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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SABER INTERACTIVE INC.,

Plaintiff,

v.

OOVEE, LTD., ZANE SAXTON, DEVIN  
MILSOM and VINCE MILSOM,

Defendants.

CASE NO. 2:21-cv-01201-JHC

AMENDED ORDER RE: DEFENDANT  
OOVEE LTD.'S  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT AND  
PLAINTIFF SABER INTERACTIVE INC.'S  
MOTION TO FILE THIRD AMENDED  
COMPLAINT

**I.**

**INTRODUCTION**

This matter comes before the Court on Defendant Oovee, LTD's Motion to Dismiss Plaintiff Saber Interactive Inc.'s Second Amended Complaint (SAC) (Dkt. # 27) and Plaintiff Saber Interactive Inc.'s Motion for Leave to File Third Amended Complaint (TAC) (Dkt. # 37). Having reviewed the materials in support of and in opposition to the motions, for the reasons below, the Court GRANTS the Motion to Dismiss, DISMISSES the SAC without prejudice and

1 with leave to amend, and GRANTS the Motion for Leave to File TAC. This amended order  
2 replaces and supersedes the Court's prior order, *see* Dkt. # 46, issued on August 30, 2022.<sup>1</sup>

## 3 II.

### 4 BACKGROUND

5 For Oovee's Motion to Dismiss, the Court presumes as true all facts alleged in Saber's  
6 Second Amended Complaint (Dkt. # 20). *See Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247  
7 (9th Cir. 2013) ("On a motion to dismiss, the court presumes that the facts alleged by the  
8 plaintiff are true." (quoting *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982))).  
9 Unless stated otherwise, the facts below are from that complaint.

10 Generally, game developers program simulated driving games to provide the consumer  
11 with the experience of driving a vehicle that "operates as closely to the real thing as possible."  
12 Dkt. # 20 at 4. Game developers also "obtain a license from the vehicle manufacturer to feature  
13 a particular vehicle in a game." *Id.* Video game consumers know games feature simulated  
14 vehicles licensed by the vehicle manufacturer. *Id.* Game developers disclose these licenses. *Id.*

15 Peterburgsky traktorny zavod JSC ("PTZ"), which is known under the brand name  
16 "Kirovets," manufactures and sells tractors, including the K-700. *Id.* at 5–6. This is an image of  
17 the K-700:

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19 <sup>1</sup> In the prior order, the Court granted Oovee's motion to dismiss, dismissed the complaint with  
20 leave to amend, and granted Saber's motion to file a third amended complaint. Dkt. # 46. Saber then  
21 filed a motion for reconsideration in which it observed that the Court's prior order mischaracterized the  
22 "SHERP" vehicle as a lookalike of the K-700 vehicle at issue in this case. *See* Dkt. # 47; *see also* Dkt. #  
23 50. In response, Oovee agreed that the prior order mischaracterized the relationship between the two  
24 vehicles but argued that this mistake should not change the Court's ultimate conclusion to dismiss the  
SAC. *See* Dkt. # 49. This amended order remedies the factual mistake identified by the parties and  
modestly adjusts the order's reasoning in accordance with that correction. But the Court agrees with  
Oovee that proper characterization of the relationship between the SHERP and K-700 vehicles should not  
alter the Court's ultimate conclusion.



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5 *Id.* at 6. Kirovets sells K-700s to consumers in the United States. *Id.* K-700s have “two discrete  
6 but connected tractor parts (a front and a back), the pair of distinctive large wheels for each part,  
7 the front part having a box cabin and the extended engine cover with grill-style grate, and the  
8 back part featuring mostly just the large pair of wheels.” *Id.*

9           Saber is a video game developer. Dkt. # 20 at 3. It develops a simulated driving video  
10 game called *Mudrunner* that allow users to choose from different vehicles to drive in a particular  
11 environment. Dkt. # 20 at 3–5. Saber sells *Mudrunner* on Steam, a Bellevue-based “digital  
12 contact distribution platform” from which consumers can purchase games. *Id.* at 11.

13           Saber uses the K-700 design in *Mudrunner*:



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18 *Id.* at 7, 9. Unlike the other vehicles featured in *Mudrunner*, the K-700 has articulated steering.

19 *Id.* at 8. Under a December 29, 2020 License Agreement between it and PTZ, Saber is the  
20 “exclusive licensee with respect to various intellectual property rights related to PTZ’s Kirovets  
21 tractors.” *Id.* at 7. The Licensing Agreement gives Saber “rights to take legal and other  
22 enforcement actions, including retroactive rights, to damages and injunctive relief against any  
23

1 entity or product that has previously infringed, is currently infringing or will in the future  
2 infringe on the granted rights at any time in any territory and to collect damages for such  
3 infringement.” *Id.*

4 Defendant Oovee, as well as individual Defendants Zane Saxton, Devin Milsom, and  
5 Vince Milsom (collectively, “Oovee”), sells a simulated driving video game called *Spintires*. *Id.*  
6 at 2. Oovee sells *Spintires* worldwide through Steam. *Id.* at 3, 11. In November 2015, Oovee  
7 released an update to *Spintires* that included the K-700:



12 *Id.* at 10. Oovee advertised *Spintires* with a video trailer, and “roughly half of the trailer segment  
13 introducing [new] vehicles was dedicated to shots involving solely the K-700.” *Id.* In 2020,  
14 Oovee released another update to *Spintires* that included a new vehicle called the SHERP ARK  
15 10x10 ATV. *Id.* at 11. Oovee promoted the SHERP as using “articulating steering like the K-  
16 700.” *Id.* Oovee provided a disclaimer, which noted that “SHERP is a registered trademark of  
17 Quadro International LLC and is being used under license.” *Id.* The disclaimer further stated  
18 that “[a]ll other trademarks are the property of their respective owners. All characters and  
19 vehicles appearing in *Spintires* ® are fictitious (except where licensed). Any representations to  
20 real-life persons (living or dead), or real-world vehicle designs (except where licensed), is purely  
21 coincidental.” *Id.*

22 On or about December 30, 2020, Steam removed *Spintires* because of “its unauthorized  
23 use of the exclusively-licensed intellectual property.” *Id.* at 11–12.

1           Saber sued Oovee on September 2, 2021. Dkt. # 1. On April 26, 2022, Saber filed its  
2 SAC, which contained three claims: (1) unfair competition under the Section 43(a) of the  
3 Lanham Act, 15 U.S.C. § 1125; (2) unfair competition under Washington’s Consumer Protection  
4 Act (WCPA), Washington Revised Code (RCW) 19.86.010; and (3) unjust enrichment. Dkt.  
5 # 20 at 13–14.

6           Oovee moves to dismiss Saber’s SAC under Federal Rule of Civil Procedure 12(b)(6) for  
7 failure to state a claim. Dkt. # 27 at 13. It argues that the First Amendment bars Saber’s claims,  
8 and that even if it does not, Saber has not pleaded facts sufficient to survive a motion to dismiss.  
9 *Id.* at 8, 14.

10           Saber filed a Motion for Leave to File TAC. Dkt. # 37. The proposed TAC alleges that  
11 on June 12, 2022, Saber became aware that Oovee published a press release titled “Indie Gaming  
12 Developers Increasingly at Risk of Losing IP to Ruthless Industry Giants.” Dkt. ## 37 at 2; 37-1  
13 at 15. It alleges that the press release “falsely claim[s] that Saber stole Oovee’s intellectual  
14 property” and makes it look like a “bully.” Dkt. # 37 at 2. The proposed TAC also alleges that  
15 Oovee “knew the statements were false and made them intentionally,” and that the statements  
16 harmed and will harm Saber’s relationships with consumers who purchase its games and  
17 distributors who market its games. Dkt. # 37-1 at 17. It alleges that the damages exceed  
18 \$100,000. *Id.* The proposed TAC seeks to add claims for defamation and tortious interference  
19 with business relationships and expectancies. Dkt. ## 37 at 2; 37-1 at 20–21.

1 **III.**

2 **ANALYSIS**

3 A. Oovee's Motion to Dismiss the SAC

4 1. Rule 12(b)(6)

5 In considering a motion under Rule 12(b)(6), the Court construes the complaint in the  
6 light most favorable to the nonmoving party. *See Livid Holdings Ltd. v. Salomon Smith Barney,*  
7 *Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). "To survive a motion to dismiss, a complaint must  
8 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its  
9 face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550  
10 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content  
11 that allows the court to draw the reasonable inference that the defendant is liable for the  
12 misconduct alleged." *Id.* But legal conclusions "are not entitled to the assumption of truth" and  
13 "must be supported by factual allegations." *Id.* at 679. A court may dismiss a complaint under  
14 Rule 12(b)(6) that lacks a "cognizable legal theory" or fails to allege "sufficient facts" under a  
15 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

16 2. Unfair Competition under the Lanham Act

17 In the SAC, Saber claims that Oovee engaged in unfair competition in violation of  
18 Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which prohibits persons from misleading  
19 consumers about the origin or nature of products they sell. Dkt. # 20 at 13. Saber says that the  
20 unfair competition arises from Oovee's unauthorized use of its trademark and trade dress. *Id.* at

21 2. Oovee moves for dismissal, claiming that the First Amendment bars the Lanham Act claim  
22 and, even if not, Saber does not sufficiently plead facts to state a claim for relief under the  
23 Lanham Act. Dkt. # 27 at 16, 24. Saber responds that the First Amendment does not bar its

1 Lanham Act claim because *Spintires* is not an expressive work and, even if considered an  
2 expressive work, Oovee explicitly misleads consumers about Saber’s endorsement. Dkt. # 31 at  
3 7. Saber also contends that it has alleged sufficient facts to support its Lanham Act claim and  
4 survive Oovee’s Motion to Dismiss. *Id.* at 7, 25.

5 Section 43(a) of the Lanham Act provides a civil cause of action against:

6 (1) Any person who, on or in connection with any goods or services, or any  
7 container for goods, uses in commerce any word, term, name, symbol, or device,  
8 or any combination thereof, or any false designation of origin, false or misleading  
9 description of fact, or false or misleading representation of fact, which—

10 (A) is likely to cause confusion, or to cause mistake, or to deceive as to the  
11 affiliation, connection, or association of such person with another person,  
12 or as to the origin, sponsorship, or approval of his or her goods, services, or  
13 commercial activities by another person. . . .

14 15 U.S.C. § 1125(a)(1).

15 a. Oovee’s First Amendment Defense

16 Oovee says that the First Amendment bars Saber’s Lanham Act claim. Dkt. # 27 at 8.

17 Generally, courts apply the “likelihood-of-confusion test” when evaluating an  
18 infringement claim under the Lanham Act. *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 264  
19 (9th Cir. 2018) (citation omitted). But when “artistic expression is at issue,” the likelihood-of-  
20 confusion test “fails to account for the full weight of the public’s interest in free expression.”  
21 *VIP Prod. LLC v. Jack Daniel’s Properties, Inc.*, 953 F.3d 1170, 1174 (9th Cir. 2020) (quoting  
22 *id.*). “Section 43(a) protects the public’s interest in being free from consumer confusion about  
23 affiliations and endorsements, but this protection is limited by the First Amendment, particularly  
24 if the product involved is an expressive work.” *Brown*, 724 F.3d at 1239; *see also Mattel, Inc. v.*  
*MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (“Were we to ignore the expressive value

1 that some marks assume, trademark rights would grow to encroach upon the zone protected by  
2 the First Amendment.”).

3 Thus, when the alleged trademark infringement concerns artistic expression, courts in the  
4 Ninth Circuit apply the test set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), to  
5 balance the First Amendment interest in protecting artistic expression against the Lanham Act’s  
6 purpose in securing trademark rights. *See Mattel*, 296 F.3d at 902 (adopting the *Rogers* test);  
7 *Gordon*, 909 F.3d at 267 (noting that after *Mattel*, the court has “extended the *Rogers* test” to  
8 apply not only to the title of an expressive work, but also to the body of that work); *VIP*  
9 *Products*, 953 F.3d at 1174 (applying the *Rogers* test in a trade-dress infringement case); *E.S.S.*  
10 *Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).

11 “The *Rogers* test requires the defendant to make a threshold legal showing that its  
12 allegedly infringing use is part of an expressive work.” *Gordon*, 909 F.3d at 264. “If the  
13 defendant successfully makes that threshold showing, then the plaintiff claiming trademark  
14 infringement bears a heightened burden—the plaintiff must satisfy not only the likelihood-of-  
15 confusion test but also at least one of *Rogers*’s two prongs.” *Id.*; *see also VIP Products*, 953  
16 F.3d at 1174. The first prong asks whether the use of the trademark has some artistic relevance:  
17 “[T]he Lanham Act should not be applied to expressive works ‘unless the [use of the trademark  
18 or other identifying material] has no artistic relevance to the underlying work whatsoever.’”  
19 *Brown*, 724 F.3d at 1242 (alteration in original) (quoting *Rogers*, 875 F.2d at 999). The second  
20 prong asks whether the defendant’s use of the trademark “explicitly misleads as to the source or  
21 the content of the work.” *Id.*; *see also Rogers*, 875 F.2d at 1000 (“[T]he slight risk that . . . use  
22 of a celebrity’s name might implicitly suggest *endorsement or sponsorship* to some people is  
23



1 outweighed by the danger of restricting artistic expression, and [in cases where there is no  
2 explicit misleading] the Lanham Act is not applicable.” (emphasis added)).

