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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 SAMANTHA POORE-RANDO, et al.,

9 Plaintiff,

v.

10 UNITED STATES OF AMERICA, et
11 al.,

12 Defendants.

CASE NO. C16-5094 BHS

ORDER DENYING MOTION FOR
RECONSIDERATION

13 This matter comes before the Court on the motion for reconsideration of Plaintiff
14 Samantha Poore-Rando. Dkt. 56. Also before the Court is Plaintiff's motion to strike.
15 Dkt. 72 at 1–2. The Court denies these motions for the reasons stated below.

16 **I. BACKGROUND**

17 Plaintiff Samantha Poore-Rando filed her complaint on February 6, 2016. Dkt. 1.
18 Plaintiff complains of complications, particularly an anastomotic leak, arising from a
19 medical procedure which included the use of a surgical stapler manufactured by
20 Defendant Ethicon Endo-Surgery, Inc. ("Ethicon"). *Id.* She brings claims against Ethicon
21 asserting (1) products liability pursuant to the Washington Products Liability Act
22

1 (“WPLA”), and (2) a tortious violation of her right to privacy. Since the filing of the
2 complaint, all defendants except for Ethicon have been dismissed. Dkts. 34, 43.

3 On July 13, 2017, Ethicon moved for summary judgment. Dkt. 44. On September
4 7, 2017, the Court entered an order granting and denying in part the motion. Dkt. 55.

5 On September 20, 2017, Plaintiff moved for reconsideration, ascribing two
6 potential errors to the Court’s previous decision. Dkt. 56. In her first argument, Plaintiff
7 claimed that the Court erred in concluding that the Medwatch report issued on April 25,
8 2014, was generated as a result of Plaintiff’s attorney contacting Ethicon about the
9 allegedly defective stapler. Dkt. 56 at 2–3. On October 5, 2017, the Court denied the
10 motion for reconsideration on this ground, noting that the evidence that Plaintiff
11 presented to support her motion did not actually rebut the uncontroverted evidence that
12 (1) the Medwatch report was created only after the office of Plaintiff’s attorney contacted
13 Ethicon, and (2) Dr. Sebesta did not actually file any report, notwithstanding the listing of
14 Dr. Sebesta as the “initial reporter” on the face of the Medwatch report because of his
15 role as the treating physician. Dkt. 64.

16 Plaintiff also argued for reconsideration on the basis that the Court erred when it
17 noted that she “failed to submit any expert testimony to support a theory regarding how
18 the design or construction of the stapler could have resulted in a misfire or improper
19 staple formation” Dkt. 56 at 3 (quoting Dkt. 55 at 8). Plaintiff pointed the Court’s
20 attention to her expert disclosure and report filed on August 4, 2017. *See* Dkt. 49. In light
21 of this report, the Court concluded that it was mistaken in stating that the record lacked
22 such a report when it entered the order granting summary judgment.

1 On October 5, 2017, the Court requested a response from Ethicon on the issues of
2 “(1) whether good cause exists under Rule 16(b) to amend the scheduling order as to
3 permit the late filing of Plaintiff’s expert disclosure and report, and (2) whether the
4 testimony included in the expert report creates a genuine dispute of material fact over the
5 existence of a defect.” Dkt. 64. On October 16, 2017, Ethicon filed its response. Dkt. 66.
6 Ethicon also filed a declaration by Dr. C. Neal Ellis. Dkts. 69–71. On October 19, 2017,
7 Plaintiff replied, simultaneously moving to strike the declaration of Dr. Ellis on the basis
8 that it was unsigned. Dkt. 72.

9 II. DISCUSSION

10 A. Motion to Strike

11 Plaintiff moves to strike the Declaration of Dr. Ellis (Dkt. 69) on the basis that the
12 first copy filed by Ethicon was unsigned and the signed version was filed a day late. Dkt.
13 72 at 1–2. Ironically, Plaintiff makes this request notwithstanding the fact her motion for
14 reconsideration is predicated on an expert report that was filed nearly a month after the
15 scheduling order’s deadline, without leave, after the deadline had already lapsed for her
16 opposition to Ethicon’s summary judgment motion. Ethicon diligently filed its praecipe
17 to attach the appropriately signed declaration the day after the unsigned (but otherwise
18 identical) version was timely filed. Dkt. 70. None of the cases cited by Plaintiff stand for
19 the proposition that such a praecipe should be rejected. Plaintiff’s motion to strike is
20 **DENIED.**

1 **B. Motion for Reconsideration**

2 Motions for reconsideration are governed by Federal Rule of Civil Procedure 60
3 and Local Rules W.D. Wash. LCR 7(h). LCR 7(h) provides:

4 Motions for reconsideration are disfavored. The court will ordinarily deny
5 such motions in the absence of a showing of manifest error in the prior
6 ruling or a showing of new facts or legal authority which could not have
7 been brought to its attention earlier with reasonable diligence.

8 The Ninth Circuit has described reconsideration as an “extraordinary remedy, to
9 be used sparingly in the interests of finality and conservation of judicial resources.” *Kona*
10 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting 12 James
11 Wm. Moore et al., *Moore’s Federal Practice* § 59.30[4] (3d ed. 2000)). “[A] motion for
12 reconsideration should not be granted, absent highly unusual circumstances, unless the
13 district court is presented with newly discovered evidence, committed clear error, or if
14 there is an intervening change in the controlling law.” *Id.* (quoting *389 Orange Street*
15 *Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

16 Plaintiff filed her disclosure and the expert report of Dr. Yadin David, a
17 biomedical engineer, nearly a month after the deadline established in the Court’s Rule 16
18 scheduling order. *See* Dkts. 49, 50. Because Dr. David’s report was filed on the same day
19 as Ethicon’s reply on its summary judgment motion, Plaintiff’s opposition to summary
20 judgment naturally failed to reference or rely upon the report. Nor did Plaintiff file any
21 supplemental briefing or subsequent motions requesting that the Court consider the report
22 when making its determination on the summary judgment record. These facts create two
procedural hurdles before the Court may consider the report.

1 **1. The Rule 16(b) “Good Cause” Standard**

2 First, because the report was filed subsequent to the deadline established in the
3 Court’s Rule 16 scheduling order, the Court can only consider the report if Plaintiff can
4 establish “good cause” for doing so. Fed. R. Civ. P. 16(b)(4). “Rule 16(b)’s ‘good cause’
5 standard primarily considers the diligence of the party seeking the amendment.” *Johnson*
6 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Reviewing the
7 declaration of Franklin Wilson, it does not appear that Plaintiff was late in obtaining and
8 disclosing the report due to a lack of diligence in pursuing it. *See* Dkt. 58. Instead, it
9 seems that Plaintiff’s late receipt of the report was a result of Dr. David’s delayed
10 communications and his time spent out of the country. Therefore, because there is no
11 prejudice to Ethicon and no other factors appear to weigh against modifying the
12 scheduling order, the Court concludes that good cause exists to modify the scheduling
13 order as necessary to receive and consider the expert report. *See* Dkt. 58 at 2–3.

14 **2. The LCR 7(h) “New Facts” Standard**

15 Second, because the expert report of Dr. David was raised on reconsideration and
16 not in the original opposition to summary judgment, Plaintiff must also overcome the
17 hurdle of establishing that it could not have been brought to the Court’s attention earlier
18 with reasonable diligence. Local Rules W.D. Wash. LCR 7(h). This is a closer question
19 than determining good cause for modifying the scheduling order. On one hand, Plaintiff
20 did not receive the expert report until August 4, 2017—after they had already filed their
21 opposition to the summary judgment motion—and they filed the report on the same day.
22 Dkt. 58 at 2; Dkt. 50. This shows that the report itself was not in Plaintiff’s possession

1 while drafting their opposition to summary judgment. However, it is also clear that by
2 July 12, 2017, before Ethicon's motion for summary judgment had been filed, Plaintiff
3 had already requested the report, was in communication with Dr. David, and had received
4 an expected date for the report to be finished. Dkt. 58 at 2, 9. Despite this, Plaintiff made
5 no reference to the expected report in their opposition to summary judgment and declined
6 to seek a continuance of the summary judgment proceedings pursuant to Rule 56(d),
7 which provides a remedy for exactly these types of situations. *See* Dkt. 48. Instead, in
8 opposing summary judgment, Plaintiff relied on a proffered hearsay statement of Dr.
9 Sebesta to suggest that a genuine factual dispute exists as to whether the stapler misfired,
10 which statement the Court found to be inadmissible. *See* Dkt. 55 at 5–8.

11 Moreover, in her motion for reconsideration, Plaintiff offered no explanation or
12 analysis on how the expert report would allow her to withstand summary judgment. *See*
13 Dkt. 58. Instead, the expert report was referenced only to challenge the Court's previous
14 conclusion that the proffered hearsay statement of Dr. Sebesta was not the most probative
15 evidence available through reasonable efforts, as expert testimony could be substantially
16 more probative as to the existence of a manufacturing defect than the proffered hearsay.
17 *See* Dkt. 56. In that sense, when the Court required a response from Ethicon on the
18 motion for reconsideration, it could be argued that the Court sua sponte raised the
19 argument that the contents of the expert report might be construed to support Plaintiff's
20 claim that the stapler misfired due to a defect. *See* Dkt. 64 at 4. It is only in her reply on
21 the motion for reconsideration that Plaintiff first argues as to how the contents of the
22 report might support the existence of a manufacturing defect, and even then this argument

1 only arises in the context of discussing the reliability and relevance of Dr. David’s report
2 for the purpose of addressing its admissibility under Federal Rule of Evidence 702. *See*
3 Dkt. 72 at 6, 9.

4 Based on the foregoing, the Court concludes that the expert report does not
5 constitute a “new fact” “which could not have been brought to its attention earlier with
6 reasonable diligence.” Plaintiff should have brought it to the Court’s attention earlier by
7 actually referencing the then-pending report in her opposition to summary judgment,
8 moving for a continuance, or requesting leave to file supplemental briefing on the report
9 after it was received. Accordingly, any newly raised arguments based on the expert report
10 do not form an appropriate basis for reconsideration.

11 Regardless, the Court also briefly notes that, even if the report were a “new fact”
12 that could not have been brought to the Court’s attention earlier, its contents still fail to
13 create a genuine dispute of fact over the existence of a manufacturing defect for the
14 purpose of withstanding summary judgment. The expert report opines that Ms. Poore-
15 Rando’s anastomotic leak was the result of *either* an improper use of the stapler by Dr.
16 Sebesta or a manufacturing defect in the stapler. Dkt. 50 at 10. Plaintiff’s expert witness
17 reported that, while the absence of the stapler itself prevented him from “render[ing] a
18 specific reason for the anastomotic leak found after Ms. Poore-Rando’s surgery, . . .
19 [e]ither of these opinions will explain the unfortunate outcome” *Id.* at 10. Notably,
20 nowhere does Dr. David opine that a manufacturing defect more likely than not existed.
21 *See McElroy v. Pac. Autism Ctr. for Educ.*, 14-CV-04118-LHK, 2016 WL 3029782, at *9
22 (N.D. Cal. May 27, 2016) (“[E]ven if Dr. Miranda’s expert report were not untimely and

1 unauthenticated, Dr. Miranda’s expert report . . . is legally insufficient to meet Plaintiff’s
2 burden to show through expert evidence that it is more likely than not that the PACE
3 Defendants’ conduct caused Plaintiff’s injury.”). Moreover, Dr. David’s opinion
4 regarding the possibility of a defect is based on the purported absence of testimony in Dr.
5 Sebesta’s deposition regarding the presence of a “breakaway washer” or “audible and
6 tactile feedback” when the stapler was used. *See* Dkt. 50 at 8–9, 11. However, Dr.
7 Sebesta did testify that the stapler “had a good bite” when it produced the expected flesh
8 “donuts” and that it made the proper sound when firing. Dkt. 67-1 at 12, 14. The
9 existence of the “donuts” is impossible if there is no “breakaway washer,” since the
10 washer acts as the “cutting board” type surface against which the flesh must be cut. Dkt.
11 70 at 7. Accordingly, Dr. David’s opinion that the stapler may have malfunctioned due to
12 the absence of a “breakaway washer” is premised on inaccurate data and is disproved by
13 facts that Plaintiff has failed to genuinely dispute. *In re Silberkraus*, 336 F.3d 864, 871
14 (9th Cir. 2003) (“When an expert opinion is not supported by sufficient facts to validate it
15 in the eyes of the law . . . it cannot support a jury’s verdict.”) (citation omitted).

16 Plaintiff’s motion for reconsideration is **DENIED**.

17 **C. Modifying the Expert Report**

18 Finally, the Court notes that Ethicon seeks to prevent Plaintiff from “modifying or
19 revising” Dr. David’s report. Dkt. 66 at 18–20. The Court need not address this issue, as
20 Plaintiff has stated that she does not seek to do so. *See* Dkt. 72 at 10.

1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Plaintiff's motion to strike (Dkt. 73) and
3 motion for reconsideration (Dkt. 56) are **DENIED**.

4 Dated this 17th day of November, 2017.

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6 BENJAMIN H. SETTLE
7 United States District Judge

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