

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SOARING HELMET CORPORATION, a
Washington Corporation,

Plaintiff,

v.

NANAL, INC., a Nevada corporation, d/b/a
LEATHERUP.COM,

Defendant.

Cause No. C09-0789 JLR

MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT

**NOTE ON MOTION CALENDAR:
DECEMBER 31, 2010**

I. RELIEF REQUESTED

Plaintiff, Soaring Helmet Corporation (“Soaring Helmet”), respectfully requests this Court to enter an order pursuant to FRCP 15(a), 19(a)(1), and 20(a)(2) allowing it to amend its Complaint to add Albert Bootesaz, President of Defendant Nanal, Inc., as an Individual Defendant. Albert Bootesaz exercises total control over all of Nanal’s

1 activities, including those which form the basis of this complaint. The Court cannot
2 fashion complete relief to Soaring Helmet unless Albert Bootesaz is added as an
3 individual defendant.

4 **II. STATEMENT OF FACTS**

5 In its Complaint, Soaring Helmet has asserted claims for federal trademark
6 infringement, false designation of origin, false advertising, unfair competition, and
7 tortious interference with prospective economic advantage against defendant Nanal, Inc,
8 d/b/a Leatherup.com. Soaring Helmet requested injunctive relief, damages, attorney fees
9 and other relief against Nanal. Soaring Helmet's claims arise out of Nanal's infringement
10 of Soaring Helmet's VEGA® trademark through the use of VEGA® in false
11 advertisements for Leatherup.com and through the sale of motorcycle jackets utilizing the
12 VEGA® mark.

13
14 Albert Bootesaz is the president of Nanal, Inc, and is primarily responsible for the
15 day-to-day operation of the company. See Declaration of Heather M. Morado in Support
16 of Motion for Leave to File Third Amended Complaint ("Morado Dec.") ¶ 2, Exh. A.
17 Nanal is a Las Vegas corporation that exists solely for the purpose of operating the
18 website Leatherup.com. Morado Dec., ¶ 3, Exh. B. The only other officer of Nanal, Inc.
19 is Nahid Botesaz, Albert Bootesaz's sister. Morado Dec., ¶ 4, Exh. C. Despite the fact
20 that he is the President of the company, Mr. Bootesaz doesn't know whether Nanal has
21 directors nor whether Nanal issues shares of stock. *Id.*, Morado Dec., ¶¶ 4, 5, Exhs. C and
22 D. Mr. Bootesaz also does not know whether Nanal keeps any corporate records; nor
23 whether the corporation has bylaws, annual reports, corporate resolutions, or even whether

1 Nanal has employees. Morado Dec., ¶¶ 6, 7, Exhs. E and F. Mr. Bootesaz is also
2 affiliated with a large number of other companies, which he estimates to be as many as “a
3 hundred.” Morado Dec., ¶ 8, Exh. G. For many of these, Mr. Bootesaz does not know
4 what role he plays in the corporation, nor whether they observe corporate formalities.
5 Morado Dec., ¶¶ 8, 9, 10, Exhs. G, H, and I.

6 Soaring Helmet only learned of Mr. Bootesaz’s controlling participation in the
7 actions of Defendant Nanal, Inc. when it took his deposition on September 20, 2010.
8 Prior to that, Nanal had made it very difficult for Soaring Helmet and its counsel to learn
9 the identity of Defendant Nanal’s officers and directors, or even its location. For
10 example, Soaring Helmet initially named the wrong defendant, Bill Me, Inc., because the
11 Leatherup website falsely stated in its terms and conditions that Bill Me, Inc. owned
12 Leatherup.com. Morado Dec., ¶ 11, Exh. J. Once the identity of Nanal’s leadership was
13 discovered, and Soaring Helmet was able to take Mr. Bootesaz’s deposition, the extent of
14 Mr. Bootesaz’s exclusive control and direction of the company, and his control of its
15 infringing activities, became clear.
16

17 **III. STATEMENT OF ISSUE**

18 Should Soaring Helmet be allowed to amend its Complaint to add Albert Bootesaz
19 as an individual defendant?

20 **IV. EVIDENCE RELIED UPON**

21 This motion is based on the Declaration of Heather M. Morado, the exhibits
22 attached thereto, and all pleadings and papers filed in this case.
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V. AUTHORITY

FRCP 15(a) states that “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Courts generally permit amendments with “extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990). The four factors commonly used to determine the propriety of a motion for leave to amend are bad faith, undue delay, prejudice to the opposing party, and futility of amendment. *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 155-56 (N.D. Cal. 2005).

Under FRCP 21, “[p]arties may be...added by order of the court on motion by any party...on such terms as are just.” Rule 21 allows the court broad discretion to permit the addition of a party at any stage in the litigation. See *Andujar v. Rogowski*, 113 F.R.D. 151, 154 (S.D.N.Y. 1986) (internal citation omitted). Finally, FRCP 19(a)(1) requires that a party be joined if, without that person, the court cannot accord complete relief among the existing parties.

A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf. *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir.1996). Cases which have found personal liability on the part of corporate officers have typically involved instances where the defendant was the ‘guiding spirit’ or the ‘central figure’ in the wrongful corporate activity. *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 523 n. 10 (9th Cir.1989). Under such circumstances,

1 both the corporation and the officers or directors who participated in the tortious conduct
2 may be held liable. *See Pai Corp. v. Integrated Sci. Solutions, Inc.*, No. C-06-5349 JSW
3 (JCS), 2007 WL 1229329 at *9 (N.D.Cal. Apr.25, 2007); *Symantec Corp. v. Logical Plus,*
4 *Inc.*, C 06-7963 SI, 2009 WL 3416178 at *4 (N.D. Cal. Oct. 20, 2009) (Owner of
5 corporation held individually liable for tort of trademark infringement which he
6 authorized and directed as an agent of the corporation). Because Mr. Bootesaz is the
7 central figure guiding and directing the corporate infringement, he should be a named
8 defendant in this matter.

9 **A) Soaring Helmet’s amendment is made in good faith.**

10 Soaring Helmet’s amendment is introduced to add the dominant, guiding figure in
11 the infringing activity, Albert Bootesaz. Mr. Bootesaz is individually liable for the
12 tortious acts he committed and directed as the operating officer of the corporation. See
13 *Symantec Corp. v. Logical Plus, Inc.*, supra. Further, given that Mr. Bootesaz has
14 established a history of operating numerous “shell” companies, any injunctive or
15 monetary relief granted to Soaring Helmet would need to also include Mr. Bootesaz
16 individually. Otherwise, it is highly likely that Mr. Bootesaz would merely dissolve
17 Nanal, Inc. and then proceed to commit further infringement under another corporate
18 guise.

19 **B) Soaring Helmet is timely seeking amendment.**

20 Delay alone is insufficient to provide grounds for denying leave to amend.
21 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). Soaring
22 Helmet did not know of Mr. Bootesaz’s dominant role in Nanal’s activities until Mr.
23

1 Bootsaz was deposed in late September, 2010. Thus, Soaring Helmet has not acted with
2 a dilatory motive, but rather acted with diligence once it learned the facts. See *DCD*
3 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.1987) (finding no bad faith when
4 satisfactory explanation for delay).

5 **C) Defendant will not be substantially prejudiced by the amendment.**

6 To deny leave to amend, the prejudice must be substantial. *Abels*, 229 F.R.D. at
7 156. Albert Bootsaz is the primary and authoritative figure directing the actions of the
8 defendant in this case, Nanal, Inc. Since Mr. Bootsaz has had the opportunity to defend
9 the case from the outset, Mr. Bootsaz will not be prejudiced if he is added as a defendant.
10 The sole depositions taken by either party in this case were Soaring Helmet's depositions
11 of Mr. Bootsaz, both as an individual witness and as a 30(b)(6) representative of Nanal,
12 Inc. Thus, he has had ample opportunity to prepare for and defend against all claims,
13 including those related to his domination of Nanal's activities and the extent to which he
14 observes corporate formalities, about which he was questioned extensively.
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16 **D) Soaring Helmet's amendment is meritorious.**

17 A proposed amendment is futile only if "no set of facts can be proved under the
18 amendment that would constitute a valid claim or defense." *Miller v. Rykoff-Sexton, Inc.*,
19 845 F.2d 209, 214 (9th Cir.1988). Denials based on futility are rare. *Abels*, 229 F.R.D. at
20 157 (internal citations omitted). Here, there is substantial evidence that would allow a fact
21 finder to conclude that Mr. Bootsaz was the sole director of the allegedly infringing
22 activity and that he should be held individually liable as a joint tortfeasor with Nanal, Inc.
23 Since Soaring Helmet's amendment is not futile, it should be granted.

1 In sum, allowing Soaring Helmet to add Mr. Bootesaz individually in this case will
2 ensure that this case is adjudicated in the most efficient way possible, without requiring
3 Soaring Helmet to file a separate lawsuit against Mr. Bootesaz arising out of the same
4 conduct. Adding Mr. Bootesaz as a defendant in this case reduces the very real risk that
5 Soaring Helmet will never be accorded any injunctive or monetary relief because Mr.
6 Bootesaz will simply dissolve Nanal, Inc. and then continue his offending activities under
7 another corporate shell.

8 **VI. CONCLUSION**

9 For all the foregoing reasons, Soaring Helmet respectfully requests that the Court
10 grant leave to amend the Complaint to add Albert Bootesaz as an individual defendant in
11 this action.

12 DATED December 10, 2010.

13 INVICTA LAW GROUP, PLLC

14
15 By Heather Morado
16 Heather M. Morado, WSBA No. 35135
17 Stacie Foster, WSBA No. 23397
18 Attorneys for Plaintiff
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