

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM J. CANNON,  
  
Plaintiff,  
  
v.  
  
AUSTAL USA LLC AND UNITED STATES OF  
AMERICA  
  
Defendants.

Case No.: 15CV2582-CAB(BLM)

**ORDER DENYING AS MOOT  
PLAINTIFF'S UNOPPOSED MOTION TO  
ALTER BRIEFING SCHEDULE AND  
DENYING MOTION FOR LEAVE TO  
DEPOSE PLAINTIFF'S  
TREATING PHYSICIANS FOR  
TRIAL PURPOSES AFTER THE  
CLOSE OF EXPERT DISCOVERY**

**[ECF Nos. 76, 81]**

On May 8, 2017, Plaintiff filed an "UNOPPOSED MOTION TO ALTER BRIEFING SCHEDULE." ECF No. 76-1. In that motion, Plaintiff seeks to continue the deadline for filing a motion to take a late deposition from May 12, 2017, to one week after the District Judge issues a ruling on his anticipated "Motion for Protective Order and/or Limine Allowing Complainant to Use Depositions of Complainant's Treating Doctors at Trial." Id. at 3. Plaintiff is seeking the extension because under the current schedule, he could "incur significant expense taking

1 depositions of treating doctors" for trial purposes, only to later find out that the doctors are  
2 required to personally attend the trial. Id. at 2.

3 On May 8, 2017, Defendant USA filed a "REQUEST FOR BRIEFING SCHEDULE TO FILE  
4 RESPONSE TO" Plaintiff's motion. ECF No. 77. Defendant USA requested two weeks to respond  
5 to Plaintiff's motion "[u]less the Court sees fit to deny this request without briefing." Id. at 2.  
6 On May 10, 2017, the Court issued an order giving Defendant USA until May 17, 2017 to respond  
7 to Plaintiff's motion. ECF No. 79.

8 On May 12, 2017, Plaintiff filed a "MOTION FOR LEAVE TO DEPOSE COMPLAINANT'S  
9 TREATING PHYSICIANS FOR TRIAL PURPOSES AFTER THE CLOSE OF EXPERT DISCOVERY."  
10 ECF No. 81-1. Plaintiff seeks permission to depose his treating physicians after expert discovery  
11 has closed<sup>1</sup> and closer to the time trial is scheduled to begin.<sup>2</sup> Id. at 3. In support, Plaintiff  
12 argues that he is still undergoing treatment for his injuries and that taking his treating physicians'  
13 depositions now would be premature. Id. Plaintiff notes that if the depositions take place too  
14 early, follow-up depositions may be required resulting in unnecessary expense. Id. In further  
15 support, Plaintiff argues that he intends to file A "Motion for Protective Order and/or Limine  
16 Allowing Complainant to Use Depositions of Complainant's Treating Doctors at Trial" before  
17 District Judge Bencivengo, since he will be unable to compel the physicians, who reside and  
18 work in Alabama and Louisiana, to testify at trial. Id. at 2.

19 On May 16, 2017, Defendant USA filed a "RESPONSE TO PLAINTIFF'S MOTION TO 'ALTER  
20 BRIEFING SCHEDULE'." ECF No. 82. Defendant USA contends that Plaintiff's motion should be  
21 denied because Plaintiff's motion would allow him to "upend discovery and trial preparation by  
22 untethering the date [for completing expert discovery] and 'moving' it to an entirely non-fixed,  
23 unascertainable date that potentially could be, quite literally, the eve of trial." Id. at 2.  
24 Defendant USA further contends that Plaintiff's desire to save money on depositions where live

---

25 <sup>1</sup> Expert discovery closes on September 1, 2017. ECF No. 72 at 7.

26 <sup>2</sup> Trial is currently scheduled to begin on January 22, 2018. ECF No. 72 at 8.

1 testimony may be required at trial “is a tactical consideration that *all* parties face” and not a  
2 reason for altering the Court’s scheduling order or prejudicing other parties. *Id.* at 7 (emphasis  
3 in original). Defendant USA notes that Plaintiff’s motion does not contain any affidavits,  
4 declarations, or exhibits and relies solely on the unsworn arguments of counsel. *Id.* at 2.  
5 Defendant USA also notes that Plaintiff could have chosen to retain medical experts in or near  
6 the Southern District of California where the case is being heard and that there is a disconnect  
7 in Plaintiff’s pleadings as the instant motion refers to the doctors at issue as treating physicians,  
8 whereas his Rule 26 disclosures and previous representations to the Court describe the doctors  
9 as experts, which is an important distinction because experts and treating physicians are  
10 permitted to testify about different things at trial. *Id.* at 2-3. Finally, Defendant USA notes that  
11 Plaintiff has the ability to depose the doctors before the close of discovery and he needs to  
12 choose to do so or not, but altering the scheduling order so that he may potentially take the  
13 depositions on the eve of trial is not appropriate and is highly prejudicial. *Id.* at 7.

14  
15       Once a Rule 16 scheduling order is issued, dates set forth therein may be modified only  
16 “for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4); see also ECF No. 46 at  
17 10 (stating that dates and times “will not be modified except for good cause shown”). The Rule  
18 16 good cause standard focuses on the “reasonable diligence” of the moving party. Noyes v.  
19 Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007); Coleman v. Quaker Oats Co., 232 F.3d  
20 1271, 1294-95 (9th Cir. 2000) (stating Rule 16(b) scheduling order may be modified for “good  
21 cause” based primarily on diligence of moving party). Essentially, “the focus of the inquiry is  
22 upon the moving party’s reasons for seeking modification.” Johnson v. Mammoth Recreations,  
23 Inc., 975 F.2d 604, 609 (9th Cir. 1992). However, a court also may consider the “existence or  
degree of prejudice to the party opposing the modification . . . .” *Id.*

      Plaintiff’s “UNOPPOSED MOTION TO ALTER BRIEFING SCHEDULE” is **DENIED AS**  
**MOOT**. Plaintiff filed a timely motion to take a late deposition on May 12, 2017 and, therefore,  
no longer needs to continue the deadline for filing such a motion. See ECF No. 81.

1 Plaintiff's "MOTION FOR LEAVE TO DEPOSE COMPLAINANT'S TREATING PHYSICIANS  
2 FOR TRIAL PURPOSES AFTER THE CLOSE OF EXPERT DISCOVERY" is **DENIED**. While Plaintiff  
3 was diligent in filing his motion prior to the expiration of the discovery deadline, the Court finds  
4 that the degree of prejudice to the opposing parties would be very high if the Court were to  
5 grant Plaintiff's motion. Plaintiff does not offer a date certain by which the depositions would  
6 be taken and has yet to file a motion in front of District Judge Bencivengo to assist him in  
7 determining whether or not he wants to risk "incur[ring] significant expense taking depositions  
8 of treating doctors" for trial purposes, only to later find out that the doctors are required to  
9 personally attend the trial. ECF No. 76-1 at 2. The Court sets deadlines so that cases can  
10 proceed in an orderly fashion and all parties will know what to expect and how to plan their  
11 cases. Accordingly, the Court will not grant a request for a party to take a deposition whenever  
12 they want prior to trial. The Court is aware that Plaintiff may incur some additional expenses if  
13 he deposes his doctors and then needs to later update those depositions or fly the doctors to  
14 California to testify live at trial, however, those are the risks and costs associated with the  
litigation process and cannot be avoided by amending the scheduling order in such a way that  
will benefit Plaintiff and prejudice Defendants.

**IT IS SO ORDERED.**

Dated: 6/2/2017

  
Hon. Barbara L. Major  
United States Magistrate Judge