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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

THE STATE OF NEVADA, on relation of its  
Department of Transportation,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE  
TREASURY – INTERNAL REVENUE  
SERVICE, *et al.*,

Defendants.

Case No.: 2:16-cv-00665-APG-GWF

**ORDER**

This matter is before the Court on Plaintiff’s Motion to Strike Tio DiFederico’s Supplemental Report (ECF No. 45), filed on December 2, 2016. The Defendant Landowners filed their Response (ECF No. 60) on December 23, 2016 and Plaintiff filed its Reply (ECF No. 66) on January 9, 2017. The Court conducted a hearing in this matter on January 12, 2017.

**BACKGROUND**

This action arises out of the State of Nevada’s taking, or proposed taking, of a portion of the Defendants’ vacant land located on Martin Luther King Boulevard for “Project Neon,” a project to widen Interstate Highway 15 between Desert Inn Road and the U.S. 95;1-515 Interchange in Las Vegas, Nevada. The State filed its action to condemn the subject parcel in exchange for fair compensation on February 24, 2016 in the District Court, Clark County, Nevada. Defendant Internal Revenue Service removed the action to this court on March 25, 2016.

The Defendant Landowners allege a counterclaim for “precondemnation” damages. As stated in *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 229,181 P.3d 670 (2008), to support a claim for precondemnation damages, the landowner must allege facts showing an official action by the would-be

1 condemner amounting to an announcement of intent to condemn. Second, the landowner must show  
2 that the public agency acted improperly following the announcement of its intent to condemn.  
3 Unreasonable or extraordinary delay in moving forward with the condemnation proceeding can  
4 constitute improper action which causes damage to the landowner such as reduced market value of the  
5 property. In this case, the Defendant Landowners alleged that the State engaged in unreasonable or  
6 extraordinary delay that prevented them from developing an office building on the property. The  
7 Landowners seek precondemnation damages for rental income that they would have earned if they  
8 could have developed the property. They also seek interest and other charges on the promissory note  
9 for the purchase of the property, and attorneys' fees and architectural service fees relating to the  
10 rezoning of the property for commercial use.

11 The discovery plan and scheduling order entered on May 10, 2016 provided that initial expert  
12 witness disclosures were due on September 20, 2016, rebuttal expert witness disclosures were due on  
13 October 20, 2016 and discovery would close on November 21, 2016. *Scheduling Order (ECF No. 20)*.  
14 On September 20, 2016, the court granted the parties' stipulation to extend the initial expert witness  
15 disclosure deadline to September 27, the rebuttal expert witness disclosure deadline to October 27, and  
16 the close of discovery to November 28, 2016. *Order (ECF No. 29)*.

17 On September 27, 2016, Plaintiff State of Nevada disclosed its appraiser expert witness, Tami  
18 L. Campa, and produced a copy of her September 27, 2016 report which valued the Defendant  
19 Landowner's just compensation claim at \$167,000 for the diminished value of the property resulting  
20 from the partial taking. *Motion (ECF No. 45)*, Exhibit 4 (Plaintiff's Initial Expert Disclosure).  
21 On that same date, the Defendant Landowners disclosed Tio DiFederico, a real estate appraiser, as their  
22 expert witness, and produced a copy of his September 27, 2016 report which valued the Defendant  
23 Landowners' just compensation claim at \$215,000 for the reduced value of the property and for a  
24 temporary construction easement. *Motion (ECF No. 45)*, Exhibit 3 (Defendant Landowners' Second  
25 Supplement to List of Witnesses and Production of Documents) ("Second Supplement").

26 Defendant Landowners' Second Supplement also stated that Defendants Darrell Jackson,  
27 Thomas Strawn, Jr. and Andrew Levy would testify "regarding all of the facts and circumstances  
28 surrounding the taking and damaging of the subject property, including precondemnation damages." *Id.*

1 Under the computation of damages section, the Second Supplement stated that the Defendant  
2 Landowners' precondemnation damages include the loss of rental income and lost  
3 development/professional expenses for the office building they were unable to build due to Project  
4 Neon. *Id.* The Defendant Landowners further stated that they would be "timely supplementing their  
5 calculation of lost rental income upon review and consideration of the expert's value opinions." *Id.*  
6 The Defendant Landowners served their Third Supplement to List of Witnesses and Production of  
7 Documents ("Third Supplement") on October 13, 2016. *See Plaintiff's Motion to Compel (ECF No.*  
8 *41)*, Exhibit 3. The Third Supplement amended the Defendant Landowners' computation of  
9 precondemnation damages by stating a claim for lost rental damages of \$107,000 per year from May  
10 2010 to present. *Id.* Alternatively, the Defendant Landowners claimed lost rental income of  
11 approximately \$474,754, that with interest yields a total lost rental income claim of \$555,732 to  
12 \$665,075. *Id.*

13 On October 21, 2016, the Court granted the parties' stipulation to extend the rebuttal expert  
14 witness disclosure deadline to November 3, 2016. *Order (ECF No. 36)*. On November 2, 2016, the  
15 Court granted the parties' stipulation to further extend the rebuttal expert witness disclosure deadline to  
16 November 17, 2016 and the discovery cut-off date to January 27, 2017. *Order (ECF No. 39)*.

17 On November 17, 2016, Plaintiff disclosed four rebuttal expert witnesses "to rebut the alleged  
18 pre-condemnation damages proffered by the individual Defendants." *Reply (ECF No. 66)*, pgs. 4-5.  
19 Plaintiff states that these rebuttal experts "are expected to testify regarding the opinions in their rebuttal  
20 reports which relate to Defendants' alleged pre-condemnation damages as set forth in Defendants'  
21 'computation of damages' disclosed on September 27, 2016 and October 13, 2016." *Id.* at pgs. 4-5.  
22 One of these rebuttal experts is Plaintiff's appraiser, Tami L. Campa.

23 On November 17, 2016, the Defendant Landowners served their Fourth Supplement to List of  
24 Witnesses and Production of Documents ("Fourth Supplement"). *Motion (ECF No. 45)*, Exhibit 6. The  
25 Fourth Supplement states that the Defendant Landowners' appraiser expert witness, Mr. DiFederico,  
26 will also testify regarding their claim for precondemnation damages. *Id.* The Defendant Landowners  
27 produced a November 17, 2016 report by Mr. DiFederico, entitled "A Supplemental Analysis," which  
28 analyzes the Defendant Landowners' precondemnation damages claim. Mr. DiFederico states that the

1 Defendant Landowners suffered a loss of rental income from June 2010 to February 2016 in the amount  
2 of \$240,000. *Id.* He applies 12 % compound interest to this amount from June 2010 apparently to the  
3 date of his report, for total lost rental income damages in the amount of \$473,717.14. *Id.*

4 Plaintiff moves to strike Mr. DiFederico's November 17, 2016 report on the grounds that the  
5 report is not a proper supplement to his previous expert report; nor is it a rebuttal expert report.

#### 6 DISCUSSION

7 Rule 26(a)(2)(D) of the Federal Rules of Civil Procedure provides that a party must make its  
8 expert witnesses disclosures at the times and in the sequences that the court orders. Absent stipulation  
9 or court order, the rule provides that "the disclosures must be made: (i) at least 90 days before the date  
10 set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or  
11 rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C),  
12 within 30 days after the other party's disclosure." This District's Local Rule (LR) 26-1(b)(3) states that  
13 "[u]nless the discovery plan otherwise provides and the court so orders" expert witness disclosures  
14 must be made 60 days before the discovery cut-off date and rebuttal-expert disclosures must be made  
15 30 days after the initial disclosure of experts. In this case, the original discovery plan and scheduling  
16 order and the first stipulation and order extending the expert disclosure deadlines followed the sequence  
17 set forth in LR 26-1(b)(3). After the parties made their initial expert witness disclosures, the Court  
18 extended the deadline date for rebuttal expert disclosures to November 17, 2016.

19 Rule 26(a)(2)(E) states that parties must supplement their disclosures when required under Rule  
20 26(e). Rule 26(e)(2), in turn, states that for an expert whose report must be disclosed under Rule  
21 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to  
22 information given during the expert's deposition. Any additions or changes to this information must be  
23 disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

24 Mr. DiFederico's November 17, 2016 report does not constitute a rebuttal expert report within  
25 the meaning of Rule 26(a)(2)(D)(ii). "A rebuttal expert may only testify after the opposing party's initial  
26 expert witness testifies." *LaFlamme v. Safeway, Inc.*, 2010 WL 3522378, \*2 (D.Nev. Sept. 2, 2010)  
27 (citing *Linder v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Hawai'i 2008)). "Specifically,  
28 rebuttal expert testimony must address the 'same subject matter' identified by the initial expert."

1 (citations omitted). In other words, “[a] rebuttal expert report is not the proper place for presenting new  
2 arguments.” *Id.* (quoting *Trowbridge v. United States*, 2009 WL 1813767 at \*11 (D. Idaho June 25  
3 2009)); *see also Nunez v. Harper*, 2014 WL 979933, \*1 (D.Nev. 2014) and *R & O Const. Co. v. Rox*  
4 *Pro Int’l Grp., Ltd.*, 2011 WL 2923703 (D.Nev. July 18, 2011).

5 In *Internet Services LLC v. Immersion Corp.*, 2008 WL 2051028 (N.D. Cal. May 13, 2008), the  
6 defendant disclosed two expert witness reports on the rebuttal expert witness disclosure deadline even  
7 though the plaintiff had not previously disclosed any expert witnesses. In granting plaintiff’s motion to  
8 strike the defendant’s experts’ reports, the court stated:

9 Here, because there were no opening expert reports, the [defendant’s  
10 experts’] reports are not rebuttal reports “intended solely to contradict or  
11 rebut evidence of the same subject matter” contained in initial expert  
12 reports and therefore are untimely. *See Jarritos v. Los Jarritos*, 2007 WL  
13 1302506 (N.D.Cal. May 2, 2007) (White, J) (holding that there was no  
14 showing of substantial justification or harmlessness for some expert  
15 reports that were not timely served and that were not actually in rebuttal  
16 to the opening expert reports); *United States v. Southern Cal. Edison Co.*,  
17 U.S. Dist. LEXIS 24592, \*, n. 2 (E.D. Cal. Sept. 23, 2005) (striking  
expert report that was not truly in rebuttal to an initial expert report: . . . );  
*see also 3M Innovative Properties Co. v. Barton Nelson, Inc.*, 2004 WL  
1774528 at \*5 (D. Minn. August 8, 2004) (stating that “On October 17,  
200[3], 3M submitted “Rebuttal Expert Reports” of Dr. Payne and Dr.  
Anderson. However, as noted above, neither party made expert  
disclosures by September 3, 2003, as required by the scheduling order.  
Therefore, absent any initial expert report to rebut, these reports must be  
excluded. Barton Nelson’s motion is granted on this point.”).

18 In *Carroll v. Allstate Ins. Co.*, 2013 WL 3810864, \*5 (D.Colo. July 22, 2013), the court also  
19 struck plaintiff’s purported rebuttal expert reports, stating that “Defendant did not designate any  
20 affirmative expert witness. . . . As a result, Plaintiff’s purported rebuttal experts cannot possibly be  
21 offering evidence to rebut any affirmative expert witnesses.”

22 In this case, the Defendant Landowners did not initially disclose a retained expert witness, as  
23 defined in Rule 26(a)(2)(B), to testify on their claim for precondemnation damages. The Defendant  
24 Landowners, instead, stated that Defendants Jackson, Strawn and Levy would testify in support of this  
25 claim. Plaintiff apparently viewed the individual Defendant Landowners as non-retained expert  
26 witnesses who may provide expert testimony without being required to prepare written reports or  
27 comply with the other provisions of Rule 26(a)(2)(B). Accordingly, Plaintiff disclosed four expert  
28 witnesses to rebut the testimony of Defendants Jackson, Strawn and Levy with respect to the

1 counterclaim for precondemnation damages. The Defendant Landowners have not disputed the  
2 propriety of Plaintiff's rebuttal expert disclosures. Although the Court has not been provided with  
3 Plaintiff's rebuttal experts' reports, it is evident from the circumstances that they are directed at  
4 rebutting the Defendant Landowners' computation of precondemnation damages and other information  
5 that the Defendant Landowners disclosed about that claim prior to November 17, 2016. Mr.  
6 DiFederico's November 17, 2016 report is not a rebuttal report because Plaintiff did not disclose any  
7 experts to testify in regard to the Defendant Landowners' precondemnation damages claim prior to that  
8 date.

9 Mr. DiFederico's November 17, 2016 report is also not a proper supplement under Rule  
10 26(a)(2)(E) or (e). His initial expert report addressed only the Defendant Landowners' just  
11 compensation claim relating to the diminished value of the property resulting from the partial taking. It  
12 did not address the Defendant Landowners' counterclaim for precondemnation damages. As stated in  
13 *Hologram USA, Inc. v. Pulse Evolution Corporation*, 2016 WL 3965190, \*2 (D.Nev. July 7, 2016):

14 Rule 26(e) "creates a duty to supplement, not a right." *Luke v. Family*  
15 *Care & Urgent Med. Clinics*, 323 Fed.Appx. 596, 500 (9th Cir. 2009).  
16 Supplementation "means correcting inaccuracies, or filling the interstices  
17 of an incomplete report based on information that was not available at the  
18 time of initial disclosure." *Id.* (citing *Keener v. United States*, 181 F.R.D.  
19 639, 640 (D. Mont. 1998). It is not "a loophole through which a party  
20 who submits partial expert witness disclosures, or who wishes to revise  
21 her disclosures in light of her opponent's challenges to the analysis and  
22 conclusions therein, can add to them to her advantage after the court's  
23 deadline for doing so has passed." *Id.*

20 Absent a stipulation by the parties or leave of court, an expert witness cannot "supplement" his  
21 initial report under Rule 26(a)(2)(B) by providing opinions on a completely different claim that was not  
22 addressed in the initial report.

23 Rule 37(c)(1) states that if a party fails to provide information or identify a witness as required  
24 by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a  
25 motion, or hearing, or at trial, unless the failure was substantially justified or is harmless. In addition to  
26 or instead of this sanction, the court may order the payment of reasonable expenses, including  
27 attorney's fees caused by the failure, may inform the jury of the party's failure, and may impose other  
28 appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). The burden is upon

1 the disclosing party to show that the failure to disclose was substantially justified or harmless. *Yeti by*  
2 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). Rule 37(c)(1) does not  
3 require the court in all instances to exclude evidence as a sanction for late disclosure that is neither  
4 justified nor harmless. In *Wendt v. Host International, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997), the  
5 court stated that the following factors should be considered in deciding whether an untimely disclosed  
6 expert witness should be precluded: (1) the public's interest in expeditious resolution of litigation, (2)  
7 the court's need to manage its docket, (3) the risk of prejudice to the other parties, (4) the public policy  
8 favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions. The court  
9 in *University of Pittsburgh*, 2006 WL 837606, \*1 (C.D. Cal. Oct. 3, 2006) stated that application of the  
10 *Wendt* factors is limited to cases in which the severe sanction of dismissal or default is sought. *Wendt*,  
11 however, did not state that these factors should only be considered if the preclusion order would result  
12 in dismissal. See *NW Pipe Co. v. DeWolff, Boberg and Associates, Inc.*, 2012 WL 137585, \*3 (C.D.  
13 Cal. Jan. 17, 2012) (discussing application of the *Wendt* factors on a motion to preclude testimony on  
14 damages not included in plaintiff's computation of damages). If preclusion of evidence will eliminate  
15 the plaintiff's damages claim, however, this weighs in favor of a lesser sanction. *Id.* at \*4.

16 Consideration of the *Wendt* factors weighs in favor of striking Mr. DiFederico's November 17,  
17 2016 report. The Defendant Landowners made an apparent decision prior to the September 27, 2016  
18 initial expert witness disclosure deadline to present their precondemnation damage claim through the  
19 testimony of the Defendants Jackson, Strawn and Levy. Plaintiff's experts prepared their rebuttal  
20 opinions to respond to that testimony. As evidenced by the October 20, 2016 stipulation and order  
21 extending the rebuttal expert disclosure deadline, the Defendant Landowners knew that Plaintiff  
22 intended to disclose an expert to rebut the Defendant Landowners' testimony. *Stipulation and Order*  
23 *(ECF Nos. 34, 36)*. The Defendant Landowners should have notified Plaintiff substantially before  
24 November 17, 2016 that Mr. DiFederico was preparing an expert report on precondemnation damages  
25 so that if such a report was allowed, Plaintiff's experts could await receipt of that report prior to  
26 preparing their rebuttal reports. If the Defendant Landowners are now permitted to introduce Mr.  
27 DiFederico's opinions on precondemnation damages, Plaintiff's experts would have to be given the  
28 opportunity review his report and revise their rebuttal opinions. Although this could be done, it would

1 result in additional expense to Plaintiff that could have been avoided if Mr. DiFederico's report on  
2 precondemnation damages had been timely disclosed. Permitting Mr. DiFederico's report would also  
3 require the reopening of discovery. Moreover, the Defendant Landowners have made clear that they  
4 still intend to pursue recovery of precondemnation damages based on Defendants Jackson, Strawn and  
5 Levy's significantly higher estimates of those damages. Mr. DiFederico's November 17, 2016 opinions  
6 are, in effect, an alternative basis for recovery if the jury does not accept the Defendant Landowners'  
7 testimony. It therefore does not appear that the Defendant Landowners will be precluded from pursuing  
8 their claim for precondemnation damages if Mr. DiFederico's untimely report is excluded.

9 **CONCLUSION**

10 The Defendant Landowners' failure to timely disclose Mr. DiFederico's November 17, 2016  
11 report was not substantially justified or harmless. Consideration of the *Wendt* factors does not favor  
12 excusing the Defendant Landowners' failure to disclose the report. Accordingly,

13 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Strike Tio DiFederico's Supplemental  
14 Report (ECF No. 45) is **granted**.

15 DATED this 18th day of January, 2017.

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17   
18 GEORGE FOLEY, JR.  
United States Magistrate Judge