



1 Plaintiffs' expert, Peter Wrobel, in his report. Defendant sought to depose the accountant prior to  
2 finalizing its expert report rebutting Wrobel's report. Due to discovery issues, the deposition was  
3 rescheduled. Around the same time, the parties engaged in mediation in an effort to resolve their  
4 disputes. Apparently, those efforts were unsuccessful. Several months later, on March 3, 2017,  
5 WSC produced its rebuttal report by its expert, Neal Beaton.

6 Plaintiff moves to strike Beaton's rebuttal report on the grounds that it is untimely.  
7 Federal Rule of Civil Procedure 26(a)(2)(D)(ii) provides that "evidence [that] is intended solely to  
8 rebut evidence on the same subject matter identified by another party under Rule 29(a)(2)(B) or  
9 (C), [must be disclosed] within 30 days after the other party's disclosure." If a party fails to  
10 disclose information required under Rule 26(a) such information may be excluded unless the  
11 failure to disclose was harmless or substantially justified. Fed. R. Civ. P. 37(c)(1). In exercising  
12 its discretion to exclude an untimely expert report a court must consider: "1) the public's interest in  
13 expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of  
14 prejudice to the defendants; 4) the public policy favoring disposition of cases on their merits; 5)  
15 the availability of less drastic sanctions." *Wendt v. Host Intern, Inc.* 125 F.3d 806, 814 (9th Cir.  
16 1997).

17 Here, the failure to disclose the rebuttal report was harmless. Plaintiffs received the  
18 rebuttal report 90 days before trial was scheduled. In such time Plaintiffs were able to analyze and  
19 respond to the rebuttal report. Plaintiffs assert that they are harmed because if not for the  
20 continuance of trial "the rebuttal report would not have been available," allowing Defendant to  
21 "exploit the Court's trial date continuance" would prejudice Plaintiff, and because Plaintiffs will  
22 be forced to incur more time and expense analyzing the rebuttal report than they would had  
23 Defendant not filed one. Plaintiffs' claimed harm is nothing more than the mere existence of the  
24 rebuttal report. Plaintiffs point out that if not for the continuance of trial, there would not have  
25 been a rebuttal report. Additionally, Plaintiffs contend that if there is a rebuttal report they will  
26 have to analyze it. These reasons do not constitute sufficient harm to merit sanctions. The  
27 opposite conclusion would render meaningless the requirement that a delayed disclosure be  
28 harmful in order to merit sanctions. If the mere existence of a delayed rebuttal report was

1 sufficient harm to require sanctions, then any delayed disclosure would be harmful. Accordingly,  
2 since Plaintiffs fail to show any harm as a result of the delay in disclosure of the rebuttal report,  
3 sanctions are not warranted.

4 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Strike Defendant and Counter  
5 Plaintiff's Rebuttal Expert Report (Dkt. No. 84) is DENIED.

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7 Dated: May 25, 2017.

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MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE

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