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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY A. JURGENS, JR.,
Plaintiff,
v.
M. DUBENDORF, et al.,
Defendants.

No. 2:14-cv-02780-KJM-DB

ORDER

After relying on a paper-based calendaring system for over three decades, defendants' counsel missed expert discovery deadlines in this case due to a clerical error. Defendants' counsel immediately took steps to provide plaintiff with his clients' expert reports, but the cut-off for all expert discovery has passed and defendants now move the court to deem timely their expert disclosures. Mot., ECF No. 44. Plaintiff opposes and asks for complete exclusion of defendants' experts. Opp'n, ECF No. 45. Because the court finds defendants' delay constitutes excusable neglect, the court GRANTS defendants' motion and modifies the scheduling order to permit the parties' completion of expert discovery.

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1 I. BACKGROUND

2 Plaintiff filed this case on November 26, 2014. Compl., ECF No. 1. On
3 October 16, 2015, the court issued a pretrial scheduling order, which it modified on September 9,
4 2016, based on the parties' stipulation. Scheduling Order, ECF No. 23; Am. Scheduling Order,
5 ECF No. 32. The amended scheduling order sets the following deadlines relevant here: expert
6 witness disclosures due by January 3, 2017; supplemental expert disclosures due by January 24,
7 2017; and expert discovery cut-off on February 17, 2017. Am. Scheduling Order at 2. The court
8 also set dispositive motions to be heard by March 10, 2017, scheduled trial for August 7, 2017,
9 and noted that "no further extensions of time will be granted absent extraordinary circumstances."
10 *Id.*

11 On January 3, 2017, plaintiff timely disclosed his three initial expert witnesses and
12 filed an expert report for each witness. ECF No. 37; Opp'n at 2. Defendants missed the
13 January 3 deadline, a fact defendants' counsel, James McGarry, realized only upon reviewing his
14 receipt of plaintiff's filing the next morning. McGarry Decl. at 3, ECF No. 44-2. McGarry had
15 shared the modified scheduling order with his legal secretary, but she inadvertently did not record
16 the discovery deadlines in their master calendar. *Id.* at 2; Gonzalez Decl. at 2, ECF No. 44-1. As
17 a result, McGarry was not reminded of the expert deadlines when they came up. McGarry Decl.
18 at 4; Gonzalez Decl. at 3.

19 After learning of his mistake, counsel immediately took steps to address the error.
20 McGarry spoke with plaintiff's counsel and provided plaintiffs with the names of defendants'
21 three experts. *See* McGarry Decl. at 4–5. Defendants produced the full reports of the three
22 experts over the coming weeks. They produced one on January 24 and the other two on
23 February 3. McGarry Decl. at 5. January 24 was the day of the rebuttal expert disclosure
24 deadline. February 3 was after all disclosure deadlines but about two weeks before the close of
25 expert-related discovery. Plaintiff's counsel has decided not to depose any of defendants'
26 experts.

27 The parties repeatedly met and conferred about defendants' untimely disclosures,
28 but could not come to an agreement on the admissibility of defendants' expert evidence.

1 Defendants originally noticed this motion for hearing before the magistrate judge assigned to this
2 case, ECF No. 41, but the court instructed defendants to re-notice the motion for hearing before
3 the undersigned, ECF No. 43, and defendants re-filed the operative motion on March 9, 2017.
4 Mot. On April 3, 2017, the court submitted the matter without oral argument. ECF No. 47.

5 II. STANDARD

6 As a threshold matter, the parties dispute whether Federal Rule of Civil Procedure
7 6 or 37 provides the standard applicable to defendants' motion. Sanctions for untimely discovery
8 disclosures ordinarily fall under Rule 37, which provides "[i]f a party fails to . . . identify a
9 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
10 witness . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c).
11 Rule 26(a)(2) in turn requires a party disclose the identities and reports of its experts "at the times
12 and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

13 However, Rule 6 contains an exception to the timing requirements of the other
14 Federal Rules and this court's scheduling order. Under Rule 6(b), "[w]hen an act may or must be
15 done within a specified time, the court may, for good cause, extend the time . . . on motion made
16 after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P.
17 6(b)(1). This rule also lists exceptions when a court "must not extend the time to act," most of
18 which involve post-judgment relief and none of which are relevant here. Fed. R. Civ. P. 6(b)(2).
19 The rule's language is broad, covers any "act [that] may or must be done within a specified time,"
20 and does not exclude discovery disclosures from its operation. The advisory committee notes
21 further emphasize Rule 6(b)'s broad reach: "Rule 6(b) is a rule of general application giving
22 wide discretion to the court to enlarge [the Rules'] time limits or revive them after they have
23 expired." Fed. R. Civ. P. 6 (1946 advisory committee notes).

24 Though the Ninth Circuit has not directly addressed the applicability of Rule 6(b)
25 to expert disclosures under Rule 26, it has recognized how Rule 6(b) can interact with and expand
26 other Federal Rules. *See, e.g., Zanowick v. Baxter Healthcare Corp.*, 15-56034, 2017 WL
27 929203, at *2 (9th Cir. Mar. 9, 2017) ("[Rule 6(b)] works in conjunction with Rule 25(a)(1) to
28 provide the intended flexibility in enlarging the time for substitution"). And other courts have

1 specifically applied Rule 6(b) to discovery-related issues before turning to Rules 26 or 37. *See*,
2 *e.g.*, *Colony Apartments v. Abacus Project Mgt., Inc.*, 197 F. App'x 217, 223 (4th Cir. 2006)
3 (applying Rule 6(b) standard to plaintiff's motion, untimely under Rule 26, for leave to file
4 supplemental expert disclosures); *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990)
5 (holding that a trial court may extend time for response to interrogatories under Rule 6(b) or
6 otherwise issue sanctions under Rule 37); *Stark-Romero v. Nat'l R.R. Passenger Co. (AMTRAK)*,
7 275 F.R.D. 544, 545 (D.N.M. 2011) (granting plaintiff's request to modify scheduling order
8 because plaintiff showed excusable neglect under Rule 6(b) in failing to meet the expert
9 disclosure deadline); *Montano v. Solomon*, 2:07-CV-0800 KJN P, 2010 WL 4137476, at *3 (E.D.
10 Cal. Oct. 19, 2010) (analyzing defendant's untimely propounding of interrogatories under Rule
11 6(b)); *see also Los Feliz Ford, Inc. v. Chrysler Grp., LLC*, CV1006077GAFMANX, 2012 WL
12 12886961, at *1 (C.D. Cal. Apr. 23, 2012) (explaining that scheduling orders may be modified
13 after the relevant time period has expired only if party failed to act because of "excusable
14 neglect" under Rule 6(b)); *but see Gurvey v. Legend Films, Inc.*, 09-CV-942-AJB BGS, 2011 WL
15 3241832, at *1 (S.D. Cal. July 29, 2011) (requiring a party must show both "good cause" and
16 "excusable neglect" under Rule 6(b) and that the party's failure was either "substantially
17 justified" or "harmless" under Rule 37(c)).

18 In light of Rule 6(b)'s expansive language, and the overwhelming authority that
19 applies Rule 6(b) to the discovery deadlines created by the other Federal Rules, this court finds
20 that Rule 6(b) provides the applicable standard to analyze defendants' motion. Accordingly, only
21 if defendants do not satisfy Rule 6(b)'s requirements will the court turn to consider sanctions
22 under Rule 37. *See Geiserman*, 893 F.2d 793 (suggesting this order of operations).

23 As indicated above, under Rule 6(b) a court may "for good cause, extend the
24 time . . . on motion made after the time has expired if the party failed to act because of excusable
25 neglect." Fed. R. Civ. P. 6(b). The Supreme Court addressed the meaning of "excusable
26 neglect," a phrase that appears in many contexts, in *Pioneer Investment Services Co. v. Brunswick*
27 *Associates Limited Partnership*, 507 U.S. 380 (1993). There, the Court resolved a circuit split
28 and held "neglect" embraced a failure to act "caused by inadvertence, mistake, or carelessness"

1 and not just “by intervening circumstances beyond the party’s control.” *Id.* at 388. The Court
2 next found that whether an omission was “excusable” was an equitable determination, to be made
3 “taking account of all relevant circumstances.” *Id.* at 395. The Ninth Circuit has recognized the
4 following factors as relevant in making this equitable determination: “(1) the danger of prejudice
5 to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings,
6 (3) the reason for the delay, including whether it was within the reasonable control of the movant,
7 and (4) whether the moving party’s conduct was in good faith.” *Pincay v. Andrews*, 389 F.3d
8 853, 855 (9th Cir. 2004) (en banc) (citing *Pioneer*, 507 U.S. at 395); *see also Ahanchian v. Xenon*
9 *Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010) (holding that a district court abuses its
10 discretion by failing to engage in this four-factor test or at least the “equitable analysis” captured
11 by the test); *Pincay*, 389 F.3d at 860 (Berzon, J., concurring) (“*Pioneer* . . . indicates that a district
12 court may find neglect ‘excusable’ if it is caught quickly, hurts no one, and is a real mistake,
13 rather than one feigned for some tactical reason—even if no decent lawyer would have made that
14 error.”).

