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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Ocean Garden Products Incorporated,

No. CV-18-00322-TUC-RM

10 Plaintiff,

**ORDER**

11 v.

12 Blessings Incorporated, et al.,

13 Defendants.  
14

15 Pending before the Court is Plaintiff Ocean Garden Products Incorporated's  
16 ("OG") Motion to Amend Its Complaint Against Amanda Lopez Vergara and Viviana  
17 Lopez. (Doc. 342.)<sup>1</sup> Defendants David Mayorquin, Viviana Lopez ("Lopez"), and  
18 Amanda Lopez Vergara ("Vergara") filed Responses opposing the Motion. (Docs. 358,  
19 359, 360.) OG filed a Reply. (Doc. 374.) For the following reasons, the Motion to  
20 Amend will be granted.

21 **I. Background**

22 OG initiated this litigation on July 2, 2018, when it filed a lawsuit against David  
23 Mayorquin and Blessings, Inc., alleging breach of contract and other claims ("the  
24 Contract Action"). (Doc. 1.) The Court issued a Scheduling Order on October 10, 2018,  
25 providing a deadline of December 12, 2018 for amending pleadings. (Doc. 27 at 2.) OG  
26 moved for leave to file a First Amended Complaint in the Contract Action on that  
27 deadline. (Doc. 63.) The Court granted leave to amend (Doc. 83), and OG filed its First

28 <sup>1</sup> All record citations refer to the page numbers generated by the Court's electronic filing system and, unless otherwise noted, the docket in CV 18-322.

1 Amended Complaint in the Contract Action on January 29, 2019 (Doc. 86).

2 On May 22, 2019, OG initiated a separate lawsuit in CV 19-284-TUC-RM,  
3 alleging claims under Arizona’s Uniform Fraudulent Transfer Act against numerous  
4 defendants, including Lopez and Vergara (“UFTA Action”). (Doc. 1 in CV-19-284.)  
5 The parties jointly moved to consolidate CV 18-322 and CV 19-284 (Doc. 144), and the  
6 Court granted the Joint Motion (Doc. 146). In its consolidation Order—which was based  
7 on a proposed order submitted by OG with the parties’ Joint Motion to Consolidate—the  
8 Court specified that, “[e]xcept for good cause shown or unless otherwise ordered by the  
9 Court,” the pleadings in the UFTA Action could not be amended “after the expiration of  
10 the deadline to amend as a matter of course under Fed. R. Civ. P. 15(a)(1).” (Doc. 146 at  
11 2; see also Doc. 144-2.) OG filed a First Amended Complaint in the UFTA action as a  
12 matter of course on July 8, 2019. (Doc. 154.) OG then filed a Second Amended  
13 Complaint (“SAC”) in the UFTA action, with leave of Court, on November 25, 2019.  
14 (Doc. 260; see also Doc. 239.)

15 OG now seeks leave to file a Third Amended Complaint (“TAC”) in the UFTA  
16 Action in order to join Vergara and Lopez for purposes of Arizona’s community property  
17 law. (Doc. 342.) The proposed TAC adds allegations that David and Abraham  
18 Mayorquin acted on behalf of their wives Vergara and Lopez, to benefit the marital  
19 communities. (Doc. 342-2 at 4; Doc. 342-3 at 4.) OG argues that the proposed  
20 amendment “will be less prejudicial and more efficient” than litigating community  
21 property defenses post-judgment. (Id. at 17.) Plaintiff further argues that the amendment  
22 should be permitted under Rules 15(a)(1) and 16(b)(4) of the Federal Rules of Civil  
23 Procedure, and it blames Vergara and Lopez’s delayed disclosure of community property  
24 defenses for its own delay in seeking amendment. (Id. at 11-17.)

25 Defendants argue that the allegations in OG’s proposed amendment could have  
26 been made in OG’s original Complaint, First Amended Complaint, or Second Amended  
27 Complaint, and that OG has failed to show good cause pursuant to Rule 16(b)(4) to  
28 modify the Scheduling Order. (Doc. 358 at 5-6; Doc. 359 at 2, 4-5; Doc. 360 at 2-3, 7-9.)

1 With respect to OG’s argument concerning the delayed disclosure of community property  
2 defenses, Defendants contend that it is not their responsibility “to ensure that Plaintiff . . .  
3 has a basic understanding of Arizona law.” (Doc. 358 at 5; see also Doc. 359 at 5 and  
4 Doc. 360 at 7-8.) Defendants also argue that they would be prejudiced by OG’s proposed  
5 amendment. (Doc. 359 at 3; Doc. 360 at 9.)

6 In Reply, OG argues that, regardless of whether it was diligent, “[c]ommon sense,  
7 case-law, and basic fairness militate” in favor of allowing its proposed amendment.  
8 (Doc. 374 at 2.) OG contends that Rule 16 should not function ““as an inflexible  
9 straightjacket,”” and that amendments should be allowed if they do ““not significantly  
10 prejudice either party.”” (Id. (quoting *Kendrick v. Cnty. of San Diego*, No. 15CV2615-  
11 GPC(RBB), 2017 WL 2692903, at \*3, 5 (S.D. Cal. June 22, 2017)); see also id. at 3-5.)  
12 OG further argues that it was diligent because its amendment is tied to Vergara and  
13 Lopez’s “failure to timely disclose their community property defenses,” and that  
14 Defendants have failed to meet their burden of establishing prejudice under Rule 15(a).  
15 (Id. at 5-10.)

## 16 **II. Legal Standard**

17 In cases in which a scheduling order’s deadline for amending pleadings has  
18 expired by the time a motion to amend is filed, the motion is properly examined first  
19 under Federal Rule of Civil Procedure 16(b)(4) as a motion to modify the scheduling  
20 order. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (citing *Johnson*  
21 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–09 (9th Cir. 1992)). Rule 16(b)(4)  
22 provides that a scheduling order “may be modified only for good cause and with the  
23 judge’s consent.” “This standard ‘primarily considers the diligence of the party seeking  
24 the amendment.’” *Coleman*, 232 F.3d at 1294 (quoting *Johnson*, 975 F.2d at 609); see  
25 also Fed. R. Civ. P. 16 advisory committee’s notes to 1983 amendment (a pretrial  
26 schedule may be modified “if it cannot reasonably be met despite the diligence of the  
27 party seeking” the modification). If the moving party “was not diligent, the inquiry  
28 should end.” *Johnson*, 975 F.2d at 609; see *Wong v. Regents of Univ. of Cal.*, 410 F.3d

1 1052, 1060 (9th Cir. 2005) (“Parties must understand that they will pay a price for failure  
2 to comply strictly with scheduling and other orders . . .”).

3 If the party seeking to amend shows good cause under Rule 16(b)(4), the Court  
4 must then analyze whether amendment would be proper under the liberal requirements of  
5 Rule 15(a). Johnson, 975 F.2d at 608 (citing Forstmann v. Culp, 114 F.R.D. 83, 85  
6 (M.D.N.C. 1987)). With the exception of amendments made as a matter of course under  
7 Rule 15(a)(1), “a party may amend its pleading only with the opposing party’s written  
8 consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The district court has discretion  
9 in determining whether to grant or deny leave to amend, Foman v. Davis, 371 U.S. 178,  
10 182 (1962), but leave should freely be given “when justice so requires,” Fed. R. Civ. P.  
11 15(a)(2). In determining whether to grant leave to amend under Rule 15(a)(2), the Court  
12 considers whether there has been ““undue delay, bad faith or dilatory motive on the part  
13 of the movant, repeated failure to cure deficiencies by amendments previously allowed,  
14 undue prejudice to the opposing party by virtue of allowance of the amendment, futility  
15 of amendment, etc.”” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th  
16 Cir. 2003) (per curiam) (quoting Foman, 371 U.S. at 182). “Delay alone does not  
17 provide sufficient grounds for denying leave to amend” under Rule 15(a)(2). Hurn v.  
18 Retirement Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal., 648 F.2d 1252,  
19 1254 (9th Cir. 1981).

### 20 **III. Discussion**

21 The Court first analyzes OG’s Motion to Amend under Rule 16(b)(4) because OG  
22 filed the Motion after the expiration of the Scheduling Order’s deadline for amending  
23 pleadings. In analyzing OG’s diligence in seeking amendment, the Court notes that the  
24 proposed amendment is not based on newly discovered facts; OG has known since the  
25 beginning of this litigation that David and Abraham Mayorquin are married to Vergara  
26 and Lopez. OG complains that Defendants did not signal their intent to assert a  
27 community property defense until December 24, 2019. (Doc. 342 at 2-3.) However, OG  
28 could have anticipated the community property issue and could have included its

1 proposed allegations concerning David and Abraham acting on behalf of their marital  
2 communities in its original Complaint or in prior amendments. OG's failure to include  
3 such allegations earlier in this litigation displays a lack of diligence.<sup>2</sup>

4 Despite OG's arguable lack of diligence, the Court nevertheless finds that good  
5 cause exists to modify the Scheduling Order under Rule 16(b)(4) based on an "overall  
6 evaluation of the rights of the parties, the ends of justice, and judicial economy." *United*  
7 *States v. Dang*, 488 F.3d 1135, 1143 (9th Cir. 2007) (internal quotation marks and  
8 alteration omitted). Vergara and Lopez are already defendants in this action, and the  
9 SAC already alleges that they benefitted from all fraudulent transfers orchestrated by  
10 their husbands David and Abraham Mayorquin. (Doc. 260 at ¶¶ 119-122.) OG's  
11 proposed TAC adds only two sentences joining Vergara and Lopez for purposes of  
12 Arizona's community property law; it adds no new factual allegations. The Court is  
13 extremely reluctant to take any action that could cause delay in these proceedings, as this  
14 litigation has already suffered from numerous delays and a litany of discovery disputes,  
15 and the scope of the litigation has expanded considerably since the filing of OG's original  
16 Complaint in the Contract Action. However, OG has sufficiently shown that allowing its  
17 proposed amendment is likely to further the interests of judicial efficiency by preventing  
18 the potential post-judgment litigation of community property defenses.

19 Furthermore, Defendants have not shown that allowing OG's proposed  
20 amendment would cause them to suffer prejudice. See *DCD Programs, Ltd. v. Leighton*,  
21 833 F.2d 183, 187 (9th Cir. 1987) ("The party opposing amendment bears the burden of  
22 showing prejudice."). Discovery in this case does not close until August 21, 2020 (Doc.  
23 382 at 2), and Defendants have not shown that the filing of OG's proposed TAC will  
24 cause any discovery delays. Defendants complain that they would need to file amended  
25 answers if OG were allowed to file its proposed TAC, but the filing of amended answers

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27 <sup>2</sup> The Court also notes that the timing of OG's Motion to Amend appears to be connected  
28 to its retention of local counsel who, presumably, is more familiar with Arizona's  
community property law. OG filed its Motion to Amend approximately two weeks after  
local counsel noticed its appearance in this litigation. (Doc. 337.) OG chose not to retain  
local counsel until expressly directed to do so by this Court.

1 would not be burdensome given that the TAC is identical to the SAC with the exception  
2 of the addition of two sentences. Defendants also complain that OG filed its Motion to  
3 Amend after Vergara and Lopez had filed summary judgment motions. However, the  
4 Court has denied Vergara and Lopez's summary judgment motions without prejudice as  
5 premature, with leave to re-file the motions after the close of discovery. (Doc. 414.)


6 The lack of undue prejudice to Defendants weighs in favor of granting leave to  
7 amend under Rule 15(a)(2). See *Eminence Capital*, 316 F.3d at 1052. The Court does  
8 not find that allowing OG's proposed amendment would be futile, nor does the Court find  
9 evidence of bad faith or dilatory motive on OG's part. See *id.* Because OG's proposed  
10 amendment is likely to further the interests of judicial efficiency, the Court does not find  
11 that consideration of undue delay weighs against allowing the amendment. See *id.* And  
12 while it is true that OG has file two prior versions of its UFTA Complaint, it has not  
13 previously amended its allegations against Vergara and Lopez or failed to cure  
14 deficiencies in those allegations. See *id.* The Court finds that leave to amend should be  
15 granted in the interests of justice under Rule 15(a)(2).

16 Accordingly,

17 **IT IS ORDERED** that Plaintiff's Motion to Amend (Doc. 342) is **granted**.  
18 Plaintiff shall file its Third Amended Complaint within **five (5) days** of the date this  
19 Order is filed.

20 Dated this 30th day of June, 2020.

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Honorable Rosemary Márquez  
United States District Judge