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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 NOBLE INC., a Krypton Corporation)	Case No. 19-CV-0000 DMK (AJRx)
13 Plaintiff,)	
14 vs.)	NOBLE INC.'S OPENING BRIEF IN
15 COPYCAT CORP., a Death Star)	SUPPORT OF MOTION IN LIMINE
corporation,)	TO EXCLUDE THE UNTIMELY
16 Defendant.)	SUPPLEMENTAL REPORT
)	OPINIONS OF DR. DARTH VADER.

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1 **I. INTRODUCTION**

2 This is a patent infringement action where plaintiff Noble and defendant
3 Copycat have each listed an expert witness to testify at trial on the issue of
4 damages. Under the scheduling order in this case any supplemental expert reports
5 on damages were due by November 15, 2019.

6 On January 25, 2020, the Court ruled on Noble’s Daubert motion and found
7 that the reasonable royalty opinion of Copycat’s expert witness Dr. Darth Vader had
8 improperly relied on a 70/30 profit split methodology. The Court accordingly
9 ordered that Dr. Vader’s opinion be excluded from evidence at trial. Subsequently,
10 and without prior Court authorization, on February 1, 2020, Copycat served Noble
11 with a supplemental report of Dr. Vader containing new information and opinions.
12 Noble hereby moves the Court for an order barring Copycat from introducing at
13 trial any of the new information and opinions which were only provided to Noble in
14 the tardy supplemental report.

15 **II. ARGUMENT**

16 Under Federal Rule 26(a)(2), "a party must disclose to the other parties the
17 identity of any [expert] witness it may use at trial to present evidence" and "this
18 disclosure must be accompanied by a written report signed by the witness." Fed. R.
19 Civ. P 26(a)(2); See *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,
20 1106 (9th Cir. 2001). "The report must contain: (i) a complete statement of all
21 opinions the witness will express and the basis and reasons for them." Fed. R. Civ.
22 P. 26(a)(2)(B). Rule 26(a)(2)(D) provides: "A party must make these disclosures at
23 the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).
24 Under the Court's scheduling order in this case, Dr. Vader's supplemental expert
25 report was due by November 15, 2019.

26 Federal Rule of Civil Procedure 37(c)(1) provides: "If a party fails to provide
27 information or identify a witness as required by Rule 26(a) or (e), the party is not
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1 allowed to use that information or witness to supply evidence on a motion, at a
2 hearing, or at a trial, unless the failure was substantially justified or is harmless."
3 Fed R. Civ. P. 37(c)(1). "Rule 37 `gives teeth' to Rule 26's disclosure requirements
4 by forbidding the use at trial of any information that is not properly disclosed." See
5 *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011).
6 "Rule 37(c)(1) is a `self-executing,' `automatic' sanction designed to provide a
7 strong inducement for disclosure." *Id.*

8 However, under Rule 37(c)(1), "[t]he information may be introduced if the
9 parties' failure to disclose the required information is substantially justified or
10 harmless." See *Yeti by Molly*, 259 F.3d at 1106. The party facing sanctions bears the
11 burden of proving substantial justification or harmlessness. *Id.* The court has some
12 latitude in determining whether to issue sanctions under Rule 37(c)(1). *Id.*

13 During the meet and confer process preceding this motion Copycat argued
14 that it should be permitted to use the February 1, 2020, supplemental expert report
15 because the proposed opinions in the report are limited to curing the specific
16 deficiencies identified in the Court's January 25, 2020, Daubert order, and the report
17 does not introduce a new damages theory. This is incorrect.

18 First, as a matter of law, Copycat was not entitled to serve and rely upon a
19 supplemental expert report with new information and opinions it believed cured the
20 deficiencies identified in the Court's Daubert order. To the extent Copycat wished
21 to serve a supplemental expert report after the deadline for doing so, for whatever
22 reason, this would have required Copycat to seek a modification of the schedule set
23 by the Court in this case. See Rule 16(b)(4). Copycat made no effort to seek a
24 modification of the scheduling order.

25 Second, the opinions disclosed in the February 1, 2020, supplemental expert
26 report represent entirely new opinions and theories by Dr. Vader for calculating the
27 reasonable royalty rate. Specifically, Dr. Vader opines for the first time in the
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1 supplemental report that the reasonable royalty rate should be calculated by looking
2 at the ratio of Noble's research and development expenses to Noble's total operating
3 expenses. This methodology was not contained anywhere in Dr. Vader's original
4 expert reports. It is an entirely new theory and methodology for calculating a
5 reasonable royalty rate in this case. As such it is clearly untimely and improper. See
6 Rule 37(c)(1).

7 Copycat has failed to proffer any explanation as to why its new alternative
8 methodology for determining a reasonable royalty rate could not have been timely
9 presented in Dr. Vader's initial expert reports. It is highly prejudicial to present an
10 entirely new methodology of calculating a reasonable royalty only after the close of
11 expert discovery and deadline for filing pre-trial motions, and less than five weeks
12 before the scheduled trial date. By the time this motion is even ruled on the trial will
13 likely be only days away, and Noble will have had no ability to depose Dr. Vader
14 on his new methodology, challenge the opinions disclosed in the supplemental
15 expert report through another Daubert motion, or through a rebuttal expert report.

16 **III. CONCLUSION**

17 The failure of Copycat to timely disclose Dr. Vader's alternative royalty rate
18 methodology and opinion is neither substantially justified nor harmless. As such it
19 is mandatory under the Rules that Copycat be precluded from presenting at trial the
20 alternative royalty rate methodology and opinions only disclosed in the tardy
21 supplemental report of Dr. Vader. See Rule 37(c)(1).

22 Noble requests that the Court issue an order barring Copycat from
23 introducing at trial any of the new information or opinions contained in Dr. Vader's
24 untimely February 1, 2020, supplemental report.

25 Date:

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28 David M. Kleiman