

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9

10 ALI FARAJ,

11 Plaintiff,

12 v.

13 6TH AND ISLAND INVESTMENTS
14 LLC, a California limited liability
15 company, d.b.a. OMNIA
16 NIGHTCLUB SAN DIEGO, et al.,

17 Defendants.

Case No.: 16-cv-00181

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

(ECF No. 34)

18 Plaintiff has filed a motion for leave to file a second amended complaint.
19 [ECF No. 34.] For the reasons below, Plaintiff's Motion will be granted.

20 I. Procedural Background

21 On January 25, 2016, Plaintiff filed this action against two defendants: 6th
22 and Island Investments LLC, d.b.a. Omnia Nightclub San Diego ("6th and Island"),
23 and Hakkasan LA LLC. Plaintiff contends he was denied entry into the Omnia
24 Nightclub because he is blind. He states claims against Defendants for violation
25 of Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§
26 12181, et seq., the Unruh Civil Rights Act, California Civil Code §§ 51 et seq., and
27 common law.

28 On March 16, 2016, Defendants filed a corporate disclosure pursuant to

1 Federal Rule of Civil Procedure 7.1 in which they indicated that Defendants were
2 “wholly owned by” Hakkasan Fabric-Stingaree Holdings, LLC (“Hakkasan Fabric-
3 Stingaree”). Defs.’ Rule 7.1 Discl. Stmt. at 2 [ECF No. 7].

4 On May 13, 2016, Magistrate Judge Burkhardt entered a scheduling order
5 setting June 20, 2016 as the deadline for filing “[a]ny motion to join other parties,
6 to amend the pleadings, or to file additional pleadings.” Scheduling Order
7 Regulating Disc. and Other Pre-Trial Proceedings ¶ 1 [ECF No. 15].¹

8 On June 20, 2016, Plaintiff filed a motion for leave to amend the complaint
9 in order to (among other things) add Hakkasan Fabric-Stingaree as a defendant,
10 based on the information in Defendants’ corporate disclosure identifying it as their
11 corporate parent, making it potentially liable as a “person who owns ... a place of
12 public accommodation” within the meaning of Title III of the ADA. Pl.’s Mot. Leave
13 to File Am. Compl. at 4-5 [ECF No. 16].

14 On September 23, 2016, the Court granted Plaintiff’s motion, and on
15 September 26, 2016, Plaintiff filed his First Amended Complaint (“FAC”). [ECF
16 Nos. 22, 23.]

17 On September 28, 2016, Defendants—including Hakkasan Fabric-
18 Stingaree—filed an answer as well as a supplemental Rule 7.1 corporate
19 disclosure in which they reiterated the information in their initial disclosure
20 indicating that “6th and Island Investments, LLC dba Omnia Nightclub San Diego
21 is wholly owned corporation by [sic] Hakkasan Fabric-Stingaree Holdings, LLC.”
22 Defs.’ Rule 7.1 Suppl. Discl. Statement at 2 [ECF No. 26-1].

23 On November 14, 2016, Plaintiff filed the instant motion. He seeks leave to
24 file a Second Amended Complaint to add another entity, Hakkasan Holdings, LLC
25 (“Hakkasan Holdings”), as a defendant to this action. He contends that deposition
26

27 ¹ The May 13, 2016 Scheduling Order was subsequently modified, but none of the modifications altered the June
28 20, 2016 deadline for amending pleadings or adding parties. See Amended Scheduling Order [ECF No. 18];
Minute Order [ECF No. 33].

1 testimony elicited in this case on November 9, 2016, indicated that Hakkasan
2 Fabric-Stingaree is merely a holding company with no staff or employees, and that
3 Hakkasan Holdings, a parent entity of Hakkasan Fabric-Stingaree, is the company
4 whose employees actually oversee the operations of the Omnia Nightclub. Pl.’s
5 Mot. for Leave to File SAC at 3-4 (“Pl.’s Mot.”).² Based on this testimony, he
6 argues, Hakkasan Holdings is potentially liable under 42 U.S.C. § 12182(a) as a
7 “person who owns, leases (or leases to), or operates a place of public
8 accommodation.” Id. at 8.

9 Plaintiff acknowledges that this Motion was filed after the Scheduling Order’s
10 June 20, 2016 deadline for filing motions to add parties or amend the pleadings.
11 He contends he has been diligent in trying to discover the corporate entities
12 potentially responsible for the alleged incident of discrimination on which his claims
13 are based, and that despite his diligence—and thanks to Defendants’ failure to
14 identify Hakkasan Holdings in their initial or supplemental corporate disclosures—
15 he did not learn of the existence of Hakkasan Holdings, and its relationship to his
16 claims, until the November 9th deposition of Jan Marks. Id. at 5-6.

17 On December 16, 2016, Defendants filed an opposition to Plaintiff’s Motion.
18 [ECF Nos. 40, 40-1.] Defendants do not oppose Plaintiff’s request to modify the
19 Scheduling Order, nor do they respond to the contention that they contributed to
20 Plaintiff’s delay by failing to identify Hakkasan Holdings in their corporate
21 disclosures. See Defs.’ Opp. to Pl.’s Mot. at 2-4. Rather, their opposition brief
22 focuses on attempting to show it would be futile to add Hakkasan Holdings as a
23 defendant. See id.

24
25
26
27 ² On December 9, 2016, Plaintiff filed a Declaration of Christopher H. Knauf in support of the Motion, attaching
28 relevant excerpts of the deposition transcript of witness Jan Marks, who testified as the Federal Rule of Civil
Procedure 30(b)(6) corporate designee of 6th & Island Investments, LLC and Hakkasan Fabric-Stingaree. [ECF
Nos. 37, 37-1.]

1 II. Discussion

2 A. Legal Standard

3 Federal Rule of Civil Procedure 15(a)(2) provides that courts “should freely
4 give leave when justice so requires,” a policy that is to be applied “with extreme
5 liberality,” Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
6 Cir. 1990), no matter “whether the amendment will add causes of action or parties.”
7 DCD Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987); see Fed. R.
8 Civ. P. 21 (“the court may at any time, on just terms, add or drop a party”). Factors
9 that may support denial of leave to amend include bad faith, undue delay, prejudice
10 to the opposing party, and futility of amendment, DCD Programs Ltd., 833 F.2d at
11 185, although “[u]ndue delay by itself... is insufficient to justify a motion to amend,”
12 Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999).

13 However, Rule 15 does not control where the moving party seeks leave to
14 amend after the deadline established in a pretrial scheduling order. Johnson v.
15 Mammoth Recreations, 975 F.2d 604, 607-08 (9th Cir. 1992). “Once the district
16 court had filed a pretrial scheduling order pursuant to Federal Rule of Civil
17 Procedure 16 which established a timetable for amending pleadings[,] that rule’s
18 standards controlled.” Id. Such scheduling orders may be modified only for good
19 cause. Fed. R. Civ. P. 16(b)(4); Mammoth Recreations, 975 F.2d at 608.

20 Plaintiff filed this motion on November 15, 2016, almost four months after the
21 June 20th deadline established by the Scheduling Order. Thus, he must establish
22 good cause for his delay pursuant to Rule 16(b)(4). Mammoth Recreations, 975
23 F.2d at 609. “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence
24 of the party seeking amendment.” Id. “The district court may modify the pretrial
25 schedule ‘if it cannot reasonably be met despite the diligence of the party seeking
26 the extension.’” Id. (quoting Fed. R. Civ. P. 16(b) Adv. Comm.’s Notes (1983
27 Amendment)). If the moving party succeeds in demonstrating good cause to modify
28 the scheduling order, the court then considers the propriety of amendment under

1 Rule 15. Only by meeting the standards of Rule 16 and Rule 15 can a party obtain
2 leave to amend a pleading after the deadline established by a scheduling order.
3 Mammoth Recreations, 975 F.2d at 608.

4 B. Analysis of Plaintiff's Motion

5 Although Plaintiff's request for leave to amend was filed as a single motion,
6 for practical purposes, it seeks two forms of relief—first, amendment of the
7 Scheduling Order to allow him to pursue this motion, and second, granting the
8 motion for leave to amend.

9 As a threshold matter, Plaintiff's decision to direct both requests to the
10 undersigned creates an issue of comity, or perhaps judicial deference, since it was
11 Magistrate Judge Burkhardt, and not this Court, who issued the Scheduling Order
12 Plaintiff seeks to modify. Magistrate judges in this District are authorized by local
13 rule to issue Rule 16 scheduling orders. See Fed. R. Civ. P. 16(b)(1) ("the district
14 judge—or a magistrate judge when authorized by local rule—must issue a
15 scheduling order") and CivLR 16.2 ("Magistrate judges may hold status conference
16 and issue scheduling orders in any case which has been referred to the magistrate
17 judge by the district judge for that purpose"). However, district courts retain their
18 decision-making authority over non-Article III functions delegated to magistrate
19 judges. See Wellness Int'l Network, Ltd. v. Sharif, ___ U.S. ___, 135 S. Ct. 1932,
20 1938-39 (2015) and United States v. First Nat. Bank of Rush Springs, 576 F.2d
21 852, 853 (10th Cir. 1978) (stating that although the "purpose of the Federal
22 Magistrates Act, 28 U.S.C. §§ 631, et seq. was to provide a method to relieve
23 judges of some of their non-Article III functions[,] [i]t is clear that district court
24 judges were intended to retain ultimate decision-making power and continuing
25 jurisdiction over the actions of magistrates").

26 While this Court possesses the authority to alter the Scheduling Order, a
27 party should ordinarily address a request for modification to the issuing magistrate
28 judge. See CivLR 16.2. Here, however, the Court does note that Plaintiff's request

1 has been brought in conjunction with his motion for leave to amend. Time is of the
2 essence with regard to both requests, since any delay in bringing either motion
3 could serve as grounds for denying it. Mammoth Recreations, 975 F.2d at 609
4 (“The district court may modify the pretrial schedule ‘if it cannot reasonably be met
5 despite the diligence of the party seeking the extension”); Bowles, 198 F.3d at
6 757-58 (undue delay is a factor the court may consider in determining whether to
7 grant leave to amend). A motion for leave to amend is not categorically non-
8 dispositive, see Bastidas v. Chappell, 791 F.3d 1155, 1164 (“the dispositive nature
9 of a magistrate judge's decision on a motion to amend can turn on the outcome”),
10 so it was not inappropriate for Plaintiff to submit it to this Court for consideration.
11 28 U.S.C. § 636(b)(1)(A); CivLR 72.1(b) (“a magistrate judge will hear and
12 determine any pretrial motions... other than the dispositive motions which are
13 specified in 28 U.S.C. § 636(b)(1)(A)”); Reynaga v. Cammisa, 971 F.2d 414, 416
14 (9th Cir. 1992) (parenthetically quoting Taylor v. Oxford, 575 F.2d 152, 154 (7th
15 Cir. 1978) (“It appears that [the Federal Magistrates Act] was not intended that the
16 magistrate [judge] would have the power to hear and determine dispositive
17 motions.”) The Court also notes that this case is scheduled for Final Pretrial
18 Conference on March 1, 2017. See Am. Sched. Order Regulating Disc. and Other
19 Pre-Trial Proceedings at 6 [ECF No. 18]. Given the relative urgency of the need
20 to resolve whether Hakkasan Holdings will be added to this action, and the
21 efficiency gained by deciding both of the issues presented by Plaintiff’s motion at
22 once, the Court will address the motion in its entirety.

23 The Court thus turns to the merits of Plaintiff’s motion. The first issue to
24 decide is whether Plaintiff has shown good cause why he should be allowed to
25 pursue this motion despite the fact that it was filed after the Scheduling Order’s
26 June 20, 2016 deadline. Mammoth Recreations, 975 F.2d at 609. Plaintiff
27 contends he was diligent in trying to discover the identity of potential new parties.
28 Id. His counsel states in a supporting affidavit that prior to filing this action on

1 January 25, 2016, he “diligently researched Defendants and business filings with
2 the secretary of state and other public filings.” Knauf Decl. in Supp. Pl.’s Mot. ¶ 4
3 [ECF No. 34-1]. Despite his diligence—and, he says, because of Defendants’
4 failure to identify Hakkasan Holdings in their initial or supplemental corporate
5 disclosures—Plaintiff’s counsel did not learn of the existence of Hakkasan
6 Holdings, and its potential relationship to Plaintiff’s claim under Title III of the ADA,
7 until the November 9th deposition of Jan Marks. Id. at ¶¶ 3-9.

