IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-31932

MEDEX REGIONAL LABORATORIES, LLC

Debtor

CHARLES McRAE SHARPE,
CHAPTER 11 TRUSTEE

Plaintiff

v. Adv. Proc. No. 03-3208

PERSHING, YOAKLEY & ASSOCIATES, P.C.

Defendant

MEMORANDUM ON PLAINTIFF'S MOTION TO IDENTIFY EXPERT AND MOTION TO CONTINUE TRIAL DATE AND MODIFY SCHEDULING ORDER

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The following motions are presently before the court: (1) the Motion for Pretrial Ruling as to Evidentiary Character of the Testimony of Richard F. Ray on the Issue of Damages Under Fed. R. Evid. 701 and for Modification of the Scheduling Order to Identify Richard F. Ray as an Expert Pursuant to Fed. R. Civ. P. 26(a)(2)(A) filed by the Plaintiff on June 25, 2004 (Motion for Expert Designation), seeking to characterize the opinion testimony of Richard F. Ray, the Debtor's Chief Financial Officer, as lay testimony under Federal Rule of Evidence 701 and to modify the Scheduling Order entered by the court on March 8, 2004, to allow the Plaintiff to designate Mr. Ray as an expert witness on the subject of damages; and (2) the Motion by Plaintiff to Continue Trial Date and Modify Scheduling Order filed on June 29, 2004 (Motion for Continuance), requesting that the court continue the trial currently scheduled for September 20, 2004, to allow the Plaintiff to sell assets, clarify damages by virtue of completing the trial of another adversary proceeding, and resolve preference claims and claims objections.[1]

The Defendant's Opposition to Motion for Pretrial Ruling as to Evidentiary Character of the Testimony of Richard F. Ray on the Issue of Damages Under Fed. R. Evid. 701 and for Modification of the Scheduling Order to Identify Richard R. [sic] Ray as an Expert Pursuant to Fed. R. Civ. P. 26(a)(2)(A) was filed by the Defendant on June 28, 2004. Likewise, the Defendant filed its Opposition to Motion to Continue Trial Date on June 30, 2004.

[1] A third motion, the Defendant's Motion for Contempt, filed on June 16, 2004, requesting an order compelling the Plaintiff to cure deficiencies in its response to a subpoena duces tecum, was withdrawn by the Defendant pursuant to a Notice of Withdrawal of Motion for Contempt filed on July 2, 2004.

This is a non-core but related proceeding in which a jury has been demanded. Both parties have consented to the bankruptcy judge entering orders and final judgment and conducting the jury trial. 28 U.S.C.A. § 157(c)(2) and (e) (West 1993 & Supp. 2004).

I

The Complaint commencing this adversary proceeding was filed on December 23, 2003, and amended on May 27, 2004, as allowed by Order of the court entered on May 21, 2004. The Plaintiff alleges that the Defendant breached an employment engagement contract between the Debtor and the Defendant, under which the Defendant recruited and recommended for employment the Debtor's former Chief Financial Officer, Mike Ladd. The Plaintiff contends that this breach of contract was a proximate cause of the Debtor's bankruptcy filing and seeks damages of, at a minimum, $7,410,000.00, plus reasonable costs and expenses.[2]

On March 5, 2004, the court held a scheduling conference and, pursuant thereto, entered a Scheduling Order on March 8, 2004. The Scheduling Order set forth the deadline for disclosures, discovery, and motions *in limine*, and set the adversary proceeding for a three-day jury trial beginning September 20, 2004. The dates and deadlines set forth in the Scheduling Order were agreed upon by the parties at the scheduling conference. Among the

[2] The Debtor originally filed this adversary proceeding while operating as a debtor-in-possession. On March 18, 2004, the court approved appointment of a Chapter 11 trustee in the underlying bankruptcy case, and the Plaintiff was duly appointed by Order entered on March 26, 2004. On May 21, 2004, the court entered an Order substituting the Plaintiff for the Debtor in this proceeding. All references to the Plaintiff in connection with this lawsuit includes actions of the Debtor.

agreed upon deadlines were a March 31, 2004 cutoff for making disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), the Plaintiff's April 23, 2004 deadline for disclosure of any expert witnesses, followed by a May 14, 2004 deadline for the Defendant to disclose any expert witnesses, and a final discovery deadline of May 31, 2004. The Scheduling Order was amended pursuant to the court's May 21 and June 21, 2004 Orders, extending the Defendant's time to designate expert witnesses to July 21, 2004, and making July 31, 2004, the deadline for the completion of all discovery, including depositions "for evidence." Additionally, the May 21, 2004 Order allowed the Plaintiff through May 27, 2004, to supplement his Rule 26(a)(1) disclosures regarding damages. Since the scheduling conference, the court has been inundated with numerous motions concerning modification of the Scheduling Order, as well as issues involving discovery disputes.[3]

II

The first issue before the court is the Plaintiff's Motion for Expert Designation, requesting a modification of the Scheduling Order, thus allowing the Plaintiff to designate Mr. Ray as his expert witness. In addition, the Plaintiff seeks to classify Mr. Ray as a lay witness as set forth in Rule 701 of the Federal Rules of Evidence. The Plaintiff first argues that the classification of Mr. Ray as an "expert" is not necessary, since he can properly give opinion testimony as a "lay" witness based upon his position as Chief Executive Officer of the Debtor. Nevertheless, the Plaintiff avers that he is coming forward to designate Mr. Ray as an expert

[3] The most recent motion is the Defendant's Motion for Summary Judgment filed July 2, 2004, whereby the Defendant seeks a summary judgment that, as a matter of law, it did not breach its agreement with the Debtor.

at this late date in order to "avoid unnecessary dispute, litigation, and resources over whether any opinion testimony to be provided by Mr. Ray is 'lay' testimony or 'expert' testimony[.]" Finally, the Plaintiff argues that the Defendant will not be prejudiced by this designation because it has been aware that the Plaintiff intended to call Mr. Ray through the Plaintiff's Rule 26(a)(1) disclosures.

The Defendant opposes the Motion for Expert Designation on both counts. With respect to the Plaintiff's request to modify the Scheduling Order, the Defendant argues that the Plaintiff does not have cause to modify, nor does the Plaintiff make the disclosures in his Motion for Expert Designation required of an expert by Federal Rule of Civil Procedure 26(a)(2)(B). As to the classification of Mr. Ray's testimony, the Defendant first argues that until the Plaintiff sets forth the contents of Mr. Ray's testimony, the court cannot determine if it is admissible under either Rule 701 or Rule 702 of the Federal Rules of Evidence. Notwithstanding this argument, the Defendant avers that Mr. Ray's deposition testimony reflects that he lacks the personal knowledge to support his opinions on the damages issue, which are based instead upon his specialized or technical skills, making his testimony an expert opinion.

The Scheduling Order was entered pursuant to Federal Rule of Civil Procedure 16, made applicable to bankruptcy proceedings by virtue of Rule 7016 of the Federal Rules of Bankruptcy Procedure, which provides, in material part:

> (a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to

appear before it for a conference or conferences before trial for such purposes as

> (1) expediting the disposition of the action;
>
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
>
> (3) discouraging wasteful pretrial activities;
>
> (4) improving the quality of the trial through more thorough preparation, and;
>
> (5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge . . . shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference . . . enter a scheduling order that limits the time

> (1) to join other parties and to amend the pleadings;
>
> (2) to file motions; and
>
> (3) to complete discovery.

The scheduling order may also include

> (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
>
> (5) the date or dates for conferences before trial, a final pretrial conference, and trial; and
>
> (6) any other matters appropriate in the circumstances of the case.

. . . A schedule shall not be modified except upon a showing of good cause and by leave of the district judge[.]

. . . .

> (f) Sanctions. If a party or party's attorney fails to obey a scheduling . . . order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).[4]

FED. R. CIV. P. 16. Rule 16 was "designed to ensure that 'at some point both the parties and the pleadings will be fixed.'" *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003) (quoting FED. R. CIV. P. 16 Advisory Comm. notes (1983)); *accord Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

The Plaintiff did not designate any expert witnesses prior to the April 23, 2004 deadline, and on at least two separate occasions in open court, counsel for the Plaintiff assured both the court and the Defendant's counsel that he did not intend to call any expert witnesses. Specifically, at a hearing on May 20, 2004, the following exchange ensued between the court and counsel for the Plaintiff:

> Court: Have you made the expert disclosures?
>
> Plaintiff's Counsel: We don't have an expert in this case, Your Honor.

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[4] Rule 37 sets forth the potential consequences and sanctions for failure to comply with discovery, including the court's entry of:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination[.]

FED. R. CIV. P. 37(b)(2)(B), (C), (D).

Court: I'm sorry?

Plaintiff's Counsel: We won't have an expert in this case.

Similarly, at a hearing on June 17, 2004, the following discussions occurred:

Court: But they [the Plaintiff] disclosed no expert?

Defendant's Counsel: They disclosed no expert, but I need to get somebody from their side who's going to explain how they calculated these damages so I can take them to an expert so we can then schedule a Daubert hearing to say this is some kind of expert testimony, and it won't be permitted at trial. This is expert testimony that they're trying to bring in after saying –

Court: All right. [Counsel], who calculated the damages?

Plaintiff's Counsel: Mr. Ray. It's a calculation. It's not an expert opinion. . . . We've told [Defendant's counsel] over and over again that Mr. Ray is the most qualified person that we have regarding our damages calculation.

Court: But you do not consider Mr. Ray an expert witness?

Plaintiff's Counsel: Well, he's just – he's a – he can crunch numbers and not be an expert.

Court: All right. Mr. Ray appears to be their witness. . . . Is he the one that's going to prove damages?

Plaintiff's Counsel: I think largely that's the case. . . . Right now I could tell [Defendant's counsel] that Mr. Ray is the person at Medex who has the most knowledge about the damages . . . . As far as the damages, we have Mr. Ray, and we have Mr. Ladd identified.

Court: Well . . . they have not disclosed an expert, they're not going to call anyone as an expert, so it appears to me then you can depose who you choose to depose.

Defendant's Counsel: . . . I will depose Mr. Ray . . . and if we could set a hearing on the issue of whether Mr. Ray's testimony is, in fact, expert testimony because I believe that the testimony Mr. Ray is prepared to offer on the issue of damages is, in fact, expert testimony. It is not just calculations. It's, in fact, expert testimony which they – I believe they're not permitted to introduce at

> this time, but I believe, and I think this would be in the nature of a Daubert hearing.

Nevertheless, despite these representations to the court, the Plaintiff has now filed the Motion for Expert Designation, arguing that because he believes that the Defendant will attempt to disqualify Mr. Ray from testifying as to damages because he was not disclosed as an expert witness, in an exercise of judicial economy, good cause exists to modify the Scheduling Order and allow the Plaintiff to reclassify Mr. Ray as an expert witness.

As an initial matter, the Plaintiff argues that Mr. Ray may properly testify regarding damages as a lay witness, without his being designated as an expert, based upon his position as the Debtor's Chief Executive Officer. Rule 701 of the Federal Rules of Evidence, governing opinion testimony given by lay person witnesses, states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. "It is well settled that a lay witness may offer testimony based upon observation and experience." *In re LTV Steel Co., Inc.*, 285 B.R. 259, 264 (Bankr. N.D. Ohio 2002).

Rule 701 was amended in 2000, and subsection (c) was added to prevent parties from "proffering an expert in lay witness clothing" and "evad[ing] the expert witness disclosure requirements set forth in [Rule] 26 . . . by simply calling an expert witness in the guise of a

layperson." FED. R. EVID. 701 Advisory Comm. notes (2000). The Advisory Committee notes additionally explain that:

> The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil . . . Rules.
>
> . . . .
>
> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.
>
> . . . .
>
> The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

FED. R. EVID. 701 Advisory Comm. notes (2000).

Accordingly, if a witness has relied on specialized knowledge in giving his opinion, Rule 702 applies:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. Moreover, parties relying upon expert witnesses in the production or defense of their case must abide by the requirements of Federal Rule of Civil Procedure 26, which provides, in material part:

> (a) Required Disclosures; Methods to Discover Additional Matter.
>
> (1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:
>
> > (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information[.]
> >
> > . . . .
>
> (2) Disclosure of Expert Testimony.
>
> > (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rule[] 702 . . . of the Federal Rules of Evidence.
> >
> > (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the

> qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26 (made applicable to bankruptcy proceedings by virtue of FED. R. BANKR. P. 7026). "'The difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter is confined to testifying from personal knowledge.'" *In re Syed*, 238 B.R. 133, 144 (Bankr. N.D. Ill. 1999) (quoting *United States v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996)).

Based upon the wording of the Rules, along with guidance from the Advisory Committee notes, the Plaintiff is correct in his assertion that Mr. Ray, as Chief Executive Officer of the Debtor, may offer "lay" testimony as to damages, without being designated or classified as an expert.

> Although parties often enlist the help of expert witnesses to determine damages calculations, business owners and officers are allowed to make damages calculations if they have sufficient personal knowledge of the facts. Such business owners and officers are allowed to testify as lay witnesses under Fed. R. Evid. 701. The business owner or officer, however, must possess personal knowledge of the lost profits and damages and may not rely on hearsay. The key question is therefore whether there is a foundation upon which the lay witness can testify regarding lost profits.

Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 481 (M.D.N.C. 2002) (citations omitted).

On the other hand, Mr. Ray's ability to provide "lay" testimony stems only from his position as an officer of the Debtor. *See, JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370

F.3d 519 (6th Cir. June 3, 2004) (holding that because the witness, who was the plaintiff's certified public accountant, had never been an officer of the plaintiff and the information upon which he relied came primarily from other sources, his "lay" testimony regarding lost profits and loss of business value was improperly allowed). Accordingly, Mr. Ray's testimony will be limited to facts concerning the Debtor's damages obtained by virtue of his relationship with the Debtor. Furthermore, the admissibility and relevance of this information cannot be ascertained until Mr. Ray actually testifies, so any attempt to determine the scope of his testimony is premature.

Nonetheless, this finding provides the court with evidence that good cause does not exist to modify the Scheduling Order to designate Mr. Ray as an expert. The two primary factors in assessing "good cause" under Rule 16(b) are (1) the diligence of the moving party to meet the scheduling order requirements and (2) whether the opposing party will suffer any prejudice by allowing the modification. *Inge v. Rick Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002). "A party demonstrates good cause for the modification of a scheduling order by showing that, even with the exercise of due diligence, he or she was unable to meet the timetable set forth in the order." *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 671 (C.D. Cal. 2003). "Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Dilmar Oil Co. v. Federated Mut. Ins. Co.*, 986 F. Supp. 959, 980 (D.S.C. 1997).

The deadline for the Plaintiff to disclose experts was April 23, 2004. The Plaintiff did not make any such disclosures, and in fact, repeatedly represented to both the court and the

Defendant that he was not going to call any expert witnesses in this case. The Plaintiff has known both prior to and following the April 23, 2004 deadline that he intended to call Mr. Ray as a witness regarding the issue of damages; i.e., he has had ample opportunity to classify Mr. Ray as an expert. Instead, the Plaintiff adamantly insisted that he was not going to call any expert witnesses, even as recently as June 17, 2004, only eight days before he filed the Motion for Expert Designation. These events do not satisfy the diligence requirement of Rule 16's "good cause" standard.

Moreover, the court believes that the Defendant would likely be prejudiced if the Motion for Expert Designation was granted. The Defendant has relied upon the Plaintiff's repeated assertions that he would not be calling an expert to testify in this case. Furthermore, the Defendant is facing a July 21, 2004 deadline for disclosing its expert witnesses. If the Motion for Expert Designation were granted, the Defendant would possibly be required to hire additional experts, at additional costs, and most expeditiously. In light of the Plaintiff's representations that he would not rely upon any expert testimony, the court agrees that the Defendant would suffer prejudice if the Motion for Expert Designation were granted.[5] The Plaintiff cannot establish that "good cause" exists to modify the Scheduling Order to extend

[5] The Defendant also argues that the Plaintiff has failed to make disclosures required of an expert witness under Rule 26(a)(2)(B). However, this requirement applies only to those experts hired expressly for providing testimony or those whose employment duties routinely involve giving expert testimony. *See* FED. R. CIV. P. 26(a)(2)(B); *Connolly v. NEC Am., Inc. (In re Tess Communications, Inc.)*, 291 B.R. 535, 537 (Bankr. D. Colo. 2003) ("[T]he pre-trial report requirement does not apply to fact witnesses who also qualify to give expert opinions that are offered in the limited context of their direct, personal knowledge, as actors or viewers of the facts of the particular case."). As such, it would not apply to Mr. Ray if he were allowed to testify as an expert.

the Plaintiff's deadline for disclosing expert witnesses, and the Plaintiff's Motion for Expert Designation will be denied.

III

The second motion before the court is the Motion for Continuance filed by the Plaintiff. As previously stated, the trial of this adversary proceeding is scheduled to begin on September 20, 2004. The trial is before a jury, and three days have been set aside. Also pending before the court is an adversary proceeding styled *SunTrust Bank v. First Tennessee Bank*, Adv. No. 03-3162 (SunTrust Adversary), through which it will be determined if SunTrust Bank holds a security interest in property of the Debtor, as well as whether any interest takes priority over security interests held by First Tennessee Bank. The trial in the SunTrust Adversary proceeding is scheduled to begin November 22, 2004. The Plaintiff avers that the damages sought against the Defendant in this adversary proceeding are directly correlated with amounts to be determined in the SunTrust Adversary. He, therefore, seeks a continuance of the trial until after the SunTrust Adversary has been resolved in order to correctly clarify damages to be sought against the Defendant. Similarly, the Plaintiff argues that a continuance would allow him additional time to resolve some of the possible preference and objection to claims issues, and it would not interfere with his attempts to sell the Debtor's assets, the closing for which would likely take place near the time of trial.

The Defendant opposes the Motion for Continuance, arguing that the Plaintiff has recently represented his ability to be ready for trial by the September 20, 2004 date.[6] Moreover, the Defendant argues that although the Plaintiff has known since April 29, 2004, the date upon which the SunTrust Adversary was scheduled for trial, that it would be occurring subsequent to the trial in this adversary proceeding, only now has he requested a continuance on the basis of better assessing damages against the Defendant.

For the following reasons, the court does not find "good cause" to grant the Plaintiff's Motion for Continuance, nor is it inclined to do so. As previously stated, the trial was scheduled, by agreement, at the parties' scheduling conference. Therefore, a continuance would require the court to modify the Scheduling Order under the "good cause" standard set forth in Rule 16, whereby the Plaintiff must prove diligence and lack of prejudice to the Defendant. In the court's opinion, the reasons stated by the Plaintiff for requesting the continuance do not rise to the requisite standard.

First, the following time-line evidences that the Plaintiff has not been particularly diligent. On February 5, 2004, the parties to the SunTrust Adversary attended a scheduling conference, at which time it was agreed that trial would commence on July 6, 2004. Thereafter, on March 5, 2004, the Plaintiff and the Defendant attended the scheduling conference for this adversary proceeding, pursuant to which the Scheduling Order was

[6] As clarification, the Defendant avers that the Plaintiff represented to the court at the June 17, 2004 hearing that he would be ready for trial. In actuality, it was counsel for the Defendant that stated to the court that it would be ready for trial in September. The Plaintiff's counsel did not respond to the court's question regarding readiness for trial.

entered, and the parties agreed to the September 20, 2004 trial date. On March 23, 2004, a pretrial order was entered in the SunTrust Adversary, memorializing the dates and deadlines set at the February 5, 2004 scheduling conference. On March 31, 2004, the Plaintiff, a defendant in the SunTrust Adversary, filed a motion to continue that trial, which was granted by an Order entered on April 6, 2004. On April 29, 2004, the court held a status conference in the SunTrust Adversary, at which time the parties agreed to the November 22, 2004 trial date. On June 2, 2004, the court entered the pretrial order scheduling the SunTrust Adversary for trial commencing November 22, 2004. The Motion for Continuance in this adversary proceeding was then filed on June 29, 2004.

The court notes that the Motion for Continuance was filed exactly two months after the Plaintiff agreed to the trial date in the SunTrust Adversary. This two-month delay, together with the fact that the Plaintiff was the party to request a continuance of the SunTrust Adversary, weighs against modification of the Scheduling Order under the Rule 16 standards. Additionally, even though the Plaintiff asserts that his attempted sale of the Debtor's assets is expected to culminate around the time that trial is currently scheduled, he did not present the court with any proof in support of that assertion, and the court is not swayed by this argument.

Furthermore, the court believes that the Defendant could be prejudiced if the Motion for Continuance is granted. The Plaintiff has made a jury demand, and the court has set aside three days to conduct this jury trial. Discovery has been well underway for more than three months, and the deadline to complete discovery is less than three weeks away. The parties

have contentiously fought over discovery issues, and the court has been required to rule on several matters that were not resolvable by the parties themselves. Only by virtue of these many motions and conflicts has the court been required to extend the discovery deadlines set forth in the Scheduling Order. As recently as June 17, 2004, the Defendant indicated to the court that it would be ready for trial in September 2004. The fact that the Plaintiff now states that he will not be ready cannot be held against the Defendant, and the court will not require the Defendant to put on hold its defense of this adversary proceeding. Moreover, the court is not particularly sympathetic to the Plaintiff's averments that a continuance would allow him to better clarify the damages he seeks against the Defendant by virtue of resolution of the SunTrust Adversary, preference actions, and/or claims objections. The Plaintiff has had ample opportunity to better ascertain and clarify the damages to be sought against the Defendant in this adversary proceeding. "Good cause" does not exist to modify the Scheduling Order to set another trial date, and the Motion for Continuance shall be denied.

IV

In summary, the Plaintiff's Motion for Expert Designation and the Plaintiff's Motion for Continuance shall be denied.

An order consistent with this Memorandum will be entered.

FILED: July 12, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-31932

MEDEX REGIONAL LABORATORIES, LLC

Debtor

CHARLES McRAE SHARPE,
CHAPTER 11 TRUSTEE

Plaintiff

v. Adv. Proc. No. 03-3208

PERSHING, YOAKLEY & ASSOCIATES, P.C.

Defendant

O R D E R

For the reasons set forth in the Memorandum on Plaintiff's Motion to Identify Expert and Motion to Continue Trial Date and Modify Scheduling Order filed this date, the court directs the following:

1. The Motion for Pretrial Ruling as to Evidentiary Character of the Testimony of Richard F. Ray on the Issue of Damages Under Fed. R. Evid. 701 and for Modification of the Scheduling Order to Identify Richard F. Ray as an Expert Pursuant to Fed. R. Civ. P. 26(a)(2)(A) filed by the Plaintiff on June 25, 2004, is, to the extent the Plaintiff seeks to modify the Scheduling Order entered on March 8, 2004, to designate Richard Ray as an expert witness pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure to testify on

damages, including lost profits, DENIED. To the extent allowable under Rule 701 of the Federal Rules of Evidence, Richard Ray may, however, offer opinion testimony as a lay witness.

2. The Motion by Plaintiff to Continue Trial Date and Modify Scheduling Order filed by the Plaintiff on June 29, 2004, is DENIED.

SO ORDERED.

ENTER: July 12, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE