

1 hourly employees under Federal Rule of Civil Procedure 23(b)(3) (“California Class”)
2 and conditionally certified a nationwide opt-in collective action under the Fair Labor
3 Standards Act (“FLSA”). (ECF No. 13.)

4 Plaintiffs’ initial Complaint and each subsequent amended complaint, up until
5 Plaintiffs’ Third Amended Complaint, defined the California Class as encompassing
6 all hourly, non-exempt, union or non-union employees employed in Costco warehouses
7 in California. (ECF Nos. 1, 34, 72.)

8 On October 4, 2010, Costco filed a motion for partial summary judgment, in
9 which it argued that the “union exemption” found in California Labor Code § 514
10 prevented class members represented by unions from recovering overtime pay under
11 state law. (ECF No. 78.) On November 3, 2010, Judge Huff granted Costco’s request
12 for summary judgment on these grounds. (ECF No. 92 at 13-14.)

13 On October 28, 2010—prior to Judge Huff’s November 3, 2010
14 Order—Plaintiffs filed a motion for leave to file a fourth amended complaint (“Motion
15 for Leave to File 4AC”). (ECF No. 90.) In their Motion for Leave to File 4AC,
16 Plaintiffs represented that, after considering Costco’s request for summary judgment
17 regarding California Labor Code § 514, Plaintiffs wished to “**clarify** that the members
18 of the proposed California Class are, *inter alia*, **non-union members.**” (ECF No. 90-1
19 at 3 (emphases in original).) Judge Huff, already having ruled that union members
20 belonging to the California Class were not eligible to receive overtime pay, granted
21 Plaintiffs’ unopposed Motion for Leave to File 4AC on November 10, 2010. (ECF No.
22 94.) Plaintiffs’ filed their 4AC on November 16, 2010. (ECF No. 96.) The California
23 Class was, and continues to be, defined as “all persons who worked for Costco
24 Wholesale Corporation in California as hourly, non-exempt, non-union employees who
25 were subject to Costco’s lockdown procedures” (See 4AC ¶ 24.) On December
26 13, 2012, Judge Huff certified this newly defined California Class. (ECF No. 104.)

27 On March 11, 2011, Costco sent notice and opt-out forms to 32,139 persons
28 identified as members of the California Class. During the summer and fall of 2011, the

1 parties proceeded with discovery, during which both California union and non-union
2 employees were deposed. On November 29, 2011, Costco produced records pertaining
3 to members of the California Class that contained data for both union and non-union
4 employees. Plaintiffs assert that, after reviewing the records and noticing that Costco
5 included information regarding some union employees, Plaintiffs realized they had
6 mistakenly excluded from the California Class union employees eligible to receive
7 straight time. Approximately four months later, on April 4, 2012, Plaintiff filed the
8 instant Motion for Leave to File 5AC. (ECF No. 160.)

9 **I. Legal Standard**

10 Although neither party raises the issue, the Court observes that the deadline to
11 file a motion to amend pleadings passed on March 5, 2010, and was never extended.
12 (See ECF No. 18.)

13 Ordinarily, Federal Rule of Civil Procedure 16(b)(4)'s good cause standard
14 governs the modification of a Rule 16 scheduling order, which includes the deadline
15 to seek leave to amend pleadings. This good-cause standard comports with Rule
16 6(b)(1), which provides: "When an act may or must be done within a specified time,
17 the court may, for good cause, extend time" Rule 6, however, provides more
18 specificity regarding the timing of a request to extend a deadline.

19 Rule 6 provides that, if a motion to extend is made after a deadline has expired,
20 the motion to extend may only be granted "if the party failed to act because of
21 excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). Thus, if a party wishes to seek leave
22 to amend its pleadings after the deadline to do so has passed, the party must
23 demonstrate both good cause for modifying the scheduling order, in addition to
24 demonstrating excusable neglect for having missed the deadline. See O'Banion v.
25 Select Portfolio Servs., Inc., 2011 U.S. Dist. Lexis 133116, at * 13-15 (D. Idaho Nov.
26 16, 2011) (applying Rules 6 and 16 to motion for leave to file amended complaint that
27 was filed after deadline to file such a motion had passed); Weil v. Carecore Nat'l, LLC,
28 2011 WL 1938196, at *2 (D. Colo. May 19, 2011) (observing that other courts "have

1 held that a party moving to amend a pleading after a scheduling order deadline has
2 passed must support the motion by demonstrating both excusable neglect and good
3 cause”); see also Yeoman v. Ikea U.S.A. West, Inc., 2013 U.S. Dist. Lexis 96270, at
4 *11-14 (S.D. Cal. July 10, 2013) (applying Rules 6 and 16 to motion for leave to
5 extend discovery deadlines after deadlines passed).

6 In Pioneer Investment Services Co. v. Brunswick Associates Limited
7 Partnership, 507 U.S. 380, 395 (1993), the United States Supreme Court established
8 a four-part balancing test for determining whether there has been “excusable neglect.”
9 Although that case involved Federal Rule of Bankruptcy Procedure 9006(b)(1), the
10 Court reviewed the various contexts in which the phrase appears in the Federal Rules
11 of Civil Procedure and made clear that the test applies in all of those contexts. Id. at
12 395. The factors include: (1) the danger of prejudice to the non-moving party, (2) the
13 length of delay and its potential impact on judicial proceedings, (3) the reason for the
14 delay, including whether it was within the reasonable control of the movant, and (4)
15 whether the moving party’s conduct was in good faith. Id. The Pioneer test requires
16 a flexible approach whereby no one factor is more significant than any other. Id. at 395
17 n.14. The Court cautioned against “erecting a rigid barrier against late filings
18 attributable in any degree to the movant’s negligence.” Id. at 395 n.14. The weighing
19 of the Pioneer factors is left to the discretion of the court. Pincay v. Andrews, 389 F.3d
20 853, 860 (9th Cir. 2004).

21 The good cause standard primarily considers the party’s diligence in seeking to
22 modify a scheduling order. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609
23 (9th Cir. 1992). The focus of the inquiry is on the moving party’s reasons for seeking
24 modification; “[i]f that party was not diligent, the inquiry should end.” Id.
25 “[C]arelessness is not compatible with a finding of diligence and offers no reason for
26 a grant of relief.” Id.

27 **II. Analysis**

28 Plaintiffs seek leave to amend their 4AC in order to modify the definition of the

1 California Class to include both union and non-union hourly employees for purposes
2 of recovering unpaid “straight time.”

3 While the parties did not apply the correct legal standards to Plaintiffs’ Motion
4 for Leave to File 5AC, the Court finds that the parties have provided sufficient
5 information and argument for the Court to construe Plaintiffs’ Motion for Leave to File
6 5AC as also requesting an extension of the deadline to seek leave to amend pleadings.
7 Accordingly, the Court will apply the Pioneer factors to determine whether Plaintiffs’
8 failure to abide by the scheduling order is a result of excusable neglect.

9 **A. Danger of Prejudice to the Non-moving Party**

10 Costco argues it would be unduly prejudiced by a late amendment because
11 Costco would be forced to expend thousands of dollars to notify new class members,
12 conduct an additional deposition, and produce more records. Costco contends the
13 production of additional records would require an additional twelve to eighteen hours
14 of work and that Costco would have to send notice to an additional 16,689 union
15 employees.

16 Plaintiffs assert Costco has already sent out notice to some union employees and
17 produced records for some union employees. Plaintiffs argue leave to amend would
18 prevent undue prejudice to themselves and promote judicial economy because failure
19 to grant leave to amend would likely necessitate a second trial, which would involve
20 major duplication of efforts by both parties.

21 The Court finds that, while Costco might suffer some inconvenience as a result
22 of Plaintiffs’ mistake, the inconvenience is slight in comparison to the possibility of
23 another trial. Beery v. Hitachi Home Elecs., 157 F.R.D. 481, 484-85 (C.D. Cal. 1994).
24 Still, this factor requires the Court to consider the prejudice to the non-moving
25 party—not the moving party.

26 The Court finds Costco would suffer some prejudice by Plaintiffs’ untimely
27 request for leave to amend in that Costco would be required to spend an additional
28 twelve to eighteen hours producing additional documents, deposing at least one union

1 employee, and sending notice to over 16,000 new class members. This would, of
2 course, require the Court to re-open discovery at this late stage in the proceedings. The
3 Court thus finds that this factors weights against a finding of excusable neglect.

4 **B. Length of Delay and Potential Impact on Judicial Proceedings**

5 Plaintiffs filed their Motion for Leave to File 5AC more than two years after the
6 deadline to seek leave to amend pleadings passed, (see ECF No. 18), almost two years
7 after they filed their 4AC, (see ECF No. 90), and three months after the close of
8 discovery, (see ECF No. 142). This is a substantial delay. The impact of this delay is
9 that the Court would be required to re-open limited discovery at a late stage in the
10 proceedings. While this is not a significant impact on the judicial proceedings, the
11 Court finds the length of delay weighs against a finding of excusable neglect.

12 **C. The Reason for Delay**

13 Plaintiffs assert the reason for their delay is that they mistakenly removed all
14 union members from the California Class in their attempt to defeat Costco's October
15 4, 2010 Motion for Summary Judgement with respect to California Labor Code § 514.
16 Plaintiffs assert they realized their mistake on March 21, 2012, after receiving
17 explanation codes to differentiate union from non-union employees in records
18 produced by Costco. Plaintiffs state that they noticed Costco had sent notice to some
19 union employees, along with the notice sent to non-union employees, which led
20 Plaintiffs to realize they had mistakenly omitted all union employees from the
21 California Class instead of just union employees seeking overtime compensation.
22 Plaintiffs then filed the instant Motion for Leave to File 5AC more than five weeks
23 after this discovery.

24 Costco argues Plaintiffs' Motion for Leave to File 5AC demonstrates undue
25 delay by Plaintiffs because Plaintiffs have already amended their operative pleading
26 four times, and the proposed amendment is not based on any new facts or discovery of
27 new evidence. Costco asserts Plaintiffs knew union members were not included in the
28 California Class definition during the period from January 3, 2011, to February 18,

1 2011, which is when the parties exchanged proposed Rule 23 class notices, reviewed
2 one another's proposed notices, and agreed on an amended notice. (ECF Nos. 105-2;
3 109-3; 112-3.)

4 The Court finds that, even accepting Plaintiffs' representation that they
5 mistakenly omitted union employees from the class definition, Plaintiffs had the
6 information necessary to correct their mistake but failed to do so in a timely manner.
7 Instead, Plaintiffs waited two years after making the mistake, three months after the
8 close of discovery, and more than five weeks after they apparently discovered their
9 mistake before attempting to rectify it by filing the instant Motion for Leave to File
10 5AC. Accordingly, this factor weighs against a finding of excusable neglect.

11 **D. Whether the Moving Party's Conduct Was in Good Faith**

12 The final factor is whether Plaintiffs acted in good faith. The Court finds
13 there is no evidence of bad faith by the Plaintiffs. This factor is therefore neutral.

14 Weighing the foregoing factors together, the Court finds Plaintiffs' failure to
15 abide by the deadline to seek leave to amend its 4AC is not the result of excusable
16 neglect. Accordingly, the Court must deny Plaintiffs' Motion for Leave to File
17 5AC.

18 **CONCLUSION & ORDER**

19 Having considered the parties' submissions, the record in this matter, and the
20 applicable law, and for the foregoing reasons, **IT IS HEREBY ORDERED** that
21 Plaintiffs' Motion for Leave to File 5AC, (ECF No. 160), is **DENIED**. The hearing
22 on Plaintiffs' Motion for Leave to File 5AC, currently set for September 27, 2013, is
23 **VACATED**. Remaining on calendar is the hearing on Costco's Motion to
24 Decertify.

25
26 DATED: September 26, 2013

27 
28 HON. GONZALO P. CURIEL
United States District Judge