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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 MiCamp Solutions LLC,

10 Plaintiff,

11 v.

12 National Processing LLC,

13 Defendant.
14

No. CV-19-05468-PHX-MTL

ORDER

15 Before the Court is Plaintiff's Motion for Leave to File Second Amended
16 Complaint. (Doc. 86.) Plaintiff MiCamp Solutions LLC ("Plaintiff" or "MiCamp") moves
17 to amend the First Amended Complaint to add two new defendants under an alter ego
18 theory of liability. Defendant National Processing LLC ("Defendant" or "National
19 Processing") opposes the motion. For the following reasons, the motion is denied.

20 **I.**

21 Plaintiff filed its Complaint in Arizona Superior Court on July 26, 2019. (Doc. 1-3
22 at 5.) Plaintiff then filed the First Amended Complaint, also in state court, on October 23,
23 2019. (Doc. 1-3 at 10.) It asserts claims for breach of contract, breach of the covenant of
24 good faith and fair dealing, and for a declaratory judgment.¹ (*Id.* at 12–15.) Defendant
25 removed the case to this Court on October 22, 2019. (Doc. 1.) The Scheduling Order in
26 this case set the deadline to move to amend pleadings as January 31, 2020. (Doc. 20 at 1.)

27 ¹ Defendant has also filed counterclaims against Plaintiff for breach of contract, breach of
28 the covenant of good faith and fair dealing, tortious interference with prospective business
relations, violations of the Lanham Act, and unfair competition. (Doc. 21.) These
counterclaims are not directly relevant for purposes of the present motion.

1 Plaintiff filed the present motion on January 8, 2021. (Doc. 86.) The Court heard oral
2 argument on January 26, 2021.² (Doc. 99.)

3 **II.**

4 The motion states that Plaintiff seeks to amend the Complaint pursuant to Rule 15(a)
5 of the Federal Rules of Civil Procedure. (Doc. 86 at 1.) Rule 15(a)(2) provides that “[t]he
6 court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2).
7 As Defendant argues, however, because Plaintiff moves to amend after the deadline, the
8 present motion is governed by Rule 16(b), not 15(a). (Doc. 95 at 4.)

9 Rule 16(b)(3)(A) requires a district court to include a deadline for amending
10 pleadings in its scheduling order. Fed. R. Civ. P. 16(b)(3)(A) (“The scheduling order must
11 limit the time to join other parties, amend the pleadings, complete discovery, and file
12 motions.”). “Normally, attempts to amend complaints before the Federal Rule of Civil
13 Procedure 16 scheduling order’s deadline are addressed under Rule 15.” *AZ Holding,*
14 *L.L.C. v. Frederick*, No. CV-08-0276-PHX-LOA, 2009 WL 3063314, at *3 (D. Ariz. Sept.
15 22, 2009). But when “an amendment would require an extension of the scheduling order
16 deadlines, Rule 16’s good-cause standard is considered first.” *Id.* See also *Johnson v.*
17 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (A “party seeking to amend
18 [a] pleading after [the] date specified in scheduling order must first show ‘good cause’ for
19 amendment under Rule 16(b), then, if ‘good cause’ be shown, the party must demonstrate
20 that amendment was proper under Rule 15.”) (citation omitted). Plaintiff does not dispute
21 that it filed the present motion after the amendment deadline. (Doc. 86 at 4.)

22 The Court first addresses, as a threshold matter, whether Plaintiff’s failure to bring
23 a motion to modify the Scheduling Order is fatal. Plaintiff’s motion does not cite Rule 16.
24 (Doc. 86 at 4.) Defendant’s counsel emphasized at oral argument that this “procedural”
25 shortcoming was sufficient reason to deny the motion. The Ninth Circuit Court of Appeals
26 has indicated that district courts *may* deny untimely motions to amend on this basis. See
27 *Johnson*, 975 F.2d 608–09. Nonetheless, multiple courts have construed untimely motions

28 ² The Court also addressed Defendant’s Motion for Extension of Discovery (Doc. 99) and
a joint discovery dispute (Docs. 91, 92), both of which were resolved at the hearing.

1 to amend as motions to modify the scheduling order. *See, e.g., Jacobs Silver K Farm, Inc.*
2 *v. Taylor Produce, LLC*, No. 4:13-CV-00535-EJL-CWD, 2015 WL 12839162, at *4 (D.
3 Idaho Sept. 3, 2015) (“The Court therefore construes [plaintiff’s] motion to amend its
4 complaint as including also a motion to amend the deadline within which to file an
5 amended complaint.”); *Williams v. Perdue*, No. C19-0444-JCC, 2020 WL 5893408, at *1
6 (W.D. Wash. Oct. 5, 2020) (“[T]he Court concludes that it may construe a party’s untimely
7 motion for leave to amend as a motion to modify the scheduling order, and it does so
8 here.”). The Court will construe the present motion as containing a motion to amend the
9 Scheduling Order, and will not deny it on this basis.

10 III.

11 The Court next addresses the merits of the motion. As noted, Plaintiff must
12 demonstrate “good cause” to modify the Scheduling Order. Fed. R. Civ. P. 16(b)(4). This
13 District “consistently upholds the good-cause standard regarding amending pleadings after
14 the scheduling order’s amendment deadline has expired.” *Reg’l Care Servs. v. Companion*
15 *Life Ins. Co.*, No. CV-10-2597-PHX-LOA, 2012 WL 1018937, at *4 (D. Ariz. Mar. 26,
16 2012). Under this standard, “the focus of the inquiry is upon the moving party’s reasons
17 for seeking modification.” *Johnson*, 975 F.2d at 609. Courts specifically focus on the
18 “diligence of the party seeking the amendment.” *Id.*

19 Plaintiff seeks to add Wayne Hamilton and his wife, Kenzi Hamilton, as new
20 defendants and the alter egos of National Processing.³ (Doc. 86 at 1.) Plaintiff asserts that
21 it learned of the need to amend the Complaint at the December 11, 2020 deposition of
22 Defendant’s former Director of Finance, Jill Putnam. (*Id.* at 2; Doc. 86-1 at 10.) Ms.
23 Putnam stated that in her role, she was responsible for “any and all accounting and financial
24 responsibilities,” including Mr. Hamilton’s personal finances. (Doc. 86-1 at 11.) She also
25 stated that Mr. Hamilton received distributions from Defendant “whenever he wanted one,”
26 and that he deposited money from his own personal account into Defendant’s “as needed.”
27 (*Id.* at 13, 14.) Plaintiff relies on this and other testimony to assert that the Hamiltons are

28 ³ The Hamiltons are the two members of Defendant, a limited liability company. (Docs.
86-1 at 5; 95 at 8.)

1 liable as Defendant’s alter egos.

2 Plaintiff filed the present motion on January 8, 2021—nearly one year after the
3 amendment deadline, and, at the time, the same day as the discovery deadline.⁴ Plaintiff
4 states that its proposed amendments “could not have reasonably been pled” prior to Ms.
5 Putnam’s deposition. (Doc. 86 at 4.) Plaintiff previously “had no reason” to believe that
6 the Hamiltons used Defendant’s “assets for their own benefit and that they regularly
7 intermingled their personal funds with the company’s funds.” (Doc. 86 at 4.) Plaintiff also
8 states that it “simply could not have complied with its Rule 11 obligations” any time prior
9 to Ms. Putman’s deposition. (*Id.*)

10 As noted, the primary consideration in the Rule 16 good cause analysis is the
11 “diligence of the party seeking the amendment.” *Johnson*, 975 F.2d at 609. The Court finds
12 that Plaintiff has not demonstrated diligence in seeking amendment. Plaintiff’s motion, for
13 example, does not reference the fact that it deposed Mr. Hamilton on July 15, 2020—five
14 months before Ms. Putnam’s deposition. (Doc. 62.) Plaintiff does not indicate whether
15 similar questions were asked of Mr. Hamilton. Defendant, in fact, states in its response that
16 Plaintiff did not “ask him *any* questions about these topics.”⁵ (Doc. 95 at 5) (emphasis in
17 original). Plaintiff also does not state whether it attempted to uncover these alleged facts
18 through written discovery.

19 Further, as compared with the nearly one-year delay in this case, courts have found
20 a lack of good cause for motions filed *on* the amendment deadline or shortly thereafter.
21 *See, e.g., Barker v. Hertz Corp.*, No. CV07-554PHX-MHM, 2007 WL 4410253, at *4 (D.
22 Ariz. Dec. 13, 2007) (denying motion to amend complaint filed on the Rule 16 amendment
23 deadline where “Plaintiff has not shown good cause and offers no valid basis on which to
24 extend the Rule 16 scheduling deadlines”); *Brooks v. Eclipse Recreational Vehicles, Inc.*,
25 No. CV-08-1731-PHX-LOA, 2009 WL 1616017, at *3 (D. Ariz. June 9, 2009) (denying

26 _____
27 ⁴ At the January 26, 2021 hearing, the Court extended the discovery deadline to March 26,
2021. (Doc 99.)

28 ⁵ Plaintiff’s reply indicates that it “would not have learned about alter ego liability even if
it had asked [Mr. Hamilton] about it at his deposition.” (Doc. 96 at 2.) This assumed futility
is not sufficient to demonstrate diligence, however.

1 motion to amend complaint filed 11 days after amendment deadline for failure to show
2 good cause); *Villa v. Brass Eagle, LLC*, No. CV-06-0870-PHX-FJM, 2007 WL 446349, at
3 *1 (D. Ariz. Feb. 7, 2007) (denying unopposed motion to amend filed three months after
4 amendment deadline).

5 That Plaintiff filed the motion nearly one month after Ms. Putnam’s deposition also
6 does not indicate diligence. *See Schwerdt v. Int’l Fidelity Ins. Co.*, 28 F. App’x 715, 719
7 (9th Cir. 2002) (a one-month delay in filing after learning facts from a witness’s deposition
8 did not constitute diligence under Rule 16). Plaintiff asserts that after Ms. Putnam’s
9 deposition, it “immediately” raised the prospect of alter ego liability with Defendant’s
10 counsel, and “offered” Defendant “the opportunity” to produce documentation
11 demonstrating that Ms. Putnam’s testimony was inaccurate. (Doc. 96 at 3.) Plaintiff states
12 that Defendant “initially indicated it would consider MiCamp’s proposal” but ultimately
13 “withdrew from good faith compromise discussions.” (*Id.*) Plaintiff then filed the present
14 motion within 48 hours. (*Id.*) The Court finds that “neither good cause nor reliance that
15 was *justified* exists” to permit late amendment in these circumstances. *Brooks*, 2009 WL
16 1616017, at *3 (emphasis in original).

17 Pleadings “cannot be a continuously moving target for obvious reasons.” *Reg’l Care*
18 *Servs.*, 2012 WL 1018937, at *5 (citation omitted). The amendment deadline “serves to
19 frame the issues at a fixed point in time so that the parties have an adequate opportunity to
20 prepare their respective positions moving forward.” *Id.* Plaintiff had many months to move
21 to amend its Complaint, at a time in which all parties would have been amply able to
22 prepare their respective positions and actively litigate this case. But by waiting until the
23 close of discovery, and nearly one year after the amendment deadline, Plaintiff has not
24 demonstrated the diligence required under Rule 16’s good cause standard.

25 IV.

26 Further, although it is a secondary concern under Rule 16, “the existence or degree
27 of prejudice” to the party opposing amendment may supply additional reasons to deny the
28 motion. *Johnson*, 975 F.2d at 609. Plaintiff states that the Hamiltons’ addition to this case

1 “would not require any additional discovery, would not require them to hire separate
2 counsel, and would not require any delays in the resolution of this case.” (Doc. 86 at 6.)
3 These are not Plaintiff’s decision to make, however, and the Court would almost certainly
4 permit new defendants to hire counsel of their choosing, to conduct discovery, and to
5 prepare dispositive motions. Even with such accommodations, this case has been pending
6 for over a year and a half, and the dispositive motion deadline is quickly approaching.⁶ *See*
7 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (“A
8 need to reopen discovery and therefore delay the proceedings supports a district court’s
9 finding of prejudice from a delayed motion to amend the complaint.”) (citation omitted).
10 This prejudice, “although not required under Rule 16(b), supplies an additional reason for
11 denying the motion.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).

12 Because the Court concludes that Plaintiff was not diligent in seeking leave to
13 amend, and because amendment would be prejudicial, Plaintiff has not met Rule 16’s good
14 cause requirement to amend the Scheduling Order. The Court therefore does not assess
15 whether leave is appropriate under Rule 15. *See Zivkovic v. Southern California Edison,*
16 *Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (“If the party seeking the modification was not
17 diligent, the inquiry should end and the motion to modify should not be granted.”) (internal
18 quotations omitted).

19 V.

20 Accordingly,

21 **IT IS ORDERED denying** Plaintiff’s Motion for Leave to File Second Amended
22 Complaint. (Doc. 86.)

23 Dated this 28th day of January, 2021.

24 

25 Michael T. Liburdi
26 United States District Judge

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28 ⁶ At the January 26, 2021 hearing, the Court extended the dispositive motion deadline to
April 23, 2021. (Doc. 99.)