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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 MARIA AGUILAR,
12 Plaintiff,

13
14 v.

15 BOULDER BRANDS, INC., et al.
16 Defendants.
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Case No.: 3:12-cv-01862-BTM-BGS

ORDER

**GRANTING PLAINTIFF'S MOTION
FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT, and**

**GRANTING PLAINTIFF'S MOTION
FOR LEAVE TO FURTHER AMEND
THE PROPOSED SECOND
AMENDED COMPLAINT**

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19 Plaintiff Maria Aguilar brought this consumer class action alleging that
20 Defendants have engaged in false and misleading advertising by marketing butter
21 with labels stating that "100mg Plant Sterols Helps Block Cholesterol in the Butter"
22 and that the plant sterols "help block the absorption of dietary cholesterol in the
23 butter."

24 Plaintiff has now moved for leave to file a second amended complaint.
25 (Docs. 43, 45). Plaintiff subsequently moved for leave to further amend the
26 proposed second amended complaint by substituting a new proposed class
27 representative. (Doc. 62). Defendants oppose both motions. (Docs. 49, 64).
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1 **I. Motion for Leave to File a Second Amended Complaint**

2 Fed. R. Civ. P. 15(a)(2) provides that “a party may amend its pleading only
3 with the opposing party's written consent or the court's leave. The court should
4 freely give leave when justice so requires.” The Ninth Circuit has held that “Rule
5 15's policy of favoring amendments to pleadings should be applied with extreme
6 liberality.” DCD Programs, LTD. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)
7 (internal quotation marks and citations omitted).

8 This liberality in granting leave to amend is not
9 dependent on whether the amendment will add causes of
10 action or parties. It is, however, subject to the
11 qualification that amendment of the complaint does not
12 cause the opposing party undue prejudice, is not sought
13 in bad faith, and does not constitute an exercise in
futility.

14 Four factors are commonly used to determine the
15 propriety of a motion for leave to amend. These are: bad
16 faith, undue delay, prejudice to the opposing party, and
17 futility of amendment. These factors, however, are not of
18 equal weight in that delay, by itself, is insufficient to
justify denial of leave to amend.

19 Id. (internal citations omitted). The party opposing an amendment has the burden of
20 establishing why leave to amend should not be granted. Senza-Gel Corp. v.
21 Seiffhart, 803 F.2d 661, 666 (Fed. Cir. 1986); Larios v. Nike Retail Services, Inc.,
22 2013 WL 4046680, at *3 (S.D. Cal. Aug. 9, 2013); Genetech, Inc. v. Abbot
23 Laboratories, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989).

24 Defendants argue that the Court should deny leave to amend because the
25 proposed amendment (1) would be futile, (2) is made in bad faith and after undue
26 delay, and (3) would prejudice the defendants.

1 **1. Futility**

2 To prevail on a California Unfair Competition Law (UCL) claim for
3 deceptive advertising, the plaintiff must establish that the defendant used “unfair,
4 deceptive, untrue or misleading advertising,” Cal. Bus. & Prof. Code § 17200.
5 Similarly, to make out a claim under California’s Consumer Legal Remedies Act
6 (CLRA), the plaintiff must show that the defendant engaged in “unfair methods of
7 competition” or “unfair or deceptive acts or practices,” which includes
8 representations “that goods or services have sponsorship, approval, characteristics,
9 ingredients, uses, benefits, or quantities which they do not have.” Cal. Civ. Code §
10 1770(a)(5).

11 Plaintiff’s First Amended Complaint explained that the basis for her
12 misrepresentation claim was that “Smart Balance Spreadable Butter . . . does not
13 have sufficient levels of plant sterols to block the absorption and thus reduce
14 cholesterol in the body.” (FAC ¶ 2). Plaintiff’s proposed Second Amended
15 Complaint modifies the claim, stating that

16 [E]ach and every consumer of Defendants’ Smart Balance
17 Spreadable Butter is exposed to the promise that
18 consumption of Defendants’ Smart Balance Spreadable
19 Butter will “actually help block the absorption of the
20 dietary cholesterol in the butter” and this benefit is the
21 result of “100mg Plant Sterols.” Taken individually and as
22 a whole these statements, if not expressly, imply that there
23 is there is a health benefit being provided by the 100mg of
24 Plant Sterols contained in these butters and that there is a
25 health benefit in eating one of these butters.

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27 [T]he 100mg of plant sterols contained in Smart Balance
28 Spreadable Butter is not an amount sufficient to provide
consumers with a clinically meaningful cholesterol

1 blocking effect and, as such, there is no clinically
2 meaningful health benefit that can be derived from the
3 100mg of plant sterols contained in a serving of these
4 butters.

5 As a result, Plaintiff and Class members were deceived
6 into purchasing what they believed to be Products with
7 meaningful health benefits based on Defendants' promise
8 that the plant sterols in the Products will "actually help
9 block the absorption of the dietary cholesterol in the
10 butter," when, in fact, the blockage effect from the plant
11 sterols in Defendants' Products is so insignificant that it is
12 clinically meaningless.

13 (SAC ¶¶ 1-3).

14 Defendant argues that Plaintiff's proposed amendment would be futile
15 because California law does not recognize Plaintiff's amended claim as actionable.
16 First, Defendant contends that its product labels do not expressly state or imply that
17 plant sterols in the butter will "provide consumers with a clinically meaningful
18 cholesterol blocking effect." Defendants cannot be held liable for statements they
19 did not make or imply. See, e.g., Videtto v. Kellogg USA, 2009 WL 1439086, at *3
20 (E.D. Cal. May 21, 2009) (dismissing UCL and CLRA claims because Froot Loops
21 cereal "packaging makes no claim that the Product is particularly nutritious or
22 designed specifically to meet the nutritional needs of toddlers or children.");
23 Rooney v. Cumberland Packing Corp., 2012 WL 1512106, at *4 (S.D. Cal. April
24 16, 2012) (dismissing UCL claim because "Sugar in the Raw" box did not state that
25 it was "unprocessed" or "unrefined," and "turbinado sugar is widely marketed in
26 the industry as raw cane sugar.").

27 Plaintiff argues in response that reasonable consumers will read Defendant's
28 statements that "100mg Plant Sterols Helps Block Cholesterol in the Butter" and
that the plant sterols "help block the absorption of dietary cholesterol in the butter"

1 and understand them to mean that they will derive a meaningful cholesterol
2 blocking benefit from consuming the butter.

3 The Court finds that Plaintiff's reading of Defendant's labels is plausible.
4 Moreover, whether or not the label's implication is deceptive is a dispute of
5 material fact and inappropriate for resolution at this early stage in the litigation. See
6 Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) ("California
7 courts . . . have recognized that whether a business practice is deceptive will usually
8 be a question of fact not appropriate for decision on demurrer.").

9 Second, Defendants argue that even their label can be read to imply the
10 existence of a clinically meaningful cholesterol blocking effect, that representation
11 is too vague and ambiguous to be actionable. Vitt v. Apple Computer, Inc., 469
12 Fed. Appx. 605, 607 (9th Cir. 2012) ("[T]o be actionable as an affirmative
13 misrepresentation, a statement must make a 'specific and measurable claim, capable
14 of being proved false or of being reasonably interpreted as a statement of objective
15 fact.'" (quoting Coastal Abstract Serv. v. First Am. Title Ins. Co., 173 F.3d 725,
16 731 (9th Cir. 1999))); Rooney, 2012 WL 1512106, at *3 ("Generalized, vague, and
17 unspecified assertions constitute "mere puffery" upon which a reasonable consumer
18 could not rely, and hence are not actionable' under the UCL . . . or CLRA."
19 (quoting Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal.
20 2005))).

21 Plaintiff argues that Defendant's implied promise of a meaningful health
22 benefit is sufficiently specific and measurable and can be proven false. To this end,
23 Plaintiff has submitted the Class Action Expert Report of Dr. Joseph M. Keenan
24 ("Keenan Report"). Dr. Keenan acknowledges that "plant sterols in certain
25 quantities do have the ability to help block absorption of cholesterol," and that
26 "consumption of a minimum of 0.8 grams of plant sterols daily, and preferably 2
27 grams (almost an entire container of Smart Balance Spreadable Butter), is required
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1 to meaningfully lower LDL cholesterol levels.” (Keenan Report ¶ 10). The report
2 goes on to note that

3 using the finding of the Racette Study read in the most
4 positive light possible for the Smart Balance Spreadable
5 Butters’ cholesterol blocking representation, one can
6 extrapolate that there is a 1.8% cholesterol absorption
7 reduction for each additional 100mg of plant sterols that a
8 person consumes over what is found in the average
9 American diet. Based on this 1.8% cholesterol absorption
10 reduction rate, the addition of the 100mg of plant sterols
11 contained in one serving of the Smart Balance Spreadable
12 Butter products to an average American diet would
13 “block” approximately 0.27mg of the 15mg of cholesterol
14 contained in a serving of the Smart Balance Butter &
15 Canola Oil Blend and Butter & Canola and EVOO blends
(or 0.018 percent of the cholesterol in a serving) and
approximately 0.18mg of the 10mg of cholesterol
contained in a serving of the Smart Balance Spreadable
Butter “Light” product (or 0.018 percent of the cholesterol
in a serving).

16 (Keenan Report ¶17).

17 Dr. Keenan concludes that

18 A blockage of either 0.18mg or 0.27mg – 0.018 percent of
19 the cholesterol in a serving – of cholesterol is such a *de*
20 *minimus* amount that I do not consider it nor would other
21 experts in the field consider it to be clinically meaningful.
22 It would have no impact on any of the parameters used to
23 evaluate cholesterol levels and provide no meaningful
24 contribution to the nutritional goal of dietary cholesterol
consumption recommendations.

25 (Keenan Report ¶ 18).

1 Based on the foregoing report, the Court finds that Defendants' implied
2 representation that their products provide a clinically meaningful health benefit is
3 specific, measurable, and falsifiable. Accordingly, the Court concludes that
4 Plaintiff's proposed amendment would not be futile.

5 **2. Bad Faith and Undue Delay**

6 Defendant argues that Plaintiff's request to amend her complaint has been
7 made in bad faith because the proposed amendment makes substantial changes to
8 the complaint, introduces a new scientific study, and changes the nature of
9 Plaintiff's UCL and CLRA claims from literal falsity to deception. Defendant
10 contends that Plaintiff misrepresents these changes as a mere clarification of her
11 allegations.

12 Defendant has the burden of establishing that Plaintiff's proposed
13 amendment is made in bad faith. See Senza-Gel Corp., 803 F.2d at 666; Larios,
14 2013 WL 4046680, at *3. Defendant has not done so. First, while Plaintiff's
15 proposed amendments are substantial, they can be fairly characterized as a
16 clarification of the allegations. There is nothing deceptive about the scope of
17 Plaintiff's revisions or how she describes the revisions. Second, there is nothing
18 improper in Plaintiff's inclusion of a new scientific study in support of her claims.
19 Third, Plaintiff's proposed amendments do modify the basis of her claims, but they
20 do not introduce an entirely new claim. Plaintiff's First Amended Complaint
21 advanced UCL and CLRA claims based on not only false statements, but also
22 misrepresentation and omission of material facts likely to deceive the public, (FAC
23 ¶¶ 44, 48, 56, 57). Even if Plaintiff has abandoned literal falsity in favor of implied
24 misrepresentation and deception in her proposed Second Amended Complaint, such
25 claims still fall within the ambit of the UCL and CLRA. Cal. Bus. & Prof. Code §
26 17200; Cal. Civ. Code § 1770(a)(5). See Lima v. Gateway, Inc., 710 F. Supp. 2d
27 1000, 1008 (C.D. Cal. 2010) ("To the extent [defendant] argues that [its]
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1 unquantifiable statements are not alleged to be false, it misses the point. The
2 relevant question is whether the statements, taken as a whole, are likely to deceive
3 members of the public.”). Accordingly, the Court rejects the argument that
4 Plaintiff’s proposed amendment is made in bad faith.

5 Defendant also contends that the amendment has been made after undue
6 delay. Defendant reasons that the motion to amend is made fourteen months after
7 the First Amended Complaint was filed and more than five months after the Court
8 ruled on Defendant’s motion to dismiss. In response, Plaintiff argues that the
9 motion is timely because it was filed within the deadline imposed by the Court’s
10 scheduling order.

11 Plaintiff’s delay in filing is less than ideal, but it does not rise to the level of
12 “undue delay” that can bar a motion to amend under Rule 15’s liberal standards.
13 Moreover, even if Plaintiff’s delay was undue, such delay standing alone would not
14 be a sufficient basis for denial of leave to amend. DCD Programs, 833 F.2d at 186
15 (“delay, by itself, is insufficient to justify denial of leave to amend.”).

16 **3. Prejudice**

17 Defendants argue they will be prejudiced if Plaintiff’s amendments are
18 allowed. Defendants note that discovery has already begun and they have
19 responded to 49 interrogatories, 88 documents requests, and 38 requests of
20 admission, and have produced nearly 4,000 pages of documents. Defendants reason
21 that if Plaintiff is allowed to modify her theory of the case at this point, it may
22 nullify their efforts and require additional discovery. Defendants also argue that
23 Plaintiff’s motion for class certification will soon be due and that the parties will
24 need to brief the motion on the operative First Amended Complaint, but may be
25 forced to re-brief the matter if Plaintiff is allowed to file a Second Amended
26 Complaint.

1 “Prejudice to the opposing party is the most important factor” when
2 determining whether leave should be granted to amend a complaint. Jackson v.
3 Bank of Hawaii, 920 F.3d 1385, 1387 (9th Cir. 1990). The nullification of prior
4 discovery and the need for new discovery can constitute sufficient prejudice to bar a
5 motion to amend a complaint. Id. at 1387-88. Plaintiff has abandoned her express
6 warranty claim in her proposed Second Amended Complaint, so it is possible that
7 some discovery on that matter may be nullified. However, Plaintiff’s UCL and
8 CLRA claims remain largely unchanged. Under both the First Amended Complaint
9 and the proposed Second Amended Complaint, the focus remains on Defendant’s
10 butter products and their cholesterol blocking representations. Discovery should not
11 be substantially impacted by Plaintiff’s Second Amended Complaint.

12 Furthermore, the Court notes that Plaintiff’s motion for class certification
13 was denied without prejudice and Plaintiff was granted leave to refile the motion
14 once the Court ruled on the instant motions to amend. Accordingly, Defendant
15 faces no risk of being forced to re-litigate the motion for class certification, which
16 will not be briefed, heard, or resolved before the instant motion to amend is ruled
17 on.

18 The Court concludes that Defendant has failed to establish that Plaintiff’s
19 motion for leave to amend is sought in bad faith, after undue delay, would be futile,
20 or would prejudice Defendants. Therefore the Court GRANTS Plaintiff’s motion
21 for leave to amend the complaint. The Court next turns to Plaintiff’s subsequent
22 motion to further amend her complaint.

23 **II. Motion for Leave to Further Amend the Proposed Second Amended**
24 **Complaint and to Substitute a New Plaintiff**

25 Plaintiff has proposed the substitution of Elizabeth Mitchell in place of Maria
26 Aguilar as named plaintiff and proposed class representative. Plaintiff’s counsel
27 explains that Ms. Aguilar informed counsel on January 15, 2014, that “due to her
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1 own health issues and some emergency health issues that had arisen with respect to
2 her son that required her assistance, she could no longer commit to serving as a
3 class representative.” (Doc. 62-3, Decl. of Patricia N. Syverson (“Syverson
4 Decl.”)). Like Ms. Aguilar, Ms. Mitchell was purportedly exposed to Defendant’s
5 cholesterol blocking benefit representation and, believing this representation,
6 purchased Defendant’s butter. (Doc. 62-2, Proposed Second Amended Complaint ¶
7 12).

8 Unlike Plaintiff’s initial motion seeking leave to file a Second Amended
9 Complaint, her second motion was made after the November 8, 2013, deadline
10 imposed by the Court’s scheduling order. (Doc. 38). As such, Plaintiff must satisfy
11 Fed. R. Civ. P. 16(b)(4), which provides that a scheduling order “may be modified
12 only for good cause and with the judge’s consent.” This “good cause” standard
13 differs from the Rule 15(a) standard:

14 Unlike Rule 15(a)’s liberal amendment policy which
15 focuses on the bad faith of the party seeking to interpose
16 an amendment and the prejudice to the opposing party,
17 Rule 16(b)’s “good cause” standard primarily considers
18 the diligence of the party seeking the amendment. . . .
19 Although the existence or degree of prejudice to the party
20 opposing the modification might supply additional
reasons to deny a motion, the focus of the inquiry is upon
the moving party’s reasons for seeking modification.”

21 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (citation
22 omitted). If the “good cause” standard for modifying the scheduling order is met,
23 the Court then evaluates the proposed amendment under the previously discussed
24 Rule 15 standard of “extreme liberality,” with an eye to “bad faith, undue delay,
25 prejudice to the opposing party, and futility of amendment.” See id. at 608; DCD
26 Programs, 833 F.3d at 186 (citations omitted).

1 Defendants raise several objections to the proposed substitution. First,
2 Defendants argue that no case or controversy exists once the sole named plaintiff
3 and proposed class representative seeks to withdraw prior to class certification, and
4 thus the Court lacks jurisdiction and must dismiss the complaint. Second,
5 Defendants contend that Plaintiffs have failed to establish good cause for departing
6 from the scheduling order. Third, Defendants argue that substitution should not be
7 allowed because the amendment would be futile and has been sought with undue
8 delay and in bad faith. The Court will address each of these arguments in turn.

9 **1. Jurisdiction**

10 “Article III of the Constitution limits the jurisdiction of the federal courts to
11 ‘Cases’ or ‘Controversies.’ The doctrine of mootness, which is embedded in Article
12 III’s case or controversy requirement, requires that an actual, ongoing controversy
13 exist at all stages of federal court proceedings.” Pitts v. Terrible Herbst, Inc., 653
14 F.3d 1081, 1086 (9th Cir. 2011) (citing U.S. Const. art. III, § 2, cl. 1.). As the Ninth
15 Circuit has explained:

16 A case becomes moot when the issues presented are no
17 longer live or the parties lack a legally cognizable interest
18 in the outcome of the litigation. In other words, if events
19 subsequent to the filing of the case resolve the parties’
20 dispute, we must dismiss the case as moot, because [w]e
21 do not have the constitutional authority to decide moot
22 cases.

23 Id. at 1086-87 (internal quotation marks and citations omitted).

24 However, the mootness doctrine is applied “flexibly, particularly where the
25 issues remain alive, even if ‘the plaintiff’s personal stake in the outcome has
26 become moot.’” Id. at 1087 (quoting Matthew I. Hall, The Partially Prudential
27 Doctrine of Mootness, 77 Geo. Wash. L.Rev. 562, 622 (2009)). Flexible application
28 is particularly appropriate in the context of class actions. Id. (citing Sosna v. Iowa,

1 419 U.S. 393 (1975) (case not moot when class representative lost personal stake in
2 outcome because case or controversy remained between defendants and members
3 of certified class)).

4 The Supreme Court and Courts of Appeal have recognized that such
5 flexibility may also apply to a not-yet-certified class. See, e.g., Sosna, 419 U.S. at
6 402 n.11 (“In such instances, whether the certification can be said to ‘relate back’ to
7 the filing of the complaint may depend upon the circumstances of the particular
8 case and especially the reality of the claim that otherwise the issue would evade
9 review.”); Pitts, 653 F.3d at 1085, 1090-92 (pre-certification action not mooted
10 when defendant made offer of judgment satisfying plaintiff’s claims and plaintiff
11 refused offer); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 921 (5th Cir. 2008)
12 (noting “there must be some time for a plaintiff to move to certify a collective
13 action before a defendant can moot the claim through an offer of judgment.”);
14 Weiss v. Regal Collection, 385 F.3d 337, 347-48 (3d Cir. 2004) (absent undue
15 delay, allowing a motion for class certification to relate back to the filing of the
16 complaint when an offer of judgment would otherwise moot the case).

17 Judge Posner, writing for the Seventh Circuit, has also discussed the tension
18 between the seeming formalism dictated by the case or controversy requirement and
19 the reality of putative class actions:

20 Strictly speaking, if no motion to certify has been filed
21 (perhaps if it has been filed but not acted on), the case is
22 not yet a class action and so a dismissal of the named
23 plaintiffs' claims should end the case. If the case is later
24 restarted with a new plaintiff, it is a new commencement,
25 a new suit. But the courts, both federal and Illinois, are
26 not so strict. Unless jurisdiction never attached . . . or the
27 attempt to substitute comes long after the claims of the
28 named plaintiffs were dismissed, substitution for the
named plaintiffs is allowed.

1 The courts thus disregard the jurisdictional void that is
2 created when the named plaintiffs' claims are dismissed
3 and, shortly afterwards, surrogates step forward to
4 replace the named plaintiffs. This may seem irregular;
5 but maybe there isn't really a jurisdictional void, since the
6 class member who steps forward to take the place of the
7 dismissed plaintiff has a real controversy with the
8 defendant.

9 Phillips v. Ford Motor Co., 435 F.3d 785, 787 (7th Cir. 2006) (internal citations
10 omitted).

11 Viewed through a formalistic lens, this case was mooted the moment Ms.
12 Aguilar resolved to withdraw as the sole named plaintiff and proposed class
13 representative. Defendants contend it does not matter that Ms. Mitchell is waiting in
14 the wings with a claim against Defendants. And it is equally irrelevant that Ms.
15 Aguilar still has an ongoing dispute with Defendants and intends to join the
16 putative class. Defendants ask the Court to turn a blind eye to the facts of the case
17 and focus strictly on the temporary void on the plaintiff's side of the "v." But the
18 Ninth Circuit has instructed the Court to apply the case and controversy
19 requirement "flexibly, particularly where the issues remain alive, even if 'the
20 plaintiff's personal stake in the outcome has become moot.'" Pitts, 653 F.3d at
21 1087.

22 With this flexible standard in mind, it is clear that the issues in this case
23 remain alive. Ms. Aguilar has not settled her dispute with Defendants, she merely
24 seeks to join the putative class and not serve as its representative due to health
25 issues. There is still a very real case or controversy sufficient to support federal
26 jurisdiction for the brief interim between Ms. Aguilar's withdrawal and Ms.
27 Mitchell's substitution.
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1 Moreover, even if there was a jurisdictional void in this case, it was not long
2 lived. Ms. Aguilar expressed her intent to withdraw on January 15, 2014. (Syverson
3 Decl. ¶ 3). On January 21, 2014, Plaintiff’s counsel informed Defense counsel of
4 Ms. Aguilar’s intent to withdraw. (Syverson Decl. ¶ 4). On February 3, 2014, Ms.
5 Mitchell retained Plaintiff’s counsel. (Syverson Decl. ¶ 7). On February 6, 2014,
6 Plaintiff filed notice of the motion to substitute Ms. Mitchell in place of Ms.
7 Aguilar. (Doc. 62). Simply put, jurisdiction is not quite as mechanistic as
8 Defendant contends. The case or controversy requirement was not fatally triggered
9 the moment Ms. Aguilar resolved to withdraw as the class representative. Rather,
10 Plaintiffs have a short amount of time to substitute the plaintiff and save their case.
11 See Pitts, 653 F.3d at 1087 (“mootness . . . [is applied] flexibly, particularly where
12 the issues remain alive,” (internal quotation marks and citations omitted)); Phillips,
13 435 F.3d at 787 (“[A]though substitution of new named plaintiffs is sought in [this
14 case], the named plaintiffs' claims, though in jeopardy, haven't been dismissed; the
15 case is very much alive.”); Wiener v. Dannon Co., Inc., 255 F.R.D. 658, 673 (C.D.
16 Cal. 2009) (granting plaintiff leave to substitute proposed class representative after
17 denying motion to certify the class for lack of typicality); Stickrath v. Globalstar,
18 Inc., 2008 WL 5384760, at *7 (N.D. Cal. 2008) (where “class representative was
19 removed from the case due to mootness, . . . substitution or intervention may be
20 possible.” (internal quotation and citation omitted)). Moreover, permitting a
21 substitution at this point in time preserves scarce judicial resources, allows
22 resolution of the case on the merits, and does no real violence to the case or
23 controversy requirement.

24 Defendants cite several cases in support of their argument that there is no
25 case or controversy when all named plaintiffs in a proposed class action have
26 settled, withdrawn, or been dismissed prior to class certification. But each of these
27 cases can be distinguished from the instant matter. See Smith v. T-Mobile USA,
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1 Inc., 570 F.3d 1119, 1120-23 (9th Cir. 2009) (case mooted after court denied
2 motion for class certification and named plaintiffs accepted settlement); Employers-
3 Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors,
4 498 F.3d 920, 922-24 (9th Cir. 2007) (case mooted after defendant prevailed on
5 motion to dismiss and named plaintiff declined to amend complaint and requested
6 dismissal); Skilstaf, Inc. v. CVS Caremark Corp., 2010 WL 199717, at * (N.D. Cal.
7 Jan 13, 2010) (case mooted when plaintiff had agreed to a prior settlement barring
8 subsequent suits).

9 Unlike the instant case, the named plaintiffs in each of the above cases had
10 reached a settlement with the defendants or requested dismissal of their own claims.
11 The case or controversy in these cases ended when the plaintiffs resolved their
12 claim. In the case at bar, Ms. Aguilar's claim has not been settled or dismissed. It is
13 very much alive. Indeed, her withdrawal will be effective on the substitution of Ms.
14 Mitchell.

15 Defendants also heavily rely on Hitt v. Arizona Beverage Co., 2009 WL
16 4261192 (S.D. Cal. Nov 24, 2009). In Hitt, the named plaintiff sought to withdraw
17 prior to certification for unspecified personal reasons and filed a motion to
18 substitute the plaintiff and requested sixty days to find a suitable replacement. Id. at
19 *2. The Court denied the motion, reasoning that, in the absence of a plaintiff who
20 wished to prosecute the case or a certified class, there was no remaining case or
21 controversy to adjudicate. Id. at *5

22 The Court notes that Hitt is an unreported district court decision and is not
23 binding precedent. To the extent Hitt can be read to suggest that withdrawal of a
24 sole named plaintiff and proposed class representative prior to class certification
25 must always result in mooting the case, this Court respectfully disagrees. As
26 previously discussed, the Ninth Circuit has admonished district courts to apply the
27 doctrine of mootness flexibly, particularly in the class action context, and with an
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1 eye to determining whether an actual conflict persists despite the formal termination
2 of a named party. See Pitts, 653 F.3d at 1087.

3 Moreover, the facts of this case are distinct in two important ways. First, the
4 named plaintiff in Hitt did not express any desire to become part of the putative
5 class after substitution or otherwise maintain her claim against the defendants. Hitt,
6 2009 WL 4261192 at *2. In the instant matter, Ms. Aguilar has done exactly that.
7 Second, plaintiff's counsel in Hitt had no substitute ready and waiting, but rather
8 asked for two months to locate a suitable plaintiff. Id. In this case, Plaintiff's
9 counsel had a proposed substitute from the moment it filed the motion. Both of
10 these facts illustrate that an actual case or controversy remains intact regardless of
11 Ms. Aguilar's desire to step down from the role of proposed class representative.

12 In summary, the Court concludes that the weight of authority allows for a
13 sole named plaintiff and proposed class representative to be substituted prior to
14 class certification when the current plaintiff has not settled her claims or had her
15 claims dismissed and intends to become part of the class, such that her claims
16 persist and the case or controversy remains active, and when plaintiff's counsel is
17 able to produce a proposed substitute immediately. On these unique facts, the
18 named plaintiff's withdrawal and substitution does not moot the case and the court
19 retains jurisdiction.

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2. Good Cause

Plaintiff filed her second motion to amend after the deadline imposed by the Court's scheduling order. Therefore, she must show that good cause exists to justify a departure from the scheduling order. Fed. R. Civ. P 16(b)(4). Plaintiff argues that good cause exists because Ms. Aguilar's health issues and her son's health issues are outside her control, but substantially burden her ability to represent the interests of the class. Moreover, Plaintiff notes that if leave to substitute is denied, a new named plaintiff will need to file a new action, resulting in the duplication of the year and half of litigation already invested in this case and would further delay resolution of the merits, contrary to public policy and procedural rules favoring "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Defendant contends that no good cause exists to modify the scheduling order because the only basis is a purported illness reported second-hand by Plaintiff's counsel. Defendant reasons that Plaintiff's counsel's declaration regarding the existence of Plaintiff's "health issues" is so vague as to fail to establish good cause. Further, Defendant notes that Ms. Aguilar prosecuted this case for a year and a half before seeking to withdraw, and thus any duplication of effort resulting from a denial of this motion is Plaintiff's responsibility.

The fact that a year and a half passed between the initial filing of this case and Plaintiff's motion to substitute is significant, but not controlling. Defendant presents no evidence, nor even directly alleges, that Plaintiff's counsel's signed declaration is false. The Court takes Plaintiff's counsel at her word and accepts that Ms. Aguilar and her son are suffering from health issues which preclude Ms. Aguilar from serving as a class representative. Moreover, the Court notes that Plaintiff's counsel was diligent in bringing this motion. Ms. Aguilar contacted her attorney on January 15, 2014, to inform counsel of her health issues. On January

1 21, Plaintiff's counsel informed Defendant's counsel of the situation and their
2 intent to file a motion to withdraw Ms. Aguilar as class representative. Twenty-two
3 days after first learning that Ms. Aguilar wanted to withdraw, Plaintiff filed the
4 instant motion on February 6, 2014. Plaintiff cannot be faulted for developing
5 emergent health issues after the deadline imposed by the Court, and Plaintiff's
6 counsel's response to that development was prompt. The Court finds that Plaintiff
7 and her counsel were diligent in responding to an event outside their control.
8 Further, the Court is mindful that failing to allow substitution at this point would
9 merely require the filing of a new case and would waste the resources of both the
10 parties and the judiciary. Accordingly, the Court finds that good cause exists to
11 modify the scheduling order and permit Plaintiff's motion to move forward.

12 **3. Futility, Undue Delay, and Bad Faith**

13 Defendant argues that even if this Court has jurisdiction and good cause
14 exists to consider Plaintiff's motion, the motion is nonetheless barred by Rule 15
15 because it would be futile and is made with undue delay and in bad faith.
16 Defendant's arguments regarding futility repeat those raised in opposition to
17 Plaintiff's initial motion seeking leave to file a Second Amended Complaint. For
18 the reasons discussed previously, the Court rejects the argument that allowing
19 substitution would be futile.

20 Defendant also argues that Plaintiff's motion to substitute has been made
21 with undue delay and is sought in bad faith. Defendant emphasizes that Ms. Aguilar
22 prosecuted this case for a year and a half and only sought to withdraw once her
23 deposition was imminent. Defendant also notes that Ms. Aguilar's claimed health
24 issues were raised with counsel merely three days after the initial motion for class
25 certification was filed, in which she reaffirmed her commitment to the case.
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1 The Court rejects the argument that Plaintiff's motion was brought with
2 undue delay. As discussed previously, Plaintiff's counsel acted diligently and
3 promptly by filing this motion less than a month after learning that Ms. Aguilar
4 sought to withdraw as named Plaintiff due to health issues. The Court also rejects
5 the argument that Plaintiff acted in bad faith. Defendant calls into question Ms.
6 Aguilar's veracity and speculates that the timing of Ms. Aguilar's health issues
7 suggests an intent to evade deposition. But Defendant has not advanced any
8 evidence in support of its speculation. Moreover, even if Ms. Aguilar withdraws as
9 named plaintiff, she may nonetheless be deposed unless the nature and severity of
10 her health issues completely precludes such activity. Accordingly, the Court finds
11 that Defendant has failed to carry its burden of showing that Plaintiff's motion is
12 made in bad faith.

13 **III. Class Certification**

14 Plaintiff has also requested leave to refile her motion for class certification
15 with the new plaintiff's information incorporated therein within seven days of any
16 order allowing the substitution. The Court anticipates that this case will soon be
17 transferred to the calendar of the Honorable Cynthia Bashant. Accordingly, the
18 Court DENIES leave to refile a motion for class certification at this time. Plaintiff
19 may seek leave and a hearing date from Judge Bashant after this case is transferred.

20 **IV. Protective Order**

21 Finally, Plaintiff has requested an order that Ms. Aguilar not be deposed
22 during this action in light of her and her son's health issues. Plaintiff cites no
23 authority in support of this request, provides no detail on the nature and extent of
24 Ms. Aguilar's and her son's health issues, and Defendant opposes the motion.
25 Accordingly, the request is DENIED without prejudice. If Defendant seeks to
26 depose Ms. Aguilar in the future, Plaintiff may seek a protective order at that time.

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