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 16 **UNITED STATES DISTRICT COURT**
 17 **DISTRICT OF ARIZONA**

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 19 Helen Roe, a minor, by and through her parent
 and next friend Megan Roe; James Poe, a
 20 minor, by and through his parent and next
 friend Laura Poe; and Carl Voe, a minor, by
 21 and through his parent and next friend, Rachel
 Voe,

22 Plaintiffs,

23 v.

24 Don Herrington, in his official capacity as
 25 Interim State Registrar of Vital Records and
 Interim Director of the Arizona Department of
 26 Health Services,

27 Defendant.

NO. 4:20-cv-00484-JAS

**DEFENDANT'S MOTION TO
 EXTEND REMAINING
 DEADLINES**

[Second Request]

1 Defendant respectfully requests an extension of all remaining deadlines pending the
2 outcome of Plaintiffs' Motion to Quash Subpoena or For a Protective Order ("Motion to
3 Quash") filed on July 25, 2023 (Dkt. 206), and Plaintiffs' Motion for Class Certification
4 (Dkt. 89), both of which are currently pending before the Court. This is Defendant's second
5 request to extend these deadlines. (*See* Dkt. 131, 139.)¹ Pursuant to LRCiv 7.3(b),
6 Plaintiffs oppose the extension of all remaining deadlines.

7 **I. Relevant Background.**

8 The briefing on Plaintiffs' Motion for Class Certification closed in February 2023.
9 (Dkt. 89, 169, 181.) The Court recently held oral argument on June 22, 2023, and has taken
10 the matter under advisement, but has not issued a ruling. (Dkt. 197.)

11 The remaining deadlines, as set forth in the Court's February 9, 2023, Order
12 amending the Scheduling Order (Dkt. 87), are as follows:

- 13 • Expert Discovery Deadline: July 28, 2023
- 14 • Dispositive Motion Deadline: August 18, 2023
- 15 • Joint Pretrial Order Deadline: September 18, 2023

16 (Dkt. 180 at 1–2.)

17 On May 8, 2023, Plaintiffs disclosed Daniel Shumer, M.D., a pediatric
18 endocrinologist, and Dr. Randi Ettner, Ph.D., a psychologist, as expert witnesses, and
19 produced their expert reports. (Dkt. 189.) After conferring with Plaintiffs' counsel, on July
20 10, Defendant noticed the deposition of Dr. Shumer for July 20, and Dr. Ettner for July 26.
21 (*See* Dkt. 203–204.) On July 17, Defendant served Subpoenas Duces Tecum on both
22 experts, requesting their respective expert files and any documents relied upon in drafting
23 their expert reports, among other items. Defense counsel provided Plaintiffs' counsel with
24 copies of these subpoenas on the same day. At Dr. Shumer's deposition, Plaintiffs' counsel
25 indicated that they instructed Dr. Shumer and Dr. Ettner not to respond to Defendant's
26 subpoenas, and that Plaintiffs intended to move to quash the subpoenas as untimely.

27 ¹ All other requests to modify the Scheduling Order have been stipulated to and/or
28 made via joint submission by the parties. (*See* Dkt. 109, 110, 154, 155, 179, 180.)

1 Plaintiffs subsequently filed a Motion to Quash on July 25, 2023. (Dkt. 206.) It is
2 Defendant’s position that the subpoenas were served prior to the expert discovery deadline
3 and are timely. Defendant intends to respond to the Motion to Quash by the deadline and
4 anticipates Plaintiffs will file a reply.

5 **II. Good Cause Exists to Extend the Remaining Deadlines.**

6 Pursuant to Rule 16, a case management schedule shall not be modified except by
7 leave of court upon a showing of good cause. Fed. R. Civ. P. 16(b)(4). The good cause
8 standard primarily considers the diligence of the party seeking the extension. *See Johnson*
9 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (A district court may
10 modify a pretrial schedule if it cannot reasonably be met despite the diligence of the party
11 seeking the extension).

12 First, the “One-Way Intervention” rule precludes the Court from ruling on a motion
13 for summary judgment prior to ruling on class certification. *See Schwarzschild v. Tse*, 69
14 F.3d 293, 295 (9th Cir. 1995) (recognizing that Rule 23(c)(2) seeks “to ensure that the
15 plaintiff class receives notice of the action well before the merits of the case are adjudicated”
16 and to “prevent one-way intervention—that is, the intervention of a plaintiff in a class action
17 after an adjudication favoring the class had taken place”) (internal citations omitted); *see*
18 *also Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-5693 PSG (RZX), 2015 WL
19 4776932, at *4 (C.D. Cal. May 27, 2015) (“The one-way intervention rule exists to protect
20 defendants from two ills—continued exposure to lawsuits even after a favorable judgment
21 and the risk imbalance in a system that allows non-mutual estoppel.”). And Defendant risks
22 waiving the rule if it elects to file a motion for summary judgment before a class-
23 certification ruling. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (“Where the
24 defendant assumes the risk that summary judgment in his favor will have only stare decisis
25 effect on the members of the of the putative class, it is within the discretion of the district
26 court to rule on the summary judgment motion first.”); *see also Hamm v. Mercedes-Benz*
27 *USA, LLC*, No. 5:16-CV-03370-EJD, 2019 WL 475 1911, at *9 (N.D. Cal. Sept. 30, 2019)
28 (“[W]hen a defendant proceeds with a motion for summary judgment, the defendant

1 proceeds at its peril, knowing that it may, in the absence of class certification, face the
2 onrush of litigants who will not be bound by the summary judgment ruling.”).

3 Furthermore, a ruling on Plaintiffs’ Motion for Class Certification directly impacts
4 the scope of any summary-judgment motion filed by Plaintiffs or Defendant. Nor can the
5 parties prepare a joint pretrial order, without knowing whether the class is certified. For
6 these reasons, the dispositive motion and joint pretrial order deadlines should be extended
7 until after the Court rules on Plaintiffs’ Motion for Class Certification.

8 With respect to the expert discovery deadline, if the Court denies Plaintiffs’ Motion
9 to Quash and orders their experts to produce documents responsive to the subpoenas, the
10 expert-discovery deadline should be extended only to the extent Plaintiffs’ experts are
11 ordered to respond to the subpoenas. Defendant requests the opportunity to re-depose
12 Plaintiffs’ experts, if necessary, based on what is produced. In addition, if the Motion to
13 Quash is denied, it is possible that Defendants will rely on documents produced pursuant to
14 the expert subpoenas and/or Plaintiffs’ experts deposition testimony in his summary-
15 judgment motion. Thus, the expert-discovery deadline should be extended for a limited
16 purpose pending the outcome of Plaintiffs’ Motion to Quash.

17 Having established good cause for an extension of the remaining deadlines,
18 Defendant respectfully requests that the Court vacate the remaining deadlines and reset
19 them after it rules on Plaintiffs’ Motion for Class Certification and Motion to Quash.
20 Defendant further suggests extending the deadlines as follows:

- 21 • If the Court grants Plaintiffs’ Motion to Quash, 30 days after a ruling on the
22 Motion for Class Certification or the Motion to Quash, whichever is later, to
23 file dispositive motions.
- 24 • If the Court denies Plaintiffs’ Motion to Quash, 30 days after a ruling on the
25 Motion for Class Certification or after the parties fulfill the orders in the ruling
26 on the Motion to Quash (e.g., responding to the subpoena and/or depositions),
27 whichever is later, to file dispositive motions.
- 28 • 45 days after a ruling on dispositive motions to submit a joint pretrial order.

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DATED this 27th day of July, 2023.

STRUCK LOVE BOJANOWSKI & ACEDO, PLC

By /s/ Dana M. Keene

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2023, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I hereby certify that on this same date, I served the attached document by U.S. Mail, postage prepaid, on the following, who is not a registered participant of the CM/ECF System:

N/A

/s/ Dana M. Keene

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Helen Roe, a minor, by and through her parent and next friend Megan Roe; James Poe, a minor, by and through his parent and next friend Laura Poe; and Carl Voe, a minor, by and through his parent and next friend, Rachel Voe,

Plaintiffs,

v.

Don Herrington, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

NO. 4:20-cv-00484-JAS

**[PROPOSED] ORDER TO
DEFENDANT’S MOTION TO
EXTEND REMAINING
DEADLINES**

After reviewing Defendant’s Motion to Extend Remaining Deadlines, and good cause appearing, the remaining deadlines as set forth in the Court’s February 9, 2023, Order (Dkt. 180) are vacated and will be reset after the Court rules on Plaintiffs’ Motion for Class Certification (Dkt. 89) and Motion to Quash Subpoena or For a Protective Order (Dkt. 206).