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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In the matter of the Complaint of
HORNBLOWER FLEET, LLC owner,
and HORNBLOWER YACHTS, LLC dba
HORNBLOWER CRUISES AND
EVENTS, owner pro hac vice for
exoneration of, or limitation of, liability,

Plaintiffs,

and Related Claims.

Case No.: 16CV2468-JM-LL

**ORDER DENYING CLAIMANTS’
MOTION FOR DETERMINATION
OF DISCOVERY DISPUTE**

[ECF No. 200]

Currently before the Court is Claimants Ana Helvie and Kyle Helvie’s (“Helvie Claimants”) Motion for Determination of Discovery Dispute [ECF No. 200 (“Mot.”)], Plaintiffs Hornblower Fleet, LLC and Hornblower Yachts, LLC’s Opposition to Claimants’ Motion [ECF No. 204 (“Opp.”)], and the Helvie Claimants’ Reply [ECF No. 211 (“Reply”)].

For the reasons set forth below, the Court **DENIES** the Helvie Claimants’ Motion for Determination of Discovery Dispute.

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1 **RELEVANT BACKGROUND**

2 The instant dispute arises from the Helvie Claimants’ “Fourth Request for
3 Production.”

4 In their Motion, the Helvie Claimants allege that “[o]n or about October 18, 2018”
5 they served their “Fourth Request for Production” on Plaintiffs. Mot. at 2. The “Fourth
6 Request for Production” contained requests “related to Plaintiff’s financial condition”
7 including “requests for documents such as balance sheets, ledgers, accounts, income
8 statements, and the like.” Id. at 5. The Helvie Claimants allege this discovery is “relevant
9 and necessary for this case because Claimants need to discover Plaintiffs financial
10 condition in advance of trial and establish that Plaintiffs can withstand a judgment that
11 includes punitive damages.” Id. The Helvie Claimants allege Plaintiffs “never responded,
12 objected, or moved for a protective order” to their “Fourth Request for Production.” Id. at
13 2. Instead, the Helvie Claimants allege that “[d]uring the Court’s Motion Conference on
14 December 13, 2018, Plaintiffs alleged that they did respond but could not provide proof of
15 service for their responses.” Id.

16 In their Opposition, Plaintiffs argue the Helvie Claimants served a first iteration of
17 their “Fourth Request for Production” on May 4, 2018. Opp, Ex. 1. Plaintiff’s responded
18 to this first iteration on June 4, 2018. Opp., Ex. 2. Plaintiffs allege the Helvie Claimants
19 subsequently served a second iteration of their “Fourth Request for Production” on October
20 19, 2018. Opp., Ex. 3. Plaintiffs argue the second iteration of the Helvie Claimants’
21 “Fourth Request for Production” was untimely, because Plaintiffs’ responses would have
22 been due after the fact discovery deadline. Opp. at 4-6.

23 In their Reply, the Helvie Claimants concede that prior to their October 19, 2018
24 “Fourth Request for Production,” they “propounded similar requests for production in June
25 2018.” Id. at 2. With respect to their October 19, 2018 “Fourth Request for Production,”
26 the Helvie Claimants argue that while Plaintiffs’ argument is “essentially” that the
27 “discovery was filed two days late vis a vis the discovery deadline[,]” the fact discovery
28 deadline should nevertheless be “retroactively continued in the present matter until

1 November 19, 2018[.]” Id. at 2, 5. In support, the Helvie Claimants argue they were
2 “diligent at attempting to obtain the records” sought by the Fourth Request “for months”
3 and were “forced” to serve this discovery only after Plaintiffs “cancelled” a noticed
4 deposition of an employee who “Claimants believed would have information concerning
5 the sales and financial information of Hornblower[.]” Id. at 2-4.

6 On December 13, 2018, counsel for the Parties in the action contacted the Court for
7 the first time regarding the Helvie Claimants’ request to file a Motion to Compel. ECF
8 No. 197. On December 14, 2018, the Court issued a briefing schedule. Id. In accordance
9 with the schedule, the Helvie Claimants and Plaintiffs filed a motion, opposition, and reply.
10 See ECF Nos. 200, 204 and 211. On January 2, 2019, Claimant Susan Pendergast filed a
11 joinder to the Helvie Claimants’ motion. ECF No. 202.

12 ANALYSIS

13 **1. The Second Iteration Of The Helvie Claimants’ “Fourth Request for** 14 **Production” Was Untimely**

15 The discovery cutoff in this matter was November 16, 2018. ECF No. 153 at 1.
16 Under the Court’s Scheduling Order, “all discovery under Rules 30-36 of the Federal Rules
17 of Civil Procedure . . . must be initiated a sufficient period of time in advance of the cut-
18 off date, **so that it may be completed** by the cut-off date[.]” ECF No. 96 at 1-2 (emphasis
19 in original).

20 The second iteration of the Helvie Claimants’ “Fourth Request for Production” was
21 served on October 19, 2018. Opp., Ex. 1. Under Federal Rules of Civil Procedure 34, the
22 deadline for Plaintiffs to respond was November 19, 2018, which fell after the fact
23 discovery deadline. Under the Court’s Scheduling Order, the second iteration of the Helvie
24 Claimants’ “Fourth Request for Production” was therefore untimely. See Walters v. Target
25 Corp., 2018 U.S. Dist. LEXIS 192348, at *3 (S.D. Cal. Nov. 9, 2018) (denying motion to
26 compel responses to requests for admission that were served two days late, holding that
27 “[c]lose enough is not good enough.”). See also Brown v. Deputy #1, 2014 U.S. Dist.

1 LEXIS 27713, at *21 (S.D. Cal. Mar. 4, 2014) (quashing subpoenas where responses would
2 have been due on date falling after discovery deadline).

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4 **2. The Helvie Claimants Have Not Shown Good Cause To Retroactively Modify
The Scheduling Order**

5 The Helvie Claimants argue the fact discovery deadline in this case should be
6 “retroactively continued” until “November 19, 2018” thereby making their “Fourth
7 Request for Production” timely. Reply at 5. Under the Court’s Scheduling Order, the
8 deadline to complete fact discovery “will not be modified except for good cause shown.”
9 ECF No. 96 at 4. The standard for good cause “primarily considers the diligence of the
10 party seeking the modification.” See Walters, 2018 U.S. Dist. LEXIS 192348, at *3 (citing
11 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)).

12 In support of their request, the Helvie Claimants argue that: (1) “Claimants
13 attempted for several months to work with Hornblower and come to an agreement without
14 involving the Court”; (2) “[i]t became clear to Claimants that no agreement between
15 Hornblower and claimants would be had”; and (3) “Claimants were forced to serve
16 discovery” after Plaintiffs “unilaterally” cancelled the deposition of one of Plaintiffs’
17 employees on October 17, which the Helvie Claimants allege was done “in an attempt to
18 avoid discovery on the matters contained in the fourth request for production.” Reply at
19 3-4.

20 The Helvie Claimants’ explanations do not justify their lengthy delay in raising this
21 matter before the Court or their belated request—made for the first time in their Reply—
22 to extend the fact discovery deadline almost two months after the deadline already passed.

23 In their Reply, the Helvie Claimants concede they propounded “similar requests” to
24 their October 19, 2018 “Fourth Request for Production” in June and allege Plaintiffs
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1 “provided no responsive document[s].” Reply at 2.¹ The Helvie Claimants also concede
2 that after meet and confer sessions, “[i]t became clear to Claimants that no agreement
3 between Hornblower and claimants would be had[.]” Id. at 2. At this point, the Helvie
4 Claimants were aware of an ongoing discovery dispute between the Parties that had
5 purportedly reached an impasse, but nevertheless failed to bring this matter to the Court’s
6 attention.

7 At the time the dispute arose, Judge Adler’s Chamber Rules required discovery
8 disputes to be submitted “within 45 days of the date upon which the event given rise to the
9 dispute occurred” and that “[f]or written discovery, the event given rise to the discovery
10 dispute is the service of the response.” Magistrate Judge Adler’s Civil Chamber Rules,
11 Case Management and Discovery Disputes, Rule C.

12 Instead of abiding by this deadline, the Helvie Claimants allege they waited to
13 determine whether they could obtain the requested information from one of Plaintiffs’
14 witnesses at a deposition. Reply at 2-3. According to the Helvie Claimants, Plaintiffs then
15 “cancelled the deposition unilaterally” on October 17. Reply at 3. Despite their awareness
16 of the Parties’ dispute and Judge Adler’s Chamber Rules, the Helvie Claimants again failed
17 to raise this matter before the Court.

18 The Helvie Claimants argue instead that they were “forced to serve” a second
19 iteration of their “Fourth Request for Production” as a result of Plaintiffs canceling this
20 deposition. Reply at 4. The second iteration of the Helvie Claimants “Fourth Request for
21 Production,” if timely, would have been due on November 19. Yet the Helvie Claimants
22 did not raise this matter to the Court’s attention until December 13 and did not request a
23 retroactive modification of the scheduling order until their January 11, 2019 Reply. See
24 ECF Nos. 197 and 211.

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27 ¹ The certificate of service attached to Plaintiffs’ Opposition indicates the first iteration of
28 the Helvie Claimants’ “Fourth Request for Production” was actually served on May 4,
2018. Opp, Ex. 1.

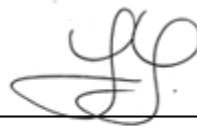
1 Here, the Helvie Claimants' lack of diligence precludes a finding of good cause to
2 modify the Court's Scheduling Order. See Joe Hand Promotions, Inc. v. Kurti, 2015 U.S.
3 Dist. LEXIS 165164, at *7-8 (S.D. Cal. Dec. 9, 2015) (defendants were not diligent by
4 waiting until after the discovery cutoff to raise discovery dispute with the court thereby
5 precluding finding of good cause to modify scheduling order). See also In re Ameranth
6 Cases, 2018 U.S. Dist. LEXIS 61753, at *17-18 (S.D. Cal. Apr. 11, 2018) (declining to
7 consider discovery dispute filed after deadline set in Chamber Rules, noting that requesting
8 supplementation to older discovery requests does not "restart" the clock on when discovery
9 disputes must be raised).

10 **CONCLUSION**

11 For the above reasons, the Court **DENIES** the Helvie Claimants' Motion for
12 Determination of Discovery Dispute.

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14 **IT IS SO ORDERED.**

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16 Dated: January 16, 2019

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19 Honorable Linda Lopez
20 United States Magistrate Judge