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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ORTHOPAEDIC HOSPITAL,
12 Plaintiff,
13 v.
14 DJO GLOBAL, INC. and DJO
15 FINANCE, LLC,
16 Defendants.

Case No.: 3:19-cv-00970-JLS-AHG

**ORDER GRANTING IN PART
DEFENDANTS' OPPOSED MOTION
TO EXTEND CASE SCHEDULE**

[ECF No. 66]

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18 This matter comes before the Court on the Opposed Joint Motion on DJO's Request
19 for an Extension of Case Schedule. ECF No. 66. Defendants DJO Global, Inc. and DJO
20 Finance, LLC request a two-month extension of the dates set forth in the Court's Case
21 Management Order (ECF No. 41). Plaintiff opposes Defendants' request.

22 Under Fed. R. Civ. P 16(b)(4), "[a] schedule may be modified only for good cause
23 and with the judge's consent." *See also* ECF No. 41 ¶ 30 (providing that the dates in the
24 Case Management Order would not be modified "except for good cause shown"). "Good
25 cause" is a non-rigorous standard that has been construed broadly across procedural and
26 statutory contexts. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010).
27 The good cause standard focuses on the diligence of the party seeking to amend the
28 scheduling order and the reasons for seeking modification. *Johnson v. Mammoth*

1 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “[T]he court may modify the schedule
2 on a showing of good cause if it cannot reasonably be met despite the diligence of the party
3 seeking the extension.” Fed. R. Civ. P. 16, advisory committee’s notes to 1983 amendment.
4 Therefore, “a party demonstrates good cause by acting diligently to meet the original
5 deadlines set forth by the court.” *Merck v. Swift Transportation Co.*, No. CV-16-01103-
6 PHX-ROS, 2018 WL 4492362, at *2 (D. Ariz. Sept. 19, 2018). Whether the requested
7 extension would prejudice the non-movant is relevant, but secondary to the Court’s
8 consideration of diligence. “Because diligence is the focus of the inquiry, prejudice to the
9 party opposing the modification is not a prerequisite; it does, however, ‘supply additional
10 reasons to deny [the] motion.’” *Cruz v. City of Anaheim*, No. CV1003997MMMJEMX,
11 2011 WL 13214312, at *2 (C.D. Cal. Dec. 19, 2011) (quoting *Johnson*, 975 F.2d at 609).

12 Here, Defendants contend there is good cause to extend all dates in the Case
13 Management Order by approximately two months for the following reasons. First, the
14 Court continued the Claim Construction Hearing from April 16 to June 11, 2020 on its own
15 motion, creating the possibility that the current fact discovery end date of July 10, 2020
16 may pass before the Court issues a claim construction order. ECF No. 66 at 2. Defendants
17 express concern that they may need to schedule fact depositions for June 2020 while many
18 stay-at-home orders and travel restrictions are still in place due to the ongoing COVID-19
19 public health crisis. *Id.* Defendants argue that being forced to prepare and defend all of
20 their witnesses (who are not experts or experience witnesses) remotely will cause prejudice
21 to them; and, further, Defendants expect that many of the restrictions related to COVID-
22 19 will be lifted by August 2020, permitting in-person preparation and defense. *Id.* at 3.
23 Finally, Defendants argue Plaintiff will not be prejudiced by a two-month extension of the
24 case schedule.

25 Plaintiff opposes the request, challenging the underlying premises that the conditions
26 preventing in-person depositions will have changed in August 2020 or that taking
27 depositions remotely would cause difficulty or prejudice to Defendants, noting that
28 Defendants already deposed Plaintiff’s expert by video in March. *Id.* at 6-7. Plaintiff also

1 counters that, even if a fact discovery extension is granted, the entire case schedule need
2 not be extended as a result. *Id.* at 7-8. Finally, Plaintiff asserts that the requested extension
3 would result in prejudice to it, because economic uncertainty has created “particular
4 challenges for non-profit organizations that rely on charitable giving (which has largely
5 dried up) and endowment funding (which has been damaged by a market downturn),” such
6 that Plaintiff would be prejudiced by any delay in obtaining relief in this action. *Id.* at 8.

7 The Court finds some persuasiveness in the arguments of both parties. In particular,
8 the Court is inclined to agree with Plaintiff that there is no right to prepare witnesses or
9 take depositions in person. The Court has been strongly encouraging all litigants in all of
10 its cases to take depositions remotely in light of travel restrictions and stay-at-home orders,
11 and finds Defendants’ professed burdens associated with conducting discovery remotely
12 to be overstated. Moreover, to credit Defendants’ argument now would justify a potentially
13 indefinite extension of the discovery deadlines in this case, depending on unpredictable
14 developments of the spread of the virus and the responses of various governmental entities
15 over the coming months. The Court agrees with Plaintiff that there is no evidence that
16 circumstances will be materially different in August 2020 than in June 2020. In short, the
17 Court will not continue the discovery schedule solely to ensure that depositions can be
18 taken and witnesses can be prepared in person.

