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7 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 EAGLE VIEW TECHNOLOGIES, INC.,

10 Plaintiff,

11 v.

12 XACTWARE SOLUTIONS, INC.,

13 Defendant.

CASE NO. C12-1913RSM

ORDER GRANTING LEAVE TO  
AMEND

14 **I. INTRODUCTION**

15 This matter comes before the Court upon Plaintiff's Motion to Amend Complaint, Dkt.  
16 #238. Plaintiff Eagle View Technologies, Inc. ("Eagle View") seeks to amend its Complaint in  
17 order to bring a new breach of contract claim based on events that occurred since it filed its  
18 original Complaint on October 29, 2012. Defendant Xactware Solutions, Inc. ("Xactware")  
19 opposes the Motion. For the reasons set forth below, the Court GRANTS Plaintiff's Motion.

20 **II. BACKGROUND**

21 Plaintiff Eagle View provides aerial roof measurement services to insurance and  
22 contracting industries by applying its proprietary technology and techniques to aerial images,  
23 arriving at an accurate estimate of the area. Dkt. #126 at ¶ 2. Defendant Xactware was founded  
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1 in 1986. See Dkt. #127-11 at 15:24–25 (*filed under seal*). Xactimate is Xactware’s flagship  
2 claims-estimation software. See *id.* at 32:17–20 (*filed under seal*). XactAnalysis is Xactware’s  
3 business-to-business network that facilitates the electronic transfer of claims to and from  
4 customers that use Xactware’s products. See *id.* at 32:12–16 and 72:1–76:10 (*filed under seal*).  
5 Eagle View and Xactware entered into an Agreement at issue in this case on November 4, 2008.  
6 Dkt. #127, Ex. A (*filed under seal*). Under the Agreement, the parties created a customized  
7 integration that permits the ordering and transmittal of Eagle View’s roof measurement reports  
8 through Xactware’s network and software. See Dkt. #127-11 at 72:5–24 (*filed under seal*).

### 9 III. ANALYSIS

#### 10 A. Standard for Motion to Amend

11 Pursuant to Fed. R. Civ. P. 15(a)(2), a “court should freely give leave [to amend] when  
12 justice so requires,” Fed. R. Civ. P. 15(a)(2). Courts apply this policy with “extreme liberality.”  
13 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Five factors are  
14 commonly used to assess the propriety of granting leave to amend: (1) bad faith, (2) undue delay,  
15 (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has  
16 previously amended the complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.  
17 1990); *Foman v. Davis*, 371 U.S. 178, 182 (1962). In conducting this five-factor analysis, the  
18 court must grant all inferences in favor of allowing amendment. *Griggs v. Pace Am. Group, Inc.*,  
19 170 F.3d 877, 880 (9th Cir. 1999). In addition, the court must be mindful of the fact that, for  
20 each of these factors, the party opposing amendment has the burden of showing that amendment  
21 is not warranted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); see also  
22 *Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988).

1 Defendant has provided no evidence that Plaintiff's Amended Complaint is in bad faith,  
2 will cause undue delay, or prejudice Defendant. *See* Defendant's Opposition, Dkt. #242.  
3 Plaintiff has not previously sought amendment. The sole factor before the Court is thus the  
4 futility of Plaintiff's amendment.

### 5 **B. Futility of Amendment**

6 A court may deny leave to amend if the proposed amendment is futile or would be  
7 subject to dismissal. *Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir.  
8 2011).

9 The substance of Plaintiff's proposed amendment is the addition of a fourth cause of  
10 action, "Breach of Contract for Discouraging Integration." Dkt. #240-1 at 14. Plaintiff claims  
11 that Xactware breached "Section 4" of a 2011 amendment to the 2008 Agreement between the  
12 parties. *Id.* This section included the provision that "Xactware and [Eagle View] agree to not  
13 discourage the use of the integration service in any manner covering any customer, current or  
14 perspective." *Id.* at 7. Plaintiff claims that Xactware breached this agreement by discouraging  
15 use of Eagle View's reports through the Xactware integration, specifically by "encouraging and  
16 promoting such customers to instead order roof reports generated by Xactware... changing the  
17 default option for ordering reports to [Xactware software] and making Eagle View the  
18 "alternate" option... removing access to Eagle View's reports when it released a new version of  
19 the Xactware network, and... offering [Xactware software]... at a steeply discounted price to  
20 discourage the sale of Eagle View's reports through Xactware's network." *Id.* at 14. Plaintiff  
21 further claims the loss of at least one of their customers due to the above actions of Defendant,  
22 and resulting damages. *Id.* at 15. The remainder of Plaintiff's amendment consists mainly of  
23 additions to the factual record for events occurring after the initial Complaint was filed, and  
24 small changes to grammar and formatting.

1 Defendant argues that the above language from Section 4 amounts to an unenforceable  
2 Non-Compete Clause. Dkt. #242 at 5 (*filed under seal*). Defendant devotes significant time to  
3 explaining how such clauses are in violation of New York law, FTC guidelines, and public  
4 policy. *See id.* at 2-8. However, Defendant also argues that this same Section 4 “is not a non-  
5 compete provision.” *Id.* at 8 (emphasis in original). Defendant goes on to argue that Section 4  
6 “is merely a loosely worded non-disparagement clause regarding the Eagle View-Xactware  
7 interface for those customers who choose to use it.... it simply is not a non-compete clause.” *Id.*  
8 at 8-9 (emphasis in original). The Court agrees with Defendant’s second interpretation of this  
9 clause. Instead of being a restriction on meaningful competition between the two companies  
10 generally, Section 4 can be read to solely require that the parties not discourage customers from  
11 using the previously agreed integration of Eagle View and Xactware. This is the reading  
12 Plaintiff is proposing in their argument, and is reflected in the title of its new proposed cause of  
13 action. *See* Dkt. # 249 at 4 (“To be clear, Eagle View’s position is not that Section 4 of the  
14 Agreement is a generalized non-compete clause...”); Dkt. #240-1 at 14. Importantly, Plaintiff is  
15 not solely claiming Defendant breached by offering its competing product on Xactware’s  
16 network; Plaintiff also claims Defendant breached by sidelining and eventually eliminating Eagle  
17 View’s software as an option for customers to choose. *See* Dkt. #240-1 at 14. The Court thus  
18 finds that Section 4 is not a general non-compete clause.

19 Defendant offers no analogous case where a similar breach of contract claim was found  
20 to be futile. Defendant’s citation to *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010) is not  
21 convincing. In *Serra*, the court found that plaintiff prisoners could not amend their complaint to  
22 include (1) a claim based on the inadequacy of prisoner’s earnings and (2) a claim of false  
23 imprisonment, as the first claim failed to allege a necessary deprivation of a constitutional right,  
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1 and the second claim failed to allege that the prisoners were confined without legal authority. *Id.*  
2 Here, Plaintiff's contract claim suffers from no similar legal barrier. Defendant has failed to  
3 meet its burden of proving futility.

4 Because Defendant has not met its burden, and given the general "policy to permit  
5 amendment with extreme liberality," *Eminence*, 316 F.3d at 1051, the Court hereby GRANTS  
6 Plaintiff leave to amend its Complaint. Upon entry of this Order, Plaintiff shall file the Amended  
7 Complaint, referenced in Exhibit A to the instant Motion, and serve it on Defendant within 14  
8 days.

### 9 **C. Discovery**

10 Plaintiff notes in its motion that discovery related to this new cause of action will be  
11 minimal, yet does not actually request additional discovery or propose a new discovery deadline.  
12 Discovery is currently closed in this matter. *See* Dkt. ##67; 234. Given that the trial in this  
13 matter is set for December 7, 2015, the Court directs the parties to jointly propose an appropriate  
14 deadline for discovery limited in scope to Plaintiff's new cause of action within 10 days of this  
15 Order.

## 16 **IV. CONCLUSION**

17 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,  
18 and the remainder of the record, the Court hereby finds and ORDERS:

- 19 (1) Plaintiff's Motion to Amend Complaint (Dkt. #238) is GRANTED.
- 20 (2) Plaintiff shall file the Amended Complaint, referenced in Exhibit A to  
21 the instant Motion, and serve it on Defendant within 14 days.

1 (3) The Court directs the parties to jointly propose an appropriate deadline  
2 for discovery limited in scope to Plaintiff's new cause of action within  
3 10 days of this Order.  
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5 Dated this 9<sup>th</sup> day of July 2015.

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7 RICARDO S. MARTINEZ  
8 UNITED STATES DISTRICT JUDGE  
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