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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 IAN MERRIT,

12 Plaintiff,

13 v.

14 JONATHAN COGLEY,

15 Defendant.

Case No.: 23-cv-1031-CAB-KSC

**ORDER DENYING MOTION TO  
AMEND SCHEDULING ORDER  
[Doc. Nos. 27, 28]**

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17 The parties' Joint Motion Regarding Proposed Amendments to the Scheduling Order  
18 is presently before the Court. Doc. Nos. 27, 28. Although plaintiff frames part of his request  
19 for a relief as a 60-day continuance of the fact discovery cutoff, fact discovery in this case  
20 closed on April 26, 2024, and the parties are well into expert discovery. *Compare* Doc. No.  
21 18 at 2-3 *with* Doc. No. 27 at 11. Accordingly, plaintiff seeks to reopen discovery as a  
22 matter of substance. Regardless of plaintiff's framing of the issue, defendant opposes any  
23 amendment to the Scheduling Order. *See* Doc. No. 27 at 27. Plaintiff also seeks leave to  
24 file a first amended complaint, which defendant opposes. *See* Doc. No. 27 at 14-17, 22-27.

25 **(A) Whether to Reopen Discovery**

26 A scheduling order may not be modified without a showing of good cause. Fed. R.  
27 Civ. P. 16(b)(4). The "good cause" standard "primarily considers the diligence of the  
28 part[ies] seeking amendment." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th

1 Cir. 1992). A request to reopen discovery—as distinct from a request to continue deadlines  
2 when discovery is still open—imposes a higher bar on parties because “[w]hereas a request  
3 for an extension acknowledges the importance of a deadline, a retroactive request suggests  
4 that the party paid no attention at all to the deadline.” *W. Coast Theatre Corp. v. Portland*,  
5 897 F.2d 1519, 1524 (9th Cir. 1990); accord *Taylor v. Kuerston*, 598 F. Supp. 3d 874, 877  
6 (E.D. Cal. 2022) (citing *W. Coast Theatre Corp.*, 897 F.2d at 1524)). Moreover, parties  
7 must *show* good cause—not just say it exists and assume the Court will agree—because  
8 the legal concept of “good cause” is uniformly rooted in objective standards. *Cf. Am. Mart*  
9 *Corp. v. Joseph E. Seagram & Sons, Inc.*, 824 F.2d 733, 734 (9th Cir. 1987); *Billingsley v.*  
10 *MV Transp., Inc.*, 242 F. Supp. 3d 1011, 1016 (E.D. Cal. 2017); *Hernandez v. Sullivan*,  
11 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005).

12 The thrust of plaintiff’s argument is that good cause to reopen discovery exists for  
13 the following reasons: (1) the identities of potential witnesses Eric Gohl and Robin Roth  
14 were unknown to plaintiff until the close of fact discovery, so there was not sufficient time  
15 to take their depositions; (2) plaintiff has “not had an opportunity to depose” a Rule  
16 30(b)(6) witness about business records received from the Music Box bar on April 19,  
17 2024; (3) plaintiff has not been able to locate potential witness Caleb Mbemba for a  
18 deposition; (4) a Porsche dealership failed to timely respond to plaintiff’s subpoena for  
19 business records and plaintiff therefore “needs more time to ensure such records are  
20 received”; and (5) plaintiff has not yet secured deposition testimony from potential witness  
21 Angel Mermis. *See* Doc. No. 27 at 12-14.

22 As to the identities of Eric Gohl and Robin Roth, plaintiff learned they might be  
23 witnesses during the depositions of defendant and defendant’s ex-wife, taken on April 15,  
24 2024, and April 17, 2024, respectively. *See* Doc. No. 27 at 12-13. Plaintiff waited until the  
25 close of discovery to depose these two obvious witnesses. If he had taken their depositions  
26 earlier, he could have deposed Mr. Gohl and Ms. Roth. Thus, the failure to discover their  
27 identities is a consequence of plaintiff’s lack of diligence to get this case ready for trial in  
28 a timely manner, and not, therefore, good cause to reopen discovery. Further, once the

1 identities of Eric Gohl and Robin Roth was learned, no explanation is provided for why  
2 they could not be deposed soon after the depositions of the defendant and his ex-wife. The  
3 same goes for taking the deposition of Angel Mermis. Plaintiff's submissions show that he  
4 knew about Ms. Mermis' status as a percipient witness since the night of the accident at  
5 issue in this case. *See* Doc. No. 27-5 at 4. Plaintiff's Motion establishes only that, despite  
6 knowing Ms. Mermis' identity all along, he chose not taken her deposition. This is a failure  
7 of diligence by plaintiff, not a showing of good cause to reopen discovery.

8       As for plaintiff's failure to depose a witness about business records produced from  
9 the Music Box bar, the subpoena duces tecum through which plaintiff obtained the records  
10 could also have been used to require the appearance of a witness who could attest to the  
11 records' authenticity and supply whatever other foundational testimony plaintiff might  
12 have sought. *See generally* Fed. R. Civ. P. 45(a)(1). Thus, plaintiff's argument that he has  
13 not had an opportunity to secure foundational testimony is unpersuasive because he had  
14 ample opportunity to do so. The Court concludes this is yet another failure of diligence and  
15 not good cause to reopen discovery.

16       Plaintiff's failure to locate witness Caleb Mbemba for a deposition is likewise a  
17 failure of diligence and not good cause to reopen discovery. Plaintiff does not dispute that  
18 he has known the identity of Mr. Mbemba since before this lawsuit was even filed. After  
19 all, Mr. Mbemba is plaintiff's friend, and he videotaped the accident at issue in this lawsuit.  
20 *See* Doc. No. 27-1 ¶ 35. Counsel's declaration in support of the instant Motion merely  
21 states the parties have made "extensive efforts" to locate Mr. Mbemba but have not thus  
22 far been able to serve him with a deposition notice and subpoena. *See id.* Plaintiff does not,  
23 however, make any effort to describe what these "extensive efforts" were. Accordingly,  
24 the conclusory statement about "extensive efforts" having been made is not good cause to  
25 reopen discovery because the Court cannot conclude whether the efforts were objectively  
26 sufficient, and plaintiff cannot, therefore, meet his burden to show good cause.

27       Finally, plaintiff states he needs more time to secure compliance with a subpoena  
28 that was served on a Porsche dealer on March 12, 2024. *See* Doc. No. 27 at 14. Plaintiff

1 could have moved the Court for an order compelling compliance with the subpoena before  
2 the close of discovery. *See generally Youngevity Int'l, Corp. v. Smith*, 16-cv-704-BTM-  
3 JLB, 2017 U.S. Dist. LEXIS 206797, at \*11-12 (S.D. Cal. Dec. 15, 2017) (describing in  
4 detail the procedure for enforcing compliance with a subpoena pursuant to Federal Rule of  
5 Civil Procedure 45). Plaintiff made no such effort, instead choosing to wait until fact  
6 discovery had been closed for more than a month and expert discovery was well underway  
7 before asking to reopen discovery to further pursue this subpoena. Again, this constitutes  
8 inexcusable neglect of plaintiff's obligation to prepare this case for trial, and, therefore, is  
9 not good cause to reopen discovery.<sup>1</sup>

10 As the Court has concluded, plaintiff had ample opportunity to secure the discovery  
11 at issue discovery before fact discovery closed in this case, but, because of a failure of  
12 diligence, the calendar ran out before plaintiff could seek all the discovery he wants. This  
13 is not a showing of good cause to reopen fact discovery. Moreover, fact discovery has been  
14 closed since April 26, 2024, yet plaintiff inexplicably waited over a month to request relief  
15 from this Court. In that time, the parties started expert discovery. As plaintiff concedes in  
16 his moving papers, reopening fact discovery will inevitably lead to reopening expert  
17 discovery, thus wasting more time and resources. *See Doc. No. 27* at 17-18. The Court also  
18 notes that continuing expert discovery will likely require a continuance of the dispositive  
19 motion cutoff date, which will cause delay of the trial. As the Court's Chambers Rules  
20 make clear, delaying trial is a sufficient basis in and of itself to warrant denial of a discovery  
21 continuance. The Court concludes that not only was plaintiff not diligent in pursuing fact  
22 discovery, he was also not sufficiently diligent in moving to amend the Scheduling Order.  
23 The request to reopen discovery is therefore **DENIED**.

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26 <sup>1</sup> Plaintiff also suggests a longer discovery calendar would let the parties retain a  
27 private mediator. *See Doc. No. 27* at 17. The parties already participated in both an ENE  
28 conference and MSC, and they have another settlement conference scheduled with this  
Court on August 5, 2024. *See Doc. No. 24*. The Court is not persuaded that a hypothetical  
settlement conference with a private mediator is somehow good cause to reopen discovery.

1            **(B) Plaintiff’s Request for Leave to Amend the Complaint**

2            Plaintiff seeks leave to amend the Complaint to plead a claim for punitive damages  
3 against defendant. *See generally* Doc. No. 27 at 14-17. The request is not contingent on the  
4 request to reopen discovery, as the information on which plaintiff bases his claim for  
5 punitive damages has already been learned in discovery. *See generally id.* Thus, even  
6 though the Court has denied the request to reopen discovery, plaintiff still has at least an  
7 arguable basis for amending the Complaint because, at least in his view, the facts presented  
8 at trial might support a claim for punitive damages. Defendant opposes the request for leave  
9 to amend on the merits, arguing not only that plaintiff’s claim for punitive damages is too  
10 weak to justify amendment, but also that plaintiff has been lax in requesting leave to amend.  
11 *See generally* Doc. No. 27 at 22-27. The presiding District Judge, rather than the  
12 undersigned Magistrate Judge, has authority to resolve a motion for leave to amend the  
13 Complaint. Accordingly, this Court will not resolve the parties’ arguments. Any motion  
14 for leave to amend shall be filed in conformity with the Civil Local Rules and Judge  
15 Bencivengo’s Chambers Rules for Civil Cases no later than **June 17, 2024**.

16            **IT IS SO ORDERED**

17 Dated: June 3, 2024



Hon. Karen S. Crawford  
United States Magistrate Judge