

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA
9

10 CARDTE HICKS,

11 Plaintiff,

12 v.

13 LOWE'S HOME CENTERS, LLC,

14 Defendant.
15
16

No. 2:12-CV-01883-KJM-KJN

ORDER

17 Cardte Hicks ("plaintiff") moves to depose defendant Lowe's Home Centers,
18 LLC's expert witness Geoffrey Miller, M.D. and to have the motion heard on an expedited
19 basis. Pl.'s Mot. to Depose Geoffrey Miller & Req. for Shortened Time to Hear the Mot.
20 ("Mot.") at 1, ECF No. 50. Finding the matter appropriate for disposition without argument,
21 the court DENIES as moot the request to have the motion heard on an expedited basis. For the
22 reasons below, the court GRANTS the motion to depose Dr. Miller.

23 In its pretrial scheduling order, the court ordered the parties to disclose expert
24 witnesses by October 21, 2013 and complete expert discovery by December 20, 2013. Pretrial
25 Scheduling Order at 2-3, ECF No. 7. Defendant concedes it did not file its expert disclosures
26 with the court by the deadline, Def.'s Opp'n to Pl.'s Mot. in Limine at 2, ECF No. 38, but
27 attests to having timely served the disclosures on plaintiff, Sharaga Decl. ¶ 4, ECF No. 38.
28 Plaintiff attests to never having received defendant's expert disclosures, Masuda Decl. ¶ 2, ECF

1 No. 50, but admits timely receipt of Dr. Miller’s independent medical examination report, Pl.’s
2 Reply at 3, ECF No. 52. In his declaration, plaintiff’s counsel states further that “he did not
3 become aware of the fact that Defendant planned to use Dr. Miller as an expert witness until
4 [the parties] filed [their] Joint Pretrial Statement . . . [and] exchanged Witness Lists.” Masuda
5 Decl. ¶ 2. The exchange took place on March 6, 2014. Joint Pretrial Statement at 14, ECF No.
6 32; Def.’s Witness List at 2, ECF No. 32-2.

7 Federal Rule of Civil Procedure 16 permits modification of the court’s
8 scheduling order “only for good cause and with the judge’s consent.” FED. R. CIV. P. 16(b)(4).¹
9 The “‘good cause’ standard primarily considers the diligence of the party seeking” relief from
10 the scheduling order: “the district court may modify the pretrial schedule if it cannot reasonably
11 be met despite the diligence of the party seeking” modification. *Johnson v. Mammoth*
12 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citations and internal quotation marks
13 omitted). “If [the moving] party was not diligent, the inquiry should end.” *Id.* “Moreover,
14 carelessness is not compatible with a finding of diligence and offers no reason for a grant of
15 relief.” *Id.* (citation omitted).

16 Here, plaintiff is the moving party whose diligence in complying with the
17 scheduling order must be examined. In his papers, he concedes timely receipt of Dr. Miller’s
18 independent medical examination report. Although the report’s disclosure suggests defendant
19 intended to call Dr. Miller as an expert witness, the report neither established this to a certainty.
20 *See, e.g., McCluskey v. AllState Ins. Co.*, No. CV 04-191-M-LBE, 2006 WL 5230018, at *1–2
21 (D. Mont. 2006) (barring use of undesignated doctor as expert witness despite production of
22 independent medical examination report). As such, plaintiff’s failure to pursue the matter
23 cannot be attributed to lack of diligence on her part. Rather, any ambiguity concerning Dr.
24
25

26 ¹ The court does not interpret the instant motion as one for reconsideration of the denial
27 of plaintiff’s previous motion *in limine*, ECF No. 35. Whereas that motion sought to prevent
28 Dr. Miller from testifying on behalf of defendant, this motion seeks to permit deposition of Dr.
Miller prior to that testimony.

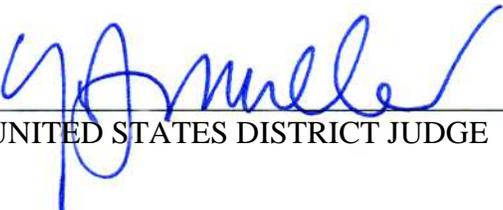
1 Miller could have been avoided by defendant's timely filing its disclosures with the court, as
2 required by the court's pretrial order.

3 Given the time between now and the trial date of June 9, 2014, defendant will
4 not be prejudiced by the taking of the deposition subject to a strict time limit of seven hours.
5 *See* FED. R. CIV. P. 30(a). Moreover, allowing plaintiff to depose Dr. Miller will have the
6 beneficial effect of saving time at trial.

7 For the foregoing reasons, plaintiff's motion is GRANTED. Discovery is
8 reopened solely to permit plaintiff's deposition of Dr. Miller. The parties are ordered to
9 conduct the deposition without disturbing the confirmed trial date.

10 IT IS SO ORDERED.

11 DATED: April 14, 2014.

12
13 
14 _____
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28