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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

AMCOR FLEXIBLES INC, No. C 14-01025 LB
Plaintiff,
v.
FRESH EXPRESS INC, **ORDER DENYING FRESH
EXPRESS’S MOTION FOR LEAVE
TO FILE AN AMENDED ANSWER
AND A COUNTERCLAIM**
Defendant. [Re: ECF No. 51]

INTRODUCTION

On March 3, 2014, Plaintiff Amcor Flexibles, Inc. (“Amcor”) sued Defendant Fresh Express, Inc. (“Fresh Express”) for breach of contract and unlawful and unfair business practices. (*See* Complaint, ECF No. 1.¹) At the initial case management conference, the court set September 26, 2014 as the deadline to seek leave to amend the pleadings. On January 22, 2015, with less than two months remaining until the deadline to complete fact discovery, Fresh Express moved for leave to file an amended answer in order to add affirmative defenses and a counterclaim against Amcor. (*See* Motion, ECF No. 51.) Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination without oral argument and vacates the March 5, 2015 hearing. Upon consideration of the briefs submitted and the applicable legal authority, the court denies Fresh Express’s motion.

¹ Record citations are to documents in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 **STATEMENT**

2 **I. FACTS**

3 **A. The 2006 Supplier Agreement and the Standard Terms**

4 On or about February 8, 2006, Amcor and Fresh Express entered into a 2006 Film Supplier
5 Agreement (“2006 Supplier Agreement” or “Master Agreement”) in which Amcor agreed to procure
6 raw materials and manufacture finished fresh salad bags for Fresh Express. (Complaint ¶ 9, ECF
7 No. 1 at 2.) The term of the 2006 Agreement was from February 1, 2006 to December 31, 2006,
8 with an automatic renewal, unless terminated by either party. (Complaint ¶ 10, ECF No. 1 at 3.)
9 Paragraph 9 of the 2006 Supplier Agreement provides that “[E]ither party may terminate this
10 Agreement without cause by giving the other party ninety (90) days written notice.” (*See id.*, Ex.
11 A.) Both parties also signed and incorporated into the 2006 Supplier Agreement the Fresh Express
12 Incorporated Purchase Order Standard Terms and Conditions (“Standard Terms”), the Seller
13 Guaranty and Indemnification Agreement, and the Nondisclosure Agreement (together with the
14 Standard Terms, “Vendor Packet”).

15 The 2006 Supplier Agreement states in relevant part:

16 11. Terms and Conditions:

17 This Agreement is a part of and incorporates the Purchase Order and the Fresh Express Standard
18 Terms and Conditions, the Seller Guarantee and Indemnification Agreement and the
19 Nondisclosure agreement (“Vendor Packet”). This Agreement, along with the Purchase Order
20 and the Fresh Express Vendor Packet constitute the final, complete and exclusive statement of
the terms of the agreement between the parties pertaining to the subject matter of this agreement.
If there are any conflicts between the terms of this Supplier Agreement and the terms of the
Vendor Packet, the terms of the Vendor Packet shall prevail.

21 (Complaint, ECF No. 1, Ex. A.)

22 The Standard Terms that were incorporated into the 2006 Supplier Agreement includes
23 provisions for the purchaser’s limitations of liability and a shortened two-year statute of limitations
24 as follows:

25 19. Limitation on Purchaser’s Liability (Statute of Limitations):

26 Except as provided herein, in no event shall Purchaser be liable for incidental or consequential
27 damages. Purchaser’s liability on any claim of any kind for any loss or damage arising out of or
28 shall in no case exceed the price allocable to the goods or services or unit thereof, which gives
rise to the claim. Purchaser shall not be liable for penalties of any description. Any action
resulting from any breach on the part of Purchaser as to the goods or services delivered
hereunder must be commenced within two years after the cause of action has accrued.

1 (Complaint, ECF No. 1, Ex. B.)

2 The Standard Terms contains other provisions based on the purchaser's termination for
3 convenience and the prevalence of the Standard Terms over the 2006 Supplier Agreement:

4 2. Termination for Convenience of Purchaser:

5 Purchaser reserves the right to terminate this purchase order or any part hereof for its sole
6 convenience. . . . Seller shall not be paid for any work done and products produced after the
7 notice of termination, nor for any costs incurred by Seller's suppliers or subcontractors with
8 Seller could reasonably have avoided.

9 . . .

10 13. Entire Agreement:

11 This purchase order and any documents referred to on the face hereof, including any
12 nondisclosure agreement or guaranty executed by the Seller for the benefit of Purchaser,
13 constitute the entire agreement between the parties. Notwithstanding anything to the contrary,
14 the parties may enter into a Supplier Agreement. Any conflict between the terms of this
15 purchase order and those of the Supplier Agreement or Guaranty, the terms and conditions of
16 this purchase order and of the Guaranty shall prevail.

17 (*Id.*)

18 Paragraph 20 of the Standard Terms also states that the laws of California shall apply to all
19 disputes thereunder. (*Id.*)

20 **B. The 2009 Agreement**

21 In September 2009, Amcor and Fresh Express entered into a letter agreement ("2009
22 Agreement") for Fresh Express to be the exclusive purchaser of Amcor's newly-developed
23 Evolution Laminated Paper Bag ("Evolution"). (Complaint ¶ 13, ECF No. 1 at 3.) The exclusivity
24 was to apply for a period of 36 months, followed by automatic annual renewals on an "Evergreen"
25 basis. (*Id.* at ¶ 17.) The exclusivity terms are set forth in the 2009 Agreement in part as follows:

26 Exclusivity:

27 Amcor offers to sell Fresh Express Incorporated and Chiquita Brands LLC ("Fresh
28 Express/Chiquita") the Evolution Package exclusively for sale in North America, and Fresh
Express/Chiquita agrees to purchase this package exclusively from Amcor.

(Complaint, ECF No. 1, Ex. C.)

The 2009 Agreement also sets forth Fresh Express's agreement to maintain its "Base Business"
with Amcor for business other than the Evolution product. The Base Business provision provides
that the terms of the 2006 Supplier Agreement (referred to in the provision as the "Master
Agreement") and the Vendor Packet shall apply to all purchases under the 2009 Agreement.

1 (Complaint, ECF No. 1, Ex. C.) The Base Business provision is as follows:

2 Base Business (Business Other Than Evolution):

3 During the term of this exclusivity agreement, except in the case of significant market share
4 changes, and/or catastrophic events affecting consumer demand for bagged salads, there will be
5 no significant decrease to the base business that Amcor currently enjoys with Fresh
6 Express/Chiquita as measured against the previous calendar year. Base business is defined as the
7 number of impressions of film in the film to film lamination business in a particular calendar
8 year. The parties agree that pricing for the Base Business shall be in accordance with the agreed
9 pricing model as defined by the existing supplier agreement in place between the two companies
10 dated February 1, 2006 (“Master Agreement”). Further to the preceding sentences, (i) Fresh
11 Express/Chiquita’s Base Business commitment described in this Section shall not apply where
12 Amcor does not comply with the pricing set forth in the Master Agreement, and (ii) neither
13 Amcor’s obligation to sell Evolution exclusively to Fresh Express/ Chiquita as set forth above
14 under “Exclusivity” nor the exclusivity of the license described below under “Termination” shall
15 apply if Fresh Express/ Chiquita does not comply with the pricing set forth in the Master
16 Agreement. The Vendor Packet as referenced in the Master Agreement applies to all purchases
17 under this agreement.

18 (*Id.*)

19 The 2009 Agreement defines what constitutes “Termination” as follows:

20 Termination:

21 This agreement will not be terminated except: (1) In the case of bankruptcy by either party, (2)
22 Fresh Express/Chiquita desires to end the Exclusivity agreement which may be done with 180
23 days notice in writing, (3) as set forth otherwise provided in this Agreement.

24 (*Id.*)

25 In reliance on the 2009 Agreement, Amcor did not sell Evolution packages to other companies,
26 despite being asked by other companies about whether Amcor could provide such products.

27 (Complaint ¶ 18, ECF No. 1 at 5.) In or about November 2011, Amcor discovered that Fresh
28 Express was communicating with Amcor’s competitors relating to the purchase of salad bags. (*Id.* at
¶ 19.) At the same time, Fresh Express informed Amcor of its decision to stop marketing the
Evolution product. (*Id.*)

In or about February 2012, Fresh Express verbally advised Amcor that it had ended its Evolution
experiment, but that Fresh Express wished to keep the exclusivity with Amcor and that Fresh
Express would continue to maintain its overall purchase level. (*Id.* at ¶ 20.) Amcor alleges that
despite these promises, and despite Fresh Express’s obligations under the 2009 Agreement, Fresh
Express failed to maintain its purchase of Base Business products and, in or around 2011, began
significantly decreasing its purchase of Base Business products. (*Id.* at ¶ 21.)

1 In or about April 2012, Fresh Express released a request for proposals (“RFP”) seeking a new
2 supplier for all of its salad bag business. (See Motion, ECF 51 at 6.) Amcor submitted a bid, but in
3 June 2012, Fresh Express informed Amcor that it had not been selected. (*Id.*)

4 On or about August 28, 2012, Amcor notified Fresh Express that it was in breach of the 2009
5 Agreement due to its alleged significant decrease in Base Business purchases in or around 2011.
6 (Complaint at ¶¶ 21-22, ECF No. 1 at 5.) On or about September 4, 2012, Fresh Express responded
7 by providing written notice of termination, stating that its relationship with Amcor had terminated in
8 mid-2011 when it stopped purchasing the Evolution product. (*Id.* at ¶ 23.)

9 Amcor alleges that as a result of the September 4, 2012 written notice of termination, Fresh
10 Express was obligated to purchase the required level of Base Business products through March 4,
11 2013 pursuant to the 2009 Agreement, but has failed to do so. (*Id.* at ¶¶ 25-26.) As a result of the
12 2009 Agreement breach, Amcor claims it has suffered lost profits. (*Id.* at ¶ 39.) Amcor also claims
13 that Fresh Express’s unlawful and unfair business practices had led to Fresh Express’s unjust
14 enrichment at the expense of Amcor. (*Id.* at ¶ 46.)

15 **II. PROCEDURAL HISTORY**

16 On March 5, 2014, Amcor filed its Complaint. (Complaint, ECF No. 1.) It contains the
17 following claims: (1) breach of contract; and (2) violation of Cal. Bus. & Prof. Code § 17200 et seq.
18 for unlawful and unfair business practices. (*Id.* ¶¶ 28-46.)

19 On April 22, 2014, Fresh Express moved to dismiss Amcor’s Complaint. (Motion to Dismiss,
20 ECF No. 14.) The court denied the motion on July 1, 2014. (Order Denying Defendant’s Motion to
21 Dismiss, ECF No. 24.) Fresh Express thereafter filed its answer to the complaint on July 15, 2014.
22 (Answer, ECF No. 26.) On August 29, 2014, after the initial case management conference, the court
23 established September 26, 2014 as the deadline for amendment of the pleadings and February 17,
24 2015 as the close of fact discovery. (Case Management and Pretrial Order, ECF No. 39.) Trial was
25 also set for August of 2015. (*Id.*) On October 10, 2014, the close of fact discovery was extended to
26 March 17, 2015. (Stipulation, ECF No. 41.) On December 11, 2014, the parties participated in
27 mediation. (*See* Motion, ECF No. 51 at 2.)

28 On January 22, 2015, nearly five months after the scheduling order was issued, Fresh Express

1 moved for leave to amend its answer in order to add defenses and a counterclaim against Amcor.
2 (Motion, ECF No. 51.) Amcor submitted its opposition brief on February 5, 2015. (Opposition,
3 ECF No. 52.) Fresh Express submitted its reply in support of its motion on February 12, 2015.
4 (Reply, ECF No. 55.)

5 ANALYSIS

6 I. LEGAL STANDARD

7 Under Federal Rule of Civil Procedure 15(a), leave to amend “shall be freely given when justice
8 so requires.” Fed. R. Civ. P. 15(a); *see Sonoma Cnty. Ass’n of Retired Employees v. Sonoma Cnty.*,
9 708 F.3d 1109, 1118 (9th Cir. 2013). Because “Rule 15 favors a liberal policy towards amendment,
10 the nonmoving party bears the burden of demonstrating why leave to amend should not be granted.”
11 *Genentech, Inc. v. Abbott Laboratories*, 127 F.R.D. 529, 530–31 (N.D. Cal. 1989) (citation omitted).
12 Courts generally consider five factors when assessing the propriety of a motion for leave to amend:
13 undue delay, bad faith, futility of amendment, prejudice to the opposing party and whether the party
14 has previously amended the pleadings. *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055
15 (9th Cir. 2009).

