

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 Darlene Isaac, *et al.*,

5 Plaintiffs,

6 v.

7 Nicolas Forcillo, *et al.*,

8 Defendants.

Case No. 2:19-cv-01452-KJD-BNW

ORDER re ECF Nos. 68 and 70

9
10 Before the Court, without oral argument, is Defendants' motion to strike Plaintiffs' untimely
11 expert reports and animation. ECF Nos. 68, 70. Plaintiffs opposed at ECF No. 73, and Defendants
12 replied at ECF No. 75. The Court requested supplemental briefing that the parties provided at ECF
13 Nos. 83 and 84.

14 For the reasons discussed below, the Court declines to impose the extreme exclusion
15 sanctions under Fed. R. Civ. P. 37(c)(1).¹ To the extent Defendants contend that Plaintiffs' expert
16 disclosures were incomplete and have prejudiced them, the fact that the Court will re-open expert
17 discovery for Defendants and direct Plaintiffs to bear the associated costs will cure any harm.
18 *See Holen v. Jozic*, No. C17-1147JLR, 2018 WL 5761775, at *2 (W.D. Wash. Nov. 2, 2018).
19 ("District courts are given 'particularly wide latitude' in determining whether to issue sanctions,
20 including the exclusion of evidence, under Rule 37(c)(1).") (quoting *Bess v. Cate*, 422 F. App'x 569,
21 571 (9th Cir. 2011)).

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24 ¹ The Court also highlights the plain language of Rule 37(c)(1). Rule 37(c)(1) provides courts with the discretion to
exclude improper Rule 26 disclosures that are not "substantially justified" or "harmless." But it also allows courts to
impose additional or *alternate* sanctions:

25 If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not
26 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless
the failure was substantially justified or is harmless. In addition to or **instead of this sanction**, the court, on
27 motion and after giving an opportunity to be heard, (A) may order payment of the reasonable expenses,
including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may
impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

28 Rule 37(c)(1) (emphasis added).

1 **I. Expert Reports**

2 It is undisputed that the initial and rebuttal expert disclosure deadlines were January 19, 2021
3 and February 19, 2021, respectively. ECF No. 67. It also is undisputed that, on August 12, 2021,
4 Plaintiffs served their Third Supplemental Disclosure of Expert and Rebuttal Witnesses with six
5 previously undisclosed reports. What is, however, disputed is whether Plaintiffs’ disclosures
6 constituted “supplemental” disclosures, were “timely,” or were otherwise “substantially justified”
7 or “harmless” in their untimeliness.

8 Defendants argue that these reports are not supplements and that their disclosure was
9 untimely. ECF No. 68 at 5. They further contend that the delay in disclosure “is without justification”
10 and the “prejudice to the defense is obvious[,]” noting that Plaintiffs had “an unfair advantage of
11 having access to the entirety of Defendants’ expert opinions prior to preparing the untimely reports”
12 and that many of these disputed reports were not produced until “after many expert depositions were
13 completed.” *Id.* at 5, 10. Defendants’ concern, at least with respect to expert depositions, appears
14 focused on the disputed animation video. *Id.* at 10.

15 Plaintiffs counter that the disputed reports were “supplemental and rebuttal reports [that]
16 were disclosed by the close of discovery.” ECF No. 73 at 4. Without conceding the timeliness of the
17 reports, they also claim that any delay in their disclosure was “because the previous supervising
18 attorney on this case left” Plaintiffs’ counsel’s firm. *Id.* Plaintiffs further explain that the disputed
19 reports were disclosed “before the deposition of a number of experts” and, where the disclosure took
20 place after the expert’s deposition, there was no prejudice because Defendants asked for the expert’s
21 opinion that was also discussed in the disputed report. *Id.* at 4–5.

22 **A. Legal Standard**

23 Fed. R. Civ. P. 26(a)(2)(C) states that a party must make expert disclosures “at the times and
24 in the sequence that the court orders.” “If a party fails to provide information or identify a witness
25 as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply
26 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is
27 harmless.” Fed. R. Civ. P. 37(c)(1). A court must exercise its broad discretion in determining whether
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1 exclusion sanctions should be ordered, but if either exception is established, the court cannot impose
2 such sanctions. *Silvagni v. Wal-Mart Stores, Inc.*, 320 F.R.D. 237, 242 (D. Nev. 2017) (citing Fed.
3 R. Civ. P. 37(c)(1)); *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010).

4 To determine whether a violation is either substantially justified or harmless,² a court
5 considers several factors, including (1) the prejudice or surprise to the party against whom the
6 evidence is offered, (2) the ability of that party to cure the prejudice, (3) the likelihood of disruption
7 at trial, and (4) bad faith or willfulness involved in not timely disclosing the evidence. *Lanard Toys*
8 *Ltd.*, 375 F. App'x at 713. This is “an equitable analysis entrusted to the Court’s discretion.” *Silvagni*,
9 320 F.R.D. at 242 (citing *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th
10 Cir. 2011)) (exercising discretion to deny exclusion sanction as a matter of “fairness” and to avoid
11 an “unjust” result).

12 If the court finds that a violation was neither substantially justified nor harmless, it must
13 then consider another set of factors in determining whether Rule 37(c)(1) exclusionary sanctions
14 are appropriate.³ *Nat'l R.R. Passenger Corp. v. Young's Com. Transfer, Inc.*, No.
15 113CV01506DADEPG, 2016 WL 1573262, at *2 (E.D. Cal. April 19, 2016). The five factors are
16 (1) the public’s interest in expeditious resolution of litigation, (2) the court’s need to manage its
17 docket, (3) the risk of prejudice to the defendants, (4) the public policy favoring disposition of
18 cases on their merits, and (5) the availability of less drastic sanctions. *Wendt v. Host Int'l, Inc.*,
19 125 F.3d 806, 814 (9th Cir. 1997) (citing *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir.
20 1990)).

21 **B. Disputed Reports**

22 Here, expert disclosures are governed by this Court’s August 18, 2021 Scheduling Order that
23 set discovery to close on November 6, 2021 and maintained the initial and rebuttal expert disclosure
24 deadlines of January 19, 2021 and February 19, 2021, respectively. ECF No. 67.

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27 ² While substantial justification “implicates the reason for the delay,” harmless “requires inquiry into resulting
28 prejudice.” *St. John v. Toyota Motor Sales, U.S.A., Inc.*, No. 810ML2151JVSFMOX, 2013 WL 12182029, at *2 (C.D.
Cal. Aug. 20, 2013) (citations omitted).

³ Neither party addressed this legal standard in their initial or supplemental briefs.

1 With respect to the six disputed expert reports, the Court first must determine whether each
2 disclosure was a proper supplemental disclosure under Fed. R. Civ. P. 26. If it finds that it was not,
3 it next must determine whether the improper disclosure was either “substantially justified” or
4 “harmless.” Finally, if it finds that the disclosure was untimely, not substantially justified, and not
5 harmless, it must consider the five factors discussed above to determine whether imposing exclusion
6 sanctions is appropriate.

7 As a threshold matter, the Court finds that this matter is ripe to decide, as Plaintiffs have
8 noted in the proposed joint pretrial order (ECF Nos. 87, 90) that they will attempt to use the disputed
9 expert reports at trial. *See, e.g., Elizondo v. SeaWorld Parks & Ent., Inc.*, No. 20-CV-00829-GPC-
10 BGS, 2021 WL 1626320, at *2 (S.D. Cal. Apr. 27, 2021).

11 **i. Kenneth Hogan, D.C.**

12 By way of background, on February 19, 2021, Plaintiffs filed an emergency motion seeking
13 a one-week extension (from February 19, 2021 to February 26, 2021) to disclose Dr. Hogan’s
14 rebuttal report. ECF No. 56. Because Plaintiffs noted that they were unable to properly confer with
15 Defendants, the Court issued a minute order directing the parties to meet and confer about the
16 proposed extension by February 26, 2021. ECF No. 57. In that same minute order, the Court directed
17 Plaintiffs to withdraw their motion by February 26, 2021 if they were able to resolve the matter
18 through the conferral process. Plaintiff subsequently withdrew their emergency motion on February
19 26. ECF No. 58.

20 In their supplemental briefing, Defendants withdrew their objection to Dr. Hogan’s February
21 23, 2021 report, noting, however, that the withdrawal was limited only to the instant motion to strike.
22 ECF No. 83 at 9. In light of the withdrawal, the Court will deny Defendants’ motion to strike Dr.
23 Hogan’s February 23, 2021 report as moot.

24 **ii. Travis Snyder, D.O.**

25 Dr. Snyder authored an initial report on October 19, 2020. ECF No. 84-2 at 2. Plaintiffs
26 disclosed that report on January 19, 2021, the deadline for initial disclosures. ECF No. 84-10 at 18–
27 22.

1 According to Plaintiffs, Dr. Snyder authored a “supplemental” report on April 16, 2021 after
2 receiving and reviewing a 2017 imaging study. ECF No. 84-3 at 3. Plaintiffs subsequently disclosed
3 the “supplemental” report on August 12, 2021. ECF No. 84 at 5.

4 Although the imaging study—a lumbar spine MRI—was performed in 2017 (and several
5 years before Dr. Snyder authored the initial report) Plaintiffs explain that, despite their requests for
6 the films, Defendants did not provide them with the study until “two days before the expert
7 disclosure deadline[.]”⁴ *Id.* at 4–5. And because of this last-minute disclosure, Dr. Snyder was unable
8 to review and update his report before the initial disclosure deadline. *Id.* Nonetheless, Dr. Snyder’s
9 opinions did not change after reviewing this 2017 study. *Id.* at 5. But, as Defendants correctly point
10 out, Dr. Snyder’s “supplemental” report referenced more than the 2017 MRI; it also referenced two
11 additional lumbar spine X-rays dated August 29, 2018 and October 12, 2018, respectively, and a
12 sinus CT dated February 5, 2020. ECF No. 83 at 7; ECF No. 84-3 at 3–4. Defendants also state that
13 “[e]ach of these studies was available long before the initial expert disclosure deadline.” ECF No.
14 83 at 7. But they do not explain how Dr. Snyder had these studies available to him at the time of the
15 initial disclosure deadline.

16 The Court finds that Dr. Snyder’s disputed report was a supplemental disclosure. *Burger v.*
17 *Excel Contractors, Inc.*, No. 2:12-cr-01634-APG-CWH, 2013 WL 5781724, at *3 (D. Nev. Oct. 25,
18 2013) (setting out a two-part test in determining whether a supplement is really supplemental
19 under Rule 26(e): “(1) whether the supplemental information corresponds to a prior Rule
20 26(a) disclosure and, if so, (2) whether the supplemental information was available at the time set
21 for the initial disclosure”). First, Plaintiffs disclosed Dr. Snyder’s original report to Defendants with
22 their initial expert disclosures. ECF No. 84-10 at 18–22. Defendants were, therefore, on notice that
23 Dr. Snyder was a retained expert and of the extent of his testimony, which he affirmed following a
24 review of additional diagnostic studies. *Compare* ECF No. 84-2 at 2–9 *with* ECF No. 84-3 at 2–10.
25 Second, it appears that the supplemental imaging studies that Dr. Snyder reviewed in his disputed

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27 ⁴ Plaintiffs state that Defendants did not disclose the imaging study until “1/7/21,” though they also explain that this
28 disclosure came only two days before the expert disclosure deadline. ECF No. 84 at 4. Given that the initial expert
disclosure deadline was January 19, 2021, the Court understands the reference to January 7 (rather than January 17)
to be a typographical error.

1 report were not reasonably available to him at the time of the initial disclosure deadline. *See* ECF
2 No. 84 at 4. Thus, Plaintiffs were not designating an entirely new expert under the guise of a
3 supplemental disclosure. They were, instead, fulfilling their obligation to supplement under Fed. R.
4 Civ. P. 26(e).

5 Plaintiffs could (and should) have disclosed Dr. Snyder’s supplemental report to Defendants
6 as soon as they received it in April 2021 (and the Court admonishes Plaintiffs’ counsel for not doing
7 so). But, at the same time, Defendants have not been prejudiced in that they were able to depose Dr.
8 Snyder about his opinions discussed in the supplemental report. *See, e.g.*, ECF No. 84-5 at 4, 11,
9 13–16. Plaintiffs disclosed the supplemental report on August 12, 2021, and Defendants deposed
10 Dr. Snyder about a month later, on September 20, 2021.⁵ *Compare* ECF No. 68 at 10 *with* ECF No.
11 84-5 at 2. At that deposition, Defendants acknowledged that “there is a second report that was
12 recently produced. It’s dated April 16, 2021, but it’s the subject of a discovery dispute, so I would
13 like to focus on the initial report.” ECF No. 84-5 at 4. However, later in the deposition, Dr. Snyder,
14 in responding to Defendants’ questions regarding whether Plaintiff Harold Howman’s injuries were
15 acute, repeatedly referenced the September 2017 MRI. *Id.* at 13–14.

16 Therefore, even assuming that Dr. Snyder’s April 2021 report was untimely and that its
17 untimeliness was not substantially justified, the Court finds that Defendants were not harmed, as
18 they had an opportunity to question Dr. Snyder about the disputed report at his deposition that was
19 scheduled more than five weeks after receiving the disputed report. *See NeSmith v. Cty. of San Diego*,
20 No. 15-CV-629 JLS (AGS), 2022 WL 272011, at *16 (S.D. Cal. Jan. 28, 2022); *Wong v. Regents of*
21 *Univ. of California*, 410 F.3d 1052, 1060 (9th Cir. 2005) (explaining that “[d]eadlines must not be
22 enforced mindlessly, of course”); *Southridge P’ship v. Aspen Specialty Ins. Co.*, No. C08-0931-JCC,
23 2010 WL 11523561, at *2 (W.D. Wash. Jan. 7, 2010) (“Although Plaintiff’s counsel appears to have
24 been less rigorous in the preparation for trial than the Court would hope, its actions were harmless.
25 Defendant has been familiar with [the expert’s] opinions since the outset of trial and has already had
26 an opportunity to depose him.”).

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28 ⁵ Defendants filed the instant motion to strike on September 24, 2021. *See* ECF Nos. 68, 70.

