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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EDU-SCIENCE (USA) INC.,

INTUBRITE LLC,

AND RELATED
COUNTERCLAIMS AND CROSS-
CLAIMS

Case No. 12-cv-1078 BAS (JLB)

ORDER:
**(1) GRANTING
DEFENDANT’S MOTION
TO DISMISS; AND**
**(2) DENYING EDU-HK’S
MOTION FOR LEAVE TO
AMEND**
[ECFs 102, 113]

On September February 16, 2012, Plaintiff Edu-Science (USA) Inc. (“Edu-USA”) sued Defendant IntuBrite LLC (“IntuBrite”) for breach of contract. ECF 2. Plaintiff now seeks to file a Second Amended Complaint, adding fraud claims against Intubrite and its alleged agent, prospective Defendant Robert Hicks.

While Plaintiff iterated its complaint, Cross-Claimant Edu-Science (HK) Ltd. (“Edu-HK”) and Cross-Claimants and Defendants Intubrite and Robert Hicks

1 filed Cross-Complaints. These Cross-Complaints have also been amended
2 repeatedly.

3 As it currently stands, Edu-USA has moved for leave to file a Second
4 Amended Complaint (ECF 113); Edu-HK has filed a Third Amended Crossclaim
5 (ECF 98), which Defendants are moving to dismiss (ECF 102); and IntuBrite's
6 First Amended Counterclaim (ECF 99) against Edu-USA and Edu-HK has been
7 answered (ECFs 103, 104).

8 For the following reasons, Defendants' motion to dismiss is **GRANTED**
9 (ECF 102) and Edu-USA motion for leave to file a Second Amended Complaint is
10 **DENIED** (ECF 113).

11 **I. BACKGROUND**

12 On February 16, 2013, Edu-USA sued IntuBrite for breach of contract. Edu-
13 USA alleges that IntuBrite breached its contract to purchase custom-manufactured
14 instruments for tracheal intubation from Edu-USA. According to Edu-USA,
15 although IntuBrite paid for some of the product, IntuBrite did not fulfill its
16 obligations under the contracts (purchase orders issued by IntuBrite).

17 IntuBrite, in a counterclaim/cross-claim, alleged that the products delivered
18 were defective and untimely. IntuBrite's Amended Counterclaim ("IACC") ¶¶ 33–
19 35. IntuBrite further claims it paid fully for the products it actually received. IACC
20 ¶ 36. IntuBrite asserts seven claims against Edu-USA and Edu-HK: (1) breach of
21 contract; (2) breach of the implied warranty of merchantability; (3) negligence; (4)
22 intentional interference with prospective economic advantage; (5) negligent
23 interference with prospective economic advantage; (6) intentional
24 misrepresentation of fact; and (7) negligent misrepresentation of fact.

25 Edu-USA and Edu-HK now attempt to assert fraud claims in addition to
26 Edu-USA's previously asserted breach of contract claims. In Edu-HK's Third
27 Amended Crossclaim ("TACC") and Edu-USA's proposed Second Amended
28 Complaint ("SAC"), Edu-HK and Edu-USA allege that IntuBrite and its agents

1 induced Edu-HK and Edu-USA to manufacture the products by falsely
2 representing that it had sufficient financial backing for the purchase orders.

3 II. MOTION TO DISMISS

4 Defendants' motion to dismiss Edu-HK's Third Amended Crossclaim
5 ("TACC") alleges that Edu-HK's amendments do not satisfy the requirements of
6 the court's previous Order dismissing the First Amended Crossclaim.¹ ECF 86. In
7 that Order, the court identified four insufficiencies that Edu-HK must remedy to
8 survive a motion to dismiss. First, Edu-HK needed to show that the challenged
9 statements were false or misleading when made. Second, Edu-HK needed to show
10 it was in a position to rely on IntuBrite's statements. Third, Edu-HK needed to
11 show that Edu-HK, not Edu-USA, bore the brunt of the losses caused by reliance.
12 Last, Edu-HK needed to allege its claims were not time-barred. The Court finds
13 that Edu-HK has failed to properly plead falsity, and therefore Edu-HK's TACC
14 are dismissed.

15 A court may dismiss fraud claims if the "allegations fail to satisfy the
16 heightened pleading requirements of Rule 9(b)[.]" *Vess v. Ciba-Geigy Corp. USA*,
17 317 F.3d 1097, 1107 (9th Cir. 2003). To satisfy the particularity requirement of
18 Rule 9(b), "[a]llegations of fraud must be accompanied by 'the who, what, when,
19 where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (quoting
20 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Plaintiffs must plead
21 enough facts to give defendants notice of the time, place, and nature of the alleged
22 fraud together with an explanation of the statement and why it was false or
23 misleading. *See id.* at 1107.

24 In Edu-HK's First Amended Crossclaim ("FACC"), Edu-HK failed to
25 properly allege *why* the challenged statements were false. Under Rule 9(b), they
26 are required to "set forth what is false or misleading about a statement, and why it
27

28 ¹ The Court previously dismissed Edu-HK's Second Amended Crossclaim because it did not properly allege diversity. As a result, the Court did not address its factual allegations. ECF 96.

1 is false.” *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999). In the
2 FACC, Edu-HK alleged that “[d]iscovery obtained in the present case confirmed
3 that Intubrite’s [sic] representations about its financial condition and resources
4 were false.” FACC ¶ 63.²

5 In the TACC, Edu-HK again challenges IntuBrite’s statements, through
6 William Goodrich and Defendant Robert Hicks, that IntuBrite was well-funded,
7 had the financial resources to enter into an order of the magnitude discussed, and
8 was backed by Hicks and another individual, Todd McKinney, who were wealthy
9 and had made substantial money from other inventions and investments. TACC
10 ¶¶27–33. Edu-HK now claims these statements were false when made because
11 SEC filings and financial documents obtained during discovery showed IntuBrite
12 operated at a \$400,000 annual loss during the relevant period and relied on revenue
13 from the sale of Edu-HK’s shipments to purchase further orders. TACC ¶¶ 73–77.

14 However, the SEC filings seem at best tangential to the falsity of Hicks and
15 Goodrich’s statements. IntuBrite is a privately-held limited liability company, of
16 which Hicks is a member, and Hicks and McKinney’s personal wealth may have
17 financed or backed the purchase orders. There are no alleged facts contradicting
18 this. Financial backing and cash reserves are independent from annual profits or
19 losses, and without facts that IntuBrite was actually insolvent at the time the deal
20 was entered into, stating it must be so is impermissibly conclusory. Even if
21 IntuBrite relied on proceeds from the sale of Edu-HK manufactured instruments to
22 purchase subsequent orders, it does not mean that IntuBrite did not have access to
23 other assets. TACC ¶ 67.

24 Edu-HK also added claims that IntuBrite’s alleged agreement with a
25 Pakistani manufacturer to produce the instruments at lower cost illustrates
26 IntuBrite acted fraudulently. TACC ¶ 60. While this might be evidence that
27

28 ² As stated in the court’s previous Order dismissing the FACC, paragraphs 50 and 51 are legal conclusions, not facts. Order Dismissing FACC 4:16–17, ECF 86.

1 IntuBrite intended to breach the contract, it does not show that IntuBrite was in
2 dire financial straits either at the time or breach or when entering into the contract.

3 At this point, Edu-HK's claims fail to show that IntuBrite made false or
4 misleading statements about its financial situation. If later facts reveal that Hicks or
5 McKinney either could not or would not financially back the contract at the time
6 Hicks and Goodrich made those statements, Edu-HK might be able to state a claim.
7 As it currently stands, Edu-HK has not properly alleged falsity. Accordingly, this
8 Court will **GRANT** Defendants' motion to dismiss the TACC and dismisses it
9 **WITHOUT PREJUDICE**. ECF 102.

10 **III. LEAVE TO AMEND**

11 The Court now turns its attention to Edu-USA's motion for leave to file a
12 Second Amended Complaint. ECF 113. Intubrite opposes the motion on three
13 bases: (1) Edu-USA unduly delayed asserting its fraud claims, (2) the proposed
14 amendment would be prejudicial, and (3) the proposed amendment would be futile
15 because it would not survive a motion to dismiss. For the following reasons,
16 amending the complaint to assert fraud claims would be futile.

17 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a
18 responsive pleading has been served, a party may amend its complaint only with
19 the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a).
20 "The court should freely give leave when justice so requires," and apply this policy
21 with "extreme liberality." *Id.*; *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186
22 (9th Cir. 1987). However, leave to amend is not to be granted automatically.
23 *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (citing *Jackson*
24 *v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Granting leave to amend
25 rests in the sound discretion of the district court. *Pisciotta v. Teledyne Indus., Inc.*,
26 91 F.3d 1326, 1331 (9th Cir. 1996).

27 The Court considers five factors in assessing a motion for leave to amend:
28 (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of the

1 amendment, and (5) whether the plaintiff has previously amended the complaint.
2 *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *see also Foman v. Davis*,
3 371 U.S. 178, 182 (1962). The party opposing amendment bears the burden of
4 showing any of the factors above. *See DCD Programs*, 833 F.2d at 186. Of these
5 factors, prejudice to the opposing party carries the greatest weight. *Eminence*
6 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). However,
7 absent prejudice, a strong showing of the other factors may support denying leave
8 to amend. *See id.*

9 “Futility of amendment can, by itself, justify the denial of a motion for leave
10 to amend.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Futility is a
11 measure of the amendment’s legal sufficiency. “[A] proposed amendment is futile
12 only if no set of facts can be proved under the amendment . . . that would constitute
13 a valid and sufficient claim or defense.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d
14 209, 214 (9th Cir. 1988). Thus, the test of futility is identical to the one applied
15 when considering challenges under Rule 12(b)(6) for failure to state a claim upon
16 which relief may be granted. *Baker v. Pac. Far E. Lines, Inc.*, 451 F. Supp. 84, 89
17 (N.D. Cal. 1978); *see Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (“A
18 district court does not err in denying leave to amend . . . where the amended
19 complaint would be subject to dismissal.” (citation omitted)).

20 Here, Magistrate Judge Jill L. Burkhardt issued a scheduling order on
21 September 30, 2014 requiring any request to amend the pleadings be filed by
22 November 24, 2014. In fact, Edu-USA did move to file an amended pleading on
23 that date. This deadline was set, in part, because of the threshold issues of standing
24 the Court took time to carefully consider before this litigation could proceed.
25 Because this delay resulted from that cogitation, it should not be blamed on Edu-
26 USA. As a result, this Court declines to weigh this factor against granting leave to
27 amend.

28 Secondly, Intubrite challenges the amendment as prejudicial. Intubrite

1 claims that their discovery deadlines are fast-approaching, and that the fraud
2 claims will require additional discovery requests. However, this prejudice can be
3 mitigated by extending the discovery deadline. The Court therefore does not weigh
4 this factor against Edu-USA.

5 Lastly, however, the proposed amendment would be futile. Edu-USA
6 attempts to assert the same fraud claims previously asserted in Edu-HK's TACC.
7 For the same reasons stated above, Edu-USA also fails to meet Rule 9(b)'s
8 requirement that claimants show falsity. Without such factual basis, the fraud
9 claims could not survive a motion to dismiss. Accordingly, the Court **DENIES**
10 Edu-USA leave to amend its complaint. ECF 113.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court **GRANTS** Defendants' motion to
13 dismiss Edu-HK's TACC. ECF 102. Edu-HK's TACC is **DISMISSED**
14 **WITHOUT PREJUDICE**. ECF 98. For the reasons stated, the Court also
15 **DENIES** Edu-USA's motion for leave to amend its complaint. ECF 113.

16 **IT IS SO ORDERED.**

17 Dated: March 10, 2015



Hon. Cynthia Bashant
United States District Judge