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

CHERYL J. WHITE, SUCCESSOR TO
WILLIAM WHITE,

Plaintiff,

No. CIV-S-06-0665 WBS GGH

vs.

NOVARTIS PHARMACEUTICALS
CORPORATION,

Defendant.

ORDER

_____ /

Presently before this court is plaintiff's motion to extend time to take *de bene esse* depositions, filed June 2, 2010.¹ After reviewing the parties' briefing, the court issues the following order.

BACKGROUND

Plaintiff filed the instant motion on June 2, 2010, the day of the discovery cutoff, seeking to extend the time to take *de bene esse* depositions of six generic experts designated by plaintiffs in multi-district litigation, if the experts are otherwise deposed in the MDL proceedings. Plaintiff seeks until September 1, 2010 to preserve this requested testimony. Under

_____ ¹ The noticed hearing date of July 22, 2010 is vacated as oral argument is deemed unnecessary.

1 the scheduling order,² filed December 10, 2009, the parties were directed to complete discovery,
2 “including depositions for preservation of testimony” by June 2, 2010. The order specified:

3 The word ‘completed’ means that all discovery shall have been
4 conducted so that all depositions have been taken and any disputes
5 relevant to discovery shall have been resolved by appropriate order
6 if necessary and, where discovery has been ordered, the order has
7 been obeyed. All motions to compel discovery must be noticed on
8 the Magistrate Judge’s calendar in accordance with the local rules
9 of this court and so that such motions may be heard (and any
10 resulting orders obeyed) no later than June 2, 2010.³

11 Defendant not only objects to the untimeliness of plaintiff’s motion, but also to the lack of good
12 cause shown for the requested modification. Because these generic experts are plaintiff’s own
13 retained experts, defendants argue that plaintiff should have considered this possibility in the
14 formation of the scheduling order, and had five months during the discovery period in which to
15 depose these individuals. Furthermore, as this case is only the second case in the multi-district
16 litigation to go to trial in federal court if trial proceeds as scheduled, defendant asserts that live
17 testimony is preferential to video testimony which provides no opportunity to cross-examine or
18 observe the witness live.

19 DISCUSSION

20 Plaintiff’s efforts amount to too little too late. Plaintiff’s assumption that *de bene*
21 *esse* depositions, essentially trial depositions pursuant to Fed. R. Civ. P 32(a)(4), are not
22 governed by scheduling orders is erroneous. Departing from previous binding Rule 16
23 scheduling orders is a serious matter. “A scheduling order ‘is not a frivolous piece of paper, idly
24 entered, which can be cavalierly disregarded by counsel without peril.’” Johnson v. Mammoth
25 Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992) (quoting Gestetner Corp. v. Case Equip. Co.,

26 ² The order also dictated that the magistrate judge could hear and decide requests to
modify dates or terms of the scheduling order, other than requests to change the trial date. (Dkt.
36.)

³ Plaintiff did not seek order shortening time in which to have this matter heard.

1 108 F.R.D. 138, 141 (D. Me.1985)). A scheduling order may be modified only upon a showing
2 of “good cause.” Fed. R. Civ. P. 16(b). Parties must show that despite due diligence they could
3 not reasonably have met the schedule. Fed. R. Civ. P. 16 Advisory Committee’s note to 1983
4 Amendment. A showing of diligence is necessary because disregard of a scheduling order may
5 “undermine the court’s ability to control its docket, disrupt the agreed-upon course of the
6 litigation, and reward the indolent and the cavalier.” Johnson, 975 F.2d at 610.

7 Here, plaintiff has made no showing of good cause for the requested modification.
8 Although plaintiff asserts that the taking of *de bene esse* depositions requires coordination of
9 plaintiff’s steering committee, of which plaintiff’s counsel are members, as well as New Jersey
10 counsel, NPC and various courts, plaintiff has made no attempt to show that she tried to
11 coordinate these depositions over the five month period permitted by discovery but was unable to
12 do so. Permitting these depositions might also interfere with the other deadlines set forth in the
13 scheduling order, including the law and motion deadline of July 7, 2010, and the September 20,
14 2010 pretrial conference and filing of the prerequisite pretrial statements.

15 Plaintiff has further failed to assert that these experts will be unavailable at trial.
16 Plaintiff apparently was aware of these experts prior to the issuance of the court’s scheduling
17 order; see Orders, filed August 13, 2009, (dkt. # 46, Exs. 1, 2), but did not consider the possible
18 necessity of their depositions in scheduling this case in the first instance.

19 Finally, plaintiff’s request is too hypothetical in nature. She seeks to *possibly*
20 cross-notice such depositions *if* they occur.

21 Without a showing of good cause, plaintiff’s request must be denied.

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1 CONCLUSION

2 Accordingly, IT IS ORDERED that:

3 1. Plaintiff's motion to extend time to take *de bene esse* depositions, filed June 2,
4 2010, (dkt. # 45), is denied.

5 2. The hearing noticed for July 22, 2010, is vacated.

6 DATED: June 21, 2010

/s/ Gregory G. Hollows

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8 GREGORY G. HOLLOWS
9 UNITED STATES MAGISTRATE JUDGE

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