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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARIANA ROSALES and
CHARLICE ARNOLD,

Plaintiffs,

v.

FITFLOP USA, LLC,

Defendant.

CASE No: 11-CV-0973 W (KSC)

**ORDER DENYING IN PART AND
GRANTING IN PART
PLAINTIFF’S MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT
[DOC. 64]**

Pending before the Court is Plaintiff Charlice Arnold’s motion for leave to file a second amended complaint (“SAC”).¹ (*Mtn.* [Doc. 64].) Defendant FitFlop USA, LLC, opposes the motion, in part. (*See Opp’n* [Doc. 65].)

The Court decides the matter on the papers submitted and without oral argument. See S.D. Cal. Civ. L.R. 7.1(d)(1). For the reasons stated below, the Court **DENIES IN PART** and **GRANTS IN PART** Plaintiff’s motion [Doc. 64].

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¹ Plaintiff Rosales withdrew from the case on July 21, 2011, leaving Charlice Arnold as the sole Plaintiff.

1 **I. BACKGROUND**

2 On June 6, 2012, Magistrate Judge Karen S. Crawford issued the Scheduling
3 Order setting July 9, 2012 as the deadline to join other parties, amend pleadings, or file
4 additional pleadings. (*Sched. Order* [Doc. 35] 1:20-21.) Discovery commenced the
5 same day. (*Opp'n* 2:12.) On August 16, 2012, counsel for Defendant took Arnold's
6 deposition and promptly sent a copy to her attorneys. (*Id.* 3:11-12.) The deposition
7 detailed information regarding Arnold's "multiple entanglements with the judicial
8 system," which counsel for Defendant had learned of a year earlier by searching public
9 records. (*Id.* 3:1-10.)

10 On August 27, 2012, the parties filed a joint motion for determination of a
11 discovery dispute. (*See Jt. Mtn.* [Doc. 40].) The dispute related to Arnold's refusal to
12 produce certain medical records. (*Jt. Mtn.* 1:11-25.) Arnold argued, in part, that the
13 documents were not relevant because she was not seeking damages for personal injuries.
14 (*Id.* 8:9-11, 16-19.) On December 19, 2012, Judge Crawford issued an order finding
15 that Arnold's argument was inconsistent with certain allegations in the First Amended
16 Complaint ("FAC"). (*See Order* [Doc. 58], 5:1-6:5.) Accordingly, Judge Crawford
17 ordered that Arnold either produce the documents requested or file a motion to amend
18 limited to clarifying "that they are not seeking any damages for physical or emotional
19 injury and are only seeking economic damages limited to the price of the FitFlp
20 products they allegedly purchased . . ." (*Id.* 6:14-16.)

21 On January 28, 2013, Arnold filed the current motion to amend the FAC to
22 clarify the damages sought, as well as to add an evidentiary allegation and another
23 named plaintiff. Defendant opposes the request to add another named plaintiff.

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1 **II. LEGAL STANDARD**

2 Ordinarily, Federal Rule of Civil Procedure Rule 15(a) governs motions for leave
3 to amend the complaint. Rule 15(a) provides that after a responsive pleading has been
4 served, a party may amend its complaint only with leave of court, and leave “shall be
5 freely given when justice so requires.” Fed. R. Civ. P. 15(a). Five factors are taken into
6 account to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue
7 delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether
8 the plaintiff has previously amended the complaint. Johnson v. Buckley, 356 F.3d 1067,
9 1077 (9th Cir. 2004). “Prejudice to the opposing party is the most important factor.”
10 Jackson, 902 F.2d at 1387.

11 Once the court-ordered deadline for amending pleadings has passed, Rule 16
12 governs. This Rule provides that a “party seeking to amend [a] pleading after [the]
13 date specified in [the] scheduling order must first show ‘good cause’ for amendment [of
14 the scheduling order] under Rule 16(b), then, if ‘good cause’ be shown, the party must
15 demonstrate that [the] amendment was proper under Rule 15.” Johnson v. Mammoth
16 Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992) (citing Forstmann v. Culp, 114
17 F.R.D. 83, 85 (M.D.N.C. 1987) and Financial Holding Corp. v. Garnac Grain Co., 127
18 F.R.D. 165, 166 (W.D. Mo. 1987)). Furthermore, the “‘good cause’ standard primarily
19 considers the diligence of the party seeking the amendment.” Id at 609. “While a court
20 may take into account any prejudice to the party opposing modification of the
21 scheduling order, ‘the focus of the inquiry is upon the moving party’s reasons for seeking
22 modification . . . [i]f that party was not diligent, the inquiry should end.” In re Western
23 States Natural Gas Antitrust Litigation, — F. 3d —, 2013 WL 1449919, at *14 (9th
24 Cir. April 10, 2013) (quoting id). In ruling on matters such as these, which involve the
25 supervision of the pretrial phase of litigation, “[t]he district court is given broad
26 discretion.” Miller v. Safeco Title Ins. Co., 758 F.2d 364, 369 (9th Cir. 1985).

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1 **III. DISCUSSION**

2 **A. Request to Clarify Damages Sought**

3 Arnold seeks to amend the complaint to clarify that she does not seek recovery
4 for personal injury on behalf of herself or the proposed class. (*Mtn.* 1:8-12.) To resolve
5 the discovery dispute regarding damages, Magistrate Crawford allowed Arnold to
6 amend the complaint on or before January 28, 2013 for the limited purpose of clarifying
7 that she is “not seeking any damages for physical or emotional injury” and “only seeking
8 economic damages.” (*Order* 6:14-17.) Arnold’s proposed amendment regarding
9 damages meets this deadline and falls within the limited scope allowed by Magistrate
10 Crawford’s order. (*Mtn.*)

11 Additionally, Defendant does not oppose this limited amendment. Because the
12 amendment meets the Rule 15 standard, the Court grants Arnold leave to amend the
13 complaint to clarify damages.

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15 **B. Request to Substitute the Class Representative and Add Evidentiary**
16 **Support**

17 Additionally, Arnold seeks to substitute herself as class representative with Ms.
18 Angie Ojeda and add factual evidence not available when the FAC was filed.² (*Mtn.*
19 1:8-15, 4:6-7.) However, Magistrate Crawford did not grant a general extension of the
20 deadline regarding amending pleadings or adding parties. Rather, her order limited the
21 scope of amendment to “clarify[ing] that [Arnold] [is] not seeking any damages for
22 physical or emotional injury and only seeking economic damages.” (*Order* 6:14-17.)
23 The sole purpose of this narrow allowance was to resolve the discovery dispute. The
24 order states, “[f]or this limited purpose, the deadline for filing any motion to amend the
25 pleadings in the Scheduling Order filed June 6, 2012 is extended to January 28, 2013.”
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27 ² Arnold seeks to add factual information regarding a study, “Do Fitflops™ increase
28 lower limb muscle activity?”, by K.E. Burgess and P.A. Swinton (“the Burgess Study”) that was
published in August 2012. (*Mtn.* 3:9-12.)

1 (Id. 6:23-24.) Magistrate Crawford’s language makes it extremely clear that the motion
2 to amend deadline was not extended for any other purpose. Thus, any amendments
3 beyond clarifying the damages issue are subject to Rule 16's standard.

4 Under Rule 16, “the scheduling order ‘control[s] the subsequent course of the
5 action’ unless modified by the court.” Johnson, 975 F.2d at 608 (quoting Fed. R. Civ.
6 P. 16). According to Johnson, a court may deny a motion to amend the pleadings
7 where the plaintiff failed to first move to amend the scheduling order. See id at 608-09.
8 Here, Arnold did not move to amend the Scheduling Order and thus, the deadline for
9 generally amending the pleadings and adding parties passed. For this reason alone, the
10 Court denies Arnold’s motion to amend to substitute a new named plaintiff and add
11 evidentiary information.

12 Nevertheless, even if the Court were to consider Arnold’s current motion as a
13 motion also to amend the Scheduling Order, Arnold does not satisfy the Rule 16
14 standard. Rule 16 requires that Arnold show ‘good cause’ for amendment of the
15 scheduling order. See Johnson, 975 F.2d at 608. To assess ‘good cause’, the main
16 inquiry is Arnold’s diligence. Id at 609; In re Western, 2013 WL 1449919, at *14. If
17 Arnold “was not diligent, the inquiry should end” and the motion to modify should not
18 be granted. Id. The degree to which Arnold’s motion is tardy and the fact that she
19 failed to file a prior motion to modify the Scheduling Order are important in assessing
20 her diligence. See In re Western, 2013 WL 1449919, at *14 (indicating the
21 importance of a moving party’s prior awareness of facts and theories supporting the
22 current proposed amendments in assessing that party’s diligence).

23 Arnold’s counsel admits to having actual knowledge by August 27, 2012 of both
24 her history and of Defendant’s plan to argue that it renders her an inadequate class
25 representative. (Mtn. 6:19-28.) At that time, Arnold should have acted diligently by
26 moving to modify the Scheduling Order to allow her additional time to find a better-

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1 suited class representative and to file the proposed SAC in a timely manner.³ Instead,
2 Arnold waited five more months before filing this motion.

3 Moreover, Arnold does not present a persuasive excuse for her excessive
4 tardiness. In fact, Defendant points out her tardiness in its Opposition, but Arnold does
5 not directly address it or give a reasonable explanation in her Reply. (*Opp'n* 8:6-8;
6 *Reply*.) Instead, Arnold states that "another plaintiff could not be added to the case
7 unless a class member expressed his or her willingness to step forward to represent the
8 class" and that "[a]fter Ms. Ojeda decided to become a named plaintiff and retained
9 [Arnold's] counsel in January 2013," she filed the motion promptly. (*Reply* 8:12-18.)
10 The explanation is not persuasive; rather, it illustrates counsel's passivity in waiting for
11 a better-suited class representative "to step forward" and fails to even suggest diligence
12 in attempting to find a new class representative.

13 Moreover, Arnold's counsel's passivity and lack of diligence is further illustrated
14 by their failure to discover Arnold's problematic legal history well before her deposition.
15 Arguably, Arnold's attorneys should have known of her legal problems even before
16 naming her a class representative. Furthermore, had they been diligent, counsel would
17 have at least known in time to meet the pertinent deadline for substitution. Counsel
18 could have asked Arnold at any time about her legal history. Indeed, Defendants
19 learned of Arnold's legal history in August 2011, a year before taking her deposition,
20 by simply searching public records. (*Opp'n* 3:1-10.) Thus, Arnold's attorneys had
21 available to them two avenues by which they could have learned of her problematic
22 legal history well before the July deadline for amending the FAC.

23 The Court finds that Arnold's attorneys' lack of diligence early in the litigation,
24 their knowledge of her legal history by August 2012, coupled with their failure to move
25 to amend the Scheduling Order and excessive tardiness in filing the current motion
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27 ³ In fact, Arnold filed a Joint Motion to Continue Certain Pretrial Deadlines on August
28 30, 2012, but failed to request a continuance of the deadline to amend pleadings generally or
add parties despite Arnold's attorneys' knowledge of her problematic legal history by then.

1 amounts to a lack of diligence. See Johnson, 975 F.2d at 606-11 (holding where the
2 plaintiff moved to join a defendant four months after the deadline to join parties, the
3 plaintiff “failed to demonstrate good cause for his belated motion to amend” because
4 the joined defendant’s answer to the complaint and responses to interrogatories put him
5 on notice that he hadn’t joined the correct party.) Accordingly, Arnold’s motion to
6 amend to add a new class representative and evidentiary support is denied.

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8 **III. CONCLUSION AND ORDER**

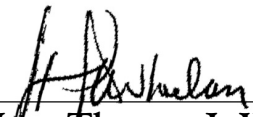
9 For these reasons, the Court **DENIES IN PART** and **GRANTS IN PART**
10 Arnold’s motion to file a second amended complaint [Doc. 64].

11 **IT IS SO ORDERED.**

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13 **DATED: June 17, 2013**

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Hon. Thomas J. Whelan
United States District Judge

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