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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HONG-NGOC T. DAO,
Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY
OF BOSTON,
Defendant.

Case No. [14-cv-04749-SI](#)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 127

Plaintiff's motion for leave to file a second amended complaint is scheduled for a hearing on February 26, 2016. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing.

Plaintiff seeks leave to file a second amended complaint to add factual allegations regarding certain actions defendant took with regard to offsetting plaintiff's disability benefits under her insurance policy based upon plaintiff's receipt of Social Security benefits. Specifically, plaintiff seeks to add several paragraphs alleging that "after the Court issued its July 2015 decision on LIBERTY'S motion to dismiss, LIBERTY discontinued benefit payments under the guise of recovering a debt it claimed Plaintiff owed it for overpaying benefits" Proposed Second Amended Complaint ¶ 106; *see also id.* ¶ 109 ("LIBERTY'S subsequent reduction of benefit payments after litigation had started was, and is, also unreasonable and demonstrates ongoing bad faith."). Plaintiff's prior complaint included allegations regarding the Social Security offset in support of plaintiff's claim for breach of the implied covenant of good faith and fair dealing (*see* Dkt. 40 ¶¶ 19-22, 31-36, 46) but this is the first time that plaintiff seeks to include such allegations under her breach of contract claim.

Defendant opposes the motion on several grounds. Defendant asserts that plaintiff has


1 unduly delayed in seeking to amend the complaint, and that defendant will be prejudiced because
2 plaintiff did not seek leave to amend until after the close of written non-expert discovery and after
3 plaintiff's deposition was taken. Defendant also argues that the proposed amendment is futile
4 because courts have held that an insurance policy's Social Security offset provision, as well as
5 related provisions permitting recoupment of overpayments in light of a retroactive Social Security
6 benefits award, are legal under the Social Security Act. Plaintiff responds that defendant has long
7 been on notice of plaintiff's challenge to the Social Security offset provision in her insurance
8 policy, and that she seeks only to add limited allegations regarding newly-arising conduct in
9 connection with a question that is already before the Court.

10 The Court concludes that plaintiff should be permitted to amend the complaint. The Court
11 finds that defendant has not demonstrated that it will be prejudiced by the amendment because
12 plaintiff has challenged the Social Security offset provision since at least April 2015 when
13 plaintiff filed the first supplemental complaint. If there is specific discovery that defendant wishes
14 to take regarding plaintiff's breach of contract claim as it relates to the Social Security offset
15 provision, the Court directs the parties to meet and confer. If the parties are unable to resolve any
16 disagreements regarding the need for additional discovery, defendant may seek leave of Court to
17 propound additional discovery. With regard to futility, the Court has previously held that the
18 parties' arguments regarding the legality of the Social Security offset provision should be resolved
19 on a fuller factual record and not on the pleadings.

20 Accordingly, for the reasons set forth above, the Court GRANTS plaintiff's motion for
21 leave to file a second amended complaint. Plaintiff shall file the second amended complaint no
22 later than February 26, 2016.

23 **IT IS SO ORDERED.**

24
25 Dated: February 22, 2016

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27 _____
28 SUSAN ILLSTON
United States District Judge