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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Michael Capuano; Desiree Capuano, )

No. CV-11-02395-PHX-JAT

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Plaintiffs, )

**ORDER**

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vs. )

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Kenneth Eisen & Associates, Limited, )

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Defendant. )

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Pending before the Court is Plaintiffs' Motion for Leave to Amend Their First

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Amended Complaint. (Doc. 28).<sup>1</sup>

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**I. BACKGROUND**

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Plaintiff Michael Capuano filed a Complaint on December 5, 2011. (Doc. 1).

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Defendant answered on December 29, 2011. (Doc. 7). The Court issued a Scheduling Order

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on February 27, 2012. (Doc. 13). That Order included a deadline to amend the Complaint of

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April 13, 2012. (*Id.* at 2). The parties stipulated to allow Plaintiff Michael Capuano to amend

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his Complaint to include Plaintiff Desiree Capuano (Doc. 16), and Plaintiffs subsequently

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filed the First Amended Complaint on April 4, 2012. (Doc. 17). Defendant answered on April

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<sup>1</sup> The Court notes the Plaintiffs requested oral argument. That request is denied because the briefing is adequate and oral argument would not aid the decisional process of the Court. *See* Fed.R.Civ.P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998). The Court now rules on the motion.

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1 13, 2012. (Doc. 19). The parties began discovery and, based on that discovery, Plaintiffs filed  
2 the Motion for Leave to Amend Their First Amended Complaint currently pending before  
3 the Court. (Doc. 28).

## 4 **II. RULE 16**

### 5 **A. Legal Standard**

6 Rule 16 states that a Scheduling Order “may be modified only for good cause and with  
7 the judge’s consent.” Fed. R. Civ. Proc. 16(b)(4). For purposes of the rule, “good cause”  
8 means the scheduling deadlines cannot be met despite the party’s diligence. *Johnson v.*  
9 *Mammoth Recreation, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citing 6A Wright, Miller &  
10 Kane, *Federal Practice and Procedure* § 1522.1 at 231 (2d ed.1990)). “The pretrial schedule  
11 may be modified if it cannot reasonably be met despite the diligence of the party seeking the  
12 extension. If the party seeking the modification was not diligent, the inquiry should end and  
13 the motion to modify should not be granted.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080,  
14 1087 (9th Cir. 2002) (citation and internal quotation marks omitted).

15 To demonstrate diligence under Rule 16’s “good cause” standard, the movant  
16 may be required to show the following: (1) that he was diligent in assisting the  
17 court in creating a workable Rule 16 order; (2) that his noncompliance with a  
18 Rule 16 deadline occurred or will occur, notwithstanding his diligent efforts  
19 to comply, because of the development of matters which could not have been  
20 reasonably foreseen or anticipated at the time of the Rule 16 scheduling  
21 conference; and (3) that he was diligent in seeking amendment of the Rule 16  
22 order, once it became apparent that he could not comply with the order.

23 *Morgal v. Maricopa County Bd. of Supervisors*, 07-CV-0670-PHX-RCB, 2012 WL 2029719  
24 (D. Ariz. June 6, 2012) (quoting *Grant v. United States*, 11-CV-00360 LKK, 2011 WL  
25 5554878, at \*4 (E.D. Cal. Nov. 15, 2011), adopted, 11-CV-0360-LKK, 2012 WL 218959,  
26 at \*1 (E.D. Cal. Jan. 23, 2012) (other citation omitted)).

27 With respect to the interplay between Rules 16 and 15(a), “[a]s the Ninth Circuit  
28 explained in *Johnson*, once the district court has filed a pretrial scheduling order pursuant to  
Rule 16 which establishes a timetable for amending pleadings, a motion seeking to amend  
pleadings is governed first by Rule 16(b), and only secondarily by Rule 15(a).” *Jackson v.*  
*Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999); *see also Coleman v. Quaker Oats Co.*,

1 232 F.3d 1271, 1294 (9th Cir. 2000). Moreover, a district court may deny as untimely an  
2 amendment motion filed after the scheduling order's cut-off date where no request to modify  
3 the order has been made. *Johnson*, 975 F.2d at 608-09. "If [the court] considered only Rule  
4 15(a) without regard to Rule 16(b), it would render scheduling orders meaningless and  
5 effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules  
6 of Civil Procedure." *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998).  
7 Accordingly, the Court will first evaluate Plaintiffs' Motion for Leave to Amend under Rule  
8 16, and then, under Rule 15(a).

### 9 **B. Discussion**

10 This Court issued a Scheduling Order on February 27, 2012. (Doc. 13). That Order  
11 set a deadline for motions to amend the Complaint of April 13, 2012. (*Id.* at 2). Plaintiffs'  
12 Motion to Amend was filed on May 10, 2012. A party seeking leave to amend their  
13 complaint after the deadline contained in a scheduling order has passed should first move the  
14 court to modify that scheduling order. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d  
15 604, 608-09 (9th Cir. 1992) (explaining that the Ninth Circuit Court of Appeals does not  
16 view a motion to amend the complaint as a motion to modify the scheduling order). Although  
17 Plaintiffs' request to modify the Scheduling Order is not as clear as it might be, the Court is  
18 persuaded that Plaintiffs have actually requested a modification. Accordingly, the Court must  
19 now decide if Plaintiffs have shown good cause to modify the Scheduling Order.

#### 20 **i. Diligence in Creating Rule 16 Order**

21 There is nothing to suggest that Plaintiffs were not diligent in assisting the court in  
22 creating a workable Rule 16 order, nor does Defendant argue this point.<sup>2</sup> The record shows  
23 that Plaintiffs participated in a telephonic conference pursuant to Rule 26(f) and subsequently  
24 submitted a Joint Case Management Report. (Doc. 9). As such, the Court finds that the first  
25 step of the good cause standard is satisfied.

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27 <sup>2</sup> Defendant is aware of the good cause standard and presumably would have  
28 contested this point if it believed Plaintiffs had not been diligent.



1 once as a matter of course within:

2 (A) 21 days after serving it, or

3 (B) if the pleading is one to which a responsive pleading is required, 21  
4 days after service of a responsive pleading or 21 days after service of a motion  
under Rule 12(b), (e), or (f), whichever is earlier.

5 (2) **Other Amendments.** In all other cases, a party may amend its  
6 pleading only with the opposing party's written consent or the court's leave.  
The court should freely give leave when justice so requires.

7 Fed. R. Civ. P. 15(a).

8 While the decision to grant or deny a motion to amend is within the discretion of the  
9 district court, "Rule 15(a) declares that leave to amend 'shall be freely given when justice so  
10 requires'; this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see*,  
11 *e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *United States*  
12 *v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) ("A district court's  
13 discretion to deny leave to amend . . . is not absolute.") (citing *Foman*); *Cal. Architectural*  
14 *Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987). "In  
15 exercising its discretion[,] . . . 'a court must be guided by the underlying purpose of  
16 Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities.  
17 . . . Thus, 'Rule 15's policy of favoring amendments to pleadings should be applied with  
18 extreme liberality.'" *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (citations  
19 omitted); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)  
20 (stating that leave to amend is generally allowed with "extraordinary liberality"). "This  
21 liberality . . . is not dependent on whether the amendment will add causes of action or  
22 parties." *DCD Programs, LTD. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

23 The extremely liberal policy in favor of amendments, however, is subject to some  
24 limitations. The United States Supreme Court has established that motions to amend  
25 should be granted unless the district court determines that there has been a showing of:  
26 (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated  
27 failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing  
28 party; or (5) futility of the proposed amendment. *Foman*, 371 U.S. at 182; *see SmithKline*

1 *Beecham*, 245 F.3d at 1052; *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991);  
2 *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991); *Cal. Architectural*  
3 *Bldg. Prods.*, 818 F.2d. at 1472; *Poling v. Morgan*, 829 F.2d 882, 886 (9th Cir. 1987).  
4 “Generally, this determination should be performed with all inferences in favor of granting  
5 the motion.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citing *DCD*  
6 *Programs*, 833 F.2d at 186). Significantly, “[t]he party opposing amendment bears the  
7 burden of showing prejudice,” futility, or one of the other permissible reasons for denying  
8 a motion to amend. *DCD Programs*, 833 F.2d at 187; see *Richardson v. United States*,  
9 841 F.2d 993, 999 (9th Cir. 1988) (stating that leave to amend should be freely given unless  
10 the opposing party makes “an affirmative showing of either prejudice or bad faith”).

## 11 **B. Discussion**

12 Plaintiffs argue that leave to amend should be granted, to enable them to add new  
13 allegations Plaintiffs became aware of only through discovery conducted after the deadline  
14 to amend had passed. They submit that their Motion for Leave to Amend presents none of  
15 the reasons justifying denial of such leave.

16 In response, Defendant contends that leave to amend should be denied because  
17 Plaintiffs unduly delayed seeking it, and further, that granting leave to amend would unfairly  
18 prejudice Defendant. Because Defendant does not argue and there is evidence of bad faith,  
19 futility, or a repeated failure to cure deficiencies, the Court will only determine whether there  
20 has been undue delay and whether amendment would prejudice Defendant.

### 21 **i. Undue Delay**

22 Plaintiffs filed their original complaint on December 5, 2011, their First Amended  
23 Complaint on April 4, 2012, and their Motion for Leave to Amend on May 10, 2012.  
24 Defendant argues that this roughly five month delay is unreasonable and that Plaintiffs were  
25 in possession of the information contained in their amendment at the time their original  
26 complaint was filed. While it is necessary for the Court to consider whether Plaintiffs knew  
27 or should have known of the facts and theories raised in their proposed amended complaint,  
28 this consideration by itself is not dispositive in denying a motion to amend. See

1 *Amerisourcebergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (stating  
2 that when considering undue delay, courts inquire as to whether the party “knew or should  
3 have known the facts and theories raised by the amendment in the original pleading.”);  
4 *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712–713 (9th Cir. 2001)  
5 (stating that “undue delay by itself is insufficient to justify denying a motion to amend.”)  
6 (citing *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir.1999)). Generally, a court should make  
7 a contemporaneous finding “of prejudice to the opposing party, bad faith by the moving  
8 party, or futility of the amendment” when denying a motion to amend on reasons of  
9 timeliness. *DCD Programs*, 833 F.2d at 186–187; see *Eminence Capital, LLC v. Aspeon,*  
10 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (stating that “it is the consideration of prejudice  
11 to the opposing party that carries the greatest weight.”). Since there has been no showing of  
12 bad faith or futility, the burden is on Defendant to show that it will be prejudiced if the  
13 Motion for Leave is granted. *DCD Programs*, 833 F.2d at 187.

14 **ii. Undue Prejudice to the Opposing Party**

15 Defendant makes a general assertion that “Plaintiff’s [sic] [p]roposed [a]mended  
16 [c]omplaint would [u]nfairly [p]rejudice Defendant.” (Doc. 31 at 6). Defendant argues that  
17 because a significant amount of discovery has already been conducted, and its defense has  
18 been proceeding based on the Plaintiffs’ first two Complaints, allowing Plaintiffs to amend  
19 their complaint would add time and expense to the defense, and thus prejudice Defendant.

20 Plaintiffs responds that Defendant would not be prejudiced because this case is at an  
21 early stage of discovery, depositions not having started, and Plaintiffs provided Defendant  
22 notice of their intent to move to amend, prior to Defendant making any discovery requests.

23 This case is still in the discovery stage, and only minimal discovery had occurred at  
24 the time Plaintiffs filed their Motion for Leave to Amend. Moreover, the new allegations  
25 Plaintiffs seek to add in their amended complaint are based on evidence Defendant had in its  
26 possession, and arise under the same facts as the previous allegations. Thus, the prejudicial  
27 effect on Defendants prior discovery of granting leave to amend is negligible. Accordingly,  
28 because any prejudice would not be undue, any delay in moving to amend is not sufficient

1 for the Court to deny Plaintiffs leave to amend.

2 **IV. CONCLUSION**

3 Based on the foregoing,

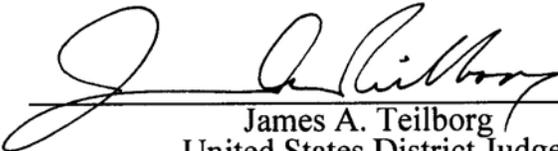
4 **IT IS ORDERED** granting Plaintiffs' Motion for Leave to Amend Their First  
5 Amended Complaint. (Doc. 28).

6 **IT IS FURTHER ORDERED** that Plaintiffs shall file their Second Amended  
7 Complaint, currently lodged as Doc. 28-3, within three days of the date of this Order, and  
8 shall otherwise comply with LRCiv 15.1.

9 **IT IS FURTHER ORDERED** that Defendant shall respond to Plaintiffs' amended  
10 complaint within ten days of being served.

11 DATED this 22nd day of June, 2012.

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James A. Teilborg  
United States District Judge