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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CYNTHIA SOMMER,  
  
Plaintiff,  
  
vs.  
UNITED STATES OF AMERICA, ROB  
TERWILLIGER, RICK RENDON,  
MARK RIDLEY, S.D. ADAMS, JOSE  
CENTENO, COUNTY OF SAN DIEGO  
MEDICAL EXAMINER’S OFFICE,  
GLENN N. WAGNER, COUNTY OF  
SAN DIEGO DISTRICT ATTORNEY’S  
OFFICE, BONNIE DUMANIS, LAURA  
GUNN, and DOES 1 through 100,  
inclusive,  
  
Defendants.

CASE NO. 09cv2093 WQH (WMc)  
**ORDER**

HAYES, Judge:

The matter before the Court is the Objection to Order Denying Without Prejudice Ex Parte Application to Amend Scheduling Order filed by Plaintiff Cynthia Sommer. (ECF No. 120).

**I. Background**

On September 24, 2009, Plaintiff Cynthia Sommer initiated this action by filing the Complaint. (ECF No. 1). Plaintiff alleges that her husband, Todd Sommer, a 23-year-old Sergeant in the United States Marine Corps, died of a cardiac arrhythmia in February of 2002. Plaintiff alleges that the results of an autopsy showed that Todd Sommer died of natural causes.

1 Plaintiff alleges that “Defendants refused to accept those results and embarked upon an  
2 investigation intended to find criminal conduct” by Plaintiff. *Id.* at ¶ 21. Plaintiff alleges  
3 Defendants “knew or should have known during the investigation ... that there was no evidence”  
4 that Plaintiff killed Todd Sommer. *Id.* at ¶ 32. Plaintiff alleges that she was wrongfully tried  
5 and convicted for murdering her husband. Plaintiff alleges that her conviction was overturned  
6 and she was granted a new trial on November 30, 2007. *Id.* at 52. Plaintiff asserts a claim for  
7 violation of her Fourth, Fifth, and Fourteenth Amendments rights pursuant to 42 U.S.C. § 1983.

8 On December 12, 2011, Plaintiff filed an Ex Parte Application for Modification of the  
9 Court’s Scheduling Order to Permit Amending the Complaint. (ECF No. 107). Plaintiff  
10 contends that the last depositions were completed on October 24, 2011, and “[d]uring the course  
11 of deposition, Plaintiff learned for the first time about key evidence relating to the allegations  
12 in Plaintiff’s Complaint.” *Id.* at 2. Plaintiff contends that “[t]he proposed First Amended  
13 Complaint alleges new facts to prove claims already made in the Complaint.” *Id.* at 5. Plaintiff  
14 states that “Plaintiff has not named any new parties that will need to be served.” *Id.* Plaintiff  
15 did not submit a copy of the proposed First Amended Complaint or identify the new facts to be  
16 alleged.

17 On December 21, 2011, the Honorable Magistrate Judge Bernard G. Skomal issued an  
18 Order Denying Without Prejudice Ex Parte Application to Amend Scheduling Order. (ECF No.  
19 118). The Magistrate Judge did not find that Plaintiff showed good cause for modifying the  
20 scheduling order.

21 On December 23, 2011, Plaintiff filed an Objection to the Magistrate Judge’s Order.  
22 (ECF No. 120). On January 18, 2012, Defendants Dumanis, Gunn and Wagner filed an  
23 Opposition. (ECF No. 129). On January 18, 2012, the United States filed an Opposition. (ECF  
24 No. 130). On January 25, 2012, Plaintiff filed a Reply. (ECF No. 132).

## 25 **II. Discussion**

26 Plaintiff objects to the Magistrate Judge’s Order denying her motion to modify the  
27 scheduling order to allow her to file a motion for leave to file an amended complaint. Plaintiff  
28 contends that she showed good cause for modifying the scheduling order. Plaintiff contends that

1 Defendants will not be prejudiced by allowing a modification of the scheduling order because  
2 the deadline for filing of dispositive motions could be extended as well and additional time could  
3 be given for discovery.<sup>1/</sup>

4 “Where a magistrate is designated to hear a discovery motion, ‘[a] judge of the court may  
5 reconsider any pretrial matter ... where it has been shown that the magistrate’s order is clearly  
6 erroneous or contrary to law.’” *Rockwell Int’l, Inc. v. Pos-A-Traction Indus., Inc.*, 712 F.2d  
7 1324, 1325 (9th Cir. 1983) (quoting 28 U.S.C. § 636(b)(1)(A)); *see also* Fed. R. Civ. P. 72(a)  
8 (“[t]he district judge in the case must consider timely objections [to nondispositive matters] and  
9 modify or set aside any part of the order that is clearly erroneous or is contrary to law.”).  
10 “Matters concerning discovery generally are considered ‘nondispositive’ of the litigation.” *See*  
11 *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). “Review under the  
12 clearly erroneous standard is significantly deferential, requiring a definite and firm conviction  
13 that a mistake has been committed.” *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*,  
14 508 U.S. 602, 623 (1993) (quotation omitted); *see also Hernandez v. Tanninen*, 604 F.3d 1095,  
15 1100 (9th Cir. 2010) (same). “[T]he magistrate judge’s decision ... is entitled to great deference  
16 by the district court.” *United States v. Abonce-Barrera*, 257 F.3d 959, 969 (9th Cir. 2001).

17 Federal Rule of Civil Procedure 16 states that “A schedule may be modified only for good  
18 cause and with the judge’s consent.” When the motion to extend time is made after time has  
19 expired, “the court may, for good cause, extend the time ... if the party failed to act because of  
20 excusable neglect.” Fed. R. Civ. P 6(b)(1). The determination of excusable neglect takes into  
21 account: “(1) the danger of prejudice; (2) the length of the delay and its potential impact on  
22 judicial proceedings; (3) the reasons for the delay which includes whether it was within the  
23 reasonable control of the party seeking to show excusable neglect; and (4) whether that party  
24 acted in good faith.” *Coleman v. Blue Cross Blue Shield of Kan.*, 487 F. Supp. 2d 1225, 1234-35  
25 (D. Kan. 2007).

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27 <sup>1/</sup> On December 16, 2011, Defendants County of San Diego District Attorney's Office, County  
28 of San Diego Medical Examiner's Office, Bonnie Dumanis, Laura Gunn, Glenn N Wagner filed a  
Motion for Summary Judgment. (ECF No. 112). On December 16, 2011, the United States filed a  
Motion for Summary Judgment. (ECF No. 114).

1 “When the proposed modification is an amendment to the pleadings, the moving party  
2 may establish good cause by showing ‘(1) that [he or she] was diligent in assisting the court in  
3 creating a workable Rule 16 order; (2) that [his or her] noncompliance with a rule 16 deadline  
4 occurred or will occur, notwithstanding [his or her] diligent efforts to comply, because of the  
5 development of matters which could not have been reasonably foreseen or anticipated at the time  
6 of the Rule 16 scheduling conference; and (3) that [he or she] was diligent in seeking amendment  
7 of the Rule 16 order, once it became apparent that [he or she] could not comply with the order.’”  
8 *Hood v. Hartford Life and Accident Ins. Co.*, 567 F. Supp. 2d 1221, 1225-26 (citing *Jackson v.*  
9 *Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted)).

10 The Magistrate Judge found that Plaintiff completed all fact witness depositions more  
11 than three months before seeking to modify the scheduling order. The Magistrate Judge found  
12 that Defendants may be prejudiced by allowing Plaintiff to amend the scheduling order after  
13 discovery ended. The Magistrate Judge stated:


14 In order for the Court to determine that Plaintiff was diligent in seeking  
15 amendment, Plaintiff must first specify what new and previously  
16 unavailable facts she learned during depositions and the particular dates  
17 these facts were learned. Plaintiff must also specify why the need to  
18 amend the pleadings could not have been reasonably foreseen or  
19 anticipated during any of the previous amendments to the scheduling  
20 order. In addition, Plaintiff must adequately explain why she waited at  
21 least three months after learning the new facts before filing her motion  
22 to amend. Accordingly, the Court does not find that Plaintiff has  
23 established good cause to amend the schedule at this late stage in the  
24 case.

25 (ECF No. 118 at 3-4). The Magistrate Judge denied Plaintiff’s request to modify the scheduling  
26 order without prejudice. The Court does not find that the Magistrate Judge’s order is clearly  
27 erroneous or contrary to law.

### 28 **III. Conclusion**

IT IS HEREBY ORDERED that the Objection to Order Denying Without Prejudice Ex  
Parte Application to Amend Scheduling Order (ECF No. 120) filed by Plaintiff is DENIED.

DATED: February 3, 2012

  
**WILLIAM Q. HAYES**  
United States District Judge