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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PARKSIDE/EL CENTRO  
HOMEOWNERS ASSOCIATION,  
  
Plaintiff,  
  
v.  
  
TRAVELERS CASUALTY  
INSURANCE COMPANY OF  
AMERICA,  
  
Defendant.

Case No.: 20cv1732-JAH(RBB)

**ORDER GRANTING MOTION FOR  
LEAVE TO DEPOSE DALE  
ERLENBUSCH [ECF NO. 71]**

Presently before the Court is a Motion for Leave to Depose Dale Erlenbusch filed by Defendant Travelers Casualty Insurance Company of America (“Travelers”) [ECF No. 71]. Plaintiff Parkside/El Centro Homeowners Association (“Parkside” or “HOA”) filed an opposition [ECF No. 73], and Travelers filed a reply [ECF No. 75]. For the reasons set forth below, Travelers’ motion is GRANTED.

**I. BACKGROUND**

This bad faith case arises out of an insurance policy issued by Travelers to Parkside that included a Directors and Officers Liability Owners Association Claims Made Form endorsement (“D&O Coverage”). (Compl. 4, ECF No. 1.) On July 25, 2014, a member of the Parkside HOA discovered that the HOA had been suspended by the

1 California Secretary of State and the Franchise Tax Board had a collection account open  
2 due to the HOA's failure to pay taxes. (Def.'s Req. Judicial Notice Attach. #1 [Cross-  
3 Compl.], at 10, ECF No. 20.) On August 14, 2014, the HOA terminated the employment  
4 of Linda Heater, a part-time employee of Parkside who had served as the HOA's  
5 manager since 1988. (Id. at 7, 10.) Shortly thereafter, Parkside terminated its  
6 relationship with Martin Mohamed, the HOA's accountant and Heater's son-in-law. (Id.  
7 at 8, 10.) After Heater's employment was terminated, a new HOA Board discovered that  
8 Heater had embezzled \$80,000 from the HOA from January 2010 through July 2014, and  
9 later realized that she had embezzled at least \$228,000 from 1990 through 2009. (Id. at  
10 11.) On October 2, 2014, Parkside reported Heater to the police. (Cinco Decl. Supp.  
11 Def.'s Opp'n Pl.'s Mot. Summ. J. Ex. 3 [police report], at 2, ECF No. 21.) Almost two  
12 years later, on August 26, 2016, Heater pleaded no contest to a felony charge of  
13 embezzlement under Cal. Penal Code section 504, committed between January 1, 2010,  
14 and July 11, 2014. (Pl.'s Opp'n Attach. #1 Steinberg Decl. Ex. 10 [Heater plea  
15 agreement], at 39-40, ECF No. 59.)

16 On April 26, 2016, before the criminal charges against Heater were resolved and in  
17 response to a civil lawsuit brought by Heater against the HOA, Parkside filed a cross-  
18 complaint against Heater, Mohamed, and three of its former directors and officers, Dale  
19 Erlenbusch, Scott Devoy, and Hernan Mendez. (Def.'s Req. Judicial Notice Attach. #1  
20 [Cross-Compl.], at 1, ECF No. 20.) The HOA alleged that the former directors were  
21 negligent and breached their fiduciary duties to Parkside and caused Parkside financial  
22 losses by failing to properly supervise and control the activities of Heater and Mohamed.  
23 (Id. at 15-17, 19-20.) On March 2, 2017, Travelers declined to indemnify the three  
24 former directors for any losses in the lawsuit filed by Parkside against them. (Compl., 6,  
25 ECF No. 1.)

26 In July 2018, the former directors stipulated to liability and causation, and agreed  
27 to permit a referee to determine damages. (Def.'s Req. Judicial Notice Attach. #2  
28 [Statement of Decision], at 5, ECF No. 20.) On April 13, 2019, the three former

1 directors, who Parkside contends are insureds under the policy, assigned their claims  
2 under the Travelers D&O policy to Parkside. (Compl. 4, 6, ECF No. 1.) On November  
3 15, 2019, a final judgment in favor of Parkside against the former directors for \$688,931  
4 was entered. (Id.)<sup>1</sup> On May 11, 2020, Travelers denied the former directors' claims and  
5 the HOA's claim for indemnification under the D&O policy. (Id.) On September 3,  
6 2020, Parkside initiated this lawsuit against Travelers for breach of contract and breach of  
7 the implied covenant of good faith and fair dealing. (Id. at 1.)

8 Turning to the facts giving rise to the current motion, Travelers sought to take the  
9 depositions of former directors Erlenbusch, Devoy, and Mendez. (Def.'s Mot. 3, ECF  
10 No. 71.) According to Travelers, its process server, Jesse Lopez of First Legal,  
11 personally served a deposition subpoena and notice of remote deposition on Erlenbusch  
12 on September 6, 2021, at his address at 1138 S. 8th Street in El Centro, California. (Id.  
13 Attach. #2 Lopez Decl. 2; see also id. Attachs. #3-5 Lopez Decl. Exs. A-C [depo.  
14 subpoena, notice, and proof of service].) The deposition was scheduled to take place on  
15 September 17, 2021, at 10:00 a.m. via remote means coordinated by Ben Hyatt Court  
16 Reporting. (Id. Attach. #3 at 2; id. Attach #4 at 2.) The deposition notice instructed  
17 recipients of the notice (i.e., Erlenbusch and Plaintiff's counsel) to call the court reporting  
18 firm's telephone number "to retrieve the necessary credentials to access the remote  
19 deposition, as well as information related to any technical assistance" required to attend  
20 the deposition. (Id. Attach. #4 at 3.) The notice also instructed the deponent to "contact  
21 the noticing attorney at least five (5) calendar days before the deposition to confirm your  
22 intent to appear at this deposition via remote means to ensure you receiving the necessary  
23 credentials, . . . ." (Id. at 4.)

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26 <sup>1</sup> The \$688,931 is comprised of \$371,922 in damages (\$173,107 for unauthorized amounts paid to  
27 Heater/lost assessment income, \$22,341 for tax penalties and interest, \$5,125 for costs related to  
28 preparation of HOA tax returns, \$22,621 in increased insurance costs, and \$148,728 in prejudgment  
interest); \$269,755 in attorney's fees, and \$47,254 in costs. (Def.'s Req. Judicial Notice Attach. #2  
[Statement of Decision], at 8-9, 13-16, ECF No. 20.)

1           There is some dispute about precisely what happened on September 16, 2021, the  
2 scheduled date of Mr. Devoy’s deposition, but according to copies of emails submitted to  
3 the Court, Plaintiff’s counsel, Mr. Steinberg, emailed Ms. Yanni, Defendant’s counsel, on  
4 1:23 p.m. that day to inquire: “Are your depositions on or off? Your reporter does not have  
5 any logon information for these depositions. Please advise ASAP.” (Def.’s Reply  
6 Attach. #2 Yanni Decl. Ex. A, at 3, ECF No. 75.) At 1:46 p.m., Ms. Yanni responded,  
7 “We will provide the log in information. Will you be defending the witnesses?” (Id. at  
8 2.) Mr. Steinberg states that he spent one hour preparing for the deposition and forty-five  
9 minutes waiting for Mr. Devoy’s deposition to start. (Pl.’s Opp’n Attach. #2 Steinberg  
10 Decl. 2, ECF No. 73.) At 2:27 p.m., he emailed Yanni: “It is now 26 minutes past the  
11 scheduled time for this deposition and I’ve heard nothing further from you and your court  
12 reporting firm indicates there is no deposition scheduled.” (Def.’s Reply Attach. #2  
13 Yanni Decl. Ex. A, at 2, ECF No. 75.) Yanni responded three minutes later, “Mr. Devoy  
14 was not served, so his deposition is not proceeding today. Mr. Erlenbusch and Mr.  
15 Mendez are scheduled for 10 and 2 tomorrow and have been served.” (Id.) At 4:45 p.m.,  
16 Yanni emailed Zoom meeting information for the Erlenbusch and Mendez depositions to  
17 Mr. Steinberg. (Id. Attach. #3 Yanni Decl. Ex. B, at 2.)

18           The following day, September 17, Mr. Erlenbusch did not appear for his  
19 deposition. (Def.’s Mot. Attach. #6 Yanni Decl. 2, ECF No. 71.) On September 21,  
20 2021, four days after the scheduled date of the deposition, Mr. Erlenbusch emailed Ms.  
21 Yanni the following:

22           Rebekah,

23           I called the # on the attached Deposition Request (Which was for Ivan  
24 Mendez and not myself) and was informed that I was not on any list. I  
25 contacted Mr. Steinberg and he informed me he had the same response. I  
26 was awaiting a call Thursday and Fri [September 16 and 17, 2021] and no  
27 one contacted me. I have no problem complying with any requests  
28 concerning this matter as I have stated before.

1 (Pl.'s Opp'n Attach. #1 Erlenbusch Decl. Ex. B, at 16, ECF No. 73.) Mr. Erlenbusch  
2 attests to the same in his declaration. (Id. at 2.) After receiving his email, Ms. Yanni  
3 spoke with Mr. Erlenbusch, who advised that he would appear for a deposition. (Def.'s  
4 Mot. Attach. #6 Yanni Decl. 3, ECF No. 71.) Ms. Yanni asked Mr. Steinberg to stipulate  
5 to proceed with the deposition, but Mr. Steinberg declined. (Id.) Travelers now seeks  
6 leave of court to proceed with the deposition after the fact discovery deadline of  
7 September 20, 2021.

## 8 II. LEGAL STANDARDS

9 A notice of deposition must state the time and place of the deposition and, if  
10 known, the deponent's name and address. Fed. R. Civ. P. 30(b)(1). A deposition may  
11 take place by remote means. Id. R. 30(b)(4). The scheduling order issued by the court is  
12 required to limit the time to join other parties, amend the pleadings, complete discovery,  
13 and file motions. Fed. R. Civ. P. 16(b)(3). The schedule may be modified only for good  
14 cause and with the judge's consent. Id. R. 16(b)(4). The "good cause" standard under  
15 Rule 16(b) "primarily considers the diligence of the party seeking the amendment."  
16 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992); see also Fed.  
17 R. Civ. P. 16 advisory committee notes to 1983 Amendment ("[T]he court may modify  
18 the schedule on a showing of good cause if it cannot reasonably be met despite the  
19 diligence of the party seeking the extension."). This is unlike the liberal amendment  
20 policy of Federal Rule of Civil Procedure 15(a), which governs amended and  
21 supplemental pleadings, and which focuses on the bad faith of the party seeking  
22 amendment and the prejudice to the opposing party. Johnson, 975 F.2d at 609. While the  
23 court is not required to consider prejudice under Rule 16(b), it may supply an additional  
24 reason to deny a motion to modify a scheduling order. See Coleman v. Quaker Oats Co.,  
25 232 F.3d 1271, 1295 (9th Cir. 2000). The focus of the inquiry is on the moving party's  
26 reasons for seeking modification. Johnson, 975 F.2d at 609. "If that party was not  
27 diligent, the inquiry should end" and the motion to modify should not be granted. Id.

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### III. DISCUSSION

#### A. Motion for Leave to Take Deposition

Travelers contends that Mr. Erlenbusch was properly served with the deposition subpoena. (Def.'s Mot. 4-5, ECF No. 71.) Defendant is not presently seeking an order compelling Mr. Erlenbusch's deposition or holding him in contempt because he has agreed to his deposition, but is seeking leave of court to proceed with the deposition after the fact discovery cutoff, which was September 20, 2021. (Id. at 6.) Plaintiff argues that Mr. Erlenbusch's failure to appear was a problem of Travelers' own making because Erlenbusch was not properly served with the deposition subpoena and Travelers failed to provide him with the Zoom credentials in advance of the deposition. (Pl.'s Opp'n 3-5, ECF No. 73.) Parkside also argues that prejudice exists because its counsel prepared and waited for two depositions (Mr. Devoy's and Mr. Erlenbusch's) that did not go forward. (Id. at 5.) Plaintiff further asserts that good cause to permit the deposition after the fact discovery deadline is lacking because Travelers has had over a year to depose the former directors, their testimony is not necessary because Travelers' denial had nothing to do with the former directors, the pertinent legal issues are currently pending in motions before Judge Houston, and Travelers did not argue in any of the motions that it needed discovery from the former directors. (Id. at 5-6.)

Based on his email to Defendant's counsel, Mr. Erlenbusch was clearly expecting to be deposed on September 17, 2021, and remains willing to sit for his deposition. (Pl.'s Opp'n Attach. #1 Erlenbusch Decl. Ex. B, at 16, ECF No. 73.) Travelers noticed the deposition in advance of the fact discovery deadline, but the deposition did not proceed on the scheduled date due to confusion and logistical issues. Defendant acted diligently in seeking relief when it realized it would not be able to comply with the scheduling order. Mr. Erlenbusch likely possesses relevant information; it is, after all, the former directors' claims against Travelers that Parkside is pursuing in this litigation through the assignment of those claims by the directors to Plaintiff. That Travelers did not argue any need for Erlenbusch's deposition in relation to the summary judgment motions is not

1 pertinent because litigants are "obligated to prepare [their] case[s] in a diligent manner"  
2 consistent with the court's scheduling order even while pursuing other means of  
3 proceeding with the case. See Osakan v. Apple Am. Grp., No. C 08-4722 SBA, 2010  
4 WL 1838701, at \*4 (N.D. Cal. May 5, 2010). Reopening fact discovery to permit  
5 Travelers to take Mr. Erlenbusch's deposition will not prejudice Parkside, as it will not  
6 delay any other deadlines in the case. In sum, Travelers has established good cause for  
7 modifying the scheduling order as required by Fed. R. Civ. P. 16(b), particularly because  
8 this Court, like other courts, prefers that cases be resolved on their merits. See, e.g.,  
9 Caldwell v. Bloomin' Brands, Inc., Case No. ED CV 19-754-DMG (MRWx), 2021 WL  
10 3264145, at \*1 (C.D. Cal. Apr. 8, 2021) (granting application to reopen discovery to  
11 permit deposition even though Plaintiff was mistaken about the discovery deadline and  
12 did not schedule the deposition until one week before the discovery deadline). Travelers  
13 has proceeded with sufficient diligence for the Court to find that good cause exists to  
14 reopen fact discovery for the limited purpose of taking Erlenbusch's deposition. See  
15 Johnson, 975 F.2d at 609 (the good cause standard under Rule 16(b) primarily considers  
16 the diligence of the party seeking the amendment). Accordingly, Travelers' motion for  
17 leave to depose Dale Erlenbusch is GRANTED.

18 **B. Civil Local Rule 2.1 Professionalism**

19 In its September 30, 2021 order, this Court directed both sides to "address whether  
20 their actions relating to the scheduling of Mr. Erlenbusch's deposition were consistent  
21 with Civil Local Rules 2.1(a)(2)(f) (requiring counsel 'to attempt to resolve disputes  
22 promptly, fairly and reasonably, with resort to the Court for judicial relief only if  
23 necessary') and (a)(3)(b) (expecting counsel 'to treat adverse witnesses, litigants and  
24 opposing counsel with courtesy, fairness and respect')." (Order 2, Sept. 30, 2021, ECF  
25 No. 68.) The Court is disappointed that neither party addressed Rule 2.1 in its brief but  
26 assumes that counsel have reviewed the entirety of this rule and will be mindful of its  
27 application to circumstances such as these going forward.


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1 **IV. CONCLUSION**

2 For the reasons set forth above, Travelers' Motion for Leave to Depose Dale  
3 Erlenbusch is GRANTED.

4 **IT IS SO ORDERED.**

5  
6 Dated: January 11, 2022

7   
8 Hon. Ruben B. Brooks  
United States Magistrate Judge

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