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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 PATRICK CALDWELL, et al.,

No. C -13-00385 WHA (EDL)

9 Plaintiffs,

**ORDER DENYING DEFENDANTS'
MOTION TO COMPEL AND MOTION
TO MODIFY LITIGATION SCHEDULE**

10 v.

11 FACET RETIREE MEDICAL PLAN, et al.,

12 Defendants.
13 _____/

14 In this ERISA action, Plaintiffs seek payment of retirement benefits after their benefits were
15 denied by Defendant Facet Retiree Medical Plan. Defendants have filed two discovery motions
16 focused on compelling Plaintiffs to appear for their depositions. At the January 21, 2014 hearing on
17 Defendants' motions, the Court ordered further briefing on the issue of whether Plaintiffs had
18 introduced new facts in their dispositive motion that would justify compelling their depositions. The
19 parties filed supplemental briefs on January 29 and February 4, 2014. For the reasons stated at the
20 hearing and in this Order, Defendants' Motion to Compel and Motion to Modify Litigation Schedule
21 are denied.

22 **Facts**

23 Defendant Facet Retiree Health Plan provides post-retirement health care benefits to a small
24 group of former officers of a company called Protein Design Labs. Compl. ¶¶ 4-12. Protein Design
25 Labs (PDL) was the original sponsor of the Plan and Plaintiffs all retired from PDL. *Id.* In 2008,
26 PDL spun off a company called Facet Biotech Corp., which assumed the Plan. Compl. ¶ 17. In
27 2009, Facet announced that it would eliminate the company's payment of any portion of the
28 premiums, and it purported to amend the Plan to reflect that change. Compl. ¶ 18. Plaintiffs
protested the change, but it was implemented in 2010. Compl. ¶¶ 20-21. Plaintiffs made an

1 administrative claim for reinstatement of the company’s payment of a portion of the premiums and
2 requested review of the denial of that claim. Compl. ¶ 36. In this case, Plaintiffs have asserted that
3 the amendment to the Plan was invalid not only because of its substance but also because of
4 procedural failures. Hasselman Decl. ¶ 13.

5 Defendants’ counsel contacted Plaintiffs’ counsel on August 1, 2013 about setting dates for
6 Plaintiffs’ depositions. Torres Decl. ¶ 2; Ex. 1. Defendants sought these depositions at least in part
7 because Plaintiffs’ initial disclosures in this case had stated that Plaintiffs were “likely to have
8 information regarding Plaintiffs’ claim and appeal, premium contributions paid by participants in the
9 Facet Retiree Medical Plan and Protein Design Labs Inc.’s intent in establishing the PDL Retiree
10 Medical Plan.” Mot. to Compel Ex. 1 at 2. Plaintiffs’ counsel responded that she would obtain
11 dates from her clients for their depositions. Torres Decl. ¶ 2; Ex. 1. Plaintiffs’ counsel did not raise
12 any substantive objections to the depositions, and only objected as to timing because Plaintiffs took
13 the position that either all depositions should occur prior to the October 23, 2013 ADR session or all
14 depositions should occur after that session. Torres Decl. ¶ 3; Ex. 2. The parties had already agreed
15 to take the deposition requested by Plaintiffs after the ADR session, so Defendants postponed
16 seeking Plaintiffs’ deposition until that time as well. Torres Decl. ¶ 4.

17 Defendants’ counsel contacted Plaintiffs’ counsel prior to the October 23, 2013 ADR session
18 regarding deposition dates for Plaintiffs. Torres Decl. ¶ 5. Plaintiffs’ counsel responded on October
19 19, 2013 that she would secure dates for the depositions. Torres Decl. Ex. 3. Again, Plaintiffs did
20 not raise any substantive objections to their depositions. Id.

21 On October 21, 2013, however, Plaintiffs counsel objected for the first time to producing
22 Plaintiffs for their depositions. Torres Decl. ¶ 6; Ex. 4. Plaintiffs do not dispute that they initially
23 did not intend to object to their depositions, but state that they had a “change of heart.” Opp. at 3.
24 Defendants did not initially respond to the October 21, 2013 email about the objection to the
25 depositions because the ADR session was being conducted on October 23, 2013 during which the
26 case could settle thereby obviating any need for the depositions. Torres Decl. ¶ 7. The case did not
27 settle at the ADR session, and on October 28, 2013, Plaintiffs’ counsel contacted Defendants’
28 counsel about further settlement negotiations. Id. ¶ 8. The settlement discussions concluded in the

1 week of November 4 without a settlement. Id. ¶ 9.

2 On November 8, 2013, Defendants’ counsel sent a letter to Plaintiffs’ counsel regarding the
3 objections to Plaintiffs’ depositions. Torres Decl. ¶ 9; Ex. 5. Defendants also advised Plaintiffs that
4 Defendants would file a motion seeking additional time to conduct Plaintiffs’ depositions and related
5 follow up discovery. Id. Plaintiffs did not respond to the November 8, 2013 letter. Torres Dec.. ¶
6 10. On November 11, 2013, Defendants filed their Motion to Modify Litigation Schedule.

7 On November 18, 2013, Defendants’ counsel sent a follow up letter to Plaintiffs’ counsel
8 addressing the issues raised in Defendants’ motion to modify the litigation schedule. Torres Decl. ¶
9 11; Ex. 6. Plaintiffs’ counsel responded on November 18, 2013. Id. ¶ 12; Ex. 7. Defendants’
10 counsel also spoke to Plaintiffs’ counsel by phone on November 19, 2013 to attempt to resolve the
11 issue of Plaintiffs’ depositions. Torres Decl. ¶ 13. On November 19, 2013, Defendants filed their
12 Motion to Compel.

13 **Discussion**

14 Defendants argue that they are entitled to Plaintiffs’ depositions based on the general rules of
15 allowable discovery under Rule 26. See Fed. R. Civ. P. 26. Defendants note that Plaintiffs stated in
16 their initial disclosures that they have discoverable information, and that Plaintiffs did not object to
17 their depositions for two months after Defendants initially sought the depositions.

18 Plaintiffs strenuously oppose the motion to compel their depositions. Plaintiffs point out that
19 Defendants have never served deposition notices so there is nothing for the Court to compel. See
20 Nuskey v. Lambricht, 251 F.R.D. 3, 12 (D. D.C. 2008). However, Civil Local Rule 30-1 requires
21 the parties to meet and confer about deposition dates prior to issuing deposition notices. Here,
22 Plaintiffs led Defendants to believe for two months that they would appear for their depositions, and
23 then three weeks before the discovery cutoff, informed Defendants that they had a “change of heart.”
24 Under those circumstances, Defendants’ failure to serve deposition notices does not preclude them
25 from taking Plaintiffs’ depositions provided they do so before any depositions are taken.

26 Plaintiffs also argue that discovery in ERISA actions is much more limited than in routine
27 civil cases and Defendants have not shown that Plaintiffs’ depositions are likely to lead to the
28 discovery of admissible evidence. See Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 969-70

1 (9th Cir. 2006). Defendants argue, however, that Plaintiffs have conceded that they discoverable
2 knowledge about their claims and their claimed damages or injury. As discussed at the hearing,
3 Plaintiffs may have discoverable information as to their damages, and Defendants may be entitled to
4 depose them on that issue. However, any depositions regarding damages would only be appropriate
5 after a ruling on the pending dispositive motions finding liability by Defendants. Further, the parties
6 have not addressed the general rule that compensatory damages are not available under ERISA. See
7 Bast v. Prudential Ins. Co., 150 F.3d 1003, 1009 (9th Cir. 1998). Therefore, Defendants' motion to
8 compel Plaintiffs' depositions as to damages is denied without prejudice.

9 The parties' supplemental briefs addressed whether Defendants were entitled to Plaintiffs'
10 depositions on substantive issues. In their supplemental brief, Defendants listed nine statements
11 from Plaintiffs' dispositive motion that Defendants believe constitute new evidence justifying
12 Plaintiffs' depositions. After a careful review of the supplemental briefs, the Court concludes that
13 none of the nine items warrant deposing Plaintiffs on substantive issues. For example, items one and
14 two do not constitute evidentiary facts justifying Plaintiffs' depositions, and instead are inferences
15 that Plaintiffs propose in their dispositive motion. Moreover, Plaintiffs do not oppose striking these
16 statements from Plaintiffs' brief, so these statements are stricken.

17 Item three does not cite to any evidence, and information about Plaintiffs' intent to re-enroll
18 in the Plan is not directly relevant to the merits. Item four relates to a matter identified in Plaintiffs'
19 initial disclosures as a topic on which Plaintiffs have knowledge, but exhibit 16 on which item four
20 relies is in the administrative record and is cited and contained in declarations from both parties in
21 the briefing on the dispositive motion. See Hasselman Decl. in Supp. of Dispositive Mot. at ¶ 17;
22 Ex. 16; Torres Decl. in Supp. of Opp. to Dispositive Mot. at 8; Ex. 6 at 84-89. Plaintiffs did not
23 provide any new evidence in making the statement in item four and citing exhibit 16. Therefore,
24 item four does not provide a basis for Plaintiffs' depositions on substantive issues.

25 Items five, six and eight are statements describing a document and do not cite extra-record
26 evidence. In addition, Plaintiffs do not cite any extra-record evidence in support of items seven and
27 nine. Therefore, these items do not support permitting Defendants to take Plaintiffs' depositions on
28 substantive issues.

1 **Conclusion**

2 Defendants' Motion to Compel and Motion to Modify Litigation Schedule are denied
3 without prejudice. In their opposition to the motion to compel, Plaintiffs seek a fee award.
4 Plaintiffs' request for fees, which was not made by separate motion, is denied. See Local Rules 7-
5 8(a), 37-4(a).

6 **IT IS SO ORDERED.**

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Dated: February 13, 2014

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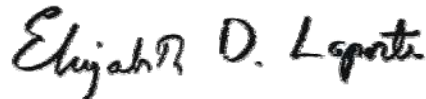
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ELIZABETH D. LAPORTE
United States Chief Magistrate Judge