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The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

STATE INTERVENORS'
MOTION TO STRIKE
UNTIMELY DISCLOSED
WITNESSES

**NOTE ON MOTION
CALENDAR:**

October 15, 2010

NO ORAL ARGUMENT
REQUESTED

MOTION

1
2 Defendant-Intervenors State of Washington, Rob McKenna, Attorney General of the
3 State of Washington, and Sam Reed, Secretary of State of the State of Washington
4 (hereinafter "State"), hereby ask this Court to strike seven lay witnesses and one expert
5 witness who were untimely disclosed in three separate disclosures by Plaintiffs Washington
6 State Republican Party (hereinafter "the Republican Party"). Because the late disclosure of
7 these witnesses was neither substantially justified nor harmless, this Court should strike them
8 pursuant to its authority under Federal Rules of Civil Procedure 16 and 37.
9

FACTS RELEVANT TO MOTION

10
11 The discovery schedule for this matter was established in late May. Order Modifying
12 Schedule (May 25, 2010) ("May 25 Order") (Dkt. 234) at 2. At the parties' joint request, this
13 Court set the fact deposition deadline at August 17, 2010, and the expert deposition deadline
14 at August 20, 2010. *Id.* The expert deposition deadline was later extended, at joint request,
15 to September 10, 2010. August 27 Minute Order (Dkt. 253) at 2.
16

17 The State and the Republican Party exchanged initial disclosures of witnesses in early
18 May. The State disclosed two witnesses. Decl. of Allyson Zipp in Support of State
19 Intervenors' Motion to Strike Untimely Disclosed Witnesses ("Zipp Decl."), Ex. J. The
20 Republican Party disclosed five. Zipp Decl., Ex. K.
21

22 In early July, in response to the Republican Party's interrogatory request to identify
23 witnesses, the State added its expert, Dr. Todd Donovan, to the two fact witnesses it had
24 disclosed in May. Zipp Decl., Ex. A. On August 12, 2010, the State timely provided Dr.
25 Donovan's two expert reports. Zipp Decl., Ex. B.
26

1 Also in early July, in response to the State's interrogatory request to identify
2 witnesses, the Republican Party identified six witnesses, three who appeared on its initial
3 disclosure and three who did not. Zipp Decl., Ex. C. The Republican Party has never
4 supplemented its response to this interrogatory.
5

6 On August 31, 2010, fourteen days after the close of fact discovery, the Republican
7 Party served a Supplemental Designation of Witnesses, listing two new potential witnesses.
8 Zipp Decl., Ex. D. In it, the Republican Party identified Mr. Dave Ammons as "a primary
9 fact witness". *Id.* Currently, Mr. Ammons serves as the Communications Director for the
10 Office of the Secretary of State.¹ The Republican Party also identified Dr. Donovan as "a
11 possible primary fact witness and expert." *Id.* The Republican Party offered no description
12 of the facts about which these witnesses were expected to testify, nor any justification for
13 their untimely disclosure as fact witnesses.
14

15 On September 13, 2010, in its response to the State's motion for summary judgment,
16 the Republican Party relied on the declaration of an undisclosed expert, Professor Emeritus
17 John Orbell. Plaintiff Washington State Republican Party Response in Opposition to State
18 Motion for Summary Judgment ("WSRP Opp. to State SJ") (Dkt. 260) at 10-11. Professor
19 Orbell's 14-page declaration was executed September 8, 2010, two days prior to the close of
20 expert discovery. Decl. of John M. Orbell in Support of Plaintiffs' Motion for Partial
21 Summary Judgment (Dkt. 261).
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25 ¹ Mr. Ammons became Communications Director in May 2008. Prior to that time, he
26 was an Associated Press reporter covering Washington State government. Office of the Secretary of
State news release, dated May 2, 2008, available at http://www.sos.wa.gov/office/osos_news.aspx?i=Agb7KV2bC2dvbjk1UtFhhw%3D%3D, last visited Sept. 27, 2010.

1 On September 16, 2010, thirty days after fact discovery closed and thirty-five days
2 after receiving the State's expert reports, the Republican Party served a Second Supplemental
3 Designation of Witnesses, listing five new witnesses. Zipp Decl., Ex. E. Four were
4 designated as "primary fact witnesses or rebuttal fact witnesses." Listed first was Ms. Mary
5 Jane Aurdal-Olson, the 2009-2010 second vice president of the Washington Federation of
6 Republican Women. Zipp Decl., Ex. F. The other fact witnesses were identified as reporters
7 who would testify to conversations with either Secretary of State Sam Reed or State's expert
8 Dr. Donovan and "the content of newspaper articles written while a reporter" with the *Seattle*
9 *Times* (David Postman), the *Tri-city Herald* (Chris Mulick), or the *Bellingham Herald* (Sam
10 Taylor). Zipp Decl., Ex. E. The fifth witness was Professor Orbell, whose declaration had
11 been provided to the State for the first time as part of the Republican Party's response to
12 State's motion for summary judgment, filed three days before. WSRP Opp. to State SJ (Dkt.
13 260); Decl. of Orbell (Dkt. 261).

16 Finally, on September 20, 2010, thirty-four days after fact discovery closed, the
17 Republican Party served a Third Supplemental Designation of Witnesses, listing another new
18 fact witness, Ms. Lori Sotelo. Zipp Decl., Ex. G. Ms. Sotelo is the current Chairman of the
19 King County Republican Party. Zipp Decl., Ex. H.

21 Trial in this matter is set to begin November 15, 2010. May 25 Order (Dkt. 234).

22 ARGUMENT

23 **A. This Court should strike the seven fact witnesses untimely designated by the** 24 **Plaintiffs Republican Party.**

25 A party's failure to identify a witness as required by Rules 26(a) and (e) precludes
26 that party from using the witness to supply evidence on a motion, in a hearing, or at trial,

1 unless the failure was substantially justified or is harmless. Fed. R. Civ. P. 37(c). Rule
2 37(c)(1) is a “‘self-executing,’ ‘automatic’ sanction to ‘provide[] a strong inducement for
3 disclosure.’” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.
4 2001) (quoting Fed. R. Civ. P. 37 advisory committee’s note, 1993 Amendment). The Ninth
5 Circuit “give[s] particularly wide latitude to the district court’s discretion to issue sanctions
6 under Rule 37(c)(1).” *Yeti by Molly*, 259 F.3d at 1106.

8 Rule 16 vests district courts “with early control over cases ‘toward a process of
9 judicial management that embraces the entire pretrial phase, especially motions and
10 discovery.’” *In re Arizona*, 528 F.3d 652, 657 (9th Cir 2008) (quoting Fed. R. Civ. P. 16
11 advisory committee’s note, 1983 Amendment). “The Federal Rules of Civil Procedure
12 explicitly authorize the establishment of schedules and deadlines, in Rule 16(b), and the
13 enforcement of those schedules by the imposition of sanctions, in Rule 16(f).” *Wong v.*
14 *Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). In concert, Rules 16 and 37
15 provide this Court with broad authority to oversee pretrial practice and enforce pretrial
16 schedules to ensure that each case proceeds in an orderly and just manner.

18 This Court established the deadline to complete fact discovery as August 17, 2010.
19 May 25 Order (Dkt. 234). In contravention of that order, the Republican Party has purported
20 to make three supplemental designations of new lay witnesses after August 17—identifying
21 two witnesses fourteen days late, four more witnesses thirty days late, and a final, seventh
22 witness thirty-four days late. Zipp Decl., Exs. D, E, and G, respectively. The Republican
23 Party’s failure to disclose these witnesses prior to the close of discovery cannot be
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1 substantially justified, nor is it harmless. Therefore, this Court should strike these seven
2 witnesses.

3 There can be no substantial justification for the Republican Party's untimely
4 disclosure of these seven lay witnesses. It is indisputable that the Republican Party had
5 knowledge of each of the witnesses prior to August 17, 2010. And, to the extent the
6 Republican Party has identified the matters on which each witness may testify—or those
7 matters may be discerned from its dispositive motion filings—those were known to it prior to
8 August 17th as well. The Republican Party's failure to disclose these witnesses as required
9 by the rules and in accordance with the schedule established by this Court should not be
10 excused. The witnesses should be stricken.
11

12 Fourteen days after the close of fact discovery, the Republican Party first designated
13 Mr. Dave Ammons. Mr. Ammons is the Secretary of State's Communications Director, a
14 public role in which he is well known to the Republican Party. The Republican Party did not
15 describe in its designation of Mr. Ammons what it expects from his testimony. Zipp Decl.,
16 Ex. D. However, in its opposition to the State's Motion for Summary Judgment, the
17 Republican Party did rely on as exhibits several communications authored by Mr. Ammons.
18 Decl. of John J. White, Jr. In Opposition To State And Grange Motions For Summary
19 Judgment ("Decl. of White in Opp to SJ") (Dkt. 269) at ¶¶ 217, 218, and 222. These
20 exhibits, identically numbered, were among those provided by the Republican Party to the
21 State in May 2010. Zipp Decl., Ex. I. The Republican Party also relied upon a fourth
22 exhibit, Exhibit 297, which it described as an "[e]-mail from Dave Ammons to John White,
23 dated August 21, 2008, re: Top 2 Primary Leftovers with attached News Release from
24
25
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1 OSOS, ‘Top 2 Primary Leftovers/Washington’s Top 2 Primary bits & pieces’” Decl. of
2 White in Opp to SJ (Dkt. 269) at ¶ 297. Clearly, prior to the mid-August close of fact
3 discovery, the Republican Party both knew of Mr. Ammons and was considering introducing
4 into evidence documents he had authored.

5
6 The Republican Party also identified fourteen days late State’s expert Dr. Donovan as
7 a “possible primary fact witness”. Zipp Decl., Ex. D. The State disclosed Dr. Donovan to
8 the Republican Party in early July and timely disclosed his two expert reports on August 12.
9 Zipp Decl., Exs. A & B. Thus, the Republican Party was well aware of Dr. Donovan prior to
10 the close of fact discovery. The Republican Party has provided no indication of what fact
11 testimony it expects to elicit from Dr. Donovan, and this Court should strike him as a fact
12 witness for Plaintiffs.

13
14 Thirty or more days after the close of fact discovery, the Republican Party disclosed
15 two witnesses with official connections to the Republican Party. The Republican Party
16 expects Ms. Aurdal-Olson, a vice president of the Washington Federation of Republican
17 Women, and Ms. Sotelo, current Chairman of the King County Republican Party, to testify
18 regarding the election of Republican precinct committee officers. Zipp Decl., Exs. E & F
19 (Aurdal-Olson); Exs. G & H (Sotelo). The Republican Party cannot plausibly claim that
20 these office-holding party members were unknown to it prior to August 17th.

21
22 As for their expected testimony, if the Republican Party sought to have either witness
23 testify about the 2008 elections of Republican precinct committee officers, that information
24 was reasonably available far before the close of fact discovery. Alternatively, if the
25 Republican Party intended to introduce testimony regarding the 2010 election of precinct
26

1 committee officers, there is an issue of practicability. It is neither reasonable nor feasible
2 that a trial beginning November 15, 2010, would consider in evidence events from the 2010
3 election season occurring after the close of fact discovery in mid-August. Such events
4 include: the 2010 elections of precinct committee officers, certified after the August 17th
5 primary;² the 2010 general election campaign season, and the 2010 general election. If
6 consideration of these events were necessary, the trial date should be continued to allow for
7 the evidence to be developed in an orderly fashion.
8

9 Finally, also thirty days after the close of discovery, the Republican Party additionally
10 designated three newspaper reporters: the *Seattle Times*' David Postman, the *Tri-city*
11 *Herald*'s Chris Mulick, and the *Bellingham Herald*'s Sam Taylor. Zipp Decl., Ex. E. Each
12 reporter would testify regarding:
13

14 conversations with [Secretary of State Sam Reed or Dr. Todd Donovan], and
15 the content of newspaper articles written while a reporter with the [newspaper
16 in question], including but not limited to the accuracy of quotations and other
17 material contained in articles written by him.

18 *Id.* The same considerations regarding expected testimony discussed with respect to the
19 Republican Party members above, apply to the testimony of these witnesses. Any testimony
20 about conversations that occurred or articles that were published prior to the close of fact
21 discovery was timely available to the Republican Party and provides no justification for the
22 witnesses' late disclosure. Testimony about conversations occurring or articles written after
23 August 17th raises the spectre of practicability, given the November 15 trial date.

24 As shown, the Republican Party cannot demonstrate any substantial justification for
25 its late disclosure of these seven lay witnesses. There is no reason that any of these
26

² <http://vote.wa.gov/Elections/WEI/?ElectionID=36>, last visited on Sept. 29, 2010.

1 individuals or his or her expected testimony could not reasonably have been identified prior
2 to the close of fact discovery.

3 Nor is the delayed disclosure harmless. Consideration of the as-applied challenge
4 currently before this Court on remand commenced in 2008. This Court, in its scheduling
5 order of October 2009, gave clear notice to parties that discovery deadlines were to be taken
6 seriously. “Note that all depositions, discovery and perpetuation, must be completed before
7 the discovery completion date.” Minutes of Status Conference (October 20, 2009) (Dkt.
8 193). The August 17th deadline for fact discovery, jointly negotiated by the parties, was
9 established in May 2010. Trial in this matter is scheduled to begin on November 15th, now a
10 mere seven weeks away. The Republican Party should not be heard to complain that it has
11 had insufficient opportunity to identify the lay witnesses it will need to rely upon in making
12 its case in November.
13
14

15 The August 17th deadline created an aggressive timeline for completing discovery
16 prior to filing dispositive motions not later than August 26th, and then preparing for trial.
17 The State was entitled to rely on August 17th as marking the close of fact discovery, after
18 which no new lay witnesses would be identified. Disruption to the schedule of the court and
19 other parties is not harmless. “In these days of heavy caseloads, trial courts . . . set schedules
20 and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts
21 will be successful only if the deadlines are taken seriously by the parties, and the best way to
22 encourage that is to enforce the deadlines.” *Wong*, 410 F.3d at 1060. The seven late-
23 disclosed lay witnesses should be stricken.
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1 **B. This Court should strike rebuttal expert Professor Orbell untimely designated**
 2 **by the Republican Party.**

3 Disclosure of expert testimony intended solely as rebuttal evidence must be made
 4 either per stipulation or court order or, absent that, within 30 days after the other party's
 5 disclosure of the expert testimony being rebutted. Fed. R. Civ. P. 26(a)(2)(C)(ii). The
 6 parties stipulated to a deadline for expert depositions in this matter of August 20, 2010. May
 7 25 Order (Dkt. 234). That date was later extended to September 10, 2010 at the parties' joint
 8 request. August 27 Minute Order (Dkt. 253) at 2. No different deadline was established for
 9 disclosure of rebuttal experts, so the most reasonable assumption is that September 10 was
 10 the absolute deadline to complete all expert discovery.³

12 But the Republican Party failed to disclose Professor Orbell as an expert by that date.
 13 Instead, on September 13, 2010, in response to the State's motion for summary judgment, the
 14 Republican Party purported to rely on the Declaration of Professor Orbell, an expert
 15 unknown to the State, to rebut the opinions of the State's expert. WSRP Opp. to State SJ
 16 (Dkt. 260) at 10-11.

18 Notably, Professor Orbell's detailed 14-page declaration was executed September 8,
 19 2010, before the close of expert discovery. Decl. of Orbell (Dkt. 261). Moreover, Professor
 20 Orbell states he reviewed both the report produced by the Republican Party's expert
 21 Manweller and the two reports produced by Dr. Donovan. *Id.* at ¶ 5. This suggests that
 22 Professor Orbell's efforts involved the investment of some measure of time before the
 23 execution of his declaration on September 8. However, the Republican Party did not see fit
 24

25 ³ Alternatively, if this Court were to conclude that the thirty-day requirement of Fed. R. Civ. P.
 26 26(a)(2)(C)(ii) governed, the deadline would have been September 13, 2010, thirty days after State's August 12
 production of Dr. Donovan's expert reports. Zipp Decl., Ex. B. Under this analysis, the Republican Party's
 September 16th disclosure of Professor Orbell would still be untimely.

1 to designate Professor Orbell as an expert until eight days later, on September 16, 2010.
 2 Zipp Decl., Ex. E.

3 The Republican Party cannot claim to have a substantial justification for failing to
 4 timely disclose an expert witness who was already laboring on its behalf prior to the deadline
 5 to complete expert discovery. And the untimely disclosure is not harmless. The State was
 6 deprived of the opportunity to consider Professor Orbell's potential impact on the case, to
 7 depose him, or to identify an appropriate counter-expert. Professor Orbell should be stricken
 8 as an expert witness.
 9

10 CONCLUSION

11 Courts establish discovery schedules "to permit the court and the parties to deal with
 12 cases in a thorough and orderly manner, and they must be allowed to enforce them, unless
 13 there are good reasons not to." *Wong*, 410 F.3d at 1062. Here, the Republican Party's late
 14 disclosures of witnesses were neither substantially justified nor harmless. There is every
 15 reason to enforce the discovery schedule agreed to by the parties, and no good reason not to.
 16 The State therefore respectfully requests that the seven lay witnesses and one expert witness
 17 untimely disclosed by the Republican Party be stricken.
 18

19 RESPECTFULLY SUBMITTED this 29th day of September, 2010.

20
 21 ROBERT M. MCKENNA
 Attorney General

22 By: s/ Allyson Zipp
 23 James K. Pharris, WSBA #5313
 24 Jeffrey T. Even, WSBA #20367
 Allyson Zipp, WSBA #38076
 25 Deputy Solicitors General
 Attorneys for Defendant Intervenors
 26 State of Washington, et al.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I electronically filed the foregoing State Intervenor’s Motion To Strike Untimely Disclosed Witnesses with the clerk of the court using the CM/ECF system which will send notification of such filing to the following:

John White and Kevin Hansen, attorneys for Washington State Republican Party

David McDonald and Emily Throop, attorneys for Washington State Democratic Central Committee

Orrin Grover and John Mills, attorneys for Libertarian Party of Washington State

Thomas Ahearne, Marco Magnano, and Kathryn Carder, attorneys for Washington State Grange

Gordon Sivley, attorney for Snohomish County

DATED this 29th day of September, 2010.

s/ Allyson Zipp
Allyson Zipp