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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
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9 ANDREW FERNANDES,  
10 Plaintiff,  
11 v.  
12 TW TELECOM HOLDINGS, INC.,  
13 Defendant.  
14

No. 2:13-cv-2221-GEB-CKD

**ORDER DENYING PLAINTIFF'S MOTION  
FOR LEAVE TO AMEND THE  
SCHEDULING ORDER AND SUA SPONTE  
AMENDMENT OF THE TRIAL  
COMMENCEMENT DATE**

15 Plaintiff filed a motion on February 27, 2015, in which  
16 he seeks de facto amendment of most dates in the scheduling order  
17 issued on February 26, 2014. (Status (Pretrial Scheduling) Order,  
18 ("Scheduling Order,") ECF No. 20.) Specifically, Plaintiff seeks  
19 leave to file an amended complaint that would add four claims  
20 against Defendant, to re-open the expired February 3, 2015  
21 discovery completion date so that he could have six additional  
22 months to conduct discovery on both his existing claims and the  
23 four proposed claims, and to continue the scheduled September 15,  
24 2015 trial commencement date for six months. The following  
25 provisions in the scheduling order concern these requests: "no  
26 further . . . amendments to pleadings is permitted, except with  
27 leave of Court for good cause shown," "all discovery shall be  
28 completed by February 3, 2015," and "[t]rial shall commence . . .

1 on September 15, 2015." (Scheduling Order 2:19-20; 3:5; 5:10-11.)  
2 Plaintiff's request would also necessitate amendment of the now-  
3 past April 13, 2015 last hearing date for motions and the  
4 scheduled June 15, 2015 final pretrial conference date. Plaintiff  
5 argues his motion should be granted, stating:

6 After his termination, Defendant . . . .  
7 inform[ed him] that he was free to apply for  
8 jobs within the company and that he would be  
9 seriously considered for any jobs for which  
10 he was qualified. And yet, unbeknownst to  
11 Plaintiff, . . . his personnel file contained  
12 a single innocuous sheet, a "Separation  
13 Checklist for Termination" ("termination  
14 checklist"). The termination checklist,  
15 baldly contradicts all communications to  
16 Plaintiff, advising internal hiring agents  
17 that Plaintiff is not eligible for rehire due  
18 to "unprofessional questionable conduct  
19 during term"

20 . . . .

21 This Court has advised that, "No further  
22 service, joinder of parties, or amendments to  
23 pleadings is permitted, except with leave of  
24 Court for good cause shown." (ECF Document  
25 No. 20, 2:19-21.) Good cause exists here for  
26 two distinct reasons. First, Plaintiff has  
27 uncovered facts which, if proven, support  
28 four additional causes of action . . . .  
Second, Defendant's persons most  
knowledgeable about key topics of the  
existing case [("30(b)(6) witnesses")]-  
including a failure to acknowledge  
Plaintiff's complaint of retaliation, a bonus  
plan paid to Plaintiff, the nature and  
existence of contracts with the government,  
and the genesis of the "termination  
checklist"-were unable to articulate details  
about these topics. Thus, good cause exists  
to extend discovery and trial by 6 months.

(Mot. 1:18-26, 17:17-26, ECF No. 22-1.)

Although Plaintiff argues in a conclusory manner that  
"good cause" exists for the scheduling order amendments he seeks,  
the authority under which he actually argues his pleading

1 amendment motion concerns the liberal amendment pleading standard  
2 prescribed in Federal Rule of Civil Procedure ("Rule") 15.  
3 However, "[o]nce the district court ha[s] filed a . . .  
4 scheduling order [under Rule 16(b)] . . . that rule's [good  
5 cause] standard[] control[s]" and the movant seeking to amend the  
6 no further amendment provision in the scheduling order must first  
7 demonstrate "good cause" under Rule 16(b) for that amendment  
8 before addressing whether a pleading amendment is proper under  
9 Rule 15. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-  
10 08 (9th Cir. 1992).

11 "A court's evaluation of good cause is not  
12 coextensive with an inquiry into the  
13 propriety of the amendment under . . . Rule  
14 15." Unlike Rule 15(a)'s liberal amendment  
15 policy which focuses on the bad faith of the  
16 party seeking to interpose an amendment and  
17 the prejudice to the opposing party, Rule  
18 16(b)'s "good cause" standard primarily  
19 considers the diligence of the party seeking  
20 the amendment. The district court may modify  
21 the pretrial schedule "if it cannot  
22 reasonably be met despite the diligence of  
23 the party seeking the extension." Moreover,  
24 carelessness is not compatible with a finding  
25 of diligence and offers no reason for a grant  
26 of relief. Although the existence or degree  
27 of prejudice to the party opposing the  
28 modification might supply additional reasons  
to deny a motion, the focus of the inquiry is  
upon the moving party's reasons for seeking  
modification. If that party was not diligent,  
the inquiry should end.

23 Id. at 609 (citations omitted) (emphasis added).

24 **A. Leave to File an Amended Complaint and Corresponding**  
25 **Discovery**

26 Plaintiff argues he should be granted leave to add four  
27 claims to his complaint and to conduct discovery on those claims  
28 since he "uncovered facts . . . support[ing] four additional

1 [claims]." (Mot. 17:19-24.) Specifically, Plaintiff contends that  
2 after filing the Complaint, he discovered that Defendant  
3 "advis[ed] internal agents [through the "termination checklist"]  
4 that Plaintiff was not eligible for rehire [due] to  
5 'unprofessional questionable conduct during [his] term.'" (Mot.  
6 1:22-26.) Plaintiff declares this information supports his  
7 additional claims since "[a]t the time [he] was terminated, [an  
8 employee of Defendant] advised [Plaintiff] that [he] could apply  
9 for any position for which [he] was qualified." (Fernandes Decl.  
10 ¶ 12, ECF No. 22-3.)

11 Defendant responds that Plaintiff has not demonstrated  
12 the "good cause" Rule 16 requires since the termination checklist  
13 "upon which [Plaintiff] bases his [m]otion . . . [was served on  
14 Plaintiff in discovery] on March 24, 2014; and [Plaintiff] did  
15 nothing for six months [after receipt of that information] to  
16 follow up on that purportedly key piece of evidence." (Opp'n 1:7-  
17 8, ECF No. 24.)

18 Plaintiff does not dispute this service date. Instead,  
19 he argues that to plead his additional claims, he needed to  
20 obtain further information about the "unprofessional,  
21 questionable conduct" statement in the termination checklist and  
22 that he sought such further information through Defendant's  
23 30(b)(6) depositions, which occurred in January 2015. (See  
24 generally Mot. 18:7-19:5; Boucher Decl. ¶¶ 2-4, 18, ECF No. 22-  
25 2.)

26 Plaintiff's counsel declares that he "inquired with  
27 Defendant about possible dates for Defendant's . . . Rule  
28 30(b)(6) . . . depositions" "in early October[2014]," and that

1 "[o]n November 19, 2014" he "set the [dates for the] deposition  
2 of Defendant's [30(b)(6) witnesses]." (Boucher Decl. ¶¶ 8, 11.)  
3 Plaintiff's counsel further declares those depositions were  
4 initially noticed for "January 14, 2015," but after communication  
5 with Defendant's counsel, the dates were changed and he  
6 ultimately deposed the witnesses on the following dates: January  
7 8, 2015, January 20, 2015, January 27, 2015, and January 30,  
8 2015. (Id. ¶¶ 11, 16-18.)

9 Plaintiff has not cogently explained why he needed  
10 Defendant's 30(b)(6) deposition testimony, in addition to the  
11 information he received in the termination checklist, to plead  
12 his additional claims. Further, while unexpected information "can  
13 constitute good cause [for amending a scheduling order], that  
14 good cause does not exist indefinitely." Fermin v. Toyota  
15 Material Handling, U.S.A., Inc., No. 10-3755, 2012 WL 1393074, at  
16 \*6 (D.N.J. Apr. 23, 2012). Rather, "amend[ment of] the  
17 [s]cheduling [o]rder [should be diligently sought] once it  
18 bec[omes] apparent [to Plaintiff] that [he or she] could not  
19 comply with the order." Hardy v. Cnty. of El Dorado, No. 2-07-CV-  
20 0799 JAM EFB, 2008 WL 3876329, at \*1 (E.D. Cal. Aug. 20, 2008)  
21 (denying plaintiff's request for amendment since plaintiff had  
22 not "adequately explain[ed] why an extension of time was not  
23 sought earlier."). Plaintiff has not "adequately explained why  
24 [he] waited [eleven] months after receiving the [termination  
25 checklist] before filing the motion to amend." Eckert Cold  
26 Storage, Inc. v. Behl, 943 F. Supp. 1230, 1233 (E.D. Cal. May 3,  
27 1996). Even assuming that Plaintiff needed Defendant's 30(b)(6)  
28 deposition testimony to state the additional claims, he still

1 fails to demonstrate diligence in seeking to amend the scheduling  
2 order since by his own account, more than seven months passed  
3 after he was served the termination checklist before he contacted  
4 Defendant about scheduling the depositions. The several months  
5 "gap [between Plaintiff's receipt of the new information and his  
6 filing of the motion to amended the scheduling order] shows a  
7 lack of diligence on his part, which cunctation is the antithesis  
8 of the finding of good cause contemplated under Rule 16 . . .  
9 Carbajal v. St. Anthony Cent. Hosp., No. 12-cv-02257, 2015 WL  
10 1499864, at \*2 n.4 (D. Colo. Mar. 27, 2015). Permitting Plaintiff  
11 to now upend the scheduling order several months after Plaintiff  
12 clearly became aware of the facts that he could have used as a  
13 basis for amendment much earlier in the proceeding, would permit  
14 "the sort of disruption that Rule 16(b) was designed to prevent."  
15 Eckert Cold Storage, Inc., 943 F. Supp. at 1233.

16 Since Plaintiff has not shown "good cause" to amend the  
17 "no further amendment" and "discovery completion deadline"  
18 provisions of the scheduling order, Plaintiff's de facto request  
19 to amend these portions of the scheduling order is denied.

20 **B. Discovery for Plaintiff's Existing Claims and Trial**  
21 **Date**

22 Plaintiff also argues discovery should be re-opened for  
23 his existing claims and the trial commencement date deferred six  
24 months because Defendant's 30(b)(6) witnesses "were unable to  
25 articulate details about . . . [relevant] topics," including  
26 "Plaintiff's [claim] of retaliation, a bonus plan paid to  
27 Plaintiff, the nature and existence of contracts with the  
28 government, and the genesis of the 'termination checklist.'"

1 (Mot. 17:22-25.)

2 Defendant counters Plaintiff has not shown "good cause"  
3 under Rule 16 for the referenced amendments since he "did not  
4 conduct any discovery in the months of April, May, June, July,  
5 August, or September 2014—the precise six-month amount of time  
6 for which [he] now seeks [to conduct additional discovery]."

7 (Opp'n 12:28-13:2.)

8 Plaintiff does not dispute that he failed to conduct  
9 any discovery from April through and including September 2014,  
10 and instead replies "[b]oth parties did little in discovery from  
11 March to October 2014." (Reply 6:9-10, ECF No. 25). Whether or  
12 not another party conducted discovery has not been shown  
13 pertinent to the issue whether Plaintiff could have "reasonably"  
14 completed discovery within the prescribed discovery period.  
15 Johnson, 975 F.3d at 609 (requiring that a satisfactory  
16 explanation be provided concerning why the discovery could not be  
17 completed "despite [his] . . . diligence.")

18 Further, the scheduling order that Plaintiff referenced  
19 in his motion states in relevant part:

20 All discovery shall be completed by February  
21 3, 2015. "Completed" means all discovery  
22 shall be conducted so that any dispute  
23 relative to discovery shall have been  
24 resolved by appropriate orders, if necessary,  
and, where discovery has been ordered, the  
order has been complied with on or before the  
"completion" date.

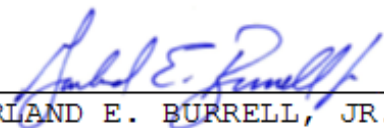
25 (Scheduling Order 3:5-10.) Therefore, it is pellucid that in the  
26 exercise of diligence Rule 16 requires, Plaintiff should have  
27 noticed Defendant's 30(b)(6) depositions early enough so that any  
28 dispute concerning the objective of that discovery was "resolved"

1 and any discovery order concerning the objective of that  
2 discovery was "complied with on or before" February 3, 2015.  
3 Instead, Plaintiff waited until the last few weeks of the  
4 discovery period to depose Defendant's 30(b)(6) witnesses and  
5 filed the motion sub judice twenty-four days after the discovery  
6 completion date. Since Plaintiff has not justified his admitted  
7 delay by explaining why the discovery completion date could not  
8 have "reasonably be[en] met despite [his] diligence," Plaintiff's  
9 motion to re-open discovery and delay the trial date is denied.  
10 Johnson, 975 F.3d at 609.

11 **C. Sua Sponte Amendment to the Trial Date**

12 However, an unrelated conflict has developed concerning  
13 the trial date. Therefore the scheduling order is amended sua  
14 sponte, and trial shall commence at 9:00 a.m. on October 20,  
15 2015.

16 Dated: April 22, 2015

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20 GARIAND E. BURRELL, JR.  
21 Senior United States District Judge  
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