19 Nonetheless, the Court also finds Defendants’ requested extension of the case
20 deadlines to be modest and reasonable in light of the approximately two-month
21 continuance of both the claim construction hearing and Mandatory Settlement Conference
22 (“MSC”) in this matter. *See* ECF Nos. 63, 65. The Court also finds Plaintiff’s contention
23 that it will be prejudiced by such an extension to be overstated. The stipulated continuance
24 of the MSC by more than three months has already delayed Plaintiff’s earliest possible
25 opportunity to obtain relief. Moreover, the Court finds it generally sensible to extend the
26 case schedule in accordance with the continuance of the key date of the claim construction
27 hearing, to be consistent with the typical trajectory of patent cases in this court.
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1 Accordingly, the Court will **GRANT IN PART** Defendants’ request to extend the
2 case schedule.¹ The Court’s Case Management Order (ECF No. 41) is **HEREBY**
3 **AMENDED** as follows:

4 1. The initial date for the substantial completion of document discovery
5 including electronically stored information (“ESI”) is **July 27, 2020**. See Patent L.R.
6 2.1(a)(1).

7 2. All fact discovery shall be completed by all parties on or before
8 **September 11, 2020**.

9 3. A party asserting infringement must serve final amended infringement
10 contentions, within the meaning of Patent L.R. 3.6(a)(1), by **September 18, 2020**.

11 4. A party opposing a claim of infringement must serve final amended
12 invalidity contentions, within the meaning of Patent L.R. 3.6(b)(2), by **October 13, 2020**.

13 5. All expert disclosures required by Fed. R. Civ. P. 26(a)(2) shall be served on
14 all parties on or before **November 2, 2020**. Any contradictory or rebuttal disclosures
15 within the meaning of Rule 26(a)(2)(D)(ii) shall be disclosed on or before
16 **December 2, 2020**. Unless otherwise stipulated by the parties, the required expert
17 disclosures shall include an expert report as required by Rule 26(a)(2)(B). If a written
18 report is not required, the disclosure must provide the information required under Rule
19 26(a)(2)(c).

20 6. All discovery, including expert discovery, shall be completed by all parties
21 on or before **December 22, 2020**.

22 7. All other dispositive motions, including those addressing Daubert issues,
23 shall be FILED on or before **January 8, 2021**. Please be advised that counsel for the
24 moving party must obtain a motion hearing date from the law clerk of the judge who will
25 hear the motion. Failure of counsel to timely request a motion date may result in the
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28 ¹ Some of Defendants’ requested dates related to the pretrial conference have been
adjusted after consultation with the presiding District Judge.

1 motion not being heard. Motions in Limine are to be filed as directed in the Local Rules,
2 or as otherwise set by **The Honorable Janis L. Sammartino**.

3 8. All parties or their counsel shall fully comply with the Pretrial Disclosure
4 requirements of Fed. R. Civ. P. 26(a)(3) on or before **March 25, 2021**. Failure to comply
5 with these disclosures requirements could result in evidence preclusion or other sanctions
6 under Fed. R. Civ. P. 37.

7 9. Pursuant to Local Civil Rule 16.1(f)(4), on or before **April 1, 2021**, the
8 parties shall meet and confer to comply with the provisions of that section and prepare a
9 proposed pretrial order in accordance with Local Rule 16.1(f)(6)(c). The proposed
10 pretrial order must include all content mandated in the Court's previous Case
11 Management Order. *See* ECF No. 41 ¶ 26. The Court encourages the parties to consult
12 with the assigned magistrate judge to work out any problems in preparation of the
13 proposed pretrial order. **The Honorable Janis L. Sammartino** will entertain any
14 questions concerning the conduct of the trial at the pretrial conference.

15 10. Counsel for plaintiff will be responsible for preparing the pretrial order and
16 arranging the meetings of counsel pursuant to Civil Local Rule 16.1(f)(6)(a). On or
17 before **April 8, 2021**, plaintiff's counsel must provide opposing counsel with the
18 proposed pretrial order for review and approval. Opposing counsel must communicate
19 promptly with plaintiff's attorney concerning any objections to form or content of the
20 pretrial order, and both parties should attempt promptly to resolve their differences, if
21 any, concerning the order.

22 11. The proposed final pretrial conference order, including objections counsel
23 have to any other party's Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures shall be prepared,
24 served and lodged with **The Honorable Janis L. Sammartino**'s chambers on or before
25 **April 15, 2021**, and shall be in the form prescribed in and in compliance with Local Rule
26 16.1(f)(6)(c). Counsel shall also bring a court copy of the pretrial order to the pretrial
27 conference.

28 12. The final pretrial conference shall be held before **The Honorable Janis L.**

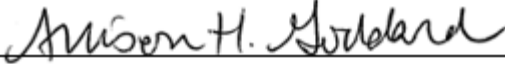
1 **Sammartino**, United States District Court Judge, on **April 22, 2021** at **1:30 PM**, during
2 which time the Court will address the submission of motions in limine, trial briefs,
3 proposed voir dire and jury instructions and the trial schedule.

4 All other requirements set forth in the Court's previous Case Management Order
5 (ECF No. 41) and Order continuing the MSC and issuing updated procedures (ECF No.
6 65) remain in place, except as explicitly modified by this Order or by any intervening
7 orders of the Court.

8 The parties are cautioned that the Court will not find good cause to grant any
9 further extensions of the case schedule based on the purported need to take depositions or
10 prepare witnesses in person.

11 **IT IS SO ORDERED.**

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13 Dated: May 28, 2020

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16 Honorable Allison H. Goddard
17 United States Magistrate Judge
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