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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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12 QUIDEL CORPORATION, a
13 Delaware Corporation,
14 Plaintiff,

15 v.

16 SIEMENS MEDICAL SOLUTIONS
17 USA, INC., a Delaware
18 Corporation, SIEMENS
19 HEALTHCARE DIAGNOSTICS
20 INC., a California Corporation, and
21 DOES 1-50 INCLUSIVE,
22 Defendants.

Case No.: 16-cv-3059-BTM-AGS

**ORDER GRANTING
DEFENDANTS' MOTION TO
MODIFY SCHEDULING ORDER
AND FOR LEAVE TO AMEND;
DENYING PLAINTIFF'S MOTION
FOR PARTIAL JUDGMENT;
DENYING PLAINTIFF'S MOTION
FOR LEAVE TO MOVE TO
STRIKE; AND GRANTING
MOTIONS TO SEAL**

**[ECF Nos. 59, 65, 66, 102, 106,
109, 111]**

22 Before the Court is Plaintiff's Motion for Partial Judgment on the Pleadings,
23 and Defendants' Motion to Modify Scheduling Order and for Leave to Amend
24 Answer and Counterclaims. The Court also considers Plaintiff's objection to
25 Defendant's introduction of new evidence on reply, as well as several pending
26 Motions to Seal.

27 For reasons set forth below, the Court GRANTS Defendants' Motion (ECF
28 No. 65) and DENIES Plaintiff's Motion for Partial Judgment as moot. (ECF No.

1 59). The Court overrules Plaintiff's objections to Defendants' introduction of new
2 evidence (ECF No. 109) and GRANTS the Motions to Seal (ECF Nos. 66, 102,
3 1016, 111).

4 **I. BACKGROUND**

5 According to the First Amended Complaint (FAC), Plaintiff manufactures a
6 product, "Thyretain," that detects thyroid-stimulating immunoglobins ("TSI") and
7 can differentiate TSI from other types of immunoglobins. (ECF No. 12 "FAC" ¶
8 13). This ability to detect TSI may aid in the diagnosis of patients with Graves'
9 disease, and distinguishes Thyretain from other products on the market, known
10 as "TRAb assays." (ECF No. 12 "FAC" ¶ 13).

11 Defendants have developed a product called "IMMULITE" that the FAC
12 alleges is "intended to compete with Thyretain." (FAC ¶ 14). Plaintiff alleges that
13 IMMULITE does not differentiate between TSI and other immunoglobins, despite
14 marketing to the contrary, and may lead to misdiagnoses of Graves' disease.
15 (FAC ¶ 15). The FAC alleges Defendant has engaged in false advertising,
16 statutory unfair competition and false advertising, and intentional interference
17 with prospective economic advantage. (See FAC).

18 On March 8, 2017, Defendant moved to dismiss the FAC. (ECF No. 14).
19 The Court denied the Motion on October 16, 2017. (ECF No. 14, 22).

20 Defendants answered the FAC on October 31, 2017. (ECF No. 23
21 "Answer"). The Answer asserts several affirmative defenses, including an
22 unclean hands defense, but no counterclaims. The unclean hands defense
23 states in its entirety: "Plaintiff's claims are barred, in whole or in part, by the
24 doctrine of unclean hands." (Answer at 8).

25 Magistrate Judge Schopler issued a scheduling order setting March 16,
26 2018 as the deadline for amending the pleadings. (ECF No. 30). The deadline
27 was later extended to April 30, 2018. (ECF No. 36). The parties have since
28 engaged in extensive discovery, including depositions and numerous meet-and-

1 confers. At a meet-and-confer in September, the parties discussed whether
2 Defendant would amend its Answer to provide a factual basis for its unclean
3 hands defense. (ECF No. 65-3, Exh. 1 at 4). Plaintiff followed up by email on
4 October 4, 2018. (Id.) Defendant agreed to amend the Answer by October 19,
5 2018. (Id. at 1). Plaintiff rejected Defendant’s proposed timeline, and on October
6 15, 2018, moved for partial judgment on the pleadings as to Defendant’s unclean
7 hands affirmative defense. (ECF No. 59).

8 On October 24, 2018, Defendant moved to modify the scheduling order and
9 for leave to file an amended answer and counterclaims. (ECF No. 65).

10 Defendant’s proposed amended answer adds more substance to its unclean
11 hands affirmative defense, alleging ways in which Plaintiff has engaged in mirror-
12 image conduct. (ECF No. 67 “Proposed Answer” Exh. B). The counterclaims in
13 the proposed amended answer include: (1) unlawful, unfair, and fraudulent trade
14 practices in violation of California Business and Professions Code; (2) intentional
15 interference with prospective economic relations under California Common Law;
16 (3) trade libel under California Common Law; and, (4) abuse of process under
17 California Common Law. (Id.).

18 **II. DISCUSSION**

19 A party moving to amend the pleadings after the deadline has passed must
20 first show “good cause” for modifying the scheduling order under Federal Rule of
21 Civil Procedure 16(b)(4) and then, upon showing good cause, demonstrate the
22 propriety of the amendment under Federal Rule of Civil Procedure 15. *Johnson*
23 *v. Mammoth Recreations, Inc.*, 975 F.3d 604, 607-08 (9th Cir. 1992).

24 **A. Modification of Scheduling Order**

25 Federal Rule of Civil Procedure 16(b)(4) provides “a schedule may be
26 modified only for good cause and with the judge’s consent.” The “good cause”
27 requirement primarily considers the diligence of the party seeking the
28 amendment. *Johnson*, 975 F.2d at 609. If the moving party “was not diligent, the

1 inquiry should end and the motion to modify should not be granted.” *Zivkovic v.*
2 *S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (internal quotation
3 omitted).

4 The deadline to amend the pleadings expired approximately six months
5 before Defendants filed their Motion. (See ECF Nos. 30, 36). However,
6 Defendants state they learned of the full extent of Plaintiff’s misconduct through
7 depositions of Plaintiff’s representatives and scientists in September 2018. (ECF
8 No. 65-1 at 8). It was at this time that Plaintiff requested that Defendants provide
9 a factual basis for its unclean hands defense. (See ECF No. 65-3, Exh. 1).
10 Defendants agreed to do so within a reasonable time, but Plaintiff nevertheless
11 moved forward with a Motion for Partial Judgment on the pleadings. (See *id.*;
12 ECF No. 59). The Court concludes Defendants were diligent in moving for leave
13 to amend in response to the events of September 2018. Good cause exists to
14 modify the scheduling order.

15 **B. Leave to Amend And Assert Counterclaims**

16 Pursuant to Federal Rule of Civil Procedure 15(a)(2), “a party may amend
17 its pleading only with the opposing party’s written consent or the court’s leave.”
18 Rule 15 also provides that the court’s leave “shall be freely given when justice so
19 requires.” *Id.* The court’s decision to grant or deny a motion to amend or assert
20 counterclaims should “be guided by the underlying purpose of Rule 15—to
21 facilitate decision on the merits rather than on the pleadings or technicalities.”
22 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Absent evidence of
23 undue delay, bad faith, undue prejudice to the opposing party, or futility of
24 amendment, courts apply this policy with extreme liberality. *Foman v. Davis*, 371
25 U.S. 178, 182 (1962); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
26 1051 (9th Cir. 2003).

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1 **1. Undue Delay**

2 “In assessing timeliness, we do not merely ask whether a motion was filed
3 within the period of time allotted by the district court in a Rule 16 scheduling
4 order. Rather, in evaluating undue delay, we also inquire “whether the moving
5 party knew or should have known the facts and theories raised by the
6 amendment in the original pleading.” *AmerisourceBergen Corp. v. Dialysist W.,*
7 *Inc.*, 465 F.3d 946, 953 (9th Cir. 2006). “We have held that an eight month delay
8 between the time of obtaining a relevant fact and seeking a leave to amend is
9 unreasonable.” *Id.* at 953.

10 Here, Defendants learned new information from depositions that took place
11 in September 2018, which provided key factual bases for both their affirmative
12 defenses and counterclaims. (See ECF No. 67, Exh. C at 8; Proposed Answer ¶¶
13 31, 46, 49, 60). Defendants moved to amend within a month of those
14 depositions, and shortly after Plaintiff requested that Defendants bolster their
15 unclean hands affirmative defense to provide fair notice. (ECF No. 65-3, Exh. 1).
16 Thus, there was no undue delay.

17 **2. Bad Faith**

18 Bad faith exists where the proposed amendment suggests that the movant
19 is “merely . . . seeking to prolong the litigation by adding new but baseless legal
20 theories.” *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 881 (9th Cir. 1999).
21 Here, nothing in the record suggests unfair tactical maneuvering. There is a
22 close nexus between the proposed amendments and the evidence uncovered
23 during discovery, and neither the amendments nor the counterclaims are
24 baseless or suprising. The Court finds no evidence of bad faith.

25 **3. Undue Prejudice**

26 “[P]rejudice to the opposing party . . . carries the greatest weight” in this
27 inquiry. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
28 2003). However, “bald assertions of prejudice cannot overcome the strong policy

1 reflected in Rule 15(a) to facilitate a proper disposition on the merits.”
2 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006)
3 (internal alterations omitted) (quoting *Hurn v. Ret. Fund Trust of the Plumbing,*
4 *Heating & Piping Indus.*, 648 F.2d 1252, 1254 (9th Cir. 1981)). After careful
5 consideration, the Court concludes this factor does not weigh against granting
6 Defendants’ Motion. The amendments and counterclaims go to the merits of the
7 controversy between the parties, and discovery has not yet fully closed. (See
8 ECF No. 117 (expert discovery cutoff set for April 12, 2019)). Because Plaintiff
9 requested the amended Answer, which would provide Plaintiff with fair notice of
10 Defendants’ unclean hands defense, and because the counterclaims are related
11 to the same mirror-conduct allegations that have been discussed throughout
12 discovery, the Court can see no prejudice to Plaintiff resulting from granting
13 Defendants leave to amend and assert counterclaims before the close of
14 discovery.

15 **4. Futility of Amendment**

16 Amendment is not futile. “A proposed amendment is futile only if no set of
17 facts can be proved under the amendment to the pleadings that would constitute
18 a valid and sufficient claim or defense.” *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d
19 209, 214 (9th Cir. 1988). Here, Defendants’ counterclaims, all of which allege
20 mirror-image conduct of Plaintiff, are plausible on their face. See *Bell Atl. Corp.*
21 *v. Twombly*, 550 U.S. 544, 570 (2007). This too weighs in favor of granting
22 Defendants’ Motion.

23 **C. Motion for Partial Judgment**

24 Because the Court grants Defendant’s Motion for Leave to Amend and
25 Assert Counterclaims, Plaintiff’s Motion for Partial Judgment on the unclean
26 hands affirmative defense is denied as moot. (ECF No. 59).

27 **D. Motion for Leave to File a Motion to Strike Defendants’ Reply**

28 Plaintiff moved for leave to strike Defendants’ Reply, asserting that

1 Defendants' inclusion of excerpted depositions and Erik Haas' declaration was
2 improper. (ECF No. 109 at 1). Plaintiff cites to Local Rule 7.1(f), which governs
3 the types of evidence that must be served with a motion, as well as Federal Rule
4 of Civil Procedure 6, which provides that "[a]ny affidavit supporting a motion must
5 be served with the motion." Fed. R. Civ. P. 6(c)(2).

6 Generally, "[n]ew evidence submitted in reply should not be considered
7 without affording plaintiffs an opportunity to respond." *Edwards v. Toys "R" Us*,
8 527 F. Supp. 2d 1197, 1205 n.31 (C.D. Cal. 2007) (citing *Provenz v. Miller*, 102
9 F.3d 1478, 1483 (9th Cir. 1996)). However, evidence is not new if it directly
10 responds to "proof adduced in opposition to a motion." *Id.*

11 The evidence here was not new. Defendants had included excerpts and
12 facts learned from the September 2018 depositions in its proposed amended
13 Answer. (See, e.g., ECF No. 67, Exh. B ¶¶ 31, 46, 49, 60). Moreover,
14 Defendants supplied the declaration and excerpted depositions to respond to
15 Plaintiff's argument that Defendants were aware of the facts prior to September
16 2018 and had failed to specify what they had learned and when they learned it.
17 (ECF No. 100 at 2). By supplying the declaration and excerpted depositions,
18 which by and large were included in its original Motion, Defendants directly
19 responded to the substance of Plaintiff's opposition.

20 The Court further notes that in resolving the Motion for Partial Judgment
21 and Motion for Leave to Amend, the Court relied on the original motion and
22 proposed amended answer, and did not consider evidence proffered in
23 Defendant's Reply. Granting leave to brief a motion to strike would not change
24 the outcome of any of the foregoing Motions. Accordingly, the Court denies
25 Plaintiff's Request for Leave to File A Motion to Strike Defendants' Reply. (ECF
26 No. 109).

27 **E. Motions to Seal**

28 Pursuant to the Protective Order entered into by the parties (ECF No. 53),

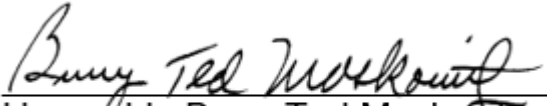
1 the Court grants all the motions to file documents under seal related to the
2 briefing of these issues. (ECF Nos. 66, 102, 106, 111).

3 **III. CONCLUSION**

4 Given the foregoing, the Court GRANTS Defendants' Motion to Modify
5 Scheduling Order and for Leave to Amend; the Court DENIES Plaintiff's Motion
6 for Partial Judgment; the Court DENIES Plaintiff's Motion for Leave to File a
7 Motion to Strike Defendants' Reply; and the Court GRANTS the Motions to file
8 the above-specified documents under seal.

9 IT IS SO ORDERED.

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11 Dated: March 27, 2019

12 
13 Honorable Barry Ted Moskowitz
14 United States District Judge
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