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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WHITEWATER WEST INDUSTRIES, LTD.,

Plaintiff,

v.

PACIFIC SURF DESIGNS, INC. AND FLOW
SERVICES, INC.,

Defendants.

AND RELATED COUNTERCLAIMS

Case No.: 17CV1118-BEN(BLM)

**ORDER GRANTING IN PART
DEFENDANTS’ MOTION TO CONTINUE
EXPERT REPORT DEADLINE**

[ECF No. 121]

On May 8, 2018, Defendants filed an *Ex Parte* Application to Extend Expert Report Deadline. See ECF No. 121 (“Mot.”). Defendants seek an order continuing the remaining pretrial deadlines. Mot. at 2. Defendants are seeking *ex parte* relief because the current deadline for expert reports is May 18, 2018. Id. In support, Defendants argue that Plaintiff still has at least 7500 documents to produce that are responsive to Defendants’ January 2018 ESI requests and which Defendants need prior to conducting various depositions and discussions with their experts. Id. Defendants note that while Plaintiff originally agreed to produce the documents the week of April 23, 2018, it has not done so and instead promised to produce them on May 8, 2018. Id. In further support, Defendants argue that because the only dates provided by Plaintiff for the deposition of Plaintiff’s president, Mr. Geoff Chutter, are May 16-18, 2018, Defendants are unable to have their expert use Mr. Chutter’s testimony in his or her opening report with the current deadline. Id. at 2-3, 5. Finally, Defendants argue that if its pending motion to compel is granted, Plaintiff will be required to produce additional documents and

1 witnesses for deposition. Id. at 3, 5-6. Defendants note that having their expert produce a
2 report now and simply supplement it later after discovery is produced is inefficient and “not
3 practicable” without a continuance of the deadlines. Id. at 7.

4 On May 9, 2018, Plaintiff filed an opposition to the motion. See ECF No. 122 (“Oppo.”).
5 Plaintiff contends that the motion was filed in violation of the Local Rules and Chambers Rules
6 because Defendants failed to inform Plaintiff of their plan to file the instant *ex parte* motion and
7 failed to meet and confer regarding the motion.¹ Oppo. at 2-4. Plaintiff also contends that
8 Defendants were aware of the “purportedly new reasons” to continue the deadlines in this matter
9 when they submitted the joint motion to continue the fact discovery deadline on April 26, 2018.
10 Id. at 5. Plaintiff states that there is no good cause for the requested relief because Defendants’
11 failure to timely retain their expert is the motivation behind the request, not Plaintiff’s failure to
12 comply with discovery. Id. at 5-6. Plaintiff notes that Defendants failed to provide any details
13 regarding how the pending discovery relates to their expert reports and that one of Defendants’
14 experts has already submitted a report while the other expert is solely a rebuttal expert to
15 Plaintiff’s damages expert.² Id. at 6. Plaintiff contends that the requested relief is due in part
16 to Defendants’ belated May 1, 2018 disclosure of expert James Carmichael, which is not good
17 cause for continuing the case deadlines. Id. at 7. Plaintiff further contends that Defendants
18 were aware of the pending ESI requests, but did not claim they were relevant to expert discovery
19 until after they retained Mr. Carmichael. Id. Additionally, Plaintiff notes that the fact that
20 Defendants were aware of Mr. Chutter and chose to wait to notice his deposition for April 27,
21 2018, the end of fact discovery at that time, does not demonstrate diligence, and that
22 Defendants’ pending motion to compel [see ECF No. 105] does not reference expert discovery
23 and only seeks an extension of the fact discovery deadline. Id. at 9-10. Finally, Plaintiff contends
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26 ¹ Plaintiff notes that Defendants’ failure to comply with the Local Rules constitutes a sanctionable
27 act and requests that at the very least, the Court “remind Defendants of their professional
28 responsibilities to the Court and counsel.” Id. at 5, n.1.

² Plaintiff notes that none of the pending discovery requests relate to damages. Oppo. at 6.

