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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Richard Steven Reiss,)

13 Plaintiff,)

No. CV 09-1760-PHX-RCB

14 vs.)

O R D E R

15 Karl Stansel, et al.,)

16 Defendants.)

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Introduction

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Currently there are three matters pending before the court, all of which pertain to defendants' recent service upon plaintiff of supplemental discovery responses. After defendants filed their Notices of Service of those responses, plaintiff filed three separate documents, which he styles as "Response[s] in Opposition[]" to defendants' various supplemental discovery responses. Resps. (Docs. 128; 132 and 134). In each of these Responses, plaintiff "requests" court orders "suppressing" defendants' supplemental discovery responses; and "precluding [them] from attempting to re-open discovery in this matter." Resp.

1 (Doc. 128) at 1; Resps. (Docs. 132 and 134) at 2. As to
2 defendants' first filed Notice (Doc. 126), plaintiff also "requests
3 the Court enjoin Defendants from attempting to submit any new or
4 supplemental discovery that was not disclosed prior to the January
5 18, 2011 close of discovery." Reply (Doc. 135) at 2 (emphasis
6 added).

7 Given the relief which plaintiff is seeking, the court is
8 treating his "Responses in Opposition" as motions. Indeed, at
9 least with respect to defendants' first Notice, the parties seem to
10 be of the same view. As to that Notice and plaintiff's "Response"
11 thereto, defendants filed their own "response[,]" asserting that
12 "'suppression' of [their] Supplemental Response" as to the
13 interrogatories is "unnecessary." Defs' Resp. (Doc. 133) at 2:12-
14 13. Plaintiff, in turn, filed a "Reply" to that Response. See
15 Reply (Doc. 135). To be sure, that is the only "Response"
16 defendants filed in connection with their supplemental discovery
17 disclosures. Even so, there is no prejudice to defendants if the
18 court deems plaintiff's "Responses in Opposition" to be motions
19 because, as explained below, the court is denying plaintiff's
20 requested relief.

21 **Background**

22 The Rule 16 Scheduling and Discovery Order ("the Rule 16
23 Order") in this case provides, among other things, for the
24 completion of discovery, including "supplement[ing] all discovery,
25 . . . on or before **January 18, 2011.**" Ord. (Doc. 39) at 2:14 and
26 16 (emphases in original). On May 24, 2011, defendants Stansel and
27 Behrens filed a "Notice of Service of Discovery to Plaintiff"
28 pertaining to their "*Supplemental* Response to Plaintiff's First

1 Non-Uniform Interrogatories[.]” Not. (Doc. 126) at 15-16; and at
2 22-23 (emphasis in original).

3 Plaintiff challenges service of that supplemental discovery
4 response on procedural and substantive grounds. Procedurally, he
5 argues that that supplemental response is untimely given the
6 January 18, 2011, discovery cut-off date. Substantively, plaintiff
7 asserts that defendants are not supplementing their response to his
8 first non-uniform interrogatories, but rather they are “completely
9 chang[ing] their original response[.]” Id. Plaintiff speculates
10 that defendants made that asserted “change . . . either because
11 [the original response] was false or because it conflicts with
12 statements other, [sic] current ICE [United States Immigration and
13 Customs Enforcement] and EDC [Eloy Detention Center] staff . . .
14 recently made to [him].” Id.

15 Presuming that plaintiff is referring to Interrogatory No. 1,
16 defendants explain that on May 11, 2011, they received a letter
17 from plaintiff “requesting confirmation of [their] original
18 response” to that interrogatory. Resp. (Doc. 133) at 1:27-2:1.¹
19 As defendants explain it, after becoming “aware” of and “agree[ing]
20 with plaintiff as to the need for “clarification[,]” defendants
21 “supplemented their original response” to Interrogatory No. 1. Id.
22 at 2:2-3. Arguing that “‘suppression’” of this supplemental
23 response is “unnecessary[,]” defendants stress that plaintiff
24 requested that response, which “clarifi[es]” an issue; hence their
25 supplemental response was “appropriate.” Id. at 2:12-13; and at
26

27 ¹ Despite indicating that a copy of plaintiff’s letter is attached to
28 defendants’ response, it is not. Plaintiff did include a copy of that letter
though as exhibit C to his reply. See Reply (Doc. 135), exh. C thereto.

