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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

VERNON WAYNE MCNEAL,  
  
                                Plaintiff,  
  
                                v.  
  
EVERT, et al.,  
  
                                Defendants.

No. 2:05-cv-0441-GEB-EFB

**ORDER GRANTING DEFENDANTS'  
MOTION TO MODIFY THE PRETRIAL  
ORDER**

On February 8, 2017, Defendants filed a motion to modify the portion of the Pretrial Order filed on February 24, 2015, concerning the expert witnesses listed therein. Defs.' Mot. ("Mot."), ECF No. 281. The Pretrial Order lists the following expert witnesses: Correctional Captain R. Plainer ("Plainer") (regarding use of force policies and procedures . . ."), and Chief Medical Executive Dr. D. Swingle **"or her designee (regarding plaintiff's injuries and their cause)."** ("Dr. Swingle"). Pretrial Order ("PO") (Emphasis added), 15:24-27, ECF No. 180. Defendants argue as follows that changed circumstances justify the modification they seek:

Since [the date the Pretrial Order issued],

1 the trial date in this case has been set and  
2 re-set on five occasions, and Dr. Swingle has  
3 retired from [the California Department of  
4 Corrections and Rehabilitation ("CDCR")],  
5 precluding her from participating in the  
6 trial currently scheduled to begin on October  
7 24, 2017. Defendants request to change . . .  
8 Plainer's designation from non-retained to a  
9 retained expert as he has also retired from  
10 CDCR. Defendants therefore request the Court  
11 to allow them to call Galen H. Church, D.O.  
12 ["Dr. Church"], an employee of [CDCR] as  
13 the Chief Physician and Surgeon at the  
14 Correctional Health Care Facility in  
15 Stockton, California, as a medical expert,  
16 who will render substantially the same  
17 opinions as Dr. Swingle. Defendants also  
18 request the Court change . . . Plainer's  
19 designation from non-retained to retained  
20 expert.

21 Mot. 1:28-2:8, ECF No. 281. Defendants' counsel declares "that  
22 following [Dr. Swingle's] retirement, attempts had been made to  
23 contact her and she was not responding." Plaintiff opposes  
24 Defendants' motion. Pl.'s Opp'n ("Opp'n"), ECF No. 282.

#### 25 **LEGAL STANDARD**

26 Rule 16(e) of the Federal Rules of Civil Procedure  
27 prescribes that a final pretrial order may be modified "only to  
28 prevent manifest injustice." Fed. R. Civ. P. 16(e). Four non-  
exclusive factors are considered when determining whether a  
modification is justified under the manifest injustice standard:

(1) the degree of prejudice to [Defendants]  
from a failure to modify; (2) the degree of  
prejudice to [P]laintiff from a modification;  
(3) the impact of a modification at [this]  
stage of the litigation on the orderly and  
efficient conduct of the case; and (4) the  
degree of willfulness, bad faith, or  
inexcusable neglect on the part of  
[Defendants].

29 United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887  
30 (9th Cir. 1981). The movants for modification have "the burden

1 of showing that an amendment to the pretrial order [is] necessary  
2 to prevent 'manifest injustice.'" Galdamez v. Potter, 415 F.3d  
3 1015, 1020 (9th Cir. 2005).

#### 4 **DISCUSSION**

##### 5 **A. Dr. Swingle**

6 Defendants contend they "will be greatly prejudiced in  
7 the event they are not permitted to substitute [a medical expert  
8 named] Dr. Galen Church for Dr. Swingle." Defs.' Reply ("Reply")  
9 2:13-14, ECF No. 283. However, the manifest injustice standard  
10 has not been shown applicable to this requested modification  
11 since the PTO authorizes an expert "designee [change] regarding  
12 plaintiff's injuries and their cause" and "a pretrial order  
13 should . . . be liberally construed to permit evidence . . . at  
14 trial that can fairly be said to be embraced within its  
15 language." First Nat'l Bank of Circle, 652 F.2d at 886.  
16 Therefore, this modification is granted.

##### 17 **B. Plainer**

18 Defendants also seek to change "Plainer's [expert  
19 witness] designation [in the Pretrial Order] from non-retained to  
20 retained expert." Reply 1:24, ECF No. 283. The Pretrial Order  
21 identifies Plainer only as "Expert Witness Correctional Captain  
22 R. Plainer (regarding use of force policies and procedures at  
23 [High Desert State Prison])." PO 15:24-25, ECF No. 180.

24 However, Defendants specific designation of Plainer as  
25 a retained expert in their motion triggers additional disclosure  
26 obligations under Rule 26(a)(2)(B) of the Federal Rules of Civil  
27 Procedure. This rule prescribes in pertinent part that in  
28 addition to providing Plainer's identity, Defendants' retained

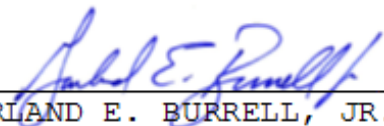
1 expert witness "disclosure [for Plainer] must be accompanied by a  
2 written report – prepared and signed by the witness." Defendants  
3 include in their motion a declaration that "[a] copy of Mr.  
4 Plainer's report was served on Plaintiff on February 8, 2017,  
5 Anderson Decl. ¶ 6, ECF No. 281, and Defendants state in their  
6 motion that they have "offer[ed] to make . . . Plainer available  
7 for deposition[] prior to trial." Mot. 3:25-26, ECF No. 281.  
8 Since Defendants have shown their necessity for changing  
9 Plainer's expert status from non-retained to retained, and have  
10 made the required additional disclosure obligations under Rule  
11 26(a)(2)(B) of the Federal Rules of Civil Procedure, the Pretrial  
12 Order is modified as Defendants request and Plainer is therefore  
13 Defendants' retained expert witness.

14 **CONCLUSION**

15 For the foregoing reasons, Defendants' Motion to Modify  
16 the Pretrial Order is GRANTED.

17 IT IS SO ORDERED.

18 Dated: April 21, 2017

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22 GARIAND E. BURRELL, JR.  
23 Senior United States District Judge  
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