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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Lisa St. Clair and Richard Poulin, as)  
10 parents and natural guardians of HP, a)  
minor child,

No. CV-10-1275-PHX-LOA

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Plaintiffs,

**ORDER**

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vs.

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14 Nellcor Puritan Bennett, LLC, a Delaware)  
Limited Liability Company,

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Defendant.

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Before the Court is Defendant Nellcor Puritan Bennett, LLC’s (“Nellcor”) Motion for Extension of Time to Serve Reports for Non-Retained Expert Witnesses, filed on February 25, 2011. (Doc. 38) The Motion requests “the Court extend the deadline for Nellcor to serve non-retained expert witness reports until thirty (30) days after examining the resuscitator bag and thirty (30) days after taking the deposition of plaintiffs’ retained expert David Eckmann[.]” (*Id.* at 1) Because timing is critical at this stage of the case, the Court denied the motion on March 9, 2011, indicating a formal order would follow. (Doc. 43) This is that order.

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After considering the briefing and file as a whole, the Court finds that Nellcor has failed to demonstrate good cause and the exercise of due diligence to comply with the expert disclosure deadline to warrant modification of the firm Rule 16 deadlines. Nellcor’s motion is denied.

1 **I. Background**

2 This products liability diversity action was removed on June 16, 2010 from the  
3 Superior Court of Arizona, Maricopa County. (Doc. 1) Suit was initially filed on August 7,  
4 2009, against six corporate defendants, including Nellcor which was served three days later  
5 on August 10, 2009. (Doc. 1-2 at 21; doc. 1-4 at 2) The First Amended Complaint was filed  
6 on August 20, 2009. (Doc. at 169-176) Nellcor answered on October 7, 2009. (*Id.* at 83-93;  
7 doc. 1-4 at 2) It appears from the State record that meaningful discovery was conducted by  
8 the various parties before Plaintiffs voluntarily dismissed all defendants except Nellcor in the  
9 State action on or about June 3, 2010. (*Id.* at 201-203)

10 The parties' August 20, 2010 Second Amended Joint Case Management Report  
11 provides a summary of the parties' claims. While Plaintiffs' three-year old child, H.P., was  
12 recovering from surgery at Phoenix Children's Hospital ("PCH"), H.P.'s healthcare providers  
13 utilized an allegedly defective resuscitator bag manufactured by Nellcor, without realizing  
14 that it was not functioning properly. (Doc. 28 at 2) As a consequence, Plaintiffs contend  
15 H.P. suffered a thirteen minute deprivation of oxygen, leaving her permanently and severely  
16 brain injured. (*Id.*) Plaintiffs assert product liability and negligence claims against Nellcor  
17 arising from the design, manufacture, and sale of the allegedly defective resuscitator. Nellcor  
18 denies its resuscitator bag was defective and contends that Nellcor's conduct was reasonable  
19 and appropriate and that the resuscitator bag used on H.P. did not cause or contribute to the  
20 injuries and damages claimed by Plaintiffs. (*Id.*)

21 Relevant to Nellcor's Motion for Extension of Time to Serve Reports for  
22 Non-Retained Expert Witnesses is information contained in the State record. According to  
23 Plaintiffs, counsel learned by letter, dated December 7, 2009, from counsel for Phoenix  
24 Children's Hospital "(who presently maintains custody of the subject resuscitator bag)" that  
25 the actual resuscitator bag involved in H.P.'s September 13, 2007 incident was allegedly "a  
26 single-patient use pediatric flat bag mask PEEP PBMV, lot number 7141147, manufactured  
27 and sold by Nellcor []." (Doc. 1-2 at 155; Exhibit ("Exh") C, at 178) This information is  
28 reflected in Plaintiffs' motion for leave to file a second amended complaint, filed on April

1 26, 2010. (*Id.* at 153-158) The amendment motion indicates that at the then recent  
2 depositions of PCH employees, counsel “was able to inspect the bag involved in the  
3 incident.” (*Id.* at 155) Plaintiffs contend that “defendants were likely aware of this issue  
4 [misidentification of the wrong resuscitator bag involved in H.P.’s incident] before it was  
5 discovered by the Plaintiffs.” (*Id.* at 156) The Court assumes, without knowing for certain,  
6 that Nellcor’s lawyers were also present at these depositions of PCH’s employees and  
7 examined the correct resuscitator bag. Most certainly, however, two of Nellcor’s counsel  
8 were endorsed on Plaintiffs’ amendment motion, and one was endorsed on the December 7,  
9 2009 letter from PCH’s counsel. (*Id.* at 158; Exh C at 178) Plaintiffs’ amendment motion  
10 was granted on May 21, 2010. (*Id.* at 192-193) Plaintiffs voluntarily dismissed all defendants  
11 except Nellcor in the Maricopa County Superior Court action on or about June 3, 2010. (*Id.*  
12 at 201-203) The lawsuit was removed to this District Court shortly thereafter.

