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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JAN RICHMOND,) Case No.: 1:14-cv-00184 JLT
)
Plaintiff,) ORDER GRANTING DEFENDANTS' MOTION
) TO MODIFY THE SCHEDULING ORDER AND
v.) FILE A SECOND AMENDED ANSWER
)
MISSION BANK, et al.,) (Doc. 22)
)
Defendants.)
)

Mission Bank seeks a modification of the Court's scheduling order and leave to file a second amended answer to raise the affirmative defenses related to Plaintiff's failure to mitigate her damages and the doctrine of avoidable consequences. (Doc. 22) Plaintiff opposes the motion by arguing that Mission failed to act diligently to meet the deadline for filing amended pleadings set forth in the scheduling order. (Doc. 23) Because the Court finds Defendants demonstrate good cause for amending the scheduling order and Plaintiff fails to demonstrate substantial prejudice, Defendants' motion to amend is **GRANTED**.¹

I. Relevant Procedural History

Plaintiff initiated this action by filing a complaint against Mission Bank on February 10, 2014. (Doc. 1.) In the complaint, Plaintiff alleges that once Mission's new president took office in April

¹ The Court finds that the matter suitable for decision without a hearing on the matter (L.R. 230(g)) so the hearing , set on December 2, 2014, is **VCACATED**.

1 2011, she began suffering age discrimination. Id. at 2. Over time, Plaintiff contends she was removed
2 from her private office and forced to use a cubicle. Id. Plaintiff's hours were cut and she was excluded
3 from a seminar though every other Vice President was allowed to attend. Id. at 3. Plaintiff's duties
4 were reduced over time such that by 2013, she was performing only administrative duties for the board
5 of directors. Id. During this same time period, Mission hired a younger person who took over
6 Plaintiff's old duties, was given a bonus though only Vice Presidents were entitled to bonuses and the
7 younger person was given a private office. Id. at 2-3.

8 Plaintiff met with the new president and complained that she was suffering age discrimination.
9 (Doc. 1 at 3) In response, the president sent Plaintiff home and later contacted Plaintiff and told her not
10 to return to work. Id. at 3. Plaintiff construed this as a termination. Id. at 3-4. Instead, the president
11 instructed her to attend a meeting to discuss a severance offer. Id. at 4.

12 Defendants filed their answer on March 24, 2014. (Doc. 5) On May 15, 2014, the Court
13 granted Plaintiff's motion to strike defenses which were not pleaded properly but granted leave to
14 amend which included, in particular, affirmative defenses which were not supported by adequate
15 factual allegations. (Doc. 12) On June 5, 2014, Defendant filed its first amended answer. (Doc. 13)
16 In the amended answer, Defendant reserved the right to amend the answer to add affirmative defenses
17 once they "became known and/or available to Defendant." (Doc. 13 at 11)

18 On July 9, 2014, the Court issued the scheduling order. (Doc. 17) The order required that
19 motions to amend pleadings or stipulations to amend pleadings be filed no later than September 1,
20 2014. Id. at 2. This was the deadline proposed by the parties, though neither side anticipated any
21 amendments at the time the date was proposed. (Doc. 14 at 3)

22 On November 4, 2014, Defendants filed the motion now pending before the Court, seeking to
23 modify the scheduling order to allow the filing of the second amended answer which includes
24 affirmative defenses that include the claims that Plaintiff failed to mitigate her losses and failed to take
25 reasonable steps to avoid her damages for front pay. The proposed amendments read,

26 **NINTH AFFIRMATIVE DEFENSE**

(Failure to Mitigate Damages)

27 Plaintiff has failed to mitigate her damages. Defendant alleges that there were
28 suitable positions available to Plaintiff and Plaintiff failed to use reasonable care and
diligence to seek out those positions. Plaintiff's efforts of speaking to representatives
from Rabobank and Valley Republic Bank, searching ads online and in the newspaper,

1 and registering online with Cal Jobs is unreasonable in light of Plaintiffs circumstances.
2 Accordingly, any damages to which Plaintiff is entitled should be proportionately
reduced.

3 **TENTH AFFIRMATIVE DEFENSE**

(Avoidable Consequences)

4 Plaintiff's damages for front pay, if any, could have been reasonably avoided if
5 Plaintiff had used reasonable diligence to find comparable employment and accepted
6 such employment pending the outcome of this litigation. Plaintiffs efforts of speaking
7 to representatives from Rabobank and Valley Republic Bank, searching ads online and
in the newspaper, and registering online with Cal Jobs is unreasonable in light of
Plaintiffs circumstances. Accordingly, any damages to which she is entitled should be
proportionately reduced.

8 (Doc. 22-1 at 39)

9 Plaintiff opposes this motion and argues that Defendant has failed to demonstrate it acted
10 diligently to meet the pleading amendment deadline. (Doc. 24) First, Plaintiff argues that the fact that
11 the motion was not made before the deadline expired demonstrates a lack of diligence. *Id.* at 2.
12 Second, Plaintiff argues that Defendant should have sought a later pleading amendment deadline or
13 propounded discovery earlier so that the results could be known sooner and the pleading amendment
14 deadline met. *Id.* at 2-3. Third, Plaintiff argues that the amendments should not be permitted because
15 the proposed complaint, as currently worded, is subject to a motion to strike for failure to state
16 sufficient factual allegations to support it. *Id.* at 4-5. Finally, Plaintiff argues that she would be
17 prejudiced if the amendment is allowed because she would be precluded from conducting discovery as
18 to the new defenses because of the imminent discovery cutoff.

19 **II. Legal Standards**

20 **A. Scheduling Orders**

21 Districts courts must enter scheduling orders in actions to “limit the time to join other parties,
22 amend the pleadings, complete discovery, and file motions.” Fed. R. Civ. P. 16(b)(3). In addition,
23 scheduling orders may “modify the timing of disclosures” and “modify the extent of discovery.” *Id.*
24 Once entered by the court, a scheduling order “controls the course of the action unless the court
25 modifies it.” Fed. R. Civ. P. 16(d). Scheduling orders are intended to alleviate case management
26 problems. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992). As such, a
27 scheduling order is “the heart of case management.” Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3rd
28 Cir. 1986).

1 Further, scheduling orders are “not a frivolous piece of paper, idly entered, which can be
2 cavalierly disregarded by counsel without peril.” Johnson, 975 F.2d at 610 (quoting Gestetner Corp. v.
3 Case Equip. Co., 108 F.R.D. 138, 141 (D. Maine 1985)). Good cause must be shown for modification
4 of the scheduling order. Fed. R. Civ. P. 16(b)(4). The Ninth Circuit explained:

5 Rule 16(b)’s “good cause” standard primarily considers the diligence of the party
6 seeking the amendment. The district court may modify the pretrial schedule if it cannot
7 reasonably be met despite the diligence of the party seeking the extension. Moreover,
8 carelessness is not compatible with a finding of diligence and offers no reason for a
9 grant of relief. Although existence of a degree of prejudice to the party opposing the
10 modification might supply additional reasons to deny a motion, the focus of the inquiry
11 is upon the moving party’s reasons for modification. If that party was not diligent, the
12 inquiry should end.

13 Johnson, 975 F.2d at 609 (internal quotation marks and citations omitted). Therefore, parties must
14 “diligently attempt to adhere to the schedule throughout the course of the litigation.” Jackson v.
15 Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999). The party requesting modification of a
16 scheduling order has the burden to demonstrate:

17 (1) that she was diligent in assisting the Court in creating a workable Rule 16 order, (2)
18 that her noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding
19 her efforts to comply, because of the development of matters which could not have been
20 reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference, and
21 (3) that she was diligent in seeking amendment of the Rule 16 order, once it become
22 apparent that she could not comply with the order.

23 Id. at 608 (internal citations omitted).

24 **B. Pleading Amendments**

25 Under Fed. R. Civ. P. 15(a), a party may amend a pleading once as a matter of course within 21
26 days of service, or if the pleading is one to which a response is required, 21 days after service of a
27 motion under Rule 12(b), (e), or (f). “In all other cases, a party may amend its pleading only with the
28 opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Because Plaintiff does
not consent to the filing an amended answer, Defendants seeks the leave of the Court.

Granting or denying leave to amend a complaint is in the discretion of the Court, Swanson v.
United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996), though leave should be “freely give[n]
when justice so requires.” Fed. R. Civ. P. 15(a)(2). “In exercising this discretion, a court must be
guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the

1 pleadings or technicalities.” United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). Consequently,
2 the policy to grant leave to amend is applied with extreme liberality. Id.

3 There is no abuse of discretion “in denying a motion to amend where the movant presents no
4 new facts but only new theories and provides no satisfactory explanation for his failure to fully develop
5 his contentions originally.” Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995); see also Allen v. City
6 of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990). After a defendant files an answer, leave to amend
7 should not be granted where “amendment would cause prejudice to the opposing party, is sought in bad
8 faith, is futile, or creates undue delay.” Madeja v. Olympic Packers, 310 F.3d 628, 636 (9th Cir. 2002)
9 (citing Yakama Indian Nation v. Washington Dep’t of Revenue, 176 F.3d 1241, 1246 (9th Cir. 1999)).

10 **III. Discussion and Analysis**

11 **A. Defendants’ Diligence**

12 The Scheduling Order set forth a pleading amendment deadline of September 1, 2014. (Doc. 17
13 at 2). The current motion was not filed until November 4, 2014. (Doc. 22.) Thus, Defendant is required
14 to demonstrate good cause under Rule 16 for filing an amended pleading out-of-time. See Coleman v.
15 Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000) (explaining the question of whether the liberal
16 amendment standard of Rule 15(a) or the good cause standard of Rule 16(b) applies to a motion for
17 leave to amend a complaint depends on whether a deadline set in a Rule 16(b) scheduling order has
18 expired). Accordingly, the Court examines Defendant’s diligence to determine whether amendment of
19 the scheduling order is proper.

20 Defendant asserts that it propounded written discovery related to Plaintiff’s efforts to obtain
21 replacement employment on August 15, 2014. (Doc. 22 at 4) This was approximately one month
22 after initial disclosures were exchanged. (Doc. 17 at 2) Responses were due on September 19 but
23 Defendant granted Plaintiff’s request for an extension of time so the responses were due on October 3,
24 2014. (Doc. 22 at 4).

25 After the responses were due, Defendant met and conferred with Plaintiff’s counsel because it
26 was unclear whether all documents had been produced related to her efforts to obtain replacement
27 employment. (Doc. 22-1 at 18-19) Defendant’s counsel sent a written statement via e-mail setting
28 forth the claimed deficiencies on October 9, 2014. Again, on October 21, 2014, counsel e-mailed

1 because Plaintiff had not responded to the earlier letter. *Id.* at 22. The next day, Plaintiff's attorney
2 responded and verified that Plaintiff had no further documents to produce related to her re-
3 employment efforts. *Id.* at 25. Defendant contends that only after this correspondence did it realize
4 the propriety of the amendments and did it have factual support for them.

5 Plaintiff argues that given the short deadline for amending the pleadings, Defendant was
6 obligated to propound discovery immediately in order to have responses in sufficient time to evaluate
7 whether an amendment was needed or should have sought a later pleading amendment deadline.
8 However, the Court finds that the minimal delay between the service of the Rule 26 disclosures and
9 the date on which written discovery was propounded was not significant. Likewise, the failure of
10 Defendant to be in a position to seek the amendment was due, at least in small part, to Plaintiff's need
11 for an extension of time to respond to the discovery. Likewise, though Defendant was entitled to
12 presume that the single document provided related to Plaintiff's job search was all that existed, it was
13 not unreasonable for Defendant to think that there were additional documents. It was not unreasonable
14 to think Plaintiff had in her possession copies of cover letters and resumes fashioned for prospective
15 employees and the like would have been produced. Moreover, the failure to have such documents
16 appears to have cemented Defendant's belief that the proposed affirmative defenses should be alleged.
17 Given this, the Court finds good cause to amend the scheduling order to allow the motion to amend the
18 answer.

19 **B. Leave to Amend the Answer**

20 Because the Court concludes Defendant demonstrated diligence, the Court must also determine
21 whether amendment of the Answer is proper under Rule 15. Evaluating a motion to amend, the Court
22 may consider (1) whether the party has previously amended the pleading, (2) undue delay, (3) bad faith,
23 (4) futility of amendment, and (5) prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182
24 (1962); *Loehr v. Ventura County Comm. College Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984). These
25 factors are not of equal weight as prejudice to the opposing party has long been held to be the most
26 critical factor to determine whether to grant leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*,
27 316 F.3d 1048, 1052 (9th Cir. 2003); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

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1 1. Prior amendments

2 The Court’s discretion to deny an amendment is “particularly broad” where a party has
3 previously amended the pleading. Allen, 911 F.2d at 373. Here, the amendment sought is the first
4 requested by Defendants. Though Defendant was permitted leave to file an amended answer, this was
5 in response to Plaintiff’s motion to strike and leave was given to amend only as to the defenses that
6 lacked adequate factual allegations. (Doc. 12 at 11) Therefore, this factor does not weigh against
7 amendment.

8 2. Undue delay

9 By itself, undue delay is insufficient to prevent the Court from granting leave to amend
10 pleadings. Howey v. United States, 481 F.2d 1187, 1191(9th Cir. 1973); DCD Programs v. Leighton,
11 833 F.2d 183, 186 (9th Cir. 1986). However, in combination with other factors, delay may be
12 sufficient to deny amendment. See Hurn v. Ret. Fund Trust of Plumbing, 648 F.2d 1252, 1254 (9th Cir.
13 1981). Evaluating undue delay, the Court considers “whether the moving party knew or should have
14 known the facts and theories raised by the amendment in the original pleading.” Jackson, 902 F.2d at
15 1387; see also Eminence Capital, 316 F.3d at 1052. Also, the Court should examine whether
16 “permitting an amendment would . . . produce an undue delay in the litigation.” Id. at 1387.

17 Here, Defendants have sought to amend their answer only after having conducted discovery to
18 allow them to gather a factual basis for the new affirmative defenses. As noted above, the discovery
19 which provided this factual information was propounded soon after discovery began and this motion
20 was filed soon after that discovery was completed. Thus, the Court finds there was no undue delay
21 such that this factor does not weigh against amendment.

22 3. Bad faith

23 There is no evidence before the Court suggesting Defendants acted in bad faith in seeking
24 amendment. Therefore, this factor does not weigh against amendment.

25 4. Futility of amendment

26 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” Bonin,
27 59 F.3d at 845; see also Miller v. Rykoff-Sexton, 845 F.2d 209, 214 (9th Cir. 1988) (“A motion for
28 leave to amend may be denied if it appears to be futile or legally insufficient”). “Futility is analyzed

1 under the same standard of legal sufficiency as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). In
2 other words, leave to amend should not be denied based on futility unless the proposed amended
3 complaint would ‘fail to state a claim upon which relief can be granted.’” SmithKline Beecham Corp.
4 v. Geneva Pharms., Inc., 287 F.Supp.2d 576, 581 (E.D. Pa. 2002). Likewise, a motion for leave to
5 amend is futile if it is undisputed that the amendment cannot impose or avoid liability. Gabrielson v.
6 Montgomery Ward & Co., 785 F.2d 762, 766 (9th Cir. 1986).

7 Plaintiff argues, in essence, that the amendment is futile because it fails to provide sufficient
8 factual support. Namely, Plaintiff asserts that the affirmative defenses should set forth the legally
9 suitable substitute positions that were available.² (Doc. 24 at 5-6) The Court disagrees.

10 First, it appears that the evidentiary support for the specific jobs that were available will be
11 provided via expert testimony. Though Defendant is obligated to allege factual support for its
12 affirmative defenses, it is not required to divulge the content of its communication with its retained
13 expert or risk having the defense barred. Likewise, the Court does not find that Defendant was required
14 to allege that its retained vocational expert has informed it that jobs existed in order for the affirmative
15 defenses to be adequately pleaded.

16 Second, though a defendant must provide a factual basis for an affirmative defense, the answer
17 must demonstrate only a plausible basis for the defense such that “boilerplate listing[s] of affirmative
18 defenses” may be weeded out. Dion v. Fulton Friedman & Gullace LLP, 2012 WL 160221, at *2 (N.D.
19 Cal. Jan. 17, 2012). Thus, for the affirmative defenses to be sufficient, Defendant was not required to
20 detail the jobs that it contends were available to Plaintiff in its answer; this is an issue for discovery. Id.
21 The answer must only provide “enough supporting facts to nudge” it from possible to plausible. Id.
22 Here, there are sufficient facts alleged to make clear that the new defenses are not mere boilerplate and
23 provides notice that Defendant will attempt to prove that Plaintiff’s re-employment efforts were
24 inadequate. Thus, this factor does not weigh against granting Defendants leave to file an amended
25 answer.

26
27 ² Plaintiff argues also, seemingly, that Defendant violated Rule 11 because it retained a vocational expert after counsel
28 discussed whether Plaintiff would stipulate to the amendment. Even if true, and the evidence does not make this clear, the
obligation under Rule 11 is that there be a factual basis for the pleading’s contentions when it is presented to the Court.
There is no question that this has occurred.

1 5. Prejudice to the opposing party

2 The most critical factor in determining whether to grant leave to amend is prejudice to the
3 opposing party. Eminence Capital, 316 F.3d at 1052. The burden of showing prejudice is on the party
4 opposing an amendment to the complaint. DCD Programs, 833 F.2d at 187; Beeck v. Aquaslide ‘N’
5 Dive Corp., 562 F.2d 537, 540 (9th Cir. 1977). Prejudice must be substantial to justify denial of leave
6 to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

7 Plaintiff asserts that she would suffer substantial prejudice because the imminent discovery
8 deadline makes it impossible for her to conduct any non-expert discovery on the topic. However,
9 expert discovery has not yet begun and this prejudice may be cured by allowing Plaintiff to propound
10 discovery, both expert and non-expert, during the remaining discovery period as to the affirmative
11 defenses. Moreover, though Plaintiff expresses her concern about having to retain an expert to address
12 the affirmative defenses, she is not obligated to do so unless she believes a rebuttal expert is necessary
13 after reviewing—and deposing—Defendant’s expert. The extended period already set forth in the
14 schedule for expert discovery allows plenty of time for this effort. As a result, this factor does not
15 weigh against granting Defendants leave to amend.

16 **IV. Conclusion and Order**

17 Defendant demonstrates good cause to modify the Scheduling Order, and satisfies the
18 requirements of Rules 15 of the Federal Rules of Civil Procedure as to the proposed amended answer.
19 Accordingly, the Court exercises its discretion to permit Defendants to file the proposed second
20 amended answer. See Swanson, 87 at 343; Fed. R. Civ. P. 15(a)(2).

21 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 22 1. Defendants’ motion for modification of the Court’s Scheduling Order and for leave to
23 file the amended answer is **GRANTED**;
- 24 2. Defendants **SHALL** file the second amended answer no later than **December 4, 2014**;

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3. Plaintiff SHALL complete non-expert discovery as to the newly added affirmative defenses no later than March 6, 2015. No other amendments to the case schedule are authorized.

IT IS SO ORDERED.

Dated: November 26, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE