

1 On October 12, 2016, Plaintiff filed a Third Amended Complaint, which Defendant
2 moved to strike on October 31, 2016, on several grounds. (ECF Nos. 27-28.) On
3 November 16, 2016, the Third Amended Complaint was stricken because Plaintiff did not
4 seek leave of Court or obtain Defendant's consent before filing the pleading. See Fed. R.
5 Civ. P. 15(a); E.D. Cal. Local Rules 137(c) and 220; Sapiro v. Encompass Inc., 221
6 F.R.D. 513, 517 (N.D. Cal. 2004).

7 On November 17, 2016, Plaintiff re-filed the Third Amended Complaint with an
8 accompanying motion for leave to amend. (ECF No. 31.) Defendant opposed the motion
9 on December 12, 2016, and also moved to modify the DSO. (ECF Nos. 33, 34.)

10 By Order dated January 15, 2017, Plaintiff's motion to amend and Defendant's
11 motion to modify the DSO were both denied. (ECF No. 35.)

12 On February 27, 2017, Plaintiff filed a motion for summary judgment. (ECF No.
13 38.) In response, Defendant now moves again for an order re-opening discovery and
14 continuing the dispositive motion deadline. (ECF No. 41.) Plaintiff opposes this motion.

15 **II. Discussion**

16 Defendant's December 12, 2016, motion to modify the DSO was based on Dr.
17 Yu's claim that he needed additional time to conduct discovery pending resolution of
18 Plaintiff's motion to amend. Defendant claimed that motion to amend rendered "the
19 scope of discovery ... unknown." Def.'s First Mot. Modify DSO at 3 (ECF No. 34).
20 Defense counsel was concerned that Plaintiff's new pleading might bring in new
21 defendants who counsel would need to represent. But there was no claim that Plaintiff's
22 motion to amend rendered the scope of discovery against Dr. Yu, the moving party,
23 unknown. Indeed, as noted in the Order denying both Plaintiff's motion to amend and
24 Defendant's motion to modify, Plaintiff's claim against Dr. Yu remained unchanged from
25 the operative pleading to the proposed Third Amended Complaint. In each, Plaintiff
26 accused Defendant of exhibiting deliberate indifference in the performance of Dr. Yu's
27 duties in May and June 2012. Since Dr. Yu had not shown good cause for his failure to
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1 conduct any discovery during the preceding eight months on the single, unchanged
2 claim directed against him, Defendant's motion was denied.

3 In Defendant's renewed request to modify the DSO, he argues that he requires
4 the discovery of facts to oppose Plaintiff's pending summary judgment motion.
5 Specifically, Dr. Yu claims that he needs to obtain Plaintiff's medical records and
6 deposition testimony to dispute material facts set forth in Plaintiff's moving papers.
7 Defendant sought this information for the first time on December 9, 2016, when he
8 served on Plaintiff a notice of deposition and request for production of documents.
9 Plaintiff's deposition was scheduled for December 19, 2016, the last day of the discovery
10 period. Defendant then canceled Plaintiff's deposition on December 16, 2016 (one week
11 after the service of the deposition notice and three days before the discovery deadline).
12 He again claims this was necessary given the uncertainty surrounding the parties and
13 claims in this action.

14 Defendant's motion is brought pursuant to Federal Rules of Civil Procedure 16(b)
15 and 56(d). Under Rule 16, a discovery and scheduling order controls the course of
16 litigation unless the Court subsequently alters the original order. Fed R. Civ. P. 16(d).
17 Modification of a scheduling order requires a showing of good cause, Fed. R. Civ. P.
18 16(b)(4), and good cause requires a showing of due diligence, Johnson v. Mammoth
19 Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish good cause, the party
20 seeking the modification of a scheduling order must generally show that even with the
21 exercise of due diligence, they cannot meet the requirement of that order. Id. If the party
22 seeking to amend the scheduling order fails to show due diligence the inquiry should end
23 and the court should not grant the motion to modify. Zivkovic v. Southern California
24 Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002).

25 "Good cause may be found to exist where the moving party shows that it
26 diligently assisted the court with creating a workable scheduling order, that it is unable to
27 comply with the scheduling order's deadlines due to matters that could not have
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1 reasonably be foreseen at the time of the issuance of the scheduling order, and that it
2 was diligent in seeking an amendment once it became apparent that the party could not
3 comply with the scheduling order.” Kuschner Nationwide Credit, Inc., 256 F.R.D. 684,
4 687 (E.D. Cal. 2009).

5 “Rule 56(d) ‘provides a device for litigants to avoid summary judgment when they
6 have not had sufficient time to develop affirmative evidence.’” Atigeo LLC v. Offshore
7 Ltd., 2014 WL 1494062, at *3 (W.D. Wash. Apr. 16, 2014) (quoting United States v.
8 Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002)). Federal Rule of Civil
9 Procedure 56(d) provides, “[i]f a nonmovant shows by affidavit or declaration that, for
10 specified reasons, it cannot present facts essential to justify its opposition, the court
11 may” defer considering the motion, deny the motion, allow time to obtain affidavits or
12 declarations to take discovery, or “issue any other appropriate order.” Fed. R. Civ. P.
13 56(d). Rule 56(d) requires the nonmovant to show “(1) it has set forth in affidavit form
14 specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3)
15 the sought-after facts are essential to oppose summary judgment.” Family Home & Fin.
16 Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008) (holding
17 that the district court did not abuse its discretion in denying a continuance where the
18 facts sought through further discovery were only “generically relevant” and the
19 nonmoving party failed to show how the evidence was “essential” to oppose summary
20 judgment). The party requesting a continuance must explain how the specific facts that it
21 seeks would preclude summary judgment. Tatum v. City & Cty. of S.F., 441 F.3d 1090,
22 1100-01 (9th Cir. 2006) (citing California v. Campbell, 138 F.3d 772, 779 (9th Cir.
23 1998)).¹ The Ninth Circuit's general rule is that “[a] continuance of a motion for summary
24 judgment for purposes of discovery should be granted almost as a matter of course
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26 ¹ On December 1, 2010, Federal Rule of Civil Procedure 56(f) was renumbered and is now Federal Rule of Civil
27 Procedure 56(d). The advisory committee's notes to Rule 56 regarding the 2010 amendments state that
28 “[s]ubdivision (d) carries forward without substantial change the provisions of former subdivision (f).” Fed. R. Civ. P.
56 advisory committee's notes. Thus, the cited authorities that refer to Rule 56(f) provide guidance on matters
related to the current Rule 56(d). Id.

1 unless the non-moving party has not diligently pursued discovery of the evidence.”
2 Atigeo, 2014 WL 1494062, at *3.

3 Defendant’s motion, whether analyzed under Rule 16(b) or Rule 56(d), fails
4 because it does not explain why Defendant did not conduct any discovery in the eight
5 months since the DSO issued before moving to modify it three days before the discovery
6 period was set to expire. Even if the Court had granted Plaintiff’s motion to amend, the
7 Third Amended Complaint would have had no bearing on the single, pre-existing claim
8 asserted against Dr. Yu.

9 Defense counsel also fails to explain why he served a notice of deposition and
10 request for production of documents within two weeks of the discovery deadline when
11 the DSO clearly provided “discovery requests and deposition notices must be served
12 sufficiently in advance of the discovery deadline to permit time for a response and time
13 to prepare and file a motion to compel.” DSO ¶ 7.

14 Defense counsel has now moved twice for an extension of time to conduct
15 discovery based not on the needs of his current client, Dr. Yu, but on concerns related to
16 potential, but ultimately non-existent, clients. This is inappropriate. Since the Court
17 concludes again that Defendant did not diligently pursue discovery during the eight-
18 month long discovery period, his motion will again be denied.

19 **III. Conclusion**

20 Accordingly, IT IS HEREBY ORDERED that Defendant’s March 3, 2017, request
21 (ECF No. 41) is DENIED.

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23 IT IS SO ORDERED.

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25 Dated: March 23, 2017

/s/ Michael J. Seng
26 UNITED STATES MAGISTRATE JUDGE