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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ESI GROUP, a foreign corporation, ESI
12 NORTH AMERICA, INC., a Michigan
13 corporation, and ESI US R&D, INC. a
Michigan corporation,

14 Plaintiffs,

15 v.

16 WAVE SIX, LLC, a California limited
17 liability company, PHILIP SHORTER, an
18 individual, VINCENT COTONI, an
19 individual, SASCHA MERZ, an
individual, and TERENCE CONNELLY,
an individual,

20 Defendants.
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Case No.: 17-CV-02293-AJB-MSB

**ORDER GRANTING PLAINTIFFS’
MOTION FOR LEAVE TO AMEND
COMPLAINT**

(Doc. No. 47)

22 Pending before the Court is Plaintiffs ESI Group, ESI North America, Inc., and ESI
23 US R&D, Inc.’s (collectively referred to as “Plaintiffs” or “ESI”) motion for leave to
24 amend their complaint. (Doc. No. 47.) Defendants Wave Six, Philip Shorter, Vincent
25 Cotoni, Sascha Merz, and Terence Connelly (collectively referred to as “Defendants”) filed
26 an opposition to Plaintiffs’ motion. (Doc. No. 49.) For the reasons set forth more fully
27 below, the Court **GRANTS** Plaintiffs’ motion.

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1 **I. BACKGROUND**

2 Plaintiffs contend their copyright protected writings, property, and trade secrets were
3 copied and used by Defendants. (Doc. No. 1 at 1.) Specifically, Plaintiffs allege all four of
4 the individual Defendants worked for ESI at one point in time but left and began working
5 for Wave Six, a direct competitor. (*Id.* at 2.) Moreover, the Plaintiffs claim the individual
6 Defendants used and continue to use Plaintiffs’ trade secret file format with their new
7 employer. (*Id.*)

8 Plaintiffs filed their complaint on November 11, 2017 in the United States District
9 Court in the Southern District of California. (*Id.* at 1.) Plaintiffs seek to add Dassault
10 Systemes Simulia Corp. (“Dassault”) as a defendant, due to Defendant Wave Six’s merger
11 with Dassault in October 2017. (Doc. No. 47-1 at 3.)

12 **II. LEGAL STANDARD**

13 Pursuant to Federal Rule of Civil Procedure 15, leave to amend should be “freely
14 give[n] [] when justice so requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to be applied
15 with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
16 Cir. 2003) (citation and internal quotation marks omitted). In *Foman v. Davis*, 371 U.S.
17 178 (1962), the Supreme Court offered several factors for district courts to consider in
18 deciding whether to grant a motion to amend under Rule 15(a):

19 In the absence of any apparent or declared reason—such as
20 undue delay, bad faith or dilatory motive on the part of the
21 movant, repeated failure to cure deficiencies by amendments
22 previously allowed, undue prejudice to the opposing party by
23 virtue of allowance of the amendment, futility of amendment,
etc.—the leave sought should, as the rules require, be ‘freely
given.’

24 *Id.* at 182. Additionally, “[a]bsent prejudice, or a strong showing of any of the remaining
25 *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to
26 amend.” *Eminence Capital*, 316 F.3d at 1052.

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1 **III. DISCUSSION**

2 Plaintiff contends that Defendant will not suffer any prejudice and the amendment
3 is not based on bad faith or undue delay. (Doc. No. 47-1 at 7.) Further, counsel for
4 Defendant Wave Six has identified in previous documents that Wave Six was merged into
5 Dassault and stated the case caption would be corrected. (Doc. No. 24-1 at 1.) Plaintiffs
6 are not seeking to add additional operative facts. (Doc. No. 47-1 at 10.)

7 A. Futility of Amendment *Foman* Factor

8 Defendants’ primary opposition to the proposed amendments center on the factor of
9 futility. (Doc. No. 49 at 4.) Defendants allege that Plaintiffs’ amendments if granted would
10 be futile because Plaintiffs refer to both Wave Six and Dassault as “Wave Six” where
11 applicable in the proposed First Amended Complaint, creating confusion and ambiguity.
12 (Doc. No. 47-3 at 49.)

13 A court may deny leave to amend if the proposed amendment is futile or would be
14 subject to dismissal. *See Carrico v. City & Cty. Of San Francisco*, 656 F.3d 1002, 1008
15 (9th Cir. 2001). The test of futility “is identical to the one used when considering the
16 sufficiency of a pleading challenged under Rule 12(b)(6).” *Miller v. Rykoff-Sexton, Inc.*,
17 845 F.2d 209, 214 (9th Cir. 1988), *implied overruling on other grounds by Ashcroft v.*
18 *Iqbal*, 556 U.S. 662 (2009). “While some courts liken the futility inquiry with that of a
19 motion to dismiss, most recognize that ‘[d]enial of leave to amend on [futility] ground [s]
20 is rare.’” *Defazio v. Hollister, Inc.*, No. Civ. 04–1358, 2008 WL 2825045, at *2 (E.D. Cal.
21 July 21, 2008) (quotation omitted).

22 Defendants contend that Plaintiffs’ use of “Wave Six” as a reference to both Wave
23 Six and Dassault creates confusing and ambiguous allegations. (Doc. No. 49 at 4.)
24 Therefore, Defendants assert, the Plaintiffs’ proposed First Amended Complaint fails to
25 give each defendant fair notice of their claim against each party. (*Id.* at 6.) Plaintiffs assert
26 the complaint is sufficient to inform each Defendant of Plaintiffs’ claims against them and
27 the Court agrees. Under California Corporations Code § 1107(a), “the separate existence
28 of the disappearing corporations ceases [upon merger] and the surviving corporation . . .

1 shall be subject to all the debts and liabilities of each in the same manner as if the surviving
2 corporation had itself incurred them.” Because Dassault and Wave Six merged in October
3 2017, Dassault is now subject to the liabilities that Wave Six incurred. Thus, Plaintiffs’
4 proposed amendments reasonably group Dassault together with Wave Six. Accordingly,
5 the Court finds the Plaintiff has sufficiently given notice without confusion to the
6 Defendants of their claim against each party for the purpose of leave to file an amended
7 complaint.

8 B. Undue Delay *Foman* Factor

9 Defendant also contends that ESI unreasonably delayed in filing its motion. (Doc.
10 No. 49 at 6.) “Relevant to evaluating the delay issue is whether the moving party knew or
11 should have known the facts and theories raised by the amendment in the original
12 pleading.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). Although
13 Wave Six merged with Dassault in October 2017, Plaintiffs filed their Complaint in
14 November 2017 without mention of Dassault. (*See generally* Doc. No. 1.) However,
15 Plaintiffs claim that Defendants informed them of the merger after the original Complaint
16 was filed. (Doc. No. 47-1 at 2.) Additionally, Defendants addressed the merger in their
17 motion to dismiss in January 2018, stating the entities named would be corrected. (Doc.
18 No. 24-1 at 1.) Because Defendants have not yet taken actions to correct the entities named,
19 Plaintiffs reasonably move to amend. Plaintiffs also first attempted to seek Defendants’
20 concurrence to the proposed amendments in November 2018. (Doc. No. 47-3, Ex. 4 at
21 104.)

22 Moreover, this is the first time Plaintiff has sought leave to amend his complaint.
23 Discovery has not yet commenced, and the amendments do not change the parties’ position.
24 Thus, finding that there is no evidence that Plaintiffs delayed in bringing this motion, this
25 factor weighs in favor of granting leave to amend. *See Davis v. Powell*, 901 F. Supp. 2d
26 1196, 1212 (S.D. Cal. 2012) (holding that undue delay is delay that “prejudices the
27 nonmoving party or imposes unwarranted burdens on the court.”).

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