STEVEN K. HOFFMAN*
DANIEL M. ROSENTHAL*
James & Hoffman, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036
Telephone: (202) 496-0500
Facsimile: (202) 496-0555
skhoffman@jamhoff.com
dmrosenthal@jamhoff.com

JEFFREY B. DEMAIN (SBN 126715)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jdemain@altshulerberzon.com

Attorneys for Defendant
Allied Pilots Association

**Admitted pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:15-cv-03125-RS **DEFENDANT ALLIED PILOTS ASSOCIATION'S RESPONSE TO PLAINTIFFS' MOTION FOR A STAY AND FOR AN OSC RE ADEQUACY OF CLASS COUNSEL** Date: February 21, 2019 Time: 1:30 p.m. Courtroom: 3, 17th Floor Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

Federal Rules and Regulations

Defendant Allied Pilots Association ("APA") hereby responds to Plaintiffs' Motion for a Stay and for an OSC [Order to Show Cause] re Adequacy of Class Counsel ("Motion"), Docket No. 152. Plaintiffs' Motion seeks three types of relief: "(1) stay these proceedings; (2) issue an OSC to class counsel regarding the adequacy of representation issues raised in this Motion; and (3) vacate all dates and deadlines *nunc pro tunc*." Motion at 10. As to the last form of relief, Plaintiffs seek to vacate the trial date, *id.*, which is scheduled for April 29, 2019, *see* Civil Minutes, Docket No. 145, as well as "any important deadlines (such as the deadline to designate an expert)," Motion at 10, which passed more than a year ago on January 30, 2018, *see* Case Management Scheduling Order at 1, Docket No. 85.

Defendant APA takes no position on Plaintiffs' second request, the issuance of an Order to Show Cause. The relationship between Plaintiffs and their counsel is primarily a matter between themselves and their counsel, and secondarily for the Court. APA opposes Plaintiffs' first and third requests, however, because they threaten to upend the entire litigation schedule the Court has established in this case, on which APA has relied throughout the case and in preparation for trial. As we show below, Plaintiffs' request for such relief should be denied because they have not come anywhere near making the legally-required showing to merit it.

1. The applicable legal standard is "good cause," which is determined through a six-factor test, with "diligence" as the most important factor.

Plaintiffs fail to set forth the correct legal standard for staying and vacating the various litigation deadlines and trial date. They rely on the standard for issuing a stay of proceedings set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009), *see* Motion at 9-10:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken is inapposite, however, because it sets forth the legal standard for an appellate court to determine whether to stay a lower court's or agency's order or judgment pending resolution of the appeal. *Id.* at 422 ("Petitioner . . . maintains that the authority of a court of appeals to stay an order of removal under the traditional criteria governing stays remains fully intact, and is not affected by the statutory provision governing injunctions. We agree . . . ."); *see also id.* at 421, 425-26. That is clearly not the relief sought by Plaintiffs' Motion.

Instead, Plaintiffs' request is governed by the "good cause" standard of Federal Rule of Civil Procedure 16. Plaintiffs seek to vacate *nunc pro tunc* "all important deadlines," including the deadline for designating expert witnesses and presumably the deadlines for fact and expert discovery.[1] Indeed, even if Plaintiffs only sought to vacate the deadline for designating expert witnesses – a narrower request than that actually presented by Plaintiffs – that relief would still entail reopening expert discovery because it would necessitate permitting each side to depose the other side's newly-designated experts.

These deadlines for conducting fact discovery, designating expert witnesses, and conducting expert witness discovery, as well as other "important deadlines," *id.*, were set in this Court's scheduling orders issued under Federal Rule of Civil Procedure 16: a non-expert discovery cut-off of December 31, 2017; an expert witness designation cut-off of January 30, 2018; a supplemental and rebuttal expert witness designation cut-off of March 1, 2018; an expert witness discovery cut-off of April 15, 2018; a dispositive motion hearing cut-off of April 5, 2018; a pretrial conference date of April 17, 2019; and a trial date of April 29, 2019. *See* Docket Nos. 85, 145.

"A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Once a scheduling order has issued, Rule 16 by its terms permits modification "only for good cause and with the

---

[1] Plaintiffs' request for relief "*nunc pro tunc*" represents an improper use of the "*nunc pro tunc*" power, and cannot be used as a device to evade scrutiny under Rule 16(b)'s "good cause" requirement. As the Ninth Circuit explained in *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000), the court's "*nunc pro tunc*" power is limited to correcting the court's own inadvertent mistakes:

> "*Nunc pro tunc* amendments are permitted primarily so that errors in the record may be corrected. The power to amend *nunc pro tunc* is a limited one, and may be used only where necessary to correct a clear mistake and prevent injustice." *Martin v. Henley*, 452 F.2d 295, 299 (9th Cir. 1971). It does not imply the ability to alter the substance of that which actually transpired or to backdate events to serve some other purpose. *See Kusay v. United States*, 62 F.3d 192, 193 (7th Cir. 1995). Rather, its use is limited to making the record reflect what the district court actually intended to do at an earlier date, but which it did not sufficiently express or did not accomplish due to some error or inadvertence.

Id. at 1009-10. Here, Plaintiffs make no argument that their motion is aimed at addressing any "error or inadvertence" by the court. *Id.*

judge's consent." Fed. R. Civ. P. 16(b)(4). The moving party "bears the burden of establishing good cause." *POGA MGMT PTNRS LLC v. Medfiler LLC*, 2014 WL 6893778, at *1 (N.D. Cal. Dec. 5, 2014). In *U.S. ex rel Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted in part*, 519 U.S. 926, *judgment vacated on other grounds*, 520 U.S. 939 (1997), the Ninth Circuit "adopted a six-factor test for evaluating motions to modify discovery deadlines" set in Rule 16 scheduling orders. *Fanny Mae v. Laruffa*, 2015 WL 13629323, at *3 (D. Ariz. Sept. 8, 2015). Under *Schumer*, the court must consider the following factors:

> (1) Whether trial is imminent; (2) whether the request is opposed; (3) whether the non-moving party would be prejudiced; (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court; (5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the court; and (6) the likelihood that discovery will lead to relevant evidence.

Schumer, 63 F.3d at 1526.[2]

The most important of these factors is a showing of the moving party's diligence in obtaining discovery within the deadline established by the court. *Fanny Mae*, 2015 WL 13629323, at *3. The Ninth Circuit has held that "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment. . . . [T]he focus of the inquiry is upon the moving party's reasons for seeking modification. . . . If that party was not diligent, the inquiry should end," *Johnson*, 975 F.2d at 609, "and the motion to modify should not be granted," *Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *see also Johnson*, 975 F.2d at 604 (Good cause for modifying a Rule 16 scheduling order exists when a deadline "cannot reasonably be met *despite the diligence* of the party seeking the extension.") (emphasis added).

---

[2] In assessing motions to reopen discovery, some courts have held that in addition to satisfying the "good cause" standard of Rule 16, the moving party must also satisfy the "excusable neglect" standard of Rule 6(b)(1)(B), which applies to motions to extend time after a deadline has passed. *See, e.g., Hammer v. City of Sun Valley*, Case No. 13-cv-211, 2018 BL 297846, at *4-6 (D. Idaho Aug. 20, 2018) (copy attached as Exhibit A to Declaration of Daniel M. Rosenthal, filed herewith); *Nat'l Corp. Tax Credit Funds III, IV, VII v. Potashnik*, 2009 WL 4049396, at *3-*6 (C.D. Cal. Nov. 19, 2009). The "excusable neglect" standard requires a four-part inquiry: "(1) the danger of prejudice to the opposing party; (2) the length of delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Hammer*, 2018 BL 297846, at *5 n.3 (quotations omitted). Here, for the same reasons discussed below why Plaintiffs cannot satisfy the "good cause" requirement of Rule 16(b), they are equally unable to satisfy the "excusable neglect" requirement of Rule 6. *See Matrix Motor Co., Inc. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 674 (C.D. Cal. 2003) ("Several courts have held that 'good cause' requires more than 'excusable neglect.'").

Moreover, and especially important here given the factual predicate of Plaintiffs' Motion, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609 (citing numerous Ninth Circuit cases to the same effect).

2. Plaintiffs cannot show diligence.

Here, Plaintiffs make no showing that they or their counsel acted diligently to obtain any fact discovery they now want to pursue or to designate an expert witness within the deadlines established by the Court. Instead, Plaintiffs merely indicate that their counsel, Christopher Katzenbach, ceased communication with them after August 2018, Motion at 2-3, and may have "missed . . . important deadlines," *id.* at 10. But neither assertion helps Plaintiffs make the necessary showing.

