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E-FILED on 01/23/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THOMAS FALLON, an Individual, ROBERT
PUETTE, an Individual, CARL REDFIELD, an
Individual, RICK TIMMINS, an Individual, on
behalf of each, individually, and on behalf of
the general public,

Plaintiffs,

v.

LOCKE, LIDDELL & SAPP, LLP, a Texas
limited professional partnership, and DOES 1
through 100,

Defendants.

Case No. C-04-03210 RMW

ORDER GRANTING PLAINTIFFS' MOTION
TO EXTEND DISCOVERY DEADLINE AND
ORDER ON DEFENDANT'S MOTION FOR
LEAVE TO FILE MOTION FOR
RECONSIDERATION

[Re Docket Nos. 122, 127]

Plaintiffs move to extend the discovery cutoff from August 29, 2008 to February 27, 2009, arguing that late-produced documents necessitate further discovery. Defendant Locke, Liddell & Sapp, LLP ("Locke") opposes the motion. For the reasons stated below, the court grants the motion with limitations.

The court has not ruled on defendant's motion for leave to file a motion for reconsideration of the court's order dated September 1, 2008 denying defendant's motion for summary judgment. The court denies the motion without prejudice but sets a briefing schedule to enable the parties and

ORDER GRANTING PLAINTIFFS' MOTION TO EXTEND DISCOVERY DEADLINE AND ORDER ON DEFENDANT'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION—C-04-03210

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1 the court to potentially resolve, or at least narrow, the issues pertaining to the types and computation
2 of recoverable damages and any off-sets to damages.

3 **I. MOTION TO EXTEND DISCOVERY CUTOFF**

4 **A. Background**

5 The facts of this case are set forth in this court's recent summary judgment order. *See Fallon*
6 *v. Locke, Liddell & Sapp, LLP*, 2008 WL 4079207, *1 (N.D.Cal. 2008). Briefly, plaintiffs bring suit
7 against Locke for breach of contract, breach of fiduciary duty, professional negligence, and other
8 claims for tax opinions Locke issued with respect to a tax shelter investment referred to as the
9 "Contingent Deferred Swap strategy" ("CDS strategy"). *Id.* The case focuses on the allegedly
10 improper tax advice given by Locke to plaintiffs concerning the CDS strategy including fraudulent
11 "should" opinion letters (IRS "should" allow the tax strategy). Defendant further is alleged to have
12 hidden from plaintiffs its close relationship with Ernst & Young, the creators of the strategy.

13 Plaintiffs here seek to modify this court's March 5, 2008 Case Management Scheduling
14 Order, which set the discovery-completion deadline for August 29, 2008 and the trial date for
15 November 10, 2008.

16 **B. Analysis and Orders**

17 **1. Modification of the Scheduling Order**

18 In order to modify a scheduling order, the moving party must show that good cause exists for
19 the requested modification. Fed. R. Civ. P. 16(b)(4). The inquiry into whether good cause exists
20 focuses primarily on the diligence of the moving party. *Johnson v. Mammoth Recreations, Inc.*, 975
21 F.2d 604, 609 (9th Cir. 1992). Good cause exists if the scheduling order "cannot reasonably be met
22 despite the diligence of the party seeking the extension." *Id.*

23 Plaintiff seek to extend the discovery deadline to February 27, 2009 so they can take three
24 additional depositions, of Khalid Malik ("Malik"), Grady Dickens ("Dickens"), and a 30(b)(6)
25 witness. Pls. Mot. for Order Extending Discovery 6-7. These depositions, plaintiffs claim, are
26 necessary because of documents produced by Locke on October 8, 2008. *Id.* Those documents
27 included a tax-shelter opinion, faxed to Locke on June 15, 1999, from Scheef & Stone. That opinion
28 mirrors a draft opinion by Pillsbury Madison & Sutro that was previously produced in this case by

1 Dickens. *Id.* at 3. The production also included a 1999 Locke internal memorandum, written by
2 Malik, that takes a position contrary to that in the opinion Locke issued to plaintiffs. *Id.*

3 With respect to the first document, when deposed on October 10, 2008, Brent Clifton
4 ("Clifton"), a tax partner at Locke, stated that he thought he first saw the Scheef opinion as a result
5 of discovery in this case. Decl. of Phillip Gregory ISO Pls.' Mot. for Extension of Time Ex. E,
6 Clifton Dep. 436:21-22. Given the similarities between the Scheef opinion, the Pillsbury opinion,
7 and the final CDS opinion, plaintiffs seek to depose Dickens to clarify or rebut Clifton's testimony.
8 Pls. Mot. for Order Extending Discovery 3.

9 The second document that plaintiffs claim warrants further discovery is the memo from
10 Malik to Clifton prepared around June 1999 which concluded that "...the likelihood of CDS
11 sustaining an IRS attack is very small." Pls. Mot. for Order Extending Discovery 4. Clifton testified
12 during his deposition that he did not recall ever seeing Malik's memo. Gregory Decl. Ex. E, Clifton
13 Dep. 476:22. Plaintiffs therefore seek to depose Malik also to clarify or rebut Clifton's testimony
14 regarding his memo.

15 Finally, plaintiffs seek to depose a 30(b)(6) witness regarding other documents produced on
16 October 8, including a redlined document described as "a discussion of the risks associated with
17 CDS," to confirm or rebut Clifton's testimony regarding them. Pls. Mot. for Order Extending
18 Discovery 4.

19 Defendant argues that plaintiffs have failed to show good cause for their proposed
20 scheduling-order modification for three reasons: 1) plaintiffs have not been diligent in seeking the
21 proposed depositions; 2) the issue of Mr. Malik's deposition was resolved through meet-and-confer
22 efforts; and 3) allowing the proposed depositions would exceed the court-imposed ten-deposition
23 limit. Def.'s Memo ISO Opp. 2. As explained below, despite these objections, the court finds that
24 good cause exists for modifying the scheduling order.

25 Defendant first contends that plaintiffs have known of Malik and Dickens for approximately
26 three years but only now seek their depositions. *Id.* at 2. In particular, defendant points out that
27 plaintiffs have had Malik's time records and have thus been aware of his involvement with CDS. *Id.*

1 This argument misunderstands plaintiffs' justification for seeking Malik's deposition. It is not
2 Malik's existence, or that he worked on the case, but the fact that his memorandum came to a
3 different conclusion from the one Locke ultimately issued that necessitates further discovery.

4 Next, defendant argues that plaintiffs agreed not to depose Malik if Locke would stipulate to
5 admit his memo at trial, and submits supporting correspondence between counsel. The letters
6 exchanged are carefully worded but at least imply that plaintiffs would not seek Malik's deposition if
7 defendant would stipulate to the admissibility of Malik's memo. The court is troubled by now
8 allowing even a short deposition of Malik but will nevertheless do so to insure full disclosure of the
9 relevant facts.

10 Locke finally argues that allowing three additional depositions would exceed the number
11 permitted under this court's December 2004 case management order. In order to take more than ten
12 depositions without consent of the other side, a party must satisfy the requirements of Rule 26(b)(2).
13 Adv. Comm. Notes on 1993 Amendments to Fed. R. Civ. P. 30(a)(2). Locke contends that plaintiffs
14 have not satisfied Rule 26(b)(2)'s requirements that discovery not be unreasonably cumulative or
15 duplicative, that the seeking party not have had ample opportunity to obtain the discovery, and that
16 the discovery's benefit outweighs its burden. Def.'s Memo ISO Opp. 2. The court concludes
17 otherwise. Malik and Dickens are uniquely qualified to clarify what plaintiffs reasonably see as
18 conflicts between deposition testimony and produced documents. And the instant motion is the first
19 opportunity to seek discovery, since the documents upon which plaintiffs request is based were
20 produced on October 8. The court thus finds that plaintiffs' request for three additional depositions
21 satisfies the requirements of Rule 26. However, given what plaintiffs say they seek, the depositions
22 should not take more than two hours each. Rather than set a per deposition time limit, the court, to
23 give plaintiffs some flexibility, limits the total time for the three depositions to no more than one day
24 (seven hours) and orders that they take place at a reasonable location chosen by defendant.

25 **2. Unsealing of Exhibits**

26 Plaintiffs' motion for an extension of time was accompanied by the supporting declaration of
27 Phillip L. Gregory, which included three exhibits filed under seal. *See* Gregory Decl. Ex. D, H, K.

1 In his declaration in support of Locke's opposition motion, defendant's counsel Harlan Watkins
2 withdrew Locke's designation of confidentiality as to Exhibits D and K, but retained it as to Exhibit
3 H because "the document potentially reflects or refers to communications about CDS to LL&S
4 clients that were intended to remain confidential." Watkins Decl. ¶ 7. Exhibits D and K shall
5 therefore be unsealed and made part of the public record.

6 Plaintiffs argue in their reply that Exhibit H should also be made public because: 1)
7 defendant failed to file a declaration establishing that the documents are sealable as required by
8 Local Rule 79-5(d); and 2) the declaration of Harlan Watkins does not overcome the presumption of
9 public access as recognized by the Ninth Circuit.

10 Local Rule 79-5(d) provides for the filing of a document designated as confidential by
11 another party. Here plaintiffs filed documents designated confidential by Locke, and the rule
12 requires that "[w]ithin five days [after the filing], the designating party must file with the Court and
13 serve a declaration establishing that the designated information is sealable, and must lodge and serve
14 a narrowly tailored proposed sealing order, or must withdraw the designation of confidentiality. If
15 the designating party does not file its responsive declaration as required by this subsection, the
16 document or proposed filing will be made part of the public record." Civ. L.R. 79-5(d). Defendant
17 has filed no such declaration or proposed sealing order, making mention of the sealed documents
18 only in their declaration in support of the reply. Watkins Decl. ¶ 7. That declaration states only that
19 the document potentially includes confidential communications. *Id.* In order to overcome the
20 presumption in favor of disclosure and permit a sealed filing, "the district court must base its
21 decision on a compelling reason and articulate the factual basis for its ruling, without relying on
22 hypothesis or conjecture." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.
23 2003). The court cannot make such a ruling based solely on Locke's assertion that the material in
24 Exhibit H is potentially confidential. Exhibit H shall therefore also become part of this case's public
25 record.

26 II. MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION


27 A. Background

1 Defendant seeks leave to file a motion for reconsideration of this court's order filed
2 September 1, 2008 denying it summary judgment. Defendant sought summary judgment on the
3 issue of damages, arguing that investment gains and tax benefits exceeded any injury. The court
4 denied summary judgment, finding that, because plaintiffs' claims arise out of alleged failures in tax
5 advice, investment gains should not properly offset damages. In their motion for leave to reconsider
6 that decision, defendant argues that the court failed to consider that plaintiffs' damages should be
7 offset by retained tax benefits. So offset, defendant contends, plaintiffs' potential damages (IRS
8 penalties, remedial fees, and professional fees) are less than the tax benefits they received in their
9 IRS settlements. Defendant contends that the court did not expressly address this argument in its
10 order denying summary judgment.

11 **B Analysis and Order**

12 Defendant is correct that the court failed to address its argument that the plaintiffs suffered
13 no loss. The argument has some apparent logic to it. However, rather than allow a motion for
14 reconsideration, the court believes that the legal viability of plaintiffs' damages theory should be
15 examined before trial to avoid unanticipated arguments on what can constitute recoverable damages
16 if plaintiffs are successful on their liability theory. This can be better accomplished by the following
17 procedure than by reconsidering defendant's summary judgment motion which may not fully address
18 plaintiffs' damages theories. The motion for reconsideration is denied without prejudice. However,
19 on or before February 20, 2009 each plaintiff is to file a detailed itemization of the damages he seeks
20 which clearly shows how the damages are computed. By March 6, 2009, defendant is to submit a
21 brief explaining why any component of claimed damages is not recoverable and explaining the
22 amount of and the method of computation of any claimed off-set. Plaintiffs may respond by March
23 13, 2009. The court will then consider the papers filed and advise the parties on what action it is
24 going to take, if any, prior to the date *in limine* motions are due.

25
26 DATED: 01/23/09 _____



RONALD M. WHYTE
United States District Judge

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1 **Notice of this document has been electronically sent to:**

2 **Counsel for Plaintiff(s):**

3 Anthony B. Gordon law@anthonybgordon.com
4 David Lefkowitz dl@wplawgroup.com
5 Nancy L. Fineman nfineman@cpmlegal.com
6 Joseph W. Cotchett jcotchett@cpmlegal.com
7 Philip L. Gregory pgregory@cpmlegal.com

8 **Counsel for Defendant(s):**

9 James A. Murphy jmurphy@mpbf.com
10 Erik Peter Weiss eweiss@mpbf.com
11 Harlan B. Watkins hwatkins@mpbf.com

12 Counsel are responsible for distributing copies of this document to co-counsel that have not
13 registered for e-filing under the court's CM/ECF program.

14 **Dated:** 1/23/09

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Chambers of Judge Whyte