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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Dean G Cameron,

10 Plaintiff,

11 v.

12 Avalon Mobility Incorporated, et al.,

13 Defendants.  
14

No. CV-15-00963-PHX-JAT

**ORDER**

15 Pending before the Court is Defendant's Motion to Amend Answer ("Motion to  
16 Amend," Doc. 62). The Court now rules on the motion.

17 **I. BACKGROUND**

18 On December 14, 2017, Defendant filed the pending Motion to Amend (Doc. 62).  
19 Plaintiff filed a timely Response (Doc. 64) on December 28, 2017. Defendant then filed a  
20 Reply (Doc. 65) on January 4, 2018.

21 On January 25, 2018, Defendant Avalon Mobility Incorporated filed a Notice  
22 (Doc. 68) that the company filed bankruptcy. On the same day, Defendant also provided  
23 notice that Defendant Scott Huffman is deceased. (Doc. 69). As per the Court's resulting  
24 Order (Doc. 70), the instant order will only apply to Defendant Brenda Huffman.

25 Defendant's Motion to Amend follows the Court's Order (Doc. 59) denying the  
26 parties' Cross-Motions for Summary Judgment issued on August 21, 2017. The Court  
27 went through the background facts of this case in its previous Order (Doc. 59), so it will  
28 not repeat them all here. (See Doc. 59 at 1-4). The Court will discuss other relevant facts

1 as necessary in the body of this Order.

2 In the pending motion, Defendant seeks to change several factual allegations  
3 within her Answer. (Doc. 62 at 3-4). Additionally, Defendant seeks to augment her  
4 affirmative defenses by referencing provisions under 29 C.F.R. § 541, which explain how  
5 the administrative and/or managerial exemption should be interpreted when an employee  
6 has multiple or related duties. (Doc. 62 at 3). Furthermore, Defendant seeks to add the  
7 Motor Carrier Exemption, as governed by 29 C.F.R. § 782, to her list of affirmative  
8 defenses. (Doc. 62 at 3). Although not clearly stated in her original motion, Defendant  
9 also seeks to amend her prayer for relief to include a request for attorney’s fees. (Doc. 62-  
10 1 at 4:25-26).

11 **II. MOTION TO AMEND**

12 Generally, Federal Rule of Civil Procedure (“Rule”) 15(a) governs a motion to  
13 amend pleadings to add claims or parties. However, Rule 16 also applies because  
14 Defendant filed her request to amend after the Rule 16 Scheduling Order deadline for  
15 amendments passed. With respect to the interplay between Rules 16 and 15(a), “[a]s the  
16 Ninth Circuit explained in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.  
17 1992), once the district court has filed a pretrial scheduling order pursuant to Rule 16  
18 which establishes a timetable for amending pleadings, a motion seeking to amend  
19 pleadings is governed first by Rule 16(b), and only secondarily by Rule 15(a).” *Jackson*  
20 *v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). “If [the court] considered only  
21 Rule 15(a) without regard to Rule 16(b), [it] would render scheduling orders meaningless  
22 and effectively would read Rule 16(b) and its good cause requirement out of the Federal  
23 Rules of Civil Procedure.” *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir.  
24 1998). Accordingly, the Court will evaluate Plaintiff’s motion first under Rule 16, and  
25 then, if necessary, under Rule 15(a).

26 **A. Rule 16**

27 **1. Legal Standard**

28 Under Rule 16, a scheduling order “may be modified only for good cause and

1 with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Under Rule 16, “good cause” means  
2 the scheduling deadlines cannot be met despite the party’s diligence. Johnson, 975 F.2d  
3 at 609 (citing 6A Wright, Miller & Kane, Federal Practice and Procedure § 1522.1 at  
4 231 (2d ed. 1990)). “The pretrial schedule may be modified if it cannot reasonably be met  
5 despite the diligence of the party seeking the extension. If the party seeking the  
6 modification was not diligent, the inquiry should end and the motion to modify should  
7 not be granted.” Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002)  
8 (internal quotation marks and citation omitted).

