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UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

SCOTT MILLER, an individual, on behalf of
himself, the general public and those similarly
situated,

Plaintiff,

v.

GHIRARDELLI CHOCOLATE COMPANY,
and DOES 1 THROUGH 50,

Defendants.

No. C 12-04936 LB

**ORDER GRANTING STEVE
LEYTON'S MOTION TO
INTERVENE AND DENYING HIS
MOTION TO FILE AN AMENDED
COMPLAINT ON THE ALL-
NATURAL CLAIMS**

[ECF No. 59-1]

In this putative class action, Plaintiff Scott Miller claims that Defendant Ghirardelli Chocolate Company violated consumer protection laws and state and federal labeling regulations by labeling its “Ghirardelli® Chocolate Premium Baking Chips – Classic White” as containing white chocolate when they do not. On October 11, 2013, Steve Leyton, a third-party who is represented by the same attorneys as Miller, filed a motion to intervene and to file an amended complaint to add new claims that Ghirardelli falsely labeled certain products “all natural.” Motion, ECF No. 59-1.¹ Miller joined Leyton’s motion. *Id.* at 5. Leyton argues that he meets the criteria to intervene as a matter of right and that if he does not, the court should permit him to intervene. *Id.* at 6. The court **DENIES** the

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the document.

1 motion to intervene as a matter of right, **GRANTS** the motion to intervene permissively, and
2 **DENIES** the motion to add the new all-natural claims.

3 **STATEMENT**

4 **I. PROCEDURAL HISTORY**

5 On August 17, 2012, Miller filed suit in San Francisco County Superior Court against
6 Ghirardelli. *See* Complaint, ECF No. 1 at 11. In the original complaint, Miller alleged that
7 Ghirardelli falsely labeled five of its products as “white” or “white chocolate flavored” when they
8 did not contain any white chocolate, and that Ghirardelli thus was liable for violating state consumer
9 protection and tort laws. *Id.* Ghirardelli removed the matter to federal court on September 21, 2012,
10 and it moved to dismiss several weeks later. *See* Notice of Removal, ECF No. 1 at 1; Motion to
11 Dismiss, ECF No. 7. The undersigned granted Ghirardelli’s motion on the ground that Miller lacked
12 standing to sue regarding the four products that he never purchased, and it denied the motion in all
13 other respects. *See* Order, ECF No. 20.

14 On January 11, 2013, Miller filed a First Amended Complaint (“FAC”) that alleged similar
15 claims, including that Ghirardelli failed to comply with state and federal labeling regulations and
16 violated the “unlawful prong” of California’s unfair competition law by using the words “Ghirardelli
17 Chocolate” on the logo of five products that did not contain chocolate or white chocolate. FAC,
18 ECF No. 24. On April 5, 2013, following Ghirardelli’s motion to dismiss, the undersigned again
19 held that Miller lacked standing for the products he did not purchase. *See* Order, ECF No. 37.
20 Miller’s remaining claims are based on labeling violations related to the one product that he did
21 purchase – Ghirardelli Chocolate Premium Baking Chips – Classic White (“white baking chips”).

22 While the motion to dismiss was pending, the parties entered into a stipulated protective order.
23 ECF No. 35. The protective order allows either party to designate material produced in the case as
24 confidential or highly confidential (collectively defined as, “Protected Material”). *See id.* ¶¶ 2.2,
25 2.3, 2.15. A “basic principle” of the protective order is that the parties may use Protected Material
26 “in connection with this case only for prosecuting, defending, or attempting to settle this litigation.”
27 *Id.* ¶ 7.1. The scope of protection includes:

- 28 (1) any information copied or extracted from Protected Material; (2) all copies, excerpts,

1 summaries, or compilations of Protected Material; and (3) any testimony, conversations, or
2 presentations by Parties or their Counsel that might reveal Protected Material.

3 *Id.* ¶ 3.

4 However, the protections conferred by this Stipulation and Order do not cover the following
5 information: (a) any information that is in the public domain at the time of disclosure to a
6 Receiving Party or becomes part of the public domain after its disclosure to a Receiving
7 Party as a result of publication not involving a violation of this Order, including becoming
8 part of the public record through trial or otherwise; and (b) any information known to the
9 Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure
10 from a source who obtained the information lawfully and under no obligation of
11 confidentiality to the Designating Party. Any use of Protected Material at trial shall be
12 governed by a separate agreement or order.

9 *Id.* ¶ 3.

10 Ghirardelli answered the FAC on April 19, 2013, and the parties began discovery. *See* Answer,
11 ECF No. 38; 5/3/2013 Joint CMC Statement, ECF No. 39 at 10-12. In their May 3, 2013 Joint Case
12 Management Conference Statement, Miller stated that he did “not anticipate further amendments to
13 the pleading. Plaintiff may, however, seek leave to add or intervene additional plaintiffs.” ECF No.
14 39 at 10. At the initial case management conference on May 10, 2013, the court set a pretrial
15 schedule based on the dates the parties requested. *Compare id.* at 2, with CMC Order, ECF No. 42
16 at 2. The pretrial schedule set June 10, 2013 as the last day to seek leave to add new parties or
17 amend the pleadings and December 11, 2013 as the last day for Miller to file his class certification
18 motion.

