

Kathryn A. Stebner, State Bar No. 121088
Brian S. Umpierre, State Bar No. 236399
George Kawamoto, State Bar No. 280358
STEBNER AND ASSOCIATES
870 Market Street, Suite 1212
San Francisco, CA 94102
Tel: (415) 362-9800
Fax: (415) 362-9801

Guy B. Wallace, State Bar No. 176151
SCHNEIDER WALLACE COTTRELL KONECKY LLP
2000 Powell Street, Suite 1400
Emeryville, CA 94608
Tel: (415) 421-7100
Fax: (415) 421-7105

[Additional counsel listed on service list]

Attorneys for Plaintiff and the Proposed Class

Jeffrey S. Ranen, State Bar No. 224285
Soojin Kang, State Bar No. 219738
LEWIS BRISBOIS BISGAARD & SMITH LLP
633 West 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: 213.250.1800
Facsimile: 213.250.7900

Attorneys for Defendant Aegis Senior
Communities LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - OAKLAND

June Newirth, by and through her Guardian
ad Litem, Frederick J. Newirth; Barbara
Feinberg; and Elizabeth Barber, Andrew
Bardin, and Thomas Bardin as successors-in-
interest to the Estate of Margaret Pierce; on
their own behalves and on behalf of others
similarly situated,

Plaintiffs,

vs.

Aegis Senior Communities, LLC, dba Aegis
Living; and Does 1 Through 100,

Defendants.

CASE NO. **4:16-cv-03991-JSW**

**STIPULATED MOTION TO AMEND THE
SCHEDULING ORDER, FOR LEAVE TO
FILE THIRD AMENDED COMPLAINT,
AND FOR PERMISSIVE JOINDER**

Date: May 7, 2021
Time: 9:00 a.m.
Place: Courtroom 5, 2nd Floor
Judge: Hon. Jeffrey S. White

Action Filed: April 12, 2016
Trial Date: None Set

1 **I. INTRODUCTION**

2 By this stipulated Motion, Plaintiffs and Defendant move this Court pursuant to Federal
 3 Rules of Civil Procedure 15, 16, and 20, for an Order: [1] amending the operative scheduling order
 4 to [2] permit Plaintiffs leave to file the proposed Third Amended Complaint (the clean and
 5 redlined versions of the proposed Third Amended Complaint are respectively attached as Exhibits
 6 A and B to the concurrently filed Notice of Lodgment of Exhibits In Support of Stipulated Motion
 7 to Amend the Scheduling Order, For Leave to File Third Amended Complaint, and For Permissive
 8 Joinder), [3] in order to permit the joinder of Carol Morrison to this action as an additional named
 9 Plaintiff and class representative and to add the Washington settlement class members as a
 10 subclass to this California action. The purpose of this stipulated Motion is to effectuate the parties’
 11 global settlement of this matter together with the related but the separate lawsuit pending in the
 12 King County Superior Court in Washington, *Morrison v. Aegis Senior Communities, LLC*, Case
 13 No. 18-2-06326-4 SEA (the “Washington Action”), which the parties are presenting for
 14 preliminary approval concurrently herewith.

15 The parties have engaged in four mediation sessions in an attempt to resolve their disputes
 16 without further litigation. After the parties’ last mediation session on March 24, 2020 before the
 17 Hon. Rebecca Westerfield (Ret.) did not achieve settlement, the parties continued to discuss the
 18 potential for resolving this case as well as the Washington Action. Those efforts resulted in an
 19 agreement among the parties to settle both this case and the Washington Action. On July 23, 2020,
 20 the parties agreed on a Deal Sheet confirming the material settlement terms, including that Aegis
 21 will stipulate that the Washington class shall be added as a subclass to the instant action and that
 22 the settlement will be submitted to this Court for approval.

23 On October 23, 2020, the parties submitted a Joint Status Report in advance of the October
 24 30 Status Conference. *See* Dkt. 199. The parties advised the Court that they had reached
 25 agreement on the terms of the Settlement Stipulation. Plaintiffs requested that the Court go
 26 forward with the October 30 Status Conference, at which time Plaintiffs would seek a hearing date
 27 for preliminary settlement approval and the Court’s guidance on one procedural issue.

Specifically, Plaintiffs advised the Court that, in order to effectuate the Settlement Stipulation and submit a global settlement for approval to this Court, Plaintiffs will seek leave to amend the pending California complaint pursuant to a stipulated motion in order to add the Washington settlement class members as a subclass to the California action and add Carol Morrison as an additional named plaintiff and class representative. *Id.* On October 27, 2020, after considering the parties' Joint Status Report, the Court vacated the October 30, 2020 Status Conference and permitted the parties to seek the relief requested herein by way of stipulated motion to be heard in conjunction with the motion for preliminary approval. *See* Dkt. 200.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that for amendments before trial a party may amend its pleading with the opposing party's consent or with leave of the court, which "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Once a scheduling order is in place which sets deadlines for amending pleadings, Fed. R. Civ. P. 16(b) applies, allowing modifications to a scheduling order when there is "good cause." Fed. R. Civ. P. 16(b)(4).

Courts have held that a party seeking to amend after the deadline set by the scheduling order should bring two motions: one to amend the pretrial scheduling order and one to modify the pleadings. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *C.F. Capistrano Unified Sch. Dist.*, 647 F.Supp. 2d 1187, 1190 (C.D. Cal. 2009) ("[T]he Ninth Circuit has found that a party wishing to file an amended pleading after the time set by the scheduling order must specifically request that the court modify the scheduling order."); *Gould v. Motel 6, Inc.*, No. CV 09-8157 CAS (FMOx), 2011 WL 759472, at *2 (C.D. Cal. Feb. 22, 2011); *Dibb v. AllianceOne Receivables Mgmt.*, No. 14-5835 RJB, 2015 WL 4094431, at *2 (W.D. Wash. July 7, 2015). The motion to amend the scheduling order is examined first under Rule 16(b), after which the motion to amend the complaint is examined under Rule 15(a). *See, e.g., Ellsworth v. United States Bank, N.A.*, No. C 12-02506 LB, 2013 WL 6730725, at *10 (N.D. Cal. Dec. 19, 2013).

Rule 16(b) focuses on the diligence of the party seeking amendment of the scheduling order. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). When the

1 plaintiff in a class action seeks scheduling amendments to add an additional class representative, a
 2 court may consider whether amended pleadings will allow the court to fashion more complete
 3 relief for the class. *See Lyon v. United States Immigration & Customs Enft*, 308 F.R.D. 203, 216-
 4 17 (N.D. Cal. 2015).

5 **A. Carol Morrison Should be Permitted to Join This Action as an Additional**
 6 **Named Plaintiff and Class Representative**

7 Federal Rule 20(a) permits the permissive joinder of a plaintiff if that individual asserts a
 8 right to relief “jointly, severally, or in the alternative with respect to or arising out of the same
 9 transaction, occurrence, or series of transactions or occurrences” and “any question of law or fact
 10 common to all plaintiffs will arise in the action.” Here, Plaintiffs seek the permissive joinder of
 11 Carol Morrison as an additional named Plaintiff and class representative in this action. Ms.
 12 Morrison is the named Plaintiff and proposed class representative in the related Washington
 13 Action.¹ That action is based on the same set of facts as the instant action and alleges causes of
 14 action under Washington law based on the same misrepresentations and omissions at issue here.
 15 This Court has supplemental jurisdiction over the Washington state claims pursuant to 28 U.S.C. §
 16 1376 in that they form part of the same case or controversy under Article III of the United States
 17 Constitution.

18 **B. The Scheduling Order Should Be Amended to Permit the Filing of the Third**
 19 **Amended Complaint**

20 Pursuant to the Order Granting Stipulation to Extend Time Set Forth by the Court’s
 21 January 19, 2018 Civil Minute Order, the date for Plaintiffs to amend their pleadings was
 22 continued to August 29, 2018. *See* Dkt. 91. In order for this Court to exercise jurisdiction over the
 23 Washington Action and effectuate the terms of the global settlement, Plaintiffs require leave to file
 24 an amended complaint adding Carol Morrison by way of permissive joinder under Federal Rule of
 25 Civil Procedure 20(a) as an additional named Plaintiff and class representative, and to add the

26 _____
 27 ¹ The Washington Action currently is stayed pending pending final approval of the settlement and
 28 the time for all appeals has passed (the “Effective Date”).

