Takeya USA Corporation v. PowerPlay Marketing Group, LLC et al.
8:21-cv-00835-JVS-DFM

TENTATIVE Order Regarding Motion for Leave to File Amended Complaint

Plaintiff and Counterclaim defendant Takeya USA Corporation ("Takeya") moves for an order for (1) leave to file an amended complaint and (2) a limited reopening of discovery so Takeya can serve a supplemental interrogatory and document production consisting of attorney's invoices, i.e., damages arising from the new theory. Mot., Dkt. No. 39. Defendant Powerplay Marketing Group, LLC ("Powerplay") opposed and Takeya replied. Opp'n, Dkt. No. 42; Reply, Dkt. No. 54.

For the following reasons, the motion is **GRANTED**.

I. BACKGROUND

In 2018, Takeya engaged Powerplay to serve as a sales representative for certain retailers and the engagement agreement was later renewed or amended. Compl., Dkt. No. 1-1. Takeya and Powerplay entered into the operative agreement in September 2020 (the "Agreement"). Decl. of Stephen Ram ("Ram Decl."), Dkt. No. 39-1 ¶ 3; Agreement, Ram Decl. Ex. 2, Dkt. No. 39-3. That Agreement contains a termination provision that allows either party to terminate the engagement upon 30-days written notice. Agreement at 7 § 4(b).[1] The Agreement also contains a choice of law and forum clauses designating California as the governing law. Compl. ¶ 11, Agreement at 13 § 26. The Agreement contains a provision in Section 5(a) that states that the "execution, delivery, and performance of this Agreement … (ii) does not violate the terms of any law…." Agreement at 7 § 5(a).

Takeya sent a written notice dated March 9, 2021 terminating the relationship between Takeya and Powerplay pursuant to the termination provision of the Agreement. Ram Decl., Ex. 2, Dkt. No. 39-3 at 3. On March 11, 2021, Powerplay responded disputing the termination, relying on the Minnesota Termination of Sales Representatives Act, Minn. Stat. § 325E.37 ("MTSRA").

[1]When referencing exhibits to the declarations, the Court refers to the page citations inserted by the CM/ECF system.

Ram Decl. Ex. 4, Dkt. No. 39-5. On April 20, 2021, Takeya commenced this action in Superior Court. Compl., Dkt. 1-1. The Complaint asserts a fraud in the inducement claim for certain misrepresentations that induced Takeya to enter into the Agreement. Id. ¶¶ 42-48. The Complaint also asserts a claim for breach of the Agreement based upon Powerplay's deficient performance. Id. ¶¶ 30-35. Powerplay removed the action, and on May 21, 2021, Powerplay filed its Answer and Counterclaims against Takeya. Dkt. 17. The Counterclaim features MTSRA prominently, including a claim for a purported violation of that law. Id. ¶¶ 82-96.

On May 4, 2022, Takeya took the deposition of Jeff Petschl, co-owner and co-founder of Powerplay. Ram Decl. ¶ 13; Ram Decl. Ex. 3, Dkt. No. 39-4 ("Petrschl Dep."). In the deposition, Petschl testified that he was familiar with MTSRA during the Takeya-Powerplay contract negotiations in 2018. Petrschl Dep. at 9-10. Petsrchl stated that Powerplay customarily used form contracts with a Minnesota choice of law provision and expressed familiarity with the MTSRA, stating that Takeya was "aware of the Minnesota rep law and that they wouldn't sign anything with the Minnesota state on the paper." Petrschl Dep. at 8, 9-10. Because of "Petschl's equivocation and reliance upon Olson for contract review," Takeya took the deposition of Gretchen Olson on June 2, 2022 in order to, among other reasons, ensure that new allegations would be warranted. Ram Decl. ¶¶ 13-14, Mot. at 12. In the declaration included in the Motion, Takeya also points to a document that it received in a production of 1,000 documents on April 29, 2022, and which it reviewed in the first week of May 2022. Ram Decl. ¶ 11. This document contains an email exchange dated August 9, 2020, one month prior to the parties entering into the Agreement, in which Petschl expresses that Takeya would not be able to terminate the relationship because of the MTSRA, and that Takeya does not know this because it does not know the law. Ram Decl. Ex. 12, Dkt. No. 39-12.

Takeya proposes to add allegations in support of existing breach of contract and fraud in the inducement clams about Powerplay's knowledge of the MTSRA, and Powerplay's belief that the Termination provision in the Agreement was invalid under the MTSRA at the time Powerplay signed the Agreement. Proposed Compl. Redline ("Redline"), Dkt. No. 37-2. Takeya contends that this was in violation of the Agreement and constitutes fraud in the inducement because Powerplay represented under Section 5(a) that entering into the Agreement did not violate any applicable laws. The proposed amendment adds theories to Takeya's breach of contract and fraud in the inducement claims on the grounds that PowerPlay entered into the Agreement with this knowledge "hoping to spring [the

MTSRA] on Takeya at the right time." Id. at 14, 15; Mot. at 13.

On June 23, 2022, Takeya contacted Powerplay requesting Powerplay's stipulation to the amendment, based on Takeya's contention that the deposition testimony and other discovery materials warranted the new allegations.

II. LEGAL STANDARD

Where a party seeks leave to amend after the deadline set in the scheduling order has passed, the party's request is judged under the "good cause" standard of Federal Rule of Civil Procedure 16(b) rather than the "liberal amendment policy" of Rule 15(a). DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC, 870 F.3d 978, 989 (9th Cir. 2017) (quoting In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 737 (9th Cir. 2013) aff'd sub nom. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015)). The central inquiry under Rule (b)(4) is whether the requesting party was diligent in seeking the amendment. Id.; Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). While a court may consider prejudice to the opposing party, "the focus of the inquiry is upon the moving party's reasons for seeking modification." Johnson, 975 F.2d at 609.

"The good cause standard typically will not be met where the party seeking to modify the scheduling order has been aware of the facts and theories supporting amendment since the inception of the action." See In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d at 737. Similarly, a party does not show good cause where it does not investigate the "basic circumstances" underlying its claims until after the deadline to amend has passed. See Hernandez v. Select Portfolio Servicing, Inc., No. CV 15-1896 PA (AJWX), 2016 WL 770869, at *3 (C.D. Cal. Feb. 24, 2016).

If the party establishes good cause, it must then show the proposed amendment is proper under Federal Rule of Civil Procedure 15. See Johnson, 975 F.2d at 608. Under Rule 15, "[f]our factors are commonly used to determine the propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citations omitted). The consideration of prejudice to the opposing party "carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in

futility, or where the amended complaint would also be subject to dismissal." Steckman v. Hart Brewing, 143 F.3d 1293, 1298 (9th Cir. 1998) (internal citations omitted). The Rule 15 factors should be analyzed with "extreme liberality" toward favoring amendments, United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (requiring that policy favoring amendment be applied with "extreme liberality").

III. DISCUSSION

Takeya argues that there is good cause shown because the amendment sought is based on newly discovered information and Takeya diligently sought amendment. The Court agrees. Takeya contends that it first learned of PowerPlay's knowledge of the MTSRA law at the time of the Takeya-PowerPlay contract negotiations, on May 4, 2022 in the deposition with Petrschl. PowerPlay contends that Takeya has been aware of both Section 5(a) of the Agreement and the MTSRA since prior to the inception of this case. Opp'n at 13-14. But Takeya's proposed allegations are not merely about those two items. The new fact of PowerPlay's familiarity with the MTSRA at the time of the contract negotiation significantly alters the impact of Powerplay signing the Agreement in light of Section 5(a). Given that this information was in Powerplay's possession, it is unclear how Takeya could have more diligently uncovered these facts. For example, responses to Takeya's interrogatories include statements such as "Powerplay did not make any knowingly false representations to Takeya." Dkt. No. 42-7 at 14 (interrogatories). Takeya's proposed amendment is therefore based on information that it discovered, for the first time, in the deposition of Petrschl taken on May 4, 2022.

Most importantly, Takeya has shown reasonable diligence in seeking the amendment. Takeya explains that it did not immediately move for amendment based on that alone because of "Petschl's equivocation and reliance upon Olson for contract review." Ram Decl. ¶ 14, Ex. 8. Subsequently, Takeya took Olson's deposition on June 2, 2022 for among other things, to ensure that the new allegations would be warranted. In the context of the good faith inquiry, the Ninth Circuit found that a movant offered a satisfactory explanation for the delay where "they waited until they had sufficient evidence of conduct upon which they could base claims of wrongful conduct." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987). After all, the court reasoned in a footnote, Federal Rule of Civil Procedure 11 provides for sanctions for bringing suits that lack factual basis. Id. n.4 (citing Fed. R. Civ. P. 11). On June 23, 2022, Takeya asked if

PowerPlay would stipulate to the amendment, which PowerPlay refused. This action taken to seek amendment was taken only about three weeks after the June 2, 2022 deposition, during which time lead counsel also contracted COVID-19. Ram Decl. ¶¶ 16-18. In the weeks that followed that initial communication regarding the amendment, Takeya took multiple steps to attempt to amend, including an ex parte motion which the Court denied in favor of a noticed and briefed motion. Because Takeya acted promptly on the new information to seek amendment, Takeya has demonstrated diligence.

For the same reasons just discussed, there is no evidence indicated a wrongful motive and therefore no basis for this Court to find bad faith or undue delay.

The Court turns to the most important consideration in the Federal Rule of Civil Procedure 15 inquiry: prejudice. Takeya argues that there is no prejudice because the information that Takeya seek to add is "uniquely within the possession" of Defendants and therefore it will not prejudice them to investigate those new allegations internally. The new allegations would add to the existing causes of action by alleging that PowerPlay was aware of the MTSRA law that they are invoking in this case and believed that it applied. The proposed amendments consist of two additional general allegations and a few lines adding theories of recovery to the existing breach of contract and fraud in the inducement claims. See Redline at 10, 13, 14.

Powerplay argues that the amendment would be prejudicial because the deadline to file for summary judgment has passed and PowerPlay has already completed summary judgment briefing. See Opp'n. "The timing of the motion, after the parties had conducted discovery and a pending summary judgment motion had been fully briefed, weighs heavily against allowing leave." Schlacter-Jones v. Gen. Tel. of California, 936 F.2d 435, 443 (9th Cir. 1991), abrogated on other grounds by Cramer v. Consol. Freightways, Inc., 255 F.3d 683 (9th Cir. 2001). But the cases that PowerPlay cites to in support of their argument are distinguishable. In M/V Am. Queen v. San Diego Marine Const. Corp.,, the Ninth Circuit found that two additional reasons supported denying the amendment aside from the pending motion for summary judgment: (1) there were no allegations that the facts were newly discovered, and (2) the new allegations would "totally alter the basis of the action, in that they covered different acts, employees and time periods necessitating additional discovery." 708 F.2d 1483, 1492 (9th Cir. 1983). Here, the proposed amendments are based on newly

discovered facts. Further, the proposed amendments would not change the basis of the action; they add a new but related theory to two of the existing claims. See Opp'n at 18; Redline. Schlacter-Jones is also distinguishable. In that case, the court considered the "combination of delay, timing of the motion, futility and the likelihood that the court would decline to exercise pendent jurisdiction over the one potentially viable pendent state claim." Schlacter-Jones, 936 F.2d at 443. Here, the Court finds that there was not undue delay, the Court has already exercised jurisdiction over the claims, and as discussed below, amendment would not necessarily be futile.

Moreover, Takeya clarifies that it does not seek additional discovery from Powerplay. Reply at 2-3. Instead, Takeya seeks a limited reopening of discovery for Takeya to serve "(1) a supplemental interrogatory (which was done before filing the motion); and (2) a supplemental document production consisting of attorney's invoices that are damages arising from the new theory." Reply at 3. Takeya also offered to make a 30(b)(6) witness available to Powerplay. Mot. at 15. In brief, Takeya has demonstrated that it acted quickly on learning the new information to seek the amendment, and given that it does not seek discovery, Powerplay's prejudice is limited to the motion for summary judgment briefing. The Court does not discount this, but the fact of the pending summary judgment motion alone does not outweigh Takeya's demonstration of good cause under Federal Rule of Civil Procedure 16 and propriety of amendment under Rule 15. Mindful of the pending summary judgment motion, the Court will allow the parties to file a request for extension of the motion deadline.

Powerplay argues that the fourth factor, futility of amendment, weighs in its favor. Powerplay characterizes the amendment to be based on Powerplay deliberately not disclosing the MTSRA prior to March 9, 2021, when Takeya attempted to terminate the relationship. Opp'n at 23. In fact, Takeya's proposed amendment is that Powerplay deliberately failed to disclose (1) its knowledge of the MTSRA (2) its belief at that time that the Agreements' terms violated the MTSRA **prior to** signing the Agreement. In Section 5(a) of the operative Agreement, Powerplay made an express, contractual representation that its "execution, delivery, and performance of th[e] Agreement" did not violate any law. Accordingly, it would not necessarily be futile to add the allegation that Powerplay knowingly violated Section 5(a) and that it entered into the Agreement knowing that Takeya would not agree to do so were Minnesota law to apply.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion to amend. Takeya shall serve its proposed supplemental interrogatory and document production and the parties shall file a request for proposed extension of the motion deadline within **ten days** of the date of this Order.

IT IS SO ORDERED.

The Court **VACATES** the August 1, 2022 hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, August 2, 2022, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.