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

15 Morgal v. Maricopa County Bd. of Supervisors, 284 F.R.D. 452, 460 (D. Ariz. June 6,  
16 2012) (citations omitted).

## 17 2. Discussion

18 Defendant argues that she was diligent in seeking this amendment and thus  
19 satisfies the Rule 16 “good cause” standard. (Doc. 65 at 2-3). Defendant, however, did  
20 not file her motion to amend until sixteen months after the August 12, 2016 deadline set  
21 by the Court’s Rule 16 Scheduling Order. (See Doc. 34 at 2). Defendant further alleges  
22 that this delay was justified because Plaintiff did not reveal that his primary job  
23 responsibility was operating a forklift until March 10, 2017. (See Doc. 65 at 2). Even  
24 accepting this allegation as true, Defendant admits that she was on notice concerning  
25 Plaintiff’s primary job responsibilities for at least nine months prior to filing the instant  
26 motion to amend. While the Court understands that Defendant’s former counsel  
27 encountered a medical issue necessitating a change of counsel, obtaining new counsel  
28 cannot justify the sixteen month delay when Defendant concedes that she was on notice

1 of the issue since at least March 10, 2017. See *Yazzie v. Mohave Cty.*, 2015 WL 7567488,  
2 at \*7 (D. Ariz. Nov. 25, 2015) (citing *Johns v. Autonation USA Corp.*, 246 F.R.D. 608,  
3 610 (D. Ariz. 2006) (“denying a motion requesting an extension of time where only  
4 explanation for delay was substitution of counsel and new counsel waited four months to  
5 request extension”)); see also *Modus LLC v. Encore Legal Sols. Inc.*, 2014 WL 1493000,  
6 at \*4 (D. Ariz. Apr. 16, 2014) (denying an untimely motion to amend where the moving  
7 party argued that delay was due to the retention of new counsel, but failed to  
8 appropriately address the “months that passed” prior to the retention of new counsel).

9 Moreover, as the Plaintiff’s former employer, Defendant failed to explain why she  
10 did not have access to information concerning Plaintiff’s job responsibilities from the  
11 start of litigation. Because Defendant was in the position to classify her employees as  
12 exempt or non-exempt, it stands to reason that she would have access to information  
13 relating to Plaintiff’s job responsibilities necessary to make such a determination.  
14 Nevertheless, even if Defendant was unable to obtain this information outside of the  
15 formal discovery process, Defendant was put on notice that Plaintiff used a forklift  
16 through Plaintiff’s deposition on August 9, 2016. (See Doc. 46-2 at 10).

17 Additionally, Defendant relies upon Plaintiff’s First Supplemental Disclosure  
18 Statement (Doc. 65-1)—submitted on the last day of discovery, March 10, 2017—to  
19 support her argument that Plaintiff did not previously claim his primary responsibilities  
20 included manual labor or the operation of a forklift. (See Doc. 65 at 2). Plaintiff,  
21 however, did describe his duties on August 3, 2016 in his responses to interrogatories as  
22 follows:

23 Plaintiff was responsible for opening the warehouse, loading  
24 and unloading trucks in the warehouse, cleaning out trucks  
25 and crates, preparing crates to be reused, cleaning paint off of  
26 crates, repainting information on the crates, and writing up  
tags for items documenting any scratches or dents on the  
items.

27 (Doc. 65-2 at 4) (emphasis added). Although Plaintiff did not use the precise term  
28 “manual labor,” loading and unloading trucks clearly falls within that category of

1 activities. *Id.*; see, e.g., *Bargas v. Rite Aid Corp.*, 245 F. Supp. 3d 1191, 1205 (C.D. Cal.  
2 2017) (“manual labor, such as stocking shelves, cleaning, unloading the truck”);  
3 *Hamilton v. Genesis Logistics, Inc.*, CV 13-01848 DDP VBKX, 2013 WL 3168373, at \*1  
4 (C.D. Cal. June 20, 2013) (“manual labor, such as moving inventory, loading trucks”).  
5 Consequently Defendant had actual or constructive knowledge that Plaintiff both  
6 performed manual labor (Doc. 65-2 at 4) and that he used a forklift (Doc 46-2 at 10) prior  
7 to the August 12, 2016 deadline to amend. Accordingly, the Court finds that Defendant  
8 failed to demonstrate the requisite diligence and thus does not satisfied the “good cause”  
9 requirement of Rule 16 to amend her affirmative defenses within her Answer at such a  
10 late stage in the proceedings.

11 Furthermore, Defendant seeks to change several factual allegations within her  
12 Answer and also seeks to amend her prayer for relief to include a request for attorney’s  
13 fees. (Doc. 65). Defendant offer little to no explanation as to why she failed to amend  
14 these components of her Answer during the time period set forth by the Scheduling  
15 Order. Accordingly, with respect to these additional requests, Defendant likewise fails to  
16 meet the “good cause” requirement of Rule 16. See *Tickin v. Carole Fabrics*, 2007 WL  
17 38330, at \*1 (D. Ariz. Jan. 5, 2007) (“[A] court may deny a motion to modify a  
18 scheduling order where the moving party fails to demonstrate diligence in complying  
19 with the order and fails to show good cause for the modification.”).

### 20 **B. Rule 15**

21 Defendant failed to demonstrate the diligence necessary to meet Rule 16’s “good  
22 cause” requirement, therefore, the Court declines to exercise its discretion to modify the  
23 Rule 16 Scheduling Order and an analysis under Rule 15(a) is unnecessary. See, e.g.,  
24 *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (holding that the Court  
25 need not evaluate Rule 15(a) unless the movant first meets the “good cause” requirement  
26 of Rule 16). Accordingly, Defendant’s Motion to Amend (Doc. 62) is denied.

### 27 **III. PLAINTIFF’S REQUEST FOR ATTORNEY’S FEES**

28 In Plaintiff’s Response (Doc. 64), Plaintiff asks the Court to award reasonable

1 attorney's fees for responding to Defendant's Motion to Amend. (Doc. 64 at 7-8).<sup>1</sup>

2 **A. Legal Standard**

3 "A court may also apply fee sanctions against attorneys or parties who engage in  
4 frivolous or vexatious litigation pursuant to 28 U.S.C. § 1927 or Federal Rule of Civil  
5 Procedure 11." *Sternberger v. Gilleland*, CV-13-02370-PHX-JAT, 2014 WL 3809064, at  
6 \*11 (D. Ariz. Aug. 1, 2014) (citing 28 U.S.C. § 1927; Fed. R. Civ. P. 11(b)-(c)). "Awards  
7 of attorney[']s fees under 28 U.S.C. § 1927 are not frequently made." *Wight v. Achieve*  
8 *Human Servs., Inc.*, 2:12-CV-1170 JWS, 2012 WL 4359078 (D. Ariz. Sept. 21, 2012).  
9 Section 1927 sanctions "must be supported by a finding of subjective bad faith." *New*  
10 *Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is  
11 present when an attorney knowingly or recklessly raises a frivolous argument, or argues a  
12 meritorious claim for the purposes of harassing an opponent." *Estate of Blas v. Winkler*,  
13 792 F.2d 858, 860 (9th Cir. 1986). In the Ninth Circuit, "section [1927] authorizes  
14 sanctions only for the 'multipl[ication of] proceedings,' it applies only to unnecessary  
15 filings and tactics once a lawsuit has begun." *In re Keegan Mgmt. Co., Sec. Litig.*, 78  
16 F.3d 431, 435 (9th Cir. 1996).

17 **B. Analysis**

18 Here, while the Court observes that Defendant's motion was brought long after the  
19 Scheduling Order deadline, Plaintiff does not sufficiently allege evidence of bad faith in  
20 his request for attorney's fees. See *New Alaska Dev. Corp.*, 869 F.2d at 1306.<sup>2</sup>

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21  
22 <sup>1</sup> Although Plaintiff does not specify the specific grounds by which he believes he  
23 is entitled to attorney's fees, the Court will construe the request under 28 U.S.C. § 1927  
24 because Plaintiff argues that Defendant's motion was brought in "bad faith." (Doc. 64 at  
25 5, 7); see also *Frye v. Pena*, No. CIV. 97-10 TUC RMB, 1997 WL 659817, at \*3 (D.  
26 Ariz. Oct. 2, 1997), *aff'd*, 199 F.3d 1332 (9th Cir. 1999) (holding that a court may award  
27 fee-shifting sanctions under § 1927 upon a finding that a motion was filed in bad faith).

28 <sup>2</sup> When this Court issued its Summary Judgment Order (Doc. 59), the Court found  
that because Defendant did not assert the Motor Carrier Exemption as an affirmative  
defense in her Answer, she was precluded from doing so at the summary judgement  
stage. In filing her Motion to Amend, it appears that Defendant was trying to cure the  
omission that prohibited her from arguing the Motor Carrier Exemption in her Motion for  
Summary Judgment (Doc. 47), and in turn prohibits her from arguing the affirmative  
defense at trial. Although unsuccessful, the Court does not find that such an attempt is the  
product of bad faith without additional evidence of evil intent.

1 Accordingly, Plaintiff's request for attorney's fees for responding to Defendant's Motion  
2 to Amend is denied.

3 **IV. CONCLUSION**

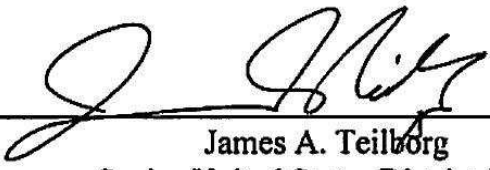
4 For the reasons set forth above,

5 **IT IS ORDERED** that Defendant's Motion to Amend (Doc. 62) is **DENIED**. The  
6 Clerk of Court shall not enter judgment at this time.

7 **IT IS FURTHER ORDERED** that Plaintiff's Request for Attorney's Fees (Doc.  
8 64) is also **DENIED**.

9 Dated this 5th day of February, 2018.

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James A. Teilborg  
Senior United States District Judge