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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAIRY, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

MILK MOOVEMENT, INC., a foreign Corporation, and MILK MOOVEMENT, LLC, a Delaware Limited Liability Company,

Defendants.

MILK MOOVEMENT, INC., a foreign Corporation,

Counterclaim-Plaintiff,

v.

DAIRY, LLC, a Delaware Limited Liability Company,

Counterclaim-Defendant.

Case No.: 2:21-CV-02233-WBS-AC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COUNTERCLAIM-PLAINTIFF MILK MOOVEMENT, INC.'S MOTION FOR LEAVE TO AMEND COUNTERCLAIMS

Date: February 21, 2023
Time: 1:30 p.m.
Ctrm: 5, 14th Floor
Judge: Hon. William B. Shubb

Compl. Filed December 2, 2021
Trial Date: September 19, 2023

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Defendant Milk Moovement, Inc. respectfully submits this memorandum in support of its motion for leave to amend its counterclaims.

INTRODUCTION

Milk Moovement is a small Canadian software company that is trying to enter the U.S. market for data services in the milk industry. By its own account, Counterclaim-Defendant Dairy, LLC controls at least 80% of this market. Data services, however, should not be a monopoly. The limited discovery to date has already revealed that Dairy has gained market power and throttled competition by using exclusivity demands, restrictive covenants, and sweeping confidentiality provisions to prevent customers from freely switching providers to Dairy's competitors.

Notwithstanding Milk Moovement's substantial efforts, Dairy itself did not produce this discovery—or any documents at all—until after the deadline to amend the Counterclaims had passed. The scant materials Dairy has produced (less than 400 documents until recently) reveal serious antitrust concerns, including prohibitions that prevent customers from providing their own raw data to Dairy's competitors in order to freely explore alternative services.

Moreover, Dairy has improperly withheld key documents that it should have produced long ago, which Milk Moovement only learned about recently via third-party discovery. For example, on December 6, 2022, third party United Dairymen of Arizona ("UDA")—a former customer of Dairy's that has since retained Milk Moovement—produced a letter from Dairy's CFO, which Dairy did not produce. The letter asserts that [redacted]

Milk Moovement respectfully seeks leave to amend its Counterclaims to assert causes of action under Sherman Act §§ 1 and 2, Clayton Act § 7, and their state-law analogs. There is good cause for such an amendment under Rule 16. Milk Moovement has been diligent in pursuing discovery and otherwise litigating this case. In contrast, Dairy has obstructed discovery and withheld evidence past the amendment deadline.

Dairy will not be prejudiced by the amendment. The proposed Counterclaims will not materially expand the scope of discovery because Milk Moovement's affirmative defenses (including unclean-hands) and declaratory-relief claim already raise similar issues. Moreover, because of Dairy's delays, discovery is still in its early stages. Dairy has hardly produced any documents, no depositions have been taken, and Dairy itself has moved the Court to extend the scheduling deadlines to have a trial in 2024. None of Milk Moovement's allegations regarding Dairy's substantial antitrust abuses will derail any case scheduling.

Finally, permitting this amendment will achieve substantial justice by enabling meritorious antitrust claims to go forward, which will fix a dysfunctional market and ultimately benefit the hundreds of millions of American consumers who collectively spend more than $15 billion on milk each year. Milk Moovement should be allowed to bring its affirmative claims in addition to defending the case on the ground that Plaintiff is misusing its substantial market power.

FACTUAL BACKGROUND

A. The Parties

Milk Moovement provides data services for the milk industry. Founded by two college friends using seed money saved from their catering paychecks and earlier business ventures, Milk Moovement offers milk cooperatives and processors customer-centric software solutions. In addition to providing innovative software solutions, Milk Moovement runs its business according to certain core values, including: "Be a good person," "Do right by others," "Honesty Over Ego," and "Leave things better than we found them." (Declaration of J. Noah Hagey ("Hagey Decl."), Ex. 2.)

Dairy is the largest U.S. supplier of dairy software and has consolidated its market power by repeatedly acquiring competitors and interfering with its own customers' ability to engage competitors. Dairy claims that it services 80% of the "Top 100" dairy companies, as reported by industry press. (Hagey Decl., Ex. 3.) Dairy is majority-owned by private equity firms Banneker Partners and Farol Asset Management. (*Id.*, Ex. 4.)

B. The Parties' Claims and Defenses

Dairy filed this action on December 2, 2021. It alleges that Milk Moovement induced one of Dairy's former customers California Dairies, Inc. ("CDI") to disclose Dairy's trade secrets and confidential information to Milk Moovement. (First Amended Complaint, Dkt. 48 ("FAC") ¶¶ 6, 7.) It further claims that Milk Moovement's inducement of the alleged disclosures constitutes misappropriation of trade secrets and tortious interference with contract. (FAC ¶ 8.)

In its initial complaint, Dairy alleged that certain reports constitute the purported "trade secrets" at issue. (Dkt. 1 ¶ 13 (identifying reports generated by Counter-Defendant's software but showing CDI's data).) Those reports (which are simply Excel spreadsheets) contain only CDI's own data and publicly available information. They do not contain any formulas, analysis, source code, or other proprietary information. In the FAC, Dairy abandoned this theory about why it sued Milk Moovement. It now claims that compilations of CDI's data generated by Dairy "contain[] outputs sufficient to allow a competitor to reverse engineer part of Dairy's unique and proprietary pooling methodology." (FAC ¶ 45.)

On April 27, 2022, Milk Moovement filed its answer and counterclaims to Dairy's operative complaint. (Dkt. 79.) In its responsive pleadings, Milk Moovement asserts, *inter alia*: (1) a counterclaim for declaratory relief regarding Dairy's trade secret misappropriation claims and (2) affirmative defenses regarding Dairy's unclean hands and bad acts. (*Id.* at 16, 21.) In support of its affirmative defenses, Milk Moovement alleges that Dairy has engaged in anticompetitive practices, including with regard to its acquisition of competitors.

C. The Court's Scheduling Order

On May 24, 2022, the parties submitted a Joint Status Report, which proposed a cutoff for general amendments to pleadings by June 21, 2022, but expressly "reserve[d] all rights to seek leave to amend the pleadings or to join additional parties at a later date." The parties' Joint Status report made the deadline to amend the pleadings expressly subject to "the outcome of discovery." (Dkt. 78 at 6.) On May 5, 2022, the Court issued a scheduling order adopting the parties' proposal. (Dkt. 81.)

D. Milk Moovement's Efforts to Obtain Discovery Related to Dairy's Anticompetitive Activities

Milk Moovement propounded its first set of discovery requests on May 20, 2022. To date, Milk Moovement has propounded eight sets of discovery requests, consisting of 122 requests for production and seven interrogatories. Milk Moovement has conferred with Dairy on numerous occasions over the past six months regarding Dairy's production, including regarding a protocol for searching and producing electronically stored information ("ESI"). In furtherance of these efforts, Milk Moovement has exchanged over 100 emails with Dairy relating to discovery. (*See e.g.*, Hagey Decl. [redacted] ¶ 7.) When Dairy refused to produce documents in response to Milk Moovement's Requests for Production Sets One and Two despite its prior representations, Milk Moovement promptly filed a motion to compel. (Dkt. 117.)

E. Dairy Delayed Production Until After the Deadline to Amend Passed

Despite Milk Moovement's extensive efforts to obtain discovery, Dairy has produced only 799 documents. It produced all those documents after the Scheduling Order's general deadline for amendments to pleadings (June 21, 2022), as follows: 236 documents on September 13, 2022; 10 documents on October 21, 2022, and 104 documents on October 24, 2022. It made its first custodial production of 96 documents on December 14, 2022, after finally agreeing to search terms on November 23, 2022. It also recently produced 353 documents on December 29, 2022, for a grand total of 799 documents over the course of almost a year.

Dairy has been particularly obstinate with respect to production of ESI. Dairy dragged out negotiating an ESI protocol for several months. (Hagey Decl., ¶ 9.) Until just days ago, Dairy had produced only 173 emails across all its productions.

F. The Documents Dairy Withheld Until after the Deadline to Amend Passed

The documents that Dairy recently produced include their actual contracts with customers. Dairy's multiple interlocking agreements, such as its [redacted] User Agreement, [redacted] reference and incorporate one another, and impose significant barriers on Dairy's clients' ability to change software providers. The daisy-chain of overlapping restrictive agreements include provisions such as: [redacted] (ii) confidentiality provisions that pertain to "setup information" and

"transaction information" provided by the user (*id.*, Ex. 12, Dairy964; [redacted] and (iii) use restrictions that prevent customers from disclosing their own data as necessary to change data service providers (Dairy964, 914, [redacted]). These agreements explain that the customer must provide its own production data to Dairy to enable Dairy to provide services to that customer. But then the agreements define that customer's own data as "Dairy.com's Confidential Information" and restrict the customer's ability to provide that data to other data service providers to, for instance, explore whether the customer would like to retain a different service provider. The agreement states:

> **5.2 Additional Responsibilities.** User specifically acknowledges and agrees that it shall not permit any third party, nor any employee, representative or agent thereof, that are in the primary business of developing, marketing or licensing computer programs with functionality similar to
>
> 17
>
> Better Way of Doing Business. 3801 Parkwood Blvd., Suite 300, Frisco, TX 75034 *office* 214 360 0061 *fax* 214 360 0169
>
> Dairy
>
> Case 2:21-cv-02233-WBS-AC Document 51 Filed 02/09/22 Page 16 of 30
>
> Dairy.com
>
> the functionality of the Software to have access to Dairy.com's Confidential Information or to any trade secrets or Dairy.com Confidential Information therein. Except to the extent required by law, User agrees to keep the details of the Entire Agreement and the discussions relating thereto strictly confidential. User will not disclose to any third party such details without the express written consent of a duly authorized officer of Dairy.com. Finally, User agrees that its Setup Information, and any specific Transaction Information:

(Hagey Decl., Ex. 12, Dairy977-78; [redacted]

These agreements also state that even if a Court holds that the customer owns its own data, that data is still subject to Dairy's restrictions:

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> If User is ever held or deemed to be the owner of any intellectual property rights in Dairy.com's Confidential Information, . . . then User hereby irrevocably assigns to Dairy.com all such right, title and interest in such materials.

