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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 YOUNGEVITY INTERNATIONAL,
10 CORP., et al.,

11 Plaintiffs,

12 v.

13 TODD SMITH, et al.,

14 Defendants.

Case No.: 16-cv-704 BTM (JLB)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR LEAVE TO
CONDUCT ADDITIONAL
DISCOVERY**

[ECF No. 283]

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16 Before the Court is Plaintiffs' Motion for Leave to Conduct Additional Discovery.
17 (ECF No. 283.) Plaintiffs Youngevity, et al. (Youngevity) seek leave to modify the pretrial
18 scheduling order and conduct discovery after being granted leave to file a Fourth Amended
19 Complaint (FAC). (ECF No. 283-1 at 3.)¹ Defendants Wakaya Perfection, et al. (Wakaya)
20 oppose Youngevity's request. Youngevity's motion is **GRANTED in part and DENIED**
21 **in part.**

22 **BACKGROUND**

23 A pretrial scheduling order issued on March 2, 2017, setting a deadline of April 21,
24 2017 for motions to amend the pleadings or join other parties. (ECF No. 87.) On April
25 20, 2017, Youngevity filed a motion for leave to file its FAC. Discovery closed, with
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28 ¹ All citations to page numbers in this Order refer to the page numbers generated by the CM/ECF system.

1 limited exceptions, on September 22, 2017. (ECF No. 132.) On October 30, 2017, the
2 Court granted Youngevity leave to file its FAC. (ECF No. 261.)

3 Youngevity filed its FAC on November 6, 2017. (ECF No. 269.) On November 7,
4 2017, the parties contacted the Court with Youngevity's request to conduct additional
5 discovery. (*See* ECF No. 273.) The Court ordered the parties to meet and confer on
6 Youngevity's request to conduct additional discovery and required Youngevity to provide
7 Wakaya with the specific discovery requests it would serve if granted leave to do so. (*Id.*)
8 The parties could not agree on what discovery, if any, would be appropriate in light of the
9 filing of the FAC. (*See* ECF No. 281.) Youngevity filed the instant motion on November
10 28, 2017, seeking leave to conduct certain discovery on the new defendants and allegations
11 contained in the FAC. (ECF No. 283-1 at 3.)

12 The FAC contains, *inter alia*, two new defendants—Michael Randolph and Michael
13 Casperson—and the following additional allegations in Youngevity's Lanham Act claims
14 against Wakaya:²

- 15 (i) Wakaya's "Plan to a Grand" advertising campaign conveyed the false impression
16 that Wakaya ambassadors could easily earn more than \$1,000 per month and that
17 ninety-five percent (95%) of its Ambassadors would earn more than \$1,000 per
18 month (ECF No. 269 at ¶¶ 42-53);
- 19 (ii) Wakaya misled consumers to believe that its "BulaFIT BURN! Capsules" only
20 contained "herbs and extracts" when the capsules actually contained a chemical
21 stimulant known as Octodrine HCl (*id.* at ¶¶ 122-30);
- 22 (iii) Wakaya falsely advertised that its turmeric products have a 6% curcumin content
23 and contain five times the amount of curcumin as other turmeric products when
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27 ² The FAC also includes additional allegations concerning defendant William Andreoli's alleged breaches
28 of fiduciary duties and contract; a new cause of action against Brytt Cloward and Patti Gardner for breach
of duty of loyalty; and names Barb Pitcock as a defendant. (ECF No. 109-1 at 7-8.) Youngevity does not
seek leave to conduct discovery on these amendments. (*See* ECF No. 283-1.)

1 the products only had a 4% curcumin content, which is the same as most turmeric
2 products available in the marketplace (*id.* at ¶¶ 162-68); and

- 3 (iv) Wakaya advertised its BulaFIT weight loss program with weight loss claims and
4 testimonials that misled customers to believe that all, or almost all, program
5 participants would lose substantial amounts of weight in a limited period of time
6 (*id.* at ¶¶ 169-87).

7 Youngevity requests leave to conduct the following discovery relating to the new
8 parties and claims in the FAC:

- 9 • Propound requests for production and interrogatories on new defendants Randolph
10 and Casperson;
- 11 • Conduct fact depositions of Dr. Shane Harada, Carolee Koehn, Dr. Randy Lundell,
12 John DeHart, and PharamaTech Lab’s Rule 30(b)(6) designee;
- 13 • Supplement the expert report of Dr. David Stewart by conducting two new consumer
14 surveys on Wakaya’s Plan to a Grand and BulaFIT weight loss program advertising;
15 and
- 16 • Retain a new expert, Dr. Richard Rucker, to analyze the curcumin content of
17 Wakaya’s turmeric productions and other turmeric products available in the
18 marketplace.

19 Wakaya objects to all of Youngevity’s proposed discovery requests as duplicative of
20 discovery already taken, futile or irrelevant to the claims in the FAC, and unduly
21 burdensome. (ECF No. 289 at 5-11.) Wakaya further objects to certain discovery on the
22 basis that Youngevity failed to include it in the meet and confer process. (*Id.* at 5.)

23 **LEGAL STANDARDS**

24 Federal Rule of Civil Procedure 16 provides that the court must issue a pretrial
25 scheduling order that limits the time to join other parties, amend the pleadings, complete
26 discovery, and file motions. The scheduling “order controls the course of the action unless
27 the court modifies it.” Fed. R. Civ. P. 16(d). “District courts have ‘broad discretion to
28 manage discovery and to control the course of litigation under Federal Rule of Civil

1 Procedure 16.”” *Hunt v. County of Orange*, 672 F.3d 606, 616 (9th Cir. 2012) (quoting
2 *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011)). Rule 16(b)(4)
3 provides that a pretrial scheduling order may be modified only for good cause and with the
4 judge’s consent. The “good cause” requirement primarily considers the diligence of the
5 party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609
6 (9th Cir. 1992). A pretrial schedule may be modified “if it cannot reasonably be met despite
7 the diligence of the party seeking the extension.” *Id.* (quoting Fed. R. Civ. P. 16 advisory
8 committee’s note to 1983 amendment). “[C]arelessness is not compatible with a finding
9 of diligence and offers no reason for a grant of relief.” *Id.* In deciding whether to amend
10 a pretrial scheduling order and reopen discovery, a court considers:

11 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-
12 moving party would be prejudiced, 4) whether the moving party was diligent in
13 obtaining discovery within the guidelines established by the court, 5) the
14 foreseeability of the need for additional discovery in light of the time allowed for
15 discovery by the district court, and 6) the likelihood that the discovery will lead to
16 relevant evidence.

17 *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017) (quoting *United*
18 *States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995)).

19 “Although the existence or degree of prejudice to the party opposing the
20 modification might supply additional reasons to deny a motion, the focus of the inquiry is
21 upon the moving party’s reasons for seeking modification.” *Id.* If the moving party “‘was
22 not diligent, the inquiry should end’ and the motion to modify should not be granted.”
23 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting
24 *Johnson*, 975 F.2d at 609).

25 ANALYSIS

26 **I. Good Cause to Amend the Scheduling Order**

27 Youngevity seeks to modify the scheduling order to allow for discovery on new
28 defendants and allegations contained in the FAC. Youngevity argues that good cause exists
to modify the scheduling order and allow discovery because it acted diligently in pursuing

1 amendments to the complaint and it had no obligation to conduct discovery on the
2 amendments prior to the grant of its motion to amend. (ECF No. 283-1 at 5.) Wakaya
3 argues that the discovery Youngevity seeks is duplicative of discovery already taken, futile
4 or irrelevant to the claims in the FAC, and unduly burdensome. (ECF No. 289 at 5-11.)

5 The Court finds that Youngevity has established good cause to modify the
6 scheduling order and permit discovery on the new allegations and parties contained in the
7 FAC, subject to the limitations of this Order. Wakaya argues that any discovery is
8 duplicative, unnecessary, and would be prejudicial. (*Id.*) “Although the existence or
9 degree of prejudice to the party opposing the modification might supply *additional* reasons
10 to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking
11 modification.” *Johnson*, 975 F.2d at 609 (emphasis added). Here, even if Wakaya may be
12 somewhat prejudiced by modification of the scheduling order, Youngevity was diligent in
13 seeking amendment of its complaint and in requesting discovery related to the
14 amendments. Youngevity filed its motion to amend the complaint on April 20, 2017,
15 before the deadline to file a motion to amend the pleadings and add parties. (ECF No.
16 109.) In granting Youngevity’s motion to amend, the Court found that amendment was
17 not sought in bad faith or futile and would not cause undue prejudice to Wakaya. (ECF
18 No. 261 at 3.) Youngevity filed its FAC on November 6, 2017, within seven days of the
19 order granting Youngevity leave to file, as directed by the Court. (ECF No. 269.) The
20 next day, the parties contacted the Court with Youngevity’s request for leave to conduct
21 discovery. (*See* ECF No.273.) Accordingly, the Court finds good cause to modify the
22 scheduling order and allow Youngevity to conduct discovery on the new allegations and
23 parties in the FAC as it was diligent in seeking leave to amend and conduct discovery on
24 its new claims.

25 Wakaya argues that reopening discovery will interfere with the current schedule for
26 the parties’ motions for summary judgment. (*Id.* at 5.) Wakaya states that at an October
27 31, 2017 Status Hearing with the Honorable Barry Ted Moskowitz regarding the issuance
28 of a briefing schedule for the parties’ motions for summary judgment, Wakaya represented

1 to Judge Moskowitz that there was no need to reopen discovery and Youngevity did not
2 object to Wakaya’s statement. (ECF No. 289 at 3-4.) Judge Moskowitz issued a scheduling
3 order for the parties’ motions for summary judgment later that day. (ECF No. 263.)
4 Wakaya argues that Youngevity “had their chance to object to the current summary
5 judgement [sic] schedule set by the Court, but chose not to say anything knowing then that
6 leave to file the 4AC had been granted.” (ECF No. 289 at 5.)

