

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9 New Parent World, LLC, d/b/a My Baby
Experts,

No. CV-23-08089-PCT-DGC

10

Plaintiff,

ORDER

11

v.

12

13 True To Life Productions, Inc.; Brightcourse,
14 LLC; Heritage House '76, Inc.; and Brandon
Monahan,

14

Defendants.

15

16

17 Plaintiff New Parent World asserts copyright, contract, trademark, and unfair
18 competition claims against Defendants True To Life Productions (“True To Life”),
19 Heritage House '76, (“Heritage House”), and their CEO Brandon Monahan. Doc. 1.¹
20 Plaintiff moves for leave to amend the complaint pursuant to Federal Rule of Civil
21 Procedure 15. Doc. 27. The motion is fully briefed and oral argument will not aid the
22 Court’s decision. *See* Fed. R. Civ. P. 78(b); LRCiv 7.2(f). For reasons stated below, the
23 Court will grant the motion.

24

I. Background.

25

26 Plaintiff created original copyrighted content for teaching breastfeeding techniques
and newborn care. Doc. 1 ¶¶ 9-10. In 2010, Heritage House began purchasing the content
27 and distributing it in audio and DVD formats. *Id.* ¶ 11. On April 1, 2019, Plaintiff entered

28

¹ Plaintiff has dismissed its claims against Defendant Brightcourse. Doc. 12.

1 into a licensing and royalty agreement with True To Life allowing it to distribute the
2 content on a subscription-based website. *Id.* ¶¶ 12-17.

3 Plaintiff alleges that True To Life breached the agreement by making the content
4 available for free on a trial basis, distributing it to other third-party websites without
5 permission, altering the content without authorization, and creating derivative works from
6 the content without providing compensation. Plaintiff further alleges that after the
7 agreement terminated, True To Life removed Plaintiff’s copyright notices from the content,
8 added its own copyright notices to derivative works, and marketed knockoff videos and
9 lesson materials in competition with Plaintiff’s content. *Id.* ¶¶ 20-30.

10 The complaint asserts ten claims: false copyright management information and
11 removal of the same in violation of 17 U.S.C. § 1202(a)-(b) (counts one and two); copyright
12 infringement in violation of 17 U.S.C. § 501 (counts three through five); breach of contract
13 and the covenant of good faith and fair dealing under Arizona law (counts six and ten);
14 false designation of origin, false description, and dilution in violation of 15 U.S.C. § 1125
15 (counts seven and eight); and unfair competition under Arizona law (count nine). *Id.* ¶¶
16 31-96. Defendants answered the complaint and asserted various affirmative defenses.
17 Doc. 13.

18 Plaintiff substituted counsel and then moved for leave to amend the complaint.
19 Docs. 22-23, 27. Plaintiff seeks to delete the dilution claim from count seven and remove
20 count eight, add a claim for unjust enrichment in new count ten, add requests for statutory
21 damages and attorneys’ fees to the copyright claims in counts one through five, and include
22 relevant factual allegations to the complaint’s background section and various counts. *See*
23 Docs. 27 at 4-5, 27-1, 29 at 7.

24 **II. Leave to Amend Standard.**

25 Rule 15(a) makes clear that the Court “should freely give leave [to amend] when
26 justice so requires.” Fed. R. Civ. P. 15(a)(2). In deciding whether to grant leave to amend,
27 the Court “must be guided by the underlying purpose of Rule 15 – to facilitate decision on
28 the merits rather than on the pleadings or technicalities.” *DCD Programs, Ltd. v. Leighton,*

1 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted). The policy in favor of leave to amend
2 must not only be heeded, *Foman v. Davis*, 371 U.S. 178, 182 (1962), it must be applied
3 with extreme liberality, *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 880 (9th
4 Cir. 2001).

5 The Court may deny leave to amend where there is futility of the proposed
6 amendment, undue delay or bad faith on the part of the moving party, or undue prejudice
7 to the opposing party. *Foman*, 371 U.S. at 182. “It is the consideration of prejudice to the
8 opposing party that carries the greatest weight,” and “absent prejudice or a strong showing
9 of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor
10 of granting leave to amend.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052
11 (9th Cir. 2003) (cleaned up). The opposing party bears the burden of showing prejudice or
12 one of the other permissible reasons for denying leave to amend. *See DCD Programs*, 833
13 F.2d at 187.

14 **III. Discussion.**

15 Defendants do not contend that granting leave to amend would be prejudicial. Nor
16 do they assert that Plaintiff seeks leave to amend in bad faith or that the request is untimely.
17 Defendants instead argue that the proposed amendments are clearly futile. Doc. 28 at 1-3.
18 The Court does not agree.

19 **A. The Proposed Unjust Enrichment Claim (Count Ten).**

20 To state an unjust enrichment claim in Arizona, the plaintiff must allege five
21 elements: (1) an enrichment, (2) an impoverishment, (3) a connection between the
22 enrichment and impoverishment, (4) the absence of justification for the enrichment and
23 impoverishment, and (5) the absence of a remedy provided by law. *See Freeman v.*
24 *Sorchych*, 245 P.3d 927, 936 (Ariz. Ct. App. 2011). The proposed unjust enrichment claim
25 alleges that Defendants were enriched and Plaintiff was impoverished by Defendants’ use
26 of Plaintiff’s intellectual property, the enrichment and impoverishment are connected and
27 are without justification, and Plaintiff is without a remedy provided by law. Doc. 27-1 ¶¶
28 128-31.

1 Defendants do not contend that the unjust enrichment claim lacks an essential
2 element. They instead argue that the claim is preempted by federal copyright law because
3 it simply alleges a misappropriation of copyrights under a different name. Doc. 28 at 2,
4 12-17. But Plaintiff makes clear in its reply that the unjust enrichment claim is an
5 alternative theory of liability to the contract claims, not the copyright claims. Doc. 29 at
6 9-10.² Courts in this Circuit have held that that where the “[p]laintiff’s unjust enrichment
7 claim is truly an alternative pleading to its breach of contract claims, it survives . . .
8 preemption.” *Genasys Inc. v. Vector Acoustics, LLC*, No. 22-CV-152 TWR (BLM), 2023
9 WL 4414222, at *22 (S.D. Cal. July 7, 2023) (cleaned up); see *Perfect 10, Inc. v. Google,*
10 *Inc.*, No. CV 04-9484 AHM (SHX), 2008 WL 4217837, at *9 (C.D. Cal. July 16, 2008)
11 (“In alleging the basis for its unjust enrichment claim, P10 specifically avoided relying on
12 its copyright claims. To the extent its unjust enrichment theory of relief is based on
13 nonpreempted claims[,] the unjust enrichment claim is not preempted by the Copyright
14 Act.”) (cleaned up); *Denton v. Dep’t Stores Nat’l Bank*, No. C10-5830RBL, 2011 WL
15 3298890, at *6 (W.D. Wash. Aug. 1, 2011) (“The Court will not grant leave to amend the
16 claims that are preempted because any amendment would be futile. It is not clear, however,
17 that any claims would be futile for breach of contract, breach of the duty of good faith and
18 fair dealing, or unjust enrichment.”).

19 Defendants have not made a strong showing that the unjust enrichment claim is
20 futile. See *Eminence Capital*, 316 F.3d at 1052; *SAES Getters S.p.A. v. Aeronex, Inc.*, 219
21 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002) (noting that “an amendment is ‘futile’ only if it
22 would clearly be subject to dismissal”) (citing *DCD Programs*, 833 F.2d at 188). The
23 Court will grant leave to amend with respect to the unjust enrichment claim.

24 **B. Defendants’ Other Arguments.**

25 The only claim Plaintiff seeks to add is the unjust enrichment claim. The other
26 proposed amendments are the inclusion of relevant facts inadvertently omitted from the
27

28 ² Defendants do not contend that the contract claims fail to state claims for relief or
that they are preempted by federal copyright law.

1 original complaint, requests for statutory damages and attorneys’ fees in the copyright
2 claims, and certain stylistic changes. *See* Docs. 27 at 4, 27-1, 29 at 2-3.

3 Defendants argue that counts one, two, and seven fail to state a claim for relief and
4 the unfair competition claim should be dismissed because it is preempted by federal
5 copyright law. Doc. 28 at 1-7, 10-17. Defendants note that they intend to further address
6 these arguments in a motion to dismiss once the present motion is resolved. *Id.* at 2 n.1.
7 But Rule 12(b) makes clear that a motion to dismiss “must be made before pleading if a
8 responsive pleading is allowed.” Because Defendants answered the claims in the original
9 complaint, they may not now move to dismiss the claims. *See Mazal Grp., LLC v. Barak*,
10 No. CV 18-4983-DMG (FFMx), 2018 WL 11352629, at *1 (C.D. Cal. Dec. 27, 2018)
11 (“Courts in the Ninth Circuit interpret Rule 12(b) to mean exactly what it says: that Rule
12 12(b) motions must be filed before the Answer. Accordingly, when Barak filed his initial
13 Answer, his window for filing a Rule 12(b)(6) motion closed.”) (citation omitted);
14 *Townsend Farms v. Goknur*, No. SA CV 15-0837-DOC (JCGx), 2016 WL 10570248, at
15 *6 (C.D. Cal. Aug. 17, 2016) (“Holding that an amended complaint allows a defendant a
16 fresh opportunity to bring a 12(b)(6) motion to dismiss as to claims raised by a prior –
17 answered – complaint would undermine the requirements of [Rule 12].”); *Brooks v.*
18 *Caswell*, No. 3:14-CV-01232-AC, 2016 WL 866303, at *3 (D. Or. Mar. 2, 2016)
19 (“Allowing a post-answer motion to dismiss on an amended complaint where the
20 amendment merely substantiates existing claims would render the Rule 12(b) restriction
21 on post-answer motions meaningless. As such, this court follows many other circuits and
22 district courts across the country which have held that an amended complaint does not
23 revive the right to file a post-answer motion to dismiss[.]”); *Ernest Bock, LLC v. Steelman*,
24 No. 2:19-cv-01065-JAD-EJY, 2021 WL 1550332, at *3 (D. Nev. Apr. 20, 2021) (“[M]any
25 of the declaratory-relief claims presented in the amended pleading were already alleged in
26 Bock’s third amended complaint, which the Steelmans answered. I see no reason to give
27 the Steelmans a second bite at a Rule 12(b)(6) motion masquerading as an opposition to a
28 motion for leave to amend.”); *Sid Avery & Assocs., Inc. v. Pixels.com, LLC*, No. CV 18-

1 10232-CJC(SSX), 2019 WL 8806199, at *2 (C.D. Cal. June 24, 2019) (“An opposition to
2 a motion for leave to file an amended pleading is not an appropriate medium to litigate the
3 merits of [the] original claims.”).³

4 Defendants argue that the statutory damages and attorneys’ fees sought in amended
5 counts three through five are not available because the alleged copyright infringement
6 commenced prior to registration of Plaintiff’s copyrights. Doc. 28 at 2, 7-10. But the
7 amended complaint alleges that Defendants violated Plaintiff’s copyrights through the
8 unauthorized creation of new derivative works after registration of the copyrights. Doc.
9 27-1 ¶¶ 70, 78, 87. The Court must accept these allegations as true for purposes of the
10 motion to amend. *See Utherverse Gaming LLC v. Epic Gaming, Inc.*, No. 2:21-cv-00799-
11 RSM-TLF, 2023 WL 4908304, at *4 (W.D. Wash. July 10, 2023) (“To analyze whether
12 any amendment would be futile, the Court accepts the assertions of fact as true[.]”); *Winet*
13 *v. Arthur Gallagher & Co.*, No.: 3:20-CV-00014 W (BGS), 2020 WL 4015709, at *4 (S.D.
14 Cal. July 16, 2020) (“Construing all allegations in Plaintiff’s proposed first amended
15 complaint as true and drawing all reasonable inferences therefrom in [his] favor, the Court
16 declines to find as a matter of law that amendment would be futile.”); *Progressive*
17 *Semiconductor Sols. LLC v. Marvell Semiconductor, Inc.*, No. 8:14-cv-00330-
18 ODW(JEMx), 2014 WL 12581783, at *1 (C.D. Cal. June 16, 2014) (“[A]t this stage of the
19 litigation and without the benefit of discovery, this Court cannot say whether amendment
20 is futile and accepts Progressive’s allegations as true.”); *see also Nat’l Union Fire Ins.*
21 *Co. of Pittsburgh, PA v. Fiesta Palm LLC*, No. 2:11-cv-00598-JCM-GWF, 2012 WL
22 13049886, at *1 (D. Nev. Apr. 27, 2012) (“In opposing this amendment, Plaintiff is arguing
23 contested issues of fact that are not properly decided in a motion for leave to amend or
24

25
26 ³ If Defendants wish to challenge the factual or legal sufficiency of the claims
27 reasserted in the amended complaint, they may file an answer and then move for judgment
28 on the pleadings. *See* Fed. R. Civ. P. 12(c), (h)(2)(b); *DISH Network L.L.C. v. Jadoo TV,*
Inc., No. 20-CV-01891-CRB, 2020 WL 5816579, at *3 (N.D. Cal. Sept. 30, 2020)
 (“Because motions for judgment on the pleadings are only available at the close of the
 pleadings, Sohail was required to file an answer to the amended complaint before moving
 for judgment on the pleadings.”).

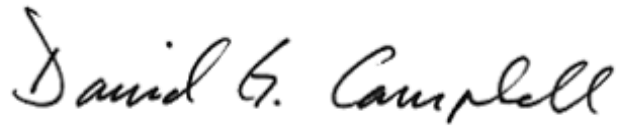
1 motion to dismiss. Consequently, this Court cannot conclude, as a matter of law, that
2 amendment of Palms' answer would be futile.”).

3 In light of the liberal policy favoring amendment and the absence of prejudice to
4 Defendants, the Court will grant Plaintiff leave to add requests for statutory damages and
5 attorneys' fees to the copyright claims.

6 **IT IS ORDERED:**

- 7 1. Plaintiff's motion for leave to amend the complaint (Doc. 27) is **granted**.
8 2. Plaintiff shall file the amended complaint (*see* Doc. 27-1) by **April 29, 2024**.⁴

9 Dated this 17th day of April, 2024.

10
11 

12
13 David G. Campbell
14 Senior United States District Judge

15
16
17
18
19
20
21
22
23
24
25
26
27
28 _____
⁴ Plaintiff shall delete the word “Dilution” from the title of count seven. *See* Docs. 27-1 at 22, 28 at 12, 29 at 7 n.3.