IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

REYNALDO ATRERO MANILA,

Plaintiff,

v.

ROBERT GUERRERO, JOSE K. PANGELINAN, and GEORGIA M. CABRERA,

Defendants.

CIVIL CASE NO. 1:18-cv-00003

DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO MODIFY FOURTH AMENDED SCHEDULING ORDER

Before the Court is Plaintiff's Motion to Modify Fourth Amended Scheduling Order (ECF No. 176), accompanied by a declaration of Plaintiff's counsel, Bruce L. Berline (ECF No. 177), a transcript of the status conference held in this matter in February 2023 (ECF No. 177-1), and a copy of an email exchange (ECF No. 177-2). Plaintiff seeks a modification of the Fourth Amended Scheduling Order (ECF No. 166) by reopening discovery, the deadline of which expired on March 23, 2023, to allow for the completion of discovery, and to continue the bench trial date if needed. (Mot. 5.)

Each of the three Defendants opposed the motion (ECF Nos. 179 (Pangelinan), 181 (Guerrero), 182 (Cabrera)), which was supported with declarations by each of their attorneys: Hunter D. Hunt (ECF No. 179-1), Leslie A. Healer (ECF No. 181-1), and Keisha Blaise (ECF No. 182 at 4-5). Plaintiff subsequently replied (ECF No. 183), with a supplemental declaration by Mr. Berline (ECF No. 184) and other supporting exhibits (ECF Nos. 184-1 through -3). For

the reasons below, the Court GRANTS Plaintiff's motion and sets the following dates and deadlines pursuant to Rule 16(b) of the Federal Rules of Civil Procedure. A separate Fifth Amended Scheduling Order will issue with these dates.

1.	Pre-Settlement Telephone Conference before Magistrate Judge Heather L. Kennedy	August 8, 2023 at 10:00 a.m.
2.	Settlement Conference before Magistrate Judge Heather L. Kennedy	August 18, 2023 at 9:00 a.m.
3.	Fact Discovery Cutoff	August 21, 2023
4.	Fact Discovery Motions Deadline	September 11, 2023
5.	Plaintiff's Expert Disclosure	September 12, 2023
6.	Defendant's Expert Disclosure	September 19, 2023
7.	Rebuttal Expert Disclosure	September 26, 2023
8.	Expert Discovery Motions Deadline	October 5, 2023
9.	*Daubert*-type Motions Deadline	October 5, 2023
10.	Dispositive Motions Deadline	November 2, 2023
11.	Joint Proposed Pretrial Order Deadline	November 27, 2023
12.	**Dispositive Motions Hearing Date**	**November 30, 2023 at 1:30 p.m.**[1]
13.	Final Pretrial Conference	November 30, 2023 at 1:30 p.m.
14.	Bench Trial	December 4, 2023 at 9:00 a.m.

I. BACKGROUND

A. February 2023 Status Conference

A status conference pursuant to the Fourth Amended Scheduling Order was held in February 2023 at which time Plaintiff's counsel, Mr. Berline, informed the Court of additional time needed to complete discovery. (Tr. 5:9-11 ("Well, I think we've had some preliminary

[1] Ordinarily, the Court holds a hearing 34 days after the motion is filed. *See* LR 7.1(c)(1). However, the Court will expedite the hearing to allow the bench trial to proceed on December 4.

discussions that we might – would like some extra time.").) According to Mr. Berline, written discovery had been completed (*id*. at 4:23-24) and it was the "deposition of Defendants and, possibly, the deposition of the treating eye doctors just to preserve their testimony" (*id*. at 4:25; 5:1-2) that remained pending. Ms. Healer confirmed that there were discussions on extending certain deadlines. (*Id*. at 6:9-11 ("[W]e were in preliminary discussions about extending it a little. We just had not come up with a date as of yet.").) Although the Court was ready to begin issuing extensions (*id*. at 7:12-16), Mr. Berline suggested that a meet-and-confer would be more efficient (*see id*. at 7:21-24; 8:5-7).

At the same time, Defendant Guerrero's counsel, Ms. Healer, sought an early settlement conference. (*Id*. at 8:5-7 ("Your Honor, we do agree with the meet-and-confer, but if we could also schedule a settlement conference in the near future as well in this case.").) In particular, Ms. Healer requested the settlement conference occur before discovery would conclude. (*Id*. at 8:14-20.) The Court acknowledged Ms. Healer's request for an early settlement conference "sometime before that March 23 [fact discovery] cutoff to get more discovery through the deposition." (*Id*. at 8:21-23.) However, because Ms. Blaise would be unavailable through much of March and wanted to be part of settlement discussions, the Court recommended an April timeframe: "I think the earliest I can offer is April, given co-counsel, Ms. Blaise's unavailability. Better than June? April is better than June? … Then you can work out all the other extensions around it." (*Id*. at 10:14-25; 11:1-2.)

After more scheduling conflicts were raised, the Court instructed the parties to flesh out viable dates to present to the magistrate judge. (*Id*. at 11:21-25; 12:1.) Ms. Blaise agreed that the parties would work it out (*id*. at 12:2-3), and as described by the Court: "This is going to be the first post-partial discovery settlement conference . . . . I understand that written discovery has

been completed. That's a starting point for this settlement conference, or early settlement conference. *If it doesn't succeed then, obviously, the full-blown discovery will proceed and counsel will meet and confer to see how an amendment to the scheduling order can be achieved without disturbing the trial date*." (*Id*. at 11:9-10; 12:7-12 (emphasis added).) Given all these discussions, the Court clearly was giving notice to the parties of its intent to grant Plaintiff's motion to modify the scheduling order regarding the discovery deadlines. At the conclusion of the status conference hearing, Ms. Healer raised a concern about the conflicting deadlines with another case without requesting any particular extension or change in the dates. (*Id*. at 13: 1-3.) The Court responded that it was not going to amend the order *solely to accommodate the other case's scheduling order*. (*Id*. at 13:11-12 (emphasis added).)

B. Meet & Confer Attempts

After the status conference, "[a]ll parties desired to take the depositions of Plaintiff's treating physicians. The parties discussed this in court after the status conference was adjourned." (Suppl. Decl. Berline. ¶ 5, ECF No. 184.)

However, there were multiple scheduling conflicts. As indicated by both Mr. Berline and Ms. Healer, they were scheduled to be off-island in February. (*See* Tr. 11:9-18 (indicating off-island travels around February 21).) Just weeks later, Ms. Blaise was scheduled to be off-island for a large portion of March. (*Id*. at 9:19-21 (indicating off-island travels from March 5 – 22).) The first week of April was also unavailable as Ms. Healer indicated she would also be off-island. (*Id*. at 11:3-5.) Finally, Mr. Berline went off-island for medical reasons from April 20 to May 4. (Decl. Berline ¶ 8.) Roughly, there was an estimate of five weeks, spread out among four months in which all attorneys could have been on-island to discuss any extensions and related discovery

issues. The Court is not aware of any attempts to conduct depositions or agreements to modify the scheduling order.

Shortly after he returned on May 9, 2023, Mr. Berline e-mailed Defendants' attorneys requesting to modify the scheduling order as to fact and expert discovery. (ECF No. 177-2 at 2.) Defendant's counsel declined, stating: "We have discussed this case and we do not believe that we need to extend the dates. We believe that the dates were final as stated by the Court on February 15, 2023 when we asked for an extension and it was not granted." (*Id.* at 1.)

On May 12, 2023, the parties met and conferred to discuss the possibility of amending the scheduling order. (Decl. Berline ¶ 9.) Plaintiff had no intention of calling any expert witnesses and informed Defendants as much. (Suppl. Decl. Berline ¶ 6.) "The suggested expert cutoff dates were merely for the benefit of the Defendants." (*Id.*) Nevertheless, "that meeting was unsuccessful . . . . [and] the defense refused to stipulate to any changes to the scheduling order." (*Id.*) As reiterated by Mr. Hunt in an email: "The shortened timeline with any potential discovery occurring no longer works with their schedules." (ECF No. 184-3.)

Plaintiff thus filed the instant motion on May 17, 2023—almost two months after the fact discovery cutoff—seeking to reopen discovery and extend the cutoff deadline. Plaintiff attempted to stipulate to a shortened briefing and hearing scheduled, but to no avail. (ECF No. 184-2.)

II. LEGAL STANDARD

A. Modifying Scheduling Order & Reopening Discovery

Modifications to a court's scheduling order may be ordered only for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). Nevertheless, "[d]istrict courts have 'broad discretion to manage discovery and to control the course of litigation under Federal Rule of Civil Procedure 16.'" *Hunt v. County of Orange*, 672 F.3d 606, 616 (9th Cir. 2012) (quoting *Avila v.*

Willits Envtl. Remediation Tr., 6633 F.3d 828, 833 (9th Cir. 2011)). In a request to reopen discovery, courts consider (1) whether the trial is imminent, (2) whether the motion is opposed, (3) whether the non-moving party would be prejudiced, (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, (5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the trial court, and (6) the likelihood that the discovery will lead to relevant evidence. *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017).

However, the standard in modifying a scheduling order "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (emphasis added). "The focus of the inquiry is upon the moving party's reasons for seeking modification . . . If the party was not *diligent*, the inquiry should end." *Id*. (emphasis added). Thus, when a party seeks to modify the scheduling order, including the reopening of discovery, the party must first show good cause. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

B. Extensions After Deadlines Have Passed

In addition, where a motion is made to extend deadlines after the deadlines have expired, the party seeking the extension must show excusable neglect in bringing the untimely motion. *See* Fed. R. Civ. P. 6(b)(1)(B). "It is significant when a party is seeking to re-open discovery rather than extend the discovery deadline." *W. Towboat Co. v. Vigor Marine, LLC*, 2021 WL 1923422, at *5 (W.D. Wash. May 13, 2021) (citation omitted). "The difference [between the two types of requests] is considerable because a request for an extension acknowledges the importance of a deadline, [while] a retroactive request suggests that the party paid no attention at all to the deadline." *Id*. (citation omitted) In determining whether there has been excusable neglect, courts

consider (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith. *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004).

III. DISCUSSION

A. Good Cause

Defendants assert that while they were amenable to modifying the scheduling order at time of the February 2023 status conference, the circumstances have changed and a modification of the schedule is no longer agreeable. (Opp'n 9, ECF No. 179.) They argue that Plaintiff has failed to establish good cause under Rule 16(b) and excusable neglect under Rule 6 reasoning that (1) Plaintiff failed to seek an extension until May, and (2) Defendants would be prejudiced. As to the first argument, Defendants claim that Plaintiff made no attempts to extend any deadlines "until after the deadlines for the Fact Discovery Cutoff, the Fact Discovery Motions, and the Plaintiff's Expert Disclosure had already passed." (*Id.* at 4.) As to the second argument, Defendants speculate that if Plaintiff procured a medical expert, Defendants would have inadequate time to retain their own rebuttal witnesses, causing them to "scramble[.]" (*Id.* at 7.) Finally, even if Defendants could comply with Plaintiff's proposed deadlines, those deadlines would make it impracticable for the parties to comply with the remaining deadlines. "In the month of September, Defendants would need to submit expert discovery motions, submit and argue dispositive motions, submit pretrial motions, and prepare for trial. Without question, Defendants would be severely prejudiced[.]" (*Id.*) Therefore, Defendants conclude, Plaintiff has failed to establish either good cause or excusable neglect.

Plaintiff has exhibited the requisite degree of diligence to establish good cause under Rule 16. Good cause is established where a scheduling deadline cannot be met despite the party's diligence. *See Johnson*, 975 F.2d at 609. Here, it was clear to both Plaintiff's counsel and Defendants' counsel that discovery would not be completed until after the March 2023 cutoff date. And in fact, Plaintiff sought to extend the deadlines at that status conference in February 2023 before the discovery deadline had passed. Although the Court was inclined to grant it—as evidenced by its attempt to begin setting new deadlines—it was Defendants' counsel that sought to postpone any extension.

Specifically, at the status conference, Ms. Healer requested an early settlement conference before discovery could conclude. (Tr. 8:5-7.) The Court acknowledged Ms. Healer's request for an early settlement conference "sometime before that March 23 [fact discovery] cutoff to get more discovery through the deposition." (*Id.* at 8:21-23.) However, because Ms. Blaise would be unavailable through much of March but still wanted to be part of settlement discussions, the Court recommended an April timeframe. (*Id.* at 10:14-25.) After more scheduling conflicts were raised, the Court instructed the parties to flesh out viable dates to present to the magistrate judge. (*Id.* at 11:21-25; 12:1.) The Court explicitly stated that discovery was only "partial[ly]" completed and that the "full-blown discovery" would come after the settlement conference that Defendants requested. While the Court did not want to disturb the trial date, the Court acknowledged that there would be a meet and confer to determine the actual modifications to the scheduling order. (*Id.* at 11:9-10; 12:7-12.)

Clearly, the Court contemplated that the scheduling order's discovery deadlines would be extended. Defendants were explicitly instructed to work out a timeframe for possible settlement discussions, and if settlement was not achieved, then the parties would need to meet and confer

on amending the scheduling order without disturbing the trial date. Despite their request and the Court's instruction, it appears from a review of the docket that while the pre-settlement telephone conference proceeded as scheduled, the early settlement conference was continued to August 2023. (Docket Entry May 12, 2023.) Yet, now, all attorneys of record in this case have omitted any discussion of the protracted discovery cutoff due entirely to defense counsel's insistence at an early settlement conference. The Court was led to believe that Defendants would seek an early settlement conference date and peg new discovery deadlines to that settlement conference date. Evidently, that is not what happened.

As a result, Plaintiff sought to meet and confer on extending the deadlines contained in the Fourth Amended Scheduling Order but was delayed at least partially because of the alleged settlement conference defense counsel sought. Defendants were on notice that discovery would be extended after said settlement conference, and Plaintiff cannot be entirely faulted for Defendants' own failures. Therefore, but for defense counsel's request to initiate an early settlement conference before setting the new deadlines, Plaintiff's oral request for discovery extensions at the February 2023 status conference would have been granted. There is good cause pursuant to Rule 16(b).

B. Reopening Discovery

Plaintiff asks the Court to modify the scheduling order so as to re-open the period of discovery. In a request to reopen discovery, courts consider (1) whether the trial is imminent, (2) whether the motion is opposed, (3) whether the non-moving party would be prejudiced, (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, (5) the foreseeability of the need for additional discovery in light of the time allowed

for discovery by the trial court, and (6) the likelihood that the discovery will lead to relevant evidence. *SQM*, 866 F.3d at 1066.

Here, trial is not so imminent in that it is currently four months away and so this first factor weighs against Defendants. However, the motion is opposed, weighing the second factor in favor of Defendants. Nevertheless, the Court does not find that Defendants would be prejudiced and so the third factor weighs against them. First, Defendants were noticed early on before the deadline had passed of the need to conduct additional discovery and thus cannot assert that they were blindsided. Relatedly, Defendants are at least partially to blame for the postponement of determining any new deadlines. That they are now concerned about any compressed timeline was partially Defendants' own doing and therefore cannot assert that Plaintiff is the sole reason for any prejudice; in any event, the Court is now extending all deadlines thereby rendering argument on a compressed timeline moot. Finally, the Court agrees with Plaintiff that based on Defendants' opposition and supporting documents, the Court cannot glean with any precision what remaining prejudice Defendants would suffer beyond mere inconvenience. Thus, the Court finds that there is no prejudice and this factor weighs in favor of Plaintiff. The fourth factor requires Plaintiff, as the movant, to show his diligence to obtain the deposition discovery of defendants as established by the Court at the status conference. This factor weighs in Defendants' favor as Plaintiff did not pursue the April, or early settlement conference requested by Defendant Guerrero through counsel, as well as an amended scheduling order until two months after the actual deadline lapsed. As to the fifth factor, it was foreseeable that the parties needed additional discovery—in fact, it was stated outright at the status conference. Because Plaintiff seeks the deposition of Defendants and possibly the treating eye doctor, the Court concludes discovery would lead to highly relevant evidence and therefore finds that this fifth and final factor weighs strongly in favor of Plaintiff.

On balance, while two of the five factors tilt in Defendants' favor, the remaining factors weigh in favor of Plaintiff. The Court thus finds that re-opening discovery is warranted.

C. Excusable Neglect

In determining whether there has been excusable neglect, courts consider (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith. *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004).

For the same reasons as previously described, the Court finds that the danger of prejudice to Defendants is limited or non-existent. Although the delay does impact the judicial proceedings—this matter has been on the docket since 2018 and the fourth amended scheduling order was entered in October, 2022 —the extensions are but an additional few months, with the bench trial delayed by only two months. Therefore, the length of delay is short and will not significantly impact the judicial proceedings. As previously described, the reason for the current delay is at least partially attributable to Defendants. So while there was some control with Plaintiff, much of that control was circumscribed by Defendants' request for an early settlement conference. As a result, Plaintiff sought in good faith to pursue a modification of the scheduling order and the later delays can be attributed to the dizzying array of scheduling conflicts among the attorneys. Therefore, there is excusable neglect and Plaintiff's motion, albeit delayed, is well taken.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has exhibited diligence, excusable neglect, and good cause pursuant to Federal Rule of Civil Procedure 6 and 16; therefore, the Court

GRANTS Plaintiff's motion to modify the fourth amended scheduling order (ECF No. 176) and issues the proposed Fifth Amended Scheduling Order herein. The hearing for this motion set for June 22, 2023 is VACATED as moot.

IT IS SO ORDERED 12th day of June, 2023.

RAMONA V. MANGLONA
Chief Judge