UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OCCIDENTAL FIRE & CASUALTY OF NORTH CAROLINA,

Plaintiff,

v.

INTERMATIC INCORPORATED, et al.,

Defendants.

2:09-CV-2207 JCM (VCF)

ORDER

This is a diversity action filed against defendants True Manufacturing Company and True Food Service Equipment (collectively "True") by plaintiff Occidental Fire and Casualty of North Carolina ("Occidental"). Before the court are six motions *in limine* (Doc. Nos. 127, 128, 155, 158, 160, 162) filed by the parties:

1. Defendants' motion *in limine* (Doc. 127) regarding plaintiff's expert, Donald F. Peak

2. Defendants' motion *in limine* (Doc. 128) regarding plaintiff's expert, Robert Longseth

3. Plaintiff's motion *in limine* (Doc. 155) regarding defendants' expert, Lorne Lomprey

4. Plaintiff's motion *in limine* (Doc. 158) regarding defendants' expert, Jeff Colwell

5. Plaintiff's motion *in limine* (Doc. 160) regarding defendants' expert Robert Armstrong

6. Plaintiff's motion *in limine* (Doc. 162) regarding defendants' expert Michael Doughty

I. Legal Standard

"Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984) (citing Federal Rule of Evidence 103©). *In limine* rulings "are not binding on the trial judge, and the judge may always change his mind during the course of a trial." *Ohler v. United States*, 529 U.S. 753, 758 n. 3 (2000); accord Luce, 469 U.S. at 41 (noting that *in limine* rulings are always subject to change, especially if the evidence unfolds in an unanticipated manner). The admissibility of expert testimony is governed by Federal Rule of Evidence 104, which provides for a court to decide "any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." Fed. R. Evid. 104(a). "In so deciding, the court is not bound by evidence rules, except those on privilege." *Id*. In order to satisfy the burden of proof for Rule 104(a), a party must show that the requirements for admissibility are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("We have traditionally required that these matters [regarding admissibility determinations that hinge on preliminary factual questions] be established by a preponderance of proof."). Federal Rule of Evidence 702 provides that a qualified expert witness may provide testimony in the form of an opinion if the court finds that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In 2000 this rule was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its progeny, including *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

II. Discussion

The court will address only those facts which are pertinent to resolution of the instant motions *in limine*.

1. Defendant's Motion *in Limine* Regarding Donald F. Peak (Doc. 127)

With this motion, defendant seeks to exclude all testimony of Donald F. Peak, plaintiff's "cause of fire" expert. Defendant argues that Peak's methods are not grounded in reliable principles and methods, and thus do not fulfill the requirements of Federal Rule of Evidence 702. Alternatively, defendant seeks to exclude the testimony from Peak's supplemental report, filed on October 31, 2012. Defendant claims that while the report was presented as a supplemental report, it presents opinions that materially differ from Peak's prior reports and therefore should be excluded as an untimely rebuttal report under Federal Rules of Civil Procedure 37(c)(1) and (b)(2).

In arguing that Peak's methods of investigation were unscientific, defendants rely heavily on the process laid out in the National Fire Protection Association's Guide for Fire and Explosion Investigations ("NFPA 921"). Indeed, this method was relied upon by plaintiff's and defendants' experts alike and is widely recognized by courts as being a highly reputable, peer-reviewed process for fire investigation. *See, e.g.*, *Fireman's Fund Ins. Co v. Canon U.S.A.*, 392 F.3d 1054, 1057-58 (5th Cir. 2005); *Presley v. Lakewood Eng'g*, 553 F.3d 638, 645 (8th Cir. 2009).

Defendants specifically argue that Peak's methodology was unreliable because he consulted only one witness in determining the fire's area of origin. Defendants assert that consulting only one witness necessarily shows that Peak's conclusions were the result of "expectation bias" and therefore were not in line with the methodology of NFPA 921. While arguing that an expert did not comport with one particular method of fire investigation could not, by itself, determine that his methods were unreliable, in this case the court does not even need to look beyond the NFPA guidelines to recognize that defendants' argument does not merit exclusion.

Indeed, Even a cursory reading of the guidelines makes clear that this argument against Peak's method of fire investigation holds no water. Section 17.2.1.2 of the NFPA states clearly that "a single item, such as an irrefutable article of physical evidence or a credible eyewitness to the ignition . . .

may be the basis for a determination of origin." This rule makes clear that there are circumstances in which a sole witness statement would be enough to validate a fire investigation under the NFPA 921 method. Because defendant's argument is incorrectly rooted in the premise that reliance on a single witness statement necessarily violates the NFPA 921 method, this argument for excluding Peak's testimony is clearly no more than smoke and mirrors.[1]

Further, defendants argue that because Peak did not utilize arc mapping to determine the fire's origin his conclusions are unreliable. While NFPA 921 does name "arc mapping" as a potential tool in determining a fire's origin, it never identifies it as necessary. The method states that a fire's origin can be determined using information gathered from one or more of the following sources: "witness information," "fire patterns," "arc mapping," and/or "fire dynamics." Nowhere does NFPA 921 state that an investigation into a fire's origin must include arc mapping to be valid. Thus, defendants' assertion that Peak did not use arc mapping does not render his opinion unreliable.

Additionally, defendants argue that Peak's supplemental report, filed on October 30, 2012, should be excluded because the report contained new opinions that had not been previously presented by Peak. In support of this proposition, defendants discuss *Plumley v. Mockett*, wherein the court excluded a supplemental report that was both submitted two months after the discovery deadline and substantially differed from the expert's initial and rebuttal reports. 836 F. Supp. 2d 1053, 1061 (C.D. Cal. 2010). Two relevant facts make this case substantially unlike that of *Plumley*.

First, unlike *Plumley*, Peak's supplemental report was submitted prior to the close of discovery. It is not refuted that the discovery deadline was October 30, 2012, and that Peak's supplemental report was submitted on that very date.

Secondly, despite their arguments to the contrary defendants cannot legitimately claim that they were "sandbagged" by the supplemental report, because the report did not contain any opinions that were not already addressed by Peak's initial report, his rebuttal report, and/or his deposition. In this motion, defendants only point to minuscule differences between the statements made in Peak's prior

[1] It is also important to note that the statement of the witness in question was not the sole basis for Peak's conclusion as to the fire's origin. Peak also conducted an in-person analysis of burn patterns and fire damage at the scene of the fire while conducting a layer search of the charred remains of the building. Such evidence is also listed in NFPA 921 as often being sufficient to make a conclusion on a fire's origin.

reports and the contents of the supplemental report. Defendants characterization of Peak's statement in the supplemental that the fire originated "in the True freezer" as materially different from his prior statement that the area of origin was "in or on the True freezer," makes a mountainous blaze out of a molehill of embers. Since the examples pointed out by defendants reflect only superficial differences in the contents of the supplemental report, it is clear that the contents of this report should have come as no surprise, and did no harm to them in this litigation. As such, exclusion of the contents of the report under Federal Rule of Civil Procedure 37(c)(1) is unwarranted.

Because Peak did not depart from to the methodology of NFPA 921 by interviewing only one witness in his investigation, and because Peak's October 30, 2012 report was correctly supplemental and timely, defendant's motion to exclude Peak's testimony is denied.

2. Defendant's Motion *in Limine* Regarding Robert Longseth (Doc. 128)

In their second motion *in limine*, defendants request that the court exclude the testimony of plaintiff's causation expert Robert Longseth. As in their prior motion, defendants rely on NFPA 921 to argue that Longseth's methods for investigating the cause of the fire were not reliable.

Specifically, defendants assert that because Longseth did not conduct tests on an exemplar of the model of the freezer at issue, that his conclusion that a component of the True freezer was the source of the fire is unreliable. Short of stating that testing an exemplar is necessary to conclude that an appliance caused a particular fire, NFPA 921 states only that "exemplar appliances *can* be operated and tested to establish the validity of the proposed ignition scenario." *NFPA 921* § 24.4.6. Nowhere does this methodology state that testing an exemplar appliance is necessary to determine that an appliance caused a particular fire. Because the testing of an exemplar is not necessary to adhere to the NFPA method, defendants' argument does not indicate that Longseth's opinions are unreliable, and therefore this motion is denied.

