

1 that Angeles suddenly pulled his tractor trailer into the emergency lane blocking the Mitsubishi
2 being driven by Richards as Richards was in the process of trying to merge back into freeway
3 traffic. Plaintiff claims Richards was forced out of the emergency lane to avoid hitting the tractor
4 trailer, lost control, and swerved onto the freeway striking two vehicles before ending up stopped
5 in the middle traffic lane. Plaintiff claims Angeles was cited and pled guilty to making an unsafe
6 lane change and is at fault for the accident. Legacy claims that Richards was at fault for the
7 accident because he was highly intoxicated, and driving recklessly at a high rate of speed on the
8 shoulder of the road. What is not disputed is that Dixon was airlifted from the accident to UMC
9 where she was treated for life-threatening injuries.

10 The Complaint (ECF No. 1) in this case was filed July 17, 2015. The parties requested and
11 received special scheduling review when the court approved a joint proposed Discovery Plan and
12 Scheduling Order (ECF No. 23) on October 21, 2015. The initial discovery plan and scheduling
13 order established an April 18, 2016 deadline for disclosure of experts, and a June 13, 2016 deadline
14 for completing discovery. The parties requested and received two extensions of the discovery plan
15 and scheduling order deadlines extending the deadline for disclosure of experts until May 31, 2016,
16 and later to October 21, 2016. A third stipulation to extend the deadlines was filed by the parties
17 on December 19, 2016 (ECF No. 39). At a hearing held on January 10, 2017, on their third request
18 for extension, the court was dissatisfied with the parties' discovery progress and required the
19 parties to schedule all remaining discovery and inform the court of what specific discovery was
20 still needed to be completed as well as proposed schedule for completing that discovery. *See*
21 *Minutes of Proceedings* (ECF No. 49). The court was also skeptical about defendants' claims they
22 should receive another extension of the expert disclosure deadline because they had been unable
23 to retain a trucking standard of care expert because their own client, Angeles, had not yet been
24 deposed. The parties submitted a stipulated discovery plan and proposed order which the court
25 approved extending the deadline for defendant to disclose a trucking standard of care expert until
26 February 17, 2017. However, all other initial expert disclosures were closed.

27 This litigation has become increasingly contentious, and the court has decided many, many
28 discovery disputes. It is apparent that there have been communication breakdowns among counsel

1 that have contributed to counsel imputing bad faith and ill motives to one another that have resulted
2 in an inordinate amount of motion practice on matters counsel would ordinarily work out among
3 themselves without judicial intervention.

4 **DISCUSSION**

5 In the current motion, defendants seek to strike all of plaintiff's treating providers from
6 offering any testimony, or in the alternative, to preclude plaintiff from offering or relying upon
7 any expert testimony from any of her treating providers in support of any motion, at any hearing,
8 or at trial. Defendants also ask for attorney's fees and costs for the necessity of filing this motion.
9 Defense counsel states defendants initiated the meet-and-confer process on June 7, 2017. The
10 following morning on June 8, 2017 at 4:43 a.m., defense counsel communicated with plaintiff's
11 counsel indicating that if plaintiff's counsel did not agree by 1 p.m. that day that plaintiff would
12 not call any of her treating physicians as witnesses or rely on their expert testimony, a motion to
13 strike would be filed. Plaintiff's counsel responded at 12:20 p.m. on June 8, 2017, suggesting that
14 the parties discuss the matter in Salt Lake City, apparently at a deposition the parties were
15 scheduled to take in this case. However, on June 8, 2017, plaintiff filed a motion for summary
16 judgment on the medical specials. As a result, defendants filed this motion.

17 Plaintiff filed and served initial disclosures on November 30, 2015, providing a lengthy list
18 of treating providers. She served eight supplemental disclosures between January 29, 2016, and
19 March 22, 2017. However, with respect to the description of her treating provider testimony, the
20 disclosures were substantially identical. On February 18, 2016, plaintiff served Answers to
21 Interrogatories. Interrogatory no. 10, asked for a list of each and every expert plaintiff reserved
22 the right to call at the time of trial as well as the opinions of each of the providers, documents
23 reviewed, and any report prepared. Plaintiff objected to this interrogatory, but copied and pasted
24 her Rule 26(a)(1) disclosures. Plaintiff has never disclosed an expert report for any of her treating
25 providers, identified the subject matter of their testimony as required by Rule 26(a)(2)(C) or
26 provided a summary of their facts and opinions. The court should therefore strike all of plaintiff's
27 treating providers as witnesses and disallow them from testifying. Discovery has now effectively
28 closed except for a few court-approved depositions that required unexpected rescheduling.

1 Defendants claim it is impossible for them to prepare for treating provider testimony, and
2 reopening discovery would result in additional motions, increased expense, and delay. The court
3 should therefore exclude all of plaintiff's treating providers from testifying even as percipient
4 witnesses because it would be grossly unfair to the defendants and undermine the practical effect
5 of Rule 37(c)(1) sanctions.

6 Plaintiff opposes the motion arguing defendants have filed a number of "hypertechnical"
7 motions based on hyperbole and exaggeration. Plaintiff also complains that the defendants have
8 engaged in a pattern of constant threats and requests for sanctions and attorney's fees which are
9 opposite of the professional tone attorneys should expect. Plaintiff acknowledges that she did not
10 update her responses to Interrogatory No. 10 after the deadline for expert disclosures to indicate
11 that her various physicians, nurses and physical therapists would not be called as expert witnesses.
12 She acknowledges and regrets this error. However, plaintiff retained Dr. Kathleen Smith to be her
13 medical expert witness in her case in chief. Dr. Smith has reviewed Sarah Dixon's ("Dixon")
14 complete medical records and provided a 70-page report and supplemental report. Plaintiff intends
15 to rely on Dr. Smith to provide expert testimony, and served a timely expert report for her opinions.

16 Plaintiff has consistently noted in her Rule 26(a)(1) disclosures that she intended to call
17 her various treating physicians, nurses and physical therapists as well as the various custodians of
18 record for her medical providers to provide testimony regarding the accuracy of the medical
19 records and bills produced. To date defense counsel has declined to stipulate that the medical
20 records produced in discovery are authentic and genuine. As a result, plaintiff is faced with having
21 to call 45-50 custodians of record for her providers.

22 Plaintiff also argues that Defendant retained Dr. Mary Ann Shannon as a medical expert
23 witness. Dr. Shannon has reviewed Dixon's complete medical records and billings and prepared
24 three reports. The medical records provided by plaintiff as well as Dr. Shannon's reports indicate
25 that defendants are well aware of all of the injuries plaintiff sustained, the billings for each of her
26 medical providers including UMC, Desert Canyon Rehab Hospital, HealthSouth, and Camp
27 Pendleton Medical Hospital. Plaintiff claims that she will call her treating physicians as lay
28 witnesses rather than expert witnesses who will only testify as to what they learned during the

1 course and scope of treating the plaintiff. Because plaintiff's treating physicians are not expert
2 witnesses, an expert report is not required unless the treating physician seeks to testify outside the
3 scope of the treatment rendered. Plaintiff does not intend to call any treating providers to testify
4 outside of the opinions reached during the course of treatment. Plaintiff's counsel has not provided
5 any of the treating providers with any information outside of their treatment. She is only seeking
6 testimony as to the treatment she received, the causal relation of that treatment to the injuries she
7 suffered in the collision, and the reasonableness of that treatment and costs. The court should
8 therefore deny the motion.

9 Defendants reply that plaintiff now makes the unusual and stunning announcement that all
10 of her treating providers would offer expert opinions despite her Rule 26(a) statements. Her 26(a)
11 statements indicated that her treating providers would provide testimony regarding "the causal
12 relationship to the accident and the reasonableness of treatment." This is expert testimony.
13 Plaintiff must prove legal causation, *i.e.*, (1) that her medical expenses were incurred as a result of
14 the accident; and (2) that he expenses were actually and proximately caused by an act or omission;
15 and (3) the expenses are reasonable in amount in the local community. It is simply not credible to
16 believe that the plaintiff does not intend to rely upon any expert opinions or testimony from her
17 treating providers. Plaintiff's opposition consists of a "conjured up strategy" to avoid the
18 mandatory Rule 37(c)(1) sanctions. The court should therefore prevent plaintiff from calling any
19 of her treating providers as witnesses in this case.