15 Rule 6 requires a movant not only show “excusable neglect,” but also “good
16 cause.” Fed. R. Civ. P. 6; *Warkentin v. Federated Life Ins. Co.*, 594 F. App’x 900, 901 (9th Cir.
17 2014) (stating that movant must meet both requirements). “‘Good cause’ is a non-rigorous
18 standard that has been construed broadly across procedural and statutory contexts.” *Ahanchian*,
19 624 F.3d at 1259 (9th Cir. 2010); *see also Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183,
20 187 (1st Cir. 2004) (“There is no precise formula for the ‘good cause’ analysis.”); *Coon v.*
21 *Grenier*, 867 F.2d 73, 76 (1st Cir. 1989) (explaining good cause is a “liberal” standard); *Stark-*
22 *Romero*, 275 F.R.D. at 547 (“Showing good cause is not . . . particularly demanding . . .”).
23 “This rule, like all the Federal Rules of Civil Procedure, ‘[i]s to be liberally construed to
24 effectuate the general purpose of seeing that cases are tried on the merits.’” *Ahanchian*, 624 F.3d
25 at 1258–59 (alteration in original) (quoting *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983)).

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1 III. DISCUSSION

2 A. Excusable Neglect

3 The court addresses each of the four factors identified in *Pioneer* to determine
4 whether defendants acted with “excusable neglect.”

5 1. Danger of prejudice

6 In this case, neither party addresses the dispositive motion hearing deadline that
7 passed on March 10, and neither party claims it was prejudiced with respect to the filing of such
8 motions. There is still time for the parties to complete expert discovery in anticipation of the trial
9 currently calendared for August 7,¹ and additional weeks of delay to complete expert discovery
10 do not by themselves create prejudice. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1225 (9th
11 Cir. 2000).

12 The court recognizes defendants might have gained a slight advantage by having
13 seen plaintiff’s expert reports first. *See Lefay v. Lefay*, 1:13-CV-01362 AWI, 2014 WL 6473725,
14 at *6 (E.D. Cal. Nov. 18, 2014) (“Where ones party’s expert has the benefit of reviewing an
15 opposing party’s expert report before having to prepare his or her own, there necessarily is
16 prejudice.”). But such an advantage can be blunted by giving plaintiff more time to depose
17 defendants’ experts, if he chooses, and to produce plaintiff’s rebuttal expert reports. *See id.* at *7
18 (deeming defendants’ expert reports timely so long as the experts were made available to
19 plaintiff’s counsel). Granting defendants relief will leave the parties in substantially the same
20 position as if defendants had filed the expert reports just three to four weeks sooner. Moreover, to
21 the extent that prejudice to the movant is relevant to the instant motion, this factor favors
22 defendants; unless the court grants some relief, defendants will be deprived of all three experts in
23 litigating their case. On balance, this factor favors defendants.

24 2. Length of delay and impact on proceedings

25 Defendants reached out to plaintiff the day after missing the initial deadline here,
26 sent initial albeit incomplete disclosures to plaintiff a few days later, and disclosed full reports

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28 ¹ The trial date will be addressed and a firm date confirmed at the final pretrial conference.

1 from all experts within a month. McGarry Decl. at 4–5. Although defendants waited a little over
2 a month to file this motion with the court, defendants’ counsel met and conferred with plaintiff’s
3 counsel during that time. Mot. Exs. 9–10. This delay was relatively short and will not
4 significantly impact the proceedings. In light of defendants’ efforts to reach an agreement with
5 plaintiff, a month’s time was sufficiently prompt under Rule 6(b). *See Bateman*, 231 F.3d at 1225
6 (finding that filing of a Rule 60(b) motion, which similarly requires “excusable neglect,” one
7 month after order in question was “not long enough to justify denying relief”). Thus, this factor
8 also favors defendants.

9 3. Reason for the delay

10 The third *Pioneer* factor directs the court to weigh the reason for the delay,
11 including whether it was within the reasonable control of the movant. This is not a case where a
12 movant offers no explanation for the delay. *Cf. Medina v. Wells Fargo Bank, N.A.*,
13 216CV00532ODWMRWX, 2016 WL 2944295, at *2 (C.D. Cal. May 20, 2016) (“Plaintiff’s
14 counsel gives no reason for his failure to timely oppose Defendant’s Motion other than that he
15 simply did not calendar its due date.”). Instead, defendants explain in detail a typically reliable
16 calendaring system, implemented faithfully by attorneys and clerical staff at counsel’s office,
17 which failed in this one instance. McGarry Decl. at 2–4; Gonzalez Decl. at 2–3. McGarry shared
18 the court’s scheduling order with his assistant, and it was through some inadvertent error that the
19 relevant deadlines did not make it into their master calendar. *Id.* Although the court could
20 imagine additional steps counsel could have taken to provide redundancy and ensure compliance
21 with the court’s deadlines, counsel exercised sufficiently reasonable control to prevent the delay.