3 i. Expressive Work

4 Before applying the *Rogers* test, the defendant bears the initial burden of demonstrating  
5 “that its allegedly infringing use is part of an expressive work protected by the First  
6 Amendment.” *Gordon*, 909 F.3d at 264. “In determining whether a work is expressive, we  
7 analyze whether the work is ‘communicating ideas or expressing points of view.’” *VIP*  
8 *Products*, 953 F.3d at 1174 (quoting *Mattel*, 296 F.3d at 900). A work need not be “the  
9 expressive equal of *Anna Karenina* or *Citizen Kane*” to merit consideration as an expressive  
10 work. *Brown*, 724 F.3d at 1241. And a work “is not rendered non-expressive simply because it  
11 is sold commercially.” *VIP Products*, 953 F.3d at 1175.

12 Oovee says that “[b]ecause it is a video game,” *Spintires* is a “highly expressive work.”  
13 Dkt. # 27 at 16. Saber responds that *Spintires* is not an expressive work because it does not  
14 “express ideas” or “social messages”; it has no characters, dialogue, or plot; and its music is  
15 “simplistic” and “simply background to the driving.” Dkt. # 31 at 18. Saber contends that “[t]he  
16 simulated world is generic and computer-generated,” and that “*Spintires* has no or minimal  
17 artistic expression.” Dkt. # 20 at 9.

18 Based on the SAC, the Court determines that *Spintires* is an expressive work. The  
19 Supreme Court has explained that “[l]ike the protected books, plays, and movies that preceded  
20 them, video games communicate ideas—and even social messages—through many familiar  
21 literary devices (such as characters, dialogue, plot, and music) and through features distinctive to  
22 the medium (such as the player’s interaction with the virtual world).” *Brown v. Entertainment*  
23 *Merchants Ass’n*, 564 U.S. 786, 789 (2011). Thus, “video games qualify for First Amendment

1 protection.” *Id.* Two years later, in *Brown v. Electronic Arts, Inc.*, the Ninth Circuit recognized  
2 that “there may be some work referred to as a ‘video game’ (or referred to as a ‘book,’ ‘play,’ or  
3 ‘movie’ for that matter) that does not contain enough of the elements contemplated by the  
4 Supreme Court to warrant First Amendment protection as an expressive work.” 724 F.3d at  
5 1241. While the Ninth Circuit declined to “draw a line between expressive video games and  
6 non-expressive video games,” it determined that an NFL football video game was an expressive  
7 work because it “features characters (players), dialogue (between announcers), plot (both within  
8 a particular simulated game and more broadly), and music. Interaction between the virtual world  
9 of the game and individuals playing the game is prevalent.” *Id.*

10 Oovee persuasively compares *Spintires* to the video game in *VIRAG, S.R.L. v. Sony*  
11 *Computer Entertainment America LLC*, in which the Ninth Circuit affirmed a district court’s  
12 determination that a racecar driving simulation video game contained expressive elements like  
13 “characters, plot, music, and extensive interactions between players and the games’ virtual  
14 world,” and was therefore an expressive work entitled to First Amendment protection. No. 3:15-  
15 cv-01729-LB, 2015 WL 5000102, at \*1 (N.D. Cal. Aug. 21, 2015), *aff’d*, 699 F. App’x 667, 668  
16 (9th Cir. 2017). In that case, the district court considered the racecar drivers to be the characters  
17 and the plot to be the drama of the races. 2015 WL 5000102, at \*8. Oovee says *Spintires* is like  
18 the game in *VIRAG* because it allows users to interact with the virtual world. Dkt. # 36 at 8–9.

19 Saber’s complaint states that “*Spintires* is an off-roading simulation that allows users to  
20 navigate a wilderness environment in particular vehicles,” that “*Spintires* allows a user to pick a  
21 vehicle and then drive it around in the simulated world,” and that it tries to “duplicate the real-  
22 world experience of driving a particular vehicle.” *Id.* at 9–10. Users interact with the virtual  
23 world by selecting a vehicle (which is like a character) and by navigating the virtual environment

1 (which is like a plot). These features render the work expressive, like the video games in *Brown*  
2 and *VIRAG*. See also *Novalogic, Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 898 (C.D. Cal.  
3 2013) (holding that the video game *Call of Duty* is an expressive work because the game features  
4 “distinctive characters,” requires that the players “interact with the virtual environment as they  
5 complete a series of combat missions,” and allows players to “control the fate of characters and  
6 the world they inhabit”).

7 Oovee has made a threshold legal showing that *Spintires* may be an expressive work.  
8 The burden shifts to Saber to overcome the *Rogers* test by satisfying either of the test’s two  
9 prongs.

10 ii. Artistic Relevance

11 To satisfy the first prong, Saber must show that the use of the K-700 has no artistic  
12 relevance to *Spintires*. See *Gordon*, 909 F.3d at 269. Under this prong “the level of artistic  
13 relevance of the trademark or other identifying material to the work merely must be above zero,”  
14 so “even the slightest artistic relevance” is sufficient. *Id.* at 1243, 1245 (citation omitted). While  
15 Saber says that “*Spintires* has no or minimal artistic expression,” it does not explain how  
16 Oovee’s use of the K-700 is artistically irrelevant. Dkt. # 31, at 11. Thus, the Court does not  
17 consider this prong.

18 iii. Explicitly Misleading

19 To satisfy the second prong of the *Rogers* test, Saber must show that Oovee’s use of the  
20 K-700 in *Spintires* “explicitly misleads” consumers about its source and to believe that PTZ or  
21 Saber endorsed or sponsored *Spintires*. “Even if the use of a trademark or other identifying  
22 material is artistically relevant to the expressive work, the creator of the expressive work can be  
23 subject to a Lanham Act claim if the creator uses the mark or material to ‘explicitly mislead[ ]

1 [consumers] as to the source or the content of the work.” *Brown*, 724 F.3d at 1245 (alterations  
2 in original) (quoting *Rogers*, 875 F.2d at 999). To satisfy this prong of the *Rogers* test, “[i]t is  
3 key here that the creator must *explicitly* mislead consumers.” *Id.* Explicitly misleading “is a high  
4 bar that requires the use to be an explicit indication, overt claim, or explicit misstatement about  
5 the source of the work.” *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 462 (9th Cir.  
6 2020) (quotation marks omitted) (quoting *Brown*, 724 F.3d at 1245); *Twentieth Century Fox*  
7 *Television v. Empire Distribution, Inc.*, 875 F.3d 1192, 1199 (9th Cir. 2017). Evidence of  
8 consumer confusion does not necessarily make a use explicitly misleading. *See Dr. Seuss*  
9 *Enters.*, 983 F.3d at 462.

