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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMERIPOD, LLC,
Plaintiff/Counter-Defendant,
v.
DAVISREED CONSTRUCTION, INC.,
Defendant/Counter-Claimant.

Case No.: 17-CV-747-H-WVG

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO CONTINUE
DISCOVERY**

On September 14, 2018, the parties jointly alerted the Court to a pending discovery dispute regarding Plaintiff/Counter-Defendant Ameripod wanting to designate an additional expert witness. For the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Ameripod’s request.

I. RELEVANT BACKGROUND

On January 19, 2018, the Court entered a Scheduling Order setting fact discovery to conclude on May 25, 2018, ordered expert witness designation be completed on or before June 8, 2018, ordered rebuttal expert witness designation be completed on or before June 22, 2018, and expert discovery to conclude on August 31, 2018. (See ECF No. 28 at ¶¶ 2-4, 6.) On May 17, 2018, the parties jointly moved the Court for an order continuing the fact discovery deadline as well as the Mandatory Settlement Conference (“MSC”). (ECF No. 31.) The Court granted the request to continue the MSC but denied the request to continue

1 fact discovery because the parties did not provide the good cause necessary. (ECF No. 32.)
2 On July 16, 2018, the parties jointly moved to continue the remaining expert discovery
3 deadlines, the MSC, and pretrial motion deadline in order to pursue private mediation.
4 (ECF No. 33.) Finding good cause, the Court granted the parties' request and ordered
5 expert reports be exchanged on or before September 18, 2018, rebuttal expert reports
6 exchanged on or before October 2, 2018, and the conclusion of expert discovery on October
7 30, 2018. (ECF No. 34 at ¶¶ 1-3.)

8 On September 14, 2018, the parties alerted the Court to the present discovery
9 dispute. The Court ordered the parties to submit briefing on the matter, which the parties
10 timely completed. On September 19, 2018, the Court convened a telephonic discovery
11 conference with the parties.

12 **II. LEGAL STANDARD**

13 Pursuant to Federal Rule of Civil Procedure ("Rule") 16(b)(3), a district court is
14 required to enter a pretrial scheduling order that "must limit the time to join other parties,
15 amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3)(A).
16 The scheduling order "controls the course of the action unless the court modifies it []" and
17 Rule "16 is to be taken seriously." Fed. R. Civ. P. 16(d); *Janicki Logging Co. v. Mateer*,
18 42 F.3d 561, 566 (9th Cir. 1994). Indeed, parties must "diligently attempt to adhere to [the
19 Court's] schedule throughout the subsequent course of the litigation." *Jackson v. Laureate*,
20 *Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). "A scheduling order 'is not a frivolous piece
21 of paper, idly entered, which can be cavalierly disregarded without peril.'" *Johnson v.*
22 *Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp.*
23 *v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)).

24 Rule 16(b)(4) "provides that a district court's scheduling order may be modified
25 upon a showing of 'good cause,' an inquiry which focuses on the reasonable diligence of
26 the moving party." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 n. 6 (9th Cir. 2007); citing
27 *Johnson*, 975 F.2d at 609. In *Johnson*, the Ninth Circuit explained,

28 ...Rule 16(b)'s "good cause" standard primarily concerns the diligence of

1 the party seeking the amendment. The district court may modify the pretrial
2 schedule “if it cannot reasonably be met despite the diligence of the party
3 seeking the extension.” Fed. R. Civ. P. 16 advisory committee’s notes (1983
4 amendment)...[T]he focus of the inquiry is upon the moving party’s reasons
5 for seeking modification...If that party was not diligent, the inquiry should
6 end.

7 *Johnson*, 975 F.2d at 609.

8 In part, the “good cause” standard requires the parties to demonstrate that
9 “noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding her
10 diligent efforts to comply, because of the development of matters which could not have
11 been reasonably foreseen or anticipated at the time of the Rule 16 Scheduling
12 conference...” *Jackson*, 186 F.R.D. at 608.

13 The parties may stipulate to various procedures concerning discovery, however “a
14 stipulation extending the time for any form of discovery must have court approval if it
15 would interfere with the time set for completing discovery, for a hearing motion, or for
16 trial.” Fed. R. Civ. P. 29(b).

17 **III. DISCUSSION**

18 Ameripod seeks leave to designate an additional expert witness and to depose six
19 additional percipient witnesses notwithstanding the fact that fact discovery and expert
20 designation were to be completed over three months ago. Ameripod argues this is necessary
21 because it has added new counsel, Kevin McConville of Wayne Thomas & Associates, in
22 addition to its current counsel. (Mot., ECF No. 39 at 2:15-28.)

23 Davisreed argues good cause does not exist to add expert witnesses because the
24 expert witness designation deadline has passed and the parties agreed to conduct only four
25 additional percipient witness depositions after the close of discovery. (Opp’n, ECF No. 40
26 at 3:24-4:2; 7:8.)

27 Both parties have overstepped the boundaries of appropriate conduct in this matter.
28 Deadlines mean something and the Court expects the parties in this case, and all cases, to

1 abide by the deadlines set forth in scheduling orders. The recent addition of new counsel,
2 not substituted counsel, for Ameripod does not excuse Ameripod's failure to designate a
3 plumbing and pod installation expert in a timely fashion nor justify allowing it to do so
4 well after the expiration of the designation deadline. Moreover, by disregarding the fact
5 discovery deadline and stipulating to depose witnesses months after fact discovery closed,
6 the parties have blatantly disregarded an order of this Court and violated Rule 29(b) all
7 while knowing the Court had explicitly denied their request to extend fact discovery. The
8 Court would be well within its discretion to not only deny the present motion but to impose
9 sanctions.

10 Notwithstanding the above, the Court, in its discretion, will allow very limited and
11 targeted discovery to ameliorate any prejudice either of the party may suffer as a result of
12 their collective misgivings. Cases should be decided on the merits and not based on the
13 failures of counsel.

14 **CONCLUSION AND COMPLIANCE MONITORING**

15 For the foregoing reasons, Ameripod's motion is **GRANTED IN PART AND**
16 **DENIED IN PART**. Accordingly, the parties are **ORDERED** as follows:

17 (1) Ameripod may designate an additional expert on or before **September 19, 2018**;

18 (2) Davisreed may designate an expert in rebuttal;

19 (3) The reports for both newly designated experts shall be exchanged on or before
20 **October 2, 2018**;

21 (4) Davisreed may select one additional percipient witness to depose. The deposition
22 must be completed no later than **October 10, 2018**;

23 (5) Ameripod may select two additional percipient witnesses to depose. The
24 depositions must be completed no later than **October 10, 2018**;

25 (6) No additional fact discovery may be conducted;

26 (7) Expert discovery shall be completed on or before **October 30, 2018**, as
27 previously scheduled.

28 For the purposes of monitoring the parties' compliance with this Order, **IT IS**

1 **FURTHER ORDERED** that:

2 (1) Ameripod shall lodge the contact information for its designated expert witness
3 on or before September 19, 2018¹;

4 (2) Service of reports must be lodged with the Court on the same date on which the
5 reports are served;

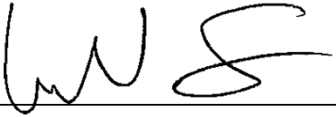
6 (3) The parties shall lodge with the Court the names of each percipient witness
7 designated by the parties once they are determined;

8 (4) The parties shall jointly notify via a lodgment that a deposition has been
9 completed at the conclusion of each deposition.

10 The parties are further admonished that no additional fact discovery may be
11 conducted outside of the discovery outlined above. The Court will not entertain any
12 discovery disputes or any requests to continue deadlines. No follow-up discovery may
13 occur as a result of information gleaned from the allowed depositions.

14 **IT IS SO ORDERED.**

15 Dated: September 26, 2018

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18 Hon. William V. Gallo
19 United States Magistrate Judge
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28 ¹ Ameripod timely lodged its notice designating its expert witness.