

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA

Impossible Foods Inc. v. Impossible LLC et al.

Impossible Foods · No. 5:21-cv-02419-BLF · Decided March 4, 2025

SUMMARY

The United States District Court for the Northern District of California grants Impossible Foods Inc.’s motion to amend its complaint and modify the scheduling order. The court finds good cause under Federal Rule of Civil Procedure 16 and concludes that amendment is proper under Rule 15, allowing proposed claims concerning fraud in the procurement of incontestability status, fraud in the procurement of trademark registrations, and abandonment. The court also denies an administrative motion concerning sealing because the designating party did not seek to maintain the materials under seal.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                    |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Northern District of California                                                                                                                                                                                                                                               |
| WRITING FOR THE COURT | Beth Labson Freeman                                                                                                                                                                                                                                                                                                |
| JURISDICTION          | United States District Court for the Northern District of California                                                                                                                                                                                                                                               |
| DECIDED               | March 4, 2025                                                                                                                                                                                                                                                                                                      |
| DOCKET                | 5:21-cv-02419-BLF                                                                                                                                                                                                                                                                                                  |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                              |
| PROCEDURAL POSTURE    | Plaintiff moved to modify the scheduling order and amend its complaint to add claims for fraud in the procurement of incontestability status, fraud in the procurement of trademark registrations, and abandonment. Plaintiff also filed an administrative motion concerning sealing of another party's materials. |
| PRECEDENTIAL VALUE    | Unknown; federal district court order with no reporter citation                                                                                                                                                                                                                                                    |

TOPICS

- motion to amend
- civil procedure
- trademark law
- commercial litigation

PRACTICE AREAS

- civil procedure
- trademark law
- commercial litigation

## QUESTIONS PRESENTED

1. Whether Plaintiff established good cause under Federal Rule of Civil Procedure 16(b)(4) to modify the scheduling order after the deadline for amending pleadings.
2. Whether the proposed amendments were proper under Federal Rule of Civil Procedure 15(a)(2), including whether they were futile, unduly delayed, brought in bad faith, repeatedly deficient, or prejudicial to Defendants.
3. Whether materials provisionally submitted under seal should remain sealed when the designating party did not seek to maintain them under seal.

## HOLDINGS

1. Plaintiff demonstrated good cause because the proposed claims were based on facts and documents that arose after the amendment deadline, and Plaintiff acted diligently in pursuing discovery and moving to amend.
2. Leave to amend was warranted because the Foman factors favored amendment: the proposed claims were not futile, Defendants did not establish undue prejudice or bad faith, any delay was not severe, and Plaintiff had not repeatedly failed to cure deficiencies.
3. The administrative sealing motion was denied and the identified materials were ordered unsealed because the party that designated them as confidential did not seek to maintain them under seal or demonstrate that sealing was warranted.

## KEY QUOTATIONS

*“The central inquiry under Fed. R. Civ. P. 16(b)(4) is whether the requesting party was diligent in seeking the amendment.”* (Section II)

*“The court should freely give leave when justice so requires.”* (Section III.B)

*“IF SHALL filed the Third Amended Complaint attached to its motion on or before March 7, 2025.”* (Section V)

## FACTUAL BACKGROUND

Plaintiff's original and amended complaints concerned the parties' respective rights in the IMPOSSIBLE mark. After the deadline to amend had passed, Defendants filed a Section 15 affidavit representing that a design mark had been continuously used in commerce for five consecutive years, and later deleted various goods from trademark registrations in response to a PTO office action requiring proof of current use. Plaintiff contended that these events, together with discovery responses, supplied newly discovered facts supporting fraud and abandonment claims.

## PROCEDURAL HISTORY

Impossible Foods Inc. filed a declaratory-relief action concerning the IMPOSSIBLE trademark. After the court set a March 25, 2024 deadline for amending pleadings, the parties conducted discovery, and Plaintiff learned of a Section 15 affidavit and a response to a PTO office action that allegedly supported additional claims. Plaintiff

moved to amend after the amendment deadline. The court granted leave to amend and denied the sealing motion, ordering the Third Amended Complaint filed without redactions.

DISPOSITION

other

CASES CITED

- DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC, 870 F.3d 978, 989
- In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 737
- Oneok, Inc. v. Learjet, Inc., 575 U.S. 373
- Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609
- VLSI Tech. LLC v. Intel Corp., No. 17-cv-05671, 2024 WL 664804, at \*2–3
- Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052
- Foman v. Davis, 371 U.S. 178, 182
- Hayward Prop., LLC v. Commonwealth Land Title Ins. Co., No. 17-cv-06177, 2021 WL 4927012, at \*4
- Chan v. ArcSoft, Inc., No. 19-cv-05836, 2022 WL 22863221, at \*3
- Coppola v. Smith, No. 11-cv-1257, 2016 WL 2348970, at \*4
- Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist., No. CIV. S-05-583, 2006 WL 3733815, at \*5
- Jacobson v. Persolve, LLC, No. 14-cv-00735, 2015 WL 2061712, at \*4
- Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1134
- Sweaney v. Ada County, 119 F.3d 1385, 1393
- Robi v. Five Platters, Inc., 918 F.2d 1439, 1444
- San Juan Products, Inc. v. San Juan Pools of Kansas, Inc., 849 F.2d 468, 473
- DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187
- Beeck v. Aqua-slide 'N' Dive Corp., 562 F.2d 537, 540
- ARF Dashnaktsutyun, W. U.S.A. v. Armenian Revolutionary Fed'n WUSA, Inc., No. 21-cv-5594, 2022 WL 16859599, at \*5
- Wizards of the Coast LLC v. Cryptozoic, 309 F.R.D. 645, 651
- Quidel Corp. v. Siemens Med. Sols. USA, Inc., No. 16-cv-3059, 2019 WL 1409854, at \*3

OPINION

1 2 3 UNITED STATES DISTRICT COURT 4 NORTHERN DISTRICT OF CALIFORNIA 5  
SAN JOSE DIVISION 6 7 IMPOSSIBLE FOODS INC., Case No. 5:21-cv-02419-BLF 8 Plaintiff,  
ORDER GRANTING PLAINTIFF 9 v. IMPOSSIBLE FOODS INC.’S MOTION TO AMEND  
COMPLAINT AND 10 IMPOSSIBLE LLC et al., SCHEDULING ORDER; AND DENYING  
MOTION TO CONSIDER 11 Defendants. WHETHER ANOTHER PARTY’S MATERIAL  
SHOULD BE SEALED 12 [Re: Dkt.

Nos. 137, 139] 13 14 15 Before the Court is Plaintiff Impossible Foods Inc.'s ("IF") Motion to Amend Complaint 16 and Scheduling Order. Dkt. No. 137 ("Mot."). Defendants Impossible LLC and Joel Runyon 17 (collectively, "Defendants" or "ILLC") filed a "qualified objection" to the motion. Dkt. No. 142 18 ("Obj."). Plaintiff filed a reply in support of its motion.

Dkt. No. 143 ("Reply"). The Court finds 19 this motion suitable for submission without oral argument and hereby VACATES the hearing 20 scheduled for May 8, 2025. See Civ. L.R. 7-1(b). 21 For the reasons stated below, the Court GRANTS Plaintiff's motion (Dkt. No. 137).

The 22 Court DENIES the accompanying Administrative Motion to Consider Whether Another Party's 23 Material Should be Sealed (Dkt. No. 139). 24 I. BACKGROUND 25 On April 2, 2021, Plaintiff Impossible Foods Inc. filed a Complaint for Declaratory Relief 26 against Defendant Impossible LLC (then identified as "Impossible X LLC"), alleging one claim 27 "concerning the use of the IMPOSSIBLE mark and the respective trademark rights of the parties." 1 dismiss for lack of personal jurisdiction, see Dkt.

No. 55, the Court held a Case Management 2 Conference on January 25, 2024, Dkt. No. 69. The Court then issued the Case Management 3 Scheduling Order, which set the deadline for amending the pleadings as March 25, 2024. Dkt. No. 4 70. IF filed an Amended Complaint against Impossible LLC on February 16, 2024, again alleging 5 one claim for declaratory relief regarding the Parties' trademark dispute.

Dkt. No. 78. On March 6 8, 2024, Impossible LLC filed its Answer to the Amended Complaint and asserted various 7 Counterclaims. Dkt. No. 80. Impossible LLC amended its Counterclaims on April 4, 2024, Dkt. 8 No. 83, and IF filed an Answer to the Counterclaims on April 18, 2024, Dkt. No. 85. 9 Meanwhile, the Parties began serving discovery requests in March 2024.

Dkt. No. 138, 10 Declaration of H. Forrest Flemming, III ("Flemming Decl.") ¶¶ 2–3. After receiving initial 11 discovery responses, IF "sought ILLC's consent for Impossible Foods to amend its complaint to 12 assert claims for trademark infringement and unfair competition." Id. ¶ 4. Nine days after that, 13 and prior to responding to IF's request, ILLC "filed an affidavit under Section 15 of the Lanham 14 Act with the United States Patent and Trademark Office ("PTO")," id. ¶ 5, in which Joel Runyon 15 declared that "[t]he [IMPOSSIBLE Nutrition Design Mark, Registration No. 5387588] has been in 16 continuous use in commerce for five consecutive years after the date of registration... and is still 17 in use in commerce on or in connection with all goods/services... listed in the existing 18 registration," id., Ex. A at 7.

The affidavit further declared that "[t]here is no proceeding 19 involving said rights pending and not finally disposed of... in a court." Id., Ex. A at 8. ILLC's 20 counsel then declined IF's request to stipulate to an amendment. Flemming Decl. ¶ 6. IF's 21 counsel requested that ILLC withdraw the Section 15 affidavit, but ILLC's counsel declined that 22 request as well.

Id. ¶¶ 8–9. 23 On July 23, 2024, IF sought to amend its Complaint to add trademark infringement and 24 unfair competition claims against both ILLC and Defendant Joel Runyon (“Runyon”). Dkt. No. 25 92. At that time, IF indicated that it “believe[d] that additional discovery w[ould] show that ILLC 26 committed fraud upon the United States Patent & Trademark Office on July 12, 2024,” but that it 27 needed “additional discovery to meet the heightened pleading standards of Federal Rule of Civil 1 that “[a]ny further amendment to add a fraud claim shall be the subject of a later motion that 2 includes a proposed pleading.” Dkt.

No. 101 at 10. 3 Also relevant to this motion is a February 3, 2024 “post-registration office action” (“Office 4 Action”) by the PTO. Flemming Decl. ¶ 27. In that Office Action, PTO requested that ILLC 5 either (1) submit evidence of current use of ILLC’s marks in connection with particular identified 6 goods and/or services in commerce, or (2) delete those goods and/or services from the registration.

7 Id., Ex. I. The deadline for compliance was set as December 4, 2024. Id., Ex. I at 5. On 8 December 4, 2024, ILLC responded by deleting various goods from its trademark registrations, 9 including “sweatshirts, pants, shorts,... yoga pants, tights and underwear.” Flemming Decl. ¶ 28 10 & Ex. J at 2. 11 II. LEGAL STANDARD 12 When the deadline for amending the pleadings set in a court’s scheduling order has passed, 13 a party seeking leave to amend must first seek modification of the scheduling order.

DRK Photo 14 v. McGraw-Hill Glob. Educ. Holdings, LLC, 870 F.3d 978, 989 (9th Cir. 2017). Under Federal 15 Rule of Civil Procedure 16, a scheduling order “may be modified only for good cause and with the 16 judge’s consent.” Fed. R. Civ. P. 16(b)(4). “The central inquiry under Fed. R. Civ. P. 16(b)(4) is 17 whether the requesting party was diligent in seeking the amendment.” DRK Photo, 870 F.3d at 18 989 (citing *In re W. States Wholesale Nat.*

*Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013), 19 *aff’d sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015)). “If th[e] party was not diligent, 20 the inquiry should end.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 21 1992). “Although the existence or degree of prejudice to the party opposing the modification 22 might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving 23 party’s reasons for seeking modification.” Id. 24 “If the moving party establishes good cause to modify the scheduling order, it must then 25 demonstrate that its motion is also proper under Rule 15.” *VLSI Tech.*

*LLC v. Intel Corp.*, No. 17- 26 cv-05671, 2024 WL 664804, at \*2 (N.D. Cal. Feb. 16, 2024) (internal quotations omitted). Under 27 Federal Rule of Civil Procedure 15, “[a] party may amend its pleading once as a matter of course” 1 its pleading only with the opposing party’s written consent or the court’s leave.” Id. 15(a)(2). 2 “The court should freely give leave when justice so requires.” Id. A district court ordinarily must 3 grant leave to amend unless one or more of the following “Foman factors” is present: (1) undue 4 delay, (2) bad faith or dilatory motive, (3)

repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment.

See *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). “[I]t is the consideration of prejudice to the opposing party that carries the greatest weight.” *Id.* However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.* 10 III. DISCUSSION 11 In this motion, IF seeks leave to amend its Second Amended Complaint in order to add 12 claims of (1) fraud in the procurement of incontestability status, (2) fraud in the procurement of 13 trademark registrations, and (3) abandonment.

Mot. at 1. As with ILLC’s recent motion to 14 amend, filed shortly prior to IF’s present motion, see Dkt. No. 121, IF’s intended amendment 15 purports to be based upon “information recently obtained during discovery.” Mot. at 2.

In 16 contrast to ILLC’s recent motion, however, the Court finds credible IF’s representations that the 17 information in question is genuinely “newly discovered,” and therefore the Court will permit IF’s 18 proposed amendments. 19 A. Rule 16 Analysis 20 “Newly discovered facts may constitute good cause to modify a pretrial scheduling order 21 to allow amendment to the pleadings.” *Hayward Prop., LLC v. Commonwealth Land Title Ins.*

22 Co., No. 17-cv-06177, 2021 WL 4927012, at \*4 (N.D. Cal. Sept. 28, 2021). As a result, 23 “[a]llowing parties to amend based on information obtained through discovery is common and 24 well established.” *Chan v. ArcSoft, Inc.*, No. 19-cv-05836, 2022 WL 22863221, at \*3 (N.D. Cal. 25 Nov. 23, 2022) (quoting *Coppola v. Smith*, No. 11-cv-1257, 2016 WL 2348970, at \*4 (E.D.

Cal. 26 May 4, 2016)); *Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist.*, No. CIV. S-05-583, 2006 27 WL 3733815, at \*5 (E.D. Cal. Dec. 15, 2006). The key question here is whether the identified 1 IF highlights two specific “newly discovered” facts.

First, IF points to the Section 15 2 affidavit that ILLC filed in July 2024, after discovery had commenced. See Mot. at 2–3, 6. 3 Second, IF points to ILLC’s December 4, 2024 response to the PTO’s Office Action, which 4 required ILLC to submit materials indicating that it had been using the IMPOSSIBLE word mark 5 in Registration No. 5620625 on all goods and services listed in that registration.

*Id.* at 4–5, 6. The 6 response ILLC submitted removed various categories of goods from the identification list, which 7 IF argues indicates that the marks were never used with those goods. See *id.* at 4–5. Both of these 8 events occurred well after the March 25, 2024 deadline to amend the pleadings set during the 9 January 25, 2024 Case Management Conference.

Accordingly, unlike with ILLC's motion, there is no indication here that IF was "aware of the facts and theories supporting the amendment since the inception of the action." *Jacobson v. Persolve, LLC*, No. 14-cv-00735, 2015 WL 2061712, at \*4 (N.D. Cal. May 1, 2015) (citing *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d at 737). Such awareness is impossible, since the documents underlying IF's proposed claims only came into existence months after the deadline to amend had already passed.

Moreover, IF moved to amend within two months after learning of ILLC's response to the PTO Office Action. And while IF first became suspicious that there might be grounds for a fraud claim related to the Section 15 affidavit in July 2024, six months prior to filing the instant motion, the Court finds that IF exhibited diligence by serving discovery requests inspired by that suspicion only a few weeks after learning of the affidavit, see *Flemming Decl.* ¶¶ 8–10 & Ex. E, and remaining actively engaged in the discovery dispute over the relevant Requests for Production throughout the fall, *Flemming Decl.* ¶¶ 10–16 & Ex. F. Critically, IF could not even have suspected the fraud prior to mid-July 2024, and it took until September for IF to receive ILLC's initial responses to IF's requests for production intended to help confirm whether a fraud had occurred.

Because those responses were ambiguous, IF was obliged to conduct discovery follow-up actions—such as serving a deficiency letter and meeting and conferring—before it could attempt to amend under the heightened pleading standard applicable to fraud claims. See *Flemming Decl.* ¶¶ 11–16 & Ex. F at 4–6 (indicating that ILLC informed IF on September 12, 1 such documents exist within its possession, custody, and control, can be identified in the course of 2 a reasonable search, and have not already been produced”).

This timeline distinguishes IF's request to amend from ILLC's, since ILLC asserted the facts underlying the counterfeiting claim addressed in ILLC's motion (Dkt. No. 121) as early as 5 March 8, 2024, when ILLC first filed counterclaims. See Dkt. No. 80, Counterclaims ¶ 48 6 (“Notwithstanding... [IF's] knowledge of [ILLC's] senior trademark rights, Impossible Foods 7 has sought to expand into other products and services that directly overlap” with ILLC's products, 8 “includ[ing] apparel products, to which the IMPOSSIBLE mark is conspicuously applied.”).

And even if some discovery was necessary for ILLC to assert its counterfeiting claim, it received the 10 discovery response on which that claim is purportedly predicated by May 2024. See Dkt. No. 121 11 at 2–3, 6.

In other words, the Parties' differing postures with regard to when they first suspected 12 that they might be able to add their additional claims—and when they received discovery 13 responses helping to confirm or deny the validity of those proposed claims—indicate a significant 14 difference in diligence between IF and ILLC, which is why the Court concludes that there is good

15 cause for IF to amend despite having found a lack of good cause for ILLC's desired amendment.

16 See Dkt. No. 148. 17 Nor is there significant prejudice to ILLC. The Court agrees that prejudice resulting from 18 amendment of the complaint is minimal where, as here, "the parties have already conducted 19 discovery on the substantive merits of the... issue." VLSI Tech. LLC, 2024 WL 664804, at \*3. 20 Discovery into the facts related to IF's proposed amendments has been ongoing since last summer, 21 including because IF's preexisting affirmative defense of abandonment through non-use, see Dkt.

22 No. 85 at 9, overlaps with the cancellation claims IF now seeks to add. Additionally, IF has 23 represented that additional unique discovery is likely to be limited to "deposition questions going 24 to the issue of scienter." Mot. at 7. Such questioning should not come as a surprise to ILLC, since 25 ILLC has been on notice of the potential fraud claims since IF requested that it withdraw the 26 Section 15 affidavit last summer.

Finally, the Court notes that ILLC had an opportunity to argue 27 the issue of prejudice via an opposition to IF's motion, but it declined to do so. See generally Obj. 1 the merits of IF's proposed abandonment and fraud claims without specifically arguing diligence 2 or prejudice). Given this lack of argument regarding prejudice from ILLC—and, indeed, given 3 ILLC's position that both Parties should be granted "a final opportunity to amend their pleadings," 4 Obj. at 3—it seems that any prejudice to ILLC is likely negligible.

Therefore, IF has 5 demonstrated good cause to modify the scheduling order under Rule 16. 6 B. Rule 15 Analysis 7 Having found good cause to modify the scheduling order, the Court proceeds to consider 8 whether permitting IF's proposed amendment is proper under Federal Rule of Civil Procedure 15. 9 The Court concludes that the Foman factors favor allowing IF to file the Third Amended 10 Complaint.

11 First, IF's claims are not futile. "[L]eave to amend should be denied as futile only if no set 12 of facts can be proved under the amendment to the pleadings that would constitute a valid and 13 sufficient claim or defense." *Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 14 2018) (emphasis added) (quoting *Sweaney v. Ada County*, 119 F.3d 1385, 1393 (9th Cir.

1997)). 15 In this case, it is plausible that IF could allege facts sufficient to support its proposed claims. 16 Indeed, it is not clear that ILLC even argues futility in its "qualified objection" to IF's motion. 17 See generally Obj.

However, to the extent that ILLC suggests that IF cannot assert an 18 abandonment claim because it will not be able to show "complete cessation" or an "intent not to 19 resume trademark use," see Obj. at 2, the Court does not find this argument persuasive in 20 establishing futility. ILLC's argument suggests that there may be factual disputes about cessation 21 and intent later in the

litigation, but IF's proposed Third Amended Complaint states that "[n]onuse 22 for 3 consecutive years shall be prima facie evidence of abandonment" under 15 U.S.C. § 1127, 23 Dkt.

No. 137-1 ("TAC") ¶ 143, and then alleges the following: 24 1. "[A]s to Registration Nos. 5590801 and 5603025, during a period of at least three years 25 after the date of the SOUs, the marks were not used in commerce on or in connection 26 with any of the identified goods," TAC ¶ 144, and 27 2. "[A]s to Registration No. 6571603, the mark was not used in commerce on or in 1 least October 2021," TAC ¶ 145.

2 Accordingly, IF's proposed Third Amended Complaint appears to include allegations sufficient to 3 state claim of abandonment. 4 Likewise, to the extent that ILLC's Objection can be read as arguing that IF's proposed 5 Section 15 fraud claim is futile because there is no "evidence that [ILLC] intended to defraud" the 6 PTO, Obj. at 2, that again is suggestive of a factual dispute.

On a motion to dismiss, IF need only 7 plead (1) a false representation regarding a material fact, (2) ILLC's knowledge or belief that the 8 representation is false, (3) the intent to induce reliance upon the misrepresentation and reasonable 9 reliance thereon, and (4) damages proximately resulting from the reliance. See *Robi v. Five 10 Platters, Inc.*, 918 F.2d 1439, 1444 (9th Cir.

1990) (citing *San Juan Products, Inc. v. San Juan 11 Pools of Kansas, Inc.*, 849 F.2d 468, 473 (10th Cir. 1988)). Here, IF has alleged that ILLC "did 12 not offer any nutritional supplements in connection with the IMPOSSIBLE NUTRITION Design 13 Mark between October 2021 and December 2023," TAC ¶ 125, and that ILLC "knew that the 14 statement regarding continuous use in the Section 15 declaration was false because Defendants 15 intentionally and specifically ceased selling products in connection with the IMPOSSIBLE 16 NUTRITION Design Mark in October 2021," TAC ¶ 126.

IF has also alleged that PTO acted in 17 reliance on this allegedly false statement by issuing an acknowledgment of the "incontestable" 18 status of Registration No. 5387588—the purpose for which ILLC submitted the allegedly 19 fraudulent affidavit—and that PTO's acknowledgment of this status has harmed IF's business. 20 TAC ¶¶ 127, 130. Again, then, IF has apparently pled facts sufficient to state a claim for fraud in 21 the procurement of incontestability status, so the Court does not believe that IF's proposed 22 amendment is futile.

23 Second, ILLC did not carry its burden to show that amendment would cause undue 24 prejudice. See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("The party 25 opposing amendment bears the burden of showing prejudice." (citing *Beeck v. Aqua-slide 'N' Dive 26 Corp.*, 562 F.2d 537, 540 (8th Cir. 1977))).

As discussed previously, ILLC submitted only a 27 "qualified objection" to IF's motion, and did not provide any argument related to Rule 15. Since 1 second Foman factor also favors IF. 2 Third, there is no evidence of bad faith on IF's part. Again, ILLC declined the opportunity 3 to explain

whether, and how, IF's attempt to amend constitutes "acting with intent to deceive, 4 harass, mislead, delay, or disrupt." See *ARF Dashnaktsutyun, W. U.S.A. v. Armenian 5 Revolutionary Fed'n WUSA, Inc.*, No. 21-cv-5594, 2022 WL 16859599, at \*5 (C.D.

Cal. Oct. 5, 6 2022) (quoting *Wizards of the Coast LLC v. Cryptozoic*, 309 F.R.D. 645, 651 (W.D. Wash. 2015)). 7 The Court does not see any such indication in the record, either, since all evidence points to IF 8 discovering certain conduct by ILLC in July and December 2024 and then diligently pursuing 9 discovery and amendment related to that conduct. Nor does the Court believe that IF is "seek[ing] 10 to amend solely 'to prolong the litigation by adding new but baseless legal theories.'" *Id.* (quoting 11 *Quidel Corp. v. Siemens Med.*

*Sols. USA, Inc.*, No. 16-cv-3059, 2019 WL 1409854, at \*3 (S.D. 12 Cal. Mar. 27, 2019)). 13 As to the fourth Foman factor, the Court finds that there may have been some delay on 14 IF's part with regard to the claim for fraud in the procurement of incontestability status.

In July 15 2024, IF foreshadowed that it was considering seeking to amend its complaint in order to add 16 fraud claims. It then took over six months to file the present motion to amend. Granted, some of 17 this time was occupied with discovery disputes over IF's RFPs related to certain of the proposed 18 claims, and it appears that production of documents in response to those RFPs may have taken 19 until at least November 2024.

See *Flemming Decl.* ¶¶ 10–15. But the fraud in the procurement of 20 incontestability status claim relies on facts initially discovered in July 2024, which was the point 21 at which IF requested that ILLC withdraw the Section 15 affidavit based on its preliminary 22 investigation indicating a lack of continuous use. See *id.* ¶¶ 7–8. It was reasonable for IF to 23 attempt to conduct some further discovery following that preliminary investigation, so this is not 24 to say that IF should have filed a motion requesting to add the fraud claim in July.

On the other 25 hand, six months is a relatively long time—particularly given the impending close of fact 26 discovery—so the Court believes that it would have been desirable for IF to make this further 27 motion to amend at an earlier date. That said, the gears of discovery can turn slowly, and in light 1 delay on IF's part is not severe enough to preclude amendment.

2 Finally, IF has clearly not failed repeatedly to cure deficiencies in its complaint, since the 3 present motion marks IF's first effort to plead the three new claims it hopes to add. 4 Since the majority of the Foman factors—including the factor carrying the most weight— 5 favor permitting IF to file the Third Amended Complaint, the Court will grant IF's motion.

6 IV. SEALING 7 Pursuant to Civil Local Rule 79-5(f) and the Parties' Protective Order, IF submits its 8 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed in order 9 to identify and provisionally file under seal materials that may be related to documents designated 10 as confidential under the Protective Order. See Dkt. No. 139 at 1–2.

Under Civil Local Rule 79- 11 5(f), the filing party submits an Administrative Motion to Consider Whether Another Party's 12 Material Should be Sealed, but it need not satisfy the requirements of subsection (c)(1). Civ. L.R. 13 79-5(f)(1). Instead, the party that designated the identified material as confidential has seven days 14 to file a statement and/or declaration in support of maintaining the material under seal.

See Civ. 15 L.R. 79-5(f)(3). If the designating party does not file such a response, the provisionally sealed 16 document may be unsealed. See *id.* ILLC timely filed a statement in response to IF's 17 administrative motion, in which it indicated that it "does not seek sealing" for the documents that 18 IF identified. Dkt. No. 141 at 1.

Therefore, the Court will order those documents unsealed. The 19 Court's ruling is summarized below: 20 Dkt. No. Document Portion(s) to Seal Ruling 21 137 Impossible Foods's Highlighted Denied, as ILLC has not sought to Motion to Amend portions on maintain the material under seal, and it is 22 Complaint and page 4, lines 13– ILLC's burden to demonstrate that the 23 Scheduling Order 14. identified material is sealable.

24 137-1 Third Amended Highlighted Denied, as ILLC has not sought to (Exhibit 1) Complaint portions on maintain the material under seal, and it is 25 page 14 through ILLC's burden to demonstrate that the page 15; identified material is sealable. 26 highlighted 27 portion on page 35. 137-47 Redlined version of Highlighted Denied, as ILLC has not sought to 1 (Exhibit 2) the Third Amended portions on maintain the material under seal, and it is 2 Complaint page 14 through ILLC's burden to demonstrate that the page 15; identified material is sealable.

3 highlighted portion on page 4 35. 137-10 Exhibit I to the Entire Document Denied, as ILLC has not sought to 5 Third Amended maintain the material under seal, and it is 6 Complaint ILLC's burden to demonstrate that the (IMP00004189) identified material is sealable. 7 137-11 Exhibit J to the Entire Document Denied, as ILLC has not sought to 8 Third Amended maintain the material under seal, and it is Complaint ILLC's burden to demonstrate that the 9 (IMP00004219) identified material is sealable.

10 137-12 Exhibit K to the Entire Document Denied, as ILLC has not sought to 11 Third Amended maintain the material under seal, and it is Complaint ILLC's burden to demonstrate that the 12 (IMP00004195) identified material is sealable. 13 138 Declaration of H. Highlighted Denied, as ILLC has not sought to 14 Forrest Flemming, portions on maintain the material under seal, and it is III page 4, ¶ 20.

ILLC's burden to demonstrate that the 15 identified material is sealable. 16 138-8 Exhibit H to the Entire Document Denied, as ILLC has not sought to 17 Declaration of H. maintain the material under seal, and it is Forrest Flemming, ILLC's burden to demonstrate that the 18 III (IMP00004195) identified material is sealable. 19 20 V. ORDER 21 For the foregoing reasons, IT

IS HEREBY ORDERED that Plaintiff Impossible Foods 22 Inc.'s Motion to Amend Complaint and Scheduling Order (Dkt.

No. 137) is hereby GRANTED. 23 The accompanying Administrative Motion to Consider Whether Another Party's Material Should 24 Be Sealed (Dkt. No. 139) is DENIED. IF SHALL filed the Third Amended Complaint attached to 25 its motion on or before March 7, 2025.

In light of ILLC's response to IF's Administrative Motion 26 to Consider Whether Another Party's Material Should Be Sealed (Dkt. No. 139), the Third 27 Amended Complaint shall not be redacted. 1 Administrative Motion to Consider Whether Another Party's Material Should Be Sealed (Dkt. No. 2 139) by March 18, 2025. 3 4 IT IS SO ORDERED. 5 6 Dated: March 4, 2025 ' fe LABSON FREEMAN 8 United States District Judge 9 10 11 12 13 15 16 it 4 18 19 20 21 22 23 24 25 26 27 28