IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARGUERITE MACQUEEN, Individually and as the Surviving Spouse of DAVID MACQUEEN, deceased,	)	
Plaintiff,	)	
v.	)	Civil Action No. 13-831-SLR-CJB Consolidated
UNION CARBIDE CORPORATION, et al.,	)	
Defendants.	)	

MEMORANDUM ORDER

Presently pending before the Court are two related motions filed by Plaintiff Marguerite MacQueen ("Plaintiff"): (1) "Motion By Plaintiff for Modification of Scheduling Order Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure[,]" (D.I. 439) ("Motion to Amend"); and (2) "Motion for Additional Time to Conduct Discovery and to Respond to Motions for Summary Judgment Pursuant to Rule 56(d)[,]" (D.I. 485) ("Motion for Additional Time," and collectively with the Motion to Amend, the "Motions"). For the reasons set forth below, the Court orders that both Motions are DENIED.[1]

I. BACKGROUND[2]

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[1] The Motion to Amend, which seeks to amend the scheduling order pursuant to Rule 16(b)(4), is a non-dispositive motion. *See, e.g.*, *Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250-51 (3d Cir. 1998); *Santiago v. McDonald's Rests. of N.J., Inc.*, Civil Action No. 06-cv-02983 (NLH), 2009 WL 223407, at *2-3 (D.N.J. Jan. 27, 2009). So too is the Motion for Additional Time, in which Plaintiff seeks a further extension of time to file a response to pending summary judgment motions. *See, e.g.*, *Justice v. Wiggins*, No. 9:11-cv-419 (GLS/DEP), 2014 WL 4966896, at *2 (N.D.N.Y. Sept. 30, 2014); *Agee v. City of McKinney*, CASE NO. 4:12-CV-550, 2014 WL 1232644, at *1 (E.D. Tex. Mar. 22, 2014).

[2] Much of the specific procedural history of this case, as it relates to these Motions, is set out in further detail in the "Discussion" section below. The Court therefore lists here a

In this matter, Plaintiff is acting individually as administratrix of the estate of and as the surviving spouse of the decedent, her husband David MacQueen. (D.I. 380 at 4) Plaintiff asserted state law causes of action based on Mr. MacQueen's alleged exposure to asbestos and asbestos-containing products while Mr. MacQueen was employed (1) by the United States Navy aboard the U.S.S. Randolph and the U.S.S. Independence from 1956 to 1960; and (2) as a salesman by Union Carbide Corporation from approximately 1963 to 1980. (*Id.* at ¶ 11) It is not disputed that the U.S.S. Randolph was built in 1944 at the shipyard of Defendant Huntington Ingalls Incorporated ("HII"). (D.I. 475 at 4)

On March 28, 2013, Plaintiff filed her initial Complaint in this case against over fifty Defendants in the Superior Court of the State of Delaware. (D.I. 1, ex. 1) On May 10, 2013, Defendants Crane Company and Elliott Company filed respective notices of removal of the case to this Court. (D.I. 1)[3] On June 7, 2013, Plaintiff filed a motion seeking remand of the case back to the Superior Court (the "Motion to Remand"). (D.I. 35)

On August 19, 2013, pursuant to Federal Rule of Civil Procedure 16(b), this Court held a scheduling teleconference; a Scheduling Order (the "Initial Scheduling Order") was subsequently issued on August 27, 2013. (D.I. 125, 126) The Initial Scheduling Order: (1) set the deadline for initial disclosures to be made by twenty-one days after the entry of the order; (2) set the date for final discovery requests as September 1, 2014; (3) set the date for objections to those final

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short summary of that procedural history.

[3] Because these two Defendants filed two separate notices of removal, this Court opened two separate actions, Civil Action Nos. 13-831-SLR-CJB and 13-835-SLR-CJB, both entitled *MacQueen v. Union Carbide Corp., et al.* The actions have since been consolidated, and Civil Action No. 13-831 has been designated as the lead case. Citations to docket numbers are to documents that have been filed in the lead case.

discovery requests as October 1, 2014; (4) set the date for the submission of a joint interim status report to the Court as April 18, 2014; (5) set the date for a status teleconference with the Court as May 2, 2014; and (6) set the deadline for the filing of all case-dispositive motions regarding product identification and nexus as October 17, 2014 (the "case-dispositive motion deadline"). (D.I. 126) Later, the parties jointly stipulated to extend, *inter alia*, the date on which the joint status report would be due to October 3, 2014 and the date for the status teleconference to October 10, 2014. (D.I. 202)[4]

On September 11, 2013, the consolidated case was referred to the Court by Judge Sue L. Robinson. (D.I. 152) Judge Robinson referred the matter for the Court to "conduct all proceedings . . . [and] hear and determine all motions[], through and including the pretrial conference." (*Id.*) On December 13, 2013, the Court recommended denial of the pending Motion to Remand, (D.I. 191), which recommendation Judge Robinson adopted on January 9, 2014, (D.I. 195).[5]

Defendants served a first set of interrogatories, requests for admission and requests for

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[4] The Court thereafter entered an order granting this jointly stipulated request for relief, just as it did with every other joint stipulation that is referenced in this Memorandum Order. For the sake of brevity, the Court will not note herein the date on which it granted these jointly stipulated requests, although those dates can be found on the Court's electronic docket. Therefore, when the Court hereafter notes that the parties "jointly stipulated" that certain relief should be granted, it should be understood that the Court later granted those requests.

[5] Prior to the referral of the case to the Court, Judge Robinson had referred the matter to United States Magistrate Judge Sherry R. Fallon. (D.I. 24) After briefing on the Motion to Remand was completed on July 12, 2013, (D.I. 92), Judge Fallon heard oral argument on that motion on August 12, 2013. When Judge Robinson later withdrew the referral to Judge Fallon and referred the case to the Court on September 11, 2013, the Court thereafter discussed the Motion to Remand with the parties in an October 17, 2013 teleconference. Then, after reviewing all relevant materials relating to the Motion to Remand, including the briefing, the oral argument transcript and materials that had been subsequently filed by the parties, the Court ultimately issued its Report and Recommendation on December 13, 2013. (D.I. 191)

production of documents on Plaintiff on March 17, 2014. (D.I. 203) They received responses from Plaintiff in April and May 2014. (D.I. 230, 252) Defendants also deposed Plaintiff's three product identification witnesses in July and August 2014. (D.I. 270, 271, 277)

On April 28, 2014, HII filed a motion to dismiss for lack of personal jurisdiction (the "HII Motion to Dismiss"). (D.I. 243) The motion was fully briefed on June 30, 2014, (D.I. 258), and on December 3, 2014, the Court issued a Report and Recommendation recommending the grant of that motion, (D.I. 512).[6]

On July 14, 2014, Plaintiff served her first set of interrogatories directed to all Defendants and her first requests for production of documents directed to all Defendants ("Plaintiff's first set of discovery requests"). (D.I. 264, 265) Thereafter, all parties jointly filed a stipulation seeking to extend: (1) the deadline for Defendants to respond to Plaintiff's first set of discovery requests until September 5, 2014; (2) the deadline for Plaintiff's counsel to file final discovery requests until October 1, 2014; and (3) the deadline for Defendants to file objections to final discovery until October 31, 2014. (D.I. 287)

A number of the then-remaining Defendants filed their responses to Plaintiff's first set of discovery requests either prior to or on September 5, 2014. (D.I. 291-94, 296, 300-07, 310, 312-17) In certain other instances, Plaintiff and individual Defendants jointly stipulated that certain Defendants' responses should be due on either September 12, September 18, September 19, September 25, or September 29, 2014. (D.I. 283, 288-90, 295, 297-99, 308-09, 311, 318, 342)

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[6] The relevant (and somewhat lengthy) procedural history leading up to the filing of the HII Motion to Dismiss is set out in the Court's Report and Recommendation as to that motion. (D.I. 512 at 5-6) Plaintiff has filed an objection to this Report and Recommendation, (D.I. 526), which is pending.

These particular Defendants did thereafter file their responses in September 2014 (and in one case, on October 6, 2014). (D.I. 319-324, 334, 341, 345, 366, 368, 369, 371, 373, 379)[7]

On October 3, 2014, the parties submitted a joint status report to the Court. (D.I. 376) On October 10, 2014, the Court held a status teleconference with the parties. Plaintiff submitted her Rule 26(a)(1) disclosures on October 15, 2014. (D.I. 405)

Thereafter, on October 17, 2014, a number of the then-remaining Defendants filed motions for summary judgment based on an asserted lack of product identification and nexus. (*See, e.g.*, D.I. 407-14, 417-38, 442-67) However, many of the Defendants that remained in the case at that time, including some who filed these summary judgment motions, have subsequently been dismissed at the joint request of Plaintiff and those respective Defendants. As a result, according to Plaintiff and a review of the docket, there are seven Defendants who currently remain in the case (other than HII, whose dismissal is the subject of pending objections to a Report and Recommendation): Buffalo Pumps, Inc., Crane Company, Ingersoll Rand Company, Spence Engineering Company, Inc., Spirax Sarco Inc., Warren Pumps LLC and Weil-McLain (the "remaining Defendants"). (D.I. 522 at 7-8; D.I. 431, 433, 444, 458, 460, 462, 464, 507)

