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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO
ARTEAGA,

Plaintiffs,

v.

CITY OF YAKIMA, MICAH
CAWLEY, in his official capacity as
Mayor of Yakima, and MAUREEN
ADKISON, SARA BRISTOL,
KATHY COFFEY, RICK ENSEY,
DAVE Ettl, and BILL LOVER, in
their official capacity as members of
the Yakima City Council,

Defendants.

NO. 12-CV-3108 TOR

**PLAINTIFFS' MOTION TO
STRIKE SECOND
SUPPLEMENTAL EXPERT
REPORT OF PETER MORRISON**

NOTED FOR HEARING: August 13,
2014

WITHOUT ORAL ARGUMENT

PLAINTIFFS' MOTION TO STRIKE –

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I. INTRODUCTION

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Plaintiffs respectfully object to and move to strike the Second Supplemental Expert Declaration of Peter Morrison, Ph.D. (“Second Supplemental Report”), attached as Exhibit A to Defendants’ reply in support of their motion for summary judgment. ECF No. 86-1. The improper and untimely Second Supplemental Report consists of expert opinions that were not disclosed in accordance with the Federal Rules of Civil Procedure and the Court’s scheduling orders in this case. Plaintiffs therefore request an order striking the Second Supplemental Report.

II. STATEMENT OF FACTS

The Court’s initial scheduling order required the parties to exchange expert reports by specified dates in early 2013. ECF No. 24. The order set out a phased disclosure schedule, under which Plaintiffs would submit their expert reports, Defendants would serve responsive reports, and Plaintiffs would then have the opportunity to file rebuttal reports. *Id.* The Court “cautioned that failure to timely identify experts or provide reports in accordance with Rule 26 and this scheduling order may result in exclusion of such testimony absent good reason.” *Id.* (citing *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005)).

The Court subsequently entered an order that, in relevant part, continued Defendants’ deadline to submit their “*Gingles* preconditions” expert report to March 22, 2013. ECF No. 38. Defendants timely served an expert report from Dr. Morrison. Thereafter, however, Defendants produced a subsequent “supplemental” report from Dr. Morrison, and the Court entered an order extending Plaintiffs’ deadline for submitting their “*Gingles*” expert rebuttal reports so that Plaintiffs could respond to this late submission. ECF Nos. 40, 42.

1 Plaintiffs submitted their rebuttal to Dr. Morrison's report on April 19, 2013.
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 3 Plaintiffs deposed Dr. Morrison on May 9, 2013. The final discovery cut-off date
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 5 in this case was June 10, 2014. ECF No. 55.¹
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7 On July 1, 2014, Defendants filed their motion for summary judgment. The
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 9 motion is premised on Defendants' contentions regarding "electoral equality,"
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 11 which in turn derive from Dr. Morrison's initial report and deposition testimony.
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 13 ECF No. 68 (Defendants' Statement of Material Facts), ¶¶ 22-27, 45-56. Plaintiffs
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 15 filed their response to the motion on July 22, 2014.
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17 On August 5, 2014, Defendants filed their reply brief, along with the Second
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 19 Supplemental Report. This report was thus disclosed for the first time (1) more
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 21 than sixteen months after the deadline for Defendants' disclosure of expert reports;
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 23 (2) two months after the close of discovery in this case; and (3) to accompany a
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 25 reply brief to which Plaintiffs have no opportunity to respond.
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27 III. ARGUMENT

28 Federal Rule of Civil Procedure 26(2)(C) forbids surprise expert testimony
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 30 and reports. Under that rule, a party "must" make expert disclosures "at the times
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 32 and in the sequence that the court orders." The consequences of failing to do so
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 37 ¹ On April 25, 2014, Plaintiffs submitted the Second Supplemental Declaration of
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 39 William S. Cooper to provide the Court with updated citizenship and voter
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 41 registration calculations using the most current available data from the U.S. Census
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 43 Bureau and Yakima County Elections Division. Defendants neither objected to
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 45 this submission nor responded to it in the six weeks then remaining before the June
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 47 10, 2014 discovery cutoff.

1 are well-established. “A party that without substantial justification fails to disclose
2 information required by Rule 26(a) . . . is not, unless such failure is harmless,
3 permitted to use as evidence at a trial, at a hearing, or on a motion any witness or
4 information not so disclosed.” Fed. R. Civ. P. 37(c)(1).
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9 Here, Defendants do not even attempt to explain why they submitted the
10 Second Supplemental Report 16 months after the disclosure deadline, let alone
11 demonstrate that this extraordinarily tardy submission is “harmless.” Indeed,
12 Defendants have identified no new information or data on which the report is based
13 that was not available when Dr. Morrison wrote his initial report. Defendants’
14 decision to spring this new report on Plaintiffs months after the close of discovery
15 and more than a year after the expert disclosure deadline is highly prejudicial.
16 Plaintiffs had no opportunity to examine Dr. Morrison’s analysis, depose
17 Dr. Morrison regarding this analysis, or prepare a rebuttal analysis. Defendants
18 then compounded this prejudice by submitting the Second Supplemental Report
19 with their *reply* brief.
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30 The Civil Rules do not contemplate or countenance this kind of
31 sandbagging. Simply put, it is far too late for Defendants to submit new expert
32 analysis that could and should have been conducted 16 months ago. We are at the
33 eleventh hour of this litigation. The summary judgment hearing is in less than two
34 weeks. Trial is next month. Courts routinely strike and/or exclude untimely expert
35 reports in similar circumstances, and the Court should do so here. *See, e.g., Yeti by*
36 *Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-08 (9th Cir. 2001)
37 (exclusion of expert report affirmed where opposing party received report one
38 month before trial, which would have required a deposition and preparation before
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1 the expert could be examined at trial); *Nw. Pipeline Corp. v. Ross*, C05-1605RSL,
2 2008 WL 1744617, at *8-9 (W.D. Wash. Apr. 11, 2008) (excluding untimely
3 expert reports); *Luke v. Emergency Rooms, P.S.*, C04-5759FDB, 2008 WL 410672,
4 at *4 (W.D. Wash. Feb. 12, 2008) (“The Ninth Circuit has expressly disallowed
5 such untimely filed expert evidence, including evidence presented in opposition to
6 summary judgment motions.”). The Court should do so here.
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12 IV. CONCLUSION

13 For the reasons stated above, Plaintiffs respectfully request that the Court
14 strike the Second Supplemental Report.
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1 DATED: August 6, 2014

s/ Kevin J. Hamilton

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PLAINTIFFS' MOTION TO STRIKE –

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CERTIFICATE OF SERVICE

I certify that on August 6, 2014, I electronically filed the foregoing
Plaintiffs’ Responses and Objections to Defendants’ Statement of Material Facts
with the Clerk of the Court using the CM/ECF system, which will send notification
of such filing to the following attorney(s) of record:

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I certify under penalty of perjury that the foregoing is true and correct.

DATED: August 6, 2014

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