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U.S. DISTRICT COURT
 CASE NO. CV 03-450-E-1mb
 03-12-07
 JWH

Attorneys for Dr. Larry R. Misner Jr.

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho professional corporation,)
)
 Plaintiff,)

Case No. CV ~~PI-0200142D-~~
 03-450-E-1mb

vs.)

INTERDENT SERVICE)
 CORPORATION, a Washington)
 corporation,)
)
 Defendant.)

**DR. LARRY MISNER'S
 OPPOSITION TO
 INTERDENT SERVICE
 CORPORATION'S
 MOTION FOR LEAVE TO
 FILE AMENDED
 COUNTERCLAIMS/
 THIRD-PARTY CLAIMS**

INTERDENT SERVICE)
 CORPORATION, a Washington)
 corporation,)
)
 Third-Party Plaintiff,)

vs.)

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho professional corporation;)

DWIGHT G. ROMRIELL, individually;)
LARRY R. MISNER, JR., individually;)
GREGORY ROMRIELL, individually;)
ERROL ORMOND, individually; and)
ARNOLD GOODLIFFE, individually,)
)

Third-Party Defendants.

I. INTRODUCTION

Defendant Larry Misner hereby opposes Interdent Service Corporation's (hereafter "ISC") Motion for Leave of Court to File Amended Counterclaims/Third-Party Claims. Interdent Service Corporation's motion should be denied, because (1) ISC has failed to request modification of this Court's Scheduling order; (2) even if this Court were to treat ISC's motion to amend the Counterclaim as a *de facto* motion to amend the Scheduling Order, ISC has failed to show "good cause" for bring the proposed amendments at this late date; and (3) even if this Court were to find "good cause", ISC's proposed amendments are "futile" as simply statements of alternative legal theories allegedly applicable to the pled facts.

II. ARGUMENT

First, ISC has relied on the incorrect standard of review for its proposed amendments. In its brief, ISC correctly cited Fed R. Civ. P. 15(a). The applicable standard here, however, is not limited to Rule 15(a). Once the district court files a pretrial scheduling order pursuant to Fed. R. Civ. P. 16 which establishes a timetable for amending pleadings, Rule 16's

standards control. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Rule 16 provides in relevant part: “A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge. F.R.C.P. 16(b). Thus, ISC’s ability to amend its complaint is governed by Rule 16(b), not Rule 15(a). *See Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).

Accordingly, as discussed herein, pursuant to Rule 16(b), ISC should have moved for modification of the Scheduling Order issued by this Court on April 7, 2004. Furthermore, even if ISC had properly moved for modification of the Scheduling Order, it has failed to meet its burden of proof to show “good cause”. F.R.C.P. 16. Finally, even if this Court were to find that ISC could show “good cause” pursuant to Rule 16(b), Counterclaims numbered 9, 10 and 11 should nevertheless be denied pursuant to Fed. R. Civ. P. 15(a)’s more liberal standard, because these proposed amendments are futile.

1. ISC’s Motion for Leave to Amend Counterclaims/Third-Party Claims Should be Denied, Because ISC has not Filed a Motion to Modify the Scheduling Order.

First, ISC’s Motion to Amend should be denied, because it has failed to seek a modification of this Court’s Scheduling order, entered April 7, 2004.

Once a scheduling order is issued pursuant to Fed. R. Civ. P. 16, the scheduling order “controls the subsequent course of the action” unless modified by the court. Fed. R. Civ. P. 16(e). A “scheduling order ‘is not a frivolous piece of paper, idly entered, which can be

cavalierly disregarded by counsel without peril.” *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) quoting *Gestetner Corp v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). “Disregard of the order would undermine the court’s ability to control its docket, disrupt the agreed-upon course of litigation, and reward the indolent and the cavalier. Rule 16 was drafted to prevent this situation *and its standards may not be short-circuited by an appeal to those of Rule 15.*” *Id.* (emphasis added). A court may deny, as untimely, a motion filed after the scheduling order cut-off date, *where no request to modify the order has been made.* See *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 608 (9th Cir. 1992); and *U.S. Dominator, Inc., v. Factory Ship Robert E. Resoff*, 768, F.2d 1099, 1104 (9th Cir. 1985). In *Johnson*, the Ninth Circuit Court of Appeals stated that if the scheduling order simply bars further motions after the cut-off date, the district court can deny any late-filed motions solely on that ground, absent a request to modify the order. *Johnson*, 975 F.2d 604, 610 fn. 7. Furthermore, the 9th Circuit Court of Appeals has repeatedly suggested that it is inappropriate to consider a motion to amend as a *de facto* motion to modify the scheduling order. See *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 608 (9th Cir. 1992); and *U.S. Dominator, Inc., v. Factory Ship Robert E. Resoff*, 768, F.2d 1099, 1104 (9th Cir. 1985).

Here, the Scheduling Order, issued by this Court on April 7, 2004, provides that all motions to amend the pleadings or to join new parties must be filed by May 15, 2004. Pursuant to Fed. R. Civ. P. 16(e), the only way to deviate from the requirements of this order

is by a modification of the Scheduling Order, or as specifically provided by the language of the Scheduling Order. This Court, however, has not modified the Scheduling Order, nor has ISC requested that the Scheduling order be modified to allow a motion for leave to file the amended counterclaims/third-party claims to be filed after the stated cut-off date. Similarly, the language of the Scheduling Order itself does not provide a method, outside of a motion to modify the Order, for filing a motion to amend at this late date. While there is a "good cause" exception contained in the Scheduling Order, allowing admission of evidence at trial that does not comply with the Scheduling Order with a showing of "good cause", there is no similar exception in the Scheduling Order for motions to amend the pleadings or join new parties. The evidence exception states:

19. Except for good cause shown, no exhibit(s) or testimony will be received in evidence at trial unless presented in accordance with this order.

Scheduling Order, p. 7, filed April 7, 2004. Motions for amendments to the pleadings in the instant action are not evidence to be presented at trial.

Accordingly, because there is no exception in the Scheduling Order for late filing of motions for leave to amend pleadings, and the deadline for filing such motions has not been modified by this Court, ISC's Motion for Leave to Amend should be denied.

2. ISC's Motion for Leave to Amend Counterclaims/Third-Party Claims Should be Denied, Because ISC has Failed to Show Good Cause.

Alternatively, in the event this Court finds ISC's Motion for Leave to Amend tantamount to a motion to amend the Scheduling Order, ISC's Motion for Leave to Amend the Complaint should still be denied because it has failed to show "good cause."

A party seeking to amend pleadings after the date specified in the scheduling order must first show "good cause" for an amendment under Rule 16(b), then, if "good cause" is shown, the party must demonstrate that the amendment was proper under Rule 15. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 608 (9th Cir. 1992), citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987). Unlike Rule 15(a)'s more liberal amendment policy which focuses primarily on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609, and see, *Coleman v. The Quaker Oats Company*, 232 F.3d 1271, 1294 (9th Cir. 2000). Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609. It is the moving party who has the burden to show "good cause" for not having amended its complaint before the time specified in the scheduling order expired, *Coleman v. The Quaker Oats Company*, 232 F.3d 1271, 1294, not, as ISC stated in its brief, the opposing party's burden to establish prejudice.

Accordingly, because this Court entered the Scheduling Order on April 7, 2004, requiring that all amendments and joinder of parties be filed by May 15, 2004, ISC must

show that the proposed amendments are made for “good cause”, pursuant to Fed. R. Civ. P. 16(b). ISC, however has not demonstrated that its proposed amendments are proposed and pursued for “good cause”.

i. Proposed Amendments to Counterclaims 6 through 8.

The record in this case shows that ISC was informed of facts giving rise to their allegations and causes of actions proposed as Counterclaims 6 through 8, at the latest, on June 2, 2004. On June 2, 2004, ISC filed for a temporary restraining order alleging that Dr. Misner was violating the non-compete cause in the contracts. It is this same grievance that ISC now seeks to add to the Counterclaim by this motion. Clearly, ISC can, and has acted with diligence to protect its interests, as demonstrated by the June 2, 2004 petition for a temporary restraining. While ISC may arguably have been able to establish that it acted with due diligence if it had properly filed for Leave to Amend the Counterclaim/Third-Party Complaint on June 2, it cannot show diligence in pursuing these amendments now. ISC has filed this present motion more than three months after this Court’s deadline for such motions, and more than two and a half months after ISC filed for a temporary restraining order arising from the same alleged grievance being proposed here as an amendment.

Furthermore, ISC’s improper filing of the Amended Counterclaims/Third-Party Claims on June 2, 2004, has no effect on ISC’s duty to show good cause for amending the complaint now. Rule 16(b)’s “good cause” standard primarily considers the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609,

and see, *Coleman v. The Quaker Oats Company*, 232 F.3d 1271, 1294 (9th Cir. 2000). Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609. Here, ISC's failure to request leave of the court for the filing of the June 2, 2004 Amendment was *carelessness* on ISC's part. Even a cursory review of the federal rules reveal that leave of court is necessary to file an amended pleading once a responsive pleading has been served. F.R.C.P. 15(a) A more diligent reading of the rules reveals that after a deadline of a scheduling order has past, the moving party must request a modification of the scheduling order, and must show good cause for the proposed amendment F.R.C.P. 16(b).

Accordingly, because ISC has waited more than two and a half months after it clearly had notice of the underlying facts giving rise to the proposed amendments, before bringing a proper motion to amend, ISC has not pursued these amendments with diligence. ISC's motion should, therefore, be denied.

ii. Proposed Amendments to Counterclaims 9 through 11.

Similarly, ISC has failed to show good cause for its proposed Amendments to Counterclaims 9 through 11. By ISC's own admission, none of the proposed amendments to Counterclaims 9 through 11 are substantively different that was previously filed. *Interdent Service Corporation's Memorandum in Support of Motion for Leave of Court fo File Amended Counterclaim/Third-Party Claims* p. 5. ISC has the burden to show good cause to amend the counterclaims/third-party complaints. There is nothing, however, in ISC's brief

even attempting to show good cause for these three proposed amendments. Accordingly, ISC's proposed amendments to Counterclaims 9 through 11 should be denied.

3. ISC's Motion for Leave to Amend Counterclaims/Third-Party Claims Should be Denied in Part, Because Proposed Amendments Counterclaims Nos. 9 Through 11 are Merely Legal Theories.

As an additional basis for denial, ISC's motion for Leave to Amend Counterclaim Nos. 9 through 11 should be denied as those proposed amendments are merely statements of legal theories.

Legal theories need not be plead in a complaint. *Electrical Construction & Maintenance Company, Inc., v. Maeda Pacific Corporation*, 764 F.2d 619, 623 (9th Cir. 1985). To plead multiple claims that differ only in the legal foundation for the same grievance controverts the very spirit of Fed. R. Civ P. 8(a) that a complaint must be "short and plain statement of the claim showing that the pleader is entitled to relief." F.R.C.P. 8(a); *and Archer Daniels Midland Co., v. Harford Fire Ins.*, 243 F.3d 369, 374 (7th Cir. 2001). When a movant presents no new facts but only new legal theories, and provides no satisfactory explanation for its failure to fully develop his contentions originally, a district court does not abuse its discretion to deny a motion to amend the complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367 374 (9th Cir. 1990).

Upon review of the proposed Amended Counterclaims, it is apparent that ISC's proposed amendments to Counterclaims 9 through 11 are nothing more than three different

legal theories for a single grievance, without no additional allegations of fact. Accordingly, because the addition of legal theories or arguments are not appropriate amendments to a complaint, ISC's proposed amendments of Counterclaims 9 through 11 should be denied.

III. CONCLUSION

For the reasons and upon the authority set forth herein, ISC's Motion for Leave to File Amended Counterclaims/Third-Party Claims should be denied. ISC has failed to move for modification of the Scheduling Order, and, even if it had so moved, ISC has failed to show good cause for the proposed amendments. Finally, amendment simply to plead new legal theories as opposed to new facts supporting any pled legal theory is unnecessary and, as irrelevant to resolution of the controversy, futile. This Court, therefore, should deny ISC's Motion for Leave to file Amended Counterclaims/Third-Party Claims.

DATED this 3rd day of September, 2004.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____


RICHARD A. HEARN

Attorneys for Defendant Dr. Larry Misner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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