19 Ghirardelli deposed Miller on May 29, 2013. *See* Motion at 9 n.3. At end of the deposition,
20 with more than seven hours on the record, Ghirardelli’s counsel asked Miller, “Do you remember
21 being influenced in any way in your purchase decision by the words All Natural ingredients on June
22 24th, 2012?” *See* Safier Decl. Ex. B. Miller answered, “No, I don’t recall.” *Id.*²

23 Before Leyton’s purchase, and without knowing of it, Miller’s counsel had been investigating
24 whether the products were “natural.” *See* Safier Decl. ¶ 3. He engaged in discovery-related meet-
25 and-confers directed at the ingredients and their sources, but Ghirardelli said that there was no need

26
27 ² Miller later corrected the transcript to change his answer to “Yes, but I don’t specifically
28 recall.” *See* Safier Decl. Ex. C. Miller’s counsel currently does not propose Miller as a
representative on the “all natural” claims. Motion at 9.

1 to provide documents because all ingredients are listed on the packages. Safier Decl., ¶ 4.

2 On June 21, 2013, 11 days after the cut-off date to amend the pleadings, Ghirardelli produced a
3 document with an email chain that showed changes in packaging in response to this lawsuit,
4 including removing references to “chocolate”³ and an email from Ghirardelli’s CEO asking staff to
5 remove the words “All Natural.” Motion at 9; *see* Safier Decl. ¶ 6, Ex. D. On July 12, 2013,
6 Ghirardelli produced a copy of a May 14, 2013 e-mail that Leyton sent Ghirardelli, saying that he
7 was dissatisfied with the white baking chips he purchased. *See* Safier Decl. ¶ 9, Ex. A.

8 On July 20, 2013, less than a month after the cut-off to amend the pleadings, Miller’s counsel
9 sent Ghirardelli another CLRA letter on behalf of Miller and all similarly-situated persons, alleging
10 that the “all natural” claim was improper. Motion at 9; Safier Decl. ¶ 8 & Ex. E.⁴ On August 9,
11 2013, Ghirardelli responded to the CLRA letter and said that it was willing to discuss the new claims
12 in the context of mediation. *See* Safier Decl. ¶ 10, Ex. F.

13 On August 12, 2013, Miller’s counsel contacted Leyton “to investigate his experience and
14 inform him of the status of the litigation.” Safier Decl. ¶ 11. Leyton expressed a desire to join the
15 litigation. *Id.* Because of the upcoming September mediation and Ghirardelli’s August 9 letter,
16 Plaintiff’s counsel decided to delay filing the motion to intervene until after the mediation. *Id.* ¶ 11.

17 In August, Miller’s counsel deposed two Ghirardelli witnesses: Vicki Wong (who was the
18 30(b)(6) witness designee on the topic of “Defendant’s manufacturing of Classic White baking
19 chips, including the ingredients and recipes used”) and Steve Genzoli (Ms. Wong’s supervisor and
20 the vice-president of quality assurance and research development). *See* Safier Decl. ¶¶ 12-14, Exs.
21 G, I. Their testimony, which Ghirardelli designated as “highly confidential - attorneys’ eyes only”
22 provided additional detail about the source and provenance of the products’ ingredients that are
23 relevant to Leyton’s proposed “all natural” claims. *See* Safier Decl. ¶¶ 12-15, Ex. G ¶¶ 276-77;

24
25 ³ Ghirardelli’s counsel acknowledged this during one of the hearings in this case.

26 ⁴ In their motion, Miller and Leyton’s counsel state that when they sent the CLRA letter,
27 “Plaintiff still did not have complete information about the ingredients or their sources,” and “Miller
28 is likely not an appropriate representative for an ‘all natural’ claim,” in part because of his
deposition testimony. Motion at 9.

1 Gutride Decl. Ex. I at 20.

2 On September 4, 2013, Miller’s counsel shared its mediation statement with Ghirardelli. Safier
3 Decl. ¶ 16. In it, counsel told Ghirardelli “that one or more class members were prepared to join as
4 named plaintiffs regarding both the existing allegations and additional ‘all natural’ allegations.” *Id.*

5 At the September 11 mediation, the parties were unable to resolve either Mr. Miller’s claim or
6 the proposed “all natural” claims. *Id.* ¶ 17. Leyton formally retained Miller’s counsel after the
7 mediation. Safier Decl. ¶ 18.

8 On October 1, 2013, Miller and Leyton’s counsel gave Ghirardelli a copy of his Proposed
9 Consolidated Amended Complaint (“PCAC”) and asked them to stipulate to add Leyton and his all
10 natural claims into the lawsuit, either by filing an amended complaint or permitting Leyton to
11 intervene. Safier Decl. ¶ 19; *see* PCAC, ECF No. 59-2. Ghirardelli would not agree. Safier Decl.
12 ¶ 19. Then on October 9, Miller and Leyton’s counsel sent Ghirardelli another CLRA letter
13 regarding Leyton’s claims. *Id.* ¶ 20.

14 **II. THE NEW ALLEGATIONS IN LEYTON’S PROPOSED COMPLAINT⁵**

15 In the PCAC, Leyton and Miller allege that Ghirardelli markets and sells numerous products as
16 “All Natural,” “100% All Natural,” and containing “All Natural Ingredients” even though they are
17 not natural. *See* PCAC ¶¶ 14, 42-48. The PCAC specifically alleges the ingredients that Leyton
18 contends are unnatural and the products that contain those ingredients. *Id.*

19 Steve Leyton is a resident of San Diego, California. *See id.* ¶ 1. During the proposed class
20 period, including in approximately April 2013, Leyton purchased several different Ghirardelli
21 products. *Id.* ¶ 59. Ghirardelli advertised and marketed all of these products as “All Natural.” *Id.*
22 Leyton reviewed the front packaging of these products before he purchased them, including the
23 words “All Natural.” *Id.* He did not see anything stating that the products were not natural, and
24

25
26 ⁵ The following factual allegations are taken from Leyton’s Proposed Consolidated
27 Amended Complaint, ECF No. 59-2. The “white chocolate” allegations in the PCAC are largely
28 identical to those in the operative complaint. The court’s previous orders detailed the “white
chocolate” allegations, so this order restates allegations relevant only to Leyton’s new “all natural”
claims. *See, e.g.*, ECF No. 37.

1 relied on Ghirardelli’s omissions and the “all natural” claim on the packaging. *Id.*

2 In May 2013, he visited a grocery store in San Diego and perused the baking chips and chocolate
3 products. *Id.* ¶ 56. He read the front of a package of the white baking chips, including the words
4 “All Natural.” *Id.* ¶ 56. He believed the white baking chips contained natural ingredients and would
5 be white chocolate and decided to purchase them. *Id.* He purchased the white baking chips for
6 approximately \$4.29. *Id.*

7 On May 19, 2013, Leyton tried to melt some of the white baking chips, but they did not melt
8 properly and gave off a bad odor. *Id.* ¶ 57. He tried again with the same results. Then he read the
9 package and discovered that the white baking chips were “not a ‘premium,’ ‘natural,’ or ‘chocolate’
10 product at all.” *Id.*

11 Leyton complained to Ghirardelli the next day. *Id.* ¶ 58. He “informed Ghirardelli that he had
12 been misle[]d by the company’s branding, and did not believe defendant should market the chips as
13 white chocolate or as natural.” *Id.* Ghirardelli responded by mailing Leyton a coupon, which he
14 threw away. *Id.* ¶ 58. If Ghirardelli had not misrepresented (by omission and commission) the true
15 nature of the white chocolate chips and the other products that Leyton purchased, he would not have
16 purchased them or would have paid less for them. *Id.* ¶ 61.

17 In the PCAC, Leyton seeks to join Miller as a class representative for a “White Chips Class”
18 comprised of “all persons who, between August 17, 2008 and the present, purchased in the United
19 States, Ghirardelli® Chocolate Premium Baking Chips – Classic White.” *Id.* ¶ 62. In addition,
20 Leyton (but not Miller) seeks to represent an “All Natural Class,” defined as “[a]ll persons who,
21 between August 17, 2008 and the present, purchased, in the United States, any Ghirardelli products
22 that bore the words ‘All Natural’ on the primary display panel.” *Id.*

23 Leyton seeks to bring the same claims on behalf of the proposed “all natural class” as Miller is
24 already bringing on behalf of the “white chips class.” *See id.* ¶¶ 71-117. These are claims for: (1)
25 violation of the Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*; (2) violation
26 of the False Advertising Law, California Business and Professions Code § 17500, *et seq.*; (3) fraud,
27 deceit, and/or misrepresentation; and (4) “unfair, unlawful, and deceptive” trade practices in
28 violation of California Business and Professions Code § 17200, *et seq.* *Id.*

1 ANALYSIS

2 Leyton, who bought a bag of the white chips and thus is a class member, moves to intervene as
3 an additional class representative to “address the adequacy and typicality challenges that Ghirardelli
4 has raised with respect to Mr. Miller.” Motion at 2. These include Ghirardelli’s arguments that
5 California law does not apply to Miller because he purchased the white baking chips in Florida. *See*
6 Motion at 6. Ghirardelli has argued that Miller is atypical because (1) he purchased the chips to
7 blend into his coffee and not for baking, (2) he did not complain directly to Ghirardelli and instead
8 hired lawyers to do so, and (3) his focus was on cocoa butter and not other ingredients. *Id.* Leyton,
9 by contrast, bought the chips for baking and other products (all in reliance on the claim that they
10 were all natural), is a California resident, and complained directly to Ghirardelli. *Id.*

11 The issue is whether under these circumstances, Leyton may intervene under Rule 24 (either as a
12 matter of right or permissively) and also amend the complaint to add the “all natural” claims.⁶

13 **I. INTERVENTION**

14 The first issue is whether Leyton may intervene, either as of right or permissively, with regard to
15 the white-chip claims. (The court considers the appropriateness of adding the “all natural” claims in
16 a stand-alone section.)

17 _____
18 ⁶ Courts in this district also apply Federal Rule of Civil Procedure 16(b) when intervention
19 comes after the deadline to add new parties or claims and requires the court to modify its scheduling
20 order. *See Harris v. Vector Marketing Corp.*, No. C-08-5198 EMC, 2010 WL 3743532, at *1-2
21 (N.D. Cal. Sept. 17, 2010) (applying Rule 16(b) to motion to intervene in putative class action and
22 denying motion, in part, for failure to demonstrate good cause); *Briggs v. United States*, No. C 07-
23 05760 WHA, 2009 WL 1560005 (N.D. Cal. June 1, 2009) (same). “Rule 16(b)’s ‘good cause’
24 standard primarily considers the diligence of the party seeking the amendment.” *Johnson v.*
25 *Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992); *see also Noyes v. Kelly Servs.*, 488
26 F.3d 1163, 1174 n.6 (9th Cir. 2007) (same). Unlike timeliness under Rule 24(a) (discussed below),
27 the focus of the good cause inquiry “is upon the moving party’s reasons for seeking modification”
28 and prejudice to the opposing party is less important. *See Johnson*, 975 F.2d at 609. As discussed
below in the section on timeliness, the court’s view is that the delay is not significant. It was close
to the cut-off time for aiding parties and claims, discovery was modest (limited to documents and
two Ghirardelli witnesses to keep costs down before mediation), and the parties agreed to include
Leyton’s claims – including the all natural claims – in the mediation. And given discovery issues,
the schedule (including the class certification deadline) will need to be moved anyway, regardless of
Leyton’s participation in the litigation. The court finds good cause.

1 **A. Intervention As of Right**

2 Under Federal Rule of Civil Procedure 24(a), a non-party has the right to intervene in any action
3 if either a federal statute gives the non-party an unconditional right to intervene, Rule 24(a)(1), or
4 the non-party:

5 claims an interest relating to the property or transaction that is the subject of the action, and
6 is so situated that disposing of the action may as a practical matter impair or impede the
7 movant’s ability to protect its interest, unless existing parties adequately represent that
8 interest.

8 Fed. R. Civ. P. 24(a)(2).

9 In *Wilderness Society v. United States Forest Service*, the Ninth Circuit provided a four-part test
10 for analyzing motions to intervene under Rule 24(a)(2): (1) The motion must be timely; (2) the
11 applicant must claim a “significantly protectable” interest relating to the property or transaction
12 which is the subject of the action; (3) the applicant must be so situated that the disposition of the
13 action may as a practical matter impair or impeded its ability to protect that interest; and (4) the
14 applicant’s interest must be inadequately represented by the parties to the action. 630 F.3d 1173,
15 1177 (9th Cir. 2011) (en banc) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).
16 “Failure to satisfy any one of the requirements is fatal to the application, and [the court] need not
17 reach the remaining elements if one of the elements is not satisfied.” *Perry v. Proposition 8 Official*
18 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). The Ninth Circuit directs district courts to follow
19 “practical and equitable considerations” and to construe the Rule “broadly in favor of proposed
20 intervenors.” *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (internal
21 quotation marks omitted); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th
22 Cir. 2001). A district court must “take all well-pleaded, nonconclusory allegations in the motion . . .
23 as true absent sham, frivolity or other objections.” *Berg*, 268 F.3d at 820.

24 Ghirardelli opposes the motion to intervene on two grounds: (1) Leyton’s motion is not timely,
25 and (2) Miller adequately represents Leyton’s interests.

26 ***1. Whether Leyton’s Motion to Intervene is Timely***

27 Leyton may intervene as or right only if his motion is timely. “Timeliness is a ‘threshold
28 requirement’ for intervention as of right.” *United States v. California*, No. 11-57098, 2013 WL

1 4367595, at *1 (9th Cir. Aug. 16, 2013) (quoting *League of United Latin Am. Citizens v. Wilson*, 131
2 F.3d 1297, 1302 (9th Cir. 1997) (“LULAC”)). If a motion to intervene is untimely, the court need
3 not consider other Rule 24(a) elements. *LULAC*, 131 F.3d at 1302. “Timeliness is a flexible
4 concept; its determination is left to the district court’s discretion.” *U.S. v. Alisal Water Corp.*, 370
5 F.3d 915, 921 (9th Cir. 2004) (citing *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981)).
6 Still, the court must consider whether a motion to intervene is timely based on all relevant
7 circumstances, not just the length of time that the case has been pending. *See United States v. State*
8 *of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (“Mere lapse of time alone is not determinative.”).

9 To determine whether an intervention motion under Rule 24(a)(2) is timely, the court must
10 consider the following three factors: “1) the stage of the proceeding at which an applicant seeks to
11 intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay.” *California*
12 *Dept. of Toxic Substances Control et al. v. Commercial Realty Projects et al.*, 309 F.3d 1113, 1119
13 (9th Cir. 2002). In considering whether the stage of the proceedings supports intervention, courts
14 consider the party’s interest in a specific phase of a proceeding. *Alisal*, 370 F.3d at 921. “Although
15 delay can strongly weigh against intervention, the mere lapse of time, without more, is not
16 necessarily a bar to intervention.” *U.S. v. Oregon*, 745 F.2d at 552. Prejudice is the most important
17 consideration in deciding whether a motion to intervene is timely. *Id.*

18 ***a. Stage of the Proceeding; Reason for and Length of the Delay***

19 Ghirardelli argues that counsel was not diligent⁷ or timely by waiting until this stage in the
20

21 ⁷ The parties dispute whether the diligence inquiry is limited to a party’s diligence or may
22 consider the diligence of counsel. *See* Opp’n at 14-15; Reply at 4. In class actions where the same
23 counsel represent the original class representatives and the proposed intervenors, courts in this
24 district have considered the attorney’s diligence, and the court’s view is that result is appropriate
25 here given the nature of the surviving claims, the context of the litigation, and Ghirardelli’s ongoing
26 dialogue with Miller’s counsel about Miller’s appropriateness as a class representative. *See Harris*,
27 2010 WL 3743532, at *3 (“the diligence of counsel for the proposed intervenors, even before the
28 proposed intervenors learned of the lawsuit, should be taken into consideration because counsel for
the proposed intervenors has represented [the named plaintiff] from the inception of this case”);
Briggs, 2009 WL 1560005, at *2 (denying motion to intervene in class action to revive dismissed
claims based, in part, on lack of diligence by named plaintiff’s counsel). Leyton nonetheless argues
that the controlling test in the Ninth Circuit does not consider counsel’s diligence and instead

1 litigation to add a new class representative designed to counter an argument that Ghirardelli raised
2 by September 2012 and repeated “early and often”: that Miller – who lives in Florida and bought
3 the chips there – cannot serve as a class representative for claims brought under California consumer
4 protection laws. Opp’n at 16 (issue was raised by September 2012 and repeated in discovery; the
5 answer pleads the choice of law and typicality issues; Miller said in the May 3, 2013 joint case
6 management statement that he did not anticipate further amendments to the pleadings “at this point”
7 but might seek leave to add additional plaintiffs); 5 & n.2 (discussing effect of *Mazza v. American*
8 *Honda Co., Inc.*, 666 F.3d 581 (9th Cir. 2012)).⁸ Plaintiff had their chance to add a California
9 plaintiff before, and they did not do, and thus their motion is untimely. Opp’n at 14-16.

10 Leyton responds that his counsel acted diligently in moving to intervene despite being hampered
11 by Ghirardelli’s discovery tactics. Motion at 13-15; Reply at 5-6. They sought to “identify new
12 potential plaintiffs even before the pleadings were settled.” Reply at 5-6. They sought “customer
13 complaints and a list of purchasers through the Ghirardelli website.” *Id.* at 6. Counsel learned of
14 Leyton’s complaint right after the cut-off to amend the pleadings. *Id.* As to Leyton’s diligence, he
15 purchased the white baking chips in May 2013 (one month before the deadline to add parties in this
16 matter) and promptly complained to Ghirardelli. He filed a motion to intervene shortly after
17 mediation in this case failed.

18 _____
19 considers only whether “the person attempting to intervene should have been aware that his
20 ‘interest[s] would no longer be protected adequately by the parties.’” Reply at 4-5 (emphasis
21 omitted) (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of San Francisco*, 934
22 F.2d 1092, 1095 (9th Cir. 1991)). In *Officers for Justice*, the Ninth Circuit reversed the district
23 court’s denial of a motion to intervene where the district court considered the wrong time period in
24 finding a motion to intervene untimely, but counsel’s diligence was not an issue. The case thus is
25 not dispositive here.

26 ⁸ Ghirardelli argues that *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012),
27 holds that a nationwide class cannot be certified under California consumer protection laws,
28 including Cal. Bus. & Prof. Code § 17200 and the Consumer Legal Remedies Act. Opp’n at 5 n 2.
Miller cites post-*Mazza* cases and argues that California law can apply to a nationwide class. Reply
at 7 (citing *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199 DDP
(Rzx), 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012); *Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D.
Cal. 2012) (certifying nationwide class of dietary supplement purchasers)). As the court said
previously, this is an issue for class certification.

1 The court previously found that these facts established good cause under Rule 16(b). *See supra*
2 at n.6. At this point, discovery has been fairly modest. The deadlines will be continued anyway. At
3 this stage of the proceedings, these facts do not establish timeliness, but they do not bar intervention,
4 either.

5 ***b. Prejudice to Ghirardelli***

6 Ghirardelli also argues prejudice from adding Leyton to the white chips case because previously
7 it faced only a Florida class and now it could face a California class. Opp'n at 18.⁹ In support of its
8 argument, Ghirardelli cites *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-
9 KHV, 2009 WL 1208073 (D. Kan. May 1, 2009). *In re Motor Fuel* was an MDL case challenging
10 the practice of selling motor fuel at a specified price per gallon and failing to disclose or adjust for
11 temperature expansion. The plaintiffs asked to amend the complaint to add 23 new parties who
12 previously were not named in any case in the MDL. *Id.* at *3. In denying permissive intervention,
13 the district court noted that six months previously, it had issued an order addressing the effect that
14 adding new parties would have on the complex litigation, and had determined that the new parties
15 would assert liability for fuel sales not at issue and substantially expand the number of jurisdictions
16 at issue. *Id.*

17 Expanding the liability for fuel sales in an MDL litigation is different than adding a Plaintiff with
18 the same white-chip claim and the same nationwide class. As discussed above, the court cannot see
19 any real impact on the case deadlines by Leyton's intervention on the white-chip claim because the
20 deadlines are being extended anyway. The additional discovery attributable to Leyton on the chip
21 claims is modest. As discussed above, the parties disagree about the impact of *Mazza*, and that is an
22 issue for class certification. The court resolves doubts in favor of permitting intervention. *See*
23 *United States v. City of Los Angeles*, 288 F.3d at 397.

24 ***2. Adequacy of Miller's Representation of Leyton's Interest***

25 Ghirardelli argues that Leyton has not shown that Miller does not adequately represent Leyton's
26 interests in the litigation. Opp'n at 11-13.

27 _____
28 ⁹ The prejudice from adding the "all natural" claims is discussed below.

1 An intervenor as a matter of right must establish that he has “significant protectable interest” in
2 the action, meaning, “the interest is protectable under some law and that there is a relationship
3 between the legally protected interest and the claims at issue.” *Citizens for Balanced Use v.*
4 *Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (internal citations omitted). Putative
5 intervenors also must show that “disposition of [the] action may, as a practical matter, impair or
6 impede [the intervenors’] ability to protect their interest.” *Id.* at 898 (citing Fed. R. Civ. P. 24
7 advisory committee’s note).

8 Leyton establishes his interest. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3rd Cir.
9 2005) (“In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry are
10 satisfied by the very nature of Rule 23 representative litigation.”). Ghirardelli does not dispute this
11 and instead argues that Leyton has not established that his interest is not represented adequately by
12 Miller. Opp’n at 10.

13 In determining adequacy, the court examines the following three factors:

14 (1) whether the interest of a present party is such that it will undoubtedly make all of a
15 proposed intervenor’s arguments; (2) whether the present party is capable and willing to
16 make such arguments; and (3) whether a proposed intervenor would offer any necessary
elements to the proceeding that other parties would neglect.

17 *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Generally, the applicant’s “burden of
18 showing inadequacy of representation is ‘minimal’ and satisfied if the applicant can demonstrate that
19 representation of its interests ‘may be’ inadequate.” *Id.* That being said, “[i]f an applicant for
20 intervention and an existing party share the same ultimate objective, a presumption of adequacy of
21 representation arises.” *Id.* (citing *LULAC*, 131 F.3d at 1305). “To rebut the presumption, an
22 applicant must make a compelling showing of inadequacy of representation.” *Id.* (quotation
23 omitted). The presumption may be overcome by evidence of collusion, adversity of interest,
24 nonfeasance, incompetence, or lack of financial resources. *See Farmland Irr. Co. v. Dopplmaier*,
25 220 F.2d 248, 248-49 (9th Cir. 1955); *see also Moosehead San. Dist. v. S.G. Phillips Corp.*, 610
26 F.2d 49, 54 (1st Cir. 1979) (same), *cited with approval in LULA*, 131 F.3d at 1305 n.4; *Clark v.*
27 *Putnam County*. 168 F.3d 458, 461 (11th Cir. 1999) (presumption is weak and requires the proposed
28 intervenor to come forward with only some evidence); *cf. Arakaki*, 324 F.2d at 1086 (very

1 compelling showing required when government entity shares interest of intervenor).

2 Here, Leyton concedes that he and Miller share the same objective: their “claims with respect to
3 the lack of cocoa butter in the white chips are identical,” they seek to represent the same nationwide
4 class for white-chip consumers, and they seek identical remedies. *See* Motion at 9. The reason that
5 Miller is potentially inadequate is not the ordinary collusion or adverse interest. Instead, he seeks to
6 intervene to counter Ghirardelli’s challenges to Miller as a class representative (including Miller’s
7 purchase of the chips in Florida, his use of them for his coffee instead of baking, his focus on cocoa
8 butter and not other ingredients, and his use of lawyers to complain instead of complaining directly).
9 *Id.* at 2. Leyton, a California resident, addresses all of these deficiencies in a case that involves
10 California’s consumer protection laws. *See id.*, Opp’n at 11 n.2.

11 Ghirardelli responds that these justifications do not address adequacy (whether Miller is
12 motivated to pursue the case). Instead, they are a means to counter Ghirardelli’s arguments about
13 Miller’s typicality. Opp’n at 12. In other words, Leyton’s desire to intervene is about whether
14 Miller has the best personal fact pattern to recover on the class’s behalf (or whether anyone could
15 represent a nationwide class). *Id.* That, Ghirardelli concludes, is not a basis for intervention as a
16 matter of right. *Id.*

17 Leyton’s best argument is that as a California resident, his interests are not protected if the court
18 cannot certify a national class for a violation of California’s consumer rights laws and instead can
19 certify only a California subclass that Miller cannot represent because he lives in Florida.¹⁰ This
20 does not support intervention as a matter of right before class certification. As Ghirardelli argues,
21 Leyton’s interests are protected if a class is certified, and he will be able to file an independent
22 action of the case is not certified. Ghirardelli points to cases allowing replacement of the named
23 plaintiff after class certification if the plaintiff can no longer represent the certified class. Opp’n at
24 12 n. 5 (citing cases where the named plaintiff’s claim becomes moot, the named plaintiff dies, and
25 the entity plaintiff went bankrupt); *see also Palmer v. Stassinios*, 236 F.R.D. 460, 464-66 (N.D. Cal.

27 ¹⁰ At least on this record, the other issues (such as how Miller consumed the chips) are less
28 consequential and more obviously about typicality.

1 2006) (newly-named plaintiffs in Fair Debt Collection Practices Act case were the named plaintiffs
2 in a separate action against defendants); *Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669,
3 673-75 (N.D. Cal. 1979). And again, right now, Leyton and Miller would make the same arguments
4 about the claim. *Cf. Sw. Ctr. for Biological Diversity*, 268 F.3d at 820 (intervenor defendants in
5 environmental case against state and federal government defendants had different interests and
6 would make different arguments). The court cannot see intervention as a matter of right when
7 Leyton’s and Miller’s interests and arguments in the case are identical. If Miller can no longer
8 represent the class, the outcome might be different.

9 **B. Permissive Intervention**

10 Under Federal Rule of Civil Procedure 24(b), “[o]n timely motion, the court may permit anyone
11 to intervene who . . . has a claim or defense that shares with the main action a common question of
12 law or fact.” Fed. R. Civ. P. 24(b). When making this discretionary determination, a district court
13 “must consider whether the intervention will unduly delay or prejudice the adjudication of the
14 original parties’ rights.” Fed. R. Civ. P. 24(b)(3). In determining whether a motion for permissive
15 intervention is timely, the court looks to the same factors considered in determining intervention as
16 or right. *See LULAC*, 131 F.3d at 1308. “In the context of permissive intervention, however,
17 [courts] analyze the timeliness element more strictly than . . . with intervention as of right.” *Id.*
18 “The district court’s discretion under Rule 24(b), to grant or deny an application for permissive
19 intervention includes discretion to limit intervention to particular issues.” *Dep’t of Fair Employment*
20 *& Hous. v. Lucent Technologies, Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (internal alterations
21 omitted) (quoting *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974)).

