

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J-M MANUFACTURING, INC.,

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,
et al.,

Defendants.

Case No.: 2:19-cv-05550-MEMF (SKx)

**ORDER DENYING MOTION FOR LEAVE
TO AMEND AND/OR SUPPLEMENT
ANSWER [ECF NO. 192]**

Before the Court is the Motion for Leave to Amend and/or Supplement Answer filed by Defendant Affiliated FM Insurance Company. ECF No. 192. For the reasons stated herein, the Court hereby DENIES the Motion for Leave to Amend and/or Supplement Answer.

I. Background

A. Factual Background

Plaintiff J-M Manufacturing, Inc. (“JM Eagle”) manufactures high grade, high performance plastic pipes. JM Eagle took out an “all risk” property insurance policy with Defendant Affiliated FM Insurance Company (“AFM”) for the period from November 1, 2016, to November 1, 2017 (the

1 “Policy”). This dispute concerns whether or not the Policy covers losses suffered by JM Eagle in
2 August 2017 due to damage caused by Hurricane Harvey.

3 **B. Procedural History**

4 On May 28, 2019, JM Eagle filed this action in the Superior Court of California, County of
5 Los Angeles, alleging claims for breach of contract, tortious breach of the implied covenant of good
6 faith and fair dealing, and declaratory relief. ECF No. 1-1 (“Initial Complaint” or “Initial Compl.”)
7 at 3. On June 26, 2019, AFM removed the action to federal court. ECF No. 1. On January 15, 2021,
8 Judge Holcomb issued a Civil Trial Scheduling Order stating:

9 There is no separate deadline for the parties to amend their pleadings or to add parties.
10 Parties who wish to amend pleadings or to add parties shall comply with Rule 15(a)
11 and, if applicable, Rule 16(b)(4) of the Federal Rules of Civil Procedure, as well as L.R.
12 15-1 through L.R. 15-3 and L.R. 16-14.

13 ECF No. 33 (“January 2021 CTO”). Although the January 2021 CTO was revised numerous times,
14 the deadline for parties to amend their pleadings or add parties remained unchanged. *See* ECF No. 95
15 (“August 2021 CTO”); ECF No. 171 (“August 2022 CTO”); ECF No. 186 (“December 2022 CTO”).

16 On January 22, 2021, the parties filed Cross-Motions for Partial Summary Judgment. ECF
17 Nos. 34, 37. On July 6, 2021, the Court issued an Order granting partial summary judgment. ECF
18 No. 87 (“MSJ Order”) at 12, 15. On August 26, 2021, JM Eagle filed a First Amended Complaint.
19 ECF No. 96 (“FAC”). The FAC alleged the same facts with respect to JM Eagle’s bad faith claim.

20 On October 15, 2021, JM Eagle filed a Motion for Reconsideration on the Court’s MSJ
21 Order. ECF No. 99 (“Reconsideration Mot.”). On February 9, 2022, the Court issued an order
22 granting JM Eagle’s Motion for Reconsideration. ECF No. 105 (“Reconsideration Order”).

23 The next day, pursuant to an Order of the Chief Judge, the case was reassigned to this Court. ECF
24 No. 106.

25 On February 25, 2022, JM Eagle filed a Second Amended Complaint. ECF No. 110
26 (“SAC”).

27 On March 12, 2022, AFM filed a Motion to Strike the SAC. However, before the Court
28 issued an order on the Motion to Strike, the parties filed a Joint Stipulation regarding JM Eagle’s
Bad Faith Claim, which they later amended on July 7, 2022. ECF No. 144 (“Amended Bad Faith

1 Stipulation” or “Amend. Bad Faith Stip.”). On September 12, 2022, the Court granted the Amended
2 Bad Faith Stipulation, ordering:

- 3 1. JM Eagle’s **bad faith claim and related prayer for punitive damages** consists of
4 allegations concerning (1) the **reasonableness of AFM’s initial and continued**
5 **reliance on the opinions of its forensic accounting expert Conrad Biegel of**
6 **Matson Driscoll & Damico set forth in his report dated May 4, 2021, and any**
7 **subsequent opinions, with respect to JM Eagle’s claimed business interruption**
8 **losses arising from property damage at its Wharton, Texas, facility; and (2) the**
9 **reasonableness of AFM’s investigation, handling, and adjustment of JM**
10 **Eagle’s claimed supply chain losses, including as set forth in the adjuster’s**
11 **letter dated May 18, 2021. All other allegations of bad faith, including**
12 **allegations based on AFM’s application of the policy term “occurrence,”**
13 **remain dismissed.**
- 14 2. AFM’s **Motion for Summary Judgment** (ECF No. 34) with respect to the
15 Wharton Bad Faith Claim and any associated punitive damages—which Judge
16 Holcomb granted in his MSJ Order—is hereby **withdrawn**.
- 17 3. AFM’s pending **Motion to Strike** (ECF No. 114) is hereby **withdrawn**.

18 ECF No. 172 (“Amended Bad Faith Stipulation Order” or “Amend. Bad Faith Stip. Order”)
19 (emphasis added).

20 On March 12, 2022, AFM filed the operative Answer to the SAC. ECF No. 115 (“Answer”).

21 On December 14, 2022, JM Eagle filed Motions in Limine, particularly one seeking to
22 exclude evidence and argument regarding AFM’s fraud and misrepresentation affirmative defense.
23 ECF No. 181 (“JME MIL 1”). On January 19, 2023, AFM filed the instant Motion for Leave to
24 Amend and/or Supplement its Answer. ECF No. 192; 193 (“Mot.” or “Motion”). The Motion was
25 fully briefed on February 16, 2023. ECF Nos. 196 (“Opp’n”), 197 (“Reply”). The Court deemed this
26 matter appropriate for resolution without oral argument and took the Motion under submission. *See*
27 ECF No. 201.

28 AFM’s Proposed Amended Answer adds, in relevant part, new factual allegations regarding
AFM’s fraud and misrepresentation affirmative defense. ECF No. 194-2 (“Proposed Amended
Answer”). In particular, the Proposed Amended Answer includes the following new allegations:

Misrepresentation regarding maintenance of financial records

Chuck Clark, JM Eagle’s Vice President of Production, made the following
representation in his Declaration in Support of JM Eagle’s Motion for Summary
Judgment:

1 JM Eagle recognizes company-wide profits and losses as a company
2 headquartered in Los Angeles and does not have subsidiary entities located at
3 manufacturing facilities. Accordingly, JM Eagle does not maintain separate financial
4 records on a plant-by-plant or location-by-location basis. All financial records are
5 maintained on a company-wide basis.

6 Decl. of Chuck Clark, ¶ 10 [ECF No. 138-8, at Page ID #4760-61].

7 This representation was knowingly false. JM Eagle previously represented that
8 it had monthly income statements for its individual plants from 2015 through 2018 and,
9 in fact, had produced those monthly income statements by plant. In addition, JM Eagle
10 admitted in a letter to AFM that its “January 11 claim submission details JM Eagle’s
11 losses by plant, which allows Affiliated FM to segregate . . . JM Eagle’s Supply Chain
12 losses suffered at its other plants.” Furthermore, JM Eagle’s damages expert measured
13 the Supply Chain loss by allocating the claimed loss to 18 different JM Eagle
14 production facilities.

15 JM Eagle’s misrepresentation that it does not maintain separate financial
16 records on a plant-by-plant or location-by-location basis and that financial records are
17 maintained on a company-wide basis was material in that it was made after the Court’s
18 summary judgment ruling in an attempt to apply the \$2.5 million sub-limit (and not the
19 \$2 million Business Interruption sub-limit for all non-headquarters locations as found
20 by the Court) to its Supply Chain claim.

21 **Misrepresentation regarding “wind” as cause of damage**

22 JM Eagle represented in its First and Second Amended Complaints and in its
23 Second Amended and Supplemental Proof of Loss signed under penalty of perjury that
24 all physical damage sustained at the Wharton facility from August 25 through August
25 27, 2017, and all Business Interruption losses arising out of that damage, were not
26 caused by “Wind” as defined in the AFM Policy.

27 This representation was knowingly false. At a May 23, 2019 meeting between
28 AFM and JM Eagle and their counsel at JM Eagle’s headquarters, JM Eagle’s counsel
represented that:

- a. Most of the damage that has been claimed by JM Eagle was caused
by wind-driven rain and not by flood; and
- b. AFM should initiate the valuation process in order to calculate the
wind deductible for a potential forthcoming wind claim.

In its Complaint filed on May 28, 2019—nearly two years after Hurricane
Harvey—JM Eagle admitted that:

All physical damage sustained at the Wharton facility from August 25 through
August 27, 2017, and all Business Interruption losses arising out of that damage, were
caused by “Wind” as defined in the Policy . . .

(Compl., ¶ 29(c) [ECF No. 1-1, at Page ID # 13].) (Ex. 260)

1 Similarly, in its original Proof of Loss for the Wharton facility, signed under
2 penalty of perjury and prepared on October 7, 2019 and its Amended Proof of Loss
3 signed under penalty of perjury and dated September 28, 2020, JM Eagle represented
4 that “tornadic rain and wind” caused the nonflood damage at the Wharton facility.

5 JM Eagle’s misrepresentation that all physical damage sustained at the Wharton
6 facility from August 25 through August 27, 2017, and all Business Interruption losses
7 arising out of that damage, were not caused by "Wind" as defined in the AFM Policy
8 was material in that it was made after the Court’s summary judgment ruling in an
9 attempt to avoid application of the “Wind and Hail” deductible as found by the Court.

10 Proposed Amended Answer at 13–15.

11 **II. Applicable Law**

12 Under Federal Rule of Civil Procedure 15(a), a party seeking to amend an Answer may do so
13 once “as a matter of course” within 21 days after serving it. FED. R. CIV. P. 15(a)(1)(A). A party
14 seeking to amend an Answer more than 21 days after serving it “may amend its pleading only with
15 the opposing party’s written consent or the court’s leave. The court should freely give leave when
16 justice so requires.” FED. R. CIV. P. 15(a)(2).

17 Once the district court has issued a CTO establishing the schedule of discovery, pretrial, and
18 trial dates, Federal Rule of Civil Procedure 16 governs the standards for amending pleadings.
19 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). Rule 16 provides in
20 relevant part:

- 21 (b) [The district court] . . . shall, after consulting with the attorneys for the parties and
22 any unrepresented parties, by a scheduling conference, . . . enter a scheduling order that
23 limits the time
24 (1) to join other parties and to amend the pleadings;
25 (2) to file and hear motions; and
26 (3) to complete discovery.

27 . . .
28 The order shall issue as soon as practicable but in no event more than 120 days after
filing of the complaint. A schedule shall not be modified except by leave of ... [the
district court] upon a showing of good cause.¹

¹ The Court notes that orders entered before the final pretrial conference may be modified upon a showing of
“good cause,” FED. R. CIV. P. 16(b), but orders “following a final pretrial conference shall be modified only
to prevent manifest injustice.” FED. R. CIV. P. 16(e). Because the final pretrial conference has not yet
occurred, the Court considers this motion under the “good cause” standard.

1 FED. R. CIV. P. 16. Under Rule 16, a district court may find “good cause” to amend the CTO “if [the
2 CTO deadline] cannot reasonably be met despite the diligence of the party seeking the extension.”
3 *Johnson*, 975 F.2d at 609 (quoting FED. R. CIV. P. 16 advisory committee’s notes (1983
4 amendment)). “If the party seeking the modification ‘was not diligent, the inquiry should end’ and
5 the motion to modify should not be granted.” *Zivkovic v. Southern California Edison Co.*, 302 F.3d
6 1080, 1087 (9th Cir. 2002) (quoting *Johnson*, 975 F.2d at 609). Moreover, Courts have held that
7 carelessness may not be cited as a reason for modification and is not a basis upon which relief may
8 be granted. *See, e.g., Johnson*, 975 F.2d at 609 (collecting cases).

9 Because a motion for amending the CTO and amending a complaint may appear similar at
10 first glance, courts have explicitly differentiated the evaluation of “good cause” under Rule 16 from
11 the evaluation of the propriety of amendment under Federal Rules of Civil Procedure Rule 15. *Id.* at
12 609. “Unlike Rule 15(a)’s liberal amendment policy, which focuses on the bad faith of the party
13 seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good
14 cause’ standard primarily considers the diligence of the party seeking the amendment.” *Id.*

15 **III. Discussion**

16 Here, AFM requests permission to amend and/or supplement its Answer on the grounds that
17 there has been no undue delay, there is no bad faith, amendment would not be futile, JM Eagle
18 would not be prejudiced, no additional discovery is needed, and this is AFM’s first requested
19 amendment. Mot. at 11–17. JM Eagle opposes the Motion, no “good cause” exists for AFM’s failure
20 to diligently seek leave to amend, AFM unduly delayed in amending its answer, AFM’s delayed
21 amendment would prejudice JM Eagle, and the proposed amendments would be futile. Opp’n at 4–7.

22 Before the Court may grant leave for AFM to amend or supplement its Answer, the Court
23 must first determine whether AFM has demonstrated “good cause” to justify modifying the CTO—
24 and, more specifically, the deadline to amend pleadings. Under the operative CTO and Federal Rule
25 of Civil Procedure 15(a), the deadline for AFM to amend their pleadings or add parties without leave
26 of the Court expired on March 4, 2022 (the first business day after the 21-day deadline lapsed). *See*
27 January 2021 CTO (“Parties who wish to amend pleadings or to add parties shall comply with Rule
28 15(a) . . .”). Although the parties previously submitted joint stipulations regarding the various

1 claims and the CTO was modified multiple times, the parties have never stipulated to or otherwise
2 indicated the need for a continuance of the deadline to amend the pleadings. In determining whether
3 “good cause” exists to modify the deadline to amend the pleadings, the Court must determine
4 whether AFM made diligent attempts to amend the CTO.

5 AFM contends that “its affirmative defense is properly pled and no amendment is necessary,”
6 but that “in an abundance of caution,” it seeks leave to amend and supplement its Answer to resolve
7 issues raised in JME MIL 1. Mot. at 4. AFM asserts that the proposed amendments set forth detail
8 regarding (1) “JM Eagle’s misrepresentation regarding the financial records maintained by JM
9 Eagle, based on a declaration filed in June 2022” and (2) “JM Eagle’s misrepresentation regarding
10 ‘wind’ as the cause of damage.” *Id.* It further notes that “[i]t was only after the Court issued several
11 summary judgment rulings in AFM’s favor in July 2021 that JM Eagle changed course and adopted
12 its current position regarding cause of damage at the JM Eagle Wharton facility. *Id.* at 4–9.

13 AFM contends that it acted diligently, as it requested to leave to amend on January 19, 2023,
14 after JM Eagle raised an objection to AFM’s existing defense on December 14, 2022. Mot. at 10.

15 The Court finds that, by AFM’s own admission, the facts forming the basis for the new
16 allegations was available to AFM as early as July 2021 (for the second alleged misrepresentation
17 regarding cause of damage) and June 2022 (for the first alleged misrepresentation regarding the
18 financial records maintained by JM Eagle). In July 2021, the Court issued a summary judgment
19 ruling holding that the “Wind and Hail” deductible of over \$2 million would apply to JM Eagle’s
20 non-flood losses at the Wharton facility, which AFM alleges led JM Eagle to represent—allegedly
21 falsely—that its non-flood damages and losses at the Wharton facility were caused by “vertical rain”
22 and not solely “wind.” Mot. at 6. Moreover, in June 2022, an officer of JM Eagle represented that
23 “JM Eagle does not maintain separate financial records on a plant-by-plant or location-by-location
24 basis.” *Id.* Given that months have passed since AFM became privy to the information necessary for
25 its amendment, AFM’s failure to file a Motion to Amend the CTO or for Leave to Amend or
26 Supplement Answer over the past year and a half indicates a lack of diligence.

1 For purposes of this motion, it is of no moment that JM Eagle only first raised potential
2 deficiencies in AFM’s answer in December 2022.² AFM does not assert that it ever identified these
3 misrepresentations as the basis of this affirmative defense prior to December 2022. And AFM does
4 not point to anything that would have put JM Eagle on notice—prior to December 2022—that AFM
5 would seek to use these facts to support this defense.

6 Although AFM asserts that delay alone is not sufficient grounds to deny leave to amend, its
7 analysis and the cases cited in support of its assertion are concerned primarily with FED. R. CIV. P.’s
8 standards for determining when to grant leave to amend pleadings—not whether to grant leave to
9 amend the CTO. *See, e.g., Howey v. United States*, 481 F.2d 1187, 1190–91 (9th Cir. 1973) (holding
10 that it is abuse of discretion to *deny leave to amend pleadings* based on delay alone); *DCD*
11 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (“[D]elay, by itself, is insufficient to justify denial of
12 leave to amend [a pleading].”); *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) (“[D]elay
13 alone no matter how lengthy is an insufficient ground for denial of leave to amend [pleadings].”);
14 *Inteliclear, LLC v. ETC Glob. Holdings, Inc.*, 2021 WL 2370617, at * 4 (C.D. Cal. Feb. 2, 2021)
15 (“As the Court has already determined a lack of prejudice, it declines to deny leave to amend [the
16 complaint] solely because of delay.”). Indeed, the primary question when considering a request for
17 leave to amend the CTO is whether good cause exists to do so and, in particular, whether the
18 requesting party was diligent in seeking amendment. *Johnson*, 975 F.2d at 609; *Zivkovic*, 302 F.3d at
19 1087.

20 In light of the foregoing reasons, the Court concludes that AFM has failed to demonstrate
21 good cause to justify a modification of the CTO. *See* FED. R. CIV. P. 16(b). Accordingly, the Court
22 DECLINES to amend the CTO.

23 Because the Court has declined to amend the CTO, the Court need not consider AFM’s
24 Motion for Leave to Amend/Supplement the Answer. Because AFM’s “ability to amend his
25

26 ² Even assuming that AFM did not become aware of the potential deficiencies in its Answer until December
27 14, 2022, its actions still indicate a lack of diligence. The instant Motion was not filed until January 19,
28 2023—over a month since JM Eagle filed its Motion in Limine 1 and nearly a month after the Court
continued the pending Final Pretrial Conference to April 16, 2023. Yet, AFM made no effort in that period to
seek Leave to Amend the CTO or the Answer.

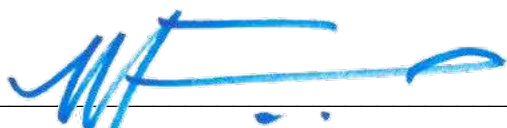
1 complaint [is] governed by Rule 16(b)” and it has not demonstrated “good cause,” the CTO will not
2 be amended. *Johnson*, 975 F.2d at 608. Since the CTO’s deadline to file amended pleadings remains
3 in place, the Motion for Leave to Amend/Supplement the Answer is therefore DENIED as untimely.
4 *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985)
5 (concluding that because the parties never modified the CTO before the deadline had passed, the
6 district court properly denied the motion to amend as untimely).

7 **IV. Conclusion**

8 For the foregoing reasons, the Court hereby ORDERS that the Motion for Leave to
9 Amend/Supplement the Answer (ECF No. 192) is DENIED.

10
11 IT IS SO ORDERED.

12
13 Dated: February 27, 2022

14 
15 MAAME EWUSI-MENSAH FRIMPONG
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28