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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JEFFREY R. PETERSON,)
)
 Plaintiff,)
)
 v.)
)
 ACUMED, LLC,)
)
 Defendant.)
)
 _____)

No. CV-10-586-HU

) OPINION & ORDER

Paul Breed
815 SW Second Ave., Suite 500
Portland, OR 97204

Attorney for Plaintiff

Courtney Angeli
Buchanan Angeli Altschul & Sullivan LLP
321 SW Fourth Ave., Suite 600
Portland, OR 97204

Attorney for Defendant

1 HUBEL, Magistrate Judge:

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3 Before the court is defendant Acumed, LLC's Motion to Amend
4 its Answer, Affirmative Defenses, and Counterclaims [#15]. For
5 the reasons set forth below, I grant the motion.

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7 Facts

8 Plaintiff Jeffrey Peterson worked for defendant Acumed LLC as
9 a controller. On January 12, 2010, Peterson alleges a conversation
10 with Acumed's president, David Jensen, about resigning from the
11 company in which plaintiff claims he was promised that in exchange
12 for his resignation, he would be given severance benefits better
13 than another employee who had previously left the company. Jensen
14 allegedly knew that the severance package was worth six months of
15 salary plus a \$35,000 bonus. According to Peterson, he accepted
16 Jensen's offer.

17 Following Peterson's conversation with Jensen, Peterson
18 allegedly discussed severance with Acumed human resources employee
19 Noel Van Dyke. Van Dyke allegedly informed Peterson that no
20 commitments regarding severance could be made without the approval
21 of Colson Associates, and that the terms of severance packages were
22 confidential.

23 Peterson ended his employment on or about March 5, 2010, at
24 which time Acumed offered him a severance agreement that provided
25 for only five months' pay.

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1 Procedural History

2 On May 24, 2010, Peterson filed this lawsuit, contending that
3 an oral contract had been formed between himself and Jensen. He
4 demanded six months' pay, or \$70,000, plus a \$35,000 bonus, the
5 value of six months of health insurance, or \$6,000, and statutory
6 penalties for the allegedly late wages.

7 On June 17, 2010, Acumed filed its Answer, stating affirmative
8 defenses of failure to state a claim, no consideration, and wages
9 timely paid. It did not file any counterclaims with the Answer.

10 On July 21, 2010, Acumed served its First Request for
11 Production on Peterson. Peterson served Acumed with his initial
12 disclosures on July 22, 2010. Included with those disclosures was
13 a copy of the severance agreement that Acumed had negotiated with
14 a former employee, Sue Richardson¹, and which Peterson had
15 retained.

16 On August 3, 2010, this court held a Rule 16 conference. At
17 the conference the attorneys advised me that depositions were
18 scheduled for September 22-23, 2010. After discussing with the
19 attorneys the need for a deadline to amend a pleading so discovery
20 could proceed on finalized pleadings, I set a deadline of September
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22
23 ¹ Although Peterson's deposition testimony is clear that he
24 retained a copy of Sue Richardson's severance agreement, for
25 reasons not clear to the court, the parties' briefs refer to the
26 retained severance agreement as the "Mockridge Agreement." See
27 Decl. Courtney Angeli Ex. A, at 3; Pl.'s Mem. Opposition Def.'s
28 Mot. Amend, at 2. For purposes of this opinion, the distinction
is irrelevant and the court will refer to the Richardson
agreement.

1 17, 2010, to amend any pleading to add a party, claim, or defense.

2 All discovery was set to close on October 29, 2010.

3 On September 1, 2010, Peterson responded to Acumed's Request
4 for Production, and produced, among other things, an email that
5 Peterson had written to his parents that disclosed the terms of his
6 severance agreement.

7 On September 21, 2010, Acumed learned that Peterson had
8 retained a copy of a law firm bill to Acumed for, among other
9 things, consultation about Peterson's termination.

10 On September 22, 2010, Acumed's attorneys deposed Peterson and
11 learned that he had disclosed the terms of his alleged severance
12 agreement to other third parties. Acumed also learned that
13 Peterson had kept the Richardson agreement because it was of
14 interest to him with respect to his own expected severance
15 agreement.

16 During the month of October Acumed unsuccessfully sought
17 Peterson's consent to amend its answer to add claims and defenses
18 based on documents received in discovery and Peterson's deposition
19 testimony. On October 27, 2010, Acumed filed the instant Motion
20 for Leave to Amend Answer and Affirmative Defenses, and Add
21 Counterclaims. Specifically, it seeks to add affirmative defenses
22 of Unclean Hands and After Acquired Evidence, and counterclaims for
23 Breach of Contract and Breach of Fiduciary Duty.

24 Standards

25 If a district court enters a pretrial scheduling order that
26 sets a deadline to amend pleadings, and a party moves to amend

1 pleadings after the deadline, the court should evaluate the motion
2 under FRCP 16 and its good cause standard, not FRCP 15. Coleman v.
3 Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000) ("the district
4 court correctly found that it should address the issue under
5 Federal Rule of Civil Procedure 16 because it had filed a pretrial
6 scheduling order that established a timetable for amending the
7 pleadings, and the deadline had expired before [the parties] moved
8 to amend.")

9 A court's evaluation of good cause is not coextensive
10 with an inquiry into the propriety of the amendment
11 under ... Rule 15. Unlike Rule 15(a)'s liberal
12 amendment policy which focuses on the bad faith of the
13 party seeking to interpose an amendment and the
14 prejudice to the opposing party, Rule 16(b)'s "good
15 cause" standard primarily considers the diligence of
16 the party seeking the amendment. The district court
17 may modify the pretrial schedule "if it cannot
18 reasonably be met despite the diligence of the party
19 seeking the extension."

20 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir.
21 1992).

22 Discussion

23 I. Good Cause

24 A party meets the good cause standard if it shows that despite
25 its diligence, it was unable to uncover the information underlying
26 its motion to amend. Mammoth Recreations, 975 F.2d at 609. But
27 where the attorneys "conduct[] discovery but fail[] to pay
28 attention to the responses they receive[]," the attorneys frustrate
"the kind of case management that Rule 16 is designed to eliminate"
and "fail[] to establish 'good cause.'" Id. at 610.

Acumed contends that leave to amend should be given freely, and

1 that it could not have amended earlier because it did not learn of
2 the facts underlying the claims and defenses until it deposed
3 Peterson on September 22, five days after the deadline to amend a
4 pleading. Peterson argues that Acumed could have and should have
5 deposed him earlier, that his production of documents contained
6 information that pointed to the defenses and counterclaims, and
7 that Acumed's motion does not show good cause for not raising these
8 issues before the deadline for amendment.

9 At the Rule 16 conference on August 3, after discussing with
10 the attorneys whether either party might bring additional claims,
11 I set the deadline to amend a pleading for five days before the
12 depositions. I set the deadline in order that all the relevant
13 claims and defenses would be disclosed by the time of the
14 depositions. If Acumed had advised the plaintiff and the court
15 that it may seek to add claims, depending on the information
16 learned at the deposition at the Rule 16 conference this could have
17 been addressed in setting the schedule. There is a tension between
18 the need to have all the issues identified before the depositions
19 and the need for depositions to disclose or complete disclosure of
20 the issues involved in the claims and defenses. This tension is
21 the reason I discuss both the deadline for amended pleadings and
22 for fact discovery at the same time in a Rule 16 conference.

23 At oral argument, Acumed's attorney noted that she was aware of
24 the possibility of additional claims and defenses prior to the
25 amendment deadline, but did not have a good faith basis to bring
26 those claims and defenses until after completing plaintiff's
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1 deposition. The better practice in this situation was for defense
2 counsel, once she was aware of the possible need to amend, to raise
3 that issue with plaintiff's counsel and either request a change in
4 the deadline to amend or to take plaintiff's deposition before the
5 deadline. However, I will not deny the motion to amend in light of
6 the specific facts of this case, which leave a credible argument
7 that defendant did not yet have a Rule 11 good faith basis for
8 amendment before the deposition of plaintiff.

9 Accordingly, Acumed's motion to amend is granted.

10 II. Form of Amendment

11 In its briefing and at oral argument, plaintiff argued that the
12 form of Acumed's proposed affirmative defenses and its proposed
13 statements of damages are insufficient in that they do not give
14 sufficient notice of their bases. Peterson contends that the
15 motion to dismiss standard applies to affirmative defenses as well
16 as to a plaintiff's claims, citing Barnes v. AT & T Pension Ben.
17 Plan-Nonbargained Program, ___ F.Supp.2d ___, 2010 WL 2507769, at
18 *4 (N. D. Cal. June 22, 2010) ("While neither the Ninth Circuit,
19 nor any other Circuit . . . has ruled on this issue, the vast
20 majority of courts presented with the issue have extended Twombly's
21 heightened pleading standard to affirmative defenses.") Prior to
22 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007, the
23 standard for affirmative defenses was "Rule 8's requirement of a
24 'short and plain' statement to give the opposing party fair notice
25 of the defense and the grounds upon which it rests." Id. at *3.

26 Here, the language of the proposed Answer reads, "In light of
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1 his inequitable conduct, plaintiff's claim for relief is barred by
2 the doctrine of unclean hands." Proposed Amended Answer ¶ 16.

3 The After Acquired Evidence defense reads, "After acquired
4 evidence of breach of confidentiality renders plaintiff's alleged
5 severance contract unenforceable." Proposed Amended Answer ¶ 17.

6 The damages section of the Breach of Contract counterclaim
7 related to disclosure of the severance terms to third parties
8 reads, "As a result of Peterson's breach, Acumed was damaged in an
9 amount to be determined at trial." Proposed Amended Answer at ¶
10 27. Similarly, the damages section of the Breach of Fiduciary Duty
11 counterclaim reads, "As a result of this breach, Acumed was damaged
12 in an amount to be proven at trial." Proposed Amended Answer at ¶
13 31.

14 As written, the proposed defenses and the statements of damages
15 are not sufficiently particular to give Peterson notice of the
16 issues to address, nor do they provide sufficient limits to what
17 evidence will be relevant on these issues at trial. Before it
18 files its amended answer, Acumed is directed to correct these
19 deficiencies.

20 III. Discovery

21 Finally, at oral argument, Peterson advised the court that if
22 amendment were allowed, he would need to reopen discovery in order
23 to conduct additional depositions and ask for additional production
24 of documents. Acumed advised the court that it does not need
25 additional discovery.

26 Accordingly, I will allow discovery to be reopened for
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1 plaintiff only. Plaintiff shall consult with defense counsel and
2 propose an amendment to the case schedule.

3 Conclusion

4 Defendants' Motion for Leave to Amend its Answer, Affirmative
5 Defenses, and Counterclaims [#15] is granted.

6 IT IS SO ORDERED,

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8 Dated this 14th day of December, 2010.

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10 /s/ Dennis J. Hubel

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12 Dennis James Hubel

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