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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 WILLIAM LANDES,
12 Plaintiff,
13 v.
14 SKIL POWER TOOLS, et. al.,
15 Defendants.
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No. 2:12-cv-01252-MCE-KJN

MEMORANDUM AND ORDER

17 On November 7, 2013, Plaintiff William Landes ("Plaintiff"), moved to augment his
18 expert disclosure or in the alternative, to amend the pre-trial conference order to allow
19 Plaintiff to withdraw an expert and name a new expert witness ("Motion"). Mot., Nov. 7,
20 2013, ECF No. 47. Plaintiff also moved to continue trial to a later date.[1] Id. For the
21 following reasons, Plaintiff's Motion is GRANTED.[2]
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25 [1] On December 17, 2013, on the Court's own motion and pursuant to Local Rule 230(g), the Final
Pretrial Conference set for 1/23/2014 and the Jury Trial set for 3/24/2014 were vacated. See ECF No. 53.
26 As set forth in this order, the Court will issue an amended final pretrial order indicating the date of the
rescheduled pretrial conference, as well as a new trial date.
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[2] Because oral argument will not be of material assistance, the Court ordered this matter
28 submitted on the briefs. E.D. Cal. Local R. 230(g).

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BACKGROUND[3]

Plaintiff alleges that he was injured while using a "SkilSaw" device manufactured by Defendant Robert Bosch Tool Corporation ("Bosch") and sold by Defendant Lowes' HIW, Inc. ("Lowes") (collectively "Defendants"). Plaintiff contends that had Bosch utilized safety technology available to it prior to the time it developed and sold the SkilSaw, Plaintiff's injury would have been eliminated or minimized. Specifically, Plaintiff asserts that if Bosch had used "flesh-detection" technology such as that developed by Dr. Stephen Gass, Plaintiff's injuries would not have occurred or at least not have been as severe.

According to Plaintiff, Dr. Gass initially agreed that he would assist Plaintiff in this case by testifying as a percipient witness about his knowledge of "flesh detection" technology generally and Gass's company, SawStop, specifically and the availability of such flesh detection technology; and would offer opinions related to whether a reasonable alternative table saw designed existed at the time that Bosch manufactured the SkilSaw.

Dr. Gass subsequently received three subpoenas from Defendants seeking the production of documents in his individual capacity and as a representative of his companies (SawStop and SD3). Plaintiff contends that the subpoenas were overly broad, intended to make Dr. Gass's life "miserable," and were designed to be as onerous as possible because they sought production of documents in seventy-five separate categories.

Plaintiff reports that Dr. Gass and his counsel expressed concern over the impact that disclosure of the requested documents might have on Dr. Gass's business, which competes directly with that of Bosch.

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[3] Unless otherwise noted, the following recitation of facts is taken from Plaintiff's Memorandum in Support of his Motion and Plaintiff's Reply. See ECF Nos. 45, 50.

Bosch contends that its subpoenas were proper because Dr. Gass's company is a competitor and these documents would show not only bias on Dr. Gass's part but also that many of his statements about the technical feasibility and economic viability of bench-top table saws are not true. Response, Nov. 20, 2013, ECF No. 49. Defendants offered to sign a "for attorney's eyes only" protective order with respect to these documents. Id.

According to Plaintiff, Dr. Gass subsequently withdrew from his agreement to cooperate with Plaintiff's counsel to prevent the disclosure of trade secret information. As a result, Plaintiff's counsel retained Dr. Irving Ojalvo to serve in place of Dr. Gass if the Court permits the substitution of experts.

The Pre-Trial Scheduling Order ("PTSO") in this case imposed a non-expert discovery cut-off of May 24, 2013, and a July 24, 2013, deadline for designating experts. PTSO, Dec. 20, 2012, ECF No. 37. On January 31, 2013, Plaintiff identified Dr. Gass as a potential witness in his response to Bosch's written discovery. On July 24, 2013, Plaintiff served his expert witness disclosure pursuant to Federal Rule of Civil Procedure[4] 26(a)(2) in which he listed Dr. Gass as a "non-retained (percipient) witness." ECF No. 43. Plaintiff stated that "Dr. Gass has information concerning defendants' failure to utilize available safer technology in their saws. . . . Though Dr. Gass has not been 'retained or specially employed to provide expert testimony,' as set forth in [Rule 26(b)(2)], a copy of Dr. Gass' report prepared regarding his opinions which may be offered at the time of trial is attached hereto as Exhibit '1.'" Id. Plaintiff contends that the report was included "in an abundance of caution to 'head off' any objection to Dr. Gass providing potentially expert testimony."

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[4] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

Plaintiff now seeks (1) to amend Plaintiff's expert designation as a modification to the pre-trial scheduling order, (2) to modify Plaintiff's expert disclosure under Rule 26(e), and (3) continue trial, either as an alternative to or in conjunction with granting leave to augment Plaintiff's expert list.

STANDARD

Generally, the Court is required to enter a pretrial scheduling order within 120 days of the filing of the complaint. Fed. R. Civ. P. 16(b). The scheduling order "controls the subsequent course of the action" unless modified by the Court. Fed. R. Civ. P. 16(e). Orders entered before the final pretrial conference may be modified upon a showing of "good cause," Fed. R. Civ. P. 16(b), but orders "following a final pretrial conference shall be modified only to prevent manifest injustice," Fed. R. Civ. P. 16(e); see also Johnson v. Mammoth Recreations, 975 F.2d 604, 608 (9th Cir. 1992).

Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. Johnson, 975 F.2d at 609. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment); Id. Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Johnson, 975 F.2d at 609. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. Id. (citing Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Me. 1985)). If the moving party was not diligent, the Court's inquiry should end. Id.

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ANALYSIS

Plaintiff seeks to amend Plaintiff's expert designation as a modification to the PTSO, to modify Plaintiff's expert disclosure under Rule 26(e), and continue trial (either as an alternative to or in conjunction with granting leave to augment Plaintiff's expert list). Specifically, Plaintiff seeks leave to designate Dr. Irving Ojalvo as an expert witness in place of Dr. Gass. The PTSO imposed a non-expert discovery cut-off of May 24, 2013, and a July 24, 2013, deadline for designating experts. See PTSO at 2. Because the deadlines for non-expert discovery and for designating experts have passed, Plaintiff seeks to modify the PTSO to extend or reset the date for expert designation. Alternatively, Plaintiff seeks leave to supplementally designate Dr. Ojalvo in place of Dr. Gass.

As detailed above, Plaintiff reports that his initial choice for an expert witness at trial, Dr. Stephen Gass, withdrew from his agreement to cooperate with Plaintiff's counsel and now Plaintiff seeks to substitute Dr. Gass with Dr. Irving Ojalvo. Although Plaintiff seeks to call Dr. Ojalvo as an expert witness, Plaintiff asserts that he may nevertheless still call Dr. Gass as a witness at trial via subpoena. Defendants state that they have no objection to Plaintiff replacing Dr. Gass with Dr. Ojalvo, but Defendants are concerned about the scope of Dr. Gass's testimony as a non-expert witness at trial.

"A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Johnson, 975 F.2d at 610. "Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." Id. As such, under Rule 16(b)(4), a scheduling order may be modified only for good cause and with the judge's consent.

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District courts “should generally allow amendments of pre-trial orders provided three criteria are met: (1) no substantial injury will be occasioned to the opposing party, (2) refusal to allow the amendment might result in injustice to the movant, and (3) the inconvenience to the court is slight.” Amarel v. Connell, 102 F.3d 1494, 1515 (9th Cir. 1996) (internal citations omitted); see also 3 Moore's Federal Practice § 16.14[b] (2003) (“‘[G]ood cause’ is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.”).

> A court's evaluation of good cause is not coextensive with an inquiry into the propriety of the amendment under . . . Rule 15. Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s “good cause” standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.

Johnson, 975 F.2d at 609 (internal citations omitted); see 6A Wright, Miller & Kane, Federal Practice and Procedure § 1522.1 at 231 (2d ed. 1990) (“good cause” means scheduling deadlines cannot be met despite party's diligence). However, “[t]he use of the good-cause standard, rather than allowing modification only in cases of manifest injustice as is done for other pretrial orders, indicates that there may be more flexibility in allowing some relief.” 6A Wright, Miller & Kane, Federal Practice and Procedure § 1522.2 (3d ed.). Where “[a] scheduling order can have an outcome-determinative effect on the case . . . total inflexibility is undesirable.” Rimbert v. Eli Lilly & Co., 647 F.3d 1247, 1254 (10th Cir. 2011). “A scheduling order which results in the exclusion of evidence is . . . a drastic sanction.” Id.

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Here, Plaintiff brought the instant Motion with reasonable diligence. Plaintiff purports to have begun searching for a new expert witness and conferring with Defendants immediately upon learning that Dr. Gass would no longer adhere to his agreement with Plaintiff. Cf. Johnson, 975 F.2d at 609 (concluding that good cause did not exist where the moving party's failure to timely request a scheduling order amendment resulted from his own inaction). Because Plaintiff acted diligently in bringing his motion to amend the PTSO to allow Plaintiff to withdraw an expert and name a new expert, this Court will analyze each of the three criteria outlined in Amare. See 102 F.3d at 1515.

1. Injury to Opposing Party

When evaluating whether to allow amendments of pre-trial orders, a court will first examine whether there will be a substantial injury to the opposing party. See Amarel, 102 F.3d at 1515.

Here, Plaintiff contends that because the Defendants have not taken Dr. Gass's deposition, replacement of Plaintiff's expert witness does Defendants no harm. Defendants do not object to the substitution of Dr. Ojalvo in place of Dr. Gass on the basis of any substantial injury that Defendants would face. Instead, Defendants' primary concern is that Plaintiff will, despite substituting Dr. Ojalvo for Dr. Gass, nevertheless call Dr. Gass as a fact witness and seek to elicit opinion testimony. Defendants state that

> [i]f [P]lantiff agrees to withdraw Dr. Gass as a non-retained expert, and not ask any expert opinions of Dr. Gass at trial, [D]efendants have no objection to [P]laintiff's motion, if [P]laintiff can only designate Dr. Irving Ojalvo in place of Dr. Gass, and the Court agrees to a reasonable continuance of the trial date and an appropriate adjustment of the pretrial scheduling order.

Response, ECF No. 49 at 2. Defendants therefore ask that should Dr. Gass be called as a witness, his potential testimony should be limited testimony to that of a fact witness who would not be questioned about his opinions or permitted to offer such opinion.

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To support their position, Defendant points to several of Dr. Gass's opinions in the expert report submitted by Plaintiff which Defendant contends should not be allowed if Dr. Gass is called as a "percipient" witness at trial.

Plaintiff responds to this concern by noting that if Plaintiff calls Dr. Gass to testify at trial, he would be questioned "as a percipient fact witness." Plaintiff concedes that while discrete sections of Gass's Declaration could be deemed "expert" opinion, the vast majority of the declaration addresses factual matters about which Dr. Gass may properly be called to testify. Plaintiff asserts that "[t]o the extent that Dr. Gass is called to testify, such testimony will necessarily be limited to factual matters." Reply, Nov. 25, 2013, ECF No. 50.

The Court recognizes Defendants' concern that Plaintiff may be attempting to circumvent expert disclosure requirements by attempting to use Dr. Gass at trial as an expert witness although called as a fact witness. This concern is one that courts have repeatedly acknowledged. See 8A Fed. Prac. & Proc. Civ. § 2031.1 (3d ed.) ("Courts have had to be alert to efforts to smuggle expert testimony into the case without complying with [the proper] requirements by characterizing it as lay testimony."). However, Defendants' concern is premature. Should Defendants timely object to the scope of Dr. Gass's potential testimony through a motion in limine and/or an objection at trial, these concerns may be addressed at that time.[5]

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[5] Plaintiff has represented to this Court that "[t]o the extent that Dr. Gass is called to testify, such testimony will necessarily be limited to factual matters." Reply, Nov. 25, 2013, ECF No. 50. Should Plaintiff call Dr. Gass as a non-expert, percipient fact witness, Plaintiff shall bear in mind the Federal Rules of Evidence which govern lay and expert testimony—in particular Rule 701. "Within a district court's broad discretion lies both the power to exclude or admit expert testimony, and to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party." Amarel, 102 F.3d at 1515. As the Committee Notes to the 2000 amendments to the Federal Rules of Evidence observe, "[b]y channeling testimony that is actually expert testimony to Rule 702, the [Rules now] ensure[] that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ.P. 26 . . . by simply calling an expert witness in the guise of a layperson." Committee Notes to Fed. R. Evid. 701; see Keener v. United States, 181 F.R.D. 639, 641 (D. Mont. 1998) (noting that expert preclusion is one possible remedy for failure to comply with Rule 26 in the Ninth Circuit).

Finally, Defendants request that if Plaintiff is permitted to withdraw Dr. Gass as a non-retained expert witness and to designate Dr. Ojalvo in his place, the PTSO be modified to set a date for the designation of Dr. Ojalvo and the production of his Rule 26 expert report. Defendants further request that a new date for the completion of expert depositions be incorporated into the PTSO along with other necessary changes, including the rescheduling of the pretrial conference and related deadlines.[6]

The Court finds that granting Plaintiff's motion to amend the PTSO to allow Plaintiff to withdraw an expert and name a new expert will not cause Defendants a substantial injury.

2. Injustice to the Movant

Next, a court will examine whether refusal to allow the amendment might result in injustice to the movant. See Amarel, 102 F.3d at 1515.

Plaintiff asserts that if he cannot appoint a new expert, he will be severely prejudiced on the liability issues in the matter. The crux of Plaintiff's argument is that had Defendant Bosch utilized safety technology available to it prior to the time it developed and sold the SkilSaw, Plaintiff's injury would have been eliminated or minimized.

Because Plaintiff's case depends largely on his ability to demonstrate that had Bosch used "flesh-detection" technology, Plaintiff's injuries would not have occurred or at least not have been as severe, if Plaintiff were unable to present expert testimony regarding safety technology as it relates to the product in question, he may be severely prejudiced.

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[6] As to Defendants' remaining concerns, as set forth in this Order, Plaintiff's Amended Expert Witness Disclosure and accompanying written report must be filed by Plaintiff within ninety (90) days of the date this order is filed. Counsel are instructed to complete all discovery of expert witnesses in a timely manner in order to comply with the Court's deadline for filing dispositive motions which will be indicated in a forthcoming amended final pretrial order. The amended final pretrial order will indicate the deadline for filing dispositive motions, the date of the rescheduled pretrial conference, and a new trial date.

This Court finds that in light of the circumstances surrounding Plaintiff's Motion, namely the fact that Defendants will not suffer a substantial injury and Plaintiff's diligence in bringing this motion, the potential injustice to Plaintiff if the Court denied Plaintiff's Motion is sufficient to warrant an amendment of the PTSO.

3. Inconvenience to the Court

Finally, a court will examine the extent of the inconvenience to the court when evaluating whether to allow amendments of pre-trial orders. See Amarel, 102 F.3d at 1515.

As the parties recognize, permitting Plaintiff to withdraw Dr. Stephen Gass as an expert witness and replace him with Dr. Irving Ojalvo will require the Court to vacate the trial date and issue an amended final pretrial order. The Court finds that this is a slight inconvenience which does not warrant denying Plaintiff's request.

Therefore, the Court finds that Plaintiff presented good cause to allow for an amendment of the PTSO and continue the trial to a later date.

The Final Pretrial Conference, which was scheduled for January 23, 2014, and the Jury Trial, which was scheduled for March 24, 2014, were previously vacated by this Court. See ECF No. 53. Although Plaintiff requests that the trial be re-set for some time after mid-June 2014 and Defendants request that the trial be continued to either late April or to July 2014, the Court will set a new trial date after considering its calendar. The Court will issue an amended final pretrial order designating a new trial date.

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CONCLUSION

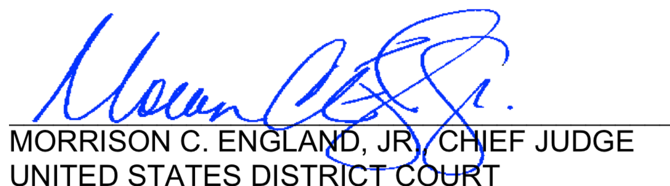
For the foregoing reasons, the Court GRANTS Plaintiff's motion (ECF No. 47) to amend the pre-trial conference order to allow Plaintiff to withdraw Dr. Stephen Gass as an expert witness and add Dr. Irving Ojalvo as an expert witness.

No other additional experts may be added or substitutions made without securing leave of this Court and the parties are reminded that the deadline for designating experts passed in July 2013. In replacing Dr. Gass with Dr. Ojalvo, Plaintiff must now file and serve an Amended Expert Witness Disclosure pursuant to Rule 26. The designation shall be accompanied by a written report prepared and signed by the witness. The report shall comply with Rule 26(a)(2)(B). The Amended Expert Witness Disclosure and accompanying written report must be filed by Plaintiff within ninety (90) days of the date this order is filed. Counsel are instructed to complete all discovery of expert witnesses in a timely manner in order to comply with the Court's deadline for filing dispositive motions which will be indicated in a forthcoming amended final pretrial order.

As set forth above, the Court will issue an amended final pretrial order indicating (1) the deadline for filing dispositive motions, (2) the date of the rescheduled pretrial conference, and (3) a new trial date.

IT IS SO ORDERED.

Dated: December 26, 2013



MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT