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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA AT FRESNO

SABAS ARREDONDO, JOSE CUEVAS, HILARIO GOMEZ, IRMA LANDEROS, and ROSALBA LANDEROS individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

DELANO FARMS COMPANY, a Washington State Corporation; CAL-PACIFIC FARM MANAGEMENT, L.P.; T&R BANGI'S AGRICULTURAL SERVICES, INC., and DOES 1 through 10, inclusive,

Defendants.

NO. 1:09-cv-01247-MJS

DELANO FARMS COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY SCHEDULING ORDER

The Honorable Michael J. Seng

Date: June 24, 2016
Time: 9:30 a.m.
Ctrm: 6

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I. INTRODUCTION

Plaintiffs' motion requires them to show that they could not have complied with the existing schedule in spite of their own diligent efforts. The record here shows the opposite. Once again, Plaintiffs seek to modify the schedule because they have *not* been diligent. Plaintiffs' withdrawal of their expert's report and trial plan was the inevitable result of their inattention to a process they promised would be tightly controlled, and their decision to disregard their plain and clear knowledge that the results could not be validated. While Plaintiffs take credit for coming forward to tell the Court that their trial plan was based on falsified data, the truth is that actions speak louder than words: a party genuinely concerned about presenting truthful and accurate results would have done whatever was necessary to validate the work *before* finalizing an expert report, *before* filing a trial plan, and *before* realizing Defendants were hot on the trail of exposing the fraud.

Plaintiffs initially proposed to administer a written survey by mail. After over a year of delay, that failed. Plaintiffs then asked to delay the proceedings again to conduct "tightly controlled direct interviews." The problem of data falsification in such surveys is well known. Aware of the problem, Dr. Roberts required a post-survey validation process: follow-up calls to the respondents to ensure that they had in fact been surveyed. But when that very test indicated that the surveys were not valid, Roberts and Plaintiffs decided to ignore the problem and submit his report anyway.

Roberts says he never questioned the data because it said what he expected it to say, and because he assumed (without checking) that CSRS was dealing with the problem. Roberts consulted with Plaintiffs' counsel, who told him that phone problems were to be expected. That is: Plaintiffs and their expert decided to abandon the validation process because the results met their expectations of what they hoped to find. Without even a peek at the data Roberts knew was available, Roberts and Plaintiffs decided to just go for it, and submitted to the Court a trial plan based on patently invalid survey results and an expert report claiming over $150,000,000 in damages. This is recklessness, not diligence.

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Plaintiffs suggest that they could not have discovered the data falsification before Defendants' discovery efforts made it impossible to ignore. This is incorrect. All of the GPS and other data was available to Plaintiffs the day the surveys were completed—and Roberts knew it. Plaintiffs and Roberts did not so much as ask for, let alone look at, this data. Instead, Plaintiffs and Roberts made Defendants fight for it in discovery—including a motion to compel—all at substantial cost. Plaintiffs now claim that only by listening to Defendants' questioning of Plaintiffs' witnesses at deposition did Plaintiffs realize what their data says and think to check it themselves. But Plaintiffs could have asked their own questions months ago and, not least given the failure of their own validation process, should have done so. Due diligence requires no less. If Defendants had not pressed, the Court would have before it a proposal to try the case using Plaintiffs' falsified data.

Plaintiffs cannot distance themselves from CSRS and BMR by pretending that Roberts and Plaintiffs' counsel were not deeply involved. Plaintiffs' counsel actively participated in the crucial decision to ignore the results of the validation study and proceed. And, as Roberts admitted at his deposition, he was the person ultimately responsible for the conduct of the survey, and he failed to follow acknowledged best practices or to provide even a modicum of instruction or supervision with regard to the survey. The results should come as no surprise to him or to Plaintiffs' counsel. Plaintiffs and their expert first enabled and then ignored the falsification of data, until Defendants' discovery efforts made it impossible to ignore any longer.

We are now nearly seven years into this litigation. Plaintiffs have submitted and belatedly withdrawn a trial plan and expert disclosure based on yet another failed survey. The problems Plaintiffs have encountered in trying to develop a valid trial plan are intractable: there is no legitimate way to generalize the experience of this particular class by sampling and extrapolation. Given the wide variation in the experiences of class members, the lack of a uniform practice, the difficulty in finding class members, and their general unwillingness to participate, this will never work. The solution is not to try again but to recognize that Plaintiffs

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have failed to meet their burden of presenting a viable trial plan because they cannot do so.[1]

II. FACTS

This is the third time Plaintiffs have asked to delay these proceedings to accommodate their fruitless efforts to find a valid way to try this case as a class action. Plaintiffs first said they would conduct a written survey more than two years ago, in the March 17, 2014 joint scheduling report. (ECF No. 313, at 10.) In the parties' July 3, 2014 joint report, Plaintiffs told the Court that they had designed a multi-faceted survey process, which included a written pilot survey, class-member meetings, a mass mailing of the survey, and more. (ECF No. 326, at 3–4.) But Plaintiffs did nothing to move the process forward in 2014. Instead, they spent their time trying to prevent or delay Defendants' pilot study.[2]

In March 2015, Plaintiffs represented that they "shortly plan[ned] to resume the survey study" and that it would be "completed or close to completion" by June 26, 2015. (ECF No. 362, at 3.) Then on June 12 Plaintiffs asked to delay completion of their survey—this time until September 25, 2015. (ECF No. 372, at 9.) Plaintiffs then delayed until late July to send a test mailing to 100 class members. (Roberts Decl. (ECF No. 393-2) ¶ 13.)

When the written survey failed due to a woefully low response rate of 3%, Plaintiffs again asked for more time. (ECF No. 393-4.) This time, Plaintiffs proposed that they would conduct a survey "using tightly controlled direct interviews instead of mail." (*Id*. at 4:12–13; *see also* Roberts Decl. (ECF No. 393-2 ¶ 14.) Roberts said the "data collection portion [of the survey] is expected to take eight to ten weeks." (ECF No. 393-2 ¶ 16.) After the eight-to-ten weeks of "direct interview[s]," Roberts estimated needing another 60 days for "compilation and analysis to produce a final report." (*Id.*)

Defendants objected, arguing that Plaintiffs had not proceeded diligently and pointing

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[1] Given the significance of the issues presented, Delano Farms respectfully requests the opportunity to appear before the Court in person for oral argument. Pursuant to L.R. 230(g), Delano Farms believes that it will need more than 10 minutes of oral argument in opposition to Plaintiffs' Motion.

[2] *See*, *e.g.*, Plaintiffs' Motion for Protective Order (ECF No. 333). Had Plaintiffs put half the effort into directing and monitoring their own survey expert that they put into directing and monitoring the efforts of KCC, the Court-appointed neutral, to serve class members with deposition subpoenas as part of Delano Farms' pilot study, they would have prevented the problem of falsified data entirely.

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out that Plaintiffs could have completed their work in the fall of 2014. (ECF No. 398, at 3−4.) In reply, Roberts and Plaintiffs' counsel misrepresented the reasons for the delay of Plaintiffs' survey in the fall of 2014. They said they had run out of time (again).[3] In fact, one of the Plaintiffs' law firms issued a stop-work order to Roberts on September 17, 2014. (Dep. Ex. 109; Roberts Dep at 205:22–206:11.)[4] But that is not what they told the Court.

The Court granted Plaintiffs' second request for more time to complete the proposed direct-interview process on January 14, 2016. (ECF No. 405.) But once again, Plaintiffs did not act with care or diligence. Instead, as discussed further below: (a) Plaintiffs and Roberts disregarded the fact that the survey responses could not be validated and proceeded without even looking at the other data available to them at the time; (b) they enabled the data falsification in the first place by failing to provide basic guidance, supervision, and monitoring in connection with the survey—all of which they were responsible for; and (c) rather than acting diligently to timely disclose the fraud evident in the data available to them all along, Plaintiffs made Defendants uncover it through discovery.

A. Roberts and Plaintiffs Chose to Disregard the Inability to Validate the Survey Responses without Using Information Available to Them at the Time for Quality Control

Plaintiffs' lengthy, detailed factual chronology leaves out the central and dispositive fact: Roberts knew that all of the information necessary to discover the falsified data was available to him—including the GPS coordinates of where the surveys were completed—when CSRS reported that the responses could not be validated. But he never asked to see the data and never asked whether CSRS had looked at it. He did not even bother to look at the

[3] Mr. Martinez filed sworn testimony stating that "[b]y mid-September 2014, Plaintiffs and their experts determined that the survey could not be completed during peak harvest of 2014 (July-October) despite the time already invested in preparing the survey, given that further steps were required prior to final survey implementation." (ECF No. 400-1 ¶10.) Roberts gave similar testimony at the same time. (*See* ECF No. 403-3 ¶ 9.)

[4] Exhibits from the BMR, CSRS, and Roberts depositions referenced herein are attached as exhibits to the Declaration of Sarah Gohmann Bigelow in Opposition to Plaintiffs' Motion to Modify Scheduling Order ("SGB Decl.") and cited as "Dep. Ex. ___." Portions of the transcript of the depositions cited in this brief are attached as exhibits to the Gohmann Bigelow declaration and cited as "[Name] Dep."

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responses to the "validating" question he had included in the survey. Instead, he blindly accepted the explanation of Plaintiffs' counsel, chose not to accept CSRS's offer to attempt in-person validation, and deemed the data "good enough."

1. The importance of validation

Interviewer falsification is a well-known problem in survey research. (Decl. Dr. A. Fink Re Mot. Mod. Sched. Or. ("Fink Decl.") ¶ 9.) Roberts knew from the outset that it would be important to prove the validity of his work. (Roberts Dep. at 97:4–25.) Roberts understands that survey research has to be reliable and validated in order to be admissible in court. (*Id*. at 23:2–5.) And Roberts agrees that an important best practice for minimizing or avoiding data-collection error is conducting a post-survey validation study. (*Id*. at 106:4–8 & 124:22–125:11; *see* Fink Decl. ¶¶ 22–23.) The simplest validation study would entail making telephone calls to survey respondents to confirm that they had participated in the survey and that their answers to a few sample questions were the same. (*Id*. at 131:14–132:12.)

Roberts contracted with CSRS to validate 20% of the completed interviews. (*See* Dep. Ex. 43 (CSRS Bid) ¶ 7; Roberts Dep. at 153:12–154:3.) The point of the validation study was, in his words, to "ensure that the people we were talking to were the people we actually thought we were talking to." (Roberts Dep. at 127:22–25.) CSRS agreed in its contract that, if any issues were discovered in the validation process, CSRS would "replace any interviews that reflect an issue." (Dep. Ex. 43 ¶ 7; Roberts Dep. at 239:20−241:17.)

Another way to validate survey responses is by asking for information that can be compared against external data sources. Roberts included such a validating question in his door-to-door survey. Question 1 asked respondents: "In what year did you first start working for Delano Farms?" (Roberts Dep. at 162:10–17.) The answers could then be compared to Bangi's payroll data. (*Id*. at 162:18−163:6.)

2. The failure to validate

Validating 20% of the 305 survey responses would have meant contacting and confirming the answers of approximately 60 people. (Roberts Dep. at 133:12–15.) But CSRS

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was able only able to contact *one* out of 305 people. (*Id*. at 133:8–11 & 145:23–146:1.) The reason—as CSRS explained to Roberts—was that the phone numbers collected as part of the surveys were "not operable." (*Id*. at 133:16–24.) Of the 169 numbers CSRS had collected and made multiple attempts to contact, 83 were disconnected, 8 were business numbers, and 17 were a wrong number. (Dep. Ex. 60; Rodriguez Dep. at 279:23–280:11 & 190:22–194:4.)[5] Indeed, CSRS had never seen such poor results in any validation study. (*Id.* at 194:1−7.)

3. Roberts' failure to examine known and available survey data that would have revealed the falsified data

Roberts was aware as of early December that the attempt to validate had been a complete failure. (Walther Decl. (ECF No. 429-1) ¶ 38.)[6] Roberts agrees that it was his responsibility to use the information to which he had access to validate the results of the survey and ensure that it was reliable. (Roberts Dep. at 40:12–17, 43:14–19; *see* Fink Decl. ¶¶10–11.) Moreover, Roberts knew all along that GPS data had been collected as part of the survey process, showing the location of the iPad when each interview was purportedly taken. (Roberts Dep. at 122:22–124:4.)[7]

Roberts could have asked CSRS to provide him the GPS data, but he never did. (*Id*. at 165:4–10 and 171:9–11.) Roberts did not even *ask* whether *CSRS* had reviewed the GPS data. (*Id*. at 242:5–15.) Instead—in the face of an unprecedented failure to validate—Roberts merely "assumed [it] was sufficient validation without the phone calls" that CSRS was "apparently… supposed to be doing spot checks." (*Id*. at 241:18–242:4.)

Had Roberts looked at the data available at the time, in December 2015, he would have seen the very information Plaintiffs eventually provided to the Court five months later with

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[5] Other numbers went to fax machines, yielded no answer or busy signals, or were identical to the numbers provided by other class members determined to be duplicates. (*Id*.)

[6] CSRS first raised the validation issue with Roberts before the survey was completed. (Roberts Dep. at 267:18–269:2.) Final results were reported to Roberts in mid-January. (Dep. Ex. 63; Rodriguez Dep. at 297:10−20.)

[7] Indeed, Roberts' knowledge that the GPS data had been collected, and his assumption that CSRS must have looked at it, is now offered as a justification for the decision not to investigate when the survey responses could not be validated. (Roberts Dep. at 241:18–242:19.)

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their motion to modify the case schedule. The GPS and other data Plaintiffs rely on to argue that they were duped despite their diligence comes from a spreadsheet attached to an internal CSRS email dated December 1, 2015—just a few days after the survey was completed. (Walther Decl. ¶¶74–81 & Ex. Y, Part 2.) The length-of-interview information came from the same spreadsheet, but Roberts never asked for it either. (*Id*. ¶ 81; Roberts Dep. at 171:12–16.) So too did that fact that most (over 70%) of the surveys were completed in English, where the majority of the surveyed population spoke Spanish. (Walther Decl. Ex. Y.)[8] Roberts did not ask for this data either. (Roberts Dep. at 171:17–24.)

Roberts also ignored the stunning discrepancy between the low response rates of prior attempts and the high response rates he was getting from the door-to-door survey. Roberts knew that Defendants' pilot study had produced a 23% response rate (ECF No. 403-3 ¶ 8), and his own mailed pilot survey produced just a 3% response rate. Roberts also estimated that it would take a sample size of 2000 to get 200 completed surveys—a rate of 10%. (Roberts Dep. at 93:4–22.) But Roberts blew past the red flag presented by the 65% response rate that CSRS reported.[9]

Roberts further chose to ignore the fact that CSRS and BMR purported to have achieved in just two weeks a process that he had told the Court would take eight to ten. (ECF No. 393-2 ¶ 16.) Best survey practices include making projections about completion time based upon available information so that interviewers are given adequate time to perform their work and to facilitate quality control by comparing projected and actual rates of progress. (Fink Decl. ¶ 12.) Had Dr. Roberts done this, he would have realized that BMR's plan to complete the interviews in two weeks was impossible. (*Id* ¶¶ 12–15.) At a 10% rate, 300 surveys should have taken

[8] Initially, CSRS and Roberts understood that the survey would be conducted predominantly or solely in Spanish. (Dep. Ex. 43 ¶ 4; Rodriguez Dep. at 76:4–17; Roberts Dep. at 167:3–14.) Roberts also could have looked in the narrative answers from the actual survey responses to see how many of those were in Spanish, but he never did. (Roberts Dep. at 167:15–169:10.)

[9] Moreover, Roberts has testified that the time to get the best response rate is July–October, during the harvest season. (ECF No. 393-2 ¶ 12.) In fact, conducting the survey in this window was so important that Plaintiffs claimed the need to delay it for a year when they couldn't conduct it within the 2014 harvest season. (*Id*.) BMR claims to have interviewed 305 of the 467 people attempted—a rate of 65%. Thus, these high results were achieved during a time of year that Roberts had previously testified was not likely to produce a good response rate.

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between 3,000 and 9,000 hours to complete. (Fink Decl. ¶ 14 .) That would take 4 interviewers working 40 hours per week *18 to 56 weeks*.[10]

Finally, Roberts neglected to compare the survey responses to his own validating question. Although the survey asked when workers first started working for Delano Farms, Roberts never attempted to compare the answers to payroll records.[11] Roberts acknowledged that, had he done this, it would have helped him determine the validity of the survey data. (Roberts Dep. at 162:10–163:6.) Indeed, had he engaged in this simple task, Roberts would have seen that the respondents got the wrong answer more than 85% of the time. (Decl. Dr. J. Krock Re Mot. Mod. Sched. Or. ¶ 10.)

In short, all of the information that Plaintiffs are claiming they were diligent in discovering had been collected and compiled by CSRS and was available to them for the asking as of December 2015 when they learned about the "overwhelming difficulty" (Mot. Mod. Sched. Or. (ECF No. 429) at 9:15) that CSRS had encountered trying to validate the survey. Roberts knew this information was available. But he never bothered to ask for it, look at it, or ask anyone else to look at it.

4. Various options were available to address the validation failure, but Roberts and Plaintiffs decided to ignore it

After validation failed, CSRS gave Roberts options to deal with the bad phone numbers and inability to validate. One obvious solution was to attempt the validation in person. (Roberts Dep. at 134:18–24.) But Roberts did not see this as "something that would be worth the price" (*id*. at 134:25–135:2) or a "valuable use of resources" (*id*. at 145:9–14)—even though he did not have a cost in mind (but "didn't expect it would be that large") (*id*. at 275:15–21). Roberts believes he presented the idea of in-person validation to Plaintiffs'

[10] Roberts and CSRS initially thought it would take 6–8 weeks to do 300 interviews. (Dep. Ex. 43 (email cover); Roberts Dep. at 184:4–9.) CSRS estimated that doing 400 interviews would take another 2 weeks. (Dep. Ex. 43.) Thus, the expected rate was 2 weeks per 100 interviews. Yet BMR purported to have completed 305 in just over 2 weeks. Anyone paying any attention at all would have noticed the discrepancy, even assuming that Roberts' and CSRS's estimates were reasonable.

[11] Dr. Roberts initially claimed not to have remembered whether he performed this comparison (Roberts Dep. 162:10− 163:9) but later admitted that he had not (*id.* at 308:14−309:13).

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counsel as well, and that they were not interested. (*Id*. at 270:24–272:25.)

The contract between Roberts and CSRS also provided that CSRS would do additional surveys to replace any that could not be validated. (Dep. Ex. 43 ¶ 7.) CSRS's agreement with BMR required the same of BMR. (Dep. Ex. 25 ¶ 8.) Even though it should not have entailed additional expense to Plaintiffs (given the requirements of the CSRS contract), Roberts never asked CSRS to redo any of the surveys. (Roberts Dep. at 239:20–240:8.)

Rather than exercising independent discretion as the expert to investigate the inability to validate, Roberts asked Plaintiffs' counsel what to do about it and deferred to their judgment. (*Id*. at 136:11–141:17 & 260:23–262:21.) In Plaintiffs' words, they "told Dr. Roberts that based on experience with migrant farm workers in low income Latino communities, encountering difficulties in contacting farm workers by phone was understandable." (Motion at 9:20–22.) And Roberts "assumed" that the explanation that respondents were afraid to give their phone numbers was correct. (Roberts Dep. at 247:23–248:7.) He accepted this explanation without question—even for those people who, as far as anyone knew, had been willing to open the door to a stranger, answer a survey to be used in a lawsuit, and sign their names under penalty of perjury. (*See id*. at 247:3–249:11.) He did nothing to test this implausible hypothesis. (*Id*. at 250:3–253:13.) Nor did he question the implausible suggestion that workers changed or disconnected their numbers within days of doing the survey.[12]

Roberts' two main reasons for ignoring the validation failure are as troubling as the decision itself:

First, Roberts testified that he was assured by the fact that "they" had addresses, names, and signatures. (Roberts Dep. at 140:9–24 & 142:20–22; *see also* Motion at 9:25–26, claiming the ability to validate by "matching names, signatures, and addresses.") But as Roberts explained, matching addresses merely meant that "[t]hey were supposed to be calling at the right address. I assumed that CSRS was monitoring and had data that would show that they

[12] The validation calls started on November 19, less than a week into the survey. (Dep. Ex. 112; Roberts Dep. at 279:11–21.) By December 1, just three days after the interview process ended, all non-duplicative phone numbers collected had been attempted. (Walther Decl. (ECF No. 429-2) Ex. Y.)

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were at the right address." (Roberts Dep. at 142:23–143:3.) And as for names and signatures, Roberts testified as follows:

> **Q: Okay. Now, you also said "As some of the validation we had, that we had names and we had signatures," right?**
> A: Correct.
> **Q: So how did that validate anything?**
> A: We have somebody that signed. This is what I said.
> **Q: How would you know that, you know, the signatures weren't faked?**
> A: I would not know that they're faked or not faked.
> **Q: So that doesn't do anything to validate the data, does it?**
> A: At least somebody signed for something.
> **Q: Yeah. But you don't know that the right person signed, correct?**
> A: I do not know that the right person signed.
> **Q: Okay. So really what you had was this GPS data that you believed was being collected that somebody could check, correct?**
> A: Correct.

(*Id*. at 147:10–148:6; emphasis in original.) In other words, what assured Roberts that the survey responses were valid was his assumption that they were not faked: "At least somebody signed for something." The assumption was bolstered by the further assumption that CSRS was looking at the GPS data that he knew had been gathered but never asked to see.

Roberts' second reason for ignoring the failure to validate is that the responses confirmed his expectations. Specifically, Roberts looked at the amount respondents claimed to have spent on tools and saw that it was "what [he] expected to see." (Roberts Dep. at 295:9–10; *see also* Motion at 1:3–9 & 16:13–25.) That is, Roberts "saw the numbers coming in as [he] would expect the numbers to come in," (*id*. at 295:16–17); and "the data appeared as [he] would expect the data to appear" (*id*. at 300:5–6). But finding consistent relationships in data sets is not the same as validating the data. (Fink Decl. ¶ 27.)

In short, Roberts and Plaintiffs chose not to ask CSRS to do what CSRS had agreed to do in the way of validation because it hardly seemed worth it given the irrational assumption that the survey was valid and supported what he wanted to say.

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B. Roberts and Plaintiffs' Counsel Failed to Fulfill Their Responsibility to Conduct a Valid and "Tightly Controlled" Survey

Although the submission of a trial plan and expert report based on false data could have been avoided had Plaintiffs and Roberts looked at their data when the responses could not be validated, the trouble began well before that. Plaintiffs promised this Court a tightly controlled survey. But from the very start, Roberts made no effort to ensure that generally accepted best practices were followed—indeed, he provided no guidance, instruction, supervision, or monitoring at all. Plaintiffs and Roberts cannot now claim surprise at the result or blame others for their failure.

1. Roberts made no effort to conduct a tightly controlled survey

Roberts agrees and has testified in other matters that, to be acceptable in court, surveys must be conducted in accordance with generally accepted survey principles, including ensuring that they are conducted by qualified persons following proper interview procedures. (Roberts Dep. at 31:25–33:5; Fink Decl. ¶¶ 16–17.)

Roberts understood that conducting the tightly controlled direct-interview process he had promised would require using best practices to avoid or minimize data-collection falsification—practices that include using qualified people, providing proper interview procedures and training, and monitoring the data-collection process. (Roberts Dep. at 105:2–106:3; Fink Decl. ¶¶ 16–21.) These things are especially important given the known fact that "curbstoning," the term given to interviewers "sitting on the curb" and making up responses, is not uncommon. (Fink Decl. ¶ 9.)

The most telling evidence of Roberts' lack of involvement in the survey process are his time records, which confirm that he did nothing at all to supervise, direct, or provide quality control for the survey that he promised would be tightly controlled. The survey was conducted in November 2015. Here are Roberts' time entries for October through December 2015, when BMR was hired and the survey was conducted—all of them:

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10/1/2015 – Confer with counsel – 2.00 hours[13]

10/4/2015 – Prepare declaration – 1.00 hours[14]

11/5/2015 – Supplemental declaration – 1.00 hours

11/6/2015 – Supplemental declaration; questionnaire – 3.00 hours[15]

(SGB Decl. Ex. D.) That's it. Roberts spent *no time at all* supervising, directing, and controlling the survey.[16] Roberts' deposition testimony confirms this—and that he knew better.

a. The absence of input regarding hiring

A responsible researcher should implement rigorous procedures to select qualified interviewers. (Fink Decl. ¶ 16.) But Roberts provided no instructions or guidance to CSRS regarding the selection of the interviewers. (Roberts Dep. at 170:7–21.) Instead, he merely relied on CSRS to get it right and claims only to have expressed a preference that CSRS use somebody they had worked with before. (*Id*. at 109:4–113:8.) He did not even look at BMR's website. (*Id*. at 111:22–112:3.)

b. The failure to provide training or instruction

A responsible researcher also must devote adequate resources and time to training the interviewers; indeed, there is evidence that interviewer performance suffers with less than a day of training. (Fink Decl. ¶ 17.) But Roberts did not train the BMR interviewers (Roberts Dep. at 56:7 –9) even though he agreed that the manner in which a survey is implemented can have a significant bearing on the accuracy and validity of the results (*Id*. at 57:1–6). Roberts neither participated in training the interviewers nor provided instructions to CSRS on how it should be done or what it should include; he did not even ask about these things. (*Id*. at 118:21–120:6.)

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[13] This is the day Roberts received the CSRS bid. (Dep. Ex. 43.) The conference likely was about the CSRS bid – reflecting Plaintiffs' counsel's deep involvement with CSRS.

[14] The next day, October 5, 2015, Roberts filed the declaration in which he promised a tightly controlled direct interview process. (ECF No. 393-2.)

[15] On November 6, 2015, Roberts filed his declaration attempting to justify Plaintiffs' previous delay, advising the Court of his awareness of the low response rates obtained in other efforts, and misrepresenting the reasons for the previous delay in the fall of 2014. (ECF No. 403-3.)

[16] Roberts' time records do reflect that he spent 1.75 hours in January reviewing and conferring regarding the data, as well as an additional 2 hours of analysis in early February, followed by a total of 18.5 hours of work on his report and in conferences, the substantial bulk of it the day before and the day his report was due.

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As a result, CSRS did not provide any instructions to BMR. At the meeting, CSRS merely instructed BMR how to operate the iPads and walked them through the survey questions. (*See* Rodriguez Dep. at 105:20–106:8 & 108:24–109:11.) Roberts did not provide guidance or instruction for answering frequently asked questions or about how surveyors should introduce themselves or what they were doing. (*Id*. at 92:22–93:7.) Even though it was clear that surveyors would have to address questions and make introductory comments, nobody provided them a script for doing so. (*Id*. at 109:18–111:23.)

c. The failure to monitor

Because "'[s]loppy execution in the field, in particular, can seriously undermine results,'" it is crucial to supervise, monitor, and test the survey work in the field. (Fink Decl. ¶ 18.) But Roberts did not supervise the conduct of the survey. (Roberts Dep. at 84:14–85:2, 170:4–6.) He did not monitor any of the in-person interviews—even though he agreed that this is a best practice to ensure quality survey work. (*Id*. at 121:9–122:4 & 169:18–22.) Whereas in prior telephone surveys with CSRS he had "actually observed the operations in-house so that they had the monitoring in place," here he merely "assumed that they would have that same type of monitoring process." (*Id*. at 290:6–12.) He never even asked CSRS what they were doing in terms of quality control—again, he just assumed. (*Id*. at 304:7–14.) In short, Roberts did nothing to ensure that CSRS was monitoring or controlling the interview process. (*Id*. at 124:13–21.) And in fact, they were not: nobody was. (*See* Rodriguez Dep. at 145:21−146:12.)

2. Plaintiffs and Roberts are responsible for these failures

Plaintiffs and Roberts offer no good excuse for failing to conduct a survey in accordance with the most basic best practices. Instead, they try to shift the blame by saying they assumed that CSRS was doing all that. But they, not CSRS, were ultimately responsible for conducting what they promised to be a "tightly controlled" survey and for verifying their submissions to this Court.

Indeed, Roberts acknowledged that it was *his* responsibility to oversee and direct the data-collection process. (Roberts Dep. at 38:24–39:4.) As Plaintiffs' counsel advised the

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Court, the survey was executed "under the supervision and control" of his firm, Phillips, Fractor. (ECF No. 403-1 ¶ 17.) Plaintiffs' counsel later advised the Court that Roberts provided strict instructions for the conduct of the survey. (Plaintiffs' May 10 statement submitted in response to ECF No. 426.)

Roberts made most of the decisions in the conduct of the survey and was responsible for setting the parameters of the survey. (Roberts Dep. at 41:3–43:3.) It was his responsibility to use any information accessible and available to him to validate the results of the survey and ensure it was reliable. (*Id.* at 40:12-17; Fink Decl. ¶¶ 10–11.) Roberts agrees that "the buck stops here." (Roberts Dep. at 44:9–11.)

That said, it is equally clear that Plaintiffs' counsel were ultimately running the show. As discussed above, Roberts made the crucial decision to proceed without validating the data in consultation with Plaintiffs' counsel. (*Id.* at 136:11–141:17 & 260:23–262:21.) Roberts claims that it was Plaintiffs' counsel, not him, who hired CSRS. (*Id*. at 42:10–12 & 228:18–229:22.) And even a cursory review of the Declaration of Anna Walther submitted with Plaintiffs' motion proves that Plaintiffs' counsel were deeply involved. (ECF No. 429-1.) Ms. Walther testifies, for instance, that "Plaintiffs' Counsel authorized Dr. Roberts to move forward with CSRS;" that Plaintiffs' counsel approved of seeking validation of the survey results; and that Plaintiffs' counsel fully participated in the decision to proceed using non-validated data. (*Id.* ¶¶ 36–40.)

C. It Was Only Delano Farms' Persistent Discovery Efforts That Forced Plaintiffs to Finally Examine Their Own Data

Plaintiffs' motion suggests that they discovered their data was false and promptly disclosed it as soon as reasonably possible. (*See* Motion at 12–14.) But this is only half true. While Plaintiffs may have disclosed that the data underlying their expert's report and trial plan was fake as soon as they figured it out (by looking at it), they never cared enough to ask for or look at it until forced to.

Delano Farms, on the other hand, did ask for the information… and asked, and asked.

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Delano Farms' difficulty in obtaining discovery from Plaintiffs began the day it was due. For instance, Plaintiffs initially objected to discovery regarding CSRS on the premise that it infringed CSRS's "privacy rights." (*See* ECF No. 415 Ex. E, Response to Interrog. No. 6.) Plaintiffs further claimed not to have documents or information from CSRS because Roberts had contracted with CSRS, not Plaintiffs. (*Id*.) And it was not until March 7—two weeks after Dr. Roberts' report was due—that Plaintiffs disclosed that CSRS had not conducted the surveys but had contracted with BMR to conduct them instead. (*Id*. Ex. Q; *see also* Decl. of A. Walther ISO Opp. to Mot. Re Discovery Resp. (ECF No. 417-1) ¶ 2.)

These and other glaring deficiencies required Delano Farms to file a motion to compel. On March 22, the Court granted the motion, requiring Plaintiffs to produce documents from Roberts (Phillips, Fractor), CSRS, and BMR related to the survey no later than March 25. (ECF No. 421.) On March 25, Plaintiffs confirmed, in writing and under oath, that all such documents had been produced. But that was not the case, as revealed by Defendants' continuing efforts. For example:

- During the BMR depositions on March 30, it became clear that additional responsive documents had not been produced and that the search for documents had been inadequate. In response to Defendants' concerns, on April 26, Plaintiffs produced BMR documents not previously provided. (SGB Decl. ¶ 5.)

- Defendants also discovered that documents were missing from the Phillips, Fractor emails. In response, Plaintiffs produced an updated privilege log on April 20 and produced additional emails and Roberts' method for matching survey respondents to payroll records, on April 26. (SGB Decl. ¶ 6.) When pushed, Plaintiffs provided additional emails from Roberts' account on May 9, just before his May 11 deposition.[17]

- By working directly with CSRS's independent counsel (retained during the BMR depositions), Defendants received previously unproduced files and emails on April 7 and 11. Comparing CSRS's emails to those produced by other custodians, Defendants determined that CSRS's previous production was incomplete. As a result, CSRS produced additional documents, received by Defendants on April 20 and 25, just before the CSRS depositions on April 26 and 27. (SGB Decl. ¶ 4.)

[17] Plaintiffs' post-March 25 productions included emails and attachments not previously produced. (SGB Decl. ¶ 7.) As of March 25, approximately 172 ***pages*** of emails had been provided from the Phillips, Fractor custodians. (*Id.*) Between April 26 and May 9, Plaintiffs produced 290 ***emails*** alone comprising hundreds of pages. (*Id.*)

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Plaintiffs' astonishing claim is that, after Defendants conducted the deposition of one of Plaintiffs' experts, Plaintiffs finally understood and were able to analyze *their own data*. (Motion at 12:9–13.) And Plaintiffs did not even need to use one of their experts to perform the analysis: Anna Walther did it. (Walther Decl. (ECF No. 429-1) ¶¶71–82.) She did so by examining a spreadsheet that CSRS had prepared as of December 1, 2015—just a few days after the survey was completed. (*Id*. ¶¶74–81 & Ex. Y, Part 2.)

Plaintiffs do not explain why they could not have asked CSRS to provide or explain the data in December 2015, so that they could have performed the same quality-control work then that they eventually did in May 2016. CSRS was hired by Roberts and paid by Plaintiffs. There is no question that CSRS would have provided the data collected had Plaintiffs requested it. And if Plaintiffs had questions about understanding the data, they could have asked: CSRS was working for them.

The problem is that Plaintiffs and Roberts never bothered to ask for the information: Defendants did, at a cost of hundreds of thousands in attorneys' fees and expert-witness expenses. It was only as the result of Defendants' persistence that Plaintiffs finally took note of the information that had been available to them all along – information they had every reason to ask for and review before submitting their trial plan and expert report. Had Plaintiffs done this, none of Delano Farms' discovery efforts and costs would have been necessary.

Once Plaintiffs and Roberts became concerned enough to look at their data, the fraud became immediately apparent. Plaintiffs' counsel advised Roberts that there were problems with the data on May 5, 2016. (ECF No. 429-1 ¶84.) Roberts gave his deposition on May 11, 2016. When asked whether he was going to withdraw his opinions, Roberts said that he would not want to "rely on simply what I'm told by somebody is taking place, but to actually see the data and see the evidence" in order to " make sure that the interpretation is right." (Roberts Dep. at 82:1–24.)

This makes good sense. Unfortunately, Roberts did not feel that it was important enough to make sure the interpretation is right—using the same data—*before* submitting the

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report in the first place, even though he knew that CSRS had been unable to validate it.

III. ARGUMENT

Section A of this argument shows that Plaintiffs have failed to make the showing of good cause that is required to support a modification of the scheduling order. Good cause is the correct standard and, as set forth in Section B, Plaintiffs' argument for a more favorable standard fails. And there is a further problem: Plaintiffs argue that they have been defrauded, but we establish in Section C that the Roberts opinion would have been excluded in any event because Roberts' use of unvalidated data would have prevented its admission under ER 703 and *Daubert*. The procedures Roberts followed were so bad that the fraud was immaterial. Finally, Section D provides the authorities demonstrating that if the Court, over Defendants' objection, gives Plaintiffs yet another chance, the Court should order Plaintiffs to pay the substantial costs the Defendants have incurred in uncovering Roberts' and Plaintiffs' failures.

A. Plaintiffs Have Not Shown Good Cause to Modify the Scheduling Order

"A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b). Plaintiffs must show "good cause" before the Court may modify the scheduling order. They have not done so. Rather, Plaintiffs have failed to exercise diligence and have made no showing that the modification they seek would allow them to present a viable trial plan.

1. Plaintiffs have not demonstrated diligence as required by Rule 16(b)

Plaintiffs cannot show good cause. As they correctly recognize,[18] good cause focuses on the reasonable diligence of the moving party. *Zone Sports Ctr., LLC v. Rodriguez*, 2016 WL 224093, at *4 (E.D. Cal. Jan. 19, 2016) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)). "A party demonstrates good cause by establishing that, even with the exercise of due diligence, he or she was unable to meet the scheduling deadlines." *Id.* "If the party seeking the modification 'was not diligent, the inquiry should end' and the motion

[18] Plaintiffs start their argument by stating the correct standard, but then take a wrong turn when they argue for an "excusable neglect" standard. (ECF No. 429, at 18:2.) We address this below at p. 23.

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to modify should not be granted." *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d at 1080, 1087 (9th Cir. 2002) (quoting *Johnson*, 975 F.2d at 609). Plaintiffs plainly were not diligent, as we explain below; the inquiry should end there. And while Defendants need show nothing more than a failure of diligence, we note that Plaintiffs and Roberts actually behaved recklessly (and at least carelessly) by, *inter alia*, using their survey data when validation failed without doing anything at all to determine what the problem was. Carelessness is *not* compatible with a finding of diligence. (Motion at 18:6–9.)

Attempting to deflect responsibility, Plaintiffs claim they are the victims of their own agents, and assert they were diligent because they "relied in good faith on CSRS to perform its duties as gatekeeper for the quality of the survey data." (ECF No. 429, at 18.) They base this narrative of victimhood on three key propositions, each of which is demonstrably false.

First, they say, it was reasonable for Plaintiffs and Roberts to rely on CSRS to act as the gatekeeper for the validity of the survey data. There's nothing inherently unreasonable in retaining an agent. But the principal remains responsible for supervising the agent. The lawyer may not shift blame to his errant associate for the associate's failure (and it is absurd to call the associate a "third party"). Plaintiffs' problem is that Plaintiffs' counsel and Roberts undeniably failed to adequately supervise their agents. Roberts admits as much. This failure of supervision was reckless (and at least careless) and thus is not good cause for a do-over.

Second, they say, Plaintiffs and Roberts made a reasonable decision to go with the "validation" they assumed they had after their actual validation effort had failed. Plaintiffs and Roberts assumed someone else was ensuring that the surveys actually were being conducted at the right addresses. But there is nothing in the contemporaneous record to support this self-serving claim, and Roberts admittedly did nothing to check this himself and did not ask to see the GPS and other data he knew existed. Roberts says that he thought names of respondents could be matched to signatures, but of course signatures can easily be (and were) faked. And Roberts says that he thought the data was valid because it was consistent with what he expected to see. This fallacy only proves Roberts' eagerness to have the survey show what he wanted it

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to show, and his failure to utilize best practices and responsible research methods.

Third, Plaintiffs claim that they could not possibly have discovered the fraud until Defendants questioned one of Plaintiffs' experts in a deposition, revealing to Plaintiffs what their own data showed and allowing Plaintiffs' counsel to do validation and quality control. This is highly troubling. Indeed, at any time Plaintiffs could—and obviously should—have asked their own agents the questions that Defendants finally had an opportunity to ask: what data do you have, and what does it show? Months ago, *before* submitting their trial plan, Plaintiffs could—and obviously should—have asked their own experts whatever questions were necessary to perform quality control so basic that a lawyer could do it. That they failed to do so is inexcusable. In truth, Plaintiffs are seeking to deflect attention from their *own* egregious failures.[19]

"Rule 16(b)(4)'s 'good cause' standard is a rigorous one, focusing not on the good faith of… any party, but rather on the parties' diligence in complying with the court's scheduling order." *Blitz Telecom Consulting, LLC v. Peerless Network, Inc*., 2016 WL 688209, at *4 (M.D. Fla. Feb. 19, 2016). Thus, the determinative question here is whether the scheduling order reasonably could have been met had Plaintiffs and their expert done what they had promised and were required to do. The answer to that question is "Yes," without even considering the actions of Plaintiffs' hired agents.

Had Plaintiffs been diligent, they would have controlled and monitored administration of the survey, as promised, and would have reviewed the collected data that was available in early December 2015, nearly six months ago. Diligent direction, oversight, supervision, and control (all of which Plaintiffs promised the Court) of this direct-interview process would have included:

- Properly planning and budgeting for the survey work;

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[19] For this reason, Plaintiffs' discussion of agency law is misplaced: the Court need only consider whether *Plaintiffs* were diligent. In any case, Plaintiffs' counsel and Roberts, having chosen to hire CSRS and BMR, "cannot now avoid the consequences of the acts or omissions of th[ese] freely selected agent[s]." *Ottovich v. City of Fremont*, 2013 WL 3245162, at *1 (N.D. Cal. June 26, 2013).

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- Hiring and vetting an appropriate firm to conduct the survey;
- Ensuring that interviewers were properly trained;
- Ensuring that interviewers were monitored;
- Spending some reasonable amount of time (instead of none) overseeing the survey process;
- Using available data to check for discrepancies, including
  - Noticing that the survey purportedly was accomplished much faster than anticipated;
  - Noticing that the surveys were completed primarily in English, not Spanish; and
  - Noticing that the response rate was *much* higher than anticipated;
- Validating the survey results; and
- When validation failed,
  - Demanding that additional validation work take place or additional interviews be conducted (pursuant to the CSRS contract), and/or,
  - Requesting additional data that was available and seeking a timely explanation of the presentation of the data so as to perform simple checks on the data that would have revealed falsified interviews.

Plaintiffs did none of these things. Their failure to even attempt to verify the data until *after* the February 22, 2016 deadline demonstrates an utter lack of the diligence Rule 16(b)(4) requires.

Under similar circumstances, courts have easily found "good cause" to be lacking. For instance, in *McDonough v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, 2013 WL 322595, at * 2 (D.N.J. Jan. 22, 2013), the district court upheld the magistrate judge's determination that the plaintiff had not shown "good cause" where the "Plaintiff had in her possession all of the relevant data for months before she sought to produce the [expert report], [and] did not complain about the adequacy of the data by the [deadline] to raise such concerns."

In *Taylor v. Dean*, 2007 WL 7622152, at *4 (M.D. Fla. Jan. 19, 2007), the plaintiff's

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expert was ill-prepared for his deposition and provided weak testimony, so the plaintiff attempted to submit a new expert report after the deadline. The court found that "where, as here, a party attempts to substitute testimony 'as makeup for initially inadequate or incomplete preparation,' it does not constitute 'good cause' under Rule 16 for violating the deadlines in the Court scheduling order." *Id.*; *cf. Rojas v. Marko Zaninovich, Inc.*, 2011 WL 6671737, at *7, *2 & *4 (E.D. Cal. Dec. 21, 2011) (noting disruption to case schedule is "not harmless" and upholding decision to strike expert report as sanction where expert "failed to conduct a holistic verification of his results" and "did not use all of the data that was provided").

Because Plaintiffs and Dr. Roberts caused and knew or should have known about the problems underlying their request for further delay, the request is without good cause.

2. There is no "good cause" for further delay where Plaintiffs make no showing that their intractable problems can be solved

Plaintiffs also have failed to demonstrate that the additional time they seek would allow them to conduct a valid and useful survey. To the contrary, all of the experience on both sides to date has shown that this is not possible. This is true for numerous reasons, but to highlight a few of the most significant:

First, the population to be surveyed is not reachable. As Plaintiffs' own knee-jerk explanation for the failure to validate says, class members are reluctant to get involved or noticed; they would prefer to be left alone. This may account for the unacceptably low response rates experienced by Delano Farms in conducting its pilot study and by Plaintiffs in attempting their mail survey. Moreover, given this general reluctance, it is likely that those who do choose to respond will be motivated to do so—ideologically, financially, or both.

Second, the subject matter of the survey—the minute details and nuances of everyday events that took place up to 10 years ago—makes any results obtained highly unreliable. CSRS concluded that questions in the survey (of which there were many) asking people to "think back to specific time periods" would not be suitable for a validation study because of the high likelihood of "respondents getting dates confused and not answering accurately" and Roberts

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agreed. (Dep. Ex. 100; Roberts Dep. at 129:17–130:24.) This concern arose despite the fact that the validation calls were to be conducted within a very short time—even days—after respondents had answered the survey. In other words, the survey questions are such that any given respondent is bound to give a different answer on any given day. This is not reliable information.

Finally, response-rate and memory problems aside, Plaintiffs are trying to survey a sample of the class to establish a uniformity of practice and experience that does not exist. The premise of a class action is that all the class members were subject to the same company-wide policies or practices. Plaintiffs are trying to build such policies or practices from the ground up, by surveying individuals about their experiences. But because there was no company-wide policy or practice, the individual experiences are all over the map, and the survey designed to prove their existence is bound to fail.

The class-member declarations in the record illustrate this problem, and Delano Farms' pilot study yielded more of the same testimony. To begin with, the practices of the 300 foremen who supervised crews working for Bangi at Delano Farms varied widely. At one end of the spectrum, there were workers who testified that their foremen either expected or allowed them to start working before the start of their shift, in varying amounts and with varying frequency. (*E.g.*, Loaeza Dep. at 17:11–20:10, 21:2–14, 22:14–23:14, 27:2–29:22; Leocadia Estrada Dep. at 28:12–30:15, 31:3–32:6, 32:20–34:11, 35:19–38:5, 38:15–39:2, 43:25–45:2.)

At the other end of the spectrum are class members like Vilma Cabanilla, who testified that she always waited with her co-workers until the shift started to begin working and that her foremen forbade workers from engaging in pre-shift work and would send home people they caught sneaking into the fields before the shift. (*See* Cabanilla Dep. at 27:21–30:2, 30:23–31:22, 33:23–34:12, 36:5–37:8, 37:21–39:4.) As Jose Medina Meza aptly put it, there were "many foremen[,] and each foremen has his way" of supervising the crew. (*See* Meza Dep. at 34:19–20; *see also* Leocadia Estrada Dep. at 38:22–39:2 (Leocadia Estrada, testifying that there was "a very big difference" between the respective practice of her foremen, Dolores Mendez

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and Henry Galinato).)

These examples are only the tip of a large iceberg of variability revealed by Defendants' pilot study. There was also tremendous variation with respect to the practices of individual crew members working for the same foreman doing the same work whose testimony showed varied experiences with respect to, among other things, how long before the scheduled start time they would arrive at the job site (if at all), why, and what they did between the time they arrived and the scheduled start time. Similar variation is evident in the testimony about foreman practices in providing tools. Because every indication in the already long history of this case is that it is impossible to undertake a valid "trial by formula" here, particularly given the subject matter and circumstances, there is no "good cause" to delay the action further to allow Plaintiffs to attempt the impossible once again.

B. Plaintiffs' Attempt to Invoke a More Favorable Standard Is Unavailing

It is telling that Plaintiffs argue for a standard that does not focus the inquiry on their lack of diligence. But the arguments lack merit.

1. Excusable neglect is not the standard

As Plaintiffs acknowledge, good cause focuses on the reasonable diligence of the moving party. *See supra*, p. 17. Plaintiffs start their argument by stating the correct standard, but take a wrong turn when they argue for an "excusable neglect" standard. (ECF No. 429, at 18:2.) This is incorrect. "Good cause" is the standard under Rule 16(b)—not "excusable neglect." *See Sacramento E.D.M., Inc. v. Hynes Aviation Indus., Inc*., 2014 WL 4961104, at *3 n.7 (E.D. Cal. Oct. 2, 2014) (citing cases distinguishing between "good cause" and "excusable neglect"); *MacDonald v. Metro. Transit Sys*., 2013 WL 1828588, at *4 (S.D. Cal. Apr. 30, 2013) ("Plaintiff is incorrect in asserting that a request to modify a schedule is governed by the excusable neglect standard."); *Palmer v. Arizona*, 2011 WL 3290602, at *2 (D. Ariz. Aug. 1, 2011).

The cases Plaintiffs cite each apply Rule 60, not Rule 16. *Engleson v. Burlington N. R. Co*., 972 F.2d 1038, 1043 (9th Cir. 1992); *Tankersley v. Lynch*, 2011 WL 2550630, at *2 (N.D.

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Cal. June 27, 2011). And while *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992) (which does address Rule 16), cites *Engleson*, it is for the proposition that "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." Plaintiffs' ill-founded argument that an "excusable neglect" standard should apply only shows that they know they cannot meet the "good cause" standard.

2. Even if framed as "reconsideration" of an interlocutory order, good cause remains the standard

Alternatively, Plaintiffs characterize the Court's scheduling order as "interlocutory" and ask the Court to "reconsider" it as working "a manifest injustice." (ECF No. 429 at 21.) While the Court may have the authority to reconsider a prior order, that does not change the standard required to amend the case schedule. The one case Plaintiffs cite dealing with a scheduling order, *Strasburg v. M/Y*, 2010 WL 3420794 (S.D. Cal. Aug. 30, 2010), does not help them. There, the court used its inherent authority to "reconsider" an order denying the defendant's motion for leave to amend its answer under Rule 16(b)(4). *Id*. at *3. In doing so, the court applied the same "good cause" standard to uphold its previous decision. *Id*. (finding that the defendant "has not sufficiently shown good cause for permitting leave to amend under [Fed. R. Civ. P. 16(b)]"); *accord*, *Villescas v. Dotson*, 2015 WL 4507266, at *7 (E.D. Cal. July 23, 2015).

The other cases Plaintiffs cite are inapposite. *Hydranautics v. FilmTec Corp*., 306 F. Supp. 2d 958. 968 (S.D. Cal. 2003), and *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc*., 5 F.3d 1255 (9th Cir. 1993), involved reconsideration of summary judgment decisions. And *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996), involved the "delicate problem of two district judges exercising their 'broad discretion' over evidentiary rulings in different phases of the same case and reaching contradictory results"—a problem not present here.

Finally, while Rule 16 does contain a "manifest injustice" standard, it applies only to a motion to modify an order issued upon a final pretrial conference under Rule 16(e), not a scheduling order issued under Rule 16(b). *See Veasley ex rel. Veasley v. United States*, 2015

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WL 1013699, at *4 n.5 (S.D. Cal. Mar. 9, 2015) ("If a pretrial order had been released [under Fed. R. Civ. P. 16(e)], a different standard—'manifest injustice'—would apply."). In any event, "manifest injustice" is a higher standard than "good cause." *Id*.; *see also* 6A FED. PRAC. & PROC. CIV. § 1522.2 (3d ed.).

C. The Roberts Opinion Would Have Been Excluded in Any Event

The facts above, including Roberts' own testimony, confirm the survey was in no way "tightly controlled," as Plaintiffs promised it would be. In fact, the complete lack of supervision and verification of the data means that Roberts' report would not have met the evidentiary requirements for admission, *without regard to the fraud*.

Roberts understands that survey research has to be reliable and validated in order to be admissible in court. (Roberts Dep. at 23:2–5.) "[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002); *see also Degelman Indus. Ltd. v. Pro-Tech Welding & Fabrication, Inc.*, No. 06-6346, 2011 WL 6754051, at *2 (W.D.N.Y. May 27, 2011) ("When an expert witness relies upon invalid assumptions or demonstrates a lack of inquiry into the relevant facts, the expert witness' testimony will be precluded.").

For example, in *Rojas v. Marko Zaninovich, Inc*., 2011 WL 6671737, at *1 (E.D. Cal. Dec. 21, 2011), a case with similar facts, former employees asserted wage-and-hour claims against commercial grape growers. The plaintiffs submitted an expert report, but based on subsequent depositions, it became apparent that the report relied on inaccurate data. After the deposition, the plaintiffs filed a declaration to supplement the report in attempt to fix the error. The defendants moved to strike both the report and declaration because, *inter alia*, the expert's conclusions were "methodologically unsound." *Id*. at *2. In upholding the magistrate's decision to strike the declaration and report, the court found there were "serious methodological flaws," including the expert's "apparent willingness to offer conclusions about ultimate issues, i.e. lack of meal and rest breaks, without adequate foundation and given that he failed to

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conduct a holistic verification of his results." *Id*. at *2, *5.

Here, for the same reasons, Roberts' report would not have met reliability requirements even absent the fraud because his methodology—including his failure to supervise administration of the survey or verify the results—was so severely flawed. Plaintiffs, therefore, should not be rewarded with another survey at further cost and delay to Defendants.

D. Defendants Should Not Bear the Burden and Cost of Plaintiffs' Failures

If the Court grants Plaintiffs' motion—and Defendants submit there is no good cause to do so—Defendants request that the Court do so only on the condition that Plaintiffs reimburse Defendants for the reasonable fees and costs related to their wasted discovery efforts. Plaintiffs either knew or should have known of the flaws in the survey data almost six months ago. Since then, Defendants have been forced to expend substantial time and resources to "uncover" it, now to be told that the opinion is withdrawn and Plaintiffs want to start over.

Requiring Plaintiffs reimburse Defendants for the fees and costs that resulted from Plaintiffs' failures is in accord with Rule 16(f), whose sanctions "may be imposed for a party's unexcused failure to comply with a Rule 16 order, even if that failure was not made in bad faith." *Fresno Rock Taco, LLC v. Nat'l Sur. Corp*., 2014 WL 4374228, at *8 (E.D. Cal. Sept. 3, 2014). Faced with similar facts, other courts have found reimbursement appropriate. For example, in *Choina v. E.I. Du Pont De Nemours & Co*., 1996 WL 200279, at *1 (E.D. La. Apr. 25, 1996), the plaintiff sought to add a new survey expert because the original expert had "falsified his report data." The court granted the request, but only on the condition that the plaintiff "reimburse defendant for all reasonable costs incurred by the defendant as a result of the addition of plaintiffs' new expert witness." *Id*. When the plaintiff later opposed the defendant's motion to assess costs related to the new survey expert, the court found that the defendant was "entitled to the costs" under Rule 16(f). *Id*. at *2.

Defendants urge the Court to deny Plaintiffs' motion. If the Court disagrees, Defendants respectfully submit that it would be unfair to grant the motion without imposing on the Plaintiffs the very substantial costs occasioned by Plaintiffs' recklessness. Any grant of

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Plaintiffs' motion should be conditioned on an award to the Defendants of the attorneys' fees and costs (including, but not limited to, expert witness fees) that Defendants in a separate hearing establish they reasonably incurred in conducting the extensive discovery and analysis that eventually caused Plaintiffs to do quality-control work that they should have done before making their expert disclosure and submitting their proposed trial plan.

IV. CONCLUSION

Plaintiffs claim that their train wreck of a survey is good cause for another try. But Plaintiffs were driving the train. It is Plaintiffs who ignored the flashing lights and warning signs, and Plaintiffs who drove the train over the limits around the bend, all with predictable results. Reckless drivers cannot claim to be innocent victims, and certainly they should not be given another turn at the wheel.

The last time Plaintiffs sought delay, so that they could perform the survey that they have just withdrawn as unreliable, Delano Farms cautioned that:

> Plaintiffs and their expert now propose to do what Delano Farms did: talk to class members in person. But while Delano Farms exhausted all efforts to talk with randomly selected individuals through a court-appointed neutral—with full transparency and the participation of the parties—Plaintiffs apparently intend to survey whomever is most readily accessible to them. And while Delano Farms questioned class members on the record with opposing counsel present, Plaintiffs propose to question them behind closed doors and off the record. Allowing Plaintiffs to try to collect what is likely to be unreliable and inadmissible evidence, privately procured, does not merit the delay they seek.

(Delano Farms' Opp. to Mot. Mod. Sch. Or. (ECF No. 398), at 5:9–17.) We have now seen what comes of the sort of private gathering of "testimony" that Plaintiffs insisted on.

Plaintiffs' latest failure proves what Defendants have been saying all along: due to the nature of the claims, the absence of a uniform practice, and the wide variation among the experiences of the class members, this class simply is not amenable to survey and sampling. It is not even possible to obtain adequate response rates. That is the teaching of Defendants' pilot study, of Plaintiffs' first failed survey (which produced a 3% response rate), and of the present debacle. Defendants respectfully submit that Plaintiffs' latest efforts have shown once again

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that this case cannot be tried as a class action. Repeating the same mistake over and over again and expecting different results is madness, not justice. Enough is enough. It would be unjust and unfair to give Plaintiffs yet another chance.

RESPECTFULLY SUBMITTED: June 10, 2016.

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