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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 JULE CROWELL, et al.,

7 Plaintiffs,

8 v.

9 COWLITZ COUNTY, et al.,

10 Defendants

11 CONMED, INC.,

12 Intervener/Third-
13 Party Defendant.

CASE NO. C14-5153 BHS

CONSOLIDATED FOR
PRETRIAL PURPOSES WITH

C14-5385BHS

C14-5672BHS

ORDER DENYING PLAINTIFFS'
MOTION FOR RELIEF FROM
DEADLINE AND GRANTING IN
PART AND DENYING IN PART
DEFENDANT'S MOTION TO
STRIKE

15 This matter comes before the Court on Intervenor /Third-Party Defendant
16 Conmed, Inc.'s ("Conmed") motion to exclude the undisclosed opinions of Dr. Richard
17 Cummins (Dkt. 88) and Plaintiffs Julie Crowell, Kele Kuanoni, David Nelson, Lisa Sully
18 and Kimberly Bush's ("Plaintiffs") motion for relief from deadline (Dkt. 93). The Court
19 has considered the pleadings filed in support of and in opposition to the motions and the
20 remainder of the file and hereby rules as follows:
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I. PROCEDURAL HISTORY

On July 29, 2014, the Court issued a scheduling order setting certain pretrial deadlines. Dkt. 19. On April 30, 2015, the Court granted the parties' stipulated motion to extend certain deadlines and extended the expert report deadline to August 27, 2015. Dkt. 80.

On September 1, 2015, Conmed filed a motion to strike the expert reports of Dr. Cummins. Dkt. 88. On September 14, 2015, Plaintiffs responded. Dkt. 101. On September 18, 2015, Conmed replied. Dkt. 113.

On September 9, 2015, Plaintiffs filed a motion for relief from deadline. Dkt. 93. On September 16, 2015, Conmed responded. Dkt. 103. On September 18, 2015, Plaintiffs replied. Dkt. 112.

II. DISCUSSION

The Court's scheduling order may be modified only for good cause. Fed. R. Civ. P. 16(b)(4). Moreover, if a party fails to meet discovery deadlines, the party is precluded from using that evidence to support a motion or at trial unless the failure was "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

In this case, Plaintiffs fail to show good cause, excusable neglect, substantial justification, or harmlessness. With regard to good cause for an extension, Plaintiffs assert, without support, that "the complexity of the case, the issues to date with obtaining discovery, and Dr. Cummins' travel schedule hampered his ability" to complete his reports on time. Dkt. 112 at 5. Even if true, none of these reasons justifies Plaintiffs' failure to request an extension before the expert deadline had passed. In fact, Plaintiffs'

1 motion was filed two weeks after the relevant deadline. “A motion for relief from a
2 deadline should, whenever possible, be filed sufficiently in advance of the deadline to
3 allow the court to rule on the motion prior to the deadline.” Local Rules, W.D. Wash.
4 LCR 7(j). Moreover, if a party requests an extension after the deadline has passed, the
5 party must show “excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). It is reasonable to
6 assume that Plaintiffs knew that Dr. Cummins’ reports would not be produced by the
7 deadline, and they failed to timely seek an extension. Under those circumstances, the
8 Court is unable to find that good cause exists or excusable neglect to grant any extension.
9 Therefore, the Court denies Plaintiffs’ motion for relief from deadline.

10 With regard to striking Dr. Cummins’ reports, the parties dispute appropriate
11 sanctions, if any should be imposed at all, because it is undisputed that Plaintiffs failed to
12 meet the relevant deadline. Exclusion is the “self-executing” or “automatic” sanction
13 contemplated under Rule 37(c). *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259
14 F.3d 1101, 1106 (9th Cir. 2001) (citing Fed. R. Civ. P. 37 advisory committee’s note
15 (1993)). However, “[t]wo express exceptions ameliorate the harshness of Rule 37(c)(1):
16 The information may be introduced if the parties’ failure to disclose the required
17 information is substantially justified or harmless.” *Id.* First, Plaintiffs’ failure to meet
18 the deadline was not substantially justified because they had knowledge that they would
19 likely miss the deadline and failed to appropriately respond to the possible failure. The
20 Court requires expert reports to be produced well in advance of trial so that the opposing
21 party has an adequate opportunity to evaluate and respond to the report. Knowingly
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1 missing this deadline, regardless of the reasons, is not substantial justification for such a
2 failure.

3 Second, Conmed has been harmed, to some extent, by Plaintiffs' failure to meet
4 the deadline. Plaintiffs contend that Dr. Cummins tendered his opinions on the Borelis,
5 Bush, and Deal decedents as of the time of their response. Dkt. 101. The Court finds
6 that, although tardy, Conmed has sufficient time to respond and may seek an extension of
7 rebuttal experts, if necessary. Dr. Cummings, however, may not supplement any of these
8 reports and may not submit any other report. Therefore, the Court grants Conmed's
9 motion in part and denies the motion in part.

10 Finally, with regard to fees, Conmed is entitled to its fees for bringing its motion.
11 *See* Fed. R. Civ. P. 37(a)(5)(A).

12 III. ORDER

13 Therefore, it is hereby **ORDERED** that Conmed's motion to exclude the
14 undisclosed opinions of Dr. Richard Cummins (Dkt. 88) is **GRANTED in part** and
15 **DENIED in part** as stated herein and Plaintiffs' motion for relief from deadline (Dkt.
16 93) is **DENIED**. Conmed may file a petition for fees no later than November 10, 2015,
17 and Plaintiffs may respond by November 13, 2015.

18 Dated this 2nd day of November, 2015.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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