20 I. Legal Standards

21 A. Expert Report Requirements

22 Rule 26(a)(2) of the Fed. R. Civ. P. requires parties to "disclose to the other parties the
23 identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702,
24 703 or 705." The Advisory Committee Notes to the 1993 Amendments to the Rules indicate that
25 the disclosure requirements for expert testimony were intended to allow opposing parties to have
26 a reasonable opportunity to prepare for effective cross-examination and arrange for expert
27 testimony from other witnesses. *See* Adv. Comm. Notes to 1993 Amendments. The 2010
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1 Amendments to the Federal Rules of Civil Procedure made significant changes to Rule 26(a)(2)
2 and (b)(4) to address concerns about expert discovery.

3 The Federal Rules establish two different classes of experts: those who are retained or
4 specially employed to give expert opinion testimony in a case, and those who are not retained or
5 specially employed, but nevertheless may provide expert testimony under Federal Rule of
6 Evidence 702, 703 or 705. Specially retained experts are required to comply with the Rule
7 26(a)(2)(B) report requirements. Witnesses who qualify to provide expert testimony based on their
8 “knowledge, skill, experience, training or education” under Rule 702 are required to comply with
9 the expert disclosure requirements of Rule 26(a)(2)(C).

10 **1. Retained Expert Report Requirements**

11 For each disclosed expert, Rule 26(a)(2)(B) requires that an expert witness disclosure be
12 accompanied by a written report prepared and signed by the witness containing: (1) a complete
13 statement of all opinions and the basis and reasons therefor; (2) the data or other information
14 considered by the witness in forming the opinions; (3) any exhibits to be used as a summary of or
15 support for the opinions; (4) the qualifications of the witness, including a list of all publications
16 authored by the witness within the preceding ten years; (5) the compensation to be paid for the
17 study and testimony; and (6) a listing of any other cases in which the witness has testified as an
18 expert at trial or by deposition within the preceding four years. Fed. R. Civ. P. 26(a)(2)(B). An
19 expert’s report must be “detailed and complete.” *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296,
20 300 (D. Nev. 1998) (quoting *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir.
21 1996)). Expert reports are required in order to eliminate “unfair surprise to the opposing party and
22 [to conserve] resources.” *Elgas*, 179 F.R.D. at 299 (quoting *Reed v. Binder*, 165 F.R.D. 424, 429
23 (D.N.J. 1996)).

24 None of plaintiff’s treating physicians were specially retained to give expert opinions in
25 this case. Plaintiff’s counsel specially retained a single expert, Dr. Kathleen Smith to offer opinion
26 testimony. The reporting requirements of Rule 26(a)(2)(B) do not apply to the parties’ current
27 dispute.

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1 arising out of their roles as actors in events giving rise to the litigation. Under the 1993
2 Amendments, to the extent treating physicians were fact witnesses, they were not regarded as
3 experts for whom expert reports were required under 26(a)(2)(B). However, a treating physician
4 who did not supply an expert report was not permitted to go beyond information learned or
5 acquired, or opinions reached as a result of the treating relationship. After the 2010 amendments
6 at least one court has found that the Federal Rules of Civil Procedure and Federal Rules of
7 Evidence now recognize treating physicians as experts rather than lay witnesses. *Romanelli v.*
8 *Long Island R. Co.*, 898 F. Supp. 2d, 626, 631 (S.D.N.Y. 2012).

9 In *Goodman v. Staples the Officer Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011), the Ninth
10 Circuit addressed, for the first time, when, if ever, a treating physician is required to prepare an
11 expert report compliant with Rule 26(a)(2)(B). In *Goodman*, the Plaintiff tripped and fell in an
12 Arizona office supply store and filed a complaint in state court alleging the store negligently
13 allowed an unreasonably dangerous condition to exist which resulted in her fall and serious
14 injuries. The case was removed to federal court based on complete diversity between the parties.
15 Under Arizona law, causation is an essential element of a negligence claim. The district judge
16 prohibited *Goodman's* medical experts from testifying about causation in plaintiff's case-in-chief
17 because she did not comply with her Rule 26(a)(2)(B) report disclosure obligations. On appeal,
18 the Ninth Circuit held that "when a treating physician morphs into a witness hired to render expert
19 opinions that go beyond the usual scope of a treating doctor's testimony, the proponent of the
20 testimony must comply with Rule 26(a)(2)." *Id.* at 819–20. However, because the law regarding
21 "hybrid experts" was not settled, and because treating physicians are usually exempt from the
22 requirement of providing written reports, the Ninth Circuit exercised its discretion to apply this
23 clarification prospectively. *Id.*

24 In *Goodman*, the Ninth Circuit recognized that the general rule is that a treating physician
25 is a percipient witness of the treatment rendered rather than an expert retained or specially
26 employed to provide expert testimony. For this reason, a treating physician is ordinarily not
27 subject to the written report requirements of Rule 26(a)(2)(B). *Id.* at 824 (citing Fed. R. Civ. P.
28 26(a)(2) Advisory Committee Note (1993)). However, the Ninth Circuit noted that district courts

1 in the circuit have limited treating physician testimony to opinions formed during the course of
2 treatment when the party seeking admission of the testimony disclosed no expert report. *Id.* at
3 825.

4 Joining other circuits that had addressed the issue, the Ninth Circuit held “that a treating
5 physician is only exempt from Rule 26(a)(2)(B)’s written report requirement to the extent that his
6 opinions were formed during the course of treatment.” *Id.* at 826. The *Goodman* decision found
7 that the Plaintiff had retained a number of her treating physicians to render expert testimony
8 beyond the scope of the treatment rendered, and that to form these opinions these doctors had
9 reviewed information provided by Goodman’s attorney that the doctors had not reviewed during
10 the course of their treatment. For these reasons, the Ninth Circuit agreed with the district court
11 that these doctors fell outside the scope of the “treating physician” exception, and under Rule
12 26(a)(2)(B), written reports were required.

13 **C. Scope of Treating Physician Opinion Testimony**

14 Disputes often arise about what expert opinions treating physicians may offer without
15 providing a Rule 26(a)(2)(B) compliant report. The majority of these disputes involve whether a
16 treating physician may offer expert opinions on causation, disability, the need for future surgery
17 and treatment, and the cost of future care, treatment, and surgery. Before the 2010 Amendments
18 to Rule 26(a)(2) the majority of courts in the country concluded that 26(a)(2)(B) reports were not
19 required for treating physicians expressing opinions as to causation, diagnosis and prognosis, and
20 the extent of disability to the extent those opinions were based on treatment of the patient. *Sprague*
21 *v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78, 81 (D.N.H. 1998) (collecting cases) (“The majority of
22 other courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a
23 prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis, and
24 extent of disability where they are based on the treatment.”).

25 Two published decisions in this district have held that treating physicians are exempt from
26 the Rule 26(a)(2)(B) report requirements even when offering opinions on causation, diagnosis,
27 prognosis and the extent of disability. In *Piper v. Harnischfeger Corp.*, 170 F.R.D. 177, (D. Nev.
28 1997) Magistrate Judge McQuaid rejected arguments that a treating physician was limited to

1 “factual percipient observations” and was required to provide a Rule 26(a)(2)(B) report to give
2 opinions on such matters as causation, future treatment, the extent of disability “and the like.” *Id.*
3 at 174-175. The court found this view was too narrow and Rule 26(a)(2)(B) was not that restrictive
4 stating:

5 It is common practice for a treating physician during, and as a part of, the course of
6 treatment of a patient to consider things such as the cause of the medical condition,
7 the diagnosis, the prognosis, and the extent of disability caused by the condition, if
8 any. Opinions such as these are a part of the ordinary care of the patient and do not
subject the treating physician to the extensive reporting requirements of Fed. R.
Civ. P. 26(a)(2)(B).

9 *Id.* at 175. The *Harnischfeger* case cited a number of other federal district court decisions that had
10 reached a similar conclusion.

11 In *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296 (D. Nev.1998), Magistrate Judge
12 Johnston followed *Harnischfeger* holding that the expert report requirements of Rule 26(a)(2)(B)
13 only apply to experts who are retained or specially employed to provide expert testimony. *Id.* at
14 297. The court agreed with the *Harnischfeger* decision that a treating physician’s opinion on
15 matters such as causation, future treatment, and extent of disability and the like “are part of the
16 ordinary care of the patient” and therefore a treating physician may testify regarding these matters
17 without being subject to the extensive reporting requirements of Rule 26(a)(2)(B). *Id.* However,
18 *Elgas* also found that a party could not avoid the Rule 26(a)(2)(B) requirements “by simply
19 indicating that her expert is a treating physician.” *Id.* at 299. Quoting *Hall v Sykes*, 164 F.R.D.
20 (E.D. Va 1995) the court found that a Rule 26(a)(2)(B) report would be required from a treating
21 physician “retained or employed to render a medical opinion based on factors that were not learned
22 during the course of the treatment of the patient” (internal quotations omitted).

23 In *Elgas*, the plaintiff designated a doctor who had never seen the plaintiff, but was the
24 directing physician at the medical clinic that plaintiff visited. The doctor was consulted and
25 directed the work of a nurse practitioner who did treat the plaintiff. The court held that the doctor
26 had knowledge of the plaintiff’s medical condition through consultation, and therefore qualified
27 as a treating physician who was not subject to the Rule 26(a)(2)(B) requirements. However, the
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1 court held that the doctor “should not be allowed to render a medical opinion based on factors that
2 were not learned in the course of his limited treatment of the Plaintiff at his clinic.” *Id.* at 300.

3 *Goodman, Piper, and Harnischfeger* were decided before the 2010 Amendments to Federal
4 Rule of Civil Procedure 26(a)(2) which now require 26(a)(2)(C) reports for experts, like treating
5 medical providers, who provide expert testimony under Federal Rule of Evidence 702, 703 or 705.
6 In *Goodman* the Ninth Circuit relied on the Sixth Circuit’s decision in *Fielden v. CSX*
7 *Transportation, Inc.*, 482 F.3d 866 (6th Cir. 2007). There, the Sixth Circuit held that “a report is
8 not required when a treating physician testifies within a permissive core on issues pertaining to
9 treatment, based on what he or she learned through actual treatment and from the Plaintiff’s records
10 up to and including that treatment.” *Id.* at 871. The Ninth Circuit concluded that *Fielden* “does
11 not stand for the proposition that a treating physician *never* has to disclose an expert report.” 644
12 F.3d at 825. In *Fielden*, the court found that evidence in the record showed the physician had
13 formed his causation opinion during the course of treatment. However, the *Fielden* decision
14 distinguished testimony regarding causation that pertains to the treatment of the patient from
15 causation testimony prepared in anticipation of litigation.

16 The Ninth Circuit also relied on the Seventh Circuit’s decision in *Meyers v. Nat’l R.R.*
17 *Passenger Co.*, 619 F.3d 729, 734-35 (7th Cir. 2010) which held that an expert report is required when
18 a treating physician is offered to provide testimony concerning the cause of the plaintiff’s injury,
19 but did not make that determination in the course of providing treatment. *Goodman* noted that the
20 Eighth Circuit “goes further, requiring disclosure of a written report anytime a party seeks to have
21 a treating physician testify as to *causation* of a medical condition, as opposed to merely the
22 existence of the condition.” 644 F.3d at 825 (emphasis in original), (citing *Brooks v. Union Pacific*
23 *R.R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010)). *Goodman* also cited district court decisions within the
24 circuit that “have limited treating physician testimony to opinions formed during the course of
25 treatment when the party seeking admission of the testimony disclosed no expert report.” *Id.*

26 Since *Goodman* was decided a number of lawyers have argued that a Rule 26(a)(2)(B)
27 report is required any time a treating provider offers expert opinion testimony. However,
28 *Goodman* did not hold that any time a treating physician offers expert opinions a Rule 26(a)(2)(B)

1 report is required. Rather, it found that the plaintiff had retained a number of her treating
2 physicians to render opinions outside the scope of her treatment, and that they had considered
3 medical records and information provided by her attorneys that they had not reviewed during the
4 course of treatment. A footnote in the decision describes the extensive materials provided by
5 plaintiff's counsel, and the request by counsel to opine on injuries caused by Goodman's fall "NOT
6 ONLY based on your own observations but also based on your understanding of the patient's
7 medical records as well." 644 f 3d 826 n. 2.

8 The court concludes *Goodman* did not adopt the Eighth Circuit's approach of requiring a
9 Rule 26(a)(2)(B) report any time an expert offers expert opinions. Rather, it joined the Sixth and
10 Seventh Circuits that have held expert reports are required when a treating provider is used to
11 render opinions not reached during the course of treatment. It cited, but did not criticize, a number
12 of district court decisions in this circuit that have "limited treating physician testimony to opinions
13 formed during the course of treatment when the party seeking admission of the testimony disclosed
14 no expert report." 644 F 3d. at 825. After citing these cases *Goodman* announced its holding that
15 "treating physicians are only exempt from Rule 26(a)(2)(B)'s written report requirement to the
16 extent that his opinions were formed during the course of treatment." *Id.* at 826. The court in
17 *Lutrell v. Novartis Pharmaceuticals Corp.*, 894 F. Supp. 2d. 1324 (E.D. Wash. 2012) reached the
18 same conclusion. Applying *Goodman* it found "a treating physician may be allowed to opine even
19 as to causation if the opinion was formed during the course of providing treatment, regardless of
20 submission of an expert report." *Id.* at 1333.

21 To summarize, before the 2010 Amendments to Rule 26(a)(2), the majority of courts held
22 that treating physicians providing opinions on causation, diagnosis, prognosis and the extent of
23 disability were not required to provide Rule 26(a)(2)(B) reports if their opinions were formed
24 during the course of treating their patients. However, if a treating physician's opinions are based
25 on information provided by an attorney or others that were not reviewed during the course of
26 treatment, a Rule 26(a)(2)(B) report was required "insofar as their additional opinions are
27 concerned." *Goodman*, 644 F.3d at 826. The 2010 Amendments to Rule 26(a)(2) now mandate
28 non-retained experts, like treating medical providers who offer opinions based on their

1 “knowledge, skill, experience, training or education” under Fed. R. Evid. 702, 703 or 705 to make
2 the disclosures required by Rule 26(a)(2)(C). Rule 26(a)(2)(C) requires disclosures of “the subject
3 matter on which the written witness is expected to present evidence under Fed. R. Evid. 702, 703
4 or 705;” Rule 26(a)(2)(C)(i), and “a summary of facts and opinions to which the witness is
5 expected to testify.” Rule 26(a)(2)(C)(ii). “The 26(a)(2)(C) disclosure obligation does not apply
6 to facts unrelated to the expert opinions the witness will present.” Advisory Committee Notes
7 (2010). A treating physician is still a percipient witness of the treatment rendered and may testify
8 as a fact witness and also provide expert testimony under Fed. R. Evid. 702, 703 and 705.

9 After the 2010 Amendments to Rule 26(a), parties are required to identify the subject
10 matter on which hybrid experts like treating physicians are intended to offer testimony as well as
11 a summary of their facts and opinions. The reporting obligations are less onerous than the ones
12 required by Rule 26(a)(2)(B) for retained experts. However, they are mandatory. Defendants are
13 correct that Rule 37(c)(1) sanctions are mandatory unless the failure to timely disclose the expert
14 information required by Rule 26(a)(2)(C) was substantially justified or harmless.

15 Here, Plaintiffs’ initial and supplemental disclosures clearly do not comply with the
16 disclosure requirements of Rule 26(a)(2)(C). However, counsel for defendants did not request
17 plaintiff to supplement her February 2016 answer to interrogatory or raise any issue regarding the
18 adequacy of plaintiff’s disclosures until June 7, 2017 when counsel gave opposing counsel less
19 than 24 hours to stipulate plaintiff would not call any of her treating providers to testify indicating
20 that otherwise a motion would be filed. Plaintiff’s counsel agreed to discuss the matter in Salt
21 Lake City where the parties were scheduled to depose a witness in this case. However, this motion
22 was filed before the parties could discuss the matter at all.

23 The court finds that plaintiff’s failure to provide the information required by Rule
24 26(a)(2)(C) is not substantially justified. However, under the circumstances of the case, the
25 plaintiff’s failure to provide the information required by Rule 26(a)(2)(C) is or with appropriate
26 remedial action may be rendered harmless. Plaintiff provided the defendants with a 70-page expert
27 report outlining all of the treatment plaintiff received arising out of this accident, as well as the
28 medical bills and all treatment plaintiff received and opinions regarding their causal relationship

1 to the accident. As explained in another decision arising out of the series of motions the court
2 heard on September 7, 2017 there is no question defense counsel knows exactly what injuries
3 plaintiff claims arise out of this accident, who treated the plaintiff, what treatment she received
4 and the cost of that treatment. Defendants' retained expert, Dr. Shannon, prepared an initial and
5 two supplemental reports. She conducted a medical records review which described the injuries
6 plaintiff was treated for during emergent and follow up care, describing her treatment as
7 conservative. Dr. Shannon's three reports clearly show that defendants know exactly what injuries
8 plaintiff received as a result of this accident, where she treated, and the amount of the bills incurred.
9 Additionally, the defendants made no genuine effort to remedy plaintiff's failure to provide the
10 information required until after the discovery cutoff in this case although they had ample time to
11 seek the information required by Rule 26(a)(2)(C) as well as to request a supplemental answer to
12 Interrogatory No. 10.

13 During oral argument counsel for plaintiff reiterated arguments that he intended to rely on
14 Dr. Smith's expert opinions but intended to call treating providers as "lay witnesses" concerning
15 their care of the plaintiff. All of the providers and custodians of records for each were listed
16 because defense counsel declined a request to stipulate that the medical records produced in
17 discovery were genuine, authentic and business records. Defense counsel conceded that he had
18 declined to stipulate because he thought plaintiff should be precluded from calling any providers
19 for the reasons stated in this and other motions. However, it is his general practice not to require
20 opposing counsel to call custodians so as not to waste the time and resources of the parties and
21 the court.

22 An opposing party is entitled to an expert disclosure from a non-retained expert, including
23 treating providers that identifies what opinions will be offered, and the bases for those opinions.
24 Rule 26(a)(2)(B) and Rule 26(a)(2)(C) share the same common purpose: to prevent unfair surprise
25 and to conserve resources.

26 Having reviewed and considered the voluminous moving and responsive papers and
27 supporting exhibits, and the arguments of counsel at the hearing, the court finds that plaintiff has
28 failed to comply with the requirements of Rule 26(a)(2)(C) with respect to the treating providers

1 she intends to call at trial. However, preclusion of all of plaintiff's treating providers is simply too
2 harsh of a sanction under the circumstances. Rather than request that plaintiff supplement her
3 discovery responses to provide the information required by Rule 26(a)(2)(C), defendants waited
4 nearly four months, until after the close of discovery, to attempt to exclude all of plaintiff's treating
5 physician testimony. The court will therefore limit the number of providers who may provide
6 testimony, limit their testimony to treating physician/percipient testimony and opinions formed
7 during the course of treatment, and require plaintiff to serve supplemental disclosures for those
8 providers that fully comply with the requirements of Rule 26(a)(2)(C).

9 **IT IS ORDERED:**

- 10 1. Defendants'/Third-Party Plaintiffs' Motion to Strike Plaintiff's Treating Providers or,
11 Alternatively, to Preclude Plaintiff from Offering or Relying Upon any Expert
12 Testimony from Any of Her Treating Providers in Support of any Motion, at any
13 Hearing, or at Trial, and for Fees and Costs (ECF No. 109) is **GRANTED** to the extent
14 that:
- 15 a. Plaintiff is limited to calling a single ER treating physician, a single Mercy Air
16 provider, a single occupational therapist, and a single physical therapist.
 - 17 b. Plaintiff's treating providers may provide testimony as percipient witnesses to
18 the treatment of the plaintiff, and to render opinions formed during the course
19 of their treatment, which may include causation, future treatment and the extent
20 of disability to the extent those opinions were formed during the course of
21 treatment.
- 22 2. Plaintiff shall have until **September 12, 2017**, to serve opposing counsel with a list of
23 the four providers plaintiff elects to testify at trial within the limitations imposed by the
24 court along with a supplemental disclosure that fully complies with the requirements
25 of Rule 26(a)(2)(C).
- 26 3. The four provider limitation does not preclude plaintiff from calling custodians of
27 record witnesses in the event defense counsel declines to stipulated medical records
28 produced in discovery are genuine, authentic and business records.

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4. The court will conduct a follow up status and dispute resolution conference to address any remaining issues regarding plaintiff's Rule 26 (a)(2)(B) disclosures, including any request to depose these four witnesses before the October 11, 2017 mandatory settlement conference on **September 25, 2017, at 10:30 a.m., in Courtroom 3B.**

DATED this 11th day of September, 2017.


PEGGY A. ZEEN
UNITED STATES MAGISTRATE JUDGE