Also on October 17, 2014, Plaintiff filed the Motion to Amend. (D.I. 439) She filed the Motion for Additional Time on November 17, 2014. (D.I. 485) Briefing on these two Motions was complete as of December 1, 2014, (D.I. 511; D.I. 522 at 68-71), and the Court heard oral

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[7] In her opening brief regarding the Motion to Amend, Plaintiff incorrectly stated that she and Defendant Aurora Pump Company agreed to extend that Defendant's deadline to provide its discovery responses until October 5, 2014. (D.I. 439 at 2 n.5) In fact, the stipulation cited required that Defendant to respond by September 5, 2014, (D.I. 285), and it did, (D.I. 312). One Defendant, however, does appear to have provided its discovery responses in October 2014: Defendant Ross Controls International, Inc., which provided those responses on October 6, 2014. (D.I. 379)

argument on the Motions on December 5, 2014, (D.I. 522).[8] Subsequent to oral argument, the Court ordered the parties to submit supplemental declarations as to certain issues relevant to the Motions by December 15, 2014, and the parties have done so. (D.I. 521, 523, 524)

II. STANDARD OF REVIEW

A. Motion to Amend

Federal Rule of Civil Procedure 16 authorizes courts to enter scheduling orders in their cases, and the rule's purpose is to "provide for the judicial control over a case, streamline proceedings, maximize the efficiency of the court system, and actively manage the timetable of case preparation to expedite the speedy and efficient disposition of cases." *Prince v. Aiellos*, Civil Action No. 09-5429(JLL), 2012 WL 1883812, at *6 (D.N.J. May 22, 2012) (citing *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990)). Rule 16(b)(4) requires that a "schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see also Cloud Farm Assoc., L.P. v Volkswagen Grp. of Am., Inc.*, C. A. No. 10-502-LPS, 2012 WL 3069390, at *2 (D. Del. July 27, 2012). To demonstrate the good cause necessary to allow for modification of a scheduling order, the moving party must demonstrate that, despite its own diligent efforts, scheduling deadlines cannot be met. *See McDerby v. Daniels*, C.A. No. 08-882-GMS, 2010 WL 2403033, at *6 (D. Del. June 16, 2010); *Gonzalez v. Comcast Corp.*, No. Civ.A. 03-445-KAJ, 2004 WL 2009366, at *1 (D. Del. Aug. 25, 2004); *see also Cloud Farm Assoc.*,

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[8] Plaintiff's deadline to respond to the pending summary judgment motions was to occur prior to the date of oral argument on the Motion to Amend. Recognizing that one form of relief that Plaintiff was seeking in that motion (and with her Motion for Additional Time) was to postpone the deadline for such responses, the Court issued an Oral Order on November 18, 2014, in which it ordered that Plaintiff's obligation to respond to the pending summary judgment motions was to be stayed until the Court ruled on the Motion to Amend.

2012 WL 3069390, at *2. Thus, whether Rule 16(b)(4)'s good cause requirement is met depends on the "'diligence of the movant, and not on prejudice to the non-moving party.'" *Cloud Farm Assoc.*, 2012 WL 3069390, at *2 (quoting *Venetec Int'l, Inc. v. Nexus Med., LLC*, 541 F. Supp. 2d 612, 618 (D. Del. 2008)). "If [the moving] party was not diligent, the inquiry should end." *Alexiou v. Moshos*, Civil Action No. 08-5491, 2009 WL 2913960, at *3 (E.D. Pa. Sept. 9, 2009) (internal quotation marks and citation omitted).

B. Motion for Additional Time

Rule 56 governs summary judgment, and part (d) of the Rule, titled "When Facts Are Unavailable to the Nonmovant[,]" states:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). A Rule 56(d) motion is essentially "the proper recourse of a party faced with a motion for summary judgment who believes that additional discovery is necessary before he can adequately respond to that motion." *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 309 (3d Cir. 2011); *see Square Ring, Inc. v. Doe-1*, Civil Action No. 09-563 (GMS), 2014 WL 1116960, at *3 (D. Del. Mar. 18, 2014). The Third Circuit has construed Rule 56(d) (and its predecessor, Rule 56(f)) as requiring that "a party seeking further discovery in response to a summary judgment motion [must] submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Dowling v. City of Phila.*, 855 F.2d 136, 139-40 (3d Cir. 1988) (citation omitted); *see also Pa., Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir.

2012).

District courts have discretion in resolving Rule 56(d) motions. *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 501 (3d Cir. 2012); *Square Ring, Inc.*, 2014 WL 1116960, at *3. "Vague or general statements of what a party hopes to gain through a delay for discovery under . . . Rule 56(d) [] are insufficient." *Atl. Deli & Grocery v. United States*, Civil No. 10-4363 (JBS/AMD), 2011 WL 2038758, at *3 (D.N.J. May 23, 2011) (citing *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 230 (3d Cir. 1987)). And in situations where relevant material was not timely pursued, the party seeking additional discovery must sufficiently explain its lack of diligence. *Lunderstadt v. Colafella*, 885 F.2d 66, 71-72 (3d Cir. 1989) (citations omitted); *Square Ring, Inc.*, 2014 WL 1116960, at *3.

III. DISCUSSION

The Court below addresses both of Plaintiff's pending Motions in turn.

A. Motion to Amend

With the Motion to Amend, Plaintiff asks the Court to amend the Scheduling Order in the case to provide for an extension of fact discovery for a period of six months, and to re-set the date for submission of case-dispositive motions to thirty days following the close of that period of discovery. (D.I. 439 at 8, 16-17)

Two primary factors, further set out below, motivate the Court's ultimate conclusion that Plaintiff's Motion to Amend should be denied.

1. Plaintiff's Explanations as to Why Good Cause Exists

The first factor relates to the nature of both of Plaintiff's explanations as to why good cause for an extension exists. The Court finds both explanations wanting, in similar ways.

a. The First Explanation: Defendants' Allegedly Deficient Discovery Responses

Plaintiff's first explanation as to why good cause exists is that case deadlines should be extended due to Defendants' deficient responses to Plaintiff's first set of discovery requests. Plaintiff claims that because these responses are so deficient, she will need more time to obtain meaningful discovery responses from certain Defendants, or to otherwise compel such responses. (D.I. 520 at 16; *id.* at 19-20 (Plaintiff's counsel citing discovery responses that have been "less than responsive in many instances" as a basis for a request to extend case deadlines); *id.* at 28, 33)

As an initial matter, this first explanation lacks specificity. In her opening brief regarding the Motion to Amend, Plaintiff provided only two examples of assertedly deficient discovery responses: (1) the response of Defendant Tate Andale, Inc. ("Tate") to Plaintiff's Request for Production of Documents ("RFP") No. 2; and (2) the response of Defendant Carrier Corporation ("Carrier") to Plaintiff's Interrogatory No. 6. (D.I. 439 at 13-15) But these two entities are no longer Defendants in this case, having been dismissed at Plaintiff's request by order of the Court. (D.I. 393, 489) Thus, any deficiency in Tate and Carrier's responses would not amount to good cause that would justify an extension to case deadlines relating to the remaining Defendants.

Plaintiff did, however, attach the discovery responses of the seven remaining Defendants (other than HII) as exhibits to her Motion to Amend.[9] (D.I. 439 at 13 n.21 & exs. C-G) But after review, it appears that all (or nearly all) of those Defendants' responses to RFP No. 2 or

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[9] Indeed, Plaintiff attached (as Exhibits C-G of her opening brief regarding the Motion to Amend) all of the discovery responses that Plaintiff had received from all Defendants in the case. (D.I. 439 at 13 n.21 & exs. C-G)

Interrogatory No. 6 are very different from (and in many cases, much more detailed than) the allegedly deficient responses of Tate and Carrier that Plaintiff called out in her opening brief. (*Id.*, ex. C at 370-71, 391-93 & 405; *id.*, ex. D at 340-41 & 364; *id.*, ex. F at 95-96, 112, 159-60, 179, 201, 204-05, 235, 269, 272-73, 302-03, 334-35, 352-53, 370)[10]

In sum, the Court is being asked to conclude that case deadlines regarding seven remaining Defendants should be pushed back for half a year, due to these Defendants' allegedly deficient discovery responses. And yet Plaintiff has not specifically cited to any of *these Defendants' actual responses* as being deficient, nor has Plaintiff explained with particularity *why* these Defendants' responses are lacking.

Another problem as to this proffered explanation for good cause has been Plaintiff's lack of consistency. On October 8, 2014, in an e-mail to Defendants' liaison counsel, Plaintiff's counsel requested (for the first time) that the case-dispositive motion deadline in the case be extended. (D.I. 475 at 5)[11] Although Plaintiff's counsel had all of the discovery responses of the then-remaining Defendants in hand (and had them, in many cases, for weeks by that time), in this e-mail, the content of the responses were not mentioned. Instead, in the e-mail, Plaintiff's counsel reported that:

> We need a little longer to finish paring down the defendants. Would defendants be amenable to agreeing that dispositive motions are not due until 11/3/14 (they are now due 10/17/14) with the understanding that we will be in the process of identifying additional defendants who we will dismiss without prejudice.

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[10] With regard to these page references to Exhibits C-G to Plaintiff's opening brief as to her Motion to Amend, the Court utilizes the page numbers generated by the ECF system.

[11] Plaintiff provided this e-mail to the Court as Exhibit B to her opening brief regarding the Motion to Amend. (D.I. 439, ex. B)

(D.I. 439, ex. B)[12]

In other words, on October 8, 2014, Plaintiff was advising Defendants that a short, two-week extension of the case-dispositive motion was needed—not because of any deficiency in Defendants' discovery responses (indeed, not due to any Defendant-related deficiency at all)—but simply because Plaintiff needed more time to decide which Defendants she wished to dismiss from the case. Two days later, during the October 10, 2014 status teleconference, Plaintiff claimed (for the first time) that Defendants' discovery responses were so deficient that they necessitated a six-month extension to the case schedule. This dramatic shift, coming so quickly in time, gives the Court pause as to the merit of this currently proffered rationale for why good cause exists.

b. The Second Explanation: The Need to Take Discovery from HII

The second explanation Plaintiff puts forward as to good cause is that Plaintiff needs more time to pursue discovery from HII. (D.I. 520 at 13) Plaintiff has asserted that while the HII Motion to Dismiss was pending in the second half of 2014, HII refused to respond to Plaintiff's first set of discovery requests. This, according to Plaintiff, left her "unable to conduct discovery, even jurisdictional discovery, of this Defendant." (*Id.*; *see* D.I. 439 at 7 (Plaintiff asserting that she was "precluded from conducting any discovery of [HII]" during the pendency of the HII Motion to Dismiss))

In her briefing on the Motion to Amend, Plaintiff has attempted to articulate why obtaining discovery from HII is relevant to her need to push back discovery and case-dispositive

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[12] Defendants' liaison counsel responded on behalf of Defendants that Defendants wished to "keep the current deadline of October 17[, 2014.]" (D.I. 439, ex. B)

motion deadlines relating to the other seven remaining Defendants.[13] (D.I. 439 at 5-6) Plaintiff stated that HII built the U.S.S. Randolph (one of the ships on which Mr. MacQueen is alleged to have been exposed to asbestos) in 1944, when HII was then known as the Newport News Shipbuilding and Drydock Company. (*Id.*) And she has asserted that because HII has refused to respond to her first set of discovery requests, "Plaintiff has been blocked from obtaining any product identification, causation or liability information from [HII]—vital information which would be relevant or reasonably likely to lead to the discovery of admissible evidence [not only] as to Defendant HII [but also] as to any other defendant in this case." (*Id.* at 7) In other words, Plaintiff now asserts that "it is reasonable to believe that as the builder of the U.S.S. Randolph, [HII] is in possession of—or at least has access to and/or control over—documents which would identify the manufacturers of various asbestos-containing products and/or machinery with asbestos-containing parts which were in use in and on this U.S. Navy aircraft carrier" when it was built in 1944. (*Id.* at 7-8 (emphasis omitted)) She further claims that these "manufacturers" could include the seven remaining Defendants, and that she hopes to obtain further discovery from HII confirming that fact. (*See* D.I. 522 at 30-31; *see also* D.I. 439 at 8) If she does, then Plaintiff would argue that this "increase[d] from [her] perspective the likelihood that [Mr.] MacQueen . . . used these pieces of [remaining Defendants'] equipment" and was exposed to asbestos due to such use in the time period from 1956 to 1960. (D.I. 522 at 36-37)[14]

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[13] As noted above, the Court has issued a Report and Recommendation recommending that HII be dismissed as a Defendant in the case. The focus of the Court's decision here on the Motion to Amend is thus whether there is a basis to grant the relief sought as to the claims against the remaining seven Defendants in the case.

[14] Defendants have responded by claiming that neither the resolution of the HII Motion to Dismiss, nor the asserted need to take further discovery from HII, should in any way affect the process for resolving pending summary judgment motions regarding product

As to this second explanation as to why good cause exists, again, a lack of specificity is palpable. Plaintiff does not assert with any particularity why she believes that HII is in fact likely to possess documents relating to the seven remaining Defendants and/or their asbestos-containing products. She does not, for example, suggest that any particular document uncovered in discovery suggests that HII possesses such evidence. Nor does she suggest that any witness deposed in discovery has provided reason to believe this is so.

Additionally, Plaintiff has also provided shifting explanations relating to why the state of discovery as to HII amounts to good cause for an extension as to these other Defendants. During the Court's October 10, 2014 status teleconference, the Court pointedly asked "how the resolution [of the HII Motion to Dismiss] has [an] impact on some or all of the [then] 20, 30 or 40 remaining Defendants" and "[w]hy does [] resolution [of that motion] tie up your ability to be able to address whether there is an issue of fact[] with respect to the other Defendants [and] whether [their] summary judgement motions" could be resolved. (D.I. 520 at 15-16) In response, Plaintiff's counsel stated:

> But with regard to the [U.S.S.] Randolph, we have what we believe is . . . a Defendant first of all that would stand perhaps as one of maybe a couple of Defendants in this case where we could take another look at the involvement of some of the equipment manufacturers and simplify the case by a substantial scale.

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identification and nexus as to the seven remaining Defendants. (D.I. 475 at 4; D.I. 520 at 25-26) They argue this is so because none of Plaintiff's three deposed product identification witnesses have identified Mr. MacQueen as having actually been in proximity to any of remaining Defendants' products while he worked on the U.S.S. Randolph or the U.S.S. Independence; thus, they claim that no discovery Plaintiff might obtain from HII could ultimately help Plaintiff in demonstrating the requisite nexus between Mr. MacQueen and one of remaining Defendants' products. (D.I. 475 at 5-6, 12-14; D.I. 520 at 25-27; D.I. 522 at 55-56) Because the Court finds that Plaintiff's lack of diligence requires the denial of the Motion to Amend, it need not pass here on Defendants' argument in this regard.

(*Id.* at 17) The Court sought clarification, and again asked why the fact that Plaintiff still had to take discovery from HII "in some way affects [Plaintiff's] ability to decide . . . whether or not [Plaintiff] believe[s] there's an issue of fact as to [the remaining Defendants] . . . ?" (*Id.* at 17-18) Plaintiff's counsel replied:

> There are a lot of practical decisions that are made in this litigation. If you have a Mercedes to drive, why would you drive a broken-down Pinto. In other words, if you've got a Defendant that is going to be able to have a much bigger liability share and you're able to put your resources in that direction and whittle the number of Defendants down considerably if that Defendant is in the case, that is a consideration or practical decision that is made all of the time on the Plaintiff's side when you've got many exposures in many different products involved in a naval career that occurred back in the '50s.

(*Id.* at 18-19; *see also id.* at 26-27)[15]

Thus, on October 10, 2014, Plaintiff's rationale for an extension as it related to potential future discovery from HII had to do with "practical decisions" Plaintiff needed to make—whether Plaintiff would ultimately be confident enough about its case against a Defendant like HII with a "much bigger liability share" (i.e., the "Mercedes"), that she would then be willing to dismiss other Defendants that had smaller asserted liability shares (i.e., the "broken-down Pinto[s]"). Just seven days later, when the Motion to Amend was filed, that rationale appeared to differ. It was now focused on the likelihood that discovery from HII would help solidify the *liability case as to other Defendants*. Again here, these quickly shifting

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[15] At the end of the status teleconference, the Court noted that it did not find that articulated "basis for Plaintiff's request to move back the summary judgment filing deadline . . . based on the pendency of the [HII] Motion to Dismiss" to be "sufficient" under the law. (D.I. 520 at 35-36) The Court stated that if Plaintiff filed a motion seeking this relief (i.e., what became the Motion to Amend), it would again consider the question then. (*Id.*)

rationales cause the Court to question the strength of the good cause claim.

2. Plaintiff's Diligence

The second reason for denial of the Motion to Amend is that the record clearly demonstrates that Plaintiff has not been diligent in this matter. It is that lack of diligence—not good cause—that has given rise to the extension sought.

This lack of diligence is first seen in Plaintiff's failure to timely begin discovery. After the Initial Scheduling Order was entered on August 27, 2013, Plaintiff did not propound her first set of discovery requests until July 14, 2014—nearly 11 months later. Since Plaintiff waited so long to begin discovery, the deadline for Defendants to provide their first set of discovery responses was necessarily going to fall close in time to the October 17, 2014 deadline for case-dispositive motions. Thereafter, by stipulation, Plaintiff and Defendants jointly agreed that the deadline for these responses would be September 5, 2014. And as noted above, Plaintiff and certain of those Defendants stipulated to further limited extensions.

Plaintiff now claims, in part, that her need to extend case deadlines is due to the fact that these stipulations "had the cumulative effect of seriously 'back-loading' the discovery process against the Plaintiff—wedging the Plaintiff and her counsel" between these new discovery response deadlines and the October 17, 2014 case-dispositive motions deadline. (D.I. 439 at 2-4, 9) She argues that were the Court not to grant the Motion to Amend, Plaintiff will have "been unfairly subjected to a litigation 'table' . . . [that] has been cruelly tilted against her." (*Id.* at 4) Yet, as the Court has noted above, the primary reason for the "back-loading" of the case schedule was due to *Plaintiff's* own actions (or inaction, as the case may be)—Plaintiff's delay in serving her first set of discovery requests until mid-July 2014.

Why did the Plaintiff wait so long to begin discovery? In her briefing, Plaintiff suggests that a part of the reason was that she filed the Motion to Remand in June 2013, (D.I. 35), and that from then until the motion was denied on December 13, 2013, (D.I. 191), "in practical terms, this case stood in a state of suspended animation[.]" (D.I. 439 at 1) Yet, of course, Plaintiff *could* have begun discovery at any point after the Initial Scheduling Order was entered in the case; she simply chose not to do so.

But in any event, even assuming that there was no lack of diligence in Plaintiff's failure to begin discovery prior to December 13, 2013, why did it thereafter take Plaintiff an additional seven months to propound her first set of discovery requests?[16] At oral argument, Plaintiff's counsel suggested that during this time, Plaintiff was engaging in "investigation" with the help of private investigators—one that had to be concluded prior to embarking upon discovery. (D.I. 522 at 11-12) There is no information in the record regarding this investigation, such as when it began, how extensive it was, or why its content helps explain Plaintiff's lengthy delay in serving the first set of discovery requests.

But again, even if the Court were to put aside the question of why Plaintiff did not embark on discovery until so late, Plaintiff would still need to explain her failure to earlier *address*—with either Defendants or the Court—any asserted need for an extension to discovery deadlines.

In other words, at any point in 2014—when, for example, it became clear that Plaintiff's first set of discovery requests would not be served until close to the date for filing case-

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[16] As was noted above, Defendants served their initial requests for discovery in March 2014.

dispositive motions—Plaintiff could have taken action. Even as late as July 2014 (when the initial discovery requests were propounded) or in early- or mid-September 2014 (when nearly all of those discovery responses came due), Plaintiff could have raised with Defendants (and with the Court) the issue of whether discovery and case-dispositive motion deadlines should be pushed back.

Similarly, at any point in early to mid-2014, Plaintiff could have raised her claim that HII's failure to respond to discovery requests should impact the case schedule. Indeed, HII's status as a party in the case was at issue repeatedly throughout that time frame. (D.I. 197, 200, 204, 208, 209, 212, 213, 219, 243, 251, 255, 258)

But during that time, Plaintiff did nothing. Nor did she raise any of these issues even as late as the October 3, 2014 date for submission of the parties' joint status report to the Court. At oral argument, Plaintiff's counsel acknowledged that "with the benefit of hindsight, I think we can say that some things should have been handled differently administratively" and that there was "[n]o question" that Plaintiff should have raised these issues earlier. (D.I. 522 at 14-15; *id.* at 68; *see also* D.I. 520 at 31-32 (Plaintiff's counsel, during October 10, 2014 status teleconference, noting that "Perhaps some issues might have been able to have been raised earlier than they have been.")) But Plaintiff's counsel asserted that, overall, "I think we have been diligent. . . . under the attendant circumstances." (D.I. 522 at 15)

The Court disagrees. In the Court's view, Plaintiff's lack of diligence is demonstrated not only in her significant delay in propounding discovery in the first instance, but also by her delay in failing to come forward earlier with any request for an extension. That lack of diligence is made all the more palpable by the fact that in the months leading up to the case-dispositive

motion deadline, Plaintiff (along with Defendants) was repeatedly seeking to alter the case schedule as it related to Defendants' discovery response deadlines. That is, Plaintiff was, by stipulation, repeatedly and affirmatively asking the Court to extend *those* deadlines—and yet, each time, failed to seek any other change to the case schedule (such as the changes she now seeks belatedly).

Also notable here is not just the fact that Plaintiff was late in making her request for relief—but exactly how late she was to do so. As noted above, the first time that Plaintiff requested an extension to the case-dispositive motion deadline from Defendants was on October 8, 2014.[17] The first time Plaintiff put forward the two now-asserted explanations as to why good cause exists for the requested extension was on October 10, 2014, during the status teleconference.[18] Plaintiff's Motion to Amend was not filed until the very date (October 17, 2014) when case-dispositive motions were due.[19]

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[17] In her briefing and at oral argument on the Motions, Plaintiff suggested that, to the contrary, Plaintiff *had* raised with Defendants, prior to October 8, 2014, the question of pushing back the case-dispositive motion deadline. (D.I. 439 at 3; D.I. 522 at 22-25, 65) The Court later asked the parties to file declarations regarding this issue. Those declarations confirmed that Plaintiff's assertions in this regard were incorrect. (D.I. 521 at ¶ 6; D.I. 524 at ¶¶ 5-7)

[18] At oral argument on the Motions, Plaintiff suggested that, to the contrary, Plaintiff *had* complained about the sufficiency of Defendants' discovery responses prior to the October 10, 2014 status teleconference. (D.I. 522 at 25) The Court later asked the parties to file declarations regarding this issue as well. Those declarations confirmed that Plaintiff's assertions here were also incorrect. (D.I. 521 at ¶ 7; D.I. 524 at ¶¶ 5-7)

[19] As a result, twenty-nine different Defendants filed motions for summary judgment on that date. All but seven of those are now moot, as those other twenty-two Defendants have subsequently been dismissed from the case, with Plaintiff's consent.

These examples of the lack of diligence on the part of Plaintiff[20] are multifaceted and they directly relate to the reasons why she now seeks an extension to the case schedule. That lack of diligence is ultimately fatal to Plaintiff's Motion to Amend.

3. Conclusion

In summary, Plaintiff's explanations as to why good cause exists in support of her request for relief were wanting. Both explanations were insufficiently specific, and the way those explanations shifted and changed in the recent past has also caused the Court to question their efficacy. Additionally, Plaintiff has not demonstrated that, despite her own diligent efforts, the scheduling deadlines she now seeks to extend could not have been earlier met. It is instead Plaintiff's own lack of diligence that caused her, Defendants and the Court to be in the present predicament they face: one where only after fact discovery is complete and case-dispositive motions have been filed does a plaintiff come forward with a motion seeking a new schedule. In such a circumstance, the Court finds that Plaintiff's Motion to Amend should be denied. *See, e.g.*, *Karlo v. Pittsburgh Glass Works, LLC*, Civil Action No. 10-1283, 2011 WL 5170445, at *3 (W.D. Pa. Oct. 31, 2011) (finding that a lack of diligence under Rule 16(b)(4) on plaintiffs' part did not warrant an alteration to the scheduling order to allow for the filing of an amended pleading, where the plaintiffs "engaged in little to no discovery for six months after initiating the suit[,]" causing them to receive relevant discovery well after the deadline for filing motions to amend had passed, such that the plaintiffs' delay in serving discovery amounted to "exactly the

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[20] There are others. For example, although the Initial Scheduling Order called for Plaintiff to file her initial Rule 26(a)(1) disclosures within 21 days of the entry of that order (i.e., by early September 2013), Plaintiff filed them over a year late—on October 15, 2014. (D.I. 405) Plaintiff has acknowledged that this was an "oversight[.]" (D.I. 522 at 12)

opposite of diligence"); *Claytor v. Computer Assocs. Int'l, Inc.*, 211 F.R.D. 665, 666-68 (D. Kan. 2003) (finding a plaintiff's lack of diligence warranted the upholding of a Magistrate Judge's decision not to extend the fact discovery deadline, where the plaintiff did not seek to extend that deadline until the day before it expired); *cf. Carrier Corp. v. Goodman Global, Inc.*, Civ. No. 12-930-SLR, 2014 WL 2796794, at *2 (D. Del. June 19, 2014) (finding no good cause to modify a scheduling order pursuant to Rule 16(b)(4) in order to allow a defendant to amend its responsive pleading, as the motion was premised in significant part on documents obtained seven months prior to the filing of the motion).

B. Motion for Additional Time

With regard to Plaintiff's Motion for Additional Time, as noted above, Rule 56(d) requires that a movant must show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify [the] opposition[to a summary judgment motion.]" Plaintiff did file such a declaration, but the declaration simply incorporated by reference all of the arguments for an extension that Plaintiff made in her Motion to Amend, addressed above. (D.I. 485-2; *see also* D.I. 485 at 2)

As the Court has noted above, in situations where a Rule 56(d) movant did not timely pursue relevant material, or timely bring concerns to the Court regarding such material, the movant must sufficiently explain its lack of diligence. *Lunderstadt*, 885 F.2d at 71-72; *see also Square Ring, Inc.*, 2014 WL 1116960, at *3 ("Thus, [plaintiff's] silence about its discovery concerns and lack of diligence in seeking additional discovery before the end of fact discovery are fatal to its [Rule 56(d)] motion."); *Acceleron, LLC v. Hewlett-Packard Co.*, 755 F. Supp. 2d 551, 555 (D. Del. 2010) ("The court concludes that additional discovery under [then-]Rule 56(f)

is not justified because [plaintiff] failed to diligently pursue the discovery necessary to prove the elements of the claims asserted in its complaint during the fact discovery period."). For the reasons set out above, Plaintiff has not adequately explained her lack of diligence here, either as to the failure to timely obtain discovery or as to the failure to seek redress from the Court. Under these circumstances, the Court cannot countenance a six-month extension to the case schedule that is the product of that lack of diligence.

For these reasons, the Motion for Additional Time is also denied.

IV. CONCLUSION

For the reasons set out above, the Court orders that the Motions be DENIED.

Dated: January 8, 2015

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE