

1 John D. Vaughn, State Bar No. 171801
Jeffrey A. Feasby, State Bar No. 208759
2 Christopher W. Rowlett, State Bar No. 257357
PEREZ VAUGHN & FEASBY Inc.
3 600 B Street, Suite 2100
San Diego, California 92101
4 Telephone: 619-702-8044
Facsimile: 619-460-0437
5 E-Mail: vaughn@pvflaw.com

6 Jeffrey L. Fillerup, State Bar No. 120543
Rincon Law LLP
7 90 New Montgomery St
Suite 1400
8 San Francisco, California 94105
Telephone: (415) 996-8199
9 Facsimile: (415) 996-8280
E-Mail: jfillerup@rinconlawllp.com

10
11 Attorneys for Defendant and Counterclaimant
Windermere Real Estate Services Company
12

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BENNION & DEVILLE FINE
HOMES, INC., a California
16 corporation, BENNION & DEVILLE
FINE HOMES SOCAL, INC., a
17 California corporation, WINDERMERE
SERVICES SOUTHERN
18 CALIFORNIA, INC., a California
corporation,

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10

23 Defendant.
24

25 AND RELATED COUNTERCLAIMS
26
27
28

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

**OPPOSITION TO PLAINTIFFS
AND COUNTER-DEFENDANTS'
MOTION TO STRIKE
DEFENDANTS AND COUNTER-
PLAINTIFFS' REBUTTAL EXPERT
REPORT**

Date: May 1, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 Trial in this matter is set for May 30, 2017. The Court did not set a deadline
3 for the exchange of expert reports or for the completion of expert discovery. On
4 March 3, 2017, nearly 90 days before the start of trial, Defendant and
5 Counterclaimant Windermere Real Estate Services Company (“WSC”) served a
6 rebuttal report prepared by its damages expert, Neil Beaton. Beaton’s March 3,
7 2017 report was limited to rebutting the analysis and conclusions of Counter-
8 Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes
9 SoCal, Inc., Windermere Services Southern California (“WSSC”), Joseph R. Deville
10 and Robert Bennion’s (collectively “Counter-Defendants”) purported damages
11 expert, Peter Wrobel. As of the filing of this opposition, Counter-Defendants have
12 not deposed Beaton. Even though they have plenty of time to prepare for and take
13 Beaton’s deposition before trial, Counter-Defendants ask the Court to impose the
14 harsh sanction of excluding Beaton’s rebuttal report. The Court should deny this
15 request.

16 When an expert disclosure is untimely, sanctions are only appropriate if the
17 untimely disclosure was substantially justified **or** harmless. Fed. R. Civ. P. 37(c)(1).
18 Because Counter-Defendants have not deposed Beaton, and because they still have
19 plenty of time to prepare for his deposition and trial testimony, any untimely
20 disclosure is completely harmless. Further, because Counter-Defendants are
21 seeking to exclude the Beaton rebuttal report altogether, they must satisfy a five-part
22 test to show that such a harsh sanction is warranted under the circumstances. Since
23 Counter-Defendants have not already deposed Beaton and the allegedly untimely
24 disclosure will not delay trial or any other proceedings in this matter, the strong
25 public policy favoring resolution of disputes on their merits weighs heavily against
26 excluding the Beaton rebuttal report.

27 This motion must be seen for what it is, a last-minute attempt by Counter-
28 Defendants to avoid the harsh analysis of the Beaton rebuttal report rather than

1 confront the analysis on its merits. The Court should deny this motion and allow
2 Beaton to explain all of his opinions to the trier of fact.

3 **II. FACTUAL BACKGROUND**

4 Pursuant to the Court's Order Setting Pre-Trial & Trial Dates, trial was
5 initially set for October 18, 2016. (Document No. 35.) The Final Pre-Trial
6 Conference was set for September 19, 2016. (*Id.*) Although that order set August
7 29, 2016 as the discovery cutoff, the Court did not set a deadline for the exchange of
8 expert reports or the completion of expert discovery. On August 9, 2016, the parties
9 filed a Joint Stipulation to Continue Trial and Related Dates. (Document No. 48.)
10 The basis for the parties' stipulation was the need for additional time to complete
11 discovery, for the parties' experts to prepare their initial reports and rebuttal reports,
12 and for the depositions of the parties' respective experts. (*See id.*, ¶¶ M-O.) Thus,
13 at that time, the parties clearly anticipated submitting rebuttal reports. The Court
14 never ruled on the parties' stipulation.

15 On September 16, 2016, the Court continued the Final Pre-Trial Conference
16 to September 26, 2016. (Document No. 58.) On September 26, 2016, the Final Pre-
17 Trial Conference was again continued to October 3, 2016. On October 3, 2016, the
18 Final Pre-Trial Conference was again continued to November 14, 2016, and the trial
19 was continued to January 31, 2017. (Document No. 63.) The Final Pre-Trial
20 Conference Order was approved on November 15, 2016 and entered on January 10,
21 2017. (Document No. 79.) On January 9, 2017, the Court continued the trial to
22 May 30, 2017. (Document No. 78.)

23 On August 29, 2016, the discovery cutoff, Counter-Defendants produced
24 additional documents, including a "Recast Profit & Loss" for WSSC. (Declaration
25 of Jeffrey A. Feasby ("Feasby Decl."), ¶ 9.) This document was materially different
26 than the audited financial statements for WSSC that had been previously produced
27 by Counter-Defendants. (*Id.*) On August 31, 2016, WSC demanded the identity of
28 the author of the Recast Profit & Loss, copies of all documents relied upon by that

1 individual in creating the Recast Profit & Loss, and requested the deposition of the
2 individual that created the Recast Profit & Loss. (Feasby Decl., ¶ 10.) Counter-
3 Defendants responded on September 2, 2016 that the Recast Profit & Loss was
4 created by their accountant, Greg Barton, and that they would make Barton available
5 for deposition.¹ (*Id.*) WSC made it clear that Barton’s deposition was necessary
6 before its experts could finalize their reports. (*Id.*)

7 On September 16, 2016, the parties exchanged their initial expert witness
8 disclosures and reports. (Feasby Decl., ¶ 11.) WSC retained Neil Beaton to assess
9 the damages it sustained because of Counter-Defendants actions. Counter-
10 Defendants retained Peter Wrobel to assess the damages they allegedly sustained in
11 this matter. In his report, Wrobel relied upon the Recast Profit & Loss. (*Id.*) The
12 Recast Profit & Loss became even more important at that time given that Wrobel
13 relied primarily upon it for purposes of his calculation of the alleged “net value” of
14 WSSC for purposes of Counter-Defendants’ alleged damages. (*Id.*)

15 Barton’s deposition was initially scheduled for October 6, 2016. (Feasby
16 Decl., ¶ 12.) However, Barton’s documents were not produced until the night of
17 October 4, which did not allow WSC sufficient time to review the documents prior
18 to the deposition. (*Id.*) As a result, the parties agreed to continue the deposition to
19 October 19, 2016. (*Id.*) It was understood that WSC’s rebuttal report could not be
20 completed until after Barton’s deposition. (*Id.*)

21 At or about this time, the parties began discussing the possibility of mediating
22 their disputes. An agreement to mediate was reached on October 31, and the
23 mediation was subsequently scheduled for November 10, 2016. (Feasby Decl., ¶
24 13.) During the parties’ discussions regarding the mediation and scheduling, WSC
25 made it clear that it was waiting until after the mediation to produce Beaton’s

26
27 ¹ WSC had served a document subpoena on Mr. Barton prior to the discovery cutoff.
28 Counter-Defendants confirmed that Mr. Barton would produce the relevant
documents in response to that subpoena. (*Id.* ¶ 10.)

1 rebuttal report in the event a settlement was reached. (*Id.*)

2 On March 3, 2017, WSC produced Beaton’s rebuttal report. In the email
3 attaching Beaton’s rebuttal report, WSC proposed deposition dates for its experts
4 during the weeks of March 13 and March 20, and requested the availability of
5 Counter-Defendants’ experts during the weeks of March 20 and 27. (Feasby Decl.,
6 ¶ 14.) On March 21, having received no response regarding scheduling expert
7 depositions, WSC noticed Wrobel’s deposition for April 5, 2017, and proposed
8 Beaton’s deposition on April 3. (*Id.*) On March 31, 2017, the parties discussed
9 deposition scheduling and agreed that Wrobel’s deposition would go forward on
10 April 5 as noticed. (Feasby Decl., ¶ 15.) They also agreed that WSC would
11 provide alternative dates for Beaton’s deposition. (Feasby Decl., ¶ 15.) On April 3,
12 2017, WSC provided proposed dates for Beaton’s deposition in early May.²
13 Counter-Defendants filed this motion later that evening. As of the filing of this
14 opposition, Counter-Defendants have not responded to schedule Beaton’s
15 deposition. (*Id.*)

16 **III. LEGAL ANALYSIS**

17 **A. Any Untimely Disclosure of the Beaton Rebuttal Report was Harmless**

18 Federal Rule of Civil Procedure 37(c)(1) states that evidence can be excluded
19 if its disclosure did not comply with Fed. R. Civ. Proc 26(a), “unless the failure was
20 substantially justified **or** is harmless.” (Emphasis added.) Because the allegedly
21 untimely disclosure was harmless, exclusion of Beaton’s rebuttal report is
22 inappropriate. *Pineda v. City and County of San Francisco*, 280 F.R.D. 517, 521
23 (N.D. Cal. 2012) (untimely disclosure of expert report did “not warrant the harsh
24 sanction” of exclusion when the report was provided with sufficient time to prepare
25 for and take the expert’s deposition).

26
27 ² During their call on March 31, Counter-Defendants’ attorney indicated that he had
28 a trial starting in late-April. (*Id.*)

1 Counter-Defendants received Beaton’s rebuttal report on March 3, 2017.
2 (Document No. 84-2, Adams Decl., ¶ 5.) The rebuttal report is specifically limited
3 to rebutting the opinions in Wrobel’s report and contains no new opinions. At the
4 time the rebuttal report was served, expert discovery was still open, and it will
5 remain open until the time of trial as no cutoff for expert discovery was ever set.
6 Counter-Defendants planned to depose Beaton prior to trial and still have plenty of
7 time to prepare for and complete that deposition.

8 Prior to March 3, WSC had made it clear that it intended to serve a rebuttal
9 report; first leading up to Barton’s deposition and subsequently as the parties
10 discussed mediation. (Feasby Decl., ¶¶ 10, 13.) Moreover, trial in this matter is
11 currently set for May 30, 2017. Consequently, Counter-Defendants will have had
12 three months to review Beaton’s rebuttal report in preparation for trial. Further,
13 despite WSC’s offers to make Beaton available for deposition – first in March and
14 then in early May – Counter-Defendants have not yet confirmed a date for Beaton’s.
15 However, they still have 50 days to complete that deposition. Therefore, any
16 allegedly untimely disclosure of the Beaton rebuttal report is harmless and cannot
17 support the harsh sanction of exclusion.

18 **B. Exclusion of the Beaton Rebuttal Report is Inappropriate Under**
19 **the Circumstances**

20 Ignoring the plain language of Rule 37(c) that excuses an untimely disclosure
21 of information if the disclosure is “harmless,” Counter-Defendants jump ahead to
22 the five-part test used to determine whether exclusion is appropriate. *See Wendt v.*
23 *Host Intern., Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). Only if the Court determines
24 that the disclosure of Beaton’s rebuttal report is neither substantially justified nor
25 harmless, should it consider the following factors to determine if exclusion is the
26 appropriate sanction: “1) the public's interest in expeditious resolution of litigation;
27 2) the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4)
28 the public policy favoring disposition of cases on their merits; 5) the availability of

1 less drastic sanctions.” *Id.* Analysis of these five factors weighs heavily against
2 exclusion of the Beaton rebuttal report.

3 Because Beaton’s rebuttal report was disclosed three months before trial, the
4 trial will not be delayed. Therefore, the first two factors weigh heavily against
5 exclusion. Counter-Defendants have not sought to postpone the trial or delay the
6 proceeding in any way relating to the Beaton rebuttal report. In fact, Counter-
7 Defendants do not even argue that allowing WSC to introduce the opinions
8 expressed in the Beaton rebuttal report will impact the timing of this litigation in any
9 way. Without any evidence that accepting the Beaton rebuttal report would delay
10 the proceedings, the first two factors weigh heavily against exclusion. *See Wendt*,
11 125 F.3d at 814 (reversing trial court’s exclusion of an untimely expert opinion
12 because both parties had ample opportunity to prepare for trial).

13 In addition, Counter-Defendants have plenty of time to review the Beaton
14 rebuttal report in preparation for his deposition and trial. Accordingly, they are not
15 prejudiced in any way by the Beaton rebuttal report. Counter-Defendants argue,
16 without any evidentiary support, that they have incurred “expert costs and attorney
17 fees that could have been avoided had these disclosures been timely served.”
18 (Document No. 84-1). This is the only argument Counter-Defendants make in
19 support of their claim of prejudice. (*Id.*) This argument is nonsensical.

20 Counter-Defendants seem to be arguing that had the Beaton rebuttal report
21 been produced in October, somehow they would not have had to spend any time or
22 money reviewing or addressing it. Presumably, regardless of when the Beaton
23 rebuttal report was produced, Counter-Defendants were going to spend time and
24 money reviewing it in preparation for deposition and trial. As mentioned above,
25 Counter-Defendants have not sought to depose Beaton yet. Therefore, they are in
26 the exact same position they would have been if the report were produced in
27 October or any other time prior to March 2017. Counter-Defendants possess all of
28 the opinions Beaton intends to present at trial with plenty of time to prepare for his

1 deposition and trial. Consequently, Counter-Defendants cannot possibly show any
2 prejudice and the third factor weighs against exclusion. *See Vinh Nhuyen v. Radiant*
3 *Pharmaceuticals*, No. 11-0406, 2013 WL 12149214, at *2 (C.D. Cal. July 19, 2013)
4 (exclusion of expert report improper where party has opportunity to depose expert
5 about his opinions before trial); *see also U.S. v. 14.3 Acres of Land*, No. 07-886,
6 2009 WL 249986, at *5 (S.D. Cal. Jan. 30, 2009) (court refused to exclude untimely
7 expert testimony because witness could be deposed before trial); *see also Fahmy v.*
8 *Jay Z*, No. 07-5715, 2015 WL 5680299, at *6-7 (C.D. Cal. Sept. 24, 2015) (court
9 refused to exclude late expert disclosures when opposing party had an opportunity to
10 depose expert about newly disclosed information); *see also Galentine v. Holland*
11 *America Line-Westours, Inc.*, 333 F.Supp.2d 991, 994 (W.D. Wash. 2004) (refusing
12 to exclude untimely expert report served after the close of expert discovery and re-
13 opening discovery for the limited purpose of allowing the expert to be deposed).

14 Certainly, the public policy favoring disposition of cases on their merits
15 weighs against excluding the Beaton rebuttal report. In the Ninth Circuit, the public
16 policy clearly favors resolving disputes on their merits whenever possible. *Wendt*,
17 125 F.3d at 814; *see also Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112,
18 1115 (9th Cir. 2004) (the public policy in favor of resolving disputes on their merits
19 will always cut against excluding evidence pursuant to rule 37(c)(1)). Lacking any
20 argument or evidence to counter this obvious point, Counter-Defendants claim that
21 the public policy “is of no concern here” because Beaton would still be allowed to
22 testify as to the opinions expressed in his initial report. (D.E. 84-1 p. 5.) This
23 argument also misses the mark. The merits of this case include Beaton’s rebuttal
24 report, which directly contradict Counter-Defendants’ outlandish and unreliable
25 damages analysis and should be considered by the trier of fact.

26 Finally, no sanction, regardless of severity, is appropriate here. As Counter-
27 Defendants acknowledge, Beaton will be testifying as WSC’s damages expert.
28 Presumably, Counter-Defendants will depose Beaton prior to trial to explore his

1 opinions and the bases for those opinions. During that deposition, Counter-
2 Defendants will have the opportunity to question Beaton about all of his opinions,
3 including those in his rebuttal report. Accordingly, no sanction is appropriate here
4 and the jury should hear Beaton explain the flaws in Counter-Defendants damages
5 analysis.

6 **IV. CONCLUSION**

7 For all of these reasons, Plaintiffs’ and Counter-Defendants’ Motion to Strike
8 Defendants and Counter-Plaintiffs’ Rebuttal Expert Report should be denied in its
9 entirety.

10
11 DATED: April 10, 2017 PEREZ VAUGHN & FEASBY INC.

12
13 By: /s/ Jeffrey A. Feasby
14 John D. Vaughn
15 Jeffrey A. Feasby
16 Attorneys for
17 Windermere Real Estate Services Company
18
19
20
21
22
23
24
25
26
27
28