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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., and UMR, INC.,

Defendants.

Case No.: 3:17-cv-00183-VC

DEFENDANTS UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., AND UMR, INC.'S NOTICE OF MOTION AND MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF KRISTI L. MARTIN AND DR. ELLEN CHETWYND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 1, 2018
Time: 10:00 a.m.
Place: Courtroom 4

Compl. Filed: Jan. 13, 2017

Honorable Vincent Chhabria

PLEASE TAKE NOTICE that on March 1, 2018 at 10:00 a.m. in Courtroom 4 of the above-captioned court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, UnitedHealthCare Services, Inc., and UMR, Inc. will, and hereby do, move the Court for an order granting the instant Motion to Exclude Opinions and Testimony of Kristi L. Martin and Dr. Ellen Chetwynd. This Motion relies upon this Notice of Motion, the attached Memorandum of Points and Authorities, and the arguments of counsel at the hearing on this Motion.

DATED: January 5, 2018

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Plaintiffs served Defendants with the supposed "rebuttal" expert reports of Kristi L. Martin and Dr. Ellen Chetwynd on November 3, 2017, 74 days after the affirmative expert disclosure deadline.[1] However, the opinions of Ms. Martin and Dr. Chetwynd are not restricted to rebuttal, but instead offer affirmative expert testimony well beyond the deadline. Plaintiffs' late and improper disclosures significantly prejudice Defendants, particularly given that Plaintiffs served them shortly before the close of discovery and deadline for summary judgment motions. Additionally, Ms. Martin's testimony must be excluded for the additional reasons that she (1) offers legal conclusions on issues of law that are solely for the Court to decide, and (2) offers opinions on medical issues while acknowledging that she has no medical training or other basis for expert knowledge about such issues. Accordingly, for these reasons and those stated below, Defendants move to exclude the opinions and testimony of Ms. Martin and Dr. Chetwynd in their entirety.

I. BACKGROUND

Plaintiffs commenced this suit on January 13, 2017 (ECF No. 1),[2] and the Court set an affirmative expert disclosure deadline of August 21, 2017 in its May 8, 2017 Scheduling Order. (ECF No. 57.) Defendants timely served Plaintiffs with the affirmative expert reports of three experts: Dr. Henry C. Lee, Dr. Henry Miller, and Dr. Cynthia S. Cooper. Plaintiffs chose not rely on any affirmative experts.

[redacted]

[1] "Plaintiffs" refers collectively to Plaintiffs Rachel Condy, Jance Hoy, Christine Endicott, Laura Bishop, Felicity Barber and Rachel Carroll. "Defendants" refers collectively to Defendants Defendants UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United HealthCare Services, Inc., and UMR, Inc.

[2] The current operative complaint is the Second Amended Class Action Complaint that Plaintiffs filed on September 5, 2017 (ECF No. 78).

[redacted]

Drs. Miller, Lee and Cooper did not offer opinions regarding the specific requirements of ACA, its implementing regulations and sub-regulatory guidance regarding preventive lactation services, or the training and capabilities of International Board Certified Lactation Consultants ("IBCLCs"). [*See generally* S.J. Ex. G, Souza Decl., Exs. 8, 9, 10, Dkts. 111-16, 18, 20 (Miller Report, Lee Report, Cooper Report).]

Plaintiffs served Ms. Martin's and Dr. Chetwynd's "rebuttal" reports on Defendants on November 3, 2017.[3] Plaintiffs [redacted] Specifically, Ms. Martin's report and proposed testimony include the following opinions:

[redacted]

[3] Plaintiffs also served Defendants with reports by Dr. Jane Morton and Dr. Joan Meek on November 3, 2017. Defendants reserve the right to seek to exclude all or portions of those reports at a later date, if Plaintiffs rely on improper affirmative testimony also contained in those reports.

Ms. Martin admits that she has no medical training or direct knowledge of the training physicians receive regarding lactation counseling and that the distinction between "preventive" and "diagnostic" services is outside the scope of her expert testimony. [Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at 10:7-8, 40:11-21, 99:25-100:7, 103:25-104:9.]

Plaintiffs offer Dr. Chetwynd, a medical researcher putatively specializing in human lactation and integration of lactation services into the healthcare system, to provide the following opinions:

Dr. Chetwynd admits that she is offering her own "clinical interpretation" of what is included within her definition of "comprehensive" lactation services, and that her definition of "comprehensive" lactation services is broader than what it recommended by the USPSTF. [Mot. Strike Ex. A, Souza Decl., Ex. 2 (Chetwynd Dep.) at 52:12-21, 145:14-23, 148:9-15.]

II. STANDARD OF REVIEW

Rule 26(a)(2)(D)(ii) of the Federal Rules of Civil Procedure provides that "[a] party must make [expert] disclosures at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D)(ii). "[S]upplemental or 'rebuttal' experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts." *Int'l Bus. Machines Corp. v. Fasco Indus., Inc.*, No. C-93-20326 RPA, 1995 WL 115421, at *3-4 (N.D. Cal. Mar. 15, 1995) (emphasis added). Accordingly, "[a] party who forgoes designating experts on the

initial disclosure date will thus find itself in a purely reactive mode, greatly restricted in its ability to offer expert testimony." *Id.*

Courts have uniformly rejected the use of "rebuttal" experts to disclose opinions that should have been disclosed at the deadline for affirmative reports. *See Vu v. McNeil-PPC, Inc.*, No. CV 09-1656 ODW (RZx), 2010 WL 2179882, at *3 (May 7, 2010) (striking purported rebuttal expert reports that dealt with matters outside scope of affirmative reports they were supposedly rebutting); *People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d 1182, 1191-92 (S.D. Cal. 2016) (same); *Clear-View Techs., Inc. v. Rasnick*, No. 13-cv-02744-BLF, 2015 WL 3509384, at *3-5 (N.D. Cal. June 3, 2015) (same). Such belated disclosures prejudice the opposing party by preventing it from rebutting the other party's affirmative expert opinions.[4] *Vu*, 2010 WL 2179882, at *3 ("This is a hornbook example of sandbagging, a litigation tactic this Court will not tolerate.").

Further, expert testimony should only be admitted if it "will assist the trier of fact to understand the evidence or determine a fact in issue." *U.S. v. Chang*, 207 F.3d 1169, 1172 (9th Cir. 2000) (citing Fed. R. Evid. 702)). To qualify as an expert, a witness must have "knowledge, skill, experience, training or education" that is relevant to the evidence or a fact in issue. Fed. R. Evid. 702. Accordingly, "an expert witness cannot give an opinion as to her *legal conclusion*, *i.e.* an opinion on an ultimate issue of law." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (emphasis in original). The admissibility of expert testimony is "peculiarly within the sound discretion of the trial judge, who alone must decide the qualifications of the expert on a given subject and the extent to which his opinions may be required." *Chang*, 207 F.3d at 1172 (citation omitted).

III. ARGUMENT

A. The Opinions Offered By Kristi L. Martin Should Be Excluded.

Ms. Martin's opinions are improper in a number of respects. First, Ms. Martin improperly

[4] Federal Rule of Civil Procedure 37(c) "automatically forbids the use of any information at trial that has not been timely disclosed under Rule 26 unless the late-disclosing party proves that the failure to disclose was substantially justified or harmless." *POM Wonderful, LLC v. Coca Cola Co.*, No. CV 08-06237 SJO (MJWx), 2016 WL 5929259, at *8 (C.D. Cal. Feb. 24, 2016) (citing Fed. R. Civ. P. 37(c)(1)) (excluding reports and opinions of expert); *see also Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011) (noting that the "burden to prove harmlessness is on the party seeking to avoid Rule 37's exclusionary sanction").

offers affirmative, rather than rebuttal, expert testimony [redacted], as well as other issues. Second, Ms. Martin's testimony would be improper even as affirmative expert testimony, as it consists almost entirely of legal conclusions [redacted]. *See Nationwide Transp.*, 523 F.3d at 1058; *U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 336-37 (9th Cir. 2017) ("Under Federal Rule of Evidence 702, matters of law are inappropriate subjects for expert testimony." (citation omitted)). Third, Ms. Martin [redacted]. For each of these reasons, Ms. Martin's opinions and testimony should be excluded.