1 that Defendants have not shown good cause to continue all dates and requests that if the Court
2 is inclined to grant Defendants' request, that the continuance be limited to two weeks and apply
3 to Plaintiff and Defendants equally. Id. at 11-12.

4 On May 11, 2018, Defendants filed Supplemental Evidence in Support of *Ex Parte*
5 Application to Extend Expert Report Deadline. See ECF No. 123 ("Mot. Supp."). Defendants
6 dispute Plaintiff's contention that it made a full and complete production on May 8, 2018. Id. at
7 3. In support, Defendants argue that Plaintiff produced 13,123 documents which was "well
8 beyond the 7,500 documents that Plaintiff had represented" and that the documents were
9 delivered on 9:44 p.m. on May 8, 2018 with a URL to download a zip file that was too
10 cumbersome to download, requiring Plaintiff to send a flash drive with the load file to
11 Defendants' office on May 9, 2018. Defendants further argue that this large late production
12 provides additional good cause for the requested extension. Id.

13 On May 11, 2018, Plaintiff filed a Response to Defendants' Notice of Supplemental
14 Authority. ECF No. 124. Plaintiff contends that Defendants' Supplemental Evidence amounts to
15 "an unauthorized reply brief" and compels Plaintiff to respond to Defendants' "deliberate
16 mischaracterization of Plaintiff's ESI production." Id. at 2. Plaintiff notes that (1) the
17 Supplemental Evidence does not actually present any new evidence, (2) it produced fewer
18 documents than anticipated, not more, and (3) Defendants did not try to access the file transfer
19 link until after the flash drive was delivered. Id. at 2-5. Plaintiff further contends that
20 Defendants should be sanctioned. Id. at 5-6.

21 Once a Rule 16 scheduling order is issued, dates set forth therein may be modified only
22 "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); see also ECF No. 82 at
23 8 (stating that dates and times "will not be modified except for good cause shown"). The Rule
24 16 good cause standard focuses on the "reasonable diligence" of the moving party. Noyes v.
25 Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007) (citing Johnson v. Mammoth Recreations,
26 Inc., 975 F.2d 604, 609 (9th Cir. 1992)); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95
27 (9th Cir. 2000) (stating Rule 16(b) scheduling order may be modified for "good cause" based
28 primarily on diligence of moving party). Essentially, "the focus of the inquiry is upon the moving

1 party's reasons for seeking modification." Johnson, 975 F.2d at 609. However, a court also
2 may consider the "existence or degree of prejudice to the party opposing the modification. . . ."
3 Id.

4 In light of the Court's discovery order [see ECF No. 133], the Court finds good cause and
5 **CONTINUES** all remaining dates for all parties as follows:

Description	Current Date	New Date
Rule 26(a)(2)(A) and (B) Disclosures	May 18, 2018	August 17, 2018
Rule 26(a)(2)(D) Supp. Disclosures	June 8, 2018	September 7, 2018
Expert Discovery Completion	July 6, 2018	October 5, 2018
Pretrial Motion Filing Deadline	July 20, 2018	October 19, 2018
Confidential Settlement Statement	August 3, 2018	October 26, 2018
Mandatory Settlement Conference	August 13, 2018 at 9:30 a.m.	November 5, 2018 at 9:30 a.m.
Pretrial Disclosures	September 17, 2018	January 14, 2019
L.R. 16.1(f)(4) Meeting of Counsel	September 24, 2018	January 21, 2019
Plaintiff's Proposed Pretrial Order due to Defendants	October 1, 2018	January 28, 2019
Proposed Final Pretrial Conference Order	October 8, 2018	February 4, 2019
Final Pretrial Conference	October 15, 2018 at 10:30 a.m.	February 11, 2019 at 10:30 a.m.

23 **IT IS SO ORDERED.**

24 Dated: 6/12/2018

25 
26 Hon. Barbara L. Major
27 United States Magistrate Judge
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