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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WAKE FOREST ACQUISITIONS, L.P.;
SHAFFER ASSET
MANAGEMENT CORPORATION;
ROBERT P. SHAFFER, individually and as
Co-Trustee of the Robert P. Shaffer
Revocable Trust; and MARY SHAFFER,
as Co-Trustee of the Robert P. Shaffer
Revocable Trust,

Plaintiffs,

v.

VANDERBILT COMMERCIAL
LENDING, INC.; and GREGORY COOK,

Defendants.

VANDERBILT COMMERCIAL
LENDING, INC.,
Counterclaim-Plaintiff,

v.

WAKE FOREST ACQUISITIONS, L.P.,
Counterclaim-
Defendant.

No. 2:15-cv-02167 KJM DB

ORDER

Plaintiffs move to reopen discovery solely to renew and resolve a previously filed motion for sanctions against defendant Gregory Cook for failure to appear at his properly noticed deposition. Mot. at 2, ECF No. 59-1; *see* ECF No. 52 (motion for sanctions).

1 No other party has filed an opposition or response to plaintiffs’ motion to reopen
2 discovery for this purpose, and the deadline to file an opposition has passed. *See* ECF No. 59;
3 L.R. 230(c). The court submitted the matter without oral argument. ECF No. 63.

4 For the reasons provided below, the court GRANTS plaintiffs’ motion to reopen
5 discovery for the limited purpose of renewing their motion for sanctions, ECF No. 52.

6 I. BACKGROUND

7 A. Dispute

8 Plaintiffs have sued defendants Gregory Cook and Vanderbilt Commercial
9 Lending (VCL) for VCL’s alleged failure to extend a \$14,060,000 loan for development of a 272-
10 bed student housing community. *See* First Am. Compl. (FAC) ¶¶ 23, 61, 117-18, 158, ECF
11 No. 69. According to plaintiffs, VCL, by and through Cook, fraudulently represented itself as a
12 lender and committed to extending the loan to plaintiff Wake Forest Acquisitions, LP. *Id.* ¶¶ 45,
13 59, 71, 78-80, 110, 170, 172. Plaintiffs have alleged injury stemming from VCL’s failure to
14 honor its obligation to fund the loan. *Id.* ¶¶ 175–90. Plaintiffs’ claims include breach of contract,
15 breach of the implied covenant of good faith and fair dealing, promissory estoppel, breach of
16 fiduciary duty, rescission, violation of California’s Unfair Competition Law, third party
17 beneficiary breach of contract, and fraud-intentional misrepresentation. *Id.* ¶¶ 191–361.

18 B. Plaintiffs’ Attempts to Depose Cook

19 Plaintiffs have sought multiple times to depose Gregory Cook, VCL’s President,
20 as both a percipient witness and a witness designated by VCL as its “person most
21 knowledgeable,” or “PMK,” subject to Federal Rule of Civil Procedure 30(b)(6). *See generally*
22 *Bellafronto Decl.*, ECF No. 52-2. Cook was one of only two witnesses plaintiffs sought to
23 depose. *Id.* ¶ 2. Plaintiffs’ counsel attempted to meet and confer with defendants’ counsel about
24 depositing Cook, but defendants’ counsel informed plaintiffs through email that Cook was
25 “experiencing severe medical issues” and was “not fit for a deposition at this time” without
26 knowing for “sure when he [would] be” fit. ECF No. 52-3 at 2, Ex. A. A few weeks later,
27 plaintiffs’ counsel contacted defendants’ counsel again to request “documentary evidence” of
28 Cook’s “medical circumstances and condition.” *Bellafronto Decl.* ¶ 5; *see* ECF No. 52-3, Ex. B.

1 Nearly a month after their initial email exchange, defendants' counsel communicated that Cook
2 "is collecting medical information, but even that is hard for him." ECF No. 52-3 at 6, Ex. C.
3 Defendants' counsel acknowledged that "we must move forward, since I will not be able to
4 provide you with comprehensive medical records in short order." *Id.* Counsel confirmed Cook
5 was "the PMK [person most qualified] of VCL," and that she had asked Cook to appear for his
6 deposition scheduled March 6, 2017. *Id.*; *see* Bellafronto Decl. ¶ 6.

7 Over the course of approximately four months, the parties stipulated several times
8 to continue fact and expert discovery deadlines based on Cook's stated health problems.
9 Bellafronto Decl. ¶¶ 8, 10-11, Exs. D-F; *see also* ECF Nos. 36, 43-47. The parties continued to
10 meet and confer to schedule Cook's deposition, and plaintiffs asked Cook's counsel to present
11 some form of medical evidence about Cook's inability to appear for deposition. Bellafronto Decl.
12 ¶¶ 5-6, 9, 12-14; ECF No. 52-3, Exs. G, H, I. According to plaintiffs, "No such documentation
13 was ever presented." Mot. at 4; Bellafronto Decl. ¶ 26.

14 As requested by the parties, the court amended the scheduling order for the case,
15 extending the fact discovery cut-off date to July 21, 2017. ECF No. 47. The parties agreed on
16 Cook's deposition as set for July 6, 2017, to take place in Corning, California where Cook
17 resided. ECF No. 52-3 at 29, 31, Exs. K-L; Bellafronto Decl. ¶¶ 9, 16-17. Defendants' counsel
18 communicated with plaintiffs' counsel at least twice through email, confirming Cook was
19 confirmed for the July 6 date. ECF No. 52-3 at 29, 31, Exs. K-L.

20 Plaintiffs' counsel then drove the three hours to Corning, California for Cook's
21 deposition, scheduled to begin on July 6 at 10:00 a.m. Bellafronto Decl. ¶ 18. "After waiting for
22 approximately 30 minutes," Cook's counsel informed plaintiffs' counsel that Cook "had an
23 'unexplained emergency' and could not appear for his deposition for another hour but that he
24 would appear." *Id.* At 11:25 a.m., Cook still had not arrived. ECF No. 52-3 at 37, Ex. M.
25 Defendants' counsel stated he thought Cook had identified "between 12:15 and 12:30," as his
26 arrival time. *Id.* Cook had not arrived by 12:30 p.m., and plaintiffs' counsel then left at 12:31
27 p.m. *Id.* at 38; Bellafronto Decl. ¶ 18. Later that day, Cook, who was no longer represented by
28 an attorney, ECF No. 49, contacted plaintiffs' counsel through email, stating he had "received a

1 most urgent and very high priority call” that he was not expecting and “was kept on this call for
2 several hours.” ECF No. 52-3 at 43, Ex. N. Cook suggested still “try[ing] to do one of [the
3 depositions] today” or arranging for “a continuance.” *Id.* at 44.

4 Plaintiffs’ counsel then sent multiple emails and called Cook on his cell phone
5 number attempting to arrange a new date and time for Cook’s deposition to occur before the fact
6 discovery cut-off date. Bellafronto Decl. ¶¶ 20-22; ECF No. 52-3 at 43, 46, Exs. N-O. After
7 three emails, a phone call and a voicemail message, Cook responded by email stating he was “not
8 trying to ignore” plaintiffs’ counsel. ECF No. 52-3 at 47, Ex. O. Despite plaintiffs’ counsel
9 requesting from Cook a date and time for his deposition, Cook did not offer any date or time. *Id.*
10 Instead, Cook asked where the parties would meet. *Id.* Cook described “still experiencing the
11 light headedness, shortness of breath, [being] unbalanced at times.” *Id.* Cook wrote that he
12 “could momentarily pass out for a few minutes” while drafting an email “without even realizing
13 it,” then “abruptly come to” and his “mouse [would] go flying across the room.” *Id.* Cook stated
14 “[t]his is all very difficult for me to stay focused long enough to finish this,” then wrote he would
15 give plaintiffs’ counsel “a call this afternoon.” *Id.* In response, plaintiffs’ counsel offered to take
16 the deposition at Cook’s house if that was “easiest for [Cook], or in Sacramento.” *Id.* Plaintiffs’
17 counsel asked Cook to provide her “with a date and location to avoid a motion [to compel].” *Id.*

18 Four days after the close of fact discovery, Cook e-mailed plaintiffs’ counsel to
19 discuss deposition scheduling, without mentioning his health condition. Bellafronto Decl. ¶ 25.
20 Plaintiffs’ counsel then called Cook but got no answer and received no reply by phone or email.
21 *Id.* Cook never provided plaintiffs’ counsel with dates for taking the deposition originally
22 scheduled for July 6, nor did he provide “any doctor’s notes, medical records or other evidence of
23 the illness which ha[d] purportedly prevented him from testifying since January [2017].” *Id.* ¶ 26.

24 C. Motion for Sanctions

25 Plaintiffs filed a motion for sanctions with the magistrate judge, requesting
26 sanctions precluding Cook “from using his own testimony in support of any defenses in this case”
27 and monetary sanctions of \$9,825 for attorney’s fees incurred in preparing for Cook’s deposition
28 and preparing the motion for sanctions. ECF No. 52-1 at 5-6; Bellafronto Decl. ¶¶ 29-34.

1 Plaintiffs asserted they had “not had the opportunity to examine Mr. Cook about their key
2 documents, or to question Mr. Cook about the reasons behind VCL’s failure and refusal to close
3 the construction loan at issue in this litigation.” ECF No. 52-1 at 6. Additionally, plaintiffs’
4 expert “has been forced to prepare his report without the benefit of Mr. Cook’s deposition,” and
5 Cook is arguably “the most key witness in these proceedings.” *Id.* The magistrate judge denied
6 plaintiffs’ motion “without prejudice to renewal,” noting in her order that “plaintiffs may re-
7 notice their motion for hearing before the undersigned in the event that discovery in this action is
8 re-opened.” ECF No. 58 at 2 & n.3.

9 Plaintiffs then filed the instant motion to reopen discovery, solely for the purpose
10 of renewing their motion for sanctions. Mot. at 2, 8; *see* ECF No. 52.

11 II. LEGAL STANDARD

12 The court will modify dates set forth in a scheduling order only upon a showing
13 of good cause by the moving party. Fed. R. Civ. P. 16(b); *Johnson v. Mammoth Recreations,*
14 *Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). The “good cause” standard also applies to requests to
15 reopen discovery. *See, e.g., Sheridan v. Reinke*, 611 F. App’x 381, 384 (9th Cir. 2015)
16 (applying *Johnson* “good cause” requirement to motions to reopen discovery); *Yeager v. Yeager*,
17 No. 2:06-CV-001196 JAM-EFB, 2009 WL 1159175, at *2 (E.D. Cal. Apr. 29, 2009) (a party
18 must show “good cause” to reopen discovery).

19 The primary factor courts consider in making a good cause determination is
20 whether the moving party was diligent in its attempts to complete discovery in a timely
21 manner. *Johnson*, 975 F.2d at 609. If that party was not diligent, the inquiry should end and the
22 request should be denied. *Id.* The decision to reopen discovery involves an exercise of
23 discretion. *Schumer*, 520 U.S. 939, 952 (1997); *see also Smith v. United States*, 834 F.2d 166,
24 169 (10th Cir. 1987) (“Whether to extend or reopen discovery is committed to the sound
25 discretion of the trial court and its decision will not be overturned on appeal absent abuse of that
26 discretion.”).

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1 Courts have used a three-step inquiry in assessing diligence for the purposes of
2 determining good cause under Rule 16:

3 [T]o demonstrate diligence under Rule 16's "good cause" standard,
4 the movant may be required to show the following: (1) that she was
5 diligent in assisting the Court in creating a workable Rule 16 order;
6 (2) that her noncompliance with a Rule 16 deadline occurred or will
7 occur, notwithstanding her diligent efforts to comply, because of
8 the development of matters which could not have been reasonably
foreseen or anticipated at the time of the Rule 16 scheduling
conference; and (3) that she was diligent in seeking amendment of
the Rule 16 order, once it became apparent that she could not
comply with the order.

9 *Grant v. United States*, No. 2:11-CV-00360 LKK, 2011 WL 5554878, at *4 (E.D. Cal. Nov. 15,
10 2011), *report and recommendation adopted*, No. CIV-S-11-0360-LKK, 2012 WL 218959 (E.D.
11 Cal. Jan. 23, 2012) (citing *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999)).

12 Specific factors courts consider when determining a motion to reopen discovery
13 include:

14 1) whether trial is imminent, 2) whether the request is opposed,
15 3) whether the non-moving party would be prejudiced, 4) whether
16 the moving party was diligent in obtaining discovery within the
17 guidelines established by the court, 5) the foreseeability of the need
for additional discovery in light of the time allowed for discovery
by the district court, and 6) the likelihood that the discovery will
lead to relevant evidence.

18 *Schumer*, 63 F.3d at 1526 (citing *Smith*, 834 F.2d at 169).

19 "Motions are more often granted when the opposing party's actions caused delay
20 or when the need to amend arises from some unexpected or outside source." *Fed. Deposit Ins.*
21 *Corp. As Receiver for Butte Cmty. Bank v. Ching*, No. 2:13-CV-01710-KJM-EFB, 2016 WL
22 1756913, at *2 (E.D. Cal. May 3, 2016) (citing *Hood v. Hartford Life and Acc. Ins. Co.*, 567 F.
23 Supp. 2d 1221, 1225-26 (E.D. Cal. 2008)).

24 III. DISCUSSION

25 A. Plaintiffs' Diligence

26 Plaintiffs have shown good cause to reopen discovery solely to re-notice their
27 motion for sanctions. The primary factor in assessing good cause, diligence, weighs heavily in
28 plaintiffs' favor. Here, plaintiffs were extremely diligent in their attempts to depose Cook.

1 Plaintiffs communicated repeatedly with defendants' counsel to arrange for the deposition.
2 Plaintiffs were flexible on both time and location for the deposition, agreeing multiple times to
3 continue fact discovery and expert discovery deadlines based on Cook's stated health issues. *See*
4 ECF Nos. 36, 43-47. These actions reflect precisely the sort of diligence expected of counsel "in
5 assisting the [c]ourt in creating a workable Rule 16 order." *Grant*, 2011 WL 5554878, at *4.

6 Plaintiffs also could not have "reasonably foreseen or anticipated" Cook's
7 numerous delays, failure to appear for his deposition, and continued failure to commit to a new
8 deposition time and location. *Id.* Plaintiffs confirmed an agreed-upon deposition date and time
9 with defendants' counsel, at a location tailored to the convenience of Cook. ECF No. 52-3 at 29,
10 31, Exs. K-L; Bellafronto Decl. ¶¶ 9, 16-17. Plaintiffs' counsel waited for two-and-a-half hours
11 at the deposition location after the planned start time based on multiple assurances that Cook
12 would eventually arrive. Bellafronto Decl. ¶ 18; ECF No. 52-3 at 37-38, Ex. M. After Cook
13 failed to show, plaintiffs' counsel communicated by email and phone several times with Cook
14 himself to arrange a deposition at a new time and place, again of Cook's choosing. Bellafronto
15 Decl. ¶¶ 20-22; ECF No. 52-3 at 43, 46, Exs. N-O. At no point does the record disclose a reason
16 plaintiffs should have anticipated such a degree of delay and lack of communication. *See*
17 Bellafronto Decl. ¶ 26.

18 Plaintiffs were diligent "in seeking amendment of the Rule 16 order," *Grant*, 2011
19 WL 5554878, at *4. On February 27, 2017, plaintiffs filed a stipulation to extend the close of fact
20 discovery from March 10 to June 29, 2017 based on Cook's "health problems" affecting "the
21 parties' ability to schedule depositions." ECF No. 36. On May 9, plaintiffs filed a stipulation to
22 extend expert discovery deadlines from June 9 to August 31 to conform to the previous extension
23 of the close of fact discovery. ECF No. 43. On May 26, the parties filed a stipulation to extend
24 the close of fact discovery to July 21 and expert witness disclosure deadline to August 1. ECF
25 No. 46. Plaintiffs consistently filed these stipulations before upcoming deadlines, and the court
26 issued an amendment to the scheduling order based on good cause. ECF No. 47.

27 Plaintiffs also promptly filed their motion for sanctions, within two weeks of the
28 close of fact discovery. ECF No. 52. And plaintiffs promptly filed the instant motion to reopen

1 discovery within eight days of the magistrate judge’s order denying the motion for sanctions
2 without prejudice. ECF Nos. 58-59. Plaintiffs have been nothing but diligent in this matter.
3 *Compare, e.g., C.F. v. Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1192-95 & n.5 (C.D.
4 Cal. 2009), *aff’d sub nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975 (9th
5 Cir. 2011) (granting leave to amend scheduling order and file amended answer after deadlines to
6 file amended pleadings and to file motions had passed and defendants had moved to amend their
7 answer one month after court ruling made it more likely new defense would succeed), *with Eckert*
8 *Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal. 1996) (finding plaintiffs failed to
9 show diligence in moving for leave to add cause of action one year after amendment deadline and
10 failing to specify what new and previously unavailable information they obtained to justify
11 amendment).

12 B. Other Good Cause Factors

13 Other good cause factors weigh heavily in finding good cause or do not apply here.
14 The first two *Schumer* factors weigh in favor of a good cause finding: trial is not imminent, and
15 this motion to reopen discovery is not opposed. *See* ECF No. 47 at 2 (vacating dates for trial);
16 ECF Nos. 59, 63 (submitting motion to reopen discovery without oral argument after deadlines
17 for defendants’ opposition or response had passed under Local Rule 230(c)). The third factor,
18 prejudice to the non-moving party, does not weigh against finding good cause when the prejudice
19 is of the non-moving party’s own making. *See Fed. Deposit Ins. Corp.*, 2016 WL 1756913, at *2.
20 The final two *Schumer* factors, “the foreseeability of the need of additional discovery” and “the
21 likelihood that the discovery will lead to relevant evidence,” do not apply here, as plaintiffs seek
22 only to reopen discovery to renew their motion seeking evidentiary preclusion and monetary
23 sanctions. *Schumer*, 63 F.3d at 1526; Mot. at 8 (requesting court reopen discovery “for the
24 limited purpose of allowing [p]laintiffs to renew, re-notice, and resolve their Rule 37 sanctions
25 motion”).

26 The court finds good cause to reopen discovery for the limited purpose of allowing
27 plaintiffs to re-notice and renew their motion for sanctions before the magistrate judge in the first
28 instance.

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IV. CONCLUSION

For the foregoing reasons, the court GRANTS plaintiffs' motion to reopen discovery solely to renew their motion for sanctions. This resolves ECF No. 59.

IT IS SO ORDERED.

DATED: March 30, 2018.


UNITED STATES DISTRICT JUDGE