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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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AREZOU MANSOURIAN; LAUREN  
MANCUSO; NANCY NIEN-LI  
CHIANG; CHRISTINE WING-SI NG;  
and all those similarly  
situated,

NO. CIV. S-03-2591 FCD EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

BOARD OF REGENTS OF THE  
UNIVERSITY OF CALIFORNIA  
at DAVIS; LAWRENCE "LARRY"  
VANDERHOEF; GREG WARZECKA;  
PAM GILL-FISHER; ROBERT  
FRANKS; and LAWRENCE SWANSON,

Defendants.

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This matter is before the court on plaintiffs' motions to  
modify the pretrial scheduling order, pursuant to Federal Rule of  
Civil Procedure 16(b),<sup>1</sup> and to amend their complaint pursuant to

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<sup>1</sup> Plaintiffs failed to address Rule 16's good cause  
requirement in their moving papers. Although they addressed this  
standard in their reply, plaintiffs assert that the 2nd Amended  
Pretrial Scheduling Order ("PSO") does not require compliance  
with Rule 16. Plaintiffs are mistaken. The prior Pretrial  
Scheduling Order in this case provided that "[N]o further joinder  
of parties or amendments to pleadings is permitted without leave

1 Rule 15 to add new plaintiffs and allegations. Defendants oppose  
2 the motion. For the reasons set forth below,<sup>2</sup> plaintiffs' motion  
3 is DENIED.

4 **BACKGROUND**

5 This action was filed on December 18, 2003, alleging that  
6 defendants violated Title IX of the Education Amendment of 1972,  
7 20 U.S.C. 1681 et seq., the Equal Protection Clause of the  
8 Fourteenth Amendment, and various state statutes "by eliminating  
9 female athletic participation and scholarship opportunities in  
10 wrestling" and that "[d]efendants continue to violate these civil  
11 rights by refusing to reinstate the women's wrestling program and  
12 by failing to provide equitable athletic participation and  
13 scholarship opportunities for women." (Pls.' Compl., filed Dec.  
14 18, 2003, at 2). Two of the plaintiffs, Arezou Mansourian and  
15 Lauren Mancuso, brought the action on behalf of themselves and  
16 "as class representatives on behalf of all those similarly  
17 situated, including all present and future female students at UC-  
18 Davis who are denied equal athletic participation opportunities

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21 of court, good cause having been shown." (Docket #28 (citing  
22 Fed. R. Civ. P. 16 (b); Johnson v. Mammoth Recreations, Inc., 975  
23 F.2d 604 (9th Cir. 1992)). The 2nd Amended PSO notes plaintiff's  
24 request for leave to amend and defendant's objection to that  
25 request. The court set out a briefing schedule for plaintiffs  
26 "to bring the appropriate motions," noting explicitly that  
27 "Plaintiffs' Motion to Amend the Complaint and/or *Motion to Amend*  
28 *the Pretrial Scheduling Order*" was to be submitted on or before  
February 2, 2007. (Docket #156) (emphasis added). However, the  
court will consider the arguments relating to Rule 16 set forth  
in plaintiffs' reply.

<sup>2</sup> Because oral argument will not be of material  
assistance, the court orders this matter submitted on the briefs.  
E.D. Cal. L.R. 78-230(h).

1 and scholarships, especially in wrestling, by Defendants'  
2 discriminatory actions." (Id. at 3).

3 The litigation in this case, albeit extended, has been  
4 thorough. In March 2004, defendants filed a motion to dismiss,  
5 which was denied. (See Mem. & Order, Docket #25, filed May 6,  
6 2004). In December 2005, plaintiffs filed a motion to certify  
7 the class and noticed the matter for hearing in February 2006.  
8 (See Docket #62-70). Between December 2005 and April 2006, the  
9 docket reflects that the parties engaged in discovery, and  
10 various discovery disputes were filed before the magistrate  
11 judge. Subsequently, plaintiffs amended their notice of hearing  
12 for the class certification motion to change the hearing date to  
13 April 21, 2006. (2d Amended Notice of Hearing, Docket #93, filed  
14 Feb. 21, 2006). On April 4, 2004, defendants filed a lengthy  
15 opposition to plaintiffs' motion for class certification,  
16 accompanied by voluminous attachments, exhibits, and objections.  
17 (See Docket # 103-07, 121). Further, the docket reflects that  
18 defendants were preparing to file a motion for summary judgment.<sup>3</sup>  
19 (See Docket # 97-102; 108-110 (relating to defendants' ex parte  
20 motion to extend page limits for motions for summary judgment)).

21 Unfortunately, throughout the course of this litigation,  
22 both defendants' and plaintiffs' counsel have suffered illnesses.  
23 In October 2005, both parties stipulated to an extension of  
24 deadlines due to defendants' lead counsel's diagnosis with breast  
25 cancer, which would make her unavailable to travel to depositions  
26 over the following two months. (Stipulation, Docket #57, filed

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28 <sup>3</sup> At this stage in the litigation, the dispositive motion  
deadline was August 4, 2006.

1 Oct. 28, 2005). On April 14, 2006, one week before plaintiffs'  
2 motion for class certification was to be heard by the court,  
3 plaintiffs' counsel filed an ex parte motion to stay and extend  
4 scheduling based upon plaintiffs' counsel's serious health  
5 issues. (Ex Parte Mot. to Stay, Docket #117, filed Apr. 14,  
6 2006). Defendants opposed the motion. The court granted  
7 plaintiffs' motion and set a status conference for June 16, 2006.  
8 (Order, Docket #125, filed Apr. 18, 2006). On June 6, 2006, the  
9 parties stipulated to extend the stay and related scheduling  
10 matters. (Stipulation to Extend Stay and Related Scheduling  
11 Matters, Docket #130, filed June 6, 2006). On July 21, 2006,  
12 plaintiffs moved to extend the stay in order to find new counsel  
13 because of plaintiffs' counsel's serious medical condition.  
14 (Motion to Extend, Docket #134, filed July 21, 2006). The court  
15 granted the extension, directed plaintiffs' counsel to file  
16 either a motion to withdraw or substitution of counsel by August  
17 18, 2006, and set a status conference for September 8, 2006.  
18 (Order, Docket # 137, filed July 24, 2006). On August 18, 2006,  
19 Monique Oliver filed a notice of appearance on behalf of  
20 plaintiffs. (Docket # 140, filed Aug. 18, 2006). On August 23,  
21 2006, and October 19, 2006, the parties stipulated to extend the  
22 stay, based upon the appearance of new counsel in this matter.  
23 (Docket #141, 147).

24 Finally, on January 19, 2007, the parties submitted a joint  
25 status report. (Docket # 154). The parties raised issues  
26 relating to plaintiffs' desire to amend the complaint, further  
27 discovery, and scheduling. On January 24, 2006, the court issued  
28 a 2nd Amended Pretrial Scheduling Order, setting forth the

1 schedule by which the parties were to file the current motions.  
2 (2d Am. Pretrial Scheduling Order, Docket # 156, filed Jan. 24,  
3 2006).

4 **STANDARD**

5 Once the court has entered a pretrial scheduling order  
6 pursuant to Rule 16, the standards of Rule 16 rather than Rule 15  
7 govern amendment of the pleadings. See Johnson v. Mammoth  
8 Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992); Eckert  
9 Cold Storage, Inc. v. Behl, 943 F. Supp. 1230, 1232-33 (E.D. Cal.  
10 1996).<sup>4</sup> Orders entered before the final pretrial conference may  
11 be modified only "upon a showing of good cause." Fed. R. Civ. P.  
12 16(b).

13 The good cause requirement of Rule 16 primarily considers  
14 the diligence of the party seeking the amendment. The pretrial  
15 scheduling order can only be modified "if it cannot reasonably be  
16 met despite the diligence of the party seeking the extension."  
17 Mammoth Recreations, 975 F.2d at 609. When evaluating whether a  
18 party was diligent, the Ninth Circuit has determined that "the  
19 focus of the inquiry is upon the moving party's reasons for  
20 modification. If that party was not diligent, the inquiry should  
21 end." Id. at 610; see also Gestetner, 108 F.R.D. at 141.

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23 <sup>4</sup> To rely solely on Rule 15 after a pretrial scheduling  
24 order has been entered would "render scheduling orders  
25 meaningless and effectively would read Rule 16(b) and its good  
26 cause requirement out of the Federal Rules of Civil Procedure."  
27 Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1419 (11th Cir.  
28 1998); see also Mammoth Recreations, 975 F.2d at 610 (adopting  
Rule 15's standards for amending the complaint would "undermine  
the court's ability to control its docket, disrupt the agreed-  
upon course of the litigation, and reward the indolent and the  
cavalier"); Eckert Cold Storage, 943 F. Supp. at 1232 n.3.



1 athletes at UC Davis" and will "clarify certain allegations in  
2 light of the scope of the relief sought, and the continuing  
3 nature of the alleged violations." (Pls.' Mot. to Amend, filed  
4 Feb. 2, 2007, at 1 ("Mot. to Amend")). The proposed plaintiffs  
5 are current UC Davis students, who are interested in varsity  
6 opportunities in wrestling, rugby, and field hockey. (Pl.'s  
7 Proposed 1st. Am. Complaint, filed Feb. 2, 2007, ¶¶ 13-15; 62-  
8 69). Defendants oppose the motion on the grounds that plaintiffs  
9 have failed to meet their burden of demonstrating good cause  
10 under Rule 16 and that leave to amend should not be granted under  
11 Rule 15. (Defs.' Opp'n to Pls.' Mot., filed Feb. 23, 2007  
12 ("Opp'n")).

13 Defendants argue that plaintiffs fail to demonstrate the  
14 requisite diligence under Rule 16 to add new plaintiffs who are  
15 current UC Davis students because plaintiffs and their counsel  
16 were on notice of facts giving rise to their current motion for  
17 leave to amend long before their motion was filed. Plaintiffs  
18 contend that the last remaining active student at UC Davis,  
19 Lauren Mancuso, graduated in June 2006, during the ten-month stay  
20 of this action, and therefore, "it is now proper to add  
21 additional plaintiffs." (Pls.' Reply, filed Mar. 2, 2007, at 6).  
22 As an initial matter, plaintiffs and their counsel were on notice  
23 since 2004 that Arezou Mansourian, one of the two proposed class  
24 representatives, graduated from UC Davis in June 2004 and that  
25 Lauren Mancuso was the only proposed class representative that  
26 currently attended UC Davis. Mancuso testified in her deposition  
27 on January 30, 2006, that she filed to graduate from UC Davis in  
28 late September or early October 2005. (Dep. of Lauren Mancuso,

1 Ex. 10 to Decl. of Nancy Sheehan in Supp. of Opp'n to Pls.' Mot.  
2 to Amend ("Sheehan Decl."), filed Feb. 23, 2007, at 48:15-21).  
3 Plaintiffs filed their original motion for class certification in  
4 December 2005, after Mancuso had filed to graduate. Soon after  
5 her deposition was taken, however, Mancuso was informed that she  
6 needed another two classes in order to graduate, which she  
7 enrolled in and successfully completed in order to graduate in  
8 June 2006. (Decl. of Lauren Mancuso in Supp. of Pls.' Mot. to  
9 Amend, filed March 2, 2007, ¶ 2). As such, plaintiffs were on  
10 notice (1) that Mancuso had filed to graduate in 2005; and (2)  
11 that in early 2006, she had to take two more classes, which she  
12 enrolled in Spring 2006. Therefore, months prior to the issuance  
13 of the stay in April 2006, plaintiffs knew that Mancuso either  
14 had graduated or would shortly be graduating from UC Davis, and  
15 that none of the class representatives would be current UC Davis  
16 students.

17 Plaintiffs' prior counsel could have brought a motion to  
18 amend the complaint to add new plaintiffs who were current UC  
19 David students. However, she did not do so. Rather, plaintiffs  
20 filed a motion to certify the class in December 2005 and noticed  
21 a hearing date in April 2006. Defendants filed a lengthy  
22 opposition to plaintiffs' motion, arguing in part that Mansourian  
23 and Mancuso do not have standing to be class representatives  
24 because they had both graduated and exhausted their eligibility  
25 to participate in varsity sports at UC Davis under N.C.A.A.  
26 rules. Now, plaintiffs' new counsel seeks a "second bite at the  
27 apple," by proposing new class plaintiffs who are current  
28 students at UC Davis. However, the retention of new counsel does



1 not constitute good cause to amend the pretrial scheduling order  
2 and add new party plaintiffs. The party's *diligence* in seeking  
3 the amendment must be demonstrated. Johnson, 975 F.2d at 609  
4 ("If [the] party was not diligent, the inquiry should end.").  
5 Because plaintiffs and plaintiffs' counsel was on notice of the  
6 graduation status of the proposed class representatives well  
7 before the stay of this action, plaintiffs have failed to  
8 demonstrate diligence in bringing this motion to amend.

9 In regards to plaintiffs additional allegations relating to  
10 field hockey and rugby, defendants contend that plaintiffs knew  
11 as early as April 2004 that women's sport club teams, such as the  
12 rugby and field hockey club teams, requested elevation to varsity  
13 status. (Sheehan Decl. ¶ 3) (stating that document requests  
14 pertaining to requests from women's sport club teams to be  
15 elevated to varsity status were disclosed in April 2004 in  
16 defendants' initial Rule 26 disclosures). At that time, two  
17 years prior to the stay in this action, plaintiffs had notice  
18 that the named plaintiffs in this action only alleged that they  
19 participated or wished to participate in a varsity wrestling  
20 program. Plaintiffs could have moved to amend the complaint to  
21 add proposed class representatives who participated in other  
22 sport club teams at UC Davis. However, plaintiffs failed to do  
23 so.<sup>5</sup> Now, almost three years later, plaintiffs' new counsel  
24 seeks to add new class plaintiffs and new allegations relating to  
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26 <sup>5</sup> Rather, plaintiffs filed their motion for class  
27 certification in December 2005. In their opposition to the  
28 motion, defendants asserted that plaintiffs were not adequate  
class representatives of a class consisting of all female  
student-athletes because their interests focused on wrestling.

1 rugby and field hockey "in light of the scope of the relief  
2 sought." (Pls.' Mot. to Amend at 1). However, because  
3 plaintiffs' delayed in bringing a motion to amend after they  
4 learned of the underlying facts which are the basis of this  
5 motion, plaintiffs fail to demonstrate good cause under Rule 16.

6 Further, even if plaintiffs had demonstrated good cause, the  
7 proposed amendments to the complaint would be prejudicial to  
8 defendants.<sup>6</sup> See Fed. R. Civ. Proc. 15; Martinez, 125 F.3d at  
9 785 (9th Cir. 1997) ("[L]eave to amend should be granted unless  
10 amendment would cause prejudice to the opposing party, is sought  
11 in bad faith, is futile, or creates undue delay."). Prior to the  
12 stay, this case was vigorously litigated by the parties.

13 Defendants' counsel has submitted evidence that, based upon the  
14 allegations in the complaint and the facts relative to the  
15 proposed class representatives, the majority of discovery in this  
16 case has related to the participation of women in the wrestling  
17 program at UC Davis. (See Sheehan Decl. ¶ 6). Defendants also  
18 present evidence that significant resources have been expended in  
19 drafting dispositive motions based upon the allegations in the  
20 complaint. (Sheehan Decl. ¶ 7). Plaintiffs' amendments would  
21 require defendants to expend these resources again, after  
22 defendants already vigorously litigated this case for over two  
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25 <sup>6</sup> For the reasons set forth above in the court's  
26 discussion of plaintiffs' diligence in bringing a motion to  
27 amend, plaintiffs' delay also raises concerns regarding undue  
28 delay. See Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994)  
(holding that the district court did not abuse in denying leave  
to amend where the "new" facts and theories had been known to the  
party seeking amendment since the inception of the litigation).

1 years. See Kaplan, 49 F.3d at 1370 ("Expense, delay, and wear  
2 and tear on individuals and companies count toward prejudice.").

3 Plaintiffs contend that due to an extended discovery  
4 deadline, defendants have "ample opportunity to conduct discovery  
5 with respect to these new plaintiffs and to litigate any issues  
6 arising from these amendments." (Pls.' Reply at 8-9). However,  
7 this "opportunity" does not lessen the prejudice to defendants as  
8 to the resources they have already devoted to this litigation  
9 since its inception and up to the point, three years later, when  
10 plaintiffs seek to amend the complaint. Plaintiffs contend that  
11 the new plaintiffs and allegations do not change the scope of the  
12 litigation, and thus, the prejudice is not substantial. The  
13 court disagrees. While plaintiffs may have sought to bring  
14 challenges on behalf of all women athletes at UC Davis, the  
15 plaintiffs only alleged that they had experience and sought  
16 opportunities in wrestling. The factual allegations in the  
17 original complaint related only to the opportunities available  
18 for women to participate in the UC Davis varsity wrestling  
19 program and plaintiffs' inability to receive the benefits of  
20 being a varsity wrestler. Further, in the class action  
21 allegations, plaintiffs alleged that "Class Plaintiffs seek to  
22 represent the class of all present and future female students at  
23 UC Davis who are denied equal athletic participation  
24 opportunities and scholarships *in women's wrestling* by  
25 Defendants' discriminatory actions." (Compl. ¶ 108).  
26 Plaintiffs' original requested relief also focused on increasing  
27 wrestling opportunities for women athletes at UC Davis. Now  
28 plaintiffs seek to add more claims relating to rugby and field

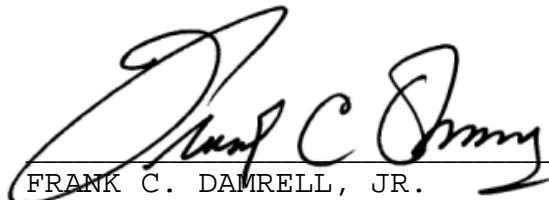
1 hockey. Contrary to plaintiffs' contentions, these amendments  
2 would substantially broaden the scope of litigation in this  
3 matter.

4 Finally, the court is not unaware that the proposed  
5 amendments to plaintiffs' complaint specifically address  
6 arguments raised by defendants' in their opposition to  
7 plaintiffs' previously filed motion for class certification.  
8 While the court is sympathetic to the situation of plaintiffs'  
9 prior counsel, these circumstances and the appointment of new  
10 counsel does not justify giving plaintiffs a "second bite at the  
11 apple" with the benefit of defendants' previous filings.

12 Therefore, because plaintiffs have not demonstrated good  
13 cause to modify the pretrial scheduling order to allow amendments  
14 to the complaint, and because the proposed amendments would be  
15 prejudicial to defendants, plaintiffs' motion to amend the  
16 complaint is DENIED.

17 IT IS SO ORDERED.

18 DATED: March 20, 2007

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22 FRANK C. DAMRELL, JR.  
23 UNITED STATES DISTRICT JUDGE  
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