7 To the extent that Wakaya argues Judge Moskowitz’s October 31, 2017 Scheduling
8 Order addressed the issue of the parties conducting additional discovery, that argument is
9 not supported by the language of the Order. The October 31, 2017 Order sets a briefing
10 schedule for the parties’ motions for summary judgment and vacates the pretrial conference
11 and trial dates. (ECF No. 263 at 1-2.) The Order does not suggest that the Court is
12 precluding requests to reopen discovery. (*Id.*) To the extent Wakaya argues Youngevity
13 waived any right to request to reopen discovery by remaining silent when counsel for
14 Wakaya opined that no new discovery would be necessary, the Court is not persuaded. If
15 Wakaya is arguing Youngevity should have alerted the Court that its request for leave to
16 file the FAC would require discovery on the new allegations, Youngevity did so. In its
17 Motion for Leave to File Fourth Amended Complaint Youngevity argued that Wakaya
18 would not be prejudiced by the amendments because the case was, at the time the motion
19 was filed, in the early stages of discovery and Youngevity would be amenable to jointly
20 moving the Court for an extension of the discovery deadline should the need arise. (ECF
21 No. 109-1 at 9-10.) The Court will, however, take into account the schedule for the parties’
22 motions for summary judgment in its modification of the scheduling order.³

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27 ³ Oral argument on the parties’ motions for summary judgment and related Daubert motions as to
28 Youngevity’s claims, previously set for January 3, 2018, was vacated on December 29, 2017. (ECF No.
405.) Oral argument on the parties’ motions for summary judgment and related Daubert motions on
Wakaya’s counterclaims is set for February 5, 2018. (ECF No. 263 at 2.)

1 **II. Leave to Propound the Requested Discovery**

2 Having decided that good cause exists to modify the scheduling order and allow for
3 some discovery on the new allegations and parties in the FAC, the Court turns to the
4 categories of discovery Youngevity seeks leave to conduct.⁴ Wakaya argues that
5 Youngevity should not be allowed to conduct any discovery because: (1) Youngevity failed
6 to meet and confer in good faith; and (2) Youngevity’s proposed discovery is duplicative
7 of discovery already taken or futile to the new claims asserted in the FAC. (ECF No. 289
8 at 5.) The Court addresses each argument in turn.

9 **A. Meet and Confer Efforts**

10 Wakaya argues that Youngevity failed to meet and confer in good faith because it
11 now seeks leave to propound discovery that it did not inform Wakaya it intended to seek
12 during the meet and confer process. (*Id.* at 4.) Wakaya states that Youngevity failed to
13 inform Wakaya that it wanted to conduct the following discovery: deposition of Dr. Randy
14 Lundell; deposition of the designated Rule 30(b)(6) deponent of PharmaTech Labs and
15 production of documents at the deposition; and issuance of a second consumer survey by
16 Dr. David Stewart relating to Wakaya’s BulaFIT weight loss program. (*Id.* at 8-10.)⁵
17 Youngevity responds only that its failure to inform Wakaya that it intended to seek this
18 discovery was immaterial because Wakaya maintains that it is not amenable to any
19 additional discovery. (ECF No. 326 at 5.)

20 Youngevity’s failure to fulfill its obligation to meet and confer under the Local Rules
21 and this Court’s Chambers Rules, in disregard of a court order, forecloses its ability to
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24 ⁴ The parties do not address specific requests for production or interrogatories in their briefing.
Accordingly, the Court rules on the categories of discovery Youngevity seeks instead of specific requests.

25 ⁵ Wakaya also states that Youngevity seeks to retain an additional expert witness not mentioned in the
meet and confer process but fails to identify the expert. (ECF No. 289 at 4.) It is not clear what additional
26 expert witness Wakaya references. Youngevity’s November 10, 2017 email to Wakaya clearly states that
it would like to “[s]ubmit an expert report comparing curcumin content in Wakaya turmeric to competing
27 turmeric.” (ECF No. 289-1 at 11.) Youngevity seeks leave to retain only one new expert—Dr. Richard
28 Rucker—who would opine on the exact issue identified in Youngevity’s November 10, 2017 email. (ECF
No. 283-1 at 10-11.)

1 pursue this discovery. The Local Rules require parties to meet and confer prior to filing
2 discovery motions. CivLR 26.1. Judge Burkhardt’s Civil Chamber Rules (Chambers
3 Rules) further provide that “[t]he Court will not address discovery disputes until counsel
4 have met and conferred to resolve the dispute.” Chambers Rules at Section IV.A. Here,
5 the Court specifically ordered Youngevity to “provide Defendants with the specific
6 discovery requests it would serve if granted leave to do so.” (ECF No. 273.) The Court
7 further ordered the parties to meet and confer on those requests in an effort resolve the
8 parties’ dispute about the propriety of additional discovery. (*Id.*)

9 Youngevity’s argument that its omission was immaterial falls flat. This is not the
10 first time Youngevity failed to fulfill its meet and confer obligations. (*See* ECF No. 333 at
11 2-3.) The purpose of the meet and confer requirement is to narrow the disputes before the
12 Court and avoid the unnecessary expenditure of resources. As the Court has previously
13 stated, the “parties’ recurring failure to satisfy their meet and confer obligations prior to
14 filing motions or contacting chambers, among other patience-trying practices, has strained
15 this Court’s resources.” (*Id.* at 4.) Accordingly, Youngevity’s request for leave to depose
16 Dr. Randy Lundell, the designated Rule 30(b)(6) deponent of PharmaTech Labs, and to
17 conduct a second consumer survey relating to Wakaya’s BulaFIT weight loss program is
18 hereby **DENIED**.

19 **B. Leave to Conduct Categories of Discovery**

20 Wakaya argues that Youngevity should not be granted leave to conduct any
21 discovery because the discovery it seeks is duplicative of discovery already taken, futile or
22 irrelevant to the claims in the FAC, and unduly burdensome. (ECF No. 289 at 5-11.)

23 Federal Rule of Civil Procedure 26, as recently amended, provides that parties
24 may obtain discovery regarding any nonprivileged matter that is relevant to
25 any party’s claim or defense and proportional to the needs of the case,
26 considering the importance of the issues at stake in the action, the amount in
27 controversy, the parties’ relative access to the information, the parties’
28 resources, the importance of the discovery in resolving the issues, and whether
 the burden or expense of the proposed discovery outweighs its likely benefit.

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2 Fed. R. Civ. P. 26(b)(1). Information within this scope “need not be admissible in evidence
3 to be discoverable.” *Id.* However, only evidence that is “relevant to any party’s claim or
4 defense” is within the scope of permissible discovery. *Id.*; *Medicinova Inc. v. Genzyme*
5 *Corp.*, No. 14-cv-2513-L (KSC), 2017 WL 2829691, at *5 (S.D. Cal. June 29, 2017) (“The
6 test going forward is whether evidence is ‘relevant to any party’s claim or defense,’ not
7 whether it is ‘reasonably calculated to lead to admissible evidence.’”) (quoting *In re Bard*
8 *IVC Filters Products Liability Litigation*, 317 F.R.D. 562, 564 (D. Ariz. 2016)).

9 The December 2015 amendment to Rule 26 reinforced the proportionality factors
10 for defining the scope of discovery and, thus, under the amended Rule 26, relevancy alone
11 is no longer sufficient to obtain discovery. *See* Fed. R. Civ. P. 26(b)(1) advisory committee
12 notes to 2015 amendment. Discovery must also be proportional to the needs of the case,
13 which necessitates conducting a cost-benefit analysis taking into consideration the
14 importance of the issue to the outcome of the case, the amount at stake in the case, the
15 parties’ resources, and their relative access to the information. Fed. R. Civ. P. 26(b)(1).

16 **1. Requests for Production and Interrogatories to Randolph and Casperson**

17 Youngevity seeks leave to serve requests for production and interrogatories on new
18 defendants Randolph and Casperson. (ECF No. 283-1 at 6.) Both Randolph and Casperson
19 served as Youngevity Vice Presidents, resigned, and then became Wakaya Vice Presidents.
20 (*Id.*) In its FAC, Youngevity alleges that both defendants violated the duty of loyalty they
21 owed Youngevity by assisting in formation of Wakaya as a new company while still
22 employed by and receiving compensation from Youngevity. (ECF No. 269 at ¶¶ 371-75.)
23 Youngevity also alleges that Casperson misappropriated Youngevity’s trade secrets. (*Id.*
24 at ¶¶ 304-16.) Youngevity argues that it should be granted leave to propound the proposed
25 requests because it was not previously able to serve these defendants with requests for
26 production and interrogatories as they were nonparties. (ECF No. 283-1 at 6.) Youngevity
27 argues that, although it previously deposed Randolph and Casperson, its proposed
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1 interrogatories are appropriate because many of them are requests for information that
2 cannot be provided in deposition form, such as specific dates. (*Id.* at 6-7.)

