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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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COMPOSITE RESOURCES INC.,
Plaintiff/Counter Defendant,
v.
RECON MEDICAL LLC,
Defendant/Counter Claimant.

Case No. 2:17-cv-01755-MMD-VCF

ORDER

This is a patent, trademark, and unfair competition case about tourniquets used to stop the flow of blood to a body part when that body part is severely injured. Before the Court is Plaintiff Composite Resources, Inc.’s motion to amend the Pretrial Order (ECF No. 171), to correct what it represents was an inadvertent omission and list Graham Rogers as a witness.¹ (ECF No. 180 (“Motion”).) Because granting the Motion will not cause substantial injury to Defendant or inconvenience for the Court, denying the Motion would result in injustice because Plaintiff would be unable to put on its damages expert at trial, and as further explained below, the Court will grant the Motion.

“The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.” Fed. R. Civ. P. 16(e). “In evaluating a motion to amend the pretrial order, a district court should consider four factors: (1) the degree of prejudice or surprise to the defendants if the order is modified; (2) the ability of the defendants to cure the prejudice; (3) any impact of modification on the orderly and efficient conduct of the trial; and (4) any willfulness or bad faith by the party seeking modification.” *Galdamez v.*

¹Defendant Recon Medical LLC filed a response (ECF No. 181), and Plaintiff filed a reply (ECF No. 182).

1 *Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005) (citations omitted). The Court should ordinarily
2 allow modification after considering these factors if “the court determines that refusal to
3 allow a modification might result in injustice while allowance would cause no substantial
4 injury to the opponent and no more than slight inconvenience to the court[.]” *United States*
5 *v. First Nat’l Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981). The moving party bears the
6 burden of making such a showing. *See Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998)
7 (superseded by statute on other grounds).

8 Plaintiff argues the Court should grant the Motion because Plaintiff timely disclosed
9 Rogers, he was deposed, some of the parties’ joint exhibits are taken from his expert
10 report and deposition, six months remain before trial, and his omission from the witness
11 list was merely inadvertence on Plaintiff’s counsel’s part. (ECF No. 180 at 3-4.) Defendant
12 counters that inadvertence cannot meet the “manifest injustice” standard of Rule 16(e).
13 (ECF No. 181 at 2-3.) Plaintiff replies that Defendant’s argument does not analyze or
14 properly consider the four factors of the “manifest injustice” standard, and that proper
15 analysis of those factors suggests the Court should grant the Motion. (ECF No. 182 at 2-
16 6.) The Court agrees with Plaintiff.

17 Defendant does not even argue it would be prejudiced by amendment of the Pretrial
18 Order to include Rogers on the witness list. (ECF No. 181 at 2-3.) Moreover, and as
19 Plaintiff argues, there is no prejudice to Defendant—rendering any curing unnecessary—
20 to add Rogers to the witness list because the parties already jointly rely on his report and
21 deposition in their joint exhibits. (ECF No. 180 at 3.) The first two *Galdamez* factors thus
22 favor allowing amendment. As to the third factor, allowing amendment will not adversely
23 impact the trial, which has been rescheduled several times due to the COVID-19 pandemic
24 and is currently set for November 29, 2021. (ECF No. 179.) Adding Rogers’ name to an
25 amended pretrial order now will not change this case’s schedule. As to the fourth factor,
26 Plaintiff states the omission was inadvertent, and Defendant does not argue otherwise.
27 (ECF No. 180, 181.) Defendant instead hangs its hat on inadvertence. (ECF No. 181.)
28

1 Inadvertence is not the same thing as willfulness or bad faith. The fourth factor therefore
2 also favors granting the Motion. As all four factors accordingly favor granting the Motion,
3 Plaintiff has met its burden. See *Byrd*, 137 F.3d at 1132 (stating Plaintiff, as the moving
4 party, bears the burden); see also *Circle*, 652 F.2d at 887 (suggesting the Court should
5 grant the Motion despite the implication of the phrase 'manifest injustice' that it is a difficult
6 standard to meet because granting the Motion will not prejudice Defendant or the Court).

7 It is therefore ordered that Plaintiff's motion to amend the pretrial order (ECF No.
8 180) is granted.

9 DATED THIS 7th Day of June 2021.



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12 MIRANDA M. DU
13 CHIEF UNITED STATES DISTRICT JUDGE
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