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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 GRANTING MOTION TO  
AMEND SCHEDULING ORDER TO  
SUBSTITUTE EXPERT**

**[Dkt. No. 75]**

20 Before the Court is Plaintiff's Motion to Amend the Deadline to Identify Experts  
21 ("Motion") [Dkt. No. 75]. Defendants Daimler Trucks North America, LLC ("Daimler")  
22 and Penske Truck Leasing Co., L.P. ("Penske") oppose the Motion. For the reasons set  
23 forth below, the Court concludes that Plaintiff has demonstrated good cause to amend the  
24 scheduling order and substitute his expert witness. The Court further concludes that an  
25 extension of pretrial deadlines, including the deadline for Daimler to furnish rebuttal expert  
26 designations and disclosures, is warranted to avoid prejudice to Daimler from the expert  
27 witness substitution.

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I.

**BACKGROUND**

On July 6, 2023, the Court held a discovery conference to address a dispute regarding Plaintiff’s request to substitute his liability expert witness, Brian Herbst (“Herbst”), after the expert designation deadline had passed. At the discovery conference, the Court set a briefing schedule. On July 13, 2023, Plaintiff filed the Motion. Dkt. No. 75. On July 20, 2023, Daimler filed an Opposition. Dkt. No. 79. On July 21, 2023, Penske filed a notice stating that it joined Daimler’s Opposition. Dkt. No. 81. On the same date, the Court heard oral argument on the Motion. Dkt. No. 82.

Plaintiff timely identified Herbst as his liability expert witness on April 27, 2023. Dkt. No. 75; *see* Dkt. No. 14 at 2. On June 3, 2023, Plaintiff learned that Herbst could not proceed as an expert in the case due to either a “personal conflict” or “personal reasons,” the nature of which was not made clear to the Court.<sup>1</sup> Dkt. No. 75-1 at 1-2; Dkt. No. 83 at ¶ 7. Immediately after learning that Herbst would no longer serve as an expert, Plaintiff contacted Dr. Stephen Batzer and retained his services as a substitute expert. Dkt. No. 75-1 at 2. On the same date, Plaintiff also contacted Daimler’s counsel by telephone to request Daimler’s agreement to substitute Herbst with Dr. Batzer, and Daimler objected to the

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<sup>1</sup> In Plaintiff’s email request for a discovery conference dated June 28, 2023, Plaintiff represented to the Court that he “was informed that Brian Herbst had a personal conflict.” In his Motion, Plaintiff stated that Herbst was unable to continue as his expert witness “for personal reasons.” Dkt. No. 75-1 at 1-2. In a July 24, 2023, declaration filed pursuant to this Court’s order, Plaintiff’s counsel Steven E. Weinberger again referred to a “personal conflict” that prevented Herbst from rendering an opinion in the case. Dkt. No. 83 at ¶ 7. Weinberger further stated that Plaintiff’s counsel did not request further explanation of Herbst’s “personal conflict.” *Id.* However, at the July 21 motion hearing, in response to the Court’s inquiry regarding the reason for Herbst’s unavailability, Plaintiff’s counsel Michael E. Medina, Jr. stated that Herbst did not feel he could offer his expert opinion based on his review of the facts of this case. This type of “professional conflict” was not what the Court had understood to be the reason for Herbst’s unavailability based on counsel’s representation that Herbst had a “personal conflict” or “personal reasons” for not testifying.

1 substitution. *Id.* On June 5, 2023, Plaintiff emailed all opposing counsel to request that  
2 they stipulate to the substitution, and Plaintiff states that Daimler and Penske refused. *Id.*;  
3 *see* Dkt. No. 83 at ¶ 10.

4 On July 24, 2023, pursuant to this Court’s order, Plaintiff’s attorney Steven E.  
5 Weinberger filed a declaration (“Weinberger Declaration”) stating that “[o]n or around  
6 September 10, 2021, my office sent our first batch of documents to Brian Herbst/SAFE  
7 (collectively, ‘SAFE’) on this Snelson matter.” Dkt. No. 83 at ¶ 3. Additionally, the  
8 Weinberger Declaration states that materials produced by the parties would have been  
9 shared with Herbst and SAFE “[t]hroughout the course of the litigation,” and that the expert  
10 dates and deadlines were provided to Herbst and SAFE when they were set by this Court.  
11 *Id.* at ¶¶ 4, 6. Moreover, “[o]n September 28, 2022, one of the SAFE engineers, Lauren  
12 Bell, inspected/photographed the subject tractor,” though Herbst was not present at the  
13 inspection. *Id.* at ¶ 4. In addition, the Weinberger Declaration reiterates that Herbst  
14 informed Plaintiff’s counsel that he “could not render an opinion in this case based on his  
15 personal conflict,” and recounts Plaintiff’s counsel’s subsequent attempts to secure a  
16 substitute expert and stipulate to a substitution with Daimler and Penske. *Id.* at ¶ 7.

## 17 II.

### 18 DISCUSSION

#### 19 A. Plaintiff’s Motion to Amend the Pretrial Schedule

20 Federal Rule of Civil Procedure 16(b) governs requests to amend scheduling orders  
21 for purposes of substituting an expert after the expert designation deadline has passed.  
22 *See, e.g., Fidelity Nat’l Fin., Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 308 F.R.D.  
23 649, 652 (S.D. Cal. 2015). Rule 16(b)(4) provides that a pretrial scheduling order “may be  
24 modified only for good cause and with the judge’s consent.” “Rule 16(b)’s ‘good cause’  
25 standard primarily considers the diligence of the party seeking the amendment.” *Johnson*  
26 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “Although the existence  
27 or degree of prejudice to the party opposing the modification might supply additional  
28 reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for

1 seeking modification. [Citation omitted.] If that party was not diligent, the inquiry should  
2 end.” *Id.*

3         Based on the Motion and the Weinberger Declaration, the Court finds that Plaintiff  
4 acted diligently in responding to Herbst’s withdrawal from the case. While Plaintiff’s  
5 failure to obtain a clear explanation of the nature of Herbst’s “personal conflict” weighs  
6 somewhat against a finding of diligence, the remainder of Plaintiff’s actions before and  
7 after Herbst’s withdrawal demonstrate an appropriate level of diligence to warrant an  
8 amendment to the pretrial schedule. Specifically, upon learning that Herbst was  
9 withdrawing from the case—and notwithstanding the fact that it was a Saturday—  
10 Plaintiff’s counsel took steps on the same day to retain the services of Dr. Batzer as a  
11 potential substitute expert and to notify Daimler’s counsel. Two days later, on the first  
12 business day after receiving notice of Herbst’s withdrawal, Plaintiff informed Penske of  
13 the situation and sought the collective agreement of Daimler and Penske to a stipulation  
14 regarding the substitution. *Cf. Fidelity*, 308 F.R.D. at 653-54 (finding that defendant failed  
15 to demonstrate diligence when it waited nine months before giving notice to plaintiff or the  
16 Court of defendant’s expert’s unavailability).

17         Daimler contends there is no “evidence to support a finding the reason for the  
18 substitution was not the result of a lack of diligence or an act or omission by plaintiff or  
19 his counsel, as opposed to something beyond their control.” Dkt. No. 79 at 4. But the  
20 subsequently filed Weinberger Declaration describes counsel’s actions to timely produce  
21 case materials to Herbst, arrange for an inspection by Herbst’s employer, and share expert  
22 dates and deadlines with Herbst. This supports a finding that the request to substitute was  
23 not caused by a lack of diligence on the part of Plaintiff or his counsel. Thus, the Court  
24 concludes that Plaintiff was diligent and that good cause exists to amend the scheduling  
25 order.

26         The Court recognizes the potential prejudice to Daimler with respect to its ability to  
27 adequately prepare for the testimony of Dr. Batzer. According to the declaration of Philip  
28 R. Cosgrove (“Cosgrove Declaration”), counsel for Daimler, he immediately began

1 conducting preliminary research and other due diligence upon Plaintiff’s designation of  
2 Herbst as its liability expert on April 27, 2023. *See* Dkt. No. 79-1 at ¶ 2. The Court  
3 concludes that Daimler should have additional time to designate and disclose an expert to  
4 rebut Dr. Batzer. The Court will issue an amended scheduling order granting an extension  
5 of the rebuttal expert designation and disclosure deadlines as to Daimler only and  
6 continuing the remaining pretrial dates and deadlines for all parties.

7 **B. Reimbursement of Daimler’s Fees and Expenses**

8 According to the Cosgrove Declaration, counsel “spent over 30 hours collecting,  
9 reviewing and analyzing articles, prior reports and testimony and testing of Brian Herbst  
10 to prepare for his testimony in this case,” the value of which “exceeds \$12,000.” Dkt. No.  
11 79-1 at ¶ 7. Additionally, the Cosgrove Declaration provides that Cosgrove “asked  
12 [Daimler’s] experts to address issues relating to this case and the approach Herbst takes  
13 and the type of testing he performs,” the cost of which Cosgrove estimates “will exceed  
14 \$10,000.” *Id.* at ¶ 8. To the extent that Daimler seeks an award of fees and costs incurred  
15 in preparing for Herbst as an expert, Daimler shall file a supplemental brief addressing any  
16 authority that supports its position on or before **August 15, 2023**. Daimler shall also attach  
17 as an exhibit an itemized statement reflecting its fees and costs incurred in preparing its  
18 defense against Herbst’s testimony for which Daimler seeks recovery from Plaintiff.

19 **III.**

20 **CONCLUSION**

21 For the foregoing reasons, the Motion to Amend the Deadline to Identify Expert is  
22 **GRANTED**. A separate order containing an amended pretrial schedule shall issue  
23 forthwith.

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1           **IT IS FURTHER ORDERED** that Daimler shall file any supplemental brief  
2 regarding its entitlement to recover fees and costs incurred in preparing for Herbst's  
3 testimony by not later than **August 15, 2023**. The brief shall not exceed three pages in  
4 length, excluding exhibits. Plaintiff may file any responsive brief, not to exceed three  
5 pages, by not later than **August 22, 2023**.

6           **IT IS SO ORDERED.**

7 Dated: August 2, 2023

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11 Honorable David D. Leshner  
12 United States Magistrate Judge  
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