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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 R&O CONSTRUCTION COMPANY,
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11 Plaintiff,

12 v.

13 ROX PRO INTERNATIONAL GROUP,
LTD.; et al.,

14 Defendants.
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2:09-cv-01749-LRH-LRL

ORDER

16 Before the court is plaintiff R&O Construction Company's ("R&O") motion to strike the
17 declarations of Christopher Collins ("Collins") and Robert S. Larsen ("Larsen") submitted in
18 support of defendant WD Partners, Inc. ("WD Partners") motion for summary judgment (Doc. #73,
19 Exhibit 1; Exhibit 2¹). Doc. #83. WD Partners filed an opposition (Doc. #97) to which R&O replied
20 (Doc. #99).

21 **I. Facts and Background**

22 This is a construction defect action. R&O was the general contractor for a Home Depot
23 store in Las Vegas, Nevada. R&O subcontracted the construction of the required stone veneer,
24 manufactured by defendant Rox Pro International Groups, Ltd. ("Rox Pro"), to non-party
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26 ¹ Refers to the court's docket number.

1 New Creation Masonry Inc. (“New Creation”). New Creation purchased the stone veneer from
2 defendant Arizona Stone and Architectural Products NV, LLC (“Arizona Stone”). Allegedly, the
3 stone veneer failed and R&O was forced to make substantial structural repairs to the Home Depot
4 store.

5 On September 3, 2009, R&O filed its initial complaint against defendants Rox Pro; Real
6 Stone Source, LLC (“Real Stone”), the distributor for Rox Pro; Arizona Stone; and WD Partners.
7 Doc. #1. R&O filed a first amended complaint on February 5, 2010 (Doc. #22) and a second
8 amended complaint on June 29, 2010 (Doc. #48). The second amended complaint alleges ten
9 causes of action: (1) implied warranty of merchantability - Arizona Stone; (2) implied warranty of
10 fitness for a particular purpose - Arizona Stone; (3) implied warranty of merchantability - Real
11 Stone; (4) implied warranty of fitness for a particular purpose - Real Stone; (5) implied warranty of
12 merchantability - Rox Pro; (6) implied warranty of fitness for a particular purpose - Rox Pro; (7)
13 express warranty - Real Stone and Rox Pro; (8) express warranty - Arizona Stone, Real Stone, and
14 Rox Pro; (9) negligent misrepresentation - WD Partners and Real Stone; and (10) breach of
15 contract - WD Partners. Doc. #48.

16 On March 22, 2011, defendant WD Partners filed a motion for summary judgment.
17 Doc. #73. In support of its motion, WD Partners attached the declarations of Christopher Collins
18 (Doc. #73, Exhibit 1) and Robert S. Larsen (Doc. #73, Exhibit 2). Thereafter, R&O filed the
19 present motion to strike the declarations for failure to disclose Collins and Larsen as witnesses
20 pursuant to Rule 37 of the Federal Rules of Civil Procedure. Doc. #83.

21 **II. Discussion**

22 Federal Rule of Civil Procedure 37 states in pertinent part that “if a party fails to provide
23 information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use
24 that information or witness to supply evidence on a motion . . . , unless the failure was substantially
25 justified or is harmless.” FED. R. CIV. P. 37(c)(1). This sanction is “self-executing” and
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1 “automatic.” *Yeti by Molly Ltd. v. Deckers Outdoor Co.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

2 Here, it is undisputed that Collins and Larsen were not disclosed as witnesses in this action
3 in accordance with Rule 26. Therefore, the court finds that their declarations are properly
4 excludable under Rule 37(c)(1).

5 In opposition, WD Partners argues that the late disclosures of Collins and Larsen were
6 harmless because Collins was indirectly identified as a witness in relation to the design contract and
7 Larsen’s declaration contains information that is cumulative of other evidence already provided to
8 the court. *See* Doc. #97. However, the court finds that WD Partners’ arguments are without merit.
9 First, the court finds that Larsen’s declaration contains additional non-cumulative statements for
10 which there is no other identified source. Second, as to Collins, the court notes that he was never
11 actually identified as a possible witness in this action. His name was only briefly mentioned in
12 another witness’s deposition as a person somewhat connected to the design contract. Therefore, the
13 court finds that WD Partners has not made a sufficient showing that its failure to identify Collins
14 and Larsen was harmless. *See Yeti by Molly Ltd.*, 259 F.3d at 1107 (“Implicit in Rule 37(c)(1) is
15 that the burden is on the party facing sanctions to prove harmlessness.”). Accordingly, the court
16 shall grant R&O’s motion to strike.

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18 IT IS THEREFORE ORDERED that plaintiff’s motion to strike (Doc. #83) is GRANTED.
19 The clerk of court shall STRIKE the declaration of Christopher Collins attached as Exhibit 1 and
20 the declaration of Robert S. Larsen attached as Exhibit 2 to defendant’s motion for summary
21 judgment (Doc. #73).

22 IT IS SO ORDERED.

23 DATED this 14th day of September, 2011.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE