

1 allow this deposition in light of the fact that she was timely disclosed and the plaintiffs chose not
2 to depose her during the discovery period. The request to depose Ms. Hitchcock is **DENIED**.

3 Second, the plaintiffs seek to re-depose Lorelei Oviatt as to whom the defendants have
4 provided an additional disclosure outlining her expected testimony related to the new map.
5 Notably, there is no indication in the Court’s order (Doc. 89)—an order drafted and proposed by
6 counsel—that the plaintiffs would have any right to re-depose Ms. Oviatt related to new testimony
7 regarding the new map. In fact, except for receiving the right to re-depose Dr. Johnson, the
8 plaintiffs reserved only the right to *seek* to depose “newly-disclosed witnesses, as well as Teresa
9 Hitchcock and Karen Rhea.” (Doc. 89 at 2) The defendants were obligated *only* to produce Rule
10 26 disclosures related to Ms. Oviatt’s “anticipated testimony” related to the new map and this has
11 occurred. There is no indication in the order, despite the clear anticipation that Ms. Oviatt *would*
12 have new testimony, that she would be re-deposed. Thus the request to re-depose Ms. Oviatt is
13 **DENIED**.

14 Finally, the plaintiffs seek to depose Kim Salas. The defendants disclosed Ms. Salas as to
15 “the communities of interests” factor related to plaintiffs’ new map. The plaintiffs argued that
16 allowing the deposition would permit the trial to go “more smoothly” because everyone would
17 know in advance what the witness will say. However, the Court has great difficulty with the fact
18 that the plaintiffs created this situation by failing to comply with the Court’s orders related to the
19 discovery deadlines. When the Court scheduled the case almost exactly a year ago (Doc. 30), it
20 adopted the deadlines for non-expert and expert discovery that counsel requested (*See* Doc. 28 at
21 8). Despite this, the plaintiffs submitted the second illustrative map prepared by Mr. Ely about 45
22 days after this deadline (Doc. 85). This failure to comply with the case schedule has caused a
23 cavalcade of delay and has disrupted the orderly resolution of this matter.

24 Nevertheless, at the informal conference, the plaintiffs did not provide the Court a
25 satisfactory explanation why the plaintiffs were entitled to create this situation—by submitting the
26 map late—and then use the discovery allowed for the defense to cure the prejudice as an
27 opportunity to reopen discovery for them as well. Rather, the Court is reminded of the parable of
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1 how to boil a frog¹. Unfortunately, in the current dispute, it appears the Court is envisioned as the
2 frog; not so. Discovery must come to an end and it was the Court's order and anticipation that the
3 end would have occurred on February 10, 2017.

4 Based upon the statements made at the informal conference, it is clear there is no
5 compromise is possible on this topic and, frankly, the Court heard no justification that would meet
6 the stringent requirements of Rule 16.² At least in the Court's view, the proffered arguments did
7 not justify amending the deadline to allow the filing of non-dispositive motions (which expired, on
8 February 20, 2017) let alone justification to amend the case schedule to allow additional discovery.
9 In any event, the Court **ORDERS**:

- 10 1. The request to re-depose Ms. Oviatt and to depose Ms. Hitchcock is **DENIED**;
- 11 2. The plaintiffs may file their motion to amend the case schedule to extend the
12 deadline for filing non-dispositive motions and to seek to amend the case schedule related to
13 discovery deadlines.³ If they choose to proceed with the motion, they **SHALL** file their notice of
14 motion no later than **September 11, 2017**;

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22 ¹ In the parable, the frog cannot be dropped into a pot of boiling water because it will leap out and save itself.
23 However, if it is placed in a cool pot of water and the temperature is raised one degree at a time, the frog will fail to
24 appreciate the danger and will not jump out, resulting in it being boiled alive.

25 ² Plaintiffs' counsel focused on the prejudice to them if the deposition was not permitted. However, under
26 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992), “. . . Rule 16(b)'s “good cause” standard
27 primarily concerns the diligence of the party seeking the amendment. The district court may modify the pretrial
28 schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Fed.R.Civ.P. 16
advisory committee's notes (1983 amendment) . . . [T]he focus of the inquiry is upon the moving party's reasons for
seeking modification. . . . If that party was not diligent, the inquiry should end.” Likewise, under Jackson v. Laureate,
Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999) this Court held, the “good cause” standard requires the parties to
demonstrate that “noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding her diligent efforts
to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the
time of the Rule 16 Scheduling conference . . .”

³ Clearly, they must first demonstrate good cause for the former amendment before the latter amendment is
relevant.