First, Mr. Katzenbach's recent lack of communication obviously does not help establish that he was diligent in pursuing the discovery that Plaintiffs now seek or in designating an expert. In fact, as discussed further below, these events are wholly irrelevant given their timing: the discovery deadlines occurred in December 2017 and January 2018, whereas Mr. Katzenbach allegedly stopped communicating with Plaintiffs only after August 2018.

Second, the possibility that Mr. Katzenbach "missed . . . important deadlines" also does not establish diligence (though it may help demonstrate the opposite). *See, e.g., POGA*, 2014 WL 6893778, at *1 (rejecting a request to reopen discovery, finding a lack of diligence where the moving party plaintiff's former counsel had failed to "file a response to Defendants' counterclaims or depose any Defendant or third-party witness"). Importantly, Plaintiffs do not suggest that any such missed deadline was caused by APA's conduct, as opposed to that of their attorney and themselves.[3]

Plaintiffs appear to believe – incorrectly – that failures by Mr. Katzenbach would support their motion to reopen discovery. But, as the Ninth Circuit has held, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief" under Rule 16. *Johnson*, 975 F.2d at 609; *see also Porter v. Cal. Dep't of Corrections*, 2006 WL 467980, at *1 (E.D. Cal. Jan. 6, 2006) (denying

[3] *Compare United States v. Thompson*, 2005 WL 1303324, at *1 (E.D. Cal. March 22, 2005) (Plaintiff's motion to reopen discovery is supported by good cause where the plaintiff was diligent in conducting discovery, but the defendants' wrongful lack of cooperation obstructed the plaintiff's attempts to complete discovery within the time allotted by the court.).

motion to reopen discovery on remand from court of appeal where, *inter alia*, the moving party failed to demonstrate "why said discovery could not have been obtained previously").[4]

Even if Plaintiffs were correct that they could obtain relief under Rule 16 on account of their counsel's alleged incapacity, there would still be a fundamental problem with their argument: they fail to allege that Mr. Katzenbach was either incapacitated or uncommunicative during the period that is actually relevant here, the discovery period leading to the fact discovery cut-off of December 30, 2017, or the expert witness designation cut-off of January 30, 2018. Plaintiffs merely state that Mr. Katzenbach stopped communicating with them after August 2018 – at least six months after the last of these deadlines.

Further, Plaintiffs' own statements show that Mr. Katzenbach was actively involved in the case before that point. Plaintiffs state that Mr. Katzenbach "remained engaged and conversational through 2017, preparing declarations, motions and responses, discussing the other SLI cases with us, and helping us draft our Updates to the class members." Declaration of Gregory Cordes in Support of Motion to Stay, Etc. ("Cordes Decl."), Docket No. 152-3, at ¶ 9. By Plaintiffs' own admission, "through November and December [2017, Mr. Katzenbach] was actively involved in all of the depositions and all of the work that entailed." Cordes Decl. at ¶ 10. And Mr. Katzenbach continued representing Plaintiffs quite actively through at least June 2018, when he succeeded in defeating Defendant APA's Motion in Limine. *See* Docket Nos. 135 & 140. As Plaintiffs admit, "In March 2018, Katzenbach did work on the APA Motion in Limine and sent us a copy of it. Once again, it appeared that everything was 'on track.'" Cordes Decl. at ¶ 11. Additionally, Plaintiffs note that Mr. Katzenbach was in touch with their newly-retained expert witness, Artemas Keitt Darby III, as long ago as June 2016, and that they were aware at the time that Mr. Katzenbach was considering retaining his services. *See* Cordes Decl. at ¶ 8; *see also* Declaration of Artemas Keitt Darby III in Support of Motion to Stay Etc., Docket No. 152-5, at ¶ 13. Plaintiffs do not disclose whether Mr. Katzenbach provided them an explanation of the decision not to retain Mr. Darby and, if so, what that explanation was.

[4] Although the court in *Porter* did not apply the six-part *Schumer* test, it nevertheless held that the "standard set forth in Rule 16 primarily focuses upon the diligence of the party requesting the amendment." 2006 WL 467980, at *1.

All of this is consistent with the experience of APA's counsel, who found Mr. Katzenbach to be a vigorous participant in discovery. Up to the December 30, 2017 discovery cut-off, Mr. Katzenbach participated extensively in discovery, both propounding and responding to a substantial number of written discovery requests, obtaining and producing voluminous documents, and participating in numerous depositions. *See* Rosenthal Decl. at ¶¶ 2-6. Several of those third-party depositions in which Mr. Katzenbach actively participated were conducted in December 2017, just before the discovery cut-off.

Thus, Plaintiffs cannot show that Mr. Katzenbach failed to participate actively in the case during the relevant time period. Mr. Katzenbach was perfectly capable of handling discovery in this case, including designation of an expert. Mr. Katzenbach apparently did not carry out these functions to the liking of Plaintiffs' new counsel, but that provides no basis to reopen deadlines and force APA to incur the substantial costs of further discovery and a delayed trial.

Given the array of circumstances here, this case closely resembles others in which courts have rebuffed efforts to vacate Rule 16 deadlines. Directly on point is *POGA MGMT PTNRS LLC*, in which the moving party plaintiff's former counsel had failed to "file a response to Defendants' counterclaims or depose any Defendant or third-party witness . . . ." *POGA*, 2014 WL 6893778, at *1 (footnote omitted). The district court found that the plaintiff had nonetheless failed to show good cause to modify the scheduling order to reopen discovery and continue the trial date because it had been represented by counsel throughout the discovery period and "has not demonstrated that it has acted diligently in conducting discovery . . . ." *Id.* at *2. Significantly, the district court rejected as "without merit" the plaintiff's "attempt to blame its former counsel for its lack of diligence," because "[i]t has long been the rule that the acts and omissions of an attorney are attributable to the client." *Id.*[5] The court continued

[5] The Court cited various authorities in support of its conclusion: *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) (affirming dismissal of action based on plaintiff's counsel's failure to appear at the pretrial conference); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993) (parties are "held responsible for the acts and omissions of their chosen counsel"); *Casey v. Albertson's, Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("[a]s a general rule, parties are bound by the actions of their lawyers"); and *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101-02 (9th Cir. 2006) ("A party will not be released from a poor litigation decision made because of inaccurate information or advice, even if provided by an attorney.").

that, "[w]hile the acts and omissions of POGA's former counsel may give rise to a claim of malpractice, they do not constitute good cause for purposes of a request to modify the Court's pretrial scheduling order." *Id.*; *accord Rashdan v. Geissberger*, 2012 WL 566379, at *2-*3 (N.D. Cal. Feb. 21, 2012) (holding that former counsel's lack of diligence in taking discovery and designating an expert prior to the deadlines for so doing, even if it constituted malpractice, is chargeable to the plaintiff and precludes her from showing good cause to reopen those deadlines.); *cf. Latshaw*, 452 F.3d at 1101 (noting that an attorney's errors are "more appropriately addressed through malpractice claims," rather than a motion to vacate the judgment).

In short, even if Plaintiffs could establish Mr. Katzenbach's negligence in representing them during the relevant period, that would still not suffice to support a showing of good cause. Nor could Plaintiffs establish good cause by showing "gross negligence." Plaintiffs have not argued that Mr. Katzenbach's conduct was grossly negligent or that any such gross negligence helps them to avoid responsibility for his lack of diligence.[6] Moreover, APA's counsel are unaware of any decisions in this judicial district holding that counsel's gross negligence can constitute "good cause" to reopen expired dates in a Rule 16 scheduling order. And even the few out-of-district cases that have considered such an argument have found, in factual circumstances much more egregious than those presented here, that the conduct in question did not amount to gross negligence. Thus, even if Plaintiffs had made, and if this Court were to entertain, a "gross negligence" argument, Plaintiffs have not shown gross negligence.

The *Matrix Motor Co.* case is illustrative of the approach taken by those courts that have assessed "gross negligence" arguments. There, the plaintiff's original counsel failed to perform any research, undertake any discovery on behalf of his client, respond to the defendant's document requests, or to designate an expert witness. 218 F.R.D. at 670-71. After communications between the plaintiff and his original counsel broke down, the plaintiff's new counsel moved to reopen and extend various case

[6] Indeed, Plaintiffs' Motion refrains from accusing Mr. Katzenbach even of simple negligence, alleging only that he ceased communicating with them in August 2018 and thus "is not currently adequately representing the class." Motion at 6. Defendant APA has no information regarding the reasons for Mr. Katzenbach's conduct as alleged in the Motion, and notes that until the Court hears from Mr. Katzenbach in response, it cannot assume that there were no legitimate reasons therefor or that his conduct was even negligent at all.

management dates, including the discovery cut-off and trial dates. *Id.* at 668-71. The district court denied the motion because the plaintiff's counsel had not been diligent in conducting discovery or otherwise prosecuting the action. *Id*. at 671-72. In doing so, the court rejected the plaintiff's argument that his former counsel had been grossly negligent. The court held that the original counsel's participation in various aspects of case management other than his wholesale failure to take discovery on behalf of the plaintiff and to designate an expert witness – specifically, participating in an early meeting of counsel, making court appearances, filing a joint settlement election form, making some (incomplete) efforts to respond to the defendant's discovery requests, securing an extension of time to respond to the defendant's interrogatories, and serving answers to those interrogatories, as well as the plaintiff's failure to monitor his counsel's performance, *id*. at 674-74 – distinguished the case from other cases in which counsel was deemed to be grossly negligent by virtually abandoning their clients, i.e., failing to make court appearances, file pleadings, and oppose motions, *id*. at 675.

Other decisions are similar. In *Plum Healthcare Group, LLC v. One Beacon Prof. Ins.*, Case No. 15-cv-2747-W-MDD, 2017 BL 134829, at *1-*4 (S.D. Cal. April 24, 2017) (copy attached as Exhibit B to the Rosenthal Decl.), the court held that there was no good cause to reopen expert and fact discovery deadlines, and the expert witness disclosure deadline, where the moving party's original counsel failed to file a motion to dismiss, after promising to do so; failed to inform his client of a motion for summary judgment filed by the opposite side; missed the expert witness disclosure deadlines and misrepresented to his client that they had been extended; and misinformed his client that fact and expert witnesses discovery had been extended. In *Lawrence v. Turner's Outdoorsman Corp.*, 2012 WL 12957105, at *5 n.4 (C.D. Cal. June 1, 2012), the court held that the moving party's counsel's lack of diligence during the discovery period – which included dismissing several claims without the consent of his client, to the prejudice of his client; failing to appear at a court hearing and refusing to file a stipulation to continue the hearing; and failing within the discovery period to conduct the later-sought discovery – did not rise to the level of extreme negligence or egregious conduct that would justify a departure from the rule that a party voluntarily chooses its counsel and cannot avoid the consequences of its counsel's acts or omissions. And in *Peck v. The Cincinnati Ins. Co.*, 2015 WL 13469930, at *2-*3 (D. Idaho Dec. 3, 2015), the court held that there was no good cause to reopen the expert witness disclosure deadline

where (as here) the moving party was aware of potential expert witnesses prior to the expert disclosure deadline, but alleged that her former counsel "dropped the ball" by failing to designate them by the deadline, concluding that she had not thereby demonstrated that her former counsel had been grossly negligent. As *Matrix Motor Co.* noted, counsel's neglectful or negligent acts are "too often a normal part of representation," and do not provide a basis for reopening deadlines set in Rule 16 scheduling orders. 218 F.R.D. at 673 (internal quotations omitted).

Mr. Katzenbach did far more to litigate the present case during the discovery and expert witness designation periods than did the plaintiffs' original counsel in the foregoing cases, whose conduct was deemed insufficient to support a "gross negligence" argument for reopening discovery. Mr. Katzenbach both propounded and responded to written discovery requests, participated in depositions, attended scheduling conferences, and zealously litigated motions (successfully certifying the class, preventing the dismissal of the case on summary judgment, and defeating Defendant APA's motion in limine). For that reason, his conduct, even if careless, was not so grossly negligent to provide good cause for modifying the scheduling order deadlines.

Moreover, there is additional reason not to allow Plaintiffs to evade the consequences of any litigation failure by Mr. Katzenbach. As class representatives, Plaintiffs are fiduciaries for absent class members, *Cohen v Beneficial Indus. Loan Corp*., 337 U.S. 541, 549 (1949), and owe the class a duty "to monitor the conduct of class counsel throughout the litigation," *Armour v. Network Associates, Inc.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001); *see also id*. at 1052 (characterizing this duty as "crucial"). In their declarations in support of their motion for class certification, Plaintiffs appear to have recognized this obligation. *See, e.g.*, Declaration of Gregory R. Cordes in Support of Motion for Class Certification, Docket No. 50-2, at ¶ 24 ("I intend to pursue this matter vigorously. The other individual plaintiffs have indicated that they will be active in this case as well."). Notwithstanding that assurance they provided to the Court, Plaintiffs provide no evidence in support of their Motion that they adequately monitored the progress of the case, and specifically the progress of discovery, even to inquire whether Mr. Katzenbach was pursuing the discovery they believed necessary to present at trial. They provide no explanation for not checking in with Mr. Katzenbach at any time prior to the January 30, 2018 expert witness designation deadline as to whether he had retained an expert witness, or thereafter as to whether he had

designated an expert witness, until January 14, 2019, nearly a year after that deadline had passed, when Mr. Cordes spoke directly to Mr. Darby. *See* Cordes Decl. at ¶ 17. Nor can they claim that Mr. Katzenbach's uncommunicativeness prevented them from doing so, given their admission that he was engaged and communicative long after that deadline had passed, and the fact that the expert was recently retained without Katzenbach's participation. *See* Cordes Decl. at ¶¶ 9-11.

Because Plaintiffs have utterly failed to demonstrate that they were "diligent in obtaining discovery" and designating an expert witness "within the guidelines established by the court," *Schumer*, 63 F.3d at 1526, "the inquiry should end," *Johnson*, 975 F.2d at 609, and their motion to vacate the scheduling order dates should be denied on that basis alone.[7]

3. The remaining five factors favor denial of Plaintiffs' Motion.

Because the diligence factor so clearly weighs against a stay and vacating the long-passed litigation deadlines, the Court need not consider the other *Schumer* factors. But those factors also support APA's opposition.

First, trial is imminent, scheduled to commence approximately two months after Plaintiffs' motion will be heard.

Second, Defendant APA opposes Plaintiffs' request to vacate and stay the dates in question.

Third, if Plaintiffs need additional discovery outside the original deadlines, that need was entirely foreseeable. *See Schumer*, 63 F.3d at 1526 (Foreseeability, during the allotted discovery period, of the need to obtain particular information through discovery supports denial of a motion to reopen discovery.). The December 31, 2017 fact discovery cut-off and January 30, 2018 expert witness designation deadline (and the subsequent rebuttal expert designation deadline and expert discovery cut-off) were set in a scheduling order that issued on November 3, 2016, nearly fourteen months before the fact discovery cut-off and fifteen months before the expert witness designation deadline. The claimed need for discovery was foreseeable to Mr. Katzenbach and Plaintiffs prior to the fact discovery cut-off

---

[7] Plaintiffs make no claim that they were unaware of the discovery and expert witness deadlines, but any such claim would be unavailing. *See, e.g., Banks v. Gail*, 2009 WL 2246377, at *3-*4 (C.D. Cal. July 27, 2009) (Good cause to reopen discovery is not shown by Plaintiffs' prior inability to locate deponent to serve a deposition subpoena or by Plaintiffs' unawareness of the discovery cut-off date.).

because they engaged in substantial discovery prior to the cut-off date, and the need for expert witness testimony was foreseeable to Mr. Katzenbach and Plaintiffs prior to the expert witness designation date because they discussed retaining, and contacted, an expert witness in June 2016, more than eighteen months prior to that designation date. *See, e.g.*, *Lawrence*, 2012 WL 12957105, at *5 (denying motion to reopen discovery where, *inter alia*, the need for the newly-sought discovery "to develop Plaintiff's case should have been apparent" during the discovery period); *Bleek v. Supervalu, Inc.*, 95 F. Supp. 2d 1118, 1121 (D. Mont. 2000) (denying motion to reopen discovery to add an expert witness denied where, *inter alia*, "it is reasonable that [the moving party] should have foreseen the necessity of identifying an appropriate expert witness to testify regarding the subject issue prior to the deadline.").

Moreover, Plaintiffs and Mr. Katzenbach had ample time in this case both to conduct discovery and to request an extension of the discovery cut-off if that was needed. The discovery period commenced with the Initial Case Management Conference on October 8, 2015, *see* Docket Nos. 30-31, and extended for more than twenty-six months thereafter. Indeed, it extended for nearly fourteen months after the November 3, 2016 scheduling order that established the discovery cut-off, so Plaintiffs and Mr. Katzenbach had both ample warning of the cut-off and ample time after that warning to finish taking discovery. The same is true of retaining an expert witness, as to which they were afforded even more time.

Fourth, Plaintiffs have failed to demonstrate the likelihood that discovery will lead to relevant evidence because they have failed to identify with any specificity what additional evidence they seek to discover. *See, e.g., Schumer*, 63 F.3d at 1526 (The moving party must do more than merely "'speculate[] as to what evidence, if any, further discovery would produce.'") (quoting *Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.), *cert. denied*, 502 U.S. 856 (1990); substitution in original); *Rashdan*, 2012 WL 566379, at *3 (denying motion to reopen discovery where, *inter alia*, the moving party neglected "to specifically identify the documents she seeks or why those documents are necessary . . . .) (emphasis omitted); *Porter*, 2006 WL 467980, at *1 (denying motion to reopen discovery where, *inter*

alia, the moving party failed "to describe the nature of this discovery, including the witness' names and their relationship to the issues presented in this case . . . .").[8]

Fifth, Defendant APA, as the non-moving party, would be prejudiced by the reopening of the discovery and expert designation deadlines. The case law is clear that reopening fact or expert discovery is inherently prejudicial to the opposing party. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) ("'A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice'") (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.1999)); *Bogutz v. Arizona*, 2007 WL 9723928, at *5 (D. Ariz. Dec. 11, 2007) (Motion to reopen discovery so that plaintiff can obtain a new fact witness's records and designate him as a witness is denied where, *inter alia*, "all the Defendants are prejudice[d] by delays in this case progressing and the associated litigation costs."); *Bleek*, 95 F. Supp. 2d at 1120 (Motion to reopen discovery to permit plaintiff to designate an expert witness after the deadline for expert witness disclosure is denied because, *inter alia*, the defendant "will undoubtedly be prejudiced" by being put "in a position of having to conduct additional discovery relative to the new expert witness and [having to] incur the attendant expenditure of time and resources in doing so.").

Further, continuing the trial date would also be prejudicial. This case has been pending for more than three-and-a-half years. *See* Complaint, Docket No. 1, filed July 6, 2015. Defendant APA requested that trial commence at the beginning of November 2018, but Plaintiffs requested to delay the trial until Spring 2019, to which the Court acceded. *See* Joint Case Management Statement and [Proposed] Order, Docket No. 144, at 2; Civil Minutes, Docket No. 145. In reliance on that already-delayed trial date, Defendant APA has scheduled meetings with witnesses and trial consultants in February and March, for which it has had to make travel and lodging arrangements. *See* Rosenthal Decl. at ¶ 7. If the trial date is

[8] Even where the moving party identifies particular evidence that is crucial to his or her claim, a request to reopen discovery should be denied where, as here, the moving party was not diligent in pursuing that evidence during the discovery period. *See, e.g., Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1026 n.3 (9th Cir. 2006) (Plaintiff's motion to reopen discovery was properly denied for lack of diligence even where the motion sought leave to obtain evidence that would have prevented the grant of summary judgment dismissing plaintiff's case.).

continued, much of the benefit of those meetings will be wasted and much of that preparation will have to be redone closer to the continued trial date.

* * * * *

Finally, it is clear that Plaintiffs and their new counsel wish to bring a new approach to this case than that previously pursued by Mr. Katzenbach. Substituting new counsel with a new approach is certainly Plaintiffs' prerogative, assuming their new counsel are appointed by this Court to represent the class, but it does not justify reopening fact discovery, reopening the expert designation and discovery deadlines, or delaying the trial date. Those dates have long been in effect and Defendant APA has relied upon them in preparing its case. New counsel's different ideas about how to litigate this case do not justify a "do-over"; rather, they must take this case as they find it. This was made clear in *Porter*, which is especially applicable here: "[T]he crux of plaintiff's motion is her new counsel's desire to have a 'second bite at the apple'. . . . Neither the retention of new counsel nor a Ninth Circuit remand decision constitutes good cause to re-open discovery under Rule 16." *Porter*, 2006 WL 467980, at *1.

CONCLUSION

For the reasons discussed above, the Court should deny Plaintiffs' request to stay all future dates, to vacate the trial date, and to vacate "any important deadlines (such as the deadline to designate an expert) . . . *nunc pro tunc*." Motion at 10. Plaintiffs should be free to replace Mr. Katzenbach as their counsel, or to associate their new counsel to assist Mr. Katzenbach in the trial of this matter, if they so desire and if the Court appoints their new counsel to represent the class, but they should not be permitted at this late date to parlay that substitution to reopen the long-passed discovery and expert designation deadlines and put off the long-scheduled trial.

Dated: February 12, 2019.

Respectfully submitted,

STEVEN K. HOFFMAN
DANIEL M. ROSENTHAL
James & Hoffman, P.C.

JEFFREY B. DEMAIN
Altshuler Berzon LLP

By: */s/ Jeffrey B. Demain*
Jeffrey B. Demain

Attorneys for Defendant Allied Pilots Association

STEVEN K. HOFFMAN*
DANIEL M. ROSENTHAL*
James & Hoffman, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036
Telephone: (202) 496-0500
Facsimile: (202) 496-0555
skhoffman@jamhoff.com
dmrosenthal@jamhoff.com

JEFFREY B. DEMAIN (SBN 126715)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jdemain@altshulerberzon.com

Attorneys for Defendant
Allied Pilots Association

**Admitted pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:17-cv-01160-RS **DECLARATION OF DANIEL M. ROSENTHAL IN SUPPORT OF DEFENDANT ALLIED PILOTS ASSOCIATION'S RESPONSE TO PLAINTIFFS' MOTION FOR A STAY AND FOR AN OSC RE ADEQUACY OF CLASS COUNSEL** Date: February 21, 2019 Time: 1:30 p.m. Courtroom: 3, 17th Floor Judge: Hon. Richard Seeborg

I, Daniel M. Rosenthal, hereby declare as follows:

1. I am one of the counsel of record for Defendant Allied Pilots Association ("APA") in the above-captioned case and a partner at James & Hoffman, P.C. I am a member in good standing of the New York State Bar and the D.C. Bar, and am admitted to the Northern District of California *pro hac vice* in this case. As counsel for APA, I have dealt regularly with Plaintiffs' counsel Christopher Katzenbach on matters related to this litigation, including discovery matters. I make this declaration in support of Defendant APA's Response to Plaintiffs' Motion for a Stay, filed herewith.

2. Mr. Katzenbach was active in pursing and participating in discovery in this litigation.

3. He sent Requests for Production ("RFPs") to both APA and American Airlines ("AA"), including forty-nine RFPs to APA alone. After APA responded to Plaintiffs' requests, Mr. Katzenbach and APA's attorneys had an extended exchange of emails and letters regarding the sufficiency of APA's responses, including negotiations regarding electronic discovery and APA's privilege log.

4. Ultimately, APA produced more than 17,000 responsive documents in PDF format and additional native documents. This was in addition to the 6,825 pages produced in conjunction with APA's initial disclosures.

5. We in turn sent RFPs, Requests for Admission ("RFAs"), and Interrogatories to Mr. Katzenbach and we received responses and objections to all eighty-four requests. Mr. Katzenbach produced documents comprising 3,798 pages in response to APA's RFPs. As with APA's responses, the parties had an exchange of emails and letters regarding the sufficiency of Plaintiffs' responses. *See* ECF No. 93.

6. Mr. Katzenbach participated vigorously in depositions in this action. Specifically, he personally defended the depositions of the five individual plaintiffs at the end of November 2017: Gregory R. Cordes, Dru Marquardt, Doug Poulton, Stephan Robson, and Philip Valente III. In December 2017, just before the discovery cut-off, Mr. Katzenbach also requested and/or participated in the depositions of several third-party witnesses: Beth Holdren, former AA Labor Relations Managing Director – Flight; Mark Leslie Burdette, former AA Vice President of Employee Relations; and Wayne Klocke and John Schleder of the Air Line Pilots Association. Also in December 2017, Mr. Katzenbach participated in the deposition of Gavin MacKenzie. The Holdren deposition lasted for

nearly six hours, and Mr. Katzenbach's questioning alone comprised over one hundred pages of the transcript. Mr. Katzenbach's questioning of Mr. Burdette took some ninety pages of the 127-page transcript. The depositions of Mr. Klocke and Mr. Schleder collectively comprise more than six and a half hours; Mr. Katzenbach's questioning comprised over a hundred pages of those transcripts.

7. In reliance on the scheduled April 29, 2019 trial date, APA has engaged in substantial trial preparation efforts. Among other things, we have scheduled meetings with witnesses and a trial consultant in February and March, for which we have made travel and lodging arrangements.

8. Attached hereto as Exhibit A, for the Court's convenience, is a true and correct copy of the U.S. District Court for the District of Idaho's August 20, 2018 decision in *Hammer v. City of Sun Valley*, Case No. 13-cv-211, 2018 BL 297846 (D. Idaho Aug. 20, 2018), which does not appear to be available on Westlaw.

9. Attached hereto as Exhibit B, for the Court's convenience, is a true and correct copy of the U.S. District Court for the Southern District of California's April 24, 2017 decision in *Plum Healthcare Group, LLC v. One Beacon Prof. Ins.*, Case No. 15-cv-2747-W-MDD, 2017 BL 134829 (S.D. Cal. April 24, 2017), which does not appear to be available on Westlaw.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 12, 2019 in Washington, D.C.

By: */s/ Daniel M. Rosenthal*
Daniel M. Rosenthal

EXHIBIT A

Pagination
* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

SHARON R. HAMMER and JAMES R. DONOVAL, husband and wife, Plaintiffs, vs. CITY OF SUN VALLEY; NILS RIBI, in his individual and official capacity; and DeWAYNE BRISCOE, in his individual and official capacity, Defendants.

Case No.: 1:13-cv-211-EJL

August 20, 2018, Filed August 20, 2018, Decided

For Sharon R Hammer, Plaintiff: James R. Donoval, LEAD ATTORNEY, James R. Donoval, Caldwell, ID; Wyatt Benton Johnson, LEAD ATTORNEY, Angstman, Johnson & Associates, PLLC, Boise, ID.

For James R. Donoval, Plaintiff: Wyatt Benton Johnson, LEAD ATTORNEY, Angstman, Johnson & Associates, PLLC, Boise, ID.

For City of Sun Valley, Nils Ribi, in his individual and offical capacity, DeWayne Briscoe, in his individual and offical capacity, Defendants: Kirtlan G Naylor, LEAD ATTORNEY, NAYLOR & HALES, Boise, ID; Jacob H. Naylor, NAYLOR & HALES, P.C., Boise, ID; Tyler D Williams, Naylor and Hales, P.C., Boise, ID.

Ronald E. Bush, Chief United States Magistrate Judge.

Ronald E. Bush

MEMORANDUM DECISION AND ORDER RE: PLAINTIFFS' MOTION TO RE-OPEN AND EXPAND DISCOVERY BASED ON WAIVER OF PRIVILEGES

(Docket No. 110)

Now pending before the Court is Plaintiffs' Motion to Re-Open and Expand Discovery Based on Waiver of Privileges (Docket No. 110). Having carefully considered the record, participated in oral argument, and otherwise being fully advised, the Court enters the following Memorandum Decision and Order:

BACKGROUND

Plaintiff Sharon Hammer wants to re-open discovery, arguing that, (1) by attaching a Sun Valley internal disciplinary investigation report (the "Ball Report") in support of their Motion for Summary Judgment, Defendants waived any previously-asserted attorney client privilege and/or work product protection relating to the Ball Report; and (2) because the Ball Report is integral to several of Plaintiff's claims against Defendants, discovery should be re-opened to permit additional discovery surrounding the investigation leading up to the Ball Report, including the Ball Report itself. This

action has a long history with many moving parts; however, for the purpose of resolving the current Motion, the relevant facts informing the instant dispute include:

1. Plaintiff initiated this action on May 3, 2013, asserting 14 Counts against Defendants, seeking relief under various federal and state statutes related to Plaintiff 's termination as the Sun Valley City Administrator in January 2012. *See* Compl. (Docket No. 1).

2. On August 2, 2013, U.S. District Judge Edward J. Lodge entered a Scheduling Order, outlining a May 19, 2014 discovery deadline. *See* Sched. Order (Docket No. 13).

3. On February 5, 2014, Defendants filed a Motion for Judgment on the Pleadings pursuant to FRCP 12(c) , requesting the dismissal of certain identified Counts within Plaintiff's Complaint. *See* Defs.' 12(c) Mot. for J. on the Pldgs. (Docket No. 18).

4. On June 17, 2014, Judge Lodge granted Defendants' Motion for Judgment on the Pleadings and dismissed Counts 1-8, 10, and 12-14 of Plaintiff's Complaint (leaving Counts 9 and 11 for trial). *See* 6/17/14 (Docket No. 41).

5. On June 18, 2014, in a factually-related case in Idaho state court (identified **[*2]** by Plaintiff as the "Ball Report Public Records Case"), Plaintiff and Defendant City of Sun Valley entered into a "Stipulation for Dismissal." wherein the parties addressed the Ball Report and agreed on the following terms:

> ¶ 5. Defendant City of Sun Valley recognizes that [the Ball Report] is a public record of the City but maintains that such record is exempt from a Public Records Request filed pursuant to I.C. § 9-342 upon the grounds that such report is attorney work product and, therefore, exempt from disclosure. the City will continue to maintain this position and will only release the report upon Court Order requiring it do so.
>
> ¶ 6. Both parties acknowledge that [the Ball Report] has been published and made available through the Idaho Mountain Express and is, therefore, in the public domain at the present time.
>
> ¶ 7. In the event that the City is ordered to release [the Ball Report] it will release, as well [a 28-page "Demand for Correction" in response to the Ball Report, a two-page letter from the Sun Valley City Attorney responding to the "Demand for Correction," and a one-page coversheet] contemporaneously, in one set of documents.

Stip., attached as Ex. M to Donoval Aff. (Docket No. 111, Att. 10).

6. On June 27, 2014, Defendants moved for summary judgment on Counts 9 and 11 of Plaintiff's Complaint. *See* Defs.' MSJ (Docket No. 47). In support thereof, Defendants attached as an exhibit (filed under seal) the Ball Report and its accompanying exhibits (259 pages). *See* Ball Rpt., attached as Ex. F to Briscoe Decl. (Docket No. 49).

7. On July 28, 2015, Judge Lodge granted Defendants' Motion for Summary Judgment, dismissed Counts 9 and 11 of Plaintiff's Complaint, and dismissed the case in its entirety. *See* 7/28/15 MDO & J. (Docket Nos. 71 & 72).

8. On August 11, 2015, Plaintiff filed a Motion for Reconsideration of Entry of Summary Judgment (amended on August 28, 2015) related to the dismissal of her liberty interest, stigma plus claims (Count 9). *See* Mots. to Recon. (Docket Nos. 77 & 81).

9. On August 27, 2015, Plaintiff filed a Notice of Appeal, appealing Judge Lodge's above-referenced June 17, 2014 and July 28, 2015 Orders (granting Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment). *See* Not. of Appeal (Docket No. 80).

10. On January 29, 2016, Defendants issued a Notice of Intent to Subpoena Documents from Third-Party, informing

Plaintiff's counsel that, on February 1, 2016, Defendants intended to serve non-party Hagen, Streiff, Newton & Oshiro ("HSNO") a subpoena for production of documents. *See* Not. of Intent to Subpoena Docs. from Third-Party, attached as Ex. D to Emergency Mot. to Quash Third-Party Subpoena (Docket No. 87, Att. 1). HSNO is an accounting firm that Plaintiff sued for defamation in a separate case in Idaho state court related to allegedly-false statements made in a forensic audit report issued by HSNO pertaining to Plaintiff's conduct as the Sun Valley City Administrator. *See* Emergency Mot. to Quash Third-Party Subpoena, p. 3 (Docket No. 87).

11. On February 1, 2016, Plaintiff filed an Emergency Motion to Quash Third-Party Subpoena, requesting that Defendants' subpoena to HSNO be quashed. *See* id. at p. 5 ("As (a) the **[*3]** entire case herein has been dismissed subject only to the Motion to Reconsider, (b) all discovery in the matter has been closed since at least May 14, 2014, and (c) the documents being sought by the Defendant are subject to the confidentiality provision of the Settlement Agreement, [Plaintiff] seeks that the Court quash the Subpoena pursuant to its authority under FRCP 45 .").

12. On March 10, 2016, Judge Lodge denied Defendants' above-referenced Motions for Reconsideration. *See* 3/10/16 MDO (Docket No. 94).

13. On May 11, 2016, Defendants withdrew their subpoena to HSNO, indicating nonetheless that they "do not intend to waive any right to re-issue the subpoena if it becomes necessary to do so based on arguments made by Plaintiff in the pending appeal." Defs.' Not. of Withdrawal of Third-Party Subpoena, p. 1 (Docket No. 99). That same day, the Court denied Defendants' Emergency Motion to Quash Third-Party Subpoena as moot. *See* 5/11/16 Docket Entry Order (Docket No. 100).

14. On August 11, 2017, the Ninth Circuit, affirmed, in part, reversed, in part, and remanded the action back to this Court, stating:

> To conclude, we affirm the district court's grant of the 12(c) motion; the denial of Hammer's motion to convert; and the denial of Hammer's motion to amend. We reverse the district court's judgment of Hammer's unconstitutional bias claim; liberty interest, stigma plus claim; the claims against Ribi and Briscoe in their individual capacities; Donoval's claim; and the entry of costs. . . . .
>
> **AFFIRMED in part, REVERSED in part, and REMANDED.**

8/11/17 Mem., p. 4 (Docket No. 104) (emphasis in original).

15. On October 5, 2017, Judge Lodge directed the parties "to confer with one another and jointly file a notice with the Court indicating how the parties would propose or intend to proceed in light of the Ninth Circuit's decision." 10/5/17 Order, p. 1 (Docket No. 107).

16. On November 1, 2017, the parties filed a Joint Notice of Intent to Proceed. *See* Joint Not. (Docket No. 108). Relevant here, the parties' Notice spoke to the need for "additional discovery," stating:

> Previously, Defendants filed a third-party subpoena to HSNO seeking supplemental materials that did not exist during the original period of discovery that Plaintiffs moved to quash. Ultimately, Defendants withdrew that subpoena due to the Court dismissing Plaintiffs' motion for reconsideration. Now that the mandate has revived certain claims, the parties have agreed that the subpoena can now proceed without objection, and the discovery can be produced by HSNO. Further, any depositions or supplemental discovery pertaining to the subject matter of the HSNO subpoena would also be permitted.
>
> The period to complete this relevant discovery would be six months from the date of the Court's new scheduling order.

Id. at pp. 1-2. Although the Notice also referenced future dispositive motions, mediation or ADR, and a request for a

trial setting, neither party indicated the need for any additional discovery beyond that related to HSNO. *See generally id.*

17. On November 22, 2017, Judge Lodge issued an Amended Scheduling Order, memorializing the parties' preferences as relayed **[*4]** in the Notice and indicating that "[t]he additional discovery anticipated and as stated in the Notice shall be completed by May 22, 2018." *See* 11/22/17 Am. Sched. Order, p. 1 (Docket No. 109).

18. On January 30, 2018, Plaintiff filed the at-issue Motion, requesting that discovery be re-opened — specifically as to the Ball Report — because Defendants waived any privilege and/or protection concerning the Ball Report when they included it and its related documents alongside their June 27, 2014 Motion for Summary Judgment. *See* Pl.'s Mem. in Supp. of Mot. to Re-Open and Expand Disc., p. 13 (Docket No. 110, Att. 1) ("Because the privileges were waived after the close of discovery, discovery related to the Hammer Investigation, Investigator Ball and the Ball Report should be re-opened to allow the Defendants to supplement their disclosures and to allow for additional discovery and depositions.").1 Defendants object to these efforts, countering that (1) Plaintiff failed to include the need to conduct discovery regarding the Ball Report within the parties' November 1, 2017 Joint Notice of Intent to Proceed following remand from the Ninth Circuit; (2) Plaintiff's request to re-open discovery is untimely because the Ball Report-related documents filed in conjunction with Defendants' Motion for Summary Judgment had already been produced to Plaintiff on October 31, 2013; (3) Plaintiff waived any argument to Defendants' use of the Ball Report and its related documents when responding to Defendants' Motion for Summary Judgment (but failing to raise the issue); and (4) there is no waiver that would justify the re-opening of discovery regardless. *See generally* Defs.' Resp. to Mot. to Re-Open Disc. (Docket No. 113).

DISCUSSION

At its core, Plaintiff's Motion is an attempt to amend the August 2, 2013 Scheduling Order and extend the May 19, 2014 discovery deadline referenced therein to allow for the discovery she now seeks. Modifying scheduling orders requires a showing of "good cause." *See* Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). FRCP 16(b)(4) 's good cause standard "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 , 609 (9th Cir. 1992). If a pretrial schedule cannot be met despite the diligence of the party seeking an extension of time, the Court may modify its scheduling order. *See* Miller & Kane, *Federal Practice and Procedure* § 1522.1 at 231 (2d ed. 1990) (good cause means scheduling deadlines cannot be met despite the party's diligence). Carelessness is not good cause for extending a discovery deadline. *See Johnson*, 975 F.2d 609 . "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification[;] [i]f that party was not diligent, the inquiry should end." *Id .* (citations omitted). Moreover, where a motion is made to extend a deadline *after* the deadline has expired, the movant must show excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B) ("When an act may or must be done within a specified time, the court may, for good cause, **[*5]** extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.").

Here, Plaintiff moved to extend the (original) May 19, 2014 discovery deadline on January 30, 2018;2 as such, Plaintiff must show not only good cause for the extension under FRCP 16(b)(4) , but also that any delay in so moving for the extension was the product of excusable neglect under FRCP 6(b)(1)(B) . In other words, part of the good cause showing generally required by this Court includes an explanation for why a timely request to extend the discovery deadline *could not* have been made before May 19, 2014 — i.e., excusable neglect.3 Plaintiff has not met this burden for at least three reasons.4

First, Plaintiff and her counsel had the same Ball Report-related materials filed in support of Defendants' June 27, 2014 Motion for Summary Judgment (in this case) as early as October 31, 2013 (albeit in relation to a different, but still unquestionably related, state court case).5 *See* Naylor Decl. in Supp. of Defs.' Resp. to Mot. to Re-Open Disc. at ¶ 5 (Docket No. 113, Att. 1) ("The pages at issue here, Ball 1-259, which were filed under seal in Defendants' summary judgment motion pursuant to that protective order, were first disclosed on October 31, 2013 [(in response to Plaintiff's May 6, 2013 subpoena to Ms. Ball "generally seeking any and all documents related to her investigation")].."). Yet,

despite having this material in the several months leading up to the May 19, 2014 discovery deadline, Plaintiff failed to pursue the additional discovery she now seeks via the same waiver arguments she now wants this Court to consider.

Second, when Defendants included the Ball Report materials in their June 27, 2014 Motion for Summary Judgment, Plaintiff had the opportunity at that time to move to re-open the discovery period that had closed only a month prior. However, not only did Plaintiff's July 22, 2014 response to Defendants' Motion for Summary Judgment not incorporate any of the waiver arguments she now offers up, she never moved to re-open discovery (or amend the Scheduling Order to extend the discovery deadline to accommodate additional discovery) until almost four years later when she filed the instant Motion.

Third, following remand from the Ninth Circuit in August 2017, the parties had an opportunity to present proposals to Judge Lodge for moving the case forward in light of the Ninth Circuit's decision reviving certain of Plaintiff's claims. But, again, Plaintiff did not raise the issue of re-opening discovery based upon Defendants' prior conduct relating to their Motion for Summary Judgment and/or the Ball Report. Rather, in November 2017, the parties jointly submitted a proposal speaking to the "additional discovery" needed before proceeding to trial, which Judge Lodge adopted. *See supra*. That additional discovery related only to HSNO, not the Ball Report. *See id.*

The Court has sought to glean from this extensive record any possible support that might exist for Plaintiff's motion. But, after doing so, it cannot be said that either good cause exists to amend the Scheduling Order and permit **[*6]** discovery beyond the original May 19, 2014 discovery deadline, or that any delay in so moving for such relief amounts to excusable neglect. Without concluding that each reason listed above alone is sufficient for denying Plaintiff's Motion, there is no question but that the combination of such reasons indicates that Plaintiff's latest attempt at exploring the depths of the Ball Report is a creative afterthought, driven by arguments that may or may not have traction, but were raised too late regardless.

Accordingly, and in the exercise of its discretion, the Court concludes that whatever neglect existed by way of Plaintiff only now moving to re-open discovery and/or to amend the Scheduling Order, it is not excusable. This is a firm line, but not an inequitable line, for the reason that cases must be managed in a sensible manner to move them forward and that in doing so "findings of excusable neglect should be reserved for extraordinary cases presented by unique or extraordinary circumstances." *Vanorden v. Bannock Co., 2015 U.S. Dist. LEXIS 62646* , [2015 BL 136399], 2015 WL 2193803 , at *3 (D. Idaho 2015). Simply put, the record does not support such a finding here. Plaintiffs' Motion to Re-Open and Expand Discovery Based on Waiver of Privileges (Docket No. 110) is denied.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Plaintiffs' Motion to Re-Open and Expand Discovery Based on Waiver of Privileges (Docket No. 110) is DENIED.

DATED: August 20, 2018

/s/ Ronald E. Bush

Ronald E. Bush

Chief U.S. Magistrate Judge

---

fn 1

To the extent Plaintiff argues that Defendants waived any privilege/protection concerning the Ball Report *because* they didn't follow the June 18, 2014 Stipulation submitted in the Ball Report Public Records Case, the argument is misplaced. *See* Pl.'s Mem. in Supp. of Mot. to Re-Open and Expand Disc., p. 6 (Docket No. 110, Att. 1) ("The submission of the Ball Report to this Court in support of the Defendants' request for the entry of summary judgment

was not required to be submitted by order of this Court, thus making the disclosure of the Ball Report a direct violation of the Stipulation that had been entered into in the Ball Report Public Records Case just nine (9) days earlier. In addition, the Defendants failed to include the Hammer Ball Report Objections in the pleadings that were mandated by the Stipulation in the Ball Report Public Records Case to be also disclosed if the Ball Report was ever released."). To be clear, a violation of the Stipulation in the Ball Report Public Records Case is just that — a violation; it does not inform the separate issue of whether a waiver of privilege/protection took place, owing to that violation. Said another way, had Defendants complied with the Stipulation's terms, Plaintiff's waiver arguments would remain intact.

fn 2

It is apparent that Plaintiff is attempting to extend the May 19, 2014 discovery deadline (as outlined in the August 2, 2013 Scheduling Order), and not the May 22, 2018 deadline to conduct additional discovery (as outlined in the November 22, 2017 Amended Scheduling Order), because (1) otherwise, there would be nothing to "re-open" in that her January 20, 2018 Motion preceded the May 22, 2018 deadline by over four months, and (2) the May 22, 2018 deadline applied only to the HSNO-related discovery. *See supra*.

fn 3

These concepts — good cause (informed by a party's diligence (*see supra*)) and excusable neglect — unquestionably overlap when understanding that excusable neglect requires consideration of four factors: "(1) the danger of prejudice to the opposing party; (2) the length of delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Bateman v. United States Postal Serv.*, 231 F.3d 1220 , 1223-24 (9th Cir. 2001) (citing *Pioneer Inv. Servs. Co. v. Brunswick Associates P'ship*, 507 U.S. 380 , 395 , 113 S. Ct. 1489 , 123 L. Ed. 2d 74 (1993)). Whether it is possible to have good cause but not excusable neglect (or vice versa) is not examined here; suffice it to say, based upon the record now before the Court, neither good cause, nor excusable neglect exists for the purpose of re-opening discovery.

fn 4

Because good cause is lacking to amend the August 2, 2013 Scheduling Order and extend the May 19, 2014 discovery deadline in the first place, the Court need not address the issues raised by Plaintiff's related (but still distinct) arguments for doing so — namely, whether Defendants actually waived any privileges/protections when they either previously produced the Ball Report materials, or attached the Ball Report materials to their June 27, 2014 Motion for Summary Judgment. *See, e.g., Cortex v. Republic Mortg., LLC, 2016 WL 7888018* , at *1 (D. Nev. 2016) ("Cortes' arguments in favor of reopening discovery are unpersuasive. Cortes cites to no authority that supports her position that discovery should be reopened; rather she reiterates why she believes she is entitled to responsive documents. *Cortes's arguments might have been appropriate as part of a motion to compel . . . . They do not constitute 'good cause' in a motion to reopen discovery.*") (emphasis added).

fn 5

Still, Defendants produced these same materials to Plaintiff *in this case* approximately two weeks later on November 15, 2013. *See* Naylor Decl. in Supp. of Defs.' Resp. to Mot. to Re-Open Disc. at ¶ 7 (Docket No. 113, Att. 1) ("In the current action, the Plaintiffs issued a subpoena to Ms. Ball on October 18, 2013, generally seeking any and all documents related to her investigation. In response, and on behalf of Mrs. Ball, on November 15, 2013, Defendants disclosed duplicates of the documents previously disclosed on October 31, 2013 in the state case CV-2012-479, after the parties agreed on a similar protective order regarding the confidentiality of those documents in this action.").

General Information

Judge(s)	Ronald E. Bush
Related Docket(s)	1:13-cv-00211 (D. Idaho);
Topic(s)	Civil Procedure
Parties	SHARON R. HAMMER and JAMES R. DONOVAL, husband and wife, Plaintiffs, vs. CITY OF SUN VALLEY; NILS RIBI, in his individual and official capacity; and DeWAYNE BRISCOE, in his individual and official capacity, Defendants.
Court	United States District Court for the District of Idaho

EXHIBIT B

Pagination
* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PLUM HEALTHCARE GROUP, LLC, et al., Plaintiffs, v. ONE BEACON PROFESSIONAL INSURANCE, et al., Defendants.

Case No.: 15cv2747-W-MDD

April 24, 2017, Filed April 24, 2017, Decided

For Plum Healthcare Group, LLC, a California corporation, GI Plum Holdco, LLC, a Delaware limited liability company, Quince Holdings, LLC, doing business as Pueblo Springs Rehabilitation Center, Plaintiffs: Harris I. Steinberg, LEAD ATTORNEY, Harris Steinberg, El Cajon, CA; Richard A Huver, LEAD ATTORNEY, The Huver Law Firm, San Diego, CA.

For OneBeacon Professional Insurance, a Bermuda corporation, Homeland Insurance Company of New York, a Minnesota corporation, Defendants: John T Brooks, Richard Randal Crispen, LEAD ATTORNEYS, Sheppard Mullin Richter & Hampton LLP, San Diego, CA.

Hon. Mitchell D. Dembin, United States Magistrate Judge.

Mitchell D. Dembin

ORDER DENYING DEFENDANTS' APPLICATION TO MODIFY THE CURRENT SCHEDULING ORDER

[ECF NO. 39]

Before this Court is Defendants' Ex Parte Application to Modify the Current Scheduling Order. (ECF No. 39). The Scheduling Order set August 29, 2016, as the deadline for motions to amend the pleadings, November 28, 2016, as the initial expert disclosure deadline, and February 6, 2017, as the deadline for completion of all discovery. (ECF No. 17). On November 29, 2016, the Court issued an Amended Scheduling Order at the parties' joint request. (ECF Nos. 23 (joint motion), 24 (Amended Scheduling Order)). The Amended Scheduling Order set January 9, 2017, as the deadline for initial expert disclosures and March 7, 2017, as the deadline for completion of all discovery. (ECF No. 24).

Defendants' motion, filed March 2, 2017, seeks to reopen discovery and motion practice for three months to relieve Defendants of their prior attorneys' "gross negligence" in failing to timely designate an expert and conduct certain fact discovery. Though Defendants' initial filing also sought a three month extension of all pretrial dates, including the June 5, 2017, Final Pretrial Conference before District Judge Whelan, Defendants abandoned the request to move pretrial dates in their reply. Defendants' reply added a new request for permission to file a motion to amend their Answer.

Plaintiffs filed their opposition on March 17, 2017. (ECF No. 44). Defendants filed their reply on March 24, 2017. (ECF

No. 46). As provided herein, Defendants' motion is **DENIED.**

DISCUSSION

A. Parties' Contentions

Defendants argue that good cause exists to push back the dates in the Amended Scheduling Order because their prior attorneys at Selman Breitman LLP (Selman) were "so grossly negligent in their failure to take the necessary steps in this litigation that Defendants were essentially abandoned and left without representation." (ECF No. 39-1 at 4:2-4). Defendants specify that Selman:

1) "led Defendants to believe that [Selman] would file a motion to dismiss Plaintiff's claims, but never did;"

2) did not inform Defendants that Plaintiffs filed a motion for summary adjudication;

3) missed the expert disclosure deadlines;

4) misled Defendants that the expert disclosure **[*2]** deadlines had been extended when they had not; and,

5) misled Defendants that the time to take percipient and expert witness depositions had been extended when it had not.

Defendants contend that they were diligent in filing this motion to modify the Scheduling Order because they did not learn of any of the issues listed above until February 28, 2017—one week before the discovery and pretrial motion cutoff date. Defendants assert that they then promptly hired new attorneys and filed this motion. Defendants assert, without any analysis, that Plaintiff will not be prejudiced by a three month extension. Finally, in their reply, Defendants seek leave to amend their Answer to specify additional policy exclusions in a non-exhaustive list of policy exclusions that is part of an existing affirmative defense, though they claim that this amendment is not necessary to assert these exclusions as defenses.

Plaintiffs argue that Defendants fail to show good cause for modifying the Scheduling Order because the discovery sought was not diligently pursued. Plaintiffs further argue that Defendants should not be relieved of Selman's lack of diligence because the claimed misconduct does not amount to gross negligence. Plaintiffs contend that they will be severely prejudiced if the Scheduling Order is modified, because any delay causes them to incur further damages flowing from Defendants' refusal to defend them in the underlying lawsuit, and they will be forced to expend additional time and money to conduct discovery and revise their fully-briefed MSA. Plaintiffs also argue that Defendants' tardy request to amend the Answer should be denied.

B. Legal Standard

District Courts have broad discretion to supervise the pre-trial phase of litigation and to "manage the discovery process to facilitate prompt and efficient resolution of the lawsuit." *Crawford—El v. Britton*, 523 U.S. 574 , 599 , 118 S. Ct. 1584 , 140 L. Ed. 2d 759 (1988). Scheduling Orders are issued pursuant to Rule 16(b) of the Federal Rules of Civil Procedure to limit the time to join parties, amend the pleadings, complete discovery and file motions. Fed. R. Civ. P. 16(b)(1) -(3) . Once in place, "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4) .

The "good cause" requirement of Rule 16 primarily considers the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 , 609 (9th Cir. 1992). 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 deadlines set forth in the order. *See Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080 , 1087-88 (9th Cir. 2002).

Mere substitution of counsel is insufficient cause to amend a scheduling order. Under Ninth Circuit precedent, "a client

is ordinarily chargeable with his [prior] counsel's negligent acts." *Community Dental Servs. v. Tani*, 282 F.3d 1164 , 1168 (9th Cir. 2002); *and see Link v. Wabash R.R. Co.*, 370 U.S. 626 , 633-34 , 82 S. Ct. 1386 , 8 L. Ed. 2d 734 (1962). Courts must distinguish, however, between "a client's accountability for his counsel's neglectful or negligent acts—too often a normal part of representation—and his responsibility for the more unusual circumstances of his attorney's extreme **[*3]** negligence or egregious conduct." *Id .; and see Cardenas v. Whitiemore*, Case No. 13cv1720-LAB-KSC, [2015 BL 229673], 2015 U.S. Dist. LEXIS 93481 , [2015 BL 229673], 2015 WL 4410643 , at *1-2 (S.D. Cal. July 16, 2015) (declining to modify scheduling order where prior counsel's errors did not amount to gross negligence); *Steel v. Stoddard*, Case No. 11cv2073-H-RBB, *2013 U.S. Dist. LEXIS 199213* , *2013 WL 12064545* , at *12 (S.D. Cal. Feb. 15, 2013) (same), *order amended on denial of reconsideration*, Case No. 11cv2073-H-RBB, *2013 U.S. Dist. LEXIS 194705* , *2013 WL 12064546* (S.D. Cal. Apr. 12, 2013). Parties may be able to satisfy the "good cause" requirement of Rule 16(b)(4) when they can show that prior counsel's actions amount to "gross negligence or abandonment." *See, e.g., Matrix Motor Co., Inc. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667 , 674 (C.D. Cal. 2003).

C. Analysis

Defendants fail to show good cause to amend the Scheduling Order under Rule 16(b)(4) . Although prior counsel was not diligent in filing a motion to dismiss, designating an expert, or in pursuing certain discovery, Defendants fail to show that Selman's performance was grossly negligent.

Defendants' assertion that they were unaware that Selman did not file a motion to dismiss until February 28, 2017, rings hollow. Selman filed an Answer in June 2016, and Selman's client representative, Daniele Freanor, personally attended the Early Settlement Conference in October 2016, at which point the case was well into the discovery phase. In any event, Selman's failure to file a motion to dismiss did not forfeit Defendants' right to conduct discovery or otherwise prejudice Defendants.

Regarding discovery, Defendants assert that Selman mistakenly believed that Defendants would not need the discovery and that Defendants had agreements with the opposing party about the substance or deadline for the discovery. Selman's mistaken beliefs do not excuse its lack of diligence. Had Selman been diligent, its attorneys would have memorialized the alleged agreements or preserved the clients' discovery rights by taking the depositions and filing the motion to compel. Selman was not diligent with respect to this discovery.

Although Selman was not always diligent, Selman's performance does not amount to gross negligence. The record reflects that Selman vigorously represented Defendants. Selman filed Defendants' Answer. Selman appeared before this Court for a telephonic Case Management Conference, an Early Settlement Conference and a Mandatory Settlement Conference, during which this Court observed that Selman zealously and effectively represented the interests of Defendants. Selman submitted a settlement conference brief. Selman participated in the preparation and submission of the Joint Discovery Plan. Selman successfully sought extensions of time to file the Answer, of discovery deadlines, and of time to file an opposition to the Plaintiff's summary adjudication motion. Selman filed an opposition to Plaintiff's motion for summary adjudication. Selman served and responded to written discovery, took and defended depositions, and engaged in substantial meet and confer negotiations with opposing counsel.

Selman's failure to designate an expert and complete certain discovery does not erase **[*4]** Selman's substantial and continuous efforts on behalf of Defendants. The Ninth Circuit has found gross negligence where the attorney "virtually abandoned" the client such that they client "receiv[ed] practically no representation at all." *Tani*, 282 F.3d at 1168 . In *Tani*, the attorney engaged in "inexcusable and inexplicable" conduct that included failure to follow court orders, failure to make court appearances, failure to file and serve pleadings, failure to oppose motions, and resulted in a default judgment. Unlike the attorney in *Tani* Selman obeyed all court orders, made all court appearances, filed and served the Answer, and opposed all motions. Selman did not virtually abandon Defendants.

This finding is consistent with the results in similar cases, such as *Matrix Motor* and *Cardenas*. In *Matrix Motor*, District Judge Morrow denied a similar motion for failure to show prior counsel's gross negligence, even though the attorney in that case "propounded no discovery, did not designate experts, and failed to respond to [the opponent's] discovery

requests in a timely fashion" because the attorney "made court appearances, filed necessary pleadings, and responded to some discovery." *Matrix Motor*, 218 F.R.D. at 672-675 . In *Cardenas*, Magistrate Judge Crawford denied a similar motion because "the defendant's interests were adequately represented by his prior counsel," who filed a timely counterclaim and "zealously and effectively" represented his client at settlement conferences. *Cardenas*, Case No. 13cv1720-LAB-KSC, [2015 BL 229673], 2015 U.S. Dist. LEXIS 93481 , [2015 BL 229673], 2015 WL 4410643 , at *1-2.

Defendants' request to extend the time to file a motion to amend the Answer was tacked on to their reply and not properly raised in their moving papers. Regardless, the Court denies this request for failure to show good cause under Rule 16 . The deadline for amending pleadings passed more than six months before Defendants brought this motion. The proposed amendment is based on facts that were known to Defendants at the start of litigation. Defendants elected to be represented by Selman, who made the decision to omit specific mention of the exclusions Defendants now seek to add. Though Defendants may now regret the decision, under the law of the Ninth Circuit, Defendants are bound by the performance of Selman. *See, e.g., Tani*, 282 F.3d at 1168 . Finally, Defendants have not shown good cause to extend the time to file a motion to amend the Answer, because the amendment Defendants seek either is unnecessary (according to Defendants) or would necessitate additional discovery and delay this action, thereby prejudicing Plaintiffs (according to Plaintiffs).

CONCLUSION

For the foregoing reasons, Defendants' motion to modify the Scheduling Order is **DENIED.**

IT IS SO ORDERED.

Dated: April 24, 2017

/s/ Mitchell D. Dembin

Hon. Mitchell D. Dembin

United States Magistrate Judge

General Information

Judge(s)	MITCHELL D. DEMBIN
Related Docket(s)	3:15-cv-02747 (S.D. Cal.);
Topic(s)	Civil Procedure
Court	United States District Court for the Southern District of California
Parties	PLUM HEALTHCARE GROUP, LLC, et al., Plaintiffs, v. ONE BEACON PROFESSIONAL INSURANCE, et al., Defendants.