1 2:5-6. Defendants also correctly point out that supplementation of
2 their response was "appropriate and timely pursuant to Fed. R. Civ.
3 P. 26(e), which requires supplementation of interrogatory
4 responses." Id. at 2:608. Lastly, defendants contend that if
5 plaintiff believes that their supplemental response to
6 Interrogatory No. 1 is "contrary" to their original response, that
7 is a "credibility" issue, properly left for trial. Id. at 2:9-10.

8 In his reply, plaintiff takes issue with defendants'
9 characterization of both their supplemental discovery response and
10 his letter dated May 6, 2011. As to the former, plaintiff asserts
11 that it was "neither supplemental nor did it clarify anything."
12 Reply (Doc. 135) at 1. Rather, from plaintiff's standpoint, that
13 supplemental response "seeks to supersede the original[,]" and
14 "does not even address the subject of the interrogatory[.]" Id.
15 (citation omitted). Insofar as plaintiff's May 6th letter is
16 concerned, plaintiff notes, as that letter reflects, that he was
17 "merely request[ing] counsel to confirm whether the original
18 response to the interrogatory was false[.]" Id. at 2 (citing exh.
19 C thereto).

20 On June 3, 2011, defendants filed another "Notice of Service"
21 stating that on May 27, 2011, they had served plaintiff with their
22 "Second Supplemental Disclosure Statement[.]" Id. at 1:19. Also on
23 that date, June 3, 2011, defendants filed a "Notice of Service"
24 upon plaintiff of their "Third Supplemental Disclosure
25 Statement[.]" Not. (Doc. 131) at 1:12; and at 1:19.

26 Plaintiff filed two separate but identical responses to those
27 two Notices. Plaintiff contends that given the January 18, 2011,
28 discovery deadline, those two supplemental disclosure statements

1 are untimely. As noted at the outset, plaintiff, therefore,
2 "requests . . . suppress[ion]" of those two statements, and "an
3 Order precluding Defendants from continuing to attempt to re-open
4 discovery in this matter." Resps. (Docs. 132 and 134) at 2.

5 In the midst of these discovery disputes, after this court
6 granted in part and denied in part defendants' summary judgment
7 motion (Doc. 127), on June 2, 2011, the Honorable Edward C. Voss,
8 United States Magistrate Judge ordered the withdrawal of the
9 reference, indicating "that this matter is now ready for trial."
10 Doc. 129.

11 Discussion

12 I. Service of Supplemental Discovery Responses

13 In addition to setting a discovery cutoff date of January 18,
14 2011, the Rule 16 Order herein "remind[s]" the parties that it
15 "governs and supersedes the '30 days before trial' disclosure
16 deadline contained in Fed.R.Civ.P. 26(a)(3)." Ord. (Doc. 39) at
17 2:16-18, ¶ 6. In relevant part that Rule 16 order thus states:

18 (1) failure to timely supplement Rule 26(a)
19 disclosures, including witnesses and exhibits
20 for trial, (2) failure to timely supplement
21 responses to any valid discovery requests,
22 . . . may result in the exclusion of such
23 evidence at trial[.]"

24 Id. at 2:18-3:1 (emphasis added). Perhaps those provisions form
25 the basis for plaintiff's argument that the court should suppress
26 as untimely defendants' supplemental discovery responses. That
27 order cannot be read in isolation, however. It must be read in
28 conjunction with Fed. R. Civ. P. 26(e), which governs supplementing
discovery disclosures and responses. Subsection (1) of that Rule
states:

1 A party who has made a disclosure under
2 Rule 26(a) - or who has responded to an interrogatory,
3 request for production, or request for admission -
4 *must* supplement or correct its disclosure or response:
5 (A) in a timely manner *if* the party learns that in some
6 material respect the disclosure or response is incomplete
7 or incorrect, *and if* the additional or corrective
8 information has not otherwise been made known to the
9 other parties during the discovery process or in writing;
10 or
11 (B) as ordered by the court.

12 Fed. R. Civ. P. 26(e)(1) (emphasis added). Especially given the
13 discretionary language of the Rule 16 Order and the mandatory
14 language of Rule 26(e)(1), the court finds that the two are not at
15 odds. Thus, because on the record as presently constituted it
16 appears that defendants were fulfilling their continuing obligation
17 to supplement under Rule 26(e)(1), the court denies plaintiff's
18 "motions" to suppress as untimely defendants' supplemental
19 discovery responses. The court denies those motions without
20 prejudice, however.

21 Further, the court agrees with defendants that insofar as
22 plaintiff is challenging the substance of their responses to his
23 First Non-Uniform Interrogatories, plaintiff may explore that issue
24 at trial.

25 **II. Proposed Joint Final Pretrial Order**

26 Because this action is now ready for trial, the court hereby
27 **ORDERS** that plaintiff *pro se* and the attorney or attorneys who will
28 be responsible for the trial of this lawsuit to prepare a proposed
Joint Final Pretrial Order and lodge it with the Clerk of the Court
no later than six (6) weeks from the filing date of this order.

Although it is plaintiff *pro se*'s responsibility to ensure
that the proposed Joint Final Pretrial Order is properly prepared
and timely lodged, defendants shall cooperate with plaintiff *pro se*

1 to ensure that such Order is properly prepared and timely lodged.
2 That proposed Joint Final Proposed Pretrial Order shall be signed
3 by plaintiff *pro se* and defense counsel. Plaintiff *pro se* may
4 authorize defense counsel to sign on his behalf.

5 The content of the proposed Joint Final Pretrial Order shall
6 include, but is not limited to, that prescribed in the form of the
7 proposed Joint Final Pretrial Order attached hereto.

8 Pursuant to Fed. R. Civ. P. 16(d) and 37(c), the court will
9 not allow the parties to modify the Joint Final Pretrial Order or
10 introduce at trial any exhibits, witnesses, or other information or
11 to make any objections to exhibits that were not previously
12 specified and/or disclosed as directed by the Court in the Joint
13 Final Pretrial Order, except to prevent manifest injustice.
14 Galdamez v. Potter, 415 F.3d 1015, 1020 (9th Cir. 2005).

15 After the lodging of the signed proposed Joint Final Pretrial
16 Order, at a date to be set by the court, the parties shall
17 participate telephonically in a Pretrial Conference to discuss that
18 Proposed Order. Following that Pretrial Conference, the court will
19 issue the Final Pretrial Order and set a trial date for this
20 action.

21 In light of the foregoing, the court hereby denies as moot
22 "Defendants [sic] Motion for Extension of Time to File Proposed
23 Joint Pretrial Order" (Doc. 138).²

24 For the reasons set forth above, **IT IS ORDERED** that:

25 (1) "Plaintiff's Response in Opposition to Defendants'
26

27 ² As an aside, the court observes that this motion was not necessary
28 because, despite what defendants contend, the July 26, 2010, Rule 16 Scheduling and
Discovery Order did not include a time frame for filing the Proposed Joint Pretrial
Order.

1 Supplemental Response to Plaintiff's First Non-Uniform
2 Interrogatories" (Doc. 128), which the court deems to be a motion
3 to suppress, is **DENIED** without prejudice;

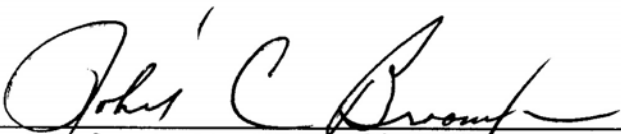
4 (2) "Plaintiff's Response in Opposition to Defendants' Second
5 Supplemental Disclosure Statement" (Doc. 132), which the court
6 deems to be a motion to suppress, is **DENIED** without prejudice;

7 (3) "Plaintiff's Response in Opposition to Defendants' Third
8 Supplemental Disclosure Statement" (Doc. 134), which the court
9 deems to be a motion to suppress, is **DENIED** without prejudice;

10 (4) "Defendants [sic] Motion for Extension of time to File
11 Proposed Joint Pretrial Order" (Doc. 138) is **DENIED** as moot; and

12 (5) the parties shall lodge a Proposed Joint Final Pretrial
13 Order in accordance herewith by no later than six (6) weeks from
14 the filing date of this order.

15 DATED this 24th day of June, 2011.

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19 _____
20 Robert C. Broomfield
21 Senior United States District Judge
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25 Copies to counsel of record and plaintiff *pro se*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RICHARD STEVEN REISS,)	
)	
Plaintiff,)	
)	CIV 09-1760 PHX RCB
vs.)	FINAL PRETRIAL ORDER
)	
KARL STANSEL, et al.,)	
)	
Defendants,)	
_____)	

This Final Pretrial Order supersedes the pleadings and shall govern the trial and further proceedings in this case.

A. STATEMENT OF JURISDICTION. Cite the statute(s) which gives this Court jurisdiction:

(example - Jurisdiction in this case is based on diversity of citizenship under Title 28 U.S.C. §1332.)

B. NATURE OF ACTION. Provide a concise statement of the type of case, the cause of the action, and the relief sought:

(example - This is a products liability case wherein

1 the plaintiff seeks damages for personal injuries
2 sustained when he fell from the driver's seat of the
3 forklift. The plaintiff contends that the forklift was
4 defectively designed and manufactured by the defendant
and the defects were a producing cause of his injuries
and damages.)

5 C. CONTENTIONS OF THE PARTIES. With respect to each
6 count of the complaint, counterclaim or cross-claim, and to any
7 defense, affirmative defense, or the rebuttal of a presumption
8 where the burden of proof has shifted, the party having the
9 burden of proof shall list the elements or standards that must be
10 proved in order for the party to prevail on that claim or
11 defense:

12 (example - In order to prevail on this products
13 liability case, the plaintiff, must prove the following
elements...)

14 example - In order to defeat this products liability
15 claim based on the statute of limitations or repose,
the defendant must prove the following elements...

16 D. STIPULATION AND UNCONTESTED FACTS

17 E. CONTESTED ISSUES OF FACT AND LAW (See and refer to
18 subpart C above)

19 F. LIST OF WITNESSES. Include or separately attach a
20 list(s) of witnesses, identifying each as either plaintiff's or
21 defendants' witnesses and indicating whether the witness is a
22 fact or expert witness.

23 G. LIST OF EXHIBITS. Include or separately attach a
24 list(s) of numbered exhibits, identifying each as either
25 plaintiff's or defendants', with a description of each containing
26 sufficient information to identify the exhibit, indicating
27 whether there is an objection to its admission and, if so, the
28 nature of the objection(s) anticipated. The actual exhibits must

1 be later marked according to instructions which will be provided
2 at the final pre-trial conference.

3 H. LIST OF DEPOSITIONS. Include or separately attach
4 those portions of depositions that will be read at trial by each
5 party listed by page and line number, whether there is an
6 objection to each passage and, if so, the nature of the
7 objection.

8 I. MOTIONS IN LIMINE. Motions in Limine are intended
9 to encompass only significant evidentiary issues and are
10 generally discouraged. Such motions, if allowed,
11 shall be filed by _____, 20___. Any responses
12 shall be filed by _____, 20___. No replies may be
13 filed without permission of the court. Motions in Limine are
14 deemed submitted without argument.

15 J. LIST OF ANY PENDING UNRULED UPON MOTIONS

16 K. PROBABLE LENGTH OF TRIAL

17 For a Bench Trial

18 L. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
19 shall be simultaneously filed by _____,
20 20__.

21 For a Jury Trial

22 M. INSTRUCTIONS. The parties shall seek to stipulate
23 to jury instructions and any stipulated jury instructions shall
24 be filed _____, 20___. Instructions
25 which are not agreed upon shall include citation to authority
26 which shall not exceed one page per instruction and shall be
27 filed by _____, 20___. Objections to
28 any non-agreed upon instruction shall include citation to

1 authority which shall not exceed one page per instruction and may
2 be filed by _____, 20__.

3 N. VOIR DIRE QUESTIONS. Any proposed voir dire questions
4 shall be filed by _____, 20__.

5 O. CERTIFICATIONS. Plaintiff, pro se, and defense counsel
6 in this action do hereby certify and acknowledge the
7 following:

8 1. All discovery has been completed.

9 2. The identity of each witness has been disclosed
10 to plaintiff, pro se, and defense counsel.

11 3. Each exhibit listed herein (a) is in existence;
12 and (b) has been disclosed and shown to plaintiff, pro se, and
13 defense counsel.

14 APPROVED AS TO FORM AND CONTENT:

15
16 _____
17 Plaintiff, pro se

Attorney for Defendants

18
19 THIS JOINT PRETRIAL ORDER IS HEREBY APPROVED AND TRIAL IS
20 SET FOR _____, 20__ AT 9:00 A.M., COURTROOM 606,
21 Sixth Floor, Sandra Day O'Connor United States Courthouse, 401 W.
22 Washington St., Phoenix, Arizona; COUNSEL SHALL APPEAR AT 8:30
23 A.M.

24 DATED this ____ day of _____, 2011.

25
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27 _____
28 ROBERT C. BROOMFIELD
SENIOR UNITED STATES DISTRICT JUDGE