

1 would need to be amended, both to permit them to amend their answer and to allow further
2 pretrial motion practice. *See, e.g., Seattle Pac. Indus., Inc. v. S3 Holding LLC*, 831 F. App'x 814,
3 816 (9th Cir. 2020) (unpublished); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608
4 (9th Cir. 1992).

5 A pretrial scheduling order may be modified if a party, despite its diligence, cannot
6 reasonably be expected to meet that order's deadlines. *Johnson*, 975 F.2d at 609. When litigants
7 request changes to the scheduling order, the court's inquiry focuses on their attempts to comply;
8 they must demonstrate their "diligence." *See, e.g., id.* at 609; *Jackson v. Laureate, Inc.*, 186
9 F.R.D. 605, 607–08 (E.D. Cal. 1999). Motions are more often granted when the opposing party's
10 actions caused delay or when the need to amend arises from some unexpected or outside source.
11 *See, e.g., Hood v. Hartford Life and Acc. Ins. Co.*, 567 F. Supp. 2d 1221, 1225–26 (E.D. Cal.
12 2008). The defendants here do not attribute their need for an amendment to an outside cause;
13 they cite a likely oversight by their previously assigned attorneys. *See Ex Parte App.* at 5–6. The
14 court cannot conclude on this record that the defendants were diligent in pursuing their proposed
15 administrative exhaustion defense. *See, e.g., Johnson v. Merck & Co.*, No. 20-00138, 2022 WL
16 229860, at *3 (E.D. Cal. Jan. 26, 2022) (denying motion to amend scheduling order to correct
17 alleged errors by previously assigned counsel); *Fed. Deposit Ins. Corp. v. Ching*, No. 13-1710,
18 2016 WL 1756913, at *3 (E.D. Cal. May 3, 2016) (denying motion to amend scheduling order
19 based on claims of "confusion" about "the effect of the court's previous orders").

20 The court acknowledges defense counsel's efforts to meet and confer soon after they came
21 to the conclusion that they had not asserted a potentially viable defense, to then quickly seek
22 relief, and to explain the reasons behind their request clearly and candidly. That action, however,
23 has come too late. Mr. McMillan filed his original complaint almost a decade ago. The court
24 recently appointed counsel to represent him at trial and held a final pretrial conference. *See Am.*
25 *Mins.*, ECF No. 174. A trial will begin in about two months. *See Min. Order*, ECF No. 175.
26 That trial date could be postponed at the defendants' request "only to prevent manifest injustice."
27 Fed. R. Civ. P. 16(e). Rather than preventing manifest injustice, adding a new affirmative
28 defense to the case now would likely cause manifest injustice to Mr. McMillan.

1 The ex parte application (ECF No. 178) is **denied**.

2 IT IS SO ORDERED.

3 DATED: March 11, 2022.



CHIEF UNITED STATES DISTRICT JUDGE