

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

KATHLEEN MOLLER,

Plaintiff,

v.

**MARTIAN SALES, INC.; JOPEN,
LLC; JOHNSON FOODS, LLC; LP
IND., LLC; CAG HOLDINGS, LLC;
RMH HOLDINGS, LLC; ABC
INSURANCE COMPANY and John
Does 1-4,**

Defendants.

*

*

*

*

*

*

*

*

*

*

*

*

CIVIL ACTION NO.

2:24-CV-228-WBV-DPC

THE HONORABLE WENDY B. VITTER

MAGISTRATE JUDGE DONNA PHILLIPS

CURRAULT

**MEMORANDUM IN SUPPORT OF DEFENDANT JOPEN, LLC’S RULE 37(C)(1)
MOTION TO PRECLUDE PLAINTIFF FROM RELYING ON CERTAIN EVIDENCE**

Pursuant to Federal Rule of Civil Procedure 37(c)(1), Defendant JOpen, LLC (“Defendant”) moves the Court for an order precluding Plaintiff from using in a motion, at a hearing, or at trial, information related to Dr. Thundiyil’s study on causes of death related to mitragynine, because Plaintiff Kathleen Moller failed to comply with the required disclosures under Rule 26.

In the alternative, Defendant asks the Court for an additional two (2) hours of deposition testimony from Dr. Thundiyil, with expenses to be borne by Plaintiff, and seeks the production of the following documents, which all relate to a study conducted by Dr. Thundiyil regarding causes of death involving mitragynine:

- 1) All research and case-related documents underlying the presentations on THUNDIYIL_000001 and THUNDIYIL_000002, *see* Exhibits A and B, including but not limited to the manual of operations and all “autopsy records and toxicology reports over a 5-year period for all decedents with MTG identified as the cause of death” that were received by medical examiners for the study, Exhibit C;

- 2) Communications with the Institutional Review Board regarding the research presented in THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to submittals for approval and any subsequent approval for such research; and
- 3) Documents sufficient to understand the training and background of the individuals (or “group of physicians” as Dr. Thundiyl referred to in a public news segment) that conducted the case studies in THUNDIYIL_000001 and THUNDIYIL_000002 (including but not limited to, Christian Iuteri, Ryan Sawyers, Connor Byrne, and Max Trojano).

INTRODUCTION

Defendant brings this Motion after Plaintiff failed to disclose all publications for one of its experts, Dr. Thundiyl, with its expert disclosures on November 18, 2025, and has refused Defendant’s reasonable compromise to move forward. Dr. Thundiyl is an emergency room doctor and one of Plaintiff’s two designated experts that has opined that Harmony Moller’s cause of death was a result of her alleged ingestion of kratom products distributed by Defendant. During his deposition, Dr. Thundiyl claimed he conducted a study in Florida in which he obtained from medical examiners the autopsy reports for nearly 40 individuals whose deaths were noted as being caused by mitragynine, an alkaloid in kratom. Dr. Thundiyl has also spoken publicly on a news station about this study and his findings, and information regarding the study and his findings were published in an article on September 4, 2025. Defendant only became aware of his study during Dr. Thundiyl’s deposition when Dr. Thundiyl began testifying about it, prompting Defendants’ counsel to repeatedly ask for the study’s underlying documents. He did not provide this information during his deposition. Even then, Plaintiff has only provided a high-level summary of information related to his study since his deposition. No publications or news segment relating

to the study were disclosed in Dr. Thundiyl's expert report disclosures on November 18, 2025, even though the study (and related publications and news segment) pre-dated Plaintiff's disclosures. This information is necessary so that Defendant can assess the veracity of this study and the methodologies employed.

In an email after Dr. Thundiyl's deposition, Defendant's counsel questioned Plaintiff's counsel on why these publications were not listed in Plaintiff's disclosure of Dr. Thundiyl. In response, Plaintiff sent two poster presentations summarizing the study. *See* Exhibits A and B. Instead of acknowledging the obvious omission, Plaintiff's counsel made the puzzling statement that "no publications were excluded" as "the manuscripts related to the attached posters have not been published, are undergoing peer review, and are not yet final." Exhibit D. Despite this representation, in September, months before his deposition, Dr. Thundiyl publicly and openly described the study's findings and conclusions in a news segment. *See* <https://www.wesh.com/article/central-florida-doctor-unveils-kratom-research-findings-potential-dangers/66102687>. Dr. Thundiyl never states that these findings are preliminary or are undergoing review, even though Defendant has since discovered that the findings were in fact published. *See* Exhibit C. Instead, Dr. Thundiyl openly states that the study "found almost 40 deaths [from kratom] in the state of Florida over a period of about 5 years." *Id.*; *see also* Exhibit E, Thundiyl Depo. Rough, at 49:18–50:9 (testifying that he and the other physicians that conducted the study reached out to "every medical examiner" in Florida to obtain every autopsy report for individuals "that had kratom in their system, even though you don't necessarily think kratom was the cause of their death").

These omissions severely prejudiced Defendant's ability to prepare for Dr. Thundiyl's deposition and thoroughly question him on the study's methodology, findings, conclusions, and

biases. Despite as much, Plaintiff has refused to negotiate with Defendant and has ignored Defendant's emails to come to a resolution. As such, Defendant requests that, pursuant to FRCP 37(c)(1), the Court preclude Plaintiff from using in a motion, at a hearing, or at trial, information related to Dr. Thundiyil's study on causes of death related to mitragynine.

In the alternative, Defendant asks the Court for an additional two (2) hours of deposition testimony from Dr. Thundiyil, with expenses to be borne by Plaintiff, and asks that Plaintiff produce the following documents:

- 1) All research and case-related documents underlying the presentations on THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to the manual of operations and all "autopsy records and toxicology reports over a 5-year period for all decedents with MTG identified as the cause of death" that were received by medical examiners for the study, *see* Exhibit C;
- 2) Communications with the Institutional Review Board regarding the studies presented in THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to submittals for approval and any subsequent approval for such research; and
- 3) Documents sufficient to understand the training and background of the individuals (or "group of physicians" as Dr. Thundiyil referred to in public news segments) that conducted the case studies in THUNDIYIL_000001 and THUNDIYIL_000002 (including but not limited to, Christian Iuteri, Ryan Sawyers, Connor Byrne, and Max Trojano).

BACKGROUND

On November 18, 2025, Plaintiff provided its expert disclosures as required by the Court's Second Amended Scheduling Order, dated August 13, 2025. Dkt. 158. Within this disclosure was

the expert report of Dr. Josef Thundiyil (“Dr. Thundiyil’s Report”), including Exhibit A to Dr. Thundiyil’s report, which was a copy of Dr. Thundiyil’s *curriculum vitae*, “Updated 4/14/2025.” (“Dr. Thundiyil’s Original CV”). See Exhibit F.

Defendant deposed Dr. Thundiyil on January 16, 2026. During the deposition, Defendant’s counsel asked Dr. Thundiyil if he had ever performed any studies related to kratom. Dr. Thundiyil disclosed a presentation in October 2025 related to a study “looking at reported deaths in the state of Florida from kratom, and comparing that to a control group of patients that died in our county who had kratom or mitragyine on board, but it wasn’t deemed to be the cause of death.” Exhibit E, Thundiyil Depo. Rough, at 17:12–17. When counsel asked why that was not on his CV, Dr. Thundiyil admitted what was provided to Defendant was “not the most recent [CV].” Exhibit E, Thundiyil Depo. Rough, at 22:14–15.

In the middle of the deposition of Dr. Thundiyil, Plaintiff’s counsel provided Dr. Thundiyil’s updated *curriculum vitae*, which states that it was “Updated 10/17/2025” (“Dr. Thundiyil’s Updated CV”), which is notably prior to the deadline for Plaintiff’s expert disclosures. See Exhibit G. Included within Dr. Thundiyil’s Updated CV were the following four publications, none of which were included in Dr. Thundiyil’s Original CV:

Iuteri C, Sawyers R, Byrne C, Trojano M, Nagel B, **Thundiyil J.** Case Control Study of Mitragynine Induced Fatalities vs All Cause Deaths with Mitragynine Found on Autopsy. Poster presentation at SAEM Southeastern Regional Meeting. Orlando, FL. July 12, 2025

Iuteri C, Sawyers R, Byrne C, Trojano M, Nagel B, **Thundiyil J.** Risk Factors Associated with Kratom Deaths in a Single State. Poster presentation at SAEM Southeastern Regional Meeting. Orlando, FL. July 12, 2025

Iuteri C, **Thundiyl J.** Case Control Study of Mitragynine Deaths vs All Cause Deaths With Mitragynine Found on Autopsy. Poster presentation at North American Congress of Clinical Toxicology (NACCT). Chicago, IL. September 19 – 21, 2025

Iuteri C, **Thundiyl J.** Risk Factors Associated With Kratom Deaths In A Single State. Poster presentation at North American Congress of Clinical Toxicology (NACCT). Chicago, IL. September 19 – 21, 2025

Exhibit G, at 17. All of these publications pre-date the deadline for Plaintiff's expert disclosures, which was November 18, 2025. In addition, the following three news segments were included in Dr. Thundiyl's Updated CV, none of which were in Dr. Thundiyl's Original CV:

Thundiyl J. Kratom / 7-OH. Good Day|Orlando WOFL (FOX). August 29, 2025

Thundiyl J. Central Florida Doctor Unveils Kratom Research Findings, Potential Dangers. WESH 2 News on CW18. September 15, 2025

Thundiyl J. FDA, Florida Crack Down on 7-OH Products. Spectrum News 13. October 14, 2025

Exhibit G, at 31. After receiving Dr. Thundiyl's Updated CV during his deposition, Defendant's counsel repeatedly asked if Dr. Thundiyl could send materials related to the study during breaks in the deposition, but he never sent any requested materials. Each of these news segments likewise pre-date the November 18, 2025 deadline for Plaintiff's expert disclosures and should have been timely disclosed. Moreover, based on the titles of these publications and news segments, they appear relevant to the issues in this case.

On January 21, 2026, Plaintiff subsequently sent Defendant's counsel "copies of the poster presentations cited on Dr. Thundiyl's updated CV and discussed during [Dr. Thundiyl's] deposition." Exhibit D; *see* Exhibits A and B. These "poster presentations" describe at a high level the studies that were omitted from Dr. Thundiyl's Original CV. In response to this late and

incomplete disclosure, on January 23, 2026, Defendant requested that Plaintiff produce certain underlying documents related to the omitted materials and reserved the right to continue Dr. Thundiyil's deposition pending review of such documents. *See* Exhibit H. Plaintiff never responded to this request, prompting Defendant to seek relief from the Court. As such, Defendant requests that the Court preclude Plaintiff from using in a motion, at a hearing, or at trial, information related to Dr. Thundiyil's study on causes of death related to mitragynine.

In the alternative, Defendant asks the Court for an additional two (2) hours of deposition testimony from Dr. Thundiyil, with expenses to be borne by Plaintiff, and asks that Plaintiff produce the following documents:

- 1) All research and case-related documents underlying the presentations on THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to the manual of operations and all "autopsy records and toxicology reports over a 5-year period for all decedents with MTG identified as the cause of death" that were received by medical examiners for the study, *see* Exhibit C;
- 2) Communications with the Institutional Review Board regarding the studies presented in THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to submittals for approval and any subsequent approval for such research; and
- 3) Documents sufficient to understand the training and background of the individuals (or "group of physicians" as Dr. Thundiyil referred to in public news segments) that conducted the case studies in THUNDIYIL_000001 and THUNDIYIL_000002 (including but not limited to, Christian Iuteri, Ryan Sawyers, Connor Byrne, and Max Trojano).

LEGAL STANDARD

Under Federal Rule of Civil Procedure 26(a)(2)(B), “[u]nless otherwise stipulated or ordered by the court, this disclosure [of the identity of any witness it may use at trial to present evidence] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case[.]” The rule continues and states that “[t]he report must contain...the witness’s qualifications, including a list of all publications authored in the previous 10 years.” Fed. R. Civ. P. 26(a)(2)(B)(iv).

Rule 37 provides for several sanctions available for a party’s failure to make proper disclosures under Rule 26. Rule 37(c)(1) provides that “[i]f a party fails to provide information ... as required by Rule 26(a) ... the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

Additionally, under Rule 37(a)(3)(A), “[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.” Moreover, “[i]n addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney’s fees, caused by the failure; (B) may inform the jury of the party’s failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).” Fed. R. Civ. P. 37(c)(1).

ARGUMENT

A. Plaintiff’s Disclosures Relating to Dr. Thundiyl’s Qualifications Under Rule 26(a)(2)(B)(iv) Omitted Information.

Pursuant to the Court’s Second Amended Scheduling Order, Plaintiff’s expert disclosures were due on November 18, 2025. *See* Dkt. 158. An expert’s written report must contain “the

witness's qualifications, including a list of all publications authored in the previous 10 years." Fed. R. Civ. P. 26(a)(2)(B)(iv).

On November 18, 2025, Plaintiff submitted Dr. Thundiyil's Report which included Dr. Thundiyil's Original CV, which stated that it was "Updated 4/14/2025." *See* Exhibit F. In Dr. Thundiyil's deposition on January 16, 2026, Dr. Thundiyil testified that this was "not the most recent [CV]." Exhibit E, Thundiyil Depo. Rough, at 22:14–15. Accordingly, later that same day, during Dr. Thundiyil's deposition, Plaintiff's counsel provided Defendant's counsel with Dr. Thundiyil's Updated CV, which stated that it was "Updated 10/17/2025." *See* Exhibit G.

Dr. Thundiyil's Updated CV included four highly relevant publications and three news segments that were not included on Dr. Thundiyil's Original CV. *See* Exhibit G at 17, 31. It is thus clear that, contrary to the requirements under Rule 26(a)(2)(B)(iv), Plaintiff's disclosure of Dr. Thundiyil's Report on November 18, 2025, failed to include a "list of *all publications* authored in the previous 10 years." (emphasis added); *see also Shea v. Royal Enters.*, Case No. 09-CV-8709, 2011 U.S. Dist. LEXIS 63763, at *21 (S.D.N.Y. June 16, 2011) (finding that the expert's CV containing "select publications and presentations" was "not comprehensive with respect to his publications," and ultimately excluded the expert).

Though Plaintiff takes the position that "no publications were excluded" as the omitted materials "are news appearances related to public safety and poster presentations at conferences," Exhibit D, such position is illogical and incorrect. The findings from this study were in fact published on September 4, 2025, in the North American Congress of Clinical Toxicology in an article titled "Case Control Study of Mitragynine Deaths vs. All Cause Deaths With Mitragynine Found on Autopsy." *See* Exhibit C. Second, Plaintiff's position is contrary to the inclusion of these materials on Dr. Thundiyil's Updated CV, which is all but an admission that these

publications *should have been included* in Dr. Thundiyl's Original CV. And third, Dr. Thundiyl publicly discusses the findings and conclusions of the study, contradicting any argument that these were merely preliminary findings. See <https://www.wesh.com/article/central-florida-doctor-unveils-kratom-research-findings-potential-dangers/66102687>.

B. Plaintiff's Failures Were Neither Substantially Justified Nor Harmless, Entitling Defendant to Relief Under Rule 37.

"If a party fails to provide information ... as required by Rule 26(a) ... the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless.*" Fed. R. Civ. P. 37(c)(1) (emphasis added). Plaintiff's failure to provide a complete *curriculum vitae* for Dr. Thundiyl in Plaintiff's expert disclosures on November 18, 2025, was neither "substantially justified [n]or harmless." *Jalowsky v. Provident Life & Accident Ins. Co.*, Case No. CV 18-279, 2020 U.S. Dist. LEXIS 117791, at *7 (D. Ariz. July 2, 2020) (after defendants failed to disclose the expert's *curriculum vitae*, the court noted that, "[t]o avoid sanctions, it is the [disclosing party's] burden to show that its failure was substantially justified or harmless," and ultimately allowed two hours of additional deposition testimony with all costs to be borne by the defendants). Sanctions are thus warranted for Plaintiff's failure. See *Kras v. Conifer Ins. Co.*, Case No. 2:16-CV-224, 2020 U.S. Dist. LEXIS 46463, at *14 (N.D. Ind. Mar. 16, 2020) (excluding an expert report for failure to comply with the disclosure requirements of Rule 26 where the failure was neither substantially justified nor harmless).

Here, Plaintiff's failure was neither substantially justified nor harmless. To date, Plaintiff has not provided any justification for its failure to provide a complete and full disclosure for Dr. Thundiyl under Rule 26. When submitting the expert disclosure, it was evident that Dr. Thundiyl's Original CV was "Updated 4/14/2025," which Plaintiff should have known did not

include items that occurred after that date and before Plaintiff's expert disclosure deadline in November 2025.

Moreover, Defendant has been clearly prejudiced by Plaintiff's failure. The publications and news segments that were omitted from Dr. Thundiyil's Original CV discuss his study that relates to the issues in this litigation, Dr. Thundiyil's report on Harmony Moller's cause of death, and ultimately, Defendant's liability. Indeed, the published article on the study concludes that "[Medical examiners] sometimes misclassify the cause of death in patients with [mitragynine] exposure." Exhibit C. This conclusion alone warrants the opportunity to depose Dr. Thundiyil, an emergency room doctor, on his qualification to assess and question the cause of death classifications assigned by medical examiners. Without any additional discovery into the documents underlying this study, including the case reports and autopsies, Defendant has no avenue to probe the methods that were used, the differences in the dozens of autopsy reports that were assessed compared to the autopsy report of Harmony Moller, and generally question how the study came to its conclusions.

Though Plaintiff states that "counsel for defendants engaged in extensive questioning about the poster presentations, news appearances, and the unpublished manuscripts" during Dr. Thundiyil's deposition, such questioning does not supplant, replace, or moot the requirement that Plaintiff produce all required materials in a timely manner under Rule 26. The two poster presentations were not even provided to Defendant until days *after* Dr. Thundiyil's examination had concluded. Defendant had no opportunity to provide any information to its experts prior to his examination and had no access to the underlying documentation upon which the study was based. It is unfair for Plaintiff to designate Dr. Thundiyil as an expert to opine on cause of death,

omit the existence of materials related to his study on cases allegedly involving kratom-related causes of death, and then ignore Defendant's requests for any documents related to this study.

After Plaintiff provided Defendant with Dr. Thundiyil's Updated CV as well as THUNDIYIL_000001 and THUNDIYIL_000002, Defendant attempted to engage in due diligence that it would have pursued prior to Dr. Thundiyil's deposition if such materials had been timely disclosed. Defendant sent Plaintiff an email on January 23, 2026 requesting that Plaintiff produce highly relevant documents related to the omitted materials and reserved the right to continue Dr. Thundiyil's deposition pending review of such documents. *See* Exhibit H. Plaintiff ignored this reasonable request, prompting Defendant to seek relief from the Court.

CONCLUSION

Defendant respectfully requests that this Court grant its Rule 37(c)(1) Motion to Preclude Plaintiff from Relying on Certain Evidence based on Plaintiff's incomplete expert disclosures under Rule 26. In the alternative, Defendant respectfully asks the Court for an additional two (2) hours of deposition testimony from Dr. Thundiyil, with expenses to be borne by Plaintiff, and asks that Plaintiff produce the following documents:

- 1) All research and case-related documents underlying the presentations on THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to the manual of operations and all "autopsy records and toxicology reports over a 5-year period for all decedents with MTG identified as the cause of death" that were received by medical examiners for the study, *see* Exhibit C;
- 2) Communications with the Institutional Review Board regarding the studies presented in THUNDIYIL_000001 and THUNDIYIL_000002, including but not limited to submittals for approval and any subsequent approval for such research; and

- 3) Documents sufficient to understand the training and background of the individuals (or “group of physicians” as Dr. Thundiyl referred to in public news segments) that conducted the case studies in THUNDIYL_000001 and THUNDIYL_000002 (including but not limited to, Christian Iuteri, Ryan Sawyers, Connor Byrne, and Max Trojano).

Dated this 3rd day of February, 2026.

Respectfully Submitted

By: /s/ Gwendolyn C. Payton

Gwendolyn C. Payton (*pro hac vice*)

Hayley R. Ambler

Louisiana State Bar No. 25848

KILPATRICK TOWNSEND & STOCKTON LLP

1420 Fifth Ave., Suite 3700

Seattle, Washington 98101

Telephone: (206) 497-9600

Facsimile: (206) 299-0414

Email: hambler@ktslaw.com

Email: gpayton@ktslaw.com

Maeghan E. Whitehead (*admitted pro hac vice*)

KILPATRICK TOWNSEND & STOCKTON LLP

2001 Ross Avenue, Suite 4400

Dallas, Texas 75201

(214) 922-7138

(214) 279-4456

mewwhitehead@ktslaw.com

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of February, 2026, a copy of the foregoing document was filed with the Clerk of Court and served on all counsel of record via the Court's ECF System.

/s/ Gwendolyn C. Payton

Gwendolyn C. Payton