(Hagey Decl., Ex. 12, Dairy979; [redacted].)

G. The Documents that Dairy Did Not Produce That Milk Moovement Obtained Through Third Parties

After the amendment deadline had passed, Milk Moovement obtained other documents that Dairy should have produced but did not. These documents show that Dairy uses the restrictive covenants in its agreements to threaten customers that want to leave. [redacted]

Upon receiving these and other materials reflecting Dairy's anticompetitive abuses, Milk Moovement performed its diligence and research, promptly analyzed its legal claims, informed Dairy of its intention to amend its counterclaims, and requested that Dairy stipulate to proposed amendments. In particular, Milk Moovement proposed that the parties agree to a briefing schedule for Dairy's anticipated motion to dismiss (which would be meritless and will fail), but that they not burden the Court with litigation regarding whether Milk Moovement is permitted to amend its counterclaims in the first place. Dairy refused, which has necessitated this motion. (*Id.*, ¶ 28.)

H. Milk Moovement's Proposed Counterclaims

Milk Moovement's proposed Counterclaims are attached as Exhibit 1 to the Hagey Declaration. They contain causes of action under both sections of the Sherman Act and Section 7 of the Clayton Act. The claims are based almost exclusively on materials that Milk Moovement obtained after the deadline for amendment had passed. The Counterclaims explain the relevant market (Hagey Decl., Ex. 1, ¶¶ 44-53), detail Dairy's stranglehold on the market (*id.* ¶¶ 54-58), describe Dairy's practices to improperly lock up customers (*id.* ¶¶ 59-71), catalog Dairy's unlawful

expansion of its monopoly through market-power-consolidating acquisitions (*id.* ¶¶ 72-88), and explain Dairy's other anticompetitive practices and activities (*id.* ¶¶ 89-116).

Under established antitrust principles, this conduct violates the Sherman Act's prohibition against anticompetitive acts by an entity with market power. *See ZF Meritor LLC v. Eaton Corp*., 696 F.3d 254, 287 (3d Cir. 2012). It constitutes an attempt to monopolize the market. *Id*. (affirming verdict finding Sherman Act § 2 violation despite customers' facial ability to terminate a contractual relationship with a monopolist; "[A] jury could very well conclude that 'in spite of the legal ease with which the relationship could be terminated,' the [customers] had a strong economic incentive to adhere to the terms of the [agreements], and therefore were not free to walk away from the agreements and purchase products from the supplier of their choice." (brackets omitted).) And it violates the Clayton Act's prohibition against acquisitions that further overconcentrate a market. *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015). These claims are meritorious and will have important protective consequences reaching far beyond this case.

ARGUMENT

Leave to amend pleadings shall be freely given when justice so requires, bearing in mind the underlying purpose of facilitating decisions on the merits, rather than on the pleadings or technicalities. Fed. R. Civ. P. 15(a). *Epikhin v. Game Insight N. Am.*, 145 F. Supp. 3d 896, 902 (N.D. Cal. 2015). When a party seeks to amend a pleading after the deadline set by the case scheduling order has passed, the request implicates Federal Rules of Civil Procedure 15 and 16. *Defazio v. Hollister, Inc.*, No. CIV 04-1358 WBS GGH, 2008 WL 2825045, at *1 (E.D. Cal. July 21, 2008) (Shubb, J.) Rule 16(b) governs the issuance and modification of pretrial scheduling orders while Rule 15(a) governs amendment of pleadings. *Id*. Under Rule 16, "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

I. GOOD CAUSE EXISTS TO AMEND THE SCHEDULE TO PERMIT MILK MOOVEMENT'S COUNTERCLAIMS

The Scheduling Order explicitly provides that post-deadline amendments may be permitted upon a showing of "good cause . . . under Federal Rule of Civil Procedure 16(b)." (Scheduling

Order at 2 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992).) The "good cause standard primarily considers the diligence of the party seeking the amendment." *Id* at *609. (quotations omitted). "[A] court may supplement its determination by considering the prejudice to the other party." *Defazio*, 2008 WL 2825045 at *1. Applying these factors in *Defazio*, for example, this Court granted leave to amend pursuant to Rule 16 because the plaintiffs sought leave to amend (1) "once the need became apparent," and (2) upon a finding that there was no unfair prejudice to defendant because—despite the case being initiated three years prior—the matter was in its "early litigious stages." *Id*. at *1-2.

Leave to amend should be granted here for the same reasons. First, Milk Moovement has been diligent in prosecuting this action—it seeks to amend its counterclaims after discovering facts regarding Dairy's misconduct, which are based on documents produced only after the amendment deadline had passed. Second, Dairy will not be prejudiced by the amendments because Milk Moovement's amended counterclaims will not expand the scope of discovery (which, in any event, has just begun in earnest) and Dairy itself seeks to lengthen the schedule in this case, which will provide plenty of time to litigate the counterclaims along with the existing claims and defenses.

Moreover, permitting Milk Moovement's proposed counterclaims will promote Rule 16's purpose, working in conjunction with Rule 15, to advance the interests of justice by resolving disputes on the merits. *See Allen v. Bayer Corp*., 460 F.3d 1217, 1227 (9th Cir. 2006) (Rule 16's purpose "is to get cases decided on the merits of issues that are truly meritorious and in dispute."). Rule 16's intent is "'not to enforce deadlines 'mindlessly' … 'A court must [also] be guided by the underlying purpose of Rule 15—to facilitate decisions on the merits rather than on the pleadings or technicalities.'" *Macias v. Cleaver*, No. 1:13-CV-01819-BAM, 2016 WL 8730687, at *6 (E.D. Cal. Apr. 8, 2016) (citations omitted) (determining that denial of counterclaim-defendant's motion "would not satisfy the Court's duty to ensure fundamental fairness in [] litigation" if it did not consider the public policy intent behind Rule 16 and 15). As set forth in Part II.B, *infra*, the interests of justice heavily weigh in favor of resolving Milk Moovement's proposed counterclaims on the merits, which establishes further good cause to modify the Scheduling Order.

A. Milk Moovement Has Been Diligent

Active participation in developing the case is sufficient to establish good cause. *See Kuschner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 688 (E.D. Cal. 2009) (finding good cause to amend scheduling order where party acted diligently by answering complaint, participating in pretrial scheduling conference, and pursuing discovery). Where a party resists discovery, it cannot complain about amendments outside the time given in the scheduling order. *See Orozco v. Midland Credit Mgmt.*, No. 2:12–cv–02585–KJM–CKD, 2013 WL 3941318, at *3 (E.D. Cal. July 30, 2013) (granting leave to amend under Rule 16 and observing that "[P]laintiff has pursued discovery diligently. It is defendant's dawdling, not plaintiff's, that caused [the delay]" (citations omitted)).

Since the outset of this case, Milk Moovement has actively pursued discovery from Dairy. It has also made seven separate productions of ESI, including over 28,000 pages and hundreds of hours of videos and transcripts in response to Dairy's requests. (Hagey Decl. ¶ 17.) It has also sought repeatedly to streamline the discovery process to avoid burdening the Court with endless discovery disputes. And, at the same time, Milk Moovement has diligently pursued the facts that underlie its proposed amendments. For example, Milk Moovement expressly sought:

> **REQUEST FOR PRODUCTION NO. 71:**
>
> All DOCUMENTS provided to any former or current DAIRY customers or prospective DAIRY customers that evidence, reflect, or RELATE to any obligation to maintain as confidential or to restrict access to reports generated from the PRODUCER PAYROLL APPLICATION, including the Deliveries by Plant and FO Report.

(Hagey Decl., [redacted]) It has also asked for documents relating to Dairy's market share (RFPs 38, 41-42), financials as they pertain to Dairy's market share (RFPs 31-32), any reports Dairy commissioned regarding the market share of its competitors (RFPs 43-44), and Milk Moovement's competition with Dairy (RFPs 47-48), among others. (*See id.*, [redacted]) These documents all relate to Milk Moovement's unclean-hands defense—*i.e.*, that Dairy cannot use the Courts to pursue supposed claims about "trade secret" misappropriation or wrongful disclosure of "confidential information" when Dairy itself is a monopolist that abuses its power to manipulate the market to its

own benefit. Dairy, however, refused to produce any documents regarding these topics, so there is no way Milk Moovement could have amended its counterclaims earlier.

In contrast to Milk Moovement's diligence, Dairy has engaged in prototypical big firm discovery abuse. First, in addition to refusing to produce documents in response to the requests above, Dairy for months also refused to produce wide swaths of discovery in response to other requests for production seeking materials relevant to Dairy's anticompetitive conduct. Indeed, it was not until *January 2023*—less than a week before the filing of this motion and only after Milk Moovement informed Dairy that it would file these amended counterclaims—that Dairy agreed to even search for documents in response to the following requests:

- Milk Moovement's RFPs Nos. 4-8 seek all agreements between Dairy and its former customers, CDI, UDA, and Borden Dairy. This information is relevant to show, among other things, that Dairy has used its customer agreements to restrict customers' ability to use their own data and to transition to new dairy data service providers, like Milk Moovement.

- Milk Moovement's RFPs Nos. 18-20 seek documents and communications relating to Dairy's customers' decisions to terminate Dairy's services and customer dissatisfaction with Dairy's data software. This information is relevant to show, among other things, that Dairy has restricted customers' freedom to terminate its services even when they are dissatisfied with the quality of those services.

- Milk Moovement's RFPs Nos. 3, 18-19 and 26 seek documents concerning Dairy's trade secret and confidential information claims and, in particular, what information Dairy claims are trade secret or confidential, the basis for that claim, what measures Dairy uses to protect such information, and how that information is used in Dairy's data software. This information is relevant not only to defend against Dairy's affirmative claims but to establish that Dairy is using overly restrictive trade secret and confidentiality designations to restrict customers' use of their own data and a customer's freedom to select alternative dairy data service providers should they choose to.

Dairy also tried to hold discovery hostage by coupling its willingness to comply with the Federal Rules to its own unreasonable demands. For example, it took the position that it would be "willing to undertake a reasonable search for documents responsive" only "[o]nce Milk Moovement ha[d] complied with Dairy's outstanding discovery requests." (Hagey Decl., Ex. 9.)

Similarly, Dairy would not provide responses to six interrogatories and another 12 requests for production specifically inquiring about its trade secret allegations because it deemed the

requests "premature"—ironic now that Dairy is arguing that Milk Moovement's counterclaims based on materials sought by those requests are *too late*.

Second, for the few documents Dairy agreed to produce, it produced them at a glacial pace. Despite deploying a New York law firm with "1,200 lawyers located in 13 offices in six countries,"[1] it took Dairy until September 13, 2022—nearly three months after the amendment deadline—to make its first document production, which comprised only 236 documents. Dairy trickled out 10 more documents on October 21, 2022. It made a "supplemental production" of 104 documents on October 25, 2022, an additional production of 96 documents on December 14, 2022, and most recently produced 353 documents on December 29, 2022. In total, Dairy has produced only 799 documents in the near nine months since Milk Moovement first propounded requests.

Third, with regard to ESI, Dairy turned to page two of the big-firm playbook and strung out the negotiations of an ESI protocol for three months, four telephonic conferences, and about 50 emails. (Hagey Decl., ¶ 9.) And while Dairy finally agreed to an ESI protocol on November 22, 2022, it still refuses to search the records of key custodians, including Dairy employee Scott Sexton, who served as Dairy's main point of contact with CDI—the customer Dairy alleges Milk Moovement used to wrongly obtain Dairy's information—during the relevant timeframe. (Hagey Decl., Ex. 6 (Joint Letter Brief Submission for Informal Discovery Conference (raising this issue to the Court) ¶ 15.)

In sum, while Milk Moovement has diligently sought discovery, Dairy has delayed at every opportunity. Under these circumstances, Dairy cannot complain about modification of the amendment deadline. *See Orozco*, 2013 WL 3941318 at *3.

B. Dairy Has Withheld Material Evidence

Third-party discovery recently revealed that Dairy has withheld key documents. [redacted]

[1] The firm, WILLKIE FARR & GALLAGHER LLP, https://www.willkie.com/about-us.

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[redacted] was responsive to several separate RFPs that Milk Moovement had propounded, including the ones set forth in Section I.A. (Hagey Decl., Exs. 7, 8 (RFPs Nos. 51, 61, 70, 71, 77, 108, 111 (seeking documents and communications regarding Dairy's trade secrets and confidential information, including user agreements, materials provided to and policies for customers, Dairy's efforts to protect such information; and regarding customer departures)).) For example, RFP No. 77 sought:

> **REQUEST FOR PRODUCTION NO. 77:**
>
> All DOCUMENTS and COMMUNICATIONS that evidence, reflect, or RELATE to any measures taken by DAIRY to maintain the secrecy or confidentiality of the ALLEGED CONFIDENTIAL INFORMATION or the ALLEGED TRADE SECRET INFORMATION.

[redacted]

[redacted]

[redacted]

Dairy, however, did not produce the [redacted] Milk Moovement became aware of the [redacted] only after UDA produced it on December 6, 2022. (Hagey Decl. ¶ 16.) Yet Pursuant to Rule 26(g), Dairy certified that it had searched for and would produce these materials:

[redacted]

This inaccurate certification is a separate and independent reason that Dairy cannot complain about Milk Moovement's proposed amendment. Even if the omission of the [redacted] was somehow inadvertent, the failure to produce it still amounts to discovery misconduct. And that misconduct is the reason Milk Moovement did not sooner have these facts—which form the backbone of the proposed Amended Counterclaims. (SACC ¶¶ 4, 106, 109 (amended allegations pertaining to the [redacted].) It also evidences a strong need for remedial discovery to understand why Dairy did not produce the letter, and what other related evidence it may have also held back.

C. The Proposed Counterclaims Are Based on Materials that Dairy Produced After the Amendment Deadline

The evidence that Dairy withheld provides the basis for Milk Moovement's proposed counterclaims. In particular, the documents Dairy trickled out months after the deadline for amendment had passed contain details of Dairy's confidential contracts with its customers that Milk Moovement had no way of knowing or obtaining. As noted in Section F above, those contracts form the basis of the proposed Counterclaims because they show how Dairy has been able to unlawfully restrain trade by imposing significant barriers on Dairy's clients' ability to change software providers, including: [redacted] (ii) confidentiality provisions that pertain to "setup information" and "transaction information" provided by the user (*id.,* Ex. 12, Dairy964; [redacted] (iii) use restrictions that prevent customers from disclosing their ***own data*** as necessary to change data service providers (*id.*), (iv) provisions that Dairy claims prevent customers from using software

similar to Dairy's software, (v) provisions that prevent customers from providing their own data to other service providers (Hagey Decl., Ex. 12, Dairy977-78; [redacted], and (vi) provisions that purport to overcome court rulings as to the ownership of client data (Hagey Decl., Ex. 12, Dairy979; [redacted]. These are just examples.

Other documents that Milk Moovement obtained after the amendment deadline had passed—that Dairy should have produced, but did not—show that Dairy construes its agreements broadly, and uses them to threaten customers that want to leave. (*See e.g.*, Illegal Restraint Letter, Hagey Decl., [redacted]) It is also apparent that many documents relevant to Milk Moovement's proposed Counterclaims are still improperly withheld by Dairy to this day. Given that Dairy withheld the [redacted], it is reasonable to conclude that (i) Dairy has likely sent similar letters to other customers, and (ii) there are likely other communications between Dairy and UDA—along with internal Dairy communications about UDA—that are responsive to Milk Moovement's document requests.

Allowing parties to amend based on information obtained through discovery is common and well established. *Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist.*, No. CIV. S-05-583 LKK/GGH, 2006 WL 3733815, at *15-16 (E.D. Cal. Dec. 15, 2006) (collecting cases where courts granted leave to amend based on "new information revealed [through] discovery"); *Cervantes v. Zimmerman*, No. 17-CV-1230-BAS-NLS, 2019 WL 1129154, at *7 (S.D. Cal. Mar. 12, 2019) (citing *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) (no undue delay where plaintiffs waited until they had sufficient evidence for their claims)); *see M.H. v. County of Alameda*, No. 11-2868 CW, 2012 WL 5835732 (N.D. Cal. Nov. 16, 2012) (granting leave to amend when discovery revealed identities of additional defendants). This is particularly true where, as here, it is a counterclaim-defendant's "obstreperousness in discovery that prevent[s] [defendants] from learning the facts that give rise to [its] proposed amendments." *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-CV-1392 JLS NLS, 2010 WL 4817990, at *5 (S.D. Cal. Nov. 22, 2010) (exercising discretion to permit amendment in far-along case where opposing party had delayed discovery); *see Orozco*, 2013 WL 3941318 at *3 (motion should be granted where opposing party's

actions caused delay). Accordingly, good cause exists to allow Milk Moovement's proposed counterclaims based on facts obtained from recent discovery.

D. Milk Moovement Promptly Moved the Court for Permission to Amend

When Milk Moovement finally obtained the evidence above, Milk Moovement worked diligently to prepare antitrust claims and moved promptly for leave to amend in order to allow those claims to be added to the case. Milk Moovement's timely and prompt request militates in favor of granting the Motion. *See Defazio*, 2008 WL 2825045 at *1; *Morales v. Ralphs Grocery Co.*, No. 12-CV-00742-AWI, 2012 WL 6087699, at *3 (E.D. Cal. Dec. 6, 2012) (leave should be freely granted where counterclaim-defendant "filed [a] motion immediately upon receiving the additional information upon which amendment" is sought).

On this point, *DCD Programs, Ltd. v. Leighton*, 833 F.2d at 187, is instructive. There, the Ninth Circuit determined that there was no "unjust delay" when plaintiffs "waited [to move to amend] until they had sufficient evidence of conduct upon which they could base claims of wrongful conduct." There, the plaintiff moved to join a new defendant over a year after initiating the suit, but the Court concluded that it had acted diligently. *Id*. (finding that fourteen-month-old suit was "still in its early stages," that plaintiffs waiting until they had sufficient proof to bring a good faith claim was "a satisfactory explanation for their delay," and that "there [was] no evidence in the record which would indicate a wrongful motive.").

Similarly, here, Milk Moovement did not have sufficient evidence to plead the antitrust violations stated in the SACC until after obtaining discovery from Dairy and third parties, such that Milk Moovement could seek leave to amend its counterclaims.

E. Amendment Will Not Prejudice Dairy

Dairy will not suffer unfair prejudice from Milk Moovement's proposed amendment. *See Johnson v. Serenity Transp., Inc*., No. 15-cv-2004-JSC, 2015 WL 4913266, at *5 (N.D. Cal. Aug. 17, 2015) ("Mere addition of new claims does not, in and of itself, establish prejudice sufficient to support denial of leave to amend."). The proposed amendments will not balloon the scope of the litigation because Milk Moovement's proposed antitrust claims involve facts and discovery that are already relevant to the case by virtue of Milk Moovement's existing counterclaims and affirmative

defenses. Likewise, the proposed amendments will not stretch the duration of the litigation because Dairy itself is seeking an extended case schedule that would provide ample time to litigate Milk Moovement's proposed counterclaims *even if* the claims would expand the scope of the dispute.

