

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAUL PIZANA,

Plaintiff,

v.
SANMEDICA INTERNATIONAL LLC,

Defendant.

No. 1:18-cv-00644-DAD-SKO

ORDER GRANTING PLAINTIFF'S MOTION
TO MODIFY THE SCHEDULING ORDER
AND FOR LEAVE TO FILE A THIRD
AMENDED COMPLAINT

(Doc. No. 118)

This matter is before the court on plaintiff Raul Pizana's motion to modify the scheduling order and for leave to file a third amended complaint filed on December 23, 2020.¹ (Doc. No. 118.) Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic, plaintiff's motion was taken under submission on the papers. (Doc. No.

¹ The undersigned apologizes for the excessive delay in the issuance of this order. This court's overwhelming caseload has been well publicized and the long-standing lack of judicial resources in this district long-ago reached crisis proportion. While that situation was partially addressed by the U.S. Senate's confirmation of a district judge for one of this court's vacancies on December 17, 2021, another vacancy on this court with only six authorized district judge positions was created on April 17, 2022. For over twenty-two months the undersigned was left presiding over approximately 1,300 civil cases and criminal matters involving 735 defendants. That situation resulted in the court not being able to issue orders in submitted civil matters within an acceptable period of time and continues even now as the undersigned works through the predictable backlog. This has been frustrating to the court, which fully realizes how incredibly frustrating it is to the parties and their counsel.

1 128.) For the reasons explained below, the court will grant plaintiff's pending motion.

2 **BACKGROUND**

3 **A. Procedural Background**

4 Plaintiff filed this putative class action on May 9, 2018, challenging the advertising and
5 efficacy of SeroVital-hgh ("SeroVital"), a purported human growth hormone supplement
6 produced by defendant SanMedica International LLC ("SanMedica"). (Doc. No. 1 at ¶¶ 1–3.)
7 On June 30, 2018, plaintiff filed a first amended complaint as a matter of course (Doc. No. 13),
8 and defendant responded by filing a motion to dismiss. (Doc. No. 25.) The court denied
9 defendant's motion to dismiss, except with regard to one of plaintiff's claims that was dismissed
10 with leave to amend. (Doc. No. 50.) On November 13, 2019, plaintiff filed the operative second
11 amended complaint ("SAC"), alleging three causes of action under state law for violations of: (1)
12 the California Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750, *et seq.*); (2) the
13 California False Advertising Law ("FAL") (Cal. Bus. Prof. Code. § 17500, *et seq.*); and (3) the
14 California Unfair Competition Law ("UCL") (Cal. Bus. Prof. Code § 17200, *et seq.*). (Doc. No.
15 53 at 20–24.) On December 13, 2019, defendant answered the SAC. (Doc. No. 60.)

16 On March 5, 2020, a scheduling conference was held, and the assigned magistrate judge
17 thereafter issued a scheduling order for class certification deadlines, including that "[a]ny motions
18 or stipulations requesting leave to amend the pleadings . . . be filed by no later than June 15,
19 2020." (Doc. Nos. 73; 74 at 1.) The scheduling order also provided that class certification
20 discovery was to be completed by no later than December 18, 2020, and that any motion for class
21 certification was to be filed by January 21, 2021. (*Id.* at 2.) That scheduling order did not set any
22 other discovery or motion filing deadlines.

23 Discovery commenced with plaintiff serving discovery requests on defendant on April 13,
24 2020, to which defendant responded by producing "a few thousand pages of documents" on July
25 13, 2020 and turning over "nearly one million pages in records" on August 13, 2020. (Doc. No.
26 118 at 11.) Depositions of the eight witnesses designated by defendant under Rule 30(b)(6) were
27 taken on September 8, 9, 10, and 14, 2020; November 12, 17, 18, and 19, 2020; and December 8,
28 ////

1 2020.² (*Id.* at 12–13.) The court observes that the discovery phase of this litigation has
2 apparently been somewhat contentious with both sides filing several discovery-related motions.³

3 In light of the information plaintiff learned during discovery, on December 23, 2020,
4 plaintiff filed the pending motion to modify the scheduling order and for leave to file a third
5 amended complaint. (Doc. No. 118.) Defendant filed an opposition to the pending motion on
6 January 15, 2021, and plaintiff filed his reply thereto on January 29, 2021. (Doc. Nos. 139, 144.)

7 **B. Factual Background**

8 In his pending motion, plaintiff contends that during the Rule 30(b)(6) depositions taken
9 in September and November 2020, new facts arose that warrant an amendment to the pleadings in
10 order to seek to add fifteen new defendants, new claims, new products, and eight new plaintiffs
11 who allegedly purchased some of the new products. (Doc. Nos. 118 at 12–13; 118-9 at 1.)
12 Specifically, plaintiff claims these new facts reveal that defendant is part of a web of affiliated
13 entities and individuals operating a single enterprise (referred to by plaintiff as the “Basic
14 Research Enterprise”) with a unified aim to manufacture, market, and sell the same product under
15 different brand names based on the same purportedly faulty science and false representations.⁴

16 ² Although plaintiff lists eight different witnesses designated under Rule 30(b)(6) in his pending
17 motion, and has provided the deposition transcripts for those eight witnesses, he states in his
18 pending motion—apparently by mistake—that defendant “designated seven (7) separate
19 witnesses.” (Doc. Nos. 118 at 12; 118-3, 118-4, 118-5, 118-6, 118-7, 133, 134, 135.)

20 ³ Plaintiff moved to compel seven hours of deposition time for each Rule 30(b)(6) witness (*see*
21 Doc. Nos. 79, 80, 81) and responses to requests for production of documents, including in regard
22 to identifying putative class members (*see* Doc. No. 82), and defendant moved for a protective
23 order with regard to question topics for the Rule 30(b)(6) depositions and for designating a
24 witness for identification of putative class members (*see* Doc. Nos. 83, 84). The assigned
25 magistrate judge issued an order addressing several of these motions on October 15, 2020. (Doc.
26 No. 97.)

27 ⁴ On June 5, 2018, defendant filed a corporate disclosure statement in this action pursuant to
28 Federal Rule of Civil Procedure 7.1, stating that Basic Research Intermediate, LLC was
defendant’s parent corporation and that Basic Research Holdings, LLC was defendant’s
grandparent corporation. (Doc. No. 9.) During one of the depositions in September 2020,
plaintiff learned that Basic Research Intermediate, LLC sold defendant to another entity, BR Cos,
LLC. (Doc. No. 118 at 13–14.) To date, defendant has not filed a supplemental corporate
disclosure statement to reflect any changes to the identity of its parent corporation, as required by
Rule 7.1(b)(2).

1 (Doc. Nos. 118 at 7–9; 144 at 6 n.1.)

2 In opposing the pending motion, defendant argues, among other things, that “much of the
3 information” in question was available to plaintiff and his counsel before this case was filed and
4 plaintiff could have learned of these purportedly “new” facts earlier from three other similar
5 lawsuits that plaintiff’s counsel either knew about or were involved in. (Doc. No. 139 at 5.)

6 In reply, plaintiff counters that it was not possible to infer the complicated web of entities
7 associated with defendant that was uncovered during the September and November 2020
8 depositions from the other lawsuits. (Doc. No. 144 at 6.)

9 1. Facts Purportedly First Discovered by Plaintiff During Rule 30(b)(6) Depositions

10 The new information that plaintiff claims he learned from the depositions of defendant’s
11 Rule 30(b)(6) witnesses falls into two categories: (i) facts about the alleged Basic Research
12 Enterprise’s sprawling corporate structure; and (ii) facts about new products that are substantially
13 similar, if not identical to, SeroVital. (Doc. No. 118 at 13–17.) Plaintiff purportedly first learned
14 of this information during the depositions of defendant’s corporate representatives: Gina Daines,
15 Amy Heaton, Brokk Mowrey, Matthew Draper, Bradley Skinner, Jim Kreeck, Evan Strassberg,
16 and Alexis Timpson. (*Id.* at 13.)

17 In regard to the first category of new information, plaintiff claims that he began to unravel
18 the corporate structure during the depositions when each of defendant’s Rule 30(b)(6) witnesses
19 were asked which company they worked for, and their responses varied. (*Id.* at 14–15.) For
20 example, plaintiff maintains that several of the witnesses testified that they worked for affiliates
21 of defendant or merely, “Basic Research”: (i) Alexis Thomson (September 8, 2020) testified that
22 she worked for Basic Research; (ii) Jim Kreeck (September 14, 2020) testified that he worked for
23 Bydex Management, which was described as the “employee leasing company” that is located in
24 the same building as Basic Research; (iii) Brokk Mowrey (November 18, 2020) testified that he
25 worked for Bydex Management but was also director of operations at Basic Research; (iv) Amy
26 Heaton (November 17, 2020) testified that she worked for Bydex Management, which is “part of
27 the Basic Research family of companies,” but was also the chief scientific officer of Basic
28 Research and its “R&D arm” (which is another entity called Sierra Research) and that she was

1 also the former director of scientific affairs at Limitless Worldwide, “another brand, similar to the
2 other Basic Research family of brands for which Sierra [Research] develops products”; and (v)
3 Brad Skinner (September 10, 2020) testified that he worked for Basic Research but was employed
4 by Majestic Media. (*Id.* at 14–15.) These various different answers from the Rule 30(b)(6)
5 witnesses indicated to plaintiff’s counsel that the alleged Basic Research Enterprise had a
6 complex corporate structure. (*Id.* at 15.) But it was not until the deposition of Gina Daines on
7 November 19, 2020 that the scope of the alleged Basic Research Enterprise became fully known
8 to plaintiff. (*Id.*)

9 In her deposition, Daines testified that the alleged Basic Research Enterprise is closely
10 held by family members, including Daines and her siblings Bodee Gay, Haley Blackett, and
11 Kimm Humphries, who acquired ownership in companies “affiliated with ‘Basic Research’” after
12 their father passed away in 2018. (*Id.*) Daines also testified that Mitchell K. Friedlander—one of
13 the individuals that plaintiff now seeks to add as a named defendant in this action and the
14 purported inventor of SeroVital—was involved in SeroVital’s marketing, and that he too holds an
15 ownership interest in the alleged Basic Research Enterprise. (*Id.*) Daines further testified as to
16 the general corporate structure of the alleged Basic Research Enterprise, confirming that it is
17 made up of one or more holding companies with numerous wholly-owned subsidiary affiliates,
18 and that these entities are engaged in a unified business of developing, manufacturing,
19 distributing, and selling dietary supplements. (*Id.* at 16.) Based on Daines’ testimony, coupled
20 with the information regarding other entities that plaintiff learned from the other depositions,
21 plaintiff alleges that each of those entities are wholly-owned affiliates and subsidiaries of
22 different holding companies that, like defendant SanMedica, perform a particular function within
23 the alleged Basic Research Enterprise, and that all employees working for the affiliate entities
24 perform work on behalf of the alleged Basic Research Enterprise. (*Id.* at 16–17.)

25 In regard to the second category of information revealed during depositions, plaintiff
26 contends that he learned that two other products—GF-9 and Thrive—used the same science,
27 substantiation, formulation, and manufacturing specifications as defendant’s SeroVital, but were
28 ////

1 merely “branded under different names.”⁵ (*Id.* at 15–16.) Plaintiff further alleges that SeroVital
2 and all its related products are not only identical, but also are manufactured by different entities
3 within the alleged Basic Research Enterprise that operate out of the same principal place of
4 business in Salt Lake City, Utah. (*Id.* at 15–17.)

5 2. Plaintiff’s Proposed Additions to a Further Amended Complaint

6 Based on this allegedly new information obtained during the September and November
7 2020 depositions, plaintiff seeks leave to file a third amended complaint to add: (i) ten entity
8 defendants and five individual defendants (“proposed defendants”);⁶ (ii) a claim against defendant
9 and the proposed defendants for violation of the Racketeer Influenced and Corrupt Organizations
10 Act (“RICO”), 18 U.S.C. § 1962(a), (c), (d) and allegations in support thereof that defendant and
11 the proposed defendants were alter egos of each other (“proposed claims”); (iii) allegations
12 regarding three products (SeroDyne, Thrive, and GF-9) that are “substantially similar, if not
13 identical, products to SeroVital” (“proposed products”), including allegations that the specific
14

15 ⁵ Plaintiff also contends that SeroDyne—a third new product that plaintiff seeks to include in a
16 third amended complaint—uses “the same oral amino acid complex that purportedly increases
17 growth hormone[s] to provide anti-aging benefits.” (Doc. No. 118 at 16.) Plaintiff’s assertion
18 appears to be based on information from the website for that SeroDyne product, not on
19 information plaintiff learned during the Rule 30(b)(6) depositions. However, the entity appearing
to sell SeroDyne previously employed Heaton, one of defendant’s Rule 30(b)(6) designated
witnesses who, as noted, testified that she worked for the “Basic Research family of companies.”
(*Id.* at 15–16)

20 ⁶ Plaintiff seeks to add the following new entities as defendants in this action: (1) Basic
21 Research Holdings, LLC; (2) Basic Research Intermediate, LLC; and (3) BR Cos, LLC, (an
22 alleged holding company for several affiliated subsidiaries); (4) Basic Research, LLC (the alleged
23 sales and distribution department of the enterprise’s products); (5) Sierra Research Group, LLC
24 (the alleged research and development department for the enterprise); (6) Majestic Media, LLC
25 (the alleged marketing and advertising department for the enterprise); (7) CRM Specialists, LLC
26 (the alleged customer service and direct to customer sales department for the enterprise); (8)
27 Limitless Worldwide, LLC (the alleged nominal manufacturer of SeroDyne and Thrive); (9)
28 Novex Biotech, LLC (the alleged nominal manufacturer for GF-9); and (10) Bydex Management,
LLC (the alleged human resources department and nominal “employer” of the individuals who
work for the enterprise). (Doc. Nos. 118 at 9; 118-9 at 1.) Plaintiff also seeks to add the
following individuals as defendants: (1) Bodee Gay; (2) Gina Daines; (3) Haley Blackett; (4)
Kim Humphries; and (5) Mitchell K. Friedlander. (Doc. Nos. 118 at 9; 118-9 at 1.) Plaintiff
refers collectively to defendant and the proposed defendants as the “Basic Research Enterprise.”
(Doc. No. 118 at 7.)

1 false and misleading representations about the proposed products also violate the same California
2 consumer protection statutes; and (iv) eight new plaintiffs who each purchased one or more of the
3 proposed products or SeroVital (“proposed plaintiffs”).⁷ (Doc. No. 118 at 9–10, 17–18.)
4 Collectively, the newly proposed defendants, proposed claims, proposed products, and proposed
5 plaintiffs will be referred to herein as the “proposed amendments.”

6 **LEGAL STANDARDS**

7 Once the district court has issued a pretrial scheduling order pursuant to Rule 16
8 establishing the time for any amendment to the pleadings, “a motion seeking to amend pleadings
9 is governed first by Rule 16(b), and only secondarily by Rule 15(a).” *Jackson v. Laureate, Inc.*,
10 186 F.R.D. 605, 607 (E.D. Cal. 1999) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
11 604, 607–08 (9th Cir. 1992)). Under Rule 16, the court will only modify a scheduling order upon
12 a showing of “good cause” by the moving party. Fed. R. Civ. P. 16(b)(4); *Johnson*, 975 F.2d at
13 609. “Unlike Rule 15(a)’s liberal amendment policy, which focuses on the bad faith of the party
14 seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good
15 cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson*,
16 975 F.2d at 609. “Although the existence or degree of prejudice to the party opposing the
17 modification might supply additional reasons to deny a motion, the focus of the inquiry is upon
18 the moving party’s reasons for seeking modification.” *Id.*

19 “Only after the moving party has demonstrated diligence under Rule 16 does the court
20 apply the standard under Rule 15 to determine whether the amendment [is] proper.” *Hood v.*
21 *Hartford Life & Accident Ins. Co.*, 567 F. Supp. 2d 1221, 1224 (E.D. Cal. 2008). Under Rule 15,
22 leave to amend pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a).
23 Nevertheless, leave to amend need not be granted when the amendment: (1) prejudices the
24 opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is
25 futile. *See AmerisourceBergen Corp. v. Dialysist W. Inc.*, 465 F.3d 946, 951 (9th Cir. 2006)

26
27 ⁷ Plaintiff seeks to add the following additional plaintiffs in this action: (1) Maureen Hobbs; (2)
28 Charles Berglund; (3) Jeanette Mills; (4) Erica Laroche; (5) Ann Marie Lynch; (6) Oskar Laffont;
(7) Sal Munoz; and (8) Keith Barnes. (Doc. No. 118-9 at 1.)