8 While he could perhaps have done more to explore whether there were
9 additional potential defendants, the Court finds credible Plaintiff’s counsel’s
10 explanation that he was led astray by Defendants’ initial and supplemental
11 corporate disclosures, neither of which revealed the existence of Hakkasan
12 Holdings, despite the fact that (based on Marks’s testimony) it is a grandparent
13 entity of 6th and Island, and a parent of Hakkasan Fabric-Stingaree. Both parent
14 and grandparent corporations should be disclosed to best serve the purpose of
15 Federal Rule of Civil Procedure 7.1. See Best Odds Corp. v. iBus Media Ltd., No.
16 2:14-cv-00932-RCJ-VCF, 2014 WL 5687730 (D. Nev. Nov. 4, 2014) (“Rule 7.1
17 should be broadly construed to serve its purpose: full disclosure”) (citing 53 C.
18 Wright & A. Miller, Federal Practice & Procedure: Civil 3d § 1197 at 78 (3d ed.
19 2004)).

20 The weakest part of Plaintiff’s effort to show diligence is the lack of
21 description of what he did to discover potential new defendants between the time
22 he filed this action on January 25, 2016, and November 9, 2016, when he first
23 learned of the existence of Hakkasan Holdings. Plaintiff’s counsel explains that
24 during this period, there were “ongoing settlement discussions” aimed at resolving
25 the case “without extensive discovery.” Knauf Decl. in Supp. Pl.’s Mot. ¶ 3 [ECF
26 No. 34-1]. These Defendants have not opposed Plaintiff’s request to amend the

27 //

28 //

1 Scheduling Order, nor have they offered any evidence contradicting his claim of
2 diligence. Thus, the Court accepts Plaintiff's undisputed characterization of his
3 efforts as diligent, and his attribution of any apparent delay to the parties' efforts to
4 settle the case before engaging in extensive discovery.

5 Although Plaintiff has not made an impressive showing of diligence, overall,
6 the Court finds he has made a sufficient showing such that good cause exists to
7 allow him to pursue this motion despite filing it after the Scheduling Order deadline.
8 Courts holding that a plaintiff failed to demonstrate good cause for a delayed
9 request to add a party frequently reach that conclusion based on evidence that the
10 opposing party notified the plaintiff, sometimes more than once, of the existence
11 of the omitted entity. See, e.g., Mammoth Recreations, 975 F.2d at 609 (affirming
12 district court's determination that plaintiff failed to show good cause where
13 "Mammoth Recreations's answer to the complaint and response to interrogatories
14 amply indicated that Mammoth Recreations did not own and operate the ski resort"
15 and "Mammoth Recreations's counsel had sent a letter explicitly offering to
16 stipulate to a substitution of the 'proper defendant'"); Learjet, Inc. v. Oneok, Inc. (In
17 re W. States Wholesale Nat. Gas Antitrust Litig.), 715 F.3d 716, 737 (9th Cir. 2013)
18 (holding that district court did not abuse its discretion when it denied a motion to
19 amend, because plaintiff had known earlier of facts and theories supporting
20 amendment); Siliga v. Deutsche Bank Nat'l Trust Co., 637 Fed. Appx. 438, (9th
21 Cir. 2016) (mem.) (same).

22 Here, by contrast, there is no evidence Defendants gave Plaintiff or his
23 counsel reason to suspect, before the November 9th deposition, that the FAC had
24 not identified all potentially responsible parties. The Court finds credible Plaintiff's
25 counsel's contention that he was diligent, but nevertheless was not reasonably
26 able to determine the existence of Hakkasan Holdings before the November 9th
27 deposition of Marks. Plaintiff filed this motion on November 14th. The Court
28 concludes there is good cause under Rule 16 to allow Plaintiff to file this motion

1 for leave to amend despite the fact that it was filed after the deadline in the
2 Scheduling Order.

3 The Court next determines whether to grant Plaintiff's motion for leave to file
4 a Second Amended Complaint. Such motions are typically granted "with extreme
5 liberality." Morongo Band of Mission Indians, 893 F.2d at 1079. Denial of a motion
6 for leave to amend may be warranted where the opposing party demonstrates bad
7 faith, undue delay, prejudice to the opposing party, or futility of amendment. DCD
8 Programs Ltd., 833 F.2d at 185.

