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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIXT GREENS,
Plaintiff,
v.
SPROUT CAFÉ,
Defendant.

No. C-08-5175 EMC

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE FIRST
AMENDED COMPLAINT**

(Docket No. 81)

Plaintiff Mixt Greens has moved for leave to file a first amended complaint. Mixt Greens seeks an amendment in order to (1) add as new defendants to the action Vinh Vi, Tu Ha Huynh, and Café Sprout, Inc. (dba Sprout Café) and (2) add allegations supporting an alter ego theory (such that Mr. Vi and Mr. Huynh could be held personally liable for any wrongdoing by Café Sprout, Inc.). Having considered the parties' briefs, the oral argument of counsel, and all other evidence of record, the Court hereby **GRANTS** the motion for leave to amend.

I. FACTUAL & PROCEDURAL BACKGROUND

Mixt Greens initiated this lawsuit in November 2008. *See* Docket No. 1 (complaint). In its original complaint, the only defendant named in the action was Sprout Café ("Sprout"). Mixt Greens described Sprout Café in its original complaint as an entity of unknown origin. *See* Compl. ¶ 5.

1 On April 2, 2010, this Court granted a motion to compel filed by Mixt Greens. As part of
2 this order, the Court required Sprout to produce its financial statements. *See* Docket No. 62 (order).
3 Most of the financial statements were produced in May and June 2010.

4 Mr. Vi was deposed by Mixt Greens on March 23 and May 10, 2010. Mr. Hyung was
5 deposed on May 20, 2010. *See* Mot. at 4; *see also* Cirillo Decl., Ex. 2 (Vi Depo.); Cirillo Decl., Ex.
6 3 (Huynh Depo.). Both of these depositions have yet to be completed.

7 On June 21, 2010, Mixt Greens filed the currently pending motion, essentially arguing that
8 the recently produced discovery described above gave rise to the need to file an amended complaint.

9 II. DISCUSSION

10 Federal Rule of Civil Procedure 15(a) provides that,

11 after the initial period for amendments as of right, pleadings may be
12 amended only by leave of court, which "leave shall be freely given
13 when justice so requires." "Four factors are commonly used to
14 determine the propriety of a motion for leave to amend. These are: bad
15 faith, undue delay, prejudice to the opposing party, and futility of
16 amendment."

15 *Ditto v. McCurdy*, 510 F.3d 1070, 1078-79 (9th Cir. 2007).

16 In the instant case, Sprout argues both undue delay and prejudice in opposing the motion for
17 leave to amend. The critical issue here is prejudice, *i.e.*, whether allowing the amendment would
18 prejudice either Sprout or the new defendants. This is because, even assuming undue delay on the
19 part of Mixt Greens, "[u]ndue delay by itself . . . is insufficient to justify denying a motion to
20 amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). There must also be, *e.g.*, a showing of
21 prejudice in order to justify a denial of a motion for leave to amend. *See id.* (noting that the Ninth
22 Circuit has "previously reversed the denial of a motion for leave to amend where the district court
23 did not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by
24 the moving party, or futility of the amendment").

25 Ninth Circuit case law indicates that prejudice may effectively be established by
26 demonstrating that a motion to amend was made after the cutoff date for such motions, or when
27 discovery had closed or was about to close. *See, e.g., Zivkovic v. Southern Cal. Edison Co.*, 302
28 F.3d 1080, 1087 (9th Cir. 2002) (affirming denial of plaintiff's motion for leave to amend where

1 proposed amendment would have added additional causes of action which would have required
2 further discovery and discovery was set to close five days after motion to amend was filed);
3 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (stating that
4 “[a] need to reopen discovery and therefore delay the proceedings supports a district court's finding
5 of prejudice from a delayed motion to amend the complaint”); *Solomon v. North Am. Life & Cas.*
6 *Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (affirming the denial of leave to amend where the
7 motion was made "on the eve of the discovery deadline" and “[a]llowing the motion would have
8 required re-opening discovery, thus delaying the proceedings”).

9 In the instant case, the fact discovery deadline was, at the time Mixt Greens filed the
10 currently pending motion, July 14, 2010. *See* Docket No. 70 (stipulation and order). Trial was
11 slated for October 18, 2010. *See* Docket No. 44 (order). Although such a schedule might suggest
12 that Mixt Greens’s proposed amendment would be prejudicial to Sprout and/or the new defendants,
13 it became clear at the hearing that any prejudice that might be suffered could easily be cured. That
14 is, the amendment, if allowed, would not require Sprout or the new defendants to engage in
15 substantial additional discovery because all of the information related to the principals and the
16 incorporation of Café Sprout, Inc. was within their possession, custody, or control. At best, Sprout
17 or the new defendants would need to propound limited contention interrogatories on Mixt Greens in
18 order to determine what its litigation position related to the new allegations would be. Nor would
19 the amendment, if allowed, require Sprout or the new defendants to respond to substantial new
20 discovery by Mixt Greens. In fact, at the hearing, Mixt Greens represented that it only needed to
21 complete the depositions of the principals in order to support the claims and allegations of the
22 proposed amendment. Accordingly, a brief extension of discovery deadlines could cure any
23 prejudice were the amendment allowed.

24 Both in its papers and at the hearing, Sprout argued that, even with an extension of discovery
25 deadlines, the amendment would be prejudicial to at least Mr. Vi and Mr. Huynh because they may
26 need to find new counsel to prepare for the case because there may be a conflict for Sprout’s counsel
27 to represent both Sprout and the individuals. *See* Opp’n at 4. But this argument is largely
28 speculative at this point. The Court notes that Sprout and the principals have been aware of the

1 proposed amendment since at least June 21, 2010, but in the more than three weeks that have passed
2 there is nothing concrete to establish that, *e.g.*, the insurer would not permit counsel for Sprout to
3 also represent the principals. Moreover, it should have been evident that there was a risk of personal
4 liability incurred for alleged infringing activities that occurred while the restaurant was open and
5 operating prior to the incorporation of Café Sprout, Inc. Yet no potential conflict of evidence has
6 given rise to any cited problems in defense of this action to date.

7 Based on the lack of prejudice, the Court shall permit the proposed amendment requested by
8 Mixt Greens.

9 **III. CONCLUSION**

10 For the foregoing reasons, Mixt Greens's motion for leave to amend is granted. Mixt Greens
11 shall file its amended complaint within a week of the date of this order.

12 Consistent with the discussion at the hearing, the parties shall meet and confer and submit a
13 proposed case management schedule, including, *e.g.*, new discovery deadlines, with a new trial start
14 date of December 13, 2010. The Court is continuing the trial date in part to allow the parties to
15 explore settlement.

16 This order disposes of Docket No. 81

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18 IT IS SO ORDERED.

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20 Dated: July 15, 2010

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23 EDWARD M. CHEN
24 United States Magistrate Judge
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