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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NICHOLE HUBBARD, et al.,
Plaintiffs,
v.
GOOGLE LLC, et al.,
Defendants.

Case No. 19-cv-07016-BLF

**ORDER GRANTING MOTION FOR
LEAVE TO AMEND COMPLAINT**

[Re: ECF No. 178]

Before the Court is Plaintiffs’ Motion for Leave to File a Further Amended Complaint. ECF No. 178 (“Mot.”). Defendants filed an opposition to the motion. ECF No. 186 (“Opp.”). Plaintiffs filed a reply in support of the motion. ECF No. 189 (“Reply”). The Court found this motion suitable for submission without oral argument and vacated the hearing originally scheduled for November 9, 2023. ECF No. 193.

For the reasons stated below, the Court GRANTS Plaintiffs’ motion.

I. BACKGROUND

On October 25, 2019, Plaintiffs filed the initial complaint in this action, alleging that Google LLC and the owners of several YouTube Channels violated the privacy rights of children under the age of thirteen by collecting their personal data and information without parental consent when the children access the YouTube platform. ECF No. 1 ¶¶ 1–12. The original complaint raised claims under California law. *Id.* ¶¶ 141–70. On March 26, 2020, Plaintiffs filed an amended complaint that added five new plaintiffs from Colorado, Indiana, Massachusetts, New Jersey, and Tennessee and raised new claims under those states’ laws. *See* ECF No. 88. Pursuant to stipulation and Court order, Plaintiffs filed a second amended complaint on April 14, 2020. ECF No. 92.

1 On December 21, 2020, the Court granted Defendants’ motion to dismiss the second
2 amended complaint with leave to amend. ECF No. 117. The Court found that all of Plaintiffs’
3 state law claims were expressly preempted by the Children’s Online Privacy Protection Act
4 (“COPPA”). *Id.* at 7–12. The Court later clarified the scope of amendment, stating that “absent
5 specific leave of Court to add parties or claims or a stipulation to amend the complaint in this
6 fashion, Plaintiffs have only been granted leave to amend the existing claims of the current
7 parties.” ECF No. 119.

8 On January 22, 2021, Plaintiffs filed a third amended complaint. ECF No. 121. The third
9 amended complaint added allegations of deception but did not include any additional plaintiffs or
10 new state law claims. On July 1, 2021, the Court granted Defendants’ motion to dismiss the third
11 amended complaint, finding again that Plaintiffs’ claims were expressly preempted by COPPA.
12 ECF No. 146 at 6–11. The Court granted leave for the Plaintiffs to amend the complaint “if they
13 can substitute proper plaintiffs to represent persons in the 13–16 age range.” *Id.* at 11.

14 On July 30, 2021, Plaintiffs informed the Court that they were unable to amend their
15 complaint to comply with the Court’s order dismissing the third amended complaint and advised
16 the Court of their intention not to file an amended complaint. ECF No. 147. The Court entered
17 judgment, ECF No. 148, and Plaintiffs appealed, ECF No. 149.

18 The Ninth Circuit reversed, holding that “COPPA’s preemption clause does not bar state-
19 law causes of action that are parallel to, or proscribe the same conduct forbidden by, COPPA.”
20 *Jones v. Google LLC*, 73 F.4th 636, 644 (9th Cir. 2023). The panel remanded to this Court “so
21 that the district court can consider in the first instance the alternative arguments for dismissal, to
22 the extent those arguments were properly preserved.” *Id.*

23 **II. LEGAL STANDARD**

24 Under Federal Rule of Civil Procedure 15, “a party may amend its pleading only with the
25 opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). “The court
26 should freely give leave when justice so requires.” *Id.* A district court ordinarily must grant leave
27 to amend unless one or more of the following “*Foman* factors” is present: (1) undue delay,
28 (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue

1 prejudice to the opposing party, or (5) futility of amendment. *See Eminence Capital, LLC v.*
2 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Foman v. Davis*, 371 U.S. 178, 182
3 (1962)). “[I]t is the consideration of prejudice to the opposing party that carries the greatest
4 weight.” *Id.* However, a strong showing with respect to one of the other factors may warrant
5 denial of leave to amend. *Id.*

6 **III. DISCUSSION**

7 Plaintiffs seek leave to file a fourth amended complaint that would (1) remove allegations
8 of deceptive conduct that are no longer necessary in light of the Ninth Circuit’s decision; (2) add
9 new allegations supporting Plaintiffs’ claims for injunctive and equitable relief; and (3) add
10 additional plaintiffs and claims for fourteen states. Mot at 1; ECF No. 178-3 (redlined complaint).

11 Plaintiffs argue that the Court should grant them leave to file the proposed fourth amended
12 complaint because none of the *Foman* factors is present. Mot. at 3. Plaintiffs argue that they did
13 not unduly delay because they brought their motion shortly after this matter was remanded to this
14 Court. *Id.* at 3–4. They also argue that the amendment is brought in good faith with no dilatory
15 motive, they have not repeatedly failed to cure previously identified deficiencies, and amendment
16 is not futile. *Id.* at 4. Finally, Plaintiffs argue that Defendants will not be prejudiced because the
17 proposed fourth amended complaint maintains the same causes of action and substantive
18 allegations as the initial complaint. *Id.*

19 Defendants oppose the motion for leave. They argue that Plaintiffs have unduly delayed
20 because Plaintiffs could have added the new plaintiffs and new claims when they filed the third
21 amended complaint almost three years ago. Opp. at 3–4. Defendants also argue that Plaintiffs
22 waived their right to seek further amendment because Plaintiffs elected not to amend after their
23 third amended complaint was dismissed. *Id.* at 4–8.

24 The Court finds that Plaintiffs have satisfied Rule 15’s lenient standard, as none of the
25 *Foman* factors counsels against granting leave to amend. The Court will first address each factor
26 and then address Defendants’ waiver argument.

27 **A. *Foman* Factors**

28 Undue Delay: The Court finds that Plaintiffs did not unduly delay in bringing their motion

1 for leave to file the fourth amended complaint. Plaintiffs brought the motion only two months
2 after the Ninth Circuit mandate issued. To the extent that Defendants argue that Plaintiffs unduly
3 delayed by failing to add the new plaintiffs and state law claims to the third amended complaint,
4 any such delay is alone insufficient to deny leave to amend. *See United States v. United*
5 *Healthcare Ins. Co.*, 848 F.3d 1161, 1167 (9th Cir. 2016) (“Undue delay by itself is insufficient to
6 justify denying leave to amend.”); *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (same).
7 Accordingly, the Court finds that the first *Foman* factor, to the extent that it is present, does not
8 counsel against granting leave to amend.

9 Bad Faith: Plaintiffs state, and Defendants do not dispute, that Plaintiffs do not bring their
10 motion in bad faith. Accordingly, the Court finds that the second *Foman* factor is not present.

11 Repeated Failure to Cure Deficiencies in Amendment: Plaintiffs state, and Defendants do
12 not dispute, that Plaintiffs have not repeatedly failed to cure deficiencies in amendment.
13 Accordingly, the Court finds that the third *Foman* factor is not present.

14 Undue Prejudice to Opposing Party: The Court finds that there is no undue prejudice to
15 Defendants. “The undue prejudice which a court must guard against is that prejudice which would
16 cause a party undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories
17 on the part of the other party.” *Laatz v. Zazzle, Inc.*, No. 22-CV-04844-BLF, 2023 WL 4550941,
18 at *3 (N.D. Cal. Mar. 13, 2023) (quoting *Braun v. Norton*, No. C-05-03777-MJJ, 2006 WL
19 8459605 (N.D. Cal. Jan. 27, 2006)). Defendants bear the burden of showing prejudice, *DCD*
20 *Programs, Ltd. V. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987), but Defendants have not raised
21 any argument regarding undue prejudice. In fact, the Court finds that Defendants will not be
22 unduly prejudiced because the fourth amended complaint includes the same causes of action and
23 substantive allegations as the initial complaint. It seeks only to remove unnecessary allegations,
24 include additional evidence, and add parties and state law claims based on the same substantive
25 allegations as the initial complaint. Accordingly, the Court finds that the fourth *Foman* factor is
26 not present.

27 Futility of Amendment: Plaintiffs state, and Defendants do not dispute, that Plaintiffs’
28 proposed amendment would not be futile. *See Laatz*, 2023 WL 4550941, at *3 (finding that where

1 defendants made only a cursory argument that claims are futile, defendants failed to meet “their
2 heavy burden of proving futility of amendment”). Accordingly, the Court finds that the fifth
3 *Foman* factor is not present.

4 **B. Waiver**

5 Defendants argue that “the Ninth Circuit has made clear that a plaintiff’s strategic decision
6 to accept a final judgment and appeal rather than taking the opportunity to amend the complaint
7 waives the plaintiff’s right to further amend.” Opp. at 4. Plaintiffs respond that Defendants rely
8 on inapposite case law to support this conclusion and that the law is clear that a district court may
9 permit amendment after remand from an appeal. Reply at 3.

10 The Court agrees with Plaintiffs that Defendants’ case law is inapposite. The two Ninth
11 Circuit cases on which Defendants rely are cases in which the appellate court affirmed the lower
12 court’s dismissal and then considered whether the plaintiff should be granted leave to amend the
13 complaint to address the affirmed deficiencies. *See Robles v. GOJO Indus., Inc.*, No. 22-55627,
14 2023 WL 4946601, at *2 (9th Cir. Aug. 3, 2023); *Rick-Mik Enterprises, Inc. v. Equilon*
15 *Enterprises LLC*, 532 F.3d 963, 976–77 (9th Cir. 2008). The third case is a bankruptcy appeal to
16 the Central District of California in which the question before the district court was whether the
17 bankruptcy court abused its discretion in imposing restrictions on appeal and whether those
18 restrictions were proper. *See In re Ferrante*, No. SACV 22-1087-MWF, 2022 WL 17540997, at
19 *7 (C.D. Cal. Dec. 6, 2022). Unlike the plaintiffs in *Robles* and *Rick-Mik Enterprises*, Plaintiffs
20 are not seeking leave to amend after losing on appeal and Plaintiffs are not seeking leave to amend
21 pleadings that the Ninth Circuit has considered. Unlike in *Ferrante*, Plaintiffs do not argue that
22 previous restrictions on prior amendments, if any, were an abuse of discretion. The Court’s prior
23 orders dismissing Plaintiffs’ second and third amended complaints addressed only preemption and
24 directed Plaintiffs to allege facts that might allow the complaint to survive preemption. *See* ECF
25 No. 119 at 1; ECF No. 146 at 11. Similarly, the Ninth Circuit’s decision on appeal addressed only
26 preemption. *See Jones*, 73 F.4th at 644. Now that the issue of preemption has been resolved,
27 Plaintiffs seek leave to amend allegations in the complaint the merits of which no court has yet
28 considered. With respect to these allegations, this is effectively a new case. For this reason,

1 permitting leave to file the proposed fourth amended complaint does not implicate the same
2 problems of gamesmanship, piecemeal appeals, and multiplicity of litigation that Defendants
3 invoke in their opposition. Opp. at 5. As such, the Court finds that Plaintiffs have not waived
4 their right to seek further amendment.

5 Moreover, the Court has discretion to permit amendment after a remand from appeal. The
6 Ninth Circuit has made clear that “[a]bsent a mandate which explicitly directs to the contrary, a
7 district court upon remand can permit the plaintiff to ‘file additional pleadings, vary or expand the
8 issues’” *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Rogers v.*
9 *Hill*, 289 U.S. 582, 587–88 (1933)). Because leave to amend under Rule 15 should “be applied
10 with extreme liberality” and none of the *Foman* factors counsels against leave to amend, the Court
11 finds it appropriate to exercise its discretion to permit Plaintiffs to file the proposed fourth
12 amended complaint.

13 **IV. ORDER**

14 For the foregoing reasons, IT IS HEREBY ORDERED that:

15 1. Plaintiffs’ Motion for Leave to File a Further Amended Complaint (ECF No. 178)
16 is GRANTED. Plaintiffs SHALL file the fourth amended complaint on the docket within 3 days
17 of the date of this Order.

18 2. Defendants’ pending Motion to Dismiss (ECF No. 166) is TERMINATED without
19 prejudice to Defendants filing a motion to dismiss Plaintiffs’ fourth amended complaint.

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21 Dated: November 13, 2023

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24 BETH LABSON FREEMAN
25 United States District Judge
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