22 At least as to the current claim, and for the reasons stated in the previous section, the timing does
23 not unduly delay or prejudice the adjudication of Ghirardelli’s rights. Ghirardelli’s other arguments
24 do not change the outcome either.¹¹

25 First, Ghirardelli says that Miller could have timely amended his complaint to add a co-plaintiff.

27 ¹¹ Some of these arguments were raised in the context of intervention as a matter of right.
28 The court considers them here because it did not need to in the previous section.

1 Opp'n at 13. As the court said in the previous section, it is not persuaded by Ghirardelli's arguments
2 about timeliness, even in the context of permissive intervention. Also, Miller joins Leyton's motion.

3 Second, Ghirardelli argues that this is a back-door attempt to begin the action anew. *Id.* at 12.
4 In support of this conclusion, it cites *Lidie v. State of California*, 478 F.3d 552, 555 (9th Cir. 1973).
5 In that case, plaintiffs challenged the state government's processing of food stamp applications, but
6 the named plaintiffs either were not eligible for food stamps at all or had been dropped from the food
7 stamp rolls for failure to use food stamps and were complaining of delay in their recertification. The
8 Ninth Circuit denied a motion by new plaintiffs to intervene on appeal, in part because the new
9 parties "could not enhance the common cause, and would add to the idiosyncratic problems
10 presented by the original plaintiffs"). *Lidie* is about a case with plaintiffs with no claims at all in the
11 context of a putative class with fact issues peculiar to individual plaintiffs. *See id.*

12 *Velazquez v. GMAC Mortgage Corporation*, which was a TILA and state-law case involving the
13 sales and servicing of mortgages, similarly is a case where the named plaintiffs apparently had no
14 substantive claims. 2009 WL 295838, at *3 (C.D. Cal. Sept. 10, 2009). They elected to withdraw,
15 and the court denied a motion to amend to substitute similarly-situated plaintiffs, noting that
16 Defendants would have to redo all the discovery and explore the same issues. *Id.* ("The Ninth
17 Circuit has affirmed denial of leave to amend where, as here, '[t]he proposed amendment was not
18 based upon any facts which were not known or readily available' and prior extensive discovery was
19 'not directed' to the factual issues raised by the proposed amendment.") (*quoting Komie v. Buehler*
20 *Corp.*, 449 F.2d 644, 648 (9th Cir. 1971).

21 Ghirardelli also quotes *Ho v. Ernst & Young LLP*, a wage-and-hour case: "[i]ntervention
22 shouldn't be allowed just to give class action lawyers multiple bites at the certification apple when
23 they have chosen, as should have been obvious from the start, patently inappropriate candidates to
24 be the class representatives." No. C-05-04867 RMW, 2012 WL 95342, at *3 (N.D. Cal. Jan. 11,
25 2012) (quotation omitted). *Ho* is distinguishable because it of the timing issues presented. *Ho* was
26 first filed in 2005. In 2007, the court permitted amendment to add three new representative
27 plaintiffs. *See id.* at *1. In 2008, the court granted summary judgment against two of the plaintiffs'
28 claims, but was unable to determine whether defendant's arguments (which implicated typicality)

1 defeated the remaining plaintiffs' claims. *Id.* In 2011, the court certified a narrower class than the
2 plaintiff wanted because she was not typical for the reasons the defendant asserted years earlier. *Id.*
3 Then, in 2012, the plaintiff moved to add a new representative plaintiff to overcome the typicality
4 problems. The court found that Plaintiffs were reasonable in putting forth the previous
5 representative but deficient in exploring whether other plaintiffs should be added to the case given
6 that they "should have realized that [the motion for class certification] was likely their only
7 opportunity to ensure that all of their positions were put forward." *Id.* at *3. As this procedural
8 history shows, *Ho* involves a complicated timeline that shows much more evidence of undue delay
9 and prejudice than the facts at issue in this case.

10 In sum, as discussed in the previous sections, and in the context of only the white-chip claim, the
11 court's view is that adding a new plaintiff is not inappropriate at this stage. The court grants
12 permissive intervention on the white-chip claim.

13 **II. AMENDMENT TO ADD THE ALL-NATURAL CLAIMS**

14 What really is at stake is Leyton's request to add new claims that Ghirardelli falsely labeled
15 many additional products as "all natural."

16 Because the court found good cause, the court examines the appropriateness of amendment
17 under Rule 15. *See Johnson*, 975 F.2d at 608. A court considers five factors to determine whether
18 to grant leave to amend: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4)
19 futility of amendment; and (5) whether the plaintiff previously amended his complaint. *See Nunes v.*
20 *Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). Delay alone is insufficient to justify denial of leave to
21 amend. *Jones v. Bates*, 127 F.3d 839, 847 n.8 (9th Cir. 1997).

22 Of the factors, prejudice to the opposing party is the "touchstone of the inquiry under rule 15(a)"
23 and "carries the greatest weight." *See Eminence Capital*, 316 F.3d at 1052. Absent prejudice or a
24 strong showing on other factors, a presumption exists under Rule 15(a) favoring granting leave to
25 amend. *See id.* The party opposing a motion to amend bears the burden of showing prejudice.
26 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

27 Ghirardelli argues that the new claims are an attempt to shoehorn new claims by a new plaintiff
28 into the older and much narrower white chips case. The court agrees. These are new claims

1 involving many new products sold in different grocery store departments, marketed by different
2 departments within Ghirardelli, and sold to different consumers. Opp’n at 21-23. Different legal
3 issues are involved, including whether the court should stay or dismiss the case on primary
4 jurisdiction grounds, and the effect of differing statutes of limitations on the proposed “white
5 chocolate” and “all natural” classes. The “all natural” claims are a larger and more complex case
6 that would require significantly more and different discovery before class certification. *Id.* at 21-24.
7 In short, Leyton’s new claims would be the primary focus of this litigation, and allowing them into
8 this suit would be akin to starting the litigation from the beginning.

9 Leyton nonetheless argues that the court should allow him to bring the new claims in this case
10 because (1) judicial economy favors trying the “all natural” and “white chocolate” claims in the
11 same action, and (2) the rule against claim-splitting and the doctrine of claim preclusion prevent him
12 from bringing the “all natural” claims in a separate lawsuit. Motion at 20-21.

13 The best argument about the first point is that – as Ghirardelli concedes – Miller could have
14 amended his complaint to bring all-natural claims (and for the reasons stated above, the court likely
15 would have granted leave to amend). That being said, Leyton is not Miller and instead is a new
16 plaintiff, and this point does not alter the outcome.

17 Leyton also has a fair second point that if he intervenes in the white chip case, he has to bring the
18 “all natural” and “white chocolate” claims in the same action. Motion at 20-21. Ghirardelli
19 responds that claim-splitting does not apply where the court orders the alleged split. Opp’n at 27-29.

20 “The doctrine of claim splitting bars a party from subsequent litigation when the same
21 controversy has already been sued on.” *Pasternak v. Trans Union LLC*, No. C 08-02972 CW, 2008
22 WL 4544370 (N.D. Cal. Sept. 30, 2008). The “main purpose behind the rule preventing claim
23 splitting is ‘to protect the defendant from being harassed by repetitive actions based on the same
24 claim.’” *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 328 (9th Cir. 1995). To
25 determine if the doctrine of claim splitting bars a subsequent case, the Ninth Circuit uses the
26 transaction test applicable to determine claim preclusion. *Adams v. California Dep’t of*
27 *HealthServs.*, 487 F.3d 684, 688 (9th Cir. 2007). “Whether two events are part of the same
28 transaction or series depends on whether they are related to the same set of facts and whether they

1 could conveniently be tried together.” *Id.* (quoting *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871
2 (9th Cir. 1992)). In applying the transaction test, courts examine four criteria:

3 (1) whether rights or interests established in the prior judgment would be destroyed or
4 impaired by prosecution of the second action; (2) whether substantially the same evidence is
5 presented in the two actions; (3) whether the two suits involve infringement of the same
6 right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

6 *Id.* (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982)). “The last
7 of these criteria is the most important.” *Id.*

8 Here, the parties agree that barring an exception, if Leyton does not assert his “all natural”
9 claims in this action, the claim splitting doctrine would bar him from bringing them in a separate
10 suit. Opp’n at 27-29; Reply at 10-11 n.6. Ghirardelli argues that the court can refuse to permit
11 Leyton to file amended claims in this action and expressly reserve his rights to bring those claims
12 later. Opp’n at 65-4; see *Central States, SE & SW Areas Pension Fund v. Hunt Truck Lines, Inc.*,
13 296 F.3d 624, 629 (7th Cir. 2002); *King v. Provident Life and Acc. Ins. Co.*, 23 F.3d 926 (5th Cir.
14 1994). And as Leyton points out, the Ninth Circuit has held that the rule against claim splitting is
15 inapplicable “where a defendant acquiesces in the split.” *Clements*, 69 F.3d at 328; see Reply at 10-
16 11 n.6. Leyton asks that if the court denies leave to amend, it should “ensure that Ghirardelli will not
17 be able to successfully raise this affirmative defense in a subsequent lawsuit.” Reply at 11 n.6.

18 At the December 19, 2013 hearing in this matter, Ghirardelli’s counsel acknowledged on the
19 record that it acquiesces in the split and stipulated to not raising this affirmative defense in a future
20 lawsuit brought by Leyton or any one else who might file the lawsuit. The court also expressly
21 declines to allow Leyton to bring the all-natural claims and holds that his intervention does not
22 preclude him from bringing them in a separate lawsuit.

23 Given this outcome, the court denies leave to amend to bring in the all-natural claims.

24 **III. VIOLATION OF THE PROTECTIVE ORDER**

25 Ghirardelli also asserts that Miller’s attorney obtained discovery that he used to develop the all-
26 natural claims. According to Leyton’s attorney’s, Leyton has “never received information
27 designated confidential.” Reply at 11 (emphasis omitted). Given the court’s holdings in the
28 previous sections, it does not decide the issue in this case.

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CONCLUSION

The court **DENIES** the motion to intervene as a matter of right, **GRANTS** the motion to intervene permissively, and **DENIES** the motion to add the new all-natural claims. Leyton is not precluded from bringing the all-natural claims in a later lawsuit. This disposes of ECF No. 59-1.

IT IS SO ORDERED.

Dated: December 20, 2013



LAUREL BEELER
United States Magistrate Judge