Soaring Helmet Corporation v. Bill Me Inc et al Doc. 77

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOARING HELMET CORPORATION, a Washington corporation,

Plaintiff,

v.

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

Defendant.

No. C09-789-JLR

DEFENDANT NANAL, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

NOTE ON MOTION CALENDAR: December 31, 2010

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Months after the relevant case schedule deadlines set by the Court have passed, as the summary judgment motion of Defendant Nanal, Inc. is pending before the Court, only days before the parties were required to begin exchanging pre-trial papers in preparation for trial, and less than two months before trial, Plaintiff Soaring Helmet Corporation now seeks to amend its complaint for a third time to add a new defendant without reference to the Court's deadlines or the appropriate legal standard governing its motion. Plaintiff also fails to identify for the Court all of the proposed substantive changes to its complaint, some of which have nothing to do with the proposed addition of Albert Bootesaz, and makes spurious, unsupported allegations about him that appear to be an improper attempt to influence the Court's consideration of Nanal's pending summary judgment motion. Because Plaintiff has utterly failed to support its request under the applicable legal standard, Plaintiff's dilatory motion to amend should be denied. In addition, in light of Plaintiff's bad faith conduct with respect to Plaintiff's motion, Nanal requests that it be awarded its attorneys' fees incurred in responding to the motion.

I. BACKGROUND FACTS.

Plaintiff filed its initial complaint on June 9, 2009, naming as defendants Google, Inc. and Bill Me, Inc. "d/b/a Leatherup.com." (Docket No. 1.) After realizing it had named the wrong defendant—a mistake Plaintiff still refuses to take responsibility for, stubbornly insisting on blaming Nanal—Plaintiff filed its First Amended Complaint on July 27, 2009, which named Nanal for the first time.[1] (Docket No. 9.) After receiving leave of the Court, Plaintiff filed a Second Amended Complaint on May 13, 2010, to add allegations that Nanal used Plaintiff's trademark as a keyword on the Bing and Yahoo search engines and in connection with a Xelement-branded motorcycle jacket. (Docket Nos. 47, 48.)

On February 2, 2010, the Court entered a Minute Order setting a case schedule, including a (1) March 2, 2010 deadline for joining additional parties; (2) July 21, 2010 deadline for

[1] Although it has no relevance to Plaintiff's motion, Plaintiff refers to Nanal as a "Las Vegas corporation." (Motion for Leave to File Third Amended Complaint, Docket No. 74 ("Motion") at p. 2.) As far as Nanal is aware, no such entity type exists and in any event, as Plaintiff is well aware, Nanal is a Nevada corporation incorporated in 2005. (Declaration of Stacia N. Lay in Support of Defendant Nanal, Inc.'s Opposition to Plaintiff's Motion for Leave to File a Third Amended Complaint ("Lay Decl.") ¶ 7, Exh. 6 at p. 58.)

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amending pleadings; (3) September 20, 2010 deadline for discovery; and (4) November 3, 2010 deadline for filing dispositive motions. (Lay Decl. ¶ 2, Exh. 1 at p. 7.) The Court's Minute Order further stated that the deadlines were "firm dates that can be changed only by order of the court" and that the Court "will alter these dates only upon good cause shown," a standard consistent with FED. R. CIV. P. 16(b)(4). (Lay Decl. ¶ 2, Exh. 1 at p. 8.)

Following the September 20th discovery deadline, on November 3, 2010, Nanal filed a timely motion for summary judgment on the claims in Plaintiff's Second Amended Complaint; the motion has been fully briefed and is pending before the Court. (Docket No. 57.) Under CR 16 and the Court's case schedule, the parties are now into the pre-trial preparation process, beginning with the exchange of pretrial statements,[2] motions in limine must be filed by January 4, the agreed pretrial order is due January 13, the pretrial conference is set for January 18, and trial is scheduled to begin February 1. (Lay Decl. ¶ 2, Exh. 1 at pp. 7-8.)

II. ARGUMENT.

A. Plaintiff Misstates the Standard Governing its Motion.

Because the Court entered a case scheduling order pursuant to Rule 16, that rule, not Rule 15, governs Plaintiff's untimely motion to amend its complaint for a third time. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992); *Fremont Inv. & Loan v. Beckley Singleton, CHTD*, No. 2:03-CV-1406-PMP-RJJ, 2007 WL 1213677, at *5 (D. Nev. Apr. 24, 2007) (where scheduling order deadline has passed, "the moving party must satisfy the stringent 'good cause' standard under [Rule] 16, not the more liberal standard under Rule 15(a)"). Only if Plaintiff satisfies the Rule 16 threshold standard does the Court consider the Rule 15 standard for amending pleadings. *Interscope Records v. Leadbetter*, No. C05-1149-MJP-RSL, 2006 WL 3858397, at *2 (W.D.

[2] CR 16(h) required Plaintiff to serve its pretrial statement no later than December 14th, 30 days prior to the January 13th deadline for filing the proposed pretrial order. Under CR 16(i), Nanal's pretrial statement was due no later than December 24th, 20 days prior to the January 13th deadline. But Nanal did not receive anything from Plaintiff until after 6 p.m. on December 15th, when Plaintiff emailed a draft pretrial order, not its pretrial statement in accordance with CR 16(h). (Declaration of Katherine Hendricks in Support of Defendant Nanal, Inc.'s Opposition to Plaintiff's Motion for Leave to File a Third Amended Complaint ("Hendricks Decl.") ¶ 7, Exh. 3.)

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Wash. Dec. 29, 2006); *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1232 n.3 (E.D. Cal. 1996). Plaintiff's failure to even reference Rule 16 or to request modification of the Court's scheduling order alone constitutes sufficient grounds to deny the motion.[3] *Jankanish v. First Am. Title Ins. Co.*, No. C08-1147MJP, 2009 WL 1919117, at *1 (W.D. Wash. July 2, 2009); *see also Johnson*, 975 F.2d at 608-09 (Ninth Circuit precedent suggests an untimely motion to amend should *not* be treated as a motion to modify the scheduling order).

Plaintiff's failure to even mention the Court's case schedule deadlines demonstrates a marked lack of deference to the Court's scheduling order, a disregard that should not be rewarded by granting the motion. *See Johnson*, 975 F.2d at 610 ("A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'") (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)).

> The district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [Plaintiff's] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier. Rule 16 was drafted to prevent this situation and its standards may not be short-circuited by an appeal to those of Rule 15.

Johnson, 975 F.2d at 610.

B. Plaintiff Fails to Show Good Cause to Amend its Complaint for a Third Time.

Under Rule 16, "a plaintiff must show good cause for failing to amend the complaint before the deadline specified in the scheduling order." *Precor Inc. v. Fitness Quest, Inc.*, No. C05-0993L, 2007 WL 136749, at *1 (W.D. Wash. Jan. 12, 2007). Rule 16's standard is not coextensive with Rule 15's standard; Rule 16 is more stringent and "primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. Although the existence or degree of prejudice to the party opposing amendment may supply additional reasons to deny the request, "the focus of the inquiry is upon the moving party's reasons for seeking modification." *Johnson*, 975 F.2d at 609; *Precor*, 2007 WL 136749, at *1. "If that party was not diligent, the inquiry should end." *Johnson*, 975 F.2d at 609.

[3] Nor should any belated attempt by Plaintiff to incorporate and argue the proper standard into its reply on this motion be countenanced as that would deprive Nanal of an opportunity to respond.

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1. The Record Reflects That Plaintiff Was Not Diligent.

Plaintiff has not demonstrated that it acted diligently by waiting to file its motion to amend until less than two months before trial and indeed does not even address the applicable "good cause" standard, relying instead solely on Rule 15. *See Rowen v. New Mexico*, 210 F.R.D. 250, 253 (D. N.M. 2002) (denying motion to amend where plaintiff offered no reason for delay but instead "merely cite[d] the liberal standard of amending a complaint pursuant to Rule 15(a)"). Plaintiff suggests that it could not discover Nanal's officers and directors and was unaware of Mr. Bootesaz's involvement in the matters alleged in Plaintiff's Second Amended Complaint until after Plaintiff deposed Mr. Bootesaz on September 20, 2010. (Motion at p. 3.) But the facts belie Plaintiff's assertions and highlight a remarkable lack of diligence.

In early October 2009, before the Court entered its scheduling order and before Plaintiff amended its complaint for the second time, Mr. Bootesaz filed a declaration that identified him as the president of Nanal, that stated he was responsible for Nanal's marketing, and that described Nanal's use of Google's AdWords program and Mr. Bootesaz's involvement in responding to Plaintiff's complaints with regard to that issue. (Lay Decl. ¶ 3, Exh. 2 at pp. 13-14.) On January 25, 2010, Nanal served its initial disclosures, which identified Mr. Bootesaz and his areas of knowledge, which included "Nanal's business, operations, products and marketing, including with any relevant Internet search engine, namely, Google, Inc., and Nanal's use of Google's Adword program." (Lay Decl. ¶ 5, Exh. 4 at p. 28.) Similarly, in Plaintiff's Amended Initial Disclosures, dated February 1, 2010, Plaintiff identified Mr. Bootesaz as an individual "likely to have discoverable information that Soaring Helmet may use to support its claims or defenses." (Lay Decl. ¶ 6, Exh. 5 at p. 34.) Plaintiff further indicated that Mr. Bootesaz and the other identified individuals "may be called to testify concerning their knowledge of all matters relevant to these proceedings, including the trademarks at issue; financial information; customer base; marketing and advertising; and defendant's infringement." (Lay Decl. ¶ 6, Exh. 5 at p. 34.) *See Robinson v. Twin Falls Highway Dist.*, 233 F.R.D. 670, 673 (D. Idaho 2006) (noting in denying motion to add a party that plaintiff had identified the proposed party in his initial

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disclosures before deadline for joining parties had passed).

Additionally, on July 30, 2010, Nanal served interrogatory responses that specifically identified Mr. Bootesaz as the individual primarily responsible for certain purportedly relevant actions. For example, in response to Interrogatories 3, 4, 9 and 10, Nanal stated that "Albert Bootesaz, President of Nanal, was primarily responsible for selecting the keyword terms through use of Google's Adwords keyword suggestion tool."[4] (Lay Decl. ¶ 7, Exh. 6 at pp. 47-50.) Mr. Bootesaz, "president of Nanal," was also identified as the person answering the discovery requests. (Lay Decl. ¶ 7, Exh. 6 at p. 46.) On July 30, Nanal also served documents that included corporate information from the Nevada Secretary of State's electronic database—available to the general public—which specifically identified Nanal's officers (Mr. Bootesaz and his sister Nahid Botehsaz) by name, position and location. (Lay Decl. ¶ 7, Exh. 6 at pp. 56-57.)

Plaintiff's own documents indicate that Plaintiff began investigating Mr. Bootesaz as early as July 17, 2009—**before Plaintiff filed its First Amended Complaint that named Nanal for the first time**—according to printouts from the California Secretary of State's website and a "Whitepages" "Free People Search."[5] (Lay Decl. ¶ 9, Exh. 7 at pp. 61-63.) Plaintiff's decision to ignore the results of its own investigation is wholly inconsistent with a claim of diligence. *See Johnson*, 975 F.2d at 609 ("[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.").

This evidence amply demonstrates that Plaintiff knew of Mr. Bootesaz's role in Nanal and involvement with the issues alleged in this litigation long before Mr. Bootesaz's deposition and Plaintiff's present motion.[6] It is therefore false for Plaintiff to state that before Mr. Bootesaz's September 20th deposition, "Nanal had made it very difficult for Soaring Helmet and its counsel to learn the identity of Defendant Nanal's officers and directors, or even its location."

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[4] Nanal later served supplemental and corrected interrogatory responses but no changes were made to the quoted portions of the responses. (Lay Decl. ¶ 8.)

[5] The "Whitepages" search results dated July 17, 2009 identified "Albert Bootesaz" as "Leatherup Co, Director." (Lay Decl. ¶ 9, Exh. 7 at p. 63.) There is also a lengthy investigative report on Mr. Bootesaz which is undated but which was produced at the same time as the other documents dated July 17, 2009. (Lay Decl. ¶ 9.)

[6] By citing this information, Nanal in no way concedes that Mr. Bootesaz would, in fact, be personally liable if Plaintiff was allowed to amend its complaint and in the unlikely event Plaintiff was successful on any of its claims.

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(Motion at p. 3.) Similarly false is Plaintiff's suggestion that it was not until the deposition that the "extent of [his] exclusive control and direction of the company, and his control of its infringing activities, became clear." (Motion at p. 3.) To make such assertions in light of all of this information and in reliance only on a single allegation regarding something that purportedly occurred before Plaintiff even sued Nanal is grossly improper.

> The burden was upon [Plaintiff] to prosecute [its] case properly. [It] cannot blame [Nanal] for [its] failure to do so. The simple fact is that [Plaintiff's] attorneys filed pleadings and conducted discovery but failed to pay attention to the responses they received. That is precisely the kind of case management that Rule 16 is designed to eliminate.

Johnson, 975 F.2d at 610. In short, the facts overwhelmingly support the conclusion that Plaintiff was not diligent in seeking to add Mr. Bootesaz.[7] *See Robinson*, 233 F.R.D. at 673 ("Knowing of the facts forming the basis for the proposed amendment prior to the deadline for amending precludes a finding of due diligence.").

Even if the Court were to accept Plaintiff's assertion that it could not move to amend until after Mr. Bootesaz's September 20th deposition (despite the overwhelming evidence to the contrary), Plaintiff offers ***no explanation*** for failing to make its motion until nearly three months ***after*** that deposition and the close of discovery, more than a month after the deadline for dispositive motions expired, after Nanal's summary judgment motion was fully briefed and pending before the Court, and only days before Plaintiff was required to serve its pretrial statement. These facts alone show an utter lack of diligence on Plaintiff's part and amply justify denying Plaintiff's dilatory motion to amend. *See Interscope*, 2006 WL 3858397, at *2 (denying motion to amend to add defendant where plaintiffs waited nearly five months after deposition allegedly providing the relevant information before seeking joinder); *Eckert*, 943 F. Supp. at 1233 (finding that plaintiffs had not been diligent where they did not adequately explain why

[7]Even if there was any merit to Plaintiff's assertion that it could not name Mr. Bootesaz specifically, Plaintiff does not explain why it did not apprise the Court in the Amended Joint Status Report, when the parties proposed a January 31, 2010 deadline for joining additional parties, that there was a possibility that Plaintiff may name additional parties even if their identity was unknown at that time. (Lay Decl. ¶ 4, Exh. 3 at p. 21.) *See Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) ("Parties anticipating possible amendments to their pleadings have an 'unflagging obligation' to alert the Rule 16 scheduling judge of the nature and timing of such anticipated amendments in their status reports[.]").

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waited months after receiving the purportedly necessary information to seek amendment).

2. Significant Prejudice Would Result if Amendment Was Allowed.

Because the inquiry under Rule 16 focuses on Plaintiff's diligence, Nanal and Mr. Bootesaz need not show any prejudice resulting from Plaintiff's lack of diligence. *Johnson*, 975 F.2d at 609. But the existence of substantial prejudice to them if amendment was allowed on the eve of trial further supports denying Plaintiff's motion. *Johnson*, 975 F.2d at 609.

Plaintiff's cursory claim (under the Rule 15 standard) that there is no prejudice to Nanal or Mr. Bootesaz if amendment is allowed is false. Plaintiff only references the passage of the discovery deadline, ignoring the fact that, *inter alia*, the deadline for dispositive motions has passed and the parties are preparing for a trial that is scheduled to take place in less than two months. Thus, Plaintiff's dilatory conduct prevents Mr. Bootesaz from asserting counterclaims against Plaintiff and/or its principals in connection with their conduct in this litigation as the deadline for amending pleadings and joining parties have long since passed. Moreover, by waiting to file until the deadline for filing dispositive motions had passed and Nanal's motion for summary judgment on Plaintiff's Second Amended Complaint had been fully briefed—without offering any explanation whatsoever for that delay—Plaintiff improperly seeks to deprive Nanal and Mr. Bootesaz from moving for summary judgment on the new issue of Mr. Bootesaz's alleged personal liability for Plaintiff's claims.[8] *Phoenix Payment Solutions, Inc. v. Towner*, No. CV-08-651-PHX-DGC, 2009 WL 2870087, at *2 (D. Ariz. Sept. 3, 2009) (allowing amendment would be harmful where deadline for summary judgment motions had passed); *Samonte v. Maglinti*, Civ. No. 05-00598 SOM-BMK, 2007 WL 1670061, at *2 (D. Haw. June 6, 2007) (granting plaintiff's motion to amend "virtually on the eve of trial" would require a trial continuance to allow new defendants to be served and to answer and would require the court "to reopen long-closed discovery and motions deadlines to allow the newly added defendants the

[8] Any claim by Plaintiff that this prejudice could be remedied by a continuance of the trial should be soundly rejected. In light of Plaintiff's failure to offer any legitimate explanation for its lack of diligence and Plaintiff's apparent disregard for the deadlines set by the Court, neither Nanal nor the Court should be forced to delay the resolution of this case to accommodate Plaintiff's dilatory conduct.

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same opportunities to defend against suit that the original defendants had" which "strongly weigh[ed] against granting Plaintiff's request"); *Robinson*, 233 F.R.D. at 673 (finding of prejudice further supported denying motion to amend to add a party where deadlines for discovery and dispositive motions had passed); *Milt's Flying Serv., Inc. v. AV Finance, Inc.*, No. CV 01-180-BR, 2002 WL 31975066, at *5 (D. Or. Dec. 2, 2002) (late amendment would prejudice defendants where motion was made on eve of discovery deadline, time had expired on other case management extensions and defendants' summary judgment motion was pending).

Plaintiff's failure to make its motion until after the dispositive motion filing deadline had passed and in the face of Nanal's pending summary judgment motion on Plaintiff's Second Amended Complaint is also suspicious and suggestive of bad faith. *See Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (noting that "[f]acing a summary judgment motion," plaintiff sought to amend its complaint to add causes of action on which discovery had not been taken, which might reflect bad faith); *Gonzalez v. City of Fresno*, No. 1:06-CV-01751-OWW-TAG, 2009 WL 2208300, at *12 (E.D. Cal. July 23, 2009) ("Plaintiff's tactic is reflective of bad faith" where filed motion to amend after defendants moved for summary judgment and filed their motion to dismiss). Bad faith is also implicated by Plaintiff's proposed deletion of substantive allegations that have nothing to do with adding Mr. Bootesaz as a defendant and which Plaintiff has not explicitly identified for the Court. Specifically, Plaintiff's proposed third amended complaint deletes allegations and an exhibit pertaining to the claim that Nanal used Plaintiff's trademark in connection with other internet search engines, namely, Yahoo and Bing. (Lay Decl. ¶¶ 10-12, Exh. 8.) But Plaintiff cannot simply delete information from its complaint that may be unfavorable to it, particularly when the complaint is the subject of a pending summary judgment motion and Plaintiff fails to disclose to the Court what it has done when seeking leave to file the amended complaint.

C. Plaintiff is Not Entitled to Amend Under Rule 15.

Because Plaintiff fails to mention, much less satisfy, the threshold requirement of good cause under Rule 16, the Court need not consider the proposed amendments under Rule 15.

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Jankanish, 2009 WL 1919117, at *1, 3; *Hansen v. Schubert*, 459 F. Supp. 2d 973, 1001 (E.D. Cal. 2006). But even if the Court were to consider Rule 15, Plaintiff has not established an entitlement to amend its complaint for a third time under that rule's more lenient standard.

Rule 15's liberal amendment policy is tempered by factors a court should consider in deciding whether to exercise its discretion and allow amendment. The Court "need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *Amerisourcebergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). Moreover, "leave to amend is not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). Not all the factors carry equal weight; rather, "[p]rejudice is the 'touchstone of the inquiry under rule 15(a).'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)). And "[a]mending a complaint to add a party poses an especially acute threat of prejudice to the entering party." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

As described above, Plaintiff's unexplained and unjustified delay in bringing its motion to amend its complaint for a third time[9] poses significant prejudice to Nanal and Mr. Bootesaz. Plaintiff also offers no evidence to support its claim that it will not be able to obtain complete relief if Mr. Bootesaz is not added and instead merely offers spurious allegations. Plaintiff has no evidence to support the allegation that any of the companies Mr. Bootesaz has been part of are "shell" companies or that Mr. Bootesaz would dissolve Nanal in the unlikely event Plaintiff was successful on its claims. As Plaintiff is well aware, Nanal has been incorporated for more than five years and has been operating its successful website LeatherUp.com throughout that period.

The timing of Plaintiff's motion is also indicative of bad faith. Plaintiff waited until the deadline for dispositive motions had passed and Nanal's summary judgment motion was fully briefed and pending before the Court to make a motion that includes spurious and unsupported

[9]The fact that Plaintiff has already amended its complaint twice militates against allowing a third amendment, particularly when the relevant deadlines passed months ago. *Gonzalez*, 2009 WL 2208300, at *12.

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allegations about Nanal's president that seem clearly aimed at attempting to influence the Court's consideration of Nanal's motion and precluding Nanal and Mr. Bootesaz from challenging the alleged personal liability of Mr. Bootesaz by motion. *See, e.g.*, *Lockheed Martin*, 194 F.3d at 986; *Gonzalez*, 2009 WL 2208300, at *12. In addition, by choosing to file its motion when it did, Plaintiff forced Nanal to simultaneously prepare its opposition to the motion (which is due on the Monday after Christmas) and its pretrial statement (which is due on Christmas Eve). Having to respond to Plaintiff's untimely motion has also forced Nanal to take time away from other trial preparation, including preparing motions in limine which must be filed by January 4, 2011, according to the Court's scheduling order. Moreover, it is clear that Plaintiff chose to prepare and file its untimely motion in lieu of completing and serving its pretrial statement by CR 16(h)'s deadline. Plaintiff was required to serve its pretrial statement by December 14 but Nanal did not receive a copy of a draft pretrial order—not a pretrial statement—from Plaintiff until after 6 p.m. on December 15th. (Hendricks Decl. ¶ 7, Exh. 3.) Given that Plaintiff offers no explanation for delaying the filing of its motion to amend for nearly three months after Mr. Bootesaz's deposition,[10] the timing of Plaintiff's motion is highly suggestive of a bad faith intent to prejudice Nanal as it prepares for trial and to delay this matter.

D. Nanal Should Be Awarded its Attorneys' Fees Incurred in Responding to Plaintiff's Unsupported and Untimely Motion.

Plaintiff's motion (1) fails to state or satisfy the correct legal standard; (2) fails to identify for the Court all of the proposed substantive changes to the complaint; (3) ignores the relevant case schedule deadlines set by the Court; (4) makes unsupported allegations regarding Mr. Bootesaz that appear aimed at influencing the Court's consideration of Nanal's fully briefed and pending summary judgment motion on Plaintiff's Second Amended Complaint; and (5) fails to offer any legitimate explanation for Plaintiff's failure to make the motion until numerous critical case deadlines have long since passed and as the parties have begun preparing for trial. In light of these facts, Nanal believes Plaintiff's motion was frivolous and made in bad faith, justifying

[10]Of course as Nanal amply demonstrated in discussing Plaintiff's lack of diligence, Plaintiff had the information necessary to file its motion well before Mr. Bootesaz's deposition, which further reinforces a finding of bad faith.

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an award of the reasonable attorneys' fees incurred by Nanal in responding to the motion under either FED. R. CIV. P. 16(f) or the Court's inherent sanctioning power.

Rule 16 explicitly empowers the Court to sanction parties and attorneys for failure to comply with the rule:

> Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16(f)(2). "Rule 16(f) was designed not only to insure expeditious and sound management of the preparation of cases for trial but to deter conduct that unnecessarily consumes 'the Court's time and resources that could have been more productively utilized by litigants willing to follow the Court's procedures.'" *Martin Family Trust v. Heco/Nostalgia Enters. Co.*, 186 F.R.D. 601, 603 (E.D. Cal. 1999) (quoting *Mulkey v. Meridian Oil, Inc.*, 143 F.R.D. 257, 262 (W.D. Okla. 1992)). Rule 16(f) sanctions were intended to obviate dependence upon the court's inherent power and to reinforce "the rule's intention to encourage forceful judicial management." FED. R. CIV. P. 16 advisory committee's notes (1983 amendment).

> In these days of heavy caseloads, trial courts in both the federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence. The Federal Rules of Civil Procedure explicitly authorize the establishment of schedules and deadlines, in Rule 16(b), and the enforcement of those schedules by the imposition of sanctions, in Rule 16(f).

Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1060 (9th Cir. 2005). An award of sanctions under Rule 16(f) is within the Court's discretion. *Ayers v. City of Richmond*, 895 F.2d 1267, 1269 (9th Cir. 1990).

The Court also may award attorneys' fees as a sanction under its inherent powers if the party's or its attorney's conduct constitutes or is tantamount to bad faith. *In re Keegan Mgmt. Co. Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996); *see also Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). "[A] finding of bad faith 'does not require that

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the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar the assessment of attorney's fees.'" *In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986) (quoting *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980)); *see also Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001) ("[S]anctions are justified when a party acts *for an improper purpose*—even if the act consists of making a truthful statement or a non-frivolous argument or objection[.]").

As described above, under either standard, Plaintiff's conduct in bringing this untimely motion in disregard of the Court's case schedule, the unsupported allegations made in the motion, and Plaintiff's failure to identify for the Court all of the substantive changes it proposes making to its complaint warrant imposition of sanctions in the form of Nanal's reasonable attorneys' fees incurred in responding to Plaintiff's motion.

In calculating an award of Nanal's attorneys' fees, "once the Court has established that fees should be awarded, a single standard governs how the Court arrives at a reasonable fee award." *Gordon v. Virtumundo, Inc.*, No. 06-0204-JCC, 2007 WL 2253296, at *6 (W.D. Wash. Aug. 1, 2007). Specifically, the determination of the amount of reasonable attorneys' fees is the number of hours reasonably expended multiplied by a reasonable hourly rate. *Gordon*, 2007 WL 2253296, at *6-7 (identifying factors to consider). Using that standard, Nanal has provided evidence supporting its request for an award of its attorneys' fees incurred in responding to Plaintiff's motion totaling $6,720.00. (Hendricks Decl. ¶¶ 2-6, Exhs. 1, 2.)

DATED this 22nd day of December, 2010.

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of eighteen years and am not a party to the within action. My business address is Hendricks & Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164.

I hereby certify that on December 22, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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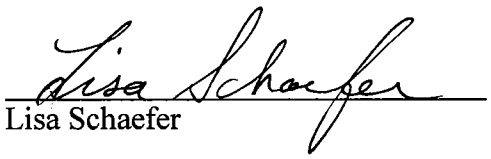
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed December 22, 2010, at Seattle, Washington.



Lisa Schaefer

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