

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARISOL GOMEZ, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

J. JACOBO FARM LABOR
CONTRACTOR, INC. and
BEDROSIAN FARMS LLC,

Defendants.

Case No. 1:15-cv-01489-AWI-MJS

ORDER GRANTING IN PART PLAINTIFF'S
EX PARTE APPLICATION FOR ORDER
CONTINUING CLASS CERTIFICATION
SCHEDULE

(ECF No. 62)

I. Procedural Background

This is a wage-and-hour action brought by Plaintiff Marisol Gomez on behalf of herself and a proposed class of all individuals employed by Defendants J. Jacobo Farm Labor Contractor, Inc. and Bedrosian Farms LLC (hereinafter collectively "Defendants") in California at any time since September 30, 2011. Plaintiff and the class of individuals she seeks to represent under Rule 23, and those they represent through California's Private Attorneys General Act (PAGA), are current or former non-exempt agricultural and packing work employees of Defendants in California, who, Plaintiff alleges, were

1 subjected to unlawful labor and payroll policies in violation of various state and federal
2 wage and hour laws. (ECF No. 1.)

3 Defendants generally deny the substance of the allegations of the Complaint.
4 (ECF Nos. 40 & 48.)

5 This case was initiated on September 30, 2015, but the pleadings were not closed
6 until November 9, 2016. A Scheduling Order was issued January 17, 2017. It generally
7 limited initial discovery and other proceedings to class certification issues and set March
8 27, 2018 as the deadline for filing a motion for class certification. (ECF No. 52.)

9 Now before the Court is the February 20, 2018, "Notice of Ex Parte Application for
10 an Order Continuing the Existing Class Certification Schedule and Awarding Costs and
11 Fees to Plaintiff," filed by Plaintiff Marisol Gomez.¹ (ECF No. 62.) She seeks to extend
12 the deadline for moving for class certification to July 31, 2018, and to adjust opposition,
13 reply, and hearing dates accordingly.

14 The ex parte Application was discussed along with other topics during a February
15 23, 2018, informal Telephonic Discovery Dispute Conference and, opposition to the
16 Application being expressed, it was agreed the Defendants would have until February
17 28, 2018 (a few days longer than initially requested) to file written opposition and the
18 Plaintiff until March 2, 2018, to file a reply. (ECF No. 64.) The opposition and reply were
19 filed by the agreed deadlines. (ECF No. 65 & 66.)

20 The court now deems the matter submitted on the record and briefs and without
21 the need for oral argument. Local Rule 230(g).

22 **II. Applicable Law**

23 **A. Scheduling Order Modification**

24 Districts courts must enter scheduling orders that "limit the time to join other
25 parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P.

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27 ¹ Plaintiff refers to an award of fees and costs in the caption of her motion but does not otherwise refer to
28 or support such a request. Accordingly, the Court will not grant Plaintiff fees and costs in relation to this ex parte motion.

1 16(b)(3)(A). Once entered by the court, a scheduling order “controls the course of the
 2 action unless the court modifies it.” Fed. R. Civ. P. 16(d). Scheduling orders are intended
 3 to alleviate case management problems. Johnson v. Mammoth Recreations, Inc., 975
 4 F.2d 604, 610 (9th Cir. 1992). As such, a scheduling order is “not a frivolous piece of
 5 paper, idly entered, which can be cavalierly disregarded by counsel without peril.” Id.
 6 (quoting Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Maine 1985)).

7 The district court may modify the pretrial schedule “if it cannot reasonably be met
 8 despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 advisory
 9 committee's notes (1983 amendment). Good cause must be shown for modification of
 10 the scheduling order. Fed. R. Civ. P. 16(b)(4). The “good cause” standard focuses
 11 primarily on the diligence of the party seeking the amendment. Johnson, 975 F.2d at
 12 609. “[C]arelessness is not compatible with a finding of diligence and offers no reason for
 13 a grant of relief.” Id. “Although the existence or degree of prejudice to the party opposing
 14 the modification might supply additional reasons to deny a motion, the focus of the
 15 inquiry is upon the moving party's reasons for seeking modification.” Id. If the party was
 16 not diligent, the inquiry should end.

17 **B. Ex Parte Relief**

18 “Ex parte applications are a form of emergency relief that will only be granted
 19 upon an adequate showing of good cause or irreparable injury to the party seeking
 20 relief.” Moore v. Chase, Inc., No. 1:14-CV-01178-SKO, 2015 WL 4393031, at *4 (E.D.
 21 Cal. July 17, 2015) (quoting Clark v. Time Warner Cable, No. CV-07-1797-VBF (RCx),
 22 2007 WL 1334965, at *1 (C.D. Cal. May 3, 2007)). See also Mission Power Eng'g Co. v.
 23 Cont'l Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995)). The moving party must be
 24 “without fault” in creating the need for ex parte relief or establish that the “crisis
 25 [necessitating the ex parte application] occurred as a result of excusable neglect.”
 26 Moore, 2015 WL 4393031, at *4 (quoting Clark, 2007 WL 1334965, at *1). An ex parte
 27 application seeks to bypass the regular noticed motion procedure; consequently, the
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1 party requesting ex parte relief must establish a basis for giving the application
2 preference. See id.

3 **III. Arguments of the Parties**

4 **A. Plaintiff**

5 Plaintiff claims that the request to delay the certification motion deadline is
6 attributable to the asserted failure of Defendant J. Jacobo Farm Labor Contractor, Inc.
7 (“Jacobo”) to respond to discovery. More specifically, Plaintiff asserts: Plaintiff served
8 interrogatories, document production demands, and requests for admission on both
9 Defendants in June 2016, even before the pleadings were settled and the Scheduling
10 Order issued. Plaintiff’s written discovery sought time and payroll records and identity
11 and contact information for putative class members and documents reflecting
12 Defendants’ policies and procedures for compensation, rest and meal breaks, record
13 keeping, etc. Jacobo conditioned its responses to this discovery upon first entering into a
14 court-approved stipulated protective order. That was secured on July 27, 2016.
15 According, to Plaintiff’s counsel, he followed up with Jacobo’s counsel on August 31,
16 2016, to secure the production promised once the protective order was obtained. Jacobo
17 requested more time due to “solvency issues.” Plaintiff followed up again on September
18 19, 2016. Counsel received no response.

19 On January 17, 2017, the date the Scheduling Order was entered, Plaintiff served
20 additional discovery on the Jacobo. Jacobo requested, and Plaintiff granted, an
21 extension of time to March 24, 2017 to respond to the new discovery. Eventually, on
22 April 21, 2017, Jacobo responded to the second set of discovery requests. However, on
23 the same date, Jacobo’s counsel advised that it would be withdrawing its representation
24 and asked “that all pending discovery be stayed to allow the parties to obtain new
25 counsel.” No formal motion to withdraw was filed until November 29, 2017. It was not
26 granted until January 5, 2018. Plaintiff’s counsel promptly, on January 10, 2018,
27 conferred with Jacobo’s new attorney who asked for a couple of weeks to review the file
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1 and get up to speed before discussing outstanding discovery matters. Plaintiff's counsel
2 then followed up on February 6, 2018, and on three subsequent occasions to secure a
3 date on which the requested documents would be produced. It was not until the
4 February 23, 2018, Telephonic Discovery Dispute Conference that Plaintiff was able to
5 secure a commitment from Jacobo to produce the requested documents by March 9,
6 2018.

7 Plaintiff asserts that it needs these responses in order to establish the elements of
8 numerosity and commonality necessary to class certification. If responses are produced
9 on March 9, 2018, Plaintiff would have marginal time to analyze, compile and incorporate
10 same into a class certification motion. If documents are not produced and a discovery
11 motion must to be filed, the class certification deadline would most assuredly pass
12 before a discovery motion could be resolved. Hence, the instant motion to continue the
13 class certification schedule was filed ex parte.

14 **B. Defendant Bedrosian**

15 The essence of the opposition filed by Bedrosian Farms LLC ("Bedrosian") is its
16 assertion that Plaintiff was far from diligent in delaying for 20 months the challenge to the
17 sufficiency of Jacobo's responses. Bedrosian also argues that Plaintiff herself brought
18 about the circumstances that caused her to seek this relief, and she has failed to
19 demonstrate irreparable harm if the relief is denied.

20 More specifically, Bedrosian insists that Plaintiff "**has done nothing**" with regard
21 to this issue. (Emphasis in original.) Bedrosian faults Plaintiff for not earlier pursuing the
22 discovery via an informal Telephonic Discovery Dispute Conference or by filing a formal
23 motion to compel supplements to Jacobo's July 2016 and April 2017 discovery
24 responses. Bedrosian claims the delay is prejudicial to it because it was done "simply to
25 enlarge the relevant time period and accrued interest for Plaintiff's class claims" and
26 because delay makes it difficult for Bedrosian to secure favorable witnesses at trial.

1 Bedrosian further argues Plaintiff should be denied relief because she has acted
2 in bad faith by frustrating the taking of her own deposition.

3 Finally, Bedrosian argues that the ex parte nature of Plaintiff's request for relief
4 deprived Defendant of a fair opportunity to oppose Plaintiff's requests.

5 **IV. Analysis**

6 **A. Diligence**

7 Certainly, Plaintiff could have attempted to bring these discovery issues to a head
8 earlier than she did. However, the failure to do so, the failure to be as diligent as
9 humanly possible, is not the same as a failure of diligence sufficient to justify denial of
10 this motion. The Court is satisfied that Plaintiff acted with sufficient diligence under all
11 the circumstances presented in the history of this case.

12 The responses which appear to have been and remain challenged are those
13 provided by Jacobo in June 2016. Once received, Plaintiff apparently objected and, in
14 response, was led to believe further full responses would be provided once a protective
15 order was entered. The protective order was entered on July 27, 2016. The delay
16 between June 2016 and July 27, 2016, is reasonable, appropriate, and does not reflect
17 lack of diligence.

18 Plaintiff engaged in further efforts to secure Jacobo's responses in August, 2016,
19 but was asked to be patient because Jacobo had "solvency issues." Professional
20 courtesy alone might have justified delay in pushing the issue; common sense and self-
21 interest dictated Plaintiff not hasten a possible insolvency. She did follow up in
22 September. The Court finds no lack of diligence there.

23 On January 17, 2017, Plaintiff served additional discovery. Its topics and how it
24 differed from or supplemented the earlier discovery is far from clear. Bedrosian
25 suggests, without refutation, that this new discovery dealt only with Defendants'
26 affirmative defenses, not issues relevant to numerosity and commonality necessary to a
27 class certification motion. Plaintiff does not dispute this. Thus, it may be that subsequent
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1 discussions between Plaintiff and Jacobo about supplemental answers related to the
2 more recent discovery. The conflation of issues relating to the two sets of discovery is
3 not helpful.

4 However, it is clear that the responses Jacobo had promised back in 2016 were
5 still outstanding – they remain outstanding even now. Plaintiff continued to follow up and
6 seek additional discovery responses and, at Jacobo's request, Plaintiff granted an
7 extension of time to March 24, 2017, for Jacobo to provide further responses. While it is
8 somewhat unclear whether this extension pertained to the first or second set of
9 discovery requests, or both, this again suggests to the Court that Plaintiff's counsel was
10 affording Jacobo a common professional courtesy; it does not suggest a lack of
11 diligence.

12 Then, though the second round of discovery finally was responded to on April 21,
13 2017, Jacobo's attorney advised that he would soon be withdrawing as counsel and he
14 requested that "all pending discovery be stayed" while Jacobo obtained new counsel.
15 Again, it is unclear whether the reference to pending discovery was to the first or second
16 round initiated by Plaintiff, to both, or to new discovery. However, as noted, issues
17 remained regarding responses to the initial set of discovery, and it must be assumed that
18 Jacobo's counsel's request for a "stay" applied to all outstanding discovery issues. Once
19 again, common courtesy and professionalism favor granting Jacobo's request,
20 particularly given that Jacobo's attorney offered to stipulate to or join in any requests for
21 continuances of deadlines or hearings to avoid prejudice to Plaintiff. Good judgment
22 would inform experienced counsel that a Court would frown on an aggressive disregard
23 of this request absent some impending deadline. No lack of diligence yet.

24 Regrettably, it was some months before a motion to withdraw was filed, and then
25 finally granted on January 5, 2018. While Plaintiff would not likely have been faulted for
26 revisiting the issue sooner, the above-noted justifications for not acting remained. Once
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1 new counsel was secured by Jacobo, the record reflects Plaintiff pursued the matter
2 diligently with him and then brought things to a head with the instant ex parte application.

3 Under all these circumstances, the Court cannot find Plaintiff lacked reasonable
4 diligence.

5 **B. Prejudice.**

6 As the Court mentioned during the informal discussion of this matter on February
7 23, 2018, it would nevertheless have considerable concern about Plaintiff's request if a
8 party demonstrated that genuine prejudice might result from the delay requested.
9 Despite the invitation, Bedrosian has presented nothing to suggest any real prejudice. It
10 simply suggests Plaintiff had an improper motive for seeking delay and that delay will
11 make it more difficult to secure favorable witnesses.

12 The Court has absolutely no interest in, and firmly disapproves of, Bedrosian's
13 speculation as to Plaintiff's motivation. Both parties need to stick to citing and arguing
14 facts and law in support of their position, not surmising about improper motives.

15 Further, Bedrosian does not explain, and the Court does not envision, how
16 anything Plaintiff has done or not done to date would have prevented Bedrosian from
17 identifying, interviewing and lining up favorable witnesses.

18 There is no prejudice to Bedrosian.

19 **C. Bad Faith**

20 The issues raised by Plaintiff's failure to make herself available for a deposition
21 have been addressed (see ECF No. 64) and, if they continue, likely will be addressed
22 further and with potentially quite adverse consequences for Plaintiff. In the Court's view,
23 those issues exist independently of the issues presented here. They do not provide a
24 basis for denying the instant request.

25 **D. Opportunity to Oppose**

26 Bedrosian's counsel was asked during the February 23, 2018 telephone
27 conference how long he would like to have to respond in writing to Plaintiff's ex parte
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1 application. He was granted more time than he requested. He may not now be heard to
2 complain he had insufficient time to respond. More importantly, he had adequate time to
3 properly and fully setting out the history of the case and alerting the Court to delays to
4 date. That history is neither extensive nor contested. It is unlikely more time would have
5 provided more enlightenment.

6 **E. Justification for Request**

7 The discovery Plaintiff seeks logically relates to issues of numerosity and
8 commonality, proper subjects for discovery relevant – if not prerequisite – to a motion for
9 class certification. See Chavez v. Petrissans, No. 08 cv 00122 LJO GSA, 2008 WL
10 4177797, at *4 (E.D. Cal. 2008) (“The requested information is relevant and discoverable
11 for purposes of class certification since the documents provide information regarding the
12 numbers of hours worked and the amount employees were paid.”); Hill v. Eddie Bauer,
13 242 F.R.D. 556, 562-63 (C.D. Cal. 2007) (holding that time and wage records are
14 discoverable prior to class certification because they assist the plaintiff in showing
15 numerosity and commonality); Valenzuela v. MC2 Pool & Spa, No. C09–01698 RS
16 (HRL), 2010 WL 3489596, at **1-2 (N.D. Cal. 2010) (ordering defendant to produce all
17 putative class member timecard and payroll records prior to class certification).

18 Absent compelling circumstances, the Court would not put Plaintiff or the putative
19 class in the position of having to seek class certification without such information. The
20 Court finds no compelling reasons to do so here.

21 **F. Propriety of Ex Parte Relief**

22 Plaintiff’s request to proceed ex parte in her effort to modify the schedule is not
23 ideal. Such motions allow litigants to bypass normal procedures to “go to the head of the
24 line in front of all other litigants and receive special treatment.” Mission Power Eng'g Co.
25 v. Cont'l Cas. Co., 883 F.Supp. 488, 489 (C.D. Cal. 1995).

26 Nonetheless, as stated above, the Court is unwilling to fault Plaintiff for affording
27 Jacobo’s attorneys the professional courtesy of additional time to respond to the
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1 discovery requests, particularly in light of Jacobo's potential insolvency and its prolonged
2 efforts to obtain new counsel. By the time it became apparent that Jacobo's new
3 attorney was unable promptly to produce the requested discovery, Plaintiff was left with
4 insufficient time to file a properly noticed motion, obtain relief, and review the discovery
5 before the deadline for filing her class certification motion.

6 One could question whether these facts are sufficient to show the type of
7 necessity and lack of fault required to support proceeding ex parte with such a request.
8 At the same time, as stated above, Defendant has not shown it is prejudiced by the ex
9 parte request. The motion itself is relatively straightforward, and Bedrosian had ample
10 time to file a comprehensive opposition.

11 Thus, even if Plaintiff has offered only borderline support for her request to
12 proceed ex parte, the Court is unwilling to deny a continuance on this ground.

13 **G. Relief Requested**

14 Plaintiff requested until July 31, 2018 to file her motion for class certification.
15 However, the Court believes a three month extension will be sufficient to enable Plaintiff
16 to secure, analyze and incorporate into a class certification motion the information it
17 seeks through the contested discovery. Accordingly, the Court's Scheduling Order will be
18 modified to give Plaintiff until June 29, 2018, to file her motion for class certification. The
19 defense shall have until July 30, 2018 to file opposition, and Plaintiff will have until
20 August 14, 2018 to file a reply. The hearing on the motion shall be held before the
21 Honorable Anthony W. Ishii, in Courtroom 2 of this Court, Fresno, at 1:30 p.m. on
22 October 1, 2018.

23 **IV. Conclusion and Order**

24 Based on the foregoing, it is HEREBY ORDERED that:

- 25 1. Plaintiff's ex parte request to continue the class certification schedule is
26 GRANTED IN PART as stated herein;

2. Any motion for certification of a class must be filed not later than June 29, 2018;
3. Opposition to such a class certification shall be filed on or before July 30, 2018;
4. A reply to the opposition may be filed at any time before August 14, 2018; and
5. Hearing on the motion shall be before the Honorable Anthony W. Ishii on October 1, 2018 at 1:30 p.m. in Courtroom 2.

IT IS SO ORDERED.

Dated: March 9, 2018

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE