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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

THE CHURCH OF THE HOLY LIGHT)
OF THE QUEEN, a/k/a The Santo Daime)
Church, *et al.*,)
)
Plaintiffs,)
v.)
)
MICHAEL B. MUKASEY, *et al.*,)
)
Defendants.)
_____)

Civ. No. 08-3095-PA

**REPLY IN SUPPORT
OF DEFENDANTS'
MOTION TO STRIKE AND
IN LIMINE TO EXCLUDE
WITNESS STATEMENT OF
GHISELIN AND REBUTTAL
STATEMENTS OF COZZI, HALPERN,
MACRAE, AND GURULE**

In their opposition to Defendants' motion to strike and *in limine* to exclude Plaintiffs' rebuttal statements, Plaintiffs largely ignore the arguments presented in Defendants' motion and memorandum. Most significantly, Plaintiffs fail to address Rule 26(a)(3)(B), which requires that *all* pretrial disclosures, including rebuttal expert reports, be filed at least thirty days before trial. Fed. R. Civ. P. 26(a)(3)(B). This rule, as Defendants previously observed, supercedes Rule 26(a)(2)(C), upon which Plaintiffs rely to justify their untimely and highly prejudicial filings. *See IBM Corp. v. Fasco Indus.*, Civ. No. 93-20326, 1995 WL 115421, at *2 (N.D. Cal. March 15, 1995) (holding that, where a pretrial order is silent as to rebuttal experts, the Rule provision permitting rebuttal designation is overridden and all expert testimony must be exchanged at the specified time). Plaintiffs' defense that their statements are, in fact, "real rebuttal" statements entirely misses the point. Although much of Plaintiffs' new testimony is nonresponsive to Defendants' witness testimony, Defendants did not contend that they were somehow "fake" rebuttal. Rather, Defendants asserted that by filing the statements in violation of the Court's orders, without notice, and in the midnight hour, Plaintiffs are abusing the process in two ways: (1) by holding back on the majority of their presentation until the last minute and/or attempting to compensate for their own failures of presentation; and (2) by supplanting cross-examination (a forum in which Defendants would have an opportunity to respond) with improper rebuttal testimony (to which Defendants have no time to respond). This is precisely the sort of tactic the Federal Rules are designed to prohibit. *See, e.g., Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d* § 1522 (1990) (Rule 16 is focused "on the use of the pretrial conference as a means to familiarize the litigants and the court with the issues actually involved in a lawsuit so that the parties can accurately appraise their cases and

substantially reduce the danger of surprise at trial.”) (emphasis added); *see also* *Mallinckrodt, Inc. v. Masimo Corp.*, 254 F. Supp. 2d 1140, 1156 (C.D. Cal. 2003) (quoting *Wright & Miller*).

Moreover, the notion that Plaintiffs could not have intended to surprise Defendants with these filings because the testimony “could have been withheld until plaintiffs’ witnesses took the witness stand,” *Opp.* at 5, is absurd, because Plaintiffs’ witnesses will only be cross-examined and will not be providing direct testimony at trial. This notion is likewise belied by Plaintiffs’ failure either to provide prior notice or to seek for leave to file their statements. Surely, by the time of the final pretrial conference, Plaintiffs were aware of their intent to supplement their testimony. And yet Plaintiffs chose not to raise the issue at the conference, despite the fact that the Court’s orders did not contemplate such supplementation. In fact, the opposite is true. As set forth in Defendants’ prior filing on this point (yet another point ignored in Plaintiffs’ opposition), the *only* provision made by the Court for any other presentation of evidence is via supplemental statements, either (1) based on additional evidence brought forward in discovery after initial statements had already been filed, or (2) to correct oversights. *TRO Hearing Tr.*, Sept. 10, 2008, at 7. None of Plaintiffs’ expert statements fall within these narrow categories.¹ They cite to no evidence brought forward in discovery after the filing of the parties’ statements. They correct no oversights or inadvertent omissions. To the contrary, they consist solely of testimony which Plaintiffs failed adequately to establish in their initial statements – testimony

¹ Defendants’ motion was misdesignated as seeking to exclude the rebuttal statement of Jonathan Goldman. While this statement is both untimely and prejudicial, Defendants believe that it does fall within the narrow category of supplemental statements allowed by the Court. It also (unlike its peers) focuses on only one minor topic and Defendants expect, despite severe time constraints, to be able to file a supplemental statement of Denise Curry to address the matters raised by Mr. Goldman, as well as to address documents and matters recently brought to light via discovery and arising from Ms. Curry’s deposition.

designed to supplant what should take place at trial: cross-examination (an opportunity Plaintiffs have abdicated).

Plaintiffs' excuse for their failure, either to file their new statements or to provide notice of their intent to file them before the final pretrial conference, is, again, to simply ignore it. Plaintiffs necessarily concede, therefore, that they were obligated to provide such notice and did not do so. Fed. R. Civ. P. 16(e) (modification of pretrial orders only permitted to "prevent manifest injustice"); *Colvin v. United States*, 549 F.2d 1338, 1340 (9th Cir. 1977) (affirming exclusion of new evidence proffered after pretrial order and observing that "[a]ny injustice resulting from exclusion ... comes from [the defaulting party's] own failure properly to present his case.>").

Nor do Plaintiffs address Defendants' demonstration that the introduction of entirely new witnesses (as with Dr. Ghiselin) at the final hour, as Plaintiffs attempt to do, is both highly prejudicial and plainly improper. *United States v. Lummi Tribe*, 841 F.2d 317, 320-21 (9th Cir. 1988) (affirming exclusion of expert testimony not revealed in pretrial list of witnesses); *Thibeault v. Square D Co.*, 960 F.2d 239, 246-47 (1st Cir. 1992) ("Many courts ... have recognized that the introduction of new expert testimony on the eve of trial can be seriously prejudicial to the opposing party."); *Bradley v. United States*, 866 F.2d 120, 125 (5th Cir. 1989) (holding that a district court abused its discretion by designating new expert witnesses shortly

before trial).² Likewise, Plaintiffs fail to address, and necessarily concede, that exclusion of their rebuttal statements is mandatory. Fed. R. Civ. P. 37(c)(1) (“If 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 a trial, unless the failure was substantially justified or is harmless.”) (emphasis added). As the Ninth Circuit has recognized: “Rule 37(c)(1) gives teeth to [the disclosure] requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (affirming exclusion of expert witness as a sanction where disclosure made less than one month before trial: “[E]ven though [the disclosing party] never violated an explicit court order to produce the [rebuttal witness] report and even absent a showing in the record of bad faith or unwillingness, exclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a).”).

As Defendants have demonstrated – and, yet again, as Plaintiffs concede by omission – Plaintiffs’ ambush tactics are not substantially justified, nor are they harmless. Plaintiffs have attempted to expand their presentation of evidence by orders of magnitude and in the midnight hour, giving Defendants (and the Court) no notice whatsoever, and leaving Defendants no meaningful opportunity to respond prior to trial. The statements must be excluded.

² The substantive grounds for excluding the testimony of Dr. Ghiselin are fully set forth in Defendants’ prior memorandum. For purposes of this reply Defendants will only observe that Plaintiffs do not bother to address the fact that Dr. Ghiselin’s entire presentation is based on a manifestly erroneous reading of the *O Centro* decision. Even if he were allowed to apply his expertise in biology to opine on legal questions of admissibility, all of his opinions are tainted by this erroneous legal predicate.

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Respectfully submitted,

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