



1 (ECF No. 264), the fourth motion pending. On October 6, 2017 at 1:00 pm, the undersigned held  
2 an informal telephonic conference with all attorneys who appeared at the prior hearing. Upon  
3 review of the parties' briefing and oral arguments, and good cause appearing therefor, THE  
4 COURT FINDS AS FOLLOWS:

5 Both parties are responsible for the numerous breakdowns in communication and  
6 cooperation that have created the current impasse; multiple discovery requests remain  
7 unanswered and/or unfulfilled as the discovery deadline approaches. The court is confident,  
8 however, that parties are capable of following the court's orders and being ready for trial on the  
9 scheduled date.

10 To that effect, the court has issued a protective order (ECF No. 266) to assuage Mr.  
11 Gilbert's concerns regarding his production of discovery that the court previously ordered him to  
12 produce on May 25, 2017 (ECF No. 235). Additionally, the court has reviewed each remaining  
13 issue with the parties and crafted the discovery plan detailed below.

14 A. Plaintiffs' motion for default judgment, ECF No. 250

15 Plaintiffs assert that the court ought to render default judgement against defendants  
16 pursuant to Federal Rule of Civil Procedure 37(b)(2), because defendants failed to timely respond  
17 to the court's May 25, 2017 order to produce discovery. (See ECF No. 250.) However, as the  
18 undersigned explained during the September 27, 2017 hearing, such a sanction is draconian and  
19 unwarranted at the present juncture. As such, the motion for default judgement is denied.

20 However, Mr. Gilbert's conduct was unacceptable. The court ordered Mr. Gilbert to  
21 provide all discovery in question by June 5, 2017. (ECF No. 235.) While he provided partial  
22 responses before that deadline, Mr. Gilbert neither provided complete responses nor petitioned  
23 the court for an extension (which Mr. Gilbert claimed was necessitated by the need for a  
24 protective order before he could comply with the court's order). Thus June 5, 2017, came and  
25 went without defendants producing the discovery they had been ordered by the court to provide.<sup>1</sup>

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27 <sup>1</sup> Troublingly, these particular discovery requests were served on Mr. Gilbert on September 15,  
28 2016. (ECF No. 250-1 at 3.) Mr. Gilbert did not mention a protective order to plaintiffs or the  
court until after the courts' May 25, 2017 order. (See ECF Nos. 238, 250-1.)

1 B. Defendants' motion to compel plaintiffs to abide by discovery agreement, ECF  
2 No. 251

3 Defendants have moved to enforce an alleged stipulated protective order, and to have the  
4 court order plaintiffs to appear for depositions at the end of October. (See ECF No. 251.)  
5 Because the court has issued a protective order (ECF No. 266), and the parties have agreed on  
6 dates for the depositions in question (see ECF Nos. 262, 263), this motion is moot.

7 C. Plaintiffs' motion to compel defendants' responses to written discovery and  
8 production of documents, ECF No. 252

9 Plaintiffs allege that defendants have failed to respond to a series of discovery requests  
10 made in June of 2017. (See ECF No. 252.) Mr. Gilbert erroneously maintained that he had been  
11 given a thirty day extension to respond to these requests.<sup>2</sup> (See ECF No. 256.) At the informal  
12 hearing, the parties reported that defendants have yet to provide complete responses to these  
13 requests.

14 D. Extension of Discovery

15 Plaintiffs have proposed that discovery be extended and/or that the time for filing  
16 discovery motions be shortened. (See ECF No. 264.) This matter originated in 2011, and  
17 discovery has been ongoing for over a year. The court will not extend discovery any further.

18 Accordingly, it is HEREBY ORDERED THAT:

- 19 1. Plaintiffs' ex parte motion to shorten time for hearing (ECF No. 264) is DENIED.
- 20 2. Defendants' motion to compel plaintiffs to abide by discovery agreement (ECF No.  
21 251) is DENIED as moot.
- 22 3. Plaintiffs' motion for default judgment (ECF No. 250) is DENIED IN PART. As  
23 explained below, the court will consider what alternative sanctions, short of default,  
24 may be appropriate against defendants.

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26 <sup>2</sup> At the hearing, it became clear that, in his opposition brief, Mr. Gilbert had inappropriately cited  
27 to an email as the basis for this thirty day extension, omitting the second page of that email,  
28 which demonstrated that the extension did not cover the requests at issue. It is unclear if Mr.  
Gilbert's representation to the court was inadvertently erroneous or purposely deceptive. In either  
case it is troubling.

1 4. Plaintiffs' motion to compel defendants' responses to written discovery and  
2 production of documents (ECF No. 252) is GRANTED. For the discovery requests  
3 covered by this motion to compel:

4 a. Defendants shall produce all outstanding documents and responses, by  
5 **October 9, 2017 at 5:00 pm.**

6 b. Defendants shall produce all revised responses that were promised, by  
7 **October 11, 2017 at 5:00 pm.**

8 5. Regarding defendants' outstanding discovery requests:

9 a. Plaintiffs shall provide all responses to defendants' special interrogatories,  
10 without formalistic objections, by **October 13, 2017 at 5:00 pm.**

11 b. Plaintiffs shall produce all responsive documents, by **October 16, 2017 at 5:00**  
12 **pm.**

13 6. DISCLOSURE OF EXPERT WITNESSES: All counsel are to designate in writing,  
14 file with the Court, and serve upon all other parties the name, address, and area of  
15 expertise of each expert that they propose to tender at trial not later than **December 4,**  
16 **2017.**<sup>3</sup> The designation shall be accompanied by a written report prepared and signed  
17 by the witness. The report shall comply with Fed. R. Civ. P. 26(a)(2)(B).

18 7. SANCTIONS: The court will determine what sanctions are appropriate for  
19 defendants' failure to comply with the court's May 25, 2017 order (ECF No. 235), and  
20 as a result of plaintiffs' September 11, 2017 motion to compel (ECF No. 252).

21 a. Defendants have until **October 12, 2017 at 5:00 pm** to respond to the motions  
22 for sanctions contained within plaintiffs' recent pleadings. (See ECF Nos. 250,  
23 252.)

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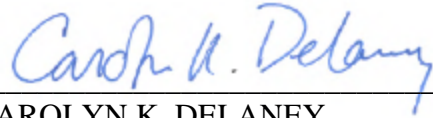
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27 <sup>3</sup> The discovery of experts will include whether any motions based on Daubert v. Merrell Dow  
28 Pharmaceuticals, Inc., 509 U.S. 579 (1993) and/or Kumho Tire Co. v. Carmichael, 119 S. Ct.  
1167 (1999) are anticipated.

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b. Plaintiffs will then have until **October 16, 2017 at 5:00 pm** to reply.

c. The matter shall thereafter stand submitted.

Dated: October 6, 2017



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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE