

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DENIZ BOLBOL and JOSEPH CUVIELLO, )  
INDIVIDUALLY, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
FELD ENTERTAINMENT, INC. (dba )  
RINGLING BROS. and BARNUM & BAILEY )  
CIRCUS); JAMES DENNIS; MATTHEW )  
GILLET; and DOES 1-10, )  
 )  
Defendants. )

Case No.: C 11-5539 PSG  
**ORDER RE PLAINTIFFS' MOTION  
TO AMEND SCHEDULING ORDER**  
**(Re: Docket No. 109)**

Plaintiffs Deniz Bolbol and Joseph CuvIELLO ("Plaintiffs") move for relief from having to respond to the motion for summary judgment filed by Defendants Feld Entertainment, Inc., et al ("Feld").<sup>1</sup> Plaintiffs also seek leave to move to amend the scheduling order issued by this court on December 9, 2011.<sup>2</sup>

The court first must address the nature of Plaintiffs' motion. As titled, Plaintiffs filed an ex parte motion to "stay their time for opposing, or in the alternative grant relief from opposing,

<sup>1</sup> See Docket No. 109.

<sup>2</sup> See *id.*

1 Feld's motion for summary judgment, and request for leave to file motion to modify the scheduling  
2 order."<sup>3</sup> Feld seeks the court to disregard Plaintiffs' motion in light of its procedural defects,  
3 namely Plaintiffs' failure to cite any authority justifying an ex parte motion and their failure to  
4 properly notice their motion.<sup>4</sup> Although Plaintiffs' motion is problematic, the court nevertheless  
5 construes it as a motion to amend the scheduling order regarding the deadline for a dispositive  
6 motions hearing and the deadline for discovery.<sup>5</sup>

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8 The scheduling order currently sets December 18, 2012 as the deadline for a hearing on  
9 dispositive motions and sets trial for February 19, 2013.<sup>6</sup> Fact discovery closed August 31, 2012  
10 and expert discovery closed November 2, 2012.<sup>7</sup> In compliance with the scheduling order, Feld  
11 filed a motion for summary judgment on November 13, 2012 with a hearing date set for December  
12 18, 2012.<sup>8</sup> On November 15, 2012, the court issued its decision granting Plaintiffs leave to amend  
13 and file a Third Amended Complaint and denying Feld's second motion to dismiss as moot.<sup>9</sup> The  
14 court gave Plaintiffs seven days from the issuance of the order to file a TAC in compliance with its  
15 directives.<sup>10</sup> Because of the recent Thanksgiving holiday, Plaintiffs' TAC was due November 26,  
16 2012,<sup>11</sup> and they filed their TAC on that date.<sup>12</sup>

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19 <sup>3</sup> See Docket No. 109.

20 <sup>4</sup> See Docket No. 111.

21 <sup>5</sup> Cf. *Foti v. Wilson*, Case No. 96-3054 TEH, 1997 WL 118357, at \*1 (N.D. Cal. Mar. 5, 1997).

22 <sup>6</sup> See Docket No. 15.

23 <sup>7</sup> See *id.*

24 <sup>8</sup> See Docket No. 101.

25 <sup>9</sup> See Docket No. 107.

26 <sup>10</sup> See *id.*

27 <sup>11</sup> See Fed. R. Civ. P. 6.

28 <sup>12</sup> See Docket No. 110.

1 Plaintiffs now seek relief from having to oppose Feld's motion for summary judgment, the  
2 deadline for which is November 27, 2012. Plaintiffs argue that Feld's motion is based on the  
3 earlier Second Amended Complaint (“SAC”) and is mooted by the November 15 order allowing  
4 Plaintiffs to file a TAC.<sup>13</sup> Feld’s motion in fact addresses both Plaintiffs’ SAC and Plaintiffs’  
5 proposed TAC but not the TAC the court gave Plaintiffs leave to file.<sup>14</sup> Feld responds that  
6 although its motion may be broader than necessary because the motion addresses Plaintiffs’  
7 proposed TAC, the motion nevertheless addresses the causes of action and allegations the court  
8 permitted Plaintiffs to add to the TAC.<sup>15</sup>

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10 An amended complaint “supersedes the original, the latter being treated thereafter as non-  
11 existent.”<sup>16</sup> The TAC Plaintiffs filed on November 26, 2012, therefore, is the operative complaint.  
12 Feld’s motion for summary judgment on either the SAC or the proposed TAC thus is moot because  
13 it fails to address the operative complaint. Because Feld’s motion was mooted by this court’s  
14 November 15 order permitting Plaintiffs to file the TAC by November 26, 2012, the court finds  
15 good cause to amend the deadline for the dispositive motions hearing. The court moves the  
16 deadline from December 18, 2012 to January 22, 2013. This new deadline gives Feld at least two  
17 weeks from the filing of Plaintiffs' TAC to file a new motion for summary judgment and still  
18 calendar the hearing for January 22, 2013.

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20 As to Plaintiffs' motion for leave to amend the scheduling order regarding discovery, the  
21 court does not find that Plaintiffs have exhibited good cause to change the deadlines. Fed. R. Civ.  
22 P. 16 requires a party seeking amendment of a scheduling order to show “good cause.”<sup>17</sup> To  
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24 <sup>13</sup> See Docket No. 109.

25 <sup>14</sup> See Docket No. 101.

26 <sup>15</sup> See Docket No. 111.

27 <sup>16</sup> *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011).  
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1 determine whether good cause exists, the court looks primarily to whether the moving party has  
2 been diligent in seeking the amendment, and if so, whether amending the order will prejudice the  
3 non-moving party.<sup>18</sup>

4 Plaintiffs point to the “volatility” of the pleadings and the fact that the court granted leave  
5 to amend their complaint to include events occurring “merely three weeks before the discovery  
6 deadline” to support amending the scheduling order.<sup>19</sup> They also point to Feld's position at the  
7 December 6, 2011 case management conference that discovery should not be taken until the court  
8 ruled on Feld’s first motion to dismiss to suggest that Feld’s position aligns with Plaintiffs’.<sup>20</sup>

9  
10 Plaintiffs disregard the June 4, 2012 order on Feld's first motion to dismiss in which the  
11 court denied Feld's motion with regards to two of Plaintiffs’ claims and permitted Plaintiffs to  
12 amend their complaint to attempt to correct the defects the court identified.<sup>21</sup> Plaintiffs had notice  
13 more than two months before fact discovery closed that they would have to proceed on at least two  
14 of their claims to at least the dispositive motion stage. They have provided no good reason why  
15 they failed to pursue discovery for those two claims or failed to move the court earlier to amend the  
16 scheduling order. In light of Plaintiffs’ previous references to the possibility of changing the trial  
17 date and the scheduling order in motion papers and at their last hearing,<sup>22</sup> they cannot claim now  
18 that they were surprised by the impending deadlines in this case.  
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20 As to the more recent allegations, again Plaintiffs never sought to amend the scheduling  
21 order to permit late discovery of those allegations. Although they may not have known whether  
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23 <sup>17</sup> See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

24 <sup>18</sup> See *Adobe Systems Inc. v. Coffee Cup Partners, Inc.*, Case No. C 11-2243 CW, 2012 WL  
3877783, at \*6 (N.D. Cal. Sept. 6, 2012).

25 <sup>19</sup> See Docket No. 109.

26 <sup>20</sup> See *id.*

27 <sup>21</sup> See Docket No. 43.

28 <sup>22</sup> See Docket No. 89, 95.

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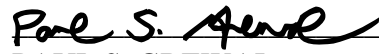
the court would permit the addition of those allegations, Plaintiffs were the parties seeking to include these later allegations and so it was their obligation to move the court to allow late discovery if necessary. Plaintiffs' current motion - over three months after the alleged confrontations took place and more than two months after Plaintiffs sought to amend their complaint - does not exhibit the diligence required by Rule 16.

Because they failed to show the diligence necessary to support amending the scheduling order under Rule 16, Plaintiffs' motion to amend the scheduling order to allow late discovery is DENIED. Accordingly,

IT IS HEREBY ORDERED that the deadline for a hearing on dispositive motions for this case shall be amended from December 18, 2012 to January 22, 2013.

**IT IS SO ORDERED.**

Dated: November 27, 2012

  
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PAUL S. GREWAL  
United States Magistrate Judge