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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PERSHING PACIFIC WEST, LLC,
Plaintiff,
v.
FERRETTI GROUP, USA, INC., *et al.*,
Defendants.

Case No. 10-cv-1345-L(DHB)

ORDER:

**(1) GRANTING MOTION FOR
LEAVE TO FILE THIRD AMENDED
COMPLAINT [DOC. 103]; AND**

**(2) TERMINATING DEFENDANTS'
MOTIONS TO DISMISS AS MOOT
[DOCS. 99, 101]**

On May 24, 2010, Plaintiff Pershing Pacific West, LLC (“Pershing”) commenced this action in the San Diego Superior Court against Defendants Ferretti Group, USA, Inc. (“Ferretti”), MarineMax, Inc., and MTU Detroit Diesel, Inc., doing business as Detroit Diesel Corporation (“MTU DD”). About a month later, Ferretti and MarineMax removed this action to federal court. On April 12, 2012, after receiving leave from the Court, Pershing filed its First Amended Complaint (“FAC”) in order to add Defendant MTU Friedrichshafen GmbH (“MTU GmbH”) to this action.¹

¹ For the purposes of this order, the Court shall refer to MTU DD and MTU GmbH collectively as “MTU.”

1 On February 7, 2013, Pershing filed a Second Amended Complaint. Thereafter, Ferretti
2 and Marinemax, and MTU separately filed motions to dismiss. (Docs. 99, 101.) While those
3 motions were pending, Ferretti and MarineMax filed a Notice of Settlement, which also
4 withdraws their opposition to this motion and requests that the Court take their motion to dismiss
5 off calendar. (Doc. 124.) Now pending before the Court is Pershing’s motion for leave to file a
6 Third Amended Complaint (“TAC”). In light of Ferretti and MarineMax’s Notice of Settlement,
7 only MTU now opposes.²

8 The Court found this motion suitable for determination on the papers submitted and
9 without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 109.) For the following reasons, the Court
10 **GRANTS** Pershing’s motion for leave to file a TAC, and **TERMINATES AS MOOT**
11 Defendants’ motions to dismiss.

12 13 **I. BACKGROUND**

14 This action arises from Pershing’s purchase of a 72' motor yacht, the 2009 Pershing
15 Model 72. (SAC ¶ 1.) The transaction took place on August 22, 2008, when Pershing and
16 MarineMax entered into a purchase agreement. (SAC ¶ 9.) Pershing seeks to recover damages
17 based upon the purchase and sale of the yacht, which was allegedly in defective condition at the
18 time of the sale. It also named Ferretti as manufacturer of the yacht, MarineMax as the seller,
19 and MTU as the manufacturer and warrantor of the yacht’s engines. (*Id.*)

20 At the time Pershing filed its complaint, its counsel believed that MTU DD was the
21 manufacturer of the engines. (Kessler Decl. ¶ 2.) However, around November 2010, after
22 reviewing newly issued warranty-related information, Pershing’s counsel discovered that the
23 actual manufacturer and warrantor of the yacht’s engines was the Germany-based company
24 MTU GmbH. (*Id.* ¶ 4.)

25 In its SAC, Pershing asserts the following six claims: (1) revocation of acceptance against
26

27
28 ² Pershing also requests that the Court strike Ferretti and MarineMax’s late-filed
opposition. (Pl.’s Reply 10:7–16.) The Court **DENIES AS MOOT** this request.

1 MarineMax; (2) rescission against MarineMax; (3) breach of implied warranty of
2 merchantability against MTU; (4) breach of implied warranty of merchantability against Ferretti;
3 (5) negligence against MTU and Ferretti; and (6) breach of express warranty against MTU.

4 Pershing now moves for leave to file a TAC, which adds factual allegations and claims.
5 (Doc. 103.) These additional claims include violation of the Magnuson-Moss Warranty Act
6 (“MMWA”), deceit, and negligent misrepresentation. (Doc. 103-3.) In light of Ferretti and
7 MarineMax’s Notice of Settlement, only MTU opposes the motion. (Doc. 105.)

9 **II. LEGAL STANDARD**

10 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a responsive
11 pleading has been served, a party may amend its complaint only with the opposing party’s
12 written consent or the court’s leave. Fed. R. Civ. P. 15(a). “The court should freely give leave
13 when justice so requires,” and apply this policy with “extreme liberality.” *Id.*; *DCD Programs,*
14 *Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). However, leave to amend is not to be
15 granted automatically. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)
16 (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Granting leave to
17 amend rests in the sound discretion of the district court. *Pisciotta v. Teledyne Indus., Inc.*, 91
18 F.3d 1326, 1331 (9th Cir. 1996).

19 The Court considers five factors in assessing a motion for leave to amend: (1) bad faith;
20 (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment; and (5)
21 whether the plaintiff has previously amended the complaint. *Johnson v. Buckley*, 356 F.3d 1067,
22 1077 (9th Cir. 2004); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The party opposing
23 amendment bears the burden of showing any of the factors above. *See DCD Programs*, 833
24 F.2d at 186. Of these factors, prejudice to the opposing party carries the greatest weight.
25 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). However, absent
26 prejudice, a strong showing of the other factors may support denying leave to amend. *See id.*

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1 **III. DISCUSSION**

2 MTU opposes the motion for leave to amend on five grounds: (1) undue delay; (2)
3 prejudice; (3) bad faith; (4) futility; and (5) failure to show good cause to modify the scheduling
4 order. (Defs.’ Opp’n, 1:9–2:12.) In essence, MTU argues that Pershing’s motion is a bad-faith
5 litigation tactic to add futile claims in order to unnecessarily delay litigation and prejudice
6 Defendants. The Court disagrees.

7
8 **A. Modification of the Scheduling Order**

9 Once the court-ordered deadline for amending pleadings has passed, Rule 16 governs.
10 Under Rule 16, “the scheduling order ‘control[s] the subsequent course of the action’ unless
11 modified by the court.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir.
12 1992) (quoting Fed. R. Civ. P. 16). This rule further provides that a “party seeking to amend [a]
13 pleading after [the] date specified in [the] scheduling order must first show ‘good cause’ for
14 amendment [of the scheduling order] under Rule 16(b), then, if ‘good cause’ be shown, the party
15 must demonstrate that [the] amendment was proper under Rule 15.” *Johnson*, 975 F.2d 604, 608
16 (9th Cir. 1992) (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987); *Fin. Holding*
17 *Corp. v. Garnac Grain Co.*, 127 F.R.D. 165, 166 (W.D. Mo. 1987)). Furthermore, the “‘good
18 cause’ standard primarily considers the diligence of the party seeking the amendment.” *Id.* at
19 609. “While a court may take into account any prejudice to the party opposing modification of
20 the scheduling order, ‘the focus of the inquiry is upon the moving party’s reasons for seeking
21 modification . . . [i]f that party was not diligent, the inquiry should end.’” *In re W. States*
22 *Natural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013) (quoting *Johnson*, 975 F.2d at
23 609). In ruling on matters such as these, which involve the supervision of the pretrial phase of
24 litigation, “[t]he district court is given broad discretion.” *Miller v. Safeco Title Ins. Co.*, 758
25 F.2d 364, 369 (9th Cir. 1985).

26 Pershing concurrently moves to modify the scheduling order to permit it to amend its
27 complaint. Pershing argues that good cause exists to modify the scheduling order because it
28 diligently seeks to do so. (Pl.’s Mot. 13:26–14:13.) To demonstrate diligence, Pershing points

1 to the fact that it received documents through discovery *after* the scheduling order deadline
2 showing “[Defendants’] prior knowledge and intentional concealment of the problems
3 experienced on the [yacht],” and that it filed this motion shortly after the Court issued its orders
4 on the then-pending motions to dismiss in January 2013. (*Id.*) Pershing adds that “Defendants
5 seek to capitalize on their continued delay and obfuscation when contending [Pershing] does not
6 have good cause to seek leave,” punctuating that proposition with the fact that “[MTU GmbH]
7 has yet to produce a single document in this lawsuit.” (Pl.’s Reply 8:18–19, 9:19.) MTU
8 responds that Pershing “was aware of the purported grounds to pursue this amendment at least in
9 September 2012,” and that it did not bring up amending the complaint when the parties entered
10 into a stipulation in December 2012 to “move procedural dates.” (Defs.’ Opp’n 13:17–14:3.)

11 After reviewing the circumstances presented, the Court concludes that Pershing has
12 shown good cause to modify the scheduling order to permit it to move for leave to amend its
13 complaint. *See Johnson*, 975 F.2d at 609. Pershing demonstrates that it acted diligently in light
14 of the circumstances, and thus is permitted to request leave to amend its complaint. *See id.*

15 16 **B. Undue Delay**

17 MTU argues that Pershing unduly delayed in requesting leave to file its TAC. (Defs.’
18 Opp’n 11:20–22.) As the Ninth Circuit held in *Bowles v. Reade*, “[u]ndue delay by itself . . . is
19 insufficient to justify denying a motion to amend . . . [w]e have previously reversed the denial of
20 a motion for leave to amend where the district court did not provide a contemporaneous specific
21 finding of prejudice to the opposing party, bad faith by the moving party, or futility of the
22 amendment.” 198 F.3d 752, 758 (9th Cir. 1999). For the reasons below, MTU fails to meet its
23 burden of demonstrating prejudice, bad faith, or futility of amendment. Thus, its contentions as
24 to undue delay are unavailing.

25 26 **C. Prejudice**

27 MTU’s argument that it will be prejudiced by Pershing’s TAC is without merit. MTU
28 contends that Pershing waited until Defendants had filed motions to dismiss before filing its

1 motion for leave to amend, thus “[prejudicing] [D]efendants by forcing them to work up prior
2 motions to dismiss that may not have been needed.” (Defs.’ Opp’n 10:1–6.) The core of MTU’s
3 prejudice argument is that Pershing’s delay in filing its motion for leave to amend suspended
4 resolution of the dispute, and forced MTU to file a motion to dismiss which would then become
5 moot.

6 In support of this contention, MTU cites to *Lockheed Martin Corp. v. Network Solutions,*
7 *Inc.*, 194 F.3d 980 (9th Cir. 1999). In *Lockheed*, the Ninth Circuit affirmed the holding of a
8 district court denying a plaintiff’s motion for leave to amend after discovery had closed and
9 when a defendant’s summary-judgment motion was pending. *Id.* at 986. The court reasoned that
10 because the claims sought to be added would require reopening discovery and conducting
11 extensive investigation in the face of the pending summary-judgment motion, amendment would
12 be prejudicial. *Id.* But here, discovery has not closed. Discovery is ongoing, and so are the
13 discovery disputes. In fact, the parties have stipulated to extend the deadline for all discovery to
14 November 22, 2013. (Doc. 119.) The magistrate judge held a discovery conference with regard
15 to this matter on June 11, 2013, more than two months after MTU filed its opposition to
16 Pershing’s motion, claiming prejudice based on undue delay.

17 As the Ninth Circuit reasoned in *Westlands Water District v. United States*, “legal
18 prejudice is . . . prejudice to some legal interest, some legal claim, some legal argument.
19 Uncertainty because a dispute remains unresolved is not legal prejudice.” 100 F.3d 94, 97 (9th
20 Cir. 1996). MTU offers no reason why any of its legal interests or claims have suffered as a
21 result of Pershing’s motion. The only prejudice MTU attempts to show as a result of Pershing’s
22 motion for leave to amend stems from delay, and this attempt is ineffectual. As of right now, the
23 parties have until late November to complete discovery. MTU does not show that this is an
24 insufficient time period to conduct discovery as to the added claims.

25 Therefore, while Pershing may not have been as expeditious as it could have been in
26 filing its motion, MTU fails to show any prejudice to its legal interests as a result of permitting
27 Pershing to file a TAC. *See Westlands Water Dist.*, 100 F.3d at 97.

28 //

1 **D. Bad Faith**

2 MTU argues that Pershing’s failure to discuss its new and separate claim against all
3 defendants for breach of the MMWA “rings loudly of bad faith.” (Defs. Opp’n 14:26–27.) Why
4 it does so is unclear, and MTU provides no support for this conclusion. Rather, MTU continues
5 that it is “procedurally improper” for Pershing to insert a new claim without requesting leave of
6 the court in its motion. (Defs.’ Opp’n 14:27–28, 15:1–3.) To support the latter proposition,
7 MTU cites to *Brandt v. Davis*, 191 F.3d 887 (8th Cir. 1999). In *Brandt*, the Eighth Circuit
8 denied a plaintiff leave to amend when the plaintiff did not explain how he would amend a
9 complaint to save a defective claim. 191 F.3d at 893. This Court has not held Pershing’s
10 MMWA claim to be defective, and MTU does not otherwise attempt to meaningfully apply
11 *Brandt* to the circumstances presented here.

12 It is true that Pershing did not discuss the new MMWA claim in its motion, despite
13 including the claim in its proposed TAC. Pershing may have asserted the claim less explicitly in
14 its two previous operative complaints, but its intention to clarify and expound upon this claim
15 should have been made clear in its motion. Nonetheless, the nonmoving party bears the burden
16 of showing the factors above in opposing a motion for leave to amend, and MTU ultimately fails
17 to meet its burden to show that Pershing acted in bad faith. *See DCD Programs*, 833 F.2d at
18 186.

19
20 **E. Futility**

21 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”
22 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Futility is a measure of the amendment’s
23 legal sufficiency. “[A] proposed amendment is futile only if no set of facts can be proved under
24 the amendment . . . that would constitute a valid and sufficient claim or defense.” *Miller v.*
25 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Thus, the test of futility is identical to the
26 one applied when considering challenges under Rule 12(b)(6) for failure to state a claim upon
27 which relief may be granted. *Baker v. Pac. Far E. Lines, Inc.*, 451 F. Supp. 84, 89 (N.D. Cal.
28 1978); *see Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (“A district court does not err

1 in denying leave to amend . . . where the amended complaint would be subject to dismissal.”
2 (citation omitted)). MTU argues that Pershing’s amendments are futile.

3
4 **1. Federal Rule of Civil Procedure 9(b)**

5 As a preliminary matter, MTU is correct that Pershing’s Proposed TAC does not set forth
6 its allegations of fraud with sufficient specificity to satisfy the requirements of Rule 9(b). Actual
7 fraud in California “consists in any of the following acts, committed by a party to the contract, or
8 with his connivance, with intent to deceive another party thereto, or to induce him to enter into
9 the contract:

- 10 1. The suggestion, as a fact, of that which is not true, by one who
11 does not believe it to be true;
12 2. The positive assertion, in a manner not warranted by the
13 information of the person making it, of that which is not true,
14 though he believes it to be true;
15 3. The suppression of that which is true, by one having knowledge
16 or belief of the fact;
17 4. A promise made without any intention of performing it; or,
18 5. Any other act fitted to deceive.

19 Cal. Civ. Code § 1572. Rule 9(b)’s particularity requirement applies to all averments of fraud in
20 federal court, even those which are based in state law or in which fraud is pleaded even though it
21 is not an essential element of the claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04
22 (9th Cir. 2003).

23 To satisfy Rule 9(b), “[a]verments of fraud must be accompanied by ‘the who, what,
24 when, where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106 (9th Cir. 2003)
25 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)). Plaintiffs must plead sufficient
26 facts to give defendants notice of the time, place, and nature of the alleged fraud together with
27 an explanation of the statement and why it was false or misleading. *See id.* at 1107. Averments
28 of fraud must be pled with sufficient particularity as to give the defendants notice of the
circumstances surrounding a fraudulent statement. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d
1541, 1547 (9th Cir. 1994) (superseded by statute on other grounds as stated in *Ronconi v.*
Larkin, 253 F.3d 423, 429 n.6 (9th Cir. 2001)). The circumstances constituting the alleged fraud
must “be specific enough to give defendants notice of the particular misconduct . . . so that they

1 can defend against the charge and not just deny that they have done anything wrong.” *Vess*, 317
2 F.3d at 1106 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (internal
3 quotation marks omitted). “A plaintiff may . . . satisfy Rule 9(b) with allegations of
4 circumstantial evidence if the circumstantial evidence alleged explains how and why the
5 statement was misleading when made.” *Fecht v. Price Co.*, 70 F.3d 1078, 1083 (9th Cir. 1995).
6 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

7 The Proposed FAC includes two claims that sound in fraud: deceit and negligent
8 misrepresentation. In its deceit claim, Pershing alleges that “throughout the time Plaintiff owned
9 the Pershing Watercraft, MTU . . . misrepresented to, and/or concealed from, Plaintiff their
10 knowledge of the problems and repairs to the problems experienced and reported by Plaintiff
11 regarding the engines and fuel delivery systems on the Pershing Watercraft.” (Proposed TAC ¶
12 91.) It then provides an example of this alleged deceit:

13 For example, in July 2009, in response to reports of problems by
14 Plaintiff, MTU . . . through their agents Joran Kraczak and Steven Neil,
15 among others, represented to Plaintiff that the problems experienced by
16 Plaintiff in San Diego with respect to the engines and fuel delivery
17 systems were either not problematic for the performance of the engines
18 and/or were resolved simply by increasing the fuel temperature alarm
19 settings. MTU . . . failed to reveal, and suppressed the facts, that the
20 same problems being experienced by Plaintiff had been experienced on
21 other vessels with the same engines and fuel delivery systems as had
22 been reported to them by other boat owners in as early as January 2008.
23 MTU . . . also failed to reveal, and suppressed the facts, that the issues
24 reported by Plaintiff were problematic for the performance of the
25 engines and were not actually resolved by simply increasing the fuel
26 temperature alarm settings.

27 (*Id.* ¶ 92.) And in its negligent-misrepresentation claim, Pershing alleges that “[t]hroughout the
28 time Plaintiff owned the Pershing Watercraft, MTU . . . misrepresented to Plaintiff various
29 repairs to the problems experienced and reported by Plaintiff regarding the engines and fuel
30 delivery systems on the Pershing Watercraft.” (*Id.* ¶ 107.) It then provides an example of this
31 alleged misrepresentation in general terms. (*Id.* ¶ 108.) For these claims, Pershing alleges that
32 MTU either made a false assertion or suppressed the truth. (*Id.* ¶ 91–92, 107.) In other words,
33 Pershing alleges fraud, and thus Rule 9(b) applies. *See* Cal. Civ. Code § 1572; *Vess*, 317 F.3d at
34 1103.

35 //

1 Here, Pershing's deceit claim fails to include allegations explaining the circumstances in
2 which the alleged fraud took place. (Proposed TAC ¶ 91.) The who, what, where, when, and
3 how of MTU's alleged fraud, all of which must be pled with particularity, are noticeably
4 missing. *See Vess*, 317 F.3d at 1106. The example that Pershing provided is closer to meeting
5 the Rule 9(b) standard, but it still falls short. In that example, Pershing fails to provide the date
6 or time of the alleged fraudulent statements, the mode of communication used to deliver the
7 statements, the specific recipients of the statements within Pershing, or the specific contents of
8 the statements made. *See id.* To meet the Rule 9(b) standard, Pershing must plead sufficient
9 facts to give the defendants notice of the time, place, and nature of each alleged instance of fraud
10 along with an explanation of the statement and what makes it false or misleading. *See id.* at
11 1107; *GlenFed*, 42 F.3d at 1547. Pershing ultimately fails to plead deceit with sufficient
12 particularity. *See Fed. R. Civ. P. 9(b).*

13 Similarly, Pershing's negligent-misrepresentation claim fails to meet the heightened Rule
14 9(b) standard. This claim is even less specific about MTU's fraudulent actions than the deceit
15 allegations. Pershing again fails to provide the circumstances in which the fraud took place,
16 such as the time, place, or mode of communication. There is not enough specificity here to bring
17 the negligent-misrepresentation claim into compliance with Rule 9(b). *See Vess*, 317 F.3d at
18 1106; *GlenFed*, 42 F.3d at 1547.

19 Nonetheless, though the Proposed TAC does not adequately meet the Rule 9(b) standard,
20 there is enough factual matter to suggest that the claims for deceit and negligent
21 misrepresentation are not futile. *See Miller*, 845 F.2d at 214. Therefore, this factor weighs in
22 favor of permitting leave to amend.

23 24 **2. Duty to Disclose**

25 In California, "[t]he elements of fraud are: (1) a misrepresentation (false representation,
26 concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e.,
27 to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co.,*
28 *Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004). Additionally, "[t]here are four circumstances in

1 which nondisclosure or concealment may constitute actionable fraud.” *LiMandri v. Judkins*, 52
2 Cal. App. 4th 326, 336 (1997) (quoting *Heliotis v. Schuman*, 181 Cal. App. 3d 646, 651 (1986))
3 (internal quotation marks omitted). These circumstances are: (1) a fiduciary relationship
4 between the parties; (2) a situation in which the defendant has exclusive knowledge of material
5 facts not known to the plaintiff; (3) a situation in which defendant actively conceals a material
6 fact from the plaintiff; and (4) a situation in which the defendant makes partial representations
7 but also suppresses some material facts. *Id.* at 336-37. The latter three circumstances
8 presuppose some relationship between the parties resulting from a transaction between them. *Id.*
9 at 337. And showing the suppression of a fact by one who has a duty to disclose may establish
10 the misrepresentation element. *See Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1136
11 (2010).

12 MTU also argues that allowing amendment to the deceit claim is futile because MTU
13 does not owe Pershing a duty to disclose. (Defs.’ Opp’n 105:3–5.) While MTU is correct that
14 Pershing fails to allege a duty to disclose as required to establish fraud by concealment under
15 California law, MTU’s futility argument is without merit. It is not clear from Pershing’s
16 Proposed TAC whether the basis of its deceit claim is a nondisclosure or an affirmative
17 misrepresentation. (*See Proposed TAC* ¶¶ 90–97.) Even if Pershing’s deceit claim is based solely
18 on concealment, that neither of the MTU Defendants did not sell the yacht to Pershing does not
19 necessarily lead to the conclusion that no transaction took place between MTU and Pershing
20 which may have given rise to a duty to disclose. *See LiMandri*, 52 Cal. App. 3d at 336-37.

21 Here, Pershing alleges that MTU “misrepresented to, and/or concealed” their knowledge
22 of problems with the engines and fuel delivery systems on the yacht. (*Proposed TAC* ¶ 91.)
23 However, these allegations do not specify whether its basis is affirmative misrepresentation or
24 mere nondisclosure. If Pershing alleges concealment or nondisclosure as the basis for actionable
25 fraud, it must plead a duty to disclose stemming from some relationship between the parties as a
26 result of a transaction. *See LiMandri*, 52 Cal. App. 4th at 336. Pershing has not done that here.

27 Though the deceit claim with respect to a duty to disclose does not adequately meet the
28 Rule 12(b)(6) standard, MTU nonetheless fails to show that permitting amendment would be

1 futile. *See Miller*, 845 F.2d at 214.


2 In sum, MTU fails to meet its burden of opposing the motion for leave to amend. *See*
3 *DCD Programs*, 833 F.2d at 186; Fed. R. Civ. P. 15(a)(2). Therefore, permitting amendment is
4 appropriate in this instance. *See id.*

5
6 **IV. CONCLUSION & ORDER**

7 In light of the foregoing, the Court **GRANTS** Pershing's motion for leave to file a TAC.
8 (Doc. 103.) Pershing shall revise its TAC in a manner consistent with this order only as to the
9 claims discussed above, and file it by **July 1, 2013**. Furthermore, in anticipation of Pershing's
10 amended complaint, the Court also **TERMINATES AS MOOT** Defendants' motions to
11 dismiss. (Docs. 99, 101.) If Pershing does not file its TAC by the aforementioned date, then
12 Defendants may request that the Court reinstate its motions to dismiss through an *ex parte*
13 application.

14 **IT IS SO ORDERED.**

15
16 DATED: April 24, 2013

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18 
M. James Lorenz
United States District Court Judge

19 COPY TO:

20 HON. DAVID H. BARTICK
UNITED STATES MAGISTRATE JUDGE

21 ALL PARTIES/COUNSEL
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