C. Plaintiff's Motions *in Limine* Regarding Lorne Lomprey and Jeff Colwell (Docs. 155 and 158)

Plaintiff argues that the court should exclude the testimony of defendants' causation experts, Lorne Lomprey and Jeff Colwell. In support of its motions, plaintiff argues that Lomprey's methods

did not comport with the NFPA 921 method because he did not inspect the scene of the fire in person and interviewed only one witness, and similarly that Colwell's investigation was insufficient because he did not personally visit the scene and did not speak to any witnesses. Defendants acknowledge that Lomprey and Colwell each conducted their investigations by analyzing extensive photographs of the site of the fire rather than personally visiting the site.

Notably, NFPA 921 states that a thorough investigation can be performed through examination of photographs without any in-person examination of the scene of a fire. *NFPA 921* § 4.4.3.3. For this reason, it is erroneous to state that the investigations of these experts did not comply with the accepted methodology merely because it was performed through analysis of photographs of the fire site.

Additionally, as previously noted, relying on only one witness statement also does not deem a fire investigation to be unreliable. The NFPA 921 method insists that investigations that rely exclusively upon analysis of fire patterns and fire dynamics, which can be conducted through photographs, can be sufficient for a thorough investigation of a fire's cause without interviewing any witnesses at all. Thus, the fact that Lomprey consulted only one witness and Colwell did not consult any does not indicate that they did not adhere to the NFPA 921 methodology. Plaintiff's motion is therefore denied.

D. Plaintiff's Motion *in Limine* Regarding Robert Armstrong (Doc. 160)

Plaintiff requests that the court exclude the testimony of Robert Armstrong, a causation expert who was originally disclosed by a defendant that has since been dismissed from this case. Plaintiff argues that because Armstrong was never disclosed as an expert by the defendants still remaining in the case that his testimony should be excluded pursuant to Fed. R. Civ. P. 37(c)(1), or that alternatively it should be excluded because his reports "add nothing of consequence" to the information provided by Lomprey and Colwell.

Up front, it is rather contradictory that plaintiff indicates first that Armstrong's testimony should be excluded because it was not given sufficient notice of his opinions, but also that his opinions are virtually identical to those provided by other experts. Regardless, plaintiff was given

sufficient notice of Armstrong's participation in the case, was able to review his reports during the course of discovery, and was able to depose him. As such, it would be incorrect to state that plaintiff was not given proper notice of Armstrong's participation in the case.

Though defendant has numerous causation experts at its disposal, plaintiff does not adequately demonstrate that Armstrong's opinions merely duplicate the opinions of Lomprey and Colwell. As such, plaintiff's motion to exclude Armstrong's testimony is denied. Plaintiff may raise an objection at trial if it so desires.

E. Plaintiff's Motion *in Limine* Regarding Michael Doughty (Doc. 162)

Plaintiff argues that the court should exclude the testimony of Michael Doughty, a fire investigation expert, because Doughty's investigation did not include an extensive layer search of the fire site and instead consisted only of witness interviews and viewing the top of the burned debris. While defendant disputes the extent of Doughty's physical examination of the charred rubble, plaintiff's assertion that the investigation should be deemed unreliable because it is primarily based on witness statements is incorrect. Indeed, just as NFPA 921 illustrates that witness statements are not a necessary part of a proper fire investigation, it also clearly states that a proper fire investigation can take place using *only* witness statements. *NFPA 921* § 17.2.1.2. Because of this, plaintiff's argument does not demonstrate that defendant in any way deviated from the NFPA 921 methodology. Accordingly, plaintiff's motion is denied.

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III. CONCLUSION

IT IS HEREBY ORDERED that motion *in limine* (Doc. 127) is **DENIED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 128) is **DENIED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 155) is **DENIED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 158) is **DENIED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 160) is **DENIED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 162) is **DENIED.**

DATED August 15, 2013.

James C. Mahan

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

OCCIDENTAL FIRE & CASUALTY of NORTH CAROLINA, a North Carolina Corporation,

Plaintiff,

v.

INTERMATIC INCORPORATED, a Delaware Corp. dba GRASSLIN, formerly a GE Industrial Systems Company; TRUE MANUFACTURING COMPANY, A Missouri Corporation; TRUE FOOD SERVICE EQUIPMENT, INC. A Missouri business entity; SYSCO FOOD SERVICE OF LAS VEGAS, INC., a Nevada Corporation; WHEELER'S ELECTRIC, INC., a Nevada Corporation; GARY DEAN SCACCO dba VALLEY REFRIGERATION AND SHEET METAL, GARY SCACCO, dba VALUE REFRIGERATION & SHEET METAL; MADONE, LLC, a Nevada Limited Liability Corporation dba STAGECOACH DEPOT,

Defendants.

Case No. 2:09-cv-02207-JCM-VCF

DEFENDANT TRUE MANUFACTURING COMPANY, TRUE FOOD SERVICE EQUIPMENT AND SYSCO FOOD SERVICE OF LAS VEGAS' MOTION IN LIMINE # 1

TO EXCLUDE TESTIMONY BY DONALD F. PEAK

Pretrial Conf: 8/14/13
Time: 1:30 p.m.
Judge: Hon. James C. Mahon

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Cases

Statutes

I. ORDER REQUESTED

Defendants TRUE MANUFACTURING COMPANY, TRUE FOOD SERVICE EQUIPMENT, INC., and SYSCO FOOD SERVICE OF LAS VEGAS, INC. (collectively, "Defendants") will and hereby do move this Court for an Order, prior to the selection of a jury in the above-captioned case, to exclude the testimony of Plaintiff's expert Donald F. Peak, an origin and cause of fire expert.

This motion is brought pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993). Under Rule 702, the proposed expert is only allowed if "the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Peak's anticipated testimony, as indicated in his expert witness reports and his deposition, does not satisfy the reliability principles articulated in Rule 702.

In addition, the motion is brought pursuant to Rule 37(c)(1) and (b)(2) of the Federal Rules of Civil Procedure. Peak's October 31, 2012 report, submitted well after the deadline for the Court's order regarding expert disclosure deadlines, impermissibly goes beyond the scope of proper supplementation and is a late rebuttal report. Therefore, the report and any testimony based on the report should also be excluded.

II. INTRODUCTION

As a gatekeeper, the Court assesses whether the reasoning or methodology underlying an expert's testimony is scientifically valid. This motion does not seek to disqualify Peak based on his qualifications or credentials, but rather, seeks to exclude Peak's testimony because it is the fruit of unreliable methodology: the expectation bias limited Peak's initial scene examination to the room where the freezer was located, and caused him to lose sight of other potential fire causes located adjacent to the rooms where he examined. In addition, his sudden reversal of opinion regarding the appropriateness of arc mapping in this case further undermines the reliability of his opinion.

In addition, Peak's second report, submitted on the last day before the discovery close of discovery, disclosed for the first time new and contradictory opinions regarding area of origin, the

cause of the fire, and physical conditions in the structure that had not been disclosed previously. This untimely submittal violates not only Rule 26 of Federal Rules of Civil Procedure, but also this Court's order regarding expert disclosures. Considering the remedy of such a violation is an automatic and mandatory exclusion, as well as the amount of prejudice suffered by Defendants, the Court should exclude Peak's second report, and any testimony derived from the report on this independent ground.

III. PROCEDURAL HISTORY

The Court has issued nine scheduling orders, regarding discovery cut-off deadline and expert disclosure deadlines. After various extensions, the Court ordered that the discovery cut-off date be October 30, 2012. Amended Stipulation and Order to Extend Discovery Deadlines [Ninth Request], Doc. 105, p. 3. The Court also ordered that the deadline for initial expert disclosures be May 27, 2011. Stipulation and Order to Extend Discovery Deadlines [Third Request], Doc. 80, p. 4. And the deadline for rebuttal expert disclosures was August 13, 2011. Stipulation and Order to Extend Discovery Deadlines [Fourth Request], Doc. 88, p. 4.

Plaintiff's origin and cause expert Peak submitted his first report on May 12, 2008. Donald Peak's Report ("Peak's Report"), p. 7 (May 12, 2008), Exhibit **F**, attached to Affidavit of Keith R. Gillette in Support of Defendants' Motion in Limine # 1 ("Gillette Affd."), ¶ 7. On October 30, 2012, the day before the discovery was cut off, Peak submitted a second report. Donald Peak's Report ("Peak's Second Report"), pp. 1-10 (October 31, 2012), Exhibit **G**, attached to Gillette Affd., ¶ 8. The second report was submitted well after the Court's order regarding initial disclosure and rebuttal disclosure deadlines.

Plaintiff's cause expert Longseth timely submitted his report on March 21, 2011. Robert Longseth's Report ("Longseth's Report"), p. 9 (March 21, 2011), Exhibit **H**, attached to Gillette Affd., ¶ 9.

Defendants' expert Lomprey timely submitted his rebuttal report on July 8, 2011 and his supplemental report on October 21, 2012. Loren Lomprey's Supplemental Report ("Lomprey's Supplemental Report"), p. 4, (October 21, 2012), Exhibit **I**, attached to Gillette Affd. ¶ 10; Loren Lomprey's Rebuttal Report ("Lomprey's Rebuttal Report"), p. 1, (July 8, 2011), Exhibit **J**,

attached to Gillette Affd., ¶ 11. Defendants' expert Jeff Colwell also timely submitted a rebuttal report on July 8, 2011. Jeff Colwell Rebuttal Report, Exhibit **K**, p. 1, (July 8, 2011), attached to Gillette Affd., ¶ 12.

IV. SUMMARY OF FACTS

A. The April 10, 2008 Fire

On April 10, 2008, during the early morning hours of Officer Nathan Bradford's routine patrol, he observed smoke coming from the Stagecoah Depot. Deposition Transcript of Nathan Bradford, April 21, 2011 ("Bradford Depo."), 13:25-14:25, Exhibit **A**, attached to Gillette Affd., ¶ 2. At 2:44 a.m., the Clark County Fire Department issued an alarm and the first fire department units arrived at the scene at 3:04 a.m. Clark County Incident Report, Exhibit **B**, attached to Gillette Affd., ¶ 3. Unfortunately, the building was destroyed by the fire. Exhibit **C** shows a layout of the Stagecoach Depot. Exhibit C, attached to Gillette Affd., ¶ 4.

B. The Receptacle Installed by Vernon Madewell Was Wired Incorrectly.

Before the fire, in 2007, a new True Manufacturing freezer was installed in room R4. Deposition Transcript of Beverly Madewell, March 3, 2011, ("Madewell Depo.") 18:17-22, Exhibit **D**, attached to Gillette Affd., ¶ 5. The plug for the new freezer did not mate with the receptacle in the wall for the 220-volt electrical supply, so Vernon Madewell purchased and installed a new wall receptacle. *Id.* at 12:18-21; 13:19-24. However, the freezer still did not work. *Id.* at 17:18-18:1.

Valley Refrigeration was called and found that the receptacle was wired incorrectly, with one of electrical supply conductors incorrectly "swapped" with the "neutral leg" of the 220-volt electrical supply. Deposition Transcript of Brian Scacco, May 3, 2011 ("Scacco Depo."), 45:14-17, Exhibit **E**, attached to Gillette Affd., ¶ 6. This resulted in 220 volts being supplied to motors designed for 110 volts, causing them to burn out. *Id.* at 22:12-14. Two replacement motors were installed and the freezer operated normally. *Id.* at 15:18-23; Peak's Report, at p. 7.

There has been no recall for the freezer. Longseth's Report, at p. 9.

C. The Clark County Investigative Report

After the fire, the Clark County Fire Department, Fire Investigation Division performed

an investigation. Clark County Fire Department Investigative Report ("Official Investigative Report"), Exhibit 3, attached to Deposition Transcript of Michael Doughty, April 21, 2011, Exhibit **L**, attached to Gillette Affd., ¶ 13. It concluded that "the nature of the fire will remain undetermined," and "[t]he area of origin appeared to have been to the northwest most portions of the structure," i.e., rooms R4, S1, S2, S4 and C4 in Exhibit C, "but due to the degree of destruction and the differences in construction over the years the exact area and the ignition source will also remain undetermined." *Id.* at p. 3.

D. The Erroneous Methodology Employed by Peak to Determine the Area of Origin in His First Report

Peak first received the assignment on April 11, 2008. Exhibits 4 and 5, attached to Peak Depo. Deposition Transcript of Donald Peak ("Peak Depo."), 66:21-23, Exhibit **M**, attached to Gillette Affd., ¶ 14. Three days later, on April 14, 2008, Peak interviewed Ms. Madewell. Peak Depo. 88:23-89:4. He wrote in his notes, "Rumor-electrical fire." Exhibit 8, attached to Peak Depo. Peak later testified that he wrote this based on what Ms. Madewell had heard—the fire "was electrical" and the freezer was "the cause." Peak Depo. 85:24-25, 86:1-2; 88:23-89:12; Exhibit 8, attached to Peak Depo. Peak also wrote "Locked cooler room [R4] area of origin" based on what Ms. Madewell told him. Peak Depo. 93:12-94:5.

On April 14 and 15, 2008, Peak performed an initial scene examination, limiting the inspection only to "[t]he southwest cooler room"(R4). Peak's Expert Report, p. 4; Peak Depo. 131:2-3. The reason for the limitation is that "you take the witness statements; you get a general area of origin. Once we found a general area of origin, we conducted a layer search and scene examination." Peak Depo. 110:20-23. And in this case, "the first thing you do is you get your witness statements, and your witness statements clearly put the fire in R4," so "[t]here's no question that fire was in R4, and it spread from there, pushed by firefighting operations." *Id.* at 111:8-15.

As a result, Peak did not layer search or make any observation of burn patterns in rooms S4, C4, C5, and S1, which were suggested by the official investigative report as possible areas of origin. Peak did not note "the electrical equipment," or "the electrical loads" in rooms S4, C4,

C5, and S1. Peak Depo. 126:10-22; 127:19-128:1. Peak "do[es]n't know where the breaker box is for the swamp coolers" that were probably in use (one on the roof of R4, and the other on the roof of S5) before the fire. Peak Depo. 55:10-18; Madewell Depo. 87:21-23; 114:2-3; 115:5-6.

Even within R4, his layer search did not include the overhead lighting or the wiring behind the True freezer, including the branch wiring, circuitry and building wiring. *See* Lomprey's Supplemental Report, at p. 4. Peak's layer search is only limited to the freezer and the area immediately adjacent to the freezer.

And when he "left the scene on April 15th, [he] had made a determination that . . . the fire started in room R4," and "the True freezer, was the cause of that fire." Peak Depo. 116:1-8. The determination becomes the "conclusion" even before the joint scene examination in May of 2008. Peak Depo. 128:19-25.

Not surprisingly, Peak concluded that "[t]he area of origin was . . . on the left half of the freezer at the base around the power distribution box." Peak's Report, p. 8. The conclusion is based on four sources: "the fire scene examination, the layer search, the burn patterns, and witness statements." Peak Depo. 110:13-19. Peak denied that he reached the conclusion after speaking with Ms. Madewell before the initial scene examination. *Id.*

E. Peak's Contradictory Interpretations of Key Evidence Regarding Arc Mapping

Peak dictated his notes while performing the initial scene examination on April 14, 2008. *See* Exhibit 9, attached to Peak Depo.; Peak Depo. 108:13-109:6. The notes provide that "the arcing and the arc mapping in the conduit feeding [R4] is evidence of electrical activity after fire left the room." Exhibit 9, attached to Peak Depo., p. 1, attached to Peak Depo. The notes also provide, "Burn patterns and witness statements, arc mapping places the fire originating in [R4]. There is arcing in the conduit just outside the room indicating the fire originated on the west side of the arcing which is the down leg from [R4]." Exhibit 9, p. 2, attached to Peak Depo.

Peak's notes indicate that he neither located the arc site on a sketch of the area nor documented its physical characteristics. *See* Exhibit 9, attached to Peak Depo. In addition, Peak did not flag the location of the arc sties with a suitable marking or document such locations. *See id.* Nevertheless, Peak concludes that "[t]he fire appeared to be an electrical failure at or in the

freezer." Peak Report, at 1.

The opinion was recanted two years later. Peak testified that "conduit is not a good example of arc mapping," because "if you heat conduit, you're going to get failures all along that because it's melting the insulation." Peak Depo. 138:15-19.

In addition, Peak testified that "the building burned too far along and too hot in order to successfully do . . . arc mapping," because "[y]ou can't do arc mapping when the fires reach above 1900 degrees because copper melts." Peak Depo. 140:19-141:6. Peak's second report also completely abandons arc mapping as an appropriate method in this case, or that it was an electrical fire. Peak's Second Report, pp. 1-10.

F. Peak's Second Report, Dated October 31, 2012

Peak's initial report does not discuss the open exterior door located in S1. See Peak's Report, pp. 1-8. However, Defendants' experts Colwell and Lomprey discuss the importance of the open door observed from Officer Bradford's photographs taken shortly after his arrival at the scene. Colwell opines that because the door was open, he is "unable to rule out an intentionally set fire." Colwell's Rebuttal Report, at pp. 5, 7, 9. Lomprey opines that the open door provided an alternative explanation for why witnesses observed fire venting from the evaporative cooler located over R4, which was the basis for Peak to conclude that the fire originated in R4. Lomprey's Rebuttal Report, at pp. 8, 15; Lomprey's Supplemental Report, at p. 4.

On October 30, 2012, the last day before the discovery cut-off, after reviewing both Lomprey's and Colwell's reports, Peak filed the purported supplemental report. Peak's Second Report, at p. 1. The second report attempts to bolster Peak's original opinion by adding a list of documents that Peak reviewed. *Id.* at pp. 1-3. In addition, the report reiterates the initial scene examination and the joint scene examination. *Compare id.* at pp. 4-9 *with* Peak's Report at 2-8.

The second report differs from the first report in three key aspects. First, the second report abandons the opinion that the "fire appeared to be an electrical failure at or in the freezer" with the explanation that arc mapping could not be used in this case. *Compare* Peak's Second Report at pp. 1-10 *with* Peak's Report at p. 1. Second, the second report changed the area of origin from "on the left half of the freezer at the base around the power distribution box" to "in

the True Freezer." *Compare* Peak's Second Report at p. 3 *with* Peak's Report at p. 8. And lastly, the second report attempts to rebut Lomprey's and Colwell's opinions by pointing out that the door at S1 does not have access to the building and various purported deficiencies in Lomprey's and Colwell's opinions. *Compare* Peak's Second Report at pp. 9-10 *with* Peak's Report at pp. 1-8. However, Peak has not disclosed any data or information he considered in forming the opinion contained in his second report. *See* Peak's Second Report, at pp. 1-10. In addition, Plaintiff has not produced those additional file materials that by implication must be in Peak's file that support such new and contradictory opinions.

V. ARGUMENT

A. The Court Is Both Authorized and Obligated to Perform the Gatekeeping Role and Plaintiff Bears the Burden of Establishing Admissibility of Its Expert's Opinion

Federal Rules of Evidence Rule 702 provides, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion . . . if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Trial courts "perform a gatekeeping role," by "scrutinize[ing] whether the principles and methods employed by an expert have been properly applied to the facts of the case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999). "Faced with a proffer of expert scientific testimony, then, the trial judge *must* determine at the outset, pursuant to *Rule 104(a)*, whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 501 (9th Cir. 1994), emphasis original. This "entails a preliminary *assessment of whether the reasoning or methodology underlying the testimony is scientifically valid* and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.*, emphasis original. The "district court [i]s both authorized and obligated" to perform the gatekeeping role. *Id.*

The Supreme Court provided a list of four non-exclusive factors which a district court

may consider in the discharge of its gatekeeping duties: (1) whether the theory or technique can be tested; (2) whether it has been subject to peer review and publication; (3) the known or potential error rate of the theory or techniques; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 592-94.

Meanwhile, Plaintiff has the burden to establish its admissibility "by a preponderance of proof." *Daubert*, 509 U.S. at 593. Regarding the reliability of Peak's methodology, Plaintiff fails to meet its burden.

B. Plaintiff Fails to Meet Its Burden to Establish Peak's Methodology Is Reliable

In the area of fire investigation, an overwhelming amount of authority supports *Guide for Fire and Explosion Investigations*, ("NFPA"), a publication issued by the National Fire Protection Association, as "a reliable method endorsed by a professional organization." *Fireman's Fund Ins. Co. v. Canon U.S.A.*, 394 F.3d 1054, 1057-58 (8th Cir. 2005); *Presley v. Lakewood Eng'g.*, 553 F.3d 638, 645 (8th Cir. 2009); *Bryte v. Am. Household, Inc.*, 429 F.3d 469, 478 (4th Cir. 2005); *Truck Ins. Exch. v. Magnetek, Inc.*, 360 F.3d 1206, 1215, fn. 11 (10th Cir. 2004); *Indiana Insurance Co. v. General Electric*, 326 F.Supp.2d 844, 851 (N.D. Oh. 2004).

Under the heading "Conclusions," Peak wrote that "the following opinion and conclusions were made on the scientific method recommended in NFPA 921, (2008 ed.) and required in NFPA 1033." Peak's Second Report, at p. 3. Despite his purported claim of adhering to the NFPA 921, and the NFPA 1033, Peak's methodology falls short of the standards and thus, must be excluded.

1. Contrary to the NFPA 921's teaching, Peak's decision to limit his initial scene inspection to room R4 exposes his expectation bias

A Ninth Circuit case *Claar v. Burlington Northern Railroad* is instructive. *Claar*, 29 F.3d at 502-03. There, Plaintiff brought a lawsuit against Burlington Northern, alleging that they suffered various ailments due to their exposure to the chemicals in Burlington's shop. *Id.* at 500. The district court excluded the plaintiffs' two causation experts' opinions, partially based on the fact that they "formed their opinions before reading the relevant literature even though they admitted that they were not sufficiently familiar with the field to diagnose the causes of plaintiffs'

injuries without first reviewing that literature." *Id.* at 502-03, fn. 5.

The Ninth Circuit affirmed, holding that although "scientists may form initial tentative hypotheses," "scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver . . . that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method," because "[c]oming to a firm conclusion first and then doing research to support it is the antithesis of [scientific] method." *Id.*

In the context of fire investigation, the same principle applies. The NFPA 921 section 4.3.8 warns against expectation bias. It defines expectation bias as "a well-established phenomenon that occurs in scientific analysis when investigator(s) reach a premature conclusion too early in the study and without having examined or considered all of the relevant data." NFPA 921 § 4.3.8. It occurs when investigators, "instead of collecting and examining all of the data in a logical and unbiased manner to reach a scientifically reliable conclusion, [they] use the premature determination to dictate [their] investigative processes, analyses, and, ultimately, their conclusions, in a way that is not scientifically valid." *Id.* As a result, "expectation bias . . . results in the use of only that data that supports this previously formed conclusion and often results in the misinterpretation and/or the discarding of data that does not support the original opinion." *Id.*

In order to avoid expectation bias, the NFPA 921 cautions against "[a] narrow focus on only identifying the first item ignited and a competent ignition source," because it "fails to take into account important data that can be used to test any origin hypothesis." NFPA 921 § 17.2.1. As such, the NFPA 921 requires investigators to examine the entire fire scene, the surrounding area of the fire scene, the structure exterior, and all rooms within the damaged structure, during initial scene examination. *Id.* at §§ 17.3.1.3.; 17.3.1.4.; 17.3.1.5.; 17.3.1.6.

