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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SIMON GORO, et al.,

12 Plaintiffs,

13 v.

14 FLOWERS FOODS, INC., et al.,

15 Defendants.  
16  
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18

Case No.: 17-cv-02580-JO-JLB

**ORDER DENYING DEFENDANTS’  
EX PARTE APPLICATION TO  
AMEND SCHEDULING ORDER TO  
ADD EXPERT WITNESS**

**[ECF No. 229]**

19 Before the Court is Defendants’ *Ex Parte* Application to Amend the Scheduling  
20 Order wherein Defendants’ include a motion for leave to add expert witness Basil Imburgia  
21 to their expert witness disclosures (the “Motion”). (*See* ECF No. 229.) Plaintiffs filed an  
22 opposition thereto on February 8, 2022. (ECF No. 232.) Defendants filed a reply on  
23 February 11, 2022. (ECF No. 233.) The Court finds this motion suitable for ruling on the  
24 papers pursuant to Civil Local Rule 7.1(d). For the reasons discussed below, this Court  
25 **DENIES** the Motion.

26 **I. BACKGROUND**

27 This case centers around Plaintiffs’ allegation that Defendants willfully  
28 misclassified them and their distributor co-workers as independent contractors rather than

1 employees. Plaintiffs allege violations of California law stemming from their alleged  
2 misclassification. (See ECF No. 95 ¶¶ 28–74.)

3 In response to Plaintiffs’ claims, Defendants deny misclassification and assert a good  
4 faith affirmative defense, arguing that they “acted in good faith and had reasonable grounds  
5 for believing that they did not violate” California or federal law. (ECF No. 98 at 15–16.)

6 Defendants removed this action from state court on December 18, 2017. (ECF No.  
7 1.) Following a case management conference, Magistrate Judge Jill L. Burkhardt issued a  
8 Scheduling Order setting April 13, 2018 as the deadline to designate expert witnesses.  
9 (ECF Nos. 13; 14.) On April 22, 2018, the parties sought an extension of the deadline for  
10 producing expert witness reports, at the same time confirming for the Court their intent to  
11 comply with the scheduling deadline for designating expert witnesses. (ECF No. 20 at 2  
12 ¶¶ 5, 6.) The Court granted that, and numerous subsequent requests to extend the deadline  
13 for producing expert reports and/or completing expert discovery. (ECF Nos. 21; 35; 49;  
14 52; 59.) On November 2, 2018, the Court granted one last extension of time to complete  
15 any expert discovery by November 8, 2018. (ECF No. 73 at 2.) At no time did either party  
16 request an extension or re-opening of the expert *designation* deadline.

17 Long after the close of expert discovery, District Judge Janis L. Sammartino granted  
18 Defendants’ Motion to Stay on February 18, 2020. (ECF No. 166.) The stay was lifted on  
19 January 29, 2021. (ECF No. 169.)

20 The instant dispute involves Defendants’ *Ex Parte* Application to Amend  
21 Scheduling Order filed on February 1, 2022. (ECF No. 229.) Defendants’ *ex parte*  
22 application consisted of four requests: (1) for the Court to set a briefing schedule regarding  
23 whether the ABC Test applies to Plaintiffs’ PAGA claims; (2) for the Court to set a briefing  
24 schedule regarding whether a Joint Employer Test should be applied to Defendant Flower  
25 Foods, Inc.; (3) leave to add expert witness Basil Imburgia to their Expert Witness  
26 Disclosures; and (4) leave for an amendment to the Scheduling Order to allow the currently  
27 designated experts to update their reports before any trial. (*Id.* at 3.) Defendants’ motion  
28 to allow the experts to update their reports was unopposed. (*Id.*)

1 Upon review of Defendants' Application (ECF No. 229) and related filings (*see* ECF  
2 Nos. 225; 226), the Court determined that only Defendants' third and fourth requests within  
3 their application were properly before Judge Burkhardt. (ECF No. 230.) Accordingly, the  
4 Court granted Defendants' unopposed motion to allow the experts to update their reports  
5 and issued a briefing schedule regarding Defendants' motion for leave to add expert  
6 witness Basil Imburgia to their Expert Witness Disclosures. (*Id.*)

## 7 **II. LEGAL STANDARD**

8 Scheduling orders are intended to alleviate case management problems. *Johnson v.*  
9 *Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). As such, a scheduling  
10 order is "not a frivolous piece of paper, idly entered, which can be cavalierly disregarded  
11 by counsel without peril." *Id.* (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D.  
12 138, 141 (D. Me. 1985)). Good cause must be shown for modification of the scheduling  
13 order. Fed. R. Civ. P. 16(b)(4). The Ninth Circuit has explained the good cause  
14 requirement as follows:

15 Rule 16(b)'s "good cause" standard primarily considers the diligence of the  
16 party seeking the amendment. The district court may modify the pretrial  
17 schedule if it cannot reasonably be met despite the diligence of the party  
18 seeking the extension. Moreover, carelessness is not compatible with a finding  
19 of diligence and offers no reason for a grant of relief. Although the existence  
20 of a degree of prejudice to the party opposing the modification might supply  
21 additional reasons to deny a motion, the focus of the inquiry is upon the  
22 moving party's reasons for seeking modification. If that party was not diligent,  
23 the inquiry should end.

24 *Johnson*, 975 F.2d at 609 (internal quotation marks and citations omitted).

25 Parties must therefore "diligently attempt to adhere to the schedule throughout the  
26 course of the litigation." *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999).  
27 In addition, when deciding whether to amend a pretrial scheduling order, a court considers  
28 the following factors:

1) whether trial is imminent, 2) whether the request is opposed, 3) whether the  
non-moving party would be prejudiced, 4) whether the moving party was  
diligent in obtaining discovery within the guidelines established by the court,

1 5) the foreseeability of the need for additional discovery in light of the time  
2 allowed for discovery by the district court, and 6) the likelihood that the  
3 discovery will lead to relevant evidence.

4 *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017) (quoting *United*  
5 *States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995) (citation  
6 omitted), vacated on other grounds, 520 U.S. 939 (1997)).

### 7 **III. DISCUSSION**

8 Defendants ask the Court to permit them to disclose Basil Imburgia as an accounting  
9 expert witness over three years after the Court’s April 13, 2018 deadline to designate expert  
10 witnesses. (ECF Nos. 229 at 5; 233 at 5–6.) Defendants assert that good cause exists for  
11 the late disclosure of Mr. Imburgia because “there is still time for the . . . request[] to be  
12 added to the current schedule” and “Plaintiff[s] will not be prejudiced . . . especially when  
13 pre-trial disclosure requirements have not occurred.” (ECF No. 229 at 5–6.) In addition,  
14 Defendants argue that they should be allowed to add Mr. Imburgia as an expert witness  
15 because discovery is being shared in this case and the related case of *Ludlow v. Flowers*  
16 *Foods, Inc., et al.*, Case No. 18-cv-01190-JO-JLB (“*Ludlow*”), and because “Plaintiffs have  
17 been aware of Mr. Imburgia’s involvement in these matters and the opinions that he has  
18 expressed for many months now.” (*Id.*)

19 In their opposition, Plaintiffs argue that Defendants have not been diligent, and their  
20 request to add Mr. Imburgia as an expert witness should be denied because they lack “any  
21 explanation why [Defendants] waited so long to attempt to modify the scheduling order, or  
22 why [they were] precluded from doing so earlier in time.” (ECF No. 232 at 7.) In support  
23 of this argument, Plaintiffs also assert that the “facts in this case show that accounting  
24 issues were a central part of this case since mid-2018” and that Defendants “advised the  
25 Court [they] would seek an order modifying the schedule to add an accounting expert in  
26 the ‘near future’ but then waited a year after that to actually move for such relief.” (*Id.*)

27 In their reply, Defendants reassert the arguments in their Motion and contend that  
28 “Plaintiffs focus on diligence, not prejudice. That is because there is no prejudice. There

1 is no trial date. Mr. Imburgia only makes a few points. Plaintiffs have been on notice of  
2 his opinion for months and could have conducted discovery. They did not and do not  
3 explain why.” (ECF No. 233 at 6.)

4 The Court finds that Defendants were not diligent in their pursuit of adding Mr.  
5 Imburgia as an expert witness in this case and the circumstances before the Court do not  
6 demonstrate good cause to permit the disclosure of Mr. Imburgia as an expert witness now.  
7 Notably, and as Plaintiffs highlight in their opposition, Defendants stated in a Joint Status  
8 Report filed after the stay in this case was lifted that they intended “in the near future to  
9 seek leave to add another expert on accounting, financial and consolidated financial  
10 statement issues.” (ECF Nos. 232 at 7–8; 174 at 7.) Defendants have offered no  
11 explanation for their failure to designate an accounting expert before the April 13, 2018,  
12 expert designation deadline, much less their failure to endeavor to designate him in the  
13 almost four years since. Particularly puzzling—and unexplained—is Defendants’ delay of  
14 almost a year after notifying Plaintiffs and the Court of their then-imminent intent to  
15 belatedly request to add an accounting expert. Defendants seemingly ignore the Ninth  
16 Circuit’s standard for good cause and argue only that they should be allowed to add Mr.  
17 Imburgia as an expert witness because “there is not prejudice.” (ECF No. 233 at 6.) But  
18 Plaintiffs argue that they will in fact be prejudiced because “[t]he parties are preparing  
19 pretrial filings and working to get this case ready for trial.” (ECF No. 232 at 9.)

20 Defendants rely on *Prest v. Jermstad*, No. 07cv1771 WQH (BLM), 2009 WL  
21 10671340 (S.D. Cal. Jan. 15, 2009) in contending that “Courts have found it appropriate to  
22 allow an expert witness to be added to the disclosure past the deadline.” (ECF Nos. 229 at  
23 6; 233 at 7.) Defendants argue that “[j]ust like in *Prest*, pretrial deadlines have not occurred  
24 nor has any trial date been set.” (ECF No. 233 at 7.) While it’s true that a trial date has  
25 yet to be set and pretrial deadlines have yet to occur in this case, that’s where the similarity  
26 to *Prest* ends. As Plaintiffs point out in their opposition, *Prest* involved considerably  
27 different factual circumstances. (ECF No. 232 at 8–9.) In *Prest*, plaintiff’s counsel was  
28 “a sole practitioner” and “his work flow ha[d] been impacted due to his poor health.” *Prest*,

1 2009 WL 10671340, at\*2. In addition, plaintiff filed his motion for leave to amend his  
2 expert witness list on December 3, 2008—less than six months after the deadline for expert  
3 disclosures. *Id.* at \*1. Here, Defendants do not offer the Court any similar circumstances  
4 to justify their substantial, over three-year, delay in requesting to add Mr. Imburgia to their  
5 expert witness disclosures.

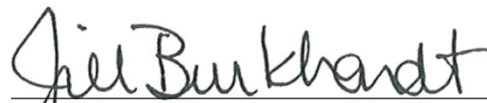
6 Based on the foregoing, the Court finds that Defendants were not diligent in pursuing  
7 their request to add Mr. Imburgia to their expert witness disclosures before the Court-  
8 ordered deadline. As the Ninth Circuit has stated, “[i]f [the moving] party was not diligent,  
9 the inquiry should end.” *Johnson*, 975 F.2d at 609. However, consideration of the other  
10 factors identified by the Ninth Circuit leads the Court to the same conclusion. The Final  
11 Pretrial Conference in this matter is presently set for May 11, 2022. (ECF No. 226.) The  
12 request is opposed by Plaintiffs. (ECF No. 232.) In addition, the need to disclose an  
13 accounting expert was not only foreseeable to Defendants, but it was specifically identified  
14 and forecast by Defendants almost a year ago. (*See* ECF No. 174 at 7.)

15 **IV. CONCLUSION**

16 For failure to set forth good cause, Defendants’ motion for leave to add expert  
17 witness Basil Imburgia to their expert witness disclosures is **DENIED**.

18 **IT IS SO ORDERED.**

19 Dated: February 22, 2022

20   
21 Hon. Jill L. Burkhardt  
22 United States Magistrate Judge  
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