3 Wakaya argues that Youngevity is not entitled to this discovery because Randolph
4 and Casperson were previously deposed and Youngevity has known about both defendants'
5 roles from the outset of the case. (ECF No. 289 at 6.) Wakaya argues that most of the
6 questions Plaintiffs propose to ask in written discovery either were or could have been
7 asked during their depositions. (*Id.*)⁶ Wakaya argues that Youngevity could have served
8 Randolph and Casperson with Rule 45 subpoenas before they were named defendants, but
9 chose not to do so. (*Id.*) Lastly, Wakaya argues that most of Randolph and Casperson's
10 relevant communications have already been produced. (*Id.*)

11 Youngevity is granted leave to serve Randolph and Casperson with requests for
12 production and interrogatories. First, the information Youngevity seeks from Randolph
13 and Casperson is relevant to the new allegations against these defendants. The FAC alleges
14 that Randolph and Casperson breached their duty of loyalty to Youngevity by working for
15 Wakaya while being compensated by Youngevity, neglected their employment duties to
16 Youngevity, used Youngevity equipment and computers to benefit Wakaya, improperly
17 used Youngevity's trade secrets, and enticed Youngevity distributors and employees to
18 join Wakaya. (ECF No. 269 at ¶¶ 371-75.) Youngevity's requests for production and
19 interrogatories request, *inter alia*, information regarding the amount the defendants earned,
20 their job responsibilities at both Youngevity and Wakaya, communications regarding
21 Wakaya during the time period the company was established, and communications with
22 Youngevity and Wakaya distributors after both defendants joined Wakaya. (ECF No. 283-
23 3 at 12-13, 25-26, 36-37, 49-50.)

24 Second, Youngevity did not have an obligation to conduct discovery on its proposed
25 claims before it was granted leave to file the FAC. Youngevity could not have served
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28 ⁶ Wakaya does not identify which questions asked during the depositions of Randolph and Casperson are repeated in Youngevity's requests for production and interrogatories.

1 Randolph or Casperson with requests for production or interrogatories prior to the filing of
2 the FAC as they were nonparties. Fed. R. Civ. P. 33(a); Fed. R. Civ. P. 34(c). Although
3 Youngevity may have previously conducted some discovery related to the new allegations
4 against Randolph and Casperson, Youngevity was not required to expend the resources to
5 fully conduct discovery on these allegations before it was granted leave file its FAC. Rule
6 26(b) provides that parties may obtain discovery on matters “relevant to any party’s claim
7 or defense.” Youngevity did not have any claims against Randolph and Casperson until
8 after it was granted leave to file its FAC and properly filed the amended complaint. As a
9 result, Youngevity did not have an obligation to incur the cost of conducting discovery on
10 proposed claims by issuing subpoenas to Randolph and Casperson prior to filing its FAC.

11 Lastly, Youngevity’s request for leave to propound requests for production and
12 interrogatories on the new defendants is proportional to the needs of the case. Youngevity
13 has limited its discovery requests to 14-16 requests for production and 8-9 interrogatories
14 for each defendant. (ECF No. 283-1 at 6.) Youngevity’s requests for production take into
15 account the fact that both parties have expended substantial resources in responding to
16 discovery requests in this litigation and specifically instruct Randolph and Casperson that
17 they are not required to produce any documents already produced in this litigation. (ECF
18 No. 283-3 at 8, 32.) Accordingly, Youngevity’s request for leave to propound the proposed
19 requests for production and interrogatories on Randolph and Casperson is **GRANTED**.

20 **2. Deposition of Dr. Shane Harada**

21 Youngevity seeks leave to depose Dr. Shane Harada, a Youngevity and Wakaya
22 distributor who allegedly held weight loss meetings discussing Wakaya’s products and
23 attended a BulaFIT seminar with Defendant Blake Graham. (ECF No. 283-1 at 7.)⁷ The
24 FAC includes new allegations regarding Wakaya’s BulaFIT weight loss program. (ECF
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27 ⁷ Both parties refer to Wakaya’s “weight loss program” and “weight loss meetings” without indicating
28 whether these programs and meetings were related to the BulaFIT program. (*See, e.g.*, ECF Nos. 283-1
at 7, 289 at 7.) The Court presumes that these references to weight loss programs and meetings refer to
the BulaFIT weight loss program.

1 No. 269 at ¶¶ 169-87.) Youngevity alleges that “[t]hrough the use of advertisements and
2 testimonialists,” Wakaya falsely advertised that the vast majority of BulaFIT program
3 participants lost a substantial amount of weigh in a limited period of time. (*Id.* at ¶ 180.)
4 Youngevity argues that Dr. Harada has information relevant to these claims because he
5 held weight loss meetings and attended a BulaFIT seminar with Defendant Blake Graham.
6 (ECF No. 283-1 at 7.) Youngevity argues that Dr. Harada may testify on the claims he
7 made about the weight loss program and the actions, if any, taken by Wakaya to reprimand
8 distributors for false or misleading claims. (*Id.* at 7-8.)

9 Wakaya argues that this discovery is duplicative of other evidence as Youngevity
10 already questioned witnesses about statements related to Wakaya’s weight loss program in
11 dozens of depositions and issued an expert report on the BulaFIT weight loss program.
12 (ECF No. 289 at 7-8.) Wakaya also argues that Dr. Harada’s testimony would be irrelevant
13 to Youngevity’s new claims relating to alleged false advertising. (*Id.*)

14 Youngevity request for leave to depose Dr. Harada is **GRANTED**. The information
15 Youngevity seeks from Dr. Harada is relevant to its new claims. The FAC states that
16 Wakaya, “through its employees and agents,” made false claims about its weight loss
17 program. (ECF No. 269 at ¶ 170.) As a Wakaya distributor who held weight loss meetings,
18 Dr. Harada is likely to have information on claims he made about Wakaya’s weight loss
19 program, in addition to claims made by other Wakaya employees and agents. As discussed
20 above, Youngevity did not have an obligation to conduct discovery on proposed claims
21 before these claims became operative. Further, Youngevity’s request to depose Dr. Harada
22 is proportional to the needs of this case. Youngevity has not previously deposed Dr.
23 Harada. The fact that Youngevity may have conducted some discovery on the claims in
24 the FAC does not establish that the information it now seeks is wholly duplicative of prior
25 discovery. Wakaya does not argue that his deposition is otherwise unduly burdensome.⁸

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28 ⁸ Youngevity intends to depose Dr. Harada, Carolee Koehn, and John DeHart in Salt Lake City, Utah,
where they reside and where Wakaya’s counsel is located. (ECF No. 283-1 at 7.)

1 Youngevity may depose Dr. Harada on the new allegations in the FAC relating to the
2 BulaFIT weight loss program (*id.* at ¶¶ 169-87).

3 **3. Deposition of Carolee Koehn**

4 Youngevity seeks leave to depose ambassador Carolee Koehn, also known as Keri
5 Ann, who promoted the BulaFIT program and worked with Blake Graham to develop
6 promotional material and answers to consumers' questions about the program. (ECF No.
7 283-1 at 8.) Youngevity argues that Koehn has information on the claims Wakaya allowed
8 its ambassadors to make about its weight loss program and the actions, if any, taken by
9 Wakaya to reprimand distributors for making false or misleading claims. (*Id.*) As with
10 Dr. Harada's deposition, Wakaya argues that deposing Koehn would only result in
11 redundant and irrelevant information because Youngevity has already asked about the
12 BulaFIT program and products in dozens of depositions and issued an expert report on the
13 issue. (ECF No. 289 at 7-8.)

14 Youngevity's request for leave to depose Koehn on the new allegations in the FAC
15 relating to Wakaya's allegedly false and misleading advertising of the BulaFIT weight loss
16 program is **GRANTED**. The information Youngevity seeks is relevant to its new claims.
17 The record indicates that Koehn worked with Defendant Graham to develop and
18 disseminate promotional material on the BulaFIT program. (ECF No. 283-3 at 75-97.)
19 Koehn is likely to have relevant information on the weight loss claims Wakaya's
20 employees and agents made, Wakaya's promotion of the weight loss program, and
21 Wakaya's response to allegedly false claims. This discovery is proportional to the needs
22 of the case—Koehn has not been previously deposed and Wakaya has not presented any
23 evidence that Koehn's deposition would be unduly burdensome.

24 **4. Deposition of John DeHart**

25 Youngevity also seeks leave to depose John DeHart regarding Wakaya's promotion
26 of the BulaFIT weight loss program. (ECF No. 283-1 at 9.) Youngevity asserts that DeHart
27 helped Graham develop the BulaFIT Ketogenic shake product and has information on the
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1 “safety and efficacy” of the shake product. (*Id.*)⁹ Youngevity does not explain DeHart’s
2 role in the development of the shake product or why his involvement would provide him
3 with information on the safety and efficacy of the product. (*See id.*)

4 Wakaya disputes that DeHart was involved in the development of the Ketogenic
5 shake product. (ECF No. 289 at 8.) Wakaya further argues that even if DeHart was
6 involved in the product’s development, the shake product is irrelevant to the new claims in
7 the FAC as Youngevity’s claims concerning the weight loss program relate only to the
8 BulaFIT Burn Capsules. (*Id.*) Wakaya argues that DeHart has no knowledge of the Burn
9 Capsules or the alleged false statements identified by Youngevity. (*Id.*)

10 Information regarding Wakaya’s allegedly false advertising of its BulaFIT products,
11 including the Ketogenic shake, is relevant to Youngevity’s new claims. Youngevity
12 alleges that Wakaya made false and misleading statements in its promotion of the BulaFIT
13 weight loss program as a whole. (ECF No. 269 at ¶¶ 169-87.) The BulaFIT product line
14 contains products other than just the BulaFIT capsules, and includes the Ketogenic shake.
15 (*Id.* at ¶¶ 90, 174.) The new allegations in the FAC specifically reference the Ketogenic
16 shake product. (*Id.* at ¶ 174.) Nonetheless, Youngevity fails to provide enough information
17 for the Court to conclude that DeHart has information relevant to the new claims.
18 Youngevity’s claim that DeHart had a role in the product development of the Ketogenic
19 shake is disputed by Wakaya and Youngevity fails to provide the Court with any support
20 for its claim. Even if DeHart had some role in the development of the Ketogenic shake,
21 Youngevity does not explain why DeHart’s involvement makes it likely that he has
22 information relevant to its claims that Wakaya promoted the BulaFIT products in a false
23 and misleading manner. Accordingly, Youngevity’s request to depose DeHart is
24 **DENIED.**

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27 ⁹ Youngevity attaches excerpts of Blake Graham’s deposition transcript to support its assertion that
28 DeHart worked with Graham to develop the Ketogenic shake product; however, the excerpts are wholly
unrelated to DeHart or the shake product. (ECF Nos. 283-1 at 9, 283-3 at 105-11.)

1 **5. Supplement to Dr. David Stewart’s Expert Report**

2 Youngevity requests leave to supplement the expert report of Dr. David Stewart with
3 two new consumer surveys and additional analysis of Wakaya’s statements regarding its
4 Plan to a Grand Promotion, BulaFIT weight loss program, and BulaFIT Burn Capsules.
5 (ECF No. 283-1 at 10.) As discussed above, Youngevity’s request to commission an expert
6 survey on Wakaya’s BulaFIT weight loss program and the BulaFIT Burn Capsules is
7 denied because Youngevity failed to inform Wakaya during the meet and confer process
8 that it intended to seek this discovery. *See supra* Section II.A. Youngevity requests leave
9 to conduct a consumer survey relating to consumers’ perception of the Plan to a Grand
10 advertisements. (*Id.*) Youngevity argues that supplementing Dr. Stewart’s report is
11 estimated to cost \$50,000,¹⁰ and Youngevity should not have been obligated to incur this
12 cost prior to being granted leave to file the FAC. (*Id.*)

13 Wakaya argues that Youngevity is actually seeking to cure deficiencies in Dr.
14 Stewart’s report that were exposed during his deposition. (ECF No. 289 at 10.)¹¹ Wakaya
15 argues that Dr. Stewart already issued a report specifically analyzing the Plan for a Grand
16 Promotion and should not be granted leave to conduct a consumer survey he failed to
17 administer the first time around. (*Id.*)

18 Youngevity’s request to supplement Dr. Stewart’s expert report with a consumer
19 survey and analysis of Wakaya’s Plan for a Grand Promotion is **GRANTED**. The
20 consumer survey and additional analysis of Wakaya’s Plan for a Grand Promotion is
21 directly relevant to the new allegations in the FAC that Wakaya’s Plan to a Grand
22 advertising campaign conveyed the false impression that Wakaya ambassadors could earn
23 significant amounts of money in a short period of time. (*See* ECF No. 269 at ¶¶ 42-53.)
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26 ¹⁰ This amount refers to the cost of supplementing Dr. Stewart’s expert report with two additional
27 consumer surveys and analysis of Plan to a Grand Promotion, BulaFIT weight loss program, and BulaFIT
28 Burn Capsules. (ECF No. 283-1 at 10.)

¹¹ Wakaya does not identify what deficiencies were allegedly exposed during Dr. Stewart’s deposition
that Youngevity seeks to cure with additional analysis and consumer surveys. (*See* ECF No. 289 at 10.)

1 Dr. Stewart's initial report included two consumer surveys designed to determine whether
2 consumers obtained misleading or deceptive beliefs about the role of David Gilmour and/or
3 the source of Wakaya's products from Wakaya's website. (ECF No. 289-1 at 27-28.) Dr.
4 Stewart did not conduct a consumer survey on the Plan to a Grand Promotion. (*See id.* at
5 27-43.) His report included a brief analysis of Wakaya's Plan for a Grand Promotion. (*Id.*
6 at 42-43.) Youngevity states that it asked Dr. Stewart to opine on the Plan for a Grand "in
7 a cost-effective manner" before the FAC was the operative complaint. (ECF No. 326 at
8 7.) As discussed above, Youngevity did not have an obligation to incur the cost of
9 discovery that would have been unnecessary if its motion for leave to file the FAC was
10 denied. Dr. Stewart may supplement his report with additional analysis of Wakaya's
11 statements regarding its Plan to a Grand Promotion and the proposed consumer survey
12 relating to this claim.

13 **6. Retention of Dr. Richard Rucker as an Expert**

14 Lastly, Youngevity requests leave to retain a new expert, Dr. Richard Rucker, to test
15 and analyze the curcumin content of Wakaya's turmeric productions and other turmeric
16 products available in the marketplace. Youngevity argues that it should not have been
17 required to pursue extensive and costly discovery that would have been unnecessary if its
18 motion for leave to file the FAC was denied. (ECF No. 283-1 at 10.) Youngevity estimates
19 that Dr. Rucker's report will cost over \$15,000. (*Id.*)

20 Wakaya argues that Youngevity has already conducted this discovery when it retained Dr.
21 Michael Glade. (ECF No. 289 at 11.) Dr. Glade issued an expert report opining on the
22 results and curcumin content of Wakaya's turmeric products. (ECF No. 289-1 at 64-73.)
23 Youngevity argues that it commissioned only a "cost-effective" analysis by Dr. Glade as
24 more costly testing would have been a waste of resources had the Court denied its motion
25 for leave to file the FAC. (ECF No. 326 at 7.)

26 Youngevity's request to retain Dr. Rucker as an expert to opine on Wakaya's
27 turmeric products is **GRANTED**. The proposed analysis is directly relevant to the claim
28 that Wakaya falsely advertised that its turmeric products had a higher curcumin content

1 than the products actually contained and misled consumers to believe that Wakaya's
2 products had a higher curcumin content than similar products available in the
3 marketplace. (ECF No. 269 at ¶¶ 162-68.) Youngevity was not obligated to incur the
4 cost of a more in-depth analysis of Wakaya's turmeric products and other products on the
5 market prior to the grant of its motion for leave to amend the operative complaint.
6 Further, Wakaya has not identified any undue burden that allowing Youngevity to retain
7 an additional expert will impose. Accordingly, Youngevity is granted leave to retain Dr.
8 Rucker to opine on the new allegations in the FAC concerning Wakaya's turmeric
9 products (*id.* at ¶¶ 162-68).

10 CONCLUSION

11 Youngevity's motion is **GRANTED in part and DENIED in part** for the reasons
12 set forth above. Youngevity is granted leave to conduct the following discovery:

- 13 • Youngevity may propound its proposed requests for production and interrogatories
14 on newly named Defendants Mike Randolph and Mike Casperson.
- 15 • Youngevity may depose Dr. Shane Harada on the new allegations in the FAC
16 relating to Wakaya's allegedly false and misleading advertising of the BulaFIT
17 weight loss program (*Id.* at ¶¶ 169-87).
- 18 • Youngevity may depose Carolee Koehn on the new allegations in the FAC relating
19 to Wakaya's allegedly false and misleading advertising of the BulaFIT weight loss
20 program (*id.*).

21 Youngevity must complete the above discovery on or before **February 23, 2018**.
22 "Completed" means that all discovery under Rules 30-36 of the Federal Rules of Civil
23 Procedure, and discovery subpoenas under Rule 45, must be initiated a sufficient period of
24 time in advance of the cut-off date, **so that it may be completed** by the cut-off date, taking
25 into account the times for service, notice and response as set forth in the Federal Rules of
26 Civil Procedure.

- 27 • Youngevity may have Dr. David Stewart supplement his report with additional
28 analysis of Wakaya's alleged false advertising in its Plan to a Grand Promotion (*id.*

1 at ¶¶ 42-53) and a proposed consumer survey relating to this claim. Youngevity
2 shall provide Wakaya with Dr. Stewart’s supplemental report on or before **February**
3 **23, 2018**. Wakaya may provide Youngevity with a rebuttal expert report solely to
4 contradict or rebut evidence on the same subject matter identified in Dr. Stewart’s
5 supplemental report on or before **March 16, 2018**.

- 6 • Youngevity may retain a new expert to test the curcumin content of Wakaya’s
7 turmeric products and other turmeric products and issue a report summarizing that
8 testing. Youngevity shall provide Wakaya with this new expert’s report on or before
9 **February 23, 2018**. Wakaya may provide Youngevity with a rebuttal expert report
10 solely to contradict or rebut evidence on the same subject matter identified in the
11 new expert’s report on or before **March 16, 2018**.

12 Youngevity is not granted leave to conduct any other discovery except as specified
13 in this Order.

14 **Counsel shall promptly and in good faith meet and confer with regard to all**
15 **discovery disputes in compliance with Local Rule 26.1(a)**. The Court expects counsel
16 to make every effort to resolve all disputes without court intervention through the meet and
17 confer process. If the parties reach an impasse on any discovery issue, counsel shall file
18 an appropriate motion within the time limit and procedures outlined in the undersigned
19 magistrate judge’s chambers rules. **A failure to comply in this regard will result in a**
20 **waiver of a party’s discovery issue. Absent an order of the court, no stipulation**
21 **continuing or altering this requirement will be recognized by the court.**

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1 Discovery motions must be filed in the time and manner directed by Magistrate
2 Judge Burkhardt (*see* Judge Burkhardt’s Civil Chambers Rules on Discovery Disputes
3 available on the Court’s website). All discovery motions must be filed within 30 days of
4 the service of an objection, answer, or response which becomes the subject of dispute, or
5 the passage of a discovery due date without response or production, and only after counsel
6 have met and conferred to resolve the dispute **and** requested an informal teleconference
7 with the Court.

8 **IT IS SO ORDERED.**

9 Dated: December 29, 2017

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11 Hon. Jill L. Burkhardt
12 United States Magistrate Judge
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