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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIANANCY MARTINEZ,
Plaintiff,
v.
COUNTY OF SAN BENITO, et al.,
Defendants.

Case No. 15-cv-00331-JST

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
EXPERT DISCLOSURES**

Re: ECF No. 95

Before the Court is Plaintiff Nancy Martinez's motion for leave to amend her expert disclosures. ECF No. 95. Martinez seeks to disclose an expert, Dr. Lipton, who has not previously been disclosed, to take the place of a previously disclosed expert, Dr. Stimac. The Court also construes the motion as asking for leave to provide a late report from Dr. Greene, an expert who was previously disclosed but who never produced an expert report. Martinez intends to offer both experts' testimony in opposing Defendants' motion for summary judgment on her wrongful death claim. The Court will deny the motion.

The wrongful death claim was included in Martinez's first amended complaint. ECF No. 68 at 11-12. The deadline to disclose experts related to that claim was February 23, 2018.¹ ECF No. 71 at 1.

Martinez timely disclosed Dr. Greene on August 14, 2017. But the disclosure failed to comply with Federal Rule of Civil Procedure 26(a)(2)(B), which requires that disclosures of experts who are "retained or specially employed to provide expert testimony in the case" – like Dr. Greene – must be "accompanied by a written report." Martinez did not provide a report with

¹ The Court set a later deadline for claims raised for the first time in the second amended complaint. ECF No. 87 at 1.

1 her disclosure and instead stated that, “the report is not complete because of the untimely death of
2 Justin Baldasano [on April 29, 2017]; additional information is needed in order for Dr. Greene to
3 complete his report.” ECF No. 95 at 15. However, even if this explanation were sufficient to
4 allow a belated expert report – a question this Court does not decide – no report has ever been
5 produced in this case. Defense counsel’s declaration states that he has “never received a report
6 from Dr. Greene,” ECF No. 96 at 6, and Martinez has provided no contrary evidence.

7 As to Dr. Lipton, Martinez acknowledges that any disclosure would be untimely, and she
8 unsuccessfully sought a stipulation from Defendants for leave to amend her expert disclosures.
9 ECF No. 95 at 4. She contends that the late disclosure is warranted based on new information
10 obtained from the deposition of the coroner, Dr. O’Hara, which was originally noticed for
11 January 22, 2018, but not completed until March 28, 2018. However, Martinez fails to mention
12 that Dr. O’Hara’s deposition was noticed by Defendants, not Martinez. ECF No. 92 at 2. In
13 addition, Martinez received the autopsy performed by Dr. O’Hara on July 13, 2017. ECF No.
14 96-1 at 2. Martinez contends that, “[t]he deposition of the medical examiner who performed the
15 autopsy was instrumental in understanding the mechanism and dynamics of the cause of death,”
16 ECF No. 95 at 6, but she does not explain why she did not notice Dr. O’Hara’s deposition or seek
17 other discovery on this issue, or why it would not have been sufficient for her own experts to
18 review the autopsy.

19 Federal Rule of Civil Procedure 37(c)(1) provides: “If a party fails to provide information
20 or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that
21 information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure
22 was substantially justified or is harmless.” In addition to, or instead of that sanction, the court
23 may also impose any of the other appropriate sanctions provided for in Rule 37. Fed. R. Civ. P.
24 37(c)(1)(A)-(C). “The party facing sanctions bears the burden of proving that its failure to
25 disclose the required information was substantially justified or is harmless.” *R & R Sails, Inc. v.*
26 *Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012).

27 Rule 37(c)(1) “gives teeth” to Rule 26’s disclosure and supplementation requirements,
28 including the requirement that parties disclose experts and expert reports “at the times and in the

1 sequence that the court orders.” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,
2 1106 (9th Cir. 2001); Fed. R. Civ. P. 26(a)(2)(D). The Advisory Committee Notes to the 1993
3 amendments to Rule 37 describe subsection (c)(1) as a “self-executing,” “automatic sanction [that]
4 provides a strong inducement for disclosure of material” that must be disclosed pursuant to
5 Rule 26. Rule 37(c)(1) sanctions based on failure to disclose evidence in a timely manner may be
6 appropriate “even when a litigant’s entire cause of action or defense” will be precluded. *Yeti*, 259
7 F.3d at 1106. The Ninth Circuit has recognized, however, that “evidence preclusion is, or at least
8 can be, a ‘harsh’ sanction,” and where a “sanction amount[s] to dismissal of a claim, the district
9 court [is] required to consider whether the claimed noncompliance involved willfulness, fault, or
10 bad faith.” *R & R Sails*, 673 F.3d at 1247 (quoting *Yeti*, 259 F.3d at 1106) (alteration omitted).

11 Martinez has not provided substantial justification for her delay. Although she claims that
12 she only became aware of the need for an additional expert after the deposition of Dr. O’Hara, she
13 provides no justification for why she failed to notice that deposition earlier – or at all – following
14 receipt of the autopsy report in July 2017. Moreover, Martinez states that Dr. Stimac informed
15 counsel before March 9, 2018, “that because the diagnostic studies were inconclusive, he could
16 not be of assistance.” ECF No. 95 at 2. Thus, the need for a different medical expert was apparent
17 before the March 28 deposition of Dr. O’Hara, and Martinez presents no explanation for why it
18 could not have been discovered before the February 23 expert disclosure deadline. Nor does she
19 explain why, months after his initial disclosure, Dr. Greene has been unable to produce an expert
20 report.

21 In addition, Martinez’s untimely disclosures are not harmless. “Disruption to the schedule
22 of the court and other parties in that manner is not harmless. Courts set such schedules to permit
23 the court and the parties to deal with cases in a thorough and orderly manner, and they must be
24 allowed to enforce them, unless there are good reasons not to.” *Wong v. Regents of Univ. of*
25 *California*, 410 F.3d 1052, 1062 (9th Cir. 2005). Trial is scheduled to begin on July 9, 2018, with
26 a pretrial conference on June 15, 2018, and a pretrial conference statement due on June 5, 2018.
27 ECF No. 71 at 2. The parties have known about these dates since October 3, 2017. *Id.* Martinez
28 asserts on reply that any prejudice to Defendants can be cured by allowing Defendants’ experts an

1 opportunity to amend their reports, but this ignores the unavailability of one of Defendants’
2 experts, see ECF No. 96 at 6, as well as Defendants’ likely desire to depose Dr. Lipton and
3 perhaps conduct a further deposition of Dr. Greene. This would undoubtedly delay the briefing on
4 Defendants’ motion for summary judgment and impact the trial date.

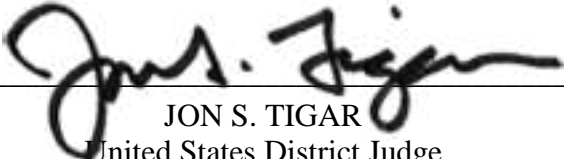
5 Finally, Martinez’s conduct in this case was willful. “[D]isobedient conduct not shown to
6 be outside the control of the litigant’ is all that is required to demonstrate willfulness, bad faith, or
7 fault.” Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993) (quoting Fjelstad v. Am.
8 Honda Motor Co., 762 F.2d 1334, 1341 (9th Cir. 1985)). Martinez has not persuaded the Court
9 that the delays at issue were outside her control. To the contrary, Martinez’s inability to satisfy
10 the expert disclosure deadlines in this case appear to be entirely of her own making.

11 **CONCLUSION**

12 Martinez’s motion to provide a late expert report from Dr. Greene and to amend her expert
13 disclosures to add Dr. Lipton is denied.

14 **IT IS SO ORDERED.**

15 Dated: April 17, 2018

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17 _____
18 JON S. TIGAR
19 United States District Judge