13           At the August 23, 2010 scheduling conference, the Court informed counsel that  
14 it would give great weight to the deadlines counsel wanted within reason. It was made plain  
15 to counsel, however, both verbally and in the Court’s subsequent order that once the  
16 deadlines were agreed upon and established, the “deadlines in the scheduling order were  
17 **real, firm**, and, consistent with the undersigned’s responsibilities mandated by Congress in  
18 the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 *et seq.*, **will not be altered** except  
19 upon a showing of good cause and by leave of the assigned trial judge.” (Doc. 29 at 4)  
20 (emphasis in original; footnote omitted). The scheduling order makes clear that in the Ninth  
21 Circuit, the Rule 16 deadlines are “to be taken seriously,” citing *Janicki Logging Co. v.*  
22 *Mateer*, 42 F.3d 561, 566 (9th Cir. 1994). (*Id.*) Further, counsel were informed orally and  
23 in writing that “[t]he Court intends to enforce the deadlines in this Order. Counsel should  
24 plan their litigation activities accordingly.” (*Id.*)

25           With the firmness of the prospective deadlines patent and counsels’ active  
26 involvement in setting them, the Court fashioned mutually agreed-upon deadlines for the fair  
27 and reasonably expeditious resolution of this case. The scheduling order mandates, among  
28 others, that Plaintiffs’ expert disclosures will be made by **Friday, January 7, 2011**; Nellcor’s

1 expert disclosures “(regardless of whether such expert witness has or has not been  
2 specifically retained for this case, such as, if the expert is an employee of [Nellcor])” will be  
3 made by **Friday, February 25, 2011**; Plaintiffs’ true rebuttal expert disclosures by **Friday,**  
4 **March 25, 2011**; supplementation of all discovery pursuant to Rule 26(e), Fed.R.Civ.P., by  
5 **Friday, April 29, 2011**; completion of all discovery by **Tuesday, May 31, 2011**; and filing  
6 of dispositive motion(s) by **Thursday, June 30, 2011**. (*Id.* at 5-6) (emphasis in original).

7           Nellcor’s Motion confirms that Plaintiffs timely “served 11 expert reports from  
8 retained experts and a cover letter identifying various treating physicians as expert  
9 witnesses.” (Doc. 38 at 2) Nevertheless, Nellcor requests an extension of the deadline for  
10 the disclosure of its *own employee*, non-retained experts and reports “until thirty (30) days  
11 after examining the resuscitator bag and thirty (30) days after taking the deposition of  
12 plaintiffs’ retained expert David Eckmann[.]” (*Id.* at 1) Nellcor claims that it is “unable to  
13 timely provide written reports from” Roger Mecca, M.D., VP of Medical Affairs, and Stan  
14 Kaus, a Sustaining Engineer, both Nellcor employees. Nellcor vaguely claims that “[t]he  
15 examination of the subject resuscitator bag is currently scheduled to take place on a date to  
16 be determined prior to April 30, 2011 by agreement of counsel.” (*Id.* at 2) Even if a  
17 stipulation alone could modify a Rule 16 scheduling order, which it cannot, no written  
18 stipulation is provided the Court regarding a date for the bag’s inspection nor is an  
19 explanation given why Nellcor’s employees could not have examined the resuscitator bag  
20 earlier in this case. Nellcor criticizes one of Plaintiffs’ experts, Dr. David Eckmann, whose  
21 report allegedly “raises only general criticisms of the design, manufacturing and testing of  
22 the subject resuscitator bag, but does not sufficiently detail his general criticisms in a manner  
23 that allows for a meaningful written response.” (*Id.* at 3)

24           Plaintiffs’ Response denies Nellcor’s criticism of Dr. Eckmann’s report and  
25 that a date was currently scheduled for Nellcor’s employees to examine the resuscitator bag.<sup>1</sup>

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27           <sup>1</sup> Plaintiffs’ Response was not properly filed in electronic, text-searchable format,  
28 contrary to the District Court’s Local Rules, LRCiv 7.1(c). This non-compliance will be