1 Additionally, the Court finds that there is minimal likelihood of disruption at trial, as trial is
2 set for at least eight months away and neither party has filed dispositive motions. *See* ECF No. 90
3 (“Jury Trial set for 12/5/2022 at 09:00 AM in LV Courtroom 4A before Judge Kent J. Dawson”).
4 Moreover, the Court does not find that Plaintiffs acted with bad faith or willfulness in not timely
5 disclosing the evidence. Rather, it accepts Plaintiffs’ representation that the “third expert supplement
6 was delayed in their submission because the previous supervising attorney on this case left”
7 Plaintiffs’ counsel’s firm.⁶ ECF No. 84 at 3.

8 Accordingly, the Court will not strike Dr. Snyder’s supplemental report.

9 **iii. David Oliveri, M.D.**

10 Plaintiffs timely disclosed Dr. Oliveri’s initial report and first supplemental report. At dispute
11 is whether his third report dated March 29, 2021, and disclosed on August 12, 2021, is actually a
12 supplement or an untimely rebuttal report.

13 In the disputed report, Dr. Oliveri noted that he reviewed additional information, including
14 four imaging records, eight rebuttal reports, and MCV Physicians records and billings. ECF No. 69
15 at 16. He concluded that “[b]ased on my review of the other information and my review of my initial
16 report and two supplemental reports, my previously outlined conclusions and opinions are
17 unchanged.” *Id.* at 35. He also explained that his “direct review of imaging is consistent with
18 assumptions made when I authored my reports.” *Id.* Finally, he stated that he does not have
19 “comments with respect to the radiology rebuttal by Dr. Posin[,] the biomechanical analysis of Brian
20 Jones[, or] the rebuttal by Dr. Larmore.” *Id.*

21 Here, the Court finds that the third report is not entirely supplemental as Dr. Oliveri’s
22 opinion, though unchanged and not exceeding the scope of the first two reports, relied on eight
23 rebuttal reports, four imaging studies, and another set of medical records that either were or should
24 have been available to him at the time he submitted his first supplemental report on February 19,
25 2021. *See* Fed. R. Civ. P. 26(e); *see also* *Burger*, 2013 WL 5781724, at *3.

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28 ⁶ This explanation is further supported by the stipulations to extend discovery deadlines and their reference to personal
issues affecting Plaintiffs’ counsel. *See, e.g.*, ECF No. 66 at 4.

1 As noted above, and as Defendants correctly state, Fed. R. Civ. P. 26(e)'s supplementation
2 "means correcting inaccuracies, or filling the interstices of an incomplete report based on
3 information that was not available at the time of the initial disclosure." *Lo v. United States*, No. 2:17-
4 CV-01202-RAJ, 2021 WL 5121745, at *1 (W.D. Wash. Nov. 3, 2021) (citations omitted). Plaintiffs
5 do not argue that Dr. Oliveri's third report is correcting inaccuracies. Rather, their position is that
6 the doctor was updating his report because he did not have several medical records and expert reports
7 available to him prior to the February 19, 2021 rebuttal expert disclosure deadline. However, these
8 records appeared to have been disclosed by Defendants in March 2020, December 2020, and
9 February 2021. With respect to the February 2021 disclosures, Plaintiffs could have moved for an
10 extension (as they did with Dr. Hogan's rebuttal report). But they did not.

11 Having found that Dr. Oliveri's disputed report was not a supplement, the Court next
12 considers whether the failure to timely provide this third report was substantially justified or
13 harmless under Fed. R. Civ. P. 37(c)(1).

14 Assuming that the February 12, 2021 disclosures were not "reasonably" available to Dr.
15 Oliveri in time for him to meet the February 19, 2021 deadline, Plaintiffs have not explained how
16 the March and December 2020 disclosures were not "reasonably" available to him. As such, the
17 Court finds that Plaintiffs have not met their burden in showing that their untimely disclosure of Dr.
18 Oliveri's third report was substantially justified.

19 The Court next considers whether the untimely disclosure harmed Defendants. Defendants
20 speak generally about the prejudice that they will experience. They note that they have deposed
21 many of Plaintiffs' experts, though it is unclear, from the moving papers, whether they deposed Dr.
22 Oliveri prior to the disclosure of the disputed report. *See* ECF No. 68 at 10. That said, the Court was
23 able to confirm that Defendants deposed Dr. Oliveri on July 28, 2021, a few weeks before Plaintiffs
24 disclosed the disputed report. ECF No. 73 at 9. Defendants also generally argue that Plaintiffs have
25 "an unfair advantage of having access to the entirety of Defendants' experts' opinions prior to
26 preparing the untimely reports." ECF No. 68 at 10. While many of the disputed reports were written
27 prior to the disclosure deadlines, Dr. Oliveri's was written after—on March 29, 2021. ECF No. 84-
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1 7 at 2. Finally, Defendants claim, without any specificity, that their experts “may” need to update
2 their rebuttal reports. ECF No. 68 at 10.

3 While this untimely disclosure of Dr. Oliveri’s third report could prejudice Defendants, there
4 is time to cure this minimal prejudice.⁷ First, despite being written after the rebuttal disclosure
5 deadlines, Dr. Oliveri’s report reads almost verbatim to his second report that was timely disclosed.
6 *Compare* ECF No. 84-6 with ECF No. 84-7. Aside from summarizing four imaging studies and eight
7 expert reports, his diagnoses and findings remain unchanged from his second (and timely) disclosed
8 report. *Compare* ECF No. 84-6 at 19 with ECF No. 84-7 at 21–22. Second, unlike in *Yeti by Molly*,
9 259 F.3d at 1105, where the disclosures occurred only 28 days before trial, there are still almost 8
10 months until trial in this case. Moreover, at the time Defendants filed the instant motion, there
11 remained over one month until discovery closed. Additionally, no dispositive motions have been
12 filed. Furthermore, the Court does not find that Plaintiffs acted with bad faith or willfulness in not
13 timely disclosing the evidence.

14 Thus, if Defendants find it necessary, there is time for the Court to reopen discovery for the
15 limited purpose of having Defendants re-depose Dr. Oliveri for the limited purpose of addressing
16 the additional imaging studies and reports⁸ and allowing Defendants’ rebuttal experts an opportunity
17 to update their reports in response only to the new language found in Dr. Oliveri’s third report.⁹ *See*,
18 *e.g.*, *Liberty Mut. Fire Ins. Co. v. Bosa Dev. Cal. II, Inc.*, No. 17CV666 AJB (BGS), 2019 WL
19 3554938, at *1 (S.D. Cal. Aug. 5, 2019) (finding that striking untimely disclosed expert reports was
20 “not warranted” and, instead, ordering the non-moving party to pay for the cost of deposing, for a
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22 ⁷ Even if the Court were to find that Plaintiffs’ untimely disclosures prejudiced Defendants and such prejudice could
23 not be cured, the Court does not find that the five *Wanderer* factors weigh in favor of imposing Rule 37(c)(1) exclusion
sanctions, particularly in light of the public policy favoring disposition of cases on their merits and the availability of
less drastic sanctions. *See Nat’l R.R. Passenger Corp.*, 2016 WL 1573262, at *2.

24 ⁸ The Court orders that this deposition, if it takes place, to last no longer than one hour, to occur via Zoom or in person,
and to take place within 30 days from the date of this Order. That additional deposition time cannot be spent for any
25 other purpose. It further orders Plaintiffs’ counsel to bear the cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL 3554938,
at *1.

26 ⁹ If they so choose, Defendants must obtain these rebuttal report(s) within 30 days from the date of this Order.
Plaintiffs’ counsel is ordered to bear the (reasonable) cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL 3554938, at *6
27 (noting that “there is time available to allow [the recipient of an untimely disclosure] a rebuttal expert(s) to respond
to the combined initial and supplemental reports of each expert, so [the party] has not been denied an opportunity to
28 fully rebut these opinions”).

1 second time, the expert who wrote the disputed report and further allowing the moving party an
2 opportunity to provide rebuttal expert(s)); *Corbrus, LLC v. 8th Bridge Cap., Inc.*, No.
3 219CV10182CASAFMX, 2021 WL 4439220, at *6 (C.D. Cal. Aug. 9, 2021) (permitting the parties
4 leave to re-open the depositions of the experts who provided untimely disclosures because the
5 moving party “argued that it may be prejudiced because it was not adequately prepared to cross
6 examine” the expert at his deposition).

7 **iv. William Muir, M.D.**

8 Dr. Muir prepared two reports that were timely disclosed by the initial and rebuttal expert
9 disclosure deadlines. ECF No. 83 at 6; ECF No. 84 at 8. At dispute is Dr. Muir’s third report dated
10 March 29, 2021. ECF No. 73 at 13; ECF No. 83 at 6–7. According to the report, Plaintiff’s expert
11 reviewed additional medical records (that Defendants argue were or should have been available to
12 him prior to the initial expert disclosure deadline) and rebuts several defense rebuttal expert reports.
13 ECF No. 83 at 6–7.

14 The Court finds that Dr. Muir’s disputed report is not entirely a supplement and, therefore,
15 is untimely. *See Bessler v. City of Tempe*, No. CV-19-04610-PHX-MTL, 2021 WL 3089104, at *12
16 (D. Ariz. July 22, 2021), *amended on reconsideration in part*, No. CV-19-04610-PHX-MTL, 2021
17 WL 4122247 (D. Ariz. Sept. 9, 2021) (internal quotation marks and citations omitted) (“Courts have
18 rejected supplemental expert disclosures where they attempted to deepen and strengthen the expert’s
19 prior reports with previously available information.”). This is so because it appears that—at least
20 with respect to the medical records—he had or should have had access to them prior to either expert
21 disclosure deadline. *See* ECF No. 84-9 at 4, 6 (Defendants’ disclosure of Holy Rosary Healthcare
22 and Ortho Montana records on March 23, 2020).

23 The Court next turns to whether this untimely disclosure was substantially justified or
24 harmless.

25 Plaintiffs have not met their burden in establishing that their untimely disclosure was
26 substantially justified (or even justified). They simply gloss over this issue. ECF No. 73 at 13–14.

1 Plaintiffs, however, do argue that disclosing the disputed report after Dr. Muir was deposed
2 is harmless, as his opinions “remained constant” except with respect to his opinion on defense expert
3 Kathleen Hartman’s report. *Id.* at 14. They further claim that even the changed opinion is harmless
4 because Defendants discussed this opinion at his deposition. *Id.* Defendants counter that Dr. Muir’s
5 disputed report is prejudicial because its untimely disclosure precluded Ms. Hartman from
6 addressing his opinions “either in a rebuttal report or at deposition.” ECF No. 75 at 5–6.

7 As discussed above, the Court finds that there is time to cure the prejudice.¹⁰ Thus, if
8 Defendants find it necessary, there is time for the Court to reopen discovery for the limited purpose
9 of having Defendants re-depose Ms. Hartman for the limited purpose of addressing Dr. Muir’s
10 opinions regarding her report¹¹ and allowing her to update her report in response to Dr. Muir’s third
11 report.¹²

12 **v. Thomas/Terrence Clauretje, Ph.D.¹³**

13 Plaintiffs timely disclosed Dr. Clauretje as an initial expert on January 19, 2021. ECF No.
14 83 at 8; ECF No. 84 at 9. On April 14, 2021, Dr. Clauretje authored a disputed report titled, in
15 pertinent part, “Response to the Rebuttal Reports of Dr. Eugenia Larmore, Ph.D.” ECF No. 83 at 8.

16 Defendants argue that Dr. Clauretje’s disputed report is a “sur-rebuttal report [that] should
17 be excluded at trial because the majority of documents relied upon were available prior to the initial
18 expert disclosure date.” *Id.* They further claim that his report “does not correspond to any of his
19 earlier reports and is inappropriate.” *Id.* They also generally note that their experts “were deprived
20 of the opportunity to address Mr. Clauretje’s additional opinions either in rebuttal reports or
21 deposition.” ECF No. 75 at 6.

22 ¹⁰ Even if the Court were to find that Plaintiffs’ untimely disclosures prejudiced Defendants and such prejudice could
23 not be cured, the Court does not find that the five *Wanderer* factors weigh in favor of imposing Rule 37(c)(1) exclusion
24 sanctions, particularly in light of the public policy favoring disposition of cases on their merits and the availability of
25 less drastic sanctions. *See Nat’l R.R. Passenger Corp.*, 2016 WL 1573262, at *2.

26 ¹¹ The Court orders that this deposition, if it takes place, to last no longer than one hour, to occur via Zoom or in
27 person, and to take place within 30 days from the date of this Order. That additional deposition time cannot be spent
28 for any other purpose. It further orders Plaintiffs’ counsel to bear the cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL
3554938, at *1.

¹² Ms. Hartman must update her report within 30 days from the date of this Order. The update is limited only to
replying to Dr. Muir’s opinions about her rebuttal report. Plaintiffs’ counsel is ordered to bear the (reasonable) cost.
See Liberty Mut. Fire Ins. Co., 2019 WL 3554938, at *6.

¹³ Defendants refer to Dr. Clauretje as Terrence Clauretje (ECF No. 83 at 8) whereas Plaintiffs refer to him as Thomas
Clauretje (ECF No. 73 at 15).

1 Plaintiffs counter that Defendants have not suffered any harm or prejudice as they were able
2 to question Dr. Clauretje about his opinions on Dr. Larmore’s report during his deposition, as he
3 specifically stated, on at least two occasions, that his opinions are “in response” to Dr. Larmore’s
4 findings. ECF No. 73 at 15–16.

5 When comparing Dr. Clauretje’s initial report (that was timely disclosed) with his disputed
6 report, it is clear, as Defendants argue, that the disputed report is exclusively a sur-rebuttal to defense
7 expert Dr. Larmore’s rebuttal report. *Compare* ECF No. 84-18 *with* ECF No. 84-20.

8 Although the Federal Rules of Civil Procedure are silent on sur-rebuttal expert reports, many
9 courts do not prohibit them, though they do require parties to seek leave of court before filing such
10 reports. *Canyon Ests. Condo. Ass’n v. Atain Specialty Ins. Co.*, No. 2:18-CV-01761-RAJ, 2020 WL
11 3048016, at *1 (W.D. Wash. June 8, 2020).

12 Here, Plaintiffs did not seek leave of court (or obtain a stipulation) before disclosing Dr.
13 Clauretje’s sur-rebuttal report. Thus, the Court finds that the report was improperly disclosed under
14 Fed. R. Civ. P. 26.

15 The Court next addresses whether sanctions under Fed. R. Civ. P. 37(c)(1) are appropriate.
16 As addressed earlier, whether Plaintiffs’ failure to properly disclose Dr. Clauretje’s disputed report
17 is subject to discovery sanctions turns on whether the failure was substantially justified or harmless.

18 Plaintiffs have not shown that the failure to properly disclose the disputed report was
19 substantially justified. But they have shown that it was harmless. The Court finds that there is time
20 to cure this prejudice and do so in a way that does not necessarily delay the case.¹⁴ Dr. Clauretje’s
21 report was provided before the close of discovery, sufficiently far before the trial date, and well
22 before dispositive motions deadlines. As such, the Court will reopen discovery for the limited
23 purpose of having Defendants re-depose Dr. Clauretje on his opinions related to Dr. Larmore’s
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27 ¹⁴ Even if the Court were to find that Plaintiffs’ untimely disclosures prejudiced Defendants and such prejudice could
28 not be cured, the Court does not find that the five *Wanderer* factors weigh in favor of imposing Rule 37(c)(1) exclusion
sanctions, particularly in light of the public policy favoring disposition of cases on their merits and the availability of
less drastic sanctions. *See Nat’l R.R. Passenger Corp.*, 2016 WL 1573262, at *2.

1 February 16, 2021 report¹⁵ and allowing Dr. Larmore an opportunity to update her report in response
2 to Dr. Clauretjie’s third report dated April 14, 2021.¹⁶

3 **vi. Ira Spector, M.S., C.R.C.**

4 Mr. Spector is a certified rehabilitation counselor whose initial and rebuttal expert reports
5 were timely disclosed on January 19, 2021 and February 19, 2021, respectively. *See* ECF No. 84-10
6 at 12; ECF No. 84-11 at 15. He authored a third “supplemental” report (dated March 17, 2021) that
7 opined on Plaintiff Darlene Isaac’s loss of earning capacity. ECF No. 69 at 36, 43. In authoring the
8 disputed report, Mr. Spector noted that he reviewed three additional documents: Ms. Isaac’s
9 deposition transcript, James Wilcher’s rebuttal and supplemental report dated February 15, 2021,¹⁷
10 and Eugenia Larmore’s economic loss of earning capacity report dated February 16, 2021. *Id.* at 36.
11 Mr. Spector’s report rebutted both Mr. Wilcher and Dr. Larmore’s opinions. *Id.* at 36–40.

12 Here, the Court finds that Mr. Spector’s disputed report is not entirely a supplement. While
13 the Court finds that Mr. Spector’s disputed report includes supplemental information that
14 corresponds to a prior Rule 26(a) disclosure, it also finds that this supplemental information was
15 available to him at the time he authored his second report. *See* Fed. R. Civ. P. 26(e). Specifically,
16 information relating to Ms. Isaac’s deposition transcript was, as Plaintiffs concede, available to Mr.
17 Spector well before his February 15, 2021 rebuttal report. ECF No. 84 at 11.

18 Having found that Mr. Spector’s disputed report was not entirely a supplement, the Court
19 next considers whether the failure to timely provide this third report was substantially justified or
20 harmless under Fed. R. Civ. P. 37(c)(1).

21 The Court finds that Plaintiffs have not met their burden in showing that their untimely
22 disclosure of Mr. Spector’s third report was substantially justified. Plaintiffs concede that Mr.

23 _____
24 ¹⁵ The Court orders that this deposition, if it takes place, to last no longer than one hour, to occur via Zoom or in
25 person, and to take place within 30 days from the date of this Order. That additional deposition time cannot be spent
26 for any other purpose. It further orders Plaintiffs’ counsel to bear the cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL
27 3554938, at *1.

28 ¹⁶ Dr. Larmore must update her report within 30 days from the date of this Order. The update is limited only to replying
to Dr. Clauretjie’s opinions about her rebuttal report. Plaintiffs’ counsel is ordered to bear the (reasonable) cost. *See*
Liberty Mut. Fire Ins. Co., 2019 WL 3554938, at *6.

¹⁷ According to Plaintiffs’ February 19, 2021 disclosures, Mr. Spector reviewed Mr. Wilcher’s expert report and video
interview. ECF No. 84-11 at 17. It is, therefore, unclear whether Mr. Spector’s reference to Mr. Wilcher’s February
15, 2021 report as a new document that he reviewed in authoring the disputed report is a typographical error.

1 Spector had access to both Ms. Isaac’s deposition transcript and Mr. Wilcher’s report, though they
2 do not address whether he had access to Dr. Larmore’s report before the rebuttal expert disclosure
3 deadline. Plaintiffs could have moved for an extension (as they did for Mr. Hogan’s expert report),
4 but they did not.

5 The Court next turns to whether Plaintiffs’ untimely disclosure of Mr. Spector’s disputed
6 report prejudiced Defendants.

7 In their reply, Defendants explain that they were prejudiced because they deposed Mr.
8 Spector before receiving his disputed report and because their experts “were not given the
9 opportunity to address” his opinions provided in the disputed report. ECF No. 75 at 6.

10 The Court finds that there is time to cure this prejudice and do so in a way that does not
11 necessarily delay the case.¹⁸ Mr. Spector’s report was provided before the close of discovery,
12 sufficiently far before the trial date, and well before dispositive motions deadlines. As such, the
13 Court will reopen discovery for the limited purpose of having Defendants re-depose Mr. Spector for
14 the limited purpose of addressing his opinions related to Ms. Isaac’s deposition, Mr. Wilcher’s
15 February 15, 2021 report, and Dr. Larmore’s February 16, 2021 report¹⁹ and allowing Defendants’
16 rebuttal experts an opportunity to update their reports in response to Mr. Spector’s third report dated
17 March 17, 2021.²⁰

18 **II. Animation Video**

19 Defendants move the Court to strike Plaintiffs’ animation video as untimely, reasoning that
20 the animation was not subject to the expert disclosure deadlines because it “allegedly used the
21 Defendants’ accident reconstruction video created by defense expert Erik Johnson of Rimkus, as a
22

23 ¹⁸ Even if the Court were to find that Plaintiffs’ untimely disclosures prejudiced Defendants and such prejudice could
24 not be cured, the Court does not find that factors weigh in favor of imposing Rule 37(c)(1) exclusion sanctions,
25 particularly in light of the public policy favoring disposition of cases on their merits and the availability of less drastic
26 sanctions. *See Nat’l R.R. Passenger Corp.*, 2016 WL 1573262, at *2.

27 ¹⁹ The Court orders that this deposition, if it takes place, to last no longer than one hour, to occur via Zoom or in
28 person, and to take place within 30 days from the date of this Order. That additional deposition time cannot be spent
for any other purpose. It further orders Plaintiffs’ counsel to bear the cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL
3554938, at *1.

²⁰ If Defendants so choose, Dr. Larmore and Mr. Wilcher must update their reports within 30 days from the date of
this Order. The update is limited only to replying to Mr. Spector’s opinions about their reports. Plaintiffs’ counsel is
ordered to bear the (reasonable) cost. *See Liberty Mut. Fire Ins. Co.*, 2019 WL 3554938, at *6.

1 basis for the animation[.]” ECF No. 68 at 5–6. Plaintiffs counter that the video is not expert evidence
2 but, rather, demonstrative evidence and, therefore, not subject to the expert disclosure deadlines.
3 ECF No. 73 at 5. The Court agrees with Plaintiffs.

4 “Computer animations are allowed in the Ninth Circuit.” *Allison v. Smoot Enterprises Inc.*,
5 2019 WL 5095779, at *4 (D. Oregon 2019). Additionally, they are generally considered
6 demonstrative evidence. *See, e.g., Friend v. Time Mfg. Co.*, 2006 WL 2135807, at *20 (D. Ariz. July
7 28, 2006) (“The use of computer animations is allowed when it satisfies the foundational
8 requirements for demonstrative evidence.”).

9 “[D]emonstrative exhibits that merely support an expert’s analysis, or ‘demonstrate existing
10 expert opinion in the record,’ do not fall within the scope of FRCP 26(a)(2)(B)’s pretrial disclosure
11 requirements.” *In re SFPP Right-of-Way Claims*, No. SACV 15-00718 JVS (DFMx), 2017 WL
12 2378363, at *7–*8 (C.D. Cal. May 23, 2017); *see also Rodriguez v. Vill. of Port Chester*, 535 F.
13 Supp. 3d 202, 217-18 (S.D.N.Y. 2021) (explaining that demonstrative exhibits do not “fit
14 comfortably within the disclosure requirements” of FRCP 26 because they normally do not exist at
15 the outset of a case and stating that there exists no requirement to disclose such materials at a specific
16 time; it is within the trial court’s “discretion to require parties to make pretrial disclosures of such
17 materials by specific deadlines”).

18 Here, Plaintiffs created an animated video depicting what they believe occurred on the day
19 of the accident. This constitutes demonstrative evidence and, therefore, is not subject to pretrial
20 disclosure. Accordingly, the Court finds that Plaintiffs’ disclosure of the demonstrative animation
21 was not untimely.²¹

22 **III. Conclusion and Order**

23 Other than the sanctions of fees and costs related to Plaintiffs’ untimely disclosure of Dr.
24 Clauretje, Dr. Muir, Dr. Oliveri, and Mr. Spector’s expert reports set forth above, **IT IS ORDERED**
25 that Defendants’ Motion to Strike (ECF Nos. 68, 70) is DENIED.


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27 _____
28 ²¹ Notably, the Court is not addressing whether Plaintiff may introduce the video at trial, as this question is best
addressed in a motion *in limine*.

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IT IS FURTHER ORDERED that the parties must meet and confer regarding appropriate deadlines for completion of the above noted depositions and the provision of rebuttal expert reports by Defendants no later than April 22, 2022.

IT IS FURTHER ORDERED that the parties must file a joint status report with the finalized schedule by April 29, 2022.

DATED: April 14, 2022.



BRENDA WEKSLER
UNITED STATES MAGISTRATE JUDGE