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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICKY DIAZ,

Plaintiff,

v.

UNITED STATES OF AMERICA, ALONSO
MORALES, and DOES 1-25, Inclusive,

Defendants.

Civil No. 11-cv-2028-IEG (DHB)

**ORDER GRANTING DEFENDANTS'
MOTION TO AMEND THE
SCHEDULING ORDER AND FILE AN
AMENDED ANSWER**

[ECF No. 24]

On August 24, 2012, Defendants filed a Motion to Amend the Scheduling Order and File an Amended Answer. (ECF No. 24.) Defendants seek leave to amend their Answer to correct an inconsistency between certain paragraphs that could be confusing to the trier of fact. Plaintiff has not filed any opposition to this motion. Based upon the failure of Plaintiff to file an opposition¹ and for the reasons set forth below, this Court finds good cause to GRANT Defendants' Motion to Amend the Scheduling Order and Motion to File an Amended Answer.

I. Procedural Background

On September 2, 2011, Plaintiff filed a Complaint against Defendants the United States of America and Alonso Morales (collectively "Defendants"). (ECF No. 1.) On December 20, 2012,

¹ When an opposing party fails to file an opposition, that failure may constitute consent to the granting of the motion. *See* CivLR 7.1(f).

1 Defendants filed their Answer. (ECF No. 3.) On March 28, 2012, the Court issued a Scheduling
2 Order setting April 30, 2012 as the deadline to file any motions to amend the pleadings. (ECF No.
3 18.) On August 24, 2012, Defendants filed the instant motion.

4 **II. Discussion**

5 The Complaint lists several the causes of action against Defendants, including claims for
6 excessive force (Count One), wrongful arrest (Count Two), and wrongful detention (Count Three).
7 (ECF No. 1 at 3-5.) The supporting facts for these three claims are identical.² Plaintiff alleges the
8 following:

9 Plaintiff, who was crossing from Mexico into the United States at [sic] turnstile operated
10 by Defendants, presented two forms of valid identification - a California Drivers License
11 and a State of California Department of Corrections and Rehabilitation employee
12 identification card. Plaintiff walked through the turnstile, but then was called back by
13 Officer Morales, Defendant United States of America's employee, who was then acting
14 in an official capacity as a U.S. Customs and Border Protection Officer. Plaintiff
15 complied. Officer Morales handcuffed Plaintiff, hit Plaintiff on his back and in the back
16 of his head, and caused Plaintiff's neck to be positioned in a manner so as to cause
17 injury. During the entire assault and batter, Plaintiff never provoked any officer or
18 resisted any officer. As a result of the excessive force, and the unreasonable manner in
19 which the officer used force, Plaintiff was injured and required surgery.

20 (ECF No. 1 at 3.)

21 In response to Count One, Defendants denied that Plaintiff presented two forms of identification
22 as described in the Complaint. Specifically, Defendants answered:

23 Answering Paragraph (C) (Count 1) of the Complaint, Federal Defendants admit:
24 Plaintiff walked through the turnstile at the port of entry operated by U.S. Customs and
25 Border Protection; Officer Morales called Plaintiff back for inspection; and, Officer
26 Morales handcuffed Plaintiff. Federal Defendants deny each, every, and all remaining
27 allegations contained therein.

28 (ECF No. 3 at 2, ¶ 4.) However, when Defendants answered Counts Two and Three, they admitted
Plaintiff presented a California driver's license. (ECF No. 3 at 2, ¶5 and 4, ¶ 6.) On May 30, 2012,
Officer Morales was deposed. He testified that Plaintiff had not shown documents to enter the United
States. (ECF No. 24, Ex. C at 33:25-35:25.) Officer Morales' testimony was consistent with paragraph
4 of the Answer, but inconsistent with paragraphs 5 and 6.

² The supporting facts in Counts Two and Three are identical. The supporting facts in Count
One are identical, except for the last sentence in Count One, which is not relevant to the instant motion.

1 Defendants state that on August 22, 2012, they became aware of the inconsistency in the Answer
2 when Plaintiff’s counsel called defense counsel, expressing confusion about the conflicting paragraphs.
3 Defendants now seek to amend paragraphs 5 and 6 to be consistent with their answer to paragraph 4,
4 which is also consistent with Officer Morales’ testimony.³

5 **A. Legal Standard**

6 Leave to amend should be freely given “when justice so requires.” Fed.R.Civ.P. 15(a)(2). In
7 light of this liberal standard, the Court can consider the following factors: (1) undue delay, (2) bad faith,
8 (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the party has previously
9 amended their pleading. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Eminence Capital, LLC v. Aspeon,*
10 *Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003). “Prejudice to the opposing party is the most important
11 factor.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). *See also Eminence Capital,*
12 *LLC*, 316 F.3d at 1052. The party opposing leave to amend bears the burden of showing prejudice.
13 *DCD Program, Ltd. V. Leighon*, 833 F.2d 183, 187 (9th Cir. 1987).

14 However, once a court has already issued a scheduling order and the motion cutoff date has
15 passed, amendment of the pleadings is only permitted if there is “good cause” for modification of the
16 scheduling order. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (citing *Johnson*
17 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992)). “This standard ‘primarily
18 considers the diligence of the party seeking the amendment.’” *Id.* Only where a party shows good cause
19 for a belated motion to amend may the Court consider whether the amendment would be proper under
20 Rule 15. *Johnson*, 975 F.2d at 607-09.

21 **B. Analysis**

22 First, the Court finds there is good cause to amend the Scheduling Order to permit Defendants
23 to file an Amended Answer. Although the instant motion was filed four months past deadline set forth
24 in the Scheduling Order, Defendants filed their motion just two days after becoming aware of the
25 inconsistency in the Answer. Accordingly, the Court finds Defendants acted with sufficient diligence
26

27 ³ Defendants state in their Memorandum of Points and Authorities that they seek to amend
28 paragraphs 7 and 8. (ECF No. 24 at 5.) However, upon closer review of the proposed Amended
Answer, it is clear Defendants are seeking to amend paragraphs 5 and 6.

1 to warrant modification of the Scheduling Order. Moreover, the Court notes that the modification
2 should not create any delay or case management issues as it will not affect the remaining dates in the
3 Scheduling Order.

4 Next, the Court finds Defendants' proposed Amended Answer is proper under Rule 15 of the
5 Federal Rules of Civil Procedure. Defendants' Motion to Amend the Answer is unopposed. As a
6 result, there has been no showing of prejudice, and the Court is unable to identify any substantial
7 prejudice that Plaintiff would incur. Indeed, the proposed amendment clarifies the ambiguity that
8 Plaintiff's counsel raised to defense counsel.

9 The Ninth Circuit has stated that "[a]bsent prejudice, or a strong showing of any of the remaining
10 *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend."
11 *Eminence Capital*, 316 F.3d at 1052. Without any opposition having been filed, there is no strong
12 showing of the remaining factors justifying denial of leave to amend. The Court notes there is no
13 apparent bad faith or undue delay on the part of Defendants in seeking leave to amend the Answer.
14 Defendants have not previously sought to amend their Answer. Further, allowing Defendants to clarify
15 the ambiguity in the Answer would not be futile because it will eliminate any possible confusion caused
16 by the Defendants' current conflicting answers to Counts One, Two and Three. In light of the fact that
17 there are no demonstrated or apparent reasons warranting denial, this Court finds that Defendants'
18 Motion for Leave to File an Amended Answer should be granted.

19 **III. Conclusion**

20 For the foregoing reasons, Defendants' Motion to Amend the Scheduling Order and File an
21 Amended Answer is GRANTED. Defendants' may file their Amended Answer within ten (10) days
22 of the date of this order.

23 **IT IS SO ORDERED.**

24 DATED: September 25, 2012

25 
26 DAVID H. BARTICK
27 United States Magistrate Judge
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