IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

JEFF BOARDMAN, et al.,

Plaintiffs,

v.

PACIFIC SEAFOOD GROUP, et al.,

Defendants.

No. 1:15-cv-108-MC

ORDER

McShane, District Judge:

Plaintiffs Jeff Boardman, Dennis Rankin, Robert Seitz, Todd L. Whaley, Lloyd D. Whaley, South Bay Wild, Inc., Miss Sarah, LLC, and MY Fisheries, Inc. bring this antitrust action against the Pacific Seafood Group and more than 50 other businesses owned in full or part by defendant Frank Dulcich. Plaintiffs, who are commercial fishermen, seek an injunction prohibiting the Pacific Seafood Group defendants (Pacific Seafood) from acquiring any additional ownership interest in Ocean Gold Seafoods and its affiliates Ocean Protein, LLC and Hoquiam Riverview Properties, LLC (collectively Ocean Gold).

Plaintiffs now move to replace their lead expert economist, Dr. Hans Radtke, alleging that Dr. Radtke, who is 77 years old, is no longer able to act as an expert witness. I grant the motion subject to the conditions set out below.

FACTUAL BACKGROUND

Plaintiffs' counsel Michael Haglund retained Dr. Radtke as an expert economist for a prior antitrust action filed in 2010, *Whaley v. Pacific Seafood Group,* No. 1:10-cv-3057-MC. Radtke Decl. ¶ 1, ECF No. 198. In 2015, Haglund retained Dr. Radtke as an expert economist for this action.

This court's scheduling order required that Plaintiffs serve their expert witness disclosure on Defendants by June 30, 2017. Starting in March 2017, Dr. Radtke worked closely with Haglund on the expert witness disclosure, spending hundreds of hours preparing his report. Radtke Decl. ¶ 3; Foster Decl. ¶ 19, ECF No. 206; Haglund Decl., Ex. A, ECF No. 197-1 (Dr. Radtke's expert witness disclosure).

Haglund states that during the preparation of Dr. Radtke's expert witness disclosure, he had no concern about "Dr. Radtke's ability to effectively handle questioning from an opposing lawyer in the high pressure situations of a deposition or trial." Haglund Decl. ¶ 7. After submitting the expert report, Dr. Radtke spent more than forty hours preparing for his deposition. Radtke Decl. ¶ 3.

Defendants' counsel Randolph Foster deposed Dr. Radtke on October 25, 2017, starting at 9:30 a.m. Foster states that Dr. Radtke seemed to be "a pleasant and confident witness." Foster Decl. ¶ 8. Foster, who has nearly forty years of litigation experience, states,

> Dr. Radtke showed no signs of mental or cognitive incapacity. Nothing I observed during his deposition examination suggested to me that he is unable to serve as a witness in this matter. From my perspective, he was able to coherently answer questions, and to remember and recite facts that he knew first-hand or could recall. Nothing in his

> behavior, demeanor or answers suggested to me that he was not mentally competent or that he did not understand or process well-framed questions.

Id.

Foster states that Dr. Radtke's deposition testimony undermined Plaintiffs' legal positions in several ways. For example, Dr. Radtke testified that there was "substantial excess shoreside seafood processing capacity available," despite Plaintiffs' claim that Pacific Seafood or other processors have "the power to set the prices paid to fishermen or to exclude competition because competitors have the capacity to increase their purchases." Defs.' Resp. 8, ECF No. 205. Foster states that Dr. Radtke's testimony showed that several of Plaintiffs' key factual claims not well supported. For example, Foster states that although Dr. Radtke stated in his expert report that multiple businesses were interested in purchasing Ocean Gold's processing and fish meal plants, at the deposition he identified only one possible purchaser, based solely on telephone conversations with a person he had never met who claimed to represent Chinese investors. Defs.' Resp. 9-10.

Haglund chose to end Dr. Radtke's deposition at 5 p.m., stating to Foster, "I've got to call it quits. And you've got reserved time for a later time, but I've got to make a judgment on how tired my witness is." Second Haglund Decl., Ex. A, at 261 (Deposition Transcript), ECF No. 209-1. Haglund states that it appeared "fatigue over the course of a long day was contributing to Dr. Radtke's problems expressing himself." Haglund Decl. ¶ 7.

Dr. Radtke now states that during the deposition, "I encountered considerable difficulty being able to express myself in a clear and logical manner in response to defense counsel's questions. I have not had a similar experience in any prior depositions." Radtke Decl. ¶ 4. Dr. Radtke states that during the two weeks after the deposition, he talked several times with Haglund "regarding the problems I encountered in that deposition. I have advised Mr. Haglund

that I do not believe I am able to express myself in the same highly professional fashion that has prevailed throughout my career. I am very concerned about my ability to clearly defend the opinions in my expert witness disclosure at trial." Radtke Decl. ¶ 5. Dr. Radtke concludes, "Under the circumstances, I am not willing to continue as an expert witness for plaintiffs in this case because I do not believe I have the ability to present my testimony and respond to cross examination in a way that matches the standard of performance that prevailed until this most recent deposition experience." Radtke Decl. ¶ 6.

On November 27, 2017, Haglund notified Foster that Dr. Radtke would not continue to act as an expert witness because of cognitive problems related to age and health. Haglund told Foster that "Plaintiffs had retained a substitute expert who was prepared to file a new expert report to replace Dr. Radtke's by the end of January." Foster Decl. ¶ 24.

On December 4, 2017, Haglund wrote Foster to confirm that Plaintiffs would not call Dr. Radtke as a testifying expert at trial. Haglund Decl., Ex. B, at 1. Haglund wrote that Dr. Radtke had concluded "he was not able to process the answers to antitrust-related economic issues under the pressures that attend the adversarial process in a deposition or at trial." *Id.* Foster responded by letter dated December 11, 2017, stating that Defendants would not consent to Plaintiffs' request to designate a new expert. Haglund Decl., Ex. C, at 1. Plaintiffs then filed this motion to substitute.

At this point in the litigation, because of Defendants' difficulty in obtaining fisheries information, all deadlines have been struck, including discovery deadlines. ECF Nos. 164, 186. Defendants will not be required to disclose their expert reports until their experts have had time to study the fisheries information. No trial date has been set.

LEGAL STANDARDS

The parties did not cite, and I did not find, a Ninth Circuit decision that addresses the legal standards for the substitution of an expert witness after the deadline for designating expert witnesses has passed. District courts in the Ninth Circuit have generally looked either to Federal Rule of Civil Procedure 16, construing the motion to substitute as a motion to amend the scheduling order, or as an untimely expert designation under Rule 26(a), "and determine whether to sanction the untimely disclosure" under Rule 37(c)). *In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06-06213-AB (JCx), 2016 WL 6826171, at *2 (C.D. Cal. April 7, 2016).

Here, I conclude that Plaintiffs' motion should be treated as a request under Rule 16(b) to amend this court's scheduling order. *See Eichorn v. AT & T Corp.*, 484 F.3d 644, 650-51 (3d Cir. 2007). "A schedule may be modified only for good cause and with the judge's consent." Fed.R.Civ.P. 16(b)(1)(4). In determining whether good cause exists, the trial court primarily considers the diligence of the party seeking to modify the schedule. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The trial court may also consider whether the modification would prejudice the opposing party, but "the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Id.* (citation omitted). **"**The purpose of allowing substitution of an expert is to put the movant in the same position it would have been in but for the need to change experts; it is not an opportunity to designate a better expert." *United States. ex rel. Agate Steel, Inc. v. Jaynes Corp.*,No. 2:13-cv-1907, 2015 WL 1546717, at *2 (D. Nev. April 6, 2015). The trial court has discretion to deny a motion to add an expert after the close of discovery or after a deadline in a scheduling order. *Eichorn.*, 484 F.3d at 650-51.

DISCUSSION

In applying Rule 16, I look first to Plaintiffs' diligence in notifying this court of their request to replace Dr. Radtke as an expert witness. Plaintiffs notified Defendants of Dr. Radtke's requested withdrawal about a month after the deposition, which was about four months after the June 30, 2017 deadline for submitting the expert disclosure. After the parties could not agree on substitution, Plaintiffs filed this motion on December 19, 2017.

Unlike cases in which a party sought to replace an expert witness within a few weeks of trial, here no trial date has been set. *Cf. Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (affirming trial court's exclusion of expert testimony at trial when the opposing parties received the expert report "one month before they were to litigate a complex case"); *Harris v. United States*, 132 F.App'x 183, 184, at *1 (9th Cir. 2005) (affirming exclusion of expert when expert's designation and report were not disclosed until eight days before trial). In addition, Defendants have not yet submitted their own expert disclosure or any rebuttal report. I find that Plaintiffs acted with sufficient diligence in seeking to substitute Dr. Radtke.

I turn to the issue of prejudice to Defendants. Defendants note that Plaintiffs have not submitted any medical reports to support their claim about Dr. Radtke's competence. Defendants argue that Dr. Radtke's expert report demonstrates his ability to analyze and present complex information and opinions, and that Dr. Radtke showed no signs of incapacity during his deposition.

Defendants argue that Plaintiffs have made a tactical decision to "regroup and replace Dr. Radtke with a new expert and a new expert report." Defs. Resp. 13. Defendants argue that Plaintiffs seek to replace Dr. Radtke not because he is incompetent, but because Plaintiffs want "a second bite at the apple" to correct "the fatal errors" in Dr. Radtke's testimony and expert

report exposed at the deposition. Defs.' Resp. 15. However, Dr. Radtke declared under oath that he is not willing "to continue as an expert witness . . . because [he does] not believe [he has] the ability to present [his] testimony and respond to cross examination in a way that matches the standard of performance that prevailed until this most recent deposition experience." Radtke Decl. ¶ 6. I accept Dr. Radtke's sworn statement. Under these facts, I conclude that Defendants have not shown sufficient prejudice to justify denying Plaintiffs' motion to substitute.

However, I find that Defendants are entitled to strict limits on the new expert witness's report and testimony, and that Defendants may use Dr. Radtke's expert report and deposition testimony for impeachment. Plaintiffs do not contend that Dr. Radtke was incompetent when he drafted his expert report, but rather that he is no longer competent to testify in support of its conclusions. I conclude that to minimize the prejudice to Defendants, Plaintiffs' new expert witness "may not testify in any manner that is contrary to or inconsistent" with Dr. Radtke's disclosure. *Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-cv-03587, 2014 WL 8094582, at *2 (N.D. Cal. Nov. 19, 2014). In other words, the new expert's opinions must be "substantially similar" to Dr. Radtke's opinions. *See In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06-06213-AB (JCx), 2016 WL 6826171, at *4 (C.D. Cal. April 7, 2016). Plaintiffs' new expert may, however, perform his or her own analysis and calculations so long as the results are not contrary to or inconsistent with Dr. Radtke's conclusions. *See id.* As one court explained, the substitute expert "should have the opportunity to express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform." *Lincoln Nat. Life Ins. Co. v. Transamerica Fin. Life Ins. Co.*, No. 1:04-cv-396, 2010 WL 3892860, at *3 (N.D. Ind. Sept. 30, 2010) (further quotation marks and citation omitted).

Defendants seek to condition the substitution of Dr. Radtke on Plaintiffs' payment of Defendants' costs and fees for experts and attorneys incurred in preparing for and taking Dr. Radtke's deposition. I agree that Plaintiffs should pay reasonable fees and expenses to compensate for the prejudice to Defendants. However, I find that it would be premature to determine the amount of fees and costs while discovery is ongoing.

CONCLUSION

Plaintiffs' Motion to Substitute Testifying Expert Economist, ECF No. 196, is GRANTED.

IT IS SO ORDERED.

DATED this 22nd day of January, 2018.

/s/Michael J. McShane
MICHAEL MCSHANE
U.S. DISTRICT JUDGE