

1 HUESTON HENNIGAN LLP
John C. Hueston (164921; jhueston@hueston.com)
2 Alison Plessman (250631; aplessman@hueston.com)
620 Newport Center Drive, Suite 1300
3 Newport Beach, California 92660-6324
Telephone: (949) 229-8640
4 Facsimile: (949) 775-0898

5 STATE COMPENSATION INSURANCE FUND
Linda S. Platisha (195281; lsplatisha@scif.com)
6 1750 E. Fourth St., 5th Floor
Santa Ana, CA 92705
7 Telephone: (714) 347-6130

8 Attorneys for Plaintiff
STATE COMPENSATION
9 INSURANCE FUND, a Public
Enterprise Fund and Independent
10 Agency of the State of California

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

14 STATE COMPENSATION)
INSURANCE FUND,)
15)
Plaintiff,)
16 v.)
17 MICHAEL D. DROBOT, SR., et al.,)
18 Defendants.)

Case No. SACV 13-00956-AG (CWx)
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
STATE FUND'S UNOPPOSED
MOTION TO AMEND ITS SECOND
AMENDED COMPLAINT AND
MODIFY THE SCHEDULING
ORDER**

19 _____)
HEALTHSMART PACIFIC, INC., et)
20 al.,)
21 Third-Party Plaintiffs,)
v.)
22 MITCHELL G. COHEN., et al.,)
23 Third-Party Defendants,)
24 _____)

**Date: June 15, 2015 (Oral
Argument Waived)**
Time: 10:00 a.m.
Place: Courtroom 10D
Judge: Hon. Andrew Guilford

25
26
27
28

1 **1. Introduction**

2 Plaintiff State Compensation Insurance Fund (“State Fund”) requests leave to
3 amend its Second Amended Complaint to add additional defendants, including a
4 number of medical providers and entities associated with those medical providers.
5 A copy of the Proposed Third Amended Complaint is attached hereto as Exhibit A.
6 State Fund additionally requests that the Court modify the current scheduling
7 deadlines, Dkt. No. 444, to extend all dates by nine months in order to allow
8 additional discovery to and from the newly-added defendants and permit time for
9 any motion practice arising out of the amendment (a chart showing the precise dates
10 to be changed is included in the Declaration of Jeff Wilkerson filed concurrently
11 herewith (“Wilkerson Decl.”)).

12 State Fund is seeking, as permitted by Federal Rule of Civil Procedure Rule
13 14(a)(3), to assert claims directly against many of third parties added to the case by
14 the Third-Party Complaint filed in March of this year (Dkt. No. 534, the “Third-
15 Party Complaint”) by Healthsmart Pacific Inc., Healthsmart Pacific Inc. d/b/a
16 Pacific Hospital of Long Beach, Michael D. Drobot, Sr., Long Beach Pain Center
17 Medical Clinic, Inc.; International Implants, LLC; Pacific Specialty Physician
18 Management, Inc.; and First Medical Management Inc. (collectively, the “Surgical
19 Defendants”). Additionally, State Fund seeks to add a number of additional
20 defendants that are similarly situated to these Defendants. This request is consistent
21 with Federal Rule of Civil Procedure 15, and is also consistent with an efficient
22 judicial process—given that certain additional defendants have already been brought
23 into this case by Surgical Defendants’ Third-Party Complaint, it would not be
24 economical or efficient to proceed separately against other similarly-situated parties.

25 If State Fund’s motion for leave to amend its complaint is denied, State Fund
26 intends to file a separate complaint against the parties named in its amended
27 complaint. Given that many of these parties have already been named as third-party
28 defendants in this case, it would not be efficient to proceed against an alleged RICO

1 enterprise in one action and alleged conspirators with that enterprise in a separate
2 action. That would require that the same issues be determined in two separate cases
3 and that numerous witnesses testify twice before two different juries, unnecessarily
4 expending the time and resources of the Court, the parties and the witnesses.

5 This request has been made with diligence—State Fund moved quickly after
6 being served with the Third-Party Complaint to perform due diligence on the new
7 parties, research, draft, and file its proposed Third Amended Complaint.

8 State Fund’s unopposed request to extend the scheduling deadlines by nine
9 months is also supported by good cause. All parties to this case need additional time
10 to take discovery from the newly-added defendants, and these defendants will
11 presumably wish for time to take their own discovery as well. Indeed, it is highly
12 doubtful that the numerous third-party defendants who have already been sued will
13 be able to prepare for the current August 11, 2015 trial date even were State Fund’s
14 motion for leave to amend its complaint not granted. No party will be prejudiced by
15 the extension of these scheduling deadlines—all current parties have stipulated to
16 the extension of these deadlines, and the extension is meant in part to avoid
17 prejudice to the parties that will be newly-named in the proposed Third-Amended
18 Complaint.

19 For these reasons, State Fund respectfully requests that the Court grant this
20 Motion in full.

21 **2. Factual Background**

22 Under the current scheduling deadlines in this case, discovery is set to close
23 on June 1, 2015, and trial is set to begin on August 11, 2015. Dkt. No. 444 at 2; *see*
24 *also* Wilkerson Decl. ¶ 4 (recounting prior amendments to the scheduling deadlines
25 in this case). On February 7, 2015, with the Court’s leave, State Fund filed its
26 Second Amended Complaint (“SAC”). Dkt. No. 464. On February 10, 2015, the
27 Court granted a stipulation allowing Defendants until March 11, 2015 to file their
28 answers to the SAC. Dkt. No. 474. On March 9, 2014, Surgical Defendants

1 answered State Fund’s SAC. Dkt. Nos. 512-514. Then, on March 23, 2015,
2 consistent with Federal Rule of Civil Procedure 14(a)(1), which permits a Defendant
3 to file a third-party complaint as of right if it does so within 14 days of answering
4 the complaint, Surgical Defendants filed a Third-Party Complaint impleading an
5 additional 34 parties. Dkt. No. 534.

6 After Surgical Defendants filed their Third-Party Complaint, State Fund
7 determined that it wished to assert claims directly against many of the parties named
8 in the Third-Party Complaint as permitted by Rule 14(a)(3). Wilkerson Decl. ¶ 5.
9 State Fund also determined that, given the addition of many medical providers as
10 third-party defendants, it should also seek leave to add additional, similarly-situated
11 parties as defendants (as it was not economical to add only *some* of the relevant
12 parties). *Id.* State Fund immediately began conducting its due diligence on the
13 parties it would add and drafting an amended complaint, and additionally conferred
14 with all present defendants on whether they would stipulate to an amendment of the
15 complaint. *Id.* at ¶¶ 5-6. The Defendants agreed in principle to stipulate to the
16 amendment, but would not commit to stipulate to the amendment until they could be
17 provided with a draft of the proposed Third Amended Complaint. *Id.* at ¶ 6. State
18 Fund endeavored to finish a draft and provide it to Defendants, and all current
19 parties then agreed that the amendment of the complaint to add these additional
20 parties was appropriate so long as additional time was provided for discovery prior
21 to trial. *Id.* at ¶¶ 6-7.

22 3. Legal Standard

23 Federal Rule of Civil Procedure 14(a)(3) provides that a plaintiff “may assert
24 against [a] third-party defendant any claim arising out of the transaction or
25 occurrence that is the subject matter of the plaintiff’s claim against the third-party
26 plaintiff.” The rule does not provide a specific mechanism by which such claims are
27 to be raised, but the “preferred” method for asserting such claims is via amendment
28 of the complaint. Rutter Group Prac. Guide: Fed. Civ. Pro. Before Trial, Calif. &

1 9th Cir. Eds. § 7:351 (“The rule does not specify the procedure for plaintiff to
2 follow. Normal and preferred practice is to request leave of court to amend to
3 complaint to state a cause of action against the third party defendant.”) (citing
4 cases); *see also* Rule 14 Adv. Comm. Note (“[T]he plaintiff may, if he desires,
5 assert directly against the third-party defendant either by amendment or by a new
6 pleading any claim he may have against him arising out of the transaction or
7 occurrence that is the subject matter of the plaintiff’s claim against the third-party
8 plaintiff.”). Unlike other types of amendment, the Federal Rules “do not restrict the
9 time period to assert third-party claims [under Rule 14(a)(3)].” *Federated Serv. Ins.*
10 *Co. v. STIHL Inc.*, 2013 WL 1100728 at *2-3 (D. Ore. Mar. 14, 2014)

11 State Fund recognizes that it is not seeking only to assert claims against
12 Defendants named in the Third-Party Complaint (although that was the catalyst for
13 this Motion), but is also seeking to add additional new parties (and to extend the
14 discovery cutoff and trial date). As a general matter, Federal Rule of Civil
15 Procedure 15(a)(2) provides that amendment of the pleadings is permitted where the
16 moving party has “the opposing party’s written consent” or “the court’s leave,”
17 which should be “freely give[n] ... when justice so requires.” However, when leave
18 to amend is sought after the date for amendment in the applicable Scheduling Order,
19 the moving party must also show, pursuant to Rule 16, “good cause” for amendment
20 of the scheduling order. *Contract Assocs. Office Interiors, Inc. v. Ruiter*, 2008 WL
21 2420546, at *1 n.1 (E.D. Cal. June 12, 2008). The “focus of the [good cause]
22 inquiry is upon the moving party’s reasons for modification.” *Johnson v. Mammoth*
23 *Recs., Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Courts ask whether the moving party
24 was diligent in seeking to modify the scheduling order and will modify the
25 scheduling order if it “cannot reasonably be met despite the diligence of the party
26 seeking the extension.” *Id.* Courts have found that good cause for amending the
27 scheduling order exists where the moving party discovered “additional context and
28 content” that bore upon their proposed new claim shortly before filing their request

1 for a modification of the scheduling order. *T. Dorfman, Inc. v. Melaleuca, Inc.*,
2 2013 WL 5676808, at *3 (D. Idaho Oct. 18, 2013). Similarly, it has been found that
3 good cause exists where the amendment at issue could also be accomplished by
4 filing a separate action, which might itself later be consolidated with the present
5 action for purposes of judicial economy. *Contract Assocs.*, 2008 WL 2420586 at
6 *1.

7 **4.0 Argument**

8 **4.1 Amendment of the Second Amended Complaint is Consistent With** 9 **Rule 14(a)(3)**

10 State Fund’s proposed Third Amended Complaint asserts claims directly
11 against, among others, Dr. Faustino Bernadett, Jeffrey Catanzarite, Dr. Gerald
12 Alexander, Dr. Jack Akmakjian, Dr. Ian Armstrong, Michael Barri, Dr. Mitchell
13 Cohen, Alan Ivar, Edward Komberg, Dr. Randy Rosen, Dr. Lokesh Tantuwaya, Dr.
14 Jacob Tauber, Dr. Assad Moheimani, and Jason Bernard, as well as entities
15 associated with these individuals (the “Third-Party Defendants”). Each of these
16 individuals was named as a Third-Party Defendant in the Third-Party Complaint that
17 Surgical Defendants filed in late March. *See* Third-Party Complaint.

18 Federal Rule of Civil Procedure 14(a)(3) specifically provides that a plaintiff
19 is permitted to assert claims directly against parties impleaded by a Defendant. Fed.
20 R. Civ. Pro. 14(a)(3). State Fund’s proposed Third Amended Complaint thus seeks
21 to do precisely that which State Fund is permitted to do under the Federal Rules.

22 **4.2 Amendment of the Second Amended Complaint is Consistent With** 23 **Rule 15(a)(2)**

24 In addition to the Third-Party Defendants, State Fund’s Proposed Third
25 Amended Complaint seeks to name as additional parties a number of medical
26 providers, and associated entities, that are similarly-situated to the Third-Party
27 Defendants. In short, State Fund alleges that each of these individuals conspired
28 with the present Defendants to facilitate the fraudulent schemes alleged in the

1 complaint, including but not limited to accepting kickbacks to refer patients to
2 Pacific Hospital of Long Beach and/or Long Beach Pain Center Medical Clinic,
3 accepting kickbacks for prescribing medications to be dispensed by the Pharmacy
4 Defendants, and submitting false or fraudulent bills to State Fund concealing this
5 illegal activity and requesting payment. *See generally* Ex. A (Proposed TAC).

6 Federal Rule of Civil Procedure 15(a)(2) provides that, when a party seeks to
7 amend its pleading more than once, it must have either “the opposing party’s written
8 consent or the court’s leave” and that the “court should freely give leave when
9 justice so requires.” In this case, State Fund has written consent from all current
10 parties to amend its complaint. Wilkerson Decl. ¶ 3. Moreover, even if there were
11 no such written consent (and there is), leave to amend would be appropriate. Under
12 Rule 15, leave to amend is freely given with “extreme liberality” unless the
13 opposing party makes a showing of undue prejudice, or bad faith or dilatory motive
14 on the part of the moving party. *Sonoma Cnty. Ass’n of Retired Employees v.*
15 *Sonoma Cnty.*, 708 F.3d 1109, 1119 (9th Cir. 2013). Here, no party contends that
16 State Fund has acted with bad faith or dilatory motive or that they are unfairly
17 prejudiced. As discussed above, State’s Fund’s request for amendment was
18 prompted by the Third-Party Complaint, and State Fund quickly moved to perform
19 its due diligence and draft and seek the court’s leave to file an amended complaint
20 after the Third-Party Complaint was filed.

21 **4.3 Modification of the Scheduling Order to Allow Amendment of the**
22 **Complaint and Extend Discovery is Supported by Good Cause as**
23 **Required By Rule 16**

24 State Fund recognizes that the Court’s current deadline for amending
25 pleadings has passed, and that the filing of the amended complaint thus requires
26 good cause under Rule 16. *Johnson*, 975 F.2d at 609. And State Fund of course
27 further recognizes that it is asking the Court to modify its Scheduling Order to allow
28 nine more months for discovery and to defer the trial date. However, there is good

1 cause for the Court to amend its Scheduling Order, as required by Rule 16, and this
2 request by State Fund is unopposed.

3 Modification of a scheduling order under Rule 16 should be permitted where
4 the requesting party did not “unduly delay.” *C.F. ex rel Farnan v. Capistrano*
5 *Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir. 2011). There is no such undue delay
6 in this case. The deadline for amending the pleadings in this case was set for May
7 2014, but State Fund’s current request to amend its complaint follows upon the
8 Third-Party Complaint filed by the Surgical Defendants in March 2015—nearly a
9 year after the deadline. State Fund is seeking, pursuant to Rule 14(a)(3), to assert
10 claims against parties that were first brought into this case as part of that Third-Party
11 Complaint (as well as additional, similarly-situated parties so as to avoid a
12 multiplicity of actions). The request for modification is premised, therefore, on
13 events that took place long after the relevant deadline. This is the paradigmatic
14 situation in which the deadline set in the Scheduling Order could not “reasonably be
15 met despite the diligence of the party seeking the extension.” *Johnson*, 975 F.2d at
16 609. Upon receiving the Third-Party Complaint filed by Surgical Defendants on
17 March 23, 2015, State Fund promptly undertook to review recent discovery relating
18 to the proposed new defendants (totaling 34 Third-Party Defendants and more than
19 40 additional, similarly-situated parties) and otherwise perform due diligence
20 relating to those parties, and to research, draft, and seek to file its Third Amended
21 Complaint.

22 Moreover, discovery in this litigation is ongoing and many of the documents
23 relating to the new parties have only recently been produced. Wilkerson Decl. ¶ 8;
24 *see also Benchmark Young Adult Sch., Inc. v. Launchworks Life Svcs., LLC*, 2014
25 U.S. Dist. LEXIS 91136, at *10-11 (S. D. Cal. July 3, 2014) (finding good cause to
26 amend the scheduling order where “Plaintiff was...diligent in seeking to amend the
27 Complaint shortly after it discovered the new facts as issue”); *Burns ex rel. Office of*
28 *Pub. Guardian v. Hale & Dorr, LLP*, 242 F.R.D. 170, 174 (D. Mass. 2007) (holding

1 that good cause exists when facts came to light as a result of discovery); *Cencast*
2 *Services, L.P. v. United States*, 94 Fed. Cl. 425, 452 (Fed. Cl. 2010) (same). Indeed,
3 many of the documents providing support for the allegations regarding the newly-
4 named defendants in State Fund’s Proposed Third Amended Complaint were
5 produced between January and March of 2015. *Id.* Once State Fund received such
6 information (and some is still forthcoming), it endeavored to perform due diligence
7 on each of the newly-named defendants before naming them in its amended
8 complaint.

9 Additionally, no party will be prejudiced by the request for modification of
10 the Scheduling Order. *See Johnson*, 975 F.2d at 609 (noting that “the existence or
11 degree of prejudice to the party opposing the modification might supply additional
12 reasons to deny a motion”). All parties are in agreement that the proposed
13 amendment is appropriate and the most efficient way to proceed, and that any
14 potential prejudice will be sufficiently mitigated by an extension of other applicable
15 scheduling deadlines. *See Wilkerson Decl.* ¶ 3.

16 Finally, the proposed amendments to the current discovery cut-off and trial
17 dates are also not without good cause. All present parties, as well as the newly-
18 named parties in the Proposed Third Amended Complaint, will need additional time
19 to take and receive discovery prior to trial. Indeed, many of the newly-named
20 parties may not be served until after the current discovery cut-off. Thus, for the
21 same reasons that the amendment of the complaint to add these parties is supported
22 by good cause, a modest extension to the scheduling deadlines to allow discovery to
23 and from these newly-added parties is also warranted. And, as with the amendment
24 of the complaint, this amendment to the current deadlines will not cause any party
25 prejudice. Indeed, the goal of the proposed extensions is precisely to avoid
26 prejudice to any party.

27
28

1 **5. Conclusion**

2 For the foregoing reasons, State Fund respectfully requests that the Court
3 grant this Motion in its entirety.

4
5 Dated: May 16, 2015

HUESTON HENNIGAN LLP

6

7

8

By: _____ /s/ Jeff Wilkerson

9

Jeff Wilkerson
Attorneys for Plaintiff
State Compensation Insurance Fund

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28