

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DAVID LIGHTBODY,

Plaintiff,

v.

Case 2:10-CV-02772-JPM-cgc

KELLOGG USA, INC.,

Defendant.

**ORDER DENYING EXPEDITED ORDER ALLOWING R. JEFFREY COLE, M.D. TO
TESTIFY AT TRIAL VIA EVIDENTIARY DEPOSITION AND TO EXTEND
SCHEDULING ORDER DEADLINE**

Before the Court is Plaintiff David Lightbody's Amended Motion Requesting Expedited Order Allowing R. Jeffrey Cole, M.D. ("Dr. Cole") to Testify at Trial via Evidentiary Deposition and to Extend Scheduling Order Deadline. (Docket Entry "D.E." #59). The instant motion was referred to the Magistrate Judge by Chief United States District Judge Jon P. McCalla's July 17, 2012 Standing Order Referring Certain Matters to Magistrate Judge for Determination.

With respect to Plaintiff's request that R. Jeffrey Cole, M.D. be permitted to testify at trial via evidentiary deposition, Plaintiff filed a motion on April 23, 2012 requesting the same relief. On May 10, 2012, the District Court denied the motion, concluding that it was premature and that "Plaintiff has thus far not articulated an adequate basis for use of the deposition of Dr. Cole under Rule 32(a)(4)." While Plaintiff's current motion provides further information about Dr. Cole's professional obligations as a hand surgeon and the financial burden it would impose upon Plaintiff to have Dr. Cole present to testify at trial, the allegations merely expound upon those that Plaintiff

made in support of the initial motion, which the District Court did not find were adequate to grant the relief as requested. Additionally, Plaintiff's additional information does not in any way affect the District Court's conclusion that the request is premature. Thus, the Magistrate Judge relies upon the District Court's analysis and concludes that Plaintiff's motion should again be denied as premature and as failing to articulate an adequate basis for use of the deposition of Dr. Cole as trial testimony.¹

With respect to Plaintiff's request for an extension to the scheduling order to permit the deposition of Dr. Cole, the deadline for taking expert depositions passed on June 26, 2012. Thus, Plaintiff's motion implicates Rules 6 and 16 of the Federal Rules of Civil Procedure. Rule 16(b)(4) provides that a schedule may be modified only for good cause and with the judge's consent." "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Fin. Corp.*, 281 F.2d 613, 625 (6th Cir. 2002) (quoting *Bradford v. DANA Corp.*, 249 F.3d 897, 809 (8th Cir. 2001)). Rule 6(b)(2) permits the court to extend the time to act, after the time to act has expired, upon a finding of good cause that the party failed to act because of excusable neglect. The Rule 6(b) excusable-neglect standard requires the court to consider five factors: (1) the danger of prejudice to the non-moving party, (2) the length of delay and its impact on the case, (3) the reason for the delay, (4) whether the

¹ Plaintiff's April 23, 2012 motion was opposed by former Third-Party Defendant Ecolab, who objected to the scheduled evidentiary deposition, and Defendant Kellogg USA, Inc., who neither objected to nor consented to the use of Dr. Cole's deposition at trial. In the instant motion, Plaintiff states that opposing counsel currently has "no objection to Dr. Cole's deposition testimony being used at trial as evidence." However, Rule 32(a)(4) does not provide that the agreement of the parties is a basis for admitting deposition testimony at trial. Instead, Rule 32(a)(4) requires the Court to determine that the witness is either unavailable or that exceptional circumstances make testimony by deposition desirable. The District Court has already concluded that such a determination would be premature.

delay was within the reasonable control of the moving party, and (5) whether the moving party acted in good faith despite the delay. *Nafziger v. McDermott Int'l, Inc.*, 467 F.3d 514, 522 (6th Cir. 2006).

Upon review, as to the Rule 16(b)(4) requirements, Plaintiff has stated that Dr. Cole has provided tentative deposition dates in September and October, 2012. However, the District Court's Amended Scheduling Order has set the pretrial conference on October 16, 2012 and the jury trial for October 22, 2012. It is not practical that deposition dates in September and October, 2012 would allow the parties to comply with these deadlines set by the District Court, and thus the Magistrate Judge concludes that good cause has not been demonstrated.

As to the Rule 6(b) factors, there is minimal danger of prejudice to the non-moving party, as the proposed relief is not opposed. However, the proposed relief would create a significant delay that would adversely impact the timely progress of the case. There is no reason given for the delay in requesting the relief, whether the delay was in the reasonable control of the moving party, or whether the moving party acted in good faith. However, the Magistrate Judge finds that Plaintiff has been aware since the District Court's May 10, 2012 Order that the District Court had found the request for Dr. Cole to testify via evidentiary deposition to be premature. Plaintiff had nearly seven weeks before the expiration of the expert deposition deadline to determine whether he still wanted to take Dr. Cole's deposition. Plaintiff apparently elected, the District Court's Order notwithstanding, not to do so.² Accordingly, the Magistrate Judge finds that the delay was attributable to Plaintiff's choices and was within Plaintiff's control. Further, the Magistrate Judge

² Plaintiff's motion states that Dr. Cole's deposition had been previously scheduled for March 12, 2012 and May 14, 2012. The latter scheduled date was after the District Court's ruling, at which time Plaintiff was aware of the District Court's conclusion. Although Plaintiff states that the March 12, 2012 deposition was cancelled due to a request from former Defendant Ecolab, Inc., there is no reason provided for the cancellation of the May 14, 2012 deposition.

finds that Plaintiff has not provided sufficient justification for a finding of excusable neglect. Accordingly, pursuant to Rule 6(b) and Rule 16(b), Plaintiff's request for an extension of the scheduling order deadline for taking depositions of expert witnesses is denied.

IT IS SO ORDERED this 3rd day of August, 2012.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE