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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

ROBERT MORRIS,)	1:08-cv-01422-AWI-MJS
)	
Plaintiff,)	ORDER RE: REQUEST TO
)	SUPPLEMENT WITNESS LIST
v.)	
)	(Doc. 215)
OFFICER CHRISTOPHER LONG,)	
)	
Defendant.)	

I. INTRODUCTION

Defendant Officer Christopher Long (“Defendant”) has filed a request to supplement his witness list in the modified pretrial order and to limit the medical evidence and testimony the parties may present at trial on the issue of damages to that which was in both parties’ possession at the time of the April 30, 2012 motions in limine hearing. For reasons discussed below, the request to supplement witness list shall be denied; the request to limit medical evidence shall be denied without prejudice.

II. FACTS AND PROCEDURAL BACKGROUND

The Court refers the parties to its prior orders for a complete chronology of the proceedings. On January 11, 2012, plaintiff Robert Morris (“Plaintiff”) filed his ninth amended complaint, asserting

1 one cause of action against Defendant for federal civil rights violations (specifically, excessive force
2 in violation of the Fourth Amendment right to be free of unreasonable searches and seizures)
3 pursuant to 42 U.S.C. § 1983. On May 15, 2012, the Court issued a modified pretrial order
4 containing lists of the witnesses the parties expected to call at trial. On July 3, 2012, Defendant filed
5 a request to supplement his witness list with seven impeachment witnesses. Defendant further
6 requested the Court limit the medical evidence and testimony the parties may present at trial on the
7 issue of damages to that which was in both parties' possession at the time of the April 30, 2012
8 motions in limine hearing. On July 7, 2012, Plaintiff filed his opposition to Defendant's request.

9 10 **III. LEGAL STANDARD**

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12 Federal Rule of Civil Procedure 16(d) provides: "After any conference under this rule, the court
13 should issue an order reciting the action taken. This order controls the course of the action unless
14 the court modifies it." Fed. R. Civ. P. 16(d). "District courts have 'broad discretion to manage
15 discovery and to control the court of litigation under Federal Rule of Civil Procedure 16.' [Citation.]
16 Where . . . the district court has entered a pretrial order, modifications are allowed 'only to prevent
17 manifest injustice.' [Citation.]" *Hunt v. County of Orange*, 672 F.3d 606, 616 (9th Cir. 2012). "The
18 district court should consider four factors in determining whether to modify the parties' pretrial
19 order: (1) the degree of prejudice or surprise to the [opposing party] if the order is modified; (2) the
20 ability of the [opposing party] to cure any prejudice; (3) the impact of the modification on the orderly
21 and efficient conduct of the case; and (4) any degree of willfulness or bad faith on the part of the
22 party seeking the modification. [Citation.] It is the moving party's burden to show that a review of
23 these factors warrants a conclusion that manifest injustice would result if the pretrial order is not
24 modified. [Citation.]" *Id.* (quoting *Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998) (abrogated
25 on other ground as recognized in *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365,
26 369 (9th Cir. 1998)). "Where, upon consideration of factors such as [these], the court determines

1 that refusal to allow a modification might result in injustice while allowance would cause no
2 substantial injury to the opponent and no more than slight inconvenience to the court, a modification
3 should ordinarily be allowed.” *U.S. v. First Nat. Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981).
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5 **IV. DISCUSSION**
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7 ***A. Defendant’s request to supplement witness list*** – Defendant first requests he be allowed to add
8 the following individuals to his witness list: Officer Shawn Bishop, Sergeant William Grove,
9 Sergeant Anthony Dewall, Officer Greg Jouroyan, Stephanie Pina, Officer Darren Nelson and
10 Rhonda Smith. Defendant contends these individuals were percipient witnesses to collateral matters
11 involving himself, Heather Ziegenbein and Bryon Stuckey, and that their testimony may be needed
12 to impeach Ziegenbein’s and Stuckey’s testimony regarding such matters. Having reviewed the
13 pleadings of record and all competent and admissible evidence submitted, the Court, applying the
14 foregoing principles, finds Defendant has failed to establish manifest injustice would result if
15 supplementation of the modified pretrial order to include these witnesses were not allowed.

16 In a declaration submitted with the request, defense counsel Brande L. Gustafson testifies
17 omission of these individuals from the earlier pretrial orders was inadvertent: “I became aware after
18 reviewing the 41 witnesses listed for the Plaintiff and the 98 witnesses listed for the Defendant that
19 the seven impeachment witnesses . . . had inadvertently been omitted from the witness[] lists.
20 Defense counsel had been operating under the mistaken belief that these seven witnesses had been
21 on the witness list of the Joint Pretrial Statement and were therefore also on the witness list for the
22 Pretrial Orders.” Problematically for Defendant, Plaintiff contends – and Defendant does not dispute
23 – that the identities of the individuals were not disclosed previously in the litigation. Defendant
24 further concedes the names of the individuals were redacted in discovery responses produced to
25 Plaintiff pursuant to court order. Under these circumstances, the Court cannot presume Defendant
26 intended to include these individuals on his witness list, and inclusion of these individuals at this
27

1 stage of the litigation would cause significant surprise to Plaintiff given Defendant's nondisclosures.

2 Permitting Defendant to supplement his witness list at this point in time would also cause
3 significant prejudice to Plaintiff. Defendant first requested leave to supplement his witness list
4 through the filing of this request on July 3, 2012. Although this was seven weeks before the August
5 21, 2012 trial date, it was only six days before the July 9, 2012 filing date for further motions in
6 limine, leaving Plaintiff insufficient time to familiarize himself with the witnesses' expected
7 testimony before moving to preclude it. The only way to remedy such prejudice would be to extend
8 discovery to allow Plaintiff to depose the witnesses and to set a new briefing schedule for motions
9 in limine. These actions would in turn require a continuance of the trial date. Thus, introduction of
10 new witnesses at this stage of the litigation would have an impact on the orderly and efficient
11 conduct of the case. Although the record does not reveal willfulness or bad faith on the part of
12 Defendant in seeking a modification, the foregoing circumstances weigh against modifying the
13 modified pretrial order. Accordingly, Defendant's request to supplement must be denied.¹

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15 ***B. Defendant's request to limit medical evidence*** – Defendant further requests the Court limit the
16 medical evidence and testimony the parties may present at trial on the issue of damages to that which
17 was in both parties' possession at the time of the April 30, 2012 motions in limine hearing. Having
18 reviewed the pleadings of record and all competent and admissible evidence submitted, the Court
19 finds this issue to be more appropriately addressed at a motion in limine hearing. Defendant has
20 raised this issue in his motions in limine filed July 9, 2012. Accordingly, Defendant's request to
21 limit medical evidence at trial shall be denied without prejudice

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25 ¹ The Court further notes Defendant does not seek to introduce these witnesses to testify on
26 the emergent matters that led the Court to reopen limited discovery and vacate all previous dates
27 back on April 30, 2012. Rather, Defendant wishes to use these witnesses to rebut the testimony of
28 persons whose identities were disclosed *last year* by Plaintiff.

V. DISPOSITION

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Based on the foregoing, Defendant's request to supplement his witness list is DENIED. Defendant's request to limit the medical evidence and testimony the parties may present at trial on the issue of damages to that which was in both parties' possession at the time of the April 30, 2012 motions in limine hearing is DENIED without prejudice.

IT IS SO ORDERED.

Dated: July 10, 2012



CHIEF UNITED STATES DISTRICT JUDGE