

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

TIMOTHY J. BENTLEY,)	CV 09-01-M-DWM
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
CONOCOPHILLIPS PIPELINE)	
COMPANY,)	
)	
Defendant.)	
_____)	

I. Introduction

Timothy J. Bentley (“Bentley”) brought this case against Defendant ConocoPhillips Pipeline Company (“ConocoPhillips”). He seeks over \$1.5 million in damages for wrongful discharge and assorted other claims based on the termination of his employment with Defendant. Bentley currently has three discovery motions pending. The first two are motions to compel, and the third is a

motion to exclude Defendant's expert witness. For the most part the motions are well taken as set forth below.

II. Factual Background

In 2007, Bentley was working for pipeline company Kinder Morgan, in Seattle, Washington. He interviewed for a job with ConocoPhillips at its Spokane, Washington facility. After the interview process, he was instead offered a position at ConocoPhillips' Missoula facility. Bentley claims he took the job in part because he was told he would work a rotating four day on-three day off schedule. He started working at the Missoula plant as an operator in April of 2007.

Bentley claims his work conditions were dangerous and he was forced to work overtime without being paid the overtime rate. Based on his dissatisfaction, on November 7, 2008, Bentley utilized ConocoPhillips' confidential reporting system to report to the company about problems with its Missoula Facility. He was also upset with his supervisor. Bentley claims that this confidential information was sent to his supervisor, who in turn retaliated against him. What next took place forms the factual predicate for this dispute. On November 12, 2008, after hearing that Bentley might pose a risk to the workplace, personnel from ConocoPhillips' Texas office flew to Missoula to speak with him. Relying on some source, Texas Conoco people asked to search Bentley's truck. Bentley

refused, and was immediately suspended. Five days later on November 17, 2008, Bentley received a letter terminating him.

Bentley's suit has ten claims for relief. The first three claims—(1) wrongful inducement, (2) negligent misrepresentation, and (3) constructive fraud—are based on ConocoPhillips allegedly luring Bentley from Seattle to Missoula with promises of a rotating schedule, opportunities for outdoor recreation, and better working conditions. Count (4) is for negligence stemming from the company, inter alia, failing to adequately hire, train and supervise its employees. Counts five through eight—(5) breach of contract, (6) breach of implied covenant, (7) breach of failure to pay wages, and (8) failure to pay overtime—are based on ConocoPhillips' alleged failure to pay Bentley in accordance with his contract and state law. Count (9) is for wrongful discharge, and count (10) seeks punitive damages.

III.

A. Standard of Review

The court of appeals reviews discovery rulings for an abuse of discretion. Laub v. United States Dep't of Interior, 342 F.3d 1080, 1084 (9th Cir. 2003).

B. Motion to Compel

To support his claim that ConocoPhillips negligently hired, trained and supervised its employees, Bentley requested the personnel file of his supervisor,

Steve Thomas (“Supervisor”). ConocoPhillips objected to the request, ostensibly in order to protect the Supervisor’s right to privacy under the Montana Constitution. Additionally, while deposing the Supervisor, Bentley’s counsel asked questions about a past altercation between the Supervisor and another employee. Defense counsel instructed the Supervisor not to answer questions about the incident, again, in order to protect his privacy rights under the Montana Constitution. At no point has ConocoPhillips moved for a protective order under Fed. R. Civ. P. 26(c). Unquestionably the instruction at the deposition was improper. See Rule 30(c)(2), F. R. Civ. P.

Bentley now moves under Fed. R. Civ. P. 37(a)(3) and 30(d) for an order compelling Defendant to respond to the discovery request and to force the Supervisor to provide complete deposition testimony. His position is well taken.

1. Right to Privacy

ConocoPhillips argues employees have a right to privacy in their personnel files under the Montana Constitution. Montana Human Rights Div. v. City of Billings, 649 P.2d 1283 (Mont. 1982). However, the right to privacy only extends to state action. State v. Malkuch, 154 P.3d 558, 560 (Mont. 2007) (citing State v. Long, 700 P.2d 153, 157 (Mont. 1985)). An employee’s constitutional right to privacy is infringed only when the state attempts to discover an individual’s

personnel file or there is some other form of state action involved. See, e.g., State v. Burns, 830 P.2d 1318 (Mont. 1992) (holding that private employer's personnel records need not be disclosed to the State of Montana); City of Billings, 649 P.2d at 1285 (noting a right to privacy concern after state agency attempted to discover files). Here, neither party is a state actor. Thus, there is no constitutional privacy issues involved.¹

There is a compelling interest to require the discovery here because the Supervisor's personnel file "could reasonably cast some light on the truth or falsity" of Bentley's claims, and there is no other way for Bentley to learn of the contents of the file. City of Billings, 649 P.2d at 1289. Thus, Defendant's objections to producing the requested personnel file and to allowing the Supervisor to be fully deposed are not well taken.

2. Protective Order

Federal Rule of Civil Procedure 26(c) empowers the Court to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ConocoPhillips has not sought a protective order to

¹ConocoPhillips acknowledges that "the Montana constitutional guarantee of privacy is applied to government intrusion." (Def.'s Response 5.) It argues that the Montana Supreme Court has stated that the "[i]nvasion of individual privacy by a fellow citizen is a bad thing." Dowart v. Caraway, 58 P.3d 128, 141 (2002). That does not mean, as ConocoPhillips seems to suggest, that the Montana Constitution protects a citizen from such conduct.

limit or block the production of the Supervisor's personnel file, or to preclude deposition testimony about an incident involving the Supervisor and another employee. Before seeking to compel, Bentley first sought a compromise with ConocoPhillips by offering a protective order for and redaction of personal information from the Supervisor's file. (See dkt #29-2.) Unfortunately for ConocoPhillips, these attempts were rebuffed. (Dkt #29-3.)

In order to protect the Supervisor's privacy while promoting the speedy and inexpensive resolution of this matter, ConocoPhillips must produce the entire file after both parties agree to a protective order of limited dimensions focused solely on protecting the Supervisor's medical, family and financial information. The file must be produced within three calendar days of the entry of this order. Bentley is entitled to attorney fees and costs necessitated by ConocoPhillips' position.

C. Second Motion to Compel

On December 11, 2009, Bentley filed a second motion to compel. This motion seeks an order requiring ConocoPhillips to fully respond to various interrogatories (nos. 5, 6 and 7) and requests for production (nos. 11, 12, 14 and 17).

1. Local Rule 26.3

As an initial matter, ConocoPhillips argues that the Court need not consider

Bentley's motion because he failed to comply with Local Rule 26.3(c)(2), which states:

[t]he Court will deny any discovery motion unless counsel have conferred concerning all disputed issues before the motion is filed. The mere sending of a written, electronic, or voice-mail communication does not satisfy this requirement. Rather, this requirement can be satisfied only through direct dialogue and discussion in a face to face meeting, in a telephone conversation, or in detailed, comprehensive correspondence.

ConocoPhillips disingenuously argues that there has been no conferring between the parties.

On June 26, 2009, Bentley sent a letter regarding discovery issues, and ConocoPhillips provided supplemental discovery responses on September 14, 2009. ConocoPhillips argues this exchange of letters fails to meet the terms of Local Rule 26.3.

The argument is not well taken. Bentley's June 26, 2009 letter states that its purpose is to "confer" with ConocoPhillips regarding specific discovery concerns with the intent to avoid "the Court's intervention." (Dkt #29-2, p. 1.) The letter explicitly addresses each of the discovery disputes Bentley raised in this motion. ConocoPhillips' response letter confirmed its refusal to produce some of the discovery that Bentley requested. Bentley's motion seeks intervention on those requests that were not resolved between the parties. This "detailed,

comprehensive correspondence” between the parties satisfies the terms of Local Rule 26.3.

ConocoPhillips also argues that there was no Local Rule 26.3 discussion between the parties because Bentley did not file the motion until three months after correspondence. Implicit in this argument is the suggestion that if Bentley had only asked, ConocoPhillips would have produced. There is irony in the argument but not much more. Bentley raised his issues in a letter and even offered some compromises. ConocoPhillips flatly refused. The passage of a few months, with no indication that ConocoPhillips would be likely to work with Bentley on the issues in the interim, does not require him to engage in a second round of discussions before filing his motion.

2. Interrogatories 5, 6 and 7, and Requests for Production 11, 12 and 14

Bentley sent ConocoPhillips interrogatories to determine who the company had disciplined for the “type of infraction for which Bentley was accused,” (no. 5), who the company had subjected “to a search request,” (no. 6), and who the company had disciplined pursuant to its firearms policy. (No. 7). Each interrogatory also sought the circumstances and outcome of each episode, and had a corresponding request for related documents. (Nos. 11, 12 and 14).

In response, ConocoPhillips objected to each interrogatory and request on

the grounds that it is overly broad, burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and that it violates the Montana Constitution's right to privacy. Additionally, Defendant objected to all questions but one for being vague. Now, however, ConocoPhillips only objects to these interrogatories and requests by asserting that they are overly broad and unduly burdensome.² The other objections are abandoned. Cardenas v. Dorel Juvenile Group, Inc., 232 F.R.D. 377, 380 (D.Kan. 2005).

Discovery can be limited when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii); see also Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co., 981 F.2d 429, 438-39 (9th Cir. 1992) (noting the appropriateness of refusing an “unnecessarily burdensome and overly broad” discovery request). The responding party has the burden to show the costs and efforts required to produce the requested information. Fed. R. Civ. P. 26(b)(2) advisory committee’s notes. The requesting party then must show its needs for the discovery outweigh those

²ConocoPhillips incorporates its arguments on the right to privacy addressed in the previous motion. The objection suffers the same fatal flaws as set forth above.

costs and efforts. Id.

ConocoPhillips argues that Bentley's requests are unduly burdensome. In support, the company notes that it has over 34,000 current employees around the world, to say nothing of its number of past employees. It has no centralized database to track every time a vehicle search has been requested, or what, if any, disciplinary action followed. Bentley has not limited his request to incidents that were recorded. ConocoPhillips contends that to provide Bentley with the information he requests would require it to contact facility managers—past and present—at every facility across the globe to enquire if they performed a vehicle search of an employee and what the outcome was. This in turn, or so the argument goes, would lead to interviews with other personnel, and then reviewing personnel files. In short, ConocoPhillips claims there is no efficient way to locate the information as requested.³

Bentley's requests are burdensome. The question then becomes are they unnecessarily so. Bentley rationalizes that his request for information about all facilities around the world is warranted because Defendant is a large corporation

³Bentley faults ConocoPhillips for failing to submit an affidavit establishing these details. The nature of the interrogatories renders this argument moot. The questions as posed are too broad and it would be unwieldy to answer them as posed. Perhaps more artful interrogatories would have avoided the dispute.

with centralized offices in Texas, and that he was fired by individuals from its corporate offices in Texas. This claim does not show that his need for the discovery outweighs the burden imposed on ConocoPhillips to respond.

Moreover, the likely relevance of discovery about searches and disciplinary actions at far-flung facilities is unclear.⁴ The burdens of the requests outweigh any likely benefits “without a more specific showing that the burdens of production would be minimal and that the requested documents would lead to relevant evidence”. Nugget Hydroelectric, 981 F.2d at 439. The motion to compel ConocoPhillips to answer Interrogatories 5, 6, and 7, and Production Requests 11, 12 and 14 is ill taken. ConocoPhillips is entitled to attorney fees and costs in responding to “this” aspect of Bentley’s motions.

3. Request for Production 17

Bentley also requested all documents that “refer or relate to [ConocoPhillips’] OWST policy.” OWST refers to the company’s oral, written, suspension, termination” progressive discipline policy. ConocoPhillips objected that the request is

⁴Bentley asserts the discovery is relevant because it would answer questions such as when else have corporate officials visited a facility, conducted a search and then terminated an employee. This proposition can be answered, however, through a much more narrow, focused and less burdensome discovery request than the ones at hand.

overly broad, unduly burdensome, not limited in time, not reasonably calculated to the discovery of admissible evidence and the term “OWST policy” is vague and ambiguous because [ConocoPhillips] has no written policy titled “OWST”.

(dkt #29-1, p. 14.) Bentley clarified that he is only seeking the disciplinary policies in place during Bentley’s employment. (dkt #29-2, p. 3.) To this, ConocoPhillips supplied Bentley with its Firearms/Weapons Policy. Unless the only discipline ConocoPhillips recognizes involves firearms then the answer and production is not responsive.

ConocoPhillips must provide Bentley all disciplinary policies as requested through Bentley’s clarification. ConocoPhillips argues that it already fully responded to Bentley’s request, but if so the position seems at odds with the objection that the request is vague. It also argues that Bentley is inappropriately expanding his original request from the production of the OWST policy to relevant disciplinary policies. This seems like posturing if it isn’t game playing. Bentley originally sought all documents that refer or relate to the OWST policy thinking OWST was the relevant disciplinary policy. When Bentley learned that there is no “OWST” policy, it clarified that it was seeking the disciplinary policies in place during Bentley’s term of employment, and no longer needed all documents that refer or relate to OWST. ConocoPhillips now knows what Bentley is seeking, it is

relevant, and there is no reason why the company should not comply with the request. Bentley is entitled to attorney fees and costs necessitated by ConocoPhillips obstructionism on a matter that may go to the heart of the case.

D. Motion to Exclude Defendant's Expert Witness

Bentley moves to exclude ConocoPhillips' expert witness because the witness' expert report relies on materials that Bentley should have received but was never given, and those materials were not produced before the expert deadline. ConocoPhillips counters that any materials its expert reviewed that Bentley did not receive prior to the deadline is because he did not request them, and that its expert witness made a full disclosure by listing—albeit not producing—all the materials she relied upon. For the reasons that follow, Bentley's motion to exclude is granted in part.

1. Background

In its initial disclosure on July 14, 2009, ConocoPhillips informed Bentley that it had delivered to him its “policies relating to searches, firearms, violence in the workplace and overtime.” (Def.'s Resp. 15.) Bentley later requested the production of all documents that “refer or relate” to ConocoPhillips' search policy and firearms policy, and requested all documents that relate to the claims in the complaint. ConocoPhillips objected to these requests as overly broad and it did

not produce those things it evidently had.

On November 27, 2009, the expert witness deadline, ConocoPhillips disclosed Anna Winningham as an expert witness. In doing so it produced her written report. In the report, Winningham provided a list of materials she reviewed. The list included, inter alia, ConocoPhillips' Violence in the Workplace Policy, its U.S. Business Units Contraband & Inspection Guidelines, its Code of Business Ethics & Conduct Handbook, and four Violence in the Workplace Training PowerPoint Presentations. Even though ConocoPhillips claims that it disclosed "all policies relating to searches, firearms [and] violence in the workplace," as well as meeting Bentley's subsequent requests for such documents, Bentley now claims he did not receive any of the documents before the expert witness disclosure deadline.

Bentley then filed this motion to exclude ConocoPhillips' expert witness on December 11, 2009. On December 16, 2009, ConocoPhillips supplemented its discovery responses and provided all the materials Winningham reviewed that had not been previously produced.

2. Failure to Properly Disclose and Produce Materials

Bentley's motion to exclude is based on the factual premise that ConocoPhillips' expert relies upon documents that Bentley should have received

months prior to the expert disclosure deadline through either ConocoPhillips' initial disclosures or responses to interrogatories and requests for production.

a. Initial Disclosures

As part of its initial disclosures, ConocoPhillips informed Bentley that it had delivered to him its "policies relating to searches, firearms, violence in the workplace and overtime." (Def.'s Resp. 15.) Bentley claims that ConocoPhillips' expert relies upon such policies that were not disclosed to him prior to the expert disclosure deadline.

There are two factual questions involved here. First, are the documents that ConocoPhillips failed to produce before the expert disclosure deadline company policies relating to searches, firearms or workplace violence? Bentley presumes without argument that they are. The company's violence in the workplace policy and Contraband & Inspection Guidelines are such policies.

Second, were the violence in the workplace policy, and contraband and inspection guidelines relied upon by the expert witness produced before the expert disclosure deadline? Bentley states he did not receive these materials until after the expert disclosure deadline, (Pl.'s Br. 3), while ConocoPhillips suggests they were produced prior to the deadline. (Def.'s Resp. 15.) It is unclear exactly what has transpired. ConocoPhillips informed Bentley that it had produced its "policies

relating to . . . violence in the workplace.” If its expert relied upon a different or additional violence in the workplace policy, then ConocoPhillips’ initial disclosure was misleading at best.

b. Interrogatories and Requests

Bentley lists sixteen separate discovery requests that he claims should have caused ConocoPhillips to produce the documents it provided to its expert but did not produce to Bentley before the expert disclosure deadline. Not all fall categorically into Bentley’s view.⁵

Bentley asked for documents that refer or relate to the company’s firearms and search policies. Some of the documents ConocoPhillips’ expert relies upon—such as the Violence in the Workplace Policy and the Code of Business Ethics and Conduct Handbook—specifically refer or relate to those policies.⁶ Moreover, when ConocoPhillips’ expert witness requested these documents it should have alerted the company about the shortcomings in its initial disclosures and discovery responses. There are discovery documents—e.g. the violence in the

⁵For instance, Bentley requested all documents that relate in any manner to the claims in the Complaint. While this might capture the documents that the expert relied upon, this request seems broad.

⁶Firearms policies are part of a company’s violence in the workplace policies. (See Expert Review by Anna M. Winningham, p. 6, Nov. 27, 2009). ConocoPhillips’ Code of Business Ethics and Conduct Handbook includes the company’s firearms policy.

workplace policy, contraband and inspection guidelines, Code of Business Ethics and Conduct Handbook, and violence in the workplace training PowerPoint presentations—that should have been produced when Bentley asked for documents that “refer or relate” to the company’s firearms and search policies.

Bentley also asked for all documents, correspondence, and email prepared by or sent to ConocoPhillips’ expert witness. This request would likely have covered all of the materials the expert relied upon. Yet again, ConocoPhillips objected to the request on June 3, 2009. Rule 26(a)(2) compels the disclosure of the data and information considered by the expert, including documents provided by counsel. See Iacangelo v. Georgetown Univ., 560 F. Supp. 2d 53 (D.D.C. 2008); Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 461-62 (E.D. Pa. 2005).

3. Fed. R. Civ. P. 26(a)(2)(B)

Federal Rule of Civil Procedure 26(a)(2)(B) mandates in relevant part, that an expert witness file a written report that includes a “statement of all opinions the witness will express and the basis and reasons for them,” “the data or other information considered” and “any exhibits that will be used to . . . support” them. The July 10, 2009 Scheduling Order in this case also warned that “[a]n inadequate report or disclosure may result in exclusion of the expert’s opinions at trial.” The

deadline for complete disclosures was set for November 27, 2009.

ConocoPhillips argues that it complied with Rule 26 and this Court's Scheduling Order because all the materials relied upon by its expert were listed in the report. This argument is premised on the notion that the "data or other information" relied upon by an expert witness need not be "physically provided." Dolin v. Contemporary Fin. Solutions, 2009 WL 4730465, at *2 (D. Colo. Dec. 8, 2009). Thus, ConocoPhillips contends because it listed its Violence in the Workplace Policy, without producing it, that the company has conformed to the requirements of Rule 26.

The argument is unpersuasive for two reasons. First, it inaccurately restates Bentley's argument. Bentley is not arguing that the expert testimony should be excluded simply because the policy was not physically attached to the report. Rather, Bentley argues the testimony should be excluded because the expert relies upon materials that ConocoPhillips previously informed Bentley that it had delivered to him but in fact had not, or were requested by Bentley but were never produced.

Second, ConocoPhillips' reading of Rule 26(a)(2) contravenes the purpose of the rule. Rule 26(a) disclosures are designed to save "time and expense" by requiring parties to reveal the data and materials upon which an expert's testimony

is based. Fed. R. Civ. P. 26(a) advisory committee's notes. "A major purpose of the [rule] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives." Id.

The rule does not allow ConocoPhillips to inform Bentley that it has produced its violence in the workplace policy when in fact it has not, and then consider its mere listing of the policy's existence in the expert report to be enough to satisfy Rule 26(a)(2). If such were the case, Bentley would be expected to request documents that he had supposedly received, a concept that defies common sense, not to mention Rule 26 and the scheduling order in this case.

The failure to disclose a report meeting the requirements of Rule 26(a)(2)(B) may preclude the proponent from introducing the evidence at trial. Such a sanction is "automatic and mandatory" when the party failing to disclose cannot show the failure was justified or harmless. The record here justified neither. See, Pena-Crespo v. Puerto Rico, 408 F.3d 10, 13-14 (1st Cir. 2005).

In line with this analysis, this Court has previously excluded a party's expert witness from relying upon data that was not produced by the expert disclosure deadline. Olson v. Montana Rail Link, Inc., 227 F.R.D. 550 (D. Mont. 2005). In that case, an expert witness submitted his written report that referenced the

underlying data without disclosing it. The opposing party then requested the information, but received only part of it. Id. at 551. The half-hearted response was viewed as a demonstration of the party “gaming the rules.” Id.

Here, ConocoPhillips failed to produce all of its violence in the workplace policies to Bentley, while its own expert was reviewing and relying on them. In the expert’s written report, the policy was listed but still not made available to Bentley. ConocoPhillips did not correct this inadequacy until after the expert disclosure deadline and Bentley filed this motion. This allowed Defendant’s expert to rely on materials that Bentley’s expert should have also received. In short, ConocoPhillips was “gaming the system” by providing one set of policies to Bentley and another to its expert, and in doing so failed to fully disclose its expert testimony by the deadline. The consequence is to strike those portions of the expert’s testimony that relate to the undisclosed material.

4. Sanctions

Under Rule 37(c)(1), a party who fails “to provide” expert testimony disclosure cannot use that information at trial, “unless the failure was substantially justified or is harmless.” This is “a ‘self-executing,’ ‘automatic’ sanction to ‘provide[] a strong inducement for disclosure of material’” Yeti By Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001) (quoting Fed.

R. Civ. P. 37 advisory committee's note).

ConocoPhillips argues that its failure to disclose all the materials relied upon by its expert was substantially justified by the fact that the materials were subsequently disclosed. The rules do not depend on the ad hoc or post hoc decisions of the parties or counsel. Nor do the pretrial orders of the court have any meaning if they can be bent or disregarded with impunity. There is no justification to handing over documents to an expert but omitting to hand them over to the other side, especially when the information had been requested under the rules.

ConocoPhillips next argues that Bentley has not been harmed by its failure to produce the materials because he received them on December 16, 2009, and thus he still had time to prepare a rebuttal report prior to the deadline of December 29, 2009. Not so. ConocoPhillips' conduct limited Bentley's ability to prepare a rebuttal report that must be done within 30 days of the disclosure. The failure to disclose the policy at the time of initial disclosures deprived Bentley of fully informing his own expert, with the aid of the documents, and possibly subjecting the expert to issues on cross examination that go to his or her credibility.

Bentley seeks the exclusion of the company's expert testimony, as well as an order for ConocoPhillips to show cause as to why it should not pay his fees and costs incurred throughout the discovery process. ConocoPhillips gained an

advantage by allowing its expert to rely on things that Bentley did not have but should have. Here the appropriate sanction is to prohibit the expert witness from testifying or expressing any opinion based on documents ConocoPhillips should have produced to Bentley in its initial disclosures and discovery responses, but failed to do.

Neither party is entitled to attorney fees or costs associated with this motion.

IV. Conclusion

THEREFORE, IT IS ORDERED that Bentley's Motion to Compel production of the Supervisor's personnel file (dkt #26) is GRANTED subject to a limited protective order as described in this order.

IT IS FURTHER ORDERED that Bentley's motion to compel answers to discovery requests concerning any person who has been searched or disciplined by the company anywhere in the world (dkt #28) is DENIED. IT IS FURTHER ORDERED that the motion to compel ConocoPhillips to produce disciplinary policies in place during Bentley's employment (dkt #28) is GRANTED.

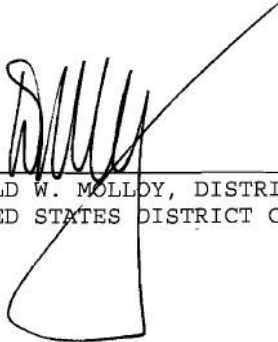
IT IS FURTHER ORDERED that Bentley's Motion to Exclude Defendant's Expert Witness (dkt #30) is GRANTED in part and DENIED in part.

ConocoPhillips' expert is precluded from expressing any opinion at trial based on a document, standard, compilation or report that was not produced in response to

Bentley's formal discovery requests.

IT IS FURTHER ORDERED that each party awarded fees and costs submit an affidavit in support of attorney fees and costs on those limited areas where they have been awarded by this order. The affidavits shall be filed within 7 days of this order. Objections to claimed costs and fees shall be filed within 10 days of the date of this order.

Dated this 3rd day of February, 2010.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT