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7 **UNITED STATES DISTRICT COURT**  
8 **NORTHERN DISTRICT OF CALIFORNIA**  
9 **SAN FRANCISCO DIVISION**

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11 NEXTDOR.COM, INC.,

12 Plaintiff,

13 v.

14 RAJ ABHYANKER,

15 Defendant.

Case No. 12-cv-05667 EMC (NC)

**ORDER SETTING DEPOSITION  
SCHEDULE; DENYING  
DEFENDANT'S MOTION FOR  
RECONSIDERATION OR TO  
REOPEN DISCOVERY**

Re: Dkt. No. 311

16  
17 The parties submitted a joint letter brief seeking the Court's resolution of two  
18 disputes: first, the scheduling of expert depositions and second, whether to reopen discovery  
19 to allow defendant to take three fact depositions. The Court now schedules the expert  
20 depositions and denies the motion to reopen fact discovery for lack of good cause.

21 **A. Expert Deposition Scheduling**

22 The parties were unable to agree on a schedule for the depositions of the seven total  
23 expert witnesses, and the deadlines for production of documents associated with those  
24 depositions. Therefore, at oral argument today, the Court set the following deadlines:

25 1) The deposition of O'Leary<sup>1</sup> is to take place on August 22 at 12:00 p.m. Documents

26 <sup>1</sup> Because the parties did not provide the names of the experts in writing, the Court spells  
27 the experts' names phonetically and trusts that the parties understand to whom the Court is  
28 referring.

1 are to be produced by August 22 at 9:00 a.m.

2 2) The deposition of Sugarman is to take place on August 25. Documents are to be  
3 produced by August 25 at 9:00 a.m.

4 3) The deposition of Berryhill is to take place on August 26. Documents are to be  
5 produced by August 25 at 9:00 a.m.

6 4) The deposition of Fisher is to take place on August 27. Documents are to be  
7 produced by August 26 at 12:00 p.m.

8 5) The deposition of Jay is to take place on August 28. Documents are to be  
9 produced by August 26 at 12:00 p.m.

10 6) The deposition of Sheldon is to take place on August 29. Documents are to be  
11 produced by August 25 at 9:00 a.m.

12 7) The deposition of McCain is to take place on September 2. Documents are to be  
13 produced by August 26 at 12:00 p.m.

14 **B. Motion to Reopen Discovery**

15 Next, defendant moves to take the deposition of two fact witnesses and one 30(b)(6)  
16 person most knowledgeable. Viewing the motion as one for reconsideration of the Court's  
17 previous order denying the request to compel these depositions, the motion is denied for  
18 lack of showing of new material facts or a change of law. Viewing the motion as one to  
19 reopen discovery, the Court denies the motion because defendant has not demonstrated  
20 good cause.

21 First, viewing the motion as one for reconsideration of the Court's earlier order  
22 denying Abhyanker's request to take the depositions of Tolia and Janakiraman, Dkt. No.  
23 223, the Court finds that Abhyanker has not met the standard for demonstrating that  
24 reconsideration is warranted. First, the procedurally correct method to challenge the order  
25 of the Court would have been to appeal the order to Judge Chen within 14 days of the order.  
26 Fed. R. Civ. P. 72(a). Defendant did not appeal the order. Even if it were proper to ask this  
27 Court directly to reconsider its order, the form of the motion is procedurally improper. Our  
28 Local Rules specify that a party may "make a motion before a Judge requesting that the

1 Judge grant the party leave to file a motion for reconsideration of any interlocutory order”  
2 and the rule makes clear that “[n]o party may notice a motion for reconsideration without  
3 first obtaining leave of Court to file the motion.” Civ. L. R. 7-9(a). Defendant has failed to  
4 take the step of seeking leave of Court, and has instead filed a motion that in effect asks the  
5 Court to reverse its previous holding that the depositions would not go forward for lack of  
6 relevance and good cause.

7 Even if the Court were to consider the motion despite the improper form, the Local  
8 Rules instruct that a party seeking reconsideration must demonstrate:

- 9 (1) That at the time of the motion for leave, a material difference in fact  
10 or law exists from that which was presented to the Court before entry of  
11 the interlocutory order for which reconsideration is sought. The party  
12 also must show that in the exercise of reasonable diligence the party  
13 applying for reconsideration did not know such fact or law at the time  
14 of the interlocutory order; or  
15 (2) The emergence of new material facts or a change of law occurring  
16 after the time of such order; or  
17 (3) A manifest failure by the Court to consider material facts or  
18 dispositive legal arguments which were presented to the Court before  
19 such interlocutory order.

17 Defendant has failed to demonstrate that any of these circumstances exist. The only  
18 circumstance that has changed since defendant’s original motion is that fact discovery has  
19 closed, the parties are well underway with expert discovery, and dispositive motions are due  
20 in roughly three weeks. Dkt. No. 274. Defendant’s argument that the Court’s previous  
21 extension of fact discovery means that the Court should again extend time for fact discovery  
22 is without merit. Putting aside the questionable relevance of the depositions, the date of  
23 trial is approaching, the experts have written their reports, and defendant has not identified a  
24 new fact or change of law that would warrant the Court reconsidering its previous order  
25 denying these depositions. The motion to reconsider is thus denied.

26 Next, viewing the motion as one to reopen discovery, the Court denies the requested  
27 relief for lack of good cause. Federal Rule of Civil Procedure 16(b) provides that the  
28 district court must issue a scheduling order that limits the time to join other parties, amend

1 the pleadings, complete discovery, and file motions. Fed. R. Civ. P. 16(b)(1)-(3). Once in  
2 place, “[a] schedule may be modified only for good cause and with the judge’s consent.”  
3 Fed. R. Civ. P. 16(b)(4). The “good cause” requirement of Rule 16 primarily considers the  
4 diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975  
5 F.2d 604, 609 (9th Cir. 1992). “The district court may modify the pretrial schedule if it  
6 cannot reasonably be met despite the diligence of the party seeking the extension.” *Id.*  
7 (internal citation and quotation marks omitted).

8 Here, defendant has admitted that he could have sought these depositions much  
9 earlier, and offers no explanation as to why defendant waited over 18 months after the filing  
10 of the complaint, and only two months before the original close of fact discovery, to notice  
11 a fact deposition. Nor has defendant shown that he diligently pursued the depositions after  
12 noticing them. Defendant has thus failed to act with diligence in the discovery process and  
13 has not shown good cause to reopen discovery at this extremely late stage.

14 Defendant’s only argument for reopening discovery is that fairness requires that he be  
15 permitted to take depositions, so that he is better prepared for trial. But there are two sides  
16 to the fairness coin. It would prejudice plaintiff, particularly in light of the lack of diligence  
17 by defendant in pursuing fact discovery, for the Court to now order three fact depositions to  
18 take place. This would likely require experts to amend their reports or create new ones, and  
19 it would require continuing the expert depositions that the Court has just scheduled. In light  
20 of defendant’s lack of diligence in pursuing the depositions, and the prejudice to plaintiff,  
21 the Court denies the motion.

22 Any party may object to this order to District Court Judge Edward M. Chen within 14  
23 days. Fed. R. Civ. P. 72(a).

24 IT IS SO ORDERED.

25 Date: August 21, 2014

26 

27 Nathanael M. Cousins  
28 United States Magistrate Judge