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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA AGUILAR, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

BOULDER BRANDS, INC., a Delaware
Corporation (formerly known as Smart
Balance, Inc.) and GFA BRANDS, INC., a
Delaware Corporation,

Defendant.

Civil No. 12-CV-1862-BTM (BGS)

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND THE
SCHEDULING ORDER**

[ECF No. 69.]

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I. INTRODUCTION

Currently before the Court is Plaintiff's motion to amend the Court's October 11, 2013 Scheduling Order. (ECF No. 69.) Plaintiff requests the Court vacate the fact discovery deadline until the District Judge rules on her pending Motion for Leave to Further Amend the Proposed Second Amended Complaint and to Substitute a New Proposed Class Representative. In the alternative, Plaintiff asks for a 60-day extension of the fact discovery deadline. (*Id.* at 5.) The current Scheduling Order requires all fact discovery to be completed by May 9, 2014. (ECF. No. 38.)

II. PROCEDURAL HISTORY

On November 8, 2013, Plaintiff filed a motion for leave to file a second amended complaint, which was taken under submission by the Honorable Barry Ted Moskowitz on

1 January 27, 2014. (ECF. No. 43.) On January 10, 2014, Plaintiff filed her Motion for Class
2 Certification. (ECF No. 52.) Defendants filed a Motion to Stay Class Certification Proceedings
3 and Class Discovery Pending Determination of Plaintiff's Motion for Leave to File Second
4 Amended Complaint. (ECF No. 54.) On February 5, 2014, Judge Moskowitz granted
5 Defendants' Motion to Stay Class Certification and Class Discovery and instructed Plaintiff to
6 "seek a new hearing date and refile her motion to certify a class after the Court rules on her
7 motion for leave to file a second amended complaint." (ECF No. 63.)

8 On February 6, 2014, Plaintiff filed a Motion for Leave to Further Amend the Proposed
9 Second Amended Complaint and to Substitute a New Proposed Class Representative. (ECF No.
10 62.) The District Court took the Motion for Leave to Further Amend and to Substitute a New
11 Proposed Class Representative under submission on March 7, 2014. (ECF No. 67.)

12 **III. DISCUSSION**

13 Plaintiff is requesting the court vacate the fact discovery deadline until after a decision on
14 her pending motion to amend and to substitute a new proposed class representative. Plaintiff
15 asserts that although the parties have been diligent, unforeseen developments require a
16 modification of the fact discovery deadline. Specifically, Plaintiff argues that after the October
17 11, 2013 Scheduling Order issued, she and her son suffered health issues which have caused her
18 to seek to withdraw as class representative. Plaintiff argues it would be wasteful for the parties
19 to continue with fact discovery when they do not know if a new class representative will be
20 approved by the district court. Moreover, Plaintiff contends she should not be noticed for a
21 deposition if the district court will ultimately allow a new class representative. Plaintiff also
22 argues she would be prejudiced by having a limited time frame for merits discovery when there
23 is no ruling yet on file from the district court as to the scope of the proposed class. Plaintiff
24 urges the court to either vacate the current fact discovery deadline, or in the alternative, continue
25 the deadline for 60 days to allow for the resolution of any issues that may arise in the event
26 Plaintiff is granted leave to file an amended complaint and substitute a new class representative.

27 Defendants argue that while they have avidly pursued discovery, Plaintiff, however, has
28 not been diligent in her pursuit of fact discovery. Specifically, they contend: (1) Plaintiff agreed

1 on December 17, 2013, to provide them with supplemental interrogatory responses before the
2 end of 2013, but no supplemental responses have yet been provided; and (2) although Plaintiff's
3 deposition was scheduled for January 29, 2014, she did not inform Defendants until January 21,
4 2014, that she intended to file a motion to withdraw from the case and no longer intended to
5 appear for her deposition.¹ Defendants also contend that they are poised to continue with the
6 discovery deadlines currently in place and ask the Court to compel Plaintiff's deposition and
7 supplemental document production.

8 Once a scheduling order has been filed pursuant to Rule 16, the "schedule may be
9 modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Rule
10 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the
11 amendment. The district court may modify the pretrial schedule 'if it cannot reasonably be met
12 despite the diligence of the party seeking the extension.'" *Johnson v. Mammoth Recreations,*
13 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citing Fed. R. Civ. P. 16 advisory committee's notes
14 (1983 amendment)).

15 Defendants focus their opposition to Plaintiff's motion on Plaintiff's failures to respond to
16 written discovery and to appear for deposition to demonstrate lack of diligence, however,
17 Defendants' opposition brief also shines light on Defendants' own failure to bring these
18 problems to the Court's attention in a timely and diligent fashion. The Court's chambers rules
19 require the parties to bring discovery disputes to the Court's attention after meeting and
20 conferring in-person and within no more than 30 days after the dispute arises. Parties that fail to
21 meet this deadline are prohibited from filing a motion to compel unless good cause is shown.
22 *See* Judge Skomal's Local Chambers Rules at <http://www.casd.uscourts.gov/Rules>. Defendants
23 attempt to explain their failure to comply with the Court's deadline for bringing discovery
24 disputes by stating in a footnote that they did not preserve their right to bring a motion to compel
25 because they believed the case to be moot. The Court's chambers rules specifically alert the
26 parties that "[c]ounsel may not stop conducting other discovery due to a dispute." Regardless of
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28 ¹Defendants contend Plaintiff's counsel knew on January 15, 2014, Ms. Aguilar no longer wished to serve as named plaintiff in this case.

1 Defendants' position as to whether a case or controversy exists in light of Plaintiff's desire to
2 withdraw before class certification, they did not follow the Court's rules requiring a discovery
3 dispute be brought to the Court's attention for adjudication or for preservation within 30 days of
4 its inception. Good cause has not been shown by Defendants to compel Plaintiff's deposition or
5 supplemental responses and their requests are **DENIED**.

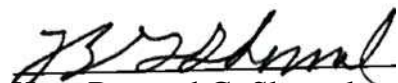
6 As to Plaintiff's motion, the Court finds good cause to modify the Scheduling Order has
7 been established. In her reply brief, Plaintiff underscores the argument that it would be a waste
8 of the parties' resources to pursue merits-based discovery because the district court may deny
9 Plaintiff's motion for leave to amend and to substitute a new class representative; and in the
10 event of a denial, Plaintiff will have to request that the case be voluntarily dismissed and then
11 file a new complaint on behalf of the proposed class representative, Elizabeth Mitchell. The
12 Court agrees and finds: (1) the current fact discovery deadline cannot be reasonably met in light
13 of the pending Motion for Leave to File Second Amended Complaint; and (2) is in keeping with
14 Judge Moskowitz's Order Granting Defendant's Motion to Stay Class Certification. (*See* ECF
15 No. 63.)

16 **IV. CONCLUSION**

17 As explained above, the Court **GRANTS** Plaintiff's Motion for Amended Scheduling
18 Order. The May 9, 2014 deadline for fact discovery is **HEREBY VACATED**. The parties are
19 ordered to contact Judge Skomal's chambers at (619) 557-2993 within three (3) court days of
20 receiving a ruling on Plaintiff's Motion for Leave to Further Amend the Second Amended
21 Complaint in order to schedule a telephonic Status Conference regarding case management. The
22 telephonic status conference presently scheduled for April 18, 2014 with Judge Skomal is **ALSO**
23 **VACATED**.

24 **IT IS SO ORDERED.**

25 DATED: March 25, 2014

26 
27 Hon. Bernard G. Skomal
28 U.S. Magistrate Judge
United States District Court