

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

**ORLANDO DIVISION**

TELEDYNE INSTRUMENTS, INC.,

Plaintiff,

v.

JAMES L. CAIRNS, ABYSSAL SYSTEMS,  
INC., KATHRYN F. KRAUSE, and THE  
STILLWATER TRUST,

Defendants.

Case No.: 6:12-cv-00854-JA-TBS

**DEFENDANTS' MOTION TO EXCLUDE PLAINTIFF'S REPLY EXPERT REPORT  
AND RELATED TESTIMONY**

Defendants respectfully move the Court for an order excluding Plaintiff's "Rebuttal Report to James L. Cairns' Corrected Expert Rebuttal Report" (the "Reply Report") and related testimony. Just as discussed in Defendants' currently pending motion to exclude Plaintiff's "Counter-Defendant" expert reports (Doc. 106), Plaintiff continues to disregard this Court's schedule. Plaintiff's fifty-plus page "Reply Report" was served about one and a half days before Defendants deposed the expert and less than six days before the close of discovery in this case. It addresses matters that could and should have been, and in some instances in fact were, addressed in the principal report.

The "Reply Report" is in plain violation of the Court's Case Management and Scheduling Order (Doc. 37, "CMSO") and left no time for Defendants to analyze and address the information in it prior to the expert deposition and the close of discovery. Accordingly, the "Reply Report" and related testimony should be excluded under Rules 26(a)(2)(D) and 37(c)(1)

of the Federal Rules of Civil Procedure and this Court’s CMSO, as amended by the Court’s Order dated April 23, 2013. *See* Doc. 63.

Defendants have requested Plaintiff to withdraw the “Reply Report,” but Plaintiff refuses. *See* Exs. A, B, and C.

**I. BACKGROUND**

The Background concerning this Motion is more fully set forth in Defendants’ Motion to Exclude Plaintiff’s “Counter-Defendant” Expert Reports (Doc. 106).

On December 6, 2012, the parties filed a joint Case Management Report (Doc. 26) in which they disagreed on the timing and sequence of their respective expert disclosures. *See* Doc. 26, p. 2. Plaintiff sought two rounds of simultaneous expert disclosures: (1) a first round of disclosures by “Plaintiff” and “Counter-Plaintiff”; and (2) a second round of disclosures by “Defendant” and “Counter-Defendant.” Doc. 26, p. 2. Defendants maintained that separate expert disclosures as to the counterclaims were unnecessary and wasteful. Defendants requested one round of disclosures by Plaintiff’s experts and a second round of disclosure by Defendants’ experts. Doc. 26, p. 2. At no point did the parties mention rebuttal reports or reply reports.

On January 8, 2013 the Court entered the CMSO (Doc. 37). Consistent with Defendants’ proposal, the CMSO authorized only one disclosure by Plaintiff’s experts and only one disclosure by Defendants’ experts:

Disclosure of Expert Reports	Plaintiff:	June 3, 2013
	Defendants:	July 3, 2013

Doc. 37, p. 3. The parties later filed a joint motion for an extension of the due dates for expert disclosures. *See* Doc. 61. Plaintiff sought to extend the date for its expert disclosures to incorporate testimony from Dr. Cairns’ deposition. *Id.* at ¶ 3. The Court granted the request for

additional time on April 23, 2013, indicating that “[t]he new deadline for the disclosure of expert reports by Plaintiffs is June 27, 2013 . . . .” Doc. 63.

On June 27, 2013, Plaintiff timely served Defendants with three expert reports from four different expert witnesses. It notified Defendants that it intended to rely on three technical expert witnesses and one damages expert. Then on July 26, 2013, Defendants served one technical report by Dr. Cairns in rebuttal to the three technical expert witness reports served by Plaintiff.<sup>1</sup> Now, late in the evening of August 26, 2013, less than two days before its expert was to be deposed, and less than six days before the close of discovery, Plaintiff served yet another expert report. This time Plaintiff served a fifty-plus page “Reply Report” addressing information that could and should have been addressed in its opening report, and in the case of one patent (U.S. Patent No. 4,682,848, “the ‘848 patent”) had indeed been considered in connection with the opening report.

Plaintiff had no right to serve its “Reply Report” and certainly not at such a late date. This late disclosure and any testimony related thereto are highly prejudicial to Defendants and should be stricken.

## **II. PLAINTIFF’S “REPLY REPORT” AND RELATED TESTIMONY SHOULD BE EXCLUDED**

The Rules of Civil Procedure require 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). “[C]ompliance with the requirements of Rule 26 is not merely aspirational.” *Maryland Cas. Co. v. Earth Inspired Living, LLC*, No. 6:12-cv-1033-ORL-19TBS, 2013 WL 869394, at \*2 (M.D. Fla. Mar.

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<sup>1</sup> On the same day that Dr. Cairns submitted his expert report, and without leave of court or consent by (or even prior notice to) Defendants, Plaintiff served a new wave of no less than five expert reports by six expert witnesses under the designation of “Counter-Defendant” reports. These “Counter-Defendant” expert reports are the subject of Defendants’ currently pending motion to exclude (Doc. 106).

7, 2013) (Smith, Mag.) (internal citations omitted). Further, “Federal Rule of Civil Procedure 37(c)(1) provides that ‘[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.’” *Id.* (quoting Fed. R. Civ. P. 37) (alteration in original).

The Court’s CMSO required Plaintiff to disclose its expert reports by June 27, 2013. *See* Docs. 37, p. 3; 63. There was no provision for further supplementation by Plaintiff’s experts, and there certainly was no provision for service of the “Reply Report” served by Plaintiff. For these reasons alone, Plaintiff’s “Reply Report” and testimony related thereto should be excluded as untimely. *Kelly v. Nelson, Mullins, Riley & Scarborough, L.L.P.*, No. 8:01-CV-1176-T-27MAP, 2003 WL 25778702, at \*1 (M.D. Fla. Mar. 25, 2003) (striking additional expert report where “[t]he Case Management and Scheduling Order expressly lists *one* date for the disclosure of expert reports.”).

Plaintiff argues, however, that its “Reply Report” is a rebuttal to Dr. Cairns’ expert report and should be allowed under Rules 26(a)(2)(D)(ii). *See* Ex. C. Although Plaintiff titled its report as a rebuttal to Defendants’ rebuttal report, it is simply a further opening report primarily addressing information that could have been disclosed within the time set for its initial expert report, and actually discusses one patent, the ’848 patent, that Plaintiff indicated in its opening report – and the expert admitted on deposition – he had reviewed and considered during the preparation of the first disclosure. Regardless of whether Plaintiff’s new report is considered a reply report or a rebuttal report, the CMSO in this case did not allow for it. There is simply no justification for Plaintiff’s concealing new opinions until less than two days before Plaintiff’s expert was to be deposed and less than six days before discovery was to close. The only

conceivable purpose for holding back that information was to deny Defendants an opportunity to analyze and address the new expert report, and conduct a proper examination of Plaintiff's expert. With essentially one day before the deposition (and Defendants' counsel was traveling much of that day), less than six days before the close of fact and expert discovery, and just over one month before dispositive and *Daubert* motions are due, it is unfair and prejudicial for the Plaintiff, who brought this action, to spring new complex technical opinions on Defendants. Defendants are unable to properly address the new information before the close of discovery and the due date for summary judgment and other motions.

### **III. CONCLUSION**

Plaintiff was not substantially justified in serving its "Reply Report" after the deadline for disclosure of expert witnesses. Defendants will be prejudiced if the Court allows this inappropriate report and related testimony to be admitted. Accordingly, under the CMSO and Fed. R. Civ. P. 26(a)(2)(D) and 37(c)(1), Defendants respectfully request this Court to exclude Plaintiff's "Rebuttal Report To James L. Cairns' Corrected Expert Rebuttal Report" and related testimony.

Dated: August 31, 2013

Respectfully submitted,

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**LOCAL RULE 3.01(g) CERTIFICATE**

Pursuant to Local Rule 3.01(g), I, Kevin C. Keenan, counsel for Defendants, in a good-faith effort to resolve the issues raised by this motion, conferred with counsel for the Plaintiff by telephone on August 30, 2013. Plaintiff stated that it would not withdraw the “Rebuttal.

Dated: August 31, 2013

/s/ Kevin C. Keenan  
Kevin C. Keenan

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2013, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

Dated: August 31, 2013

/s/ Kevin C. Keenan  
Kevin C. Keenan