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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAMES W. BRADY and PATRICIA
M. BRADY,

Plaintiffs,

v.

GRENDENE USA, INC., a Delaware
Corporation, and GRENDENE S.A., a
Brazil Corporation,

Defendants.

AND RELATED COUNTERCLAIMS

CASE NO. 3:12-cv-0604-GPC-KSC

**ORDER:
DENYING DEFENDANTS'
MOTION FOR LEAVE TO AMEND
COUNTERCLAIM**

[ECF No. 374]

**GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO FILE
SURREPLY**

[ECF No. 410]

**GRANTING DEFENDANTS' EX
PARTE REQUEST TO FILE
RESPONSE TO SURREPLY**

[ECF No. 413]

**GRANTING RELATED MOTIONS
TO SEAL**

[ECF Nos. 377, 399, 406, 411, 416]

Before the Court is Defendants' Motion for Leave to Amend Counterclaim ("Def. Mot."), ECF No. 374, as well as related motions Plaintiffs' Motion for Leave to File Surreply ("Pl. Surreply"), ECF No. 410, Defendants' Ex Parte Request to File Response to Surreply ("Def. Resp. to Pl. Surreply"), ECF No. 413, and Motions to

1 Seal, ECF Nos. 377, 399, 406, 411, and 416. The motion for leave to amend
2 counterclaim has been fully briefed. *See* Pl. Opp., ECF No. 397; Def. Reply, ECF No.
3 405; Pl. Surreply; Def. Resp. to Pl. Surreply.

4 For the foregoing reasons, the Court **DENIES** Defendant’s Motion for Leave to
5 Amend Counterclaim, ECF No. 374; **GRANTS** Plaintiff’s Motion for Leave to File
6 Surreply, ECF No. 410; **GRANTS** Defendants’ Ex Parte Request to File Response to
7 Surreply, ECF No. 413; and **GRANTS** Parties’ related Motions to Seal, ECF Nos. 377,
8 399, 406, 411, 416.

9 **BACKGROUND**

10 On June 3, 2015, this Court granted Defendants’ Motion for Summary
11 Judgement as to all five of the Plaintiffs’ causes of action. Summ. J. Order 16, ECF No.
12 295. In the Summary Judgment Order, the Court also *sua sponte* found good cause to
13 consider whether Defendants’ counterclaims should also be dismissed. *Id.* Following
14 briefing on the issue, the Court found on August 28, 2015 that Defendants’ first
15 counterclaim for a declaratory judgment of noninfringement was moot, but declined to
16 dismiss Defendant’s second counterclaim for a declaratory judgment of invalidity on
17 mootness grounds. Order Dismissing Without Prejudice Grendene’s First Counterclaim
18 For A Declaratory Judgment of Noninfringement (“Order Dismissing First
19 Counterclaim”) 12, ECF No. 358. Defendants’ Motion for Leave to Amend
20 Counterclaim followed on September 4, 2015.

21 By the terms of the Magistrate Judge’s February 11, 2014 Scheduling Order,
22 ECF No. 62, the deadline to amend the pleading or to file additional pleadings was
23 March 14, 2014. *Id.* at 1. This deadline was never amended. The deadline for all other
24 pretrial motions was May 9, 2015. September 26, 2014 Order Amending Scheduling
25 Order 22, ECF No. 138.

26 **LEGAL STANDARD**

27 Under Fed. R. Civ. P. Rule 16(b)(4), a scheduling order “may be modified only
28 for good cause and with the judge’s consent.” In addition, Rule 15(a)(2) specifies that

1 for amendments to pleadings, if more than 21 days has passed since the pleading has
2 been served, “a party may amend its pleading only with the opposing party’s written
3 consent or the court’s leave. The court should freely give leave when justice so
4 requires.” Thus, once the district court has entered a pre-trial scheduling order, a party
5 seeking to amend the pleading after the date specified in the scheduling order must first
6 show “good cause” for amendment under Rule 16(b), and then that amendment would
7 be proper under Rule 15. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
8 608 (9th Cir. 1992) (citations omitted). In *Johnson*, the Ninth Circuit set out the
9 standard for “good cause” under Rule 16(b):

10 Rule 16(b)’s “good cause” standard primarily considers the diligence of
11 the party seeking the amendment. . . . [C]arelessness is not compatible
12 with a finding of diligence and offers no reason for a grant of relief.
13 Although the existence or degree of prejudice to the party opposing the
modification might supply additional reasons to deny a motion, the focus
of the inquiry is upon the moving party’s reasons for seeking
modification. If that party was not diligent, the inquiry should end.

14 *Id.* at 609 (citations omitted).

15 DISCUSSION

16 I. Defendant’s Motion for Leave to Amend Counterclaim

17 Grendene seeks to amend their counterclaim in order to plead fraud with
18 particularity. Def. Mot. 1. They argue that they meet the “good cause” standard because
19 they “could not have amended [the] counterclaim prior to the Scheduling Order’s
20 March 14, 2014 deadline.” *Id.* at 4. Grendene argues that they did not receive
21 deposition testimony concerning Plaintiffs’ 2013 sales from the Bradys’ daughter,
22 Patricia Brady, until November 14, 2014, and from James Brady until January 8, 2015.
23 *Id.* at 4–5. Moreover, Grendene argues that they did not receive Plaintiffs’ 2013 tax
24 records, which confirmed James Brady’s testimony concerning Plaintiffs’ 2013 sales,
25 until August 28, 2015, and that there was still a deposition scheduled to be conducted
26 upon James Brady to provide additional information as to Plaintiffs’ sale of products
27 on October 2, 2015. Def. Mot. 5–6.

28 The Bradys reply that Grendene first set forth their fraud theory on October 2,

1 2015, when they filed their Supplemental Response to Plaintiffs’ Interrogatory No. 10
2 (“Def. Interrog. Resp.”), ECF No. 398-6. Pl. Resp. 7–8.¹ Moreover, Plaintiffs argue that
3 Grendene did not need the 2013 tax records produced in August 28, 2015 or any further
4 evidence produced in discovery to plead their fraud claim with particularity, because
5 the Bradys’ deposition testimony had already provided the factual basis Defendants
6 were seeking. Pl. Resp. 12.²

7 Defendants have failed to pursue their amendment with diligence. The record as
8 described demonstrates that as of October 2, 2014, Defendants had already articulated
9 their theory of fraud. Even if the Court accepts Defendants’ argument that it was not
10 until January 8, 2015 that James Brady’s deposition provided the factual basis to plead
11 fraud with particularity, Defendants cannot explain the more than eight month delay
12 in filing their Motion for Leave to Amend Counterclaim. Indeed, it seems that it was
13 not until the matter was alluded to in a cursory footnote by Plaintiffs that Defendants
14 were alerted to the perceived deficiency in their pleadings. *See* Def. Mot. 7 (citing
15 Plaintiffs’ July 7, 2015 Response in Opposition to Defendants’ Ex Parte Motion for
16 Leave to File Motion for Summary Judgment as to Second Counterclaim (“Pl. July 7,
17 2015 Resp.”) 13 n.10, ECF No. 321).

18 Moreover, at this point, not only has the deadline for amending the pleadings
19 passed, but so have the deadlines for (1) any other motions; (2) additional briefing on
20 the counterclaims; and (3) the first Pretrial Conference hearing. ECF No. 419.
21 Granting Defendants’ motion would throw the pretrial proceedings into even further
22 disarray than they have already been put by the actions of both parties’ counsels. *See*
23 Minute Entry for October 30, 2015 Pretrial Conference Proceedings, ECF No. 419

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25 ¹ In this interrogatory response, Grendene alleged that “in direct contradiction” to Plaintiffs’
26 May 20, 2013 renewal declaration to the United States Patent and Trademark Office, wherein Plaintiffs
27 declared that the contested marks were in use in commerce, “Plaintiffs made no sales of any products
under the IPANEMA mark in 2013,” and “Plaintiffs made no sales of any products under the THE
GIRL FROM IPANEMA mark in 2013.” Def. Interrog. Resp. 6.

28 ² Parties also dispute when James Brady “completed” deposition testimony. *Compare* Def.
Mot. 4 *with* Pl. Resp. 8. The Court finds that Mr. Brady gave the relevant testimony about Plaintiffs’
2013 sales in January 8, 2015. *See* Brady Dep. 492:9–11, ECF No. 400-1.

1 (rejecting parties' proposed Pretrial Order, ordering resubmission, and reprimanding
2 both parties' counsels for their unprofessional behavior in this case heretofore).

3 Accordingly, Defendants' Motion for Leave to Amend Counterclaim is
4 **DENIED.**

5 **II. Plaintiffs' Motion for Leave to File Surreply**

6 Plaintiffs suggest that the Court should enter judgment against Defendants on
7 the counterclaim because the Court previously held in its summary judgment ruling that
8 the 1995 settlement agreement is binding on the parties, and that settlement agreement
9 should be understood to bar Defendants' counterclaim. Pl. Surreply 4–5. A decision to
10 grant or deny leave to file a surreply is generally committed to the “sound discretion”
11 of the court. *Mitchell v. Donahoe*, 2013 WL 4478892, at *10 (D. Ariz. Aug. 21, 2013).
12 The Court **GRANTS** Plaintiffs' motion for leave to file surreply, ECF No. 410, as well
13 as Defendants' ex parte request to file a response to the surreply, ECF No. 413.

14 However, the Court **DENIES** Plaintiffs' request to enter judgment on
15 Defendants' counterclaim on the basis of a suggestion contained in an opposition to a
16 motion to amend counterclaim. Such a request essentially constitutes a motion for
17 summary judgment or motion for judgment on the pleadings on the part of Plaintiffs.
18 Since the scheduling order deadline for filing all pretrial motions passed on May 29,
19 2015, such a motion would be subject to the same “good cause” standard as
20 Defendants' motion to amend.

21 **III. Motions to Seal**

22 Parties have moved to seal various documents filed in support or opposition of
23 Defendants' motion pursuant to the magistrate judge's previous protective orders. *See*
24 ECF Nos. 377, 399, 406, 411, 416. Where a court filing contains “business information
25 that might harm a litigant's competitive standing,” the court may properly deny public
26 access. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978).

27 The Court finds that both parties have met their burden. All the documents and
28 deposition testimony contain either Plaintiffs' or Defendants' confidential business

1 information such as profit and loss data as well as contractual agreements. Accordingly,
2 the Court **GRANTS** the parties' motions to seal.


3 **CONCLUSION**

4 For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- 5 1. Defendant's Motion for Leave to Amend Counterclaim, ECF No. 374, is
6 **DENIED;**
- 7 2. Plaintiff's Motion for Leave to File Surreply, ECF No. 410, is **GRANTED;**
- 8 3. Defendants' Ex Parte Request to File Response to Surreply, ECF No. 413, is
9 **GRANTED;**
- 10 4. Parties' related Motions to Seal, ECF Nos. 377, 399, 406, 411, 416, are
11 **GRANTED.**

12 **IT IS SO ORDERED.**

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14 DATED: November 6, 2015

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16 HON. GONZALO P. CURIEL
17 United States District Judge
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