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IN THE SUPREME COURT OF THE STATE OF NEVADA

Irving Torremoro; Keolis Transit Services, LLC, Petitioner, vs. The Eighth Judicial District Court and the Honorable Erika Ballou, Judge, Respondents and Lamont Compton, Real Party in Interest	Supreme Ct. No.: Dist. Ct. Case No.: A-18-777320-C **Irving Torremoro & Keolis Transit Services, LLC's Petition for Writ of Mandamus**

ORIGINAL PETITION

From the Eighth Judicial District Court, Clark County
The Honorable Erika Ballou, District Judge

Docket 83596 Document 2021-28925

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Attorney's Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,772 words.

3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

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requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of October, 2021.

WILSON ELSER
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NRAP 26.1(a) Disclosure

The undersigned counsel of record certifies that the following are persons and entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Parent Corporation: Keolis America, Inc.
2. Publicly held company that owns 10% or more of the party's stock: None
3. Law firms who have appeared or are expected to appear for Irving Torremoro or Keolis Transit Services, LLC: Wilson Elser Moskowitz Edelman & Dicker, LLP

DATED this 8th day of October, 2021.

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Routing Statement

NRAP 17(b)(13) governs pretrial writ proceedings challenging discovery orders. This petition challenges a discovery order.

DATED this 8th day of October, 2021.

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

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NRAP 21(a)(5) Verification

I am the lead attorney for petitioners in A-18-777320-C and this petition. On their behalf, I believe the facts stated in this petition are true to the best of the information available to me. I declare under penalty of perjury that the foregoing is true and correct, per NRS 53.045(1).

DATED this 8th day of October, 2021.

/s/ Michael P. Lowry
Attorney for Petitioners

Certificate of Service

Per NRAP 25(c), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on October 8, 2021, **Irving Torremoro & Keolis Transit Services, LLC's Petition for Writ of Mandamus** was served via electronic means by operation of the Court's electronic filing system to:

Stephen G. Clough, Esq. Maier Gutierrez & Associates 8816 Spanish Ridge Avenue Las Vegas, Nevada 89148 Attorneys for Lamont Compton	Judge Erika Ballou Eighth Judicial District Court Department 24 200 Lewis Ave. Las Vegas, Nevada 89155

BY: */s/ Michael Lowry*
An Employee of
WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

x

Relief Sought

This petition seeks a writ of mandamus concerning the district court's order allowing substitution of an expert witness. Real party in interest ("Compton") moved for this order, petitioners (collectively "Torremoro") opposed, and the district court granted the motion. Torremoro seeks to reverse that order.

Issues Presented

1. A party timely designates expert witness 1. Fifteen months after discovery closes and less than two months before trial, the party wants to replace expert witness 1 with expert witness 2. Nevada's Rules of Civil Procedure contain no language allowing a party to substitute experts. Is the party's motion to substitute treated as a motion to re-open discovery?
2. The party seeking to replace expert witness 1 was aware of a pending criminal indictment against expert witness 1 for at least 15 months before filing the motion to replace him. The motion was filed only after expert witness 1 was convicted of the pending charges and less than two months before trial. Is an unsuccessful litigation strategy good cause to re-open discovery?

Facts Necessary to Consider the Petition

This petition arises from a personal injury case. Compton designated Jeffrey Gross, M.D., as a retained medical expert. Just two months before trial Compton

moved to replace Dr. Gross with a different medical expert. Torremoro opposed, but the district court granted the motion.

A. The timeline of events relevant to this petition.

1. **November 3, 2017:** The motor vehicle accident at issue occurs.
2. **January 23, 2018:** An indictment is filed, under seal, against Dr. Gross in the United States District Court for the Central District of California.[1]
3. **May 18, 2018:** The federal court enters an order unsealing the indictment.[2]
4. **June 14, 2018:** The United States Attorney for the Central District of California issues a press release publicizing the indictment.[3]
5. **July 6, 2018:** Compton files his complaint.[4]
6. **July 23, 2018:** Dr. Gross agrees to treat Compton on a lien basis.[5]
7. **August 12, 2018:** Dr. Gross writes a neurosurgical consultation report.[6]
8. **February 15, 2019:** Dr. Gross projects the cost of future medical care.[7]
9. **March 27, 2019:** Dr. Gross writes a supplemental report. That same day the Central District of California publishes an order describing the charges against Dr. Gross.

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[1] App0130.
[2] App0131.
[3] App0192-0193.
[4] App001.
[5] App0195.
[6] App0168-0171.
[7] App0173-0179.

> Defendant is alleged to have received kickbacks in exchange for referrals of patients needing spinal surgeries and other (usually invasive) procedures. The Indictment alleges Defendant is associated with kickbacks totaling $622,936. The payments were allegedly disguised as payments pursuant to bogus contracts entered into for the purposes of disguising and concealing the kickback payments. The charges against Defendant involve kickbacks related to surgeries billed to personal injury attorneys rather than insurers, as Defendant performed surgeries contingent on a recovery through personal injury cases.[8]

10. **October 9, 2019:** Compton designates Dr. Gross as a retained medical expert in this case.[9]

11. **November 6, 2019:** Parties stipulate to extend discovery.[10] Initial expert disclosures are due December 9, 2019. Discovery closes on March 7, 2020.

12. **March 6, 2020:** Compton files his motion in limine 11 expressly asking the court to exclude evidence of Dr. Gross' pending federal indictment. The motion notes "Dr. Gross is federally indicted for allegedly not disclosing the fact he is receiving kickbacks from a hospital. This is not a formal conviction but an unproven claim made by in [sic] his case that has not been heard on the merits yet."[11]

13. **March 7, 2020:** Discovery closes as scheduled.

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[8] *United States v. Gross*, 370 F. Supp. 3d 1139, 1143 (C.D. Cal. 2019).
[9] App0159-0166.
[10] App0011.
[11] App0018:21-23 (emphasis in original).

14. **March 24, 2020:** Torremoro opposes motion in limine 11. He agrees the fact Dr. Gross was indicted is inadmissible. However, he argues the evidence obtained about Dr. Gross and his billing practices in that case is independently relevant and admissible.

15. **July 16, 2020:** Dr. Gross' plea agreement is filed in the federal case.[12] Although labeled as sealed, the seal was later lifted. The docket does not indicate when.

16. **July 21, 2020:** Compton replies concerning motion in limine 11, asserting further arguments about how the federal indictment is not admissible.[13]

17. **August 5, 2020:** The district court enters an order granting motion in limine 11, concluding "the evidence Defendants present is more prejudicial than probative."[14]

18. **May 21, 2021:** The United States Attorney for the Central District of California issues a press release publicizing Dr. Gross' conviction.[15]

19. **June 29, 2021:** Compton files a motion to substitute Dr. Gross out of the case. The motion is filed on an order shortening time and scheduled for hearing on July 13, 2021.[16] When it was filed, the case was assigned to a

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[12] App0092-0118.
[13] App0061-0067.
[14] App0074:13-15. The case was assigned to Judge Stefany Miley at the time.
[15] App0197-0198.
[16] App0080.

trial stack starting September 7, 2021 and was 3rd in line for trial.[17] Calendar call was scheduled for August 31, 2021.

20. **July 13, 2021:** The district court hears and orally grants Compton's motion. As a consequence, the case is delayed one year and reassigned to a trial stack starting September 6, 2022.

B. The district court's ruling.

The district court granted Compton's motion, but based upon a clearly erroneous factual finding. Despite the fact that Compton filed motion in limine 11 in March, 2020, the district court concluded he had no knowledge of Dr. Gross' pending criminal charges until April, 2021.

> Here's the issue. I mean, if it was a sealed indictment, then they didn't have any knowledge of what was in it or anything like that, and so they don't know. And if he's, you know, as he stated, as Mr. Clough stated many times, you are innocent until you're proven guilty, and so they didn't have the knowledge until April of 2021.[18]

That factual error was repeated in the court's written order. It granted the motion because

> (1) the request to substitute Dr. Jeffrey Gross is substantially justified; (2) the harm to Plaintiff is outweighed by any harm to Defendants; (3) Plaintiff had no knowledge of the status of the criminal case as it was under seal until in or about April 2021; (4) discovery shall be reopened for the limited purpose of replacing Dr. Gross only; and (5) no other discovery is permitted.[19]

[17] App0184.
[18] App0203:21-25.
[19] App0210-0211.

Why the Writ Should Issue

A. Judicial economy favors considering this petition.

Writ relief is available when there is no "plain, speedy and adequate remedy in the ordinary course of law."[20] "Because an appeal from a final judgment or order is ordinarily an adequate remedy, in most cases, we decline to exercise our discretion to consider writ petitions challenging interlocutory district court orders."[21] Nevada's appellate courts "generally will not exercise our discretion to review discovery orders through" writ petitions.[22] "Nevertheless, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction."[23] Writ petitions may also be considered "when an important issue of law needs clarification and considerations of sound judicial economy are served."[24]

Applied here, Dr. Gross' conviction spawned motions to substitute in multiple cases pending in the Eighth Judicial District. Thus far at least 9 have generated orders, applying varying approaches due to the lack of controlling

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[20] NRS 34.170.
[21] *Oxbow Constr., LLC v. Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014).
[22] *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).
[23] *Las Vegas Sands Corp. v. Dist. Ct.*, 130 Nev. 578, 581, 331 P.3d 876, 878 (2014).
[24] *Helfstein v. Dist. Ct.*, 131 Nev. 909, 912, 362 P.3d 91, 94 (2015).

Nevada law on point.[25] This situation is similar, although on a narrower scale, to *Williams v. Dist. Ct.* where a discovery based writ petition was considered because "these issues have the potential of being repeated in the many endoscopy cases pending before the district court."[26]

A decade ago district courts dealt with the conviction of Mark Kabins, M.D. and motions to substitute. Yet Nevada has no guidance from appellate courts for addressing these scenarios. Considering this petition on its merits promotes judicial economy by providing the district courts and litigants a framework to assess these scenarios when they arise.

B. The district court applied the wrong facts.

1. Standard of Review

"Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion."[27] "In the context of a writ petition, this court gives deference to the district court's findings of fact, but reviews questions of law de

[25] App0213-0241.
[26] 127 Nev. 518, 525, 262 P.3d 360, 365 (2011).
[27] *Canarelli v. Dist. Ct.*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 119 (2020).

novo."[28] "Findings of fact are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence."[29]

2. The district court's factual finding is clearly erroneous.

The district court made only one factual finding, concluding "Plaintiff had no knowledge of the status of the criminal case as it was under seal until in or about April 2021."[30] That is clearly erroneous. The facts indicate Compton was aware of Dr. Gross' pending criminal case no later than March 6, 2020 when he filed motion in limine 11. It is likely Compton had knowledge of the case at some point before that to prepare the motion.

This factual finding is important. Filing motion in limine 11 demonstrated Compton was keenly aware of the allegations against Dr. Gross and how they might affect Dr. Gross' testimony at trial. Motion in limine 11 also demonstrated Compton factored the pending indictment into his litigation strategy and was willing to take a risk on Dr. Gross. Finally, motion in limine 11 is an important factor for assessing whether good cause supported Compton's motion to re-open discovery to replace Dr. Gross.

The district court's only factual finding about when Compton knew of Dr. Gross' indictment is clearly erroneous and thus receives no deference upon review.

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[28] *Williams*, 127 Nev. at 525, 262 P.3d at 365.
[29] *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. Adv. Op. 3, 458 P.3d 328, 334 (2020)
[30] App0211:1-2.

C. The district court applied the wrong law.

The next question is what legal standard should a district court apply to a motion to substitute an expert witness? The district court's order did not identify what standard it applied, stating only that the request was "substantially justified."[31]

There is no provision in Nevada's Rules of Civil Procedure that allows a party to substitute expert witnesses. No prior Nevada appellate case has directly considered this point either. Considering and deciding this petition on its merits would benefit the parties in this case, and the others where Dr. Gross was designated, by articulating the standards against which the motions should be judged. This in turn promotes judicial economy.

Procedurally, the only way a party may appropriately designate a new retained expert is by re-opening the expert disclosure deadline. Permitting Compton to designate a new expert to replace Dr. Gross required re-opening discovery, 15 months after it closed, and continuing the trial date that was less than two months away. The district court did just that, stating "discovery shall be reopened for the limited purpose of replacing Dr. Gross only."[32] Since the district court was re-opening discovery, it should have evaluated Compton's motion against the standards required for a motion to re-open discovery and continue trial.

[31] App0210:26-27.
[32] App0211:4.

Substantial justification is not part of that analysis, thus the district court's ruling is erroneous as a matter of law.

When the standards for extending or re-opening discovery are applied, it is apparent Compton did not meet them.

1. There was no excusable neglect for Compton's late motion.

EDCR 2.35(a) governs motions to extend discovery deadlines in the Eighth Judicial District. Motions must "be filed no later than 21 days before the discovery cut-off date or any extension thereof. A request made beyond the period specified above shall not be granted unless the moving party, attorney or other person demonstrates that the failure to act was the result of excusable neglect." Applied here, Compton wanted to re-open discovery to designate a new expert to replace Dr. Gross. Discovery closed on March 7, 2020, but he filed this motion on June 29, 2021. As the motion was filed after more than 15 months *after* discovery closed, Compton was obligated to demonstrate the motion's timing was the result of excusable neglect.

The motion's timing was the result of a strategy, not neglect. Dr. Gross' indictment was a matter of public record as of May 21, 2018 and publicized by prosecutors on June 14, 2018. Compton's motion to substitute was carefully drafted to avoid saying he did not know of the *indictment*, instead arguing only he did not know Dr. Gross would *plead guilty*. Compton chose to designate Dr. Gross

as a retained expert, chose to have him project future medical costs, and chose to stick with Dr. Gross despite a pending indictment on kickback charges for medical billing practices. Compton knew there was a risk Dr. Gross might be convicted but accepted that risk, as evidenced by filing motion in limine 11. Compton filed his motion to replace Dr. Gross only after he learned the risk did not work out in his favor. That is a strategy, not neglect, and is not a basis to re-open discovery just two months before trial. As no excusable neglect was present, the motion should have simply been denied.

That result is consistent with the result from *Clark v. Gold Coast*. There the district court excluded the plaintiff's liability expert, resulting in summary judgment. The plaintiff then moved to re-open discovery and asserted excusable neglect was present because she could not have anticipated her expert witness would be excluded and she needed time to get a new one. The district court denied the motion and the Supreme Court agreed. "The concept of 'excusable neglect' does not apply to a party losing a fully briefed and argued motion; instead, the concept applies to instances where some external factor beyond a party's control affects the party's ability to act or respond as otherwise required."[33]

There was no external factor beyond Compton's control here. He knew of the pending indictment against Dr. Gross. He decided to designate Dr. Gross as a

[33] No. 62603, 2014 Nev. Unpub. LEXIS 1238, 2014 WL 3784262 (2014).

retained expert anyway, took a risk, and that risk did not work out for him. That is a strategy, not excusable neglect that supports an untimely motion.

2. There was no good cause to re-open discovery.

If excusable neglect supported the motion's timing, the motion's merits had to be "supported by a showing of good cause for the extension…."[34] The good cause requirement primarily considers the diligence of the party seeking the amendment.[35] The extension may be granted if the deadline "cannot be met despite the diligence of the party seeking the extension. Carelessness is not compatible with a finding of diligence."[36] "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification."[37]

Diligence is not at issue. Compton diligently worked to designate Dr. Gross as an initial expert. Instead, the district court's analysis should have focused on the moving party's reasons for the extension. As discussed above, Compton's reason for the extension is that his litigation strategy to hire Dr. Gross as an expert witness

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[34] EDCR 2.35(a).
[35] *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992).
[36] *Carrillo v. Las Vegas Metro. Police Dep't*, 2013 U.S. Dist. LEXIS 114781, 2013 WL 4432395 (D. Nev. August 14, 2013).
[37] *Johnson*, 975 F.2d at 610.

backfired. Compton knew of that risk, but accepted it and should be stuck with the results.

Further, the district court's ruling significantly prejudiced Torremoro. While part Compton's trial strategy relied upon Dr. Gross being cleared of his charges, part of Torremoro's trial strategy was a contingency that Dr. Gross would be convicted because that could affect his credibility and the weight a jury might give his opinions. The district court's order effectively allowed Compton to escape the consequences of a problem he created by shifting those consequences onto Torremoro. This prejudice to Torremoro weighs against re-opening discovery.

Both parties placed their bets on Dr. Gross. The fact that Compton lost his bet is not a reason to re-open discovery and re-deal the cards.

3. Compton's proposed designation of Dr. Leon was untimely.

Compton's motion could alternatively be viewed as a request to deem a new designation of Dr. Leon timely. As to expert witnesses, "[a] party must make these disclosures at the times and in the sequence that the court orders."[38] "If a party fails to provide information or identify a witness …, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."[39] Federal courts interpreting their equivalent have ruled Rule 37(c)(1) gives teeth to discovery

[38] NRCP 16.1(a)(2)(E)(i).
[39] NRCP 37(c)(1).

disclosure obligations.[40] The Advisory Committee Notes to the 1980 Amendment to Rule 37 stated it is an "automatic," "self-executing sanction." When considering whether to excuse a party's non-compliance, "the burden is on the party facing sanctions to prove harmlessness."[41] Applied here, it was Compton's burden to demonstrate harmlessness.

Compton wanted to designate a late expert witness. In *Hansen v. Universal Health Servs., Inc.* the plaintiff designated additional experts long after discovery closed. The district court excluded them from trial and that decision was affirmed on appeal. "[I]t appears that either the defendants would have been prejudiced or the trial date would have had to be continued once again to allow discovery if the new experts were to testify."[42] *Staccato v. Valley Hosp.* also addressed excluding several proposed expert witnesses who were named after the discovery deadline. "[W]e perceive no abuse of discretion in the district court's decision to exclude any untimely designated witnesses, and we decline to disturb that decision on appeal."[43]

While *Hansen* and *Staccato* did not concern substituting experts, their analysis should have applied here and generated the same result. Again, Compton

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[40] *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).
[41] *Id.*
[42] *Hansen v. Universal Health Services of Nevada, Inc.*, 115 Nev. 24, 28-29, 974 P.2d 1158, 1160-61 (1999).
[43] *Staccato v. Valley Hosp.*, 123 Nev. 526, 529 n.2, 170 P.3d 503, 505 (2007).

knew there was a risk that Dr. Gross could pled guilty or be convicted on the charges he faced. Compton knew the nature of the charges and how they could affect Dr. Gross' credibility at trial. Compton accepted that risk but it did not work out for him. An unsuccessful litigation strategy is not substantial justification to re-open discovery, especially when trial was less than two months away.

Further, Compton did not meet his burden to demonstrate harmlessness. Discovery closed long ago. Plaintiff's motions in limine were heard and decided. The parties were preparing for trial. Again, part of Torremoro's defense strategy was a contingency that Dr. Gross *would* be convicted because that could affect his credibility and the weight a jury might give his opinions. Allowing Compton to reshuffle the deck, after deciding he dealt himself a losing hand, materially and adversely affected Torremoro's own strategy.

Another factor weighing against harmlessness was that Compton's motion to substitute provided no substantive information about his proposed substitute expert. Compton promised much of Dr. Leon's opinions, but provided nothing from Dr. Leon binding himself to those promises. Compton did not provide a CV or fee schedule so Torremoro could compare Dr. Leon's qualifications and expenses to Dr. Gross'. Nor did Compton provide a report from Dr. Leon that could be compared to Dr. Gross' for scope and content.

It was Compton's burden to demonstrate harmlessness but he did not meet it.

4. The case law supports Torremoro.

This particular scenario is thankfully rare, but the cases cited below supported Torremoro's position that substitution should have been denied.

For instance, in *Groves v. City of Reno* the plaintiff designated as an expert witness a lawyer who had been suspended from practice, twice, while the case was pending.[44] Discovery closed and 11 months later Plaintiff asked to substitute replace that expert with someone else.

Groves applied the analysis required to re-open discovery because otherwise Plaintiff's substitute designation would be untimely. It noted in the Ninth Circuit, "when an expert is not timely disclosed, there is a *presumption* the opposing party is harmed."[45] *Groves* concluded the substitution was not harmless, "as demonstrated in the additional discovery expense the Defendant would incur, a possible alteration of Defendant's strategies, and the disruption in the court's calendar."

Compton cited a variety of cases to support his position, but none allowed substitution where the need for it arose because of an unsuccessful litigation

[44] No. 3:13-cv-537, 2015 U.S. Dist. LEXIS 79246 (D. Nev. June 18, 2015).
[45] Emphasis in original.

strategy. For instance, the requested substitution from *In re Northrop Grumman Corp. ERISA Litig.* arose because the plaintiff's expert died.[46]

In *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co.*, the defendant's expert was convicted of embezzlement after being designated as an expert witness and being deposed. However, the defendant "only learned of Mr. Van Elsen's legal troubles and eventual incarceration on June 24, 2010."[47] The problem was brought the court's attention at a status check a month later and a substitute expert was permitted.

Lincoln Nat'l's facts contrast starkly with the facts here. Dr. Gross' indictment was a matter of public record and publicized by prosecutors. Compton even filed a motion in limine to exclude reference to the indictment 15 months *before* a conviction occurred. Clearly Compton was aware of the indictment and took a calculated risk, unlike the defendant in *Lincoln* who learned of the risk only after the expert was convicted and sentencing occurred.

In *Stone Brewing Co. v. MillerCoors* Stone asked to substitute one of its experts because the expert "was uncomfortable testifying in-person given the COVID-19 pandemic, and that he was also unwilling to meet with counsel in-

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[46] No. CV 06-06213, 2016 U.S. Dist. LEXIS 185126, 2016 WL 6826171 (C.D. Cal. Apr. 7, 2016) ("Here, it is undisputed that Plaintiffs could not have named Witz as their expert by the January 5, 2011 deadline because Kampner did not die until September 2011.").

[47] No. 1:04-cv-396, 2010 U.S. Dist. LEXIS 103744 (N.D. Ind. Sep. 30, 2010).

person to prepare for trial."[48] Stone even confirmed the new expert "endorsed and accepted all of [the former expert's] opinions…." Given the ongoing COVID-19 pandemic, the court granted the substitution. This conclusion has no relevance to whether Plaintiff should be allowed to escape the result of his choice to use Dr. Gross despite knowledge of the pending indictment.

Rebel Communs., LLC v. Virgin Valley Water Dist. is also inapplicable. There the plaintiff designated an expert witness and the defense asked to depose him. "After attempting to contact Radtke, Rebel learned that Radtke was no longer employed by Spectrum, and that another employee … had been assigned to the matter."[49] The plaintiff then moved to substitute, which was allowed. The circumstances that led to the substitution were beyond the plaintiff's control, whereas here Compton *knew* about Dr. Gross' pending indictment and decided to accept that risk.

Conclusion

When the expert disclosure deadlines have expired and a party moves to replace one retained expert with another, that motion is one to extend or re-open discovery. The district court did not apply the standards required to extend or re-

[48] No. 3:18-cv-331, 2021 U.S. Dist. LEXIS 66859, 2021 WL 1263836 (S.D. Cal. Apr. 5, 2021).

[49] *Rebel Communs., LLC v. Virgin Valley Water Dist.*, No. 2:10-cv-513, 2015 U.S. Dist. LEXIS 123197, 2015 WL 5430297 (D. Nev. Sep. 12, 2015).

open discovery and thus erred as a matter of law. The district court's only factual finding was also clearly erroneous.

It is clear Compton's motion should have been denied when the correct fact is applied to the correct law. Compton freely chose his litigation strategy. He was aware of the risk of hiring Dr. Gross and accepted that risk. The risk did not work out as Compton hoped, but that is neither excusable neglect nor good cause to re-open discovery and continue trial. Further, the district court's ruling significantly prejudiced Torremoro's own trial strategy.

The district court's order allowing Compton to re-open discovery applied the wrong fact to the wrong law and consequently was an abuse of discretion. Torremoro requests a writ directing the district court to vacate its prior order and instead enter an order denying Compton's motion.

DATED this 8th day of October, 2021.

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