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 BE IN, INC., a New York corporation

11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

15 **BE IN, INC., a New York corporation,**

16 **Plaintiff,**

17 **v.**

18 **GOOGLE, INC., a California corporation,**
 19 **RICHARD ROBINSON, and DOES 1 through**
 20 **3, inclusive,**

21 **Defendants.**

CASE NO. 5:12-CV-03373-LHK

**PLAINTIFF'S NOTICE OF MOTION AND
 MOTION FOR LEAVE TO FILE SECOND
 AMENDED COMPLAINT**

Date: September 26, 2013
 Time: 1:30 p.m.
 Dept: Courtroom 8, Fourth Floor
 Judge: Hon. Lucy H. Koh

Date Comp. Filed: June 28, 2012

Trial Date: None set.

1 **NOTICE OF MOTION**

2 Please Take Notice that on September 26, 2013 at 1:30 p.m. or as soon thereafter as the matter
3 may be heard before the Honorable Lucy H. Koh, 280 South 1st St., San Jose, California, Plaintiff Be
4 In, Inc. (“Be In”) will and hereby does move this Court pursuant to Rule 15(a) of the Federal Rules of
5 Civil Procedure for an order granting leave to file its Second Amended Complaint.

6 **RELIEF REQUESTED**

7 Be In seeks an order granting leave to file a Second Amended Complaint to withdraw claims,
8 address new claims, and add and remove defendants—before the commencement of discovery in this
9 case. The Ninth Circuit repeatedly has held that leave to amend under Rule 15(a) should be granted
10 freely, particular where (as here) there would be no resulting prejudice to Defendants. Be In
11 respectfully requests that the Court grant this motion for several reasons: (1) new counsel has only
12 recently joined the case; (2) Defendants would not be prejudiced by the filing; (3) the new filing
13 withdraws certain claims, one of which was subject to motion practice, thereby ensuring more
14 efficient progression of the case; and (4) the amendment would not be futile.

15 **BACKGROUND**

16 Be In filed its original complaint in this action on June 28, 2012 against Google, Inc.
17 (“Google”) and Richard Robinson—whom it currently understands to be a direct employee of Google
18 UK—as well as three Doe defendants. (*See* Compl. (Dkt. No. 1).) The complaint alleged that
19 numerous Google employees encountered Be In’s social entertainment consumption platform,
20 CamUp, at the 2011 South by Southwest Interactive Conference, and that, approximately two months
21 later, Mr. Robinson conducted a meeting with Be In executives regarding the platform and Be In’s
22 confidential business and marketing strategies. (*Id.* at ¶¶ 2, 27–29.) Less than two months later,
23 Google launched an identical platform, Hangouts—the “killer feature” in the new Google+ social
24 network—and began implementing the business and marketing strategies that Be In disclosed
25 confidentially in its meeting with Mr. Robinson. (*Id.* at ¶¶ 33–37.) The complaint alleged theft of
26 trade secrets with respect to business and marketing strategies that were disclosed to Mr. Robinson,
27 civil conspiracy regarding the same, and infringement of copyright and trade dress with respect to the
28 CamUp platform. (*Id.* at ¶¶ 38–58.) Be in sought preliminary and permanent injunctive relief, an

1 accounting, compensatory damages, fees, costs, and interest. (*Id.* at pp. 11–12.)

2 On August 16, 2012, Be In filed its First Amended Complaint, adding additional context to its
3 allegations, but asserting the same causes of action against the same Defendants, and seeking the
4 same relief. (*See* First Am. Compl. (Dkt. No. 12).)

5 On March 7, 2013, this Court issued an order granting withdrawal of prior counsel and
6 substitution of the undersigned as counsel for Plaintiff Be In. (*See* Order (Dkt. No. 33).) Then on
7 March 26, 2013, this Court granted Plaintiff Be In’s unopposed administrative motion continuing the
8 case management conference scheduled for April 18, 2013, to June 5, 2013, based on Be In’s stated
9 intent to seek leave to file a Second Amended Complaint by April 30, 2013. The Court ordered
10 Plaintiff to file its Motion for Leave to File a Second Amended Complaint by April 30, 2013, denying
11 as moot Defendants’ Motion to Dismiss Plaintiff’s Third and Fourth Causes of Action, and vacating
12 the April 18, 2013 hearing on Defendants’ Motion. (*See* Order (Dkt. No. 35).)

13 Pursuant to that Order, Plaintiff Be In now brings this Motion for Leave to File its Second
14 Amended Complaint. The Proposed Second Amended Complaint (“Proposed SAC”), which is
15 attached as Exhibit A to the concurrently filed Declaration of Katie Townsend (“Townsend
16 Declaration” or “Townsend Decl.”), (i) removes two causes of action from the First Amended
17 Complaint—civil conspiracy and trade dress infringement, the latter of which was the subject of
18 Defendants’ former Motion to Dismiss; (ii) and removes Richard Robinson as a defendant. (*See*
19 Townsend Decl., Exhibit A.) In addition, the Proposed SAC adds two causes of action—breach of
20 implied contract and breach of contract—and adds two new defendants: YouTube, LLC, and Google
21 UK Ltd. (*Id.* at ¶¶ 93–105.) The Proposed SAC also provides additional details and allegations
22 relating to the misappropriation of trade secrets and copyright infringement claims, in part to address
23 Defendants’ assertion that the First Amended Complaint lacked adequate specificity. (*Id.* at ¶¶ 18–
24 32, 62–69, 86–92.)

25 One week prior to filing, Be In provided counsel for Defendants with a copy of the Proposed
26 SAC, in an effort to seek written consent to file, pursuant to Rule 15(a) of the Federal Rules of Civil
27 Procedure. (Townsend Decl., ¶ 4.) Plaintiff’s counsel advised that Be In was prepared to remove
28 Defendant Robinson (and refrain from including Mr. Robinson’s direct employer, Google UK) as

1 defendants in the SAC, so long as Defendants confirmed that they would search for and produce
2 discovery from Google UK and Mr. Robinson as if they were parties in the case. Defendants
3 responded that Google Inc. and YouTube would stipulate to the amendment without prejudice to their
4 rights or defenses, if Plaintiff agreed to an extension of time for Defendants to respond to the new
5 complaint. (Townsend Decl., Exhibit B.) However, Defendants were also unwilling to agree to
6 search for and produce materials from Google UK, stating: “Google UK will not enter any agreement
7 with respect to the proposed second amended complaint or discovery in this action.” (*Id.*)

8 Because Defendants would not confirm Google’s intent to collect or produce relevant
9 documents in the possession of its subsidiary, Google UK Ltd., Plaintiff Be In revised the draft
10 Second Amended Complaint to add Google UK Ltd. as a defendant and forwarded a revised draft to
11 Defendants. (*Id.*) Earlier today, Defendants’ counsel advised that they were prepared to stipulate to
12 filing of the Proposed Second Amended Complaint only on the condition that Plaintiff agree to an
13 extension of time for Defendants to respond, “counting from the date when service is effectuated
14 upon all Defendants.” (*Id.*) At the same time, however, counsel for the Defendants refused to accept
15 service on behalf of the new Defendants—each a subsidiary of Defendant Google, Inc. (*Id.*) To
16 avoid unnecessary delay in the progress of this case, Plaintiff Be In seeks leave of this Court to file its
17 Proposed SAC.

18 LEGAL STANDARD

19 Rule 15(a) of the Federal Rules of Civil Procedure directs that leave to amend “shall be freely
20 given when justice so requires.” This policy of favoring amendments to pleadings “is to be applied
21 with extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.
22 1990). Courts commonly consider four factors when determining whether to grant leave to amend:
23 (1) bad faith on the part of the movant; (2) undue delay; (3) prejudice to the opposing party; and (4)
24 futility of the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed Martin*
25 *Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). “[I]t is the consideration of
26 prejudice to the opposing party that carries the greatest weight.” *Eminence Capital, LLC v. Aspeon,*
27 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *DCD Programs, Ltd v. Leighton*, 833 F.2d 183, 185
28 (9th Cir. 1987)). “Absent prejudice, or a strong showing of any of the remaining *Foman* factors,

1 there exists a presumption under Rule 15(a) in favor of granting leave to amend.” *Id.* (citation
2 omitted).

3 ARGUMENT

4 The undersigned was substituted as counsel for Plaintiff Be In less than two months ago,
5 promptly assessed the most appropriate claims for the vindication of Plaintiff’s rights, and timely
6 brings this Motion in good faith for leave to file the Proposed SAC.

7 Defendants will suffer no prejudice if this Court grants leave to file the Proposed SAC. The
8 new and amended causes of action are based on the same set of underlying events as those in the
9 original and First Amended Complaint, and Defendants have therefore been on notice of the relevant
10 events since at least the initiation of this suit. Moreover, no discovery has taken place, and there has
11 yet been no case management conference. As such, Defendants will have every opportunity to
12 investigate and defend against the amended and new causes of action.

13 Moreover, the changes in the Proposed SAC will contribute to the efficient progress of the
14 case and address issues raised in Defendants’ earlier motion to dismiss. The new filing removes two
15 causes of action, trade dress infringement and civil conspiracy, and the Doe defendants. The trade
16 dress infringement claim was the subject of Defendants’ Motion to Dismiss, and its removal thus will
17 avoid unnecessary delay and the necessity of a hearing or ruling from this Court. The Proposed SAC
18 also adds significant detail to Be In’s copyright claim, the other cause of action challenged in
19 Defendants’ Motion to Dismiss, thus reducing the likelihood of motion practice.

20 In addition, the Proposed SAC adds two causes of action—breach of implied contract and
21 breach of the CamUp Terms of Service. The new causes of action are tailored to the parties’ conduct
22 and relationship, and raise claims that are best addressed now, before the imminent commencement
23 of discovery.

24 Finally, the Proposed SAC adds two new defendants—YouTube, LLC, and Google UK Ltd—
25 who (in addition to parent company Google, Inc.) are key players in the misappropriation of Be In’s
26 trade secrets, copyright infringement and breach of contract at the heart of this case. Google UK
27 Ltd.’s employee, Richard Robinson, was the initial recipient of Be In’s confidential business and
28 marketing strategies, and YouTube, LLC directly implemented these confidential strategies after

1 receiving proprietary information about CamUp from Google UK Ltd. and Mr. Robinson. Both
2 played a critical role in the infringement to and harm suffered by Be In.

3 Lastly, the amendment would not be futile. Regarding its trade secrets claim, Be In alleges in
4 detail that Defendants improperly used its confidential business and marketing strategies (provided
5 under conditions of secrecy), integrating them into YouTube and many other Google products, to Be
6 In's detriment. (*See* Townsend Decl., Exhibit A at ¶¶ 80–85.) Regarding its copyright claim, Be In
7 sufficiently alleges that Defendants had access to CamUp, its original social entertainment
8 consumption media platform, and that Defendants engaged in the unauthorized copying and
9 exploitation of numerous original elements of the CamUp platform. (*See id.* at ¶¶ 86–92.)
10 Regarding its breach of implied in fact contract claim, Be In sufficiently alleges that it disclosed its
11 business and marketing strategies to Defendants on the express condition that, if used, Defendants
12 would license CamUp from Be In, and that Defendants accepted that disclosure under circumstances
13 that made them aware of those conditions. In connection with that claim, Be In also sufficiently
14 alleges that Defendants' continuing conduct is a breach of that understanding. (*See id.* at ¶¶ 93–98.)
15 Regarding its breach of contract claim, Be In sufficiently alleges that (i) the Terms of Service on the
16 CamUp website—which Defendants accessed repeatedly after meeting with Be In executives—
17 provide that no visitor to the site may copy any element of the site for commercial purposes without
18 authorization, and that (ii) Defendants did in fact access the site for such a purpose and without
19 authorization, to Be In's detriment. (*See id.* at ¶¶ 99–105.)
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