16 Where a party seeks leave to amend after the date specified in a scheduling order, Rule 16(b)
17 also applies. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Under
18 Rule 16(b), “[a] schedule shall not be modified except upon a showing of good cause and by leave
19 of the district judge.” *Id.*; *see* Fed. R. Civ. P. 16(b)(4). Therefore, a party seeking to amend a
20 pleading after the date specified in a scheduling order must first show “good cause” for the
21 amendment under Rule 16(b), and second, if good cause is shown, the party must demonstrate that
22 the amendment is proper under Rule 15. *Id.*

23 To determine whether good cause exists to modify the scheduling order, courts focus on
24 the reasonable diligence of the moving party. *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 n.6
25 (9th Cir. 2007); *see also Johnson*, 975 F.2d at 609 (stating that “carelessness is not compatible with
26 a finding of diligence and offers no reason for a grant of relief” under Rule 16(b); adding that “the
27 existence or degree of prejudice to the party opposing the modification might supply additional
28 reasons to deny a motion, [but] the focus of the inquiry is upon the moving party’s reasons for

1 seeking modification”). “If that party was not diligent, the inquiry should end.” *Johnson*, 975 F.2d
2 at 609.

3 **II. DISCUSSION**

4 Because Fresh Express did not seek leave to amend its answer until after the deadline established
5 by the scheduling order, it must show that good cause exists under Rule 16(b). If it can do so, it
6 must then show that leave is appropriate under Rule 15. Fresh Express seeks leave to add a
7 counterclaim and new affirmative defenses. The court discusses each proposed amendment in turn.

8 **A. Fresh Express Has Not Shown that Good Cause to Add the Counterclaim Exists under**
9 **Rule 16(b)**

10 Fresh Express seeks leave to add a counterclaim against Amcor. (Motion, ECF No. 51 at 2.)
11 Fresh Express argues that Amcor’s 2012 bid price for all of Fresh Express’s salad bag business was
12 significantly lower than the price Fresh Express had been paying to Amcor under the 2006 Supplier
13 Agreement. The significant price discrepancy, Fresh Express contends, suggests that Amcor had
14 been giving other salad bag buyers a better price than it had been giving to Fresh Express. If so,
15 Amcor would have been (according to Fresh Express) in violation of the “price warranty” found in
16 Paragraph 6 of the Standard Terms. That paragraph states:

17 Price Warranty. Seller expressly warrants that the prices for the articles sold Purchaser
18 hereunder are not less favorable than those currently extended to any other customer for the same
19 articles in similar quantities. In the event Seller reduces its price for such article during the term
20 of this purchase order, Seller agrees to reduce the prices hereof accordingly. Seller warrants that
21 prices shown on this purchase order shall be complete, and no additional charges of any type
22 shall be added without Purchaser’s express written consent. Such additional charges include, but
23 are not limited to, shipping, packaging, labeling, custom duties, taxes, storage, insurance, boxing,
24 [or] crating.

25 (Complaint, ECF No. 1, Ex. B.) Fresh Express thus wants to bring a counterclaim against Amcor for
26 breach of contract.

27 The “good cause” inquiry focuses on the diligence of the moving party. *See Noyes*, 488 F.3d at
28 1174 n.6; *see also Johnson*, 975 F.2d at 609.² Courts often find diligence where new facts

² Fresh Express does not explicitly argue its motion that it was diligent. Instead, it spends most of the pages arguing that its proposed counterclaim is not futile and that adding the claim to this action will not prejudice Amcor and would further interests of judicial economy. Futility, prejudice, and judicial economy, however, are factors to be considered under Rule 15. That inquiry

1 underlying the proposed amendment occurred or became known to the moving party after the
2 scheduling order's deadline for amendment. *See Bolbol v. Feld Entertainment, Inc.*, 2012 WL
3 5828608 at *5-6 (N.D. Cal. Nov. 15, 2012); *Jackson v. Laureate, Inc.*, 186 F.R.D. 605 at 609 (E.D.
4 Cal. June 16, 1999); *cf. Smith v. United States*, 2007 WL 2554142 at *2-3 (N.D. Cal. Sept. 4, 2007).

5 In its motion, Fresh Express says that its counsel first learned that Amcor offered Fresh Express
6 a significant discount when its counsel was "preparing for [the December 11, 2014] mediation,
7 reviewing documents, and interviewing witnesses" and first identified its proposed counterclaim in
8 its "mediation summary" that it served on December 4, 2014. (Motion, ECF No. 51 at 3, 7.)

9 In its opposition, however, Amcor persuasively argues that Fresh Express either did know, or
10 should have known, about this price discrepancy much earlier. First, it notes that Amcor's bid
11 occurred in April 2012 and that Fresh Express's in-house counsel referred to its bid in a letter sent to
12 Amcor dated September 4, 2012. (*See* Opposition, ECF No. 52 at 6-7; Jensen Decl., Ex. A, ECF No.
13 52-1 at 4-5.) Second, Amcor points out that Fresh Express explicitly acknowledged knowing about
14 Amcor's 2012 bid in several documents served or filed in this action, such as the Rule 26 initial
15 disclosures that Fresh Express served on August 22, 2013, and the parties' August 14, 2014 joint
16 case management statement. (*See* Opposition, ECF No. 52 at 7-9; *see also* Jensen Decl., Ex. B
17 (Fresh Express's Initial Disclosures), ECF No. 52-1 at 7-12 (stating that Fresh Express's in-house
18 counsel has privileged knowledge about Amcor's bids to Fresh Express and that among the
19 documents within Fresh Express's possession, custody, and control that may be used to support its
20 claims or defenses are copies of, and data from, Amcor relating to all bids submitted to Fresh
21 Express from 2005 to 2012); 8/14/2014 Joint CMC Statement, ECF No. 33 at 5 (stating that a
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24 occurs only if Fresh Express first shows that it was diligent. Accordingly, the court addresses these
25 factors later.

26 Fresh Express additionally argues that good cause exists because its counterclaim may later
27 be deemed to have been compulsory under Rule 13(a), and thus waived if they are not allowed to
28 raise it now. (Motion, ECF No. 51 at 9.) The potentially compulsory nature of the counterclaim,
however, is unrelated to Fresh Express's diligence. Fresh Express has failed to point to any
authority for the proposition that the potentially compulsory nature of a proposed counterclaim
constitutes or supports a finding of good cause under Rule 16(b).

1 principal factual issue in dispute is whether Amcor submitted a bid in 2012 and that a legal issue is
2 whether Amcor’s 2012 bid evidenced Amcor’s intent to terminate the 2009 Agreement).) Even if
3 Amcor had not compared Amcor’s 2012 bid amount to the price Fresh Express was paying to Amcor
4 under the 2006 Supplier Agreement, it could have done so easily, and if it had, it could have sought
5 to add a counterclaim much earlier in this litigation.

6 In its reply, Fresh Express offers a different theory to support its argument that Amcor must have
7 been offering lower prices to its other customers.³ It says that its proposed counterclaim is based on
8 the discrepancy between Amcor’s 2012 bid amount and the bid amounts of the other bidders, who
9 were Amcor’s competitors. (*See* Reply, ECF No. 55 at 2 (“Fresh Express’s cause of action arises
10 from the fact that in a competitive bid process, where Amcor’s prices can be compared against its
11 competitors, Amcor’s competitor’s bids were 20-28% lower than the prices Amcor was charging
12 Fresh Express. . . . This discrepancy, in a competitive bidding process, strongly suggests that if
13 Amcor was to have any other business, it would have to be offering other potential customers prices
14 in line with the other bidders.”).)

15 Even so, the court is not persuaded by Fresh Express’s new theory. First, it is not clear that the
16 discrepancy between Amcor’s bid and the other bids is “new and previously unavailable
17 information” that supports a finding of good cause. *See Eckert Cold Storage, Inc. v. Behl*, 943 F.
18 Supp. 1230, 1233 (E.D. Cal. 1996). All of the bid amounts were in Fresh Express’s possession the
19 entire time. What was new in December 2014 was Fresh Express’s counsel *thinking* about all of
20 those bid amounts. Second, even if the court considered the discrepancy between Amcor’s bid and
21 the other bids to be a new fact to be discovered, Fresh Express still was not diligent. The

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23 ³ Fresh Express’s motion states that its proposed counterclaim is based upon the discrepancy
24 between the price Amcor charged it under the 2006 Supplier Agreement and Amcor’s 2012 bid
25 amount. (*See* Motion, ECF No. 51 at 3 (“In the course of preparing for mediation, reviewing
26 documents, and interviewing witnesses, Fresh Express’s counsel learned that Amcor offered to sell
27 Film to Fresh Express at significantly lower prices than its then[-]current prices, begging the
28 question of whether Amcor was complying with its price warranty.”), 4 (“Amcor’s offers to reduce
its prices to Fresh Express in a competitive bid process strongly suggests that Amcor had provided
or offered ‘other customer[s] for the same articles in similar quantities’ at lower prices than it was
charging Fresh Express at the time.”).) It says nothing about the discrepancy between Amcor’s bid
and other bids.

1 discrepancy is not based on events which only recently occurred, *see Bolbol*, 2012 WL 5828608 at
2 *5 (finding that leave to amend was appropriate only where the “new factual allegations” involved
3 events that had occurred since the filing of the last operative complaint), nor was it identified
4 through information discovered from Amcor, *see Smith*, 2007 WL 2554142 at *3 (granting leave
5 because the facts supporting the proposed amendment were discovered from depositions and
6 interrogatories). It had all of the bids; it just had to look at them. It says most of the witnesses
7 involved in the underlying contract negotiations are no longer employed at Fresh Express, but the
8 documents and at least two critical witnesses (including its associate general counsel) were still
9 there. And even if new employees were an issue (a conclusion that the record does not support),
10 Fresh Express does not explain why it took until December 2014 (over three months into fact
11 discovery) to begin to figure out which employees were still with the company or why it took so
12 long to start gathering information relevant to Amcor’s 2012 bid. (*See* Motion, ECF No. 51 at 10.)

13 Finally, even putting aside this context, and considering Fresh Express’s arguments about when
14 it discovered the issue, Fresh Express says that it did not discover either discrepancy until it was
15 preparing for the mediation that took place on December 11, 2014 and first identified the proposed
16 counterclaim on December 4, 2014. Again putting aside the conclusion that Fresh Express appears
17 to have known the fact context supporting a counterclaim, Fresh Express, does not explain why it
18 then took 49 days (December 4, 2014 to January 22, 2015) for it to move to add the counterclaim to
19 this litigation. *See Jackson*, 186 F.R.D. at 608 (“[T]o demonstrate diligence under Rule 16’s ‘good
20 cause’ standard, the movant may be required to show . . . that she was diligent in seeking
21 amendment of the Rule 16 order” after the relevant new facts came to light.). In the circumstances
22 of this case, 49 days is too long.

23 In short, the court does not find that Fresh Express was diligent under either of its theories.
24 Thus, it has not met its burden to show that there is good cause under Rule 16 to allow it to add its
25 proposed counterclaim at this stage in the litigation. This alone is sufficient for the court to deny
26 Fresh Express’s motion.

27 **B. Leave to Add the Counterclaim Is Inappropriate Under Rule 15, Too**

28 Still, the court does not believe that Fresh Express has met its burden under Rule 15, either.

1 Under Rule 15, courts generally consider five factors when assessing the propriety of a motion for
2 leave to amend: prejudice to the opposing party, undue delay, futility of the amendment, bad faith,
3 and whether the party has previously amended the pleadings. *Ahlmeyer*, 555 F.3d at 1055.

4 Of these factors, prejudice is given the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*,
5 316 F.3d 1048, 1052 (9th Cir. 2003). Here, prejudice to Amcor likely would occur if Fresh Express
6 is allowed to add a counterclaim at this stage of the litigation. On September 18, 2014, Amcor
7 propounded 49 requests for production of documents and 20 interrogatories. (Discovery Letter
8 Brief, ECF No. 56 at 1.) Amcor has also issued subpoenas for depositions and documents from a
9 third party. (Joint Case Management Statement, ECF No. 53 at 2.) These efforts likely have been
10 tailored to address the contours of the case as it has so far been defined. To allow Fresh Express to
11 assert a counterclaim now would require Amcor to engage in additional discovery in order to ensure
12 congruence with the altered nature of the case. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387
13 (9th Cir. 1990) (recognizing “the nullification of prior discovery” and “the burden of necessary
14 future discovery” as indicating prejudice).

15 Additionally, the proposed amendment would likely result in delay. Fresh Express, by its own
16 admission, has “not yet propounded a majority of its discovery” (at least as of the date it filed its
17 motion on January 22, 2015). (Motion, ECF No. 51 at 7.) This fact raises concerns about the
18 viability of the upcoming fact discovery deadline. Fresh Express’s counterclaim would require
19 additional discovery and therefore increases these concerns. Amcor might move to dismiss the
20 proposed counterclaim. The briefing for such a motion would add further delay. These delays
21 would risk necessitating an extension of the current trial date, which is less than six months away.
22 Still, this is not an enormously complicated case, and perhaps the court could adjust discovery
23 deadlines to minimize prejudice while still maintaining an orderly completion of discovery and
24 motions before the trial date.

25 The real issue, though, is that the counterclaim Fresh Express seeks to assert appears to be futile
26 in that it is entirely speculative and based on an inference made by Fresh Express that is not
27 supported by new discovery to date (a context that might support an amendment). Fresh Express so
28 far has not even been to conceptualize its counterclaim adequately. As explained above, Fresh

1 Express said in its motion that its counterclaim is based on Amcor’s 2012 bid amount being
2 significantly lower than the price Fresh Express had been paying to Amcor under the 2006 Supplier
3 Agreement. (*Id.* at 4.) Fresh Express then speculated that this “strongly suggests” that Amcor made
4 similar offers to other customers in violation of its price warranty obligation. (*Id.*) In its reply,
5 Fresh Express said that its counterclaim is based on the discrepancy between Amcor’s 2012 bid and
6 the (lower) bids submitted by Amcor’s competitors. (Reply, ECF No. 55 at 2.) Fresh Express then
7 once again speculated that this “strongly suggests” that Amcor must have offered comparably low
8 prices to other customers in order to stay in business. (*Id.*) Under either speculative theory, the
9 court does not believe that Fresh Express sufficiently alleges a plausible claim for relief.

10 For these reasons, even if the court found good cause under Rule 16(b), leave to amend would be
11 inappropriate under Rule 15.

12 **C. Fresh Express Has Not Shown That Good Cause to Add The Additional Affirmative**
13 **Defenses Exists Under Rule 16(b) and Leave to Add Them Is Inappropriate Under Rule 15**

14 Fresh Express also seeks leave to add the affirmative defenses of waiver and estoppel. (Motion,
15 ECF No. 51 at 5.) Two of the proposed defenses (nos. 19 and 21) rely on the fact that Amcor
16 submitted a bid in 2012 in response to Fresh Express’s RFP and Amcor’s behavior after being
17 informed that another bidder was awarded the contract. (*Id.* at 6.) As discussed above, Fresh
18 Express has had knowledge of these facts since the bid was received in 2012, has acknowledged the
19 bid in several documents served or filed in this action, and has alleged no new or distinct facts that
20 might explain why, despite its diligence, it only recently identified its proposed defenses. The court
21 therefore finds that Fresh Express has not been diligent in asserting these defenses.

22 The other two proposed additional affirmative defenses (nos. 18 and 20) rely on the fact that
23 Fresh Express stopped purchasing the Evolution product. (*Id.*) This fact, however, implicates
24 several of the affirmative defenses already asserted by Fresh Express in its original answer. (*See*
25 Answer, ECF No. 26 at 12-13 (Aff. Def. Nos. 2-5).) Also, Fresh Express again has failed to allege
26 any additional facts which might explain its delay in raising these defenses. The court therefore
27 finds that Fresh Express has not been diligent in asserting them.

28 Fresh Express has thus failed to meet the good cause standard of Rule 16(b) with regard to its

1 proposed additional defenses. Furthermore, the addition of the proposed affirmative defenses would
2 result in the same prejudice to Amcor and undue delay discussed above. Leave to amend also would
3 be inappropriate under Rule 15.

4 **CONCLUSION**

5 For these reasons, the court denies Fresh Express's motion.

6 This disposes of ECF No. 51.

7 **IT IS SO ORDERED.**

8 Dated: March 2, 2015



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LAUREL BEELER
United States Magistrate Judge

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