

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

REPLY TO DEFENDANT'S  
RESPONSE TO MOTION FOR LEAVE  
TO FILE THIRD AMENDED  
COMPLAINT

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

REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR  
LEAVE TO FILE THIRD AMENDED COMPLAINT

1840 071 j1280801

**INVICTA LAW GROUP, PLLC**

1000 SECOND AVENUE, SUITE 3310

SEATTLE, WA 98104-1019

FAX (206) 903-6365

TEL (206) 903-6364

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

## I. INTRODUCTION

Soaring Helmet did not discover a good faith basis to amend its complaint until it deposed Mr. Bootesaz. Accordingly, Soaring Helmet could not have met the Court’s scheduling order deadline to amend its complaint to add Mr. Bootesaz. Because Mr. Bootesaz is without dispute, the central figure guiding and directing the alleged corporate infringement, and because Mr. Bootesaz is the alter ego of Defendant Nanal, Inc., he should be a named defendant in this matter. Further, since Mr. Bootesaz controlled the defense of the case from the outset, Mr. Bootesaz will not be prejudiced if he is added as a defendant. Accordingly, Soaring Helmet has met both the good cause standard under Rule 16 and the liberal standard of Rule 15(a).

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

## II. ARGUMENT

Defendant’s primary contention, that the motion should be denied because Rule 16 applies, fails. If a motion to amend the complaint is filed after the deadline set in the scheduling order, but no motion to modify the scheduling order accompanies it, the Court may treat the motion as both to amend both the complaint under Rule 15(a) and to modify the scheduling order under Rule 16. See *Aldan v. World Corp.*, 267 F.R.D. 346, 355 (D.N.M.I. 2010); *Li v. Sheltzer*, 1:07-CV-01039 AWIGSA, 2008 WL 2690404 at \*1 (E.D. Cal. July 1, 2008). The Rule 16 “good cause” standard primarily considers whether the existing deadline could not have reasonably been met despite the diligence of the party seeking the extension. *Aldan*, 276 F.R.D. at 355. If the moving party is able to satisfy the good cause standard under Rule 16, then the Court will examine whether the amendment

1 is proper under Rule 15(a). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-  
2 608 (9<sup>th</sup> Cir. 1992). Soaring Helmet has met both standards.

3 A) **Soaring Helmet acted in good faith because it did not discover the facts**  
4 **underlying the basis for its proposed amendment until it deposed Mr.**  
5 **Bootesaz.**

6 In a strikingly similar case, *Peterson v. Acumed, LLC*, the Court found that  
7 defendant had demonstrated “good cause” to amend its complaint because the defendant  
8 did not learn of the facts underlying the proposed amendments until it deposed the  
9 plaintiff:

10 “There is a tension between the need to have all the issues identified before the  
11 depositions and the need for depositions to disclose or complete disclosure of the  
12 issues involved in the claims and defenses...At oral argument, [Defendant’s]  
13 attorney noted that she was aware of the possibility of additional claims and  
14 defenses prior to the amendment deadline, but did not have a good faith basis to  
15 bring those claims and defenses until after completing plaintiff’s deposition...I will  
16 not deny the motion to amend in light of the specific facts of this case, which leave  
17 a credible argument that defendant did not yet have a Rule 11 good faith basis for  
18 amendment before the deposition of plaintiff.”

19 See *Peterson v. Acumed, LLC*, 2010 WL 5158542 at \*3 (D. Or. 2010); See also *Hood v.*  
20 *Hartford Life & Acc. Ins. Co.*, 567 F. Supp. 2d 1221, 1225-26 (E.D. Cal. 2008) (Plaintiff  
21 demonstrated “good cause” to amend when it did not discover facts related to  
22 amendments until after it took defendant’s deposition). Similarly, in this case, Soaring  
23 Helmet did not first learn of the facts underlying Mr. Bootesaz’s abuse of the corporate  
form and exclusive control over the infringing activities until Soaring Helmet deposed Mr.  
Bootesaz on September 20, 2010. Soaring Helmet acted in good faith by waiting until

1 after it deposed Mr. Bootesaz to ensure that there was a legitimate basis to allege that Mr.  
2 Bootesaz should be held individually liable.<sup>1</sup>

3 Further, Soaring Helmet did not move immediately after Mr. Bootesaz's deposition  
4 to add him individually as a defendant because the case was scheduled for mediation, and  
5 Soaring Helmet was engaging in good faith settlement negotiations with Nanal. See  
6 *Aldan v. World Corp.*, 276 F.R.D. 346, 357-358 (D.N.M.I. 2010) (Plaintiff's delay of two  
7 months in filing motion to amend was excusable when plaintiff believed case would settle  
8 and had waited to file to amend in order to save unnecessary time and expense). Thus, the  
9 relatively slight delay between Mr. Bootesaz's deposition and the filing of the present  
10 motion on December 10, 2010 was due only to Soaring Helmet's good faith intent under  
11 the circumstances.

12 Defendant argues at length that because it disclosed Mr. Bootesaz as a witness with  
13 knowledge of the matters relevant to the proceedings, that Soaring Helmet did not act  
14 diligently. This argument is specious. None of the disclosures and responses referenced  
15 by Defendant suggest or assert that Mr. Bootesaz is the alter ego of Defendant. Soaring  
16 Helmet timely deposed Mr. Bootesaz because of these disclosures and responses, and it  
17

18  
19  
20  
21 <sup>1</sup> For clarity, and in order to avoid a spurious claim by Defendant that by not addressing an allegation,  
22 that Soaring Helmet "agrees" with Defendant – Soaring Helmet deleted the Bing and Yahoo search  
23 engines from its complaint in order to simplify and streamline the issues in anticipation of trial. This  
is not only appropriate, but it is also required as part of the parties' pretrial conference scheduled for  
January 18, 2011. See, e.g., Fed.R.Civ.P. 16(c), stating that purpose of pretrial conference is to amend  
the pleadings if necessary and to simplify issues in anticipation of trial.

1 was his deposition testimony relating to his own conduct that provided the predicate of  
2 Soaring Helmet's proposed amendment.<sup>2</sup>

3 **B) Nanal will not be prejudiced by the amendment; and judicial economy**  
4 **weighs in favor of allowing the amendment.**

5 The prejudice to the opposing party is lessened when the amendment presents  
6 solely an issue of law to be determined upon application to the existing facts, and the  
7 amendment will not require the re-opening of discovery or the delay of trial. See  
8 *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 470 (D.N.J. 1990);  
9 *Hood*, 567 F. Supp. 2d at 1226. In this case, Defendants Nanal, Inc. and Mr. Bootesaz  
10 will not require separate counsel (and Defendant has made no such contention), as their  
11 interests are aligned. Further, because Mr. Bootesaz is the principal witness to his own  
12 conduct, adding Mr. Bootesaz will not necessitate further discovery nor delay the trial  
13 date. See *Harrison*, 133 F.R.D. at 470 (“[J]ustice requires permitting amendment  
14 [regarding] issues which are largely implicated in this case in any event, and both issues  
15 lie within evidentiary determinations to be made at trial.”) Not surprisingly, Defendant  
16 has not identified any additional discovery that it would need in order to defend the claim.  
17 And notably, none of the cases relied upon by Defendant involve the facts and claim at  
18 hand – the addition of an individual party alleged to be the alter ego of the defendant  
19 corporation that has defended the case from the outset. Thus, Mr. Bootesaz will not be  
20 prejudiced if he is added as a defendant.  
21

---

22 <sup>2</sup> Defendant's argument appears to suggest that Defendant's disclosures provide evidence that should  
23 have led Soaring Helmet to conclude that Mr. Bootesaz is the alter ego of Nanal, Inc., a statement that  
appears to be against Mr. Bootesaz's self-interest.

1 Finally, 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. Thus, considerations of judicial economy also weigh in favor of allowing the  
5 amendment.

6 C) **Defendant has not properly moved for sanctions; nor are they**  
7 **warranted under the circumstances.**

8 Under Fed.R.Civ.P. 16(f)(1), a party must bring a motion if it requests that  
9 sanctions be awarded. Since Defendant has not done so, sanctions should be denied on  
10 that basis alone. Further, none of the cases cited by Defendant support the award of  
11 sanctions requested by Defendant in this case.<sup>3</sup>

12 Defendant has also failed to show that sanctions are warranted under the Court's  
13 inherent power. In order for the Court to award sanctions on this basis, a party must have  
14 acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Fink v. Gomez*, 239  
15 F.3d 989, 992 (9<sup>th</sup> Cir. 2001). Again, Defendant does not cite to any case that even  
16 remotely supports its request for sanctions in this case. See *In re Securities Litigation*,  
17 791 F.2d 672, 675 (9<sup>th</sup> Cir. 1986) (Court found that attorney's concession that he willfully  
18 abused the judicial process by filing objections in the case in order to exact fee  
19

---

21 <sup>3</sup> With respect to the amount claimed, Defendant's request is particularly egregious. See *Martin*  
22 *Family Trust v. Heco/Nostalgia Enters. Co.*, 186 F.R.D. 601, 603 (E.D. Cal. 1999) (ordering attorney  
23 to pay a \$300 sanction for failure to file a status report as required by the Court's Rule 16 order);  
*Ayers v. City of Richmond*, 895 F.2d 1267, 1269 (9<sup>th</sup> Cir. 1990) (ordering attorney to pay a \$749  
sanction for failure to attend a settlement conference under Rule 16(f)).


1 concessions in an action pending before another court justified award of sanctions). Thus,  
2 Defendant's request for sanctions should be denied.

3 **VI. CONCLUSION**

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

7 DATED December 30, 2010.

8 INVICTA LAW GROUP, PLLC

9  
10 By 

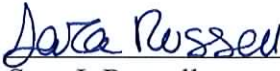
11 Heather M. Morado, WSBA No. 35135  
12 Stacie Foster, WSBA No. 23397  
13 Attorneys for Plaintiff  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

1 CERTIFICATE OF SERVICE

2 I hereby certify that I electronically filed the foregoing with the Clerk of the Court  
3 using the CM/ECF system which will send notification of such filing to the following  
4 persons/attorneys of record:

5 Ms. Katherine Hendricks  
6 Ms. Stacia N. Lay  
7 HENDRICKS & LEWIS, PLLC  
8 901 Fifth Avenue, Suite 4100  
9 Seattle, WA 98164  
10 kh@hllaw.com

11 Dated this 30<sup>th</sup> day of December 2010, at Seattle, Washington.

12   
13 \_\_\_\_\_  
14 Sara J. Russell  
15 Legal Secretary