

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)

Plaintiffs,)

v.)

PHILIP J. SMITH,)

Defendant.)

Civil Action No. 6:06-CV-109-HMH

MOTION FOR LEAVE TO
AMEND COMPLAINT

COMES NOW BidZirk, LLC (“BidZirk”), Daniel G. Schmidt, III (“Schmidt”) and Jill Patterson (“Patterson”), Plaintiffs in the above-captioned action, and pursuant to Fed. R. Civ. P. 15(a), file this their motion for leave to amend their complaint, and show the Court the following:

INTRODUCTION

Plaintiffs filed their complaint on January 10, 2006, asserting claims for trademark dilution, defamation and invasion of privacy. See Doc. 1. The Court’s deadline for the parties to file motions to amend their pleadings expired on May 17, 2006. See Doc. 20. Subsequent to the May 17, 2006 deadline, new claims have arisen from Defendant’s tortious behavior. Specifically, on May 25, 2006, Defendant published new defamatory remarks on his website at www.jackwhispers.blogspot.com. See Exhibit 1. Plaintiffs seek leave to amend their original complaint to include and allege certain acts

of misconduct by Defendant, which directly resulted in further harm to Plaintiffs in their business or profession.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

[A] party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In exercising its discretion to amend, the Court should focus on factors like "undue delay, bad faith, or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, etc." Shiflet v. Allstate Ins. Co., 233 F.R.D. 465, 466 (D.S.C. 2006).

On May 25, 2006, eight days after the Court's deadline for the parties to amend their pleadings, Defendant published and continues to display statements on his website that impeach the honesty, integrity, virtue, or reputation of Plaintiffs, which caused and continue to cause injury to their business or profession. See Doc. 20; See Exhibit 1. As a result of his actionable publications, Defendant has further libeled Plaintiffs, and Plaintiffs seek additional damages.

The new claims contained in Plaintiffs' proposed amended complaint are necessary to ensure Plaintiffs' full recovery in this action. See Shiflet, 233 F.R.D. at 466. The instant motion is not the result of undue delay, bad faith or dilatory motive on the part of Plaintiffs. Rather, it is the result of newly-arising facts. Allowing Plaintiffs to amend their complaint will not prejudice Defendant, and is unlikely to increase the amount of formal discovery required in this action. See, e.g., Berkeley-Dorchester Counties Economic Dev. Corp. v. U.S. Dep't. of Health and Human Svcs., 395 F. Supp. 2d 317, 325 (D.S.C. 2005) (holding that leave to amend was not prejudicial where

significant factual developments had occurred since the plaintiff filed its initial complaint). The relief sought by Plaintiffs falls squarely within Rule 15(a)'s commandment that leave to amend be granted "when justice so requires."

CONCLUSION

WHEREFORE Plaintiffs respectfully request that the Court grant them leave to file their amended complaint. Plaintiffs' proposed amendment is attached as Exhibit 2.

This 5th day of June, 2006.

/s/ Kevin M. Elwell

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing MOTION FOR LEAVE TO AMEND COMPLAINT upon the following parties by depositing same in the United States Mail in a properly-addressed envelope with adequate postage affixed to:

Philip J. Smith
601 Cleveland Street
Apartment 5-C
Greenville, South Carolina 29601

This 5th day of June, 2006.

/s/ Kevin M. Elwell

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