

United States District Court,
 E.D. California.
 Pamela KINCAID, etc., et al., Plaintiffs,
 v.
 CITY OF FRESNO, et al., Defendants.
No. 1:06-cv-01445-OWW-SMS.

March 19, 2008.

[Michael Temple Risher](#), American Civil Liberties Union of Northern California, San Francisco, CA, [Paul Alexander](#), Heller Ehrman LLP, Menlo Park, CA, for Plaintiffs.

[James B. Betts](#), Betts & Wright, Fresno, CA, Navtej Singh Bassi, California Department of Transportation, Sacramento, CA, for Defendants.

ORDER RE: DEFENDANTS WILL KEMPTON, JAMES PROVINCE, AND DARYL GLENN'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT TESTIMONY AND OTHER EVIDENCE, OR, IN THE ALTERNATIVE TO COMPEL PRODUCTION OF EXPERTS' REPORTS AND FOR MONETARY SANCTIONS (Doc. 173)

[SANDRA M. SNYDER](#), United States Magistrate Judge.

*1 Caltrans Defendants Will Kempton, James Province, and Daryl Glenn ("Caltrans") filed their motion to exclude Plaintiffs' expert testimony and other evidence, or, in the alternative to compel production of experts' reports and for monetary sanctions on February 15, 2008 (Doc. 173). Thereafter, on March 11, 2008, the parties

filed their joint statement pursuant to Local Rule 251. Defendants City of Fresno, Alan Autry, Jerry Dyer, Greg Garner, John Rogers, Reynaud Wallace, and Phillip Weathers ("City") filed a supplement(s) to the joint statement on March 13, 2008 (Doc. 230 & 231).

The Court has read and considered the original noticed motion, together with its declarations and exhibits, as well as the joint statement and supplement(s) to that statement. The Court requires no hearing nor any further argument and hereby rules summarily.

It is unfortunate that this Court apparently failed to adequately communicate its patterns and practices with regard to discovery disputes of the nature focused upon in the herein motion. Since this Court held at least four (4) prior informal telephonic conferences with all counsel concerning deposition scheduling and the alleged tardiness of one party's response to outstanding discovery, it was this Court's belief that all parties understood the philosophy behind holding informal telephonic conferences prior to spending possibly/ probably unnecessary time, energy, and money putting together pleadings for issues that could be resolved much more expeditiously. Nonetheless, the pleadings are before the Court, so deal with them we shall.

The Court is aware of the scheduling order of March 7, 2007 (Doc. 117), as well as Judge Wanger's sincere desire to hold to the schedule as set forth therein to the extent possible given the ongoing exigency of the subject matter and position of all the parties in this lawsuit. That said, things happen. And, a review of the docket of this case reveals more than the pleadings:

DATE	DOCS	EVENT/FILING
10/17/06	1	Complaint for Declaratory/Injunctive Relief
10/17-24/06	3-34	Parties focusing on Temporary Restraining Order
10/24/06-11/22/06	34-80	Parties focusing on Preliminary Injunction
1/12/07	96-98	Defendants file Motion to Dismiss
2/7/07	99	Plaintiffs file First Amended Complaint
2/22/07	108	Plaintiffs file Second Amended Complaint
3/1/07 & 3/7/07	112, 117	Scheduling Conference/Order Re:

3/1-30/07		Scheduling <i>[Parties obviously busy during this period of time, quieting the pleadings, stipulating for extensions of time to answer second amended complaint, preparing position papers for motion to dismiss, scheduling case]</i>
3/30/07-4/12/07	126-128	Setting of, preparing for, and participating in a Settlement Conference with Judge Wanger
6/15/07-9/28/07	131-159	Parties focusing on Plaintiffs' Motion to Certify Class; hearing held on 7/30/07; Class Administration Hearing held on 9/17/07; notice to all Plaintiffs on 9/28/07
12/05/07	164	First discovery dispute of any significance comes to the attention of this Court
12/6-19/07	166-170	Series of telephonic discovery dispute conferences focusing on City's alleged failure to produce documents and attend depositions. Note: Attorney Betts was in trial in another matter before Judge Wanger, so conferences had to be rescheduled.
2/15/08	173-179	The subject Motion To Compel filed
2/28/08	182-228	Motion for Summary Judgment filed and thereafter listings of filings from all parties re: Summary Judgment

*2 This case is time sensitive, and all parties appear to have been extremely busy on several fronts since the lawsuit was filed some seventeen (17) months ago. Obviously discovery has to have been ongoing while motion practice has been taking place in the district court. And, to the best of everyone's ability, it would appear, compliance with Judge Wanger's scheduling order has been attempted. Plaintiffs did disclose their experts on the date required of October 1, 2007. As set forth in the Joint Statement ("JS"), the reports mandated by [FRCP 26](#) were not forthcoming as Plaintiffs were waiting for the documents that were the subject of the telephonic discovery dispute conferences held with this Court in

December, 2007. Caltrans argues "[b]y [Plaintiffs'] own admission, the reason for not producing the required reports (an alleged but unidentified discovery dispute with the City Defendants) had absolutely nothing to do with any alleged act or admission by the Caltrans Defendants." (JS p. 4) While that may be, it makes little sense to require or expect an expert to prepare partial reports or a report regarding evidence as to one defendant, only to be amended then probably amended yet further, inviting other forms of discovery disputes having to do with "moving target opinions" by experts, etc. However, the Court does agree with Caltrans counsel that it was wholly inappropriate for Plaintiffs' counsel to "ignore" Caltrans communications of December 19, 2007 and January 3,

2008 regarding discovery issues. (Motion p. 7 and Exhibits 4 & 5)

What, in the final analysis, is the prejudice? Plaintiffs opine they have offered “a practical and effective resolution to the issues raised by Caltrans' motion ...” (JS p. 5) And, they argue the City Defendants are agreeable to the resolution. In fact, the City “elected not to submit any contentions as to this motion or the disputes therein.”(JS p. 7) Unless or until Caltrans submits that, for example, responding to the motion(s) for summary judgment is made difficult due to lack of experts' reports, the Court sees no real problem or prejudice with the resolution proposed by Plaintiffs, to wit, the production of Ms. Liza Apper's report on or before April 4, 2008, and to make Ms. Apper available for deposition on or before May 2, 2008. Plaintiffs have withdrawn their second expert, Professor Snow.

Sanctions

Caltrans argues they should not have been put to the necessity of filing a motion. Agreed, they should not have been. Yet, both parties taking positions regarding this motion are to blame: Plaintiffs' counsel should have been more forthcoming with responses to the letters mentioned above and the concern discussed during the discovery dispute conferences with the Court regarding how all remaining discovery was going to be completed in time for the discovery cutoff deadline of January 31, 2008. But, Caltrans counsel should have put together a telephonic discovery dispute conference, and this matter would have been resolved earlier and probably with other discovery matters worked out as well. Again, that is the habit and custom of this Court, as well as the other Magistrate Judges of the Fresno Division of the Eastern District. Therefore, the Court will not award sanctions at this juncture.

Conclusion

*3 Caltran's motion to compel production is GRANTED pursuant to Plaintiffs' proposal:

1. Plaintiffs shall provide an expert report from Liza Apper on or before **April 4, 2008**;
2. Plaintiffs shall make Ms. Apper available for deposition on or before **May 2, 2008**; and,

3. Defendants' request for sanctions is DENIED.

IT IS SO ORDERED.

E.D.Cal.,2008.
Kincaid v. City of Fresno
Slip Copy, 2008 WL 752668 (E.D.Cal.)

END OF DOCUMENT