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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

LYNN NOYES,

No. CIV S-02-2685-GEB-CMK

Plaintiff,

vs.

ORDER

KELLY SERVICES,

Defendant.

_____ /

Pending before the court are plaintiff's motions (Docs. 83 and 84) to strike defendant's expert witness disclosures and to exclude expert testimony at trial. The parties have filed joint statements (Docs. 88, 89, 90, and 91) as required by local rules. The matter was referred to the undersigned pursuant to Eastern District of California Local Rule 72-302(c)(1) and designation of the district judge. A hearing was held in Redding, California, on January 15, 2008, at 10:00 a.m., with counsel for both parties appearing telephonically. After hearing oral arguments, the matter was submitted.

In her motions, plaintiff challenges two of defendant's experts: (1) Daryl Matthews; and (2) Brian J. Bergmark. The parties have filed joint statements (Docs. 88 and 90) in connection with these motions. In general, plaintiff argues the experts' testimony should be excluded as a discovery sanction because defendant's expert witness disclosures were not timely.

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1 **I. BACKGROUND**

2 **A. Plaintiff's Allegations**

3 In the joint statement filed in connection with defendant's earlier motion to strike
4 (Doc. 77), plaintiff offers the following statement of the case:

5 In her complaint, Plaintiff alleges that Defendant's continued
6 denial to her of a promotion constitutes disparate treatment in violation of
7 the Fair Employment and Housing Act, Government Code § 12941, and
8 Title VII, 42 U.S.C. § 2000e-2(a)(1), in that such intentionally [sic] denial
9 of employment opportunities were because of her religion or lack thereof.
10 She alleges further that she lost management opportunities because of
11 Defendant's policy or practice in its Nevada City, California, office of
12 giving promotional preference to members of a religious organization
13 called the Fellowship of Friends. This policy or practice, she alleges, had
14 a disparate impact on her in that it caused her to be demonstrably
15 disadvantaged compared to members of the Fellowship who were
16 candidates for management positions. She alleges specifically that in
17 April, 2001, Defendant denied her equal opportunity to compete for the
18 position of Software Development Manager by giving the promotion to a
19 Fellowship member who had lower qualifications for the position. She
20 alleges that William Heinz, the person with full control over hiring and
21 promotion decisions for Defendant . . . is a member of the Fellowship of
22 Friends. She alleges that Defendant . . . in 1997 or 1998 became aware of
23 the hiring and promotion practices in the office, including the exclusion
24 from equal opportunity within the company of people who were not
25 members of the Fellowship. (citations to complaint omitted).

16 **B. Relevant Procedural History**

17 On July 12, 2007,¹ the district judge issued a supplemental status order (Doc. 75)
18 specifying: (1) defendant's rebuttal experts . . . shall be disclosed no later than October 11, 2007;
19 and (2) expert discovery shall be completed by December 11, 2007.

20 1. Matthews

21 The following is a timeline of events relating to Matthews:

22 9-28-2007	Plaintiff disclosed her expert "cult" witness Rick Ross.
23 10-11-2007	Defendant disclosed Matthews as its rebuttal expert. The designation did not include Matthews' report.

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26 ¹ Counsel refer to July 11th, which was the date the order was signed. It was docketed on July 12th.

1 11-7-2007 Defendant's counsel sent a letter to plaintiff's counsel indicating
2 that, because Ross' report was deficient, he was unable to provide
3 Matthews' rebuttal report.

4 11-11-2007 Plaintiff's counsel sent a letter to defendant's counsel asking if he
5 would allow Matthews' deposition to be taken in Sacramento
6 notwithstanding the lack of Matthews' report. According to
7 plaintiff's counsel, defendant's counsel never responded to this
8 request.

9 11-29-2007 Plaintiff's counsel emailed defendant's counsel Ross'
10 supplemental report, which defendant's counsel still found to be
11 deficient.

12 12-4-2007 Hearing held on defendant's motion to strike plaintiff's designation
13 of Ross.

14 12-6-2007 Court issued order (Doc. 82) on defendant's motion to strike. The
15 court concluded that Ross' report was deficient "in that it does not
16 list the case numbers of cases in which he has testified, not does it
17 specify whether such testimony was offered at trial or deposition."
18 Plaintiff was directed to serve a further supplemental expert report
19 by December 11, 2007. Defendant was given until December 11th
20 to serve its disclosure of its rebuttal expert. The court continued
21 the deadline for expert discovery as to Ross and any rebuttal
22 witnesses only to December 31, 2007.

23 12-10-2007 Plaintiff's counsel served Ross' further supplemental report by
24 email to defendant's counsel.

25 12-11-2007 Counsel had a telephone conversation regarding Matthews'
26 deposition. According to plaintiff's counsel, defendant's counsel
informed her that Matthews was available for his deposition in
Honolulu, Hawaii, on December 26th, 26th, or 28th of 2007.
Defendant's counsel also stated that, if the deadline for Matthews'
deposition was continued, Matthews could be available for
deposition in San Diego, California, on January 10th or 11th of
2008. Regarding this phone conversation, plaintiff's counsel adds:

. . . It was clear that there was no expert
report forthcoming from Matthews that day and
Jones [plaintiff's counsel] agreed to accept a tardy
report, provided she had sufficient time to review it
prior the January 11, 2008, deposition of Dr.
Matthews described above.

However, Jones was also insistent that the
matter be taken up with the magistrate at the first
opportunity In light [of] the practical
problems of flying to and staying in Hawaii on such
short notice over the holidays, counsel both thought
that there was sufficient "cause" for the magistrate

1 to modify his order and agreed to take it to him
2 jointly at the first opportunity.

3 Plaintiff's counsel sent a letter to defendant's counsel the same day
4 confirming her understanding of the conversation.

5 12-12-2007 Plaintiff's motion to strike Matthews disclosure filed (Doc. 83).

6 12-13-2007 Defendant's counsel left a telephone message with plaintiff's
7 counsel indicating that Matthews' deposition would be taken in
8 Hawaii. Counsel had a telephone conversation later that day in
9 which plaintiff's counsel informed defendant's counsel that she
10 had reconsidered her position and had filed a motion to strike
11 based on violation of the court's order. As far as plaintiff's
12 counsel was concerned, the deposition would not go forward and
13 the dispute would have to resolved by the court.

14 12-31-2007 Defendant's counsel faxed Matthews' report to plaintiff's counsel.

15 2. Bergmark

16 The following is a timeline of events relating to Bergmark:

17 10-11-2007 Defendant disclosed its rebuttal damages expert Bergmark. The
18 designation did not include Bergmark's report.

19 11-6-2007 Parties participated in private mediation.

20 11-11-2007 Plaintiff's counsel wrote a letter to defendant's counsel asking
21 when she could expert Bergmark's report.

22 12-7-2007 Plaintiff's counsel had a telephone conversation with defendant's
23 counsel in which she indicated that she would be moving to strike
24 defendant's designation of Bergmark because no report had been
25 received and because it would be impossible to complete
26 Bergmark's deposition before the December 11th cut-off date
established in the July 12th order.

12-12-2007 Defendant's counsel sent a letter to plaintiff's counsel setting forth
defendant's position on the issue and urging plaintiff's counsel to
reconsider. On this same day, defendant's counsel faxed to
plaintiff's counsel Bergmark's report.²

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25 ² Plaintiff concedes that the report and designation comply with Rule 26 except that
26 they do not list the cases in which Bergmark has testified as an expert in the preceding two years.

1 **II. DISCUSSION**

2 Federal Rule of Civil Procedure 37 provides the court with discretion to exclude
3 an expert witness where the designation was not accompanied by a report in compliance with
4 Federal Rule of Civil Procedure 26. See Fed. R. Civ. P. 37(b)(2). Plaintiff argues both experts'
5 testimony should be excluded because neither of their reports meets the requirements of Rule 26.

6 **A. Matthews**

7 Plaintiff argues:

8 Plaintiff moves to strike the testimony of Dr. Daryl Matthews in its
9 entirety based on Defendant's failure to follow the requirements of
10 F.R.C.P. Rule 26 and this Court's previous orders filed on July 11, 2007,
11 and December 6, 2007. Although Plaintiff did agree to an informal
12 (without prior court order) extension of the timeline for Dr. Matthews's
13 report on the day it was due, this was based on Defendant's offer to take
14 the deposition in California rather than Hawaii, which was later revoked.
15 In sum, Defendant (1) failed to seek an extension of time for its rebuttal
16 report to Plaintiff's expert Rick Ross; (2) even if it had sought an
17 extension, it cannot show "good cause" within the meaning of F.R.C.P.
18 Rule 16(b) and therefore (3) Defendant failed to timely disclose its expert
19 on the "Fellowship of Friends" or cult issues. As a result, the testimony of
20 Dr. Daryl Matthews must be stricken.

21 It is clear from the timeline, plaintiff's argument, and defendant's response that the central issue
22 regarding Matthews is whether the agreement to have Matthews' deposition taken in early
23 January 2008 – beyond the December 31, 2007, cut-off date – was premised on the deposition
24 being taken in California as opposed to Hawaii. According to plaintiff's counsel, it was and,
25 therefore, her agreement to a deposition date beyond December 31st was rendered void when
26 defendant's counsel insisted upon a deposition in Hawai'i.

21 In the December 11, 2007, letter from plaintiff's counsel, counsel recited her
22 understanding that the deposition would take place on January 11, 2008, in San Diego. On
23 December 13th, defendant's counsel informed plaintiff's counsel that she would have to travel to
24 Hawaii for the deposition because that is where Matthews lives.³ Following this, plaintiff's

25 ³ It is fair to conclude that this was retaliation for plaintiff's counsel having filed a
26 motion to compel concerning Bergmark on December 12th.

1 counsel sent a letter confirming her December 13th telephone conversation with defendant's
2 counsel that he was revoking her agreement to have the deposition taken beyond the December
3 31st cut-off because counsel was insisting that the deposition be taken in Hawaii. In a December
4 14th letter from defendant's counsel, defendant asserted that plaintiff's counsel agreed in writing
5 to the Hawaii location. Counsel does not, however, reference or provide the court with the
6 writing containing plaintiff's counsel's purported agreement.

7 1. Meet and Confer Requirement

8 Notwithstanding defendant's counsel's unsupported contention that plaintiff's
9 counsel agreed in writing to the Hawaii location, it is clear that plaintiff's counsel understood on
10 December 11th that the agreement was for a deposition on January 11, 2008, in San Diego. It
11 seems that, at the last minute, defendant's counsel unilaterally changed the terms of this
12 agreement, instead insisting on the Hawaii location. It is also clear that Matthews' report was not
13 provided to plaintiff's counsel until December 31st – well beyond the disclosure deadline set in
14 the district judge's scheduling order and on the date this discovery was to be completed.

15 Defendant argues that plaintiff's motion as to Matthews should not be considered
16 because plaintiff's counsel failed to engage in any meet and confer efforts concerning the dispute.
17 However, given the December 11th agreement, there was nothing to discuss. The parties had
18 agreed to a January 11th deposition in San Diego and plaintiff's counsel agreed to accept a late
19 report provided it was supplied before the January 11th deposition. In order to preserve a
20 January 15, 2008, hearing date (which was the date set for hearing on the dispute concerning
21 Bergmark), counsel protectively filed her notice of motion concerning Matthews' disclosure.

22 Defendant's meet and confer argument also reflects an incorrect reading of the
23 local rules. According to defendant, this court must decline to hear the matter because plaintiff
24 failed to engage in meet and confer efforts prior to filing the motion on December 12, 2007.
25 Eastern District of California Local Rule 37-251(b), however, requires meet and confer efforts
26 prior to filing the motion or prior to hearing on the motion. In fact, the joint statement required

1 by Local Rule 37-251(c), which is not filed until three court days before the scheduled hearing
2 date, is where counsel document their meet and confer efforts. In this case, it is clear that
3 counsel must have met and conferred in preparation of the joint statement.

4 For these reasons, plaintiff has satisfied the meet and confer requirement.

5 2. Compliance with December 6, 2007, Order

6 Defendant argues that it did not fail to comply with the December 6, 2007, order
7 requiring disclosure of rebuttal experts by December 11, 2007. Specifically, defendant argues:

8 To begin with, the Court did not specifically order Kelly to serve
9 Dr. Matthews' rebuttal report on or before December 11, 2007. Rather, it
10 ordered Kelly to serve its "disclosure of experts it intends to call in
11 rebuttal to Ross by December 11, 2007." . . . Kelly understood the
12 December 6, 2007, order to simply require service of Dr. Matthews' expert
13 [report] well in advance of Dr. Matthews' deposition (to occur at some
14 point prior to December 31, 2007).

15 This is not a reasonable interpretation of the December 6th order. First, Federal Rule of Civil
16 Procedure 26(a)(2)(B) requires that an expert's report accompany the disclosure. Therefore, by
17 setting a deadline for the disclosure, the court also set the same deadline for the report. Second,
18 defendant's reading of the order is not logical or practical. If the court only required the report to
19 be provided "well in advance" of a deposition which could have occurred as late as December
20 31, 2007, how did defendant intend to comply if the deposition was scheduled for, say,
21 December 12th? December 31st was an outside date, not an absolute date, for the deposition.
22 Avoidance of this problem is the reason the report must be provided with the disclosure. Finally,
23 defendant's argument is disingenuous given that it did not provide the report until December
24 31st, which is not "well in advance" of the December 31st cut-off date.

25 Defendant cannot escape its failure to provide Matthews' report in a timely
26 manner.

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1 2. Late Disclosure of Matthews' Report

2 Inconsistent with the foregoing, defendant concedes that it's disclosure was late.
3 However, defendant argues that the late disclosure was justified. Specifically, defendant argues
4 that "at no time prior to learning that Dr. Matthews would appear for deposition in Hawaii did
5 plaintiff's counsel demand his rebuttal report or claim that it was due on December 11, 2007."
6 Plaintiff did not have to do so because the court did in its December 6th order. That plaintiff's
7 counsel agreed to a later disclosure date on the premise the deposition would be conducted in San
8 Diego was a generous gift. Defendant lost any reason to rely on that gift when defendant's
9 counsel unilaterally changed the terms of the location agreement on December 13th. Again,
10 defendant cites no writing demonstrating that plaintiff's counsel ever agreed to the Hawaii
11 location. While defendant repeatedly relies on the agreement as to the January 11th date, it
12 repeatedly ignores the agreement as to the San Diego location.

13 3. Remedy

14 Given that defendant's counsel unilaterally changed the location agreement and
15 insisted that any deposition would be taken in Hawaii, plaintiff was justified in revoking her
16 portion of the agreement that the deposition could occur after the December 31st cut-off date
17 established in the court's order. The question becomes whether defendant should be punished in
18 the form of an order excluding its rebuttal expert Matthews from testifying at trial. Rule 37(b)(2)
19 specifically allows the court to do so.

20 At this point, plaintiff has been provided with Matthews' report, but has been
21 denied the opportunity to take his deposition prior to trial. The final pre-trial order specifically
22 states that all discovery is over, except as the parties may otherwise agree. Therefore, Matthews'
23 deposition may only go forward if plaintiff agrees to allow it. Further, even if defendant could
24 argue under the rules that a deposition must be taken where the witness lives, it agreed to San
25 Diego and should be bound by that agreement. So, if plaintiff agrees to allow the deposition, it
26 must take place in San Diego. But, it is unlikely plaintiff would agree. Further, the pre-trial

1 order states that any post cut-off discovery agreement would not be enforceable by the court.
2 Thus, even if she did agree and the deposition was noticed for a location in San Diego, there is no
3 way for the court to enforce the agreement should defendant again renege and insist on Hawaii.
4 In essence, allowing the deposition if plaintiff agrees and the deposition takes place in San Diego
5 is really a hollow remedy for plaintiff because the court cannot enforce the agreement.

6 The only remaining remedy is to strike the Matthews disclosure and exclude his
7 testimony at trial. Defendant cannot propose a remedy short of this sanction given that the
8 window for conducting discovery has closed pursuant to the court's prior orders. Defendant
9 complains that exclusion will prevent it from rebutting the "shocking" cult testimony from Ross.
10 However, this is a problem of defendant's own making. Had counsel provided Matthews' report
11 by December 11th, or had counsel honored the agreement to have the deposition take place in
12 San Diego, the situation defendant complains of would not exist.

13 **B. Bergmark**

14 Plaintiff argues:

15 Plaintiff moves to strike the testimony of Mr. Bergmark in its
16 entirety based on Defendant's failure to follow the requirements of
17 F.R.C.P. Rule 26 and this Court's Supplemental Status Order. By the time
18 its Rule 26 disclosure was complete, it was one day past the time for
19 Plaintiff to take Mr. Bergmark's deposition and several weeks past the
20 time to reasonably schedule it.

21 The facts of the Bergmark dispute are not quite as egregious as those concerning Matthews. The
22 prejudice, however, is no less. As to Bergmark, the court never extended the discovery cut-off.
23 In the July 12, 2007, order, the district judge ordered that all expert discovery was to be
24 completed by December 11th. That deadline was extended to December 31st as to Ross and
25 related rebuttal witnesses only. Pursuant to the July 12th order, the disclosure as to Bergmark
26 was due by October 11th. Under Rule 26(1)(2)(B), Bergmark's report should have accompanied
the disclosure. Nonetheless, the report was not included with the disclosure. On November
11th, plaintiff's counsel asked about the missing report. Had defendant's counsel simply

