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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DIRECT LIST LLC, a North Carolina  
Limited Liability Company; and  
ERAN SALU, an individual,  
  
Plaintiffs,  
  
v.  
VISTAGE INTERNATIONAL, INC.,  
a Delaware Corporation; PHIL  
KESSLER; LAUREN KESSLER;  
DIANA OWENS; EDETTE  
HERRON; and DOES 1 through 10,  
inclusive,  
  
Defendants.

CASE NO. 15cv2025-WQH-JLB  
ORDER

HAYES, Judge:

The matter before the Court is the Motion for Leave to Modify the Scheduling Order and File a First Amended Complaint filed by Plaintiffs Direct List, LLC and Eran Salu (“Plaintiffs”). (ECF No. 97).

**I. Background**

On September 11, 2015, Plaintiffs Direct List LLC (“Direct List”) and Eran Salu (“Salu”) commenced this action by filing a complaint alleging four causes of action against Defendants Vistage International, Inc. (“Vistage”), Phil Kessler, Lauren Kessler, Diana Owens (“Owens”), and Edette Herron (“Herron”) as follows: (1) fraud, brought by Salu against Vistage and Phil Kessler; (2) breach of fiduciary duty, brought by Salu against Vistage and Phil Kessler; (3) misappropriation of trade secrets in violation of

1 Cal. Civil Code § 3426 *et seq.*, brought by Direct List against Phil Kessler, Lauren  
2 Kessler, Owens, and Herron; and (4) unfair business practices in violation of Cal. Bus.  
3 & Prof. Code § 17200 *et seq.*, California’s unfair competition law (“UCL”), brought by  
4 Salu and Direct List against Vistage, Phil Kessler, Lauren Kessler, Diana Owens, and  
5 Edette Herron.

6 On February 8, 2016, the Court issued an order granting Vistage’s motion to  
7 dismiss the claim for breach of fiduciary duty brought by Salu, and denying Vistage’s  
8 motion to dismiss the claim for fraud brought by Salu. (ECF No. 20). On November  
9 3, 2016, the Court issued an order granting Vistage’s motion to dismiss the fraud and  
10 UCL claims brought by Salu, and granting Vistage’s motion for summary judgment on  
11 the UCL claim brought by Direct List. (ECF No. 61).

12 On January 13, 2017, the Court held a pretrial conference in this matter. (ECF  
13 No. 74). The Court issued a scheduling order setting a February 13, 2017 deadline for  
14 Defendants to file additional motions and dates for a motion in limine hearing and jury  
15 trial. (ECF No. 75). On January 26, 2017, Brandon Baum, former counsel for  
16 Plaintiffs, filed a motion to withdraw as attorney. (ECF No. 76). On February 13,  
17 2017, Defendants Phil Kessler, Lauren Kessler, and Diana Owens (“the Kessler  
18 Defendants”) filed a motion to dismiss. (ECF No. 81). On February 23, 2017, the  
19 Court issued an order granting the motion to withdraw as attorney, and ordering  
20 Plaintiffs to file a notice of appearance of new counsel or a status report. (ECF No. 85).  
21 On April 7, 2017, attorneys William Patrick Keith and Anne K. Wilson filed notices of  
22 appearance on behalf of Plaintiffs. (ECF Nos. 87 & 88).

23 On May 2, 2017, Plaintiffs filed the Motion for Leave to Modify the Scheduling  
24 Order and File a First Amended Complaint (ECF No. 97). On May 22, 2017, Vistage  
25 filed a response in opposition. (ECF No. 105). On May 22, 2017, the Kessler  
26 Defendants filed a response in opposition. (ECF No. 106). On May 26, 2017, Plaintiffs  
27 filed a reply. (ECF No. 107). On June 13, 2017, Vistage filed a surreply. (ECF No.  
28 119).

1 **II. Contentions of the Parties**

2 Plaintiffs contend that they have demonstrated good cause to modify the pretrial  
3 scheduling order to allow the filing of a first amended complaint. Plaintiffs contend  
4 that good cause exists to add Arrow Marketing Company, L.L.C. (“Arrow”) as a  
5 defendant and to assert claims against Arrow because Arrow’s existence was not  
6 discovered by Plaintiffs until February 2017, and because Arrow was not registered  
7 with the State of California until after this action was filed. (ECF No. 97-1 at 10).  
8 Plaintiffs contend that good cause exists to add Direct List as a plaintiff to several  
9 causes of action because Plaintiffs seek to address standing issues raised in the motions  
10 to dismiss and the motion for summary judgment filed in this case. Plaintiffs contend  
11 that good cause exists to add additional claims against the previously-named  
12 Defendants because Plaintiffs seek to “state alternative claims against Vistage and the  
13 Kessler Defendants in light of the adverse rulings (and possible future rulings) on the  
14 three Rule 12 motions.” *Id.* at 20.

15 Vistage contends that Plaintiffs have failed to demonstrate good cause because  
16 Plaintiffs were aware of the facts asserted in the proposed first amended complaint as  
17 to Vistage prior to filing this action. Vistage contends that Plaintiffs did not seek leave  
18 to amend following this Court’s orders on Vistage’s motion to dismiss and motion for  
19 summary judgment. Vistage contends that it “pursued discovery based on a strategic  
20 plan formulated from the pleadings brought against it[,]” and that it was “properly  
21 dismissed and exited this dispute seven months ago.” (ECF No. 105 at 8).

22 The Kessler Defendants contend that Plaintiffs have failed to demonstrate good  
23 cause because their proposed amendments are the result of Plaintiffs’ “strategic  
24 decisions” in this case, including not pleading contract or interference claims against  
25 the Kessler Defendants and not pleading computer-access claims against the Kessler  
26 Defendants. (ECF No. 106 at 2).

27 **III. Analysis**

28 Federal Rule of Civil Procedure 16(b) states that a scheduling order “may be

1 modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4).  
2 Unlike the liberal amendment policy set forth in Federal Rule of Civil Procedure 15(a)  
3 “which focuses on the bad faith of the party seeking to interpose an amendment and the  
4 prejudice to the opposing party, Rule 16(b)’s ‘good cause’ standard primarily considers  
5 the diligence of the party seeking the amendment.” *Johnson v. Mammoth Recreations,*  
6 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). *See also Jackson v. Laureate, Inc.*,  
7 186 F.R.D. 605, 607 (E.D. Ca. 1999) (“once the district court has filed a pretrial  
8 scheduling order pursuant to Rule 16 which establishes a timetable for amending  
9 pleadings, a motion seeking to amend pleadings is governed first by Rule 16(b), and  
10 only secondarily by Rule 15(a).”). “While a court may take into account any prejudice  
11 to the party opposing modification of the scheduling order, ‘the focus of the [Rule  
12 16(b)] inquiry is upon the moving party’s reasons for seeking modification . . . [i]f that  
13 party was not diligent, the inquiry should end.” *In re Western States Wholesale*  
14 *Natural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013) (quoting *Johnson*, 975  
15 F.2d at 609).

16 In determining whether a movant seeking to amend pleadings pursuant to Rule  
17 16(b) has demonstrated diligence, courts may consider whether the party was diligent  
18 in assisting the Court with creating the Rule 16 order, whether the movant’s  
19 noncompliance with the scheduling order will occur because of developments the  
20 movant could not have reasonably foreseen or anticipated at the time the scheduling  
21 order was issued, and whether the movant was diligent in seeking amendment under  
22 Rule 16(b) once it became apparent that the movant could not comply with the  
23 scheduling order. *Jackson*, 186 F.R.D. at 608.

24 On December 2, 2015, the Magistrate Judge entered a scheduling order in this  
25 matter. (ECF No. 18). The order set a January 16, 2016 deadline for filing any motion  
26 to amend the pleadings, and the order set a July 22, 2016 deadline for filing all other  
27 pretrial motions. *Id.* at 1, 3. On April 7, 2017, current counsel for Plaintiffs entered  
28 their notices of appearance. (ECF Nos. 87 & 88). On May 2, 2017, Plaintiffs filed the

1 Motion for Leave to Modify the Scheduling Order and File a First Amended Complaint.  
2 (ECF No. 97).

3 Having reviewed the Motion for Leave to Modify the Scheduling Order and File  
4 a First Amended Complaint, the responses in opposition, the reply, and the surreply  
5 filed by the parties, the Court finds the following:

6 **A. Proposed Claims Against Arrow Marketing Company L.L.C.**

7 The Court concludes that Plaintiffs have demonstrated good cause to file an  
8 amended complaint to add Arrow as a defendant in this matter, as Plaintiffs contend that  
9 they learned of the existence of Arrow after the deadline to amend the complaint had  
10 passed. *See Copart, Inc. v. Sparta Consulting, Inc.*, No. 2:14-cv-00046-KJM-CKD,  
11 2016 WL 3126108, at \*4 (E.D. Ca. June 2, 2016) (“Allowing parties to amend based  
12 on information obtained through discovery is common and well established.”).

13 The Court will permit Plaintiffs to file an amended complaint naming Arrow as  
14 a defendant and containing each of the claims against Arrow that Plaintiffs have  
15 included in the proposed first amended complaint. (ECF No. 97-4 at 3-62). The Motion  
16 is granted as to the proposed addition of Arrow as a defendant in this matter and as to  
17 the proposed claims against Arrow.

18 **B. Proposed Claims Against AVS Leads**

19 The Court concludes that Plaintiffs have not demonstrated good cause to file an  
20 amended complaint to add AVS Leads as a defendant in this matter. Plaintiffs have not  
21 demonstrated diligence throughout this matter that would justify permitting amendment  
22 of the complaint to include any of the proposed claims against AVS Leads. *See*  
23 *Johnson*, 975 F.3d at 609 (“If th[e] party [seeking amendment] was not diligent, the  
24 inquiry should end”). The Motion is denied as to the proposed addition of AVS Leads  
25 as a defendant in this matter and its inclusion as a defendant in any cause of action in  
26 the amended complaint to be filed by Plaintiffs.

27 **C. New Claims Against Vistage**

28 The Court concludes that Plaintiffs have not demonstrated good cause to file an

1 amended complaint as to any of the proposed claims to be added against Vistage.  
2 Plaintiffs have not demonstrated diligence throughout this matter that would justify  
3 allowing amendment of the complaint to include the proposed claims against Vistage.  
4 *See Johnson*, 975 F.3d at 609. Plaintiffs have not demonstrated that they have  
5 discovered additional information after the deadline to amend the pleadings had passed  
6 that would justify asserting new claims against Vistage at this stage of the litigation.  
7 The Motion is denied as to the proposed claims against Vistage.

#### 8 **D. New Claims Against Kessler Defendants and Herron**

9 The Court concludes that Plaintiffs have demonstrated good cause to file an  
10 amended complaint as to the proposed fifth cause of action for violation of  
11 Cal. Penal Code § 502, the sixth cause of action for intentional interference with  
12 prospective economic advantage, and the seventh cause of action for negligent  
13 interference with prospective economic advantage, as Plaintiffs contend they learned  
14 new information concerning these claims during discovery.

15 The Motion is granted as to the proposed addition of these claims against the  
16 Kessler Defendants and Herron. The Court concludes that Plaintiffs have not  
17 demonstrated good cause to file an amended complaint as to any of the additional  
18 proposed claims to be added against the Kessler Defendants and Herron.

#### 19 **E. New Claims Asserted by Direct List Previously Asserted Only By Salu**

20 The Court concludes that Plaintiffs have demonstrated good cause to file an  
21 amended complaint naming Direct List as a plaintiff on the two claims included in the  
22 original complaint that were brought only by Salu: the first cause of action for fraud,  
23 and the second cause of action for breach of fiduciary duty. The Court concludes that  
24 permitting the proposed addition of Direct List as a plaintiff as to these two claims  
25 would serve the interests of justice and judicial efficiency. *Moss v. U.S. Secret Serv.*,  
26 572 F.3d 962, 975 (9th Cir. 2009); *Planned Parenthood of Southern Arizona v. Neely*,  
27 130 F.3d 400, 403 (9th Cir. 1997). *See also Neely*, 130 F.3d at 403 (“the general  
28 purpose of the Rules [regarding amended and supplemental complaints is] to minimize

1 technical obstacles to a determination of the controversy on its merits’’) (quoting  
2 *U.S. ex rel. Atkins v. Reiten*, 313 F.2d 673, 675 (9th Cir. 1963)).

3 The Motion is granted as to the proposed addition of Direct List as a plaintiff on  
4 the first cause of action for fraud and the second cause of action for breach of fiduciary  
5 duty.

#### 6 **IV. Conclusion**

7 IT IS HEREBY ORDERED that the Motion for Leave to Modify the Scheduling  
8 Order and File a First Amended Complaint filed by Plaintiffs (ECF No. 97) is  
9 GRANTED IN PART and DENIED IN PART. Within **ten (10) days** from the date of  
10 this order, Plaintiffs shall file an amended complaint that complies with this order. The  
11 amended complaint shall include only the following claims, plead as follows:

12 First Cause of Action: Fraud – brought by Direct List and Salu against Phil  
13 Kessler

14 Second Cause of Action: Breach of Fiduciary Duty – brought by Direct  
15 List and Salu against Phil Kessler

16 Third Cause of Action: Misappropriation of Trade Secrets – brought by  
17 Direct List against Phil Kessler, Lauren Kessler, Owens, Herron, and  
18 Arrow

19 Fourth Cause of Action: UCL – brought by Direct List against Phil  
20 Kessler, Lauren Kessler, Owens, Herron, and Arrow

21 Fifth Cause of Action: California Comprehensive Computer Data Access  
22 and Fraud Action – brought by Direct List against Phil Kessler, Lauren  
23 Kessler, Owens, Herron, and Arrow

24 Sixth Cause of Action: Intentional Interference with Prospective  
25 Economic Advantage – brought by Direct List against Phil Kessler,  
26 Lauren Kessler, Owens, Herron, and Arrow

27 Seventh Cause of Action: Negligent Interference with Prospective  
28 Economic Advantage – brought by Direct List against Phil Kessler,

