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7 IN THE UNITED STATES DISTRICT COURT FOR THE
8 NORTHERN DISTRICT OF CALIFORNIA
9 OAKLAND DIVISION

10
11 AF HOLDINGS LLC,)
12 Plaintiff,)

13 v.)

14 JOHN DOE)

15 Respondent.)

No. 4:12-cv-02049-PJH

Judge: Hon. Phyllis J. Hamilton

**PLAINTIFF’S REPLY TO
THIRD-PARTY RESPONDENT’S
RESPONSE TO MOTION
FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

16 Date: November 7, 2012

17 Time: 9:00 a.m.

Courtroom: 3, 3rd Floor

18 **INTRODUCTION**

19 Plaintiff AF Holdings LLC (“Plaintiff”) filed a Motion for Leave to File Second Amended
20 Complaint (“Plaintiff’s Motion”) (ECF No. 27.) Having conducted a further investigation, Plaintiff
21 sought to name Josh Hatfield as the Respondent and direct infringer in the instant action. Third-Party
22 Respondent Josh Hatfield (“Respondent”) has filed a Response to Plaintiff’s Motion (“Respondent’s
23 Response”) (ECF No. 30).¹ Plaintiff, by and through its undersigned counsel, now files this Reply to
24 Respondent’s Response to Plaintiff’s Motion for Leave to File Second Amended Complaint.
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27 ¹ Plaintiff replies to Respondent’s Response under protest. As stated its Motion to Strike Respondent’s Response (ECF
28 No. 31) filed on October 18, 2012, Respondent should never have even been permitted to file such a response in light of
the fact that Respondent is *not a party to this case*. Respondent, in his current position as a bystander in this case,
cannot, in that position, have any influence over this case or this Court’s decision on Plaintiff’s Motion. Plaintiff prays
that the Court merely ignore Respondent’s clear attempt to wrongfully influence this case.

1 Before turning to Respondent's Response, Plaintiff asserts that, as a threshold matter,
2 Respondent does not have standing to respond to Plaintiff's Motion. On September 4, 2012, this
3 Court dismissed Plaintiff's negligence claim against Respondent; as that was Plaintiff's only claim
4 against Respondent, Respondent was himself dismissed as a party to the case as well. (ECF No. 26.)
5 Tellingly, Respondent does not identify his role in the case anywhere in his Response; Respondent
6 titled his Response "*Josh Hatfield's Opposition to Plaintiff's Motion to Amend*," does not include
7 Respondent's name in the captioning of the case, and does not indicate how Respondent may be a
8 party to the case in any other manner (ECF No. 30 at 1.) Plaintiff addresses in greater detail, in its
9 Argument section below, Respondent's curious belief that, though a non-party, he is entitled to
10 respond to Plaintiff's Motion.
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12 Though Respondent does not have standing to respond to Plaintiff's Motion, Plaintiff, for the
13 sake of argument, now turns to Respondent's Response. Plaintiff first addresses Respondent's
14 opening remarks. Respondent asserts that "an IP address is simply insufficient to identify the
15 infringer of a Plaintiff's copyright," citing *SBO Pictures* in support of the proposition that "the ISP
16 subscriber to whom a certain IP address was assigned *may* not be the same person who used the
17 internet connection for illicit purposes." (ECF No. 30 at 1) (emphasis added). The key word in the
18 language cited by Respondent is "*may*." While it is sometimes the case that there is not a match
19 between the subscriber of an IP address engaged in illicit conduct and the person who actually
20 engaged in that conduct, IP addresses have repeatedly been found to be a sound basis for making
21 such allegations. Notably, one of the contexts in which IP addresses are frequently used as the
22 foundation for claims of illicit behavior is that of criminal cases. For example, law enforcement
23 often uses IP addresses as the basis of probable cause to investigate potential purveyors of child
24 pornography. (*See, e.g., U.S. v. Hay*, 231 F.3d 630, 647 (9th Cir. 2000).) To be certain, there is a
25 criminal trial that follows such investigations, but the fact remains that IP addresses form the
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1 foundation for probable cause. Plaintiff in the instant action is held to a lower standard than probable
2 cause in making its allegations; as such, it would be reasonable for Plaintiff to allege that Josh
3 Hatfield infringed Plaintiff's work on the basis of the fact that the IP address for which he was the
4 subscriber was found to be doing so. Out of an abundance of caution, however, Plaintiff conducted
5 further investigation in order to ensure that it had an objectively reasonable basis for naming Josh
6 Hatfield as the direct and contributory infringer. As in the criminal context, the purpose of civil trial
7 and of pre-trial mechanisms such as discovery is to supplement and test the allegations of the alleged;
8 Plaintiff looks forward to doing just that in the instant action.

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10 Respondent next asserts that "Plaintiff's counsel has frequently been forced to admit that an
11 IP address is insufficient to identify the actual infringer of its copyright." (ECF No. 30 at 5.)
12 Respondent supports this assertion by stating that "the Plaintiff's justification in each was explicit –
13 that an IP address is not sufficient, without further discovery, to determine whether an ISP subscriber
14 is actually the individual that committed copyright infringement via a particular IP address." (ECF
15 No. 30 at 6.) Plaintiff notes, however, that the cases cited by Respondent involved a different
16 Plaintiff, and necessarily involved different circumstances. In the present case, Plaintiff's further
17 investigations have proven sufficient to give Plaintiff good cause to allege that Josh Hatfield
18 infringed Plaintiff's copyright. As previously mentioned, an IP address alone has proven sufficient
19 as probable cause for law enforcement to pursue its investigations; Plaintiff here chose not to name
20 Josh Hatfield as the Respondent until it felt comfortable with the amount of evidence it had gathered
21 in support of its case, and Plaintiff had every right to do so; Respondent has no imperative to dictate
22 legal strategy to Plaintiff. Though Plaintiff has not taken formal discovery of Josh Hatfield, Plaintiff
23 has gathered information through other avenues, and is now prepared to name Josh Hatfield as the
24 infringer in its case.
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1 Respondent goes on to assert that “at 6:18 PM, less than five hours after this court’s decision
2 granting Mr. Hatfield’s motion to dismiss, Plaintiff’s counsel threatened to sue Josh Hatfield as the
3 infringer, despite the prior admission that they did not know whether he was indeed the responsible
4 party.” (ECF No. 30 at 9.) First of all, that prior “admission” happened weeks before, thus allowing
5 Plaintiff weeks to do further research on the potential infringer and to come to a conclusion about
6 Respondent’s potential further liability in this case once the motion papers were before the Court.
7 Further, Plaintiff’s prior statement is not, however, tantamount to a blanket admission that the fact of
8 whether Hatfield is the responsible party is *unknowable*; rather, at the time the statement was made,
9 Plaintiff indeed was not prepared to assert from a legal standpoint that Hatfield was the responsible
10 party. Things change, however; as Respondent notes, Plaintiff stated in its motion that its further
11 investigations gave Plaintiff good cause to allege that Josh Hatfield was the infringer. Respondent
12 correctly asserts that Plaintiff did not indicate in its motion what the investigation may have entailed,
13 but cited absolutely no case law in support of the proposition that Plaintiff had an obligation to
14 indicate the step-by-step details of its investigation. Such issues are properly resolved at trial and
15 through pre-trial mechanisms such as discovery.
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18 Having addressed Respondent’s opening remarks, Plaintiff now turns to Respondent’s
19 substantive arguments. In support of his Opposition to Plaintiff’s Motion, Respondent first argues
20 that “this matter should be dismissed via Fed. R. Civ Proc. 41(b) for failure to prosecute and failure
21 to comply with court order.” (ECF No. 30 at 10.) Respondent’s second argument is that leave to
22 amend the complaint should be denied because of bad faith, undue delay, failure to provide
23 evidentiary support, and futility of amendment. (ECF No. 30 at 14-18.)
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ARGUMENT**I. RESPONDENT DOES NOT HAVE STANDING TO RESPOND**

On September 4th, 2012, this Court dismissed Plaintiff's negligence claim against Respondent. (ECF No. 26.) At that time, the negligence claim was Plaintiff's only alleged cause of action against Respondent. (ECF No. 14.) Thus, when this Court dismissed Plaintiff's negligence claim against Respondent, Respondent was no longer a party to the action. Due to Respondent's status as a non-party to the instant action, Plaintiff has moved to strike Respondent's entire response from the record pursuant to Fed. R. Civ. Proc. 12(f), as the response of a non-party is immaterial to the action.

II. PLAINTIFF'S ACTION SHOULD NOT BE DISMISSED**A. PLAINTIFF DID NOT FAIL TO PROSECUTE ITS ACTION**

Respondent argues that Plaintiff's action should be dismissed via Fed. R. Civ. Proc. 41(b) for failure to prosecute. (ECF No. 30 at 11.) In support of this proposition, Respondent asserts that the factors enumerated in *Citizens Utilities*—public interest and risk of prejudice from unreasonable delay—weigh in his favor. (*Id.*) Respondent's assertion is incorrect. Though Respondent correctly states that "Plaintiff did not serve any Doe Respondents in the prior action, and the prior action was dismissed based on Plaintiff's failure to effectuate service," Plaintiff had no motive to unreasonably delay its action. (*Id.*) Rather, Plaintiff wanted to marshal sufficient evidence before it named and served an individual as the infringer, and, regardless of the imposed deadlines, did not want to take such action even a moment before it had gathered such sufficient evidence. Respondent, citing *Nealey*, asserts that "the plaintiff, of course, has the ultimate burden of persuasion both as to the excuse for his own delay and as to the lack of prejudice to the Respondent." Though Respondent would have this assertion stand for the proposition that Plaintiff is obligated to disclose the nature of the evidence yielded by its investigations, such an assertion is unsubstantiated. In order to carry its burden of persuasion under *Nealey*, Plaintiff notes here that *Nealey*, and most other cases dealing

1 with failure to prosecute, are centered upon a known, named Respondent. In the instant case,
2 Plaintiff simply was not certain before as to whom to prosecute for the direct and contributory
3 infringement claims, hence posturing those claims against a unknown yet-to-be-named John Doe. If
4 one considers the contrary course of action, which is to name a Respondent before having sufficient
5 evidence, one begins to run afoul of Fed. R. Civ. Proc. 11. Thus, Plaintiff is left in a precarious
6 position, balancing on one hand the need to comply with court deadlines while on the other hand
7 making sure that it has good cause to name an individual as the Respondent in its case. To
8 summarily dismiss Plaintiff's claim because of its insistence on carrying out due diligence would be
9 to demonstrate a marked prejudice against any plaintiff aiming to recover for online infringement of
10 its copyright, leaving Plaintiff and others similarly situated with absolutely no way of enforcing their
11 rights. Plaintiff's due diligence is, however, time-consuming, as it must be to ensure as much
12 accuracy as possible under the circumstances.
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15 Respondent asserts that "much of the evidence for the copyright infringement claim would
16 consist in fleeting electronic evidence which may be irretrievably lost due to the passage of time."
17 (ECF No. 30 at 12.) Plaintiff, however, would assert that this is highly unlikely. Electronic evidence
18 is only fleeting to the extent that it can be deleted; for example, the subpoena of an ISP for
19 subscriber information involves evidence that is known by all parties involved to be fleeting, since
20 most ISPs have a policy of regularly deleting such evidence. In the instant case, Josh Hatfield was
21 recently the subject of a negligence claim in the instant action; as such, Hatfield had a legal
22 obligation to preserve evidence that could be used in connection with his case, and, as a practical
23 matter, would likely have preserved such evidence anyway, particularly evidence that he could use
24 in his defense. In addition, the *Nealey* Court asserted that "fairness dictates, however, that a plaintiff
25 not be deprived of his cause of action if the missing evidence would have been lost even absent
26 delay." *Nealey v. Transportacion Maritima Mexicana*, 662 F.2d 1275, 1281 (9th Cir. 1980). Unlike
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1 an ISP, the decision of whether to keep or destroy evidence relating to the instant action was in the
2 hands of Josh Hatfield; his decisions in that regard would likely have been no different if he had
3 earlier been named the direct infringer rather than the contributory infringer.

4 **B. PLAINTIFF COMPLIED WITH THE COURT ORDER**

5 Respondent argues that Plaintiff's action should be dismissed for failure to comply with a
6 court order. (ECF No. 30 at 12.) In order to comply with the Court order, and serve Josh Hatfield,
7 Plaintiff first needed leave to amend the First Amended Complaint. Without a Complaint naming
8 Josh Hatfield as the Respondent, Plaintiff simply had nothing it could serve. Respondent cites
9 *Whitehead* in support of the proposition that "filing an amended complaint generally will not toll the
10 120-day limit for service." (ECF No. 30 at 12-13.) Though that may be the case, the situation in the
11 instant case involved an unknown Respondent; even if filing an amended complaint does not
12 generally toll the 120-day limit for service, the instant case is ripe for exception to that general rule.
13 Respondent's arguments inherently ignore the discretion that courts have to keep cases alive in the
14 interest of justice under Rule 4 once a plaintiff shows valid reasons for delay of process. ("But if the
15 plaintiff shows good cause for the failure, the court *must* extend the time for service for an
16 appropriate period." Rule 4 [emphasis added]). To restate Plaintiff's earlier assertion, Plaintiff
17 necessarily faces the need to strike a difficult balance between prompt compliance on the one hand
18 and due diligence on the other. Plaintiff complied with the substance of the order by filing its motion
19 to amend within the deadline established by the court order, and is prepared to serve Josh Hatfield
20 immediately after Plaintiff's Second Amended Complaint is accepted into the record. Plaintiff notes
21 that it *did not*, as Respondent asserts, file its motion after the deadline to file proof of service. (ECF
22 No. 30 at 13.) The deadline set forth by the order was October 5th (ECF No. 26 at 8.)

23 With regard to the court's interest in deciding cases on the merits, Respondent argues that
24 "the first three factors weigh heavily in favor of dismissal, and outweigh the generalized interest in
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1 deciding cases on the merits.” (ECF No. 30 at 13.) For the reasons Plaintiff has detailed above,
2 Respondent’s assertion is incorrect; the analogies which Respondent makes in support of his
3 assertion were to quite different circumstances. Plaintiff’s instant action faced the difficulty of
4 having to identify, with objectively reasonable certainty, the true identity of the Doe Respondent,
5 and Plaintiff filed its Motion immediately after its investigation had allowed it to have objectively
6 reasonable certainty. Respondent also argues that “Plaintiff has had ample opportunity to test its
7 claim on the merits, and has already had its prior claim against Mr. Hatfield determined on the
8 merits.” (ECF No. 30 at 14.) The allegations against Respondent which Plaintiff makes in its Second
9 Amended Complaint, however, have not been tested on the merits at all. Though the evidence which
10 Respondent would present in his defense to the allegations in the Second Amended Complaint would
11 likely be substantially the same as that he would have presented in defense of the earlier negligence
12 claim, the direct and contributory infringement claims can in no way be said to have been tested on
13 the merits; even a cursory glance at the record in this case would easily reveal that fact.
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16 Respondent also asserts that “AF Holdings has not reached the merits of its copyright claims
17 in any of its previous filings across the country, nor have they attempted any action against the vast
18 majority of individuals from the underlying suit, AF Holdings v. Does 1-135.” (ECF No. 30 at 13.)
19 Plaintiff will once again note here the precarious balance it must strike between naming Respondents
20 and having an objectively reasonable basis to do so. The additional investigation that is required in
21 most instances to have such basis takes time and effort. Plaintiff does not control the rate at which it
22 gathers the required information; exercising due diligence in naming an unknown, anonymous
23 Respondent is necessarily a long and arduous process. If Plaintiff did not have “any real desire to
24 have its cases decided on the merits,” Plaintiff certainly would not have moved for leave to file its
25 Second Amended Complaint. Plaintiff’s Second Amended Complaint is a necessary step to having
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1 its claims against Josh Hatfield decided on their merits, and Plaintiff looks forward to doing just that
2 at trial.

3 **III. LEAVE TO AMEND THE COMPLAINT SHOULD NOT BE DENIED**

4 **A. PLAINTIFF HAS NOT ACTED IN BAD FAITH**

5 Respondent argues that “Plaintiff’s bad faith is evident, and the timeline discussed above is
6 the most obvious evidence thereof. Plaintiff has strung Mr. Hatfield, and this Court, along for
7 months on the premise that it does not know the identity of the infringer, and was unable to
8 determine the identity without formal discovery.” (ECF No. 30 at 14.) The timeline to which
9 Respondent refers played out as it did because Plaintiff’s efforts had, at that time, not yielded
10 sufficient evidence to give it an objectively reasonable basis to name Josh Hatfield as the direct and
11 contributory infringer. Things change however; as mentioned in Plaintiff’s Motion for Leave to
12 Amend, Plaintiff conducted further investigation, and as a result of that investigation, Plaintiff found
13 that it had such basis. Though Respondent would have this Court believe that Plaintiff committed
14 some sort of malicious act, Plaintiff would strongly retort that waiting to make a particular allegation
15 until having gathered enough evidence to do so epitomizes good faith rather than bad. Plaintiff
16 would note that it could just as easily have named Josh Hatfield as the direct and contributory
17 infringer rather than claiming negligence. Plaintiff has, in fact, done so in several other cases.² The
18 key difference in these cases, however, is that these cases involve situations where Plaintiff felt,
19 from the beginning, confident that it has an objectively reasonable basis to name that defendant as
20 the infringer. This case took a bit longer to come to that conclusion. Plaintiff did not previously have
21 such basis to name Josh Hatfield as the direct and contributory infringer in its action, but further
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25 ² Here are just a few recent examples of Respondents named as direct and contributory infringers in California cases
26 alone: *AF Holdings LLC v. Jourdan Valiente*, 4:12-cv-02408 (PJH) (N.D. Cal.); *AF Holdings LLC v. Thang Ngo*, 4:12-
27 cv-02416 (WHA) (N.D. Cal.); *AF Holdings LLC v. David Trinh*, 3:12-cv-02393 (CRB) (N.D. Cal.); *AF Holdings LLC v.*
28 *Ali Yang*, 2:12-cv-01079 (JAM-KJN) (E.D. Cal.); *AF Holdings LLC v. Cory Phan*, 2:12-cv-0176 (JAM-GGH) (E.D.
Cal.); *AF Holdings LLC v. Parry Buck*, 2:12-cv-01068 (LKK-KJN) (E.D. Cal.); *AF Holdings LLC v. Udish Sundarajan*,
2:12-cv-01078 (GEB-(GGH) (E.D. Cal.).

1 investigation yielded such basis. Respondent argues that Plaintiff threatened Josh Hatfield with a
2 lawsuit mere hours after he prevailed on the negligence claim. (ECF No. 30 at 15.) The e-mail to
3 which Respondent refers merely conveyed a settlement offer. One can imagine that a situation where
4 a Plaintiff has gathered sufficient evidence to bring a claim but offers settlement to the other side
5 before bringing that claim must happen thousands of times a day across the United States; to
6 characterize such an e-mail as a threat is to discredit a common, well-accepted practice within the
7 American legal system.

9 Respondent argues that “courts have found bad faith where the Plaintiff engages in
10 gamesmanship by proffering one cause of action and, following a Respondent’s successful motion to
11 dismiss, proffering a new, inconsistent theory.” (ECF No. 30 at 15.) In citing to *Vine v. Beneficial*
12 *Finance Co.* to support that proposition, Respondent once again analogizes to a situation that simply
13 does not apply to the instant case. *Vine* involved a plaintiff bringing a case against a known
14 Respondent. In the instant case, Plaintiff sued Respondent under a theory of negligence because that
15 is the claim it had an objectively reasonable basis to make based on the evidence gathered by
16 Plaintiff up until that point. Having conducted further investigation, Plaintiff found that it had
17 sufficient evidence to name Josh Hatfield as the direct and contributory infringer. Put more simply,
18 the difference between *Vine* and the instant case is that, in *Vine*, the Plaintiff alleged novel claims
19 against the same Respondent, whereas in the instant case, Plaintiff looks to amend its allegation of
20 the particular *role* which Respondent played in the harms that Plaintiff has *already fully alleged*.
21 Before, Plaintiff’s evidence had initially led it to believe that Respondent’s negligence allowed
22 another individual to directly and contributorily infringe Plaintiff’s work; after further investigation,
23 Plaintiff now has an objectively reasonable basis to name Josh Hatfield as the individual who
24 directly and contributorily infringed its work.

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B. PLAINTIFF DID NOT UNDULY DELAY FILING ITS MOTION

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2 Respondent argues that Plaintiff “knew, or should have known, of the facts and theories
3 raised by the amendment in the original pleading.” (ECF No. 30 at 15-16.) Respondent asserts that
4 “here, Plaintiff has not been granted any discovery since the initial order authorizing it to subpoena
5 Mr. Hatfield’s ISP. This was approximately one year ago. Plaintiff’s motion does not identify what
6 new information it has learned, how the information was learned, or, most importantly, why it
7 couldn’t have conducted its ‘investigation’ prior to filing two complaints and additional opposition
8 papers identifying Mr. Hatfield as a ‘concededly ignorant’ account holder.” (ECF No. 30 at 16.) The
9 nature of investigation which Plaintiff must undertake is, however, heavily reliant on insights, the
10 timing of which are out of Plaintiff’s control; after enough “digging”, Plaintiff will sometimes have
11 the good fortune to find information sufficient to name a direct and contributory infringer. Plaintiff
12 was not able to find such insight prior to the filing of the First Amended Complaint, but was able to
13 do so prior to the filing of the instant Motion for Leave to Amend. Though Respondent repeatedly
14 points out that Plaintiff “did not identify what new information it has learned”, Respondent has cited
15 absolutely no case law in support of the proposition that Plaintiff had an obligation to do so in its
16 Motion for Leave to Amend. Plaintiff asserts here that the proper venue for Plaintiff to disclose the
17 nature of its investigations is through discovery and at trial. Respondent asserts that “the fact that
18 Plaintiff has not requested or conducted any formal discovery strongly suggests that any
19 investigative capacity has been available to Plaintiff since the date of the infringement. There is
20 simply no reason that Plaintiff couldn’t have conducted its ‘investigation’, if indeed there was one,
21 before wasting the time and resources of this Court and Mr. Hatfield.” (ECF No. 30 at 16.)
22 Respondent may be surprised to learn, however, that some information can be gathered without the
23 use of formal discovery. The further investigation which Plaintiff conducted, and which yielded the
24 basis for Plaintiff to file its Motion for Leave to Amend, was, as suggested, *further* investigation.
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1 Plaintiff had conducted investigation earlier on, but, as Plaintiff has asserted throughout this Reply,
2 the earlier investigation simply did not yield information sufficient to name Josh Hatfield as the
3 contributory infringer. Respondent's assertion that "there is simply no reason that Plaintiff couldn't
4 have conducted its 'investigation' before wasting the time and resources of this Court and Mr.
5 Hatfield" completely misses the nature and purpose of investigation; Plaintiff could not magically
6 control the sort of information available to it, the time at which Plaintiff encountered such
7 information, nor the inferences which could be gleaned from such information. The process of
8 investigating the identity of an unknown Respondent is long and arduous, starting with requesting
9 leave to serve a subpoena from a court, getting information (after months) from an Internet service
10 provider, and, when, for instance, that that individual refuses to communicate with Plaintiff, doing
11 further alternative investigations through other means to come up with a good faith basis to name a
12 defendant in that case. Plaintiff attempted in this, and attempts in every case, to take every
13 precaution to ensure that it had sufficient evidence against the person whom it alleged of committing
14 direct and contributory infringement of its work. Plaintiff now has such evidence, and has
15 accordingly brought its Motion for Leave to Amend.

18 C. PLAINTIFF COMPLIED WITH LOCAL RULE 7-5

19 Respondent argues that "Plaintiff's Motion to Amend should be denied for failing to provide
20 any evidence in support of the motion, whether by declaration, affidavit, or otherwise. N.D. Cal.
21 Local Rule 7-5 requires that 'factual contentions made in support of or in opposition to any motion
22 must be supported by an affidavit or declaration and by appropriate references to the record.'" (ECF
23 No. 30 at 16.) In support of this proposition, Respondent goes on to cite *Waters v. Weyerhaeuser*, in
24 which "it was clearly discretionary to deny the first motion to amend for failure to comply with the
25 local rule." (*Id.*) Respondent stretches the local rules and misstates the reasoning in *Waters*. In
26 *Waters*, the motion to amend was denied because Plaintiff *did not attach the proposed complaint*, as
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1 required by a local rule of the District of Nevada. Respondent goes on to cite *Layfield*: “when
2 appellant finally filed her motion for leave to amend, she failed to supply any briefs or affidavits in
3 support thereof.” (ECF No. 30 at 17.) It appears that the Court affirmed the denial of appellant’s
4 motion for leave to amend because appellant had submitted nothing further than a bare request for
5 leave to amend. Plaintiff in the instant case, however, argued in its motion why it should be granted
6 leave to amend. In addition, appellant’s counsel in that case stated that the facts relevant to the
7 proposed amendment were known to the appellant at the time she filed her original complaint; as
8 Plaintiff has reiterated throughout this Reply, Plaintiff simply did not have such information until the
9 time of filing its Motion for Leave to Amend. Regardless of how many times Respondent may assert
10 that Plaintiff was obliged to disclose the result of its investigation in its Motion for Leave to Amend,
11 Respondent’s assertion is simply not supported by case law. Should this Court, however, find that
12 Local Rule 7-5 did, in fact, obligate Plaintiff to disclose the results of its investigation, Plaintiff notes
13 that the cases cited by Respondent to support his proposition that violation of a local rule justifies
14 denial of leave to amend constituted gross violations of extremely straightforward rules. The relevant
15 facts of *Waters* could be distilled to “Plaintiff should have attached the proposed amendment, as
16 required by the local rule, and failed to do so”, while the relevant facts of *Layfield* could be distilled
17 to “appellant filed a bare motion for leave to amend but filed no brief or argument supporting that
18 motion.” Plaintiff asserts that, under Local Rule 7-5, believing that it has an objectively reasonable
19 basis to bring suit against Josh Hatfield as the direct and contributory infringer is not a “factual
20 contention”, but rather a precondition to its bringing of such a suit in the first place.
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24 **D. AMENDMENT IS NOT FUTILE**

25 Respondent argues that “Plaintiff is barred by principles of equitable and judicial estoppel
26 from alleging that Josh Hatfield is the infringer of its copyrighted works. The doctrine of judicial
27 estoppel applies to bar a party who has taken a position in a prior proceeding from subsequently
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1 asserting an inconsistent position in future litigation.” (ECF No. 30 at 17.) Respondent asserts that
2 Plaintiff’s amendment constitutes asserting an inconsistent position because “the court was required
3 to accept each of Plaintiff’s allegations regarding the unidentified third party’s infringement in order
4 to analyze the negligence” in Respondent’s Motion to Dismiss. (*Id.*) If Respondent’s argument were
5 to succeed, however, then no complaint for which a motion had been considered by a court could
6 ever be amended. An amended complaint inherently changes the position taken by the amending
7 party; that is the very purpose of amendment in the first place. Such a result would clearly be
8 undesirable, both for this Court and for the legal system as a whole.
9

10 **CONCLUSION**

11 For the reasons contained herein, Plaintiff’s Motion for Leave to Amend should be granted.
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15 Respectfully Submitted,

16 PRENDA LAW INC.

17 **DATED: October 19, 2012**

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