Adrian & Pankratz, P.A.
Attorneys at Law
301 N. Main, Suite 400
Newton, KS 67114
Phone: (316) 283-8746
Fax: (316) 283-8787

STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	)	
Phase II Aquifer Storage and Recovery Project	)	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	)	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

MOTION FOR RECONSIDERATION AND FOR LEAVE TO HAVE ADDITIONAL MOTIONS CONSIDERED OUT OF TIME

COMES NOW the Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Motion for Reconsideration and for Leave to Have Additional Motions Considered Out of Time (hereinafter "Motion for Reconsideration"). In support of said Motion for Reconsideration, Movant states as follows:

I. Facts

a. Brief Background and Revised Motion for Summary Judgment Already Requesting Relief to File Motion Out of Time

1. On March 12, 2018, the City of Wichita (hereinafter "City") submitted to the Chief Engineer of the Division of Water Resources (hereinafter "DWR") a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" (hereinafter "the Proposal"). This administrative hearing of course addresses the content and interpretation of that Proposal.

2. Through this administrative hearing, the parties have been charged with operating under different specific deadlines and general rules of fairness.
3. The City was originally required to furnish its expert reports by February 15, 2019 and its answers to the District's second set of propounded discovery by December 16, 2018,[1] with close of General Discovery on January 7, 2019.
4. This original schedule afforded the District an opportunity to review this information before determining whether it wished to take depositions of the City's experts or file motions.
5. On March 11, 2019, the District filed both its Motion in Limine to Exclude Expert Testimony of the City *and* its Motion to Compel the City.
6. The Hearing Officer's July 24, 2019 Order granted the District's motions, in part, but allowed the City the ability to furnish supplemental discovery by 12:00 p.m. August 2, 2019 and to furnish supplemental expert reports by 12:00 p.m. August 23, 2019.
7. The District has now obviously received those further disclosures as ordered by the Hearing Officer and, on September 25, 2019, filed a Revised Motion for Summary Judgment (referred to herein as "Motion"). On October 9, 2019, the Hearing Officer ruled on that Motion.
8. As pointed out in the District's Revised Motion for Summary Judgment, the City's additional disclosures are germane to further motion(s). For instance, the supplemental discovery received by the District provided the crucial undisputed facts the District had been seeking originally for its Motion for Summary Judgment. The District should not

[1]It merits reminding the Hearing Officer that the District propounded a set of discovery requests much earlier than this date. However, the City found reason to parse the words used by the District and not provide straightforward answers at that time also. Thus, the District's first attempt to develop uncontroverted facts occurred much sooner in the timeline.

be prejudiced because the City skirted fully answering the District's discovery by the original deadline. The District should be allowed to use these supplemental answers in its Revised Motion for Summary Judgment and have that Motion heard. To rule otherwise would reward the City for furnishing evasive[2] answers in the first place.

9. As also requested in the District' Revised Motion for Summary Judgment, the District should be allowed to have that Motion heard out of time for the reasons identified above.
10. However, despite those reasons identified in the Revised Motion for Summary Judgment, the Hearing Officer has essentially ruled that the Motion was untimely and might result in prejudice to the other parties by delaying the hearing. The Hearing Officer also indicated that "this matter is of significant public concern." The Order also identifies that the District should have identified "extreme circumstances" to postpone the hearing.
11. The District identified how it was prejudiced in its Revised Motion for Summary Judgment. Further, the District filed the Motion almost three months before the scheduled hearing with the belief that the Motion could be resolved well in advance of the hearing. Indeed, the District sincerely believed that the Motion could dispose of many issues and reduce the time required for preparing for the hearing—thus saving everyone time and money.
12. Further, as will be articulated below, the Motion will not prejudice the other parties and will not delay the hearing. Further, the District, and the public that the District serves, will be significantly prejudiced if this Motion of great public import is not properly heard. Simply put, the illegalities inherent in the City's Proposal should be resolved prior to the travesty of having a full-blown hearing. Because the Motion advances black letter

[2]The District is mindful of the Hearing Officer's prior caution against using terms that attack another party and this word is not intended for that purpose. However, the City's answers were incomplete at best and a careful reading of the word-parsing by the City illuminates the proper use of this term.

law that should govern the City's Proposal, not resolving these issues before the hearing would give reason for public concern. Further, resolving the Motion now could save all parties significant time and resources.

b. There Is Little or No Prejudice to the Other Parties if These Motions are Heard

13. The District fully believes that the Revised Motion for Summary Judgment can be resolved well in advance of the scheduled hearing dates. If the other parties are afforded 21 days to respond, they can file responses by the end of October. Additional responses of the parties could be completed by mid-November. The parties could then have oral arguments on the Motion sometime in mid to late November. The District would entertain waiving oral argument on this Motion to accommodate the hearing schedule (certainly over not having the Motion heard at all). The District even wouldn't be opposed to the Motion being heard and argued—for the benefit of the public—at the start of the hearing. Regardless of how it is sliced, the Motion will not delay the hearing schedule and the District has no intention of delaying the scheduled hearing.

14. With the above in mind, the *only* prejudice the Motion might cause the other parties is the need to respond to it. However, this should cause little or no prejudice. Both the City and DWR have indicated that they have researched this matter before from a legal standpoint. If so, such legal memorandums should easily be converted into proper responses to the Motion, finally potentially explaining how the Proposal fits into the ambit of current law. Such responses would be beneficial to the public by reducing the academic discord inherent in the competing legal theories regarding the City's proposal.

15. It is also acknowledged that resolution of the Motion may prejudice the City by having the matter resolved in favor of the District.

c. Additional Facts Clarifying the District's Intent

16. To clarify some points in the Hearing Officer's Order, when the District filed its Motion for a Continuance, the District had not yet had a chance to review the hundreds of pages of additional discovery the City sent on August 2, 2019. In fact, the District was having trouble initially accessing the information in the City's digital dropbox.

17. At any rate, the supplemental discovery answers were produced after 5:00 p.m. on August 1, and the supplemental discovery documents, except those subject to the City's Motion to Modify Order on Prehearing Motions, were produced on Friday, August 2. The District labored to file its Motion for a Continuance by noon on the following Tuesday (August 6)—in an effort to meet a quick timeline.

18. Simply put, the District had not yet looked at the supplemental discovery over the weekend nor had the District seen the supplemental expert reports when the August 6 telephone conference occurred. Thus, the District had not yet formulated a plan with regard to that information.

19. The District wished to analyze the supplemental discovery and expert reports internally, and with its own experts, to determine if the discovery and expert reports could be used to support the Motion for Summary Judgment or other motions.

20. This took some time as there were hundreds and hundreds of pages of documents to sift through. The City's supplemental discovery included over 300 pages of information and countless emails. The City's amended expert reports totaled over 800 pages.

21. The District had to wait on its own experts to provide input and allow its legal team the opportunity to review this information.

22. Frankly, filing the Motion within approximately a month of receiving the supplemental reports, is lighting speed in the District's opinion.

23. Thus, for clarification, the District did not know its strategy by August 6, 2019, or even by the end of August with respect to motions.

24. While true that the District was formulating its option to file a Revised Motion for Summary Judgment by the time of the brief phone conference on September 18, 2019, the District understood this phone call as only a logistical conference to set the details of the hearing. Indeed, even the Hearing Officer's October 9, 2019 Order recognizes this distinction.

25. In sum, the District moved as quickly as it could and had no ill intent behind the timing of its Motion.

d. There is Extreme Prejudice to the District if These Motions Are Not Heard

26. In addition to the previously articulated points, failing to hear the Motion would cause extreme prejudice to the District.

27. As identified above, per the original scheduling timelines, the District should have had the City's expert reports approximately one month before filing its motions.

28. The District should have had the City's proper discovery responses at least two months before filing its motions.

29. The District should have had ample time to consider the information and conduct depositions, if desired, before filing motions.

30. The District should have had months to analyze its complete motion strategy after receiving information from the City.

31. The District was robbed of these opportunities.

32. Instead, the District was forced to cram a reading of hundreds and hundreds of pages of additional discovery and hundreds and hundreds of pages of supplemental expert reports into a little over a month, before a decision was made to file additional motions.
33. The District noted in its August 6, 2019, Response to City's Motion to Modify Order on Prehearing Motions and District's Motion for Continuance of Hearing, that the District was requesting a continuance of the hearing to allow the District time to "...properly consider the additional expert reports in preparing for the hearing...."
34. Certainly, the District's option of filing motions after reviewing the City's supplemental discovery and expert reports is well within the scope of "preparing for the hearing."
35. Indeed, the District recognized in its August 6, 2019, Response to City's Motion to Modify Order on Prehearing Motions and District's Motion for Continuance of Hearing, that had the City properly submitted expert reports and properly answered the discovery, it would have guided the District's motions, and that absent of new motion deadlines, there is no cure for the procedural disadvantage forced on the District. This motion thus invited such a "curative remedy"—the ability to file new or amended motions. Thus, there is no element of "unfair surprise" in the District's strategy.
36. The City's September 25, 2019 email, although not in the form of a motion, argued that the information provided to the District in the supplemental discovery is not new and has been "ascertainable" from the Proposal.
37. However, the Hearing Officer ordered the City to properly answer two fundamental discovery questions from the District's Second Set of Requests for Admissions that the City had objected to answering previously and had not properly answered. Clearly this is

new information relevant to the District's Motion because it created responses that could not be controverted.[3]

38. Further, the District's experts could have considered this supplemental information in writing their reports.

39. The District would be well within its rights to conduct additional depositions after receiving the supplemental expert reports. In an effort to promote the Hearing Officer's timeline, the District opted to instead file the Motion. Scheduling and taking depositions would have delayed the hearing timeline much further. However, at this juncture, the District respectfully requests the ability to take depositions if, for some reason, additional motions are not allowed.

40. Not resolving these Motions will result in potentially extra time and money involved in preparing for the hearing.

e. Additional Extreme Circumstances

41. If the delayed disclosure of hundreds and hundreds of pages of additional discovery and hundreds and hundreds of pages of new expert reports—divulged months after the original deadlines—is not reason alone to afford the opportunity District to file revised dispositive Motions, other "extreme circumstances" exist.

42. The Motion advances arguments addressing the legality of the City's Proposal. These arguments are of great public importance and should be heard.

43. The District further incorporates all its factual arguments regarding how it has been prejudiced, identified above, as "extreme circumstances."

---

[3]The original Motion for Summary Judgment was denied due to the existence of controverted facts. At that time, the District did the best it could to explain the Proposal in a fashion that could not be controverted, yet the City still controverted the District's summary of the Proposal outlined in the original motion. By using the City's supplemental responses to the District's Second Set of Requests for Admissions almost verbatim, the Motion does not lend itself to realistic controverting.

44. Finally, the District notes that it is the District's understanding that "extreme circumstances" only needed to be shown if the hearing is delayed. Again, the District has no intent of delaying the hearing and, if anything, narrow the scope of what is argued at the hearing.

f. Additional Facts Germane to the Motion in Limine

45. In the same vein, the City has not corrected the issues identified by the District in the City's original expert disclosures as the City's experts only provide cursory observations and conclusions. Again, the District should not be prejudiced by the fact that the City has declined to remediate the concerns identified by the District and in the Hearing Officer's Order.

46. This is outlined in the contemporaneously filed Renewed Motion in Limine, and all those arguments are incorporated into this Motion for Reconsideration.

47. The District asks for the ability to file the Renewed Motion in Limine and also file rebuttal expert reports.

II. Argument and Authorities

Case law and other legal authority overwhelmingly supports the District's ability to have these motions heard "out of time."[4] A trial court, and by extension a Hearing Officer, has immense discretion to determine whether a motion or pleading can be filed out of time. *See, e.g., Boyce v. Boyce*, 206 Kan. 53, 56, 476 P.2d 625 (1970); *Columbia Sav. Ass'n, F.A. v. McPheeters*, 21 Kan. App. 2d 919, 925, 911 P.2d 187 (1996); *Mitchell v. Miller*, 27 Kan. App. 2d 666, 670, 8 P.3d 26 (2000) (allowing an appeal to be filed out of time where the party acted in good faith).

[4]It is the District's contention that these motions are not "out of time." The delay in the City providing its supplemental discovery and its supplemental expert reports should afford the District a corresponding amount of additional time to file motions or conduct depositions.

In determining whether to grant such a motion, the Court should consider factors such as the prejudice to the parties involved and whether excusable neglect occurred. *See id.*; K.S.A. 60-206(b). As articulated in *Boyce*, if a party requests to file out-of-time, such a motion "should be supported by evidence of his good faith, he should establish a reasonable excuse for his failure and he should show that the interests of justice can be served by granting the enlargement." 206 Kan. at 56 (allowing a Bank to file an answer to a garnishment out of time); *see also State v. Sheppard*, 56 Kan. App. 2d 1193, 1198, 444 P.3d 1006 (2019). Granting such a motion is designed to avoid a "miscarriage of justice." *Boyce*, 206 Kan. at 56. Further, a court has broad discretion to amend a pretrial order to avoid "manifest injustice." *Butler v. HCA Health Servs. of Kan, Inc.*, 27 Kan. App. 2d 403, 417-18 (1999)

Putting the above rules together, in *St. Clair v. City of Iola*, Case No. 92-4024-SAC, 1994 U.S. Dist. LEXIS 4625, at *3-5 (D. Kan. Mar. 2, 1994) (applying Kansas law), a case with facts almost identical to the one at hand, the Court allowed the filing of a Motion for Summary Judgment long after the time for dispositive motions had passed in the scheduling order. In that case, one of the parties had uncovered additional information and newly decided legal authority for its position. *Id.* Consequently, that party wished to file a revised motion for summary judgment. *Id.* The Court observed that, "There is a presumption that a pretrial order will be amended in the interest of justice and sound judicial administration provided there is no substantial injury or prejudice to the opposing party or inconvenience to the court." *Id.* at *4 (*Smith v. Ford Motor Co.*, 626 F.2d 784, 795 (10th Cir. 1980), *cert. denied*, 450 U.S. 918, 67 L. Ed. 2d 344, 101 S. Ct. 1363 (1981)). The Court analyzed and weighed the limited prejudice to the other parties (briefing and arguing the motion) while observing that the resolution of the

motion could avoid "undue expense." *Id.* (*citing and quoting Seneca Nursing Home v. Secretary, Etc.*, 604 F.2d 1309, 1314 (10th Cir. 1979)).

The *St. Clair* case is almost directly on point. Here, like in *St. Clair* where new information and law were discovered after the dispositive deadlines had passed, the District has received new supplemental discovery and supplemental expert reports months and months after the original deadlines imposed on the City by the Scheduling Order. Consequently, the District seeks to file motions after the original deadlines imposed in the Scheduling Order. Further, as in the *St. Clair* case, the District seeks to advance law that should resolve the situation and avoid "undue expense," by having the motions heard in advance of the administrative hearing. Not having a determination of whether any legal framework exists for the City's Proposal, would be a "miscarriage of justice."

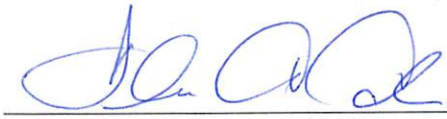
However, the District's argument to file motions "out of time" is far more compelling than the facts in *St. Clair*. In the instant case, the District's reason for even having to file motions out of time was due to prejudice imposed on the District by the City. Yet, ironically, the City has argued that the District's response is not compliant with the scheduling order. It is well established under the law that "one that seeks justice must do justice." The City's unclean hands in failing to answer discovery requests or file expert reports properly in the first place, deprives the City of the ability to even complain about the District's actions in this regard. In this case, the District has had to wait almost an entire year to receive sufficient answers to its original discovery requests. The DWR, on the other hand, can choose to let the City respond to the motions, and may not be prejudiced in any fashion. In sum, in researching this matter extensively, the District could not find a Kansas case that offered a more compelling set of facts for filing motions out of time.

No parties will be seriously prejudiced by the filing of these motions (other than the potential outcome inherent in the substantive gatekeeping functions these motions serve). On the other hand, the District and the public at large will be greatly prejudiced if these motions are not heard. The District has certainly demonstrated extreme circumstances warranting the resolution of these motions. Further, the District has established that it acted in good faith in pursuing these motions and actually did so in a timely fashion under the circumstances.

III. Conclusion

WHEREFORE, for the reasons articulated above, the District respectfully asks that the Hearing Officer reconsider its Order declining to review the District's Revised Motion for Summary Judgment, grant the District's ability to file additional motions out of time and have them heard, and for such further relief as the Hearing Officer deems just and equitable.

RESPECTFULLY SUBMITTED,



Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Leland Rolfs SC#9301
Leland Rolfs Consulting
leland.rolfs@sbcglobal.net
Attorneys for Equus Beds Groundwater Management District Number

CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian, Leland Rolfs, and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 10 day of October, 2019, to:

Aaron Oleen
Division of Water Resources
Aaron.Oleen@ks.gov; Lane.Letourneau@ks.gov

Brian K. McLeod
City of Wichita
BMcLeod@wichita.gov; jpajor@wichita.gov; AKing@wichita.gov; DHenry@wichita.gov
SMacey@wichita.gov; JMagana@wichita.gov; SDickgrafe@wichita.gov

Tessa M. Wendling
twendling@mac.com

State of Kansas
Division of Water Resources
Kansas Department of Agriculture
Kenneth.Titus@ks.gov; David.Barfield@ks.gov; Chris.Beightel@ks.gov; Ronda.Hutton@ks.gov
Stephanie.Murray@ks.gov

and the original sent by (___) mail, (___) fax, (_x__) email, and/or (____) electronically filed to/with:

Presiding Officer
Connie Owen connieowen@everestkc.net

Thomas A. Adrian, SC #06976
tom@aplawpa.com
ADRIAN & PANKRATZ, P.A.
David J. Stucky, SC #23698
stucky.dave@gmail.com
Leland Rolfs SC#9301
Leland Rolfs Consulting
leland.rolfs@sbcglobal.net
Attorneys for Equus Beds Groundwater
Management District Number 2

LexisNexis®

User Name: RANDY PANKRATZ
Date and Time: Thursday, October 10, 2019 8:59:00 AM CDT
Job Number: 99677181

Document (1)

1. *St. Clair v. City of Iola, 1994 U.S. Dist. LEXIS 4625*
   Client/Matter: -None-
   Search Terms: St. Clair v. City of Iola, 1994 U.S. Dist. LEXIS 4625
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

St. Clair v. City of Iola

United States District Court for the District of Kansas

March 2, 1994, Decided ; March 2, 1994, Filed, Entered

Case No. 92-4024-SAC

Reporter
1994 U.S. Dist. LEXIS 4625 *; 1994 WL 129993

WILLIAM K. ST. CLAIR, TERRY A. CALL, NORMAN M. MULLINS, RICHARD S. BROWN, JR., ALTIE DEWAYNE SMITH, TIMOTHY JAY THYER, GREGG OWEN STUKEY, HENRY J. TRABUC, JR., DONALD LEAPHEART, KIRK PRESS, GERALD W. KIMBALL, RONALD A. JENKINS, RICHARD D. GILLILAND, JAMES E. GODDARD, FRANK J. REITMEIER, Plaintiffs, v. CITY OF IOLA, KANSAS, Defendant.

Core Terms

summary judgment, defense motion, pretrial order, parties, file a motion, memorandum

Case Summary

Procedural Posture
Defendant city filed a motion for leave to file a motion for summary judgment out of time, arguing that intervening case law favorable to its position had been decided since the time for filing dispositive motions passed, in an action brought by plaintiff employees. The employees argued that the granting of the motion would prejudice them. After requesting briefing on the issue, the court sua sponte reconsidered the motion.

Overview
After the city filed the motion for leave to file a motion for summary judgment out of time, the court requested briefing by the parties and responses to resolve a factual dispute which previously existed concerning the frequency of call-backs as calculated by the parties. Recognizing that the proposed motion for summary judgment was only a motion for partial summary judgment on the issue of liability for time spent on-call, the court found, in the exercise of its discretion, that under the circumstances of the case it was a benefit to both the court and the parties to permit a motion for summary judgment out of time. The court, noting that pretrial orders were capable of amendment and were intended to suit the interests of justice, concluded that the employees would not be prejudiced by the filing of the motion out of time. The court explained that while the employees would be required to spend the time and effort necessary to respond to the motion, if the issue of liability for time spent on-call was resolved by the motion, the court and each of the parties would have saved a great deal of time and resources.

Outcome
The court granted the city's motion for an order permitting filing of motion for summary judgment out of time.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > General Overview

HN1[↓] **Civil Procedure, Pretrial Matters**

The pretrial order supersedes the pleadings and controls the subsequent course of litigation and the pretrial order measures the dimensions of the lawsuit, both in the trial court and on appeal. These rules, however, are tempered by the purpose that they serve: the fair and orderly disposition of cases. There is a presumption that a pretrial order will be amended in the interest of justice and sound judicial administration provided there is no substantial injury or prejudice to the opposing party or inconvenience to the court. A purpose of pretrial order is to insure the economical and efficient trial of every case on its merits without chance or surprise. One purpose of a pretrial order is to simplify the litigation process by avoiding unnecessary expense and delay.

Civil Procedure > Pretrial Matters > General Overview

HN2[⬇] **Civil Procedure, Pretrial Matters**

The trial judge is vested with broad discretion to preserve the integrity and purpose of a pretrial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice. *Fed. R. Civ. P. 16*. However, in the interest of justice and sound judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight.

Civil Procedure > Pretrial Matters > General Overview

HN3[⬇] **Civil Procedure, Pretrial Matters**

The district court has broad discretion in its control and management of trials. A district court has wide discretion in handling discovery and pretrial matters.

Counsel: **[*1]** For WILLIAM K ST CLAIR, TERRY A CALL, NORMAN M MULLINS, RICHARD S BROWN, JR, ALTIE DEWAYNE SMITH, TIMOTHY JAY THYER, GREGG OWEN STUCKEY, HENRY J TRABUC, JR, DONALD LEAPHEART, KIRK KRESS, GERALD W KIMBALL, RONALD A JENKINS, RICHARD D GILLILAND, JAMES E GODDARD, FRANK J REITMEIER, plaintiffs: Robert F. Chase, Robert V. Talkington, Talkington & Chase, Iola, KS. Brad E. Avery, Kansas Association of Public Employees, Topeka, KS.

For IOLA, KANSAS, THE CITY OF, defendant: Charles H. Apt, Charles H. Apt, III, Apt & Apt, Iola, KS. Louis F. Eisenbarth, Michael E. Francis, Sloan, Listrom, Eisenbarth, Sloan & Glassman, Topeka, KS.

Judges: Crow

Opinion by: SAM A. CROW

Opinion

MEMORANDUM AND ORDER

On November 17, 1993, the City of Iola filed a motion for leave to file a motion for summary judgment out of time, arguing that intervening case law favorable to its position had been decided since the time for filing dispositive motions passed. The plaintiffs opposed the defendant's motion to file a motion for summary judgment out of time, essentially arguing that the time for filing dispositive motions had long-passed and that they would be prejudiced by allowing the defendant to file such a motion at this late date.

On January **[*2]** 6, 1994, the court denied the defendant's motion for an order permitting it to file a motion for summary judgment out of time. The court, however, ordered each of the parties to set forth with specificity the average number of call-backs per day calculated for each plaintiff, to explain in clear and concise terms the manner and means by which those calculations were made, and to attempt to explain any discrepancy between each party's calculations. The order further indicated that after each of the parties had responded, the court would, sua sponte, reconsider the defendant's motion for an order permitting filing of a motion for summary judgment out of time.

Each of the parties has responded to the court's January 6, 1994, memorandum and order. The court, having reviewed the responses of each of the parties, reconsiders its prior ruling and grants the defendant's motion for an order permitting the filing of a motion for summary judgment out of time. The responses filed by the parties essentially resolve a factual dispute which previously existed concerning the frequency of call-backs as calculated by the parties. Without expressing any opinion upon the merits of the defendant's motion **[*3]** for summary judgment, the court concludes that it is appropriate to grant the defendant's motion for an order permitting the filing of a motion for summary judgment out of time.

The court recognizes that the defendant's motion for summary judgment is only a motion for partial summary judgment on the issue of liability for time spent on-call and does not address the remainder of the plaintiffs' claims. The court also recognizes that *HN1*[⬆] the "pretrial order supersedes the pleadings and controls the subsequent course of litigation," *Hullman v. Board of Trustees of Pratt Com. College, 950 F.2d 665, 667 (10th Cir. 1991)* (quoting *Hullman v. Board of Trustees of Pratt Com. College, 732 F. Supp. 91, 93 (D. Kan. 1991)*), and that the pretrial order "'measures the dimensions of the lawsuit, both in the trial court and on appeal.'" *Hullman, 950 F.2d at 668* (quoting American *Home Assur. Co. v. Cessna Aircraft Co., 551 F.2d 804,*

806 (10th Cir. 1977) (quoting Hodgson v. Humphries, 454 F.2d 1279, 1281 (10th Cir. 1972)). These rules, however, are tempered [*4] by the purpose that they serve: the fair and orderly disposition of cases. See United States v. Varner, No. 92-9089, 13 F.3d 1503, 1994 U.S. App. LEXIS 2445, at *10-11 (11th Cir. February 10, 1994) ("There is a presumption that a pretrial order will be amended in the interest of justice and sound judicial administration provided there is no substantial injury or prejudice to the opposing party or inconvenience to the court."); [1] Smith v. Ford Motor Co., 626 F.2d 784, 795 (10th Cir. 1980), cert. denied, 450 U.S. 918, 67 L. Ed. 2d 344, 101 S. Ct. 1363 (1981) (purpose of pretrial order "is to insure the economical and efficient trial of every case on its merits without chance or surprise."); Seneca Nursing Home v. Secretary, Etc., 604 F.2d 1309, 1314 (10th Cir. 1979) ("One purpose of a pretrial order is to simplify the litigation process by avoiding unnecessary expense and delay.").

[*5] The court, in the exercise of its discretion, finds that under the circumstances of this case it is a benefit to both the court and the parties to permit the defendant to file a motion for summary judgment out of time. [2] See generally, Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1449 (10th Cir.) HN3[↑] ("The district court has broad discretion in its control and management of trials."), cert. denied, 126 L. Ed. 2d 240, 114 S. Ct. 291 (1993); Smith 626 F.2d at 794 (district court has wide discretion in handling discovery and pretrial matters).

[*6] The defendant is therefore permitted to file its motion for summary judgment out of time. In support of its motion for summary judgment, the defendant may file the memorandum in support of its motion for summary judgment which was part of the defendant's motion for an order permitting it to file for summary judgment out of time and simply include its response to the court's January 6, 1994, order as an additional exhibit in support of its uncontroverted fact number 28. In the alternative, the defendant may file a memorandum that incorporates more fully the information provided in response to the court's January 6, 1994, order. In either event, the defendant shall file its motion for partial summary judgment on the issue of liability for time spent on-call on or before March 9, 1994. The time for the plaintiffs to respond and the time for the defendant to file a reply are otherwise governed by D. Kan. Rule 206.

IT IS THEREFORE ORDERED that the court, upon its own motion, reconsiders its previous denial of the defendant's motion for an order permitting it to file a motion for summary judgment out of time, and grants the defendant's motion for an order permitting filing of motion for [*7] summary judgment out of time (Dk. 74). The defendant shall file its motion for partial summary judgment and accompanying memorandum on or before March 9, 1994.

Dated this 2nd day of March, 1994, Topeka, Kansas.

Sam A. Crow, U.S. District Judge

End of Document

[1] In *Varner*, the Eleventh Circuit stated:

> HN2[↑] The trial judge is vested with broad discretion to preserve the integrity and purpose of a pretrial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice. Fed. R. Civ. P. 16. However, in the interest of justice and sound judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight. (quoting Sherman v. United States, 462 F.2d 577, 579 (5th Cir.1972)).

[2] The court has given careful consideration to the plaintiffs' argument that they will be prejudiced by granting the defendant's motion to file a motion for summary judgment out of time. While the plaintiffs will be required to spend the time and effort necessary to respond to the defendant's motion, if the issue of liability for time spent on-call is resolved by the defendant's motion for summary judgment, the court and each of the parties will have saved a great deal of time and resources. On balance, the court concludes that the potential benefits of permitting the defendant to file a motion for summary judgment out of time outweigh any prejudice to the plaintiffs. In this case, rigid enforcement of the time deadline set for filing dispositive motions in the pretrial order would not further the interests of justice.