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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SUMOTEXT CORP.,
Plaintiff,
v.
ZOOVE, INC., et al.,
Defendants.

Case No. 16-cv-01370-BLF

**ORDER VACATING HEARING ON
SUMOTEXT’S MOTION FOR LEAVE
TO FILE FOURTH AMENDED
COMPLAINT; DENYING MOTION;
AND DIRECTING SUMOTEXT TO
FILE UNREDACTED AND REDACTED
VERSIONS OF ITS OPERATIVE
THIRD AMENDED COMPLAINT
SEPARATELY IN THE DOCKET**

[Re: ECF 186]

Plaintiff Sumotext Corporation (“Sumotext”) has filed a Motion for Leave to File Fourth Amended Complaint which is set for hearing on September 28, 2017. *See* Motion for Leave, ECF 186. The motion is hereby SUBMITTED without oral argument and the hearing date is VACATED. *See* Civ. L.R. 7-1(b). The motion is DENIED for the reasons discussed below.

In reviewing the record, the Court discovered that Sumotext’s operative third amended complaint is not filed separately; it appears only as an exhibit to Sumotext’s Administrative Motion to File Documents Under Seal. *See* Admin. Motion, ECF 185. For the sake of clarity, Sumotext is DIRECTED to file unredacted and redacted versions of its third amended complaint separately in the docket.

I. BACKGROUND

The facts of this case are well-known to the parties and need to be repeated in full here. In brief, the action involves the rights to operate StarStar numbers, which are vanity mobile dial codes such as “**LAW” and “**MOVE.” Prior to this litigation, Sumotext leased numerous StarStar numbers from Defendant Zoove, Inc. (“Zoove”), now doing business as “StarStar Mobile.” Zoove has exclusive rights to operate StarStar numbers for AT&T, Verizon Wireless,

1 T-Mobile, and Sprint. Sumotext built a business around subleasing the StarStar numbers to
2 customers while also providing additional services to those customers.

3 Sumotext alleges that the following entities violated state and federal laws in an effort to
4 force Sumotext out of the StarStar market: Zoove, Mblox, Inc. (“Mblox”), Virtual Hold
5 Technology, LLC (“VHT”), StarSteve LLC (“StarSteve), and VHT StarStar LLC (“VHT
6 StarStar”). *See* Third Am’d Compl., ECF 185-4. On August 1, 2017, following dismissal of its
7 second amended complaint with leave to amend, Sumotext submitted both a third amended
8 complaint and the current motion for leave to file a fourth amended complaint.

9 Sumotext asserts the following claims in its operative third amended complaint: (1) breach
10 of contract against Zoove; (2) breach of the implied covenant of good faith and fair dealing against
11 Zoove; (3) tortious interference with contract against VHT, StarSteve, and VHT StarStar; (4)
12 restraint of trade in violation of the Sherman Act § 1 against VHT, StarSteve, VHT StarStar,
13 Zoove, and Mblox; and (5) conspiracy to monopolize and monopolization in violation of the
14 Sherman Act § 2 against VHT, StarSteve, VHT StarStar, Zoove, and Mblox. *Id.* Sumotext also
15 seeks leave to add four individual defendants to those claims: Steve Doumar (“Doumar”),
16 President of Zoove, StarSteve, and VHT StarStar; Wes Hayden (“Hayden”), Chief Executive
17 Officer (“CEO”) of VHT, VHT StarStar, Zoove, and StarStar Mobile; Greg Garvey (“Garvey”),
18 Chairman of the Board of Directors of VHT, VHT StarStar, Zoove, and StarStar Mobile; and Tom
19 Cotney (“Cotney”), CEO of Mblox and Zoove. *See* Motion for Leave, ECF 186.

20 Defendants moved to strike Sumotext’s motion for leave to file a fourth amended
21 complaint, asserting that it was unfair to require them to file motions to dismiss the third amended
22 complaint and then potentially motions to dismiss the fourth amended complaint if leave to amend
23 were granted. *See* Motion to Strike, ECF 188. The Court held a Case Management Conference on
24 August 17, 2017 to address the scheduling issues raised by Sumotext’s simultaneous filing of its
25 third amended complaint and request for leave to file a fourth amended complaint. *See* Minute
26 Entry, ECF 198. The Court stayed Defendants’ obligation to respond to the third amended
27 complaint pending a ruling on Sumotext’s motion for leave to file a fourth amended complaint.
28 *Id.* Based on that ruling, Defendants withdrew their motion to strike. *Id.*

1 **II. LEGAL STANDARD**

2 A party seeking to amend a pleading after the date specified in a scheduling order must
3 demonstrate “good cause” for the amendment under Federal Rule of Civil Procedure 16(b).
4 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). “Unlike Rule
5 15(a)’s liberal amendment policy which focuses on the bad faith of the party seeking to interpose
6 an amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good cause’ standard
7 primarily considers the diligence of the party seeking the amendment.” *Id.* at 609. “The district
8 court may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the
9 party seeking the extension.” *Id.* (internal quotation marks and citation omitted).

10 If good cause is found, “the Court may then consider whether leave to amend should be
11 granted pursuant to Rule 15(a).” *Thomas v. San Francisco Travel Ass’n*, Case No. 14-cv-03043-
12 YGR, 2016 WL 861239, at *2 (N.D. Cal. March 7, 2016). “While leave to amend under Rule
13 15(a) is liberally granted, the Court still must evaluate whether there has been undue delay, bad
14 faith, or a dilatory motive; repeated failure to cure deficiencies; prejudice to the defendant; or if
15 the amendment would be futile.” *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

16 **III. DISCUSSION**

17 As Sumotext acknowledges, the stipulated scheduling order in this case set March 17, 2017
18 as the deadline to amend pleadings or add parties. Stipulated Schedule and Order, ECF 118.
19 Accordingly, Sumotext must show that good cause exists for modification of the scheduling order
20 and, if good cause is shown, that amendment is warranted under the *Foman* factors listed above.

21 Sumotext seeks leave to add four individual defendants: Doumar, Hayden, Garvey, and
22 Cotney.¹ Sumotext does not claim prior ignorance regarding those individuals’ identities or roles
23 in the events giving rise to its claims. In fact, all four are identified by name in Sumotext’s
24 original complaint, first amended complaint, and second amended complaint, which were filed
25

26 ¹ Sumotext states in its motion that it seeks to add four individual defendants *and* to remove two
27 antitrust claims. Motion for Leave at 2, ECF 186. However, the operative third amended
28 complaint omitted the two antitrust claims in question. Third Am’d Compl., ECF 185-4.
Consequently, the only issue presented by Sumotext’s motion is whether Sumotext should be
granted leave to add the four individual defendants.

1 before the March 17, 2017 deadline for amendment. *See* Compl., ECF 1; First Am'd Compl., ECF
2 50; Second Am'd Compl., ECF 124. Specifics regarding the individuals' conduct are alleged in
3 those prior pleadings. *See, e.g.*, Second Am'd Compl. ¶¶ 71, 78, 82, 113 (alleging that Doumar
4 engaged in "illegal endeavor," used "false pretenses," "misrepresented" facts, and "pressured"
5 StarStar customers); Second Am'd Compl. ¶¶ 97, 98, 100, 103, 113, 212 (describing Hayden's
6 efforts to prevent contractual protection for Sumotext and to pressure StarStar customers); Am'd
7 Compl. ¶ 248, 249 (alleging that VHT's conduct was "willfully and intentionally directed" by
8 Garvey); Am'd Compl. ¶¶ 185-190 (alleging Cotney's knowledge of corporate defendants' intent
9 to force Sumotext out of market, quoting Cotney as saying he would have preferred to keep that
10 "cat in the bag," and stating that Defendant Mblox's actions "were willfully and intentionally
11 directed by its President and CEO Tom Cotney").

12 In light of its prior allegations, Sumotext does not (and could not) argue that its proposed
13 claims against the individuals arise from new information. Indeed, it appears that documents
14 attached as exhibits to the proposed fourth amended complaint in support of Sumotext's claims
15 was produced to Sumotext in 2015 and 2016. *See* Noorossadat Torabi Decl. ¶¶ 2-5, ECF 210.
16 Sumotext does not submit any affidavits explaining what prevented it from adding the individual
17 defendants when it amended its pleading to add corporate defendant VHT StarStar in January
18 2017. Nor does it appear that any such affidavit could be factually supported. Sumotext concedes
19 in its motion that "these four individual parties [] were named in the allegations, although not as
20 parties, in the prior complaints." Motion for Leave at 4, ECF 186. That Sumotext chose not to
21 sue the individuals then, but wishes to do so now, does not satisfy Rule 16. *See, e.g., Gomez v.*
22 *Great Am. Plumbing Co., Inc.*, No. 5:15-CV-02465-EJD, 2016 WL 3194363, at *2 (N.D. Cal.
23 June 9, 2016) (Rule 16 not satisfied where plaintiffs failed to explain why they waited several
24 months before seeking to add individual as a defendant despite knowledge that individual was
25 part-owner of corporate defendant); *Felarca v. Birgeneau*, No. 11-CV-05719-YGR, 2016 WL
26 730069, at *2 (N.D. Cal. Feb. 24, 2016) (Rule 16 not satisfied where evidence giving rise to
27 claims against corporate officers was provided to plaintiffs six months to a year before they filed
28 motion for leave to amend).

