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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 Youngevity International, *et al.*,
12 Plaintiffs,
13 v.
14 Todd Smith, *et al.*,
15 Defendants.

Case No.: 3:16-cv-704-BTM-JLB

**ORDER GRANTING MOTION FOR
LEAVE TO FILE FIFTH AMENDED
COMPLAINT**

[ECF NO. 628]

16 Before the Court is the plaintiffs' motion for leave to file a fifth amended
17 complaint to allow Plaintiff Youngevity International Corp. ("Youngevity") to add
18 claims for breach of contract against Defendants Dave Pitcock, Barb Pitcock, Todd
19 Smith, Blake Graham, Andre Vaughn, and Total Nutrition, Inc. (collectively, the
20 "Distributor Defendants"). (See ECF No. 628; see *also* 628-3, at 81-83.)

21 "After a party has amended a pleading once as a matter of course, it may
22 only amend further after obtaining leave of the court, or by consent of the adverse
23 party." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)
24 (citing Fed. R. Civ. P. 15(a)). Rule 15 provides that "[t]he court should freely give
25 leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "This policy is to be
26 applied with extreme liberality." *Eminence Capital*, 316 F.3d at 1051. Indeed, "[i]n
27 exercising its discretion a court must be guided by the underlying purpose of Rule
28 15—to facilitate decision on the merits rather than on the pleadings or

1 technicalities.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)
2 (internal quotations and citations omitted). Nevertheless, “[f]ive factors are
3 frequently used to assess the propriety of a motion for leave to amend: (1) bad
4 faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment;
5 and (5) whether plaintiff has previously amended his complaint.” *Allen v. City of*
6 *Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Moreover, where a motion to
7 amend is filed after the deadline set by the Court for filing such a motion, the
8 movant must demonstrate “good cause” as to why the schedule should be
9 amended. Fed. R. Civ. P. 16(b)(4).

10 Here, the defendants have failed to demonstrate they will suffer prejudice
11 from the grant of the requested leave to amend. See *DCD Programs*, 833 F.2d at
12 187 (“The party opposing amendment bears the burden of showing prejudice.”)
13 (citations omitted). The facts underlying the proposed claims are already at issue
14 in this action given that they form one of Youngevity’s defenses to the Distributor
15 Defendants’ breach of contract counterclaims. (See ECF No. 670-1, at 8-17
16 (seeking summary judgment based upon the Distributor Defendants “cross-
17 recruiting” activities).) The defendants’ vague assertion that they “would have
18 conducted discovery differently” had Youngevity added its proposed claims earlier
19 in this litigation is insufficient to support a finding of prejudice given their failure to
20 delineate any additional discovery required to defend against Youngevity’s “new”
21 allegations. (See ECF No. 639, at 8-9.) Additionally, that the defendants have
22 incurred significant expenses in defending against Youngevity’s attempts to
23 compel arbitration – and will incur significant expenses in defending against the
24 proposed claims if amendment is allowed – are not sufficient to establish prejudice
25 where, as here, there is an absence of a showing of bad faith or that such expenses
26 were ultimately avoidable. See *United States v. United Healthcare Ins. Co.*, 848
27 F.3d 1161, 1184-85 (9th Cir. 2016).

28 Further, the Court concludes that the plaintiffs have demonstrated good

1 cause under Rule 16(b)(4) – and the absence of undue delay under Rule 15(a) –
2 in the filing of their instant motion given that the Distributor Defendants’ breach of
3 contract counterclaims were stayed pending interlocutory appeal (ECF No. 560, at
4 2) and prior attempts to amend the plaintiffs’ complaint to include the proposed
5 claims may have mooted the appeal or needlessly increased litigation. While the
6 Ninth Circuit ultimately upheld this Court’s conclusion that Youngevity had waived
7 its right to compel arbitration, the plaintiffs moved for leave to amend less than ten
8 days after the issuance of the relevant mandate. (See ECF No. 650.) Additionally,
9 while the defendants argue that Youngevity “engag[ed] in tactical gamesmanship”
10 in the manner by which it sought to compel arbitration or otherwise seek
11 adjudication of the breach of contract claims and counterclaims (ECF No. 639, at
12 7), the defendants nonetheless fail to demonstrate such efforts were wholly without
13 merit, motivated by an improper motive, or otherwise made in bad faith.

14 Finally, the defendants have failed to demonstrate the futility of the proposed
15 amendment, as their arguments concerning the lack of evidence to support
16 Youngevity’s allegations of damages proximately caused by the Distributor
17 Defendants’ purported breaches are inapposite to a motion seeking leave to
18 amend.¹ See *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017)
19 (“An amendment is futile when no set of facts can be proved under the amendment
20 to the pleadings that would constitute a valid and sufficient claim or defense.”
21 (internal quotations and citations omitted)). Moreover, given the unusual
22 procedural history of this case and guided by Rule 15(a)’s purpose of resolving
23 disputes on their merits, the Court is reluctant to conclude that Youngevity has
24 waived its breach of contract claims against the Distributor Defendants by its
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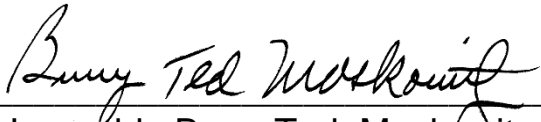
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27 ¹ The Distributor Defendants may raise such arguments in a timely-filed motion for
28 summary judgment. The Court reminds the parties of the limitations on further
motion practice in this matter. (See ECF No. 675, at 3-4.)

1 efforts in seeking to compel arbitration.

2 Based upon the foregoing, the plaintiffs' motion for leave to file a fifth
3 amended complaint (ECF No. 628) is **GRANTED** and the plaintiffs may file an
4 amended complaint in the form of the proposed fifth amended complaint attached
5 to their motion as Exhibit A (ECF No. 628-3). The plaintiffs shall file their amended
6 complaint **on or before April 10, 2020**.

7 **IT IS SO ORDERED.**

8 Dated: March 23, 2020


Honorable Barry Ted. Moskowitz
United States District Judge

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