1 Washington settlement class members as a subclass to this action. Plaintiffs are making their
 2 motion upon coming to terms on the settlement agreement and to conform the pleadings with the
 3 proposed settlement. Under these circumstances, good cause exists under Rule 16(b) to amend the
 4 scheduling order to permit the filing of an amended complaint. *See, e.g., Castillo v. General*
 5 *Motors Corp.*, Case No. CIV 07-2142 WBS GGH, 2008 WL 8585691, at n.1 (E.D. Cal. Sept. 8,
 6 2008) (same). Doing so will allow this Court to exercise jurisdiction over the Washington Action
 7 and allow it to provide more complete relief for the class.

8 C. Leave to File the Third Amended Complaint Should be Granted

9 For the same reasons, the parties respectfully submit that leave to file the Third Amended
 10 Complaint should be granted. *See Hoang v. Bank of America, N.A.*, 910 F.3d 1096, 1102 (9th Cir.
 11 2018) (quoting *Eminence Capital, LLC. v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (Rule
 12 15's policy favoring amendments to pleadings "is to be applied with extreme liberality"). In
 13 accordance with the terms of the parties' agreement, Defendant has agreed to stipulate that the
 14 Washington class be added as a subclass to this action and to the permissive joinder pursuant to
 15 Fed. R. Civ. Pro. 20(a) of Carol Morrison in this action; Defendant also consents to leave to
 16 amend the Second Amended Complaint and the filing of the Third Amended Complaint. The
 17 proposed amendment is, therefore, proper. *See Fed. R. Civ. Pro. 15(a)(2)* ("a party may amend its
 18 pleading only with the opposing party's written consent or the court's leave"); *see also Miller v.*
 19 *Ghirardelli Chocolate Co.*, Case No. C 12-04936 LB, 2014 WL 4978433, at * 7 (N.D. Cal. Oct. 2,
 20 2014). It is common for courts in this district to grant leave to amend where the parties have
 21 agreed to file an amended complaint as part of the class settlement, subject to the terms of the
 22 settlement agreement. *See, e.g., National Federal of the Blind of California v. Uber Technologies,*
 23 *Inc.*, Case No. 14-cv-04086 NC, 2016 WL 9000699, at *5 (N.D. Cal. Jul. 13, 2016).

24 III. CONCLUSION

25 For the foregoing reasons, Plaintiffs and Defendant respectfully request that their
 26 stipulated Motion be granted in its entirety, and (1) the scheduling order be amended to permit the
 27 filing of the Third Amended Complaint; (2) Plaintiffs be permitted leave to file the proposed Third

1 Amended Complaint, attached as Exhibit A to the Notice of Lodgment of Exhibits In Support of
2 Stipulated Motion to Amend the Scheduling Order, For Leave to File Third Amended Complaint,
3 and For Permissive Joinder; and (3) Carol Morrison be permitted to join this action as an
4 additional named Plaintiff and class representative.

5 The e-filing attorney hereby attests attest that she has obtained concurrence in the filing of
6 the document from the other signatory.

7 Dated: March 23, 2021

/s/ Kathryn A. Stebner

Kathryn A. Stebner, State Bar No. 121088
Brian S. Umpierre, State Bar No. 236399
George Kawamoto, State Bar No. 280358
STEBNER AND ASSOCIATES
870 Market Street, Suite 1212
San Francisco, CA 94102
Tel: (415) 362-9800
Fax: (415) 362-9801

Attorneys for Plaintiffs

13 Dated: March 23, 2021

/s/ Soojin Kang

Jeffrey S. Ranen, State Bar No. 224285
Soojin Kang, State Bar No. 219738
LEWIS BRISBOIS BISGAARD AND
SMITH LLP
633 West 5th Street, Suite 4000
Los Angeles, CA 91107
Tel: 213.250.1800
Fax: 213.250.7900

Attorneys for Defendants Aegis Senior
Communities LLC