10 Based on the facts as pleaded in the SAC, the Court concludes that Oovee did not  
11 explicitly mislead consumers. First, Saber argues that “[w]hen consumers play *Spintires*, they  
12 are likely to be confused as to whether PTZ has endorsed or sponsored or is associated with  
13 *Spintires*,” and that “[c]onsumers are also likely to be confused as to whether [Saber] has  
14 endorsed, owns, or sponsored *Spintires*.” Dkt. # 20 at 11, 13. Saber says that this confusion is  
15 created, at least in part, because “[c]onsumers . . . expect that actual vehicles featured in  
16 simulations are licensed.” Dkt. # 31 at 21. But alleging a likelihood of confusion does not  
17 necessarily suffice to show that Oovee “explicitly misled consumers” as to PTZ’s or Saber’s  
18 involvement or endorsement. Rather, this prong of the *Rogers* test requires the use to be an  
19 “explicit indication,” “overt claim,” or “explicit misstatement” about the source of the work.  
20 *Brown*, 724 F.3d at 1245 (quoting *Rogers*, 875 F.2d at 1001). Even if the public believes that  
21 vehicles in video games are typically licensed (potentially generating consumer confusion),  
22 Saber cannot satisfy this prong without pointing to an explicitly misleading statement. *Cf. id.*

1 (noting that this prong of the *Rogers* test is not satisfied even if “a majority of the public believes  
2 that identifying marks cannot be included in products without permission”).

3         Second, Saber argues that Oovee’s disclaimers misrepresented the company’s  
4 relationship with Saber, PTZ, and the K-700 vehicle. Dkt. ## 20 at 11; 31 at 21. In an  
5 advertisement for the “SHERP” vehicle (an all-terrain vehicle unaffiliated with the K-700, PTZ,  
6 or Saber), Oovee included the following disclaimer: “All other trademarks are the property of  
7 their respective owners. All characters and vehicles appearing in Spintires ® are fictitious  
8 (except where licensed). Any representations to real-life persons (living or dead), or real-world  
9 vehicle designs (except where licensed), is purely coincidental.” Dkt. # 20 at 11. Saber says that  
10 the disclaimer suggests that Oovee has “licensed any ‘real-world vehicle designs,’” and that this,  
11 in turn, inaccurately “conveys to consumers that PTZ endorsed the use of the K-700’s vehicle  
12 design.” Dkt. # 31 at 21.

13         But Saber misinterprets the language of the disclaimer. In the disclaimer, Oovee does *not*  
14 purport to have obtained a license for all “real-world vehicles.” To the contrary, the disclaimer  
15 expressly states that all vehicles appearing in the game are “fictitious” “*except where licensed*,”  
16 and that unless a vehicle is licensed, any similarity to a “real-world vehicle design . . . is purely  
17 coincidental.” Dkt. # 20 at 11 (emphasis added). Moreover, the disclaimer further notes that  
18 “SHERP is a registered trademark of Quadro International LLC and is being used under license.”  
19 *Id.* This shows that Oovee clearly indicates when a vehicle is licensed (like it did for the SHERP  
20 vehicle). Oovee’s failure to make a similar statement as to the K-700 vehicle suggests,  
21 consistent with its disclaimer that any similarity to a “real-world vehicle design . . . is purely  
22 coincidental” unless licensed, that any vehicle resembling the K-700 is *not* being used under  
23 license. To be sure, the disclaimer is far from a model of clarity. But it does not *explicitly*

1 mislead consumers into believing that Saber or PTZ is affiliated with *Spintires*. See *Brown*, 724  
2 F.3d at 1245 (requiring an “overt claim” or “explicit misstatement” about the source of the work  
3 to satisfy this prong of the *Rogers* test).

4 Third, Saber argues that Oovee misled consumers “by calling out the K-700, describing it  
5 by name, and showing it as distinct from the other vehicles” in a promotional video trailer,  
6 suggesting that Saber or PTZ endorses *Spintires*.<sup>2</sup> Dkt. ## 31 at 21–22; 20 at 10. But “use of a  
7 mark alone is not enough to satisfy this prong of the *Rogers* test.” *Brown*, 724 F.3d at 1245.  
8 Therefore, the mere fact that *Spintires* uses the K-700 name or includes the vehicle in the video  
9 game or its promotional materials is not sufficient.

10 In conclusion, Saber has not plausibly alleged that Oovee’s use of the K-700 mark or  
11 trade dress is explicitly misleading. See *Destefani v. Ubisoft Ent.*, No. 220CV10126FLAAFMX,  
12 2022 WL 649262, at \*5 (C.D. Cal. Jan. 10, 2022) (collecting trademark cases involving video  
13 games in which courts held that the trademark use was not explicitly misleading). The “explicitly  
14 misleading” standard is a “high bar” that is not overcome by the mere possibility of consumer  
15 confusion, and Saber has not cleared that bar with its second amended complaint. *Dr. Suess*  
16 *Enters.*, 983 F.3d at 462.

17 b. Trade Dress Infringement

18 Oovee argues that even if the First Amendment does not bar Saber’s Lanham Act claim,  
19 the Court should dismiss it for failure to state a claim for relief. Dkt. # 27 at 24. “Trade dress  
20 refers generally to the total image, design, and appearance of a product and ‘may include features  
21 such as size, shape, color, color combinations, texture or graphics.’” *Clicks Billiards*, 251 F.3d  
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23 <sup>2</sup> Oovee responds that the promotional video did not “‘describe by name’ each vehicle,” and that  
24 the “name of the vehicle is never shown nor spoken.” Dkt. # 27 at 21–22.

1 1252, 1257 (9th Cir. 2001) (quoting *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819,  
 2 822 (9th Cir.1993)). “To withstand a motion to dismiss an infringement claim under § 43(a) of  
 3 the Lanham Act—whether it be a trademark claim or a trade dress claim—a plaintiff must  
 4 identify the mark and allege three basic elements: (1) distinctiveness [or secondary meaning];  
 5 (2) nonfunctionality; and (3) likelihood of consumer confusion.” *RDF Media Ltd. v. Fox Broad.*  
 6 *Co.*, 372 F. Supp. 2d 556, 562 (C.D. Cal. 2005) (footnote omitted) (citing *Clicks Billiards*, 251  
 7 F.3d at 1258). Oovee says Saber does not allege sufficient facts to identify the trade dress, the  
 8 secondary meaning of the trade dress, and the non-functionality of the trade dress.<sup>3</sup> Dkt. # 27 at  
 9 25.

10 i. Identification of Trade Dress

11 As an initial matter, “[a] plaintiff should clearly articulate its claimed trade dress to give a  
 12 defendant sufficient notice.” *Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL  
 13 1881770, at \*3 (N.D. Cal. May 10, 2010). Oovee says Saber failed to identify the trade dress  
 14 with sufficient clarity, and that the trade dress is otherwise generic and ambiguous. Dkt. # 27 at  
 15 25–27.

16 In *Lepton Labs, LLC v. Walker*, the court found that a plaintiff’s list of nine website  
 17 features sufficed to allege a protectable trade dress. 55 F. Supp. 3d 1230, 1240 (C.D. Cal. 2014).  
 18 The court concluded that at the motion-to-dismiss stage, “[s]o long as a plaintiff has alleged a  
 19 complete recitation of the concrete elements of its alleged trade dress, it should be allowed to  
 20 proceed.” *Id.* In *Deckers Outdoor Corp. v. Fortune Dynamics, Inc.*, the court held that a  
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22 <sup>3</sup> While Oovee discusses Saber’s likelihood of confusion allegations in the context of the First  
 23 Amendment and *Rogers* test’s “explicitly misleading” prong, Oovee does not address those allegations  
 here.

1 description of a boot’s style and the placement of the boot’s panels, edges, lining, and buttons,  
2 paired with three images of the boot, was sufficient to describe the elements of the trade dress.  
3 No. CV 15-769 PSG (SSX), 2015 WL 12731929, at \*4 (C.D. Cal. May 8, 2015).

4 Saber identifies the K-700 trade dress as “the two discrete but connected tractor parts (a  
5 front and a back), the pair of distinctive large wheels for each part, the front part having a box  
6 cabin and the extended engine cover with grill-style grate, and the back part featuring mostly just  
7 the large pair of wheels.” Dkt. # 20 at 6. Saber also includes photographs of PTZ’s K-700, as  
8 well as *Mudrunner’s* and *Spintires’s* versions of the K-700. *Id.* at 6, 8–10. The combination of  
9 Saber’s photographs and the description of the K-700 suffice to put Oovee on notice of Saber’s  
10 trade dress claim and avoid dismissal on this basis.

11 ii. Distinctiveness and Secondary Meaning

12 Trade dress can be inherently distinctive or can acquire distinctiveness. *See Wal-Mart*  
13 *Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 210 (2000). “[A] mark is inherently distinctive if  
14 ‘[its] intrinsic nature serves to identify a particular source.’” *Id.* (quoting *Two Pesos, Inc. v.*  
15 *Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). “[A] mark has acquired distinctiveness, even if it  
16 is not inherently distinctive, if it has developed secondary meaning.” *Id.* at 211.

17 “A trade dress has acquired secondary meaning when consumers associate the design  
18 features with a particular producer.” *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 754  
19 (9th Cir. 2018). “Some of the relevant factors for determining secondary meaning include the  
20 exclusivity, manner, and length of use of the trade dress, the amount and manner of advertising,  
21 the amount of sales, and proof of intentional copying by the defendant.” *Id.* Whether the K-700  
22 is distinctive and obtained a secondary meaning involves a question of fact to be determined by a  
23



1 jury. *See Glassybaby, LLC v. Provide Gifts, Inc.*, No. C11-380 MJP, 2011 WL 2218583, at \*2  
2 (W.D. Wash. June 6, 2011).

3 Oovee argues that Saber “fails to allege *how* the generic features of ‘large wheels’, a ‘box  
4 cabin’ and ‘extended engine cover with grill-style grate’ have or could establish a secondary  
5 meaning,” and thus that Saber’s allegations are conclusory and insufficient. Dkt. # 27 at 27. But  
6 in addition to alleging that the K-700’s separate front and back tractor parts with large wheels,  
7 box cabin, and extended engine cover with a grate are distinctive characteristics that provide  
8 secondary meaning, Saber also alleges it acquired the secondary meaning “over time.” Dkt. # 20  
9 at 6. This suggests an extended “length of use” of the trade dress. *Adidas Am.*, 890 F.3d at 754.  
10 Saber also alleges that “[t]he popularity and success of the K-700 has led to several subsequent  
11 related models sharing a similar design. In fact, PTZ has always used the aforementioned  
12 distinctive, nonfunctional characteristics in the production of its tractors for the sole purpose of  
13 indicating its Kirovets brand.” *Id.* This indicates that the K-700 features plausibly serve to  
14 identify PTZ and Kirovets. Construing the facts presented in the SAC in the light most favorable  
15 to Saber, it has alleged sufficient facts to avoid dismissal based on distinctiveness and secondary  
16 meaning.

17 Oovee also argues that a trade dress must acquire its secondary meaning within the  
18 United States, which, it says, the K-700 has not done. Dkt. # 27 at 27. Oovee cites cases stating  
19 that a trademark is only entitled to protection in the geographic area in which it established a  
20 secondary meaning. *See Grupo Gigante S.A. de C.V. v. Dallo & Co., Inc.*, 391 F.3d 1088, 1096–  
21 97 (9th Cir. 2004); *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 987–88 (9th Cir. 1995). While Saber  
22 alleges “that PTZ expended significant resources to produce, market, and sell [K-700s]  
23 throughout the world,” Saber also alleges that “PTZ has been distributing K-700-style tractors to

1 consumers in the United States for more than a decade.” Dkt. # 20 at 5–6. Construing the facts  
2 in the SAC in the light most favorable to Saber, Saber has adequately pleaded that the K-700 has  
3 gained distinctiveness in the United States through PTZ’s distribution of them in the United  
4 States for decades.

5 iii. Functionality

6 “Trade dress protection extends only to design features that are nonfunctional.” *Clicks*  
7 *Billiards*, 251 F.3d at 1258. “A product feature is functional ‘if it is essential to the use or  
8 purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of  
9 the feature would put competitors at a significant non-reputation-related disadvantage.” *Disc*  
10 *Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998) (quoting *Qualitex*  
11 *Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995)). Courts “consider several factors in  
12 determining whether trade dress is functional: ‘(1) whether the design yields a utilitarian  
13 advantage, (2) whether alternative designs are available, (3) whether advertising touts the  
14 utilitarian advantages of the design, and (4) whether the particular design results from a  
15 comparatively simple or inexpensive method of manufacture.’” *Clicks Billiards*, 251 F.3d at  
16 1260 (quoting *Disc Golf*, 158 F.3d at 1006)). “In determining functionality, a product’s trade  
17 dress must be analyzed as a whole.” *Int’l Jensen*, 4 F.3d at 823.

18 Here, Saber asserts that the K-700’s nonfunctional features are the front and back tractor  
19 parts, large wheels, box cabin, and extended engine cover with a grate. Dkt. # 20 at 6. But Saber  
20 does not explain *how* these features are non-functional. It is unclear from the complaint whether  
21 the combination of identified features provide the K-700 with a “utilitarian advantage,” for  
22 example, or whether such features are ornamental and aesthetic. *Clicks Billiards*, 251 F.3d at  
23 1260. The complaint therefore provides little more than “a legal conclusion couched as a factual

1 allegation.” *Iqbal*, 556 U.S. at 678 (citation omitted); *see also id.* (“Threadbare recitals of the  
 2 elements of a cause of action, supported by mere conclusory statements, do not suffice.”). As the  
 3 court observed in *Glassybaby*, a plaintiff alleging trade dress infringement “must plead with at  
 4 least some detail what the purported design is and *how* it is nonfunctional.” 2011 WL 2218583,  
 5 at \*2 (emphasis added). And while functionality is a question of fact, *see Clicks Billiards*, 251  
 6 F.3d at 1258, Saber has pleaded no facts to create a “reasonable inference” that the identified  
 7 features are nonfunctional. *Iqbal*, 556 U.S. at 678. Because Saber cannot rely on “conclusory  
 8 statements,” and instead must plead with at least some detail as to functionality, it has not  
 9 satisfied Rule 12(b)(6) on this issue.<sup>4</sup> *Iqbal*, 556 U.S. at 678–79; *see also Glassybaby*, 2011 WL  
 10 2218583, at \*2.

### 11 3. Unfair Business Practice under the WCPA

12 Oovee says that if Saber’s Lanham Act claim fails on First Amendment grounds, its  
 13 WCPA claim necessarily fails, too. Dkt. # 27 at 12, 23–24. Saber’s WCPA claim is based on  
 14 the same theory of liability as its Lanham Act claim: that Oovee’s unauthorized use of Saber’s  
 15 trademark and trade dress is deceptive, and thus constitutes an unfair business practice under  
 16 both the Lanham Act and the WCPA. Because Saber’s Lanham Act claim fails under the *Rogers*  
 17 test, its WCPA claim also fails. *Cf. E.S.S.*, 547 F.3d at 1101 (dismissing claims brought under  
 18 California’s unfair-competition law because “the First Amendment defense applies equally to  
 19 [the plaintiff’s] state law claims as to its Lanham Act claim”); *Entrepreneur Media, Inc. v. Smith*,

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20  
 21 <sup>4</sup> Saber says that Oovee misrepresents the applicable test by relying on cases decided at the  
 22 summary judgment stage. Dkt. # 31 at 28. But Oovee cites *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*,  
 23 532 U.S. 23 (2001) and *Millennium Labs. v. Ameritox, Ltd.*, 817 F.3d 1123 (9th Cir. 2016) to state the  
 24 factors district courts consider when determining whether a feature is functional. Dkt. # 27 at 29–30.  
 And those factors are the same ones the court in *Glassybaby* explained that a plaintiff must allege to  
 survive a Rule 12(b)(6) motion to dismiss. 2011 WL 2218583 at \*2; *see also Kremerman v. Open Source  
 Steel, LLC*, No. C17-953-BAT, 2017 WL 3970894, at \*4 (W.D. Wash. Sept. 8, 2017).

1 279 F.3d 1135, 1153 (9th Cir. 2002); *Atlas Equip. Co., LLC v. Weir Supply Grp., Inc.*, No. C07-  
2 1358Z, 2009 WL 4670154, at \*16 (W.D. Wash. Sept. 15, 2009) (dismissing the plaintiff’s  
3 WCPA claim because it was “premise[d]” on the Lanham Act trade-dress infringement claim),  
4 *aff’d sub nom. Atlas Equip. Co. LLC v. Weir Mins. Australia Ltd.*, No. 09-36151, 2011 WL  
5 52455 (9th Cir. Jan. 6, 2011).

6 Washington courts have similarly dismissed claims brought under the WCPA when those  
7 claims would conflict with the First Amendment. In *State v. TVI, Inc.*, for example, the court  
8 held that the WCPA, as applied to the state’s attempted regulation of allegedly deceptive  
9 charitable solicitation, violates the First Amendment because it did not provide “sufficient  
10 breathing room for protecting speech.” 18 Wash. App. 2d 805, 824, 493 P.3d 763 (2021)  
11 (quoting *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 617 (2003)),  
12 *review granted*, 199 Wash. 2d 1005, 506 P.3d 642 (2022). Thus, the court dismissed the WCPA  
13 claims. *Id.*; see also *Washington League for Increased Transparency & Ethics v. Fox News*, 19  
14 Wash. App. 2d 1006 (2021) (unpublished) (holding that the First Amendment barred the  
15 plaintiff’s WCPA claim).

#### 16 4. Unjust Enrichment

17 To state a claim for unjust enrichment under Washington law, a plaintiff must allege:  
18 “(1) that [defendant] received a benefit, (2) at [plaintiff’s] expense, and (3) the circumstances  
19 make it unjust for [the defendant] to retain the benefit without payment.” *Cousineau v.*  
20 *Microsoft Corp.*, 992 F. Supp. 2d 1116, 1129 (W.D. Wash. 2012) (citing *Young v. Young*, 164  
21 Wash. 2d 477, 484–85 (2008)). Saber alleges that Oovee benefits from the “unauthorized use of  
22 the exclusively-licensed intellectual property.” Dkt. # 20 at 14. Saber says that “[w]hen a  
23 consumer purchases *Spintires*, Defendants profit financially from the unauthorized use of the

1 exclusively-licensed intellectual property that they wrongfully misappropriated and incorporated  
2 into *Spintires*.” *Id.* at 12.

3 But as Oovee observes, “[a] license is only required where the use would otherwise  
4 infringe the Plaintiff’s mark.” Dkt. # 27 at 31. Under the *Rogers* test, Oovee did not  
5 impermissibly infringe on Saber’s mark and trade dress. As a result, Oovee was not required to  
6 obtain a license. Thus, Oovee has not “received a benefit” at Saber’s expense under  
7 circumstances that would make it “unjust for [Oovee] to retain the benefit without payment.”  
8 *Cousineau*, 992 F. Supp. 2d at 1129 (citation omitted). Saber’s unjust-enrichment claim fails.  
9 *See Caiz v. Roberts*, 382 F. Supp. 3d 942, 952–53 (C.D. Cal. 2019) (dismissing the plaintiff’s  
10 Lanham Act claim under the *Rogers* test, and then dismissing the plaintiff’s unjust-enrichment  
11 claim because that claim “was dependent on a finding of infringement of a protectable mark”).

12 5. Leave to Amend

13 Saber requests that, if the Court dismisses its complaint for failure to state a claim, the  
14 Court grant it leave to amend. Dkt. # 31 at 29. “If a complaint is dismissed for failure to state a  
15 claim, leave to amend should be granted unless the court determines that the allegation of other  
16 facts consistent with the challenged pleading could not possibly cure the deficiency.” *Schreiber*  
17 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also* Fed. R.  
18 Civ. P. 15(a)(2) (“[A] party may amend its pleading only with . . . the court’s leave. The court  
19 should freely give leave when justice so requires.”). Because Saber could cure its claims by  
20 alleging other facts, the Court grants leave to amend.

21 B. Saber’s Motion for Leave to File TAC

22 After Oovee moved to dismiss the SAC (Dkt. # 27), Saber moved for leave to file a TAC  
23 (Dkt. # 37) under Rule 15(a)(2). Saber seeks to add claims for defamation and tortious

1 interference. Dkt. # 37 at 2. Saber alleges that Oovee published a press release titled “Indie  
2 Gaming Developers Increasingly at Risk of Losing IP to Ruthless Industry Giants,” that Oovee  
3 “falsely claim[ed] that Saber stole Oovee’s intellectual property,” and that Oovee’s statements  
4 made Saber look like a “bully.” *Id.*

5 1. Rule 15

6 Oovee argues that “although titled as a motion seeking leave to amend, Plaintiff is really  
7 seeking leave to supplement its SAC pursuant to [Rule] 15(d).” Dkt. # 40 at 8. Oovee asks the  
8 Court to treat Saber’s Motion for Leave to File TAC as a motion to supplement under  
9 Rule 15(d)—not a motion to amend under Rule 15(a)—and deny it because the newly asserted  
10 claims do not share the same concern as or focal point to the claims asserted in the SAC. Dkt.  
11 # 40 at 10–12.

12 Rule 15(a) governs amended pleadings. Rule 15(a)(2) provides that “a party may amend  
13 its pleading only with the opposing party’s written consent or the court’s leave. The court should  
14 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). “In general, a court should  
15 liberally allow a party to amend its pleading.” *Sonoma Cty. Ass’n of Retired Emps. v. Sonoma*  
16 *Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). A court may deny a motion for leave to amend “only  
17 if there is strong evidence of ‘undue delay, bad faith or dilatory motive on the part of the movant,  
18 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the  
19 opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.’” *Id.*  
20 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

21 Rule 15(d) governs supplemental pleadings. Under Rule 15(d), “[o]n motion and  
22 reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading  
23 setting out any transaction, occurrence, or event that happened after the date of the pleading to be

1 supplemented.” Fed. R. Civ. P. 15(d). Rule 15(d) operates much like Rule 15(a), and “the  
2 standard for Rule 15(d) supplementation and Rule 15(a) amendment are the same.” *Acosta v.*  
3 *Austin Elec. Servs. LLC*, 325 F.R.D. 325, 330 (D. Ariz. 2018); *see also Yates v. Auto City 76*,  
4 299 F.R.D. 611, 614 n.4 (N.D. Cal. 2013) (noting that several circuit courts have “analogized”  
5 the standard applied under Rule 15(d) to the Rule 15(a) standard). “While some relationship  
6 must exist between the newly alleged matters and the subject of the original action, they need not  
7 all arise out of the same transaction.” *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988). Courts  
8 permit parties to bring “new claims in a supplemental complaint to promote the economical and  
9 speedy disposition of the controversy.” *Id.* at 473. Thus, “[w]hile the matters stated in a  
10 supplemental complaint should have some relation to the claim set forth in the original pleading,  
11 the fact that the supplemental pleading technically states a new cause of action should not be a  
12 bar to its allowance.” *Id.* at 474 (quoting 3 J. Moore, *Moore’s Federal Practice* ¶ 15.16[3]  
13 (1985)). And because Rule 15(d) “is a tool of judicial economy and convenience,” its “use is  
14 therefore favored.” *Id.* at 473.

15 The Court agrees with Oovee that the pleading is more appropriately labeled as a Rule  
16 15(d) supplemental pleading because it concerns an “event that happened after the date of the  
17 pleading.” Fed. R. Civ. P. 15(d). But whether Saber’s new claims are evaluated under Rule 15(a)  
18 or Rule 15(d) makes no difference: Under either rule, Saber may assert the defamation and  
19 tortious-interference claims. Oovee does not contend that Saber’s actions led to undue delay,<sup>5</sup>  
20 that Saber proposed the amendment or supplementation in bad faith, that Saber failed to cure  
21 deficiencies, or that the amendment or supplementation would be unduly prejudicial or futile.

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23 <sup>5</sup> Saber alleges Defendants released the press release on or about June 12, 2022. Dkt. # 37-1 at  
24 15. Saber filed the motion to file an amended complaint four days later, on June 16. Dkt. # 37.  
AMENDED ORDER RE: DEFENDANT OOVEE LTD.’S  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT AND  
PLAINTIFF SABER INTERACTIVE INC.’S  
MOTION TO FILE THIRD AMENDED COMPLAINT - 23

1 See *Sonoma Cty. Ass'n of Retired Emps.*, 708 F.3d at 1117; *Lyon v. U.S. Immigr. & Customs*  
2 *Enft*, 308 F.R.D. 203, 215 (N.D. Cal. 2015) (“Absent prejudice or a ‘strong showing’ of any  
3 other *Foman* factor, there is a presumption in favor of granting leave to supplement.”  
4 (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003))).  
5 Moreover, there is at least “some relation to the claim[s] set forth in the original pleading.”  
6 *Keith*, 858 F.2d at 474 (citation omitted). The allegedly defamatory statements at the center of  
7 Saber’s new claims are about this very litigation. That “the supplemental pleading technically  
8 states a new cause of action should not be a bar to its allowance.” *Id.* (citation omitted). And the  
9 interests of judicial economy favor allowing Saber to raise these claims: Discovery has not  
10 started, the claims are related, and there is no reason to require the new claims to proceed in a  
11 separate lawsuit.

12 Oovee also argues the Court should deny the motion because Saber is seeking relief on  
13 the same claims in the United Kingdom (UK). Dkt. # 40 at 12–13. Oovee alleges that Saber  
14 sought pre-litigation discovery and served Oovee with a “Letter of Claim” in the UK. *Id.* at 13.  
15 It says that a “‘Letter of Claim’ is the first step for initiating a UK proceeding for defamation  
16 claims under the Pre-Action Protocol for Media Communications Claims.” *Id.* at 9, 13. Oovee’s  
17 UK counsel declared that Saber’s Letter of Claim “alleges that certain statements and a press  
18 release sent by Oovee and/or its representatives to Eurogamer, a UK-based online publication,  
19 violated UK law against defamation, malicious falsehood, breach of confidence, and  
20 conspiracy.” Dkt. # 41 at 2.

21 The only legal authority Oovee cites to support this argument is *In re Exxon Valdez*, 318  
22 F. App’x 545, 547 (9th Cir. 2009). In that case, the Ninth Circuit explained that while courts  
23 favor granting leave to permit supplemental pleadings, a party cannot use Rule 15(d) “to



1 introduce separate, distinct, and new cause[s] of action.” *Id.* (quoting *Planned Parenthood of S.*  
2 *Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir.1997)). It determined that the district court did not  
3 abuse its discretion in denying the defendant leave to supplement its answer with a counterclaim  
4 because that claim could have been subject to a separate action as evidenced by the fact that it  
5 was already subject to a separate, pending appeal in the same court. *Id.*

6 Oovee argues that, like in *Exxon*, “not only could Plaintiff’s putative defamation and  
7 tortious interference claims be the subject of a separate action, but it appears that Plaintiff has  
8 already initiated filing such an action in the UK.” Dkt. # 40 at 13. But *Exxon* involved two  
9 concurrent suits filed in U.S. courts, both of which were appealed to the Ninth Circuit. By  
10 contrast, Oovee objects to Saber’s new claims because they may one day be litigated in the UK.<sup>6</sup>  
11 While supplementing the pleadings in *Exxon* would have been duplicative and wasteful of  
12 judicial resources (because another U.S. court applying the same body of substantive law had  
13 already addressed the claims), the Court has been given no reason to believe that the same is true  
14 here. Oovee has not shown, for example, that the scope of the claims in the UK and the United  
15 States are coextensive with one another, or that UK and United States law treat such claims the  
16 same. Thus, Oovee has not demonstrated why Saber’s new defamation and tortious-interference  
17 claims cannot proceed in both the UK and the United States. Oovee may pursue similar comity-

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23 <sup>6</sup> The declaration submitted by Oovee’s UK counsel indicates only that Saber sent Oovee a  
“Letter of Claim.” Dkt. # 41, at 2. While this may be the “first step” for initiating litigation in the UK,  
*id.*, the declaration does not suggest that a Letter of Claim represents the formal start to litigation.

1 based arguments in a subsequent pleading or motion to dismiss, but these arguments do not  
2 support denying Saber the opportunity to plead its claims.

3 2. Personal Jurisdiction

4 “Personal jurisdiction must exist for each claim asserted against a defendant.” *Action*  
5 *Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). The Ninth  
6 Circuit has adopted the doctrine of pendent personal jurisdiction. *Id.* at 1181. “[A] court may  
7 assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no  
8 independent basis of personal jurisdiction so long as it arises out of a common nucleus of  
9 operative facts with a claim in the same suit over which the court does have personal  
10 jurisdiction.” *Id.* at 1180.

11 Here, Oovee argues that if the Court grants its motion to dismiss (presumably with  
12 prejudice), the Court should deny Saber’s Motion for Leave to File TAC for lack of personal  
13 jurisdiction. Oovee argues that Saber does not provide an independent basis for personal  
14 jurisdiction as to its potential new claims, and that, if Saber’s other claims are dismissed, there  
15 would be no “anchor” claim that could provide the basis for the exercise of pendent jurisdiction  
16 over the new claims. But because the Court is dismissing the claims in the SAC without  
17 prejudice, and granting leave to amend, this argument does not apply. Because Oovee does not  
18 contest that the Court has personal jurisdiction over the original claims, the Court may exercise  
19 pendent personal jurisdiction as to the new claims.

IV.

CONCLUSION

Based on the above, the Court (1) GRANTS the Motion to Dismiss and DISMISSES Saber’s Lanham Act, WCPA, and unjust enrichment claims without prejudice;<sup>7</sup> (2) GRANTS Saber leave to amend its complaint; and (3) GRANTS the Motion for Leave to File TAC. Saber must include all claims—including any amendments to its original claims, as well as the new claims included in its proposed TAC—in a single, third amended complaint filed no later than October 26, 2022. In light of this amended order, the Court DENIES Saber’s motion for reconsideration, *see* Dkt. # 47, as moot.

Dated this 6th day of October, 2022.



John H. Chun  
United States District Judge

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<sup>7</sup> In its Motion to Dismiss, Oovee asks the Court to consider documents outside Saber’s Second Amended Complaint. Dkt. # 27 at 12. Specifically, Oovee submits current and previous copies of *Spintires* (Dkt. # 19) and a Declaration of Michael E. Chait (Dkt. # 19) summarizing the versions of the game, as well as a copy of a *Spintires* promotional video trailer (Dkt. # 25) and a Declaration of Chait with exhibits summarizing the trailer (Dkt. # 28). Dkt. # 27 at 12. Saber moves to strike the two Chait declarations and their attachments, and the portions of Oovee’s Motion to Dismiss that rely on those materials. Dkt. # 31 at 13–14. Because the Court need not, and did not, consider those materials in ruling on the motion to dismiss, the Court denies Saber’s request to strike as moot.

In opposition to Oovee’s Motion to Dismiss, Saber submits supplemental authority (Dkt. # 38) and asks the Court to take judicial notice of Defendant Zane Andrew Saxton’s certificate (Dkt. # 39). Oovee asks the Court to strike both. Dkt. # 42. Again, the Court did not consider those materials, and denies Oovee’s request to strike as moot.