22 These facts are at least as sympathetic as those discussed in *Pincay*, where the
23 Ninth Circuit affirmed a district court’s finding of “excusable neglect” based on a paralegal’s
24 misreading of a rule governing a filing deadline. 389 F.3d at 855. In *Pincay*, the Ninth Circuit
25 found that the district court did not abuse its discretion in granting relief due to “a lawyer’s failure
26 to read an applicable rule,” which “is one of the least compelling excuses that can be offered.” *Id.*
27 at 859. On the one hand, this case does not present the life-threatening emergencies that courts
28 have found sufficient to support this factor. *See, e.g., Bateman*, 231 F.3d at 1222–23 (counsel

1 was required to travel to Africa due to a family emergency); *Lemoge v. United States*, 587 F.3d
2 1188, 1197 (9th Cir. 2009) (counsel failed to timely serve a complaint in part because he had
3 severe medical complications from a staph infection that required him to undergo “three
4 surgeries, skin grafts, extensive therapy, and a full regimen of medications”). But this factor does
5 not require such dramatic circumstances. *See, e.g., Pioneer*, 507 U.S. at 398 (excusable neglect
6 where counsel failed to file timely proof of claim because, contrary to usual practice, notice of the
7 deadline was placed in an inconspicuous area of the notice sent to creditors); *In re Zilog, Inc.*,
8 450 F.3d 996, 1007 (9th Cir. 2006) (same). This factor favors defendants.

9 4. Good faith

10 Defendants assert they have proceeded in good faith, Mot. at 4, plaintiffs
11 acknowledge defendants’ lack of bad faith, Opp’n at 8, and the court finds no evidence of bad
12 faith. Thus, this final factor also favors granting defendants’ request.

13 In sum, after applying *Pioneer*’s four-factor test, and considering the “equitable
14 analysis” it facilitates, the court finds defendants’ neglect was excusable because “it [was] caught
15 quickly, hurt[] no one, and [was] a real mistake, rather than one feigned for some tactical reason.”
16 *Pincay*, 389 F.3d at 860. Defendants also establish “good cause” for relief.

17 The court GRANTS defendants’ motion under Rule 6(b) and deems timely the
18 three defense expert reports.

19 B. Scheduling order

20 As indicated above, the scheduling order can be amended to prevent any prejudice
21 to plaintiff, and thus the court next considers what modifications to the scheduling order are
22 appropriate to do so. The court sees no need to provide additional time for initial expert
23 disclosures, but the court modifies the scheduling order to provide the parties more time to
24 disclose rebuttal expert reports and to depose experts. Accordingly, the parties shall have through
25 June 9, 2017 to make supplemental expert disclosures and through June 30, 2017 to complete all
26 expert-related discovery. The joint pretrial statement shall now be due on July 21, 2017, and the
27 final pretrial conference is rescheduled for August 11, 2017, at 10 a.m. At the final pretrial
28 conference, the court will confirm a trial date and set a deadline for the parties’ trial briefs. All

1 other provisions of the court's prior scheduling orders remain in effect. *See* Scheduling Order,
2 ECF No. 23; Am. Scheduling Order, ECF No. 32.

3 IV. CONCLUSION

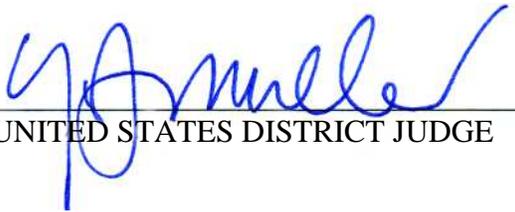
4 The court GRANTS defendants' motion to deem its three expert reports timely.

5 The court MODIFIES the scheduling order as follows: Supplemental expert
6 disclosures due by June 9, 2017; expert discovery cut-off extended to June 30, 2017; joint pretrial
7 statement due by July 21, 2017; and final pretrial conference set for August 11, 2017, at 10 a.m.

8 This order resolves ECF No. 44.

9 IT IS SO ORDERED.

10 DATED: May 19, 2017.

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13 UNITED STATES DISTRICT JUDGE
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