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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR
BUTTE COMMUNITY BANK,

Plaintiff,

v.

ROBERT CHING, et al.,

Defendant.

No. 2:13-cv-01710-KJM-EFB

ORDER

The defendants, several former officers and directors of Butte Community Bank (the Bank), move to amend their answer to the complaint. The plaintiff, the Federal Deposit Insurance Corporation (FDIC), acting as receiver for the Bank, opposes the motion. After reviewing the parties' briefing, the court found the matter appropriate to resolve without a hearing. The motion is denied.

I. BACKGROUND

The FDIC claims the defendant directors transferred several million dollars from the Bank to its corporate parent, and then to themselves. *See generally* Compl., ECF No. 1. These payments allegedly triggered the Bank's failure. *See id.* ¶¶ 2, 69. The FDIC's complaint was filed in this court in August 2013. It alleged four claims: negligence, gross negligence under

1 12 U.S.C. § 1821(k), gross negligence under California Corporations Code section 309, and
2 breach of fiduciary duties. *See generally id.* The directors answered and asserted several
3 affirmative defenses: failure to state a claim, estoppel, waiver, laches, unclean hands, the statute
4 of limitations, accord and satisfaction, release, failure to mitigate damages, the FDIC's lack of
5 legal capacity, contributory or comparative negligence, offset, preemption, supervening
6 causation, unjust enrichment, the business judgment rule, and compliance with all requirements
7 the law imposes. Answer 9–11, ECF No. 7.

8 The court held a status (pretrial scheduling) conference in January 2014. Minutes,
9 ECF No. 12. In February 2014, the court issued a scheduling order, which provided that all
10 discovery was to be completed by January 12, 2015, ECF No. 13; this date was later extended to
11 September 11, 2015 by the parties' stipulation, *see* Minute Order, ECF Nos. 42, 74, and in
12 October of last year, the court granted the FDIC's *ex parte* application for a limited extension of
13 the discovery deadline, Order Oct. 2, 2015, ECF No. 105. The scheduling order provided that no
14 amendments to the pleadings were anticipated and that amendments would not be permitted
15 except with the court's permission after a showing of good cause. *See* Sched. Order at 2 (citing
16 Fed. R. Civ. P. 16(b) and *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992)).

17 Soon after the scheduling order was issued, the directors moved for summary
18 judgment, arguing in broad strokes that the FDIC's claims were preempted by statute. ECF
19 No. 19. The court granted summary judgment on two of the FDIC's claims—common law
20 negligence and breach of fiduciary duties—finding these claims were preempted by California
21 Corporations Code section 309, which had essentially codified the FDIC's preexisting common
22 law claims. ECF No. 40. The directors again moved for summary judgment in February 2015,
23 arguing as in their previous motion that the FDIC could not pursue its claims in light of a more
24 specific statutory regime. ECF No. 45. This motion was denied, ECF No. 86, as was the
25 directors' motion for reconsideration, ECF No. 117.

26 In February of this year, the FDIC moved for summary judgment on all of the
27 directors' affirmative defenses but one, under the business judgment rule. ECF No. 124. That
28 motion was briefed, argued, and submitted by late February 2016. Minutes, ECF No. 135. It

1 remains pending with an order to issue soon. A final pretrial conference is set for May 18, 2016,
2 and a jury trial currently scheduled for June 20, 2016.

3 The directors' current motion for leave to amend their answer was filed on March
4 25, 2016. ECF No. 135. They request leave to add one additional affirmative defense: "The
5 FDIC-R's claims are barred on the grounds, and to the extent, that the Articles of Incorporation of
6 Butte Community Bank eliminate or limit the liability of the Defendants for monetary damages."
7 See Mot. Am. Answer Ex. 1, at 11, ECF No. 135. The FDIC opposed the motion, ECF No. 137,
8 and the directors replied, ECF No. 138.

9 II. LEGAL STANDARD

10 As an initial matter, the directors' motion can only be considered if the scheduling
11 order is first modified. See Status (Pretrial Scheduling) Order 2, ECF No. 13 ("No further joinder
12 of parties or amendments to the pleadings is permitted without leave of court, good cause having
13 been shown." (citing *Johnson*, 975 F.2d at 609)). The court disagrees with the directors that the
14 word "pleadings" excludes their answer. See, e.g., Fed. R. Civ. P. 7(a)(2) ("Only these pleadings
15 are allowed: . . . an answer to a complaint . . ."); Black's Law Dictionary 1270 (9th ed. 2009)
16 ("In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's
17 answer."). The court therefore interprets their motion as an implicit request to both modify the
18 court's scheduling order and for leave to amend their answer. See, e.g., *Johnson*, 975 F.2d at
19 608–09; *Lara v. Sutter Davis Hosp.*, No. 12–2407, 2014 WL 28817, at *1 n.1 (E.D. Cal. Jan. 2,
20 2014).

21 Under Federal Rule of Civil Procedure 16, a pretrial scheduling order may be
22 modified if a party, despite its diligence, cannot reasonably be expected to meet the order's
23 deadlines. *Johnson*, 975 F.2d at 609. When a party requests changes to the scheduling order, the
24 court's inquiry focuses on that party's honest attempt to comply; she must demonstrate her
25 "diligence." See, e.g., *id.*; *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607–08 (E.D. Cal. 1999).
26 Motions are more often granted when the opposing party's actions caused delay or when the need
27 to amend arises from some unexpected or outside source. See, e.g., *Hood v. Hartford Life and*
28 *Acc. Ins. Co.*, 567 F. Supp. 2d 1221, 1225–26 (E.D. Cal. 2008). Prejudice to another party may

1 reinforce a decision to deny a motion, but whether a scheduling order will be amended “primarily
2 considers the diligence of the party seeking the amendment.” *Johnson*, 975 F.3d at 609. The
3 court’s decision is one of discretion. *Id.* at 607.

4 III. DISCUSSION

5 Here, the directors waited more than two years to assert an affirmative defense
6 based on the Bank’s articles of incorporation. Their original answer was filed in November 2013.
7 The discovery cut-off date and the deadline for the hearing of dispositive motions have passed,
8 and a trial is set to begin in a few months.

9 The directors explain their delay by first noting their understanding that an
10 affirmative defense based on the Bank’s articles of incorporation could apply only to a simple
11 negligence claim. Mot. Am. Answer at 8. They point out that after the court granted their
12 original motion for summary judgment in part, only two claims remained: the second and the
13 fourth, both for “gross negligence.” *See* Order July 8, 2014, at 10 (granting summary judgment
14 on claims one and four, negligence and breach of fiduciary duties). The directors also cite
15 confusion and negotiation between the FDIC and themselves concerning the effect of the court’s
16 previous orders and whether a simple negligence claim had survived summary judgment. *See*
17 Mot. Am. Answer at 4–5; Hughes Decl. ¶¶ 8–19, ECF No. 135-1.

18 The FDIC’s original complaint included a claim for simple negligence, and the
19 directors’ original answer responded to that complaint, not the FDIC’s post-summary-judgment
20 complaint. The directors claim they were unaware at the time that the Bank’s articles of
21 incorporation included provisions limiting their liability. *See* Reply at 4–5. They explain that the
22 articles of incorporation were filed more than twenty years before this lawsuit began, and given
23 their lack of legal training, their ignorance should be excusable. *See id.* They also note that when
24 the FDIC closed the Bank in 2010, it seized all the Bank’s files. *Id.*

25 If anyone, a corporation’s officers and directors may be expected to have
26 familiarity with the articles of incorporation, even articles adopted some time ago. Here, the
27 articles are only two pages long, and the passage in question is printed clearly on the first page in
28 ordinary-sized text. *See* Hughes Decl. Ex. A, at 2–3, ECF No. 135-1. It is written in relatively

1 simple language. *See id.* at 1 (“The liability of the directors of the corporation for monetary
2 damages shall be eliminated to the fullest extent permissible under California law.”).

3 Moreover, the directors have been represented by counsel including at the time
4 they filed their answer. Counsel may reasonably be expected to have sought out and obtained
5 copies of the articles of incorporation much earlier in this case. Because the Bank is a California
6 corporation, *see* Compl. ¶ 21; Answer ¶ 12, its articles of incorporation are public records
7 maintained by the California Secretary of State. The public-record content of a corporation’s
8 articles of incorporation is so indisputable as to be subject to judicial notice. *See, e.g., Rhodes v.*
9 *Sutter Health*, No. 12-0013, 2012 WL 662462, at *3 (E.D. Cal. Feb. 28, 2012).

10 Because the directors have not shown they were unable to comply with the court’s
11 scheduling order despite their diligence, their motion is denied. The court’s decision is bolstered
12 by the late stage of this litigation.

13 IV. CONCLUSION

14 The motion is DENIED. This order resolves ECF No. 135.

15 IT IS SO ORDERED.

16 DATED: May 3, 2016.

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20 UNITED STATES DISTRICT JUDGE
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