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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 ENRIQUE ALVAREZ ZARDAIN, an  
12 individual,

13 Plaintiff,

14 v.

15 IPACPA US., INC., a Delaware  
16 corporation, TRC HOLDINGS, INC., a  
17 Delaware corporation and DOES 1-20,

Defendants.

No. 2:15-cv-01207-MCE-EFB

**ORDER**

18 Through the present action, Plaintiff Enrique Alvarez Zardain ("Plaintiff") seeks  
19 damages for breach of contract and related claims as a result of purchase and  
20 commission agreements entered into by Plaintiff with Defendant IPACPA U.S, Inc.  
21 ("IPACPA"). Plaintiff alleges that IPACPA defaulted on its obligation to make payments  
22 under those agreements. Defendant TRC Holdings, Inc. ("TRC") is also named as a  
23 Defendant on grounds that it acted as guarantor for promissory notes made in  
24 connection with the agreements.

25 Presently before the Court is Plaintiff's Ex Parte Motion Application (ECF No. 28)  
26 to either continue Defendant TRC's presently scheduled Motion for Summary Judgment  
27 in this matter (ECF No. 27) or alternatively to amend the Court's operative October 19,  
28

1 2015 Pretrial Scheduling Order (“PTSO,” ECF No. 17). Plaintiff asks the Court to either  
2 extend his deadline for opposing TRC’s Motion or to permit Plaintiff to file its own  
3 potential cross motion for summary judgment. The Court treats Plaintiff’s application as  
4 a request to amend the PTSO in that regard.

5 Once a district court has issued a PTSO pursuant to Federal Rule of Civil  
6 Procedure 16, that Rule’s standards control. Johnson v. Mammoth Recreations, Inc.,  
7 975 F.2d 604, 607-08 (9th Cir. 1992). Prior to the final pretrial conference in this matter,  
8 which is presently for June 22, 2017, the Court can modify its PTSO upon a showing of  
9 “good cause.” See Fed. R. Civ. P. 16(b).

10 “Unlike Rule 15(a)’s liberal amendment policy, which focuses on the bad faith of  
11 the party seeking to interpose an amendment and the prejudice to the opposing party,  
12 Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking  
13 the amendment.” Johnson, 975 F.2d at 609. In explaining this standard, the Ninth  
14 Circuit has stated that:

15 “[a] district court may modify the pretrial schedule ‘if it cannot  
16 reasonably be met despite the diligence of the party seeking  
17 the extension.’ Moreover, carelessness is not compatible  
18 with a finding of diligence and offers no reason for granting of  
19 relief. Although the existence or degree of prejudice to the  
20 party opposing the modification might supply additional  
21 reasons to deny a motion, the focus of the inquiry is upon the  
22 moving party’s reasons for seeking modifications. If that  
23 party was not diligent, the inquiry should end.”

24 Id. (citations omitted).

25 According to Plaintiff’s counsel, Jamie Dreher, when TRC’s Motion was Summary  
26 Judgment was filed on July 23, 2016 the opposition was calendared as due in  
27 accordance with provisions of Local Rule 230 (c) (fourteen days preceding the noticed  
28 hearing date) without realizing that the Court’s October 19, 2015 PTSO in fact made the  
deadline five weeks prior to the hearing in order to accommodate full briefing for the  
opposing party’s cross-motion for summary judgment should one be contemplated. That  
made Plaintiff’s opposition deadline August 17, 2016 instead of the September 8, 2016  
deadline that would otherwise apply under the Local Rules.

1           Once Mr. Dreher learned of his mistake after receiving an email from defense  
2 counsel on Friday August 19, 2016 about the status of his opposition, he immediately  
3 emailed defense counsel for a stipulation to either continue the hearing date or stipulate  
4 to a late opposition. After counsel declined to so stipulate, Mr. Dreher proceeded to  
5 prepare and file the instant application and supporting documents on Monday, August,  
6 22, 2016, the next business day. Defense counsel opposed the request on Wednesday,  
7 August 24, 2016 (ECF No. 29) and Plaintiff filed its reply later that same day (ECF No.  
8 30).

9           Mr. Dreher has assumed full responsibility for his error in mistakenly calendaring  
10 the opposition deadline, and the Court notes that its extended opposition deadline to  
11 accommodate the filing of a cross-motion has since been discontinued in PTSOs due to  
12 the confusion it has engendered with the diverging requirements of the Local Rules. The  
13 Court therefore treats the mistake as an inadvertent one made in good faith, so the next  
14 inquiry becomes whether Mr. Dreher was diligent in rectifying his error. He was. Once  
15 the mistake was brought to its attention, Dreher immediately sought a stipulation and  
16 when that failed, had an ex parte application for relief on file the next business day.  
17 Because Johnson makes it clear that whether or not good cause has been established  
18 for modifying a PTSO (here its requirement as to the filing of opposition papers) hinges  
19 on the responding party's diligence, that necessary diligence has clearly been  
20 established

21           Having established that Plaintiff is entitled to relief from the strictures of the  
22 current PTSO, the Court next addresses whether Plaintiff's time for opposing TRC's  
23 Motion should be extended with reference to its presently scheduled hearing date of  
24 September 22, 2016, or instead whether the Motion should be continued so as to permit  
25 Plaintiff to both submit an opposition and to file any counter motion he may wish to  
26 present given the PTSO's requirement that both events occur simultaneously.

27           Defendant TRC wants to keep the existing hearing date in order to avoid incurring  
28 expenses connected with having to disclose expert witnesses on October 14, 2016, as

1 the PTSO currently requires. While the Court notes that meeting this objective would  
2 appear highly unlikely given the time frames involved, it nonetheless will defer to the  
3 date chosen by TRC for its motion despite the fact that said motion was filed more than  
4 six months prior to the deadline for hearing dispositive motions, and almost three months  
5 before fact discovery was scheduled to close. Consequently, the PTSO is modified to  
6 permit Plaintiff to file a timely opposition not later than September 8, 2016. Since that  
7 result preserves the existing hearing date, TRC cannot claim prejudice.

8 Having permitted that late opposition, should Plaintiff wish to file an additional  
9 motion for summary judgment he will have to apply for leave to do so as the PTSO  
10 requires. It would be improper for the Court to continue the hearing date now, when  
11 according to Plaintiff's own papers he has not made any firm decision on whether to  
12 pursue such a motion.

13 In sum, then, Plaintiff's Ex Parte Application (ECF No. 28) is GRANTED to the  
14 extent that the operative PTSO is amended to permit Plaintiff to file a timely opposition to  
15 TRC's Motion for Summary Judgment not later than September 8, 2016. All other  
16 provisions in the PTSO continue to apply. Plaintiff's Ex Parte Application is otherwise  
17 DENIED.

18 IT IS SO ORDERED.

19 Dated: August 26, 2016

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22 MORRISON C. ENGLAND, JR.  
23 UNITED STATES DISTRICT JUDGE  
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