The NFPA 921 section 17.3.1.3. requires "[t]he [initial] assessment [to] include an overall look at *the entire scene or structure,* both exterior and interior, and all pertinent areas." In addition, investigators "should include . . . the site or areas *around the scene*," because "[t]hese areas may exhibit significant evidence or fire patterns, *away from the main body of the scene*, that

may enable the investigator to better define the site and the investigation." *Id.* at § 17.3.1.4, emphasis added. In examining the exterior structure, investigators should note "[t]he general construction method and occupancy classification . . . how the building was built, types of materials used, exterior surfaces, previous remodeling, and any unusual features that may have affected how the fire began and spread." *Id.* at § 17.3.1.5. And most importantly, "[o]n the initial assessment, investigators should examine *all rooms* and *other areas* that may be relevant to the investigation, including those areas that are fire damaged or *adjacent to the fire and smoke damaged areas*." *Id.* at § 17.3.1.6, emphasis added.

Within the areas of initial examination, investigators must document, among others, electrical systems and electrical loads. *Id.* at §§ 17.3.3.2; 17.3.3.3. The NFPA 921 provides, "The electrical system should be documented," including "[t]he means used to distribute electricity . . . the damage to the system . . . [t]he main panel amperage and voltage input . . . [t]he type, rating position (on/tripped/off), and condition of the circuit protection devices." *Id.* at § 17.3.3.6. In addition, "[e]lectrical appliances and loads should be noted." *Id.* at § 17.3.3.7.

Here, Peak first received the assignment on April 11, 2008. Exhibits 4 and 5, attached to Peak Depo.; Peak Depo. 66:21-23. Three days later, on April 14, 2008, Peak interviewed Ms. Madewell. Peak Depo. 88:23-89:4. He wrote in the notes, "Rumor-electrical fire." Exhibit 8, attached to Peak Depo. Peak later testified that the phrase was written down based on what Ms. Madewell had heard—the fire "was electrical" and the freezer was "the cause." Peak Depo. 85:24-25, 86:1-2; 88:23-89:12; Exhibit 8, attached to Peak Depo. In addition, Peak wrote "Locked cooler room [R4] area of origin" based on what Ms. Madewell told him. Peak Depo. 93:12-94:5.

Then on April 14 and 15, 2008, Peak did an initial scene inspection, *limiting the inspection only to "[t]he southwest cooler room," i.e., R4*, despite the Official Investigative Report can only narrow the origin to "the northwest most portions of the structure"—R4, S1, S2, S4 and C4. Peak's Expert Report, at p. 4; Peak Depo. 131:2-3; Official Investigative Report, at p. 2.

The reason for the limitation is that "you take the witness statements; you get a general

area of origin. Once we found a general area of origin, we conducted a layer search and scene examination." Peak Depo. 110:20-23. And in this case "the first thing you do is you get your witness statements, and your witness statements clearly put the fire in R4," so "[t]here's no question that fire was in R4, and it spread from there, pushed by firefighting operations." *Id.* at 111:8-15.

As a result, contrary to the teaching of the NFPA 921, Peak did not note "the electrical equipment," or "the electrical loads" in rooms S4, C4, C5, and S1, because Peak had already "determined the origin was in [R4]" based on the witness statements. Peak Depo. 126:10-22; 127:19-128:1. Contrary to the teaching of the NFPA 921, Peak "do[es]n't know where the breaker box is for the swamp coolers" that were probably in use (one on the roof of R4, and the other on the roof of S5) before the fire. Peak Depo. 55:10-18; Madewell Depo. 87:21-23; 114:2-3; 115:5-6.

Even when performing the layer search in R4, the search was limited to the freezer and the area immediately adjacent to the freezer. Contrary to the NFPA 921's teaching, Peak failed to preserve other potential ignition sources in R4, including the lights and the electrical conductors overlaying the area in room R4.

And when he "left the scene on April 15th, [he] had made a determination that . . . the fire started in room R4," and "the True freezer, was the cause of that fire." Peak Depo. 116:1-8. Peak testified that this determination becomes the "conclusion" even before the joint scene examination in May of 2008. Peak Depo. 128:19-25.

Although Peak adamantly denied that his conclusion is based on the "rumor" from Ms. Madewell, a close examination of Peak's methodology reveals otherwise. Peak offers no scientific explanation as to why he chose to only layer search the cooler room, leaving other possible suspects S1, S2, S4 and C4 untouched. Peak also offers no scientific explanation as to why he chose to only examine burn patterns in the cooler room, leaving the burn patterns in the other possible suspect rooms unexamined.

Instead, Peak stated that his conclusion was based on four sources: "the fire scene examination, the layer search, the burn patterns, and witness statements." Peak Depo. 110:13-19.

Because "the fire scene examination," "the layer search," and "the burn patterns" are all limited to R4, Peak's decision to limit the initial assessment to R4 must have been based on the witness statement, i.e. the "rumor" Ms. Madewell told Peak on April 14.[1] *See also* Peak's Expert Report, at p. 5. Indeed, Peak conceded that "the first thing you do is you get your witness statements, and your witness statements clearly put the fire in R4," so "[t]here's no question that fire was in R4, and it spread from there, pushed by firefighting operations." Peak Depo. at 111:8-15.

Peak's own concession exposes the fatal flaw of Peak's methodology—the expectation bias—before Peak even inspected the scene, he had already determined that the True freezer caused the fire. As a result, "instead of collecting and examining all of the data in a logical and unbiased manner to reach a scientifically reliable conclusion, [Peak] use[d] the premature determination to dictate [his] investigative processes, analyses, and, ultimately, their conclusions, in a way that is not scientifically valid." NFPA 921 § 4.3.8.

And not surprisingly, Peak's report uses "only that data that supports this previously formed conclusion . . . misinterpretati[ng] and/or the discarding of data that does not support the original opinion," i.e. any electrical equipment in rooms S1, S2, S4 and C4. *Id.* Because "[c]oming to a firm conclusion first and then doing research to support it is the antithesis of this [scientific] method," the Court must exclude Peak's opinion. *Claar*, 29 F.3d at 502.

2. Contrary to the NFPA 921, Peak's failure to eliminate all other possible fire causes renders his methodology unreliable

The Ninth Circuit case *Claar* provides an additional ground to exclude Peak's opinion. *Claar*, 29 F.3d at 502-03. There, the district court excluded the plaintiffs' two causation experts' opinions, because "neither [experts] made any effort to rule out other possible causes for the injuries plaintiffs complain of, even though they admitted that this step would be standard procedure before arriving at a diagnosis." *Id.* at 502. The Ninth Circuit affirmed, holding that "[t]he district court properly scrutinized the reasoning and methodology underlying the expert testimony proffered by plaintiffs . . . ." *Id.* at 505.

[1] "The only fire scene examination which included a layer search, scene reconstruction, burn pattern analysis and documentation was conducted by Mr. Perkins and Mr. Peak on April 14th and 15th 2008." Peak's Supplemental Report, p. 4.

Fire investigation is no different. When a fire's area of origin is defined, the NFPA 921 section 18.2.1. permits investigators to determine a fire's cause by "eliminat[ing] . . . all other potential ignition sources."[2] NFPA 921 § 18.2.1.

Bryte v. American Household illustrates this principle. There, a fire started in an apartment killing the plaintiff. 429 F.3d at 471. The decedent's relatives brought a product liability claim against a throw manufacturer, claiming that the throw had a defective safety circuit that caused the fire. *Id.* At trial, the district court excluded the plaintiffs' fire cause and origin expert's testimony for lack of sufficiently reliable basis, despite the expert's claim that he had excluded other causes. *Id.* at 474, 477.

