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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Empire Talent-Modeling Agency, LLC and
Marisa Sclafani, a married woman,

No. CV-12-0711-PHX DGC

10 Plaintiffs,

ORDER

11 v.

12 Auto-Owners Insurance Company, et al.,

13 Defendants.
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15 On May 18, 2012, the Court issued a Case Management Order which stated: “The
16 deadline for joining parties, amending pleadings, and filing supplemental pleadings is **30**
17 **days** from the date of this Order.” Doc. 16 ¶ 2. The Court emphasized that the “parties
18 are advised that the Court intends to enforce the deadlines set forth in this Order, and [the
19 parties] should plan their litigation activities accordingly.” Doc. 16 ¶ 9. Almost seven
20 months later, on December 10, 2012, Defendant Auto-Owners Insurance Company filed a
21 motion to amend its answer to include the affirmative defense of fraud. Doc. 42.
22 Defendant asked permission to do so under Rule 15 of the Federal Rules of Civil
23 Procedure. *Id.* at 1. Although Rule 15 embodies a liberal amendment policy, *see* Fed. R.
24 Civ. P. 15(a)(2), that is not the standard to be applied in this case. The Court finds that
25 although Defendant has shown “good cause” to modify the scheduling order under Rule
26 16, the Defendant’s motion to amend is nonetheless futile and prejudicial.

27 **A. Rule 16.**

28 When a party seeks to modify the schedule set by a case management order, that

1 party must show “good cause” to do so under Rule 16. Fed. R. Civ. P. 16(b)(4). Good
2 cause exists when a deadline “cannot reasonably be met despite the diligence of the party
3 seeking the extension.” Fed. R. Civ. P. 16 Advisory Comm.'s Notes (1983 Am.). “Rule
4 16(b)'s ‘good cause’ standard primarily considers the diligence of the party seeking the
5 amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992);
6 *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).

7 In this case, Defendant has shown the necessary diligence. Defendant did not
8 suspect Plaintiffs of fraud until a deposition of Plaintiff Marisa Sclafani on July 18, 2012.
9 Doc. 51 at 2. Afterwards, Defendant repeatedly requested that Plaintiffs produce
10 financial documents and contact information for Plaintiffs’ clients, all of which may have
11 been probative of fraud. Doc. 51 at 3, 4. Defendant did not receive these materials until
12 November 5, 2012, after this Court ordered production of the documents. Doc. 51 at 3.
13 One month later, Defendant filed its motion to amend. Doc. 42. While this motion
14 certainly comes late in the proceedings, Defendant has nonetheless been diligent in
15 pursuing its defense of fraud.

16 **B. Rule 15.**

17 If a party shows the Court good cause to modify the schedule, the Court must still
18 consider whether to grant leave to amend under Rule 15(a). *See Johnson*, 975 F.2d at
19 608. The Court may deny a motion to amend if there is a showing of undue delay or bad
20 faith on the part of the moving party, undue prejudice to the opposing party, or futility of
21 the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Since the Court
22 finds that the motion to amend is futile and prejudicial, the Court will not address issues
23 of undue delay, bad faith, and pleading fraud with particularity.

24 In deciding whether an amendment would be futile, courts have examined the
25 legal sufficiency of the proposed amendment. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d
26 209, 214 (9th Cir. 1988) (“A motion for leave to amend may be denied if it appears to be
27 futile or legally insufficient.”) (citation omitted); *see also Sound of Music Co. v.*
28 *Minnesota Min. & Mfg. Co.*, 477 F.3d 910, 923 (7th Cir. 2007) (finding that leave to

1 amend may be denied if court properly can determine that the claim would not survive
2 summary judgment). In this case, Defendant seeks to amend its answer to include the
3 affirmative defense of fraud. The proposed amendment states:

4 As and for a separate defense, and in the alternative, Defendant alleges that
5 Plaintiffs have committed concealment, misrepresentation, and/or fraud
6 concerning a claim under the applicable insurance policy which *voids* the policy.
7 During the presentation of the claim, Defendant alleges that Plaintiffs
8 misrepresented information regarding their claim including, but not limited to, the
9 value of the modeling portfolios and the identities of clients. These
10 misrepresentations *void* the policy.

11 Doc. 42-1 ¶ 74 (emphasis added). The thrust of this defense is that Defendant has no
12 duty to pay Plaintiffs' claims, because the insurance policy was voided when Plaintiffs
13 presented fraudulent claims.

14 Plaintiffs argue that Defendant's policy is not necessarily voided when an insured
15 presents fraudulent claims. Doc. 48 at 11. Quoting the relevant policy sections, Plaintiffs
16 show that Defendant *may* cancel the insured's policy if the insured presents a fraudulent
17 claim, but to do so Defendant must provide notice of cancellation sixty days before
18 cancellation. *Id.* at 10–11. Defendant does not allege that it gave any notice of
19 cancellation to Plaintiffs. Moreover, in its reply, Defendant does not seriously contest
20 Plaintiffs' assertions, nor does Defendant identify the policy provisions that void an
21 insured's policy merely upon the presentation of fraudulent claims.

22 Instead, Defendant argues that the amended answer need only give "fair notice" of
23 the affirmative defense to Plaintiffs, citing *Wyshak v. City Nat'l Bank*, 607 F.2d 824 (9th
24 Cir. 1979), as authority. Doc. 51 at 6. But the court in *Wyshak* found the "fair notice"
25 standard satisfied because, in addition to asserting a statute of limitations defense, the
26 defendant also indicated the specific statute that provided the relevant time limits.
27 *Wyshak*, 607 F.2d at 827. Here, Defendant has not identified a provision in its insurance
28 policy that immediately voids a fraudulent claim. Defendant in its reply also asserts that
there is a common law fraud defense that permits it to void a policy when an insured
presents a fraudulent claim. Doc. 51 at 6. But Defendant provides no support for this

1 assertion. Its citation to *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 93 P.3d 507 (Ariz.
2 2004), is inapposite as this case discussed the burden of proof for an insurer's *policy*
3 defense of concealment or misrepresentation. *Id.* at 512.

4 Therefore, Defendant's proposed defense is legally insufficient. Whatever effect
5 an insured's fraudulent claim may have, the policy does not provide for automatic
6 cancellation.

7 Moreover, by allowing Defendant to amend its answer, there would be a strong
8 possibility of prejudice to Plaintiffs. Plaintiffs would be unable to conduct further
9 discovery as to the fraud defense, because the deadline for the completion of fact
10 discovery (January 18, 2013) has already passed. Doc. 16 ¶ 4. While the prejudice to
11 Plaintiffs may not be great, as they are best situated to know whether they have presented
12 fraudulent claims, it is still significant. Defendant remains free to dispute whether
13 Plaintiffs have in fact incurred any losses and whether its policy would provide coverage
14 for those losses.

15 **IT IS ORDERED** that Defendant's motion for leave to file first amended answer
16 (Doc. 42) is **denied**.

17 Dated this 20th day of February, 2013.

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22 David G. Campbell
23 United States District Judge
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