1. Ms. Martin's [redacted] Is Improper Affirmative, Not Rebuttal, Testimony.

Rather than confine herself to opinions that contradict those of Defendants' experts, [redacted] However, Defendants' experts did not offer opinions about those subjects. [*See generally* S.J. Ex. G, Souza Decl., Ex.s 8, 9, 10, Dkts. 111-16, 18, 20 (Miller Report, Lee Report, Cooper Report).] As such, Ms. Martin's opinions do not contradict or rebut those of Drs. Miller, Lee or Cooper, and thus Ms. Martin's opinions are improper affirmative testimony. Plaintiffs' efforts to introduce such affirmative opinions long after the deadline has passed is "a hornbook example of sandbagging." *Vu*, 2010 WL 2179882, at *3.

While [redacted], these sources were not discussed in detail by Defendants' experts, and [redacted]. [*See* D. Smith S.J. Decl., Ex. 4, Dkt. 116-04 (Martin Report) at 4-9.] Instead, [redacted]. Indeed, Ms. Martin admitted that these sources do not "necessarily exactly contradict" Defendants' experts, but that they "should have been considered as part of their opinion…." [Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at 82:16-83:3.] By

focusing and offering opinions on what Defendants' experts did not discuss, Ms. Martin necessarily offers affirmative opinions on these new topics under the guise of rebuttal testimony.

For example, [redacted]. [D. Smith S.J. Decl., Ex. 4, Dkt. 116-0 (Martin Report) at 12-15; Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at 39:4-18; 97:22, 123:12-22, 145:19-146:14]; *see Clear-View Tech., Inc.*, 2015 WL 3509384, at *2 ("rebuttal expert is limited to offering opinions rebutting and refuting the theories set forth by [the other party's] experts" (citation omitted)). When repeatedly asked to provide examples of how the experts' failure to use the word "comprehensive" made their opinions inaccurate, Ms. Martin was unable to clearly do so. [Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at147:2-149:14.] Instead, Ms. Martin improperly uses her purported "rebuttal" report [redacted], rather than attacking the theories of Defendants' experts. *Int'l Bus. Machines Corp.*, 1995 WL 115421, at *3-4.

Plaintiffs have no justification for seeking to introduce Ms. Martin's affirmative expert testimony after the deadline has passed, and "'[d]isruption to the schedule of the court and other parties . . . is not harmless.'" *Tamburri v. SunTrust Mortg., Inc.*, No. 11-cv-02899-JST, 2013 WL 3152921, at *2 (N.D. Cal. June 19, 2013) (quoting *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005)) (granting motion to strike expert reports and stating that "Rule 37(c)(1) sanctions based on failure to disclose evidence in a timely manner may be appropriate 'even when a litigant's entire cause of action or defense' will be precluded" (citation omitted)). Here, Ms. Martin uses her "rebuttal" report [redacted], but Defendants have no opportunity to rebut these affirmative opinions. As such, Defendants been prejudiced and the Court should strike her report and exclude her opinions and testimony. *Vu*, 2010 WL 2179882, at *3.

2. Ms. Martin's Testimony Consists of Inadmissible Legal Conclusions.

Ms. Martin's testimony should be stricken for the additional reason that it is improper for an expert to interpret the law. Expert witnesses are not permitted to testify regarding the law, particularly as applied to the facts of the case, as that is the "exclusive province of the court." *Nationwide Transp.*, 523 F.3d at 1058. [redacted] is a matter of law that is inappropriate for expert testimony. *See Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1052 (9th Cir. 2012) (affirming exclusion of expert testimony consisting of "improper legal conclusions and opinions regarding government regulations and policies"); *CFM Comm'ns LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1236 (E.D. Cal. 2005) (excluding expert on FCC regulations, since "Court is perfectly able to review FCC decisions and regulations to decide how the law applies to the present facts").

Ms. Martin's proposed testimony [redacted] is inappropriate.[5] [D. Smith S.J. Decl., Ex. 4, Dkt. 16-04 (Martin Report) at 4]; *Nationwide Transp.*, 523 F.3d at 1058. This is most clear from Ms. Martin's own summary of her anticipated testimony, which underscores [redacted]

[redacted]

[redacted]

[5] While [redacted], Defendants' experts in fact offer no such opinions. [redacted] While it is true that Dr. Miller [redacted] [*See generally* S.J. Ex. G, Souza Decl., Exs. 8, 9, 10, Dkts. 111-16, 18, 20 (Miller Report, Cooper Report, Lee Report).]

[redacted]

[D. Smith S.J. Decl., Ex. 4, Dkt. 16-04 (Martin Report) at 3.] The Court therefore should exclude Ms. Martin's opinions and testimony on this basis as well. *Nationwide Transp.*, 523 F.3d at 1058.

3. Ms. Martin Lacks Expertise to Offer Opinions [redacted].

Ms. Martin has no basis in any expert knowledge for rebuttal testimony [redacted]. She admits that she has no medical training, is not an expert on the training of OB/GYNs and has no direct knowledge regarding their training in lactation counseling. [Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at 10:7-8, 99:25-100:7, 103:25-104:9.] Her only disclosed basis for her opinions on the topic is a report by the American College of Obstetricians and Gynecologists. [*Id.* at 103:25-104:9.] In other words, Ms. Martin's opinion is admittedly not based upon any expert knowledge, but rather on a single article she read, and therefore is not proper expert testimony. *See Chang*, 207 F.3d at 1172-73 (district court properly excluded expert testimony based on expert's lack of expert knowledge); *Massok v. Keller Indus.*, 147 Fed. Appx. 651, 656 (9th Cir. 2005) (same).

Ms. Martin likewise lacks expert medical knowledge [redacted]. She admits that [redacted], "is outside the scope of my expert opinion." [Mot. Strike Ex. A, Souza Decl., Ex. 1 (Martin Dep.) at 40:11-21.] Ms. Martin further admits that she "can only speak to what the [IOM's] recommendation actually says" regarding what constitutes "preventive" services, which encompasses the extent of her knowledge. [*Id.* at 169:24-170:16.] Nevertheless, [redacted] [D. Smith S.J. Decl., Ex. 4, Dkt. 116-04 (Martin Report) at 16.] As noted above, to the extent Ms. Martin [redacted], her testimony is inappropriate. *Hooper*, 688 F.3d

at 1052. Moreover, as with her opinions [redacted], Ms. Martin admits that she has no expert medical knowledge and is essentially just pointing the factfinder to a source that she believes is in conflict with Defendants' experts' opinions. Because Ms. Martin lacks expert knowledge, that is not proper expert testimony. *Chang*, 207 F.3d at 1172-73; *Massok*, 147 Fed. Appx. at 656.

B. The Opinions Offered By Dr. Ellen Chetwynd Should Be Excluded.

The Court should also strike Dr. Chetwynd's opinions and testimony in their entirety, as each of her opinions is improper affirmative testimony that goes well beyond the scope of proper rebuttal testimony. *Vu*, 2010 WL 2179882, at *3. First, to the extent that Dr. Chetwynd opines about [redacted], she is offering an improper affirmative opinion, and not rebutting Defendants' experts. Second, Dr. Chetwynd's opinions [redacted] likewise constitute improper affirmative expert testimony that does not rebut any of Defendants' experts' opinions. Finally, Dr. Chetwynd's opinion [redacted] does not actually rebut those experts' opinions, but instead misstates them in order to improperly introduce affirmative expert testimony.

1. Dr. Chetwynd Offers Improper Affirmative, Not Rebuttal, Testimony Regarding "Comprehensive" Lactation Services.

Defendants' experts did not offer opinions on what [redacted]. Instead, their opinions focused on whether [redacted] Dr. Chetwynd nevertheless [redacted], based on her "clinical interpretation of what's necessary to provide the care that is … put forward" in ACA and supporting regulations and guidance. [Mot. Strike Ex. A, Souza Decl., Ex. 2 (Chetwynd Dep.) at 52:12-21.] However, [redacted]—is not found in ACA, its implementing regulations, or sub-regulatory guidance. In fact, Dr. Chetwynd admits that her

definition of "comprehensive" is broader than what the USPSTF guidelines recommend. [*Id.* at 145:14-23, 148:9-15 (admitting USPSTF's recommendations are narrower in scope than Dr. Chetwynd's definition of "comprehensive").] To the extent that [redacted] that view was not discussed by Defendants' experts, does not rebut their opinions and is improper affirmative expert testimony and is prejudicial to Defendants. *Int'l Bus. Machines Corp.*, 1995 WL 115421, at *3-4; *Vu*, 2010 WL 2179882, at *3; *Tamburri*, 2013 WL 3152921, at *2. The Court therefore should exclude Dr. Chetwynd's opinions and testimony to the extent they rely upon [redacted]. *Id.*

2. Dr. Chetwynd Offers Improper Affirmative, Not Rebuttal, Testimony [redacted]

None of Defendants' experts express any opinions [redacted] [*see* D. Smith S.J. Decl., Ex. 51, Dkt. 116-04 (Chetwynd Report) at 11-14, 23-24] and [redacted] [*id.* at 19-20]. Like [redacted], these opinions do not rebut any of the testimony offered by Defendants' experts, and instead are improper attempts to introduce affirmative expert opinions after the deadline for such opinions has passed. Accordingly, the Court should exclude these opinions and testimony. *Vu*, 2010 WL 2179882, at *3; *Tamburri*, 2013 WL 3152921, at *2.

3. Dr. Chetwynd's Opinions Distort Opinions of Drs. Cooper and Lee in Order to Introduce Improper Affirmative Testimony.

Dr. Chetwynd offers opinions that she claims rebut statements by Drs. Cooper and Lee [redacted], but she in fact misstates those experts' opinions, erecting straw-men as a way to introduce further affirmative expert opinions. [D. Smith S.J. Decl., Ex. 51, Dkt. 116-04 (Chetwynd Report) at 20-24.] Specifically, Dr. Chetwynd incorrectly [redacted]

[redacted]. [*Id.* at 21-23.] However, Drs. Cooper and Lee [redacted]. [*See generally* S.J. Ex. G, Souza Decl., Exs. 9, 10, Dkts. 111-18, 20 (Cooper Report, Lee Report).] For example, Dr. Lee [redacted] [S.J. Ex. G, Souza Decl., Ex. 10, Dkt. 111-20 (Lee Report) at 1], and [redacted] [*see, e.g., id.* at 9 [redacted]]. Similarly, Dr. Cooper [redacted] [S.J. Ex. G, Souza Decl., Ex. 9, Dkt. 111-18 (Cooper Report) at 5] and [redacted] [*id.* at 9]. Accordingly, Dr. Chetwynd's assertion [redacted] is a straw-man that Dr. Chetwynd uses to introduce improper affirmative expert opinions [redacted]. [D. Smith S.J. Decl., Ex. 51, Dkt. 116-04 (Chetwynd Report) at 22-23.] As with the other testimony discussed above, this testimony constitutes improper affirmative testimony that is outside the scope of rebuttal, and therefore the Court should exclude it. *Vu*, 2010 WL 2179882, at *3; *Tamburri*, 2013 WL 3152921, at *2.

IV. CONCLUSION

In their "rebuttal" reports, Ms. Martin and Dr. Chetwynd do not solely respond to the opinions set forth in Defendants' affirmative expert reports, as required by the Federal Rules of Civil Procedure; instead, they address matters that reach far beyond the scope of Defendants' reports. Moreover, Ms. Martin's opinions largely consist of [redacted], which is the "exclusive province" of the Court. *Nationwide Transp.*, 523 F.3d at 1058. This Court should not countenance Plaintiffs' failure to submit these opinions in a timely fashion. Plaintiffs have played "fast-and-loose with Rule 26's requirements to the detriment of"

Defendants, and the proper sanction is the exclusion of Ms. Martin's and Dr. Chetwynd's opinions and testimony. *Clear-View Techs., Inc.*, 2015 WL 3509384, at *3.

DATED: January 5, 2018

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