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## UNITED STATES DISTRICT COURT

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## EASTERN DISTRICT OF CALIFORNIA

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THOMAS T. AOKI, M.D., and AOKI  
DIABETES RESEARCH INSTITUTE, a  
California Non-Profit Corporation,

No. 2:11-cv-02797-TLN-CKD

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Plaintiffs,

**ORDER**

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v.

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GREGORY FORD GILBERT, et al.,

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Defendants.

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The Court held a Final Pretrial Conference for this matter on May 31, 2018. (ECF No.

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313.) At that time, the Court granted Defendants' *Ex Parte* Application to continue the trial for at

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least 90 days. (ECF No. 302.) The trial was reset for March 25, 2019, and a second Final Pretrial

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Conference was set for January 24, 2019. At the May 31 conference, the Court took under

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consideration two issues Plaintiffs raised in their pretrial statement. Namely, whether to allow

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early briefing on three motions *in limine* and whether to send certain discovery matters back to

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the magistrate judge. The Court found Defendants had not had an opportunity to respond and

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ordered supplemental briefing on the two issues.

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Defendants filed their response to Plaintiffs' requests on June 11, 2018, in accordance

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with the Court's order. (ECF No. 315.) The filing comprises thirty-seven pages of largely

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unnecessary argument. It appears from the briefing that Defendants took the Court's request for

1 briefing on two discrete issues as an opportunity to respond to Plaintiff's entire amended pretrial  
2 statement. In fact, Defendants' response to an advanced briefing schedule on motions *in limine*  
3 and discovery issues amounts to only two paragraphs. Those two paragraphs are as unhelpful in  
4 aiding the Court in its decision as the remainder of the thirty-seven-page brief.

5 As to the advanced briefing schedule on motions *in limine*, Defendants make no reply  
6 except to say that no motions *in limine* are currently pending, and thus, no discussion is  
7 necessary. This response misses the point entirely and offers no guidance on Defendants'  
8 position that the Court might use in deciding whether to grant Plaintiffs' request. As to the issue  
9 of outstanding discovery, the Court quotes the entirety of Defendants' argument to highlight the  
10 illogical nature of the argument and its unhelpfulness.

11 After all these years, and the failure to make any of these motions  
12 before the very date of the Pretrial Statement, there is no known  
13 excuse for trying to re-make an entirely new lawsuit when the  
14 operative facts are now over 16 years old, and many documents no  
15 longer available. This is why cases are required to be litigated  
16 before the witnesses are gone and the documents are [sic] no  
17 longer available. And, it is not as if Plaintiffs have been diligent.  
18 Plaintiffs actually had a similar case against Defendants Gilbert and  
19 Bionica, which was dismissed without any Order or Findings  
20 during the term when said Defendants were parties to the case. If  
21 Plaintiffs believe they can obtain a court order under that case, the  
22 proper forum is Nevada. Of course, that is impossible since they  
23 voluntarily Dismissed the Nevada case. It is difficult to believe that  
24 a dismissed case where the Parties before this court were never  
25 parties during the preliminary hearing, are somehow ordered to  
26 waive their rights.

27 Plaintiffs have not offered one single reason for waiting until now  
28 to offer new theories or new experts. The request for leave of court  
to reopen discovery after 6 years of this litigation is untimely, as it  
has been 15 years since the separation of the parties, Dr. Aoki and  
Mr. Gilbert.

(ECF No. 315 at 9.)

24 Essentially, Defendants take the request to send discovery issues to the magistrate judge  
25 as a reopening of discovery. Technically, Defendants are not wrong. However, the question  
26 before the Court is whether to order the parties to participate in proceedings before the magistrate  
27 judge to deal with possible contempt of the magistrate judge's orders regarding previous  
28 discovery disputes. The Court did not take Plaintiffs' request to mean a complete re-opening and

1 new requests for discovery never previously requested. In that sense, the Court is not  
2 contemplating re-opened discovery and certainly would not allow an “entirely new lawsuit” or  
3 “new theories or new experts.” Additionally, the Court sees no connection to the occurrence of  
4 the operative facts over 15 years ago and the diligence of Plaintiffs’ request. The only time frame  
5 bearing on Plaintiffs’ diligence is the time between when they learned Defendants allegedly failed  
6 to comply with the discovery orders and the time Plaintiffs requested to send the issue back to the  
7 magistrate judge. Finally, the mention of the Nevada case has no bearing on discovery as that  
8 case was raised solely in Plaintiffs’ request for an advanced briefing schedule for motions *in*  
9 *limine*. Thus, Defendants’ response is wholly inadequate and ineffective.

10 The Court’s ire in this matter, however, does not fall solely on Defendants. The Court  
11 granted Plaintiffs two days to respond to Defendants filing. Plaintiffs filed a ten-page document  
12 after admittedly “having great difficult identifying any response to the issues raised by the Court  
13 in the 37 pages [Defendants] filed.” (ECF No. 316 at 3.) Rather than point out Defendants’  
14 deficiency and stand on their previous request, Plaintiffs chose — without invite from the Court  
15 — to provide a longer more detailed explanation. An explanation, Defendants have not been  
16 granted an opportunity to respond to.

17 Simply put, the Court is weary of the behavior of the parties in this matter. As Defendants  
18 point out, this case has been pending for over six years. The Court recognizes that not one party  
19 is solely to blame so cautions both parties against continuing their current course of behavior.  
20 Such behavior in the future will be met with an Order to Show Cause and the possible imposition  
21 of sanctions. The Court will now turn to the merits of Plaintiffs’ requests.

22 As to Plaintiffs’ request for motions *in limine*, Plaintiffs outline three motions they assert  
23 an advanced briefing schedule would benefit the parties’ preparation for trial: (1) a motion that  
24 Defendants have waived their patent-related affirmative defense by virtue of their conduct to date,  
25 and as a result of the Nevada Court’s ruling; (2) a motion limiting expert testimony; and (3) a  
26 motion that the Nevada Court’s ruling bars Defendant Gilbert’s claims here. (ECF No. 316 at 3.)  
27 The Court will order advanced briefing on the second motion regarding expert testimony as it is  
28 the only motion appropriately sought as a motion *in limine*. As for the first and third requests, the

1 scope of those motions are not appropriate for motions *in limine*. The Pretrial Scheduling Order  
2 issued in this case included a clear warning: “The parties are reminded that a motion *in limine* is a  
3 pretrial procedural device designed to address the admissibility of evidence. The Court will look  
4 with disfavor upon dispositional motions presented in the guise of motions *in limine*.” (ECF No.  
5 223 at 5.) Now, Plaintiffs ask this Court to allow motions to bar or strike affirmative defenses  
6 and bar Defendants’ claims based on a ruling of a Nevada Court. Neither request deals with the  
7 admissibility of evidence at trial, and thus, will not be considered. Accordingly, the Court will  
8 not order advanced briefing on requests one and three and cautions the parties against any further  
9 attempts to cast dispositive motions in the form of motions *in limine*. Plaintiffs shall file their  
10 motion with respect to expert testimony and admissibility with a hearing date of January 24,  
11 2019.

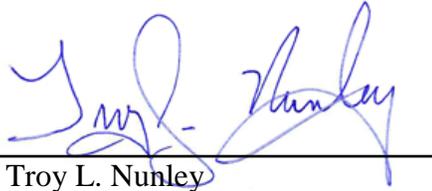
12 Lastly, as to Plaintiffs’ request to send discovery matters to the magistrate judge, the  
13 Court finds Plaintiffs were not diligent and denies the request. Plaintiffs sought an order from the  
14 magistrate judge compelling production of documents or Default Judgment in September 2017.  
15 Ultimately, the magistrate judge ordered Defendants to produce documents in discovery by  
16 October 9, 2017. (ECF No. 268.) Plaintiffs assert Defendants produced documents on October  
17 11, 2017, but failed to produce all of the requested documents including necessary financial  
18 documents. (ECF No. 316 at 7.) Plaintiffs asks the Court to send this matter back to the  
19 magistrate judge to determine if Defendants complied with the discovery orders. In the ten-page  
20 reply Plaintiffs submitted, there is no mention of why Plaintiffs did not make a request sooner.  
21 Even if Plaintiffs were producing their own documents, the Court sees no reason for the almost  
22 seven-month delay in bringing this issue to the Court’s attention. Additionally, were it not for  
23 Defendants need to continue the trial, the Court would never have entertained a request to submit  
24 this matter to the magistrate judge before the originally planned trial date. For these reasons, the  
25 Court denies Plaintiffs’ request to submit this matter to the magistrate judge to determine the  
26 issue of outstanding discovery.

27 Plaintiffs shall file their motion *in limine* regarding expert disclosures and testimony in  
28 accordance with Local Rule 230(b) to be heard on January 24, 2019. Oppositions and replies

1 shall be filed in accordance with Local Rule 230(c) and (d), respectively.

2 IT IS SO ORDERED.

3 Dated: June 25, 2018

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6 Troy L. Nunley  
7 United States District Judge  
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