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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 MARLA GUTIERREZ,

12 Plaintiff,

13 vs.

14 UNITED STATES OF AMERICA and
15 SOUTH BAY SAND BLASTING AND
16 TANK CLEANING, INC.,

17 Defendants.

18 AND RELATED CROSS-COMPLAINT

Case No.: 15cv01618-JLS-KSC

**ORDER DENYING PLAINTIFF'S
MOTION TO AMEND
SCHEDULING ORDER PURSUANT
TO RULE 16(b)(4) OF THE
FEDERAL RULES OF CIVIL
PROCEDURE**

Doc. No. 60

19 Before the Court is plaintiff's *ex-parte* Motion to Amend Scheduling Order
20 ("Motion"). [Doc. No. 60.] Therein, plaintiff seeks to amend the remaining pre-trial
21 deadlines in this case because she needs "more time to fairly prosecute her claim."¹ [Doc.
22 No. 60-2, at pp. 2-3.] Defendants oppose the Motion because, "[p]laintiff has failed to
23 conduct *any* discovery, and thus has not only failed to exercise reasonable diligence, but
24 has not even attempted to comply with the Scheduling Order's requirement to complete
25 fact discovery by July 21, 2017." [Doc. No. 63, at p. 6.]

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27 ¹ Notably, plaintiff's Motion fails to propose an amended schedule or specify how many days plaintiff
28 seeks to continue the current schedule. [Doc. No. 60.] However, on July 31, 2017, plaintiff filed a Reply
to defendants' Opposition, in which she requests "no less than a ninety (90) day extension." [Doc. No. 65,
at p. 9.]

1 **A. Background and Procedural History**

2 Plaintiff filed her original Complaint on July 21, 2015, and this case has been
3 pending for over two years. [Doc. No. 1.] On September 30, 2016, the Court granted the
4 Motion to Withdraw filed by plaintiff's prior attorney, Preston Easley. [Doc. No. 49.] On
5 November 2, 2016, the Court held a Status Conference and plaintiff advised the Court that
6 she had not been successful in finding a new lawyer to represent her, and had decided to
7 proceed *pro se*. [Doc. No. 52.] During the Status Conference, the Court set initial discovery
8 dates, including a deadline for the Rule 26(f) conference and initial disclosures. [Doc. No.
9 52.] On January 20, 2017, the Court held a Case Management Conference, and plaintiff
10 appeared *pro se*. [Doc. No. 53.] The Court subsequently issued a Scheduling Order
11 Regulating Discovery and other Pre-Trial Proceedings ("Scheduling Order").
12 [Doc. No. 54.] Therein, the Court ordered "[a]ll fact discovery shall be completed by all
13 parties on or before July 21, 2017." [Doc. No. 54, at p. 2.] The Scheduling Order also set
14 dates up to and including the pre-trial conference on May 3, 2018. [Doc. No. 54, at p. 5.]
15 The Scheduling Order provides that "[t]he dates and times set forth herein will not be
16 modified except for good cause shown." [Doc. No. 54, at p. 5.] On April 19, 2017,
17 Maxwell Agha filed a Notice of Substitution of Attorney as plaintiff's new counsel. [Doc.
18 No. 57, at 1.]

19 Plaintiff filed the instant Motion on July 20, 2017. [Doc. No. 60.] Defendants filed
20 a Response in Opposition to plaintiff's Motion on July 25, 2017. [Doc. No. 63.] Plaintiff
21 filed a Reply to Defendants' Opposition on July 31, 2017. [Doc. No. 65.]

22 **B. Discussion**

23 Plaintiff contends that good cause to modify the schedule exists because "[p]laintiff
24 has diligently pursued discovery." [Doc. No. 60-2, at p. 3.] Plaintiff claims to have
25 "exercised diligence in prosecuting this case by responding to request[s] for admission,
26 request[s] for production of documents, interrogatories, and by propounding
27 interrogatories, requests for production, and requests for admission upon Defendants."
28 [Doc. No. 60-2, at p. 3.] Plaintiff further argues that the Court should grant plaintiff's

1 Motion because “the request is sought in good faith, is not futile, not prejudicial to
2 defendants, is timely, and the plaintiff’s diligence and prosecution of the case now
3 necessitates the amendment of the Scheduling Order.” *Id.* at p. 6. Plaintiff argues in her
4 Reply that a continuance is warranted because her newly retained counsel, Mr. Agha, “was
5 *not* up-to-speed or even in any way a part of the matter until three months ago.” [Doc. No.
6 65, at p. 6 (emphasis in the original).] Plaintiff also asserts in her Reply that the parties
7 “had agreed to stipulate to a joint motion to amend the Scheduling Order and then
8 [defendants] withdrew their agreement prior to Plaintiff’s Motion to Amend.” [Doc. No.
9 65, at p. 2.]

10 Defendants oppose plaintiff’s request and argue:

11 *Plaintiff has conducted no discovery*, which is not only an undeniable
12 failure to exercise reasonable diligence to prosecute her own case, but is
13 proof that plaintiff did not even attempt to comply with the Scheduling
14 Order’s requirement to complete fact discovery by July 21, 2017. The
15 United States conducted discovery, is ready to proceed pursuant to the
16 Scheduling Order, and respectfully requests this Court deny plaintiff’s
17 request to amend the Scheduling Order. . . . Nothing has prevented
18 plaintiff from propounding discovery and/or noticing depositions over
19 the past five months since the Court issued its Scheduling Order.

20 [Doc. No. 63-2, at pp. 2-3 (emphasis in original).] Defendants further argue that “plaintiff
21 was expected to complete fact discovery in this case by July 21st, regardless of whether
22 she subsequently retained an attorney.” *Id.* at p. 3. Defendants contend that plaintiff’s
23 claim that she “requires time to allow defendants to respond to propounded fact discovery”
24 is false noting that she has never propounded written discovery nor noticed any depositions.
25 *Id.* Defendants further oppose plaintiff’s argument regarding her newly retained counsel
26 noting that “[i]n the three months since Mr. Agha filed his Substitution of Attorney,
27 plaintiff has propounded no discovery.”² [Doc. No. 63, at p. 4.]

28 ² Plaintiff makes bald assertions without any factual support in her Reply in response to defendants’
argument that plaintiff has failed to serve any discovery in this case. For example, plaintiff argues:
“Defendants[’] proffer that Plaintiff engaged in no discovery of any sort, is clearly a misguided spin on
the notion of the discovery process.” [Doc. No. 65, at p. 4.] She also argues: “[d]evoid of fact is

1 The Court finds that plaintiff has failed to demonstrate she acted with diligence as
2 required by *Johnson v. Mammoth Rec., Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992) (“If the
3 party was not diligent, the [good cause] inquiry should end.”).] First, the instant Motion
4 was filed merely one day before the deadline for the completion of fact discovery. The
5 Scheduling Order clearly provides that “[a]ll fact discovery shall be completed by all
6 parties on or before July 21, 2017.” [Doc. No. 54.] Plaintiff’s Motion was filed on July 20,
7 2017, one day before this deadline. This does not demonstrate diligence by plaintiff or her
8 counsel.

9 Second, plaintiff’s argument that the parties had “agreed to stipulate to a joint motion
10 to amend the Scheduling Order and then [defendants] withdrew their agreement just prior
11 to Plaintiff’s Motion to Amend” is without merit. [Doc. No. 65, at p. 2.] Parties cannot
12 stipulate to amend a Scheduling Order without a Court Order. As set forth in the
13 Scheduling Order, “[t]he dates and times herein will not be modified except for good cause
14 shown.” [Doc. No. 54, at p. 5.] Notwithstanding plaintiff’s alleged agreement between the
15 parties, she failed to appropriately request leave from the Court for any modification to the
16 discovery schedule.

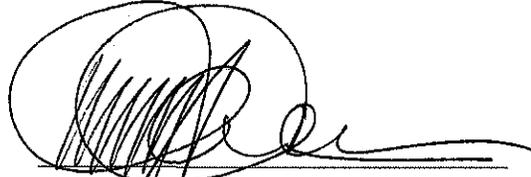
17 Third, plaintiff’s argument that Mr. Agha needs more time to get “up-to-speed” also
18 fails. Mr. Agha entered his Notice of Substitution as plaintiff’s counsel more than three
19 months ago, which is more than enough time for him to have gotten “up-to-speed” and
20 conducted any necessary discovery. To the extent Mr. Agha believed that he needed more
21 time for discovery and/or to comply with the other pre-trial deadlines, he should have
22 requested it more than one day before the expiration of fact discovery. Additionally,
23 plaintiff notified the Court on November 2, 2016 that she had decided to proceed *pro se*.
24 [Doc. No. 51.] When the Court entered its Scheduling Order on February 3, 2017, plaintiff
25 was expected to comply with the schedule in her *pro se* capacity regardless of whether she
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28 Defendants’ false assertion that Plaintiff did not conduct any discovery.” *Id.* at p. 7. Notably, there is no
factual basis in plaintiff’s arguments.

1 ultimately retained counsel to represent her.

2 In sum, plaintiff fails to explain why she waited until July 20, 2017 to seek the broad
3 relief she now requests. The Court finds that plaintiff has failed to demonstrate diligence
4 and good cause does not exist for her request. Accordingly, plaintiff's Motion to Amend
5 Scheduling Order Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure is
6 hereby **DENIED**. [Doc. No. 60.]

7 Dated: August 3, 2017



Hon. Karen S. Crawford
United States Magistrate Judge

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