The Fourth Circuit affirmed, holding that the plaintiffs' cause and origin expert "did not exclude all or even most of the other possible sources of the fire," because he "did not physically examine the lamp, the candle, the cord that remained which he found on [the deceased plaintiff's] arm, or the wall outlet or its wiring, which supplied electricity to the throw." *Id.* at 480. As a result, the Fourth Circuit concluded it could not "credit [the expert's] say-so supporting his own reliability by way of excluding other causes," because "[i]t is clear that such possibilities have not been excluded in any methodical or reliable fashion." *Id.* at 477; *see also Indiana Insurance*, 326 F.Supp.2d at 856 ("Before a plaintiff can rely on circumstantial evidence or the process of elimination . . . the plaintiff must at least present evidence to show why the defendant's product should not be among the possible causes to be eliminated.").

More importantly, the Fourth Circuit found that the expert's decision to exclude "the most likely alternative source of the fire, the candle" unreliable. *Bryte*, 429 F.3d at 477. The expert excluded the candle based on a witness's "observation that the candle was still lighted when she arrived at the scene." *Id.* However, the Fourth Circuit held that although the expert "was permitted to rely on what [a witness] saw," the expert was not permitted to rely on "her conclusions about the cause of the fire." Because the expert's "failure to independently evaluate

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[2] NFPA 921 § 18.2.1 provides that "when the origin of a fire is clearly defined, it is occasionally possible to make a credible determination regarding the cause of the fire, even when there is no physical evidence of the ignition source available. This finding may be accomplished through the credible elimination of all other potential ignition sources provided that the remaining ignition source is consistent with all known facts."

the open flame in the room," the expert's methodology "cannot be reconciled with the reliability mandate" of *Daubert*. *Id.*

Here, as in *Claar* and *Bryte*, Peak has not excluded all other possible causes of the fire. As noted, before the initial scene inspection, Peak had narrowed the area of origin to room R4 and the cause of the fire to the True freezer. Even if Peaked was correct in jumping to the conclusion that the fire originated in room R4, he still made no attempt to eliminate other numerous potential ignition sources in that room. As a result, Peak did not layer search or make any observation of burn patterns from other possible areas of origin: the balance of the undisturbed debris accumulation in R4; or, rooms S4, C4, C5, and S1. This is significant as these additional rooms were suggested by the official investigative report as possible areas of origin.

In addition, as in *Bryte*, Peak cannot eliminate the electrical equipment in the rooms adjacent to R4, including the evaporative (swamp) cooler in room S4, the AC unit in the room next door to the True freeze, and the electrical wire in the EMT. Peak did not note "the electrical equipment," or "the electrical loads" in rooms S4, C4, C5, and S1. Peak Depo. 126:10-22; 127:19-128:1. Peak "do[es]n't know where the breaker box is for the swamp coolers" that were probably in use (one on the roof of R4, and the other on the roof of S5) before the fire. Peak Depo. 55:10-18; Madewell Depo. 87:21-23; 114:2-3; 115:5-6.

Even within R4, his layer search did not include the overhead lighting and the wiring behind the True freezer, including the branch wiring, circuitry and building wiring. *See* Lomprey's Supplemental Report, p. 4, October 21, 2012. Peak's failure to even examine the electrical equipment both in the rooms adjacent to R4 and in R4 makes it impossible for Peak to eliminate them as potential fire causes through a reliable means.

As in *Bryte*, despite Peak's purported claim that he has done so, he has not eliminated all other possible causes. Cf. Peak's Supplemental Report, p. 3. As such, the Court cannot "credit [Peak's] say-so supporting his own reliability by way of excluding other causes," because "[i]t is clear that such possibilities have not been excluded in any methodical or reliable fashion." 429 F.3d at 477.

As in *Bryte*, the sole reason for limiting his inspection to room R4 is because the "witness

statements clearly put the fire in R4." Peak Depo. at 111:8-15. However, as in *Bryte*, "*Daubert* aims to prevent expert speculation, and . . . [Peak's] failure to independently evaluate [rooms S4, C4, C5, and S1] cannot be reconciled with the reliability mandate," because an expert "was permitted to rely on what [a witness] saw, but not on her conclusions about the cause of the fire." 429 F.3d at 477. Therefore, the Court should exclude Peak's opinion because it fails to eliminate all other possible causes of fire.

3. Peak's failure to adhere to the NFPA 921's procedure for arc mapping and his sudden reversal of opinion regarding the appropriateness of arc mapping for this case render his methodology unreliable

In *Fireman's Fund Insurance v. Canon*, the Eight Circuit affirmed the district court's ruling to exclude the plaintiffs' fire causation experts, because their methodology departed from the teaching of the NFPA 921. 394 F.3d at 1059, 1062. There, a fire destroyed a store inside a strip mall. *Id.* at 1056. The plaintiff insurance companies sued a copier manufacturer for product liability. *Id.*

The plaintiffs' experts initially stated that "the burn patterns inside the copier established the copier's upper fixing heater assembly as the cause of the fire." *Id.* at 1058. However, the rebuttal report stated that the burn patterns inside the copier established that "the composite power supply board was the source of the fire." *Id.* at 1059.

The Eighth Circuit held that "this sudden reversal of opinion regarding the meaning of the burn pattern evidence, in a case where that evidence was the sole basis from which to infer the location of a defect, seriously undermines the reliability of the experts' opinions." *Id.*

The same principle applies here. The NFPA 921 section 17.4.5. provides that arc survey or arc mapping "is a technique in which the investigator uses the identification of arc locations or 'sites' to aid in determining the area of fire origin," because "[t]he spatial relationship of the arc sites to the structure and to each other can be a pattern, which can be used in an analysis of the sequence in which the affected parts of the electrical system were compromised."

The NFPA 921 section 17.3.4.5.1. outlines the procedure of arc mapping, including "[l]ocat[ing] the arc site on the sketch [of the area] and document[ing] its physical characteristics (faulted to another conductor in same cable, faulted to conductor from another cable, completely

severed conductor, partially severed conductor, faulted to grounded metallic conduit, or a conductive building element)," and "[f]lag[ging] the location of the arc site(s) with a suitable marking and document such location(s)."

Here, Peak's Report concludes that "[t]he fire appeared to be an electrical failure at or in the freezer." Peak's Report, at 1. However, neither Peak's Report nor Peak's Second Report provide any support to his conclusion of electrical failure, or the method of arc mapping. See *id.* at 1-8; *see also* Peak's Second Report, at 1-10. In fact, Peak's Second Report abandons the applicability of arc mapping in this case. Peak's Second Report, at p. 8. And more importantly, Peak's Second Report also does not mention electrical fire any more. *See id.* at pp. 1-10.

A close examination of Peak's initial scene examination notes reveals how Peak reached the conclusion regarding electrical failure at or in the freezer. See Exhibit 9, attached to Peak Depo. The notes from his initial scene examination provide that "*the arcing* and *the arc mapping in the conduit* feeding that room [R4] is evidence of *electrical activity* after fire left the room." Exhibit 9, p. 1, attached to Peak Depo., emphasis added. In addition, the notes provide, "Burn patterns and witness statements, *arc mapping* places the fire originating in that room [R4] in the southwest corner. There is *arcing in the conduit* just outside the room indicating the fire originated on the west side of the arcing which is the down leg from the room." Exhibit 9, p. 2, attached to Peak Depo.

However, Peak neither "[l]ocate[ed] the arc site on the sketch [of the area] [nor] document[ed] its physical characteristics" during the initial scene examination. NFPA 921 § 17.3.4.5.1; *see* Exhibit 9, attached to Peak Depo., at pp. 1-2. In addition, Peak did not "[f]lag the location of the arc site(s) with a suitable marking [or] document such location(s)," either. NFPA 921 § 17.3.4.5.1; *see* Exhibit 9, attached to Peak Depo., at pp. 1-2. As a result, Peak used no scientific method to approach arc mapping.

Peak's failure to adhere to the scientific method is further demonstrated by his contradictory testimony regarding the effectiveness of arc mapping in conduit. Peak testified that "conduit is not a good example of arc mapping," because "if you heat conduit, you're going to get failures all along that because it's melting the insulation," even though his field notes provide that

"*the arcing* and *the arc mapping in the conduit* feeding that room [R4] is evidence of *electrical activity* after fire left the room." *Compare* Peak Depo. 138:15-19 *with* Exhibit 9, p. 1, attached to Peak Depo., emphasis added.

Furthermore, Peak recanted his opinion regarding the appropriateness of arc mapping for the structure. He testified, "the building burned too far along and too hot in order to successfully do . . . arc tracing" because "]y]ou can't do arc mapping when the fires reach above 1900 degrees because copper melts." Peak Depo. 140:19-141:6. Likewise, Peak's Second Report also abandons arc mapping as an appropriate method to determine the fire origin in this case: "Arc mapping could not be used due to the extensive damage to the structure." Peak's Second Report, at p. 8.

"[T]his sudden reversal of opinion regarding the meaning of [arc mapping], in a case where that evidence was the sole basis from which to infer [an electrical failure at or in the freezer], seriously undermines the reliability of [Peak's] opinions." *Fireman's Fund Insurance*, 394 F.3d at 1059. Therefore, the Court must exclude Peak's opinion regarding "an electrical failure at or in the freezer." Peak's Report, at 1.

C. Alternatively, Peak's Untimely "Supplemental" Report Must Be Excluded, Because It Violates this Court's Scheduling Orders and Rule 26 Expert Disclosure Rules

Peak's Second Report was submitted well after the deadlines imposed by this Court's orders for initial and rebuttal expert disclosures. The second report attempts to bolster the initial report by enumerating the documents Peak had reviewed and reiterating the initial and the joint scene examinations, both of which occurred before the submission of his first report. In addition, the second report, for the first time, changes the area of origin from "on the left half of the freezer at the base around the power distribution box," to "in the True Freezer," omits the opinion that it was an electrical fire, and discusses the door located in S1, an attempt to rebut the basis of Defendants' experts Colwell's and Lomprey's opinions.

Because Peak's report was submitted on the last day before the discovery was cut off, making drastic changes to Peak's conclusions, Plaintiff cannot meet its burden of demonstrating that the failure to comply with both the Court's order and Rule 26 concerning expert disclosure is

substantially justified or harmless. Therefore, Peak's Second Report must be excluded.

1. Peak's October 30, 2012 report must be excluded because it departs from his original May 12, 2008 report, and thus violated the Court's Scheduling Order

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure regulates the content of an expert written report: "[t]he report must contain" among others, "(i) a *complete* statement of all opinions the witness will express and the basis and reasons for them." Emphasis added.

"*Rule 37(c)(1)* gives teeth to these 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). This rule excludes untimely expert witness testimony, unless the "parties' failure to disclose the required information is substantially justified or harmless." *Id.*

In addition, "a party who fails to comply with a scheduling order is subject to the sanctions available to a court to enforce its orders, including those authorized by *Rule 37(b)(2)(A)(ii)-(vii)*." *Plumley v. Mockett*, 836 F.Supp.2d 1053, 1061 (C.D. Cal. 2010), citing *FED. R. CIV. P. 16(f)*.

Plumley is instructive. 836 F.Supp.2d at 1062. There, the deadline to serve reports containing each party's experts' complete opinions was June 30, 2008. *Id.* The deadline to serve rebuttal reports was July 14, 2008. *Id.* And the discovery cutoff was August 28, 2008. *Id.* The defendants served their expert's initial report timely, in June 2008. *Id.* However, in response to the plaintiff's motion for summary judgment, the defendants served a "supplemental report" on February 4, 2009, "well after the [c]ourt's deadlines for expert disclosures and discovery completion." *Id.*

The court found that the report "departs sufficiently from the opinions in [the] original June 2008 report such that it violates both the [c]ourt's scheduling order regarding expert disclosures and *Rule 26(a)*, and thus should be excluded from evidence as a sanction under *Rule 37*." *Id.*

In doing so, the court rejected the defendants' argument that their late report was timely because it was "supplemental." *Id.* The court found that "supplementary disclosures do not

permit a party to introduce *new opinions* after the disclosure deadline under the guise of a 'supplemental.'" *Id.*, emphasis added. The court explained that "[a]lthough *Rule 26(e)* obliges a party to 'supplement or correct' its disclosures upon information later acquired, this 'does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report," because "[t]o rule otherwise could create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports." *Id.*, citing *Beller ex. rel. Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003). As a result, the court held that "a supplemental expert report that states additional opinions or 'seek to strengthen or deepen opinions expressed in the original expert report' is beyond the scope of proper supplementation and subject to exclusion under *Rule 37(c)*." *Plumley*, 836 F.Supp.2d at 1062, citing *Cohlmia v. Ardent Health Servs.*, 254 F.R.D. 426, 433 (N.D. Okla. 2008).

Here, according to the Court's orders, the deadline for the initial expert disclosures was May 27, 2011; the deadline for rebuttal expert disclosures was August 13, 2011; and the deadline for discovery cutoff was October 30, 2012. As a result, as in *Plumley*, Peak's Second Report, submitted on October 30, 2012, was "well after the Court's deadlines for expert disclosures." *Plumley*, 836 F.Supp.2d at 1062.

Peak's Second Report not only changed the area of origin from "on the left half of the freezer at the base around the power distribution box," to "in the True Freezer,"[3] but also abandoned the opinion that the "fire appeared to be an electrical failure at or in the freezer."[4] *Compare* Peak's Report, at pp. 1, 8, *and* Peak's Second Report, at pp. 1-10. As in *Plumley*, as both the origin and cause expert of Plaintiff, Peak's flip flopping regarding the area of origin and the cause of the fire "departs sufficiently from the opinion[] in [Peak's] original report such that it violates both the Court's scheduling order regarding expert disclosures and *Rule 26(a)*, and thus

[3] Peak changed his opinion regarding the area of origin after his colleague Robert Longseth's conclusion that the power distribution box, located at the bottom of the freezer, was not a potential fire cause. *See* Longseth's Report, at pp. 11-12.

[4] Strangely, Peak gave a third opinion regarding the area of origin on August 9, 2012 during his deposition, just two months before he submitted his second report. He testified that the area of origin is "in or on the freezer." Peak Depo. at 78:17-19.

should be excluded from evidence as a sanction under *Rule 37*." 836 F.Supp.2d at 1062.

Furthermore, as in *Plumley*, Peak cannot circumvent the expert disclosure rule and the Court's scheduling order by mischaracterizing the late report as "supplemental," because "supplementary disclosures do not permit a party to introduce *new opinions* after the disclosure deadline under the guise of a 'supplemental.'" *Id.*, emphasis added.

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In addition, the facts upon which Peak utilized to reach his new opinions remain the same: he based his conclusions on the burn patterns he observed and the layer search results from the initial scene and the subsequent scene examinations, both of which occurred before Peak's first report. *Compare* Peak's Report, at pp. 1-8 *and* Peak's October 30, 2012 Report, at pp. 1-10. As such, Peak's late report is also an impermissible attempt to "state[] additional opinions [and] 'seek to strengthen or deepen opinions expressed in the original expert report,'" and therefore, Peak's late report "is beyond the scope of proper supplementation and subject to exclusion under *Rule 37(c)*." *Plumley*, 836 F.Supp.2d at 1062, citing *Cohlmia v. Ardent Health Servs.*, 254 F.R.D. 426, 433 (N.D. Okla. 2008). Therefore, the Court must exclude Peak's late report as untimely.

