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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SUSAN C. SCHEURER and MARK M. SCHEURER, M.D.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No.: 21cv1053-LL(RBB)

**ORDER DENYING PLAINTIFFS’
MOTION TO REOPEN FACT
DISCOVERY PURSUANT TO FED. R.
CIV. P. 6(b)(1)(B) [ECF NO. 17]**

Presently before the Court is Plaintiffs’ Motion to Reopen Fact Discovery Pursuant to Fed. R. Civ. P. 6(b)(1)(B) [ECF No. 17]. The motion, filed on October 3, 2022, seeks an order extending the fact discovery deadline for a period of ninety days to permit Plaintiffs to take depositions of ten Navy doctors who treated Plaintiff Susan C. Scheurer. (Id. at 1.) For the reasons set forth below, Plaintiffs’ Motion is **DENIED**.

I. BACKGROUND

Plaintiffs initiated this lawsuit on June 3, 2021 [ECF No. 1]. On August 24, 2021, Plaintiffs’ counsel, David L. Bruckart, filed a Pro Hac Vice Application to allow him to appear in this Court and participate in the litigation of this case [ECF No. 3]. Attorney Bruckart designated Norman M. Finkelstein as associate local counsel, and attorney Finkelstein consented to the designation. (Id.)

1 Plaintiff Susan C. Scheurer alleges medical malpractice under the Federal Tort
2 Claims Act for the delay by doctors at the Naval Medical Center San Diego, operated by
3 Defendant United States of America, in diagnosing her breast cancer. (Compl. 1-4, ECF
4 No. 1.) Specifically, Plaintiffs contend that bilateral routine screening mammograms
5 conducted by the Navy on July 23, 2013, October 30, 2014, November 5, 2015, and May
6 22, 2017, were insufficient cancer screening mechanisms given Ms. Scheurer's extremely
7 dense breast tissue, primary family history of breast cancer, and prior breast surgery. (Id.
8 at 2-3.) According to the Complaint, the failure to order supplemental screening or testing
9 modalities caused a delay in the diagnosis and treatment of Plaintiff's breast cancer. (Id.
10 at 3.) Ms. Scheurer was diagnosed with stage 2B breast cancer in September 2017, for
11 which she underwent a right mastectomy and chemotherapy. (Id. at 3-4; Pls.' Mot.
12 Attach. #1 Bruckart Decl. 2, ECF No. 17.) In September 2021, Plaintiff suffered a
13 recurrence of her breast cancer, which was diagnosed as stage four with metastatic
14 disease. (Pls.' Mot. Attach. #1 Bruckart Decl. 2, ECF No. 17.) Plaintiff Mark M.
15 Scheurer, M.D., Ms. Scheurer's husband, asserts a loss of consortium claim. (Compl. 5-6,
16 ECF No. 1.)

17 An Early Neutral Evaluation Conference, requiring the participation of the
18 Plaintiffs, was scheduled for December 2, 2021 [ECF No. 7]. The conference did not go
19 forward on that date because the Plaintiffs did not appear [ECF No. 8]. The Early Neutral
20 Evaluation Conference and Case Management Conference were continued to January 20,
21 2022; on that date, both conferences went forward [ECF No. 11]. On the same date, this
22 Court issued a Scheduling Order Regulating Discovery and Other Pretrial Proceedings
23 [ECF No. 12]. The scheduling order required all fact discovery to be completed by July
24 22, 2022, and all expert discovery to be completed by November 25, 2022. (Id. at 2, 3.)
25 No discovery was taken by Plaintiffs during the six-month period provided for fact
26 discovery. (Def.'s Opp'n 1-2, ECF No. 18.) Defendant propounded interrogatories and
27 document requests upon Ms. Scheurer, and both Plaintiffs sat for their depositions on
28 July 20, 2022. (Pls.' Mot. Attach. #2 Mem. P. & A. 4, ECF No. 17.)

1 On August 19, 2022, four weeks after expiration of the fact discovery deadline, the
2 parties filed a Joint Motion to Modify Scheduling Order [ECF #12]. (Joint Mot., ECF No.
3 13.) In this Joint Motion, the parties requested “an order extending by 60 days all
4 upcoming discovery-related and pretrial motion deadlines set out in the Court’s
5 scheduling order [ECF #12].” (Joint Mot. 1, ECF No. 13.) Notably, the only deadlines
6 identified in the joint motion begin with the August 19, 2022 deadline to serve initial
7 expert disclosures. (Id. at 2.) There was no mention of the already-expired fact discovery
8 deadline. The joint motion concludes: “The parties request that all other terms of the
9 Scheduling Order remain unchanged.” (Id.) The Joint Motion was granted on August 23,
10 2022 [ECF No. 15]. As a result, the expert discovery deadline was continued to January
11 25, 2023. (Id.)

12 On August 22, 2022, Plaintiffs’ counsel, Mr. Bruckart, contacted the Court to
13 request a hearing date for a motion to reopen fact discovery. The Court provided a
14 hearing date of September 22, 2022. The motion was not filed within 24 hours as
15 required by the Court’s Chambers Rules. (See Honorable Ruben B. Brooks, U.S.
16 Magistrate Judge, Chambers Rules.) On August 26, 2022, attorney Bruckart called the
17 Court again to advise that he was ready to file his motion and inquired if a new hearing
18 date was needed. Because the previously issued hearing date of September 22, 2022, no
19 longer allowed for briefing to be completed pursuant to the 28-day rule set forth in the
20 Court’s Civil Local Rules, (see S.D. Cal. Civ. R. 7.1(e)(1)), and despite Plaintiffs’ failure
21 to comply with the Court’s 24-hour motion filing requirement, the Court provided a new
22 hearing date of October 5, 2022. Again, the motion was not filed. A month later, on
23 September 23, 2022, Mr. Bruckart informed the Court that “the motion to reopen fact
24 discovery is now ready to be filed” and requested a hearing date convenient to the Court.
25 This Court issued an Order Setting Briefing Schedule on Plaintiffs’ Motion to Reopen
26 Discovery and Directing Plaintiffs to Address Timeliness and Diligence on September
27 26, 2022. (Order 1, Sept. 26, 2022, ECF No. 16.)
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1 On October 3, 2022, more than six weeks after the filing of the August 19, 2022
2 Joint Motion to Modify the Scheduling Order, Plaintiffs filed their Motion to Reopen
3 Fact Discovery Pursuant to Fed. R. Civ. P. (6)(1)(B) [ECF No. 17]. They seek to reopen
4 fact discovery for a period of ninety days to depose ten Navy physicians who participated
5 in Ms. Scheurer's pre-diagnosis breast cancer surveillance. (Pls.' Mot. Attach. #1
6 Bruckart Decl. 4-5, ECF No. 17.) Defendant filed an opposition on October 17, 2022
7 [ECF No. 18]. There, the Defendant observes that "all ten of the medical providers who
8 Plaintiffs now seek to depose were identified in records documenting Ms. Scheurer's care
9 prior to her diagnosis, and Plaintiffs have cited no difficulty in securing these records in
10 advance of, or during, the discovery phase." (Def.'s Opp'n 2, ECF No. 18.) Plaintiffs
11 filed a reply on October 24, 2022 [ECF No. 21]. In their Reply, Plaintiffs state that in
12 September of 2017, Ms. Scheurer was first diagnosed with breast cancer; four years later,
13 the cancer recurred and progressed to stage 4 with distant metastasis. (Pls.' Reply 1-2,
14 ECF No. 21.) They continue: "[N]o medical records documenting any of the significant
15 changes to the medical condition of the plaintiff Susan C. Scheurer were provided to
16 counsel until June 3, 2022." (Id. at 2.) According to Plaintiffs, "plaintiff Mark M.
17 Scheurer, M.D.[,] provided counsel with sixteen pages of records from James M.
18 Waisman, M.D., an oncologist . . . which covered two televideo conferences with Susan
19 C. Scheurer [on] December 17, 2021[,], and March 23, 2022[]." (Id.) Yet, counsel
20 apparently had access to medical records and refers to mammograms that were taken on
21 July 23, 2013, October 30, 2014, November 5, 2015, and May 22, 2017. (Id. at 2-3.)
22 Counsel identifies the family practice clinic doctors who ordered the mammograms, the
23 radiologists who read the images and authored the reports, and the attending radiologists
24 who approved the reports. (Id. at 3.) Finally, Plaintiffs identify the doctors who (1)
25 ordered the May 21, 2017 ultrasound of Susan Scheurer's right breast, which confirmed a
26 breast cancer diagnosis, and (2) the radiologist who interpreted the images and approved
27 that report. (Id.)

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1 In this context, the Court considers the Plaintiffs' Motion to Reopen Fact
2 Discovery.

3 II. LEGAL STANDARDS

4 Under Rule 16 of the Federal Rules of Civil Procedure, the Court "must issue the
5 scheduling order as soon as practicable." Fed. R. Civ. P. 16(b)(2). The scheduling order is
6 required to "limit the time to join other parties, amend the pleadings, complete discovery,
7 and file motions." Id. R. 16(b)(3)(A). The schedule may be modified only for good cause
8 and with the judge's consent. Id. R. 16(b)(4). The good cause standard under Rule 16(b)
9 "primarily considers the diligence of the party seeking the amendment." Johnson v.
10 Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). "Although the existence
11 or degree of prejudice to the party opposing the modification might supply additional
12 reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for
13 seeking modification." Id.; see also C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.,
14 654 F.3d 975, 984 (9th Cir. 2011). "Deadlines are not options." See J.K.G. v. County of
15 San Diego, Civil No. 11cv0305 JLS(RBB), 2012 U.S. Dist. LEXIS 126195, at *4 (S.D.
16 Cal. Sept. 5, 2012). "Allowing parties to disregard the instructions of a scheduling order
17 would undermine the court's ability to control its docket, disrupt the agreed-upon course
18 of the litigation, and reward the indolent and cavalier. Rule 16 was drafted to prevent this
19 situation." Sokol Holdings, Inc. v. BMB Munai, Inc., 05 cv 3749 (KMW)(DCF), 2009
20 U.S. Dist. LEXIS 100478, at *17 (S.D.N.Y. Oct. 28, 2009) (citation and internal
21 quotations omitted).

22 The standard for amending a scheduling order was described in Zivkovic v. S. Cal.
23 Edison Co., 302 F.3d 1080 (9th Cir. 2002). "The pretrial schedule may be modified 'if it
24 cannot reasonably be met despite the diligence of the party seeking the extension.'" Id. at
25 1087 (quoting Johnson, 975 F.2d at 609). "If the party seeking the modification 'was not
26 diligent, the inquiry should end' and the motion to modify should not be granted." Id.
27 (quoting Johnson, 975 F.2d at 609). Parties must therefore "diligently attempt to adhere

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1 to [the] schedule throughout the . . . course of the litigation.” Jackson v. Laureate, Inc.,
2 186 F.R.D. 605, 607 (E.D. Cal. 1999).

3 III. DISCUSSION

4 As an initial matter, Plaintiffs’ motion ignores the “good cause” standard under
5 Rule 16(b) and instead focuses on “excusable neglect” under Rule 6(b)(1)(B). Under
6 Rule 6, when a motion to extend time is made after the time has expired, the Court may
7 extend time “if the party failed to act because of excusable neglect.” Fed. R. Civ. P.
8 6(b)(1)(B). Plaintiffs contend that their failure to request an extension of time to complete
9 fact discovery before the July 22, 2022 deadline was due to “excusable neglect.” (Pls.’
10 Mot. Attach. #2 Mem. P. & A. 2, ECF No. 17.) They provide four reasons to support
11 their argument: (1) the advancement of Ms. Scheurer’s medical condition from stage 2B
12 breast cancer (in September 2017) to stage four metastatic cancer (in September 2021);
13 (2) Plaintiffs’ counsel’s delayed receipt, on June 3, 2022, of medical records covering the
14 period from December 17, 2021, to March 23, 2022; (3) a “breakdown in attorney/client
15 communications” since the summer of 2021 when Dr. Scheurer informed Mr. Bruckart
16 that he would no longer communicate by telephone, leading to “less effective and
17 sometimes discordant [communications] resulting in misunderstandings, particularly with
18 regard to medical records and other requests for information”; and (4) the birth of
19 counsel’s first grandchild on July 9, 2022, and visit from his daughter from Copenhagen,
20 Denmark from July 22, 2022, to August 12, 2022. (Id. at 2-3.)

21 Even if Plaintiffs could establish excusable neglect under Rule 6(b)(1)(B) for
22 failing to seek an extension of the fact discovery period until after the July 22, 2022
23 deadline had expired, this would be an insufficient basis on which to extend the fact
24 discovery deadline set by the scheduling order. As established by the authorities
25 discussed above, Rule 16(b) provides that the schedule may be modified only for good
26 cause, (see Fed. R. Civ. P. 16(b)(4)), and the good cause standard is primarily concerned
27 with the diligence of the party seeking amendment of the schedule. See Johnson, 975
28 F.2d at 609. Only if the moving party demonstrates that it could not reasonably meet the

1 deadlines in the scheduling order despite its diligence can the schedule be modified. See
2 id.

3 Here, Plaintiffs were not diligent in taking discovery during the six-month period
4 allotted for fact discovery, from the issuance of the scheduling order on January 20, 2022,
5 to the fact discovery deadline of July 22, 2022. Indeed, Defendants state that Plaintiffs
6 did not take any discovery at all during this period, (Def.'s Opp'n 1-2, ECF No. 18), and
7 Plaintiffs do not counter this assertion. In an apparent attempt to justify their failure to
8 conduct any discovery, their counsel claims, without citation to authority, that the "order
9 of depositions in a medical malpractice action is plaintiff/patient first and then the
10 defendant/doctor(s)." (Pls.'s Mot. Attach. #1 Bruckart Decl. 3, ECF No. 17.) In response,
11 Defendant states that it "did not make any such demand on Plaintiffs, and the order of
12 scheduling depositions was never a subject of any meet and confer discussions with
13 counsel." (Def.'s Opp'n 2 n.1, ECF No. 18.) The Court finds that Plaintiffs' counsel's
14 belief regarding the order of depositions does not satisfactorily explain why Plaintiffs
15 failed to proceed with any fact discovery, including the depositions they now seek, during
16 the period set forth in the scheduling order.

17 The Court has evaluated the four reasons provided by Plaintiffs to demonstrate
18 excusable neglect to determine if they support a showing of diligence in obtaining fact
19 discovery during the period set by the Court. They do not. Ms. Scheurer's advancement
20 to stage four breast cancer (reason one) occurred in September 2021, before the
21 scheduling order was issued, and there is no explanation of how this impacted Plaintiffs'
22 ability to take the ten Navy doctor depositions they presently seek during the fact
23 discovery period from January 20, 2022, to July 22, 2022. Similarly, the claimed delay in
24 Plaintiffs' counsel's receipt of updated medical records (reason two), relates to records
25 dated after the period for which Plaintiffs presently seek discovery; that is, prior to her
26 September 2017 cancer diagnosis. Therefore, this does not provide any justification for
27 Plaintiffs' failure to timely take depositions from Ms. Scheurer's treating doctors
28 regarding her medical care preceding her diagnosis. The "breakdown in communications"

1 between Plaintiffs and their counsel (reason three) has apparently existed since the
2 summer of 2021, before the issuance of the scheduling order, and does not excuse their
3 delay in taking the depositions they presently seek.¹ Finally, Plaintiffs had six months
4 between January 20, 2022, and July 22, 2022, to take fact discovery. The birth of
5 counsel's grandchild on July 9, 2022 (reason four), toward the end of the fact discovery
6 period, would not have hindered diligent counsel from taking necessary depositions.

7 Plaintiffs offer no counter to Defendant's assessment that "all ten of the medical
8 providers who Plaintiffs now seek to depose were identified in records documenting Ms.
9 Scheurer's care prior to her diagnosis [in September 2017], and Plaintiffs have cited no
10 difficulty in securing these records in advance of, or during, the discovery phase." (See
11 Def.'s Opp'n 2, ECF No. 18.) Plaintiffs' complaint and moving papers reflect that they
12 have access to the records and mammogram reports identifying the medical practitioners
13 whom they presently wish to depose. (See Compl. 2-3, ECF No. 1 (referring and citing to
14 mammograms taken on July 23, 2013, October 30, 2014, November 5, 2015, and May
15 22, 2017, and their associated radiology reports); see also Pls.' Mot. Attach. #1 Bruckart
16 Decl. 4-5, ECF No. 17 (listing names of ten doctors sought to be deposed regarding their
17 participation in Ms. Scheurer's breast cancer surveillance on July 23, 2013, October 30,
18 2014, November 5, 2015, and May 22, 2017).) Their reply brief further substantiates that
19 Plaintiffs have access to medical records and mammograms taken on July 23, 2013,
20 October 30, 2014, November 5, 2015, and May 22, 2017, including the names of each of
21 the doctors who ordered the studies, interpreted the images, and approved the reports.
22 (See Pls.' Reply 3, ECF No. 21.) Plaintiffs provide no indication that they did not have
23 access to these records in advance of and during the fact discovery period. There is no
24 discernable reason that Plaintiffs could not have taken the ten Navy doctor depositions
25 they presently seek, relating to Ms. Scheurer's pre-September 2017 medical treatment,
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28 ¹ The Court expects Plaintiffs and their counsel to resolve any communication issues that may be
impeding their ability to timely and efficiently litigate this matter.

1 during the fact discovery period set forth in the scheduling order. Their failure to do so
2 demonstrates a lack of diligence.

3 Moreover, not only did Plaintiffs fail to act with diligence in taking discovery
4 during the fact discovery period, but they also lacked diligence in pursuing their motion
5 to modify the scheduling order to reopen fact discovery. As detailed above, Plaintiffs’
6 counsel, Mr. Bruckart, waited until August 22, 2022, a month after the expiration of the
7 fact discovery deadline on July 22, 2022, to first request a hearing date for a motion to
8 reopen fact discovery. He received a hearing date from the Court but failed to file his
9 motion. On August 26, 2022, he contacted the Court to inquire if a new hearing date was
10 needed. The Court again provided a hearing date, but Mr. Bruckart again failed to file his
11 motion. A month later, on September 23, 2022, attorney Bruckart advised the Court that
12 he was ready to file his motion and requested a new hearing date. He finally filed the
13 motion on October 3, 2022, in accordance with the briefing order issued by the Court on
14 September 26, 2022. (Order 1, Sept. 26, 2022, ECF No. 16.) This chronology
15 demonstrates that Plaintiffs were not diligent in filing the current motion, and it does not
16 comport with Rule 16’s good cause standard, which was intended to prevent “reward[ing]
17 the indolent and cavalier.” See Sokol Holdings, 2009 U.S. Dist. LEXIS 100478, at *17;
18 see also Jackson, 186 F.R.D. at 609 (“Plaintiff fails to show diligence in filing her motion
19 to amend and having it heard.”); Sharp v. Covenant Care LLC, 288 F.R.D. 465, 468 (S.D.
20 Cal. 2012) (finding that defendants were not diligent in seeking a modification of the
21 schedule once they determined that they could not comply with the scheduling order).

22 Finally, the Court notes that Plaintiffs’ counsel, attorney Bruckart, has had access
23 to his chosen local counsel, attorney Finkelstein, since the early stages of this case, but
24 appears to have not sought his assistance until the preparation of the current motion. (See
25 Pls.’ Mot. Attach. #1 Bruckart Decl. 6, ECF No. 17.) This also reflects a failure to
26 proceed with diligence.

27 If a party seeking to modify the schedule “was not diligent, the inquiry should end”
28 and the motion to modify should not be granted. Johnson, 975 F.2d at 609. Here,


1 Plaintiffs’ failure to proceed with the ten Navy doctor depositions they presently seek
2 during the fact discovery period shows a lack of diligence, as does their delay in filing the
3 current motion and their attorney’s failure to consult with local counsel. Accordingly,
4 their Motion to Reopen Fact Discovery [ECF No. 17] is **DENIED**.

5 **IV. CONCLUSION**

6 “A scheduling order ‘is not a frivolous piece of paper, idly entered, which can be
7 cavalierly disregarded by counsel without peril.’” Johnson, 975 F.2d at 610 (quoting
8 Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Maine 1985)). For the
9 reasons set forth above, Plaintiff’s Motion to Reopen Fact Discovery [ECF No. 17] is
10 **DENIED**.

11 **IT IS SO ORDERED.**

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13 Dated: November 10, 2022

14 
15 Hon. Ruben B. Brooks
16 United States Magistrate Judge
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