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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Larry Whiting, Leroy Whiting and Lorenzo  
Garcia,

10 **Plaintiff,**

11 v.

12 Dana A. Hogan; Clark Moving and Storage  
13 of Albany, Inc., and Mayflower Transit,  
LLC; et al.

14 **Defendants.**

No. 12-CV-08039-PCT-GMS

**ORDER**

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16 Pending before the Court is Defendants' Motion to Strike Plaintiffs' Experts.  
17 (Doc. 116.) For the reasons discussed below, the Court grants in part and denies in part  
18 the Motion.

19 **DISCUSSION**

20 **I. SUFFICIENCY AND TIMELINESS OF EXPERT DISCLOSURES**

21 Federal Rule of Civil Procedure 26 governs the disclosure of expert testimony. In  
22 addition to disclosing the identity of expert witnesses, Rule 26(a)(2)(B) sets out the  
23 requirements for providing written reports:

24 Unless otherwise stipulated or ordered by the court, this [expert] disclosure  
25 must be accompanied by a written report—prepared and signed by the  
26 witness—if the witness is one retained or specially employed to provide  
27 expert testimony in the case or one whose duties as the party's employee  
28 regularly involve giving expert testimony. The report must contain: (i) a  
complete statement of all opinions the witness will express and the basis  
and reasons for them; (ii) the facts or data considered by the witness in

1 forming them; (iii) any exhibits that will be used to summarize or support  
2 them; (iv) the witness's qualifications, including a list of all publications  
3 authored in the previous 10 years; (v) a list of all other cases in which,  
4 during the previous 4 years, the witness testified as an expert at trial or by  
deposition; and (vi) a statement of the compensation to be paid for the  
study and testimony in the case.

5 Further, Rule 26(a)(2)(D) demands that disclosures are timely made based on "the times  
6 and in the sequence that the court orders." The Case Management Order ("CMO")  
7 entered by the Court on April 9, 2012, states that "[t]he party with the burden of proof  
8 shall provide full and complete expert disclosures as required by Rule 26(a)(2)(A)-(C) of  
9 the Federal Rules of Civil Procedure no later than **March 15, 2013.**" (Doc. 59 ¶ 5(a))  
10 (emphasis in original).

11 Plaintiffs have not abided by the deadline for expert disclosures as set by the  
12 Court. On March 15, 2013, Plaintiffs filed a Notice of Service of Plaintiff's Expert  
13 Witness List and provided to Defendants the contact information, subject matter of  
14 testimony, and CVs for their four expert witnesses along with a case list of previous  
15 testimony for one of the witnesses. (Doc. 111; Doc. 116-1.) However, Plaintiffs did not  
16 file accompanying expert reports as required by Rule 26(a)(2)(B). During the two weeks  
17 following the deadline, they supplemented the original disclosure with expert reports but  
18 these were untimely. The dates of disclosures are: (1) March 22, 2013, for Dr. Keith  
19 Harvie and economist Thomas McKinnon (Doc. 116-2); (2) March 26, 2013, for  
20 consultant David Sonne (Doc. 116-6); and (3) March 27, 2013, for vocational  
21 rehabilitation expert Janet Toney (Doc. 116-7). Plaintiffs provided to Defendants a  
22 "missing impairment rating page" from Dr. Harvie's report on March 26, 2013. (Doc.  
23 116-5.)

24 Defendants further note that Plaintiffs only recently provided the previous case  
25 testimony lists for Dr. Harvie and Ms. Toney, see Fed. R. Civ. P. 26(a)(2)(B)(v), on April  
26 9, 2013, and that as of the date of their Reply, April 17, Plaintiffs have not provided a  
27 statement of the compensation paid to the experts for their reports, see id. 26(a)(2)(B)(vi).  
28 Thus, Plaintiffs failed to comply with Rule 26 and the deadline set out in the CMO for

1 expert disclosures, and the disclosures they did provide are deficient.

## 2 **II. SANCTIONS**

3 Federal Rule of Civil Procedure 37(c)(1) describes the consequences for failing to  
4 provide timely or sufficient expert disclosures as required by Rule 26. Rule 37(c)(1)  
5 states: “the party is not allowed to use that information or witness to supply evidence on a  
6 motion, at a hearing, or at a trial, unless the failure was substantially justified or is  
7 harmless.” This discovery sanction is described as a “self-executing, automatic sanction  
8 to provide a strong inducement for disclosure of material.” *Yeti by Molly Ltd. v. Deckers*  
9 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (citing the Advisory Committee’s  
10 Notes to Rule 37(c)(1) (1993)) (internal quotation marks and alterations omitted).  
11 Plaintiffs may still introduce the expert testimony if they can prove that their failure to  
12 disclose was substantially justified or harmless. *Id.* at 1106-07.

### 13 **A. Substantial Justification**

14 Plaintiffs argue that sanctions are unwarranted because their failure to disclose  
15 was substantially justified. Plaintiffs contend that the experts did not provide their reports  
16 in time despite “exhortations for them to do so” and that after Plaintiffs “timely retained  
17 and provided all necessary information to their experts,” they were “at the experts’ mercy  
18 as to when their reports would be tendered.” (Doc. 120 at 4-5.) In support, Plaintiffs refer  
19 to *Potlatch Corp v. U.S.*, in which the Ninth circuit reversed a district court’s exclusion of  
20 the government’s expert witness based on a violation of the Rule 26 disclosure  
21 obligations. 679 F.2d 153, 156 (9th Cir. 1982). The Ninth Circuit found that “[o]nce the  
22 experts had been hired, the completion date of their reports was beyond the control of the  
23 Government.” *Id.*

24 The disclosure delay in *Potlatch* is distinguishable from this case. There, the  
25 government’s attorney had advised the district court during a case management  
26 conference that the experts would require six months to prepare their reports and that the  
27 proposed deadline would not be workable; the experts “did well” and completed the  
28 reports in six months as expected. *Id.* at 155-56. The government notified the plaintiff

1 one month before the deadline that despite their diligence and that of the experts, the  
2 reports would not be completed by the deadline. *Id.* at 155. Here, Plaintiffs did not alert  
3 Defendants or the Court of delay in preparing the expert reports and providing  
4 disclosures nor was there any apparently justifiable reason for their delay. Further, the  
5 Ninth Circuit noted in *Potlatch* that bureaucratic delay between the IRS and the DOJ and  
6 the plaintiff's delay in responding to interrogatories could not be ignored in contributing  
7 to missing the deadline. *Id.* at 156. There were no such extraordinary circumstances here.  
8 Plaintiffs further provide no evidence concerning how long, once discovery was initiated  
9 they waited before engaging their experts, nor whether they provided their experts with  
10 adequate notice of the applicable deadlines.

11 Plaintiffs have not carried their burden to prove that their delay was substantially  
12 justified. They do not provide any rationale as to why they were not able to work with  
13 their experts to meet the disclosure deadline. It is revealing that Dr. Harvie's reports are  
14 dated March 1, 5, and 6, 2013 but were faxed to Plaintiffs and forwarded to Defendants  
15 on March 22 and Plaintiffs only recently disclosed previous case testimony lists for two  
16 of the experts on April 9. (Doc. 116-2.) As of April 17, 2013, Plaintiffs had not provided  
17 to Defendants a statement of compensation for the experts. That conduct remains  
18 unjustified. It is Plaintiffs' discovery obligation under the Rules to ensure that their  
19 experts provide timely reports. Plaintiffs did not inform the Court before the deadline of  
20 anticipated delay, let alone a delay based on good cause. Contrary to their argument, it is  
21 not sufficient that Plaintiffs provided the identity and expected testimony of the experts to  
22 Defendants on March 15, 2013. Such nominal disclosure is insufficient. The CMO  
23 required full disclosure in accordance with Rule 26(a)(2)(B) and as clearly therein, "[t]he  
24 deadlines are real."<sup>1</sup> (Doc. 59 ¶¶ 5(a), 10.)

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26 <sup>1</sup> Plaintiffs further argue that Defendants failed to confer with them in good faith  
27 as required by the CMO before filing this Motion, see Doc. 59 ¶ 6(a), and thus it should  
28 be denied. However, this Motion does not concern a dispute in which the Parties cannot  
agree on an exchange of information or discovery. The damage was done by Plaintiffs  
after they decided to disclose their expert reports after March 15, 2013 in an untimely  
fashion and in violation of Rule 26. The Plaintiffs' additional argument that they offered

1           **B.     Harmlessness**

2           Plaintiffs contend that even if their delay was not substantially justified, no harm  
3 has accrued to Defendants from the delay. It is Plaintiffs’ burden to prove that the delay  
4 was harmless. *Yeti*, 259 F.3d at 1106-07. Defendants contend that the disclosure delay  
5 was prejudicial because they expected to receive the expert reports two weeks in advance  
6 of the good faith settlement talks mandated by the Court scheduled for Thursday, March  
7 28, 2013. (*See* Doc. 59 ¶ 8.) Instead, they received the final expert report on March 27,  
8 2013 and were not able to accurately assess the strength of Plaintiffs’ case before the  
9 mediation. (Doc. 116-7.) Plaintiffs assert that the mediation was non-binding and aimed  
10 at pre-trial settlement. They note that one of the three Plaintiffs, Lorenzo Garcia, agreed  
11 to settle at the mediation and that even if the reports had been timely received by  
12 Defendants, the other two Plaintiffs would not have settled because “the parties remain  
13 worlds apart both in value and liability.” (Doc. 120 at 8.) However, Defendants point out  
14 that two of Plaintiffs’ damages experts, Mr. McKinnon and Ms. Toney, are being offered  
15 solely for non-settling Plaintiff Larry Whiting “who claims large future, ongoing  
16 economic damages” and their reports were not disclosed until March 22 and 27, 2013,  
17 respectively. (Doc. 122 at 6.) The mediation would have been likely more productive if  
18 Defendants were timely provided full disclosure of Plaintiffs’ damages case. The Court  
19 finds that the violation of Rule 26 was prejudicial to the mandatory mediation and not  
20 harmless.

21           Further, Defendants argue that the “limbo” created by Plaintiffs’ violation and the  
22 pending Motion to Strike filed as a result is prejudicial. Defendants are not sure whether  
23 they should dedicate significant resources to depose Plaintiffs’ experts before the  
24 deadline of May 17, 2013, if they are to be struck by the Court. Defendants would not  
25 have had their own experts prepare timely reports by the deadline of April 12, 2013, had

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27 to stipulate to an extension of the Defendants’ expert disclosures and depositions deadline  
28 to remedy their delay is also lacking. As stated in the CMO, “[e]ven if all parties stipulate  
to an extension, the Court will not extend the deadlines, absent good cause to do so.” (*Id.*  
¶ 10.) Plaintiffs fail to establish good cause for their delay.

1 they known Plaintiffs would not comply with Rule 26 and their experts would be struck.  
2 The Court will not consider this argument in determining whether the violation was  
3 harmless. Although Plaintiffs did not abide by the Court's mandatory deadline,  
4 Defendants are expected to proceed with discovery while the Court addresses any such  
5 violation. Defendants' unnecessary and wasteful expenditure resulting from Plaintiffs'  
6 disregard for the CMO may be properly addressed by levying monetary sanctions against  
7 Plaintiffs.

8 The Court finds that the Plaintiffs have not carried their burden to establish that  
9 their failure to disclose was harmless. They have shown in this case that they do not  
10 comprehend the significance of discovery deadlines and other protocol set out in the  
11 CMO. (*See* Doc. 110.) In fact, they unwisely state "no harm, no foul" in regards to their  
12 violation of Rule 26 and the CMO. (Doc. 120 at 7-8.) The Court must next turn to  
13 appropriate sanctions for such violation.

#### 14 **C. Sanctions**

15 The Ninth Circuit "give[s] particularly wide latitude to the district court's  
16 discretion to issue sanctions under Rule 37(c)(1)." *Yeti*, 259 F.3d at 1106. In addition to  
17 or instead of the exclusion sanction, the Court, on motion and after giving Plaintiffs  
18 opportunity to be heard: "(A) may order payment of the reasonable expenses, including  
19 attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and  
20 (C) may impose other appropriate sanctions, including any of the orders listed in Rule  
21 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(c)(1).

22 While the Court certainly does not approve of Plaintiffs' delay in disclosing expert  
23 reports it does not merit excluding these important witnesses from the case. The last of  
24 Plaintiffs' expert reports was disclosed twelve days late on March 27, 2013. The case  
25 testimony lists for two of the experts were not provided to Defendants until April 9, 2013,  
26 and that Plaintiffs have yet to provide statements of compensation for any of the experts.  
27 The expert depositions deadline is May 17, 2013, but the Court will extend it by four  
28 weeks, thus there is sufficient time to prepare for them after receipt of the reports.

1 Although Defendants were prejudiced by not receiving the reports before the good faith  
2 settlement talks, excluding the experts is an excessive sanction. However, sanctions are  
3 warranted here. Accordingly,

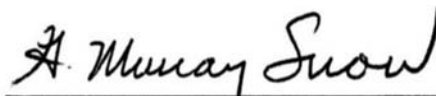
4 **IT IS HEREBY ORDERED** that Defendants' Motion to Strike Plaintiff's  
5 Experts (Doc. 116) is **granted in part and denied in part**, as follows:

6 1. Plaintiffs will pay Defendants' reasonable expenses, including attorney's  
7 fees, incurred from preparing for and attending the mediation, and pursuing this Motion  
8 to Strike, upon Defendants' application in compliance with Local Rule 54.2.

9 2. Plaintiffs must supply the statements of compensation for all four experts  
10 **within one week (seven days) from the date of this Order**. If they fail to do so,  
11 Plaintiffs' experts shall be excluded from testifying at trial or offering an opinion for any  
12 other purpose in this case under Rule 37(c)(1).

13 3. The deadline for deposing Plaintiffs' expert witnesses will be extended by  
14 four weeks to **June 14, 2013**.

15 Dated this 16th day of May, 2013.

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19 G. Murray Snow  
20 United States District Judge  
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