

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TIM and PENNY PATERSON, husband and
wife and the marital community thereof,

Case No. 2:05-CV-01719-TSZ

Plaintiffs,

vs.

MOTION TO EXCLUDE
DEFENDANTS' EXPERT WITNESS
REPORT AND TESTIMONY

LITTLE, BROWN AND COMPANY, a
Massachusetts state corporation, TIME
WARNER BOOK GROUP, a Delaware state
corporation, HAROLD EVANS
ASSOCIATES LLC, a New York state
limited liability company, HAROLD EVANS,
and DAVID LEFER,

NOTE ON MOTION CALENDAR
JUNE 29, 2007

Defendants.

COME NOW Plaintiffs Tim and Penny Paterson, by and through their attorneys, D.

Michael Tomkins and Dietrich Biemiller, and respectfully request that the testimony of

Defendants' expert Gary J. Nutt be excluded pursuant to CR 26(a)(2) and CR 37(c).

MOTION TO EXCLUDE DEFENDANTS' EXPERT
WITNESS REPORT AND TESTIMONY - 1

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1 **I. PROCEDURAL HISTORY**

2 On March 20, 2007, the parties stipulated to an extension of certain deadlines in this
3 case, including the disclosure of expert testimony under FRCP 26(a)(2). The previous
4 deadline for disclosure of expert witnesses and their reports had been March 21, 2007, and
5 the new proposed deadline was April 18, 2007. On March 23, 2007, the Honorable Judge
6 Zilly ordered these new deadlines into effect. *See Exhibit A.*

7 On April 18, 2007, Plaintiffs timely provided the Defendants the name, expert witness
8 report, and *curriculum vitae* of their expert witness, Professor Lee A. Hollaar.

9 An expert witness disclosure was mailed to Plaintiff on April 18, 2007, the day of the
10 deadline, which merely identified an expert witness, but there was no report provided. The
11 report was to be furnished “when it is available.” This disclosure was not received until
12 April 20, two days after the deadline expired. *See Exhibit B.*

13 Pursuant to CR 26 (a)(2)(C), any rebuttal report was due thirty days from the delivery
14 of Professor Hollaar’s report, or on May 18, 2007. No rebuttal report was provided.

15 Shortly after this deadline passed, the discovery period expired on May 21, 2007.

16 On June 6, 2007, Plaintiffs received an “Expert Witness Report of Gary J. Nutt” from
17 the defendants, which referenced their duty to provide such a report pursuant to CR
18 267(a)(2)(B). *See Exhibit C.*

1 **II. ISSUE**

2 Should the testimony of Defendants' expert witness and his report be excluded
3 pursuant to CR 37(c), when the report was provided 49 days (seven full weeks) after the
4 deadline for doing so had passed, nineteen days after the deadline for filing a rebuttal
5 report had passed, and fourteen days after the discovery cutoff?
6

7 **III. EVIDENCE RELIED UPON**

8 Plaintiffs rely on the attached Declarations, exhibits, and the records and files herein.
9

10 **IV. ARGUMENT AND AUTHORITY**

11 (A) In addition to the disclosures required by paragraph (1), a party shall disclose to
12 other parties the identity of any person who may be used at trial to present
13 evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

14 ...

15 (C) These disclosures shall be made at the times and in the sequence directed by
16 the court. In the absence of other directions from the court or stipulation by the
17 parties, the disclosures shall be made at least 90 days before the trial date or the
18 date the case is to be ready for trial or, if the evidence is intended solely to
19 contradict or rebut evidence on the same subject matter identified by another
20 party under paragraph (2)(B), within 30 days after the disclosure made by the
21 other party. The parties shall supplement these disclosures when required
22 under subdivision (e)(1).

23 LFRCP 26(a)(2)(A)(C).

Here, the parties stipulated to a deadline for expert witness disclosures, April 18, 2007.

Plaintiffs timely identified their expert witness, Professor Lee A. Hollaar, and sent
Defendants his expert witness report.

1 Defendants failed to comply with this deadline in a timely fashion, and instead merely
2 identified their expert witness and filed the required report seven weeks late, after the
3 ability to depose their expert had also expired.

4 Defendants may argue that they intended to provide the actual report of their expert as
5 a rebuttal of Plaintiff's expert witness. However, the deadline for producing a rebuttal
6 report was thirty days after the other party filed their report. Here, the deadline for filing
7 the report as a rebuttal witness was May 18, 2007. Defendants' report was 19 days late for
8 that deadline as well.

9 The proper remedy for failure to comply with CR 26 is the exclusion of that witness'
10 testimony and report. Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp., 464
11 F.3d 885 (9th Cir. Hawai'i), 2006.

12 CR 37(c)(1) gives teeth to the requirements under CR 26 by forbidding the use at trial
13 of any information required to be disclosed by Rule 26(a) that is not properly disclosed.

14 Rule 37(C)(1) provides, in relevant part:

15 A party that without substantial justification fails to disclose information required by
16 Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule
17 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial,
18 at a hearing, or on a motion any witness or information not so disclosed.

19 Fed R. Civ. P. 37(c)(1).

20 Here, there is no requirement to find that the defendants acted willfully, with fault, or
21 in bad faith, because the remedy sought is short of a dismissal of the case. Yeti by Molly,
22 Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101 (9th Cir., Mont., 2001).

23 MOTION TO EXCLUDE DEFENDANTS' EXPERT
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2 The Yeti court continued:

3 Furthermore, although we review every discovery sanction for an abuse of discretion,
4 we give particularly wide latitude to the district court's discretion to issue sanctions
5 under Rule 37(c)(1). *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y*
6 *Beneficiencia de Puerto Rico*, 248 F.3d 29, 34 (1st Cir.2001). This particular
7 subsection, implemented in the 1993 amendments to the Rules, is a recognized
8 broadening of the sanctioning power. *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st
9 Cir.1998) (“***[T]he new rule clearly contemplates stricter adherence to discovery***
10 ***requirements, and harsher sanctions for breaches of this rule....***”). The Advisory
11 Committee Notes describe it as a “self-executing,” “automatic” sanction to “provide[]
12 a strong inducement for disclosure of material...” Fed.R.Civ.P. 37 advisory
13 committee's note (1993). Courts have upheld the use of the sanction even when a
14 litigant's entire cause of action or defense has been precluded. *Ortiz-Lopez*, 248 F.3d
15 at 35 (although the exclusion of an expert would prevent plaintiff from making out a
16 case and was “a harsh sanction to be sure,” it was “nevertheless within the wide
17 latitude of” Rule 37(c)(1)). Thus, even though Deckers never violated an explicit
18 court order to produce the Vuckovich report and even absent a showing in the record
19 of bad faith or willfulness, ***exclusion is an appropriate remedy for failing to fulfill the***
20 ***required disclosure requirements of Rule 26(a).***

21
22
23 Yeti v. Deckers Outdoor, 259 F.3d at 1106, ***emphasis added.***

24 The situation the court faced in that case is similar, in that the expert was disclosed but
25 no report was timely filed. Merely disclosing the expert without the attendant report is not
26 sufficient to comply with the rule.

27 There are two exceptions to the rule. Testimony can be allowed if the failure to
28 comply with the court deadline is “Substantially justified” or “harmless.”

29 The burden is on the defendants, however, to establish that the failure to disclose was
30 justified or harmless. Yeti, at 1107.

1 Here, defendants as yet have provided no reason for the late report, justified or not.
2 Defendants cannot claim ignorance of the date, they proposed and stipulated to the
3 deadline themselves. Nor is the late disclosure harmless: it is impossible for plaintiff's
4 counsel to depose the expert because the discovery deadline has passed. In Yeti, the court
5 found that the opposing party must have the opportunity to depose the expert witness and
6 prepare for questioning him at trial. Id., citing NutraSweet Co. v. E-L Eng'g Co., 227 F.3d
7 776, 786 (7th Cir. 2000). With the trial looming in early September, with summer
8 schedules in effect, and the discovery cutoff expired, there is no opportunity to depose
9 defendants' expert before trial.

10
11 **V. CONCLUSION**

12 Defendants failed to comply with the strict deadline for supplying the report of their
13 expert witness, and the proper remedy for this is exclusion of the expert. There is no
14 justification for the failure, and the omission is not harmless. Accordingly, Plaintiffs
15 request that the report and testimony of Gary J. Nutt be excluded.

16 Respectfully submitted this 13th day of June, 2007.

17 /S/

18

D. Michael Tomkins, WSBA # 4979
Attorney for Plaintiffs

19 /S/

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Dietrich Biemiller, WSBA # 32171
Attorney for Plaintiffs

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23 MOTION TO EXCLUDE DEFENDANTS' EXPERT
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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2007, I caused to be electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of and a link providing free access to the following:

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