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 (D. Nev. 2011). “A party
14 is not excused from making its disclosures because it has not fully investigated the case.” Fed. R. Civ.
15 P. 26(a)(1)(E).

16 When a party fails to meet its initial disclosure obligations, the Court turns to Rule 37(c) to
17 determine the appropriate sanction. Rule 37(c)(1) provides that a non-compliant party is “not allowed
18 to use the information . . . at trial, unless the failure was substantially justified or harmless.” The party
19 facing the sanction has the burden of showing substantial justification or harmlessness. *See Yeti by*
20 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001). Even where non-
21 disclosure was neither harmless nor justified, however, the Court is not required in all instances to
22 exclude evidence as a sanction. *Jackson*, 278 F.R.D. at 594. Rule 37(c)(1) also enumerates a number
23 of other potential sanctions, including payment of reasonable expenses incurred, an order that the
24 movant may inform the jury of the opposing party’s failure, and any other “appropriate” sanction,
25 including those listed in Rule 37(b)(2)(A)(i)-(vi).

26 The court has “particularly wide latitude” in determining the appropriate sanction. *See Yeti*, 259
27 F.3d at 1106; *see also Risinger v. SOC, LLC*, 306 F.R.D. 655, 662 (D. Nev. 2015). In exercising that
28 discretion, the Court looks to five factors: (1) the public’s interest in expeditious resolution of litigation;

1 (2) the court’s need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the
2 public policy favoring disposition of cases on their merits; and (5) the availability of less drastic
3 sanctions. *See Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). Moreover, where evidence
4 exclusion “amount[s] to dismissal of a claim, the district court [is] required to consider whether the
5 noncompliance involved willfulness, fault, or bad faith,” as well as whether less drastic sanctions are
6 available. *R&R Sails, Inc. v. Insurance Co. of Penn.*, 673 F.3d 1240, 1247 (9th Cir. 2012).²

7 **II. BACKGROUND**

8 This is a case involving a non-compete clause and alleged damage flowing from a former
9 employee soliciting Plaintiff’s clients in her current employment with one of Plaintiff’s competitors.
10 The primary relief sought by Plaintiff was an injunction preventing Defendant from soliciting its clients
11 during the prohibited contractual period. *See, e.g.*, Docket No. 10. Plaintiff’s motion for a preliminary
12 injunction was denied based on an insufficient showing of a likelihood of success on the merits or a
13 likelihood of irreparable harm. Docket No. 37. The Court further found that issues concerning
14 modification of the agreement were better resolved following discovery. *See* Docket No. 37 at 7.
15 Plaintiff then filed a motion for summary judgment, which the Court granted. Docket No. 85. Based
16 on the procedural posture of the case, issuance of the order granting summary judgment resulted in an
17 injunction that lasted roughly two weeks. *See id.* at 10.

18 The order granting summary judgment also concluded that Defendant had breached the
19 underlying contract and left for trial the issue of damages. *See id.* at 9. With respect to damages,
20 Plaintiff’s initial disclosure provided neither an estimated amount of damages to be claimed, nor any
21 explanation of the methodology that would be used to compute damages. *See, e.g.*, Docket No. 73-1 at
22 3. On the last day of discovery, Plaintiff supplemented its disclosure to by referencing “revenue” earned
23 by Defendant in violation of her contractual obligations and citing a spreadsheet provided by
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26 ² There is tension in the Ninth Circuit’s case law on this point. *See, e.g., Toyrrific, LLC v.*
27 *Karapetian*, 606 Fed. Appx. 365, 366 n.1 (9th Cir. June 2, 2015) (discussing *Hoffman v. Constr. Protective*
28 *Servs., Inc.*, 541 F.3d 1175 (9th Cir. 2008)). Nonetheless, it appears that *R&R Sails* is the governing law
on the issue and the Court will apply it. *See id.*

1 Defendant's current employer. *See, e.g.*, Docket No. 73-2 at 4. Defendant now seeks sanctions on the
2 basis that these disclosures were insufficient.

3 **III. ANALYSIS**

4 Defendant's motion seeks two alternative types of sanctions based on her contention that Plaintiff
5 failed to comply with its duty to provide a proper damages calculation: (1) exclusion of all damages
6 evidence at trial or (2) the reopening of discovery and supplementation of the damages calculation. *See*
7 Docket No. 93 at 1. The primary sanction sought of exclusion of all damages evidence is not properly
8 imposed in this case. As noted above, based on the procedural posture of the case, the injunctive relief
9 awarded Plaintiff was limited to two weeks at the end of the restriction period. To exclude damages
10 would prevent Plaintiff from obtaining any other relief and would be a fatal blow to Plaintiff's case
11 tantamount to dismissal. In these circumstances, the Court must consider willfulness, fault or bad faith
12 with respect to the failure to provide a proper computation of damages. *R&R Sails*, 673 F.3d at 1247.
13 Willfulness, fault or bad faith are absent in this case. The Court agrees with Defendant's attorney's
14 summation at the hearing that it is difficult to conclude anything other than Plaintiff was fixated on
15 obtaining injunctive relief and, as a result, was derelict in its obligations to provide a proper damages
16 computation. Hearing Rec. (9/24/2015) at 3:10 p.m. (Defendant's attorney arguing: "It's difficult to
17 conclude anything other than they were pursuing the case as an injunction case, as an equitable remedies
18 case, at the last minute they realized they . . . hadn't disclosed anything, they threw in something
19 perfunctory as a token"). The Court does not condone Plaintiff's failure to comply with its initial
20 disclosure obligations, but it does not amount to bad faith, fault or willfulness. As such, the Court will
21 deny the request to bar Plaintiff from presenting evidence of damages at trial. Nonetheless, the Court
22 **ADMONISHES** Plaintiff and its counsel for failing to comply with their obligation to provide a proper
23 damages calculation and **WARNS** them that the Court expects strict compliance with all applicable rules
24 in the future.

25 Having found that exclusion of damages evidence is not proper in this instance, the Court turns
26 to Defendant's alternative relief sought. Plaintiff does not oppose the alternative request to reopen
27 discovery and provide a supplemental damages calculation. *See, e.g.*, Docket No. 94 at 3. Under the
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1 circumstances, the Court agrees with the parties that reopening discovery and requiring a supplemental
2 damages calculation is the appropriate remedy.³

3 **IV. CONCLUSION**

4 For the reasons discussed more fully above, the motion for sanctions is hereby **GRANTED** in
5 part and **DENIED** in part. The parties shall immediately confer and provide a proposed plan to conduct
6 the damages discovery and provide the supplemental calculation. That joint proposal shall be submitted
7 no later than October 13, 2015.

8 **IT IS SO ORDERED.**

9 DATED: October 6, 2015



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11 NANCY J. KOPPE
12 United States Magistrate Judge

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28 ³ The Court declines to award attorneys' fees. The relief provided through this order was unopposed
and could have been presented to the Court through stipulation.