9 Plaintiff has demonstrated grounds for amending the pleadings to add
10 Hakkasan Holdings as a defendant. Based on Marks's testimony, Hakkasan
11 Holdings is the parent company of Hakkasan Fabric-Stingaree. Although
12 Hakkasan Fabric-Stingaree owns the Omnia Nightclub, it is a mere holding
13 company with no employees. The staff of Hakkasan Holdings operates the
14 nightclub. Marks Depo. 33:7-34:25, Knauf Decl. ¶ 4, Ex. A [ECF No. 37]. Based
15 on that testimony, Hakkasan Holdings is potentially liable as an owner or operator
16 of the Omnia nightclub, the "facility" at issue for purposes of Plaintiff's claim under
17 Title III of the ADA, 42 U.S.C. § 12182(a).

18 Defendants argue that leave to amend should be denied as futile. They first
19 contend—without any supporting evidence—that Plaintiff was actually excluded
20 from the Omnia Nightclub for reasons unrelated to his disability. Defs.' Opp. at 2-
21 3. Therefore, "if Plaintiff is denied leave to amend his complaint as requested, he
22 will not be injured," because "[t]he evidence bears out that there was no
23 discrimination against Plaintiff." Id. at 3:8. The Court finds this argument uniquely
24 unmeritorious. It is not just that Defendants do not actually submit any of the
25 evidence that supposedly "bears out that there was no discrimination against
26 Plaintiff." Id. It is not even that Defendants' argument demonstrates, at most, that
27 there is a factual dispute regarding the alleged incident, and that factual disputes
28 do not establish the futility of a proposed amendment. See, e.g., Miller v. Rykoff-

1 Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (“a proposed amendment is futile
2 only if no set of facts can be proved under the amendment to the pleadings that
3 would constitute a valid and sufficient claim or defense”). Rather, what makes
4 Defendants’ argument remarkable is that it is a verbatim recitation of the argument
5 they made in opposition to Plaintiff’s first motion for leave to amend—an argument
6 the Court previously rejected. Compare, e.g., Defs.’ Opp. [ECF No. 40] at 3:21-22
7 (“On our facts, if Plaintiff is denied leave to amend his complaint as requested, he
8 will not be injured.”) with Defs.’ Opp. [ECF No. 19] at 3:6-7 (“On our facts, if Plaintiff
9 is denied leave to amend his complaint as requested, he will not be injured.”)
10 Defendants’ argument has not grown more convincing with time. The Court rejects
11 it for the same reasons set forth in its September 23, 2016 order granting Plaintiff
12 leave to amend. See Order Granting Pl.’s Mot. for Leave to File Am. Compl. at 3-
13 4.

14 Defendants’ second argument is that “[t]he proposed amendment is
15 unnecessary, as Plaintiff was previously granted leave to add [Hakkasan Fabric-
16 Stingaree]” the owner of 6th and Island, and therefore of the Omnia nightclub.
17 Def.’s Opp. at 4:5-11. The Court rejects this argument, because it ignores the fact
18 that Plaintiff seeks to add Hakkasan Holdings not only as the owner of Hakkasan
19 Fabric-Stingaree, but also as an operator of the Omnia nightclub. See 42 U.S.C.
20 § 12182(a) (prohibiting disability discrimination “by any person who owns, leases
21 (or leases to), or operates a place of public accommodation”).

22 Therefore, the Court rejects Defendants’ position that leave to amend should
23 be denied as futile. Defendants do not attempt to demonstrate bad faith or
24 prejudice. For the reasons discussed above, the Court does not find undue delay.
25 As there are no factors that would support denial of leave to amend, DCD
26 Programs Ltd., 833 F.2d at 185, the Court will grant Plaintiff’s motion.

27 //

28 //

1 III. Conclusion and Order

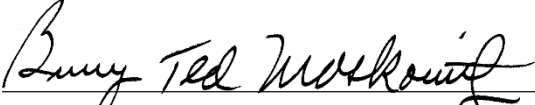
2 For the foregoing reasons, Plaintiff's Motion for Leave to File Second
3 Amended Complaint is GRANTED. The Court orders as follows:

4 (1) The May 13, 2016 Scheduling Order is modified to provide that the
5 deadline for filing any motion to join other parties, amend the pleadings,
6 or file additional pleadings is November 14, 2016; and

7 (2) Plaintiff shall file and serve the Second Amended Complaint within seven
8 days of the entry of this Order.

9 **IT IS SO ORDERED:**

10 Dated: January 27, 2017

11 
12 Barry Ted Moskowitz, Chief Judge
13 United States District Court
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28