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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM J. CANNON,

Plaintiff,

v.

AUSTAL USA LLC AND UNITED STATES OF
AMERICA,

Defendants.

Case No.: 15cv2582-CAB (BLM)

**ORDER GRANTING PLAINTIFF'S EX
PARTE MOTION TO AMEND
SCHEDULING ORDER**

[ECF No. 62]

Currently before the Court is Plaintiff's April 3, 2017 motion to amend scheduling order [ECF No. 62-1 ("Mot.")], Third Party Defendant Austal USA, LLC'S April 10, 2017 response [ECF No. 66 ("Response")], Defendant United States of America's April 11, 2017 opposition to the motion [ECF No. 68 ("Oppo.")], and Plaintiff's April 18, 2017 Reply [ECF No. 71 ("Reply")]. For the reasons set forth below, Plaintiff's motion is **GRANTED**.

BACKGROUND

On April 3, 2017, Plaintiff filed an "Ex Parte Motion to Amend Scheduling Order." ECF No. 62. The Court issued a briefing schedule on April 4, 2017. Id. In accordance with that schedule, the parties timely filed their motion, opposition, response, and reply. See Id.; see also Mot., Oppo., Response, and Reply.

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RELEVANT DISCOVERY BACKGROUND

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2 On June 20, 2016, Defendant Austal responded to Defendant USA's Interrogatories, Set
3 One which asked Austal to identify all "personnel working with Plaintiff at the time of the alleged
4 incident." Mot. at 9; see also ECF No. 62-2, Declaration of Thomas M. Discon in Support of
5 Complainant, William J. Cannon's Ex Parte Motion ("Discon Decl."), at Exh. 5. Defendant Austal
6 responded "[n]one]. According to Plaintiff's complaint he 'was attempting to pick up and move
7 lifts with three Navy personnel..." Id.

8 On July 29, 2016, Plaintiff propounded Interrogatories on Austal requesting "the names,
9 addresses, telephone numbers, social security numbers, driver's license numbers and position
10 of each and every person known to Defendant, who may have any knowledge of the facts
11 relevant to this lawsuit." Mot. at 8-9; see also Discon Decl. at Exh. 4. Austal responded on
12 August 31, 2016 with the names of four individuals. Id.

13 On August 25, 2016, Plaintiff served Defendant USA with requests for production of
14 documents which sought "[e]very accident report, report of first injury, illness and/or ailment
15 report, and/or root cause analysis report with respect to complainant, which was made by any
16 agent, employee, or representative of any party or insurer or any party designated above or any
17 governmental agency." Mot. at 15-16; see also Discon Decl. at Exh. 11. Defendant USA
18 objected to the request and stated that it had "no documents responsive to this request." Id.

19 On December 27, 2016, Defendant Austal responded to Defendant USA's Interrogatories,
20 Set Two which asked Austal to identify "all of your personnel who were aboard the U.S.S.
21 CORONADO (LCS-4) at any time on November 25, 2013" and "all of your Safety Officers who
22 were assigned to U.S.S. CORONADO (LCS-4) at any time from August 7, 2013 through and
23 including November 25, 2013." Mot. at 9; see also Discon Decl. at Exh. 6. Defendant Austal
24 objected to the requests, but listed seventeen names. Id.

25 On February 17, 2017, Austal served First Supplemental Initial Disclosures which included
26 twenty-three new fact witnesses. Mot. at 14; see also Discon Decl. at Exh. 9. On February 24,
27 2017, Austal served Corrected First Supplemental Initial Disclosures that narrowed the twenty-
28 three witnesses down to seven witnesses including Tony Ardito, Susan Brigitha, Dan Goergen,

1 Dave Growden, Thomas “Tommy” Mendiola, Paul Quinn and Steve Williamson. Mot. at 14; see
2 also Discon Decl. at Exh. 10. Fact discovery closed on February 27, 2017. ECF No. 51 at 2.

3 After investigating on his own, Plaintiff discovered the identity of Ms. Felicia London, a
4 female safety officer employed by Austal, who took a report of Plaintiff’s accident on November
5 25, 2013.¹ Mot. at 11-12. On March 27, 2017, counsel for Plaintiff contacted Ms. London and
6 got a sworn and notarized statement from her indicating:

7 (1) that she was aboard the USS Coronado on the date of Complainant, Mr.
8 Cannon’s, accident; (2) that she witnessed Mr. Cannon, several Austal employees
9 and Naval personnel surrounding the ramp extension at issue in this case
10 immediately following the accident herein; (3) that Mr. Cannon informed her that
11 he sustained an injury in an accident; (4) that she noted the names of individuals
12 involved in the accident, including Naval officers; (5) that she informed all
13 witnesses at that time of their obligation to furnish a statement concerning Mr.
14 Cannon’s accident; (6) that she attempted to collect said statements from Naval
15 officers in the SUPSHIP Naval building, but did not collect any; (7) that she
16 completed an incident report concerning Mr. Cannon’s accident, which she printed
17 and saved on the safety office computer; and (8) that she placed a copy of said
18 incident report in a fellow safety officer, Timothy “Blake” Thomas’s, file for review.

15 Id. at 12; see also Discon Decl. at Exh. 8.

16 On March 29, 2017, Plaintiff’s counsel met and conferred with counsel for Austal. Mot.
17 at 4; see also Discon Decl. at Exh. 2. Austal did not oppose Plaintiff’s request to reopen
18 discovery, but reserved its right to object or oppose further discovery until after Plaintiff served
19 it with formal discovery requests. Id. Counsel for Defendant USA declined to participate in the
20 meet and confer. Id.

21 **PARTIES’ POSITIONS**

22 Plaintiff seeks an order from the Court amending the scheduling order and reopening
23 discovery. Mot. Plaintiff requests that he be permitted to depose nine additional witnesses²,
24 _____

25 ¹ Plaintiff does not state the date on which he discovered Ms. London’s identity; he only states
26 that his counsel contacted her immediately upon receipt of her information. Mot. at 11-12.

27 ² The witnesses are Felicia London, Timothy “Blake” Thomas, Tony Ardito, Susan Brigitha, Dan
28 Goergen, Dave Growden, Thomas “Tommy” Mendiola, Paul Quinn and Steve Williamson. Mot.
at 14, 17.

1 discover the records of Austal and Defendant USA based on the signed affidavit of one of the
2 witnesses, and be given the “opportunity to discover the identities of any and all SUPSHIP
3 personnel who may have any knowledge of Mr. Cannon’s accident and accordingly conduct their
4 depositions.” Id. at 15. Fact discovery in this matter closed on February 27, 2017. ECF No. 51
5 at 2. Plaintiff argues that the additional discovery should be permitted after the discovery
6 deadline because seven of the nine witnesses were disclosed by Austal “immediately prior to the
7 fact discovery deadline” which prevented Plaintiff’s counsel from timely deposing the additional
8 witness. Mot. at 2-3. Plaintiff further argues that Defendant USA “failed to disclose the
9 involvement of the SUPSHIP office and/or SUPSHIP personnel in Complainant’s accident” and as
10 such, he should be given additional time to conduct discovery on this issue. Id. at 15. Finally,
11 Plaintiff argues that he could not have discovered these additional areas of inquiry prior to the
12 February 27, 2017 discovery deadline. Id. at 16.

13 Defendant USA opposes Plaintiff’s motion noting that it was filed more than one month
14 after the close of fact discovery and after the filing of expert reports. Oppo. at 2. Defendant
15 USA contends that Plaintiff has failed to meet the good cause standard required for re-opening
16 discovery and to present any factual or legal basis in support of his motion. Id. at 3-4.
17 Defendant USA further contends that Plaintiff never mentioned a female safety officer in his
18 deposition³ and that he had the entire period of discovery to try and find the name and location
19 of the security officer. Id. at 6. Defendant USA notes that since Plaintiff has spoken with Ms.
20 London and obtained her affidavit, re-opening discovery for her deposition “is a mere pretext.”
21 Id. Defendant USA contends that if Plaintiff took issue with Austal’s untimely disclosures, Plaintiff
22 should have filed a discovery motion which would have been due on March 24, 2017 in
23 accordance with the Court’s scheduling order [see ECF No. 51]. Id. at 7. If this is a disclosure
24 issue as opposed to a discovery issue, an appropriate motion, such as a motion to exclude such
25 witnesses, can be filed at a later time as Austal should also not benefit from its late disclosure.

26
27 ³ One of the witnesses Plaintiff seeks to depose is Ms. Felicia London, a female safety officer
28 alleged to have made a report regarding Plaintiff’s accident on November 25, 2013. Mot. at 11-
13.

1 Id. at 8. Defendant USA states that it satisfied its initial disclosure duties and timely
2 supplemented those disclosures. Id. Finally, Defendant USA contends that (1) Plaintiff has not
3 diligently pursued discovery, (2) re-opening discovery will prejudice Defendant USA, and (3) all
4 remaining pre-trial dates will be affected. Id. at 9-10.

5 Austal responds that it does not oppose Plaintiff's motion "so long as the amended
6 scheduling order also permits Austal to take a supplemental deposition of Plaintiff William J.
7 Cannon on the same day any other depositions are taken of current or past employees of Austal
8 in Mobile, Alabama." Response at 2.

9 Plaintiff replies that he has been diligent in conducting discovery and that had Austal and
10 Defendant USA disclosed the names of the witnesses and SUPSHIP personnel in their Initial
11 Disclosure as required, Plaintiff would have completed discovery before the deadline expired.
12 Reply at 3-4. Plaintiff notes that his accident occurred two years before he initiated the instant
13 matter and that he failed to identify Ms. London due to a "true memory lapse as a result of the
14 passage of time." Id. at 6.

15 **LEGAL STANDARD**

16 Once a Rule 16 scheduling order is issued, dates set forth therein may be modified only
17 "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); see also ECF No. 51 at
18 8 (stating that the dates set forth in the CMC Order regulating discovery and other pretrial
19 proceedings "will not be modified except for good cause shown"). The Rule 16 good cause
20 standard focuses on the "reasonable diligence" of the moving party. Noyes v. Kelly Servs., 488
21 F.3d 1163, 1174 n.6 (9th Cir. 2007); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th
22 Cir. 2000) (stating Rule 16(b) scheduling order may be modified for "good cause" based primarily
23 on diligence of moving party). Essentially, "the focus of the inquiry is upon the moving party's
24 reasons for seeking modification." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609
25 (9th Cir. 1992). However, a court also may consider the "existence or degree of prejudice to
26 the party opposing the modification" Id.

27 In addition to being required to establish good cause, a party moving to extend time after
28 a scheduling order deadline has passed must demonstrate excusable neglect. Mireles v. Paragon

1 Sys., Inc., 2014 WL 575713, at *2 (S.D. Cal. Feb. 11, 2014) (citing Weil v. Carecore Nat'l, LLC,
2 2011 WL 1938196, at *2 (D. Colo. May 19, 2011)); see also Fed. R. Civ. P. 6(b)(1)(B) (stating
3 “the court may, for good cause, extend the time on motion made after the time has expired if
4 the party failed to act because of excusable neglect.”). The following factors are considered in
5 determining whether there has been excusable neglect: the danger of prejudice to the non-
6 moving party; the length of the delay and its potential impact on judicial proceedings; the reason
7 for the delay, including whether it was within the reasonable control of the movant; and whether
8 the moving party’s conduct was in good faith. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd.
9 P’ship, 507 U.S. 380, 395 (1993).

10 **DISCUSSION**

11 Because the Court already has issued a scheduling order and the deadline at issue has
12 passed, Plaintiff must demonstrate good cause and excusable neglect in order to have the
13 deadline amended. Plaintiff has failed to do so. As stated, good cause turns on the reasonable
14 diligence of the party seeking the amendment. Noyes, 488 F.3d at 1174 n.6. Plaintiff became
15 aware of the seven additional witnesses on February 17, 2017. Mot. at 14. At that point in
16 time, Plaintiff had ten days in which to file a motion with the Court seeking to continue the
17 February 27, 2017 fact discovery deadline, but failed to do so. The subject of the additional
18 witnesses was raised again on February 24, 2017 when Austal corrected its supplemental
19 disclosures, and Plaintiff again failed to seek an extension of the discovery deadline prior to its
20 expiration. Instead, Plaintiff chose to wait for forty-five days (and after discovery closed) before
21 filing a motion to amend the scheduling order to re-open discovery. Plaintiff offers no
22 explanation for this delay which does not demonstrate reasonable diligence. Plaintiff also fails
23 to provide any details surrounding his discovery of Ms. London or how long he waited between
24 finding Ms. London and seeking additional time to take her deposition. Mot. Plaintiff merely
25 states that upon learning that Ms. London was a safety officer on the date of Plaintiff’s accident
26 and that she was no longer employed by Austal, he contacted her “[i]mmediately.” Mot. at 12.

27 While Plaintiff was not diligent in seeking a continuance of the discovery deadline, the
28 fact of the matter is that such a motion may not have been necessary had Austal supplemented

1 its initial disclosures earlier than ten days before the discovery deadline was set to expire.
 2 Additionally, Plaintiff's allegations regarding the failure of either Defendant to disclose the
 3 identity of Ms. London or the involvement of the SUPSHIP office and/or personnel are concerning
 4 and something that does not speak to Plaintiff's diligence or lack thereof. Finally, it appears that
 5 Plaintiff learned of Ms. London's identity after fact discovery closed and that she has relevant
 6 information that is proportional to the needs of the case. Granting Plaintiff's request will have
 7 an impact on the timing of the judicial proceedings and may result in additional discovery for all
 8 parties, but the reasons provided for the request, the fact that most of those reasons were not
 9 in Plaintiff's control, and the lack of any reason for the Court to believe that Plaintiff's actions
 10 were not taken in good faith, demonstrate excusable neglect on Plaintiff's part.

11 In light of the representations that have been made, Austal's lack of opposition, Plaintiff's
 12 excusable neglect, and in the interest of fairness, Plaintiff's request to reopen discovery is

13 **GRANTED.** The remaining case deadlines are amended as follows:

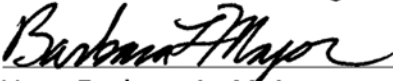
	Current Date	New Date
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15	Completion of Fact Discovery	February 27, 2017
16	Amended Expert Reports	June 30, 2017
17	Amended Rebuttal Expert Reports	July 20, 2017
18	Completion of Expert Discovery	August 10, 2017
19	Mandatory Settlement Conference	May 1, 2017
20	Confidential Statements	June 28, 2017 at 9:30 a.m.
21	Pretrial Motions	September 1, 2017
22	<u>Daubert</u> Motions	June 19, 2017
23	Memorandum of Facts and Law	September 15, 2017
24	Expert Pretrial Disclosures	June 5, 2017
25	Meet and Confer	September 15, 2017
26		September 22, 2017
27		November 10, 2017
28		September 22, 2017
		November 17, 2017
		September 29, 2017
		November 24, 2017

1	Plaintiff's Counsel Provides Proposed Pretrial Conference Order	October 6, 2017	December 1, 2017
2			
3	Lodging of Proposed Final Pretrial Conference Order	October 13, 2017	December 8, 2017
4			
5	Final Pretrial Conference	October 20, 2017 at 2:30 p.m.	December 15, 2017 at 2:00 p.m.
6	Trial Date		January 22, 2018 at 8:45 a.m.
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8			

9 All other guidelines and requirements remain the same. See ECF Nos. 46, 51.

10 **IT IS SO ORDERED.**

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12 Dated: 4/25/2017



13 Hon. Barbara L. Major
14 United States Magistrate Judge
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