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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRED BREINING, et al.,
 Plaintiffs,

 v.

OCWEN LOAN SERVICING, LLC, et al.,
 Defendants.

No. 2:13-cv-02441-TLN-DB

**ORDER GRANTING DEFENDANT’S
MOTION TO STRIKE PLAINTIFFS’
EXPERT WITNESS DESIGNATION**

This matter is before the Court pursuant to Defendant Ocwen Loan Servicing, LLC’s (“Defendant”) Motion to Strike the Breinings’ Expert Witness Designation. (ECF No. 45.) Plaintiffs Fred and Cathy Breining (“Plaintiffs”) oppose the motion. (ECF No. 55.) Defendant has filed a reply. (ECF No. 58.) The Court has carefully considered the arguments raised by the parties. For the reasons set forth below, Defendant’s Motion to Strike is GRANTED. (ECF No. 45.)
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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 As relevant to the instant motion, this case arises out of Plaintiffs’ attempts to obtain a
3 loan modification on their mortgage.¹ On October 19, 2015, the Court issued a Pretrial
4 Scheduling Order. (ECF No. 34.) Section V governs the disclosure of expert witnesses and states
5 as follows:

6 All counsel are to designate in writing, file with the Court, and serve
7 upon all other parties the name, address, and area of expertise of each
8 expert that they propose to tender at trial not later than August 18,
9 2016. The designation shall be accompanied by a written report
 prepared and signed by the witness. The report shall comply with
 FED. R. CIV. P. 26(a)(2)(B). (ECF No. 34 at 2.)

10 On August 18, 2016, Plaintiffs filed an expert witness designation, naming Stan Smith,
11 Ph.D., as their sole expert witness. (ECF No. 43 at 2.) However, Plaintiffs failed to include a
12 written report as required by the Court’s Pretrial Scheduling Order (ECF No. 34 at 2) and Federal
13 Rule of Civil Procedure (“Rule”) 26(a). FED. R. CIV. P. 26(a)(2)(B). Defendant moves to strike
14 Plaintiffs’ expert witness disclosure pursuant to Rule 37(c)(1), arguing it fails to comply with the
15 Court’s Pretrial Scheduling Order and Rule 26(a). (ECF No. 45 at 5.)

16 **II. STANDARD OF LAW**

17 Rule 26(a)(2)(B) deals with disclosure of expert reports and provides as follows:

18 Unless otherwise stipulated or ordered by the court, this disclosure
19 must be accompanied by a written report--prepared and signed by the
20 witness--if the witness is one retained or specially employed to
21 provide expert testimony in the case or one whose duties as the
22 party’s employee regularly involve giving expert testimony. The
23 report must contain: a complete statement of all opinions the witness
24 will express and the basis and reasons for them; the facts or data
25 considered by the witness in forming them; any exhibits that will be
 used to summarize or support them; the witness’s qualifications,
 including a list of all publications authored in the previous 10 years;
 a list of all other cases in which, during the previous 4 years, the
 witness testified as an expert at trial or by deposition; and a statement
 of the compensation to be paid for the study and testimony in the
 case. FED. R. CIV. P. 26(a)(2)(B).

26 Rule 37(c) addresses a party’s failure to disclose expert reports and provides:

27 ¹ The Second Amended Complaint (“SAC”) (ECF No. 25) is the operative complaint. In an order dated
28 March 28, 2018, (ECF No. 61) the Court dismissed two of Plaintiffs’ three causes of action. Plaintiffs are proceeding
 on a single negligence cause of action.

1 If a party fails to provide information or identify a witness as
2 required by Rule 26(a) or (e), the party is not allowed to use that
3 information or witness to supply evidence on a motion, at a hearing,
4 or at a trial, unless the failure was substantially justified or is
5 harmless. In addition to or instead of this sanction, the court, on
6 motion and after giving an opportunity to be heard: may order
7 payment of the reasonable expenses, including attorney's fees,
8 caused by the failure; may inform the jury of the party's failure; and
9 may impose other appropriate sanctions, including any of the orders
10 listed in Rule 37(b)(2)(A)(i)-(vi). FED. R. CIV. P. 37(c).

11 Rule 26(a) requires the parties to disclose the identities of each expert and, for retained
12 experts, requires that the disclosure includes the experts' written reports. FED. R. CIV. P. 26(a).
13 Parties must make these expert disclosures at the times and in the sequence that the court orders.
14 *Id.* Rule 37(c) "gives teeth" to Rule 26(a)'s disclosure requirements by forbidding the use at trial
15 of any information that is not properly disclosed. *Goodman v. Staples The Office Superstore,*
16 *LLC*, 644 F.3d 817, 827 (9th Cir. 2011); *Yeti by Molly Ltd.*, 259 F.3d 1101, 1106 (9th Cir. 2001)
17 (citing FED. R. CIV. P. 37(c)(1)). Rule 37(c)(1) is a "self-executing," "automatic" sanction
18 designed to provide a strong inducement for disclosure. *Goodman*, 644 F.3d at 827 (quoting FED.
19 R. CIV. P. 37 advisory committee's note (1993)). The only exceptions to Rule 37(c)(1)'s
20 exclusion sanction apply if the failure to disclose is substantially justified or harmless. *Goodman*,
21 644 F.3d at 827; FED. R. CIV. P. 37(c)(1). The burden of demonstrating substantial justification or
22 harmless lies squarely with the non-complying party. *Goodman*, 644 F.3d at 827.

23 III. ANALYSIS

24 Both parties concede Plaintiffs failed to comply with the Court's Pretrial Scheduling
25 Order and Rule 26(a) by not including the required written report in their expert witness
26 disclosure on August 18, 2016. (ECF No. 45 at 4; ECF No. 55 at 2.) Under Rule 37(c)(1), Dr.
27 Smith's testimony is inadmissible unless Plaintiffs' failure was substantially justified or harmless.
28 FED. R. CIV. P. 37(c). Defendant argues Plaintiffs are unable to meet their burden to show their
failure was substantially justified, and that they were harmed by Plaintiffs' failure. (ECF No. 45
at 9.) Plaintiffs argue their failure to include the required written report was both substantially
justified and harmless. (ECF No. 55 at 5.) After careful review, the Court finds Plaintiffs have

1 not shown their failure to include a written report in their expert witness disclosure was
2 substantially justified or harmless.

3 Plaintiffs assert they were substantially justified because they miscalculated the amount of
4 time required to obtain a written report from their expert witness. (ECF No. 55 at 2.) However,
5 Plaintiffs cite no case law supporting their assertion that mismanagement of time qualifies as a
6 substantial justification for ignoring the Court's Pretrial Scheduling Order. In fact, the Ninth
7 Circuit has rejected the notion that attorney error constitutes substantial justification for failing to
8 comply with a court's scheduling order. *See Goodman*, 644 F.3d at 827 (holding an attorney's
9 failure to read the scheduling order did not constitute substantial justification). Like the failure to
10 read the scheduling order, Plaintiff's failure to appropriately manage time is an attorney error
11 which does not constitute substantial justification.

12 Plaintiffs further state they requested a 10-day extension from Defendants after the
13 deadline passed. (ECF No. 55 at 4.) Despite their request, modifications to the Pretrial
14 Scheduling Order only occur upon good cause and with judicial consent. (ECF No. 34 at 11);
15 FED. R. CIV. P. 16(b). The Court did not consent to this modification. Therefore, Plaintiffs'
16 request for an extension did not modify the scheduling order. In any event, Plaintiffs ignored
17 their own extension request because Defendant has still not received a written report, more than a
18 year and a half later. None of the reasons advanced by Plaintiffs constitute a substantial
19 justification for their failure to comply with the Court's Pretrial Scheduling Order and Rule 26(a).

20 Plaintiffs further argue their error was harmless because they believe there is enough time
21 before trial for the Defendant to depose their witness. (ECF No. 55 at 4.) Plaintiffs further state
22 their failure to include a witness report is harmless because Mr. Smith's popularity as an
23 economist supports his credibility as a witness. (ECF No. 55 at 4.) Again, Plaintiffs offer no
24 legal support for their arguments. The Ninth Circuit has held that when a party fails to identify
25 expert witnesses and provide the disclosures required by Rule 26(a) in accordance with the
26 court's scheduling order, "[d]isruption to the schedule of the court and other parties in that
27 manner is not harmless." *Wong v. Regents of University of California*, 410 F.3d 1052, 1062 (9th
28 Cir. 2005). Plaintiffs concede they failed to provide the required written report on August 18,

1 2016, as required by the Pretrial Scheduling Order. (ECF No. 55 at 2.) Pursuant to Ninth Circuit
2 authority and the Federal Rules of Civil Procedure, both Defendant and this Court have been
3 harmed by Plaintiffs' failure. Thus, Plaintiffs have not carried their burden under Rule 37(c).

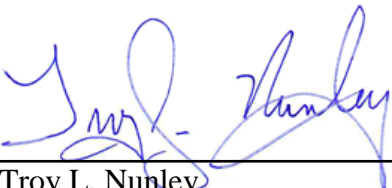
4 **IV. CONCLUSION**

5 Accordingly, the Court hereby GRANTS Defendant's Motion to Strike Plaintiffs' Expert
6 Witness Designation. (ECF No. 45.)

7 **IT IS SO ORDERED.**

8 Dated: September 12, 2018

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Troy L. Nunley
United States District Judge