1 (Doc. 39 at 3) Plaintiffs claim that Nellcor “raised this issue in late February [2011], and  
2 Plaintiffs promptly requested that the defense provide proposed dates for this examination,  
3 but Plaintiffs have not received any specific date when this examination is to take place.”  
4 (*Id.*) Attorney Tanner, Plaintiffs’ out-of-district counsel, explained that he is lead counsel  
5 in a three-week trial, will be out of the country during the last two weeks of March, and  
6 “desires to be present if this critical evidence is examined.” (*Id.*) This response suggests it  
7 will be, at least, April before the various individuals and conditions can be met before the  
8 lawyers and Nellcor’s employees may examine the bag. Plaintiffs write that they do not  
9 oppose Nellcor’s request for extension if “Plaintiffs receive reciprocal extensions of time to  
10 complete the remaining discovery and assembly of rebuttal information.” (*Id.* at 3-4)  
11 “However, in the absence of such a reciprocal extension of time, this extension will prove  
12 prejudicial to Plaintiffs, and Plaintiffs have no choice but to oppose it.” (*Id.*)

13           Nellcor’s March 7, 2011 Reply indicates that this lawsuit is “being handled by  
14 experienced trial counsel” who “recently exchanged dates and compared schedules and have  
15 determined that the week of April 18, 2011 will allow the best opportunity to conduct both  
16 the device examination and the examination of HP in Phoenix, Arizona.” (Doc. 42 at 1-2)  
17 “Nellcor requests May 6, 2011 as the operative deadline for the parties to serve expert reports  
18 arising out of the inspection of the device . . . [and] May 20, 2011 as the operative deadline  
19 for either party to serve a rebuttal report in response to expert reports arising out of the  
20 inspection of the device.” (*Id.* at 2) Nellcor’s proposed May 20, 2011 deadline for the parties  
21 to serve a rebuttal report would leave a mere 11 days for the *completion* of all discovery,  
22 including, of course, the scheduling and taking of expert rebuttal depositions. Disclosure this  
23 late will most likely require the Court to modify the scheduling order again and, perhaps,  
24 re-open discovery, rather than focusing on dispositive motions or setting this case for a final  
25 pretrial conference and trial. Such multiple modifications to the Court’s and parties’  
26 schedules diminish the importance of the initial scheduling order and may support a finding

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28 addressed at the end of this order.

1 that the failure to timely disclose expert witnesses was not harmless. *Wong v. Regents of the*  
2 *Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (“Courts set such schedules to permit the  
3 court and the parties to deal with cases in a thorough and orderly manner, and they must be  
4 allowed to enforce them, unless there are good reasons not to. The district court did not abuse  
5 its discretion here in refusing to permit Wong to supplement his disclosure with the  
6 additional expert witnesses and in barring testimony by and relying upon those witnesses.”).

## 7 **II. Good Cause and Rule 16**

8 Federal Rule of Civil Procedure 16(b)’s “good cause” standard primarily  
9 considers the diligence of the party seeking the amendment. *Johnson v. Mammoth*  
10 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). A district court may modify the  
11 pretrial schedule “if it cannot reasonably be met despite diligence of the party seeking the  
12 extension.” *Id.* at 608; Fed.R.Civ.P. 16 advisory committee’s notes (1983 amendment).  
13 “Good cause” means the Rule 16 scheduling deadlines cannot be met despite the party’s  
14 diligence, citing Miller & Kane, *Federal Practice and Procedure* § 1522.1 at 231 (2d ed.  
15 1990). *Id.* “Carelessness is not compatible with a finding of diligence and offers no reason  
16 for a grant of relief.” *Soto v. Greyhound Lines, Inc.*, 2010 WL 457351, \* 1 (E.D.Cal., Feb.  
17 3, 2010). “Although the existence or degree of prejudice to the party opposing the  
18 modification might supply additional reasons to deny a motion, the focus of the inquiry is  
19 upon the moving party’s reasons for seeking modification. If that party was not diligent, the  
20 inquiry should end.” *Id.*

## 21 **III. Discussion**

22 The requisite good cause for extending Nellcor’s non-retained expert disclosure  
23 and report deadline has not been shown. The docket reflects that Nellcor knew, at least, as  
24 early as PCH’s December 7, 2009 letter, of the type and lot number of the resuscitator bag  
25 (“a single-patient use pediatric flat bag mask PEEP PBMV, lot number 7141147,  
26 manufactured and sold by Nellcor”) that Plaintiff claims caused H.P.’s serious injuries and  
27 who had physical possession of it at the time. It is beyond a simple judge’s understanding  
28 why a product manufacturer would wait approximately 18 months after it had been sued for

1 injuries and damages worth potentially millions of dollars before its in-house experts  
2 examine its alleged defective product unless, of course, there is a motive for such delay, such  
3 as, gaining a tactical advantage by deposing an adverse party’s expert before disclosing its  
4 own employees’ expert opinions. Nellcor is attempting to undo the measured schedule  
5 established to facilitate a thorough and orderly resolution of this case not for some extremely  
6 busy, nationally-renowned expert over whom Nellcor has little control but for two of its own  
7 employees over whom it has significant, if not total, employment control. Surely,  
8 “experienced trial counsel” recognizes that at some point in litigation when cooperative  
9 efforts toward discovery with adverse counsel fail and time is running short, counsel must  
10 resort to the Federal Rules of Procedure and seek judicial intervention for assistance. Waiting  
11 until the very last day to seek judicial approval of an extension to disclose non-retained  
12 experts and their reports is clearly too late and a formula for possible disastrous  
13 consequences. *Wilderness Development, LLC v. Hash*, 2009 WL 564224, \* 3 (D. Mont.  
14 2009) (“The federal courts strictly enforce the expert witness disclosure requirements in Rule  
15 26(a)(2)(B), and have the discretion to impose sanctions for an untimely or inadequate expert  
16 disclosure including the exclusion of expert witness testimony.”) (citing *Yeti by Molly, Ltd.*  
17 *v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). “Exclusion of expert  
18 testimony ‘is an appropriate remedy for failing to fulfill the required disclosure requirements  
19 of Rule 26(a).’” *Id.* “Rule 37(c)(1) gives teeth to [the disclosure] requirements by forbidding  
20 the use at trial of any information required to be disclosed by Rule 26(a) that is not properly  
21 disclosed.” *Yeti by Molly*, 259 F.3d at 1106.

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24 <sup>2</sup> Federal Rule of Civil Procedure 37(c)(1) provides in part:

25 1) **Failure to Disclose or Supplement.** If a party fails to provide information or  
26 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use  
27 that information or witness to supply evidence on a motion, at a hearing, or at a  
28 trial, unless the failure was substantially justified or is harmless.

28 Rule 37(c)(1), Fed.R.Civ.P.

1           If sufficiently motivated to discover this case, the length of time provided to  
2 Nellcor’s counsel in the scheduling order to, for example, schedule an examination of the  
3 alleged defective product was more than reasonably adequate if diligence were exercised  
4 with the slightest amount of planning. If the Court were to grant both Nellcor’s and  
5 Plaintiffs’ requested extensions, it would result in a serious disruption of the August 24, 2010  
6 scheduling order and the orderly resolution of this case or reduce an important case  
7 management order into a nullity. Nellcor has not demonstrated that the Rule 16 pretrial  
8 schedule “cannot reasonably be met despite diligence” by Nellcor. *Johnson*, 975 F.2d at 608.  
9 Like other deadlines set forth in the federal civil rules, to hold that good cause has been  
10 shown here “would allow the good cause exception to swallow the rule.” *Townsel v. County*  
11 *of Contra Costa*, 820 F.2d 319, 320 (9<sup>th</sup> Cir. 1987). Plaintiffs appear to have fully complied  
12 with the scheduling order’s January 7, 2011 expert disclosure deadline. Fundamental fairness  
13 and impartiality demand nothing less from Nellcor.

14           Accordingly,

15           **IT IS ORDERED** that Defendant Nellcor Puritan Bennett, LLC’s Motion for  
16 Extension of Time to Serve Reports for Non-Retained Expert Witnesses, doc. 38, is  
17 **DENIED**.

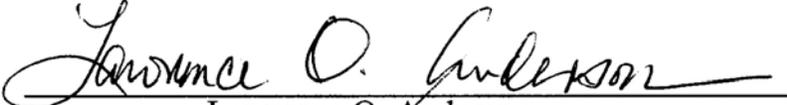
18           **IT IS FURTHER ORDERED** that, except as set forth herein, all pleadings,  
19 motions, memoranda, or other filings in this case shall be created via personal computer with  
20 a word processing application, e.g., Microsoft Word® or Corel WordPerfect®, then  
21 converted to portable document format (.pdf). See, definition of “.pdf,” ECF Manual, at  
22 I(A), p. 2. (“[E]lectronic documents must be converted to .pdf directly from a word  
23 processing program (e.g., Microsoft Word® or Corel WordPerfect®) and must be text  
24 searchable.”). Such filings shall not be printed to paper and then scanned and saved as  
25 portable document format (.pdf). Documents which exist only in paper form, like exhibits  
26 or certain attachments to pleadings may, however, be scanned from a paper copy and saved

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1 in a portable document format (.pdf). Future violations of this or other Local Rules may  
2 result in the striking of the non-conforming motion, brief or other document.

3 Dated this 21<sup>st</sup> day of March, 2011.

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6 Lawrence O. Anderson  
United States Magistrate Judge

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