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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THE BEST LABEL COMPANY, LLC,  
Plaintiff,  
v.  
CUSTOM LABEL & DECAL, LLC, et al.,  
Defendants.

Case No. 19-CV-03051-LHK

**ORDER DENYING PLAINTIFF'S  
MOTION TO SUBSTITUTE PARTY  
AND FOR LEAVE TO FILE FIRST  
AMENDED COMPLAINT**

Re: Dkt. No. 110

Before the Court is Plaintiff The Best Label Company, LLC’s motion to substitute Resource Label Group, LLC (“RLG”) as plaintiff and motion for leave to file a first amended complaint. ECF No. 110 (“Mot.”). Having considered the parties’ submissions, the relevant law, and the record in this case, the Court DENIES Plaintiff’s motion to substitute plaintiff and for leave to file a first amended complaint.

**I. BACKGROUND**

**A. Factual Background**

The Best Label Company, LLC is a custom label maker. ECF No. 1-1, at 3 (“Compl.”). In November of 2018, The Best Label Company, LLC (“Plaintiff”) acquired Best Label Company

1 Inc. and thus acquired all of Best Label Company Inc.’s intellectual property, confidential  
2 information, assignments, and contractual rights. *Id.* Hereafter, the Court refers to the acquired  
3 company, Best Label Company Inc., as “Best Label.”

4 Defendant Daniel Crammer (“Crammer”) was employed at Best Label prior to the sale of  
5 the company to Plaintiff. After the sale, Crammer sought employment with Defendant Custom  
6 Label & Decal, LLC (“Custom Label”). Plaintiff alleges that before Crammer resigned from  
7 Plaintiff and joined Custom Label, Crammer engaged in several wrongful acts, including (1)  
8 soliciting Best Label employees to leave and join Custom Label; (2) taking confidential company  
9 information; and (3) taking a company laptop. *Id.*

10 Plaintiff alleges that Defendant Scott McKean (“McKean”) became an employee of  
11 Plaintiff after the acquisition of Best Label, but then left to join Custom Label. *Id.* at 4. Plaintiff  
12 alleges that McKean engaged in several wrongful acts after leaving Plaintiff, including making  
13 false statements to Plaintiff’s prospective and current customers and attempting to “pass off”  
14 Custom Label as Plaintiff. *Id.* Plaintiff alleges that Defendant Gareth Cole (“Cole”), another  
15 former employee of Plaintiff, engaged in similar unlawful acts after leaving employment at  
16 Plaintiff to work at Custom Label. *Id.* Plaintiff also alleges that Defendant Travis Gilkey  
17 (“Gilkey”), a former General Manager at Best Label, assisted Crammer, Cole, and McKean in  
18 their misconduct. *Id.* at 5.

19 Finally, Plaintiff alleges that on September 30, 2019, after the commencement of the  
20 instant case, Plaintiff merged with RLG, a Delaware limited liability company. *Mot.* at 3.

21 **B. Procedural History**

22 Plaintiff filed a complaint in the California Superior Court on May 3, 2019. *Compl.* at 1.  
23 Plaintiff’s complaint alleges claims for (1) misappropriation of trade secrets; (2) breach of the duty  
24 of loyalty; (3) defamation and disparagement; (4) common law unfair competition; (5) unlawful  
25 interference with prospective economic advantage; (6) statutory unfair competition; (7) claim and  
26 delivery; (8) conversion; (9) violation of California Penal Code Section 502; (10) trademark

1 infringement under 15 U.S.C. § 1125(a); and (11) common law trademark infringement. *Id.* at  
2 17–26. On June 3, 2019, Defendants removed the instant case to federal court. *Id.* On July 2,  
3 2019, Defendants Cole, Custom Label, Gilkey, and McKean filed an answer. ECF No. 15. On  
4 July 15, 2019, Defendant Crammer filed an answer. ECF No. 20.

5 On October 15, 2020, Plaintiff filed the first motion to substitute and for leave to file a first  
6 amended complaint. ECF No. 64. On October 29, 2020 Defendants filed their opposition. ECF  
7 No. 67. Plaintiff filed its reply to the motion to substitute on November 5, 2020. ECF No. 69. On  
8 March 16, 2021 the Court denied the motion. ECF No. 102.

9 After the Court denied Plaintiff’s motion to substitute RLG as Plaintiff, RLG filed its own  
10 lawsuit on May 6, 2021 against the Defendants in this case as well as the three new defendants.  
11 Case No. 21-cv-03392, ECF No. 3 (N.D. Cal. May 6, 2021).

12 On June 3, 2021, Plaintiff filed the instant motion. ECF No. 110. On July 1, 2021,  
13 Defendants Cole, Custom Label, Gilkey, and McKean filed an opposition. ECF No. 111. On July  
14 8, 2021, Plaintiff filed a reply. ECF No. 116.

15 **II. LEGAL STANDARD**

16 **A. Federal Rules of Civil Procedure 15(a) and 16**

17 As a general matter, Federal Rule of Civil Procedure 15(a) provides that leave to amend  
18 shall be freely given “when justice so requires.” Fed. R. Civ. P. 15(a). The Court considers five  
19 factors in assessing a motion for leave to amend: “bad faith, undue delay, prejudice to the  
20 opposing party, futility of amendment, and whether the plaintiff has previously amended the  
21 complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). However, where a party  
22 moves to amend after the Court’s deadline for filing motions or amending the pleadings, Federal  
23 Rule of Civil Procedure 16 governs, and the party must show good cause and obtain the judge’s  
24 consent to modify the deadlines set by the Court. *See* Fed. R. Civ. P. 16(b)(4). “The ‘good cause’  
25 standard primarily considers the diligence of the party seeking the amendment. Carelessness is  
26 not compatible with a finding of diligence and offers no reason to grant relief.” *Hannon v. Chater*,

1 887 F. Supp. 1303, 1319 (N.D. Cal. 1995) (internal alterations and quotations omitted) (quoting  
2 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992)).

3 **B. Federal Rule of Civil Procedure 17**

4 Federal Rule of Civil Procedure 17 requires that an action “be prosecuted in the name of  
5 the real party in interest.” Fed. R. Civ. P. 17(a)(1). Where the action is originally brought by a  
6 party other than the real party in interest, Rule 17 provides that a court “may not dismiss an action  
7 for failure to prosecute in the name of the real party in interest until, after an objection, a  
8 reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into  
9 the action.” Fed. R. Civ. P. 17(a)(3). “The purpose of this portion of Rule 17(a) is to prevent  
10 forfeiture of an action when determination of the right party to sue is difficult or when an  
11 understandable mistake has been made.” *U.S. for Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d  
12 1070, 1074 (9th Cir. 1989).

13 **C. Leave for Reconsideration**

14 Under Civil Local Rule 7-9, leave of the Court is required before a party may file a motion  
15 for reconsideration of an interlocutory order. Local Rule 7-9(b) only allows for reconsideration if  
16 the moving party can show:

17 (1) That at the time of the motion for leave, a material difference in fact or law exists from  
18 that which was presented to the Court before entry of the interlocutory order for which  
19 reconsideration is sought. The party also must show that in the exercise of reasonable diligence the  
20 party applying for reconsideration did not know such fact or law at the time of the interlocutory  
21 order; or

22 (2) The emergence of new material facts or a change of law occurring after the time of  
23 such order; or

24 (3) A manifest failure by the Court to consider material facts or dispositive legal arguments  
25 which were presented to the Court before such interlocutory order.

26 Civil L.R. 7-9(b). Civil Local Rule 7-9(c) further requires that “[n]o motion for leave to  
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1 file a motion for reconsideration may repeat any oral or written argument made by the applying  
2 party in support of or in opposition to the interlocutory order which the party now seeks to have  
3 reconsidered.” Civil L.R. 7-9(c). In general, motions for reconsideration should not be frequently  
4 made or freely granted. *See generally Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d  
5 1338, 1341 (9th Cir. 1981).

6 **D. Interlocutory Appeal**

7 Lastly, a district court may, in its discretion, certify an interlocutory order in a civil action  
8 for appellate review when the court is of “the opinion that such order involves a controlling  
9 question of law as to which there is substantial ground for difference of opinion and that an  
10 immediate appeal from the order may materially advance the ultimate termination of the  
11 litigation.” 28 U.S.C. § 1292(b). “[T]he legislative history of 1292(b) indicates that this section  
12 was to be used only in exceptional situations in which allowing an interlocutory appeal would  
13 avoid protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th  
14 Cir.1982). “Section 1292(b) is a departure from the normal rule that only final judgments are  
15 appealable, and therefore must be construed narrowly.” *James v. Price Stern Sloan, Inc.*, 283 F.3d  
16 1064, 1068 n.6 (9th Cir.2002).

17 **III. DISCUSSION**

18 The Best Label Company, LLC (“Plaintiff”) again moves to substitute Resources Label  
19 Group, LLC (“RLG”) for Plaintiff as the real party in interest. Plaintiff previously moved under  
20 Federal Rule of Civil Procedure 25 to substitute RLG for Plaintiff (“Rule 25 Motion”) on October  
21 15, 2020, which was over one year after Plaintiff merged with RLG in September 2019, and about  
22 six months after the April 24, 2020 deadline to amend the pleadings or add new parties. The  
23 Court denied Plaintiff’s Rule 25 Motion in its March 16, 2021 Order because Plaintiff  
24 inadequately showed that a transfer of interest occurred between Plaintiff and RLG, as required  
25 under Rule 25.

26 Plaintiff now tries again to substitute RLG for Plaintiff four different ways. Plaintiff  
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1 moves to substitute RLG as Plaintiff under Federal Rules 15(a) and 16, or Rule 17. Plaintiff also  
2 seeks reconsideration of the Court’s March 16, 2021 Order denying Plaintiff’s Rule 25 Motion, or  
3 certification of the March 16, 2021 Order for interlocutory appeal under 28 U.S.C. § 1292(b).  
4 Lastly, Plaintiff also moves for leave to amend the complaint under Federal Rules of Civil  
5 Procedure Rules 15(a) and 16 to add three new defendants.

6 The Court analyzes these issues in the following order: (1) whether Plaintiff can substitute  
7 RLG as Plaintiff and add three new defendants under Rules 15 and 16; (2) whether Plaintiff can  
8 substitute RLG as Plaintiff under Rule 17; (3) whether the Court should reconsider Plaintiff’s Rule  
9 25 Motion; (4) whether the Court should certify the March 16, 2021 Order for an interlocutory  
10 appeal; and (5) whether Plaintiff can add three new defendants under Rules 15(a) and 16.

11 **A. Plaintiff Fails to Show “Good Cause” to Modify the Court’s Schedule.**

12 The Court begins with Plaintiff’s arguments that it is entitled to substitute RLG as Plaintiff  
13 and to add three new defendants under Federal Rules of Civil Procedure 15 and 16. Mot. at 7-10,  
14 14-16. Defendants oppose on the grounds that: (1) Plaintiff’s requests are untimely; (2) Plaintiff  
15 has failed to show good cause; and (3) Plaintiff’s request would prejudice Defendants. Opp’n at  
16 10-14.

17 Pursuant to Federal Rule of Civil Procedure 15, a party may amend its pleading once as a  
18 matter of course, either twenty-one days after serving the pleading or within twenty-one days after  
19 service of a responsive pleading or a motion under 12(b), (e), or (f), whichever is earlier. Fed. R.  
20 Civ. P. 15(a)(1). Otherwise, a party may only amend its complaint with the opposing party’s  
21 permission or with the court’s leave. Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) provides that leave to  
22 amend should be freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2). In general, the  
23 Court considers five factors in assessing a motion for leave to amend: “bad faith, undue delay,  
24 prejudice to the opposing party, futility of amendment, and whether the [party] has previously  
25 amended the [pleading].” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

26 However, where a party seeks leave to amend a pleading after the Court’s deadline for  
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1 amending pleadings has passed, Rule 16 of the Federal Rules of Civil Procedure governs. *See*  
2 Fed. R. Civ. P. 16. Under Rule 16, the party must show good cause and obtain the judge’s consent  
3 in order to modify the deadlines set by the Court. Fed. R. Civ. P. 16(b)(4). “The ‘good cause’  
4 standard primarily considers the diligence of the party seeking the amendment.” *Hannon*, 887 F.  
5 Supp. at 1319 (internal citation and quotations omitted); *see also Green v. Bimbo Bakeries USA*,  
6 2014 WL 12641598, at \*2 (N.D. Cal. July 7, 2014) (same). Moreover, “[c]arelessness is not  
7 compatible with a finding of diligence and offers no reason to grant relief.” *Id.*

8 Here, the Court’s deadline to amend pleadings or add parties was April 24, 2020. ECF No.  
9 45. Plaintiff filed its Rule 25 Motion on October 15, 2020, about six months after the deadline to  
10 amend pleadings or add parties. Plaintiff did not seek to add new defendants in that motion.  
11 Plaintiff filed the instant motion on June 17, 2021, about 14 months after the deadline. Mot. at 1.  
12 Rule 16(b)(4) therefore governs, and Plaintiff concedes it must show “good cause” for the  
13 requested amendments. *Id.*

14 The Court first considers where Plaintiff has shown “good cause” to substitute RLG as  
15 Plaintiff and then whether Plaintiff has shown “good cause” to add three new defendants.

16 **1. Plaintiff fails to show “good cause” to substitute in RLG.**

17 Plaintiff argues that leave to amend should be granted because “Plaintiff did not delay in  
18 seeking to substitute RLG.” Plaintiff argues there was no delay because “Plaintiff’s counsel first  
19 learned of the merger at the end of July 2020” and “not long after Plaintiff’s counsel learned of the  
20 merger” Plaintiff filed its Rule 25 Motion on October 15, 2020. Mot at 8. Plaintiff also argues  
21 that “good cause” exists because “RLG has now filed its own separate Complaint which concerns  
22 the same facts and circumstances.” Mot. at 9. Defendants contend that “Plaintiff is altering the  
23 standard” because the proper focus is when Plaintiff and not Plaintiff’s counsel knew or should  
24 have known about the merger. Opp’n at 11. Plaintiff merged with RLG on September 30, 2019.  
25 Mot. at 3. Defendants argue that Plaintiff knew of the merger “in September 2019, at least seven  
26 months prior to” to the Court’s April 24, 2020 deadline to amend the pleadings. Whether you  
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1 evaluate Plaintiff or Plaintiff’s counsel, both were not diligent. The Court briefly summarizes the  
2 case timeline and Plaintiff’s belated actions to substitute RLG as Plaintiff before turning to the  
3 legal arguments.

4 On August 30, 2019, the Court proposed a case schedule with an April 24, 2020 deadline  
5 to amend the pleadings or add parties. ECF No. 44. The Court gave the parties until September 3,  
6 2019 to file any objections to the proposed case schedule. *Id.* Neither party objected. In January  
7 2020, over three months after the September 2019 merger, the parties stipulated to continue the  
8 case management conference, but did not seek any other modifications to the case schedule. ECF  
9 Nos. 47. The Court granted the parties’ request to continue the case management conference.  
10 ECF No. 48.

11 On April 8, 2020, over six months after the September 2019 merger, the parties sought  
12 modifications to the case schedule, but did not seek to change the deadline to amend the pleadings  
13 or add parties. ECF No. 51. The Court granted the parties’ request, modified some of the parties’  
14 proposed dates and gave the parties 24 hours to file any objections to the new deadlines. ECF No.  
15 52. Neither party objected. The April 24, 2020 deadline to amend the pleadings or add parties  
16 then expired.

17 On August 12, 2020, nearly one year after the merger, and almost four months after the  
18 April 24, 2020 amendment deadline, the parties filed a joint case management statement and  
19 informed the Court of Plaintiff’s merger with RLG. ECF No. 59. Plaintiff still did not ask the  
20 Court to modify the case schedule to amend the pleadings. Based on the parties’ requests to  
21 extend future deadlines for discovery and dispositive motions, and to extend the pre-trial  
22 conference and trial dates, the Court proposed a new case schedule, retaining the existing April 24,  
23 2020 amendment deadline, and again gave the parties 24 hours to file any objections. Plaintiff  
24 only objected to the proposed trial date because of a conflict. ECF No. 61. Plaintiff did *not* seek  
25 to modify the schedule to amend the complaint to substitute RLG as Plaintiff. The Court issued  
26 the new case schedule on August 14, 2020. Although the deadline to amend the pleadings had  
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1 already passed on April 24, 2020, Plaintiff waited *two more months* to file its Rule 25 Motion on  
2 October 15, 2020. ECF No. 64.

3 On March 16, 2021, the Court denied Plaintiff’s Rule 25 Motion. ECF No. 102. At that  
4 time, fact discovery was scheduled to close on July 30, 2021, the deadline to file dispositive  
5 motions was October 7, 2021 and the pretrial conference and trial were scheduled for January 13,  
6 2022 and January 31, 2022, respectively. ECF No. 99. With these deadlines rapidly approaching,  
7 Plaintiff waited until June 15, 2021 (three months) to file the instant motion. ECF No. 110. In  
8 contrast, RLG, represented by the same counsel, filed its own lawsuit, which included the three  
9 new proposed defendants on May 6, 2021—one month *earlier* than Plaintiff’s instant motion to  
10 substitute RLG as Plaintiff. *See Resources Label Group v. Custom Label & Decal, LLC*, No. 21-  
11 cv-03392-LHK, ECF No. 3 (N.D. Cal. May 6, 2021). Plaintiff provides no compelling  
12 justification for its delay in filing the instant motion.

13 Under Rule 16(b), the Court “primarily considers the diligence of *the party* seeking the  
14 amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)  
15 (emphasis added). Plaintiff cites no case law excusing either its own, or its counsel’s, failure to  
16 inquire or inform each other that Plaintiff allegedly “ceased to exist” after the merger, Mot. at 6.  
17 *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 239 (agreeing that “the most important event that can  
18 occur in a small corporation’s life” is a merger, “to wit, its death”). As explained above, Plaintiff  
19 and its counsel had at least from September 30, 2019 to April 24, 2020 (nearly *seven* months) to  
20 discuss the September 30, 2019 merger to prior to the amendment deadline. Plaintiff and its  
21 counsel presumably could have discussed the merger while the merger was negotiated and  
22 finalized, prior to the merger’s September 30, 2019 effective date. Yet Plaintiff’s counsel only  
23 learned of this merger because *Defendants*, not Plaintiff, informed Plaintiff’s counsel in July 2020  
24 (nearly *ten* months after the merger) based on Defendants’ review of Plaintiff’s publicly available  
25 documents. Opp’n at 8. Plaintiff inexplicably then waited *another* three months to file its Rule 25  
26 Motion on October 15, 2020. Mot. at 8. Plaintiff and its counsel were simply not diligent.

1 Plaintiff's unsupported argument that "good cause" exists because RLG has now filed its  
2 own lawsuit is also unpersuasive because "the standard primarily considers the diligence of the  
3 party seeking the amendment." *Hannon*, 887 F. Supp. at 1319. Moreover, RLG's lawsuit does  
4 not establish good cause for Plaintiff and Plaintiff's counsel who have not been diligent. RLG's  
5 filing of its own lawsuit is an effective acknowledgement that Plaintiff's instant motion to  
6 substitute in RLG in the instance case lacks merit.

7 **2. Plaintiff fails to show "good cause" to add three new defendants.**

8 Plaintiff argues that "good cause" exists and leave to amend to add three new defendants  
9 should be granted "because Plaintiff did not discover the new defendants' involvement until *after*  
10 the deadline to amend pleadings had passed, *after* Plaintiff had already filed its previous motion to  
11 amend (ECF No. 64), and *after* it had obtained and reviewed Defendants' document production.  
12 Plaintiff discovered the involvement of the new defendants while reviewing Defendants' 12,000-  
13 page document production in early 2021." Mot. at 14-15. However, the Court finds that good  
14 cause does not exist.

15 Plaintiff obtained discovery from Defendants in November 2020 and then waited seven  
16 months until June 2021, one month before fact discovery was set to close, to inform the Court in a  
17 Joint Case Management Statement that Plaintiff would seek leave to amend to include three new  
18 defendants and to file the instant motion. ECF No. 108; Opp'n at 13-14. Notably, RLG's  
19 complaint, filed a month earlier in May 2021, already named these three new defendants. *See*  
20 *Resources Label Group v. Custom Label & Decal, LLC*, No. 21-cv-03392-LHK, ECF No. 3 (N.D.  
21 Cal. May 6, 2021). Presently, after case schedule extensions at the parties' request, fact discovery  
22 is set to close on November 22, 2021, and the parties have until January 7, 2022 to file a motion  
23 for summary judgment. Plaintiff suggests that adding three new defendants to the lawsuit "will do  
24 nothing other than formalize their responsibility for the wrongs alleged in the Complaint" because  
25 "[a]ll three defendants have been involved in the litigation since the inception of this case, even  
26 though they have not been formally named as defendants." *Id.* This unsupported argument strains  
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1 credulity. Both the current and new defendants will need to conduct additional discovery,  
2 reformulate their case strategy, and determine whether to engage separate representation. The  
3 three new defendants will also require additional time to respond to the operative complaint, and  
4 have less than two months to file a motion for summary judgment, and less than four months to  
5 prepare their defenses for the March 28, 2021 trial. Requiring them to do so under the current case  
6 schedule will cause extreme prejudice. Rewarding Plaintiff’s untimely actions will cause undue  
7 delay. Ultimately, Plaintiff’s arguments only demonstrate that Plaintiff lacked diligence. *Hannon*,  
8 887 F. Supp. at 1319 (“The ‘good cause’ standard primarily considers the diligence of the party  
9 seeking the amendment.”).

10 Plaintiff appears to suggest it held off apprising the Court of Plaintiff’s intent to add the  
11 three new defendants because by the time Plaintiff discovered this alleged involvement by the  
12 proposed defendants, “Plaintiff already had a motion to file a First Amended Complaint pending  
13 before this Court in which it sought to add a claim for relief under the Defend Trade Secrets Act.”  
14 Mot. at 14. However, even if the Court granted that motion, Plaintiff would still have been  
15 required to file a subsequent motion seeking leave to amend to include the three new defendants.  
16 Plaintiff argued in that motion that “[t]he [Defend Trade Secrets Act] claims are premised on the  
17 same facts that support” the pled state law claim. ECF No. 64-1 at 8. Here it argues that inclusion  
18 of the proposed defendants is based on newly discovered facts after the first motion to substitute  
19 was pending. Mot. at 14. Plaintiff thus could not have included the proposed defendants without  
20 further leave of the Court. Moreover, Plaintiff could have, but did not, inform the Court in the  
21 March 2021 Joint Case Management Statement that there were potentially three new defendants.  
22 Plaintiff does not provide the exact date it discovered the three new defendants. Plaintiff only  
23 vaguely states in the instant motion that Plaintiff learned of the three new defendants in “early  
24 2021,” Mot. at 14, and vaguely states in its declaration that Plaintiff learned of the three new  
25 defendants between December 2020 and April 2021, ECF No. 110-2 ¶ 7. However, Defendants  
26 produced the documents in November 2020, so Plaintiff’s failure to inform the Court and file the  
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1 instant motion until June 2021 demonstrates a lack of diligence.

2 For all the reasons discussed above, Plaintiff has failed to establish “good cause” under  
3 Rule 16 to substitute RLG as Plaintiff or add the three new defendants. The Court’s conclusion is  
4 further confirmed by the fact that on May 6, 2021, *over one month* before Plaintiff filed the instant  
5 motion, RLG filed its own lawsuit and sued the three new defendants. *See Resources Label*  
6 *Group v. Custom Label & Decal, LLC*, No. 21-cv-03392-LHK, ECF No. 1 (N.D. Cal. May 6,  
7 2021). The Court next considers Plaintiff’s request to substitute RLG as Plaintiff under Rule 17.

8 **B. Plaintiff Cannot Substitute RLG under Rule 17**

9 Federal Rule of Civil Procedure 17(a)(1) requires that an action “be prosecuted in the name  
10 of the real party in interest.” Plaintiff argues that because “RLG is the real party in interest,” the  
11 Court should substitute RLG as Plaintiff under Rule 17 to allow RLG “to prosecute this case  
12 instead of” Plaintiff. Mot. at 6. Defendants contend that Rule 17 is not an available remedy and  
13 that Plaintiff’s motion is untimely and prejudicial. Opp’n at 7-9. Because the Court concludes  
14 that Rule 17 is not an available remedy, the Court need not reach Defendants’ arguments that  
15 Plaintiff’s Rule 17 motion is untimely and prejudicial.

16 Rule 17 is inapplicable here because RLG did not become the real party in interest prior to  
17 the lawsuit. “Rule 17(a) would control if an interest was transferred prior to the commencement  
18 of the suit.” *Hilbrands v. Far East Trading Co., Inc.*, 509 F.2d 1321, 1323 (9th Cir. 1975). Even  
19 if Plaintiff is correct that RLG is presently the real party in interest, Rule 17 does not control  
20 because RLG had no interest in the lawsuit prior to May 3, 2019, when Plaintiff filed the  
21 complaint. As Plaintiff notes, the merger occurred on September 30, 2019—approximately five  
22 months after the lawsuit was filed on May 3, 2019.<sup>1</sup> Mot. at 3.

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24  
25 <sup>1</sup> It is also unclear whether a plaintiff may seek substitution under Rule 17(a) when a defendant  
26 does not contest plaintiff’s status as the real party in interest. *See Lindsey v. Starwood Hotels &*  
27 *Resorts Worldwide Inc.*, 409 F. App’x 77, 79 (9th Cir. 2010) (“Rule 17 is a proper procedural  
device to cure the failure to state a claim.”); *cf. RK Co. v. See*, 622 F.3d 846, 850 (7th Cir. 2010)  
(explaining that the purpose of Rule 17 “is to protect *the defendant* against a subsequent action by  
the party actually entitled to recover.” (emphasis added)).

1           Instead, Rule 25 controls the outcome here. “Rule 25(c) applies if the transfer occurs  
2 during the pendency of the action.” *Hilbrands*, 509 F.2d at 1323. Plaintiff concedes the relevant  
3 merger purportedly transferring the interest from Plaintiff to RLG occurred while the lawsuit was  
4 pending. Mot. at 3. Accordingly, Rule 25 controls. *Id.*; see also *Mitnick v. davisREED Const.,*  
5 *Inc.*, No. 3:17-cv-00747-H-WVG, 2019 WL 1572988, at \*2 (S.D. Cal. Apr. 11, 2019) (concluding  
6 Rule 17 was not applicable because the relevant party “was the proper real party in interest when  
7 the case began” and thus “Rule 25(c) controls.”)

