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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11
12 CALTEX PLASTICS, INC.,

13 Plaintiff,

14 v.

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16 SHANNON PACKAGING CO.,

17 Defendant.
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19
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2:13-cv-06611 RSWL (JEM)

**ORDER re: Defendant's
Motion for Summary
Judgment [27]**

21 Currently before the Court is Defendant Shannon
22 Packaging Co.'s ("Defendant" or "Shannon") Motion for
23 Summary Judgment [27] ("Motion"), in which Defendant
24 requests summary judgment in its favor on all three
25 claims asserted against it by Plaintiff Caltex Plastics
26 Inc. ("Plaintiff" or "Caltex"). Notice of Def.'s Mot.
27 Summ. J. 1:21-2:4, ECF No. 27.

28 The Court, having reviewed all papers submitted and

1 pertaining to Defendant's Motion [27], **NOW FINDS AND**
2 **RULES AS FOLLOWS:** The Court **GRANTS** Defendant's Motion
3 for Summary Judgment [27].

4 **I. FINDINGS OF FACT**

- 5 1. Plaintiff Caltex, a California corporation with a
6 principal place of business in California,
7 manufactures, markets, and distributes polyethylene
8 bags and laminated products for military and
9 electronics. Pl.'s Resp. to Def.'s Statement of
10 Uncontroverted Facts ("Pl.'s Facts") ¶ 11, ECF No.
11 35 (undisputed).
- 12 2. Defendant Shannon, also a California corporation
13 with a principal place of business in California,
14 is a leading supplier of custom pouches, tubing,
15 and sheeting products that protect, unitize, and
16 market products for a variety of industries. Id. ¶
17 9 (undisputed).
- 18 3. The U.S. Department of Defense ("DOD") has a
19 Qualified Products List ("QPL"), which lists
20 products that the DOD has approved to be used in
21 Defense Department contracts that require a
22 "qualified" product. Id. ¶¶ 14-15, 24
23 (undisputed).
- 24 4. The QPL does not apply to non-military contractors
25 or applications, nor does it apply to military
26 contracts that do not call for a qualified product.
27 Id. (undisputed).
- 28 5. Caltex's packaging products include flexible

1 military packaging material that is qualified by
2 the Department of the Navy ("DON") as meeting the
3 DOD's MIL-PRF-81705 Type III specification for
4 "flexible barrier materials, often supplied as
5 bags." Id. ¶ 12 (undisputed).

6 6. The MIL-PRF-81705 specification's requirements are
7 used to qualify types of flexible barrier material
8 that is either Type I (moisture barrier) or Type
9 III (static shielding). Id. ¶ 16 (undisputed);
10 Compl. ¶ 15 (undisputed).

11 7. Caltex's MIL-PRF-81705 Type III products have been
12 approved by the DON and were placed on the DOD's
13 QPL in February 2010. Pl.'s Facts ¶ 13
14 (undisputed).

15 8. At present, Plaintiff is the only entity qualified
16 by the DON to provide materials designated MIL-PRF
17 81705 Type III to U.S. Defense contracts that
18 require "qualified" product for MIL-PRF 81705 Type
19 III material. Id. ¶¶ 12-14 (undisputed).

20 9. The QPL can be accessed by anyone on the Internet.
21 Id. ¶ 25 (undisputed).

22 10. Plaintiff did not allege or produce evidence to
23 support that Shannon ever stated that its products
24 appear on the QPL or that Shannon's products have
25 been qualified by the DOD. Id. ¶ 4 (undisputed).

26 11. Shannon's data sheets for some of Shannon's
27 product, including Shannon's SS103 product,
28 previously stated that the product was "[d]esigned

1 to meet the performance of MIL PRF 81705 T3." Id.
2 ¶ 5 (undisputed); see Williams Decl. Supp'g Def.'s
3 Mot. Summ. J. ("Williams Decl."), Ex. A, ECF No. 29.

4 12. Shannon ceased to state that its products were
5 "[d]esigned to meet the performance of MIL PRF
6 81705 T3" prior to the commencement of this
7 lawsuit. Pl.'s Facts ¶ 6 (not disputed by
8 admissible evidence); Walsh Decl. ¶ 8, ECF No. 30;
9 see Williams Decl., Ex. E.

10 13. Shannon clearly communicates to its customers and
11 potential customers that Shannon is not on the QPL
12 for MIL-PRF 81705 Type III product, that Shannon
13 products are not on the QPL, and that Shannon
14 products are not qualified by the DOD. Pl.'s Facts
15 ¶¶ 7, 23 (not disputed by admissible evidence);
16 Walsh Decl. ¶¶ 12-15, Exs. C-D; see Williams Decl.,
17 Ex. D.

18 14. When accepting an order from a customer for its
19 SS103 bags, Shannon advises the customer that the
20 SS103 bags are not on the QPL. Pl.'s Facts ¶ 29
21 (not disputed by admissible evidence); Walsh Decl.
22 ¶ 15.

23 15. Shannon's representation that its bags were
24 "[d]esigned to meet the performance of MIL PRF
25 81705 T3" was based upon the results of testing
26 Shannon conducted of its material, or which a third
27 party conducted on behalf of Shannon of its
28 material. Pl.'s Facts ¶ 8 (not disputed by

admissible evidence); Walsh Decl. ¶ 11.

16. The bags Shannon described as being “[d]esigned to meet the performance of MIL PRF 81705 T3” have not been tested by Caltex, or by any third party on behalf of Caltex, to determine whether the material meets the performance requirements of MIL-PRF-81705 for Type III material. Pl.’s Facts ¶ 19 (undisputed).

17. Caltex tested the bags of some of its competitors, other than Shannon, to determine if those bags met the requirements of MIL-PRF-81705 Type III. *Id.* ¶ 20 (undisputed).

18. Shannon’s data sheets for some of Shannon’s product represent that the product has a physical property of “EMI Shielding” that is tested by the “MIL B 81705 C” “Test Method.” Williams Decl., Ex. E.

19. No evidence of actual confusion has been offered by Caltex. Pl.’s Facts ¶¶ 21-22 (undisputed).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 states that a “court shall grant summary judgment” when the movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Under Rule 56, the party moving for summary judgment has the initial burden to show “no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a); see Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03

(9th Cir. 2000). The burden then shifts to the non-moving party to produce admissible evidence showing a triable issue of fact. Nissan Fire & Marine Ins., 210 F.3d at 1102-03; see Fed. R. Civ. P. 56(a). When a defendant moves for summary judgment, summary judgment “is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial.” Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805-06 (1999); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

A. Evidentiary Objections

Both parties make evidentiary objections, asserting that portions of witness declarations are inadmissible evidence. Pl.’s Objections to Walsh Decl., ECF No. 36; Def.’s Objections to Stein Decl., ECF No. 41; Def.’s Objections to Higgs Decl., ECF No. 42.

When determining a motion for summary judgment, the court may only consider evidence admissible at trial, though the form may be different at the summary judgment stage. Fed. R. Civ. P. 56(c)(2)-(4); Colony Holdings, Inc. v. Texaco Refining & Mktg., Inc., No. SACV00217DOC(MLGX), 2001 WL 1398403, at *5 (C.D. Cal. Oct. 29, 2001) (citing Curnow v. Ridgecrest Police, 952 F.2d 321, 324 (9th Cir. 1991)).

1. Plaintiff’s Evidentiary Objections

Plaintiff makes objections [36] to portions of the

Walsh Declaration in support of Plaintiff's Motion for Summary Judgment. Plaintiff objects [36] on grounds of lack of foundation and relevance, among other arguments. "To the extent that the Court relied on objected-to evidence, [the Court] relied only on admissible evidence" and, therefore, **OVERRULES** Plaintiff's objections to the Walsh Declaration. Caldwell, 2015 WL 1897806, at *2 n.2; see also Capital Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010).

2. Defendant's Evidentiary Objections

Defendant objects to the Higgs Declaration and portions of the Stein Declaration.

a. *Objections to Stein Declaration*

Defendant objects to the Declaration of Steven A. Stein because the Declaration "is misleading as to what occurred during and after the close of discovery in this matter" and raises irrelevant points. Def.'s Objections to Stein Decl. 1:23-2:12. Because the Court need not rely on the Stein Declaration to determine the present matter, Defendant's objections to the Stein Declaration are **OVERRULED** as moot. See Henson Beverage Co. v. Vital Pharm., Inc., No. 08-CV-1545-IEG (POR), 2010 WL 1734960, at *3 (S.D. Cal. Apr. 27, 2010).

b. *Objections to Higgs Declaration*

Defendant objects to the Higgs Declaration on the grounds that "(1) it demonstrates Caltex's violation of the Stipulated Protective Order [ECF 24] in this

1 matter; (2) the declarant appears to attempt to offer
2 expert testimony without having been disclosed as an
3 expert witness; and (3) the declarant's testimony is
4 irrelevant." Def.'s Objections to Higgs Decl. 1:23-28.
5 Defendant requests that the Court strike the entirety
6 of the Higgs Declaration as being in violation of the
7 parties' Stipulated Protective Order and the Federal
8 Rules of Civil Procedure governing the disclosure of
9 expert witnesses. Id. at 2:1-7.

10 i. *Violation of Fed. R. Civ. P. 26*

11 Defendant argues that the testimony in the Higgs
12 Declaration goes beyond the scope of a lay witness and
13 that Higgs was never disclosed as an expert witness, in
14 violation of Rule 26(a) of the Federal Rules of Civil
15 Procedure, which, under Rule 37(c)(1), should result in
16 the exclusion of the Higgs Declaration. Id. at 4:5-14,
17 7:26-8:7.

18 To determine whether the Higgs Declaration should
19 be excluded under Rule 37(c)(1), the Court must
20 determine three things: (1) whether Higgs's testimony
21 goes beyond the scope of lay witness opinion testimony,
22 and is therefore expert testimony, under Rules 701 and
23 702 of the Federal Rules of Evidence; (2) whether
24 Plaintiff failed to disclose Higgs as an expert
25 witness, as required by Rule 26 of the Federal Rules of
26 Civil Procedure; and (3) whether Plaintiff's failure to
27 disclose was "substantially justified or harmless."
28 Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d

1 1101, 1106 (9th Cir. 2001); see Fed. R. Civ. P.
2 37(c)(1).

3 Beyond Scope of Lay Witness Opinion Testimony

4 The Court must first determine whether Higgs's
5 testimony goes beyond the scope of permissible lay
6 witness testimony. Rule 701 of the Federal Rules of
7 Evidence states that "[i]f a witness is not testifying
8 as an expert, testimony in the form of an opinion is
9 limited to one that is . . . (c) not based on
10 scientific, technical, or other specialized knowledge
11 within the scope of Rule 702."¹ Fed. R. Evid. 701.

12 While a lay witness may testify based on their own
13 experience, lay witness observations and opinions must
14 be "common," i.e., based on common observations or
15 experience, and must not require expertise. Humboldt
16 Baykeeper v. Union Pacific R.R. Co., No. C 06-02560
17 JSW, 2010 WL 2179900, at *1 (N.D. Cal. May 27, 2010);
18 see Fed. R. Evid. 701; United States v. Figueroa-Lopez,
19 125 F.3d 1241, 1246 (9th Cir. 1997) (holding that
20 opinion by lay witness on observations that were not
21 "common," but required demonstrable expertise, was
22 _____

23 ¹ Rule 702 of the Federal Rules of Evidence states that "[a]
24 witness who is qualified as an expert by knowledge, skill,
25 experience, training, or education may testify in the form of an
26 opinion or otherwise if:
27 (a) the expert's scientific, technical, or other specialized
28 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.

1 improper lay witness testimony). "The mere percipience
2 of a witness to the facts on which he wishes to tender
3 an opinion does not trump Rule 702." Humboldt
4 Baykeeper, 2010 WL 2179900, at *1 (citing Figueroa-
5 Lopez, 125 F.3d at 1246) (internal quotation marks and
6 alterations omitted)).

7 Upon review of the Higgs Declaration, the Court
8 finds that substantial portions of the Higgs
9 Declaration go beyond the scope of permissible lay
10 witness opinion testimony, as Higgs testifies to
11 matters of expertise beyond "common" observations or
12 experience. See id. at *1; Higgs Decl. ¶¶ 11-20.

13 Higgs testifies regarding MIL-PRF-81705
14 qualification specifications promulgated by the
15 Department of the Navy, which include "designations as
16 to the particular materials that must be used, the
17 qualifications they must meet, their applications, and
18 related specifications." Higgs Decl. ¶ 3. Higgs
19 testifies about MIL-PRF-81705 "Performance
20 Requirements," which, according to Higgs, include,
21 among other requirements, "Seam fabrication," "Blocking
22 resistance," "Contact corrosivity," "Static decay,"
23 "Surface resistivity," and "Electromagnetic
24 interference (EMI) attenuation." Id. ¶ 13. Higgs also
25 testifies about "ASTM INTERNATIONAL standards that can
26 be utilized to test MIL-PRF-81705 Type III products."
27 Id. ¶ 14. Higgs states that, in connection with this
28 litigation, he reviewed the advertising and other

1 documents produced by Shannon that relate to Shannon's
2 static shielding bags. Id. ¶ 12. Upon review of
3 Shannon's "Static Control Film Data Sheet" for
4 Shannon's SS103 product, Higgs asserts the opinion and
5 conclusion that Shannon's SS103 product "is not
6 'designed to meet the performance' of MIL-PRF-81705
7 Type III as claimed because there is no showing that
8 the product in question has the mandatory
9 characteristics required by the Performance
10 Requirements." Id. ¶ 13.

11 Such an opinion unquestionably requires a high
12 level of expertise and "scientific, technical, or other
13 specialized knowledge." Fed. R. Evid. 701. Higgs's
14 opinions and conclusions are not based on common
15 observations or experience but, instead, require
16 "demonstrable expertise." Figueroa-Lopez, 125 F.3d at
17 1246.² It is not "common" experience to know the
18 meaning of the term, "Electromagnetic interference
19

20 ² See also United States v. Skeet, 665 F.2d 983, 985 (9th
21 Cir. 1982)(explaining that lay witnesses opinion testimony is
22 sometimes permitted "[b]ecause it is sometimes difficult to
23 describe the mental or physical condition of a person, his
24 character or reputation, the emotions manifest by his acts; speed
25 of a moving object or other things that arise in a day to day
26 observation of lay witnesses; things that are of common
27 occurrence and observation, such as size, heights, odors,
28 flavors, color, heat, and so on"); Fed. R. Civ. P. 701, 2000
Amend. Advisory Committee Notes (stating that Rule 701 makes the
following kind of distinction between lay and expert opinion
testimony: "lay testimony 'results from a process of reasoning
familiar in everyday life,' while expert testimony 'results from
a process of reasoning which can be mastered only by specialists
in the field'").

1 (EMI) attenuation," or to know whether certain product
2 testing is "comparable" to "the ASTM INTERNATIONAL
3 standards." See Higgs Decl. ¶¶ 13-14.

4 As such, the Court finds that portions of Higgs's
5 testimony go beyond the scope of lay witness opinion
6 testimony under Federal Rules of Evidence 701 and 702
7 and thus constitute expert witness testimony.³ See
8 Figueroa-Lopez, 125 F.3d at 1246.

9 Failure to Disclose Under Fed. R. Civ. P. 26

10 Second, the Court must determine whether Plaintiff
11 complied with the disclosure requirements of Fed. R.
12 Civ. P. 26(a)(2).

13 Rule 26 of the Federal Rules of Civil Procedure
14 requires that parties make mandatory initial
15 disclosures, including "the identify of any witness
16 [the party] may use at trial to present evidence under
17 Federal Rule of Evidence 702." Fed. R. Civ. P.
18 26(a)(2)(A). Rule 26 requires parties to not only
19 disclose the identify of an expert witness, but to
20 supply the opposing party with either a written report
21 for "retained or specially employed" experts, or a
22 statement of "the subject matter on which the witness
23 is expected to present [Rule 702] evidence" and "a
24

25 ³ Even if Higgs is "extremely familiar with the tests that
26 are performed and the requirements that must be met to obtain MIL
27 SPEC approval from the DON" due to his years of experience with
28 such matters, this does not change the fact that Higgs's
testimony is undoubtedly beyond the scope of lay witness opinion
testimony. See Humboldt Baykeeper, 2010 WL 2179900, at *1.

1 summary of the facts and opinions to which the witness
2 is expected to testify" for all other experts. Fed. R.
3 Civ. P. 26(a)(2)(C). Rule 26 states that such initial
4 disclosures related to expert witnesses must be made
5 "at least 90 days before the date set for trial" unless
6 another date is stipulated to or ordered by the court.
7 Fed. R. Civ. P. 26(a)(2)(D). Rule 26 requires the
8 parties to "supplement these disclosures when required
9 under Rule 26(e)." Fed. R. Civ. P. 26(a)(2)(E).

10 Here, it is clear that Plaintiff failed to disclose
11 Higgs as an expert witness, as required by Rule
12 26(a)(2). Not only did Plaintiff fail to disclose
13 Higgs as an expert, Plaintiff did not even disclose
14 Higgs as a lay witness.⁴ See Fed. R. Civ. P.
15 26(a)(1)(A)(i).

16 Because Plaintiff did not properly disclose Higgs
17 as a witness, much less as an expert witness, and
18 because the expert cut-off date in this Action has
19 passed, see Dckt. # 18, Plaintiff clearly failed to
20 comply with Fed. R. Civ. P. 26(a)(2). See Seifert v.
21 United States, No. CIV-S-04-0553DFLGGH, 2005 WL
22 3439010, at *1 (E.D. Cal. Dec. 14, 2005)(granting a
23 party's motion to exclude expert testimony when the
24 proponent of the expert testimony violated Rule

25
26 ⁴ Plaintiff's Initial Disclosure, filed February 14, 2015,
27 which has not been amended or supplemented, discloses only two
28 lay witnesses: Jim Walsh and Eugene Bowan, and no expert
witnesses are identified. Pl.'s Initial Disclosure, ECF No. 20.

1 26(a)(2) and the expert cut-off date had passed).

2 Substantially Justified or Harmless

3 "Rule 37(c)(1) gives teeth to [Rule 26(a)(2)'s]
4 requirements by forbidding the use at trial of any
5 information required to be disclosed by Rule 26(a) that
6 is not properly disclosed." Yeti by Molly, 259 F.3d at
7 1106. Rule 37(c)(1) of the Federal Rules of Civil
8 Procedure states plainly that "[i]f a party fails to
9 provide information or identify a witness as required
10 by Rule 26(a) or (e), the party is not allowed to use
11 that information or witness to supply evidence on a
12 motion, at a hearing, or at a trial, unless the failure
13 was substantially justified or is harmless." Fed. R.
14 Civ. P. 37(c)(1). The Advisory Committee Notes
15 describe Rule 37(c)(1) as a "'self-executing,'
16 'automatic' sanction to 'provide[] a strong inducement
17 for disclosure of material.'" Yeti by Molly, 259 F.3d
18 at 1106. The burden is on the party facing the sanction
19 to demonstrate that its failure to comply with Rule
20 26(a) is "substantially justified or harmless." Torres
21 v. City of L.A., 548 F.3d 1197, 1213 (9th Cir. 2008).

22 The Ninth Circuit has provided factors that may be
23 used to "guide a district court in determining whether
24 a violation of a discovery deadline is justified or
25 harmless": "(1) prejudice or surprise to the party
26 against whom the evidence is offered; (2) the ability
27 of that party to cure the prejudice; (3) the likelihood
28 of disruption of the trial; and (4) bad faith or

1 willfulness involved in not timely disclosing the
2 evidence." Lanard Toys Ltd. v. Novelty, Inc., 375 F.
3 App'x 705, 713 (9th Cir. 2010).

4 Here, nothing supports a finding that Plaintiff's
5 failure to disclose was "substantially justified." As
6 in Yeti by Molly, Plaintiff could have supplemented its
7 initial disclosure or "could have asked for an
8 extension of the discovery [or expert] deadline[s],"
9 but did not. Yeti by Molly, 259 F.3d at 1106. Under
10 the four factors, Plaintiff's failure to disclose was
11 not substantially justified or harmless.

12 Regarding prejudice or surprise, it is clear that
13 the Higgs Declaration was a surprise to Defendant, as
14 Defendant's Motion for Summary Judgment does not
15 anticipate the material in the Higgs Declaration.
16 Defendant even argues in its Reply that Plaintiff is
17 trying to "amend its Complaint" by asserting completely
18 new facts and legal theories not asserted in
19 Plaintiff's Complaint. Reply 2:26-3:1, 6:15-7:9. It
20 is also clear that the Higgs Declaration is highly
21 prejudicial to Defendant, as Defendant had no
22 opportunity to conduct discovery related to the content
23 of the Higgs Declaration, no opportunity to depose
24 Higgs about his technical testimony, and no reasonable
25 opportunity to retain an expert who could testify on
26 Defendant's behalf in response to the Higgs
27 Declaration. At this late stage of the Action, within
28 a few weeks of the trial date, Plaintiff does not have

1 the practical "ability to cure the prejudice," and the
2 delays caused by the new expert testimony would likely
3 result in a "disruption of the trial." Lanard Toys,
4 375 F. App'x at 713; See Seifert, 2005 WL 3439010, at
5 *1 ("The failure to turn over expert reports cannot be
6 described as harmless, particularly when the time for
7 discovery has elapsed.").

8 Because Plaintiff's failure to disclose Higgs as a
9 witness, as required by Rule 26, was not "substantially
10 justified or harmless," the Court, pursuant to Rule
11 37(c)(1), **SUSTAINS** Defendant's objections to the Higgs
12 Declaration and **HEREBY EXCLUDES** the Higgs Declaration
13 in its entirety, including the attached exhibits. Fed.
14 R. Civ. P. 37(c)(1).⁵

15 *ii. Violation of Protective Order*

16 Regarding the Protective Order, Defendant states
17 that the material in Exhibits 6 and 7 is designated
18 "ATTORNEY'S EYES ONLY," which, under the Protective
19

20 ⁵ See Yeti by Molly, 259 F.3d at 1006 ("[E]xclusion is an
21 appropriate remedy for failing to fulfill the required disclosure
22 requirements of Rule 26(a)."); Carson Harbor Village, Ltd. v.
23 Unocal Corp., No. CV 96-3281 MMM (RCX), 2003 WL 22038700, at *2
24 (C.D. Cal. 2003) ("Excluding expert evidence as a sanction for
25 failure to disclose expert witnesses in a timely fashion is
26 automatic and mandatory unless the party can show the violation
27 is either justified or harmless." (internal quotation marks
28 omitted)); Colony Holdings, Inc. v. Texaco Refining & Mktg.,
Inc., No. SACV00217DOC(MLGX), 2001 WL 1398403, at *6 (C.D. Cal.
Oct. 29, 2001) (in the context of summary judgment, excluding a
witness's declaration asserting technical opinions and
conclusions because it was beyond the scope of lay witness
opinion testimony and the witness had not been disclosed as an
expert witness, as required by Fed. R. Civ. P. 26(a)(2)).

1 Order in this Action, cannot be disclosed to the
2 receiving party due to the competitive harm that could
3 result from such disclosure. Def.'s Objections to
4 Higgs Decl. 2:17-3:19. Defendant states that Caltex's
5 counsel allowed Caltex's Vice President, James Higgs,
6 to review documents, including Exhibits 6 and 7, that
7 were designated by Shannon as ATTORNEY'S EYES ONLY,
8 even though Higgs did not fall within the category of
9 persons allowed to review such material, as Higgs's
10 company is Shannon's competitor. Id. Defendant also
11 notes that, even if Caltex could have shown the
12 ATTORNEY'S EYES ONLY material to Higgs, Caltex was
13 required to first have Higgs sign Exhibit A of the
14 Protective Order, agreeing to be bound by its terms,
15 which Caltex did not do. Id. (citing Protective Order
16 ¶ 8). Defendant requests that the Court sanction
17 Plaintiff for its violation of the Protective Order by
18 excluding the entire Higgs Declaration or, in the
19 alternative, the portions of the Higgs Declaration
20 related to Exhibits 6 and 7. Id. at 5:4-6:1.
21 Defendant argues that "Caltex should not be allowed to
22 derive benefit" from its violation of the Protective
23 Order. Id. at 3:1-3.

24 The Court finds that Plaintiff violated the
25 Protective Order [24] in this Action by disclosing
26 Exhibits 6 and 7, properly marked "ATTORNEY'S EYES
27
28

1 ONLY,"⁶ to Mr. Higgs, who is Vice President of Plaintiff
2 Caltex, a competitor of Defendant Shannon. See
3 Protective Order ¶¶ 4, 7, 12. Rule 37(b) authorizes
4 the Court to sanction Plaintiff for its violation of a
5 Court order.⁷ The Court finds that Defendant's
6 requested sanction, to exclude the Higgs Declaration in
7 its entirety, is an appropriate sanction for
8 Plaintiff's violation of the Protective Order.

9 **B. False Advertising Claims**

10 1. False Advertising under 15 U.S.C. § 1125(a)

11 To prove a prima facie case for false advertising
12 in violation of 15 U.S.C. § 1125(a), a plaintiff must
13 show, among other elements, that "the defendant made a
14 false statement either about the plaintiff's or its own
15 product." Jarrow Formulas, Inc. v. Nutrition Now,
16 Inc., 304 F.3d 829, 835 n.4 (9th Cir. 2002) (citing
17 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134,
18 1139 (9th Cir. 1997)). "Falsity" can be proved by
19 showing that the advertisement is "literally false,
20 either on its face or by necessary implication"; or, if
21 not literally false, that the representation is "likely
22 to mislead or confuse consumers," which requires proof

23
24 ⁶ See Pl.'s Renewed Appl. to File Under Seal Exs. 6 & 7, ECF
25 No. 46 (stating that Exhibits 6 and 7 consist of information that
"constitute[s] trade secrets").

26 ⁷ Fed. R. Civ. P. 37(b); see See Ajaxo, Inc. v. Bank of Am.
27 Tech. & Operations, Inc., No. 2:07-cv-00945-GEB-GGH, 2008 WL
28 4933652, at *1 (E.D. Cal. Nov. 18, 2008); United States v. Nat'l
Med. Enters., Inc., 792 F.2d 906, 910-11 (9th Cir. 1986).

1 "by extrinsic evidence" that the advertisements "tend
2 to mislead or confuse consumers." Southland Sod Farms,
3 108 F.3d at 1139; In re Century 21-RE/MAX Real Estate
4 Adver. Claims Litig., 882 F. Supp. 915, 922-23 (C.D.
5 Cal. 1994).

6 a. Literal Falsity

7 Plaintiff alleges in its Complaint that "Shannon
8 has misrepresented the nature, characteristics,
9 qualities, and other material aspects of certain of its
10 products" by representing in a film data sheet that
11 Shannon's product is "[d]esigned to meet the
12 performance of MIL PRF 81705 Type III." Compl. ¶¶ 18-
13 19; see Williams Decl., Ex. B. Though not alleged in
14 the Complaint, Plaintiff's Opposition adds that Shannon
15 also falsely represented in data sheets that Shannon's
16 product was subjected to the MIL B 81705 C Test Method.
17 Opp'n 1:14-16; see Williams Decl., Exs. B, E.

18 To prove that Shannon's representations are
19 literally false, Plaintiff bears the burden of proving
20 by affirmative evidence⁸ that Shannon's SS103 bags are
21

22 ⁸ See Hansen Beverage Co. v. Vital Pharm., Inc., No. 08-cv-
23 1545-IEG, 2010 WL 1734960, at *4-*5 (S.D. Cal. Apr. 27, 2010)
24 (stating that "[b]ecause [the defendant] does not expressly
25 represent" that its advertising claim "is based on product
26 testing, or implicitly make that claim through visual
27 representations, [the plaintiff] must affirmatively prove that
28 the claim is false"). In this case, Elkay did not "expressly
represent" that it tested its Elkay bags or implicitly make a
claim of testing based on graphs or any sort of visual
representation; thus, Elkay's advertisement is less like an
"establishment claim" and more like a statement that "lacks

1 not "[d]esigned to meet the performance of MIL PRF
2 81705 Type III" or that Shannon did not subject to the
3 MIL B 81705 C test method the products for which
4 Shannon made that representation. Though Plaintiff
5 asserts that Shannon's representations are "literally
6 false," Opp'n 10:21-23, Plaintiff does not provide any
7 admissible evidence showing literal falsity.

8 Plaintiff offers the following allegations to
9 support its claim of "literal falsity":

10 1) Shannon's products "have not been tested by the DON
11 nor have they successfully passed the DOD qualifying
12 activity," Compl. ¶ 20;

13 2) Shannon's products are not listed on the Qualified
14 Products List under the Defense Standardization
15 Program," id.;

16 3) Shannon's products "are not military grade
17 products," id.;

18 4) Shannon's representations are "without the
19 substantiation required under applicable laws," id. ¶
20 27; and

21 5) Shannon's discovery material does not establish that
22 Shannon's products were subjected to the MIL B 81705 C

23 _____
24 substantiation." See Fraker v. Bayer Corp., No. 08-1564, 2009 WL
25 5865687, at *7-*9 (E.D. Cal. Oct. 6, 2009) (noting that in a case
26 for false advertising under the Lanham Act, the burden of proof
27 does not shift to the defendant to prove substantiation of
28 advertising claims because otherwise, a plaintiff could use a
false advertising claims to "shoehorn an allegation of violation
of the Federal Trade Commission Act," which does not allow
private causes of action).

1 test method or to the performance requirements of MIL-
2 PRF-81705 Type III, Opp'n 1:14-2:6.

3 *i. Qualification Argument*

4 Plaintiff's factual allegations related to the
5 testing or qualification of Shannon's products by the
6 Department of Defense ("DOD") or the Department of the
7 Navy ("DON"), even if true, do not establish literal
8 falsity.

9 As discussed in Caltex Plastics, Inc. v. Elkay
10 Plastics Co., Inc., Case No. 2:12-cv-10033 RSWL (JEMx)
11 (C.D. Cal. Feb. 4, 2015), ECF No. 62, the facts that
12 Shannon's products "have not been tested by the DON nor
13 have they successfully passed the DOD qualifying
14 activity" and "are not listed on the Qualified Products
15 List under the Defense Standardization Program" do not
16 establish the falsity of Shannon's representations that
17 its product is "[d]esigned to meet the performance of
18 MIL PRF81705 T3" or was subjected to the MIL B 81705 C
19 test method. See Ruling & Order re: Bench Trial,
20 Caltex Plastics, Case No. 2:12-cv-10033 RSWL, ECF No.
21 62, at 10:10-12:18. Shannon has not represented that
22 its products are qualified or on the QPL. Pl.'s Resp.
23 to Def.'s Statement of Uncontroverted Facts ¶ 4
24 (undisputed fact). Plaintiff has not proved its
25 allegation that "[a] manufacturer may only reference [a
26 mil spec] number in its product advertisements if the
27 product has been tested and qualified by the DON."
28

1 Compl. ¶ 16; see Ruling & Order re: Bench Trial, Caltex
2 Plastics, Case No. 2:12-cv-10033 RSWL, ECF No. 62, at
3 10:10-12:18. Defendant asserts that regardless of the
4 DOD's or DON's involvement, a product can be subjected
5 to MIL B 81705 C test method and can meet the
6 performance requirements of MIL PRF 81705 Type III.
7 Def.'s Mot. 8:10-10:6. Plaintiff has not proved
8 otherwise, and it is Plaintiff's burden to prove.⁹

9 Plaintiff's argument that Shannon's representations
10 are literally false because Shannon's products "are not
11 military grade products" also fails, if not for the
12 above reasons, then for lack of proof. Plaintiff does
13 not define the term, "military grade products," but if
14 the term includes non-qualified products, then
15

16
17 ⁹ Plaintiff argues, via the Stein Declaration, that it was
18 unable to obtain the evidence required to support the falsity
19 element of its false advertising claims because Defendant did not
20 supply Plaintiff with samples of the SS103 material. Stein Decl.
21 ¶¶ 3-5. This argument is meritless because Plaintiff did not
22 request samples of Shannon's product until after the discovery
23 cut-off date. See id.; Dckt. ## 18, 26. Plaintiff cannot blame
24 Defendant for not responding to discovery requests made after the
25 discovery cut-off date when Plaintiff had ample time to make
26 discovery requests and did not file any motions to compel or
27 motions to further extend the discovery cut-off date.
28 Plaintiff's late-filed Stipulation for a Protective Order, giving
Defendant only two months to provide the requested discovery
material, also counsels against sympathy for Plaintiff. See
Stein Decl., Exs. A-C.

Furthermore, Plaintiff requested samples of product that
Shannon sold as "'meets the electrostatic requirements' of MIL-B-
81705 Type III," but there is no evidence that Shannon ever sold
any products under that representation. As such, Shannon's
failure to respond to that late discovery request is justified
even if the request was not late. Stein Decl., Ex. C, at 3, ¶ 8.

1 Plaintiff has failed to provide any admissible evidence
2 showing that Shannon's products fail to meet military
3 specification requirements. See Fraker v. Bayer Corp.,
4 No. 08-1564, 2009 WL 5865687, at *7-*9 (E.D. Cal. Oct.
5 6, 2009) (noting that, in a case for false advertising
6 under the Lanham Act, the burden of proof does not
7 shift to the defendant to prove substantiation of
8 advertising claims; otherwise, a plaintiff could use a
9 false advertising claim to "shoehorn an allegation of
10 violation of the Federal Trade Commission Act," which
11 does not allow private causes of action).

12 *ii. Lack of Substantiation*

13 Plaintiff's Complaint asserts that Shannon's
14 representations are literally false because they are
15 "without the substantiation required under applicable
16 laws." Compl. ¶ 20. Plaintiff fails to identify any
17 of the "applicable laws" to which Plaintiff refers and
18 fails to provide any "applicable laws" that require
19 Defendant to substantiate its advertising claims.

20 Plaintiff's allegation also misstates the law: in
21 an action for false advertising, the burden of proof
22 does not shift to the defendant to prove substantiation
23 of advertising claims.¹⁰

24
25 ¹⁰ Fraker, 2009 WL 5865687, at *7-*9; see also In re Clorox
26 Consumer Litig., 894 F. Supp. 2d 1224, 1232 (N.D. Cal. Aug. 24,
27 2012) (stating that "[c]ourts have been careful to distinguish
28 between allegations that a defendant's advertising claims are
actually false and allegations that such claims lack
substantiaion" and that "[c]onsumer claims for a lack of

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substantiation are not cognizable under California law"); Chavez v. Nestle USA, Inc., No. CV 09-9192-GW(CWx), 2011 WL 2150128, at *5 (C.D. Cal. May 19, 2011) (stating that "lack of substantiation" "is not a cognizable theory under the UCL or FAL"), rev'd in part on other grounds, 511 F. App'x 606 (9th Cir. 2013).

Plaintiff asserts that the following vague allegation in its Complaint enables Plaintiff to fairly assert new facts under a new establishment claim theory of liability: "Defendants made express and implied claims about the Shannon products without the substantiation required under applicable laws." Pl.'s Resp. to Def.'s Statement Uncontroverted Facts ¶ 3 (quoting Compl. ¶ 27). Such an allegation does not put Defendant on "fair notice" of an establishment claim theory of liability, and no other allegations in the Complaint do so, either. As in Pickern, Plaintiff's vague allegation lacking any factual "grounds" "is not a substitute for investigating and alleging the grounds for a claim," and, as such, the Court finds that Plaintiff's "complaint gave [Defendant] no notice of the specific factual allegations [or legal theory] presented for the first time in [Plaintiff's] opposition to summary judgment." Pickern, 457 F.3d at 969.

1 that have been shown unreliable and not probative by
2 the Higgs Declaration. Opp'n 1:14-2:6, 11:7-19:2.
3 Plaintiff's last attempt to establish literal falsity
4 fails for lack of evidence.

5 An "establishment claim" theory of literal falsity
6 is a "subspecies of the false by necessary implication
7 doctrine"¹² and requires that the defendant's
8 advertising claim be "based on product testing." FLIR
9 Sys., Inc. v. Sierra Media, Inc., 903 F. Supp. 2d 1120,
10 1129 (D. Or. 2012); see Southland Sod Farms v. Stover
11 Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

12 Here, Plaintiff asserts for the first time in its
13 Opposition to summary judgment that Defendant's
14 representations that its product is "[d]esigned to meet
15 the performance of MIL PRF 81705 T3" and was subjected
16 to the MIL B 81705 C test method are advertisements
17 "based on product testing." Opp'n 10:21-19:2.

18 Even if Shannon's representations qualify as
19 establishment claims, Plaintiff still has the burden of
20 producing evidence that "either attack[s] the validity
21 of the defendant's tests directly or . . . show[s] that
22 the defendant's tests are contradicted or unsupported
23 by other scientific tests." Southland Sod Farms, 108

24
25 ¹² "A false message is conveyed by necessary implication
26 when, 'considering the advertisement in its entirety, the
27 audience would recognize the claim as readily as if it had been
28 explicitly stated.'" Hansen Beverage Co. v. Vital Pharm., Inc.,
No. 08-CV-1545-IEG (POR), 2010 WL 1734960, at *3 (S.D. Cal. Apr.
27, 2010).

1 F.3d at 1139.¹³ In other words, an establishment claim
2 theory of literal falsity does not shift the burden of
3 proof to the defendant. See Fraker, 2009 WL 5865687,
4 at *7-*9 (stating that a private plaintiff asserting a
5 false advertising claim cannot “shoehorn an allegation
6 of violation of the Federal Trade Commission Act . . .
7 into a private cause of action” by shifting the burden
8 of proof to the defendant). A plaintiff is not
9 relieved of its burden of proof merely because the
10 defendant made a product testing claim. See id.;
11 Southland Sod Farms, 108 F.3d at 1139.

12 Without the Higgs Declaration, which has been
13 excluded, Plaintiff fails to provide sufficient
14 evidence showing that Shannon’s product testing claims
15 are “not sufficiently reliable to permit one to
16 conclude with reasonable certainty that they
17 established the claim made.” Southland Sod Farms, 108
18 F.3d at 1139.

20 ¹³ The Ninth Circuit explained the standard for proving an
21 establishment claim theory of false advertising:

22 To prove that an advertisement claim based on product
23 testing is literally false, “a plaintiff must do *more*
24 *than show* that the tests supporting the challenged claim
25 are unpersuasive.” “Rather, the plaintiff *must*
26 *demonstrate* that such tests ‘are not sufficiently
27 reliable to permit one to conclude with reasonable
28 certainty that they established’ the claim made.” A
plaintiff may meet this burden either by *attacking* the
validity of the defendant’s tests directly or by *showing*
that the defendant’s tests are contradicted or
unsupported by other scientific tests.

Southland Sod Farms, 108 F.3d at 1139 (emphasis added).

1 The Court finds that Plaintiff fails to show
2 "literal falsity" by sufficient admissible evidence.

3 b. Not Literally False, but Misleading

4 "[I]f a plaintiff cannot show literal falsity . .
5 ., the plaintiff must prove, by extrinsic evidence,
6 [that] the challenged advertisements tend to mislead or
7 confuse consumers." In re Century 21-RE/MAX, 882 F.
8 Supp. at 922-23 (internal quotation marks and
9 alterations omitted). Plaintiff does not offer any
10 "extrinsic evidence" that Shannon's representations
11 "tend to mislead or confuse consumers," and Plaintiff
12 admits as such, stating that "Caltex does not need to
13 show actual confusion because its primary claim is for
14 literal falsity." Pl.'s Facts ¶¶ 21-22.

15 In conclusion, Plaintiff fails to meet its burden
16 of proof as to the "falsity" element of Plaintiff's
17 state¹⁴ and federal false advertising claims. As such,
18 the Court **GRANTS** Defendant's Motion for Summary
19

20 ¹⁴ To allege a claim for false advertising under California
21 law, a plaintiff must allege that the defendant "publicly
22 disseminated advertising that [was] false or misleading, and
23 which the defendant knew or reasonably should have known was
24 untrue or misleading." New Show Studios LLC v. Needle, at *17
25 (C.D. Cal. June 30, 2014) (citing Cal. Bus. & Prof. Code §
26 17500). Here, Plaintiff's California false advertising claim
27 fails for the same reason that its Lanham Act claim fails:
28 Plaintiff fails to meet its burden of proof as to the "false or
misleading" requirement of both claims. See, e.g., Appliance
Recycling Ctrs. of Am., Inc. v. JACO Envtl., Inc., 378 F. App'x
652, 656 (9th Cir. 2010) (agreeing that a California claim for
false advertising is "'substantially congruent'" to a false
advertising claim under the Lanham Act).

Judgment as to Plaintiff's claims for federal and state false advertising.

C. California Unfair Competition Claim

"California's Unfair Competition Law ("UCL") prohibits any 'unlawful, unfair or fraudulent business act or practice.'" Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008); Cal. Bus. & Prof. Code § 17200.

1. Unlawful

To claim a UCL violation under the "unlawful" prong, a plaintiff must prove the defendant engaged in a business act or practice "'forbidden by law.'" VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073, 1086 (E.D. Cal. 2009). Because Plaintiff's federal and state false advertising claims fail, as discussed above, and because Plaintiff proves no other legal violation to support its UCL claim, Plaintiff cannot prevail under the "unlawful" prong of the UCL.

2. Fraudulent

A "fraudulent act" under the UCL "may include a false statement, or one which, though strictly accurate, nonetheless has the likely effect of misleading or deceiving the public." Zeltiq Aesthetics, Inc. v. BTL Indus., Inc., No. 13-cv-05473-JCS, 2014 WL 1245222, at *9 (N.D. Cal. Mar. 25, 2014) (citing Garcia v. Sony Computer Entm't Am., LLC, 859 F.

1 Supp. 2d 1056, 1062 (N.D. Cal. 2012)). Because
2 Plaintiff has not offered evidence showing that Shannon
3 made a false statement or that Shannon's
4 representations were likely to mislead or deceive,
5 Plaintiff cannot assert a claim under the fraudulent
6 prong of the UCL.

7 3. Unfair

8 There is at least a three-way split among
9 California appellate courts as to the proper standard
10 for an "unfair" act under the UCL. Graham v. Bank of
11 Am., N.A., 172 Cal. Rptr. 3d 218, 233 (Cal. Ct. App.
12 2014). Upon review of the various tests, the Court
13 finds that Plaintiff has not offered sufficient
14 admissible evidence to establish an "unfair" business
15 act under the UCL. See id.

16 In conclusion, the Court finds that Plaintiff has
17 failed to meet its burden of proof for establishing a
18 claim of unfair competition under California's UCL. As
19 such, the Court **GRANTS** Defendant's Motion for Summary
20 Judgment as to Plaintiff's unfair competition claim
21 under Cal. Bus. & Prof. Code § 17200.

22 **D. Request for Costs**

23 Defendant requests an award of costs as the
24 prevailing party. Def.'s Mem. P&A Mot. Summ. J. 15:28-
25 16:1, ECF No. 28. Because the Court does not find that
26 Plaintiff's claims against Defendant were "groundless,
27 unreasonable, vexatious, or pursued in bad faith,"
28

1 Defendant's request for costs is **DENIED**. Gracie v.
2 Gracie, 217 F.3d 1060, 1071 (9th Cir. 2000); see 15
3 U.S.C. § 1117(a).

4 **IV. CONCLUSION**

5 Based on the foregoing, the Court **GRANTS**
6 Defendant's Motion for Summary Judgment and **DENIES**
7 Defendant's request for an award of costs.

8 As such, it is **HEREBY ORDERED** that Judgment be
9 entered in favor of Defendant Shannon Packaging Co. as
10 to all claims asserted against it in this Action by
11 Plaintiff Caltex Plastics, Inc., and the parties shall
12 bear their own costs.

13 **IT IS SO ORDERED.**

14 DATED: May 27, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge