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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEN & JERRY'S FRANCHISING,
INC., et al.

No. 2:07-cv-02599 JAM KJM

ORDER GRANTING LEAVE TO AMEND
SECOND AFFIRMATIVE DEFENSE

Plaintiffs,

v.

MPA GROUP, INC. and MEHRDAD
PORGHAVAMI,

Defendants.

MEHRDAD PORGHAVAMI, et al.

Cross-Complainants,

v.

BEN & JERRY'S FRANCHISING,
INC., BEN & JERRY'S HOMEMADE,
INC., BEN & JERRY'S OF
CALIFORNIA, INC., and WONDER
ICE CREAM, LLC,

Cross-Defendants.

Ben & Jerry's Franchising, Inc. and Ben & Jerry's Homemade,
Inc. (collectively, "Ben & Jerry's") brought this action against
MPA Group, Inc. and Mehrdad Porghavami for breach of franchise
agreements. Subsequently, MPA Group, Inc. and Mehrdad

1 Porghavami (collectively, "Cross-Complainants") filed a "Cross-
2 Complaint"¹ against Ben & Jerry's, Ben & Jerry's of California,
3 Inc., and Wonder Ice Cream, LLC. Cross-Complainants amended
4 their Cross-Complaint several times. Ben & Jerry's, in
5 answering Cross-Complainants' Second Amended Cross-Complaint,
6 included fourteen affirmative defenses. Ben & Jerry's now seeks
7 leave to amend one of its affirmative defenses. Cross-
8 Complainants oppose the Motion. For the reasons stated below,
9 Ben & Jerry's Motion is GRANTED.²

12 BACKGROUND

13 Cross-Complainants entered into three separate franchise
14 agreements with Ben & Jerry's to open Scoop Shops in Roseville,
15 Concord, and Sacramento, California. Among other claims in
16 their Cross-Complaint, Cross-Complainants allege that Ben &
17 Jerry's provided "Underweight Tubs of Ice Cream, Frozen Yogurts
18 and Sorbets" to the Roseville and Sacramento Scoop Shops from
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22 ¹ Although designated a "Cross-Complaint," Porghavami and
23 MPA's pleading is actually a counterclaim. See Fed. R. Civ. P.
24 13. For the purposes of convenience only, it will be referred
25 to as a "Cross-Complaint" in this Order. However, the parties
26 are ordered to refer to this pleading as a counterclaim from
27 this point forward. Furthermore, a counterclaims is not
28 separate pleadings and should part of a responsive pleading.
See Fed. R. Civ. P. 7. For convenience, the Court will treat
the Cross-Complaint as an amendment to Cross-Complainants
Answer.

² 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 2004 until the closing of those Scoop Shops on November 1, 2006
2 and to the Concord Scoop Shop from 2004 through its closing on
3 August 30, 2008. Second Amended Cross-Complaint ¶¶ 2, 82, 102,
4 132, 149, 180, 196. Docket at 73. In its answer to the Second
5 Amended Cross-Complaint, Ben & Jerry's included as affirmative
6 defenses that Cross-Complainants' claims are or may be barred by
7 Cross-Complainants' own conduct and by laches, waiver, and
8 estoppel. Answer to Second Amended Cross-Complaint, Aff. Defs.
9 2, 7, Docket at 75.

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12 After conducting discovery, Ben & Jerry's learned that
13 Cross-Complainants had received checks for underfilled tubs for
14 the summer of 2005. Ben & Jerry's now seeks to amend its Second
15 Affirmative Defense to read:

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17 2. The claims in the Cross-Complaint are or may be barred
18 by Cross-Complainants' own conduct, in particular, his (and
19 actually MPA Group's) failure to pay Wonder for products
20 purchased *and his (and actually MPA Group's) acceptance of
the checks for underfilled tubs for the summer of 2005 (and
accord and satisfaction);*

21 Ben & Jerry's Proposed Answer to Second Amended Cmplt., Docket
22 at 136, Ex. 1 (proposed amendment in italics).

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OPINION

After a responsive pleading has been served, "a party may
amend its pleadings only with the opposing party's written
consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "Rule
15(a) is very liberal and leave to amend 'shall be freely given

1 when justice so requires.' But a district court need not grant
2 leave to amend where the amendment: (1) prejudices the opposing
3 party; (2) is sought in bad faith; (3) produces an undue delay
4 in litigation; or (4) is futile." Amerisource Bergen Corp. v.
5 Dialysist West, Inc., 465 F.3d 946, 951 (9th Cir. 2006);
6 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52
7 (9th Cir. 2003). "These factors, however, are not of equal
8 weight in that delay, by itself, is insufficient to justify
9 denial of leave to amend." DCD Programs, Ltd. v. Leighton, 833
10 F.2d 183, 186 (9th Cir. 1986). The other factors used to
11 determine the propriety of a motion for leave to amend could
12 each, independently, support a denial of leave to amend a
13 pleading. See Lockheed Martin Corp. v. Network Solutions, Inc.,
14 194 F.3d 980, 986 (9th Cir. 1999).

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18 Of these factors, "prejudice to the opposing party is the
19 most important factor." Jackson v. Bank of Hawaii, 902 F.2d
20 1385, 1387 (9th Cir. 1990). The decision to grant or deny a
21 request for leave to amend rests within the discretion of the
22 trial court. International Ass'n of Machinists & Aerospace
23 Workers v. Republic Airlines, 761 F.2d 1386, 1390 (9th Cir.
24 1985). "The party opposing the motion for leave to amend bears
25 the burden of demonstrating that a 'substantial reason exists to
26 deny leave to amend.'" State of Cal. ex rel. Mueller v.
27 Walgreen Corp., 175 F.R.D. 631, 637 (N.D. Cal. 1997).
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1 Cross-Complainants have not met their burden of
2 demonstrating that substantial reason exists for the Court to
3 deny leave to amend Ben & Jerry's affirmative defenses. Cross-
4 Complainants argue that because the check only compensated them
5 for the summer of 2005 and not the entire period during which
6 they allege they received underfilled tubs, the affirmative
7 defense is futile. However, the amendment is not futile because,
8 although it fails to provide a defense for the entire claim, it
9 provides a defense for a portion of the claim, the summer of
10 2005. Amendment of the affirmative defenses would not be
11 futile.
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14 Cross-Clamaints also argue that they will suffer prejudice
15 because they might need to reopen discovery. However, because
16 Cross-Claimants, being the recipients, had full knowledge of the
17 check since 2005, it is unlikely that they would be prejudiced
18 by allowing Ben & Jerry's to amend its affirmative defense. In
19 fact, Cross-Complainants conducted discovery related to
20 reimbursement of underfilled tubs. Mot. to Amend, Docket at 135,
21 Ex. B ("Interrogatory No. 12: Identify each and every instance
22 that refund was made to franchises as the result of Tubs
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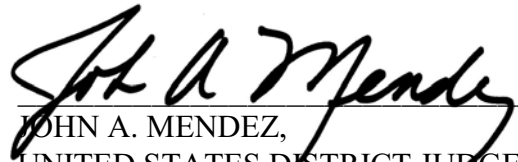
1 underweight..."). Therefore, Cross-Claimants have not shown
2 that they would be prejudiced by allowing Ben & Jerry's to amend
3 its affirmative defenses.
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5 ORDER

6 For the reasons stated above, Ben & Jerry's Motion to Amend
7 is GRANTED. The First Amended Reply to Second Amended Cross-
8 Complaint, Docket at 136 Ex. 1, is hereby deemed filed.
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11 IT IS SO ORDERED.

12 Dated: August 24, 2009

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15 JOHN A. MENDEZ,
16 UNITED STATES DISTRICT JUDGE
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