1. Milk Moovement's Defenses and Request for Relief Already Require Discovery and Briefing on the Issues Raised in the Counterclaims

Milk Moovement's proposed claims will not significantly change the "nature of the litigation." *Gonzales v. Comcast Corp*., No. 10-CV-01010-LJO, 2011 WL 1833118, at *7 (E.D. Cal. May 13, 2011) (no undue prejudice when "the ultimate nature of the litigation ha[d] not dramatically changed" by new legal theory). Milk Moovement's current pleading already raises affirmative defenses including Dairy's unclean hands and bad acts, and it also seeks declaratory relief (Dkt. 79 at 16, 21), each of which implicate the same facts and issues as the proposed counterclaims.

The defense of unclean hands, for example, applies where Dairy has acted "'inequitably in the matter in which [it] seeks relief." *Canupp v. Children's Receiving Home of Sacramento*, 181 F. Supp. 3d 767, 797-98 (E.D. Cal. 2016) (Shubb, J.); *see also Nat'l Grange of the Ord. of Patrons of Husbandry v. California State Grange*, 115 F. Supp. 3d 1171, 1182 (E.D. Cal. 2015) (Shubb, J.) ("Ultimately, the court must decide whether plaintiff's wrong, compared with the defendant's wrong, warrants punishment of the plaintiff rather than of the defendant."). Thus, Dairy's inequitable anticompetitive conduct is already at issue *regardless* of whether Milk Moovement brings affirmative counterclaims alleging that such anticompetitive conduct also amounts to statutory antitrust violations.

Similarly, like its unclean hands defense, Milk Moovement's affirmative defense pertaining to Dairy's bad acts (Dkt. 79 at 26) implicates Dairy's anticompetitive conduct regardless of whether such conduct is also the subject of affirmative antitrust claims. *See United States v. Ogden*, No. 20-CV-01691-DMR, 2021 WL 858467, at *5 (N.D. Cal. Mar. 8, 2021) (analyzing "Unclean Hands/Bad Acts" defense under the same rubric).

The same is true with respect to Milk Moovement's counterclaim for declaratory relief (against Dairy's claims for supposed trade-secret misappropriation), which will require broad

discovery regarding Dairy's use of restrictive covenants in its contracts to stifle competition by restricting customers from freely using their own information. Thus, the impropriety of Dairy's restrictive covenants is already at issue regardless of whether such impropriety amounts to an antitrust violation.

Further, as a practical matter, discovery is in its early stages; Dairy has barely begun producing documents and no depositions have taken place. Thus, even if there are differences between the scope of the current pleadings and proposed counterclaims, there is no threat of the parties needing to extend discovery or re-tread old ground. *See Artemus v. Louie*, No. 16-cv-00626-JSC, 2017 U.S. Dist. LEXIS 27307, at *11 (N.D. Cal. Feb. 27, 2017) (no accommodations need be made where "there is significant time left in discovery and the claims overlap"); *see also Am. Express Travel Related Services Co., Inc. v. D & A Corp*., No. CV-F-04-6737 OWW/TAG, 2007 WL 2462080 at *8 (E.D. Cal. Aug. 28, 2007) ("If discovery is not closed, undue delay does not exist.").

2. Dairy Itself Seeks an Extended Case Schedule

It is also worth noting that Dairy itself is seeking an extension of the case schedule. (Dkt. 156 (Counter-Defendant's motion to amend case schedule, which was denied without prejudice, but which Dairy intends to renew).) In that motion, Dairy requests that the Court "require completion of document production by April 3, 2023…[and] extend the close of fact discovery by 90 days, from April 3, 2023 to July 3, 2023." (*Id*.) Following the denial without prejudice of that motion, the parties are in the process of negotiating an extended case schedule that will take account of Dairy's desire for extended time, and will also permit ample opportunity to take discovery regarding Milk Moovement's amended counterclaims. Thus, Dairy cannot claim prejudice from any delay arising from the addition of Milk Moovement's counterclaims.

The bottom line is that—in light of the discovery conduct to date, the early stage of litigation, Milk Moovement's diligence in seeking leave to make these amendments, the critical nature of the counterclaims, and the fact that Dairy itself seeks an extended discovery schedule—good cause exists to permit the proposed amendments to go forward.

II. MILK MOOVEMENT'S AMENDMENTS COMPLY WITH RULE 15

Once a moving party has established good cause under Rule 16, the burden shifts to the non-movant to show that amendment would be futile under Rule 15. *See Wilson v. Conair Corp.*, 2016 WL 7742801, at *2 (E.D. Cal. Feb. 2, 2016) (Shubb, J.) ("non-moving party bears the burden of demonstrating why leave to amend should not be granted); *Defazio*, 2008 WL 2825045 at *2 (once movant establishes "good cause" "the court should deny plaintiffs' motion for leave to amend only if such amendment would be futile."). Denial of leave to amend on futility grounds "is rare." *Id*.