2. Last portion of Peak's Second Report is either an impermissible late rebuttal report or an impermissible late initial report

"Rebuttal reports are limited to evidence 'intended solely to contradict or rebut evidence on the same subject matter identified by another party' in an expert report." *Plumley*, 836 F.Supp.2d at 1065, citing *FED. R. CIV. P. 26(a)(2)(C)(ii)*. A rebuttal report filed outside the *Rule 26* deadline for rebuttal report is subject to exclusion. *Congressional Air v. Beech Aircraft*, 176 F.R.D. 513, 517.

In *Congressional Air*, the plaintiff's expert submitted an initial report that does not address negligent manufacturing. *Id.* at 516. The defendant's expert subsequently submitted his report, stating "there is no evidence of a defect in design or manufacturing." *Id.* at 514. After reviewing the defendant's expert report, the plaintiff's expert submitted a supplemental report, adding new opinion regarding "material defects," and "anomalies in the material." *Id.*

The court found that "[h]ad [the plaintiff expert's] original report in some way addressed

the question of negligent manufacturing, an argument could be made that any subsequent report would be a proper supplement." *Id.* at 515-16. However, because "the issue of negligent manufacturing was first raised in the report by [the defendant's expert]," and the plaintiff's expert "addressed the claim of negligent manufacturing for the first time in his [amended] report, it is either an untimely rebuttal report, or the untimely submission of an initial disclosure." *Id.* at 516. As a result, the court excluded the late amended report from the plaintiff's expert. *Id.* at 517.

Here, under the heading "Exterior Door into Compressor Room," Peak for the first time disclosed that "[t]here was no access to the building from that [open] door" at S1. Peak's October 31, 2008 Report, at p. 9. In addition, under the section "Expert Report Comments," Peak directly rebuts evidence identified by Defendants' experts Lomprey and Colwell. Both opinions under the guise of supplemental report must be excluded.

As in *Congressional Air*, whether the door was open or whether the door provided access to the building were not addressed by Peak in his May 12, 2008 report. *See* Peak's Report, at pp. 1-8. As in *Congressional Air*, Defendants' experts Colwell and Lomprey formed their opinions partially based on the fact that the open door provided access to the building. Colwell opines that because the door was open, he is "unable to rule out an intentionally set fire." Colwell Report, July 8, 2011, at pp. 5, 7, 9. Lomprey opines that the open door provided an alternative explanation for the cause of the fire. Lomprey's Rebuttal Report, at pp. 8, 15; Lomprey's Supplemental Report, at p. 4. As in *Congressional Air*, Peak's purported supplemental report was submitted *after* Defendants' experts Colwell's and Lomprey's reports. Therefore, because "the issue of [open door] was first raised in the report by [the defendants' experts]," and Peak "addressed [the issue] for the first time in his [supplemental] report, it is either an untimely rebuttal report, or the untimely submission of an initial disclosure." *Congressional Air*, 176 F.R.D. at 516.

As in *Congressional Air*, Peak's purported supplemental report was submitted after the Court's deadlines for rebuttal report and initial report. Therefore, the last portion of Peak's purported supplemental report should also be excluded as untimely.

3. Plaintiff cannot meet its burden of demonstrating that the failure to comply with rules concerning expert testimony is substantially justified or harmless

"[A] party that fails to comply with a scheduling order is subject to the sanctions available to a court to enforce its orders, including those authorized by *Rule 37(b)(2)(A)(ii)-(vii)*." *Plumley*, 836 F.Supp.2d at 1062, citing *FED. R. CIV. P. 16(f)*. "Excluding expert evidence as a sanction for failure to disclose expert witness in a timely fashion is *automatic and mandatory* unless the party can show the violation is either justified or harmless." *Id.* at 1064, citing *Carson Harbor Village v. Unocal Corp.*, 96-cv-3281-MMM, 2003 U.S. Dist. LEXIS 14438, 2003 WL 22038700, *1, *2 (C.D. Cal. Aug. 8, 2003), emphasis added. "The party facing the sanction carries the burden of demonstrating that the failure to comply with rules concerning expert testimony is substantially justified or harmless." *Plumley*, 836 F.Supp.2d at 1062, citing *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008); *see also Yeti v. Molly*, 259 F.3d at 1107 ("Implicit in *Rule 37(c)(1)* is that the burden is on the party facing sanctions to prove harmlessness.")

The Ninth Circuit has affirmed the exclusion of untimely expert testimony where the plaintiff only missed the deadline for disclosure by twenty days and the deadline for submitting expert report by six weeks. *Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998).

In *Plumley*, the court excluded the plaintiff's supplemental and rebuttal reports, because of two reasons. 836 F.Supp.2d at 1064. First, the court found that the defense expert's "new opinion contained in the report is integral to [the] [d]efendants' argument." *Id.* And second, "failure to disclose testimony is not substantially justified where, as here, the need for such testimony could reasonably have been anticipated." *Id.*

In doing so, the court reiterated the rationale, "[a]lthough *Rule 26(e)* obliges a party to 'supplement or correct' its disclosures upon information later acquired, this does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report," because "[t]o rule otherwise would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports," and "[e]nabling this pattern of behavior would surely circumvent the full disclosure requirement

implicit in *Rule 26* and would interfere with the Court's ability to set case management deadlines." *Id.* at 1062.

Here, as in *Plumley*, the new opinions contained in Peak's Second Report regarding the area of origin, electrical fire, and whether the open door provided access to the building are integral to Defendants' argument that the freezer did not cause the fire. The heart of the litigation is whether the freezer located in R4 caused the fire. As such, a change of area of origin and the cause of the fire are instrumental to Defendants' case.

In addition, as shown in both Lomprey's and Colwell's reports, if the door indeed provided access to the building, it raises other possibilities regarding the cause of the fire: it could be arson, or the fire could have originated in other rooms of the western portion of the building. Colwell's Report, at pp. 5, 7, 9; Lomprey's Rebuttal Report, at pp. 8, 15; Lomprey's Supplemental Report, at p. 4.

As in *Plumley*, the open door can be observed from Officer Bradford's photographs which were equally available to Plaintiff at the beginning of the case. And both Lomprey and Colwell first mentioned the importance of the open door in their reports submitted on July 8, 2011. At least by July 8, 2011, Peak, the area of origin and cause expert, should have been able to foresee Lomprey's and Colwell's testimonies regarding the importance of the open door. And at that time, Peak still had more than a month to submit his rebuttal report. However, instead of raising the uncertainty regarding the door right away, Peak waited until the last day before the discovery cutoff to submit the purported supplemental report, more than one year after Colwell's and Lomprey's reports.

Therefore, Peak's "failure to disclose testimony is not substantially justified where, as here, the need for such testimony could reasonably have been anticipated." *Plumley*, 836 F.Supp.2d at 1064.

Furthermore, because Peak did not file the supplemental report until the last day before the discovery cutoff, it was impossible for Defendants to further investigate the accuracy of Peak's assertion or re-evaluate defense theories. To make the matter even worse, Peak still has not submitted any "data or other information considered by [Peak] in forming" the opinion

contained in Peak's Second Report. *FED. R. CIV. P. 26(a)(2)(B).*

In addition, Peak's deposition would not help either. Peak testified that there was no document that "would represent a complete statement of all the opinions that [he] intend[s] to express," and his deposition does not "represent a complete statement of all [his] opinions." Peak Depo. 73:19-74:11. Therefore, Defendants are prejudiced by Plaintiff's gamesmanship with respect to the expert discovery rules and the Court's orders because Defendants cannot possibly prepare a competent defense against Peak's incomplete opinion.

As the court in *Plumley* correctly instructed, the supplemental disclosure rule cannot be manipulated as a "license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report," because "[t]o rule otherwise would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports," and "[e]nabling this pattern of behavior would surely circumvent the full disclosure requirement implicit in *Rule 26* and would interfere with the Court's ability to set case management deadlines." *Id.* at 1062. Therefore, the Court should exclude Peak's supplemental report and any testimony based on Peak's supplemental report as untimely.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to grant Defendants' motion in limine #1 to exclude Plaintiff's expert Donald Peak's testimony.

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