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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BRIAN TODD SNELSON ,

12 Plaintiff,

13 v.

14 DAIMLER TRUCKS NORTH
15 AMERICA LLC, formerly
16 FREIGHTLINER CORPORATION;
17 PENSKE TRUCK LEASING, CO. L.P.;
18 PENSKE CORPORATION; PENSKE
19 AUTOMOTIVE GROUP, INC.,

Defendants.

Case No.: 22-cv-551-BAS-DDL

**ORDER DENYING DEFENDANT
DAIMLER’S MOTION FOR
REIMBURSEMENT OF FEES AND
EXPENSES INCURRED IN
PREPARING FOR TESTIMONY OF
FORMER EXPERT**

[Dkt. No. 91]

20 **I.**

21 **INTRODUCTION**

22 Before the Court is Defendant Daimler Trucks North America, LLC’s (“Defendant”
23 or “Daimler”) motion for reimbursement of fees and expenses incurred in preparing for
24 Plaintiff’s formerly designated expert, Brian Herbst (“Motion”). Dkt. No. 91. In an order
25 dated August 2, 2023, the Court granted Plaintiff’s motion to amend the scheduling order
26 to allow Plaintiff to substitute Herbst with newly retained expert Dr. Stephen Batzer. Dkt.
27 No. 88. The Court further ordered that “[t]o the extent that Daimler seeks an award of fees
28 and costs incurred in preparing for Herbst as an expert, Daimler shall file a supplemental

1 brief addressing any authority that supports its position.” *Id.* at 5. In the instant Motion,
2 Defendant relies on Federal Rule of Civil Procedure 16(f) in seeking an award of fees and
3 costs. Because the record does not indicate that Plaintiff violated any scheduling or pretrial
4 order, the Motion is **DENIED**.

5 **II.**

6 **LEGAL STANDARD**

7 Rule 16(b)(1) requires a district court to enter a pretrial scheduling order, and
8 “[v]iolations of a scheduling order may result in sanctions.” *Dreith v. Nu Image, Inc.*, 648
9 F.3d 779, 787 (9th Cir. 2011) (citation omitted); *see* Fed. R. Civ. P. 16(f)(1)(C) (“On
10 motion or on its own, the court may issue any just orders . . . if a party or its attorney . . .
11 fails to obey a scheduling or other pretrial order.”). “The goal [of Rule 16] is to get cases
12 decided on the merits Subsection (f) puts teeth into these objectives by permitting the
13 judge to make such orders as are just for a party’s failure to obey a scheduling or pretrial
14 order” *Dreith*, 648 F.3d at 787 (citation omitted).

15 **III.**

16 **DISCUSSION**

17 **A. Defendant’s Entitlement to Fees Under Rule 16(f)**

18 Plaintiff did not “fail to obey a scheduling or other pretrial order,” as required to
19 grant relief under Rule 16(f)(1)(C). Plaintiff timely designated Herbst as his liability expert
20 witness on April 27, 2023, which was the original deadline for the parties to designate their
21 expert witnesses. *See* Dkt. No. 14 at 2; *see also* Dkt. No. 88 at 2. On June 3, 2023, after
22 learning that Herbst could not proceed as an expert in the case, Plaintiff designated Batzer
23 as a substitute expert and timely disclosed Batzer’s expert opinions and reports on July 10,
24 2023, in compliance with the operative scheduling order at that time. *See* Dkt. No. 58 at
25 3. Plaintiff also moved to amend the scheduling order to allow the substitution of Batzer
26 as his expert, and, in granting the motion, the Court found that Plaintiff acted diligently.
27 Dkt. No. 88 at 4.

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1 Defendant contends that *Regan v. Trinity Distribution Services, Inc.*, 251 F.R.D. 108
2 (W.D.N.Y. 2008) and *Unique Industries, Inc. v. 965207 Alberta Ltd.*, 764 F. Supp. 2d 191
3 (D.D.C. 2011), support its fee request. In each of these cases, the respective courts ordered
4 reimbursement of fees pursuant to Rule 16(f) following violations of the scheduling order.
5 However, *Regan* and *Unique Industries* are distinguishable.

6 In *Regan*, the defendants made three requests to continue a mediation because they
7 wanted their expert to conduct a pre-mediation physical examination of the plaintiff to
8 allow the defendants to sufficiently evaluate the case and make a fair offer of settlement.
9 *See Regan*, 251 F.R.D. at 109-10. However, by the time the mediation occurred—at which
10 point the fact and expert discovery deadlines had passed—the “defendants had not
11 identified any expert witnesses or provided any expert reports as required by the Court’s
12 Scheduling Order.” *Id.* at 110. Notwithstanding the defendants’ failure to comply with
13 the scheduling order, the court granted their motion to conduct the physical examination.
14 However, the court also ordered the defendants to pay the plaintiff’s reasonable attorney’s
15 fees and expenses associated with the mediation upon finding the “defendants’ failure to
16 conduct the physical examination before the mediation impeded their readiness to discuss
17 potential settlement,” and contributed to the unsuccessful mediation. *Id.* at 111.

18 In *Unique Industries*, a patent infringement case, the plaintiff failed to disclose
19 evidence of prior art until after the discovery deadline and only two weeks before the
20 parties’ deadline to file motions for summary judgment. *Unique Industries*, 764 F. Supp.
21 2d at 196-97. The court held that plaintiff’s counsel’s conduct was “a clear violation of
22 the court’s scheduling order” and that it “clearly prejudiced the defendant, which prepared
23 its final contentions and motions for summary judgment without having had the
24 opportunity to obtain discovery regarding this newly disclosed evidence.” *Id.* at 203. The
25 court allowed the parties to re-open discovery for 90 days so the defendant could
26 investigate the newly disclosed discovery and ordered the plaintiff to pay defendants’
27 reasonable attorney’s fees and costs associated with addressing it. *Id.* at 205.

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1 Unlike *Regan* and *Unique Industries*, this Court has not made any findings that
2 Plaintiff violated a scheduling or other pretrial order. On the contrary, this Court found
3 that Plaintiff acted diligently after learning that Herbst would no longer serve as an expert
4 on the case such that a modification of the scheduling order was warranted to permit
5 Plaintiff to designate Batzer as its substitute expert. Given that Plaintiff did not violate the
6 scheduling order, Rule 16(f)(1)(C) does not permit an award of fees and costs.

7 **B. Limiting Batzer to Herbst’s Opinions and Theories**

8 Defendant contends the Court’s August 2 Order should have limited Batzer “to the
9 type of testing and testimony that Herbst has provided” in prior, unspecified cases (Dkt.
10 No. 91 at 3), and that the failure to impose such a limitation prejudiced Defendant because
11 it spent time and money “researching, reviewing, analyzing and addressing the issues that
12 Herbst raised in prior heavy trucks rollover cases.” *Id.* Defendant did not move for
13 reconsideration of the August 2 Order or seek relief under Rule 72, and the issue of limiting
14 Batzer’s testimony does not affect the conclusion that a fee award is not warranted under
15 Rule 16(f), but the Court elects to address the contention.

16 The fundamental problem with Defendant’s position is that Herbst did not render
17 any opinions in this case, meaning there is no expert report that could serve to limit Batzer’s
18 opinions even if such a limitation were appropriate. Defendant suggests Batzer’s testimony
19 should be limited “to the type of testing and testimony” provided by Herbst in unspecified
20 other cases, but that limitation would be unworkable as a practical matter and would create
21 substantial collateral litigation as to the types of opinions rendered by Herbst in other cases
22 and how to craft appropriate limitations on Batzer’s testimony in this case based on
23 Herbst’s testimony in those prior, unrelated cases.

24 Neither of the cases cited by Defendant supports the proposition that a limitation on
25 a new expert’s testimony is appropriate where the former expert never provided opinions
26 in the current case. In *Henderson v. Aria Resort & Casino Holdings, LLC*, No. 2:21-cv-
27 00280-JAD-NJK, 2023 WL 3963612 (D. Nev. May 9, 2023), the party opposing the expert
28 substitution had deposed the former expert and prepared a rebuttal report based on the

1 former expert’s deposition testimony. *See Henderson*, 2023 WL 3963612, at *2. Here,
2 Herbst did not prepare an expert report, and Defendant never deposed Herbst. Rather,
3 Defendant based its preparation for Herbst’s anticipated report and testimony solely on
4 “issues that Herbst raised in *prior* heavy truck rollover cases” and the assumption that
5 Herbst would offer similar testimony in this case. Dkt. No. 91 at 3 (emphasis added).
6 Notably, as Plaintiff indicates, Defendant assumed Herbst would perform sled testing based
7 on the prior unrelated cases it reviewed, despite the existence of other reports by Herbst
8 indicating that he had also performed the same type of drop testing that Batzer performed.
9 *See* Dkt. No. 93 at 2.

10 Similarly, in *Estate of Clifford v. Placer County*, No. 2:11-cv-02591-MCE-CKD,
11 2018 WL 746475 (E.D. Cal. Feb. 6, 2018), the former expert prepared a report containing
12 the expert’s opinions, theories, and the bases for those opinions and theories. *Id.* at *2
13 (limiting the new expert to the former expert’s “opinions and theories and the bases for
14 those opinions and theories” as expressed in the first expert’s original report). Moreover,
15 by the time the moving party sought to substitute its expert, the court had already issued a
16 ruling granting in part and denying in part the opposing party’s motion for summary
17 judgment. Here, Herbst did not prepare a report, and Defendant has not relied on any
18 opinions of Herbst to move for summary judgment.

19 In both *Henderson* and *Estate of Clifford* there was an established set of opinions
20 produced by the former expert in the pending case to which the court could limit the new
21 expert’s testimony. Here, in contrast, Herbst had not produced any reports or disclosed
22 any testing, opinions, or theories in this case prior to Plaintiff’s motion to substitute him
23 with Batzer. There is no workable basis to restrict Batzer’s testimony based on the
24 speculation as to the methodology Herbst might have utilized and the opinions he might
25 have offered in this case.

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IV.

CONCLUSION

For the foregoing reasons, Defendant has not established that it is entitled to reimbursement of the fees and costs it expended in preparing for Herbst's testimony or that Batzer's testimony should be limited to the unexpressed opinions and theories of Herbst. Defendant's Motion is **DENIED**.

IT IS SO ORDERED.

Dated: November 27, 2023



Hon. David D. Leshner
United States Magistrate Judge