

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JOHN CAFIERO

Plaintiff,

Civil Action No. 08-202

-vs-

Judge Kim R. Gibson

DOUG CUSTER, a/k/a DOUG EVIL,

Electronically Filed

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

Plaintiff John Cafiero, by and through his attorneys, K&L Gates LLP, files the following Memorandum of Law in Support of Plaintiff's Motion for Leave to File First Amended Complaint.

INTRODUCTION

Mr. Cafiero filed his initial complaint on August 14, 2008 asserting claims for copyright infringement in violation of the Copyright Act, 17 U.S.C. § 101 *et seq.* and misrepresentation in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 512(f) ("DMCA") arising from Defendant's willful exploitation, reproduction, public display and digital uploading of Mr. Cafiero's copyrighted work "Misfits Re-Animated" program and knowing misrepresentation to YouTube.com that he was the owner of that copyrighted work and claims. Mr. Cafiero also is asserting claims for defamation and false light arising from Defendant's knowingly false statements regarding the ownership of that work and Mr. Cafiero generally. Mr. Cafiero now seeks leave to amend his Complaint in four important respects:

1. To add as a Plaintiff Jerry Caiafa p/k/a Jerry Only who (a) is the owner of the copyright in the musical composition and sound recording for "Mars Attacks" used in the "Misfits Re-Animated" program which Defendant has infringed by willfully exploiting, reproducing, publicly displaying and digitally uploading the "Misfits Re-Animated" program and (b) has been the victim of knowingly false

and malicious statements by Defendant which have defamed and placed Mr. Caiafa in a false light.

2. To add as a Plaintiff Cyclopien Music Inc. who is the owner of federally registered "MISFITS" trademarks which Defendant has willfully infringed and exploited in connection with his unauthorized use and release of "Misfits Re-Animated."
3. To add counts for: (a) copyright infringement arising from Defendant's unauthorized use of Mr. Caiafa's "Mars Attacks" copyrighted work; (b) trademark infringement under § 32 of the Lanham Act, 15 U.S.C. § 1114, arising from Defendant's unauthorized use and release of "Misfits Re-Animated"; and (c) false designation of origin and unfair competition under § 43 of the Lanham Act, 15 U.S.C. 1125(a), arising from Defendant's unauthorized use and release of "Misfits Re-Animated."
4. Add allegations relating to Defendant's unlawful actions that have occurred after the filing date of the initial complaint. See ¶¶ 69-70 of the First Amended Complaint attached as Exhibit A to Mr. Cafiero's Motion for Leave to File First Amended Complaint.

On May 22, 2009, the parties submitted to the Court an agreed-to Proposed Initial Scheduling Order. In the Proposed Initial Scheduling Order, the parties agreed that the deadline to move to amend the pleadings or add new parties would be September 1, 2009.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure mandates that "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15(d) of the Federal Rules of Civil Procedure provides that "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplements. Fed. R. Civ. P. 15(d). A court should grant leave to amend unless "a plaintiff's delay in seeking amendment is undue, motivated by bad faith or prejudicial to the opposing party." *Adams v. Gould Inc.*, 739

F.2d 858, 864 (3d Cir. 1984) (citing *Foman*, 371 U.S. at 182).¹ “[P]rejudice to the non-moving party is the touchstone for the denial of an amendment.” *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993). Mr. Cafiero’s Motion for Leave to File First Amended Complaint should be granted in this case for the following three reasons.

First, Defendant will not be prejudiced by the filing of the First Amended Complaint because as of the date of this filing, discovery has not begun. Thus, Defendant will have ample time to address the new counts in the First Amended Complaint and has not wasted any effort on discovery to date that might have to be redone. Moreover, the additional claims asserted in the First Amended Complaint arise out of the same set of facts as alleged in the initial complaint. Therefore, Defendant will not be prejudiced by the similar claims brought by the additional parties in the First Amended Complaint.

Second, Mr. Cafiero and the additional plaintiffs have not engaged in bad faith or dilatory motive in seeking to amend the initial complaint. Rather, they seek to amend the initial complaint in a good faith effort to place all claims and parties relevant to this dispute before the Court in a single proceeding. The First Amended Complaint also sets forth unlawful actions undertaken by Defendant subsequent to the filing of Mr. Cafiero’s initial complaint which could not have been alleged in the initial complaint.

Third, Mr. Cafiero and the additional plaintiffs have not engaged in undue delay in seeking to amend the initial complaint. Mr. Cafiero filed the Motion for Leave to File First Amended Complaint over four months before the deadline agreed to by the parties and before the parties Rule 16 scheduling conference with the Court. Additionally, Defendant’s subsequent

¹ The Court’s analysis of a Rule 15(d) motion for leave to supplement is the same as a Rule 15(a) motion for leave to amend. *See Maier v. Canon McMillan Sch. Dist.*, Civ. Act. No. 08-0154, 2009 WL 1393627, at *1-2 (W.D. Pa. May 18, 2009).

unlawful acts as alleged in the First Amended Complaint only took place a little over a month ago.

In light of the foregoing reasons, Mr. Cafiero respectfully requests that this Court grant the Motion for Leave to File First Amended Complaint.

Respectfully submitted,

/s/ Christopher M. Verdini
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Dated: May 28, 2009

Attorneys for Plaintiff John Cafiero

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT was served on this 28th day of May, 2009, by United States mail, postage prepaid, on the following:

Doug Custer
P.O. Box 137
Carinbrook, Pennsylvania 15924

/s/ Christopher M. Verdini