

1 **BACKGROUND**

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3 On May 19, 2014, Plaintiff designated her current expert, Ronald Scott, a retired
4 police officer, to testify as to firearms, ballistics, shooting reconstruction, shooting
5 incident dynamics, and related factors.² The Court thereafter granted in part and denied
6 in part Defendants' Motion for Summary Judgment and denied Plaintiff's Motion for
7 Reconsideration. In March 2016, however, after Defendant subsequently noticed an
8 interlocutory appeal, Mr. Scott purportedly advised Plaintiff he was no longer willing to
9 testify. According to Plaintiff's counsel:

10 On or around March 21, 2016 (I am not certain as to the
11 exact date), I spoke with Ronald Scott by telephone.
12 Mr. Scott informed me that he no longer wished to serve as
13 an expert in this matter and was therefore terminating his
14 services as our expert witness. He represented that he was
15 having differences with my clients due to some acrimony in
16 past conversations between them, which precluded him from
17 continuing to serve as our expert witness in this case. The
18 conversation was civil, but Mr. Scott reiterated several times
19 that he would not be continuing as an expert, and that is how
20 the conversation ended.

21 Decl. of Gregory S. Walton, ECF No. 76-1, ¶ 5. Counsel further avers that he "did not
22 foresee this development." Id. ¶ 6.

23 Plaintiff thereafter retained a new expert, Dr. Marc A. Firestone, a physicist, had
24 Dr. Firestone produce his own report, and, in April 2016, filed a Motion to Amend the
25 Pretrial Scheduling Order seeking permission to substitute her experts. On June 13,
26 2016, the Court instead stayed the case pending resolution of Plaintiff's appeal and
27 denied Plaintiff's Motion to Amend without prejudice to renewal once the stay was lifted.

28 Plaintiff's appeal was dismissed on June 27, 2017, and the following month she
renewed her Motion to Amend, which is now pending before the Court.

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² Plaintiff also designated Thomas Streed, Ph.D., as an expert as to whether Deputy Clark followed proper police procedures in the course of his confrontation and killing of Decedent and whether any deviation from police procedures was significant.

1 **ANALYSIS**

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3 Whether substitution of an expert should be permitted is properly analyzed under
4 Federal Rule of Civil Procedure 16(b), which permits the amendment of a pretrial
5 scheduling order only on a showing of good cause. See Fujifilm Corporation v. Motorola
6 Mobility LLC, 2014 WL 8094582, at *1 (N.D. Cal. 2014). “Rule 16(b)’s ‘good cause’
7 standard primarily considers the diligence of the party seeking amendment.” Johnson v.
8 Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). More specifically:

9 [a] district court may modify the pretrial schedule “if it cannot
10 reasonably be met despite the diligence of the party seeking
11 the extension.” Moreover, carelessness is not compatible
12 with a finding of diligence and offers no reason for granting of
13 relief. Although the existence or degree of prejudice to the
14 party opposing the modification might supply additional
15 reasons to deny a motion, the focus of the inquiry is upon the
16 moving party’s reasons for seeking modifications. If that
17 party was not diligent, the inquiry should end.

18 Id. (citations omitted).

19 Based on the statements of Plaintiff’s counsel, she diligently sought to retain a
20 replacement expert as soon as Mr. Scott notified her he was no longer willing to testify.
21 Although counsel indicates he knew there were some prior acrimonious exchanges
22 between Mr. Scott and his client, it does not appear that counsel could have foreseen
23 Mr. Scott’s eventual withdrawal. Plaintiff has thus demonstrated the requisite diligence.

24 That said, the Court is not particularly moved by the reasons underlying Plaintiff’s
25 request. In typical instances where a Plaintiff seeks to substitute another expert it is due
26 to circumstances outside of the expert’s and parties’ control. See, e.g., Fujifilm, 2014
27 8094582 at *1 (substitution sought after issues going to the expert’s credibility arose in
28 an unrelated action); Lincoln Nat. Life Ins. Co. v. Transamerica Financial Life Ins. Co.,
2010 WL 3892860 (N.D. Ind.) (substitution proper when original expert was convicted of
embezzlement and would be incarcerated in federal prison at the time of trial). In this
case, to the contrary, the expert unilaterally chose to terminate his relationship with
Plaintiff with no apparent objective justification. This does not change the Court’s

1 conclusion that substitution should be permitted, but it does inform the relief the Court
2 fashions below, which is intended to prevent Defendant from suffering the prejudice that
3 would result from allowing Plaintiff an unfettered second bite at the apple.