1 (citing *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999)).

2 **ANALYSIS**

3 **A. Whether Good Cause Exists to Modify the Scheduling Order**

4 Courts adhere to a three-step inquiry in determining whether good cause under Rule 16
5 has been satisfied:

6 To demonstrate diligence under Rule 16's "good cause" standard, the
7 movant may be required to show the following: (1) that she was
8 diligent in assisting the Court in creating a workable Rule 16 order;
9 (2) that her noncompliance with a Rule 16 deadline occurred or will
10 occur, notwithstanding her diligent efforts to comply, because of the
11 development of matters which could not have been reasonably
12 foreseen or anticipated at the time of the Rule 16 scheduling
13 conference; and (3) that she was diligent in seeking amendment of
14 the Rule 16 order, once it became apparent that she could not comply
15 with the order.

16 *Wake Forest Acquisitions, L.P. v. Vanderbilt Com. Lending, Inc.*, No. 2:15-cv-02167-KJM-DB,
17 2018 WL 1586362, at *3 (E.D. Cal. Apr. 2, 2018) (brackets omitted); *see also Grant v. United
18 States*, No. 2:11-cv-00360-LKK-KJN, 2011 WL 5554878, at *4 (E.D. Cal. Nov. 15, 2011), *report
and recommendation adopted*, 2012 WL 218959 (E.D. Cal. Jan. 23, 2012); *Kuschner v.
Nationwide Credit, Inc.*, 256 F.R.D. 684, 687 (E.D. Cal. 2009). "The decision to modify a
scheduling order is within the broad discretion of the district court." *FMC Corp. v. Vendo Co.*,
196 F. Supp. 2d 1023, 1030 (E.D. Cal. 2002).

20 1. Diligence in Assisting the Court in Creating a Workable Rule 16 Order

21 Plaintiff's counsel in this case timely filed several joint scheduling reports and appeared at
22 the scheduling conference on March 5, 2020. (Doc. Nos. 45, 48, 54, 72.) The assigned
23 magistrate judge thereafter issued a Rule 16 scheduling order, setting a June 15, 2020 filing
24 deadline for "[a]ny motions or stipulations requesting leave to amend the pleadings." (Doc. No.
25 74). Defendant has not argued that plaintiff was not diligent in assisting the court in this regard.
26 Consideration of this factor therefore favors the granting of the pending motion.

27 //

28 //

1 2. Development of Unforeseen Matters

2 Plaintiff must also show that his noncompliance with the June 15, 2020 deadline occurred
3 because of the development of matters which could not have been reasonably foreseen or
4 anticipated at the time of the Rule 16 scheduling conference. *Wake Forest*, 2018 WL 1586362, at
5 *3. Here, plaintiff filed the pending motion to amend the pleadings on December 23, 2020 (Doc.
6 No. 118), which is approximately six months after the June 15, 2020 deadline, and over nine
7 months after the March 5, 2020 scheduling conference held in this action. (Doc. No. 74.)

8 Plaintiff argues that he “diligently sought discovery” and “diligently seeks to amend” his
9 complaint. (Doc. No. 118 at 20–22.) Plaintiff maintains that he could not have complied with the
10 June 2020 deadline to move to amend his complaint because defendant did not serve discovery
11 responses or produce documents until July and August 2020, and defendant had not yet agreed on
12 a schedule for taking depositions. (*Id.* at 11, 20–22.) Moreover, plaintiff argues that due to the
13 slipshod nature of defendant’s document production, he could not have discovered “Basic
14 Research’s illegal racket” until after deposing defendant’s corporate representatives. (*Id.* at 21.)
15 Although plaintiff initially noticed the depositions of defendant’s Rule 30(b)(6) witnesses for
16 June 2020, plaintiff commenced taking those depositions in September 2020, shortly after
17 defendant’s document productions. (*Id.* at 11–13.) To the extent there was any delay or lack of
18 diligence in uncovering the new information, plaintiff argues that it is due to the defendant’s
19 “obstructionist tactics repeated throughout this litigation.” (*Id.* at 22.) In any event, plaintiff
20 contends that he diligently filed the pending motion on December 23, 2020 because it was not
21 until the taking of depositions in November 2020—specifically, the Heaton, Daines, and Mowry
22 depositions—that he could have known all the facts necessary to warrant seeking further leave to
23 amend his complaint. (*Id.* at 21.) Based on the declaration of plaintiff’s counsel filed in support
24 of the pending motion and the deposition transcripts attached as exhibits thereto (*see id.* at 13–
25 17), the court concludes that plaintiff has credibly shown that he discovered facts during those
26 depositions that revealed the scope of defendant’s corporate structure and that other products
27 were likely identical to SeroVital, such that it became appropriate to seek further leave to amend
28 to add new defendants and new claims based on this newly discovered information.

1 In its opposition to the pending motion, defendant principally argues that plaintiff's
2 counsel knew or should have known the facts that were purportedly discovered during depositions
3 "years in advance" because plaintiff's counsel was either directly involved in, or aware of, other
4 litigation involving plaintiff, defendant, or one of the proposed defendants. (Doc. No. 139 at 5–7,
5 12.) Defendant's argument in this regard is not persuasive for several reasons.

6 First, defendant asserts that the allegedly "new" information underlying the proposed
7 amendments was not unforeseen to plaintiff because his counsel had also represented the plaintiff
8 in *Martin v. Sanmedica Int'l, LLC*, No. 2:16-cv-07794-ODW-JPR (C.D. Cal. Oct. 19, 2016),
9 which action was based on "the same product" and "the same product packaging," and asserted
10 the "same causes of action" premised on "identical allegations" as plaintiff's allegations brought
11 in this case. (Doc. No. 139 at 5–6.) But defendant has not identified what information—
12 specifically—it was that plaintiff's counsel would have known from the *Martin* litigation. A
13 review of the docket in *Martin* merely reveals the case was stayed by the court and then
14 voluntarily dismissed by the plaintiff in 2017 after plaintiff's counsel let the deadline for the filing
15 of a motion for class certification in that case lapse. *See Order at 2, Martin*, No. 2:16-cv-07794-
16 ODW-JPR, Doc. No. 59, (C.D. Cal. July 17, 2017).

17 Second, defendant contends that plaintiff should have known about two of the newly
18 proposed defendants (Novex Biotech, LLC and Sierra Research, LLC) and one of the proposed
19 products (GF-9) because two Ninth Circuit decisions issued in 2017 involved those proposed
20 defendants and that proposed product, and purportedly addressed "the same fundamental
21 allegations made in this case." (Doc. No. 139 at 6) (citing *Kwan v. SanMedica Int'l*, 854 F.3d
22 1088 (9th Cir. 2017); *Engel v. Novex Biotech, LLC*, 689 F. App'x 510 (9th Cir. 2017)).⁸
23 However, both of the cases upon which defendant relies in this regard were dismissed at the
24 pleadings stage, and plaintiff's counsel does not appear to have been involved in either case. *See*
25 *Kwan*, 854 F.3d at 1090; *Engel*, 689 F. App'x at 510. Although one of the proposed defendants,
26 Sierra Research, LLC, was a named defendant in *Kwan*, the parties had voluntarily dismissed

27
28

⁸ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule
36-3(b).

1 Sierra Research, LLC from that action, suggesting that it was *not* a proper defendant. *See Kwan*,
2 854 F.3d at 1090. In addition, although another one of plaintiff's newly proposed defendants
3 here, Novax Biotech, LLC, was a named as a defendant in *Engel* and the GF-9 product was at
4 issue in that case, the Ninth Circuit's summary decision affirming the district court's dismissal of
5 that action did not indicate that the GF-9 product had any connection to SeroVital or that Novax
6 Biotech, LLC had any connection with defendant SanMedica. *See Engel*, 689 F. App'x at 510.

7 Third, defendant contends that plaintiff should have known about three of the newly
8 proposed defendants based on plaintiff's counsel relationship with their co-counsel, Shepherd,
9 Finkelman, Miller & Shaw, LLP ("SFMS Law"), in a different still ongoing case brought against
10 defendant, *Diebler v. SanMedica Int'l, LLC*, No. 1:9-cv-20155-NLH-MJS, (D.N.J. Nov. 13,
11 2019). Specifically, defendant contends that because SFMS Law had allegedly sued Bydex
12 Management, LLC, Basic Research, LLC, and Mitchell K. Friedlander over a decade ago for
13 alleged RICO violations in *Miller v. Basic Rsch., Inc.*, No. 2:07-cv-00871-TS (D. Utah Nov. 9,
14 2007), plaintiff's counsel should have somehow already been aware of these three newly
15 proposed defendants. (Doc. No. 139 at 8–9.) However, defendant offers no explanation as to
16 how plaintiff's counsel would have been aware of those defendants from the *Miller* case,
17 especially given that a protective order had been issued in *Miller* preventing disclosure of
18 information and that action also concerned a different product than that at issue in this action.⁹
19 (Doc. Nos. 144 at 11; 144-2 at 2; 144-3 at 4–6.)

20 _____
21 ⁹ Defendant also argues that because a Google search reveals that Mitchell K. Friedlander is
22 listed on SeroVital's patent, and defendant disclosed Friedlander as a person involved in the
23 content of SeroVital's packaging in response to an interrogatory, plaintiff should have known that
24 Friedlander was involved long before the Rule 30(b)(6) depositions were taken in this action.
25 (Doc. No. 139 at 7–8.) But defendant has not explained how the mere disclosure of Friedlander
26 would have revealed the extent of his purported involvement in the alleged Basic Research
27 Enterprise such that plaintiff should have sought leave to add Friedlander as a defendant in this
28 action much earlier than they did. Even if plaintiff was aware of the existence of certain
individuals, entities, or products from the disparate sources of information that defendant has
referenced, the court is not convinced that plaintiff would have had sufficient information
regarding the purported interconnectedness of them all to have alleged the facts underpinning all
of his newly proposed amendments. Critically, defendant has also failed to offer any reason why
plaintiff should have known before the depositions in this case were taken that SeroVital and the
proposed products share a formula.

Having considered the parties' arguments, the court is persuaded that plaintiff could not have reasonably foreseen the need for the proposed further amendment of the complaint prior to the June 15, 2020 deadline to amend the pleadings because plaintiff did not learn of the information underlying those proposed amendments until depositions taken in September and November 2020. *See Dickey v. Vital One Health Plans Direct, LLC*, No. 1:18-cv-01399-DAD-BAM, 2019 WL 3892374, at *2 (E.D. Cal. Aug. 19, 2019) ("Courts in this circuit have recognized that a plaintiff has good cause to amend a complaint to add defendants if the identities of those defendants were unknown prior to discovery.").¹⁰

Accordingly, consideration of the second relevant factor also supports the granting of plaintiff's motion.

3. Diligence In Seeking Amendment

Lastly, plaintiff must show that he was diligent in seeking an amendment of the Rule 16 scheduling order once it became apparent that he could not comply with the deadlines established in that order. *Wake Forest*, 2018 WL 1586362, at *3. Here, plaintiff filed the pending motion on December 23, 2020, approximately three and a half months after the first deposition began on September 8, 2020 and approximately one month after the last deposition commenced on November 19, 2020, though some of those depositions were continued to November 30 and December 8, 2020. (Doc. No. 118 at 1, 12–13.) In other words, plaintiff filed the pending motion a few weeks after the last deposition leading to the discovery of the new information was concluded.

Under these circumstances, the court finds that plaintiff was diligent in filing the pending motion to amend the scheduling order and for leave to further amend his complaint. Although some of the September 2020 deponents suggested that there were other corporate entities that

¹⁰ It is worth noting that the plaintiff in *Diebler* filed a motion for leave to amend the pleadings to add defendants and causes of action based on the information learned from these same depositions, and the district court granted that motion. *See Diebler v. SanMedica Int'l, LLC*, No. 19-cv-20155-NLH-MJS, 2021 WL 5013617, at *3 (D.N.J. Oct. 28, 2021) ("On the record before it, the Court cannot find that Plaintiff was previously aware, or should have been aware, of facts sufficient to formulate and support the Proposed Amendments prior to the depositions in *Pizana*.").

1 might be relevant to this action, and plaintiff's counsel informed defendant's counsel on
2 September 22, 2020 of plaintiff's intention to file a motion to amend the pleadings, it was not
3 dilatory or unreasonable for plaintiff to wait to seek leave for such an amendment until after
4 completing the remaining Rule 30(b)(6) depositions. *See Cervantes v. Zimmerman*, No. 3:17-cv-
5 01230-BAS-NLS, 2019 WL 1129154, at *7 (S.D. Cal. Mar. 12, 2019) (collecting cases and
6 noting that it can "be reasonable for a plaintiff to delay seeking an amendment [to the scheduling
7 order] to place newly discovered information into context"); *Lyon v. U.S. Immigration & Customs
8 Enf't*, 308 F.R.D. 203, 216–17 (N.D. Cal. 2015) (finding good cause to allow amending the
9 scheduling order to permit the filing of a supplemental complaint even when plaintiffs "spent
10 several months gathering [new and pertinent] information"); *cf. DCD Programs, Ltd. v. Leighton*,
11 833 F.2d 183, 187 & n.4 (9th Cir. 1987) (finding no "undue delay" or "bad faith" under Rule
12 15(a) when the plaintiff "waited [to move to amend] until they had sufficient evidence of conduct
13 upon which they could base claims of wrongful conduct" and noting an attorney's duty to
14 investigate under Rule 11 before asserting legal claims).

15 For instance, when the Draper deposition revealed on September 9, 2020 that the defendant
16 had a new parent corporation that had acquired interests in defendant and "various entities," there
17 were still six more scheduled Rule 30(b)(6) depositions to be conducted. (Doc. No. 118 at 13.)
18 Indeed, the subsequent depositions revealed additional context relevant to plaintiff's proposed
19 amendments. It was not until the deposition of Daines on November 19 and 30, 2020 that the
20 general corporate structure of the alleged Basic Research Enterprise was confirmed and the
21 individual family-member-owners were identified. (*Id.* at 15–16.) Moreover, it was at the
22 Heaton and Mowrey depositions on November 17 and 18, 2020, respectively, that plaintiff
23 learned that SeroVital shared the same formula as two of the products which plaintiff seeks to
24 identify in a third amended complaint. (*Id.*) Given that plaintiff filed a motion to compel further
25 time to depose Daines on December 2, 2020, and plaintiff's counsel was not retained to represent
26 the proposed plaintiffs until on or after December 16, 2020, plaintiff acted diligently in filing the
27 pending motion a few months after the depositions commenced and a few weeks after being
28 retained by the newly proposed plaintiffs. (*Id.* at 13; Doc. No. 111); *cf. Zivkovic v. S. Cal. Edison*

1 *Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming the district court’s finding that a four-month
2 delay in seeking amendment of a scheduling order was too long to establish “good cause” under
3 Rule 16(b)).

4 Moreover, although the pending motion was filed five days after the close of class
5 certification discovery, courts routinely find good cause when a movant shows that facts
6 supporting new amendments were revealed for the first time in discovery. *See, e.g., U.S. Equal*
7 *Emp. Opportunity Comm’n v. Bay Club Fairbanks Ranch, LLC*, 475 F. Supp. 3d 1099, 1102 (S.D.
8 Cal. 2020) (finding good cause to amend the scheduling order eight months after the deadline for
9 amendments where the new information was uncovered through depositions and admissions in
10 August, November, and December and the moving party informed the opposing party of its intent
11 to amend the complaint in December and January before moving to amend in February); *Circus*
12 *Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1279 (D. Nev. 2021) (finding
13 good cause to amend the complaint after the deadline set in a scheduling order because the
14 “critical” and “behind-the-scenes” facts that justified the proposed amendment could not have
15 been known until discovery responses were served, which occurred after the scheduling order’s
16 deadline to amend the complaint). Thus, due to the number of depositions and manner in which
17 the factual information supporting the proposed amendments unfolded over several depositions
18 taken in September and November 2020, plaintiff acted with sufficient diligence in seeking
19 amendment by filing its pending motion on December 23, 2020. Accordingly, consideration of
20 this third and final relevant factor supports the granting of plaintiff’s motion.

21 In sum, the court finds that plaintiff has established good cause to amend the scheduling
22 order and to extend the deadline for filing motions requesting leave to amend the pleadings. *See*
23 *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, No. 2:05-cv-00583-LKK-GGH, 2006 WL
24 3733815, at *5 (E.D. Cal. Dec. 15, 2006) (collecting cases) (“Allowing parties to amend [the
25 scheduling order] based on information obtained through discovery is common and well
26 established.”).

27 ////

28 ////

1 **B. Whether Leave to Amend Should Be Granted**

2 Because plaintiff has established good cause to modify the scheduling order to extend the
3 deadline to request leave to amend the pleadings, the court now turns to application of the Rule
4 15(a) standard in determining whether leave to amend should be granted here.

5 “In general, a court should liberally allow a party to amend its pleading.” *Sonoma Cnty.*
6 *Ass’n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). “This liberality in
7 granting leave to amend is not dependent on whether the amendment will add causes of action or
8 parties.” *DCD Programs*, 833 F.2d at 186. Instead, “[c]ourts may decline to grant leave to
9 amend only if there is strong evidence of ‘undue delay, bad faith or dilatory motive on the part of
10 the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
11 prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of
12 amendment, etc.’” *Sonoma Cnty.*, 708 F.3d at 1117 (quoting *Foman v. Davis*, 371 U.S. 178, 182
13 (1962)). “[I]t is the consideration of prejudice to the opposing party that carries the greatest
14 weight Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there
15 exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence Cap., LLC*
16 *v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “The party opposing leave to amend bears
17 the burden of showing prejudice,” *Clarke v. Upton*, 703 F. Supp. 2d 1037, 1041 (E.D. Cal. 2010),
18 “futility, or one of the other permissible reasons for denying a motion to amend.” *Cervantes*,
19 2019 WL 1129154, at *13; *see also Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530–31
20 (N.D. Cal. 1989) (“[S]ince Rule 15 favors a liberal policy towards amendment, the nonmoving
21 party bears the burden of demonstrating why leave to amend should not be granted.”).

22 1. Undue Delay

23 As discussed above in the Rule 16 analysis, plaintiff was not aware and did not have
24 reason to know of the facts underlying the proposed amendments before taking the September
25 and November 2020 depositions. Thus, plaintiff was diligent in seeking leave to amend once the
26 factual bases for the proposed amendments were uncovered. Moreover, as plaintiff points out, the
27 scheduling order in this case was issued on March 5, 2020 (Doc. No. 74), mere weeks before the
28 COVID-19 pandemic swept this nation. (Doc. No. 118 at 19–21.) According to plaintiff, he

1 nevertheless, despite delays by defendant, diligently pursued written and oral discovery in the
2 months following issuance of the scheduling order. (Doc. No. 118-1 at ¶ 3.)

3 In any event, the court cannot find that plaintiff acted with undue delay in pursuing
4 discovery that led to uncovering the new facts upon which the proposed amendments are based or
5 in filing the pending motion. *Cf. Rich v. Shrader*, 823 F.3d 1205, 1209 (9th Cir. 2016) (finding
6 that undue delay warranted denial of leave to amend that plaintiff requested after summary
7 judgment because plaintiff had known of the grounds for the amendment since the
8 commencement of litigation years prior and had previously been given two opportunities to
9 address the defect). Therefore, consideration of this factor does not weigh against granting leave
10 to amend.

11 2. Bad Faith

12 Defendant dedicates one paragraph of its opposition to arguing that plaintiff's bad faith is
13 evident from the fact that plaintiff filed the pending motion shortly "before Christmas and just
14 before the class certification deadline to do so." (Doc. No. 139 at 21.) However, defendant does
15 not point to any "evidence in the record which would indicate a wrongful motive" by plaintiff in
16 seeking the proposed amendment. *DCD Programs*, 833 F.2d at 187. Absent any wrongful
17 motive, merely filing the pending motion close to a holiday or as a litigation deadline approached
18 does not amount to evidence of bad faith. Thus, consideration of this factor does not weigh
19 against granting leave to amend.

20 3. Previous Amendments

21 Plaintiff seeks leave to file a third amended complaint. (Doc. No. 118 at 27.) Plaintiff
22 filed his first amended complaint as a matter of course and his SAC after the court granted
23 defendant's motion to dismiss with leave to amend so that plaintiff could add allegations
24 pertaining to certain notice requirements. (Doc. Nos. 13, 53.) Thereafter, defendant answered the
25 SAC. (Doc. No. 60.) Plaintiff's proposed amendments are unrelated to plaintiff's two previous
26 amendments, and there has been no history of repeated failures to cure pleading deficiencies in
27 this case. Thus, consideration of this factor does not weigh against granting leave to amend.

28 ////

1 4. Undue Prejudice

2 “Prejudice is the ‘touchstone of the inquiry under rule 15(a).’” *Eminence*, 316 F.3d at
3 1052. “‘Undue prejudice’ means substantial prejudice or substantial negative effect.” *SAES*
4 *Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002). “[T]he Ninth
5 Circuit has found such substantial prejudice where the claims sought to be added ‘would have
6 greatly altered the nature of the litigation and would have required defendants to have undertaken,
7 at a late hour, an entirely new course of defense.’” *Id.* (quoting *Morongo Band of Mission*
8 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). “Prejudice is generally mitigated where
9 the case is still in the discovery stage, no trial date is pending and no pretrial conference has
10 occurred.” *Calderon v. Tulare Reg’l Med. Ctr.*, No. 1:17-cv-0040-BAM, 2018 WL 4473626, at
11 *5 (E.D. Cal. Sept. 17, 2018) (citing *DCD Programs*, 833 F.2d at 187–88).

12 In its opposition to the pending motion, defendant does not cite any case authority or
13 evidence to support its arguments regarding undue prejudice, despite it bearing the burden to
14 establish the undue prejudice it would suffer from the proposed amendments. Defendant argues
15 that it will be prejudiced because it will have to conduct additional discovery, duplicate its
16 document production and privilege log efforts, and “essentially relitigate the entire case,”
17 resulting in increased expenses to defendant. (Doc. No. 139 at 21.) However, other than vaguely
18 asserting in conclusory fashion that its “expenses will greatly increase” if the court allows the
19 proposed amendments and hits the “reset” button on this litigation, defendant has not explained
20 nor shown how the proposed amendments would necessitate duplication of its discovery efforts
21 undertaken thus far. (*Id.*) Moreover, as plaintiff contends and a review of the proposed third
22 amended complaint suggests, there appears to be significant overlap among the proposed
23 amendments that may reduce the time and expense needed with respect to conducting additional
24 discovery. (Doc. Nos. 144 at 13–14; *see, e.g.*, 118-9 at ¶¶ 74, 86, 88, 92, 96.) For example,
25 seven of the proposed defendants plus defendant SanMedica, are subsidiary entities that all share
26 the exact same corporate address in Salt Lake City, Utah (Doc. No. 118-8), and plaintiff asserts
27 that he “would not need additional discovery on the formula, substantiation, or purported efficacy
28 of the [proposed] products” if he obtains “an admission from Defendant that they are the same as

1 that of SeroVital.” (Doc. Nos. 144 at 14; 118 at 26.)

2 Defendant also argues that allowing the proposed amendments would result in the newly
3 proposed plaintiffs receiving “nearly three years added on to their limitations period” as opposed
4 to the case if they were required to pursue their claims on their own. (Doc. No. 139 at 21–22.)
5 Though not entirely clear, defendant’s undeveloped assertion that it would suffer “substantial
6 prejudice” if the proposed plaintiffs receive an extended limitations period on their claims rings
7 hollow. In making this assertion, defendant ignores the fact that Rule 15(c) provides for relation
8 back of amendments and the sort of extension of the limitations period that defendant now
9 apparently protests. Under relation-back principles, where there is an “identity of interests”
10 between a plaintiff and proposed additional plaintiffs, “relation back of the amendment is not
11 prejudicial to the defendant.” *Raynor Bros. v. Am. Cyanimid Co.*, 695 F.2d 382, 384 (9th Cir.
12 1982) (finding substitution of plaintiffs not prejudicial when plaintiff “took more than six months
13 to discover the proper party plaintiff and discovery had commenced”). Though Rule 15(c) is not
14 at issue in the pending motion, defendant’s assertion of prejudice from an extended limitations
15 period is simply not persuasive against that backdrop.

16 Defendant also argues that it would be prejudiced if it had to oppose class certification as
17 to class representatives other than plaintiff because of the “specific challenges [plaintiff] will face
18 as class representative.” (Doc. No. 139 at 21–22.) This argument also lacks merit because (i)
19 defendant cites no legal authority in support of its argument, and (ii) even assuming that plaintiff
20 were to be deemed an inadequate class representative—which is an inquiry reserved for a motion
21 for class certification—courts often allow counsel seeking to represent a putative class to identify
22 a new class representative before a certification order is issued when the original class
23 representative is deemed inadequate to represent the class. *See, e.g., Woods v. Google LLC*, No.
24 11-cv-01263-EJD, 2018 WL 4030570, at *10 (N.D. Cal. Aug. 23, 2018) (granting leave to amend
25 after scheduling order deadline for amendment to substitute newly named plaintiff and noting that
26 “[a]n additional round of class certification [would] not be overly burdensome”).

27 ////

28 ////

At bottom, the court concludes that defendant has failed to meet its burden of showing that it would suffer “substantial prejudice” or a “substantial negative effect” if further leave to amend were to be granted. Since the pending motion was filed, no other meaningful activity has occurred in this case, aside from the resolution of some outstanding discovery disputes. (See Doc. No. 137, 145, 154.) There is no scheduling order in effect, no pending dispositive motions,¹¹ no pending trial date, no final pretrial conference has been held (or ever been scheduled), no other discovery appears to have occurred since the September and November 2020 depositions, and the scheduled settlement conference was vacated due to the pending motion which is the subject of this order. (Doc. No. 160). The threshold procedural issue of class certification has not yet been addressed, and there has not been any formal discovery scheduled on topics pertaining to the merits of plaintiff’s claims. In short and for better or for worse, this case remains in its beginning phases. Even though additional class certification discovery will likely be necessary due to the proposed amendments and the deadline for such discovery will need to be extended, plaintiff’s representation that he discovered this new information as a result of the September and November 2020 depositions is credible and there does not appear to have been a more efficient way for plaintiff to have raised the proposed amendments. *See Genentech*, 127 F.R.D. at 531 (finding that there was no undue prejudice when plaintiff sought amendments that would have required that defendant “depose numerous witnesses across the country who have been previously questioned,” “necessitate[d] additional document searches and written discovery,” and would “postpone the trial date” because plaintiff credibly showed that the facts on which the amendments were based “came to light only after the original complaint was filed and during the course of discovery”). Thus, consideration of this factor does not weigh against granting leave to amend.

5. Futility

In determining futility, “[a] proposed amendment is futile only if no set of facts can be proved under the amendment that would constitute a valid claim.” *Barrett v. Apple Inc.*, 523 F.

¹¹ Defendant had filed a motion for summary judgment on December 18, 2020 (Doc. No. 117), but it was withdrawn on February 1, 2021 (Doc. No. 147).

1 Supp. 3d 1132, 1149 (N.D. Cal. 2021). However, “[l]eave to amend is warranted if the
2 deficiencies can be cured with additional allegations that are ‘consistent with the challenged
3 pleading’ and that do not contradict the allegations in the original complaint.” *United States v.*
4 *Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011); *Balistreri v. Pacifica Police Dep’t*, 901
5 F.2d 696, 701 (9th Cir. 1988) (noting that it is improper to deny leave to amend when the court
6 can “conceive of facts” that would render plaintiff’s claim viable).

7 In its opposition to the pending motion, defendant contends that granting plaintiff further
8 leave to amend would be futile because: the proposed third amended complaint (“TAC”) does
9 not allege sufficient facts demonstrating that there is personal jurisdiction over some of the
10 proposed defendants; the proposed plaintiffs lack standing to sue a proposed defendant for some
11 of the proposed products; and the allegations in the proposed TAC are insufficient to plausibly
12 state the proposed claims. (Doc. No. 139 at 17–19.) In reply, plaintiff counters that the proposed
13 plaintiffs have standing to sue for the proposed products under the “substantial similarity
14 doctrine” and the proposed TAC sufficiently alleges personal jurisdiction and is sufficient to state
15 the proposed claims. (Doc. No. 144 at 18–19.) The court will address each of defendant’s futility
16 arguments below.

17 a. *Personal Jurisdiction*

18 Defendant’s attempt to object to personal jurisdiction on behalf of the proposed
19 defendants is unavailing. (Doc. No. 139 at 17–18.)

20 In contrast to subject matter jurisdiction, “[t]he personal jurisdiction requirement
21 recognizes and protects an individual liberty interest. It represents a restriction on judicial power
22 not as a matter of sovereignty, but as a matter of individual liberty.” *Ins. Corp. of Ireland v.*
23 *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Like other individual rights,
24 personal jurisdiction can be waived, and a “variety of legal arrangements have been taken to
25 represent express or implied consent to the personal jurisdiction of the court.” *Id.* However,
26 because personal jurisdiction is only “waivable by the affected parties . . . [it] cannot be raised on
27 their behalf by anyone else.” *Jenkins v. Smead Mfg. Co.*, No. 3:09-cv-00261-IEG BLM, 2009
28 WL 3628100, at *3 (S.D. Cal. Oct. 28, 2009) (collecting cases); *Caballero v. Fuerzas Armadas*

1 *Revolucionarias de Colombia*, No. 2:20-cv-07602-JWH, 2021 WL 6135758, at *6 (C.D. Cal.
2 Dec. 29, 2021) (“[D]istrict courts in this circuit and elsewhere have held that objections to
3 personal jurisdiction can be raised only by the individual defendant who is protected by that
4 right.”). In this regard, none of the proposed defendants are currently named in this action, nor is
5 it apparent that defendant’s counsel even represents those proposed new defendants. As such,
6 defendant cannot raise an objection based on personal jurisdiction on behalf of the proposed
7 defendants. Thus, the proposed amendment is not futile due to any alleged lack of personal
8 jurisdiction.

b. *Standing*

10 Defendant cursorily argues that allowing the proposed amendments would be futile
11 because none of the proposed plaintiffs ever purchased two of the proposed products, Thrive and
12 SeroDyne, which are allegedly manufactured by proposed defendant Limitless Worldwide, LLC,
13 and thus the proposed plaintiffs lack standing to sue proposed defendant Limitless Worldwide,
14 LLC or its corporate parents. (Doc. No. 139 at 18.) However, in the Ninth Circuit, “the question
15 whether [named class representatives] may be allowed to present claims on behalf of others who
16 have similar, but not identical, interests depends not on standing, but on an assessment of
17 typicality and adequacy of representation.” *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir.
18 2015). As such, “any issues regarding the relationship between the class representative and the
19 passive class members—such as dissimilarity in injuries suffered—are relevant only to class
20 certification, not to standing.” *Id.*; *see also Kirola v. City & Cnty. of San Francisco*, 860 F.3d
21 1164, 1176 (9th Cir. 2017) (finding it appropriate, under the class certification approach, to
22 certify a class of individuals with mobility disabilities who were denied access to city facilities,
23 regardless of whether the named plaintiff had personally attempted to visit all the facilities);
24 *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 890 (N.D. Cal. 2012) (“The majority of
25 the courts that have carefully analyzed the question hold that a plaintiff may have standing to
26 assert claims for unnamed class members based on products he or she did not purchase so long as
27 the products and alleged misrepresentations are substantially similar.”).

28 || ////

1 Notably, defendant does not challenge whether the proposed plaintiffs have individual
2 standing to bring their claims for purchasing either SeroVital or the other proposed product, GF-
3 9. That is the correct inquiry under Ninth Circuit law. *See B.K. by next friend Tinsley v. Snyder*,
4 922 F.3d 957, 967 (9th Cir. 2019) (“[W]hen we measure a plaintiff’s standing, regardless of
5 whether the plaintiff sues individually or as class representative, we look concretely at the facts
6 that pertain to that plaintiff.”). Whether plaintiff or any of the proposed plaintiffs can be “allowed
7 to present claims on behalf of others who have similar, but not identical, interests”—specifically,
8 the interests of unnamed individuals who purchased proposed products Thrive and SeroDyne
9 from proposed defendant Limitless Worldwide, LLC—is a question “relevant only to class
10 certification, not to standing.” *Melendres*, 784 F.3d at 1262; *see also Cardenas v. NBTY, Inc.*,
11 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012) (finding that the named plaintiff’s ability to represent
12 purchasers of a related line of dietary supplements not purchased by the named plaintiff to be
13 analyzed under Rule 23). Defendant’s “standing” objection merely raises an issue to be
14 considered, if at all, in connection with a motion for class certification; it does not demonstrate
15 the futility of allowing the proposed amendments.

c. *Alter Ego Allegations*

17 In the proposed TAC, plaintiff includes a paragraph alleging that defendant and all
18 proposed defendants are liable for violations of the CLRA, FAL, and UCL based on an alter ego
19 theory of liability, in that “each Defendant was the alter ego of each other Defendant.” (Doc. No.
20 118-9 at ¶ 197.)

Under California’s choice-of-law rules,¹² the court begins with California law in conducting the alter ego analysis because no party has invoked the law of a foreign state. *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 928 (9th Cir. 2019) (“By default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims.”), *disapproved of on other*

¹² “When a federal court sits in diversity, it must look to the forum state’s choice of law rules to determine the controlling substantive law.” *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002).

1 *ground by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, ___ F.4th ___, No.
2 19-56514, 2022 WL 1053459 (9th Cir. Apr. 8, 2022). California law provides that to determine
3 whether a limited liability company is liable under the alter ego theory, courts apply the
4 substantive law of the state where the limited liability company is formed. *MacRae v. HCR*
5 *Manor Care Servs., LLC*, No. 8:14-cv-140715-DOC-RNB, 2017 WL 11480091, at *3 (C.D. Cal.
6 Sept. 14, 2017) (collecting cases) (citing Cal. Corp. Code § 17708.01(a)).

7 Here, three of the proposed defendants are alleged to be Delaware limited liability
8 companies—Basic Research Holdings, LLC; Basic Research Intermediate, LLC; and BR Cos,
9 LLC (collectively, “Delaware defendants”—whereas defendant SanMedica and the remaining
10 proposed entity defendants are alleged to be Utah limited liability companies—Basic Research,
11 LLC; Sierra Research Group, LLC; Majestic Media, LLC; CRM Specialists, LLC; Bydex
12 Management, LLC; Limitless Worldwide, LLC; Novex Biotech, LLC; and defendant SanMedica
13 International, LLC (collectively, “Utah defendants”). (Doc. No. 118-9 at ¶ 33.) Thus, although
14 plaintiff relied on California’s substantive law to support his alter ego allegations (Doc. No. 144
15 at 19), California law does not apply. Delaware’s substantive law on alter ego liability applies to
16 the Delaware defendants and Utah’s substantive law on alter ego liability applies to the Utah
17 defendants. The court now turns to consider whether plaintiff’s alter ego allegations may suffice
18 to state a claim under the applicable substantive law.¹³

19 Under Utah law, an entity’s form may be disregarded when (1) there is a “unity of interest
20 and ownership that the separate personalities of the corporation and the individual no longer
21 exist,” and (2) “the observance of the corporate form would sanction a fraud, promote injustice,
22 or an inequitable result would follow.” *Celtig, LLC v. Patey*, No. 2:17-cv-01086, 2019 WL

23 ¹³ The court recognizes that there is some disagreement among district courts in the Ninth Circuit
24 as to whether Rule 9(b)’s heightened pleading standard applies to pleading alter ego liability. *See*
25 *Wimbledon Fund, SPC v. Graybox, LLC*, No. 15-cv-6633-CAS-AJW, 2016 WL 7444709, at *5
26 (C.D. Cal. Aug. 31, 2016) (analyzing the split of authority among district courts in the Ninth
27 Circuit over the correct pleading standard applicable to alter ego liability and noting that the
28 majority of courts apply a heightened pleading standard). This court need not decide whether a
heightened pleading standard applies here because regardless of which pleading standard is
applied, the court concludes that plaintiff has not adequately stated a claim for alter ego liability
in the proposed third amended complaint.

1 4779285, at *5 (D. Utah Sept. 30, 2019) (quoting *Norman v. Murray First Thrift & Loan Co.*, 596
2 P.2d 1028, 1030 (Utah 1979)); *see also Eskelsen v. Theta Inv. Co.*, 437 P.3d 1274, 1283 n.6 (Utah
3 Ct. App. 2019) (“We note that while most of these factors apply to traditional corporations, the
4 alter ego doctrine applies equally to Utah limited liability companies, though there is little case
5 law developing this area of law.”); *Ditty v. CheckRite, Ltd., Inc.*, 973 F. Supp. 1320, 1335 (D.
6 Utah 1997) (applying Utah’s corporate veil piercing doctrine to an LLC). “Under this test, ‘there
7 is no single factor that alone justifies piercing the corporate veil’ and ‘a careful review of the
8 entire relationship between various corporate entities and their directors and officers’ is the
9 overarching inquiry.” *Id.* In evaluating the first prong, Utah courts look to the following seven
10 factors “that bear on the unity of interest and ownership analysis”: “(1) undercapitalization of a
11 one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends;
12 (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other
13 officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade
14 for operations of the dominant stockholder or stockholders[.]” *Celtig*, 2019 WL 4779285, at *6
15 (quoting *Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987)). Under the second prong,
16 which is referred to as the “fairness requirement,” “[i]t is not necessary that the plaintiff prove
17 actual fraud, but must only show that failure to pierce the corporate veil would result in an
18 injustice.” *Jones & Trevor Mktg., Inc. v. Lowry*, 284 P.3d 630, 635–36 (Utah 2012) (citations
19 omitted).

20 Under Delaware law, “[t]o state a ‘veil-piercing claim,’ the plaintiff must plead facts
21 supporting an inference that the corporation, through its alter-ego, has created a sham entity
22 designed to defraud investors and creditors.” *Crosse v. BCBSI, Inc.*, 836 A.2d 492, 497 (Del.
23 2003). Moreover, Delaware’s veil-piercing principles “are generally applicable . . . where one of
24 the entities in question is an LLC rather than a corporation.” *NetJets Aviation, Inc. v. LHC
25 Commc’ns, LLC*, 537 F.3d 168, 178 (2d Cir. 2008) (applying legal standard for piercing corporate
26 veil to an LLC under Delaware law, and noting that one difference is that “[i]n the alter-ego
27 analysis of an LLC, somewhat less emphasis is placed on whether the LLC observed internal
28 formalities because fewer such formalities are legally required”). In analyzing alter ego

1 allegations under Delaware law, courts consider five of the same seven factors that are analyzed
2 under Utah law. *Compare Manichaean Cap., LLC v. Exela Techs., Inc.*, 251 A.3d 694, 706 (Del.
3 Ch. 2021) (stating the five factors reviewed by Delaware courts) with *Celtig*, 2019 WL 4779285,
4 at *6 (stating the seven factors reviewed by Utah courts). In addition, “Delaware public policy
5 disfavors disregarding the separate legal existence of business entities,” *Manichaean*, 251 A.3d at
6 706, thus “a plaintiff must do more than show that one corporation is an alter ego of another in a
7 conclusory fashion in order for the court to disregard their separate legal existence.” *In re Draw*
8 *Another Circle.*, 602 B.R. 878, 905 (Bankr. D. Del. 2019). Though not specifically invoking
9 either Utah or Delaware law, plaintiff argues that his allegations of alter ego in the prosed third
10 amended complaint are sufficient to state a claim because “[t]he TAC specifically alleges how the
11 Basic Research Enterprise consists of numerous phony companies, none of which are separate
12 legal entities, but instead are wholly owned, controlled, and operated by the same group of
13 individuals who share family ties,” and the proposed TAC alleges that “if each Defendant’s
14 separate legal existence were not disregarded for purposes of assessing liability for the wrongful
15 conduct herein allege, it would result in an injustice.” (Doc. No. 144 at 19). The court is
16 unpersuaded by this argument.

17 Plaintiff’s allegations attempt to round up fifteen proposed defendants in a conclusory,
18 one-size-fits-all fashion by alleging that all of the proposed defendants were alter egos of each
19 other at all relevant times. (See Doc. No. 118-9 at ¶ 197.) Indeed, the allegations of the proposed
20 TAC does not delineate whatsoever between the fifteen different proposed defendants; plaintiff
21 essentially alleges that everyone did everything in a conclusory manner, without any supporting
22 factual allegations. Such conclusory allegations are insufficient to provide notice to defendant of
23 the grounds on which the alter ego claims are based. *See Bell Atl. Corp. v. Twombly*, 550 U.S.
24 544, 556 n.3 (2007) (“Without some factual allegation in the complaint, it is hard to see how a
25 claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the
26 claim, but also ‘grounds’ on which the claim rests.”). At most, paragraphs 5 and 33 of the
27 proposed TAC allege some factual support as to just one of the factors that courts consider—“the
28 use of the corporation as a façade for operations of the dominant stockholder or stockholders”—

1 because plaintiff alleges the roles each newly proposed defendant is responsible for within the
2 alleged Basic Research Enterprise and that different entities are controlled and operated by the
3 five proposed individual defendants. (Doc. No. 118-9 at ¶¶ 5, 33.) However, there is a dearth of
4 alleged facts addressing any of the remaining factors that courts are to consider in determining
5 alter ego liability under either Utah or Delaware law. Moreover, as to the fairness requirement
6 under Utah law, plaintiff merely alleges in conclusory fashion that failing to disregard the Utah
7 defendants' entity status "would result in an injustice." (Doc. No. 118-9 at ¶ 197.)

8 Accordingly, the court concludes that the allegations of plaintiff's proposed third amended
9 complaint are insufficient to state a plausible claim for alter ego liability under either Utah or
10 Delaware law. Nevertheless, the court concludes that granting plaintiff leave to amend to include
11 the proposed allegations of alter ego liability would not be futile. Even though the alter ego
12 allegations may not survive under a Rule 12(b)(6) challenge, the granting of leave to amend is
13 still warranted because in this case the court can "conceive of additional facts, if formally
14 alleged," that would support a claim for alter ego liability. *Corinthian Colls.*, 655 F.3d at 995.

15 d. *RICO Claim*

16 To state a civil RICO claim, "a plaintiff must allege (1) conduct (2) of an enterprise (3)
17 through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to the
18 plaintiff's 'business or property.'" *Abcarian v. Levine*, 972 F.3d 1019, 1028 (9th Cir. 2020).
19 "Racketeering activity . . . requires predicate acts," which can include "mail and wire fraud
20 under 18 U.S.C. §§ 1341 and 1343." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751
21 F.3d 990, 997 (9th Cir. 2014); *see also* 18 U.S.C. § 1961(1)(B) (stating that "racketeering
22 activity" includes both mail fraud and wire fraud). "The mail and wire fraud statutes are identical
23 except for the particular method used to disseminate the fraud, and contain three elements: (A)
24 the formation of a scheme to defraud, (B) the use of the mails or wires in furtherance of that
25 scheme, and (C) the specific intent to defraud." *Eclectic Props.*, 751 F.3d at 997.

26 "Where, as here, the racketeering activity alleged is fraud, including mail fraud and wire
27 fraud, the heightened pleading requirements of Rule 9(b) apply to the predicate acts." *Shaw v.*
28 *Nissan N. Am., Inc.*, 220 F. Supp. 3d 1046, 1053 (C.D. Cal. 2016) (internal citations omitted). "In

1 the RICO context, a Plaintiff must ‘detail with particularity the time, place, and manner of each
2 act of fraud, plus the role of each defendant in each scheme.’” *Id.* (quoting *Lancaster Cnty.*
3 *Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991)). “While plaintiffs must
4 plead the factual circumstances of fraud itself with particularity, they may allege specific intent to
5 defraud through general allegations.” *Comm. To Protect our Agric. Water v. Occidental Oil &*
6 *Gas Corp.*, 235 F. Supp. 3d 1132, 1177 (E.D. Cal. 2017). Moreover, “[t]he intent to defraud may
7 be inferred from a defendant’s statements and conduct.” *Eclectic Props.*, 751 F.3d at 997
8 (quoting *United States v. Peters*, 962 F.2d 1410, 1414 (9th Cir. 1992)). “In the absence of direct
9 evidence of intent, the party asserting fraud must first [allege and ultimately] prove ‘the existence
10 of a scheme which was reasonably calculated to deceive persons of ordinary prudence and
11 comprehension,’ and then, ‘by examining the scheme itself’ the court may infer a defendant’s
12 specific intent to defraud.” *Id.* (quoting *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir.
13 1984)).

14 In opposing the pending motion, defendant contends that granting plaintiff leave to amend
15 in order to add the proposed RICO claim would be futile because that claim as proposed has not
16 been plausibly pled under the Rule 9(b) heightened pleading standard. (Doc. No. 139 at 19.)
17 Focusing on the “specific intent to defraud” element, defendant argues that plaintiff’s proposed
18 RICO allegations are speculative and not sufficiently detailed. (*Id.*) According to defendant,
19 because plaintiff’s allegations “regarding mail and wire fraud prerequisites state only that
20 defendants used these mediums to set up its corporate scheme,” one would have “to assume the
21 illegality and corrupt nature of the corporate structure” in order to draw an inference of
22 defendant’s specific intent to defraud. (*Id.*)

23 An inference of specific intent to defraud can be drawn from plaintiff’s factual allegations.
24 The proposed TAC alleges that defendant and the newly proposed defendants “have unlawfully
25 increased their profits by making fraudulent claims that the Products—under the guise of multiple
26 different brand and entity names—increase HGH and provide anti-aging benefits when they do
27 not.” (Doc. No. 118-9 at ¶ 142.) That core allegation is buttressed by several factual allegations.
28 First, the proposed TAC alleges that defendant and proposed defendants made “fraudulent

1 claims” or “false representations” regarding the efficacy of SeroVital and the newly proposed
2 products to be identified by way of amendment, which are based on, among other things, expert
3 reports prepared by the experts hired by plaintiff. (*See, e.g., id.* at ¶¶ 1–13, 103–04, 109, 111–12,
4 123–25.) Second, the proposed TAC alleges that four different products—i.e., SeroVital and the
5 new proposed products (SeroDyne, Thrive, and G-9)—are identical in formulation but publicly
6 appear and are marketed under different names and are produced by different entities that all fall
7 within the alleged Basic Research Enterprise. (*See id.* at ¶¶ 74, 86, 88, 92, 96 105.) Third, the
8 proposed TAC not only alleges that “[d]efendants each had the specific intent to participate in the
9 overall RICO enterprise and the scheme to defraud Plaintiffs and the Class, and each participated
10 in the enterprise,” (*id.* at ¶ 149), but also provides the details of each defendant’s particular role in
11 the alleged Basic Research Enterprise. (*Id.* at ¶¶ 150–62.)

12 Viewing the foregoing allegations together, the proposed TAC adequately alleges that a
13 scheme existed, that the scheme was reasonably aimed at deceiving ordinary persons by
14 marketing and selling identical products under different brand names through different entities,
15 and that the products sold as part of the scheme were allegedly no more effective than a placebo
16 despite explicit representations to the contrary. Thus, the court can infer from these allegations
17 that the defendant and the newly proposed defendants had a specific intent to defraud. *See*
18 *Andrews Farms v. Calcot, Ltd.*, 527 F. Supp. 2d 1239, 1255 (E.D. Cal. 2007) (quoting *Odom v.*
19 *Microsoft Corp.*, 486 F.3d 541, 554 (9th Cir. 2007)) (“[T]he third requirement—specific intent to
20 deceive or defraud—requires only a showing of the defendants’ state of mind, for which general
21 allegations are sufficient.”). Accordingly, the court finds that allowing amendment to include
22 plaintiff’s proposed RICO claim would not be futile.

23 In sum, the court concludes that defendant has failed to carry its burden to show that the
24 granting of leave to amend would be futile. Accordingly, the court will grant plaintiff’s pending
25 motion for leave to file a third amended complaint.

26 ////

27 ////

28 ////

CONCLUSION

For the reasons explained above:

1. Plaintiff's motion to modify the scheduling order and for leave to file a third amended complaint (Doc. No. 118) is granted;
2. Plaintiff is directed to file a third amended complaint consistent with this order within twenty-one (21) days of this order; and
3. In the event that the response to the third amended complaint is an answer by all defendants, this matter is referred back to the assigned magistrate judge for issuance of a new scheduling order. Of course, if the response is a motion to dismiss the re-scheduling of this case will await the court's resolution of any such motion(s).

IT IS SO ORDERED.

Dated: April 26, 2022

Dale A. Troyd
UNITED STATES DISTRICT JUDGE