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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LA JOLLA SPA MD, INC.,
12 Plaintiff,
13 v.
14 AVIDAS PHARMACEUTICALS, LLC,
15 Defendant.

Case No.: 17cv1124-MMA (WVG)

ORDER:

**(1) DENYING IN PART
PLAINTIFF'S MOTION TO AMEND
THE SCHEDULING ORDER; AND**

[Doc. No. 38]

**(2) DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
THIRD AMENDED COMPLAINT**

[Doc. No. 39]

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22 On November 9, 2018, Plaintiff La Jolla Spa MD, Inc. ("Plaintiff") filed an *ex*
23 *parte* application to amend the scheduling order (Doc. No. 38) and moved the Court for
24 leave to file a Third Amended Complaint ("TAC"). Doc. No. 39. Defendant Avidas
25 Pharmaceuticals, LLC ("Defendant") filed a response in opposition to Plaintiff's motion
26 for leave to file a TAC, arguing amendment would be unduly prejudicial, and Plaintiff
27 replied. Doc. Nos. 47, 48. The Court, in its discretion, decides the matter on the papers
28 submitted and without oral argument pursuant to Civil Local Rule 7.1.d.1. For the

1 reasons set forth below, the Court **DENIES IN PART** Plaintiff's *ex parte* application to
2 amend the scheduling order (Doc. No. 38) and **DENIES** Plaintiff's motion for leave to
3 file a TAC (Doc. No. 39).

4 PROCEDURAL BACKGROUND

5 On April 20, 2017, Plaintiff and Dianne York-Goldman filed this action alleging
6 the following causes of action against Defendant in San Diego Superior Court: (1) breach
7 of contract; (2) breach of the covenant of good faith and fair dealing; (3) fraud; (4) unjust
8 enrichment and/or *quantum meruit*; (5) unfair competition in violation of California
9 Business Code § 17200 *et seq.*; and (6) intentional interference with prospective
10 economic relations. *See* Doc. No. 1, Exhibit A ("Compl."). On June 2, 2017, Defendant
11 filed a notice of removal based on diversity jurisdiction in this Court. *See* Doc. No. 1.
12 Defendant subsequently moved to dismiss all claims brought by Dianne York-Goldman,
13 the first, second, third, fourth, and sixth causes of action, and the prayer for attorneys'
14 fees, punitive damages, and disgorgement of profits. Doc. No. 4. The Court granted in
15 part and denied in part Defendant's motion. Doc. No. 10. Specifically, the Court
16 dismissed without prejudice the second, fourth, and sixth causes of action, the prayer for
17 attorneys' fees, and all claims brought by Dianne York Goldman, and dismissed with
18 prejudice the third cause of action for fraud and the prayer for punitive damages. *Id.* at
19 15.

20 On November 14, 2017, Plaintiff filed the operative Second Amended Complaint
21 ("SAC"), alleging only breach of contract. Doc. No. 12 ("SAC"). Defendant answered
22 on November 28, 2017. Doc. No. 15. The Court held an Early Neutral Evaluation and
23 Case Management Conference and subsequently issued a Scheduling Order. *See* Doc.
24 Nos. 18, 19, 24 ("Scheduling Order"). The Scheduling Order set May 1, 2018 as the
25 deadline to amend pleadings or add parties, June 18, 2018 as the deadline to conduct fact
26 discovery, and August 27, 2018 for expert discovery. Scheduling Order at 1-2.

27 On June 7, 2018, Defendant's counsel filed a motion to withdraw as counsel, citing
28 to unreasonable difficulty due to Defendant's refusal to participate in the litigation. Doc.

1 No. 27. Defendant purportedly retained new counsel on May 2, 2018 who planned to file
2 a notice of appearance within two weeks. *See* Doc. No. 27-2 (“Brucker Decl.”) ¶ 5.
3 Accordingly, the Court granted the motion to withdraw and ordered Defendant to enter an
4 appearance of new counsel on or before August 1, 2018. Doc. No. 30. By October 26,
5 2018, Defendant had not entered an appearance of new counsel. *See* Docket.
6 Accordingly, the Court issued an order to show cause why sanctions should not issue for
7 Defendant’s failure to enter the appearance of new counsel and noted that failure to
8 respond to the order may result in the Clerk’s entry of default. Doc. No. 34. The Court
9 gave Defendant until November 16, 2018 to respond. *Id.*

10 On November 9, 2018, Plaintiff filed an *ex parte* motion to amend the scheduling
11 order and a motion for leave to file a TAC. Doc. Nos. 38, 39. Plaintiff seeks leave to file
12 a TAC to add claims for trademark infringement, breach of contract, and
13 misappropriation of Dianne York-Goldman’s name, thereby adding Dianne York-
14 Goldman back as a plaintiff in this action. Mtn. at 2. On November 15, 2018, Defendant
15 entered an appearance of new counsel, and the next day responded to the Court’s order to
16 show cause. Doc. Nos. 41, 43. As a result, the Court vacated the order to show cause.
17 Doc. No. 44.

18 LEGAL STANDARD

19 Once the district court issues a pretrial scheduling order establishing the deadline
20 for the amendment of pleadings, motions to amend filed after the deadline are governed
21 by Federal Rule of Civil Procedure 16 rather than Rule 15. *See Johnson v. Mammoth*
22 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “Although Rule 15(a) sets the
23 standard for determining when to allow a motion to amend a pleading, [Rule 16(b)]
24 requires that when a scheduling order must be modified, ‘good cause’ be shown.” *Cano*
25 *v. Schriro*, 236 F.R.D. 437, 439 (D. Ariz. 2006) (citing *Johnson*, 975 F.2d at 608). “A
26 court’s evaluation of good cause is not coextensive with an inquiry into the propriety of
27 amendment under . . . Rule 15.” *Johnson*, 975 F.2d at 609 (internal quotation marks and
28 citation omitted). “Unlike Rule 15(a)’s liberal amendment policy which focuses on the

1 bad faith of the party seeking to interpose an amendment and the prejudice to the
2 opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of
3 the party seeking the amendment." *Id.* If the moving party was not diligent, the inquiry
4 should end. *Id.* In other words, "the focus of the inquiry is upon the moving party's
5 reasons for seeking modification." *Morgal v. Maricopa Cnty. Bd. of Supervisors*, 284
6 F.R.D. 452, 460 (D. Ariz. 2012) (internal quotation marks and citation omitted).

7 "[T]o demonstrate diligence under Rule 16's 'good cause' standard, the movant
8 may be required to show the following: (1) that [it] was diligent in assisting the Court in
9 creating a workable Rule 16 order; (2) that [its] noncompliance with a Rule 16 deadline
10 occurred or will occur notwithstanding [its] diligent efforts to comply, because of the
11 development of matters which could not have been reasonably foreseen or anticipated at
12 the time of the Rule 16 scheduling conference; and (3) that [it] was diligent in seeking
13 amendment of the Rule 16 order, once it became apparent that [the movant] could not
14 comply with the order." *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999)
15 (internal citations omitted).

16 Upon a showing of good cause to modify the scheduling order, a party seeking
17 amendment of its pleading must then demonstrate that a court should grant leave under
18 Rule 15. *Johnson*, 975 F.2d at 608. Under Rule 15(a) of the Federal Rules of Civil
19 Procedure, "the decision of whether to grant leave to amend . . . remains within the
20 discretion of the district court, which may deny leave to amend due to 'undue delay, bad
21 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
22 amendments previously allowed, undue prejudice to the opposing party by virtue of
23 allowance of the amendment, [and] futility of amendment.'" *Leadsinger, Inc. v. BMG
24 Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178,
25 182 (1962)).

26 **DISCUSSION**

27 Plaintiff's motion for leave to file a TAC did not analyze good cause pursuant to
28 Rule 16, but instead focused on Rule 15(a). *See generally*, Doc. No. 39. However,

1 Plaintiff does analyze the Rule 16 standard in its *ex parte* application to amend the
2 scheduling order. *See generally*, Doc. No. 38. As a result, the Court supplants Plaintiff’s
3 motion for leave to file a TAC with Plaintiff’s *ex parte* application to determine whether
4 Plaintiff has established good cause to modify the deadline to amend pleadings and for
5 leave to file a TAC.¹

6 As indicated previously, the Scheduling Order mandated that motions to amend the
7 pleadings be filed on or before May 1, 2018. Doc. No. 24 at 1. Plaintiff did not file the
8 *ex parte* application to amend the scheduling order or the motion for leave to file a TAC
9 until November 9, 2018. Doc. No. 38. First, the Court notes that there is nothing to
10 suggest Plaintiff was not “diligent in assisting the Court in creating a workable Rule 16
11 order.” *Jackson*, 186 F.R.D. at 608. Therefore, the first good cause factor is met.

12 However, the Court finds that the second good cause factor has not been met.
13 Plaintiff explains that Defendant’s insurer withdrew coverage on February 13, 2018.
14 Doc. No. 38-1 at 2. Plaintiff’s counsel and Defendant’s counsel then began experiencing
15 “difficulties starting in April and continuing through July,” which resulted in
16 “Defendant’s lack of responsiveness on discovery and lack of counsel.” *Id.* at 3. For
17 example, Plaintiff explains that “a number of discovery issues remain outstanding” and
18 that “little discovery has been done by either side and no depositions have been taken.”
19 Doc. No. 39-1 at 5. Moreover, Plaintiff recently substituted in new counsel who
20 “analyzed the SAC and determined that additional claims, some of which could invoke
21 insurance coverage, should be alleged if leave is granted.” Doc. No. 38-1 at 23; *see also*
22 Doc. No. 39-1 at 5. Plaintiff asserts that these circumstances were unforeseen and that
23 “no one could anticipate that the insurance company would withdraw coverage[,] that
24 there would be a rift between Defendant and its former counsel[,] that Defendant would
25 not appear through counsel after the Court permitted former counsel to withdraw,” or that
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28 ¹ The Court **REFERS** the remainder of Plaintiff’s *ex parte* application to amend the scheduling order to
Magistrate Judge Gallo.

1 Plaintiff would need to substitute new counsel. Doc. No. 38-1 at 7; *see also* Doc. No. 39-
2 1 at 4-5. As an initial matter, Defendant’s issues with its counsel and insurance have no
3 bearing on Plaintiff’s ability to file a timely motion for leave to file an amended
4 complaint or a timely request to extend the deadline to amend. Moreover, the fact that
5 Plaintiff recently retained new counsel does not establish good cause. *See Moore v.*
6 *Sylvania Elec. Prods., Inc.*, 454 F.2d 81, 83-84 (3rd Cir. 1972) (finding there is no merit
7 to a request for additional time for substituted counsel and that counsel is bound by
8 pretrial representations of original counsel); *Yazzie v. Mohave Cnty.*, No. CV 14-08153-
9 PCT-JAT, 2015 WL 7567488, at *7 (D. Ariz. Nov. 25, 2015) (finding that Rule 16’s
10 good cause standard was not met because “obtaining new counsel is not a valid reason for
11 delay”). As a result, the Court finds that Plaintiff has not met the second good cause
12 factor.

13 As to the third factor, Plaintiff has not met the burden of showing that it “was
14 diligent in seeking amendment of the Rule 16 order, once it became apparent that [the
15 movant] could not comply with the order.” *Jackson*, 186 F.R.D. at 608. The Court
16 notes that Plaintiff’s counsel was only recently engaged in this action and, therefore, only
17 recently determined that additional causes of action should be alleged. Doc. No. 38-1 at
18 5. However, “[t]he arrival of new counsel [typically] does not entitle parties to conduct
19 additional discovery or otherwise set aside valid and binding orders of the court,
20 regardless of the efficacy of any new strategy counsel seeks to follow.” *Alvarado*
21 *Orthopedic Research, L.P. v. Linvatec Corp.*, No. 11cv0246 IEG(RBB), 2012 WL
22 6193834, at *3 (S.D. Cal. Dec. 12, 2012) (internal citations and quotations omitted). In
23 addition, “[t]he good cause standard typically will not be met where the [movant] has
24 been aware of the facts and theories supporting amendment since the inception of the
25 action.” *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th
26 Cir. 2013). Here, Plaintiff explains that “the premise of [its proposed amended
27 allegations and new claims] were already present in the [SAC].” *See* Doc. No. 39-1 at 5-
28 6. As such, the fact that Plaintiff’s new counsel only recently determined that additional

1 claims should be alleged is insufficient because “carelessness is not compatible with a
2 finding of diligence and offers no reason for a grant of relief.” *Johnson*, 975 F.2d at 609.

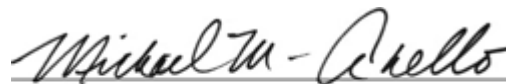
3 Accordingly, the Court finds that Plaintiff has not shown the necessary diligence
4 under Rule 16. “[I]f [the moving party] was not diligent, the inquiry should end.” *Id.*
5 Therefore, the Court need not analyze Rule 15(a). *Morgal*, 284 F.R.D. at 460.

6 **CONCLUSION**

7 Based on the foregoing, the Court **DENIES IN PART** Plaintiff’s *ex parte*
8 application to modify the scheduling order. Doc. No. 38. Specifically, the Court
9 **DENIES** Plaintiff’s request to extend the deadline to amend the pleadings and **REFERS**
10 the remainder of Plaintiff’s *ex parte* application to Magistrate Judge Gallo. Additionally,
11 the Court **DENIES** Plaintiff’s motion for leave to file a TAC. Doc. No. 39.

12 **IT IS SO ORDERED.**

13 Dated: December 12, 2018



14 Hon. Michael M. Anello
15 United States District Judge
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