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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

USI INSURANCE SERVICES
NATIONAL, INC., formerly known as
WELLS FARGO INSURANCE
SERVICES USA, INC.,
Plaintiff,
v.
STANLEY OGDEN, et al.,
Defendants.

NO. 2:17-cv-01394-SAB

**ORDER DENYING
DEFENDANTS' MOTION FOR
RELIEF FROM EXPERT
DISCOVERY DEADLINES**

Before the Court is Defendants' LCR7(j) and Fed. R. Civ. Proc. 16(b)(4) Motion for Relief from Expert Discovery Deadlines, ECF No. 167. The motion was heard without oral argument. Plaintiff is represented by Megan Crowhurst, Thomas Holt, Anne Reuben, and David Symes. Defendants are represented by Christopher Banks, Debra Fischer, Aviva Kamm, Lance Pelletier and Justo Gonzalez.

Defendants move the Court to extend the expert discovery deadline, or in the alternative, exclude the July 16, 2019 opinion of Plaintiff's expert Peter Nickerson. After reviewing the parties' briefing and fully considering this matter, the Court denies Defendants' LCR7(j) and Fed. R. Civ. Proc. 16(b)(4) Motion for Relief from Expert Discovery Deadlines.

**ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM
EXPERT DISCOVERY DEADLINES ~ 1**

1 **Motion Standards**

2 Fed. R. Civ. P. 16(b)(4) provides:

3 (4) *Modifying a Schedule*. A schedule may be modified only for
4 good cause and with the judge’s consent.

5 Fed. R. Civ. P. 26 provides, in part:

6 (a) (2)(E) *Supplementing the Disclosure*. The parties must
7 supplement [expert] disclosures when required under Rule 26(e)

8 ***

9 (e)(2) *Expert Witness*. For an expert whose report must be
10 disclosed under Rule 26(a)(2)(B), the party’s duty to supplement
11 extended both to information included in the report and to information
12 given during the expert’s deposition. Any additions or changes to this
13 information must be disclosed by the time the party’s pretrial
14 disclosures under Rule 26(a)(3) are due.

15 Local Rule 7(j) provides:

16 (j) *Motions for Relief from a Deadline*

17 A motion for relief from a deadline should, whenever possible, be filed
18 sufficiently in advance of the deadline to allow the court to rule on the
19 motion prior to the deadline. Parties should not assume that the motion will
20 be granted and must comply with the existing deadline unless the court
21 orders otherwise.

22 If a true, unforeseen emergency exists that prevents a party from meeting a
23 deadline, and the emergency arose too late to file a motion for relief from
24 the deadline, the party should contact the adverse party, meet and confer
25 regarding an extension, and file a stipulation and proposed order with the
26 court. Alternatively, the parties may use the procedure for telephonic
27 motions in LCR 7(i). It is expected that if a true emergency exists, the
28 parties will stipulate to an extension.

On November 15, 2017, Judge Lasnik entered a Case Management Order,
stating, in part:

1 These are firm dates that can be changed only by order of the Court,
2 not by agreement of counsel or the parties. The Court will alter these
3 dates only upon good cause shown; failure to complete discovery
4 within the time allowed is not recognized as good cause.

ECF No. 24.

5 The Case Management Order also set the deadline for reports from expert
6 witnesses for August 8, 2018. *Id.*

7 **Background Facts**

8 On August 8, 2018, Plaintiff disclosed and submitted its expert reports,
9 which included reports from R. Bryan Tilden and Peter Nickerson. On October 3,
10 2018, Dr. Peter Nickerson issued a supplemental report on Plaintiff's alleged
11 damages, correcting his inadvertent failure to account for certain cost savings
12 favorable to Defendants. Plaintiff also produced eight Excel files that included
13 financial "pro forma" from the Defendant producers, including the revenues
14 specifically attributable to each individual Defendant, the underlying account
15 revenue info for each broker or "producer," and the specific lost revenue per
16 producer that went to other parties with the individual Defendants' departure from
17 Plaintiff. On October 30, 2018, Dr. Nickerson produced his complete expert file in
18 response to Defendants' subpoena.

19 Defendants did not designate any experts or rebuttal experts. Defendants
20 took Dr. Nickerson's deposition on October 30, 2018.

21 On March 6, 2019, Judge Lasnik granted in part, and denied in part, the
22 parties' Motions for Summary Judgment. ECF No. 128. In doing so, some of the
23 Defendants were dismissed from the action. Judge Lasnik also noted that the lump
24 sum calculation of lost profits presented by Plaintiff's experts "makes it
25 impossible to allocate damages to those defendants who actually breached an
26 enforceable restrictive covenant or duty. *Id.* Judge Lasnik encouraged the parties
27 to resume or restart settlement negotiations. *Id.*

28 The parties engaged in settlement talks in July 2019. The talks were

1 unsuccessful. ECF No. 137. As part of the settlement talks, Plaintiff provided a
2 Report from Dr. Nickerson dated July 16, 2019. ECF No. 168-5. The report was
3 attached to Plaintiff's Mediation Statement, which indicated that it was
4 Confidential and For Settlement Purposes Only. ECF No. 168-4.

5 Shortly thereafter, this case was reassigned to this Court. On February 29,
6 2020, Defendants filed a Motion to Exclude Testimony and Reports of USI's
7 Experts Peter Nickerson & R. Bryant Tilden. ECF No. 143. In response to the
8 Motion, Plaintiff submitted Dr. Nickerson's July 16, 2019 Report. ECF No. 147-3.
9 Relying on that Report, the Court denied Defendants' Motion on July 31, 2020.
10 ECF No. 153.

11 Analysis

12 Defendants now seek an extension of the deadline for filing expert rebuttal
13 reports or in the alternative, seek to exclude Dr. Nickerson's testimony based on
14 the July 16, 2019 Report.

15 Defendants have not demonstrated good cause to extend the deadline for
16 filing expert rebuttal reports.¹ Defendants attempt to use the alleged late
17 disclosure of Dr. Nickerson's July 16, 2019 report to justify its request to extend
18 the deadline. However, Dr. Nickerson's July 16, 2019 Report is not untimely.
19 Rather, it is a proper supplementation to his initial timely disclosed expert report.
20 Even if it were not, Defendants have not acted with due diligence in preserving
21 this argument. Defendants were put on notice in March 2020 that Plaintiff
22 intended to reply on Dr. Nickerson's July 16, 2019 Second Supplemental Report.
23 *See* ECF No. 145. Likewise, it was clear in the Court's Order that it considered
24 Dr. Nickerson's Second Supplemental Report when it ruled on Defendants'
25 motion to exclude his testimony. *See* ECF No. 153. Eight months later,

26
27 ¹ The Court finds that Local Rule 7(j) does not apply to Defendant's request to
28 extend the expert deadline that was set forth in Judge Lasnik's Scheduling Order.

1 Defendants are now asking the Court to reconsider that decision, although
2 granted, this time for a different reason. Even so, if Defendants believed that Dr.
3 Nickerson's Second Supplemental Report was improperly disclosed, the time to
4 bring this to the Court's attention was either before it ruled on their pending
5 motion, or shortly thereafter.

6 Finally, Defendants cannot credibly argue that they will be unfairly
7 prejudiced by Dr. Nickerson's testimony based on his July 16, 2019 Second
8 Supplemental Report, given that they have known about this report for almost
9 three years prior to trial.

10 Accordingly, **IT IS ORDERED:**

11 1. Defendants' LCR7(j) and Fed. R. Civ. Proc. 16(b)(4) Motion for
12 Relief from Expert Discovery Deadlines, ECF No. 167, is **DENIED**.

13 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
14 this Order and to provide copies to counsel.

15 **DATED** this 21st day of March 2022.

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19 Stanley A. Bastian
20 U.S. District Judge
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