A. Milk Moovement's Counterclaims Are Viable

Courts rarely deny leave to amend on futility grounds. *Defazio*, 2008 WL 2825045 at *2. "'Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed.'" *Id*. at *2-3 (granting leave to amend absent a clear indication that movant has no viable theory of recovery pursuant to its proposed claim) (citations omitted).

As set forth in the Counterclaims, Milk Moovement's allegations regarding Dairy's violations of the Sherman Act and Clayton Act state sufficient facts in support of a viable theory of anticompetitive conduct and harm. Antitrust claims, such as these, are highly factual, and will turn on expert analysis of the relevant market, the potential for substitute services, barriers to entry, market concentration, the effects of mergers on competition, and other similar issues. The Supreme Court has even cautioned that such issues should not be resolved via summary judgment, let alone on a motion to dismiss. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

In all events, Milk Moovement's claims would easily survive a motion to dismiss. To state a claim for attempted monopolization, a plaintiff must allege "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *United Energy Trading, LLC v. Pac. Gas & Elec. Co.*, 200 F. Supp. 3d 1012, 1020 (N.D. Cal. 2016) (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–33 (9th Cir. 1995)). To state a monopolization claim, Plaintiff must allege "(1) [p]ossession of monopoly power in the relevant

market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1179 (N.D. Cal. 2012) (quoting *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)).

These elements are easily satisfied. Holding at least 80% of the market is *prima facie* evidence of market power. *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021) ("A market share of sixty-five percent or more usually establishes a prima facie case of monopoly power in Section 2 contexts."). Dairy's agreements, themselves, show an intent to destroy competition by preventing customers from providing their own data to competitors. Sending the [redacted] alone, constitutes an act seeking to increase and/or maintain market power. [redacted]

Similarly, under black letter law, market concentration is determined by the Herfindahl-Hirschman Index ("HHI"). "The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market." *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001). A post-merger market with an HHI above 2,500 is classified as "'highly concentrated,'" and a merger that increases the HHI by more than 200 points in a highly concentrated market is "'presumed to be likely to enhance market power.'" *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015) (quoting DOJ/FTC Horizontal Merger Guidelines § 5.3 at 18). Because Dairy, by its own admissions, controls at least 80% of the market, its HHI is at least 6,400—and the market is thus highly concentrated as a matter of law. *Id.* Any effort on Dairy's part to move to dismiss the Counterclaims will fail outright.

B. Public Policy Favors Allowing the Counterclaims

Substantial injustice and inefficiencies will result if Milk Moovement is unable to bring its proposed counterclaims in this action.

First, requiring Milk Moovement to bring its counterclaims elsewhere—and litigate fundamentally the same dispute in another forum—undercuts the animating force of Rule 16: to bring disputes to swift resolution on the merits. *Allen v. Bayer Corp.*, 460 F.3d 1217, 1227 (9th Cir. 2006). Granting leave to add these claims to this litigation will achieve judicial economy and

prevent litigation of multiple actions concerning the same parties or facts, which is the purpose of the Federal Rule governing counterclaims. *Alaska Barite Co. v. Freighters Inc*., 54 F.R.D. 192, 195 (N.D. Cal. 1972) (The "clear legislative policy of Rule 13(b) [is] to encourage counterclaims as a matter of judicial economy."). In *Cont. Assocs. Off. Interiors, Inc. v. Ruiter*, No. CIV.S-07-0334 WBSEFB, 2008 WL 2420586, at *1 (E.D. Cal. June 12, 2008) (Shubb, J.), this Court recognized the importance of judicial economy in considering whether to permit amendment after the deadline to amend has passed. There, the plaintiff sought to add an additional defendant following the passing of the deadline for discovery and pre-trial motions. Despite the looming trial deadline, this Court determined that good cause existed for granting the motion to amend because otherwise the plaintiff would likely file a separate action against the proposed defendant and "the court would most likely consolidate [the separate action] with [the instant] action for purposes of judicial economy." *Id*. at *1. The same reasoning applies here.

Second, splintering Milk Moovement's antitrust counterclaims from this case will also delay relief to consumers who are the ultimate victims of Dairy's unlawful monopolist practices. Milk Moovement's counterclaims seek to remedy a market made dysfunctional by Dairy's abuse of its monopoly power. *See Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957) ("Congress has, by legislative fiat, determined that such prohibited activities [*i.e.*, anticompetitive behavior] are injurious to the public, and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices, as well as the public.").[2] The public interest should not be subverted in service of a deadline for which there is ample good cause to adjust.

CONCLUSION

For the foregoing reasons, Milk Moovement's motion should be granted.

[2] In fact, the Sherman Act was created to protect the interests of the people at the heart of this lawsuit—farmers. *See* Christopher Leslie, 2 ANTITRUST LAW AS PUBLIC INTEREST LAW 885, 887-88 (2012) (explaining that the Sherman Act was passed to protect farmers who were victimized by cartels that formed powerful trusts in salt, cordage, gas, meats, and other markets).

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Respectfully submitted,

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