

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GRISEL ALONSO, as Receiver for
Elm Tree Investment Advisors, LLC,
Elm Tree Investment Fund, LP,
Elm Tree 'e'conomy Fund, LP,
Elm Tree Motion Opportunity, LP, and
Etopia, LP

Case No. 17-cv-61390-
Altonaga/Goodman

Proceeding Ancillary to
No. 15-CV-60082-Dimitrouleas/Snow

Plaintiff,

v.

VICTOR ELMALEH, an individual,
MERCEDES ELMALEH, an individual,
1925333 ONTARIO INC. d/b/a CLEARTECH
COMPUTING SYSTEM, a Canadian corporation,
ENGAGE MARKETING GROUP, INC., a
Canadian corporation, and M3 DESIGNS, LP a
Delaware partnership,

Defendants.

PLAINTIFF'S MOTION TO EXTEND DEADLINES IN SCHEDULING ORDER

Plaintiff, Grisel Alonso ("Alonso" or "Plaintiff"), not individually but solely in her capacity as the Receiver appointed over Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree 'e'conomy Fund, LP, Elm Tree Motion Opportunity, LP, and Etopia, LP (the "Receivership Entities"), by and through undersigned counsel, respectfully submits this Motion to Extend Deadlines in the Scheduling Order [D.E. 42] by ninety (90) days, and in support states:

1. On November 2, 2017, the Court entered its scheduling order in this action (the "Scheduling Order"), setting deadlines applicable to all parties through the anticipated trial date. [D.E. 42].
2. As of the date of this Motion, the deadline to complete all discovery, including expert discovery, is April 23, 2018.

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3. The deadline for the parties to conduct mediation is April 30, 2018.
4. The deadline for pre-trial motions is May 8, 2018.
5. The deadline for submission of pre-trial materials, including witness lists, jury instructions, and more, is June 5, 2018.
6. Despite Plaintiff's diligence in conducting discovery and moving this litigation, the Receiver requires an extension of time to meet the deadlines set forth in the Scheduling Order.
7. Among other things, the following events, issues, and circumstances require an extension of the deadlines in the Scheduling Order:
 - a. In order to obtain necessary discovery in this action related to the fraudulent transfers, on November 29, 2017, Plaintiff moved the Court to issue a Request for Judicial Assistance to the Ontario Superior Court of Justice requesting assistance of the Court to order the production of documents and testimony from TD Canada Trust Bank and Toronto Dominion Bank (collectively, "TD"), and Scotiabank, all of which are Canadian financial institutions [D.E. 54].
 - b. That same day, Plaintiff also moved the Court to issue a Request for Judicial Assistance to the Superior Court of Quebec requesting assistance of the Court to order the production of documents and testimony from BMO Bank of Montreal ("BMO"), which is a Canadian financial institution [D.E. 55].
 - c. On November 30, 2017, the Court granted and issued Plaintiff's two Requests for Judicial Assistance [D.E. 56-59].
 - d. Plaintiff immediately began working with her Canadian counsel to have the Requests for Judicial Assistance filed and served upon the necessary financial

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institutions in Canada.

- e. Plaintiff's Canadian counsel filed application materials in the Superior Court of Quebec on January 16, 2018, seeking an Order enforcing the Request for Judicial Assistance.
- f. On January 26, 2018, the Superior Court of Quebec granted the Plaintiff's application to enforce the Request for Judicial Assistance in respect of the documents and testimony from BMO ("Quebec Order"). Plaintiff's Canadian counsel contacted BMO on that same day to notify it of the Quebec Order.
- g. Plaintiff's Canadian counsel filed application materials in the Ontario Superior Court of Justice on February 7, 2018, seeking an Order enforcing the Request for Judicial Assistance.
- h. On February 14, 2018, Plaintiff's Canadian counsel received a first tranche of documents from BMO pursuant to the Quebec Order.
- i. On February 15, 2018, the Ontario Superior Court of Justice granted the Plaintiff's application to enforce the Request for Judicial Assistance in respect of the documents and testimony from TD and Scotiabank ("Ontario Order"). Plaintiff's Canadian counsel contacted TD and Scotiabank on that same day to notify those banks of the Ontario Order.
- j. On February 16, 2018, Plaintiff's Canadian counsel received a second tranche of documents from BMO pursuant to the Quebec Order.

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- k. TD produced a first tranche of documents on March 2, 2018 pursuant to the Ontario Order. The Plaintiff is still waiting to receive a second tranche of additional supporting documentation from TD.
- l. On March 5, 2018, BMO contacted Plaintiff's Canadian counsel to inform them of the cost of retrieving additional archived supporting documentation. Plaintiff's Canadian counsel informed BMO that it agreed to the cost of retrieving the archived documents on March 7, 2018.
- m. On March 9, 2018, Scotiabank informed Plaintiff's Canadian counsel that it had no documentation that was responsive to the Ontario Order.
- n. On March 21, 2018, BMO informed Plaintiff's Canadian counsel that it expected to produce additional responsive documents by April 6, 2018. BMO electronically sent Plaintiff's Canadian counsel additional documents on April 10, 2018. Further responsive documentation has been delivered by BMO to Plaintiff's Canadian counsel, but has not yet been received.
- o. Despite Plaintiff's timeliness and diligence in propounding discovery, she was forced to wait several months to obtain significant discovery. In fact, through no fault of her own, Plaintiff still has not received all of the discovery due pursuant to the Requests for Judicial Assistance.
- p. It is very likely that the documents Plaintiff receives in response to the Requests for Judicial Assistance will prompt additional discovery requests to the parties and/or other subpoenas to third parties.

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q. Additionally, the Receiver set the deposition of a material witness in this action for April 17, 2018, in advance of the discovery deadline. That witness has indicated to the Receiver that he cannot appear on that date, and further claims that he will not be available for several weeks.

8. Based on the foregoing, Plaintiff is not in a position to conclude discovery by April 23, 2018. Plaintiff is still waiting to receive outstanding discovery and cannot determine with any certainty whether she needs to conduct any follow-up discovery.

9. Plaintiff has not been dilatory in conducting discovery. Plaintiff has issued discovery to the parties, sought non-party discovery as far back as November 2017, and was scheduled to conduct at least three depositions this month.

10. Despite Plaintiff's diligence in issuing discovery, Plaintiff is unable to meet the deadlines set forth in the Scheduling Order. Plaintiff is still waiting to obtain discovery in response to her Requests for Judicial Assistance to Canadian financial institutions and, in all likelihood, follow-up discovery will be necessary. Plaintiff's failure to obtain discovery, despite her diligence in seeking same, is sufficient good cause to grant a modification of the Scheduling Order.

11. A scheduling order may be modified only with the Court's consent and "upon a showing of good cause." Fed. R. Civ. P. 16(b)(4); *see also Sosa v. Airprint Sys., Inc.*, 133 F. 3d 1417, 1418 (11th Cir. 1998).

12. The "good cause" standard requires less than the "manifest injustice" test used to modify a final pretrial order. Fed. R. Civ. P. 16(e); *see also* Fed. R. Civ. P. 16, 1983 Advisory Committee Notes ("Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a 'manifest injustice' or 'substantial hardship' test.").

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13. When a party moves to modify a scheduling order, the Court's inquiry focuses primarily on the diligence of the moving party and that party's reasons for seeking modification. *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F. 3d 1218, 1232 (11th Cir. 2008). Essentially, the "good cause" standard precludes modification unless the schedule cannot "be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16, 1983 Advisory Committee Notes; *see also Johnson v. Mammoth Recreations, Inc.*, 975 F. 2d 604, 609 (9th Cir. 1992) ("if [a] party was not diligent, the [good cause] inquiry should end."); *Auto-Owners Ins. Co. v. ace Elec. Serv., Inc.*, 648 F. Supp. 2d 1371, 1375 (M.D. Fla. 2009) (the key to establishing good cause is to demonstrate diligence).

14. Under similar circumstances, district courts have extended deadlines in scheduling orders. *See Al-Misehal Com. Group Ltd. v. Armored Group LLC*, 2011 WL 2147599, *1-2 (D. AZ. 2011) (granting, over opposition, a motion to extend deadlines in scheduling order by 6 months, where movant, despite diligent efforts, was awaiting response to letter rogatory for discovery from foreign country).

15. For reasons described above, Plaintiff has not been dilatory in conducting discovery.

16. Plaintiff respectfully submits that an extension of all deadlines in the Scheduling Order by an additional ninety-days (90) days should be sufficient for her to receive outstanding discovery from Canada and issue any necessary follow-up discovery.

17. The relief requested herein will not prejudice the Defendants. In fact, Defendants have not propounded any discovery in this matter to date.

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18. On the other hand, denial of this Motion would prejudice Plaintiff, who will not be able to complete critical discovery in this matter by the current deadline.

19. Moreover, denial of this Motion would prejudice innocent investors in the Receivership Entities, all of whom are dependent upon recoveries in this and other actions to be made whole for their losses. The Receiver's discovery is aimed, in good faith, at recovering assets for distribution to investors.

20. This Motion is made in good faith and is not brought for purposes of delay.

WHEREFORE, Plaintiff respectfully requests entry of an order extending all deadlines in the Scheduling Order by ninety (90) days, including the anticipated trial date, as well as any other further relief the Court deems just and proper.

CERTIFICATE OF GOOD FAITH

I hereby certify that, pursuant to Local Rule 7.1, Plaintiff's counsel attempted to confer with Defendants on the relief sought. Defendants did not respond to Plaintiff to indicate whether they objected to the relief sought.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically served the foregoing document on all parties of record on the service list below.

Respectfully submitted,

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**ORDER GRANTING
PLAINTIFF'S MOTION TO EXTEND DEADLINES IN SCHEDULING ORDER**

The Court, having reviewed Plaintiff's Motion to Extend Deadlines in Scheduling Order (the "Motion") [D.E. 64], having reviewed the docket, and for good cause shown, hereby

ORDERS and ADJUDGES that

1. The Motion is **GRANTED**; and
2. The deadlines in the Court's November 2, 2017 scheduling order (the "Scheduling Order") [D.E. 42] are hereby extended by ninety (90) days.

DONE AND ORDERED in chambers in Miami, Florida this _____ day of _____, 2018.

HONORABLE CECILIA ALTONAGA
UNITED STATES DISTRICT COURT JUDGE

Copies furnished to:

All Counsel of Record/Pro Se Parties