

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

Present: The Honorable John D. Early, United States Magistrate Judge

Maria Barr

n/a

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

n/a

n/a

**Proceedings:** (In Chambers) Order Re: Linksmart’s Motion to Compel [Dkt. 216]

On March 9, 2021, Plaintiff Linksmart Wireless Technology, LLC (“Linksmart”) filed a Motion to Compel Deposition with a Local Rule 37-2 Joint Stipulation (“Jt. Stip.”), declarations, and exhibits. Dkt. 216 (“Motion”). Linksmart seeks to compel the deposition of Dr. Matthew B. Shoemake, an expert for Defendant Panasonic Avionics Corp. (“Panasonic”). Pursuant to the Court’s March 10, 2021 briefing schedule, the parties filed supplemental briefs on March 16, 2021. Dkt. 219 (“Linksmart Suppl.”), 220 (“Panasonic Suppl.”).

The Motion is now fully briefed. The Court finds that the matter is appropriate for decision without oral argument (see Local Civil Rule 7-15), and vacates the hearing set for April 15, 2021 at 10:00 a.m. For the reasons explained below, the Motion is DENIED.

I.

**BACKGROUND**

Pursuant to the relevant scheduling orders, rebuttal expert reports were due on November 23, 2020 and the expert discovery cut-off was January 15, 2021. Dkt. 140, 144. The parties agreed to exchange the rebuttal expert reports after the deadline, on November 25, 2020. Jt. Stip. at 3 n.2. On November 25, 2020, Panasonic served the rebuttal non-infringement report of Dr. Shoemake. Declaration of Jason T. Lao (“Lao Decl.”), Exh. 2.<sup>1</sup> On December 1, 2020, Linksmart requested dates for the deposition of Dr. Shoemake. Declaration of James S. Tsuei (“Tsuei Decl.”), Exh. 1. The parties were unable to agree to

<sup>1</sup> Counsel for Panasonic states that he served Dr. Shoemake’s rebuttal non-infringement report on November 11, 2020, but the email reflects it was sent on November 25. See Lao Decl. ¶ 4, Exh. 2.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

a date before the close of expert discovery and agreed that Dr. Shoemake would sit for deposition on January 22, 2021. Id., Exh. 2; Jt. Stip. at 4 n.3. The parties did not seek consent from the District Court to conduct this deposition after the expert discovery cut-off.

On January 12, 2021, Linksmart's counsel, James S. Tsuei, received a call from Panasonic's counsel, Jason T. Lao, advising that Dr. Shoemake had contracted a "severe case" of COVID-19 and developed pneumonia and could not sit for a deposition on January 22, 2021. Tsuei Decl. ¶ 4. The substance of these communications is in dispute.

Linksmart represents that during this telephone call, Mr. Lao requested that Dr. Shoemake's deposition be postponed in light of his illness. Tsuei Decl. ¶ 4. Mr. Lao indicated that Dr. Shoemake would likely not be able to sit for deposition until at least the end of February or beginning of March. Id. Mr. Lao also asked Linksmart whether it would be amenable to considering an extension in view of Dr. Shoemake's illness. Id. ¶ 5. At the time of this call, Mr. Tsuei had not been involved in the parties' discussions about scheduling expert depositions, including that of Dr. Shoemake, or in the day-to-day management of the case for Linksmart. Id. ¶ 6. After discussing Panasonic's requests with other counsel for Linksmart, Mr. Tsuei called Mr. Lao later that day, and agreed to postpone Dr. Shoemake's deposition. Id. ¶ 7. Mr. Tsuei attests that he never agreed to withdraw the request to depose Dr. Shoemake and at no point did Mr. Lao indicate that Panasonic would not make Dr. Shoemake available for deposition again. Id. ¶ 10. With respect to an extension, Mr. Tsuei stated that Linksmart was not interested in a general extension but would consider a more concrete proposal in writing. Id. ¶ 8. According to Mr. Tsuei, Mr. Lao indicated that he would provide such a proposal and if the parties were unable to reach an agreement, Panasonic would "probably informally contact the Court for guidance." Id. Mr. Lao never followed up with a more concrete proposal regarding scheduling or to inform Linksmart that Dr. Shoemake had recovered and was available for deposition. Id. ¶ 9.

According to Panasonic's version of events, Mr. Lao learned during the first week of January 2021 that Dr. Shoemake was suffering from COVID-19 and pneumonia. Lao Decl. ¶ 7. Dr. Shoemake's condition did not improve over the next week, and Mr. Lao determined that Panasonic would need a one-month extension of the expert discovery schedule as a result. Id. ¶¶ 8-9. On January 12, 2021, Mr. Lao spoke with Mr. Tsuei and informed him of Dr. Shoemake's condition and recommended that the parties file a joint stipulation to extend the trial schedule, including the expert discovery cut-off and dispositive motion dates, to accommodate any deposition of Dr. Shoemake. Id. ¶ 10. According to Mr. Lao, he told Mr. Tsuei that if Linksmart was unwilling to approach the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

Court for an extension of the trial schedule, Panasonic would have no choice but to approach the Court on an ex parte basis for relief from Dr. Shoemake’s deposition. Id. Mr. Tsuei told Mr. Lao that he would check with his team regarding next steps. Id. That same day, Mr. Tsuei called Mr. Lao and stated that Linksmart could not agree to an extension of the trial schedule. Mr. Lao attests that he informed Mr. Tsuei that without an extension, the expert discovery deadline would pass on January 15, 2021. Id. ¶ 11. Mr. Tsuei purportedly responded that he understood, but agreed to take Dr. Shoemake’s deposition off calendar. Id. An email confirming that Dr. Shoemake’s deposition was taken “off calendar” was sent the same day. Id., Exh. 3. According to Mr. Lao, there was no discussion about a later deposition. Id. ¶ 13. Panasonic disputes Linksmart’s representation that Linksmart indicated it would consider a more concrete proposal regarding an extension of expert discovery and Panasonic never indicated that it would provide such a proposal. Id.

Thereafter, on February 12, 2021, Panasonic filed a Motion for Summary Judgment of Invalidity and Noninfringement of U.S. Patent No. RE46,459 that relied, in part, on Dr. Shoemake’s expert report. Dkt. 165 (“MSJ”). In response, Linksmart’s counsel emailed Panasonic’s counsel on February 15, 2021 to obtain an update regarding Dr. Shoemake’s health and to discuss Dr. Shoemake’s deposition in light of Panasonic’s reliance on his opinion in its MSJ. Tsuei Decl. ¶ 11, Exh. 3. Panasonic responded that it was “inappropriate” for Linksmart to now be asking to take the deposition of Dr. Shoemake at the “11th hour,” after summary judgment motions were filed, and the proposed “compressed timescale” was not possible because Dr. Shoemake was preparing for two trials. Id., Exh. 3.

The parties met and conferred, but were unable to resolve their dispute. On February 26, 2021, Linksmart filed a Motion to Strike before the District Judge, seeking an order striking Dr. Shoemake’s report, or in the alternative, to compel the deposition of Dr. Shoemake and strike his report from the pending MSJ. Dkt. 184. The hearing on this matter is currently scheduled for April 26, 2021, the same date as the hearing on the MSJ. Both the MSJ and Motion to Strike are fully briefed.

As noted, Linksmart filed the instant Motion on March 9, 2021.

**II.  
DISCUSSION**

As an initial matter, in the Court’s March 10, 2021 briefing schedule, the Court directed the parties to address in their supplemental briefs whether a magistrate judge may

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

order discovery after discovery has closed under the applicable scheduling order. See Dkt. 217 (citing Watts v. Allstate Indem. Co., 2012 WL 5289314, at \*2 (E.D. Cal. Oct. 23, 2012) (magistrate judge does not have authority to amend district judge’s scheduling order or to hear untimely discovery disputes); UMG Recordings, Inc. v. Disco Azteca Distributions, Inc., 2006 WL 2034689, at \*3 (E.D. Cal. July 18, 2006) (“Of course, the magistrate judge is not empowered to modify the district judge’s scheduling order.”); see also Local Civil Rule 16-14 (“Any application to modify an order entered pursuant to F.R.Civ.P. 16 shall be made to the judicial officer who entered the order.”).

In its Supplemental Memorandum, Linksmart argues that this Court retains jurisdiction to resolve the discovery dispute because nothing in Local Civil Rule 37-2 or the District Court’s scheduling orders set any deadline for moving to compel. Linksmart Suppl. at 1. Linksmart further contends the circumstances warrant the Court retaining jurisdiction because the Motion seeks “to enforce timely-served discovery pursuant to an agreement made during the discovery period,” which Panasonic “refused to honor.” Id. at 1-2. Linksmart maintains that the cases cited in the Court’s March 10, 2021 Order are distinguishable because in those cases, the disputes arose after the close of discovery and would have required extensions of the schedule to make the dispute timely, while here, the discovery was “timely requested and seemingly resolved during the discovery period. The Court would only be enforcing a previous discovery agreement made in a timely fashion.” Id. at 2-3.

Panasonic disagrees, arguing that a magistrate judge may not order discovery after discovery has closed under the applicable scheduling order set by the district judge. Panasonic Suppl. at 2. Panasonic cites to Waring v. Geodis Logistics LLC, 2020 WL 8509665 (C.D. Cal. Dec. 24, 2020) in support of this contention. Id. In Waring, the parties made an informal agreement to extend the expert discovery cut-off date without the court’s approval and scheduled depositions to take place after the close of discovery. After a dispute arose and the depositions did not take place as previously agreed, the defendant moved for sanctions against the plaintiff for refusing to produce his retained expert witnesses for deposition. Waring, 2020 WL 8509665 at \*1-3. In denying the motion, the magistrate judge explained that “a magistrate judge lacks authority to resolve discovery disputes after the discovery cut-off date set by the assigned district judge and cannot sua sponte advance the discovery deadline set by the district judge’s scheduling order.” Id. at \*6. The court noted that the entirety of the dispute arose after the expert discovery cut-off date and neither party sought an extension, despite an indication from the district judge that he would be willing to grant an extension. Id. When the parties agreed to notice and take depositions after the Court’s deadline, they did so without judicial consent and with no

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

stipulated Fed. R. Civ. P. 29 order in place to allow defendant to enforce the plaintiff's production of its experts for deposition after the cut-off date set by the district court. Id. The magistrate judge found that "the rules do not contemplate that parties will engage in discovery past a court-imposed deadline based solely on their own informal agreement. And while the parties certainly may agree, without court approval, to conduct discovery after the court-imposed deadlines, if they do so and disputes arise, this Court lacks jurisdiction to resolve such disputes." Id. at \*7.

The Court finds the reasoning in Waring persuasive and applicable to the present circumstances. The District Judge's Standing Order Re Jury/Court Trial for Cases Assigned to Judge John A. Kronstadt provides:

The Scheduling Order establishes a cut-off date for discovery in this action. This is not the date by which discovery requests must be served; it is the date by which all discovery is to be completed. The Court will not approve stipulations between counsel that permit responses to be served after the cut-off date, except in extraordinary circumstances.

Dkt. 116, Exh. D at 54. Nonetheless, the parties informally agreed to take the deposition of Dr. Shoemake after the discovery cut-off without the approval of Judge Kronstadt and without a Rule 29 order in place. Linksmart was aware of the impending expert discovery cut-off as it had previously suggested taking the deposition on January 25, 2021, acknowledging "it is out of time, but it shouldn't impact anything [sic] of the scheduled Court dates." Tsuei Decl., Exh. 2. The Court finds it immaterial that the parties made this informal agreement prior to the discovery cut-off or that Linksmart timely served the deposition notice. As in Waring, the dispute arose based on an extrajudicial agreement to take a deposition after the discovery cut-off. Linksmart seeks to compel a deposition that was scheduled to take place after the discovery cut-off without the District Court's consent. As the Ninth Circuit has noted, courts "routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders . . . ." Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1060 (9th Cir. 2005) (as amended). The assigned Magistrate Judge lacks jurisdiction to resolve the discovery dispute that arose as a result of an agreement between counsel to conduct discovery outside the parameters ordered by the District Judge. Waring, 2020 WL 8509665, at \*7; see also Fed. R. Civ. P. 29 ("a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

set for completing discovery, for hearing a motion, or for trial”); Wyles v. Sussman, 445 F. Supp. 3d 751, 756 (C.D. Cal. Apr. 27, 2020) (“Without a Rule 29 stipulated order in place, Plaintiff cannot have expected to enforce Defendant Brady’s promise to appear for deposition after the cutoff set by the District Court.”); Adinolfi by and through Adinolfi v. Omni La Costa Resort & Spa LLC, 2019 WL 2269881, at \*4-5 (S.D. Cal. May 28, 2019) (denying motion to depose the plaintiff’s guardian ad litem where the parties twice agreed to take the deposition after the fact discovery cut-off date and failed to timely alert the court to the issue).

Further, even if the Court were to conclude it has authority to consider this Motion, the Court would still deny the Motion because Linksmart has not established that it was diligent. First, Linksmart was aware of a potential scheduling problem with Dr. Shoemake’s deposition in early December. Rather than timely notifying the Court, counsel for Linksmart proceeded to schedule the deposition after the discovery cut-off, with full knowledge that it was “out of time.” Tsuei Decl., Exh. 2. Linksmart then had a second opportunity prior to the expert discovery cut-off to seek relief from the Court after Panasonic notified Linksmart on January 12, 2021 that Dr. Shoemake’s deposition could not proceed. At that time, Linksmart could have sought relief from the District Court, as Panasonic suggested. Despite Linksmart’s claim that Panasonic agreed to provide a proposed limited extension, Linksmart never followed up regarding this proposal. Instead, Linksmart took the deposition off calendar with no assurance regarding when the deposition would be rescheduled and without a Rule 29 stipulation order in place. At the time the deposition was taken off calendar, Linksmart knew that Dr. Shoemake’s deposition potentially would not occur until late February or early March, but Linksmart did not notify the Court even though the dispositive motion deadline was only a month away, on February 12, 2021. See Dkt. 144.

Linksmart’s claim that it was surprised that Panasonic relied on Dr. Shoemake’s opinion in its MSJ is unconvincing. Linksmart argues that Panasonic never informed Linksmart that it intended to rely on Dr. Shoemake’s opinion in support of its MSJ, it was not clear that it should have known Panasonic would rely on Dr. Shoemake’s opinion because “reliance on your own expert is often an indication of a genuine dispute of material fact,” and Linksmart disclosed when it was relying on expert testimony and its motions rely on admissions by Panasonic’s expert, not disputed opinions offered by Linksmart’s expert. Jt. Stip. at 5 & 5 n.4. There is nothing to suggest, however, that Panasonic made any representation to Linksmart that it did not intend to rely on Dr. Shoemake’s report in a motion for summary judgment. Dr. Shoemake was designated as a rebuttal expert on “non-infringement.” See Lao Decl., Exh. 2. Panasonic notified Linksmart on February 2, 2021

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | 8:18-cv-00654-JAK (JDEx)                                       | Date | March 25, 2021 |
| Title    | Linksmart Wireless Technology, LLC. V. Gogo Inc., et al., etc. |      |                |

that it intended to file a motion for summary judgment on non-infringement on the ground that Panasonic's "Accused systems do not meet the limitation of the 'a user's/users' rule set correlated to a temporarily assigned network address,' including using the 'temporarily assigned network address' 'only for the duration of the networking session.'" Tsuei Decl., Exh. 4. While Panasonic may not have expressly cited to Dr. Shoemake's report, these issues were discussed in Dr. Shoemake's report, which Linksmart received on November 25, 2020. See Lao Decl. ¶ 4, Exh. 2. Linksmart seeks to place the blame on Panasonic, but "[i]t was incumbent on counsel for [Linksmart] to address the issue in a timely manner and alert the Court as soon as it became apparent the parties were coming precariously close to the [expert] discovery deadline." Adinolfi by and through Adinolfi, 2019 WL 2269881, at \*5. Counsel for Linksmart did not do this.

The Motion is therefore denied. Nonetheless, the Motion to Strike remains pending before Judge Kronstadt and, of course, nothing in this Order limits Judge Kronstadt's ability to take any action in connection with that motion.

**III.  
CONCLUSION**

For the foregoing reasons, Linksmart's Motion (Dkt. 216) is DENIED.

IT IS SO ORDERED.

Initials of Clerk: mba