UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: 8:21-cv-01110-FWS-DFM Date: October 11, 2022
Title: *Bridget Ward et al. v. Crow Vote LLC et al.*

Present: **HONORABLE FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE**

Melissa H. Kunig	N/A
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

PROCEEDINGS: ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT [109]

Before the court is Plaintiff Bridget Ward and Plaintiff Lisa Ward's (collectively, "Plaintiffs") Motion to Amend Complaint ("Motion" or "Mot."). (Dkt. 109.) On August 11, 2022, Defendants Darrin Austin, Crow Vote LLC, and Edward Matney (collectively, "Defendants") opposed the Motion ("Opposition" or "Opp."). (Dkt. 116.) On August 17, 2022, Plaintiffs filed a Reply ("Reply"). (Dkt. 117.) On August 23, 2022, the court took the matter under submission. (Dkt. 118.) *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); L. R. 7-15 (authorizing courts to "dispense with oral argument on any motion except where an oral hearing is required by statute"). Based on the state of the record, as applied to the applicable law, the Motion is **DENIED.**

A. Legal Standard

Federal Rule of Civil Procedure 15 permits a party to amend its pleading once as a matter of course. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only

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with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) "instructs the Court to 'freely' grant a motion to amend pleadings unless (1) doing so prejudiced the opposing party; (2) the amendment is sought in bad faith; (3) the amendment causes undue delay; or (4) the proposed amendment would add a futile claim." *Robertson v. Bruckert*, 568 F. Supp. 3d 1044, 1044 (N.D. Cal. 2021) ("*Robertson* factors") (citing *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). "Absent prejudice, or a strong showing of any of the remaining . . . factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Cap., LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003); *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (stating that courts should generally draw "all inferences in favor of granting the motion"). However, "[a] motion for leave to amend is not a vehicle to circumvent summary judgment." *Maldonado v. City of Oakland*, 2002 WL 826801, at *4 (N.D. Cal. Apr. 29, 2002). The opposing party bears the burden of showing why leave to amend should not be granted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987).

B. Discussion

Plaintiffs request leave to file a First Amended Complaint by adding a third cause of action for unjust enrichment and seeking restitution or disgorgement under that new cause of action. (Mot. at 1.) Plaintiffs argue the need for amendment did not become apparent until Defendants filed their Motion for Summary Judgment, (see Dkt. 98), at which point Plaintiffs needed to rebut Defendants' argument that Plaintiffs did not suffer injury to their business or property. (Mot. at 2.) Defendants oppose and argue that all four *Robertson* factors weigh in favor of denying the Motion. (*See* Opp. at 1-2.) The court addresses each factor in turn.

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1) Prejudice to the Opposing Party

"Prejudice to the opposing party is the most important factor" when considering a request to amend the pleadings. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). The court may find prejudice where "an amendment would deny a defendant an adequate opportunity to prepare his defense, would result in surprise, or would result in increased discovery burdens, such as a need to reopen discovery or potential loss of evidence due to the passage of time." *Hansen Beverage Co. v. Nat'l Beverage Corp.*, 2007 WL 9747720, at *2 (C.D. Cal Feb. 12, 2007); *cf. Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("A need to reopen discovery and therefore delay the proceedings support a district court's finding of prejudice from a delayed motion to amend the complaint."). "Further, the addition of an 'independent claim' that catches the opposing party off guard after dispositive motions have been filed may also suffice to establish prejudice *even if* 'it is not clear that additional discovery would be required.'" *Robertson*, 568 F. Supp. 3d at 1048 (citation omitted).

Plaintiffs argue there is no prejudice to Defendants because "[t]he additional claim is dependent on the same facts as the existing RICO claim" and "no additional discovery would be needed." (Mot. at 6.) Defendants argue that Plaintiffs have filed their Motion for Class Certification and Defendants have filed their Motion for Summary Judgment—and the proposed amendment would require Defendants to resume discovery to "explore the new cause of action and potential defenses." (Opp. at 9.)

In this case, the court finds the record contains sufficient evidence of prejudice to Defendants. The court notes that fact discovery has not yet closed. (*See* Dkt. 97.) However, the parties have already engaged in significant motion practice, including the following: (1) Defendants' Motion for Summary Judgment, (Dkt. 98); (2) Plaintiffs' Motion for Class Certification, (Dkt. 89); (3) Defendants' Motion for Entry of a Case Management Order and to

Bifurcate Proceedings, (Dkt. 72); (4) Defendants' Motion to Stay, (Dkt. 51); (5) Defendants' Appeal to the Ninth Circuit, (Dkt. 50); and (6) Defendants' Motion to Compel Arbitration, Transfer Venue, or to Dismiss, (Dkt. 12). The court has already issued orders addressing many of these motions. (*See generally* Dkt.)

The briefing on these motions and the court's corresponding orders were based on the original Complaint. (*See* Dkt. 1-1.) The court thus finds that the addition of Plaintiffs' new claim at this juncture would prejudice Defendants by "catching them off guard." *See Robertson*, 568 F. Supp. 3d at 1048 ("[T]he addition of an 'independent claim' that catches the opposing party off guard after dispositive motions have been filed may also suffice to establish prejudice even if 'it is not clear that additional discovery would be required.'").

Accordingly, the court concludes Defendants would be prejudiced by the proposed amendments and this factor weighs in favor of denying leave to amend.

2) Bad Faith

"In the context of a motion for leave to amend, 'bad faith' means acting with intent to deceive, harass, mislead, delay or disrupt." *Wizards of the Coast LLC v. Cryptozoic*, 309 F.R.D. 645, 651 (W.D. Wash. 2015). The court may also find bad faith where the movant seeks to amend solely "to prolong the litigation by adding new but baseless legal theories." *Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, 2019 WL 1409854, at *3 (S.D. Cal. Mar. 27, 2019) (internal quotation marks omitted).

Defendants argue Plaintiffs are acting in bad faith to avoid summary judgment. (Opp. at 3-5.) In the Motion, Plaintiffs maintain they are "seeking leave to amend in the event the Court finds the Favorite Chef contest may have constituted illegal gambling under Arizona law but also finds Plaintiffs did not suffer economic loss within the meaning of the RICO Act." (Mot. at 3.)

In this case, the court finds insufficient evidence of bad faith by Plaintiffs. As discussed above, bad faith requires showing a party "act[ed] with intent to deceive, harass, mislead, delay or disrupt," *Wizards*, 309 F.R.D. at 651, or attempted "to prolong the litigation by adding new but baseless legal theories," *Quidel*, 2019 WL 1409854, at *3. The court finds that the current record does not support an inference of bad faith such that this factor would weigh against granting leave to amend, and thus this factor is neutral.

3) Undue Delay

The court may also consider whether the moving party unduly delayed in filing a motion to amend. *Jackson*, 902 F.2d at 1388; *Parker v. Joe Lujan Enters., Inc.*, 848 F.2d 118, 121 (9th Cir. 1998) (affirming the district court's denial of motion to amend based on undue delay). In doing so, the court may analyze "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Jackson*, 902 F.2d at 1388; *see also In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 739 (9th Cir. 2013) ("Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.") (quoting *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016-17 (9th Cir. 1999)).

Plaintiffs argue they only became aware of the need for amendment once Defendants filed their Motion for Summary Judgment on June 24, 2022. (Mot. at 2.) Defendants argue Plaintiffs' position is contradicted by the record, which indicates that Defendants challenged Plaintiffs' damages theory in the Answer, (Dkt. 56,) and Motion to Compel Arbitration, Transfer Venue, or to Dismiss, (Dkt. 12.) (Opp. at 6-7.)

First, the court agrees that Plaintiffs' characterization of the belated discovery of this theory is not supported by the record. In Defendants' Motion to Compel Arbitration, Transfer

Venue, or to Dismiss filed on July 1, 2021, Defendants argued, "assuming *arguendo* that there were UCL violations, Plaintiffs fail to allege that any such violations resulted in any economic injury suffered by Plaintiffs—or any other voter." (Dkt. 12 at 12.) Furthermore, in the Answer filed on October 29, 2021, Defendants' Fourth Defense states that, "[t]he claims of Plaintiffs and putative class members are barred because they did not sustain any ascertainable losses or damages. If they did, Plaintiffs and the putative class members' damages are contractually limited to their out-of-pocket expenses." (Dkt. 56 at 37.)

The court finds that based on the record, Plaintiffs were aware of Defendants' challenge to their damages theory as early as July 1, 2021. (*See* Dkt. 12.) The court observes that Plaintiffs filed their Motion to Amend on July 28, 2022. (Dkt. 109.) Accordingly, the court finds that Plaintiffs delayed by approximately one year—from July 1, 2021, to July 28, 2022—in seeking leave to amend with respect to their damages theory. *See Int'l Med. Devices, Inc. v. Cornell*, 2021 WL 4894271, at *1 (C.D. Cal. Aug. 11, 2021) ("[A] court should first evaluate the time that has passed between the original pleading and the proposed amendment.").

Second, the court finds that Plaintiffs knew or should have known the facts and theories raised by the proposed amendments at the time of the original pleading. Indeed, Plaintiffs state in the Motion to Amend that the proposed First Amended Complaint "does not contain any factual allegations that have not already been made earlier in this litigation or which are unknown to Defendants." (Mot. at 1-2.) *See also Jackson*, 902 F.2d at 1388 (court may analyze "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading"); *In re W. States Wholesale Nat. Gas*, 715 F.3d at 739 ("Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.").

Accordingly, because Plaintiffs were aware of Defendants' challenge to their damages theory as early as July 1, 2021, and state that the proposed amendments "d[o] not contain any factual allegations that have not already been made earlier in this litigation or which are unknown to Defendants," (*see* Mot. at 1-2), the court finds this factor weighs in favor of denying leave to amend.

4) Futility

"[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Lockheed Martin Corp.*, 194 F.3d at 986 ("Where the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend.").

In arguing the proposed amendments are not futile, Plaintiffs state the following:

> The amendment would not be futile. <u>The proposed first amended complaint add[s] a legal theory that would be viable as long as the Court finds the Favorite Chef contest was illegal gambling</u>. It simply provides an alternative equitable remedy if the Court finds the legal remedy is unavailable due to lack of standing. The burden is on Defendants to demonstrate why the new claim could not survive a motion to dismiss.

(Mot. at 5-6) (emphasis added.)

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In their Reply, Plaintiffs also state "[t]he amendment is only sought if the Court finds the contest was an illegal gambling transaction, in which case there is not a 'valid contract' and therefore no way to receive the benefit of the bargain." (Reply at 14) (emphasis added.)

Defendants argue Plaintiffs' proposed amendments will not correct the deficiencies in their existing causes of action and do nothing to maintain the nationwide scope of their proposed class. (Opp. at 12.) Defendants further argue "Plaintiffs received the benefit of their bargain because they received the exact number of votes that they purchased" and thus the amendments would be futile. (*Id*.)

Under Arizona law, "[u]njust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another." *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 48 P.3d 485, 491 (Ariz. Ct. App. 2002). "To recover under a theory of unjust enrichment, a plaintiff must demonstrate five elements: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 245 P.3d 927, 936 (Ariz. Ct. App. 2011). "Thus, a plaintiff must demonstrate that the defendant received a benefit, that by receipt of that benefit the defendant was unjustly enriched at the plaintiff's expense, and that the circumstances were such that in good conscience the defendant should provide compensation." *Id*.

"The factual predicate of an unjust enrichment claim is that someone has been 'unjustly enriched.'" *Span v. Maricopa Cnty. Treasurer*, 437 P.3d 881, 886 (Ariz. Ct. App. 2019). "A person is not entitled to compensation on the grounds of unjust enrichment if he receives from the other that which it was agreed between them the other should give in return." *Brooks v. Valley Nat. Bank*, 548 P.2d 1166, 1171 (Ariz. 1976). Thus, "[a] theory of unjust enrichment is unavailable only to a plaintiff if that plaintiff has already received the benefit of her contractual bargain." *Adelman v. Christy*, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000); *cf. USLife Title Co.*

of Arizona v. Gutkin, 732 P.2d 579, 585 (Ariz. Ct. App. 1986) (finding that "[b]ecause the bank did not obtain the benefit of its bargain it was free to pursue a claim for unjust enrichment"); *Isofoton, S.A. v. Giremberk*, 2006 WL 1516026, at *3 (D. Ariz. May 30, 2006) (emphasis in original) ("An unjust enrichment recovery is barred when the plaintiff has *received* the benefit of its bargain.").

In this case, the court finds that the proposed amendment adding a cause of action for unjust enrichment under Arizona law is futile because, as discussed in the court's Order Granting Defendants' Motion for Summary Judgment, the undisputed facts demonstrate the Favorite Chef Competition ("Competition") does not qualify as illegal gambling under Arizona law, (see Dkt. 120 at 18-29), and for the further reason that Plaintiffs received the benefit of their bargain, i.e., received the votes for which they paid Defendants, (*id*. at 34-37, 41-42).[1] Because the Competition does not qualify as illegal gambling and Plaintiffs received the benefit of their bargain[2], the court concludes the proposed amended claim for unjust enrichment is futile because all of the necessary elements are not met. *See Brooks*, 548 P.2d at 1171 ("A person is not entitled to compensation on the grounds of unjust enrichment if he receives from

[1] The court notes that in requesting the amendment, Plaintiffs state, "[t]he proposed first amended complaint add[s] a legal theory that would be viable as long as the Court finds the Favorite Chef contest was illegal gambling," (Mot. at 5), and "[t]he amendment is only sought if the Court finds the contest was an illegal gambling transaction, in which case there is not a 'valid contract' and therefore no way to receive the benefit of the bargain," (Reply at 14). Regardless of Plaintiffs' apparent concession that the sought amendment is viable only if the court finds the Competition constituted illegal gambling, the court independently concludes the amendment would be futile.

[2] The court observes that the proposed First Amended Complaint reiterates Plaintiffs' allegations that they paid for votes and received those votes. (*See* Mot., Exh. 1 ("FAC") ¶¶ 42-51).)

the other that which it was agreed between them the other should give in return."); *Adelman*, 90 F. Supp. 2d at 1045 ("A theory of unjust enrichment is unavailable only to a plaintiff if that plaintiff has already received the benefit of her contractual bargain."); *see also Freeman*, 245 P.3d at 936 (setting forth the elements for unjust enrichment). Therefore, the court concludes the proposed amendment is futile because "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Sweaney v. Ada Cnty., Idaho*, 119 F.3d 1385, 1393 (9th Cir. 1997) (citation omitted). Thus, the futility factor weighs in favor of denying leave to amend.

5. Conclusion Regarding *Robertson* Factors

Based on the state of the record, as applied to the applicable law, the court concludes that *Robertson* factors one, two, and four weigh in favor of denying amendment. Because three factors weigh in favor of denying amendment and one factor is neutral, the court **DENIES** the Motion.

C. Disposition

For the reasons set forth above, the court **DENIES** the Motion.

The Clerk shall serve this minute order on the parties.

Initials of Deputy Clerk: mku