8           Plaintiff and RLG’s actions further confirm that Rule 25 controls. Plaintiff first sought to  
9 substitute in RLG as the real party in interest and for leave to amend the complaint under Rule 25.  
10 ECF No. 64. The Court denied that motion on March 16, 2021 (“March 16, 2021 Order”) because  
11 Plaintiff did not produce sufficient documentation of the terms of the merger to establish that RLG  
12 was the real party in interest. ECF No. 102 at 3-5. Furthermore, after the March 16, 2021 Order  
13 and before Plaintiff filed the instant motion on June 17, 2021, RLG *filed its own lawsuit* on “the  
14 same facts and circumstances” on May 6, 2021. Mot. at 9; see *Resources Label Group v. Custom*  
15 *Label & Decal, LLC*, No. 21-cv-03392-LHK, ECF No. 3 (N.D. Cal. May 6, 2021). By seeking  
16 leave to file a motion for reconsideration, or leave to file an interlocutory appeal, of the Court’s  
17 March 16, 2021 Order, Plaintiff’s motion effectively concedes that Rule 25 is the proper vehicle to  
18 substitute in RLG, not Rule 17. Mot. at 10-14. The Court next considers Plaintiff’s  
19 reconsideration and interlocutory appeal arguments.

20           **C. Reconsideration of the March 16, 2021 Order is Unwarranted**

21           On March 16, 2021, the Court denied Plaintiff’s Rule 25 Motion because Plaintiff did not  
22 produce sufficient evidence “that a transfer of interest took place between Plaintiff and RLG.”  
23 ECF No. 102 at 6. Plaintiff now moves for reconsideration under Civil Local Rule 7-9, which  
24 governs when a court can grant leave to file a motion for reconsideration. The Court concludes  
25 that Plaintiff has not met the standard under Civil Local Rule 7-9 to warrant reconsideration.  
26 Furthermore, even if the Court were to reconsider the motion, Plaintiff has not shown substitution  
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1 of RLG as Plaintiff would facilitate the conduct of the litigation.

2 **1. Plaintiff does not meet the requirements of Civil Local Rule 7-9.**

3 Plaintiff seeks leave to file a motion for reconsideration only under Civil Local Rule 7-  
4 9(b)(1), (b)(3), and not (b)(2). Mot. at 10. Plaintiff argues it meets the requirements for  
5 reconsideration because “a material difference in fact or law exists from that which was presented  
6 to the Court before entry of the interlocutory order” and that there was “[a] manifest failure by the  
7 Court to consider material facts or dispositive legal arguments which were presented to the Court  
8 before such interlocutory order.” Mot. at 10 (quoting Civil L.R. 7-9(b)(1) and (b)(3)). The Court  
9 disagrees.

10 Plaintiff’s argument under Civil Local Rule 7-9(b)(1) fails because Plaintiff concedes that  
11 it knew of the merger agreement at the time it filed the Rule 25 Motion. Civil Local Rule 7-  
12 9(b)(1) contains two requirements: (1) that there is a new material fact; *and* (2) that the moving  
13 party did not know of this fact when it filed the first motion. *See* Civil Local Rule 7-9(b)(1)  
14 (Plaintiff must show “[t]hat at the time of the motion for leave, a material difference in fact or law  
15 exists from that which was presented to the Court before entry of the interlocutory order for which  
16 reconsideration is sought” *and* “that in the exercise of reasonable diligence the party applying for  
17 reconsideration *did not know* such fact or law at the time of the interlocutory order.” (emphasis  
18 added)).

19 Plaintiff’s arguments only focus on the first requirement—contending the merger  
20 agreement is a new material fact. *See* Mot. at 10. However, Plaintiff concedes it cannot meet the  
21 second requirement because “the merger agreement is not newly discovered evidence.” Reply at  
22 7; *see also School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (“The  
23 overwhelming weight of authority is that the failure to file documents in an original motion or  
24 opposition does not turn the late filed documents into ‘newly discovered evidence.’”) Plaintiff’s  
25 concession thus precludes Plaintiff from satisfying one of the two necessary requirements of Civil  
26 Local Rule 7-9(b)(1). As such, Plaintiff is not entitled to reconsideration under Civil Local Rule  
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1 7-9(b)(1), and the Court need not determine whether Plaintiff has shown that the merger  
2 agreement is a new material fact.

3 Plaintiff also fails to identify any material facts or dispositive legal arguments that the  
4 Court did not consider, as required by Civil Local Rule 7-9(b)(3). *See* Civil L.R. 7-9(b)(3)  
5 (Plaintiff must show “[a] manifest failure by the Court to consider material facts or dispositive  
6 legal arguments which were presented to the Court before such interlocutory order.”). Plaintiff  
7 argues that “the Court failed to fully consider and weigh the significance of the material facts—the  
8 Certificate of Merger—that *were* presented to establish that a merger had taken place. The  
9 Delaware Certificate of Merger was and is dispositive of the issue regarding whether BLC LLC’s  
10 assets and liabilities transferred to RLG.” Mot. at 11-12.

11 Not so. In denying Plaintiff’s Rule 25 Motion, the Court fully considered the Certificate of  
12 Merger, all other documents Plaintiff attached to its Rule 25 Motion that were subject to judicial  
13 notice, and the relevant case law cited by both parties. *See generally* ECF No. 102. However, a  
14 Certificate of Merger is decidedly not an asset merger agreement, and Plaintiff failed to include  
15 such agreement with its Rule 25 Motion. Plaintiff also produced *no* case law then (or even now)  
16 that a Certificate of Merger in conjunction with Delaware statutes are “dispositive of the issue”  
17 that a Rule 25 transfer of interest occurred. The Court explained: “Plaintiff has not produced a  
18 single case to support Plaintiff’s contention that these documents, absent an Asset Purchase  
19 Agreement or other source of information regarding the terms of the merger, are sufficient to  
20 demonstrate that there was a ‘transfer of interest’ between Plaintiff and RLG pursuant to Rule  
21 25(c).” *Id.* at 6. Accordingly, the Court concluded that “[w]ithout an Asset Purchase Agreement  
22 or a single case to support the contention that a ‘Certificate of Merger’ is sufficient to  
23 demonstrate that a transfer of interest took place between Plaintiff and RLG, Plaintiff has failed to  
24 establish that RLG may be substituted for Plaintiff under Rule 25(c).” *Id.* (emphasis added).

25 Plaintiff has failed to show it is entitled to reconsideration under Civil Local Rule 7-9(b)(1)  
26 or (b)(3). Plaintiff therefore fails to meet standard for reconsideration.

1                   **2. Plaintiff fails to show substitution of RLG would facilitate the conduct of the**  
2                   **litigation.**

3                   Even if the Court were to reconsider Plaintiff’s Rule 25 Motion, Plaintiff’s arguments  
4                   fundamentally misapprehend the discretionary nature of Federal Rule of Civil Procedure 25. Rule  
5                   25 “leaves the substitution decision to [the trial] court’s sound discretion.” *In re Bernal*, 207 F.3d  
6                   595, 598 (9th Cir. 2000); *McKesson Info. Sols., Inc. v. Bridge Med., Inc.*, No. CIVS022669 FCD  
7                   KJM, 2006 WL 658100, at \*2 (E.D. Cal. Mar. 13, 2006) (emphasizing that such a decision “is  
8                   merely a discretionary determination by the trial court that the transferee’s presence would  
9                   facilitate the conduct of the litigation.” (quotation marks omitted). Under this discretionary  
10                  standard, courts deny belated substitution attempts under Rule 25. *Id.* at \*3 (“Courts have not  
11                  condoned such belated attempts . . . under Rule 25(c), even if an additional lawsuit becomes  
12                  necessary.” (collecting cases)).

13                  Even assuming that RLG is the real party in interest, Plaintiff must still convince the Court  
14                  that its October 15, 2020 Rule 25 Motion, which sought substitution of RLG over *one year* after  
15                  Plaintiff’s September 30, 2019 merger, and three months after Plaintiff’s counsel learned of the  
16                  merger in July 2020, would help rather than delay, the case.<sup>2</sup> Because Plaintiff failed to attach the  
17                  necessary documents to determine whether a transfer took place to meet the threshold  
18                  requirements of Rule 25 in Plaintiff’s Rule 25 Motion, the Court had no occasion to find whether  
19                  RLG’s “presence would facilitate the conduct of the litigation.” *Id.* at \*2. The Court does so now.

20                  Substitution of RLG would not facilitate the conduct of the litigation because (1) Plaintiff  
21                  presents no compelling reason why substitution would aid the litigation; and (2) Plaintiff’s Rule  
22                  25 Motion is belated, entirely due to its own actions.

23                  Plaintiff’s only argument for why RLG’s substitution would facilitate the conduct of the  
24                  litigation is to resolve a discovery dispute. *See* ECF No. 64-1 at 3-5; ECF No. 68 at 6  
25                  (“Substituting RLG as the plaintiff in this matter allows BLC LLC/RLG to move forward with its  
26                  case and shut down Defendants’ argument that BLC LLC/RLG cannot conduct discovery of facts

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27                  <sup>2</sup> The Court re-analyses the Rule 25 Motion based on the timeline at the time of that motion.

1 past October 9, 2019, the date BLC LLC ceased to exist, facilitating litigation, and warranting  
2 substitution.”). However, this discovery dispute was already resolved before the Court even  
3 issued its March 16, 2021 Order denying Plaintiff’s Rule 25 Motion. On November 18, 2020,  
4 United States Magistrate Judge Virginia DeMarchi allowed Plaintiff to seek discovery past  
5 October 9, 2019. *See* ECF No. 81. Specifically, Defendants sought a protective order preventing  
6 Plaintiff from seeking discovery of its business relationship with certain customers past October 9,  
7 2019 because Plaintiff merged with RLG. *Id.* at 1. Judge DeMarchi denied the motion and held  
8 that Plaintiff could obtain discovery for responsive documents after October 9, 2019. *Id.* Plaintiff  
9 has not alleged any other discovery disputes arising from the merger. As such, Plaintiff’s  
10 argument lacks merit and substitution of RLG for Plaintiff would not aid the conduct of the  
11 litigation.

12 Moreover, on these facts Plaintiff’s Rule 25 Motion is untimely and is entirely of  
13 Plaintiff’s own making.<sup>3</sup> “Courts have not condoned such belated attempts . . . under Rule 25(c),  
14 even if an additional lawsuit becomes necessary.” *McKesson Info. Sols. Inc.*, 2006 WL 658100, at  
15 \*3 (collecting cases). Plaintiff merged with RLG on September 30, 2019, almost seven months  
16 before the April 24, 2020 deadline to amend the pleadings. Inexplicably, Plaintiff waited to file its  
17 Rule 25 Motion to substitute in RLG until October 15, 2020, or almost *13 months* after merging  
18 with RLG, and nearly six months after the deadline to amend the pleadings. Whether this was a  
19 tactical decision, or a merely a lack of diligence, Plaintiff had multiple opportunities to inform the  
20 Court of the merger in Plaintiff’s court filings, but did not do so, until an August 2020 Joint Case  
21 Management Statement, which is 11 months after the merger. ECF No. 59 at 3. Moreover,  
22 Plaintiff’s counsel appears to have only done so because counsel learned of the merger from the  
23 *Defendants*, not Plaintiff, in July 2020. Mot. at 3. At the time Plaintiff filed its Rule 25 Motion,  
24 fact discovery was scheduled to close on April 1, 2021, or less than two months after the Court  
25

26 <sup>3</sup> Recognizing this, RLG filed a separate lawsuit against Defendants before Plaintiff even filed the  
27 instant motion. *See Resources Label Group v. Custom Label & Decal, LLC*, No. 21-cv-03392-  
LHK, ECF No. 1 (N.D. Cal. May 6, 2021).

1 was scheduled to hear arguments on Plaintiff’s Rule 25 Motion on February 4, 2021. *See* ECF  
2 Nos. 62, 64. Allowing Plaintiff to substitute RLG would have required delaying the fact discovery  
3 cutoff. *See* ECF No. 65 at 12-13 (Defendants seeking several months to conduct discovery into  
4 new Plaintiff if the Court allowed substitution). Presently, after case schedule extensions at the  
5 parties’ request, fact discovery is scheduled to close in less than a week on November 22, 2021,  
6 dispositive motions must be filed by January 7, 2022 and the final pretrial conference and trial are  
7 scheduled for March 17 and 28, respectively. ECF No. 135.

8 Allowing Plaintiff to substitute RLG as Plaintiff in the instant case would further delay fact  
9 and expert discovery, summary judgment motions and trial, and ultimately impact the Court’s  
10 ability to meet the statutory requirements of the Civil Justice Reform Act. *See* ECF No. 132  
11 (discussing case deadlines). As such, the Court exercises its discretion to deny Plaintiff’s Rule 25  
12 Motion because substituting RLG for Plaintiff would not facilitate the conduct of the litigation.  
13 *McKesson Info. Sols. Inc.*, 2006 WL 658100, at \*3 (denying a Rule 25 motion due to Plaintiff’s  
14 delay and increased judicial time and resources).

15 Plaintiff’s motion for reconsideration is thus unwarranted.

16 **D. Interlocutory Appeal of the March 16, 2021 Order is Unwarranted.**

17 Plaintiff also seeks an interlocutory appeal of the Court’s March 16, 2021 Order denying  
18 Plaintiff’s Rule 25 Motion, ECF No. 102. Mot. at 12-14. The Court may certify an interlocutory  
19 appeal *only* if it finds that an order “involves a controlling question of law as to which there is  
20 substantial ground for difference of opinion and that an immediate appeal from the order may  
21 materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Plaintiff  
22 argues an interlocutory appeal is warranted because the parties dispute what type of evidence is  
23 “required to establish a transfer of interest” under Rule 25 and thus there is a substantial ground  
24 for a difference of opinion. Mot. at 13. Plaintiff also notes that “it is aware of no case that states  
25 that a merger agreement or asset purchase agreement is *required* to establish a transfer of  
26 interests.” *Id.*

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1 Plaintiff's arguments miss the mark because "[c]ourts traditionally will find that a  
2 substantial ground for difference of opinion exists where the circuits are in dispute on the question  
3 and the court of appeals of the circuit has not spoken on the point, if complicated questions arise  
4 under foreign law, or if novel and difficult questions of first impression are presented." *Id.* The  
5 proper focus of the inquiry is thus on decisions by *courts*, and not the losing party's disagreement  
6 with a court ruling. *See id.* at 634 ("A party's strong disagreement with the Court's ruling is not  
7 sufficient for there to be a 'substantial ground for difference.'" (cleaned up)). Otherwise, this  
8 factor would be readily met every time a party disputes a court ruling. Furthermore, Plaintiff's  
9 lack of knowledge about cases that agree with the Court's conclusion is irrelevant. Even if  
10 Plaintiff's implicit framing that this is a case of first impression is accurate (it is not), "the mere  
11 presence of a disputed issue that is a question of first impression, standing alone, is insufficient to  
12 demonstrate a substantial ground for difference of opinion." *Id.* at 634. Rather, two salient factors  
13 control. First, Plaintiff has "not provided a single case that conflicts with the [Court's]  
14 construction or application of" Rule 25. *Id.* at 633. Second, the Court has an obligation to  
15 narrowly construe § 1292(b), *Price Stern Sloan, Inc.*, 283 F.3d at 1068 n.6 ("Section 1292(b) . . .  
16 must be construed narrowly."). As such, Plaintiff has failed to show there is a substantial ground  
17 for difference of opinion.

18 Because the Court finds that there is no substantial ground for difference of opinion, the  
19 Court need not address the remaining requirements for certification for interlocutory appeal  
20 because such an appeal requires that all these requirements are met. *See Couch v. Telescope, Inc.*,  
21 611 F.3d 629, 633 (9th Cir. 2010) ("Certification under § 1292(b) requires the district court to  
22 expressly find in writing that all three § 1292(b) requirements are met.")

23 For these reasons, the Court DENIES Plaintiff's request to certify the Court's March 16,  
24 2021 Order denying Plaintiff's Rule 25 Motion, ECF No. 102.

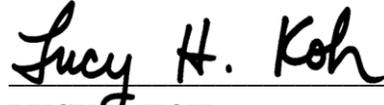
25 **IV. CONCLUSION**

26 For the foregoing reasons Plaintiff's motion to substitute and for leave to file a first  
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1 amended complaint is DENIED.

2 **IT IS SO ORDERED.**

3 Dated: November 19, 2021



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5 LUCY H. KOH  
United States District Judge

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