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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**
17

18 United States of America,

19 Plaintiff,

20 v.

21 Maricopa County, Arizona; Maricopa County
22 Sheriff's Office; and Joseph M. Arpaio, in
his Official Capacity as Sheriff of Maricopa
23 County, Arizona,

24 Defendants.

NO. CV12-00981-PHX-ROS

**DEFENDANT MARICOPA COUNTY'S
MOTION IN LIMINE TO EXCLUDE
PLAINTIFF'S WITNESSES NOT
PROPERLY DISCLOSED AS RE-
QUIRED BY FED. R. CIV. PRO. 26**

25 Pursuant to Rules 26(a)(1)(A)(i) and (a)(3)(i) and 37 of the Federal Rules of Civil
26 Procedure, Defendant Maricopa County files this Motion in Limine to exclude the testimony
27 of witnesses where Plaintiff failed to comply with its disclosure obligations under the Rules.
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1 **I. Introduction and Facts**

2 Throughout the course of this litigation, the parties exchanged disclosures pursuant to
3 Rule 26 of the Federal Rules of Civil Procedure. On September 15, 2014, the final day for
4 supplementation of discovery, Plaintiff served “United States’ Rule 26(a)(3) Disclosure of
5 Trial Witnesses and Exhibits.” This disclosure contained a list called “26(a)(3)(A)(1) Disclo-
6 sure of Trial Witnesses,” which, among others, identified the following witnesses: Mary
7 Margaret Brazel, Randy Means, Eric Miceli, Karissa Ramirez, James Siebert, Gerald Sheri-
8 dan, and Martin Spidell (collectively the “Last Supplement Witnesses”). The Last Supple-
9 ment Witnesses had previously been disclosed by Defendant Sheriff Joseph M. Arpaio
10 (“Arpaio”). While Plaintiff deposed the Last Supplement Witnesses, it had never supple-
11 mented its disclosures prior to September 15, 2014, to state that it intended to rely upon them
12 to support its claims. Thus, the first time Maricopa County learned of Plaintiff’s intent to rely
13 on the Last Supplement Witnesses was when Plaintiff served its final supplement on Sep-
14 tember 15, 2014. Pursuant to this Court’s Third Amended Rule 16 Scheduling Order (Doc.
15 277), all fact discovery in this case was required to be completed by April 11, 2014, so De-
16 fendants were precluded by Plaintiff’s disclosure, on the very last day for supplementation of
17 disclosures, from conducting any discovery aimed at obtaining information as to the testimo-
18 ny that Plaintiff might be expected to elicit from the Last Supplement Witnesses. In addi-
19 tion, Plaintiff failed to provide any summary of the anticipated testimony of the Last Sup-
20 plement Witnesses as required by Federal Rule of Civil Procedure, Rule 26(a)(1)(A)(i), in-
21 cluding in its September 15, 2014, final disclosure.

22 Following this eleventh hour disclosure of the Last Supplement Witnesses, Plaintiff
23 served a “preliminary” witness list on June 25, 2015, which identified seven witnesses that
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1 had never been disclosed in any of Plaintiff's disclosures. These undisclosed witnesses are:
2 Shelly Bunn, Juan Martin Campos-Uriarte, Terry Dong, Frank Fernandez, John Halverson,
3 John MacIntyre, and Judy Schroeder (collectively the "Undisclosed Witnesses"). While five
4 of the Undisclosed Witnesses had previously been disclosed by Arpaio, two of the seven
5 Undisclosed Witnesses (Mr. Halverson and Mr. MacIntyre) had never been disclosed by any
6 party at any time prior to June 25, 2015.
7

8 Pursuant to Federal Rules of Civil Procedure, Rules 26 and 37, Maricopa County re-
9 spectfully moves this Court to preclude Plaintiff from calling the Last Supplement Witnesses
10 and the Undisclosed Witnesses to testify at trial as part of its case-in-chief because of Plain-
11 tiff's failure to comply with disclosure requirements of Rule 26 of the Federal Rules of Civil
12 Procedure.
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14 **II. Memorandum of Law**

15 Rule 26 requires parties to exchange information pertaining to witnesses likely to
16 have discoverable information, the subjects of the information the witnesses have, along with
17 documents related to claims or defenses. Fed. R. Civ. P. 26(a)(1)(A). The purpose of disclo-
18 sures is to facilitate the exchange of information so the parties can identify relevant witnesses
19 and facts related to the claims and defenses of the party. *See* Fed. R. Civ. P. 26(a)(1) adviso-
20 rry committee note to 1993 and 2000 amendments. Rule 26 also requires a party to supple-
21 ment its initial disclosure during the course of the litigation when it learns that information it
22 originally provided is incomplete. Fed. R. Civ. P. 26(e); *Neothermia Corp. v. Rubicor Med.,*
23 *Inc.*, 345 F. Supp.2d 1042, 1045 (N.D. Cal. 2004).
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27 A party who fails to comply with the mandatory disclosure provisions of Rule 26(a),
28 or the supplemental disclosure requirements of Rule 26(e) is automatically subject to the ex-

1 clusionary sanction of Rule 37 of Federal Rules of Civil Procedure. Rule 37 provides that
2 “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or
3 (e), the party is not allowed to use that information or witness to supply evidence on a mo-
4 tion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”
5 Fed. R. Civ. P. 37(c)(1).
6

7 **A. Plaintiff is not permitted to call Last Supplement Witnesses to testi-**
8 **fy in support of its case-in-chief because it did not properly disclose**
9 **the subject of their testimony as required by Rule 26 of the Federal**
10 **Rules of Civil Procedure, and their late disclosure assured that De-**
11 **fendants had no opportunity to conduct discovery into their ex-**
12 **pected areas of testimony.**

13 Rule 26 requires a party to identify witnesses *and* disclose the subjects of the infor-
14 mation the witness has that the party will use to support its claims/defenses. Fed. R. Civ. P.
15 26(a)(1)(A)(i). Thus, in addition to identifying the Last Supplement Witnesses, Plaintiff was
16 required to provide the subjects of the information the Last Supplement Witnesses on which
17 Plaintiff intended to rely at the time of trial. While Plaintiff’s September 15, 2014, disclo-
18 sure identified the Last Supplement Witnesses, the disclosure was insufficient because the
19 subject areas of the information Plaintiff intended to use were never disclosed. Plaintiff com-
20 pounded this omission by delaying disclosure of even the identities of the Last Supplement
21 Witnesses until Plaintiff supplemented its disclosure of the Last Supplement Witnesses to
22 provide the subject areas of the testimony they would be offering as required by Rule 26. As
23 such, Plaintiff failed to comply with the disclosure requirement of Rule 26. According to
24 Rule 37(c)(1), Plaintiff’s failure to disclose means that it “is not allowed to use that infor-
25 mation or witness to supply evidence . . . at a trial unless the failure was substantially justi-
26 fied or harmless.”
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1 There is simply no justification for Plaintiff's failure to comply with the mandatory
2 disclosure requirements. Plaintiff deposed the Last Supplement Witnesses between Novem-
3 ber 7, 2013, and August 21, 2014. In fact, six of the seven Last Supplement Witnesses were
4 deposed by April of 2014. Plaintiff had plenty of opportunity to supplement its disclosures
5 to identify the Last Supplement Witnesses and the subjects of their testimony as required by
6 Rule 26(e) prior to the first time it actually did so, which was on September 15, 2014. The
7 prejudicial effects of noncompliant disclosures are magnified in a case where there are more
8 than 400 disclosed witnesses. The number of witnesses disclosed makes it extremely difficult
9 for the parties to determine which witnesses to focus on during discovery. To make matters
10 worse, Plaintiff made the incomplete disclosure of the Last Supplement Witnesses after the
11 close of discovery, foreclosing Maricopa County and Sheriff Arpaio from conducting any
12 discovery with respect to the Last Supplement Witnesses. Thus, Plaintiff should not be per-
13 mitted to call any of the Last Supplement Witnesses at the time of trial.

17 **B. Plaintiff is precluded from calling the Undisclosed Witnesses to tes-**
18 **tify because they were never disclosed by Plaintiff prior to being**
19 **identified in Plaintiff's Pretrial Witness List on June 25, 2015.**

20 In addition to incomplete disclosure, Plaintiff failed to disclose that it would be rely-
21 ing on the Undisclosed Witnesses at all! Plaintiff served its final Rule 26(a)(3) disclosure on
22 September 15, 2014. This disclosure listed 231 witnesses, but included none of the Undis-
23 closed Witnesses. Nevertheless, Plaintiff's pretrial witness list served on June 25, 2015, in-
24 cluded seven witnesses that Plaintiff had never disclosed at any prior point. Plaintiff's fail-
25 ure to disclose the Undisclosed Witnesses is inexcusable. Five of the Undisclosed Witnesses
26 were deposed prior to the close of discovery, thus it cannot be said that Plaintiff did not
27 know about them or have opportunity to supplement its disclosure. In the case of Mr. Hal-
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1 verson and Mr. MacIntyre, neither of them was disclosed by *any* party before Plaintiff identi-
2 fied them in its pretrial witness list.

3
4 The Rules are clear. Parties must disclose all witnesses upon whom they intend to re-
5 ly, or they forfeit the right to rely upon that witness at the time of trial. There is no excuse for
6 Plaintiff's failure to disclose these witnesses, and Plaintiff should be precluded from calling
7 any of the Undisclosed Witnesses to support its case-in-chief.

8
9 **III. Conclusion**

10 For the foregoing reasons, Maricopa County respectfully requests that the Court grant
11 its motion *in limine*, precluding Plaintiff from calling in support of its case-in-chief Mary
12 Margaret Brazel, Randy Means, Eric Miceli, Karissa Ramirez, James Siebert, Gerald Sheri-
13 dan, Martin Spidell, Shelly Bunn, Juan Martin Campos-Uriarte, Terry Dong, John Halver-
14 son, John MacIntyre, and Judy Schroeder as witnesses for its case-in-chief.
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17 RESPECTFULLY SUBMITTED, this 10th day of July, 2015.

18
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1 NOTICE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

2 I hereby certify that on July 10, 2015, I electronically filed Defendant Maricopa
3 County's Motion in Limine to Exclude Plaintiff's Witnesses Not Properly Disclosed as Re-
4 quired by Fed. R. Civ. Pro. 26 with the Clerk of the Court for filing and uploading to the
5 CM/ECF system which will send notification of such filing to all parties of record.
6

7 /s/ Michelle Giordano
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