4 First, Dr. Firestone shall be limited to testifying to “his opinions and theories and
5 the bases for those opinions and theories” as expressed in Mr. Scott’s original report.
6 See Park v. CAS Enterprises, Inc., 2009 WL 4057888 (S.D. Cal.) (limiting new expert’s
7 testimony to opinions and theories included in original expert’s report was proper when
8 expert unilaterally chose to withdraw); see also Fujifilm, 2014 WL 8094582, at *2 (limiting
9 a newly appointed expert to testifying consistently with the original report and requiring
10 that the opinions be substantially similar even when substitution was based on expert’s
11 credibility issues as opposed to withdrawal). The Court’s scheduling order specifically
12 directed that experts be simultaneously designated, such that no expert would have the
13 benefit of the other side’s report during drafting of his or her own opinions. It follows that
14 permitting Plaintiff to submit a new report now would do more than adjust dates; it would
15 undermine the Court’s intent in imposing such a requirement. Moreover, if the Court
16 were to grant Plaintiff’s request without the forgoing limitation, it would also be required
17 to reopen discovery to permit the further designation of rebuttal experts. This case has
18 been pending for far too long to risk taking such a large step backwards.

19 Second, as Plaintiff concedes is proper, Defendant will be permitted to depose
20 Dr. Firestone prior to this case being set for trial. Defendant, however, also seeks
21 permission to depose and call at trial Mr. Scott. Having provided no justification for such
22 a request, and absent any compelling explanation as to why access to Mr. Scott is
23 necessary to avoid prejudice, that request is denied.

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1 **CONCLUSION**

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3 Plaintiff's Motion to Amend Pretrial Order to Substitute Expert Witness (ECF
4 No. 92) is GRANTED in part and DENIED in part consistent with the foregoing. It is
5 further ordered that:

- 6 1. Not later than thirty (30) days following the date this Memorandum and Order
7 is electronically filed, Plaintiff may, but is not required to, officially designate
8 Dr. Firestone as her substituted expert pursuant to the applicable rules and
9 this Court's orders.
- 10 2. Thirty (30) days following the date Dr. Firestone is designated (if he is),
11 Defendant may, but is not required to, depose him.
- 12 3. If Plaintiff designates Dr. Firestone as her expert, the parties are directed to
13 file a Joint Notice of Trial Readiness within thirty (30) days following either the
14 expiration of the thirty (30) day period in which Defendant is permitted to take
15 Dr. Firestone's deposition or the actual date of his deposition, whichever is
16 earlier.
- 17 4. If Plaintiff declines to designate Dr. Firestone as an expert, the parties shall file
18 their Joint Notice of Trial Readiness not later than sixty (60) days following the
19 date this Memorandum and Order is electronically filed.

20 The parties are to set forth in their Notice of Trial Readiness the appropriateness
21 of special procedures, whether this case is related to any other case(s) on file in the
22 Eastern District of California, the prospect for settlement, their estimated trial length, any
23 request for a jury, and their availability for trial. The parties' Notice of Trial Readiness
24 Statement shall also estimate how many court days each party will require to present its
25 case, including opening statements and closing arguments. The parties' estimates shall
26 include the time necessary for jury selection as well as the time necessary to finalize jury
27 instructions and instruct the jury.

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This Court is in session for jury selection, opening statements, presentation of evidence, closing arguments, and instruction of the jury Monday through Wednesday, only. Jury deliberations only are Monday through Friday if necessary. After review of the parties' Joint Notice of Trial Readiness, the Court will issue an order that sets forth dates for a final pretrial conference and trial. The parties should be prepared to submit discovery documents and trial exhibits electronically in PDF format.

IT IS SO ORDERED.

Dated: February 6, 2018


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE